ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2005

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 374 of 1997

Sanjib Dhawan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Govind Krishna

Counsel for the Respondents:
S.C.

U.P. Cinematography Rules 1951-petitioner was granted licence for the exhibition of feature film-benefit under scheme dt. 21.7.86 denied-grant-in-aid cancelled with retrospective effect-on the ground of violation of terms by petitioner-basis of allegation-single report of Deputy Commissioner Entertainment Tax-held-the part benefits which has been availed can not be demanded.

Held: Para 7 and 8

In view of the aforesaid decision of the Apex Court it is held that the grant-in-aid to the petitioner can not be cancelled with retrospective effect. It can be cancelled with prospective effect and no demand can be made for the earlier period during which grant-in-aid has been availed prior to the date of its cancellation.

In the impugned order nature of the violation has not been referred, in as much as it has not been referred that the irregularity of such nature which shows that the petitioner was involved in evasion in past also and in these circumstances, we are of the opinion that on the basis of one inspection, in which some irregularity has been alleged the amount of grant-in-aid, which has been availed can not be demanded retrospectively.

Case law discussed:
W.P. 297 of 1997
SLP No. 1543 of 1998 decided on 10.4.02

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

1. In the present writ petition petitioner has sought the following relief:

"i. To issue a writ order or direction in the nature of certiorari calling for the records of the case and quash the impugned order dated 15.4.97 passed by the respondent no. 2 contained in annexure '7' to the writ petition;

ii. to issue a writ order or direction in the nature of mandamus directing the respondents not to realise any amount on the basis of the impugned order dated 15.4.1997 and also not to give effect to the recovery memo no.289 dt. 5.5.97 issued pursuant to the order, aforesaid;

iii. to issue any other such order or direction which may deems fit and proper under the circumstances of the case;

iv. award costs to the petitioner."

Brief facts of the case are as follows:

2. Petitioner being encouraged by the incentive scheme dated 21.7.1986 issued by the State of U.P. submitted an application before the Licensing Authority under Rule 3 (1) of the U.P. Cinematography Rules, 1951 for raising a permanent construction of a cinema

building under the name and style of Bhagwan Talkies, Katra, Shahjahanpur. The licensing authority after due consideration accorded the permission for raising the construction of permanent cinema hall. After completion of construction of the permanent cinema building petitioner submitted an application for grant of licence for the exhibition of feature films under the scheme before the respondent no. 2, who after inspection of cinema premises has directed the petitioner to exhibit the feature films w.e.f. 18.3.1989 and also accorded the benefit provided under the scheme dated 21.7.1986. Under the scheme dated 21.07.1986 the petitioner was entitled to recover the entertainment tax but was not liable to pay and entertainment tax for the period of two years. In the third year, the petitioner was required to deposit only 25% of the entertainment tax collected from the viewers at the time of charging admission fee and the remaining 75% benefit under the grant-in-aid scheme. Similarly for the fifty year, the petitioner was required to deposit only 50% of the total tax collected and the remaining amount was in the nature of aid given to the petitioner in the grant-in-aid scheme Instead of making any payment in cash towards aid, under the grant-in-aid to the State Government entitled the entitled the owner to appropriate 100% collected by him for the first two years aid similarly to the extent of 75% in third year and to the extent of 50% each for fourth and fifth year. The petitioner after accordingly, availed the benefit of grant-in-aid scheme w.e.f. 18.03.1989, the date on which the petitioner has been accorded permission to avail the benefit. It appears that on 08.01.1993 the petitioner has sold the cinema building by executing a sale deed to the respondent no. 3 w.e.f. 08.01.1993. Respondent no. 3 carried on the business of exhibiting the feature films on the said building.

3. On 13.07.1995 a show cause notice was issued by the respondent no. 2 alleging therein that the petitioner has violated the terms and conditions of the agreement already accorded in his favour on 19.03.1989 and as such he was directed to deposit the entertainment tax amounting to Rs.12,29,618.88p. The petitioner in compliance to the aforesaid show cause notice filed detailed reply stating therein that there was no bar in selling the cinema premises in favour of the respondent no. 3, who has also agreed to bear all the consequences with regard to the exhibition of the feature films by executing an indemnity bond. It appears that the respondent no. 2, instead of deciding the issue, referred the matter to the respondent no. 1 vide order dated 13.07.1995 and thereafter, respondent no. 1 after considering the entire facts and circumstances arrived at a conclusion that the petitioner is not required to deposit the aforesaid amount since has not violated any of the terms and conditions mentioned in the agreement dated 11.03.1989 and accordingly, passed an order to the effect that the petitioner was not liable to pay the entertainment tax. After the aforesaid order, the respondent no. 2 passed an order on 15.04.1997 directing the petitioner to deposit a sum of Rs.19,01,527.40p. including the interest @ 10%. The aforesaid amount has been demanded on the ground that at the time of inspection dated 06.06.1993 made by the Commissioner, Entertainment Tax certain irregularities were found and on the basis of which a sum of Rs.1,250/- towards tax was assessed and Rs.2000/-

was levied towards penalty, which has also been deposited on 29.03.1994 vide challan no. 2, which establishes that ate the time of inspection dated 06.06.1993 irregularities relating to the tax evasion was found. It has been accordingly, inferred that in view of the irregularities relating to the evasion there was a violation of the agreement and accordingly, decision has been taken to revoke the grant-in-aid. Respondent no. 2 accordingly, demanded a sum of Rs.12,29,639.12p. which relates to the grant-in-aid during the period 19.03.1989 to 18.03.1994 and the interest @ 18% from the year 1993-94 to 1996-97 Rs.6,71,888.28p. and accordingly, a direction was issued to deposit a sum of Rs.19,01,527.40p. In the present writ petitioner was challenged the aforesaid order dated 15.04.1997. Counter and rejoinder affidavits have been exchanged.

Heard learned counsel for the parties.

4. Learned counsel for the petitioner submitted that benefit which has been availed under the grant-in-aid scheme vide Government Order dated 21.07.1986 can not be demanded. He submitted that for the alleged irregularities the grant-in-aid can be revoked prospectively, but no demand can be raised for the earlier period during which benefit has been availed. He submitted that the grant-in-aid can only be cancelled w.e.f. 15.4.1997 and the demand for the remaining period can not be made. In support of his contention he relied upon the Division Bench decision this Court in **Writ Petition No. 297 of 1997, Neelam Talkies, Jalalabad, district Shahjahanpur Vs. District Magistrate** and submitted that Civil Appeal No. 1543 of 1998 against the said order has been dismissed by the Apex Court on 10.04.2002. Learned Standing Counsel submitted that under the scheme once it is found that terms and conditions have been violated, the benefit given under the scheme can be revoked retrospectively from the date of its grant and the benefit availed under the scheme can be demanded, which has been done in the present case by the impugned order. He further submitted that in clause 2 of the agreement it was specifically mentioned that the petitioner would follow the conditions and in case if it is not being done, the District Magistrate would immediately cancel the grant-in-aid and under the said agreement it is also declared by the petitioner that he and his heirs would be bound with the conditions and abide with the orders and conditions and he would be responsible for the deposit of amount at the normal rate. He submitted that in view of aforesaid averments made in the agreement he is liable to pay the entire amount of grant-in-aid which he has availed since inception, in as much as he has violated the terms and conditions.

5. Having heard learned counsel for the parties, we are of the view that the agreement dated 13.03.1989, allowed the petitioner to avail the grant-in-aid can only be cancelled prospectively on the violation of the terms and conditions from the date of the order and not retrospectively. Before the Division Bench in Writ Petition No. 297 of 1997, Neelam Talkies Jalalabad, district Shahjahanpur Vs. District Magistrate similar controversy arose wherein on the violation of the terms and conditions the authority concerned has demanded the entire amount availed towards grant-in-aid under the scheme dated 21.07.1986

from the date of inception vide order dated 21.01.1992. On the consideration of argument of the parties and the entire facts and circumstances, the Division Bench held as follows:

"***We see force in this submission of counsel for the petitioner. Unless there is a clear provision that in the event of any condition of the grant-in-aid scheme being violated, the recipient of the benefit would be liable to surrender the entire benefit, we are of the view that the respondent could not have legally called upon the petitioner to deposit the entire amount equal to the benefit including that which he availed under the scheme for the period, anterior to the date of the order when benefit under the scheme was specifically taken away. To make the impugned order legally enforceable, there must have been a clear provision that in the event of violation of any condition of the grant-in-aid scheme, the respondent would be entitled to reopen the matter of tax, which in the case of the petitioner would be assumed to have been deposited in view of Rule 24 (1) and to create a demand of the full amount of tax right from the first day when benefit under the grant-in-aid was granted. There is no such provision under the Act or the Rules nor on the reasonable interpretation of the scheme, can there be one.***

No finding has been recorded by the respondent that the petitioner has been violating the grant-in-aid scheme right from the inception and that violation discovered on 22.4.1991 when surprise check was carried out at 2.35 p.m. on the cinema premises, was not the first and the only one. Also there is no finding that on earlier occasions, the petitioner was found to have been seriously involved in tax evasion. In the absence of such findings, the question is whether it will be reasonable to hold that the petitioner is liable to pay tax at the full rate of entire period, covered by the scheme simply on the ground of the discovery of violation of a condition of the scheme on a single date viz. 22.4.1991, when surprise check was made on the cinema premises. In the absence of any finding as aforesaid, it will be reasonable to infer that the petitioner had abided by all the conditions of the scheme before 22.4.1991 i.e. during the major period covered by the scheme. There being no serious violation of any condition of the scheme prior to 22.4.1991, we are of the view that it will not be equitable, fair and just to hold that the petitioner is liable to pay the entire amount equal to the benefit taken under the scheme. We make it clear so that we may not be misunderstood, that we are not expressing any final opinion on the question whether or not in the event of the discovery of any condition of the scheme being violated, the proprietor of a cinema hall could be called upon to refund the entire benefit, taken under the scheme. What we hold is that on the facts and in the circumstances of the case, the impugned order of the respondent calling upon the petitioner to deposit tax at the full rate right from the first day of the period covered by the scheme, is not sustainable. A single inspection/surprise check furnishing sufficient clue of tax evasion or of any other serious violation of a condition of the scheme in the past we well though carried out at the fag-end of the period covered by the scheme may be sufficient to take away the benefit of the entire

period covered by the scheme. But in the instant case, the record does not point out the past history of the petitioner and the tax evasion on the part of the petitioner as discovered on 22.4.1991 does not warrant a conclusion that the petitioner was liable to pay tax at the full rate of the entire period, covered by the scheme. Each case will depend on its own facts and circumstances. The case at hand does not induce us to accept the contention of the respondent.

The order dated 25.7.1987 (Annexure '2' to the writ petition) granting benefit under the grant-in-aid scheme simply provides that the District Magistrate would be entitled to cancel the order granting benefit under the scheme upon the discovery of any condition of the scheme being violated and in that event, the tax would be realized in the manner as if there is no grant-in-aid scheme at all. The order dated 27.1.1992 does not clothe the District Magistrate with the power to realize tax at the full rate right from the first day, when the benefit under the grant-in-aid scheme was granted.

It is submitted by the learned Standing Counsel that while availing benefit under the grant-in-aid scheme, the petitioner himself gave an undertaking in Form-I appended to the grant-in-aid scheme, para 6 of which clearly shows that the petitioner had given an undertaking that in the even of any condition of the scheme being violated, the District Magistrate would be entitled to cancel the order of grant-in-aid and that in that even the tax would be released from him in the same manner as if there was no such scheme at all. It is not disputed that the petitioner had given an undertaking as envisaged by para 6 of Form-I (Praroop-I), appended to the grant-in-aid scheme. But the question is whether para 6 of Form-I could be construed in such a fasion as to cloth the District Magistrate with the power to retrieve the entire benefit from the petitioner, taken under the scheme. In our view, the scheme deserves to be interpreted in a reasonable, just and fair manner. Unless the scheme itself indicates, it will be wholly arbitrary to construed the scheme in the manner that immediately upon the discovery of any term of the scheme being violated howsoever trivial that may be the District Magistrate would be entitled to retrieve the entire amount equal to the benefit given to the petitioner under the scheme.

In this case, the contention of the respondent can be rejected for the simple reason besides other reasons that para 6 of Form-I appended to the scheme does not support his contention that the petitioner had given an undertaking to deposit the entire tax collected under the scheme immediately upon the discovery of any term of the scheme being violated."

In Special Appeal No. 1543 of 1998 against the aforesaid order, Apex Court held as follows:

"***We have heard learned counsel for the appellant and sent eh relevant provisions. We are of the view that the High Court is right in the view it has taken. If the intention was to require the assessee to pay tax at the normal rate even for the period during which the grant-in-aid had not been cancelled, that provision should have expressly stated***

so. As it reads, it cannot be held to have any retrospective operation.

The appeal is dismissed.

No order as to costs."

6. Apex court has categorically held that if the intention was to require the assessee to pay the tax at normal rate even for the period during which the grant-in-aid, had not been cancelled that provision should have expressly stated so, and as it reads it can not be held to be any retrospective operation.

7. In view of the aforesaid decision of the Apex Court it is held that the grant-in-aid to the petitioner can not be cancelled with retrospective effect. It can be cancelled with prospective effect and no demand can be made for the earlier period during which grant-in-aid has been availed prior to the date of its cancellation.

8. Perusal of the impugned order shows that only one inspection by the Deputy Commissioner Entertainment Tax has been made basis for arriving to he conclusion that the petitioner has violated the terms and conditions of the agreement. It has been stated that on the alleged discrepancies a sum of Rs.1,200/- has been assessed and Rs.2,000/- has been imposed towards penalty. In the impugned order nature of the violation has not been referred, in as much as it has not been referred that the irregularity of such nature which shows that the petitioner was involved in evasion in past also and in these circumstances, we are of the opinion that on the basis of one inspection, in which some irregularity has been alleged the amount of grant-in-aid, which has been availed can not be demanded retrospectively.

9. For the aforesaid reasons demand raised by the impugned order is not sustainable and liable to be quashed.

10. In the result, writ petition is allowed. Order dated 15.04.1997 is quashed. There shall be no order as costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2005

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 2738 of 1982

Hansnath ...Petitioner
Versus
Asstt. Director of Consolidation, Deoria and others ...Respondents

Counsel for the Petitioner:
Sri A.S. Rai

Counsel for the Respondents:
Sri H.S.N. Tripathi
S.C.

Under U.P. Consolidation of Holding Rules, 1956, Rule 26 (2)-Oral evidence-recorded in the presence and supervision of the Presiding officer-but not signed-whether such oral testimony in absence of the signatures of Consolidation officer is bad? Held-"No"-no such provision prescribed under the rule-except recording the Oral evidence in presence and personal direction on superintendence.

Held: Para 6

Thus the Consolidation Officer is required to hear the parties, frame issue,

take evidence both oral and documentary before proceeding to decide the objection. There is no obligation cast upon the Consolidation Officer to put his signature on the deposition of witnesses recorded before him. From a reading of Rule-26 (2) it is clear that only obligation cast upon the Consolidation Officer is to take evidence both oral and documentary tendered by the parties which obviously means that oral evidence shall be recorded in presence and personal direction or superintendence of Consolidation Officer.

(B) Constitution of India, Article 226- Writ petition-maintainability-against remand order-court normally does not interfere-can not be treated as lack of Power-remand order based on-erroneous and illegal order-deserves to be interfered-held-interference in the interest of justice in must.

Held: Para 11

If the court normally does not interfere in the remand order it does not mean that there is any lack of power in the court to interfere in such an order or the petition challenging the remand order is not maintainable. The court can interfere if it finds the circumstances to be extraordinary or the interference necessary in the interest of justice. In the present case, the view taken by Settlement Officer Consolidation and Deputy Director of Consolidation is illegal and as such the remand made on the basis of an illegal and erroneous view cannot be sustained and deserved to be interfered and quashed by this court.

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

1. The short question which arises for determination is whether oral statement of witness which is not signed by Presiding Officer before whom it was recorded, can be relied upon and read in evidence.

2. The facts are that on death of recorded tenure holder an objection under Section 12 of U.P. Consolidation of Holdings Act (for short the Act) was filed by the petitioner claiming mutation of his name on the basis of a will dated 21.9.1977. Respondent no. 3 contested the claim of the petitioner denying the execution of the will and claimed mutation of her name over the property in dispute claiming herself to be wife of the deceased.

3. The Consolidation Officer vide order dated 31.12.1980 allowed the claim of the petitioner. Appeal filed by respondent no. 3 was allowed by settlement Officer consolidation on the ground that oral evidence relied upon did not bear the signature of the Presiding Officer and remanded the case back. The revision was also dismissed by Deputy Director of Consolidation.

4. On an examination of the record of the Consolidation Officer, the Settlement Officer consolidation found that statement of witnesses adduced on behalf of the petitioner did not bear the signature of Consolidation Officer. The Settlement Officer Consolidation was of the view that oral statement of witnesses cannot be read in evidence unless the same are signed by the presiding Officer. He further found that signatures of the Consolidation Officer on the order sheet are also not legible. The Settlement Officer Consolidation set aside the order of Consolidation Officer and remanded the case back to be decided afresh after recording the statement of witnesses in his presence. The Deputy Director of

Consolidation also took the same view and dismissed the revision.

5. The proceedings before the Consolidation Officer were under Section 12 of the Act. Sub Section 2 of Section 12 provides that provisions of Section 7 to 11 of the Act shall mutatis and mutandis apply to the hearing and decision on any matter raised under Sub Section 1 as if it were a matter raised under the aforesaid sections. Rule 26 of the Rules framed under the Act provides that the procedure to be followed while disposing of the case under Section 9-A and 9-B and 9-C of the Act. By virtue of Sub-Section 12 the provision of Section 7 to 11 having been mutatis and mutandis applied, the procedure prescribed for disposal of objection under Section 9-A, 9-B and 9-C shall be applicable to the objection filed under Section 12 of the Act. Relevant rule-26 (2) reads as under:

"On the date fixed under Sub Rule 2 of Rule-25 A or any subsequent date fixed for the purpose, the Consolidation Officer shall hear the parties, frame issue on the point of dispute, take evidence both oral and documentary and decide the objection."

6. Thus the Consolidation Officer is required to hear the parties, frame issue, take evidence both oral and documentary before proceeding to decide the objection. There is no obligation cast upon the Consolidation Officer to put his signature on the deposition of witnesses recorded before him. From a reading of Rule-26 (2) it is clear that only obligation cast upon the Consolidation Officer is to take evidence both oral and documentary tendered by the parties which obviously means that oral evidence shall be recorded in presence and personal direction or superintendence of Consolidation Officer.

7. In the present case there is no averment that oral statement of witnesses was not recorded in the presence of Consolidation Officer or under his direction and superintendence. The only ground on which the order of Consolidation Officer has been set aside and the case has been remanded back for re-trial after recording afresh evidence is that the deposition of witnesses recorded by Consolidation Officer has not been signed by him and as such no reliance can be placed on the same.

8. Since the procedure prescribed for deciding the objection does not cast any obligation upon the Consolidation Officer to put his signature on the oral testimony of the witnesses, the absence of his signature will not the oral testimony of the witnesses, the absence of his signature will not vitiate the proceedings.

9. Even under the provision of order 18 rule 4 and 5 of the Code of Civil Procedure which provides for recording of evidence, there is no obligation cast upon the Presiding Officer to put his signature on the statement of witnesses recorded in the Court in his presence and under his personal direction and superintendence.

10. From aforesaid discussion, it is clear that Settlement Officer Consolidation and Deputy Director of Consolidation both committed illegality in setting aside the judgment of the Consolidation Officer and wrongly remanded the matter back for retrial after recording the evidence afresh.

11. In the end a feeble attempt was made by learned counsel for the respondent by raising an argument that writ petition against remand order is not maintainable. The argument has been advanced only to be rejected. It can not be said that as a rule writ petition against remand order is not maintainable. Generally, the court refuses to interfere or issue a writ of certiorari against a remand order for there is no final adjudication. If the court normally does not interfere in the remand order it does not mean that there is any lack of power in the court to interfere in such an order or the petition challenging the remand order is not maintainable. The court can interfere if it finds the circumstances to be extraordinary or the interference necessary in the interest of justice. In the present case, the view taken by Settlement Officer Consolidation and Deputy Director of Consolidation is illegal and as such the remand made on the basis of an illegal and erroneous view cannot be sustained and deserved to be interfered and quashed by this court.

12. In the result the writ petition succeeds and is allowed. The impugned orders dated 12.2.1982, 5.9.1981 passed by Deputy Director of Consolidation and Settlement Officer Consolidation respectively, are hereby quashed. The matter is remanded back to the Settlement Officer Consolidation for decision afresh on merits in accordance with law after notice and opportunity of hearing to all concerned. Since the matter is very old and has remained pending for long, Settlement Officer Consolidation is further directed to hear and decide the appeal within a period of six months from the date of production of certified copy of this order before him. However, in the facts and circumstances of the case there shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2005

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 24548 of 1994

Bhagwati Prasad & another ...Petitioners
Versus
The Board of Revenue U.P. at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Prakash Chandra

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

U.P. Panchayat Raj Act-Section 28 (c)- allotment of land-petitioner are the sons and grand sons of the officer bearers of either Nyay Punchayat or the Gaon Sabha-the village Pradhan and up Pradhan are the custodian of the entire property of Gaon Panchayat-the office bears of Gaon Punchayat by misusing their office-allotted the land to their family members-no material produced regarding the plea of agricultural labourer-cancellation held-justified.

Held: Para 6

Admittedly, Mahavir is grandson of Ghasi Ram Pradhan. Petitioner No. 1 Bhagwati Prasad is son of Sarpanch of Nyay Panchyat. Petitioner No. 2 Moti Ram is son of Up Pradhan. The allotment of land could not be made in favour of petitioners. The intention of legislature is that if land vests in Gaon Sabha/Gaon Panchayat, Pradhan and Up-Pradhan and

other members are custodian of entire property of Gaon Panchayat. In the instant case by misusing of their office, Office bearers of Gaon Panchayat illegally allotted the land of Gaon Panchayat to their family members.

(Delivered by Hon'ble S.N. Srivastava, J.)

1. This writ petition is directed against the judgment dated 20.6.1985 passed by Additional District Magistrate (Admin), Aligarh cancelling the allotment made in favour of petitioners. This judgment was affirmed by Additional Commissioner by judgment dated 7.10.86 and also by Board of Revenue by judgment dated 10.5.1994.

2. The matter relates to allotment of land to petitioners.

The Gram Pradhan and Up Pradhan are the Chairman and Vice Chairman of the Land Management Committee and Sarpanch of the Nyay Panchayat is also Chairman of Nyay Panchayat. Petitioner No. 1 Bhagwati Prasad is son of Sarpanch of Nyay Panchyat. Petitioner No. 2 Moti Ram is son of Up Pradhan. The allotment was also made by impugned resolution in favour of Mahavir who is grandson of Ghasi Ram Pradhan.

3. Learned counsel for petitioners urged that there is no prohibition for making allotment by Gaon Panchayat even if petitioners are family members of Gram Pradhan, Up Pradhan or Nyay Panchayat. He further urged that section 28 (c) of U.P. Panchayat Raj Act is applicable to the office bearers of Gram Panchayat/Nyay Panchayat and its members only and does not relate to the members of the family.

4. Sri Jitendra Pal Singh, learned counsel for Opposite Party No. 5, in reply, urged that petitioners are not eligible persons U/s 198 (1) of U.P.Z.A. and L.R. Act and as such allotment done in favour of family members of office bearers of Gaon Sabha/Gaon Panchayat was rightly cancelled in accordance with law.

5. Considered the arguments of learned counsel for the parties. It is not borne out from the record that allotment of land was made in favour of agricultural labourers whose main source of income was from agricultural labour. There is nothing on record to show that petitioners were agricultural labourers and working as labourers on the fields of others. No evidence was brought to my notice what was the income of petitioners.

6. Admittedly, Mahavir is grandson of Ghasi Ram Pradhan. Petitioner No. 1 Bhagwati Prasad is son of Sarpanch of Nyay Panchyat. Petitioner No. 2 Moti Ram is son of Up Pradhan. The allotment of land could not be made in favour of petitioners. The intention of legislature is that if land vests in Gaon Sabha/Gaon Panchayat, Pradhan and Up-Pradhan and other members are custodian of entire property of Gaon Panchayat. In the instant case by misusing of their office, Office bearers of Gaon Panchayat illegally allotted the land of Gaon Panchayat to their family members.

7. Courts below findings also make it clear that Moti Ram petition No. 2 was in service in Post Office and Bhagwati Prasad petitioner no. 1 was a student on the relevant date. Nothing was brought to my notice that petitioners were agricultural labourers on the date of allotment. The allotment proceedings had

not taken place in accordance with law. Findings of fact recorded by courts below were arrived at on appraisal of evidence of the parties on record. There is no error of law apparent on the face of record.

Writ Petition lacks merits and is dismissed. **Petition Dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: 12.07.2005

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

Civil Misc. Writ Petition No.48422 of 2005

Ram Krishna Dhandhania and another ...Petitioners
Versus
Civil Judge (Senior Division), Kanpur Nagar and others ...Respondents

Counsel for the Petitioners:
Sri P.K. Srivastava

Counsel for the Respondents:

Court Fee Act 1870 (as amended upto date in State of U.P.)-Section 12-Court fee deficiency right defendant-objections of valuation and deficiency of Court fee-decision taken by the Trail Court shall be final-unless the valuation suggested by the defendant affects the jurisdiction-right to question the decision of Trail Court by defendant can not be exercised.

Held: Para 17

Thus, in view of the above, the legal position can be summerised that the defendant has a right to raise all objections on the valuation and deficiency of the court fees. The matter is to be adjudicated upon and decided by the Court under Section 12 of the Act 1870 and the decision so taken by the trial Court shall be final. The defendant cannot raise the grievance against the said decision unless the valuation suggested by him affects the jurisdiction of the Court. However, the appellate or revisional Court always can test the issue suo motu and make the deficiency good as the purpose of the Act is not only fixing the pecuniary jurisdiction of the Court but also creating revenue for the State.

Case law discussed:
1957 ALJ-53
AIR 1953 SC-28
AIR 1968 Alld.-216 (FB)
AIR 1978 Alld.-21
AIR 1961 Ker. 142
AIR 1934 Alld.-620
AIR 1934 Oudh 396
AIR 1961 SC-1299
AIR 1973 SC-2384
AIR 1996 Mad-440
AIR 1978 P &H. 25
AIR 1991 Noc 53 Raj
AIR 1951 Alld. 59
1969 (3) SCC-392
AIR 1984 SC-273
AIR 1980 SC-1170
AIR 1991 SC-1617
AIR 1980 SC-1170
1994 (4) SCC-422
2002 (8) SCC-868

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

1. This writ petition has been filed seeking a direction to the learned Civil Judge (Senior Division), Kanpur Nagar to expedite the trial of the Suit No. 378 of 2000, Ram Krishna Dhandhania & Anr. Vs. Prem Shanker Pandey & Anr., which is not taking any progress in view of the objections raised by the defendant-respondents in respect of the payment of Court fees.

2. The facts and circumstances giving rise to this case are that the petitioners are purchaser of the property in dispute in which the defendants 2 and 3

had been tenants. At the time of purchasing the said property, petitioners entered into an agreement with the said defendant-respondents to allot them the area equivalent to 50% of the total area which had been in their possession prior to purchase of the said property. Certain amount of security has been deposited with the said defendant-respondents till the construction is completed and the possession is handed over to them after reconstruction. In that agreement, it was mentioned that the said defendants had been in possession to the extent of 1550 Sq. Ft.. However, subsequently, it was found that they were in possession of only 485 sq. ft. Thus, rectification of the Deed was sought and as it was not made, the petitioners-plaintiffs filed the suit for rectifying the said agreement on various grounds. Written statement and replications have been filed; 12 issues have been framed and two of them relate to the payment of court fee, namely (1) whether the suit is undervalued and (2) whether the court fee paid is insufficient. These issues have been decided as a primary issues in view of the provisions of Order XIV Rules 1 and 2 of the Code of Civil Procedure (hereinafter called the 'C.P.C.') vide order dated 22.01.2004. By consent of the parties valuation of the suit stood enhanced and the petitioner-plaintiffs deposited the required court fee on the valuation agreed by the parties. However, application was filed by the defendant-respondents to recall the said order and to re-determine the whole issue. The trial Court after hearing the learned counsel for the parties on the said application and objections, rejected the application by an order dated 18.09.2004, which is quoted below:-

"18.09.2004. Case called out. Parties counsels are present. Application 90C to recall the order dated 21.08.2004. It is filed by the defendant. Opposed. Objection is 91C. Heard. Order dated 21.08.2004 has been passed after hearing both the learned counsels of the parties. Reported submitted by the Munsarim has been accepted by the Court. Hence it cannot be reagitated in this Court. Application 90C therefore is rejected. Fix 11.10.2004 for evidence."

Again, the defendants-respondents filed another application to recall the said order, which is still pending.

3. As the petitioner-plaintiffs feel that the suit is being delayed on one ground or the other, they have approached this Court by filing this writ petition for a direction to expedite the trial of the suit.

4. The petition could have been disposed of with a direction to the Court concerned to expedite the trial of the suit but Mr. P.K. Srivastava, learned counsel for the petitioners submitted that it would be better to clarify the legal position so that the learned trial Court may proceed and decide the said application. Notices have not been issued to the defendant-respondents, as we are not deciding the issue on facts. The issue for determination is as to whether the defendant-respondents have any right to challenge the adequacy of court fee paid by the plaintiff-petitioners in the suit.

5. The issue is required to be decided in view of the provisions of the Court Fee Act, 1870 (as amended, updated and applied in the State of U.P.) read with Section 149 and Order VII Rule 11, C.P.C.

6. Section 12 of the Act 1870 deals with the decision of question as to valuation and it provides that such an issue shall be decided by the Court in which the plaint is filed and such decision shall be final between the parties to the suit. Thus, it is evident from the provisions of Section 12 of the Act 1870 that the decision taken by the Court on such an issue shall be final between the parties but in case the superior Court while exercising the appellate or revisional jurisdiction comes to the conclusion that the issue has wrongly been decided to the detriment of the revenue, it can direct the party to make the deficiency good for the reasons that the object of the Act is not to arm a litigant with a weapon of technicality but to secure the revenue. (Vide Lala Ram Babu Vs. Lala Ramesh Chandra, 1957 ALJ 53). The finality is, however, with respect to arithmetical calculation and not with respect to classification, i.e. category under which the suit falls. (Vide Nemi Chand & Anr Vs. Edward Mills Co. Ltd. & Anr, AIR 1953 SC 28); Smt. Bibbi & Anr Vs. Shugan Chand & Ors, AIR 1968 Alld. 216 (F.B.); and Mohd. Ajmal Vs. Firm Indian Chemical Co. & Ors, AIR 1978 Alld. 21).

7. In Bhikamdas Balaram & Ors. Vs. Motilal Gambhirmal, AIR 1958 Bom. 307, the Bombay High Court held that an erroneous decision to the effect that a suit fell under a particular category for the purpose of court fee, was open to revision for the reason that the **jurisdiction** of the Court might be affected by the decision.

8. In Zainabey Razak Vs. Noor Mohammed Rothan, AIR 1961 Ker.146, a Full Bench of Kerala High Court held that revision at the behest of the defendant against the order passed by the trial Court deciding the suit, fell under a particular category was valid. The same view was reiterated in Sankaran Nadar Lekshmanan Nadar Vs. Varathan Nadar Krishnan Nadar & Ors., AIR 1961 Ker.142.

9. A Full Bench of the Allahabad High Court, however, in Messrs. Gupta & Co. Vs. Messrs. Kripa Ram Brothers, AIR 1934 All. 620, held that a decision in the trial of a suit as to the amount of court fee, is not an independent proceeding and, therefore, not open to revision or challenge by the defendants.

10. Similar view has been reiterated in Lachhmi Narayan Vs. Secretary of State, AIR 1934 Oudh 396**.**

In S. Rm. Ar. S. Sp. Sathappa Chettiar Vs. S. Ar. Rm. Ramanathan Chettiar, AIR 1958 SC 245, the Hon'ble Supreme Court held as under:-

"Normally the dispute between the litigant and the Registry in respect of court fee, arises at the initial stage of the presentation of the plaint or the appeal and **the defendant or the respondent is usually not interested in such a dispute unless the question of payment of court fees involves also the question of jurisdiction of the court** either to try the suit or to entertain the appeal." (Emphasis added).

11. In Sri Rathnavarmaraja Vs. Smt. Vimla, AIR 1961 SC 1299, the Hon'ble Supreme Court held that whether proper court fee has been paid or not, is an issue between the plaintiff and the State and that the defendant has no right to question it in any manner. The said judgment of the Apex Court was re-considered and

approved in Shamsher Singh Vs. Rajinder Prashad & Ors., AIR 1973 SC 2384, observing as under:-

"The ratio of that decision was that no revision on a question of court fee lay where no question of jurisdiction was involved."

12. The Hon'ble Supreme Court further approved the judgment of the Kerala High Court in Vasu Vs. Chakki Mani, AIR 1962 Ker. 84, wherein it was pointed out that no revision would lie against the decision on the question of adequacy of court fee at the instance of the defendant unless the question of court fee involves also the question of jurisdiction of the Court.

13. In G. Krishnamurthy & Ors. Vs. Sarangapani & Anr., AIR 1996 Mad. 440, the Madras High Court held that "primarily the issue regarding court fee is essentially a matter in between the Court and the suitor and the finding rendered by the court cannot be said to have caused any prejudice to the defendant....."

14. Similar view has been reiterated by the Full Bench of the Punjab High Court in M/s. Arjan Motors Malout Partnership Firm Vs. Girdhara Singh & Ors, AIR 1978 P&H 25; by the Andhra Pradesh High Court in Subhadramma Vs. Palaksha Reddy & Ors., AIR 1975 AP 165; and M/s. Kamal Engg. Works Vs. Ashwani Kumar & Ors., AIR 1991 NOC 53 (Raj.)

15. Deficiency of court fees is an important issue and has to be decided also giving combined effect to the provisions of Section 149 and Order VII Rule 11, C.P.C. and both the said provisions provide that if there is a deficiency of court fee, the Court must give time to make the deficiency good and if during that period, the amount of court fee is paid, the plaint takes its effect from the date of its original presentation. (Vide Brijbhukhan & Ors. Vs. Tota Ram, AIR 1929 Alld. 75). In this respect, the decision has to be based on judicial discretion and cannot be made arbitrarily, as held by the Full Bench of this Court in Wajid Ali Vs. Isar Banu urf Isar Fatma, AIR 1951 Alld. 59. Section 149, C.P.C. provides that where the whole or any part of the Court fees prescribed for any document by the law for the time being in force relating to court fees has not been paid, the Court may in its discretion at any stage allow the person by whom such fees is payable to pay the whole or part, as the case may be, of such court fees and upon such payment, the document in respect of which fee is payable shall have the same force and effect as if such fees had been paid in the first instance.

16. Validity of an order is to be tested on the touch-stone of doctrine of prejudice. (Vide Jankinath Sarangi Vs. State of Orissa, (1969) 3 SCC 392; K.L. Tripathi Vs. State Bank of India & Ors, AIR 1984 SC 273; Sunil Kumar Banerjee Vs. State of West Bengal & Ors., AIR 1980 SC 1170; Maj. G.S. Sodhi Vs. Union of India, AIR 1991 SC 1617; Managing Director, ECIL, Hyderabad & Ors. Vs. B. Kanunakar & Ors., AIR 1994 SC 1074; Krishan Lal Vs. State of J&K, (1994) 4 SCC 422; State Bank of Patiala & Ors. Vs. S.K. Sharma, AIR 1996 SC 1669; S.K. Singh Vs. Central Bank of India & Ors., (1996) 6 SCC 415; State of U.P. Vs. Harendra Arora & Anr., AIR 2001 SC 2319; Oriental Insurance Co. Ltd. Vs. S. Balakrishnan, AIR 2001 SC

2400; and Debotosh Pal Choudhury Vs. Punjab National Bank & Ors., (2002) 8 SCC 68).

17. Thus, in view of the above, the legal position can be summerised that the defendant has a right to raise all objections on the valuation and deficiency of the court fees. The matter is to be adjudicated upon and decided by the Court under Section 12 of the Act 1870 and the decision so taken by the trial Court shall be final. The defendant cannot raise the grievance against the said decision unless the valuation suggested by him affects the **jurisdiction** of the Court. However, the appellate or revisional Court always can test the issue suo motu and make the deficiency good as the purpose of the Act is not only fixing the pecuniary jurisdiction of the Court but also creating revenue for the State.

18. In view of the above, we dispose of this writ petition requesting the learned Civil Judge (Senior Division), Kanpur Nagar to decide the said application for recall filed by the defendant-respondents finally in the light of the law laid down above as early as possible and to expedite the trial of the Suit giving strict adherence to the provisions of Order XVII Rule 1, C.P.C. and conclude the same as early as possible. **Petition disposed of**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2005

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

Civil Misc. Writ Petition No. 14893 of 1989

Natthu Ram ...Petitioner
Versus
VII Additional District Judge, Varanasi and others ...Opposite Parties

Counsel for the Petitioner:
Sri A.C. Tripathi

Counsel for the Opposite Parties:
Sri Shashi Nandan
S.C.

U.P. Urban Building (Regulation of letting Rent and Eviction) Act 1972-Section 21-Release application on the ground of bonafide need of land lord-property in dispute of 3 shops on monthly rent of Rs.20/- during pendency of writ petition-one shop just adjust to the land lord shop vacated-after getting possession-the land lord demolished adjoining wall and converted the two shops into one-held-need of land lords stand satisfied-but considering law laid down in Khursheeda's case the rent enhanced from Rs.20/- to 500/- per month.

Held: Para 1, 3 and 4

After filing of writ petition Sahdeo entered into compromise with the landlady and vacated the shop in his possession. The shop vacated by Sahdeo in the year 1990 was adjacent to the shop in possession of the petitioner landlord. After getting possession of the said shop, landlord demolished the adjoining wall and converted the two shops to one big shop. This fact is not denied by the learned counsel for the petitioner.

Accordingly I am of the opinion that due to availability of the shop vacated by Sahdeo during pendency of writ petition the need of the landlord stands satisfied to a great extent.

Accordingly writ petition is dismissed.

I have held in Khursheda versus A.D.J. 2004 (2) ARC 64 and H.M. Kichlu versus A.D.J. 2004 (2) ARC 652 that while granting relief against eviction to the tenant in respect of building covered by Rent Control Act or maintaining the said relief already granted by the court below, Writ Court is empowered to enhance the rent to a reasonable extent. The rent of Rs.20/- per month for a shop in Varanasi is highly inadequate, virtually it is no rent.

Case law discussed:

2002 (2) ARC-298
AIR 2001 SC-2655
2004 (2) ARC-64
2004 (2) ARC-652

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

1. This writ petition arises out of release proceedings initiated by original landlady Smt. Kundru Devi since deceased and survived by the petitioner against tenant respondent No. 3 Gopal on the ground of bonafide need of her son under Section 21 of U.P. Rent Regulation Act (U.P. Act No. 13 of 1972). Property in dispute is a shop rent of which is Rs.20/- per month. Landlady had three shops in a row. Western shop was being used by her son who is now petitioner, eastern shop is in tenancy occupation of respondent No.3 and the middle shop was also in possession of another tenant Sahdeo. All the three shops are of 5 feet 3 inch by 8 feet 10 inch. Landlady filed two release applications against both the tenants. The release application against respondent No. 3 was registered as P.A. case No. 170 of 1983 and release application against the other tenant Sahdeo was registered as P.A. case No. 169 of 1983. Prescribed authority/II Additional Civil Judge, Varanasi allowed both the release applications through judgment and order dated 4.3.1986 against which two appeals were filed. Appeal of respondent No. 3 was registered as R.C. Appeal No.98 of 1986 and appeal of Sahdeo as R.C. Appeal No.97 of 86. VII Additional District Judge, Varanasi allowed both the appeals on 12.5.1989. Landlord has filed this writ petition against judgment of lower appellate court passed in appeal of Gopal respondent No.3. Another writ petition was also filed by the petitioner against the judgment of the lower appellate court passed in the appeal of Sahdeo being writ petition No. 14895 of 1989 (dismissed in default on 5.5.2005). After filing of writ petition Sahdeo entered into compromise with the landlady and vacated the shop in his possession. The shop vacated by Sahdeo in the year 1990 was adjacent to the shop in possession of the petitioner landlord. After getting possession of the said shop, landlord demolished the adjoining wall and converted the two shops to one big shop. This fact is not denied by the learned counsel for the petitioner.

2. Learned counsel for the tenant respondent has vehemently argued that the need of the landlord if any, stands satisfied as he has obtained possession of one shop which was in tenancy of Sahdeo. Learned counsel for landlord petitioner has argued that the landlord requires the shop in dispute also to run his business properly. In the release application it was stated that landlady's son i.e. present petitioner in order to increase his business of selling food grains requires the other

two shops. Even if both the shops had been in occupation of one and the same tenant, the court would have been obliged to consider as to whether release of one shop would satisfy the need of the landlord or not ***(vide R.C. Kesarvani Vs. Dwarika Prasad, 2002 (2) ARC 298 (S.C.)).*** In the instant case two shops were in tenancy occupation of two different tenants. One tenant has already vacated. In my opinion therefore the need stands satisfied to a great extent. Under somewhat similar circumstances, Supreme Court in ***Deena Nath Versus Pooran Lal, AIR 2001 SC 2655*** held that if landlord had one room already in possession and another room became available to him during pendency of the proceedings then need stood satisfied.

3. Accordingly I am of the opinion that due to availability of the shop vacated by Sahdeo during pendency of writ petition the need of the landlord stands satisfied to a great extent.

Accordingly writ petition is dismissed.

4. I have held in ***Khursheda versus A.D.J. 2004 (2) ARC 64 and H.M. Kichlu versus A.D.J. 2004 (2) ARC 652*** that while granting relief against eviction to the tenant in respect of building covered by Rent Control Act or maintaining the said relief already granted by the court below, Writ Court is empowered to enhance the rent to a reasonable extent. The rent of Rs.20/- per month for a shop in Varanasi is highly inadequate, virtually it is no rent.

5. Accordingly it is directed that with effect from July 2005 onwards respondent No.3 Gopal shall pay rent to the landlord petitioner at the rate of Rs.500/- per month. **Petition Dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2005

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

Civil Misc. Writ Petition No. 2036 of 1983

Smt. Janki Bai ...Petitioner
Versus
District Judge, Jhansi and others ...Respondents

Counsel for the Petitioner:
Sri Prakash Gupta

Counsel for the Respondents:
S.C.

U.P. Urban Building (Regulation of letting on Rent and Eviction Act 1972-Section-21 (1-A)-Release Application-land already in possession of small portion of tenanted accommodation-her husband in governement service occupying the house provided by employer-on the date of filing the release application-was to retire after four months-approch of Lower Appellate Court not only astonishment and shocking but against well settled principle of law-accommodation provided by employer-the status of employee-become as tenant such possession can not be considered as alternative accommodation.

Held: Para 3 and 4

The appellate court did not give any weight to the fact that after about four months of the filing of the release application landlady's husband was to retire and in fact retired. Even if need is considered on the date of filing of the release application there was no occasion to deny the release on the

ground of availability of the house provided by the employer then his position in only that of tenant and possession of the house as tenant is not to be considered as an alternative accommodation available to the landlord as held by the Supreme Court in *G.K. Devi Versus Ghanshyam Das, AIR 2000 SC 656*

The judgment and order passed by the lower appellate court is utterly erroneous in law, based upon wholly irrelevant consideration and arrived at by ignoring relevant material and circumstances.

AIR 2000 SC-656-relied on

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

1. This is landlady's writ petition arising out of eviction/release proceedings initiated by her against tenant respondent No. 2 Nand Lal Narula on the ground of bonafide need under section 21 of U.P. Act No. 13 of 1972 (U.P. Rent Regulation Act).

2. Property in dispute is a house adjoining portion of which is in possession of the landlady. Landlady's husband was employed in Municipal Board, Jhansi and was going to retire on 31.8.1981. Landlady filed release application in April 1981 stating therein that by virtue of his employment husband of the landlady was provided a house by the Municipal Board and after retirement he would have to vacate the said house hence accommodation in dispute should be released. It was further stated that the adjoining portion of the accommodation in dispute already in possession of the landlady was too small to satisfy her need. It was stated by the landlady and categorically admitted by the tenant that the tenant had also acquired another house. Prescribed authority, Jhansi before whom the release application was registered as P.A. Case No. 29 of 1981, allowed the release application on 12.2.1982. Against the said judgment and order tenant respondent No. 2 filed R.C. Appeal No. 12 of 1982. District Judge, Jhansi on 8.11.1982, allowed the appeal hence this writ petition by landlady.

3. The application was filed under section 21 (1)(a) as well as section 21 (1-A) of the Act. Under the latter provision, it is provided that if landlord of a building is in service and has been provided residential house by his employer then at the time of his retirement tenanted house may be released. In respect of the said provision, the learned District Judge held that as a small portion adjacent to the accommodation in dispute was already in possession of the landlady hence no relief under the said provision could be granted.

In respect of the ground of bonafide need under section 21 (1)(a), the appellate court held that even though during pendency of release application landlord had retired but subsequent events could be considered only when they helped the tenant and not when they helped the landlord. The court can only express its astonishment and shock at this approach. Such type of approach is not only fatal to scheme of the Act but borders on cruelty to landlord. The appellate court did not disagree with the prescribed authority, that the accommodation adjacent to the house in dispute was insufficient for need of the landlady. However appellate court took the view that need will have to be determined on the date of filing of the release application and as on that date landlady's husband was in service and occupying the house provided by the

employer hence on the date of filing of the release application there was no bonafide need. The appellate court did not give any weight to the fact that after about four months of the filing of the release application landlady's husband was to retire and in fact retired. Even if need is considered on the date of filing of the release application there was no occasion to deny the release on the ground of availability of the house provided by the employer then his position in only that of tenant and possession of the house as tenant is not to be considered as an alternative accommodation available to the landlord as held by the Supreme Court in ***G.K. Devi Versus Ghanshyam Das, AIR 2000 SC 656.*** It is only such occupation of the landlord which is as of right, which can be taken into consideration as an alternative accommodation available to the landlord. If a landlord is occupying an accommodation either as licencee or as a tenant or as an employee, the same is irrelevant and cannot be taken into consideration while considering his bonafide need for release of the accommodation in the occupation of the tenant.

4. The judgment and order passed by the lower appellate court is utterly erroneous in law, based upon wholly irrelevant consideration and arrived at by ignoring relevant material and circumstances.

Writ petition is accordingly allowed.

5. Judgment and order passed by the lower appellate court is set-aside and that of prescribed authority is restored.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2005

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

Civil Misc. Writ Petition No. 33779 of 2002

Ranvir Singh and another ...Petitioner
Versus
The Board of Revenue U.P., Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri Vivek Mishra

Counsel for the Respondents:
Sri Anupam Kulshrestha
Sri K.R. Sirohi
Sri Anuj Kumar
S.C.

U.P. Zamindari Abolution and Land Reforms Act, 1956-Section 161-Exchange of Land-reserved for public utility-can not be exchanged with Bhumidari Land of private persons-permissible only when the land is not covered by Section 132 of the Act.

Held: Para 10

Under Section 132 (VI) of U.P.Z.A. & L.R. Act it has been provided that Bhoomidhari rights shall not accrue in any land set apart for public purpose under U.P. Consolidations of Holdings Act. It is correct that under Section 161 of U.P.Z.A. & L.R. Act exchange of Gaon Sabha land is permissible. However, reading the said section alongwith Section 132 U.P.Z.A. & L.R. Act makes it quite clear that such exchange is permissible only when Gaon Sabha land sought to be exchanged is not covered by Section 132 of U.P.Z.A. & L.R. Act.

Case law discussed:
1971 R.D. 466
1990 ALJ 366

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

1. The question involved in this writ petition is as to whether Gaon Sabha land reserved for some public purpose (digging in the instant case) can be exchanged with *Bhumidhari* land of a private tenure holder or not.

2. Land Management Committee, Mustafabad Tehsil and district Muzaffar Nagar passed a resolution on 14.1.2000 for exchange of its land reserved in revenue records for digging (*Khudai*) comprised in plot No. 506 and 507 area 0.092 hectares and 0.010 hectares respectively with the *Bhumidhari* land of Smt. Kamla Devi comprised in plot No. 111 area 0.113 hectares. In the resolution, it was stated that land of plot No. 111 was more appropriate to be used as *Rasta* and if the said plot was transferred to Gaon Sabha then it would serve the purpose of connecting *Rasta* with Chak marg comprised in plot No. 110. S.D.O./Deputy Collector, Sadar Muzaffar Nagar by order dated 16.3.2000, allowed the exchange on the ground that it was in public interest. The said order was passed in case No. 8 of 2000, Land Management Committee, Mustafabad versus Kamla Devi.

3. Thereafter Tehsildar filed a report date 29.5.2000 to the effect that Kamla Devi had sold plot No. 111 and the name of the purchaser (Ranvir Singh) had been mutated in the revenue records hence exchange order deserved to be set aside. S.D.O./Deputy Collector, Sadar Muzarrar Nagar accepted the report of Tehsildar and set-aside its earlier order dated 6.3.2000 as well as resolution of Land Management Committee dated 14.1.2000 by his order dated 31.5.2000. Thereafter Kamla Devi and Ranvir Singh, who had purchaged the land from her, filed restoration applications for setting aside the order dated 31.5.2000. The restoration applications were rejected by S.D.O. on 31.1.2001.

4. Against the said order two revisions being revision no. 52 and 53 of 2000-01 were filed. The revisions were allowed by Additional Commissioner (Administration), Saharanpur division, Saharanpur on 11.6.2002 and orders of the trial court dated 31.5.2000 and 31.1.2001 were set aside. Against the said order two revisions being revision no. 69 and 70 of 2001-02 were filed before Board of Revenue, Allahabad. The said revisions were allowed by Board of Revenue on 2.8.2002 (even though in the order word disposed of was used) hence this writ petition.

5. As far as sale of the property by Smt. Kamla Devi in favour of Ranveer Singh, petitioner no. 1 is concerned, in this regard it has been mentioned in para-13 of rejoinder affidavit that sale deed dated 28.1.2000 executed by Kamla Devi in favour of Ranveer Singh has been cancelled by civil court on 30.5.2000.

6. The Board of Revenue has held that admittedly consolidation operation had taken place in the village in dispute and plot nos. 506 and 507 were entered as Gaon Sabha land meant for digging. The Board of Revenue placing reliance upon an authority of this Court reported in ***1971 R.D. 466 Lalji Vs. Board of Revenue*** has held that public utility land reserved as such in consolidation operation cannot be exchanged under Section 161 of U.P.Z.A. & L.R. Act with the Bhoomidhari land of private tenure holder.

7. It has been held by this Court in ***G.S. Vs. D.D.C. 1990 A.L.J. 366*** that land reserved for artisans to dig out the earth for preparing earthen ware is also a public purpose.

8. Learned counsel for the petitioner has very vehemently argued that the authority of Lalji Vs. Board of Revenue does not lay down correct law as under Section 161 of U.P.Z.A. & L.R. Act it is specifically provided that Gaon Sabha land may be exchanged with the Bhoomidhari land of a private person.

9. I do not see any reason to doubt the correctness of the view taken in Lalji's case and refer the same to Larger Bench. In the said authority it has clearly been held that *"the Gaon Sabha has no authority in law to divert the use of land earmarked for a public purpose."*

10. Under Section 132 (VI) of U.P.Z.A. & L.R. Act it has been provided that Bhoomidhari rights shall not accrue in any land set apart for public purpose under U.P. Consolidations of Holdings Act. It is correct that under Section 161 of U.P.Z.A. & L.R. Act exchange of Gaon Sabha land is permissible. However, reading the said section alongwith Section 132 U.P.Z.A. & L.R. Act makes it quite clear that such exchange is permissible only when Gaon Sabha land sought to be exchanged is not covered by Section 132 of U.P.Z.A. & L.R. Act.

11. Accordingly, there is no error in the judgment of Board of Revenue holding that as the land comprised in plot nos. 506 and 507 was reserved for public purpose (digging) hence exchange was not permissible.

Writ petition is therefore dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 32158 of 2002

Ajai Kumar Singh ...Petitioner
Versus
High Court of Judicature at Allahabad through Registrar General and another ...Respondents

Counsel for the Petitioner:
Sri A.P. Tiwari
Sri Sada Nand Shukla
Sri Sheo Shanker Tripathi

Counsel for the Respondents:
Sri Sudhir Agrawal
Sri Amit Sthelkar
Sri K.R. Sirohi
S.C.

U.P. Subordinate Civil Courts Ministerial Establishment Rules, 1947 Rule-14 (3)- Short term appointment-petitioner being candidate of waiting list-appointed on the vacancy caused by a regular Class III employee during the period of supervision-with condition specifically provided in the appointment letter-that if the suspended employee reinstated-the service of petitioner shall come to an end-after joining of suspended person on reinstatement-the termination order challenged on ground that under similar circumstances another employee approached before the administrative judge and has been regularised-held-extraordinary powers can not be exercised for giving parity to an illegal order- particularly when such illegal appointee is not before the court-

practice of sh0ort terms appointment from waiting list highly depreciated.

Held: Para 6 and 7

The extraordinary powers under Article 226 of the Constitution of India cannot be exercised for such purpose. Why examining another person's case in his absence, rather that examining the case of the petitioner, who is present before the Court seeking relief. Giving effect to such a plea will be pre-judicial to the interest of law and will be against the public interest. Each case must be decided on its own merit both factual and legal.

The writ petition is accordingly dismissed, with directions that in future no appointment shall be made by the District Judges from out of the waiting list on any short term vacancies. The Rules clearly do not provide for any such appointments which not only cause serious administrative difficulties, but also engages time and energy of this Court. No order as to costs.

Case law discussed:
1995 (1) SCC-745
1995 (3) SCC-486

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

1. Heard Sri A.P. Tiwari, learned counsel for the petitioner and Sri Amit Sthelkar for respondents.

2. The District Judge, Deoria advertised 48 vacancies of Class III employees to be filled up by selection vide advertisement published on 13.9.1999. Out of these 48 vacancies, 36 were on the post of Clerks in Grade III, 05 on Paid Apprentices and 07 on Stenographers. The petitioner was placed in the waiting list of paid apprentices at serial no. 2. All the selected persons joined. There was no further vacancies on which the petitioner could be appointed within a period of one year i.e. The validity of the select list in terms of Rule 14 (3) of the U.P. Subordinate civil Courts Ministerial Establishment Rules 1947. It appears that four employees of the Judgeship were suspended and consequently District Judge appointed some of the persons out of the waiting list on these short term vacancies. The petitioner was given the short term appointment caused on suspension of one of such suspended employee. The appointment letter dated 7.7.2000 clearly mentioned at the end, that the appointment is on a vacancy caused on the suspension of an employee and that if the employee is reinstated, the petitioner's services will come to an end. Sri Ajai Kumar Srivastava, the suspended employee was reinstated. Consequently the petitioner's services came to an end by order dated 14.11.2000.

3. Learned counsel for the petitioner submits that similarly placed person at serial no. 1 in the waiting list, who was also appointed in short term vacancy, made a representation to High Court, which was allowed and that he was given regular appointment vide order of the High Court dated 23.5.2001. The petitioner has claimed parity with Sri Dharmendra Kumar Chaudhari and submits that rejection of his representation violates the equality before law guaranteed by Article 16 of the Constitution of India.

4. A person in the waiting list does not have a right to be appointed unless the advertised vacancies are not filled up by the selected persons. It is only when any selected person does not join, that the vacancies can be offered to the person in

waiting list in accordance with merit position within the period of validity of the select list. In the present case, it is admitted that no vacancies were caused on account of non-joining of any of the persons selected and placed in the main list. This Court has time and again and repeatedly requested the District Judges not to make appointments on short term vacancies out of waiting list prepared after regular selection. This not only causes complications but raises hopes of the wait listed candidates who are later on engaged in litigation for decades altogether. In **Madan Lal Vs. State of J & K 1995 (3) SCC 486 and Prem Singh vs. State of Haryana 1996 (4) SCC 319 (para 25)** the Supreme Court held that appointments from the waiting list, beyond advertised vacancies can be made only in exceptional circumstances, and in emergent situation, and that too by taking a policy decision, which should be free from arbitrariness.

5. The object and purpose of the waiting list is to avoid another selection for the same vacancies which cannot be filled up from the selected candidates. The petitioner was not appointed on any clear vacancy. He was appointed on a vacancy caused on account of suspension of an employee of the judgeship. It was a short term vacancy which should not have been filed up from the waiting list. In any case the appointment letter clearly stipulated that the appointment is conditional upon reinstatement of suspended employee. Sri A.P. Tiwari, learned counsel for the petitioner made an attempt to state that this condition was not incorporated in the appointment letter and was added subsequently. This ground appears to have been taken for the first time in the rejoinder affidavit. In the writ petition the petitioner has relied upon his appointment dated 7.7.2000 which clearly stipulated that the appointment is subject to reinstatement of the suspended employee. It is apparent that the petitioner is trying to create a new ground in rejoinder affidavit, which cannot be accepted.

6. Sri Dharmendra Kumar Chaudhari has not been impleaded in the writ petition. I am not inclined to go into the question of the validity of the appointment of Sri Dharmendra Kumar Chaudhari or to examine the circumstances in which he was appointed out of the waiting list and given appointment in the absence of any vacancy caused on account of non-joining of any candidate. The operative portion of the order quoted in the letter of Deputy Registrar dated 23.5.2001 proceeds with the statement that the applicant was 'appointed', after due selection. The question whether this statement is correct, is not a subject matter to be decided in this writ petition. In any case, the person whose appointment is a cited for claiming parity, has not been impleaded. This Court will not cause a futile enquiry into the circumstances in which such appointment was made. An irregular appointment does not discriminate the similarity situate person. In **Chandigarh Administration vs. Jagjeet Singh 1995 (1) SCC 745**, the Supreme Court held that an illegal order with which comparison is made can not be the basis to issue a writ compelling respondents to do the same illegality. The extraordinary powers under Article 226 of the Constitution of India cannot be exercised for such purpose. Why examining another person's case in his absence, rather that examining the case of the petitioner, who is present

before the Court seeking relief. Giving effect to such a plea will be pre-judicial to the interest of law and will be against the public interest. Each case must be decided on its own merit both factual and legal.

7. The writ petition is accordingly dismissed, with directions that in future no appointment shall be made by the District Judges from out of the waiting list on any short term vacancies. The Rules clearly do not provide for any such appointments which not only cause serious administrative difficulties, but also engages time and energy of this Court. No order as to costs. Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No.47817 of 2005

Mohammad Ehteshamul Hasan
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Jai Prakash Rai

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

Constitution of India, Art. 226-Service Law-Right to appointment-Vacancies of Tuberculosis Health visitors-advertised on 2.3.05 prescribing the essential Qualification-Interview-by subsequent advertisement the requisite qualification prescribed Intermediate with Biology-challenged on the ground once the petitioner participated in the interview as per earlier advertisement-it can not be denied by the change of requisite qualification-held-the subsequent advertisement issued as per guide lines of State Govt.-in absence of essential qualification petitioner has no right to challenge the subsequent advertisement.

Held: Para 6

Considering the aforesaid facts and circumstances and keeping in view that the subsequent advertisement has been issued on the basis of the guidelines issued by the State Government and also considering that the petitioner does not possess the essential qualification for appointment on the post T.B.H.V. even according to the guidelines of the Central Government as have been relied by the petitioner and also keeping in view the law laid down by the Supreme Court in the aforesaid two cases relied upon by the learned counsel for the respondents, the prayer made in this writ petition is not liable to be granted.

Case law discussed:
J.T. 1991 (2) SC-380
1994 (6) SCC-151

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

1. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the State-respondents no. 1,2 and 3, Sri V.K. Singh, learned counsel appearing for respondent no. 4 and Sri D.S. Shukla, learned Additional Standing Counsel for the Union of India appearing for respondent no. 5.

2. The facts in brief are that in response to an advertisement issued on 2.3.2005 by respondent no. 4, the District Tuberculosis Officer as Member Secretary of the District Tuberculosis

Control Society, Allahabad inviting applications for filling up the post of Tuberculosis Health Visitor (T.B.H.V.) the petitioner had applied. The qualification as mentioned in the said advertisement was that the candidate should have passed Intermediate with Science. It is not the case of the petitioner that in response to the said application filed by the petitioner he had been called for interview or any other action has been taken with regard to his selection. However, a fresh advertisement was issued on 14.6.2005 again inviting applications for the post of T.B.H.V. in the subsequent advertisement the essential qualification for appointment on the post of T.B.H.V. was Intermediate with Biology. In this advertisement it was also provided that those candidates who have already applied in response to the earlier advertisement need not apply afresh and their earlier applications shall be considered. According to the petitioner he has passed Intermediate with Science but not with Biology as a subject. The petitioner contends that since he was eligible on the basis of the qualification mentioned in the first advertisement dated 2.3.2005, his application ought to have been considered in response to the subsequent advertisement also and he should have been called for interview.

3. The submission of the learned counsel for the petitioner is that as per the guidelines issued by the Government of India for making appointments on certain posts (filed as Annexure-S.A. 3 to the supplementary affidavit) the essential qualification for the post of T.B.H.V. was only Intermediate with Science and experience of working as MPW/LHV/ANM. He thus contends that since the guidelines do not specify that the candidates should have biology as a subject in Intermediate, such condition as mentioned in the subsequent advertisement is illegal. This writ petition has thus been 14.6.2005 may be quashed and the petitioner may be considered for appointment to the post of T.B.H.V.

4. Learned Standing Counsel appearing for the State-respondents has, on instructions received from his client, produced before me the District Tuberculosis Control Society wherein it has been provided that the essential qualification for the post of T.B.H.V. iv Intermediate Science with Biology as a subject. It is not disputed by the petitioner that the society is controlled by the State Government and funds the provided by it and that the members of the society are all functionaries of the State Government. Thus, the subsequent advertisement issued in consonance with the direction given by the State Government cannot be said to be illegal. Even as per the own case of the petitioner the essential qualification for appointment for the post of T.B.H.V. as per the guidelines issued by the Central Government was that a candidate should be Intermediate with Science and experience of working as MPW/LHV/ANM. It is not the case of the petitioner that he possesses such qualification. According to him he is only Intermediate with Science. It is nowhere stated that he has experience as prescribed in the guidelines of the Central Government.

5. Sri V.K. Singh, learned counsel appearing for the contesting respondent no. 4 has further submitted that even after selection for appointment on a particular post the candidate does not acquire any indefensible right to be appointed.

Reliance in this regard has been placed on two decisions of the Apex Court namely, **Shankarasan Dash Vs. Union of India** JT 1991 (2) S.C. 380 and **State of M.P. and others Vs. Raghuveer Singh Yadav and others** (1994) 6 S.C.C. 151. As such, it has been contended that in such view of the matter, the petitioner who had merely filed his application for being given appointment does not acquire any right to be appointed or be considered for appointment.

6. Considering the aforesaid facts and circumstances and keeping in view that the subsequent advertisement has been issued on the basis of the guidelines issued by the State Government and also considering that the petitioner does not possess the essential qualification for appointment on the post T.B.H.V. even according to the guidelines of the Central Government as have been relied by the petitioner and also keeping in view the law laid down by the Supreme Court in the aforesaid two cases relied upon by the learned counsel for the respondents, the prayer made in this writ petition is not liable to be granted.

7. This writ petition lacks merit and is, accordingly, dismissed. No order as to costs. **Petition Dismissed**.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2005

BEFORE
THE HON'BLE AJOY NATH RAY, J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 884 of 2005

Mohd. Arif ...Petitioner
Versus
M/s Mirza Glass Works, Firozabad and others ...Respondents

Counsel for the Petitioner:
Sri Y.S. Saxena
Sri D.K. Kulshreshtha

Counsel for the Respondents:
Sri V. Sahai
C.S.C.

High Court Rules-Chapter VIII Rule 5 readwith Payment of wages Act 1936-S-15 and 18-Special Appeal-against the judgment passed by Single Judge-petition arises out against the Order passed by the Prescribed Authority under Section 15 of the Payment of Wages Act 1936-within the meaning of tribunal-entrusted with the Power of Civil Court-held-appeal barred-not maintainable.

Held: Para 5 and 6

From a conjoint reading of Section 15 (1) with Section 18 of the Payment of Wages Act, 1936, it is clear that the authority empowered to decide claims arising out of deduction from wages is entrusted all the powers of Civil Court under the Code of Civil Procedure for the purposes of taking evidence and for attendance and compelling the protection of documents. Thus the said authority has trapping of Court and is a tribunal. Any order, thus, passed by authority under Section 15 of the Payment of Wages Act, 1936 is an order passed by tribunal. The special appeal being barred against an order of

one Judge exercising jurisdiction under Article 226/227 of the Constitution arising out of a writ petition from an order of tribunal, the preliminary objection raised by counsel for the respondents has substance.

The appeal is barred under Chapter VIII Rule 5 of the Rules of the Court and is dismissed as not maintainable.

(Delivered by Hon'ble Ajoy Nath Ray, C.J.)

1. A preliminary objection has been raised by counsel for the respondents that this appeal in not maintainable in view of the fact that writ petition was filed against an order passed by Prescribed Authority against the appellant under the Payment of Wages Act, 1936.

2. Chapter VIII Rule 5 of the Rules of the Court provides that special appeal shall not lie from a judgment of learned single Judge passed in exercise of jurisdiction conferred by Article 226/227 of the Constitution in respect of any judgment, or order or award of a tribunal, Court or statutory arbitrator. Chapter VIII Rule 5 of the Rules of the Court is extracted below:-

*[**5. Special Appeal-**An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its of Superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (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 of one Judge.]"*

3. The question for consideration is as to whether the Prescribed Authority under the Payment of Wages Act, 1936 is a tribunal. Section 15 (1) of the Payment of Wages Act, 1936 provides that the State Government may, by notification in the Official Gazette, appoint the Presiding Officer of any Labour Court or Industrial Tribunal, or under any corresponding law relating to the investigation and settlement of industrial disputes or any Commissioner for Workmen;s Compensation or other officer with experience as a Judge of a Civil Court to be authority to hear and decide all claims. Section 15 (1) of the Payment of Wages Act, 1936 is extracted below:-

"Claims arising out of deductions from wages or delay in payment of wages and penalty for mallclous or vexatious claims- (1) *The State Government may, by notification in the Official Gazett, appoint [a presiding officer of any Labour Court or Industrial Tribunal, constituted under the Industrial Dispute Act, 1947 (14 of 1947), or under any corresponding law relating to the investigation and settlement o industrial Commissioner for Workmen's Compensation or other office with*

experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specified area all claims arising out of deductions from the wages, or delay in payment of wages, [of persons employed or paid in that area, including all matters, incidental to such claims;

.....:"

4. Section 18 provides for powers of authorities appointed under Section 15 which is extracted below:-

"18. Powers of authorities appointed under Section 15- *Every authority appointed under sub-section (1) of section 15 shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of "taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a Civil Court for all the purposes of section 195 and of (Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974.)"*

5. From a conjoint reading of Section 15 (1) with Section 18 of the Payment of Wages Act, 1936, it is clear that the authority empowered to decide claims arising out of deduction from wages is entrusted all the powers of Civil Court under the Code of Civil Procedure for the purposes of taking evidence and for attendance and compelling the protection of documents. Thus the said authority has trapping of Court and is a tribunal. Any order, thus, passed by authority under Section 15 of the Payment of Wages Act, 1936 is an order passed by tribunal. The special appeal being barred against an order of one Judge exercising jurisdiction under Article 226/227 of the Constitution arising out of a writ petition from an order of tribunal, the preliminary objection raised by counsel for the respondents has substance.

6. The appeal is barred under Chapter VIII Rule 5 of the Rules of the Court and is dismissed as not maintainable. **Appeal Dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 45102 of 2003

Rajendra Kumar Karanwal ...Petitioner
Versus
Smt. Kamlesh Garg and others ...Respondents

Counsel for the Petitioner:
Sri Some Narayan Mishra

Counsel for the Respondents:
Sri Manoj Kumar Sharma
Sri Namit Sharma

U.P. Urban Buildings (Regulation of letting Rent and Eviction) Act 1972-Section 30 (5)-Scope of Revision-Order the petitioner permitting tenant to deposit the rent in court-in case of refusal to accept the rent by the land lord-District Judge by impugned judgment-exercised the power of revisional court and set-aside the order passed by the Civil Judge (J.D.)-held-in view of decision of Anwar Ali case-Revisional Court acted beyond jurisdiction-No appeal or revision maintainable against the order passed by Munsif under Section 30 (1) of the Act.

Held: Para 4

In view of the provisions of Section 30 (1) and in view of the decision of Anwar Ali (supra),_in my opinion the revisional court has acted beyond jurisdiction in entertaining the revision under Section 115 of the C.P.C.

Case law discussed:
2002 (2) ARC-562 relied on
1964 ALJ 256

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

1. The petitioner-tenant has challenged the order dated 24.3.2003 passed by the Special/Additional District Judge, Saharanpur in Civil Revision No. 11 of 1997 (Annexure 6 to the writ petition).

The brief facts leading to filing of the writ petition are as under:

2. Smt. Pramod Kumari and two minor children filed an application under Section 30 (1) of the Act in the court of Civil Judge (Junior Division), Saharanpur for depositing rent of the premises under their tenancy. The said application was registered as Misc. Case No. 14 of 1989. The respondent-landlord filed an objection to the aforesaid application filed by the tenant. The Civil Judge (Junior Division), Saharanpur vide its order dated 22.11 .1996 held that there is relationship of the landlord and tenant between the parties and directed the tenant to handover the amount of rent to the landlord and directed the landlord to give the receipt of the same and further observed that if the landlords refuse to accept the rent, the tenant will deposit the same in the court. The respondent-landlord aggrieved by the aforesaid order preferred a revision being Civil Revision No. 11 of 1997 in the court of District Judge under Section 115 of the Code of Civil Procedure. who vide its order dated 24.3.2003 allowed the revision and set aside the order of the Civil Judge and rejected the application filed by the tenant under Section 30 (1). Thus, this writ petition.

3. Learned counsel for the petitioner has contended that under the provisions of U.P. Act No. 13 of 1972 no-revision or appeal lies before any authority or court against the order passed by the Civil Court under Section 30 (1) of U. P. Act No. 13 of 1972. Thus, the revision was not maintainable and the order of the revisional court entertaining the revision under Section 115 of the Code of Civil Procedure is wholly without jurisdiction. Learned counsel for the petitioner relied upon the decision of this Court reported in **2002 (2) ARC 562; Anwar Ali Versus Additional District Judge. Moradabad and others** wherein this Court has held that no appeal or revision lay against the order passed by the Munsif under Section 30 (1) of U.P. Act No. 13 of 1972 and submitted that in view of the aforesaid decision this writ petition deserves to be allowed and the order of the revisional court deserves to be quashed.

4. Learned counsel for the respondent has. relied upon the full Bench decision of this court reported in **1964 All. L.J. 256; Chatur Mohan and others Versus Ram Behari Dixit**. The Full Bench decision relied upon by learned counsel for the respondent is under the provisions of the old Act and there is no pari materia provision under old Act like section 30 (1). In view of the provisions of Section 30 (1) and in view of the decision of Anwar Ali (supra), in my opinion the revisional court has acted

beyond jurisdiction in entertaining the revision under Section 115 of the C.P.C.

5. In view of what has been stated-above, this writ petition is allowed. The order of the revisional court dated 24.3.2003 is quashed. The parties shall bear their respective costs.

Petition Allowed.

APPELLAATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2005

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No.11822 of 2005

Ravi Kant Sharma ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Rajeev sisodia

Counsel for the Respondent:
Sri Dinesh kumar
A.G.A.

Cr.P.C. Section-439-Bail Application-offence under Section 498/323/506 IPC-demand of Rs.50,000/- and motor cycle pulsar and some ornaments- prosecution story fully corroborated by medical evidence,-7 injuries on neck.-cruelty committed by the applicant tried to commit the murder of injured by hanging- duly supported by the presence of injuries–considering the gravity of offence–applicant deserves no sympathy–held-not entitled to be released on bail.

Held: Para 6

In view of the facts and circumstances of the case, the submissions made by the counsel for the applicant, learned counsel for the complainant and the learned AG.A., and after considering the medical examination report of the injured, it appears that the prosecution story is fully corroborated by the medical evidence because the injured, the applicant being the consequently, she received 7 injuries, the applicant being the husband is under legal/social obligation to maintain her wife in cool and calm atmosphere but in the present case it is not happened, and the cruelty has been committed by the applicant and others, even they tried to commit the murder of the injuries on the neck, the gravity of the offence is too much, therefore, the applicant does not deserve for any sympathy and is not entitled to be released on bail.

(Delivered by Hon'ble Ravindra Singh, J.)

1. Heard Sri Rajiv Sisodia learned counsel for the applicant, Sri Dinesh kumar,counsel for the complainant and the learned A.G.A.

2. The applicant has applied for bail in Case Crime No.245-C of 2005, P.S. Kotwali Dehat District Bijnor.

3. From the perusal of the record, it reveals that the applicant is the husband of the injured Smt. Pallavi, whose marriage was solemnized with her on 25.11.2003. The injured was subjected to cruelty by the applicant other co-accused persons with a view to fulfill the demand of Pulser Motor cycle and Rs.50,000/- and there was a demand of some ornament of gold for the Jethani of the injured. The injured conveyed all these things to her father. The first informant and other persons tried to persuade the in-laws of the injured but they were not satisfied. The injured was subjected to cruelty continuously. The injured had written

some letters to her father mentioning therein that she was subjected to cruelty to fulfill the demand of dowry. There after on 8.4.2005, when the applicant and other persons told that the demand of dowry will not be fulfilled, so the injured was detained in a room, where she was beaten by the Danda, Kicks and fists by the applicant and other co-accused persons at about 12.30 P. there after the injured was caught hold by the co-accused Shambhu Dayal, Luxmi Kant and Krishna Kant to commit the murder and the applicant and co-accused Renu tied her neck and hanged to but at the persuasion of the injured, she was not murdered. The applicant and other co-accused came to the house of the first informant by bringing her injured condition, after seeing her condition, all shocked. Again the aforesaid demand of dowry was made with the threatening that in case the demand of dowry is not fulfilled, the injured will be killed. Then the first informant made hue and cry. He was also beaten by kicks and firsts by the applicant and others. Some independent witnesses namely Daya Swaroop, Sanjai Kumar and Virendra Singh came at the place of occurrence, then the applicant and other co-accused persons ran away from there. The injured was taken to the hospital and medical aid was provided to her but F.I.R. was lodged by the police. There after, the F.I.R. was lodged in pursuance of the order passed by the learned A.C.J.M. Nagina, District Bijnor under Sec. 158(3) Cr.P.C. The medical examination report shows that the injured has received 7 injuries, in which injury Nos. 1 & 2 were on the neck.

4. It is contended by the learned counsel for the applicant that the F.I.R. is delayed and there is no demand of dowry. The alleged occurrence had taken place in a sudden quarrel because the injured was a misbehaved woman.

5. It is opposed by the learned A.G.A. and the learned counsel for the complainant by submitting that the injured is a poor woman and she was subjected to cruelty with a view to fulfill the demand of dowry and she was badly beaten by the applicant and other co-accused persons. The prosecution story is fully corroborated by the medical examination report. The F.I.R. is delayed because the police has registered the F.I.R. in pursuance of the order passed under Section 156 (3) Cr.P.C., so there is no delay on the part of the first informant.

6. In view of the facts and circumstances of the case, the submissions made by the counsel for the applicant, learned counsel for the complainant and the learned AG.A., and after considering the medical examination report of the injured, it appears that the prosecution story is fully corroborated by the medical evidence because the injured, the applicant being the consequently, she received 7 injuries, the applicant being the husband is under legal/social obligation to maintain her wife in cool and calm atmosphere but in the present case it is not happened, and the cruelty has been committed by the applicant and others, even they tried to commit the murder of the injuries on the neck, the gravity of the offence is too much, therefore, the applicant does not deserve for any sympathy and is not entitled to be released on bail.

7. Accordingly this bail application is rejected at this stage. **Application Rejected.**

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2005

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

Civil Misc. Application No.192419 of 2002
On behalf of
U.P. Sunni Central Board of Waqfs
Lucknow...Applicant.
In
Second Appeal No. 1149 of 2002
Allah Taala ...Appellant
Versus
Maya Devi and others ...Respondents

Counsel for the Appellant:
Sri S. Asraf Ali
Sri Shahid Masood
Sri Rajesh Kumar
Sri M.A. Qadeer

Counsel for the Respondents:
Sri Shamim Ahmad
Sri Faujdar Rai
Sri M.P. Sinha
Sri Sanjay Kumar Singh
Sri Sanjay Rai
Sri S.A. Ali

U.P. Waqf Act No. 43 of 1995-Section-90 (3)-Maintainability-of Application-concurrent finding recorded by the Court's below-confirmed by High Court in Second Appeal-review application also rejected-findings to the effect that the property in dispute is not Waqf property-can not be reopened on mere assertions of made by the applicant-held-application not maintainable.

Held: Para 3

In the case at hand, this question was raised at the first instance and an issue was framed and decided in negative, which has also been confirmed by this Court. In the circumstances, I come to the conclusion that this Application is not maintainable and is accordingly rejected.

Case law discussed:
1995 ACJ (2) 1159

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri M.A. Qadeer, Advocate, appearing on behalf of the U.P. Sunni Central Board of Waqfs, Lucknow. He has filed an application under Section 90 (3) of U.P. Waqfs Act No.43 of 1995 in second appeal no.1149 of 2002, Allah Taala Vs. Smt. Maya Devi and others. Sri Faujdar Rai, Advocate, appearing on behalf of the plaintiff/respondents.

2. Both the counsels have also furnished their written submissions. This application has been challenged on behalf of the plaintiff/respondents raising preliminary objection that the application under Section 90 (3) of U.P. Waqfs Act No.43 of 1995 (hereinafter referred as the Act) is not maintainable. The suit filed by the plaintiff/respondents was decreed on 24.11.1992 in Original Suit No. 101 of 1973 Musamat Bela Devi Vs. Allah Taala. This judgment was confirmed in appeal by the Additional District Judge, court no.1 Ballia in civil appeal no.6 of 1993 and the Second Appeal filed against the judgment and decree 26.8.2002 has also been dismissed by this Court on 3.10.2002. A review application was also filed on 11.11.2002, which was rejected as not maintainable at the instance of a different counsels other than one, who had filed the Second Appeal. The review application was rejected on 12.7.2004. Sri Faujdar Rai, Advocate, has emphatically argued raising this preliminary objection that since the suit has been decreed up till the stage of this High Court, this application at the behest of the Waqfs Board is not maintainable.

The property in dispute is not Waqf property as specific issue was framed on this question. Issue no.9 was that

'Whether the suit is barred by the provision of Section 65 of U.P. Sunni Act 1960'.

3. The said issue was decided by the trial court holding that it has been established that the property in question is not Waqf property. In the circumstances, no right of the Waqfs Board is effected and accordingly, the suit is not barred by Section 65 of the Act. This finding was confirmed in appeal filed on behalf of the defendant/appellants, which was dismissed on 26.8.2002. I have perused the judgment of the lower appellate court. It transpires that the finding of the trial court on issue no.9 was never challenged. The Second Appeal was dismissed by this Court. A review application was also rejected by this Court. It appears that the applicant has resorted to a second inning by filing an application under Section 90 (3) of the Act. The argument advanced by the counsel that the notice to the Waqfs Board is mandatory in respect of the property, which if admittedly is the Waqf property, is not disputed. But in the instant case, specific issue was framed regarding the question as to whether the property in dispute is Waqf property or not? This has been decided that the property in questions belongs to the plaintiffs and is not Waqf property. In the circumstances, the adjudication of the suit up till the stage of the High Court cannot be reopened on a mere assertions made by the applicant that the property is Waqf property. The argument of the counsel for the applicant that in absence of the notice under Sub clause 1 of Section 90 of the Act, the proceedings are liable to be declared as void, if the Board within one month of its knowledge of the proceeding applies to the court on this behalf. The basic question to be decided before any judgment or order is declared as void, is that the subject matter of dispute must necessarily be a Waqf property. In case it is permitted to reopen the controversy without arriving at a substantial and categorical finding to the effect that firstly the property is a Waqf property and secondly that Waqf Board was not given any notice, a piquant situation will arise in every second case. Since there are categorical findings of fact arrived at consecutively by two courts and confirmed in Second Appeal by this Court, mere saying that the property in question is a Waqf property and, therefore, the entire proceedings should be rendered void, is not correct. Counsel for the respondents has placed a decision of this Court Ajodhya Prasad Vs. Additional Civil Judge, Moradabad and others 1995 A.C.J. (2) page 1159, where it has been held that it could never have been the intention of the legislature to cast a cloud on the right, title or interest, of persons who are non Muslims. Counsel for the applicant has also placed reliance on a number of decisions relating to the property which was admittedly a Waqf property. The said decisions are not applicable in the present case. In the case at hand, this question was raised at the first instance and an issue was framed and decided in negative, which has also been confirmed by this Court. In the circumstances, I come to the conclusion that this Application is not maintainable and is accordingly rejected.

Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No. 50378 of 2005

Mahesh Chandra Gautam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam
Sri Satya Prakash
Sri Amit Srivastava

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

Constitution of India Art. 226-Service Law-right of deputanist-petitioners, were sent on deputation-from Police department to the Trade Tax Department-for period of 3 yrs.-the Commissioner Trade Tax by impugned order-repatriated back to Police Department-challenge made on ground that before expiry of the period for deputation-the Commissioner Trade Tax has no authority-held it is always open to the borrowing deport to send back to the parent department-in absence of Rules or Regulations in this regard the borrowing department has every jurisdiction it can not be saddled with surplus staff.

Held: Para 9, 10

There is another aspect of the matter. The borrowing department cannot be saddled with surplus staff and if their services are not required, it is always open to the borrowing department to sent the employee back to the parent department. In my view, the borrowing department was competent to pass the orders repatriating the petitioners back to their parent department.

In view of the aforesaid and in the absence of any Rules or Regulations, I am of the opinion that the Trade Tax Department was competent to repatriate the petitioners back to the parent department. The borrowing department had complete and full jurisdiction to pass the order repatriating the petitioners to their parent department.

Case law discussed:
1981 LIC-1057 distinguished
199 (3) AWC 2414
1981 LABIC 1057
2005 (5) SCC-362
2002 (4) AWC-3067 (L.B.)

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Heard Sri Vijay Gautam, Sri Satya Prakash and Sri Amit Srivastava, the learned counsels for the petitioners and Sri Suresh Singh, the learned standing counsel appearing for the respondents.

2. The petitioners have challenged the order dated 8.7.2005 issued by the Joint Commissioner, Trade Tax, whereby the petitioners have been repatriated back to their parent department, i.e., the Police Department. It transpires that on the request of the Trade Tax Department, the petitioners were sent on deputation to the Trade Tax Department for a period of three years. It is alleged that the period of three years has not yet expired and, by the impugned order, the period of deputation has been cut short and the petitioners have been repatriated back to their parent department. The ground of attack is, that the Joint Commissioner, Trade Tax has no power to issue the order of repatriation, inasmuch as, only the parent department could recall the petitioners. The Joint Commissioner, Trade Tax has the power and authority to transfer the petitioners in

the Trade Tax Department itself, but could not transfer or repatriate the petitioners back to the parent department and that the parent department could alone issue the order of repatriation. Further, the period of deputation had not come to an end, therefore, without cancelling the original order, the present order of repatriation could not have been issued. The learned counsel further submitted that the petitioners' lien is still with the Police Department and, therefore, the order of repatriation could only be passed by the Police Department and not by the Trade Tax Department. In support of their contention, the learned counsels for the petitioners have relied upon a Full Bench decision of the Punjab and Haryana High Court, in the case of **Dr. Bhagat Singh vs. The Vice Chancellor, Punjab University, Chandigarh and others, 1981 L.I.C.1057**, wherein it was held that a Government Officer who was appointed as a Vice Chancellor of a University for a period of three years and sent on deputation could not be recalled before the expiry of his term.

3. The learned counsels for the petitioners further submitted that the Trade Tax Department should have written to the parent department to repatriate the petitioners rather than issue the order of repatriation themselves. Since the Trade Tax Department had no jurisdiction to issue the impugned order, the impugned order was liable to be quashed.

4. On the other hand, the learned standing counsel submitted that since the petitioners themselves admitted that they had no lien on any post in the Trade Tax Department and that the lien is still with their parent department, in that event they cannot be aggrieved by the order of repatriation.

5. The learned Standing Counsel further submitted that it is open to the Trade Tax Department or to the Police Department to cut short the period and repatriate the petitioners. The Standing Counsel further submitted that it is open to both the department to pass the order of repatriation. In the present case, the petitioners were found to be surplus and were not required in the Trade Tax department. On the basis of the letter of the Additional Commissioner, the Trade Tax Commissioner, Lucknow issued an order on 7.7.2005 repatriating the petitioners to the Police Department. Based on the order of the Commissioner, the impugned order was issued by the Joint Commissioner. The Standing Counsel further stated that on the basis of the aforesaid orders, the Additional Director General of Police, Uttar Pradesh, Lucknow has accepted the repatriation of the petitioners back to the Police Department and had issued necessary directions to the authorities to post the petitioners at different places. The submission of the learned standing counsel is, that even assuming that the Trade Tax Department had no authority to issue the said order, nonetheless, the order has been accepted by the Police Department and therefore it does not lie in the mouth of the petitioner to contend that they are liable to continue to serve the Trade Tax Department till the period of deputation.

6. In my view, the contentions raised by the learned counsels for the petitioners cannot be accepted. It is the prerogative of the employer to call back its employees

sent on deputation. The employee, who has been sent on deputation and, in the present case, namely, petitioners have no right or lien on the deputation post. Even if period has been cut short, the petitioners have no right or claim on that post and they cannot stand before this Court and submit that they are entitled to continue on that post till the original period of deputation. In **Hari Om Tripathi vs. Nideshak, Rajya Nagar Vikas Adhikaram and another, 1999(3) A.W.C. 2414**, this Court held that the employee, who was sent on deputation could be reverted back to the parent department prior to the expiry of the stipulated period, since the employee cannot claim any right on the deputation post.

7. The learned Single Judge further distinguished the case of **Dr. Bhagat Singh vs. The Vice Chancellor, Punjab University, Chandigarh and others, 1981 LAB.I.C.1057** and held that the facts and circumstances in the case of Dr. Bhagat Singh were totally different and could not be equated with the facts of the petitioner. I am in complete agreement with the aforesaid decision of this Court and for the aforesaid reason, the decision cited by the learned counsel for the petitioner, i.e, namely, the case of Bhagat Singh is clearly distinguishable and is not applicable to the facts and circumstances of the present case.

8. In **Kunal Nanda vs. Union of India and another, 2000(5) SCC 362**, the Supreme Court held that a deputationist can always and at any time be repatriated to his parent department either at the instance of the borrowing Department or on the instance of the lending department. The Supreme Court further held that incumbent who had which has been posted had no vested right to continue on deputation or get absorbed in borrowing department. The Supreme Court held-

"On the legal submissions also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a 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 on deputation or get absorbed in the department to which he had gone on deputation."

Similar view was taken by a Division Bench of this Court in **Dr. O.P. Singh vs. State of U.P. and others, 2002(4) AWC 3067 (LB).**

9. There is another aspect of the matter. The borrowing department cannot be saddled with surplus staff and if their services are not required, it is always open to the borrowing department to sent the employee back to the parent department. In my view, the borrowing department was competent to pass the orders repatriating the petitioners back to their parent department.

10. In view of the aforesaid and in the absence of any Rules or Regulations, I am of the opinion that the Trade Tax

Department was competent to repatriate the petitioners back to the parent department. The borrowing department had complete and full jurisdiction to pass the order repatriating the petitioners to their parent department.

11. Consequently, I do not find any error in the impugned order. The writ petitions fail and are dismissed. In the circumstances of the case, there shall be no order as to cost. **Petition Dismissed.**

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.07.2005

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

Criminal Misc. Application No. 9693 of 2005

Rajeev Agarwal ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Vinod Prasad

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section-451-Release of vehicle-applicant submitted no objection certificate and affidavits of other heirs-Distt. Magistrates also forwarded the report for release of vehicle-rejection held-magistrate committed gross error-No good reason assigned for rejection of release application-Order-Quashed with direction to the magistrate to release the bus within period of one week.

Held: Para 3 and 4

The Magistrate committed a gross error in rejecting the application, even though all the documents were produced before him including fact was brought to the notice that the permit stands transferred in the name of the present applicant.

After taking the entire matter into consideration, I come to the conclusion that the order of the Magistrate dated 1.7.2005 can not be left to stand. No good reason has been assigned for refusing the prayer for release of the bus. Accordingly, the order dated 1.7.2005 is quashed. The Chief Judicial Magistrate, Jhansi is directed to release the bus within a period of one week from the date, a certified copy of this order is produced before him after taking adequate guarantee/ security of the bus from the applicant Rajiv Agarwal.

Case law discussed:
2003 (46) ACC 223
2004 (48) ACC-605
2003 (47) ACC-1086

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Vinod Prakash Advocate for the applicant and learned A.G.A. for the State. On the agreement between the parties, this application is finally heard.

2. This is an application challenging the order dated 1.7.2005 passed by the Chief Judicial Magistrate, Jhansi in a Misc. Application No. Nil of 2005 in a case, State Vs. Mangal Singh, under Sections 279, 337, 338, 304A, 427 I.P.C. read with Section 179 of the Motor Vehicle Act, Police Station Nababad, District Jhansi, arising out of case Crime No. 1224 of 2005. The learned Magistrate has refused to release the vehicle No. DLP 5240 in favour of the applicant. The vehicle was registered in the name of Smt. Kapoori Devi, wife of Gauri Shanker Agarwal. A carriage permit No. PHTP 55/68 was issued in respect of the vehicle

which is a bus of 1992 model. Smt. Kapoori Devi was grandmother of the applicant. Smt. Kapoori Devi died and all the family members had agreed amongst themselves that the vehicle be transferred in the name of the applicant. Affidavits were filed in favour of the applicant by the family members which was in form of a no objection/consent for transfer of permit. The affidavits have been annexed as Annexure-2 to the affidavit. However, the vehicle met an accident on 19.6.2005 in respect of which a first information report was registered at case Crime No. 1224 of 2005. The applicant applied for release of the vehicle vide application dated 21.6.2005 which is annexed as Annexure-3 to the affidavit. A report was called for in respect of the vehicle under the orders of the District Magistrate/ Collector, Jhansi regarding actual and legal heir of Smt. Kapoori Devi. Tehsildar inquired into the matter and submitted a report. Annexure-4 is a letter issued by the District Magistrate, Jhansi to the Secretary U.P.S.R.T.C. apprising him that the Tehsildar has submitted a report on 3.6.2005 that the permit PHTP 55/86 STA State/96 and vehicle No. DLIP No. 5240 Model 1992 is to be transferred in the name of the present applicant. The vehicle was also being run under his supervision. The report of the Tehsildar was appended to the letter of the District Magistrate. All these documents were brought on record before the Chief Judicial Magistrate, Jhansi and he was also apprised of the fact that on the basis of no objection issued by other heirs of late Smt. Kapoori Devi, permit of the vehicle stood transferred in the name of the applicant. The tax receipts of the vehicle were also submitted in the name of the applicant but the learned Magistrate rejected the application vide order dated 1.7.2005 for the reason that there are six children of late Smt. Kapoori Devi and the registration is not in the name of the applicant, he can not be said to be the sole owner of the vehicle. Accordingly he refused to release it in his favour, hence this application.

3. I have gone through the record as well as the impugned order. The Apex Court, in the case of **Sunder Bhai Ambalal Desai Vs. State of Gujrat, 2003 (46) A.C.C. 223** has clearly held that the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes:- (i) Owner of the article would not suffer because of its remaining unused,(ii) Court or the police would not be required to keep the article in safe custody, (iii) If the proper panchnama before handing over article is prepared, that can be used in evidence instead of its production before the court during the trial, if necessary, (iv) This jurisdiction of the court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles. The Apex Court has clearly held that appropriate orders should be passed immediately because keeping it at police station for a long period would only result in decay of the article. The court should ensure that the article will be produced if and when required by taking bond, guarantee or security. Similar view has been followed in a number of decisions of this Court as well. **Mohd. Shamim Khan Vs. State of U.P., 2004, A.C.C. (48), 605. In the case of Tulsi Rajak Vs. State of Jharkhand, 2004, Criminal Law Journal, 2450**, it was held that truck lying in the police station for more than one year resulted in heavy loss of the petitioner and in the circumstances, the High Court permitted to release of the

vehicle. In **Gurnam Singh and another Vs. State of Uttaranchal, 2003 (47) A.C.C., 1086**, it was held that what so ever the situation be, there is no use to keep the seized vehicle at the police station or court campus for a long period, the Magistrate should pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicle, if required at any point of time. In the instant case, the counsel for the applicant has brought to my notice that two wheels of the standing bus has been removed by someone and in the event, the vehicle is not released, each and every part will go one by one but for the metallic frame of the bus. The admitted position in the present case is that all the heirs of the actual owners in whose name the vehicle was registered, have filed their affidavits/ no objection certificate. The District Magistrate has also got the matter enquired through the Tehsildar and informed the UPSRTC as such it is evident that the learned Magistrate should have released the bus after taking appropriate precaution in form of bonds or security. The Magistrate committed a gross error in rejecting the application, even though all the documents were produced before him including fact was brought to the notice that the permit stands transferred in the name of the present applicant.

4. After taking the entire matter into consideration, I come to the conclusion that the order of the Magistrate dated 1.7.2005 can not be left to stand. No good reason has been assigned for refusing the prayer for release of the bus. Accordingly, the order dated 1.7.2005 is quashed. The Chief Judicial Magistrate, Jhansi is directed to release the bus within a period of one week from the date, a certified copy of this order is produced before him after taking adequate guarantee/ security of the bus from the applicant Rajiv Agarwal.

5. For the reasons discussed above, this application is finally allowed.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2005

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No.32302 of 1997

Virendra Prasad Dubey ...Petitioner
Versus
Senior Divisional Security Commissioner, RPF, Allahabad and others ..Respondents

Counsel for the Petitioner:
Sri P.N. Saxena
Sri M.M. Srivastava
Sri R.K. Srivastava

Counsel for the Respondents:
Sri B.B. Paul
Sri Govind Saran

Railway Protection Force Rules-1987- Rule 148, 153 read with Fundamental Rules- Rule 56-compulsory retirement- Petitioner-a Constable in R.P.F. proceeded on medical leave-w.e.f. 4.1.93-10.11.94-time to time leave application-duly received by the authorities-after 10 yrs. Service-Major punishment of compulsory retirement awarded at the age of 35 yrs.-without serving the charge sheet, without affording opportunity-absence from duty cannot be terned as willful absence from duty-hence no grave misconduct-impugned Order can not sustained.

Held: Para 11

It is settled law that the order of dismissal/ removal from service can be awarded only for the acts of grave nature or as cumulative effect of continued misconduct preventing incorrigibility or complete unfitness for police service. Merely one incident of absence and that too because of bad health and being on valid and justified grounds/ reasons cannot become basis to award such punishment. It is an admitted fact that the respondents had received the application for leave alongwith medical certificates. In such circumstances it can never be termed as willful absence without any information to the competent authority and also can never be termed as grave misconduct. Under the above said facts and circumstances and the pleadings of the instant case, in my view no case to award such major punishment to the petitioner is made out and the decision of the disciplinary authority inflicting a penalty of removal from service by the impugned order dated 6.10.1994 (Annexure No. 1 to the writ petition) is ultra vires of Rule 56 (j) of the Fundamental Rules and is liable to be set aside. The major punishment of removal from service by way of compulsory premature retirement is thus also excessive and disproportionate.

Case law discussed:

AIR 1985 SC-931
2004 (2) UPLBEC-1294

(Delivered by Hon'ble V.C. Misra, J.)

1. Heard Sri P.N. Saxena, Senior Advocate assisted by Sri R.K. Tiwari, learned counsel for the petitioner and Sri Govind Saran, Advocate learned standing counsel on behalf of the respondents Nos.1, 2 and 3.

2. The facts of the case in brief are that the petitioner was appointed as a constable in Railway Protection Force by posting at Allahabad on 18.5.1984. In July 1989, the petitioner was transferred to the outpost Mughal Sarai (MGS) under the Incharge Protection Force (IPF), Chunar. On 19.8.1992, the petitioner proceeded on medical leave by taking sick memo and remained as outdoor patient in the Railway Hospital, Mughal Sarai till 4.1.1993. On 5.1.1993, the petitioner was discharged from sick list by the Divisional Medical Officer-I, Eastern Railway (DMO-I, E.R.), Mughal Sarai in the midst of the treatment without mentioning the fact that the petitioner was fit for duty. The petitioner had to under-go treatment by a private doctor Dr. A.K. Mehta at Ballia with effect from 6.1.1993 and remained under his treatment till 20th August 1994. During this period, the petitioner sent several notices and informations to the concerned authority through registered post with proper medical certificate (PMC) before the Incharge Protection Force, Chunar. The petitioner was referred by Dr. A.K. Mehta to Dr. D. Rai, at District Hospital, Ballia for further treatment where he remained under treatment from 20.8.1994 to 30.10.1994. Meanwhile, the disciplinary proceedings were initiated against the petitioner by the Railway authorities and in the proceedings, 2 charges were framed against him, which are as under:-

१. वह दिनांक ५.१.१९९३ से डी०एम०ओ०/ई०आर०/एम०जी०एस० द्वारा सिक लिस्ट से डिस्चार्ज किये जाने के बाद न आप कन्ट्रोलिंग अफसर के समक्ष उपस्थित हुए और न कोई सूचना भेजा।

२. वह दिनांक ५.१.१९९३ से आज (आरोप पत्र जारी करने की तिथि) तक अनाधिकत रूप से अनुपस्थिति रहा।

3. The enquiry officer Sri D.L. Shah vide its report dated 8.9.1994 submitted

before the respondent no.1 recommended that the proceedings be initiated against the petitioner under Rule 153 of the Railway Protection Force Rules, 1987 (hereinafter referred to as 'the Rules, 1987') and held that both the charges 1 & 2 mentioned hereinabove were proved. The disciplinary authority-respondent no.1 vide its order dated 6.10.1994 compulsorily retired the petitioner prematurely at the age of 35 years by imposing the major penalty, under the provisions of Rules 148 and 153 of the Rules, though he had only completed 10 years of service.

4. The relevant portions of Rules 148 and 153 of the Rules, 1987 are reproduced as under: -

"**148. <u>Description of Punishments:</u>**

148.1. Any of the following punishments may, for good and sufficient reasons and as hereinafter provided, be imposed on an enrolled member of the Force.

148.2 Major punishments:

(a) Dismissal from service (which shall ordinarily be a disqualification for future employment under the Government.)
(b) Removal from service (which shall not be a disqualification for future employment under the Government.)
(c) Compulsory retirement from service.
(d) Reduction in rank or grade.

148.3 Minor punishments:

(a) Reduction to a lower stage in the existing scale of pay.
(b) Withholding of next increment with or without corresponding postponement of subsequent increments
(c) Withholding of promotion for a specified period.
(d) Removal from any office of distinction or deprivation of any special emoluments
(e) Censure.

148.4: Petty punishments:

(a) Fine to any amount not exceeding seven days' pay.
(b) Confinement to quarter-guard for a period not exceeding fourteen days with or without punishment drill, extra guard duty, fatigue duty or any other punitive duty.
(c) Reprimand.

148.5:
Explanation:…….

"153 Procedure for imposing major punishments.-

(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 61) 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.

(5) The disciplinary authority shall deliver or cause to be delivered to the delinquent member, at lease seventy-two hours before the commencement of the inquiry, a copy of the articles of charge the statement of imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and fix a date when the inquiry is to commence; subsequent dates being fixed by the Inquiry Officer.

(10) At the commencement of the inquiry the party charged shall be asked to enter a plea of 'guilty' or 'not guilty' after which evidence necessary to establish the charge shall be let in. The evidence shall be material to the charge and may either be oral or documentary. If oral -

(a) it shall be direct,
(b) it shall be recorded by the Inquiry Officer in the presence of the party charged; and

the party charged shall be allowed to cross-examine the witnesses.

(12) All the evidence shall be recorded, in the presence of the party charged, by the Inquiry Officer himself or on his dictation by a scribe. Cross-examination by the party charged or the fact of his declining to cross-examine the witness, as the case may be, shall also be recorded. The statement of each witness shall be read over to him and explained, if necessary, in the language of the witness, whose signature shall be obtained as a token of his having understood the contents. Statement shall also be signed by the Inquiry Officer and the party charged. Copy of each statement shall be given to the party charged who shall acknowledge receipt on the statement of witness itself. The Inquiry Officer shall record a certificate of having read over the statement to the witness in the presence of the party charged.

(13) Documentary exhibits, if any, are to be numbered while being presented by the concerned witness and reference of the number shall be noted in the statement of the witness. Such documents may be admitted in evidence as exhibits without being formally proved unless the party charged does not admit the genuineness of such a document and wishes to cross-examine the witness who is purported to have signed it. Copies of the exhibits may be given to the party charged on demand except in the case of voluminous documents, where the party charged may be allowed to inspect the presence of Inquiry Officer and take notes.

(14) Unless specifically mentioned in these rules, the provisions by the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 shall apply to the departmental proceedings under these rules."

4. While passing the order of compulsory retirement against the petitioner, the respondent no.1 held that only one charge regarding unauthorized absence stood proved whereas the other charge, i.e., absence from duty without intimation was not proved in view of the required information and notice sent by the petitioner to the concerned authority from time to time.

5. After the passing of this order, the petitioner being still ill was treated in the nearest railway hospital, Ballia/N.E.R. with effect from 1.11.1994 to 10.11.1994

and a certificate was issued by the concerned Medical Officer that he was henceforth fit for duty. On 11.11.1994, the petitioner approached the Senior Divisional Medical Officer/ER Hospital, Mughal Sarai for necessary attestation and at the back of the fitness certificate it was endorsed that the petitioner was fit for duty. The petitioner approached the concerned authority with the written application to permit him to join his duty but he was not allowed on the ground that he had already been compulsorily retired with effect from 6.10.1994.

6. The petitioner being aggrieved preferred an appeal under the Rules before the respondent no.2, which was dismissed vide order-dated 31.7.1995. The said order was intimated to the petitioner by respondent no.1 annexed with its order-dated 2.8.1995. Being aggrieved by the order dated 31.7.1995 the petitioner preferred a revision on 7.12.1994 before the respondent no.3, which too was dismissed on 22.7.1996 the information of which was served on the petitioner through letter dated 26.7.1996.

7. This writ petition has been filed by the petitioner challenging the impugned orders dated 6.10.1994, 31.7.1995 and 22.7.1996 passed by respondents no. 1,2 & 3 respectively, on the ground that disciplinary proceedings under Rule 153 of the Rules were initiated against the petitioner without serving any charge sheet on him nor he was provided any reasonable opportunity or facility to defend his case, even the witnesses were not examined in accordance with procedure and law during the disciplinary proceedings. Learned counsel for the petitioner has also submitted that compulsory retirement of an employee can be made only after he has either attained the age of 50 years or 55 years, as the case may be, in terms of F.R. 56 (j) of the Fundamental Rules and Supplementary Rules Chapter IX (hereinafter referred to as 'the Fundamental Rules'), which deals with retirement and not otherwise, and thus the petitioner had been wrongly and illegally retired compulsorily prematurely at the age of about 35 years only. He has further contended that there being no dispute that the petitioner had been ill and had been submitting proper medical certificates regularly, the award of punishment of removal from service by way of compulsory retirement was wholly unreasonable and disproportionate to the alleged charge of misconduct and also that no punishment could be awarded on the basis of the charge no. 2 which was only consequential to charge no. 1, which admittedly had not been proved and dropped by the disciplinary authority. It has been specifically stressed by the learned counsel for the petitioner that the impugned order of punishment of removal from service by way of compulsory retirement passed by the disciplinary authority, which was affirmed in appeal and revision, by quasi-judicial orders also demonstrates complete non-application of mind. Relevant portions of Rule 56 (j) of the Fundamental Rules reads as under:

"56 (j) Notwithstanding anything contained in this rule, the appropriate authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice:.

(i) if he is, in Group 'A' or Group 'B' service or post in a substantive, quasi-permanent or temporary capacity and hd entered Government service before attaining the age of 35 years, after he has attained the age of 50;

(ii) in any other case after he has attained the age of fifty- five years;

Provided that nothing in this clause shall apply to a Government servant referred to in clause (e), who entered Government service on or before the 23rd July, 1966."

Learned counsel for the petitioner in support of his arguments has placed reliance upon the decisions rendered in Marari Mohan Deb Vs. Secretary to the Government of India & others (AIR 1985 S.C. 931) and in Bhagwan Lal Arya Vs. Commissioner of Police, Delhi & others (2004) 2 UPLBEC 1294).

8. The case of the respondents, as referred to in paras-4 & 5 of the counter affidavit is that the petitioner had absented himself from duty without any authority and did not report thereafter till his services were dispensed with by virtue of his compulsory retirement under the provisions of Rule 153 of the Rules. Since the charges were of very serious nature, the petitioner deserved the punishment awarded to him. Learned counsel appearing for the respondents placed reliance on a decision of Punjab and Haryana High Court given on May 22, 1998 in the case of Raj Kumar Vs. Union of India & others (Writ Petition No. 9129 of 1997).

9. I have looked into the record of the case and heard learned counsel for the parties at length and on the above pleadings, the following questions of law arise for consideration;

1. Whether the impugned order of major punishment by way of compulsory retirement prematurely awarded to the petitioner who had only attained the age of 35 years and had completed only 10 years of service is in breach of the Rule 56 (j) of the Fundamental Rules?

2. Whether the major penalty inflicted on the petitioner is grossly disproportionate to the misconduct alleged against him and, therefore, is totally unjust, unfair and inequitable as contended?

10. From perusal of the pleadings of the parties and after hearing learned counsel for the parties, I find that it is admitted by the respondents that out of two charges framed against the petitioner, one charge regarding absence from duty without intimation was not made out since required informations and notices regarding ill-health and treatment sent by the petitioner was duly received by the concerned authorities from time to time, whereas on the charge of unauthorized absence from duty he has been removed from service imposing major punishment of compulsory retirement prematurely. As per law the petitioner could be retired compulsorily prematurely only in strict compliance of the Rule 56 (j) of the Fundamental Rules and not otherwise. The learned counsel for the respondents has been unable to show any other provisions of law applicable to the case of the petitioner under which compulsory premature retirement order could be passed. Thus when no such compulsory premature retirement order could

normally be passed in the case of the petitioner then the same could not be imposed by way of major punishment either.

11. The relevant Rule 56 (j) of the Fundamental Rules provides that the appropriate authority if is of the opinion that it is in the public interest to compulsorily retire prematurely a Government servant, he has the absolute right to retire the Government servant provided the Government servant had attained the age of 50 years as per sub-clause (i) or in any other case after he has attained the age of fifty five years as per sub clause (ii) of this Rule. In my view by no stretch of imagination the alleged misconduct against the petitioner can be considered to be an act of grave misconduct or continued misconduct indicating incorrigibility and complete unfitness for service of the petitioner. It is not the case of the respondents that the petitioner was habitual absentee. He had to proceed on leave under compulsion because of his grave condition of health. It is settled law that the order of dismissal/ removal from service can be awarded only for the acts of grave nature or as cumulative effect of continued misconduct preventing incorrigibility or complete unfitness for police service. Merely one incident of absence and that too because of bad health and being on valid and justified grounds/ reasons cannot become basis to award such punishment. It is an admitted fact that the respondents had received the application for leave alongwith medical certificates. In such circumstances it can never be termed as willful absence without any information to the competent authority and also can never be termed as grave misconduct. Under the above said facts and circumstances and the pleadings of the instant case, in my view no case to award such major punishment to the petitioner is made out and the decision of the disciplinary authority inflicting a penalty of removal from service by the impugned order dated 6.10.1994 (Annexure No. 1 to the writ petition) is ultra vires of Rule 56 (j) of the Fundamental Rules and is liable to be set aside. The major punishment of removal from service by way of compulsory premature retirement is thus also excessive and disproportionate. Also looking into the circumstances of the case as the petitioner may not get any other job at his present age and also because of the stigma attached to him on account of the impugned punishment as a result of which not only he but also his entire family, which is totally dependant on him, will be forced to starve. Such mitigating circumstances warrant that the impugned order of punishment passed by the disciplinary authority by way of compulsorily retiring the petitioner prematurely should be quashed. The above said questions formulated for considerations are decided accordingly.

12. In the result, the impugned orders dated 6.10.1994 (Annexure No. 1 to the writ petition) passed by respondent no. 1- Senior Divisional Security Commissioner/ R.P.F., Northern Railway, Allahabad, order dated 31.7.1995 (Annexure No. 2 to the writ petition) passed by respondent no. 2- the Additional Chief Security Commissioner/ Railway Protection Force, Northern Railway, Baroda House, New Delhi and the order dated 22.7.1996 (Annexure No. 3 to the writ petition) passed by respondent no. 3- the Chief Security Commissioner/ Railway

Protection Force, Baroda House, New Delhi are hereby quashed and the matter is sent back to the disciplinary authority for considering and passing a reasoned and speaking order afresh in the light of the above observations and in accordance with law and procedure after affording full opportunity to the petitioner within a period of three months from the date a certified copy of this order is placed before the disciplinary authority concerned by the petitioner.

The writ petition is allowed to the extent indicated above. No order as to costs. **Petition Allowed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 33954 of 2005

Bhagwan Deen Verma ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri P.N. Saxena
Sri Amit Saxena

Counsel for the Respondents:
Sri A.N. Verma
S.C.

Panchayat Raj Rules 1946-Rule-256 readwith Panchayat Raj Act, 1947- Section 95(1)(g) ceasure of financial and administrative power of Pradhan-enquiry report-short of requirement that the lapes on the part of Pradhan-was deliberate and for deriving personal benefit democratically elected Pradhan cannot be removed from its office at the dictates of administrative authorities—order taking the financial power quashed.

Held: Para 12, 13, 14 & 16

Under the said rule 256 any loss caused to the Gram Panchayat due to negligence or misconduct on the part of the Pradhan could be the basis for surcharge being imposed so as to compensate the loss caused to the Gram Panchayat or its property. The provision contained in rule 256 must necessarily be harmonized with Section 95 (1)(g) Sub-section 3 and read in light of the Division Bench judgment, referred to above.

Loss caused to the Gram Panchayat because of some mistake or negligence of the Pradhan, which is neither deliberate nor intended for any personal benefit, has been taken care of by rule 256 of the Panchayat Raj Rules and in such cases order as contemplated by rule 256 alone is required to be passed.

It is, therefore, necessary for removal of the elected Pradhan under Section 95 (1)(g) that a finding should be recorded that the Pradhan has deliberately misused his official position so as to derive benefit by his act and in absence of a finding so recorded, the order of removal cannot be sustained.

In the totality of the circumstance as borne out from record of the petition, the order dated 16.4.2005, passed by the District Magistrate, Hamirpur cannot be legally sustained and is hereby quashed. However, this order shall not prejudice the recovery of the loss caused to the Gram Panchayat on the basis of the assessment made during the enquiry proceedings in accordance with rule 256 of the Panchayat Raj Rules against the Petitioner.

Case law discussed:
1978 ALJ 1367

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard P.N. Saxena Senior Advocate, assisted by Sri Amit Saxena

Advocate on behalf of the petitioner, Standing Counsel on behalf of respondent nos. 1 to 3 and Sri A.N. Verma Advocate on behalf of respondent no. 4. Parties agree that the writ petition may be finally decided at this stage itself.

2. Petitioner Bhagwan Deen Verma is the elected Pradhan of Gram Panchayat Artara, Block Maudaha, District Hamirpur. The District Magistrate vide order dated 31st March, 2004 ceased the financial and administrative powers of the Pradhan under Section 95 (1)(g) proviso of the Panchayat Raj Act. Feeling aggrieved by the said order, petitioner had filed Writ Petition No. 14474 of 2004. The writ petition so filed was disposed of vide judgment and order dated 1.3.2005 with a direction that the District Magistrate may pass fresh reasoned order after considering the reply of the petitioner.

3. It appears that during this period Project Director, District Rural Development Authority was appointed as final enquiry officer. The said enquiry officer submitted his report on 4.9.2004. The District Magistrate on receipt of the said report, issued a fresh show cause notice dated 16.12.2004 to the petitioner to show cause as to why he may not be removed from the office of Pradhan in view of the charges found proved. The District Magistrate, after considering the explanation furnished by the petitioner, by means of the order dated 16.4.2005 has removed the petitioner from the office of the Pradhan and has further directed for recovery of sum of Rs.4,290/- against the petitioner. The order dated 16.4.2005 is under challenged in the present writ petition.

4. On behalf of the petitioner it is contended that the order passed by the District Magistrate is legally not sustainable inasmuch as the charges even if found proved against the petitioner are not of such nature so as to justify the removal of the elected Pradhan under Section 95 (1)(g) of the Panchayat Raj Act. The petitioner has also challenged the finding recorded in respect of the individual charge on various fact and grounds.

5. So far as the challenge to the finding recorded in respect of individual charges by the District Magistrate on the basis of the enquiry proceedings against the petitioner is concerned, this Court under Article 226 of the Constitution of India cannot re-appreciate the evidence and cannot upset the conclusion arrived at by the District Magistrate on such re-appreciation of evidence. However, it is worthwhile to reproduce the finding recorded in respect of the charges against the petitioner in respect of the charge nos. 1 and 2, which are quoted herein below:

Charge No. 1."इस प्रकार कूप मरम्मत में प्रधान द्वारा दर्शायी गयी कार्य की कुल लागत मु० २१३६६.०० रूपये के कार्य में सहायक अभियन्ता डी०आर०डी०ए० द्वारा किये गये मूल्यांकन मु० १४७८६.०० रूपये को घटाने के उपरान्त रूपये ६५८० का दुरूपयोग पाया गया। स्पष्ट है कि कार्य की गुणवत्ता भी प्रभावित हुयी इस प्रकार आरोप संख्या-१ पूर्णतया सिद्ध पाया गया।"

Charge No. 2. "प्रधान द्वारा दिये गये स्पष्टीकरण से उपरोक्तानुसार सहमत नहीं हूँ इस सम्बन्ध में जांच अधिकारी द्वारा कराया गया मूल्यांकन के अनुसार खडंजा की कुल मूल्यांकन १०६१६.०० रूपये पाया गया जबकि कार्य की कुल लागत १२६१६.०० रूपये दर्शायी गयी है। इस प्रकार मु० २०००.०० रूपये का स्पष्ट दुरूपयोग/अपव्यय के दोषी पाये गये।"

6. So far as the charge no. 3 is concerned, the same is general in nature namely in respect of construction work in

the Gram Panchayat, the petitioner has acted in violation of the Government Orders and rules and in respect of said charge only a general finding has been recorded that since the petitioner has not submitted reply to the same, he being the Pradhan cannot violate the rules.

7. In view of the finding so recorded, the issue which is up for consideration is as to whether the order of removal of Pradhan can be justified under the provisions of Section 95 (1)(g) of the U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997 or not.

8. For appreciating the aforesaid issue it would be worthwhile to refer to Section 95 (1)(g). It may be stated that in the facts of the present case the order impugned in the present writ petition can at best be referable to Clause 95(1)(g) Sub-section (iii), which reads as follows:

95(1)(g)- *Remove a Pradhan, Up-Pradhan or meber of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he-*

(i) ……..

(ii) ……..

(iii) has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest, or

9. This Court in the case of *Ishwar Dayal Vs. District Magistrate, Mainpuri and others,* reported in ***1978 All. L.J. 1367,*** had an occasion to consider the expression `abuse of position' as used in the said sub-section and in paragraph 4 it has been held as follows:

"……The expression "abuse of position" contemplates positive and deliberate action on the part of person concerned to derive benefit by misusing his official position. In the absence of any finding that the petitioner derived any benefit, any irruglarity committed by him could not amount to abuse of his position."

10. In view of the aforesaid Division Bench judgment of this court, for establishing that the Pradhan has abused his position as such, it is but necessary to establish that the Pradhan has derived benefit by misusing his official position and in absence thereof any irregularity committed by the Pradhan would not amount to abuse of his official position. The conclusion arrived at by the District Magistrate in the impugned order are necessarily to be adjudged in the light of the aforesaid interpretation placed by the Division Bench of this Court on the language of Sub-section III of Section 19 (1)(g). Examining on the touchstone of the aforesaid legal proposition, the impugned order falls short of the requirements, inasmuch as there is absolutely no allegation that the lapse on the part of the Pradhan was deliberate and for the purposes of deriving benefit, occasioned by misuse of the official position. There is absolutely no allegation of any benefit having been derived by the Pradhan in the facts of the present case.

11. Reference at this stage may also be had to the provisions of Rule 256 of the Panchayat Raj Rules, 1946, which read as follows:

*"**256.(1)** In any case where the Chief audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gram Sabha as a direct consequence of the negligence or misconduct of a Padhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat, he may call upon the Pradhan, Up-Pradhan, Member, Officer or servant, as the case may be, to explain in writing why such Pradhan, Up-Pradhan, Member, Officer, or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gram Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned.*

Provided that an explanation from the Pradhan, Up-Pradhan or meber of the Gram Panchayat shall be called for through the District Magistrate and from the officer or servant through the District Panchayat Raj Officer:

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gram Panchayats or any of its committee as having been absence from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

(2) Without prejudice to the generality of the provisions contained in sub-rule (1) the Chief Audit Officer, Co-operative Societies and Panchayats, may call for the explanation in the following cases:

(a) *where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made there-under;*
(b) *where loss has been caused to the Gram Sabha by acceptance of a higher tender without sufficient reasons in writing;*
(c) *where any sum due to the Gram Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;*
(d) *where the loss has been caused to the Gram Sabha by neglect in realizing its dues; or*
(e) *where loss has been caused to the funds or other property of the Gram Sabha on account of want of reasonable care for the custody of such money or property.*

(3) On the writing request of the Pradhan, Up-Pradhan, Member, Officer or servant from whom an explanation has been called for, the Gram Panchayat shall give him necessary facilities for inspection of the records connected with the requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged, allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons beyond his control, to consult the record for the purpose of furnishing his explanation."

12. Under the said rule 256 any loss caused to the Gram Panchayat due to negligence or misconduct on the part of the Pradhan could be the basis for surcharge being imposed so as to compensate the loss caused to the Gram Panchayat or its property. The provision contained in rule 256 must necessarily be harmonized with Section 95 (1)(g) Sub-section 3 and read in light of the Division Bench judgment, referred to above.

13. It may be emphasized that democratically elected Pradhan should not be removed from the office at the dictates of the administrative authorities, nor every negligence or mistake on his part can be made a foundation for exercise of power under Section 95 (1)(g) Sub-section 3. The provision of Section 95(1)(g) must necessarily be construed strictly and it is only in cases of positive and deliberate action of the Pradhan concerned, to derive personal benefit by misusing his official position that an order for his removal under Section 95(1)(g) Sub-section 3 could be passed. Loss caused to the Gram Panchayat because of some mistake or negligence of the Pradhan, which is neither delibrate nor intended for any personal benefit, has been taken care of by rule 256 of the Panchayat Raj Rules and in such cases order as contemplated by rule 256 alone is required to be passed.

14. It is, therefore, necessary for removal of the elected Pradhan under Section 95 (1)(g) that a finding should be recorded that the Pradhan has deliberately misused his official position so as to derive benefit by his act and in absence of a finding so recorded, the order of removal cannot be sustained.

15. It is further worthwhile to mentioned that the statement in the impugned order that the elected Pradhan has misappropriated government money, is factually incorrect inasmuch as there was no such allegation nor any facts in that regard have been noticed in the impugned order.

16. In the totality of the circumstance as borne out from record of the petition, the order dated 16.4.2005, passed by the District Magistrate, Hamirpur cannot be legally sustained and is hereby quashed. However, this order shall not prejudice the recovery of the loss caused to the Gram Panchayat on the basis of the assessment made during the enquiry proceedings in accordance with rule 256 of the Panchayat Raj Rules against the Petitioner.

17. In view of the aforesaid writ petition is allowed. **Petition Allowed.**

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2005

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

Criminal Misc. Application No. 8063 of 1997

Smt. Geeta Tiwari ...Applicant
Versus
Kashinath & another ...Opposite Parties

Counsel for the Applicant:
Sri V.C. Tiwari
Sri Ashwini Kumar Awasthi
Sri Manish Tiwari

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

Code of Criminal Procedure-Section 482-applicant filed complaint-alleging the offence committed by the opposite Party No. 2-who in its official capacity replied the Quarry make by the applicant for non Payment of the salary of her husband-and also for not making visit to her company for last four months-Courts below held the letter written under official capacity in bonafide manner-hence no offence made out-accordingly complaint rejected at the same time passed an order of acquittal-held-impugned Order suffer no illegality or

any miscarriage of justice-call for no interference.

Held: Para 6

After going through the entire record and the perusal of the ingredients of Section 499 I.P.C. the facts of the case would not constitute the offence of 'defamation', I am of a considered opinion that the alleged letter was firstly written in good faith and only an opinion was disclosed to the applicant, that too in compliance of the direction of the District Magistrate. Assuming that the imputation was made against the applicant's husband, it was in good faith for the protection of the interest of the wife (applicant) who herself had asked for information about her husband as his whereabouts was not known since last four months. The letter was only by way of a caution intended for the good of the person.

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Manish Tiwary, learned counsel for the applicant, Sri D.S. Tiwari Advocate, assisted by Sri Bajrangee Mishra Advocate for the opposite party no. 1 and learned A.G.A.

Counter and rejoinder affidavits have been filed which are on record.

2. The applicant has challenged the order dated 4.10.1997 passed by the Sessions Judge, Azamgarh in Criminal Revision No. 152 of 1997 confirming the order dated 15.4.1997 in case No. 490 of 1995, whereby the Chief Judicial Magistrate, Azamgarh rejected the complaint filed by the applicant and passed an order of acquittal under Section 500 I.P.C.

3. The facts giving rise to the dispute is that the husband of the applicant was posted as Sayayak Krishi Nirishak at Block Tarwa and the contesting opposite party was working as Vikas Khand Adhikari, Tarwa. A letter was written by the applicant to the District Magistrate, Azamgarh inquiring the reason for non payment of salary of her husband and also making a complaint that her husband has not come home since last four months, though he has written three letters requesting his wife (applicant) to arrange for some finance so that he can give it to the concerned officer for releasing his salary. The applicant Smt. Geeta Tiwari had written in that letter, twice, that she had to sell her jewelry and now she is not left with no money to look after herself and her minor children. She had very clearly enquired as to why the salary of her husband is not being paid and also expressed her doubt whether her husband is telling truth so that she may be able to take suitable steps. The District Magistrate, Azamgarh had marked the letter to the opposite party no. 1 for making inquiry vide order dated 5.7.1994. The said letter has been annexed along with counter affidavit as Annexure-CA-3. An order was passed by the District Magistrate, Azamgarh on 5.7. 1994 on the letter itself. In reply to the said letter, the contesting opposite party informed that certain charges are levelled against the applicant's husband and it is for this reason the salary is not being paid. Regarding the question as to why her husband is not coming home since last four months, he has clearly informed that a respectable lady visits her husband and this information has been given by a number of persons. It is presumed that the visiting lady is none else but wife of Gyan Prakash Tiwari i.e. applicant herself.

However, since she herself has expressed doubt about the conduct of her husband, it is better she should make enquiries in the matter so that she may not be faced with any grave and untowards situation. Copies of the letters were also sent to the District Magistrate, Assistant Agriculture Inspector Tarwa and Director of Agriculture, Lucknow. This letter sent in reply, was complained to be defamatory in nature and consequently a complaint under Section 500 I.P.C. was instituted against the opposite party no. 1 by the applicant. This was challenged in this Court on the ground that the letter was written in his official capacity as such a prior sanction under Section 197 Cr.P.C. was necessary before any prosecution could commence against the accused opposite party no. 1. An application was filed under Section 482 Cr.P.C. before this Court which was numbered as Criminal Misc. Application No. 461 of 1997-Kashi Nath Vs. The State of U.P. and others. This Court had disposed of the application vide order dated 3.2.1997 directing the applicant to move an application before the Magistrate concerned regarding the question of sanction under Section 197 Cr.P.C. which shall be disposed of expeditiously by a speaking order and till the disposal of the application, the arrest of the accused under Section 500 I.P.C. in case crime No. 490 of 1995 was stayed. A copy of this order has been annexed along with counter affidavit as Annexure CA-5. In pursuance to the aforesaid direction, the Chief Judicial Magistrate passed an order dated 15.4.1997 to the effect that the prosecution could not continue for want of necessary sanction and also that the letter written by the accused will not amount to defamation within the meaning of Section 500 I.P.C. and the applicant was acquitted vide order dated 15.4.1997. This order was challenged by filing Criminal Revision No. 152 of 1997-Geeta Tiwari Vs. State which was also dismissed on 4.10.1997 by the learned Sessions Judge, Azamgarh. This order is impugned in the present application. A preliminary objection has been raised by the learned counsel for the opposite party no. 1. He has submitted that since the sentence provided for an offence under Section 500 I.P.C. is simple imprisonment for a term which may extend for a period of two years or fine or with both. The case is a summon case. Definition of summon case is provided in Section 2(w) Cr.P.C. which is as under:-

"Summon case means a case relating to an offence and not being a warrant."

4. It is, therefore, argued that it was a summon case and the order dated 15.4.1997 clearly shows that the applicant is acquitted. In the circumstances, an appeal against the said order was maintainable but a revision could not be entertained. Sri Tiwari has emphasized that since the applicant failed to prefer an appeal against the order of acquittal, his revision could not be entertained under Section 401(4) Cr.P.C. Second argument advanced by Sri Tiwari is that the complaint was dismissed and the accused were acquitted not only for want of sanction but also after recording his finding that the letter written by the accused to the complainant (applicant) was only with an intention to give her information, which she had asked for from the District Magistrate and in no way, it can constitute a case under Section 500 I.P.C. Sri Manish Tiwary has emphatically argued that the learned Magistrate proceeded to decide the

application in pursuance to the direction of this Court in Criminal Misc. Application No. 461 of 1997. The order was very specific directing the Magistrate to decide the question of grant of sanction by a speaking order. In the circumstances, no order on merit could be passed and it will be treated that the order dated 15.4.1997 was only in respect of the question of sanction and it can not be said that it is an order of acquittal. It is, therefore, emphasized that the order dated 15.4.1997 was a revisable order and the learned Sessions Judge committed an illegality while dismissing the criminal revision No. 152 of 1997. While dismissing the revision, a finding was recorded that the letter dated 11/12.7.1994 was sent by the accused Khand Vikash Adhikari in reply to the letter of the complainant herself, as such it was she, who has invited the information, rather than the Khand Vikash Adhikari had tried to malign the reputation either of the complainant or her family. The revisional court had concluded that the letter was written in discharge of official duty, certainly permission to file complaint was required under Section 197 Cr.P.C. It is also noteworthy that the inquiry was made by the complainant on account of the reason that the District Magistrate had passed an order directing the accused/opposite party to look into the matter and give an appropriate reply, which was done by the Khand Vikas Adhikari. It is thus clear that the letter sent in reply was in compliance to the direction of the District Magistrate and therefore, in discharge of his duty. The Khand Vikas Adhikari was duty bound to give a reply and necessary information on account of the order of the District Magistrate. In the circumstances, if the courts below were of the view that the act done by the accused was in discharge of his official duty, there is no illegality. Besides the allegation of the complaint do not constitute an offence of defamation within the meaning of Section 499 I.P.C., which defines Defamation as:-

"**499. Defamation**- Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

5. There are ten exception given in the Indian Penal Code to Section 499 I.P.C. If the facts alleged are covered within any of the exceptions of Section 499 I.P.C., no offence of Defamation is made out. The facts of the present case squarely comes within the fold of 3 categories of exception.

Third Exception- **Conduct of any person touching any public question—** It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Ninth Exception—**Imputation made in good faith by person for protection of his or other's interests—**It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Tenth Exception—**Caution intended for good of person to whom conveyed or for public good—**It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

6. After going through the entire record and the perusal of the ingredients of Section 499 I.P.C. the facts of the case would not constitute the offence of 'defamation', I am of a considered opinion that the alleged letter was firstly written in good faith and only an opinion was disclosed to the applicant, that too in compliance of the direction of the District Magistrate. Assuming that the imputation was made against the applicant's husband, it was in good faith for the protection of the interest of the wife (applicant) who herself had asked for information about her husband as his whereabouts was not known since last four months. The letter was only by way of a caution intended for the good of the person.

7. In the circumstances, I do not consider that the impugned orders suffer from any illegality and it can not be said that it amounts to an abuse of the process of the court or any miscarriage of justice, which calls for interference in exercise of inherent powers. The objections of Sri Tiwari to the effect that an appeal was maintainable against the order of acquittal also appears to be well founded. The applicant had instituted the complaint on 6.1.1995 and is continuing to pursue the complaint, which stands already dismissed in the year 1997. In fact it is the contesting opposite party who has been subjected to undue harassment despite the fact he was acquitted on 15.4.1997. The Apex Court has continuously held that the High Courts should be slow in reversing the order of acquittal unless there are strong and good ground to hold that the order of acquittal by the trial judge suffers manifestly from gross illegality otherwise it should not be interfered with. The Magistrate while passing the order dated 15.4.1997 has clearly given a finding that the alleged letter do not constitute an offence of defamation and he prima facie did not consider it a fit case for summoning the accused to face the trial. In the circumstances, the argument of the counsel for the complainant/applicant do not inspire any confidence. It is a case where the view taken by the courts below can not be said to be perverse or at any rate which was not reasonably possible. In the circumstances, I do not find that the revisional order challenged in this application suffers from any illegality. The application is accordingly, rejected.

Application Rejected.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No. 5372 of 2000

Deena Nath Arora & others...Applicants
Versus
State of U.P. & another...Opposite Parties

Counsel for the Applicants:
Sri R.L. Shukla
Sri J.C. Bhardwaj
Sri S.S. Pal

Counsel for the Opposite Parties:
Sri A.K. Srivastava
A.G.A.

Code of Criminal Procedure-S-482 Summoning Order-for the alleged offence under Section 323 I.P.C.-in complaint case summoning order passed after 8 yrs.-absolutely no explanation for delay-complaint on the basis of certain apprehensions-nothing happened between 18 yrs.-impugned complaint amounts to abuse of the process of court-hence-Quashed.

Held: Para 6

A bare reading of the complaint in the present case makes it clear that only certain apprehensions against the applicants have been voiced by the complainant for the reason that his son and daughter-in-law had left his house and started living separately. After lapse of 15 years nothing has happened in between and it is apparent that continuation of the criminal proceedings on the basis of impugned complaint will only amount to an abuse of the process of the court and therefore, I therefore quash the complaint which is registered as Complaint Case No. 1007 of 1990-V.K. Taneja Vs. Deena Nath Arora and others, pending in the court of Chief Judicial Magistrate, Bareilly. This application is accordingly allowed.

Case law discussed:
AIR 1973 SC-494 (SC)
1997 JIC-212 (SC)
AIR 1994 SC-1229
2004 (50) ACC-924

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Rajiv Lochan Shukla and Sri J.C. Bharadwaj Advocates for the applicants and learned A.G.A. for the State. Sri Anil Kumar Singh has put in appearance on behalf of the complainant and has filed counter affidavit. Rejoinder affidavit has also been filed on behalf of the applicants. List is revised.

2. This application under Section 482 Cr.P.C. invoking inherent jurisdiction has been filed on behalf of the applicants with prayer to quash the complaint case No. 1007 of 1990-V.K. Taneja Vs. Deena Nath Arora and others, pending in the court of Chief Judicial Magistrate, Bareilly and also to quash the order dated 9.10.1998, Annexure-4 to the affidavit. The facts giving rise to the dispute is that the applicant no. 9 Sanjeev Kumar Taneja is the son of opposite party no. 2, complainant and applicant no. 10 Smt. Asha Taneja alias Ruchita Taneja is wife of applicant no. 9 (daughter-in-law of the complainant). The other applicants are close relatives of Smt. Asha Taneja. The complaint is annexed as Annexure-1 to the affidavit filed in support of this application which was filed on 31.3.1990 under Sections 147, 148, 149, 406, 420, 452, 504, 506, 323 I.P.C. and the same was numbered as Criminal Case No. 1007 of 1990. After lapse of 8 years, statements of Govind Raman Taneja was recorded under Section 202 Cr.P.C. which is annexed as Annexure-2 to the affidavit. Smt. Subodh Kumari Taneja, wife of the complainant was also examined under Section 202 Cr.P.C. on the same day i.e. 21.8.98. The learned Magistrate summoned the applicants vide order dated 9.10.1998 under Sections 147, 148, 149, 504, 506, 452, 323 I.P.C. It is brought to my notice that while summoning the applicants the learned Magistrate did not summon the applicants under Section 406 and 420 I.P.C. The applicants filed a protest petition challenging the summoning order which was rejected vide order dated 9.2.1999 by the learned Sessions Judge, Bareilly stating therein

that in view of the various decisions of the Apex Court as well as this Court summoning order is an interlocutory order and is not maintainable. In the circumstances, the learned Sessions Judge rejected the application as not maintainable without giving any opinion on merits. This order is also under challenge. The applicants have filed a copy of an application given by the complainant prior to institution of the complaint case on 26.3.1990 wherein it has been stated that the family members of the daughter-in-law, applicant no. 10, in absence of the complainant somehow managed to instigate his son (applicant no. 9) to leave his parent's house and finally the son and daughter-in-law left the house of the complainant. The complainant alleged in the said application that he apprehends that the family members of the applicant no. 10 may lodge false report or implicate them in some frivolous case. The allegation made in that application to the extent that they are likely to be blackmailed by the complainant and his family members. This application has been annexed as Annexure-6 to the affidavit and has not been denied by the contesting opposite parties in their counter affidavit. The applicants have prayed for quashing the complaint on the ground that; (1) it is frivolous in nature, (2) the complaint was registered in the year 1990 whereas the summoning order has been passed after lapse of 8 years and (3) the application dated 26.3.1990 moved before the Additional District Judge (Administration) was prior to the lodging of the complaint expressing his apprehension, only because his son applicant no. 10 had left his father's house with his wife and the complaint is only an abuse of the process of the court.

3. Before I proceed to decide whether the instant criminal complaint can be quashed or not, it is necessary to decide the question as to whether the order dated 9.2.1999 passed by the learned Sessions Judge in Criminal Revision No. 57 of 1999 calls for any interference. I have gone through the entire judgment and do not find any illegality. The learned Sessions Judge declined to give any opinion on merit but rejected the revision as not maintainable. The Apex Court has also ruled in the case of **Adalat Prasad Vs. Roop Lal Jindal and others, 2004 (50), A.C.C., 924** that the learned Magistrate could not review its earlier order as the Criminal Procedure Code do not contemplate such a situation. In the instant case the revisional court declined to interfere for the reason that the order summoning the accused is an interlocutory order and not maintainable placing reliance on a number of decisions. In the circumstances, I do not find any illegality in the order dated 9.2.1999 passed by the learned Sessions Judge, Bareilly.

4. Now the prayer for quashing of the complaint on the ground that it is only as a means of harassment and specially in view of the fact that on 26.3.1990 a somewhat similar application was filed before the Additional District Judge and subsequently the criminal complaint was filed. Besides, almost forty cases are going on between the parties, it is to be examined whether the summoning of the applicants under Sections 147, 148, 149, 452, 504, 506, 323 I.P.C. warrants quashing of the proceedings. It is apparent that the date of occurrence as mentioned in the criminal complaint is 28.2.1990. Almost 15 years have gone by and there has been no outcome of the so called

threat extended to the complainant and his family members by the applicants. In fact after filing of the complaint, the matter was left in cold storage continuously for the period of 8 years and thereafter summoning order has been filed after lapse of very long time. It is apparent that the complaint was instituted only because the son and daughter-in-law separated from the complainant and left the house. It is only a pressurizing tactics to get back the son and daughter-in-law. It is also noteworthy that though the applicants have been summoned under Section 323 I.P.C. but there appears to be no allegation of causing physical assault and in absence of any injury report, there is apparently nothing in the complaint to show that they were injured or their injuries were ever examined. The matter is pending since the year 1990. Almost 15 years have gone by and continuation of the criminal proceedings on the basis of criminal complaint sought to be quashed is nothing but an abuse of the process of the court. The Apex Court has categorically ruled that the criminal cases should be concluded expeditiously and delay of more than 10-12 years has been held to be fatal to the trial. In the case of **Santosh De Vs. Archana Guha and others, A.I.R. 1994 S.C., 1229,** the Supreme Court quashed the proceedings where the delay was 14 years and there was no explanation why delay was caused by the prosecution and it was held that it infringes the right of the accused to speedy trial. In the instant case the complaint was lodged in the year 1990 and the witnesses were examined under Section 200 and 202 Cr.P.C. after lapse of 8 years i.e. in the year 1998 and thereafter the summoning order was passed. A bare reading of the entire paper book, it is evident that the criminal proceedings were initiated only as a pressurizing tactics. There is no explanation whatsoever in the summoning order regarding delay and lapse of 8 years between the period when the complaint was lodged and the witnesses were examined under Sections 200 and 202 Cr.P.C. The Apex Court in the case of Santosh De (Supra) declined to interfere in the order of the High Court where the proceeding was quashed on account of delay of 8 years. For ready reference paragraph 12 of the said judgment is quoted below:-

"We are not satisfied that there are any valid grounds for interference with the order of the High Court. The most glaring circumstance in the case is the delay in commencing the trial. The case was committed to sessions court on July 15, 1974 and the charges came to be framed by the sessions court only on April 13, 1983 i.e., after a lapse of about eight years. The appellant is not in a position to explain the reasons for this delay. In the order under appeal, the High Court has stated that this delay is entirely on account of the default of the prosecution. This is not a case of what is called 'systemic delays'—as explained in A.R. Antulay, (AIR 1992 SC 1701). In our opinion, this unexplained delay of eight years in commencing the trial by itself infringes the right of the accused to speedy trial. In absence of any material to the contrary, we accept the finding of the High Court that this delay of eight years is entirely and exclusively on account of the default of the prosecution. Once that is so there is no occasion for interference in this appeal. It is accordingly dismissed.

5. Similar view has been voiced by the Apex Court in the case of **State of**

U.P. Vs. Kapil Deo Shukla, A.I.R. 1973 S.C. 494 and A.A. Mulla and others Vs. State of Maharashtra and another, 1997 J.I.C. 212 (S.C.). In the said cases reliance was placed on a number of decisions of the Apex Court. A perusal of the entire paper book shows that the identical allegations were levelled against the applicants four days prior to the lodging of the instant complaint. The application before the Additional District Magistrate dated 26.3.1990, Annexure-6 to the affidavit, it is only narration which has been given out in the instant complaint which is Annexure-1 to the affidavit. It is thus evident that repeated allegations at the instance of the complainant is nothing short of an abuse of the process of the court, specially when the complainant has only narrated his apprehensions on the basis of the so called threat said to have been extended by the applicants, such a long period has gone by and nothing has come out, therefore, mere threat to cause the injury to his person and property is sheer imagination of the complainant. It is not a case where serious criminal offences are alleged in the complaint and the applicants have been kept on waiting for the outcome of the complainant, specially the summoning order has been passed after lapse of 8 years which can not be overlooked by this Court. It is not a case where inherent powers have been invoked immediately after lodging of the complaint but they have been summoned after a considerable long span of eight years.

6. A bare reading of the complaint in the present case makes it clear that only certain apprehensions against the applicants have been voiced by the complainant for the reason that his son and daughter-in-law had left his house and started living separately. After lapse of 15 years nothing has happened in between and it is apparent that continuation of the criminal proceedings on the basis of impugned complaint will only amount to an abuse of the process of the court and therefore, I therefore quash the complaint which is registered as Complaint Case No. 1007 of 1990-V.K. Taneja Vs. Deena Nath Arora and others, pending in the court of Chief Judicial Magistrate, Bareilly. This application is accordingly allowed. **Application Allowed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 49225 of 2005

Shiv Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri M.P. Srivastava

Counsel for the Respondents:
Sri Ashok Srivastava
S.C.

U.P. Punchayat Raj Act 1957 Section 95 (1) (g)-readwith U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhans and Members) Enquiry Rules 1997-Rule-8-Financial and administrative power of Pradhan-ceasure by the District Magistrate-No enquiry as per provision of Rules conducted for long spell of time of 3 yrs.-held-the authorities failed to act in conformity with statutory provision-operation of impugned order quashed-as the Pradhan are elected by democratic process-interference must be in strict conformity with statutory provision.

Held: Para 5 and 8

The period may not be mandatory but still the authority are required to act under law with all promptness in the proceedings initiated against the Pradhan under Section 95 (1) (g) proviso of the U.P. Panchayat Raj Act without any uncalled for delay. It is to be kept in mind that the Pradhans of Gram Panchayat are elected by a democratic process, interference in powers of the elected representatives of the people by the administrative authorities must be in strict conformity with the statutory provision.

In such circumstances, this Court is prima facie of the opinion that the respondent-authorities have failed to act in conformity with the statutory provisions, by not getting a final enquiry conducted against the Pradhan (petitioner), by a nominated officer within reasonable time. Therefore, they not be permitted to continue with the ceasation of the financial and administrative powers of the Pradhan.

Case law discussed:

1999 (2) UPLBEC-718

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri M.P. Srivastava, learned counsel for the petitioner, Sri Ashok Srivastava, learned counsel for the respondent no.3 and learned Standing counsel on behalf of respondent nos. 1 and 2.

Respondents are granted three weeks time to file counter affidavit. Rejoinder affidavit may be filed within a week thereafter.

List on 31st August, 2005.

2. The financial and administrative of the elected Pradhan, namely, Shiv Devi (petitioner) were ceased under order of the District Magistrate, Sonbhadra dated 20th November, 2002. Feeling aggrieved by the aforesaid order of the District Magistrate the petitioner filed Civil Misc. Writ Petition No. 5444 of 2002. In the said writ petition the Court did not grant any interim order to the petitioner, the writ petition is still pending. Subsequently the District Panchayat Raj Adhikari, Sonbhadra passed orders dated 31st March, 2003 and dated 5th April, 2003, whereby the Pradhan as well as two other persons namely, District Panchayat Raj Adhikari and Secretary, were required to deposit a sum of Rs. 29708/- said to be loss caused to the Gram Panchayat. Thereafter the District Magistrate passed an order dated 23rd December, 2003 restoring the financial and administrative powers of the Pradhan. Feeling aggrieved by the said order of the District Magistrate Ramvyas Vishawakarma (respondent no.3) filed Civil Misc. Writ Petition No. 162 of 2004 (Ramavyas Vishwakarma Vs. District Magistrate, Sonbhadra and others). In the said writ petition initially an interim order was granted by this Court on 7th January, 2004. However, the said writ petition was disposed of finally on 5th March, 2004 by this Court and order dated 7th January, 2004 was quashed with a direction to the District Magistrate, Sonbhadra to take final decision qua in the proceedings initiated against the Pradhan strictly in accordance with law. The District Magistrate instead of getting final enquiry conducted against the Pradhan in accordance with the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as the Rules of 1997), has proceeded to pass an order dated 2nd August, 2004 whereby the financial and administrative powers of the

Pradhan were restored with a direction upon the Pradhan to deposit a sum of Rs.19854/-. The order of the District Magistrate dated 2nd August, 2004 restoring the financial and administrative powers of the Pradhan was again challenged before this Court by Sri Ramvyas Vishwakarma (respondent no.3) by means of writ petition no. 31601 of 2004. The writ petition filed by the respondent no.3 was allowed, the order dated 2nd August, 2004 was quashed vide judgment and order dated 2nd March, 2005, in view of the provisions of Section 95 (1) (g) proviso of the U.P. Panchayat Raj Act, 1947 as also in view of the judgment reported in ***1999 (1) UPLBEC 718***. The Court in the said judgment recorded a categorically finding that since the final enquiry has not been conducted against the Pradhan and he has not been exonerated of the charges levelled against her, therefore, there is no question of administrative and financial powers of the Pradhan being restored.

3. The District Magistrate has now passed an order dated 21st June, 2005 in alleged compliance of the judgment and order of this Court dated 2nd March, 2005 whereby the earlier order dated 2nd August, 2005 has been revoked and the financial and administrative powers of the Pradhan have again been ceased by restoration of the order dated 30th November, 2002. The order now passed by the District Magistrate dated 2nd June, 2005 has been challenged by the petitioner by means of the present writ petition amongst others on the ground that under the provisions of Rules of 1997 specific times frame for holding preliminary enquiry as well as for holding final enquiry has been provided. The authorities cannot keep the enquiry pending for years and thereby interfere with the rights of the elected Pradhan on the basis of preliminary enquiry alone.

In order to appreciate the contention so raised reference may be had to Rule 8 of the Rules of 1997, which regulates the time fixed for holding final enquiry and reads as follows:

*"8. **Submitting the report to the Government.**---[Enquiry Officer shall conclude the enquiry within six months from the date of receipt of complaint and forward to State Government the records of the enquiry which shall include----*

(a) the report prepared by him under Rule-7;

(b) the written statement of defence, if any, of the person against whom the enquiry has been held;

(c) the oral and documentary evidence produced during the course of the enquiry;

(d) written briefs, if any, filed during the course of the enquiry; and

(e) the orders, if any, made by the State Government and the Enquiry Officer in regard to the enquiry."

5. The period may not be mandatory but still the authority are required to act under law with all promptness in the proceedings initiated against the Pradhan under Section 95 (1) (g) proviso of the U.P. Panchayat Raj Act without any uncalled for delay. It is to be kept in mind that the Pradhans of Gram Panchayat are elected by a democratic process, interference in powers of the elected representatives of the people by the administrative authorities must be in strict conformity with the statutory provision.

6. This Court, while entertaining the present writ petition on 15th July, 2005

required the learned Standing Counsel to seek instructions from the District Magistrate, Sonbhadra as to whether any final enquiry in terms of Rule 8 (a) of the Rules of 1997, in respect of the proceedings initiated against the petitioner, Shiv Devi, Pradhan of village Jhanmsheela, District Sonbhadra, has been submitted till date or not. The learned Standing Counsel has made a statement before this Court today on the basis of the instructions so received from the office of the District Magistrate, Sonbhadra that final enquiry was conducted by the Commissioner of Division against the petitioner and the Commissioner, in its report has held that the charges as have been levelled against the petitioner are found to be corrected.

7. From the instructions so received by the learned Standing Counsel, it is apparently clear that final enquiry as contemplated under the provisions of Rules of 1997 by a nominated District Level Officer has not been conducted against the Pradhan till date nor any final enquiry report referable to the statutory rules have been obtained by the District Magistrate, Sonbhadra. It is further apparent that the Commissioner of Division was not nominated by the District Magistrate as the district level officer, to conduct the final enquiry against the Pradhan under the provisions of Rule of 1997. A period of three years have been elapsed, since the administrative and financial powers of the Pradhan under Section 95 (1) (g) proviso of the Act of 1947 were ceased. Fresh elections of the Gram Pradhan are to be held in near future.

8. In such circumstances, this Court is prima facie of the opinion that the respondent-authorities have failed to act in conformity with the statutory provisions, by not getting a final enquiry conducted against the Pradhan (petitioner), by a nominated officer within reasonable time. Therefore, they not be permitted to continue with the ceasation of the financial and administrative powers of the Pradhan.

9. The petitioner has made out a prima facie case for grant of interim order.

10. Till the next date of listing the operation of the order dated 2nd June, 2005 passed by the District Magistrate, Sonbhadra shall remain stayed and respondents shall not interfere with the administrative and financial powers of the Pradhan (petitioner).

11. A copy of this order shall be supplied to the learned counsel for the petitioner on payment of usual charges by 27th July, 2005.**Interim Order Passed.**

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No.1808 of 2000

Rajdhar ...Applicant
Versus
State of U.P. & others ...Opposite parties

Counsel for the Applicant:
Sri A.K. Srivastava

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

Code of Criminal Procedure-Section 319- Evidence during trail of case-can not be treated as evidence collected during enquiry or trail-after recording evidence of two witness-three accused named in F.I.R. acquitted-but by the same order learned session judge summoned the other name accused including the applicant-held-the summoning order is absolutely proper but the acquittal can be recorded after the prosecution evidences completed,-hearing of prosecution and the defence is completed-accordingly the order of acquittal set-a-side direction issued to summon those accused persons also-complete the trail within period of six months.

Held: Para 4

It is thus evident that after the prosecution evidence is completed and the examination of the accused and hearing of the prosecution and the defence, only an order of acquittal can be recorded whereas in the present case after the evidence of two witnesses namely P.W. 1 Chandrawati and P.W.2 Santosh Kumar, named accused were summoned. Simultaneously, an order of acquittal has been passed by the Sessions Judge, which is absolutely illegal and cannot be left to stand. "The evidence envisaged in Section 319 Cr.P.C. is the evidence rendered during trial of the case and the material placed before the committal court cannot be treated as evidence collected during inquiry or trial". In the circumstances, if the Sessions Judge was of the opinion on the basis of the evidence recorded during the trial that the named accused should also be tried, he was absolutely within his right to summon the named accused including the present applicant but he could not have recorded a finding of acquittal in respect of those three accused, who were facing the trial.

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. List is revised. No one is present for the applicant. Learned A.G.A. appears for the State.

2. The applicant Rajdhar has filed this application invoking inherent powers for quashing the order dated 15.4.1999 passed by the Sessions Judge Chitrakoot in Session Trial No.33 of 1993 under Section 302 I.P.C. The First Information Report was registered on 24.5.1991 at 7:40 a.m. against the five accused namely Rajdhar s/o Vijyanand, Premika s/o Vijyanand, Vishnu Dayal s/o Raghuman, Hemraj s/o Mahesh and Dhanpat s/o Raghuman. According to the narration of the F.I.R., the husband of the complainant Malkhan @ Bulbul was done to death in the middle of intervening night 23-24.5.1991. After completion of investigation, charge sheet was submitted against three accused Lavelesh s/o Khuraki, Dafola @ Raja Bhai and Mohan s/o Mahesh Chaubey; all of them were not named in the F.I.R. The Session Trial commenced against the said three accused under Sections 302, 120 I.P.C. Smt. Chandrawati wife of the deceased was examined as P.W.1, Santosh Kumar son of the deceased was examined as P.W.2. The learned Sessions Judge, Chitrakoot summoned the present applicant Rajdhar along with other two accused under Section 319 Cr.P.C. While summoning the accused, the learned Sessions Judge recorded a finding that the prosecution witnesses had made clear allegations against the named accused in the First Information Report and also stated that the Investigating Officer did not investigate the matter under the influence of the accused and submitted the charge sheet against different persons, who are

not named in the First Information Report. Two named accused Vishnu Dayal and Hemraj had already died before the trial could be completed as such three accused including the present applicant were summoned. Specific allegations were leveled against the investigating officer by the two witnesses and affidavits were also given by them, which is Exhibits Ka-2 and Ka-5. Eyewitnesses have clearly exonerated the three persons namely Lavlesh, Dafola @ Raja Bhai and Mohan against whom the police submitted charge sheet. On the basis of said statement, the named accused were summoned to face the trial by means of the impugned order. Argument advanced on behalf of the applicant is that Section 319 Cr.P.C. contemplates summoning and trial of such other persons, who have not been facing the trial and the court feels from the evidence recorded during the trial or inquiry that those person should be tried together with the other accused for the offence, it can proceed against such persons. Provision of Section 319 Cr.P.C. gives ample power to the court to take cognizance and add "any person" not being accused before it and try him along with accused persons sent up for the trial. It has emphatically been stated that since the three accused, who were facing the trial have been acquitted by means of common order dated 15.4.1999, nothing remains to be tried and, therefore, the trial has come to an end and the impugned order stands vitiated in law. Since no trial is pending, the learned Session Judge could not exercise powers under Section 319 Cr.P.C. Counter affidavit has been filed by the Sub Inspector Bajrangi Singh to which rejoinder affidavit has also been filed. No counter affidavit has been filed by the opposite party no.3. The order sheet dated 9.8.2000 shows that notices have been received back after due service but no counter affidavit has been filed on behalf of the complainant. In the present case, the learned Sessions Judge had passed a composite order under Section 319 Cr.P.C. as well as by the same order he has recorded a finding of acquittal in respect of accused Lavlesh, Dafola @ Raja Bhai and Mohan. After hearing counsel for the applicant and learned A.G.A. for the State, it is necessary to examine Section 319 Cr.P.C., which is reproduced below:

*319. **Power to proceed against the persons appearing to be guilty of offence.-** (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

3. Section 319 (4) (a) prescribes that the proceedings in respect of such persons, who have been summoned during course of the trial on the basis of evidence shall be commenced afresh, and the witnesses be re-heard. Sub clause (b) of clause 4 of Section 319 Cr.P.C. entitles the court to proceed against the newly added accused as they were accused at the time when the court took cognizance of the offence. In the instant case, the present accused Rajdhar along with four other accused were named in the First Information Report and specific allegations were leveled against them. The learned Sessions Judge has very categorically discussed the statement of the two witnesses P.W. 1 and P.W.2. on the basis of which, he had arrived at the conclusion that the named accused should also be tried. I do not think that there is any illegality in that part of the judgment. However, the Sessions Judge has completely erred in law in acquitting the three accused, who were sent up for trial by means of common judgment and order on the basis of evidence of P.W.1 and P.W.2 alone. Perusal of the charge sheet shows that there are as many as 34 witnesses mentioned, which the prosecution proposed to examine. In the circumstances, before the prosecution has completed its evidence and arguments are advanced after an opportunity for defence is afforded, the trial is still in progress and it cannot be said to be completed. Learned Sessions Judge erred in law in recording the finding of acquittal even before the trial was completed and that part of the judgment is against the procedure provided in Chapter XVIII of the Criminal Procedure Code. This chapter provides "trial before the court of sessions which begins from the opening case of prosecution". Section 232 Cr.P.C. defines acquittal:-

If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.

4. It is thus evident that after the prosecution evidence is completed and the examination of the accused and hearing of the prosecution and the defence, only an order of acquittal can be recorded whereas in the present case after the evidence of two witnesses namely P.W. 1 Chandrawati and P.W.2 Santosh Kumar, named accused were summoned. Simultaneously, an order of acquittal has been passed by the Sessions Judge, which is absolutely illegal and cannot be left to stand. "The evidence envisaged in Section 319 Cr.P.C. is the evidence rendered during trial of the case and the material placed before the committal court cannot be treated as evidence collected during inquiry or trial". In the circumstances, if the Sessions Judge was of the opinion on the basis of the evidence recorded during the trial that the named accused should also be tried, he was absolutely within his right to summon the named accused including the present applicant but he could not have recorded a finding of acquittal in respect of those three accused, who were facing the trial. Looking to the facts and circumstances of the case, the application is finally disposed of and the case is remanded to the learned District and Sessions Judge, Chitrakoot to issue notices to the three accused, who were facing trial and have been acquitted and thereafter commence

the trial afresh in respect of the present applicant along with other two accused, who have been summoned under Section 319 Cr.P.C. Learned Sessions Judge is directed to afford an appropriate opportunity to the prosecution to produce as many witnesses as it thinks proper after affording an opportunity to the defence and after completion of the arguments, the court shall pass final judgment. The order dated 15.4.1999 passed in Session Trial No.33 of 1993 is set aside to the extent of acquittal of the three accused by means of the common order. I am conscious of the fact that the three accused namely Lavlesh, Dafola and Mohan have not been arrayed as a party as such I direct the learned Sessions Judge to issue notice to the three accused to face the trial but they may not be taken into custody as they were already on bail at the time when the relevant order was passed on 15.4.1999. Since the sureties were discharged, they will only be required to furnish fresh bonds.

5. Learned Sessions Judge, Chitrakoot is further directed to complete the trial expeditiously preferably within a period of six months from the date a certified copy of this order is received. Registry is directed to send a certified copy of this order to the District Judge Chitrakoot for compliance of this order so that Session Trial No.33 of 1993 be completed within the stipulated period.

6. With the aforesaid observations, this application is finally disposed of and the case is remanded for afresh trial in accordance with the directions given hereinabove.

Application finally disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.07.2005

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

Criminal Misc. Application No. 8049 of 1997

Ganga Ram Singh ...Applicant
Versus
State of U.P. and others ...Respondents

Counsel for the Applicant:
Sri Dev Raj

Counsel for the Respondents:
Sri Muktar Alam
A.G.A.

Code of Criminal Procedure S. 482-readwith Negotiable Instrument Act-Section 138-Cheque dishonored due to paucity of funds-after recording the statements under section 200 and 202 Cr.P.C.-accused were summoned-but subsequently discharged on the ground of pre mature-in revision also get the same fate-held- both the courts below committed great error-They should have wait and allowed the complainant the establish his case-cognigence should have taken after expiry of the Stipulated period-impugned order quashed-necessary direction issued.

Held: Para 4

Looking to the entire facts and circumstances of the case and hearing the counsel for respective parties, I feel that in view of the decisions of the Apex Court, the trial court should have waited and allowed the complainant to establish its case or cognizance should have been taken after expiry of the stipulated period, instead of dismissing the complaint out right as premature. The court should have taken cognizance only after necessary period had lapsed in

accordance with law and cognizance should be taken subsequently. Since the complaint has been dismissed summarily, the applicant has no other alternative but to approach this Court for redressal of its grievance.

Case law discussed:

J.T. 2000 (10) SC-141
J.T. 1999 (10) SC-381
J.T. 2004 (7) SC-243

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Devraj Advocate for the applicant and Sri Mukhtar Alam Advocate for the opposite party nos. 3 and 4 and learned A.G.A. for the State.

2. This application has been filed challenging the order dated 27.3.1995 passed by the Judicial Magistrate Nagina, District Bijnor confirmed in Revision No. 156 of 1995 vide order dated 16.8.1997 by the Additional session Judge, Bijnor. The facts giving rise to the dispute is that the applicant's firm M/s Singh Brothers, Dhampur, District Bijnor is a registered firm and deals in the business of Khandsari Sugar. The applicant Ganga Ram (complainant) is managing partner of the firm. The contesting opposite parties are engaged in manufacturing the crystal less (Boora) and used to purchase sugar from the complainant on credit. It is stated that after the accounts were settled, outstanding amount of Rs.53,000/ was due against the opposite parties. An account payee cheque dated 25.9.1991 was issued for a sum of Rs.54,000/ drawn in Canara Bank Dhampur Branch, District Bijnor in the name of Singh Brothers. The cheque was dishonoured for paucity of funds. This information was received by the applicant on 24.3.1992. A written notice was sent to the opposite party nos. 2 to 4 on 6.4.1992. A copy of the notice has been annexed as Annexure-1 to the affidavit. It is alleged in the notice that the opposite party no. 2 refused to accept the notice while the notice issued to opposite party nos. 3 and 4 was returned, therefore, a second notice dated 4.5.1992 was served on opposite party no. 4 on 6.5.1992, while the notice to opposite party no. 3 was returned with an endorsement that the name has not been written correctly. Finally a complaint under Section 138 of the Negotiable Instruments Act was filed in the court of Judicial Magistrate, Bijnor on 20.5.1992. A copy of the same is annexed as Annexure-2 to the affidavit. The statements under 200 and 202 Cr.P.C. was recorded and opposite party nos. 2 to 4 were summoned, whose evidence was also recorded. The complainant has filed original cheque dated 15.9.1991 along with an endorsement of the Bank on the cheque and reason for its dishonour. The accused were discharged by the learned Magistrate vide order dated 27.3.1995. This order was challenged in revision which was dismissed and both the orders have been challenged in this application on a number of grounds.

3. Counsel for the applicant has argued that the learned Magistrate discharged the opposite party nos. 2 to 4 on the ground that the criminal complaint was premature. Reliance has been placed on a decision of the Apex Court in the case of **Narsingh Das Tapadia Vs. Goverdhan Das Partani and another, J.T. 2000 (10) S.C. 141**. Learned counsel has argued on the basis of the aforesaid decision that no period is prescribed before which the complaint can not be filed and if filed, not disclosing the cause of action in terms of Clause (c) of the proviso to Section 138 Negotiable Instruments Act, the Court may not take

cognizance till the time the cause of action arises to the complainant. Emphasis has been laid on the principle enunciated in the aforesaid decision; "Taking cognizance of an offence" by the court has to be distinguished from the filing of the complaint by the complainant. If the complaint is found to be prematured, it can await maturity, be returned to the complainant for filing later. Mere presentation of a complaint under Section 138 Negotiable Instruments Act at an earlier date would not necessarily render the complaint liable to be dismissed. The other case relied upon by the counsel for the applicant is **M/s Samrat Shipping Co. Pvt. Ltd. Vs. Dolly George, J.T. 1999 (10) S.C., 381**. Learned counsel has submitted that the dismissal of the complaint at the threshold is too hasty an action and the Apex Court has set aside the orders of the trial court as well as High Court holding that prima facie the court should have accepted the complaint. Only after evidence was recorded and the complainant was afforded an opportunity to prove the allegations of the complaint, the court could dismiss the complaint. In the present case the argument on behalf of the complainant is that the courts below rejected the complaint summarily as it was presented before the expiry of the stipulated period and thereafter he has no other alternative but to approach this court by invoking inherent jurisdiction guaranteed under Section 482 Cr.P.C. Reliance has been placed on a recent decision of the Apex Court in the case of **Adalat Prasad Vs. Roop Lal Jindal and others, J.T. 2004 (7),S.C., 243** where the Apex Court has completely barred the courts from reviewing an earlier order and in the circumstances, the applicant is not in position to institute the second complaint as the first one has been rejected on the ground that it is premature. A second complaint would amount to reviewing its earlier order and as such it has been prayed that the impugned orders be set aside and the learned trial court be directed to decide the case on merits instead of dismissing the complaint being premature.

4. Looking to the entire facts and circumstances of the case and hearing the counsel for respective parties, I feel that in view of the decisions of the Apex Court, the trial court should have waited and allowed the complainant to establish its case or cognizance should have been taken after expiry of the stipulated period, instead of dismissing the complaint out right as premature. The court should have taken cognizance only after necessary period had lapsed in accordance with law and cognizance should be taken subsequently. Since the complaint has been dismissed summarily, the applicant has no other alternative but to approach this Court for redressal of its grievance.

5. For the reasons discussed above, the application is allowed and the impugned orders dated 27.3.1995 and 16.8.1997 are set aside. The trial court is directed to proceed afresh and decide the question afresh on merits.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2005

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 3447 of 2002

Arun Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Singh

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

Constitution of India, Article 226-Service Law-Right to appointment-petitioner being placed at serial no. 2 in the waiting list for the post of U.P. State Universities (Centralized) Services Asstt. Registrar Examination 1996-On the ground that two candidates of general Category had resigned within the period of one year from the date of joining and the top most candidate of waiting list refused to join-state government send requisition vide its letter dt. 26.7.01-The Secretary Higher Education Commission by its letter dt. 20.08.01 refused on the pertext in view of Para 3 of G.O. dt. 23.12.97-the vacancy arising out due to resignation of selected candidate after the joining-can not be filled from the waiting list-held-after joining of selected candidates such vacancies stood exhausted-being fresh vacancies to be carried forward for the next selection-No right to claim appointment subsists.

Held: Para 19,20 and 26

But if all the selected candidates who had been offered appointment against the vacancies included in the process of process of selection join the post to fill up such vacancies though shortly thereafter any or some of the candidates resign from the post even if during life time or subsistence of select/waiting list, such vacancies stood exhausted on account of such joining of selected candidates and cannot be filled up either from the remaining candidates of select list who ranked lower in order of merit or from the waiting list despite their being included in select/waiting list and life of select/waiting list still subsists. Such vacancies in our considered opinion would be fresh vacancies and to be carried forward for the next selection. It is also because of the another valid reason that the vacancies arising out of resignation of selected candidate in a particular selection after joining the post can neither be said to be existing vacancy for the purpose of the aforesaid selection nor it can be said to be anticipated vacancy likely to occur within stipulated period of time as provided under the Rules of Recruitment as nobody can anticipate resignation of an incumbent like other contingencies of similar nature such as death, compulsory retirement, voluntary retirement, dismissal and removal etc. of any incumbent. Therefore, we are of the considered opinion that the vacancies arising on this ground i.e. on resignation of selected candidate after his joining cannot be filled up from the candidates included in the select list or waiting list even though it has occurred during life time of such select/waiting list or select/waiting list is still operating.

At this juncture we would also like to make it clear that only those vacancies could be included in the process of selection which were either existing at the time of initiation of process of selection or could be anticipated to be occurred during selection year as provided under particular rules of recruitment. Since no other vacancies could be anticipated except the vacancies arising out of superannuation, therefore, only such vacancies would be

anticipated vacancies and can be filled up from the select list during the life time of select list provided such vacancies were included and advertised for the purpose of such selection. Thus the vacancies occurred on account of death, compulsory retirement, voluntary retirement, dismissal, removal of any incumbent during the life time of waiting list, can not be filled up from such select/waiting list. In our considered opinion, as indicated herein before, similarly the vacancies arising out of resignation of a selected candidate after his joining would be a fresh vacancy and cannot be filled in from the aforesaid select list, rather to be carried forward for the fresh process of selection and to be filled up by affording opportunity to compete all eligible and qualified candidates. This is crux of the matter.

Thus in view of foregoining discussion we are of considered opinion that the impugned action of Commission in not recommending the name of petitioner who is wait listed candidate of general category against said vacancies arose on account of resignation of two candidates of general category within one year of their joining during subsistence of waiting list and on account of non joining of one candidate of schedule caste in given facts and circumstances of the case stated herein before is fully justified and according to law and does not call for any interference in exercise of jurisdiction under Article 226 of the Constitution of India.

Case law discussed:

2001(1) U.P.L.B.E.C.-462
1999 (2) AWC-1230
AIR 1991 SC-1612
1974 (1) SCR 1645=AIR 1973 SC-2216
(1986) 4 SCC-268=AIR 1987 SC-169
(1985) 1 SCR 899=AIR 1984 SC-1850
1994 Supp. (2) SCC-591
(1996) 4 SCC 319
(1984) 1 SCR C.P.C N)?
AIR 1987 SC-454
(1989) 4 SC-130
1986 (4) SCC-268
1993 Supp. (4) SCC 377
1994 (1) SCC-126
1994 Supp. (2) SCC-591
AIR 1994 SC-765
AIR 1995 SC-1088
1993 (2) SCC-573
AIR 2001 SC-3757
J.T. 1997 (7) SC-537
1997 (4) SCC-283
1999 (3) SCC-696
2000 (1) SCC-600
1998 (8) SCC-59

(Delivered by Hon'ble V.M. Sahai, J.)

The petitioner has filed this writ petition seeking a direction in the nature of a writ of mandamus directing the respondent no.4 Public Service Commission, Uttar Pradesh, Allahabad, (hereinafter referred to as Commission) to send the name of the petitioner from the waiting list of U.P. State Universities (Centralised) Services Assistant Registrar Examination year 1996, in pursuance of requisition sent by the State Government vide its letter dated 26.7.2001 and further a writ in the nature of mandamus was sought for directing respondents no.2 and 3 to appoint the petitioner forthwith on the post of Assistant Registrar on the vacant post of aforesaid 1996 Examination arising out of resignation of 2 candidates of general category within a period of one year after their joining. The petitioner has also challenged the letter dated 20.8.2001 contained in Annexure-9 of the writ petition whereby the Secretary of the Commission has communicated to the Secretary Higher Education, Government of Uttar Pradesh in pursuance of his letter dated 26.7.2001 stating therein that in view of para 5 of the government order dated 31.1.1994, the period of waiting list has already expired and in view of para 3 of the government order dated 23.12.1997 the vacancy arising out of resignation of selected

candidates after joining even during the life time of waiting list cannot be filled from the waiting list.

2. The brief facts having material bearing to the controversy involved in the case are that on 5.8.1996 an advertisement no.A-1/E-1 96-97 was published by the Commission in daily newspapers for holding selection against 11 vacancies on the post of Assistant Registrar in U.P. State Universities (Centralised) Services. Out of the aforesaid 11 vacancies, 6 vacancies were earmarked as unreserved for candidates of general category, 3 vacancies were reserved for other backward class candidates and 2 vacancies were reserved for the candidates belonging to S.C. & S.T. Subsequently thereafter aforesaid vacancies were increased from 11 to 19. The petitioner being fully eligible and qualified, applied for the selection and pursuance thereof, he was permitted to appear in written examination. The petitioner was declared successful in written examination and was called for interview which was held on 29.9.1997. After the interview, the result of aforesaid selection was declared on 30.9.1997 in which total 19 candidates were declared successful. The name of the petitioner did not find place in the main select list. But he was placed at serial no.2 in the waiting list of the candidates belonging to the general category. The names of selected candidates were recommended and forwarded by the Commission to the State Government for appointment and the letters of appointment have been issued to the selected candidates by the State Government on 30.12.1997. The petitioner came to know that 2 candidates of general category, namely Kamlesh Kumar Shukla and Anand Kumar had resigned from service within one year of their selection and appointment on 5.9.1998 and 2.12.1998 respectively as a result of which 2 vacancies on the said post have occurred. Since the aforesaid vacancies arose out of resignations of candidates belonging to the general category, the petitioner, being a general category candidate at serial no.2 in the waiting list, was entitled to be recommended by the Commission and the State Government was under legal obligation to ask the Commission to send the name of the petitioner for appointment and further to issue letter of appointment to the petitioner on the basis of his placement at serial no.2 in the waiting list amongst the candidates belonging to the general category. The petitioner moved several representations to the authorities concerned for his appointment against one of the aforesaid two vacancies. It is also alleged that the person placed at serial no.1 of the waiting list of general category, namely Sri Rajiv Kumar did not make any effort for appointment on the aforesaid post. In fact it appears that he is not interested in appointment against the said vacancies. It appears that in pursuance of such representations made by the petitioner, the Secretary Government of Uttar Pradesh wrote a letter to the Commission on 26.7.2001 to send the names from the aforesaid wait listed candidates which in turn was replied by the Secretary of the Commission vide his letter dated 20.8.2001 contained in Annexure-9 to the writ petition whereby the request made by the government has been turned down by the Commission on the grounds stated herein above, hence this petition.

3. A detailed counter affidavit has been filed on behalf of the Commission,

respondent no.4 whereby the stand taken by it in the impugned order/letter dated 20.8.2001 had been reiterated and supported by placing justification for not recommending the name of the petitioner for appointment against the aforesaid vacancy. For ready reference the averments made in paragraphs 4 and 11 of the counter affidavit are reproduced below:

"That the petitioner Sri Arun Kumar Singh, a general category candidate having Roll No. 404 appeared at the U.P. State Universities (Centralised) Services Assistant Registrar Examination, 1996 but after interview he was not finally declared selected. Subsequently the recommendation of the finally selected candidates for the 19 posts of Assistant Registrar was sent to the govt. vide letter no. 101/2/Misc./E-1/94-95 dated 20th November, 1997 for further action. Then after the expiry of about four years since the aforesaid recommendation was sent, the Commission received the proposal from the govt. vide letter No. Mu. Man. /645/70-1-2001-35 (6)/1999 dated 28 July 2001 to send recommendation from the waiting list for three vacant posts of Assistant Registrar which fell vacant due to non-joining of one of the S.C. candidate as well as the resignation tendered by two candidates from the general category (General merit list). Through this letter the Commission was intimated that one Sri Mool Chandra, an S.C. category candidate who was placed at serial no.17 of the recommendation, did not join his post, hence his candidature was rejected. In the same way two candidates who were placed at serial no.1 a& 2 Sri Anand Kumar (O.B.C.) and Sri Kamlesh Kumar (Gen.) who resigned from their post after joining, resulting 3 posts of Assistant Registrar vacant for which recommendation was sought by the govt. mentioning the name of the petitioner to be sent. Here it is noteworthy to state that the name from the waiting list for any examination is recommended to the govt. in accordance with the provisions provided in the State govt.'s Office Memo No. 1760-Aa/47-Ka-4-93-28-5-1980, dated 31 January, 1994 in which it is very clearly mentioned in sub para 5 & 6 that the waiting list would be valid only for one year and if the waiting list is not utilised within the stipulated period of one year, the vacancy would be forwarded for the next selection year. Apart from this the sub para 3 of the Office Memo No. 28-5-60-Ka-4-1997 dated 23 December, 1997 also maintains that the name from the waiting list cannot be recommended for the post falling vacant on account of the resignation tendered by a candidate even if the waiting list is being utilised within the stipulated period of one year. Thus the said proposal of the govt. dated 28 July, 2001 for sending recommendation from the waiting list was found to be "time barred" and against the provisions provided in the aforesaid G.O. Thus the proposal was turned down, and the govt. was informed about this vide office letter no. 74(i)/08/C-1/97-98 dated 27 October 2001. Now the petitioner wants the Commission to act in accordance with the proposal sent by the government and send his name from the waiting list. Hence he has filed the present writ petition which is devoid of merit and is liable to be rejected.

(11) That in reply to the contents of paras 18 and 19 of the writ petition, it is submitted that the name from the waiting list of any examination is recommended

to the govt. in accordance with the provisions provided in the state govt. office memo no. 1760-A/347-Ka-4-93-28-5-1980 dated 31 January, 1994 in which it is very clearly mentioned in sub-para 5 and 6 that the waiting list would be valid only for one year and if the waiting list is not utilised within the stipulated period of one year, the vacancy would be carried forwarded for the next selection year. Thus in the light of the provision provided in the said G.O. the proposal of the Govt. to recommend substitutes name from the waiting list is "time barred" proposal because it was sent by the govt. after the gap of about four years since the recommendation for the said examination was sent to the govt. by the commission. Apart from this the sub-para 3 of the office memo no. 28/5/80-Ka-4-1997, dated 23 December, 1997 also provides that the name from the waiting list cannot be recommended for the post falling vacant on account of the resignation tendered by a candidate even if the waiting list is being utilised within the stipulated period of one year. Thus it is quite obvious that the proposal of the govt. to send substitutes name from the waiting list is not at all in keeping with the rules and provisions provided in the aforesaid G.O. thus untenable. Hence the proposal was turned down and the govt. was informed about this vide letter no. 74(1)/08/C-1/97-98 dated 27 Oct. 2001. A true copy of the aforesaid G.O. dated 31 January, 1994, Office memo dated 23 Dec. 1997 are being annexed here with as "Annexure C.A-1 & Annexure C.A.-II" to this counter affidavit."

4. Since the necessary affidavits have been exchanged between the parties and the case is ripe for hearing, it is heard with the consent of the parties.

5. We have heard Sri Sanjay Kumar Singh, learned counsel for the petitioner and learned standing counsel appearing for respondents no.1 to 3 and Sri M.A. Qadeer learned counsel appearing for respondent no.4 and also perused the record.

6. The thrust of the submission of learned counsel for the petitioner is that since the name of the petitioner finds place at serial no.2 in the waiting list of candidates belong to general category and the person placed at serial no.1 in the waiting list had no interest to join the post which became vacant on account of resignation of 2 candidates of general category within a year after their selection and appointment, therefore, the petitioner being empanelled at serial no.2 in the waiting list is entitled to be recommended and appointed against one of the vacancy caused due to resignation of aforesaid two general category candidates during the life time of waiting list. The action of the respondents in not recommending the name of the petitioner for appointment against the said vacancy in given facts and circumstances of the case is wholly arbitrary, illegal and without any justification under law. In support of his submission the learned counsel for the petitioner has placed reliance on division bench decisions of this court rendered in Ved Prakash Tripathi vs. State of U.P. and others, (2001) 1 UPLBEC 462 and State of U.P. and others v. Ravindra Nath Rai and others 1999 (2) AWC 1230.

7. Contrary to it, Sri M.A. Qadeer, learned counsel for respondent no.4 has submitted that the action taken by the Commission is fully justified in given facts and circumstances of the case. While elaborating his submissions Sri Qadeer

submitted that firstly, life of select list/waiting list is 1 year from the date of its preparation and last recommendation made by the Commission to the government in pursuance of such selection and secondly, even if the vacancy is caused on account of resignation of a selected candidate after his joining within one year during the life time of the select list/waiting list, in that eventuality also the name of wait listed candidate cannot be recommended against such vacancy as the select list stood exhausted on account of joining of the candidate of the select list against such vacancy and after his resignation the vacancy caused is to be carried out for the next selection and the candidate of the waiting list cannot be recommended against such vacancy. In support of his submissions Sri Qadeer has placed reliance upon the relevant paragraph of the government order of the year 1994 and 1997, referred herein before and averments made in the counter affidavit, reproduced herein before, filed on behalf of the Commission.

8. On the basis of rival submissions and contentions of learned counsel for the parties a moot question arises for consideration is as to whether a candidate empanelled in the select list/waiting list is entitled for appointment against the vacancy caused due to resignation of selected candidates of the aforesaid select list who joins the post and resigns shortly thereafter or during life time of the said select/waiting list?

9. Before dealing with the question in issue it is necessary to deal with the relevant aspect of the matter having material bearing on the issue which has received consideration of Hon'ble Apex Court on numerous occasions. In this regard a reference can be made to a Constitution Bench decision of the Hon'ble Supreme Court rendered in Shankarsan Dash v. Union of India and others, AIR 1991 SC 1612 wherein the Hon'ble Apex Court has dealt with the question of the legal nature of select list, how can it be utilised and whether a selected candidate had indefeasible right of appointment on account of being empanelled in the select list? For ready reference para 7 of the aforesaid decision reproduced as under:

"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. 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 v. Subhash Chander Marwaha, (1974) 1 SCR 1645: (AIR 1973 SC 2216), Miss Neelima Shangla v. State of Haryana, (1986) 4 SCC 268: (AIR 1987 SC 169), or Jitendra Kumar v. State of Punjab, (1985) 1 SCR 899: (AIR 1984 SC 1850)"

10. In Gujrat State Dy. Executive Engineers' Association v. State of Gujrat and others, 1994 Supp (2) SCC 591, the Hon'ble Apex Court has considered the questions 'what is waiting list? can it be treated as a source of recruitment from which a candidate may be drawn as and when necessary and how long can it operate?' The relevant portion of paras 8 and 9, of the decision are being reproduced as under:

"8. Coming to the next issue, the first question is what is a waiting list? can it be treated as a source of recruitment from which candidates may be drawn as and when necessary? and lastly how long can it operate? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what is its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join."

9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service."

11. In Prem Singh and others v. Haryana State Electricity Board and others, (1996) 4 SCC 319 the questions for consideration before the Hon'ble Apex Court was as to whether the appointment from the select list/waiting list can be limited only to the extent of vacancies advertised or it can be extended for future vacancies also? In this case while taking note of the earlier decisions rendered by it and High Courts the Hon'ble Apex court has dealt with the issue in some detail in paras 15 to 25 of the decision. It would be useful to refer to some paragraphs of the decision as under:

"15. In Subhash Chander Sharma v. State of Haryana, (1984) 1 SLR (P & H) the facts were that as against 60 advertised posts the Public Service Commission had recommended almost double the number and more than 60 candidates were appointed on the basis of that selection. Relying upon the earlier decision of the same High Court in Sachida Nand Sharma v. Subordinate Services Selection Board decided on 1-6-1983 it was contended that all appointments beyond 60 should be invalidated. The High Court distinguished its earlier decision in Sachida Nand Sharma Case and held that if the State adopted a pragmatic approach by taking into consideration the existing vacancies in relation to the process of selection which sometimes takes a couple of years and made appointments in excess of the posts advertised then such an action cannot be regarded as unconstitutional.

16. In Ashok Kumar Yadav v. State of Haryana, AIR 1987 SC 454 what had happened was that Haryana Public Service Commission had invited applications for recruitment to 61 posts in Haryana Civil Service and other allied services. The number of vacancies rose during the time taken up in the written examination and the viva voce test and thus in all 119 posts became available for being filled. The Haryana Public Service Commission, therefore, selected and recommended 119 candidates to the Government. Writ petitions were filed in the High Court of Punjab and Haryana challenging the validity of the selections on various grounds. The High Court set aside the selection as it was of the view that the selection process was vitiated for more than one reason. On appeal, this Court also found substance in the contention that the Haryana Public Service Commission was not justified in calling for interview candidates representing more than 20 times the number of available vacancies and that the percentage of marks allocated for the viva voce test was unduly excessive. Yet this Court did not think it just and proper to set aside the selections made by the Haryana Public Service Commission as by that time two years had passed and the candidates selected were already appointed to various posts and were working on those posts since about two years.

17. In A.V. Bhogeshwarudu v. A.P. Public Service Commission, J.T. (1989) 4 Sc 130, the process of selection had started in 1983 and was completed in 1987. The vacancies that arose in between were also sought to be accommodated from the recruitment list prepared by the State Public Service Commission. The point which arose for consideration was if out of the names recommended for appointments some candidates did not join, whether the vacancies remaining unfilled can be filled from out of the

remaining successful candidates. This Court held that there was no justification in insisting that instead of filling up the vacancies by recommended candidates a fresh selection list should be made. This decision is, therefore, not relevant for the purpose of this appeal. So also, the cases of Neelima Shangla v. State of Haryana (1986) 4 SCC 268 and Shankarsan Dash v. Union of India (supra) cited by the learned counsel for the appellants are of no help as the point involved in those cases was altogether different.

18. In Hoshiar Singh v. State of Haryana, 1993 Supp (4) SCC 377, a requisition was sent to select candidates for appointment on 6 posts of Inspectors of Police by advertisement dated 22-1-1988. Applications were invited for the said 6 posts. Subsequent to the written examination but prior to the physical test and interview a revised request for 18 persons was sent. The Board recommended 19 names out of which 18 persons were given appointments. Those appointments were challenged before the Punjab and Haryana High Court and it was held that appointments beyond 8 posts were illegal. On appeal this Court held that since requisition was for 8 posts, the Board was required to send its recommendation for 8 posts only. This Court further observed: (SCC p. 384, para 10)

"The appointment on the additional posts on the basis of such selection and recommendation would deprive candidates who were not eligible for appointment to the posts on the last date for submission of applications mentioned in the advertisement and who became eligible for appointment thereafter, of the opportunity of being considered for appointment on the additional posts because if the said additional posts are advertised subsequently those who become eligible for appointment would be entitled to apply for the same. The High Court was, therefore, right in holding that the selection of 19 persons by the Board even though the requisition was for 8 posts only, was not legally sustainable."

19. In the case of State of Bihar v. Secretariat Asstt. Successful Examinees' Union 1986, (1994) 1 SCC 126 the Bihar State Subordinate Services Selection Board had issued an advertisement in the year 1985 inviting applications for the posts of Assistants falling vacant up to the year 1985-86. The number of vacancies as then existing was announced on 25-8-1987, the examination was held in November 1987 and the result was published only in July 1990. Immediately thereafter out of successful candidates 309 candidates were given appointments and the rest empanelled and made to wait for release of further vacancies. Since the vacancies available uptil 31.12.1988 were not disclosed or communicated to the Board no further appointment could be made. The empanelled candidates, after making an unsuccessful representation to the State Government approached the Patna High Court which directed them to be appointed in vacancies available on the date of publication of the result as well as the vacancies available which had arisen up to 1991. The State appealed against that decision and this 'Court held that the direction given by the High Court for appointment of empanelled candidates according to the merit list against the vacancies till 1991 was not proper and cannot be sustained. This Court further observed that since no examination was held since 1987 persons who became

eligible to compete for appointments were denied the opportunity to take the examination and the direction of the High Court would prejudicially affect them for no fault of theirs. However, keeping in view the fact situation of the case this Court upheld the appointments made on the posts falling vacant up to 1988 and quashed the judgment of the High Court which directed the filling up of the vacancies of 1989, 1990 and 1991 from out of the list of the candidates who had appeared in the examination held in 1987.

25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case."

12. The aforesaid view taken by the Hon'ble Apex Court in Prem Singh and others v. Haryana State Electricity Board and others,(supra) and Gujrat State Dy. Executive Engineers' Association v. State of Gujrat and others (supra) has been reiterated again by the Apex Court in Surinder Singh and others v. State of Punjab and others, AIR 1998 SC 18. In paras 14 and 15 of this decision the Apex Court has held as under:

"14. Prem Singh case (1996) 4 SCC 319, was decided on the facts of that case and those facts do not hold good in the present case. In the case of Gujrat State Dy. Executive Engineers' Association, 1994 Supp (2) SCC 591 this Court has explained the scope and intent of a waiting list and how it is to operate in service jurisprudence. It cannot be used as a perennial source of recruitment filling up the vacancies not advertised. The Court also did not approve the view of the High Court that since vacancies had not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed. Candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative.

15. It is no uncertain words that this Court has held that it would be improper exercise of power to make appointments over and above those advertised. It is only in rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It should be clearly spelled out as to under what policy such a decision has been taken. Exercise of such power has to be tested on the touch stone of reasonableness. Before any advertisement is issued; it would,

therefore be incumbent upon the authorities to take into account the existing vacancies and anticipated vacancies. It is not as a matter of course that the authority can fill up more posts than advertised."

13. In State of Bihar and another v. Madan Mohan Singh and others, AIR 1994 SC 765, Hon'ble Supreme Court after taking note of earlier decisions has held that a particular selection is meant for filling of vacancies advertised in that selection from the candidates selected and the select list would be well and good for the purpose of filling only those vacancies for which the selection has been made. The select list would be exhausted if the vacancies have been filled by the selected candidates irrespective of the fact that certain other persons left out and could not get appointment against such vacancies who ranks lower in merit of such selection. For ready reference relevant portion of para 7 of the aforesaid decision is reproduced as under:

"It is therefore crystal clear that the advertisement and the whole selection process that ensued were meant only to fill up 32 vacancies. Learned counsel for the respondents relying on the decisions of this Court in Kailash Chandra Sharma v. State of Haryana, 1989 Suppl (2) SCC 696: (AIR 1990 SC 454) and O.P. Garg v. State of U.P. AIR 1991 SC 1202, contended that when there are temporary vacancies, the direct recruits should have their share of quota in respect of temporary vacancies also. As noted above, the temporary vacancies arose subsequently but even otherwise in the view we are taking namely that the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have became eligible subsequent to the said advertisement and selection process."

14. In Madan Lal v. State of J.& K, AIR 1995 SC 1088 the Hon'ble Apex Court has followed the decision rendered earlier in State of Bihar and Another v. Madan Mohan Singh and others (supra) and in paragraph 23 of the decision held as under:

"23.It is now time to refer to rule 41 as pointed out by the learned counsel for the petitioners. The said rule reads as under:-

"Security of the list.-The list and the waiting list of period of one year from the date of its publication the selected candidates shall remain in operation for a in the Government Gazette or till it is exhausted by appointment of the candidates whichever is earlier, provided that nothing in this rule shall apply to the list and the waiting list prepared as a result of the examination held in 1981 which will remain in operation till the list or the waiting fist is exhausted.

A mere look at the rule shows that pursuant to the requisition to be forwarded by Government to the

Commission for initiating the recruitment process, if the Commission has prepared merit list and waiting list of selected candidates such list will have a life of one year from the date of publication in Government Gazette or till it is exhausted by the appointment of candidates, whichever is earlier. This means that if requisition is for filling up of 11 vacancies and it does not include any anticipated vacancies, the recruitment to be initiated by the Commission could be for selecting 11 suitable candidates. 'The Commission may by abundant caution prepare a merit list of 20 or even 30 candidates as per their inter se ranking on merits. But such a merit list will have a maximum life of one year from the date of publication or till all the required appointments are made whichever even happened earlier. It means that if requisition for recruitment is for 11 vacancies and the merit list prepared is for 20 candidates, the moment 11 vacancies are filled in from the merit list the same gets exhausted, or if during the span of one year from the date of publication of such list all the 11 vacancies are not filled in, the moment the year is over the list gets exhausted. In either event, thereafter, if further vacancies are to be filled in or remaining vacancies are to be filled in, after one year, a fresh process of recruitment is to be initiated giving a fresh opportunity to all the open market candidates to compete. This is the thrust of rule 41. It is in consonance with the settled legal position as we will presently see. We cannot agree with the learned counsel for respondents that during the period of one year even if all the 11 vacancies are filled in for which requisition is initiated by the State in the present case and if some more vacancies arise during the one year, the present list can still be operated upon because the Commission has sent the list of 20 selected candidates. As discussed above, the candidates standing at serial nos. 12 to 20 in the list can be considered only in case within one year of its publication, all the 11 vacancies do not get filled up for any reason. In such a case only this additional list of selected candidates would serve as a reservoir from which meritorious suitable candidates can be drawn in order of merit to fill up the remaining requisitioned and advertised vacancies, out of the total 11 vacancies. If that cannot be done for any reason within one year of the publication of the list, even this reservoir will dry up and the entire list will get exhausted. We asked learned counsel for respondents State to point out whether after the letter at page 87, there was any further communication by the State to the Commission to initiate process for recruitment to additional anticipated vacancies. He fairly stated that no further request was sent. That letter at page 87 is the only material for this purpose since that is the basis for the recruitment made by the Commission in the present case. In this connection, we may usefully refer to a decision of this Court in the Case of State of Bihar v. Madan Mohan Singh & Ors. (AIR 1994 SC 765). In that case appointments to the posts of Additional District and Sessions Judges were being questioned. The question was whether appointments could be made to more than 32 posts when the selection process was initiated for filling up 32 vacancies and whether the merit list of larger number of candidates would remain in Operation after 32 vacancies were filled in. Negativing the contention the such merit list for larger number of candidates could remain in operation after 32 advertised vacancies were filled in, K.

Jayachandra Reddy, J. made the following pertinent observations:-

"Where the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list of 129 candidates prepared in the ratio of 1: 4 on the basis of the written test as well as viva voce will hold good only 'for the purpose of filling up those 32 vacancies and no further because said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process."

Reliance placed by the learned counsel for respondents in the case of Asha Kaul (Mrs) and Anr. Vs. State of Jammu and Kashmir and Ors. (1993 (2) SCC 573), is of no avail. In that case the very same Jammu and Kashmir Government had sent a requisition to the Public Service Commission to select 20 candidates for the posts of Munsiffs in accordance with the High Court requirement. Therefore, the Commission advertised for recruitment to the said posts and held written test and oral interview. The Commission having selected 20 candidates in the order of merits and also having prepared a waiting list of candidates, the State of Jammu and Kashmir did not appoint even selected 20 candidates on these advertised posts. The High Court rejected the writ petition praying for a suitable writ of mandamus to the State to fill up the remaining vacancies out of 20 for which recruitment was made. The petitioners approached this court in appeal by way of special leave. This court speaking through Jeevan Reddy, J took the view that though inclusion in the select list does not confer any indefeasible right to appointment, there was an obligation for the Government to fill up all the posts for which requisition and advertisement were given. However on the peculiar facts of the case, the court did not think it fit to interfere. This court in para 10 of the report clearly observed that by merely approving the list of 20 there was no obligation on the Government to appoint them forthwith. The appointment depends upon the availability of the vacancies. The list remains valid for one year from the date of its approval and date of publication and if within such one year any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. Though a number of complaints had been received by the Government about the selection process, if the Government wanted to disapprove or reject the list, it ought to have done so within a reasonable time of the receipt of the select list and for reasons to be recorded. Not having done that and having approved the list partly (13 out of 20 names), they cannot put forward any ground for not approving remaining list. It is difficult to appreciate how this judgment can be of any avail to the respondents. In the case aforesaid before this court there was a clear requisition and recruitment for 20 posts. The State had however chosen to appoint only 13 out of 20. The list had a life of one year till all the 20 posts were fill up. This was in consonance with rule 41. In the present case the facts are different. The requisition is not for 20 vacancies as in Asha Kaul's case but for 11 posts. There

is no requisition to fill up any anticipated more vacancies. Once the list is approved even though it may contain names of 20 candidates, the list in the present case will get exhausted once 11 vacancies for which advertisement had been issued and recruitment is made are filled up."

15. The question for entitlement of appointment of wait listed candidate has been considered by the Hon'ble Apex Court again in Sri Kant Tripathi and others v. State of U.P. and others, AIR 2001 SC 3757 in context of recruitment in higher judicial services under U.P. Higher Judicial Services Rules, 1975. While taking note of the earlier decisions rendered by it, the Hon'ble Apex Court in para 32 of the decision held as under:

"The question whether a wait listed candidate like Avinash Kumar Sharma, for the recruitment of 1990, was an issue before the Full Bench of Allahabad High Court. The High Court did not grant the relief to the wait-listed candidate and on the other hand, requested the Chief Justice of the High Court to take necessary steps for formation of a selection committee, so that appropriate number of candidates be interviewed for the 13 posts of direct recruitment to the Higher Judicial Service. The aforesaid request of the Full Bench, tantamount to have a fresh process of selection with the constitution of a selection committee under Rule 16 and necessarily. therefore, the claim of a wait-listed candidate for being appointed, stood negatived. This decision of the Full Bench has not been assailed in any higher forum and has become final, it would, therefore, be difficult for us to accept Mr. Rao's contention that in view of the vacant position, the wait-listed candidate could be appointed for the recruitment of the year 1990. A wait listed candidate has no vested right to be appointed, except when a selected candidate does not join and the waiting list is still operative, as was held by this Court in the case of Surinder Singh v. State of Punjab (1997) 7 J.T. (SC) 537. In the case of Sanjoy Bhattacharjee v. Union of India, (1997) 4 SCC 283 this Court considered the right of a wait listed candidate and held that inclusion of candidates in merit list in excess of the notified vacancy, is not justified and waiting list candidate has no right to appointment. Reliance has been placed on the decision of this Court in Virendra S. Hooda v. State of Haryana, (1999) 3 SCC 696 for the proposition that a wait listed candidate could be appointed against the available vacancies. In our considered opinion, the aforesaid decision is of no application to the case in hand. In the said case, there existed two administrative circulars which in fact had been construed for conferring the right. This Court came to the conclusion that the High Court was in error in ignoring those circulars. But in the absence of any such circular or provision in the Recruitment Rule of Higher Judicial Service, the aforesaid decision is of no assistance. Reliance had also been placed on the judgment of this Court in the case of A.P. Agrawal v. Government of NCT, Delhi, (2000) 1 SCC 600, wherein the question of filling up of the vacancy of the member of the appellant Tribunal under Delhi Sales Tax Act was under consideration. This court construed the provision of section 13(4) of the Delhi Sales Tax Act, 1978 as well as the office memorandum dated 14.5.1987, issued by the central government, and on construction of the aforesaid provisions, came to hold that a public duty is cast to fill up the vacancy as early as possible. We are not in a

position to appreciate, how this decision will be of any assistance to the wait listed candidates. Reliance had also been placed on the decision of this court in Roshni Devi and Ors. vs. State of Haryana and Ors., 1998 (8) S.C.C. 59, where under this court had observed that some margin over the advertised vacancies is permissible. That decision was given in the peculiar set of facts present there. The practice of selecting and preparing an unusually large list of candidates compared to the vacancy position, has been deprecated by this court in no uncertain terms. But in the fact situation, the court did permit some appointments to be made beyond the advertised vacancies, by exercising power under article 142, as otherwise, it would have caused great injustice to many who had been appointed. We are afraid, this decision is absolutely of no application to the case in hand. several other counsel appeared for several persons in relation to the cases concerning appointment of 1990, but they all supported the arguments advanced by Mr. Rao and, therefore, we need not reiterate the same. We, however, do not find any infirmity with the order of the division bench of the Allahabad High Court dated 24.3.1999, which is the subject matter of challenge in Civil Appeal Nos. 1657 of 2001 and 1656 of 2001. The two writ petitions filed under article 32 of the constitution, viz. Writ Petition Nos. 97 of 2000 and 460 of 1999, challenging the full court resolution dated 11.7.1998, stand disposed of accordingly."

16. In Sri Kant Tripathi's case (supra) wherein in para 34 of the decision the Apex Court has also considered the true import of the expression "vacancies likely to occur in the next two years" and held that the inclusion of vacancies on account of death, compulsory retirement, voluntary retirement, removal, dismissal and elevation of officers as Judge Allahabad High Court could not be comprehended within the meaning of the aforesaid expression. For ready reference the relevant portion of para 34 is reproduced as under:

"34. The aforesaid Division Bench judgment of Allahabad High Court, requires little consideration, in view of the interpretation given to the expression "the vacancies likely to occur in the next two years", in Rule 8 (1) of the rules. The high court in the impugned judgment has come to the conclusion that the vacancies on account of death, compulsory retirement, voluntary retirement, removal, dismissal and appointment of officers as judge of the Allahabad High Court, could also come within the expression "vacancies likely to occur in the next two years". This concept is wholly unsustainable inasmuch as nobody can anticipate as to how many people would die or how many would compulsorily be retired or removed or dismissed or even would be elevated to the High Court. The expression "vacancies likely to occur in the next two years" would obviously mean the vacancies, which in all probability, would occur. In other words, it can only refer to the cases when people would superannuate within the next two years."

17. Thus from the aforesaid enunciation of law by the Hon'ble Apex Court it is now clear that for initiating a process of selection it is necessary for the appointing authority or competent authority to determine the existing vacancies as well as the anticipated vacancies likely to occur within the selection year or within the period provided under the relevant Rules of

Recruitment of a particular service. After determination of such vacancies, the advertisement is to be made and the selection process is to be initiated only in respect of those vacancies which were advertised for the purpose of selection. Thereafter by completing the process of selection a select list is to be prepared by including the candidates to the extent of equal number of vacancies notified and available for the process of selection and advertised for the said purpose. At the most some additional vacancies notified by the government to the Commission during the process of selection and/or before it is completed, could be included in the said process but it must be indicated in the advertisement of vacancies that same may be increased in said process of selection by adding the vacancies if available during the course of selection. If Rules of Recruitment provides to include large number of candidates in the select list than the number of vacancies to be filled in for which requisition is made, it shall be open for the selection body to include such large number of candidates in the select list. If no such provision has been made in the Recruitment Rules or Government orders holding the field on subject matter, the select list is to be prepared and confined only to the extent of number of vacancies notified and advertised for such selection. But for the purpose of meeting out emergent situation arising on account of non joining of candidates of the select list the persons placed below in merit of the aforesaid select list though otherwise found fit for selection and appointment, their names may be placed in the waiting list.

18. The candidates of such waiting list may be pushed up for appointment only against those vacancies which may have arisen out of non-joining of the candidate of select list but in all the circumstances the select/waiting list has to be confined in respect of vacancies advertised and/or included in the process of selection as the process of selection is strictly linked with the number of vacancies notified and advertised for such selection. If the appointment is made against those vacancies which were advertised and/or also included in the process of selection, from the select list so prepared, the select list so prepared shall get exhausted. Thus the select list shall remain operative till the persons included in the select list are appointed to fill up those posts which were included in the process of selection and advertised for such selection or till the life of the select list as provided under the Rules of Recruitment or government order expires, whichever is earlier. Meaning thereby if the select list has been prepared for filling up particular number of vacancies by including a particular number of candidates, say 19 vacancies as in the instant case, if candidates selected were offered appointments and in pursuance thereof they joined the post and filled up all those vacancies even earlier to the life of the select list expired, the select list stood exhausted on filling up those 19 vacancies even if the life of select/waiting list still remains subsisting and certain number of more candidates stil remain and left out without appointment. The select list would also be stood exhausted if the life of select/waiting list expired despite certain vacancies advertised and included in the process of selection still remains unfilled for any reason. In other words, if requisition and consequent advertisement is made for filling up certain number of vacancies which were included in such process of selection and

select list was prepared by including equal number of candidates or more candidates, the moment all the requisitioned and advertised vacancies are filled up from the merit list or select list same get exhausted, or during the subsistence or life time of the select list all the vacancies are not filled in, the moment life time of select/waiting list is over, the select/waiting list gets exhausted. Thus in either event, both the ways select/waiting list shall stand exhausted as a result of which such merit/select list shall be inoperative even if all the candidates included in the list could not be appointed and certain number of candidates left out for appointment or the posts advertised could not be filled in. Thereafter the candidates included in the select/waiting list cannot claim their appointment against any other vacancies or future vacancies, merely on account of their empanelment in the select/waiting list because of the simple reason that the selection was meant to fill up only particular number of vacancies advertised and included in the process of such selection, but if any selected candidate fails to join the post for any reasons in pursuance of letter of appointment and/or his candidature is cancelled after selection on any grounds like in verification of character and medical fitness and the advertised vacancies remained unfilled on account of non-joining of such candidates only in that eventuality, the candidates who rank lower in the merit list/select list or included in the waiting list can be pushed up to be offered appointment against such vacancies arising out of non-joining of such candidate during the life time of select/waiting list. If the time of waiting list expires and government does not send requisition for sending the names of selected candidates from Commission within life time of waiting list or belated requisition comes from government after expiry of period of select/waiting list, the Commission can decline to recommend the names of selected candidates for appointment from amongst the remaining candidates of select/waiting list.

19. But if all the selected candidates who had been offered appointment against the vacancies included in the process of process of selection join the post to fill up such vacancies though shortly thereafter any or some of the candidates resign from the post even if during life time or subsistence of select/waiting list, such vacancies stood exhausted on account of such joining of selected candidates and cannot be filled up either from the remaining candidates of select list who ranked lower in order of merit or from the waiting list despite their being included in select/waiting list and life of select/waiting list still subsists. Such vacancies in our considered opinion would be fresh vacancies and to be carried forward for the next selection. It is also because of the another valid reason that the vacancies arising out of resignation of selected candidate in a particular selection after joining the post can neither be said to be existing vacancy for the purpose of the aforesaid selection nor it can be said to be anticipated vacancy likely to occur within stipulated period of time as provided under the Rules of Recruitment as nobody can anticipate resignation of an incumbent like other contingencies of similar nature such as death, compulsory retirement, voluntary retirement, dismissal and removal etc. of any incumbent. Therefore, we are of the considered opinion that the vacancies arising on this ground i.e. on resignation of selected candidate after his

joining cannot be filled up from the candidates included in the select list or waiting list even though it has occurred during life time of such select/waiting list or select/waiting list is still operating.

20. At this juncture we would also like to make it clear that only those vacancies could be included in the process of selection which were either existing at the time of initiation of process of selection or could be anticipated to be occurred during selection year as provided under particular rules of recruitment. Since no other vacancies could be anticipated except the vacancies arising out of superannuation, therefore, only such vacancies would be anticipated vacancies and can be filled up from the select list during the life time of select list provided such vacancies were included and advertised for the purpose of such selection. Thus the vacancies occurred on account of death, compulsory retirement, voluntary retirement, dismissal, removal of any incumbent during the life time of waiting list, can not be filled up from such select/waiting list. In our considered opinion, as indicated herein before, similarly the vacancies arising out of resignation of a selected candidate after his joining would be a fresh vacancy and cannot be filled in from the aforesaid select list, rather to be carried forward for the fresh process of selection and to be filled up by affording opportunity to compete all eligible and qualified candidates. This is crux of the matter.

21. Thus the submissions of learned counsel for the petitioner that the petitioner being empanelled at serial no.2 in the waiting list of candidates belonging to general category, on account of resignation of two general category candidates within a period of one year, i.e. during subsistence of waiting list, he was entitled for appointment against any one of such vacancies is wholly misplaced and untenable and without any substance. The decision of the Division Bench of this court rendered in Ved Prakash Tripathi's case (supra), relied upon by the learned counsel for the petitioner in support of his submission is not applicable in this case rather distinguishable on facts. The facts of the aforesaid case as noted in para 3 of the decision is that for the post of Assistant Prosecuting Officer a selection was held by the Commission which could be completed on 27.2.1998. The Commission had recommended 99 candidates equal to the number of vacancies for which selection was held. It appears that out of aforesaid recommended candidates total 7 candidates did not join the post, but the State Government sent requisition on 27.7.1999 only for three additional names out of the candidates who appeared in Assistant Prosecuting Officers Examination 1996.The Commission admittedly forwarded the names of three additional candidates on 20.10.1999 and no reason had been shown as to why the Government requisitioned only three additional names whereas seven candidates had not joined pursuant to the recommendation made by the Commission. The candidature of four candidates were cancelled on 19.1.2000. The State Government vide letter dated 20.2.2000 requested the Commission to forward four additional names. The Commission declined to make any recommendation in pursuance thereof on the ground that no name could be sent beyond the period of one year from the date of recommendation of the last candidate which was done on 20.1.1999.

In the aforesaid case the question in issue was entitlement of appointment of the wait listed candidates against vacancies arising out of non joining of the candidates of particular select list whereas in the instant case the controversy rests on account of resignation of the selected candidates after their joining the post and resigned during the subsistence of waiting list. Therefore, the decision of the aforesaid case can be of no assistance to the case of the petitioner.

22. Another decision upon which learned counsel for the petitioner has placed reliance in support of the case of the petitioner is a decision of Division Bench of this Court rendered in Ravindra Nath Rai and others case (supra) is also distinguishable on facts wherein there was no such waiting list prepared by the Police Headquarters in the recruitment on the post of Sub Inspector of Police. A select list/merit list of eligible and qualified candidates was prepared and the vacancies were increased after selection. From the aforesaid merit list certain more candidates were picked up to fill up those increased posts and they were also sent for training. No life of said merit list was prescribed. In such peculiar facts and circumstances of the case aforesaid decision was rendered by this court. Thus the principles laid down therein has no application to the facts of instant case particularly in view of law enunciated by Hon'ble Apex Court referred herein before which could not be brought to the notice of the Division Bench of this court and also on account of subsequent pronouncements of Hon'ble Apex Court on the question in issue referred herein before, therefore, the same can be of no assistance to the case of the petitioner.

23. Now applying the aforesaid principles on facts of the instant case it is clear that undisputably, advertisement was published in the year 1996 initially for filling up 11 vacancies for the post of Assistant Registrar under the Uttar Pradesh State Universities (Centralised) Service Rules, 1975 which were increased from 11 to 19 during the process of selection. On completion of process of selection a select list containing names of 19 candidates was prepared by the Commission after holding the written examination and the interview. According to the averments made in paragraphs 4 and 11 of counter affidavit filed on behalf of Commission, the names of all 19 candidates for filling up 19 vacant posts of Assistant Registrar were sent to the State Government vide letter No. 101/2/Misc/E-1/94-95 dated 20 November, 1997. It appears that thereafter letters of appointment were issued by the Government to selected candidates to join the posts in pursuance of the said selection and recommendation made by the Commission. Subsequently thereafter, two candidates namely Sri Kamlesh Kumar Shukla and Sri Anand Kumar belonging to general category, resigned from service on 5.9.1998 and 2.12.1998 respectively that is, within one year of their joining on their posts. The State Government did not ask from Commission for recommending any name from waiting list for appointment on the said vacant posts for quite long time. Ultimately it appears that on various representations made by the petitioner the Government had sent a letter dated 28.7.2001 to the Commission asking to send 3 names from the waiting list for filling up three vacancies out of which one was caused due to non-joining of a scheduled caste candidate and remaining

two vacancies were caused due to resignation of two candidates belonging to general category. On receipt of the aforesaid letter of the State Government, Commission sent reply to the State Government that since the period of about four years had elapsed, and one year life time of the waiting list too had expired, the requisition of the government is barred by time consequently, no name could be recommended for appointment on the said vacancies from the waiting list. The communication further states that since two vacancies arose due to resignation of 2 general category candidates who even if resigned within one year after their joining the posts, even then in view of para 3 of government order dated 23.12.1997, such vacancies cannot be filled up from wait listed candidates even if the prescribed period of waiting list still remains to be expired and waiting list survives or operating. Being a general category candidate, the petitioner has claimed his appointment against one vacancy caused due to resignation of general category candidates as aforesaid and aggrieved with the action of the Commission, he filed the instant writ petition.

24. We have gone through the government order dated 31.1.1994 which in para 5 specifies the life of a waiting list for one year from the date of its preparation and last recommendation made to the State Government for appointment from select list and a time schedule has also been given for making appointment and cancellation of candidature of selected candidates who had been offered appointment in pursuance of such selection and could not join the post within time frame or extended joining time. In the government order dated 23.9.1997 which appears to have been issued on the basis of queries made from the other department of the government, a policy decision of the government is incorporated in para 3 thereof which provides that if a selected candidate after joining the post offered in pursuance of the selection, resigns from service, the select list in respect of such candidate stood exhausted and no candidate from the waiting list to substitute him can be recommended for appointment even if the vacancy occurred during life time of waiting list and waiting list still survives by that time. This policy decision of the government, in our considered opinion, is quite in consonance with the settled legal principle laid down by the Apex Court from time to time and the law enunciated herein before. Since in counter affidavit the aforesaid government orders were shown to have been annexed which in fact were not attached along with it, we desired the counsel appearing for the Commission to supply the government orders which he had supplied to us and are now part of the records.

25. In view of the aforesaid settled legal position and having regard to the facts of the case, the submission made by learned counsel for the petitioner that the petitioner is entitled to be appointed against one of the vacancies caused owing to resignation of two general category candidates within one year during the life time of waiting list, in our considered opinion, is wholly misplaced, without substance and untenable in law and cannot be accepted. The petitioner being a candidate of general category could also not be held entitled for appointment against one vacancy caused on account of non joining of one scheduled caste

candidate as the same could be filled only by a wait listed candidate of schedule caste if available and requisition could have been made by the State Government within one year life time of the waiting list and not from any other wait listed candidate of general category or other categories. But there is nothing on record to show that State Government has sent any such requisition within one year from the date of first and last recommendation made by the Commission which in fact was made on 20.11.1997. Contrary to it the requisition of State Government was sent to the Commission on 28.7.2001 much after expiry of life time of the waiting list after lapse of about 4 years. Therefore, in our considered opinion the petitioner is not entitled for appointment against any of such vacancies referred to herein before.

26. Thus in view of foregoining discussion we are of considered opinion that the impugned action of Commission in not recommending the name of petitioner who is wait listed candidate of general category against said vacancies arose on account of resignation of two candidates of general category within one year of their joining during subsistence of waiting list and on account of non joining of one candidate of schedule caste in given facts and circumstances of the case stated herein before is fully justified and according to law and does not call for any interference in exercise of jurisdiction under Article 226 of the Constitution of India.

27. For the aforesaid reasons the writ petition fails and accordingly dismissed.

28. There shall be no order as to costs. **Petition Dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2005

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 507 of 2000 (Tax)

Gopal Das ...Petitioner
Versus
The Assessing Officer,Trade Tax, Kanpur ...Respondent

Counsel for the Petitioner:
Sri M. Manglik

Counsel for the Respondent:
Sri M.R. Jaiswal
S.C.

U.P. Trade Tax Act-Section 21 Re-assessment- Petitioner doing business of manufacture and sales of agricultural implements and other house hold goods known as kharal. Assessing authority held that petitioner not manufactured agricultural implements and had sold imported iron steel and iron-after 4 years, by order dt. 20.04.04 issued show cause notice on the basis of same material of original assessment–no fresh material by which the believe could be formed impugned. Notice including entire proceeding quashed.

Held: Para 12 and 14

For the reasons stated above, we are of a considered opinion that the proceeding under Section 21 was initiated on the basis of same material, which were in existence at the time of original assessment proceeding only on account of change of opinion. There was no fresh

material with the Assessing Authority at the time of issue of notice, on the basis of which, a believe could be formed about the escaped assessment, which is a condition precedent for initiation of proceeding as referred hereinablve. The survey dated 14.9.1995 had been considered in detail by the Assessing Authority in the assessment order and by the Appellate Authority and with regard to the self manufactured Kharal, there was no material on the basis of which, a believe could be formed by the Assessing Authority that it was liable to tax as a Mill Store @ 10%.

In the result, writ petition is allowed. The notice under Section 21 of the Act (Annexure-5 to the writ petition) and the entire proceeding under Section 21 of the Act for the assessment year 1995-96 are quashed.

Case law discussed:

UPTC 2000 – 210
UPTC 2004 – 347
2002- UPTC 140
1994 UPTC–1041
AIR 1980 SC–1552
2003 UPTC–1269
41 ITR–191
2002 UPTC–210
2003 UPTC–140

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

1. The present writ petition under Article 226 of the Constitution of India, the petitioner has prayed for quashing the notice under Section 21 of U.P. Trade Tax Act (hereinafter referred to as Act) dated 28.4.2000 for the first year 1995-96 (Annexure – 5) to the writ petition.

2. The brief facts of the case are as follows: -

The petitioner was a registered dealer under Section 8 – A of the Act was engaged in the business of manufacture and sales of agricultural implements and house hold goods commonly known as Kharal (Imamdasta). During the course of assessment proceedings, petitioner disclosed total sales at Rs.1,30,25,142.25p and taxable sales at Rs.4,12218.90 within the State of U.P. and had not disclosed any interstate sales. The total sale comprises sales of manufactured agricultural implements at Rs. 1,14,78,623.85p and U.P. purchased agricultural implements at Rs. 734691.00p sales of house hold goods ar Rs.1,49,971.90, sales of Iron Scrap at Rs. 2,62,309/-. Tax was admitted on the sales of house hold and sales of Iron Scrap. An assessment order was passed for the assessment year 1995-96 both under the U.P. Trade Tax Act as well as under the Central sales Tax Act by the Trade Tax Officer, Sector 13, Kanpur vide order dated 27.3.1997. While passing assessment order, Assessing Authority had considered the survey dated 14.9.1995 made by the S.T.O. (S.I.B.) and on the basis of the said survey and other material, books of account had been rejected and the turnover of the house hold Kharal had been estimated at Rs. 3 Lacs and the turnover of Iron Steel (Scrap) had been estimated at 6 Lacs. Assessing Authority, however, granted exemption on the turnover of manufactured agricultural implements and locally purchased agricultural implements for Rs.1,26,12,861.35p. Against the assessment order, petitioner filed appeal before the Deputy Commissioner (Appeal), Trade Tax, Kanpur. Appeal was allowed and the books of accounts and the disclosed turnover was accepted vide order dated 13.4.1995.

3. After passing assessment order, Assessing Authority initiated proceeding under Section 21 of the Act on the basis

of information received from S.T.O. (SIB). Assessing Authority passed an order under Section 21 of the Act on 18.3.1988, on the basis of information which was alleged to have been sent on the basis of survey dated 26.2.1997, Assessing Authority inferred that the petitioner had not manufactured agricultural implements and held that the petitioner had not manufactured agricultural implements and had sold imported Iron Steel and Iron Steel purchased against Form 3-B and accoudingly estimated the turnover at Rs. 1,30,000,00/- of the imported Iron Steel which was alleged to have not been used in the manufacturing of agricultural implements. Against the said order, petitioner filed appeal before the Deputy Commissioner (Appeal) which was allowed vide order dated 30.11.1998 and the order passed under Section 21 of the Act had been quashed and the petitioner was declared non taxable. Respondent again issued a notice under Section 21 of the Act. In the Show – Cause – Notice dated 20.4.2004, following reasons have been given –

१. आय के वर्ष ९५-९६ के मूल कर-निर्धारण आदेश नियम ४१-८ सपठित धारा ३० दिनांक २७-३-९७ को पारित किया गया था जिसमें आप द्वारा सं०१,१४,७८,८२३-८५ की स्वनिर्मित कृषियन्त्र की बिक्री घोषित की गयी थी जिस पर अनियमित रूप से कर मुक्ति प्रदान कर दी गयी है, जबकि व्यापार कर अधिकारी बि०अनु०शा० प्रथम इकाई कानपुर से सर्वेक्षण दिनांक १४-९-९५ के अनुसार कृषियन्त्रों के निर्माण का कार्य होता नहीं पाया गया था। अतः आप कारण बतायें कि क्यों न आयातित आयरन एण्ड स्टील की बिना कोई निर्माण के उसी रूप में बिक्री मानते हुए नियमानुसार ४ प्रतिशत की दर से कर आरोपित कर दिया जाये।

२. आप द्वारा स्वनिर्मित खरल इमामदस्ता की बिक्री ३,००,०००/- कर योग्य निर्धारित की गयी थी किन्तु इस पर हाउस होल्ड गुडस की बिक्री की भांति त्रुटिवश ७.५ प्रतिशत की दर से कर आरोपित हो गया है जबकि नियमानुसार इस पर मिल स्टोर और लोहे से बनी वस्तुएं जिसके अन्तर्गत लोहे का इस्पात के तार नहीं आते हैं, किन्तु इसके अर्न्तगत लोहे या इस्पात का ऐसा माल से जो इस अनुसूची की किसी अन्धमद के अन्दर न आता हो की श्रेणी में नियमानुसार इस १० प्रतिशत की दर से सरचार्ज सहित कर आरोपित होना चाहिए। अतः कारण बतायें कि क्यों न उक्त खरल की बिक्री पर १० प्रतिशत की दर से नियमानुसार कर आरोपित कर दिया जाय।

4. Being aggrieved by the notice under Section 21 of the Act on the aforesaid ground stated in the notice, petitioner filed the present writ petition. Counter and Rejoinder Affidavits have been exchanged.

5. Heard Sri M.Manglik, learned Counsel for the petitioner and Sri M.R. Jaiswal, learned Standing Counsel appearing on behalf of the respondent. Learned Counsel for the petitioner submitted that the survey dated 14.9.1995 had been considered by the Assessing Authority in detail while passing the assessment order dated 27.3.1997. He submitted that on consideration of the entire survey report, books of account had been rejected, but the turnover of self manufactured agricultural implements and the turnover of purchased agricultural implements had been exempted. In the Appellate order dated 13.4.1998 also the survey dated 14.9.1995 had been considered and the petitioner's books of account and the disclosed turnover have been accepted. He further submitted that in the order dated 18.3.1996 passed under Section 21 of the Act, Assessing Authority levied tax on the turnover of Iron Steel which is alleged to have not been used in the manufacturing of agricultural implements on the ground that the petitioner had not manufactured agricultural implements. The Appellate Aurthority whicle allowing the appeal vide order dated 30.11.1998 again considered the survey dated 14.9.1995

and accepted the claim of the petitioner about the manufacturing of the agricultural implements and accordingly, order of the Assessing Authority passed under Section 21 of the Act had been quashed. He submitted that in the notice same survey dated 14.9.1995 had been made basis which has been considered in detail in the assessment order under section 7 of the Act, appellate order under section 21 of the Act. Thus notice under Section 21 of the Act is wholly unwarranted. He submitted that the allegations of the Assessing Authority that the self manufactured Kharal (Imamdasta)o had been taxed as a house hold goods @ 7.5% while it should be taxed @ 10% as a Mill Store is also unwarranted, inasmuch as, it is only on account of change of opinion and there was no material on the basis of which, such view could be taken. He submitted that the notice under Section 21 of the Act had been issued on the basis of the same material which was available at the time of assessment proceedings and there was no fresh material on the basis of which a believed could be formed about the escaped assessment. He submitted that the notice was issued merely n the basis of change of opinion. Which is wholly unwarranted. In support of his contention, he relied upon the Division Bench decision of this Court in the case of **Royal Trading Company Vs. reported in UPTC 2000 page 210** and the Division Bench decision in the case of **M/S Ratan Industired Pvt. Ltd. Vs. Addl. Commissioner of Trade Tax reported in 2004UPTC page 347.** Learned Standing Counsel submitted that the initiation of proceeding under Section 21 of the Act was wholly justified. He submitted that though, the survey dated 14.9.1995 was considered at the time of assessment proceedings, but it was considered fro rejecting the books of account and it has not been considered othat at the time of survey, manufacturing of agricultural implements was not found leading to the inference that no manufacturing of agricultural implement was carried on at all. He submitted that the self-manufactured Kharal is liable to tax as a Mill Store, while it had been wrongly assessed @ 7.5% as a house hold goods. In these circumstances, he submitted that the initiation of proceedings under Section 21 of the Act was justified. In Support of his contention, he relied upon the Division Bench decision of this Court in the case of **reported in 2002 UPTC page 210 and 2003 UPTC page 140.**

6. Having heard learned Counsel for the parties. We are of the considered opinion that the initiation of proceedings under Section 21 of the Act is wholly illegal, without any basis and unwarranted. Section 21 (1) and (2) reads as follows: -

Section 21 (1) and (2)

"(1) If the Assessing Authority has reason to believe that the whole or any part of the turnover of a dealer, from any assessment year or part thereof, had escaped assessment to tax or has been under assessed or has been assessed to tax at rate lower than that at which it is assessable under this Act, or any deductions or exemptions has been wrongly allowed in respect thereof, the Assessing Authority, after issuing notice to the dealer and making such inquiry as it may consider necessary assess or re-assess the dealer to tax according to law."

"(2) Except as otherwise, provided in this Section, no order of Assessment or re-assessment under any provision of this Act for any assessment year shall be made after the expiration of two years from the end of such year or March, 31, 1998 whichever is later :

Provided that if the Commissioner on his own or on the basis of reasons record by the Assessing Authority is satisfied that is just and expedient so to do authorizes the Assessing Authority in that behalf, such assessment or re-assessment may be made after the expiration of the period aforesaid but not after the expiration of eight years from the end of such year notwithstanding that such assessment or re-assessment may involve a change of opinion."

7. It appears that in the present case, limitation of four years have been expired, therefore, proceedings under section 21 of the Act had been initiated after obtaining approval from Additional Commissioner under the proviso of Section 21 (2).

8. In this case of **Royal Trading Company Vs. CST,** petitioner was a dealer of leather sheets and leather boards. Original assessment was completed assessing the turnover of leather sheets @ 4% applicable to the leather as a declared commodity under Section 14 of the Central Sales Tax Act. A notice under Section 21 was issued to reassess the turnover at a higher rate on the ground that the leather sheets sold by the petitioner was not leather as defined in Section 14 of the Central Sales Tax Act. Validity of notice was challenged in the writ petition. This Court held as follows:

"Therefore, action under Section 21 of the Act cannot be taken on the whims of the Assessing Officer by resorting to conjecture of imagination. He has to have before him the facts which are germane to the issue and on the basis of which, a rational man can have reason to believe that the whole or any part of the turnover has escaped assessment or has been under assessed. In Income Tax Officer Vs. Madnani Engineering Works Ltd. (1979) 118 I.T.R. 1: 1979 U.P.T.C. 1107 (SC), the Hon'ble Supreme Court which dealing with some what similar provision under Section 147 of the Income Tax Act, 1961 held that the existence of reason to believe on the part of the I.T.O. was a justifiable issue and it was for the Court to be satisfied whether in fact the I.T.O. had reason to believe that income had escaped assessment. In Joti Parshad Vs. State of Haryana J.T. 1992 (6) S.C. 94 the Hon'ble Supreme Court while dealing with the meaning of expression reason to believe in Section 26 of the Indian Penalo Code helod that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned. In Income Tax Officer Vs. Lakhani Mewal Dut, (1976) 103 I.T.R. 437, 1976 U.P.T.C. 809 (SC), the Hon'ble Supreme Court held that the reasons for the formation of the belief contemplated by Section 147 (a) of the Income Tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of

his belief. The Hon'ble Supreme Court further observed that though it is true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, however, vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. This view was reiterated by the Hon'ble Supreme Court while dealing with the provisions of Section 21 of the U.P. Trade Tax Act in Commissioner of Sales Tax Vs. Bhagwan Industries (P) Ltd., (1973) 31 STC 293 in which it was held that reasonable rounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under this section. If however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the Assessing Authority would be clothed with jurisdiction to take action under this section.

"This aforesaid observation of the Hon'ble Supreme Court also negative the stand taken by the learned Standing Counsel. That it lays down is that the Assessing Officer is bound to do his home work well and find out cogent reason for arriving at a tentative conclusion based on a reasonable belief that income has escaped assessment. In the present case, however, the Assessing Officer has patently rushed into action under Section 21 without undertaking any research or investigation so as to bring on record material which may lead to a reasonable belief that the turnover has escaped assessment or has been under assessed. Reliance was also placed by the learned Standing Counsel on Commissioner of Sales Tax. M/S Sonpal Sanjay Kumar Vs. Sales Tax Officer,o 1997 U.P.T.C. 73. There is nothing in those cases to support the standing set up by the learned Standing Counsel."

"It was Contended that in the assessment orders initially framed, the Assessing Officer blindly accepted that the leather sheets which the petitioner sold were leather and that, therefore, action under Section 21 was justified. This contention has no force. May be in the original assessment the Assessing Officer did not investigate into fact but that would not justify a reopening of the assessment in a mechanical manner without bringing on record material that could lead a rational person to believe that what was actually sold was not leather. As pointed out above, the Assessing Officer has not collected any such material and is merely relying on a judgment of Punjab and Haryana High Court without collecting material find out if the commodity sold by the petitioner was of a similar nature.

9. In the case of **Ratan Industries Pvt. Ltd. Vs. Additional Commissioner of Trade Tax reported in 2004 UPTC page 347,** petitioner was carrying on the business of manufacture and sales of C.I. Casting, M.S. Castings, Parts and Accessories and animal driven vehicle. In the original assessment proceedings, Show-Cause Notice was issued on the basis of report of Spl. Investigating Branch, Trade Tax Department that the animal driven Vehicle, Hubs, in respect of which, exemption claimed was of a size

of 340mm and 160 mm and are considered and hence, could not be treated as Hubs as animal driven Vehicle. Petitioner filed detailed reply, which was accepted, and the turnover of animal driven Vehicle Hubs was exempted from the tax. A proceeding under Section 21 of the Act was initiated on the ground that the Central Excise Department had found a diameter of Hubs and all were 920 mm while habitual Hubs of a diameter of 220 mm has been inferred that the Hubs sold by the petitioner was not animal driven Vehicle. Notice was challenged in Writ Petitioner in this Court. This Court held as follows:

"It is a well settled principle of law that the question which has been examined in detail in the original assessment proceedings and thereafter the assessment order has passed, then the said assessment order cannot be reopened under Section 21 of the Act on mere charge of opinion."

"A perusal of the original assessment order dated 30th March, 1999 for the Assessment Year 1996-97 clearly shows that in the assessment proceedings, the question of diameter of the hubs manufactured by the petitioner being 340mm (340 mm for one side and 160 mm on the other side) as well as the weight of each hubs being 20 to 21 kg. per piece was very much the subject matter of investigation vide the original assessment order dated 31st March, 1999 (Annexure 1 to the petition)."

"However, the Assessing Authority after considering of the Sales Tax Officer (SIB) report, as well as the Circular of the Commissioner, Trade Tax, U.P. Lucknow dated 26th February, 1992 has held that these hubs are normally used in animal driven vehicle and even if it can be used in other vehicles, still it is entitled for exemption under the Notification no. 7038, dated 31st January, 1985, as clarified by the State Government itself."

"Thus, the initiation of reassessment proceedings under section 21 on the ground of diameter of hubs being 312 mm to 320 mm on the basis of the report of I.I.T. Kanpur is in our opinion illegal and invalid, as it is based on mere change of opinion, and not on the basis of any fresh and cogent material."

In the case of **Palco Lining Co. Vs. State of U.P. reported in 1983 UPTC page 1116,** the Division Bench of this Court held as follows:-

"Section 21 of the U.P. Sales Tax Act enables the Assessing Authority to reassess a dealer to tax if it has reason to believe that the whole or any part if his turnover for any assessment year or part thereof has escaped assessment to tax or has been under assessed or has been assessed at a rate lower than that at which it should have been assessed or where any deduction and exemption has been wrongly allowed in respect thereof. It does not permit reassessment of turnover which, after due consideration, had been found not exigible to tax merely because the Assessing Authority subsequently comes to take a different view of the matter."

"A perusal of the order of assessment in these cases would show that the Assessing Authority had, after elaborately considering the evidence before it taken the view that what was being sold by the petitioners was nothing but cloth cut in the shape of collar. It turnover of sale was held exempt from tax Notification No. S%T 4069/X 960(4)/58, dated 25th November,1958 provided for such

exemption for 'cotton fabric of all varieties' subject to some exception."

"Irrespective of the amplitude of the language used in Section 21 of the Act reassessment proceedings are not permissible on mere charge of opinion by the taxing authority at a subsequent stage. The petitioners are right in their submission that issuance of a notice under Section 21 of the Act in the present cases was without authority of law."

In the case of **Harbans Lal Malhotra Vs. Asstt. Commissioner of Sales Tax reported in UPTC 1994 page 1041,** the stock transfer was accepted by the Assessing Authority in the original assessment proceedings by scrutinizing the transaction. Further given a notice under Section 21 of the Act with a view to levy tax on the stock transfer on the ground that the said stock transfer have been wrongly treated as stock transfer. The Division Bench of this Court held as follows :-

"We find in the present case as observed above the original assessment order disclosed the details scrutiny of all the documents of the petitioner including the agreement in question and the very basis of the assessment was on arriving at a conclusion that the documents on record reveal that the transfer of the goods amounts to stock transfer. After recording this finding, the present notice amounts to re-examining the same matter again and make a fresh enquiry in the same matter. Admittedly, nothing has been found by the authorities for the year in question, thus it would only amount to change of opinion. The authority cannot issue any notice on account of change of opinion nor in the absence of any material for the year in question."

In the case of **Delhi Cloth and General Mills Company Ltd. Vs. State of Rajasthan and another reported in A.I.R. 80 SC page 1552,** Apex Court held as follows:-

"It does not permit re-assessment of turnover which after due consideration, had been found not exigible to tax merely because, the Assessing Authority subsequently come to take different view in the matter."

In the case of **Samrat Trading Company, Mirzapur and another Vs. State of U.P. and another reported in 2003 U.P.T.C. page 1269,** following the judgment of Constitutional Bench of Hon'ble Supreme Court in the case of **Calcutta Discount Company Ltd. Vs. I.T.O. reported in 41 I.T.R. page 191 (SC),** and Division Bench decision in the case of **Harbansh Lal Malhotra Vs. Asstt. Commissioner of Sales Tax reported in UPTC 1994 page 1041,** the proceeding initiated under Section 21 of the Act only on acount of change of opinion was quashed.

On the aforesaid legal position, let us examine the facts of the case. In the present case in the original assessment order dated 27.3.1997, the survey dated 14.9.1995 made by the STO (SIB) has been considered in detail which reads as follows:-

व्यापारी के निर्माण स्थल फैक्ट्री का जांच दिनांक १४-६-९५ को व्यापार कर अधिकारी वि० अनु० शा० प्रथम इकाई कानपुर द्वारा की गयी। जांच के समय टिनशेड में ७ मशीनें जिनमें ग्रान्डर, खरीद मशीनें आदि पाई गयी, जिनमें से दो खरीद मशीनें चालू हालत में पायी गयीं। खरल इमामदत्ता का निर्माण होता पाया गया। जांच के समय भारी मात्रा में तैयार खरल बनाने हेतु रा-मैटेरियल व सेफफिनिष्ड खरल का स्टाक पाया गया। उक्त के अतिरिक्त स्टोर में जंग लगा पुराना

कड़ाही १५० पास रखा पाई गयी तथा २०० पास कढ़ाई बनाने हेतु रा-मैटेरियल पाया गया। जांच के समय हाउस होल्ड गुडन/खरल व कढ़ाई के स्टाक व उसके निर्माण हेतु प्रयोग किये जाने वाले रा-मैटेरियल व तैयार कृषियन्त्र का स्टाक नहीं पाया गया। वि० अनु० शा० अधिकारी के जांच के समय कोई लेखा हिसाब प्रस्तुत नहीं किये गये थे। बि० अनु० शा० अधिकारी द्वारा प्रेषित प्रतिवेदन में उल्लिखित तथ्यों से सुनवाई के समय व्यापारी को अवगत कराया गया, जो कि व्यापारी के विपरीत है, के सम्बन्ध में दिये गये कारण बताओ नोटिस के प्रत्युत्तर में व्यापारी ने दाखिल लिखित स्पष्टीकरण में उल्लेख किया है कि दिनांक १४-६-६५ को व्यापार कर अधिकारी वि० अनु० शा० प्रथम इकाई, कानपुर के द्वारा जांच एवं स्टाक में रा-मैटेरियल के पके न पाये जाने के बारे में कहना है कि इकाई में दिनांक १२-८-६५ को ४२८० कि० ग्रा० रा-मैटेरियल शेष था एवं उससे लेवलर्स का निर्माण हुआ था। दिनांक १४-८-६५ को १२६५ कि० ग्रा० कटिंग हो ट्रेडिंग के लिए खरीदी गयी थी। लेकिन भाव न मिलने के कारण बेचा नहीं गया था स्टाक में यही था इससे संबल के तौर पर तसले का निर्माण कराया गया था। इसमें ४६० कि० ग्रा० तसला तैयार हुआ था और ६८६ कि० ग्रा० ससले के सर्किल काटे गये थे चूँकि इसके अलावा कृषियन्त्रों के निर्माण के लिए कोई भी रा-मैटेरियल स्टाक में नहीं था। जिससे कि उत्पादन होता, केवल ६८८ कि०ग्रा० अर्द्धनिर्मित सबले के निर्माण के लिए इकाई को चलाना स्वाभाविक नहीं था अतः दिनांक १४-८-६५ से ही इकाई को बन्द करने का निर्णय किया गया दिनांक १४-६-६५ से २७-८-६५ तक इकाई में कोई निर्माण कार्य रा-मैटेरियल न होने के कारण नहीं किया गया तैयार तसला सम्पूल के रूप में व्यापारियों को दिखाया जाता रहा ताकि सहाभाव मिलने पर इस ट्रेडिंग वाले माल का ही निर्माण कराया जाय, लेकिन इसमें भी सफलता नहीं मिला क्योंकि कटिंग जंग लगी हुई एवं पुराना था, जिसे देखकर व्यापारी न कर देता था व्यापारी ने यह भी उल्लेख किया है कि एक छोटा मशीन की जरूरत था, जिससे वह खलर की उत्पादन करना चाहता था और उसके लिए बराबर प्रयासरत था कि पुराना मशीनों की खरीद की जाय दिनांक १६-८-६५ को दो पुराना लेयर खरीद मशीनें खरीदी गयी। पुनः ग्राइन्डर, हैमर बेल्डिंग मशीन की खरीद कर दिनांक २८-८-६५ से खलर का निर्माण कार्य चालू कर दिया, जो कि दिनांक ७-६-६५ तक निर्माण एवं बिक्री कार्य जारी रखा दिनांक ८-६-६५ से ११-६-६५ तक लगातार बिजली का संकट बना रहा। इसी बीच फैक्ट्री के मैगनेट पर टेलीफोन वालों ने केबिल का खुदाई शुरू कर दी, जिससे आवागमन का साधन बिल्कुल ही बन्द हो गया। इस समय भारी बरसात भी हुई थी और मार्ग विरूद्ध था इन सभी को देखते हुए फैक्ट्री की बन्दी की सूचना विभाग को देने का फैसला करके फैक्ट्री के पूर्ण रूप से कुछ दिनों तक बन्द रखने का निर्णय लिया गया और विभाग को रसीद संख्या-६०६५५ दिनांक १३-६-६५ के माध्यम से सूचित कर दिया गया। दिनांक ६-६-६५ को टाटा आयरन एण्ड स्टील कं० कानपुर से सीट कटिंग खरीदने वास्ते चेक से भुगतान दिया गया, जिसका माल रखने का समस्या बनी हुई थी वर्क शाप में बाहर माल रखने पर भीगने का डर था एवं अन्दर इतनी जगह उपलब्ध नहीं थी रास्ता खराब होने के कारण गाडी मैनगेट तक पहुँच भी नहीं सकती थी अतः दिनांक १०-६-६५ को एक गोदाम श्रीमती देवी से साकेत नगर में किराये पर लिया गया, जिसकी बातचीत २६-८-६५ को ही पक्की हो गया था और उनके द्वारा एक स्टाम्प पेपर का खरीद कर दोनों पक्षों का शर्तें लिखा गयी थी। इन गोदाम का किराया १८-६-६५ से लागू किया गया था। इस गोदाम में प्रगति एग्रिको एवं सहयोगी प्रतिष्ठान जामे दिया स्पात एण्ड का माल रखने का निर्णय लिया गया चूँकि प्रगति इग्रिको एवं जामेदिया स्पात इण्ड० दोनो का प्रोपराइटर एक ही है और दोनों फर्म खण्ड-१३ में ही थी अतः जामोदिया इस्पात एण्ड० के लेटर पैड पर गोदाम लेने की सूचना रसीद सं०-१५६१५६ दि० ५-१०-६५ के माध्यम से दी गयी है इसकी छाया प्रति भी व्यापारी से सलग्न की गयी। इस गोदाम में टाटा आयरन एण्ड स्टील कं० कानपुर से खरीदे गये माल को जो कि दिनांक १२-६-६६ से उठना चालू हुआ था रखा गया था।

व्यापारी ने दाखिल लिखित स्पष्टीकरण में यह भी उल्लेख किया है कि दिनांक १४-६-६५ को व्यापार कर अधिकारी, वि० अनु० शा० का सर्वेक्षण हुआ उस दिन उनके दादा जी का श्राद्ध था और वे घर पर थे। चूँकि फैक्ट्री बन्द की सूचना विभाग को पहले ही दे दी गयी थी और फैक्ट्री में कार्य बन्द था अतः फैक्ट्री में उनके रहने का कोई औचित्य नहीं था अधिकारी व्यापार कर से उनके भाई श्री अशोक कुमार की मुलाकात हुई थी, जो कि पटना बिहार में रहते हैं और वहां पर अपना कारोबार देखते हैं वे दिनांक १३-६-६५ को श्राद्ध में शामिल होने के लिए कानपुर आये हुये थे उन्हें हमारे व्यापार के बारे में कोई भी जानकारी नहीं थी श्रीमान व्यापार कर अधिकारी स्वेच्छा से घूम कर अपना सर्वे करते रहे स्टाक में रा-मैटेरियल न होने की बात पहले ही स्वीकार की जा चुकी है। जिसके कारण इकाई में निर्माण कार्य बन्द था यदि फैक्ट्री में रा-मैटेरियल होता तो निर्माण कार्य बन्द नहीं रखना पड़ता।

व्यापारी ने इस तथ्य का भी उल्लेख किया है कि व्यापार कर अधिकारी बि० अनु० शा० ने अपनी रिपोर्ट में ७ मशीनें जिनमें दो चालू हैं की चर्चा की है, जो कि सत्य है लेकिन स्टाक में पाये गये तसला एवं उसके रा-मैटेरियल की जो कड़ाही का रूप दिया है वह मानने योग्य नहीं है।

लेखा पुस्तकों के अनुसार स्टाक में ४६० कि० ग्रा० तसला पुराना जंग लगा हुआ जो कि लेक्सपेड माल से नमूने है तौर पर बनाया गया था एवं ५८८ कि०ग्रा० तसला के सर्किल में इन तसलों एवं सर्किलों को दिनांक १४-८-०५ को बनाया गया था। चूँकि यह रा-मैटेरियल पुराना था। इसी कारण इसके दाम नहीं मिल पाये थे और बिक नहीं सका था और इसलिए बाकी ट्रेडिंग वाले माल का उत्पादन भी नहीं किया गया था।

अतः स्टाक में पाये जाने वाला माल लाल होना स्वाभाविक था। जैसे कि श्रीमान व्यापार कर अधिकारी ने अपनी जांच रिपोर्ट में लिखा है। एक बात गौर करने योग्य यह भी है कि दिनांक ७-६-६५ को ही श्रीमान आई० सी० कानपुर का सर्वेक्षण हुआ था। उन्होंने खनर के निर्माण कार्य को देखा था एवं स्टाक में रखे हुए तसला, तसला के सर्मिल देखकर लेखा पुस्तकों में अपने हस्ताक्षर भी किये थे चूँकि उनके लाइसेन्स में घरेलू उपकरण कडाही नहीं है अतः उनके द्वारा कड़ाही बनाने का सवाल ही नहीं उत्पन्न होता है। क्योंकि कडाही में दोनों तरफ उसको उठाने के लिए हैण्डिल लगा होता है जबकि जांच के समय पाये गये माल में ऐसा कुछ भी नहीं था। व्यापारी ने यह भी तर्क दिया कि कडाई की शीट काफी मोटा होती है, जबकि तसला का शीट हल्का होता है और हल्का शीट कटिंग के बने तसले पाये गये थे। व्यापारी ने यह भी तर्क दिया कि स्टाक में पाया गया माल वास्तव में तसला ही था, अमान डी०आई०सी० महोदय ने भी सत्यापित किया था। यदि उक्त सर्वे में इकाई का कोई जिम्मेदार व्यक्ति या वे स्वयं मिलते तो व्यापार कर अधिकारी, वि० अनु० शा० को सभी तथ्यों से भली भाँति अवगत करा दिया जाता तथा जाच हेतु लेखे प्रस्तुत किये जाते।

दाखिल लिखित स्पष्टीकरण में व्यापारी ने इस तथ्य का भी उल्लेख किया है कि खलर बनाने का बात स्वीकार योग्य है क्योकि खल्लर बनाने में सभी उपकरण उनके पास दिनांक २४-८-६५ तक उपलब्ध हो चुके थे। अतः दिनांक २८-८-६५ को इसका कच्चा माल खरीद कर खल्लर का निर्माण कार्य चालू किया गया था और अगस्त माल की बिक्री का जो रूप-पत्र कार्यालय में दाखिल किया गया है उसमें दर्शाया गया था।

चूँकि रा-मैटिरियल के अभाव में कारण फैक्ट्री बन्दी थी अतः वर्कशाप में रा-मैटेरियल का न पाया जाना स्वाभाविक ही था। व्यापारी ने अभी तक दिया कि उनके यहाँ कृषियन्त्रों का निर्माण बाजार की आवश्यकतानुसार दैनिक कारीगरी से कराया गया है तथा कारीगरों को दिये गये भुगतान के सम्बन्ध में बाउचर्स बनाये गये हैं तथा लेखा पुस्तकों में नियमित रूप से उसकी पुष्टि की गयी है यह भी अनुरोध हुए तर्क दिया कि कारीगरों के लिए एक ही हाजिरी रजिस्टर रखा गया है जिसके आधार पर उनके काम करने के लिए दिन जोडकर उनकी मासिक भुगतान किया गया है क्योंकि उनके यहां कृषियन्त्र हस्तनिर्मित होते हैं अतः उनके लिए कोई मशीन की आवश्यकता नहीं पडता। यही कारण है कि उक्त सर्वेक्षण में कृषियन्त्रों के निर्माण हेतु कोई मशीन नहीं पायी गयी कृषियन्त्रों को बनाने के लिए दस ठाहे बने हुए हैं, जिन पर छेनी हथौडी की मदद से कृषियन्त्र बनाये जाते हैं इन ठाहे को सामान व्यापार कर का अधिकारी ने अनदेखा करते हुए सर्वेक्षण में उल्लेख नहीं किया। व्यापारी ने इस तथ्य का भी उल्लेख किया है कि जो कारीगण निर्माण कार्य हेतु लगाये जाते हैं कि वे अपने औजार स्वयं लाते हैं। चूंकि कृषियन्त्रों का निर्माण कार्य रा-मैटिरियल के अभाव में बन्द था। इस कारण से न तो कोई कारीगर उस समय मिला था और न ही उसका औजार कृषि यन्त्रों का निर्माण हस्त निर्मित होने के कारण मशीनों का न पाया जाना स्वाभाविक था। स्टाक में पाये गये पूर्ण निर्मित खल्लर, अर्द्धनिर्मित खल्लर एवं उसकी रा-मैटिरियल उनके लेख हिसाब स्टाक रजिस्टर के अनुसार ही है। व्यापारी द्वारा स्टाक का विवरण संलग्न किया गया है। जांच हेतु स्टाक रजिस्टर/निर्माण रजिस्टर प्रस्तुत किया गया। सर्वेक्षण पर पाये गये निर्मित खल्लर का वजन १२६० कि०ग्रा० अर्द्ध निर्मित खल्लर का वजन ११०५४ कि० ग्रा० एवं उसके रा-मैटिरियल का वजन १६७४ कि०ग्रा० है जिसकी गणना श्रीमान व्यापार कर अधिकारी ने नमों में किया है स्क्रेप की मात्रा हमारी लेखा पुस्तकों के अनुसार १३६ कि०ग्रा० था जिसे व्यापार कर अधिकारी ने लगभग १०० कि०ग्रा० माना है व्यापारी ने उल्लेख किया है कि लेखा पुस्तकों में निर्माण रहतियां का विवरण मात्रा में रखा जाता है जिसके अनुसार समस्त विवरण मात्रा में बनाये गये हैं व्यापारी ने इस तथ्य का भी उल्लेख किया है कि उनके यहां कोई भी माल कच्चा अथवा निर्मित माल को नक्शों में रखने का पद्धति नहीं है। अतः समस्त स्थिति वजन में जोड़ की गयी है।

व्यापारी द्वारा दिया गया स्पष्टीकरण मानने योग्य नहीं है क्योंकि निर्माण स्थल पर जांच अधिकारी के समक्ष कोई लेखे प्रस्तुत नहीं किये गये हैं, जबकि चालान बुक व तैयार कच्चे मान का रजिस्टर/निर्माण रजिस्टर अवश्य होना चाहिए था। जो, कि नहीं पाया गया सर्वेक्षण के समय मशीनों के पास बनी खरल १०० पीस तैयार तथा ५० पीस खरल बिना पेंदा का है मशीनों के पास १०० के०जी० स्टेप पाया गया तथा १२ सात इंच व्यास वाले २ फीट लम्बे विलेडर पडे हुए पाये गये थे तथा २०० खरले के नीचे लगने वाले ऐसे कटे पाये गये हाल में पश्चिमी तरफ व्यास के ५ फुट लम्बे सिलेन्डर लोहे के २८ पीस पाये गये, जिनका प्रयोग भी खरल बनाने में किया गया है। उक्त के अतिरिक्त ४-५ कुंतल आधा इंच व्यास के लोहे के पाइप के टुकडे तथा पूर्व दिशा में बन्द पड़ी मशीनों के पास १४४ पास बिना पेंदे के कटा पाइप रखा पाया गया। पश्चिमी दीवाल से सटे लगभग ३०० पीस तैयार खरल तथा बिना पेंदे के कटे रखे पाइप खरल निर्माण हेतु लगभग ८ टन पाये गये तथा ४ ढेर में जंग लगी कड़ाही बनाने का रा-मैटिरियल तथा हाल के बाहर २-३ ढेर में खरल बनाने का ४-६ इंच व्यास वाले पाइप सिलेन्डर लगभग २० टन रखे पाये गये तथा बाहर टिन शेड में बिना पेंदा लगा सेमी फिनिशिड खरल लगभग ४-५ रखा पाया गया जिसको देखते हुए व्यापारी द्वारा हाउस होल्ड गुडर्स सरस का जो बिक्री घोषित दी गयी है वह मानने योग्य नहीं है। सर्वेक्षण के समय पाये गये खरल के स्टाक, प्रोसेस में निर्माणाधीन खरल का स्टाक तथा खरल के निर्माण हेतु पाये गये पुराने सिलन्डर व पाइप कच्चे माल को देखते हुए सहज ही निष्कर्ष मिलता है कि व्यापारी करापवंचन के उद्देश्य से हाउस होल्ड गुडस दी अपवंचन बिक्री दी गयी है।

सर्वेक्षण के समय कृषियन्त्र का कोई स्टाक न पाये जाने तथा कृषि यन्त्रों का निर्माण होता हुआ न पाये जाने के कारण घोषित कृषियन्त्रों की बिक्री को पूर्ण रूप से मान्यता नहीं दी जा सकती है। उक्त सर्वेक्षण के समय कृषियन्त्रों का स्टाक न पाये जाने तथा निर्माण होता हुआ न पाये जाने के आधार पर घोषित कृषियन्त्रों के निर्माण/बिक्री को पूर्ण रूप से नकारा भी नहीं जा सकता है क्योंकि व्यापारी ने जिन परिस्थितियों का उल्लेख करते हुए कृषियन्त्रों के निर्माणार्थ रा-मैटिरियल न होने व कृषियन्त्रों का निर्माण न होने के सम्बन्ध में जो तर्क दिये हैं यह विचारणीय है कृषियन्त्र निर्माण हेतु सर्वेक्षण से पूर्व जुलाई के बाद माह सितम्बर में १२-६-६५ से फार्म-ख से रा-मैटिरियल की खरीद की गयी है तथा फार्म ३१ से १८-७-६५ तक खरीद की गयी है स्वाभाविक है कि उक्त रा-मैटिरियल का उपभोग माह सितम्बर ६५ से अर्थात जांच की तिथि से पहले हो चुका था व्यापारी द्वारा २७-८-६५ को हिन्दुस्तान एग्रिको, कानपुर से आयरन एण्ड स्टील का टैक्स पेड खरीद पाइप कटिंग व शीट कटिंग की गयी है। व्यापार द्वारा जांच हेतु प्रस्तुत स्टाक रजिस्टर के अवलोकन से यह तथ्य भी प्रकाश में आया कि दिनांक ७-६-६५ को टी०आई०सी० कानपुर के अधिकारी द्वारा हस्ताक्षर किये गये हैं, जिससे यह तो प्रमाणित होता है कि व्यापारी द्वारा स्टाक रजिस्टर/निर्माण रजिस्टर रखा गया है। व्यापारी ने जांच अधिकारी के समक्ष लेख प्रस्तुत न किये जाने के कारण का जो उल्लेख किया है कि उनके दादा जी का श्राद्ध था और वे घर पर थे तथा फैक्ट्री बन्द था तथा सर्वेक्षण के समय उनके भाई अशोक कुमार जो मिले थे। वह १३-६-६५ को श्राद्ध में शामिल होने पटना से कानपुर आये थे जिन्हें व्यापार से सम्बन्धित कोई जानकारी नहीं था तथा कोई एकउन्टेन्ट अथवा अन्य कोई जिम्मेदार व्यक्ति न मिलने के कारण ही लेखे प्रस्तुत नहीं किये जा सके थे और फैक्ट्री में स्टाक उपलब्ध स्टाक के बारे में सही जानकारी जांच अधिकारी को नहीं दी जा सकी थी। व्यापारी के इस तर्क में भी बल प्रतीत होता है कि उनके द्वारा उक्त वर्णित परिस्थितियों वश निर्माण कार्य बन्द किये जाने के सम्बन्ध में कार्यालय रसीद सं. ६०६५६ दिनांक १३-६-६५ को रसीद का फोटो प्रति प्रस्तुत की गयी है जिसकी फोटो प्रति भी पत्रावली पर उपलब्ध है। इस प्रकार से यह निष्कर्ष निकालना कि इनके द्वारा कृषियन्त्रों का निर्माण/बिक्री नहीं की गयी है। न्यायसंगत न होगा क्योंकि जो बिक्री घोषित की गयी है उसका अधिकांशतः भुगतान चेक/ड्राफ्ट से प्राप्त हुआ है तथा लेखों में नियमित रूप से इन्द्राज किया गया है। रू०७५१६७६-५० का आदेश सेल करना प्रदर्शित किया गया है उसके सम्बन्ध में कोई विवरण प्रस्तुत न किये जाने के सम्बन्ध में दिये गये कारण बताओ नोटिस के प्रत्युत्तर में व्यापारी ने दाखिल लिखित स्पष्टीकरण में उल्लेख किया है कि नकदी बिक्री स्थानीय एवं बाहर से व्यापारियों को की गयी है। व्यापारी ने उल्लेख किया है कि क्रेता व्यापारी माल एवं भाव देखता है तथा मन पसन्द आने पर नकद रू० देकर माल ले जाता है नकदी बिक्री के सम्बन्ध में व्यापारी ने नियमित रूप से कैशबुक में इन्द्राज किये जाने का उल्लेख किया है तथा जांच हेतु कैशमीमो बुक व कैशबुक प्रस्तुत किया तथा कैश सेल्स के सम्बन्ध में सूची दाखिल की।

व्यापारी द्वारा जो कैश सेल्स घोषित की गयी है उसको पूर्ण रूप से मान्यता नहीं दी जा सकती क्योंकि प्रस्तुत कैश मीमो के अवलोकन से पाया गया कि व्यापारी ने क्रेता व्यापारी के सम्बन्ध में कोई पूर्ण विवरण अंकित नहीं किया है। इस प्रकार से व्यापारी द्वारा हाउस होल्ड गुडस व स्क्रेप को जो कैश सेल्स की गयी है उसको भी पूर्ण विवरण व सत्यापन के अभाव में मान्यता नहीं दी जा सकती है। व्यापारी द्वारा जो कैश सेल्स घोषित की गयी है उसमें क्रेता व्यापारी का पूर्ण नाम पता अंकित नहीं है, जिससे कि किसी स्तर पर सत्यापन सम्भव हो सके। अस्पष्टतः व्यापारी द्वारा कैश सेल्स की आड में कृषियन्त्रों की बिक्री न करते हुए आयरन एण्ड स्टील की तथा हाउस होल्ड गुडस की अपवचित बिक्री की गयी है तथा कर देयता से बचने के लिए तथा उसको नियमित करने के लिए कैशमीमो जारी करते हुए कैश सेल्स घोषित की गयी है।

जाँच सर्वेक्षण के समय पाई गयी मशीनों का खरीद के सम्बन्ध में स्थिति स्पष्ट करने हेतु दिये गये कारण बताओ नोटिस के उत्तर में व्यापारी ने उल्लेख किया है कि फैक्ट्री में ४ लेख मशीन जिनमें दो चालू हालत में है, एक ग्राइन्डर मशीन, एक हैमर मशीन एवं एक ड्रिल मशीन है यह सातों मशीनें स्थायी रूप से टीनसेड के नीचे पडी हुई है। एक वेलडिंग मशीन है जो कि अस्थायी है। इसे भीतर बाहर कहीं भी उठाकर रखा जा सकता है। मशीनों के सम्बन्ध में व्यापारी ने उल्लेख किया है कि दो लेख मशीने पहले दी थी जो दि० १-७-६४ एवं ८-५-६५ को खरीदी गयी थी मशीनें पूर्ण रूप से चालू नहीं थी अतः इनके उपकरण धीरे-धीरे खरीदे गये दिनांक १६-८-६५ को सैनिक ट्रेडर्स फर्रूखाबाद से पुरानी मशीनों को क्रय किया गया जिनसे खल्लर निर्माण किया गया है व्यापारी ने मशीनों की खरीद के सम्बन्ध में बाउचर/बिलों को जाँच हेतु प्रस्तुत किया। अतः उक्त के आधार पर कोई विपरीत निष्कर्ष निकालना न्यायसंगत न होगा।

उपरोक्त समस्त तथ्यों के विवेचन से यह स्पष्ट रूप से निष्कर्ष निकलता है कि व्यापार कर अधिकारी, वि० अनु० शा० द्वारा किये गये जाँच सर्वेक्षण के समय जो स्टाक निर्मित/अर्द्धनिर्मित तथा रा-मैटिरियल पाया गया था उसका तुलना में व्यापारी द्वारा हाउस होल्ड गुडस की बिक्री घोषित नहीं की गयी है और जाँच के समय कोई भी लेखा हिसाब यही तक स्टाक रजिस्टर चालान बुक आदि नहीं पाये गये। यहाँ यह भी उल्लेख करना अनुचित न होगा कि व्यापारी द्वारा वि० अनु० शा० अधिकारी कि समक्ष सर्वेक्षण पश्चात भी कोई लेख प्रस्तुत नहीं किये गये। अतः मेरे समक्ष जो लेखे प्रस्तुत किये गये है, उन्हें उक्त विवेचित कारणों वश पूर्ण रूप से मान्यता नहीं दी जा सकता है।

अतः उपरोक्त वर्णित समस्त तथ्यों की पुष्टि भूमि में व्यापारी द्वारा घोषित बिक्री को अस्वीकार करते हुए श्रेष्ठतम न्याय एवं विवेक से सम्पूर्ण कर योग्य बिक्री ६००००-०० की निर्धारित की जाती है, जिसमें से ६००००-०० की आयरन एण्ड स्टील/स्क्रेप की तथा ३००००-०० का हाउस होल्ड गुडस खरल का कर योग्य बिक्री निर्धारित की जाती है। प्रान्त बाहर केन्द्रीय बिक्री किये जाने का कोई प्रमाण अभिलेख पर नहीं है अतः सम्पूर्ण कर योग्य बिक्री प्रान्त के अन्दर निर्धारित की जाती है। उपरोक्त समस्त तथ्यों के परिप्रेक्ष्य में कर संगणना निम्न प्रकार से दी जाती हैः-
प्रान्त के अर्न्तगत

१.	आयरन एण्ड स्टील/स्क्रेप की कर योग्य बिक्री ६००००-००	४ प्रतिशत	२४०००-००
२.	हाउस होल्ड गुडर्स खरल की कर योग्य बिक्री ३००००-००	७.५ प्रतिशत	२२५००-००
३.	स्वनिर्मित एग्रीकल्चर इम्प्लाइमेन्ट व स्थानीय खरीदे एग्रीकल्चर एम्पलाइमेंट्स तथा आयरन एण्ड स्टील की करमुक्त बिक्री १२६१२८६१-३५ कर मुक्त		
कुल बिक्री-१३५१२८६१-३५		४६५००-००	
कर योग्य बिक्री-६००००-००			

The Deputy Commissioner (Appeal) in its order dated 30.4.1998 has again considered the survey dated 14.9.1995 in detail which is as follows:-

विद्वान अधिवक्ता के तर्कों को सुना गया तथा अपीलीय पत्रावली का अवलोकन किया गया। व्यापार कर अधिकारी, वि०अनु० शा० द्वारा अपीलकर्ता के व्यापार स्थल का सर्वेक्षण दिनांक १४-६-६५ किया गया था दिनांक १४-६-६५ को सर्वेक्षण के समय व्यापार स्थल पर हिसाब-किताब आदि नहीं मिले थे। इस सम्बन्ध में विद्वान अधिवक्ता का कथन है कि दिनांक ८-५-६५ से ११-६-६५ तक लगातार बिजली का संकट बना रहा और इसी बीच फैक्ट्री के मेन गेट पर टेलीफोन वालों ने केबिल की खुदाई शुरू कर दी, जिसके कारण आवागमन बाधित था और इसी मध्य वर्षा हो गयी, जिससे मार्ग अवरूद्ध हो गया। इस तमाम कारणों से फैक्ट्री बन्द करने का निर्णय लिया गया और इसकी सूचना विभाग को रसीद सं०-६०८५६ दिनांक १३-६-६५ के द्वारा दे दी गयी थी। इस प्रकार के स्पष्ट है कि सर्वेक्षण के समय फैक्ट्री बन्द थी और जिसकी सूचना विभाग को दी गयी थी अतः यह अपेक्षा करना कि इस सर्वेक्षण में कोई व्यक्ति/लेखा पुस्तकें मिले अनुपस्थित है। कर निर्धारण अधिकारी ने जो खाते अस्वीकार किये हैं उसका कारण कर निर्धारण आदेश के पेज १४ पर लिखा गया है कि व्यापार कर अधिकारी, वि० अनु० शा० द्वारा किये गये जाँच सर्वेक्षण के समय जो स्टाक निर्मित/अर्द्धनिर्मित तथा रा-मैटिरियल पाया गया था, उसकी तुलना में हाउस होल्ड गुडर्स की बिक्री घोषित नहीं की गयी है और खाते अस्वीकार करने का यह है कि लेखा पुस्तकें यहाँ तक कि स्टाक रजिस्टर चालान बुक आदि भी नहीं पाये गये। मैं कर निर्धारण अधिकारी के इस मत से सहमत नहीं हूँ क्योंकि जब निर्माण/व्यापार बन्द था जो इनके हिसाब-किताब की अपेक्षा करना उचित नहीं है। मेरे समक्ष जो लेखा प्रस्तुत किये गये हैं तथा दिये गये कारण बताओ नोटिस एवं उसके सम्बन्ध में दिये गये स्पष्टीकरण को प्रस्तुत किया किया गया उसके अवलोकन से पाया गया कि अपीलकर्ता द्वारा निर्माण के सम्बन्ध में जो स्टाक/निर्माण रजिस्टर, रखा गया है, उस पर डी०आई०सी०, कानपुर के अधिकारियों द्वारा हस्ताक्षर भी किये गये हैं, जिससे यह तो प्रमाणित होता है कि अपीलकर्ता द्वारा निर्माण/बिक्री की गयी है। कर निर्धारण अधिकारी द्वारा स्थानीय खरीद माल की बिक्री पर जाँचोपरान्त कोई विपरीत तथ्य पाये जाने के कारण स्वयं कर मुक्ति दी गयी है विद्वान अधिवक्ता के इस तर्क में भी बल है कि जाँच सर्वेक्षण की तिथि पर अपने बाबा की श्राद्ध में सम्मिलित होने के लिए पटना बिहार से एक दिन पूर्व आये थे, जिन्हें कि अपीलकर्ता के व्यापार से सम्बन्धित कोई भी जानकारी नहीं थी, ऐसी स्थिति में श्री अशोक कुमार से कोई लेख प्रस्तुत करने अथवा कोई जानकारी दिया जाना सम्भव नहीं था कर निर्धारण अधिकारी द्वारा पारित आदेश में कहीं भी इस तथ्य का उल्लेख नहीं किया है कि अपीलकर्ता के लेखा हिसाब में अमुक स्थान पर अमुक त्रुटि है। कर निर्धारण अधिकारी द्वारा मात्र जाँच सर्वेक्षण के समय लेखा हिसाब प्रस्तुत न किये जाने के कारण कर निर्धारण के समय प्रस्तुत लेखा प्रस्तांक को अस्वीकार करने का आधार बनाया है, जो कि उचित नहीं है।

10. Against the re-assessment order dated 18.9.1998 when the matter went in appeal, the Deputy Commissioner (Appeal) in its order dated 30.11.1998 again considered the survey dated 14.9.1995 in detail which is as follows:-

विद्वान अधिवक्ता के तर्कों को सुना गया। एक कर निर्धारण पत्रावली, गोपनीय पत्रावली तथा वि०अनु०शा० पत्रावली का निरीक्षण किया गया। वर्ष ६५-६६ की पत्रावली के

अनुसार जिसमें कि १,१४,७८,६२३-०० के कृषियन्त्रों की बिक्री की गयी है। पेज ६३ एवं ६४ में उन समस्त व्यापारियों के नाम व पते दिये गये हैं। जिनका कृषियन्त्रों की बिक्री की गयी है और भुगतान से किये गये है उनके अनुसार १,०७,२६,६४६-०० की बिक्री पंजीकृत व्यापारियों को की गयी है और उनके भुगतान चेक से प्राप्त होते हैं। यह फर्म से सुनील स्टील ट्रेडर्स एक्सीलेंट इन्टरप्राइजेज, जिन ब्रदर्स, शरदकुमार नीरज कुमार, नीरज कुमार बिलारी स्टील इन्टरप्राइजेज, रोशनलाल एण्ड संस कानपुर इस्पात उद्योग अरूण आयरन कं०, ए० जी० स्टील, निखिल इन्टरप्राइजेज, नरेश ब्रदर्स, आदि ७,५१,६७६-०० की बिक्री कैश की गयी है। वास्तव मे जो कर योग्य बिक्री है उसकी भी काफी मात्रा में कैश बिक्री की गयी है कुल कर निर्धारण आदेश को अधिकारी द्वारा २७-३-६७ को पारित किया गया था, कर ६५-६६ के आदेश में कर निर्धारण अधिकारी को यह टिप्पणी है, व्यापारी द्वारा दिये गये स्पष्टीकरण के परिप्रेक्ष्य में बिक्री में बिलों, भुगतान के सम्बन्ध में प्रान्त बैंक/ड्राफ्ट के सम्बन्ध में जाँच करने से पाया गया कि व्यापारी द्वारा जो क्रेडिट सेल की गयी है वह पंजीकृत व्यापारियों को की गयी है तथा लेखों में इन्द्राज चेक व ड्राफ्ट द्वारा प्राप्त हुआ है अतः बिक्री को अस्वीकार किया जाने का कोई पर्याप्त/सबल आधार न होने के कारण स्वीकार किया जाता है। अतः करमुक्ति देय है।

अतः इससे स्पष्ट है कि मूल कर निर्धारण आदेश में कर निर्धारण अधिकारी ने समस्त तथ्यों को देखते हुए और यह देखते हुए कि १४-६-६५ के सर्वेक्षण में व्यापार स्थल पर कृषियन्त्र नहीं बन रहे थे। अपीलकर्ता को कृषियन्त्रों की बिक्री के लिए कर मुक्त घोषित किया है। अतः विद्वान अधिवक्ता के इन तर्कों में पर्याप्त बल है कि सम्पूर्ण विचार है के बाद जब कृषियन्त्रों की बिक्री करमुक्त घोषित की जा चुकी है। पुनः धारा २१ की कार्यवाही का कोई आधार नहीं है विद्वान अधिवक्ता के इन तर्कों में भी पर्याप्त बल है कि कभी भी सब दल तथा जाँच चौकी के अधिकारियों द्वारा अथवा वि० अनु० शा० अधिकारियों द्वारा कभी भी रा-मैटिरियल में पुसे हुए नहीं पाया गया और दूसरी तरफ अधिकांश बिक्री पंजीकृत फर्जी की चैक/ड्राफ्ट के भुगतान की गयी है कर निर्धारण अधिकारी ने पारा २१ की कार्यवाही के कारण वि० अनु० शा० का सर्व २६-२-६७ को बनाया है यह सर्वेक्षण ६५-६६ में लागू नहीं होता है और विद्वान अधिवक्ता के इन तर्कों के पर्याप्त बल है कि इसके आधार पर ६५-६६ में कोई कार्यवाही नहीं की जा सकती है मैंने गोपनीय पत्रावली वि० अनु० शा० पत्रावली का अवलोकन किया। वर्ष ६४-६५ में फर्म प्रारम्भ हुई है और ६४-६५ में १,०२,१४,८६६-०० के कृषियन्त्रों को कर मुक्त किया गया है। वर्ष ६६-६७ में ही अपीलकर्ता के खाते स्वीकार हुये हैं और १,६६,१६,४८५-०० की कृषियन्त्रों की बिक्री मानी गया है और इसके करमुक्त घोषित किया गया है इस वर्ष १,७५,२१,०००-०० की कृषियन्त्रों की बिक्री पंजीकृत व्यापारियों को की गयी है और उनके चेक एवं ड्राफ्ट से भुगतान किये गये हैं। यह बिक्री भी ६६-६७ में मनीष स्टील, ट्रेडर्स, कुली बाजार कानपुर, नरेश ब्रदर्स, जुली बाजार, कानपुर को एक्सीलेंट, इन्टरप्राइजेज, आर्यनगर, कानपुर भारत आयरन एण्ड स्टील मैन्यू० कं०, कुली बाजार कानपुर को की गयी है। सभी फर्जी के पार्टी एकाउन्टस की प्रतियाँ कर निर्धारण पत्रावली में लगी है तथा कर निर्धारण के समय कर निर्धारण अधिकारी द्वारा समस्त बिलों का सत्यापन किया गया और ६६-६७ में कर निर्धारण आदेश के अनुसार सभी भुगतान चेक से प्राप्त किया है वि. अनु० शा० पत्रावली के अनुसार २६-२-६७ को जो आकस्मिक सर्वेक्षण किया गया इसमें जिस सज्जन का नाम पता के कालम में सर्वेक्षण अधिकारी की टिप्पणी है कि फर्म स्वामी कोई नहीं और न ही फर्म का कोई बोर्ड लगा है इतना लिख होने से स्पष्ट है कि व्यापार स्थल पर फर्म का कोई भी बोर्ड नहीं लगा हुआ था, इससे स्पष्ट है जो लोकेशन सर्वेक्षण अधिकारी द्वारा बताई जा रही है लेकिन यहाँ यह तथ्य उल्लेखनीय है कि श्री माया राम ने प्रगति एग्रिको नामक फर्म के मालिक का नाम महावीर जैन बताया गया यह बताया कि ये कहीं आर्चा नगर में रहते हैं जबकि प्रगति एग्रिको के मालिक जैसा कि गोपनीय पत्रावली के रूप-पत्र १४ से स्पष्ट है कि श्री गोपाल दास पुत्र श्री बाल किशन दा है वे १३/३८५ द्वितीय ए परगट कानपुर में रहते हैं इससे स्पष्ट है कि विद्वान अधिवक्ता के इस तर्क में पर्याप्त बल है कि सह सर्वेक्षण उनके व्यापार पत्र का नहीं किया गया है। यहाँ सबसे तर्कपूर्ण स्थिति यह है कि सर्वेक्षण अधिकारी ही लिखते है कि फर्म में कोई बोर्ड नहीं लगा है जो लोकेशन अपीलकर्ता बता रहे हैं यह लोकेशन भी सर्वेक्षण में लिखी लोकेशन से भिन्न है अपीलकर्ता का यह भी कथन है कि उनका लाल रंग का गेट नहीं है सर्वेक्षण अधिकारी ने यह भी लिखा है कि पास में अन्य लोगो द्वारा भी बताया गया कि महावीन जिनके पुत्र लल्लू जैन के पास वाली दुकान होटल में है यहाँ जब देखा गया तो पता चला कि लल्लू जैन कुछ देर पहले चले गये हैं जबकि गोपाल दास के कोई लल्लू जैन पुत्र ही नहीं है। इनके पुत्र का नाम अंकित है श्री गोपाल दास सम्प्रदाय से जैन है ही नहीं और इनका लडका व्यापार में बैठता ही नहीं नाबालिग था। इस सर्वेक्षण से यह स्पष्ट है कि पास में कहीं लल्लू जैन थे और जिस फैक्ट्री का सर्वेक्षण अधिकारी द्वारा किया गया व किसी महावीर जैन की फैक्ट्री थी इस सर्वेक्षण में लिखा गया है कि फर्म में कोई मशीन नहीं दिखाई दे रही है और अन्दर एक कमरा है जिसमें मेज पडी दिखाई पड रही है। इससे स्पष्ट है कि जिस स्थान का सर्वेक्षण अधिकारी ने किया है वहाँ कि यह स्थिति थी। वहाँ इसी से लगता है कि वि० अनु० शा० की प्रथम इकाई ने १४-६-६५ को जो सर्वेक्षण किया था उसमें कमरा नहीं था टिन शेड में ७ मशीनें जिनमें ग्राइन्डर और दो खराब मशीन पायी गयी थी। इससे यह स्थिति संदिग्ध प्रतीत होती है कि यह सर्वेक्षण इस फर्म का किया ही नहीं गया है।

11. The observation and the findings of Assessing Authority and the Appellate

Authority clearly shows that the survey dated 14.9.1995 was fully considered by the Assessing Authority and by the Appellate Authority in detail. All the authorities have considered that at the time of survey dated 14.9.1995, the manufacturing agricultural implements was not found which had been made basis for inferring the sale of imported Iron Steel in the same form and condition, in the impugned notice under Section 21 of the Act. With regard to levy of tax on the self manufactured Kharal also no material, had been brought on record which could led to believe that the turnover of Kharadl was liable to tax as a Mill Store which had been wrongly assessed to tax @ 7.5%. Assessing Authority had proceeded to treat the self manufactured Kharal as a Mill Store only on account of chage of opinion.

12. For the reasons stated above, we are of a considered opinion that the proceeding under Section 21 was initiated on the basis of same material, which were in existence at the time of original assessment proceeding only on account of change of opinion. There was no fresh material with the Assessing Authority at the time of issue of notice, on the basis of which, a believe could be formed about the escaped assessment, which is a condition precedent for initiation of proceeding as referred hereinablve. The survey dated 14.9.1995 had been considered in detail by the Assessing Authority in the assessment order and by the Appellate Authority and with regard to the self manufactured Kharal, there was no material on the basis of which, a believe could be formed by the Assessing Authority that it was liable to tax as a Mill Store @ 10%.

13. The submissions of learned Standing Counsel that the survey was not subject matter of assessment and the appeal, can not be accepted in view of the fact stated above. The decisions cited by the learned Standing Counsel in the case of **Royal Trading Company Vs. reported in 2002 UPTC page 210** and in the case of **M/s Bhagwan Das and Company Vs. State of U.P. and another reported in 2003 UPTC page 140** are not applicable to present case. They are distinguishable on the facts of the case.

14. In the result, writ petition is allowed. The notice under Section 21 of the Act (Annexure-5 to the writ petition) and the entire proceeding under Section 21 of the Act for the assessment year 1995-96 are quashed. **Petition Allowed.**

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 09.08.2005

BEFORE
THE HON'BLE V.K. SHUKLA, J.

Civil Misc. Writ Petition No. 8540 of 1996

Rama Kant Misra ...Petitioner
Versus
Committee of Management, Badri Nath Intermediate College, Meja Road, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar Jain
Sri Hari Shanker Misra
Sri R.K. Singh
Sri Anil Bhushan

Counsel for the Respondents:
Sri Sudhir Agarwal, Addl.A.G.
Sri Radhey Shyam Dwivedi
Sri S.S. Sharma

Sri Rajesh Dwivedi
S.C.

U.P. Act No. 4 of 1994-Section 2 (C), 3 (7)-readwith Constitution of India Art. 14, 16-Reservation in Promotional Post-Govt. order proving reservation to S.C./S.T.-continue to be applicable till revocation, or modification-Post of Lecturer-if the vacancy falls under reserved Quota-suitable candidates for thereunder there is no mention for providing any reservation, but as promotion is to be made in "public service and post" as defined under Section 2(c) and 2(c) (iv) of U.P. Act No. 4 of 1994 then in terms of Section 3(7) of U.P. Act No. 4 of 1994, the Government Orders which covered the field of promotion qua SC/ST category candidates, continue to be applicable till they are modified or revoked. As till date said Government Orders have not been revoked or modified, net effect of the same would be that 21% of vacancies is to be filled by way of promotion from amongst SC category and 2% of vacancies from amongst ST category candidates.

Thus, this much is clear that when the point is fixed for reserved category candidates by way of roster then same has to be filled from amongst the members of reserve category and the candidates belonging to General category are not entitled to be considered on the reserved post and the Sate Government has discretion to carry forward the point in just and fair manner. Thus, reserved post cannot be offered to other category candidate and State Government is empowered to carry forward the said point in just and fair manner.

(Delivered by Hon'ble V.K. Shukla, J.)

1. Brief facts giving rise to instant writ petition in brief is that in the district of Allahabad there is a recognised institution known as Badri Nath Tiwari Inter College, Meja Road, Allahabad. Said institution is a duly recognised institution under the provisions as contained under U.P. Intermediate Education Act 1921 and Regulations framed therein. Said institution is engaged in imparting education up to Intermediate level. Institution in question is also in grant-in-aid list of the State Government and the provisions of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 are also fully applicable to the said institution. After enforcement of U.P. Act No. 5 of 1982 selection and appointment on the post of Principal, Lecturer and L.T. Grade teachers is to be made strictly as per the provisions as contained in U.P. Act No. 5 of 1982and Rules framed. In the institution concerned Ramkant Misra was appointed as L.T. Grade teacher on 01.08.1974. Eight posts of Lecturer have been sanctioned in the aforementioned institution. One such post was being held by one Manideo Singh in the capacity of Lecturer in Civics. Said Manideo Singh retired on 30.06.1992 and thus, a substantive vacancy on the post of Lecturer in Civics fell vacant. Petitioner has contended that out of eight sanctioned post of Lecturer only two post of Lecturer had been filled up by way of promotion and as such said post of Lecturer in Civics

promotion not available-it shall carry forward to next year-but can not be filled up by general category.

Held: Para 20 & 22

The logical conclusion on the basis of reference made above is that though in the matter of promotion under U.P. Act No. 5 of 1982 and the Rules framed

fell within promotional quota and as such same ought have been filled up by way of promotion by promoting the petitioner on the post of Lecturer in Civics. As no action was being taken petitioner, Rama Kant Mishra in his turn represented the matter again and again for promoting him, but no action was taken on the same and in the meantime Managing Committee of the institution on the pretext that there is no S.C./S.T. Candidate available in the institution sent requisition to U.P. Secondary Education Services Selection Board on 24.05.1995 for filling up aforementioned vacancy by way of direct recruitment from amongst S.C./S.T. Candidate. When requisition was sent, at this juncture Civil Misc. Writ Petition No. 8540 of 1996 had been filed before this Court by Ramakant Mishra claiming therein promotion on the post of Lecturer in Civics with effect from 01.07.1992.

2. On presentation of aforementioned writ petition, this Court as an interim measure passed following order which is being quoted below:

"Meanwhile, I direct respondent no. 2 to decide the petitioner's representation filed on 20.10.1995 within a period of one month from the date a certified copy of this order is produced before him alongwith the copy of the said order. "

3. Pursuant to directives issued by this Court, Deputy Director of Education proceeded to decide the representation moved on behalf of the Ramakant Mishra petitioner and order was passed on 18.04.1996 by Deputy Director of Education 4th Region Allahabad accepting claim of Ramkant Misra for being promoted under promotional quota as post in question was not liable to be filled up by way of direct recruitment. Said order has been subject matter of challenge before this Court by means of Civil Misc. Writ Petition No. 20453 of 1996 by Managing Committee of the Institution. Thereafter Civil Misc. Writ Petition No. 39441 of 1996 has been filed by Ramkant Misra praying therein that order dated 18.04.1996 be implemented and be given effect to by according promotion to him.

4. Counter affidavit has been filed in Civil Misc. Writ Petition No. 8540 of 1996 and therein Management of the institution has tried to raise dispute in respect of educational qualification of Ramakant Mishra and further it has been asserted that there is no teacher in L.T. Grade belonging to S.C/S.T category and as such post in question in all eventuality is to be filled up from amongst reserved category candidate, by way of direct recruitment. Further it has been asserted that one Mahendra Nath Tripathi is senior to the petitioner and it is his claim which is to be accepted and not that of petitioner.

5. Rejoinder affidavit has been filed to this counter affidavit and therein it has been asserted that promotion cannot be permitted to be defeated in the way and manner as has been sought to be done in the present case as such action of the Management in not according promotion to the petitioner is wholly unjustifiable. In respect of post of Lecturer in Civics, alternatively it has been contended that even if said post is reserved for S.C./S.T. Category candidates and there being no one available in the next lower grade it has to be filled up by way of promotion

from amongst General Category candidate.

6. After pleadings have been exchanged inter se parties with the consent of the parties all these three writ petitions are being taken up together and are being decided together, as issues raised are interconnected.

7. Issue which has been sought to be raised in this writ petition is; (1) whether there is any provision of reservation provided for in the matter of promotion under U.P. Act No. 5 of 1982 and Rules framed thereunder (2) In case it is accepted that there is provision of reservation in promotion and in the next lower grade no one eligible from reserved category is available then whether said post has to be filled up by way of promotion from amongst General Category candidate or by way of direct recruitment from amongst SC/ST category candidate.

8. As question mentioned above was of general importance, as such invitation was extended to Members of "Bar, to advance arguments and pursuant thereto arguments were advanced by various counsel at the Bar in support of the reservation and against the reservation.

9. Sri Raj Kumar Jain, Senior Advocate Sri R.K. Singh, Advocate, Sri Anil Bhushan, Advocate and Sri H.S. Misra, Advocate, counsel for the petitioner contended that under U.P. Act No. 5 of 1982, there is no provision of reservation in promotion and now right of promotion has been accepted to be fundamental right, and said right cannot be permitted to be defeated, specially when in the feeder cadre, no one elligible from the reserve category is available, and in that event post has to be filled up from amongst General Category candidate, and promotion quota post cannot be permitted to be diverted under direct recruitment quota, as such action of Respondents cannot be subscribed.

10. Sri Radhey Shyam, Advocate as well as Sudhir Agarwal, Additional Advocate General U.P. submitted with vehemence that once post in question is reserved for S.C./S.T. Category candidate in the matter of promotion by way of roster, then by no stretch of imagination said post could be filled up from amongst General category candidate and the post will have to be filled up by way of direct recruitment in case in the next lower grade, no one from reserved category is available and same cannot be filled up by way of promotion from amongst General category candidate.

11. After respective arguments have been advanced in the present case. Relevant provisions, which cover the field are being looked into. At the point of time when petitioner's promotion was to be adverted to the provision as contained under Section 10 and 11 of U.P. Secondary Education Services Selection Board Act 1982 alongwith relevant Rules 4 to 9 of U.P. Secondary Services Commission Rules 1983 are being quoted below:

U.P. Act No. V of 1982

10. **Procedure of selection:-** (1) For the purpose of making appointment of a teacher, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of post other

than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Schedule Castes, the Scheduled Tribes and other Backward Class of citizens in accordance with the Uttar Pradesh Public Services (Reservation for Schedule Castes, Schedule Tribes and Other Backward Classes) Act 1994 and notify the vacancies to the Commission in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for appointment to the post of teachers shall be such as may be prescribed:

Provided that the Commission shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under Sub-section (1).

11. Panel of Candidates:- (1) The Commission shall, as soon as may be after the vacancy is notified under Sub-section (1) of Section 10, hold interviews of the candidates and prepare a panel of those found most suitable for appointment.
(2) The panel referred tin Sub-section (1) shall be forwarded by the Commission to the officer or authority referred in Sub-section (1) of Section 10 in such manner as may be prescribed.
(3) After the receipt of the panel under Sub-section (2) the officer or authority concerned shall in the prescribed manner intimate the Management of the Institution the names of the selected candidates in respect of the vacancies notified under Sub-section (1) of Section 10.
(4) The management shall within a period of one month from the date of receipt of such intimation, issue appointment letter to such selected candidate.
(5) Where such selected candidate fails to join the post in such Institution within the time allowed in this behalf, or where such candidate is otherwise not available for appointment, the officer or authority concerned may, on the request of the Management intimate in the prescribed manner, fresh name from the panel forwarded by the Commission under Sub-section (2)]

U.P. Secondary Education Services Commission Rules 1983:-

"4. Determination and intimation of vacancies- (1) (i) The Management shall determine and intimate to the Commission, in the proforma given in Appendix "A" and in the manner hereinafter specified , the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of any post, other than the post of the head of an institution also the number of vacancies to be reserved for the candidates belonging to the scheduled caste, scheduled tribes and other category of persons in accordance with the rule or others issued by the Government in this behalf in regard to the educational institution.

(ii) In regard to the post of head of an institution the Management shall also forward, mutatis mutaindis in the manner hereinafter specified the name of two senior most teacher copies of their service records (including character rolls) and such other record or particulars as the Commission may require from time to time.

Explanation - For the purpose of this sub-rule 'senior most teacher' mean the senior

teachers in the post of the highest grade in the institution.

(iii) Where an institution is raised from High School to an Intermediate College, the post of Principal of such a college shall with the approval of the Commission be filled by promotion of the Head master of such High School if he was duly appointed as Headmaster in substantive capacity in accordance with law for the time being in force and posses a good record of service and the minimum qualification prescribed in that behalf or has been granted exemption from such qualification by the Board. Proposal for such promotion shall be submitted by the Management to the Commission mutatis mutandis in the manner hereinafter specified alongwith the service book, character roll and the educational and other qualification of the Headmaster concerned.

(2) The statement of vacancies shall be sent by the Management to the Inspector in quadruplicate by 15th September of the year of recruitment and the Inspector shall after verification forward two copies of the same to the Deputy Director by October 15, with a copy of the Commission.

(3) The Deputy Director shall after keeping a copy, forward the statement received by him under sub-rule (2) alongwith a consolidated subject-wise statement of various categories of vacancies to the Commission by November 15.

(4) Notwithstanding anything contained in sub-rule (1), (2) and (3) the time schedule mentioned in the sub-rules shall not apply in respect of recruitment year 1982 and unless any other date or schedule is notified by the Government the Director shall ensure that vacancies are notified to the Commission by February 28, 1983.

Provided that where Government is satisfied that there are sufficient reasons for doing so it may relax the time schedule in the respect of any year generally or in respect of any particular institution.

(5) Where a vacancy occurs at any time during the session or after the requisition has already been sent in accordance with sub-rules (2), (3), (4) or (5) of this rule the management shall notify the vacancy to the Inspector within 15 days of its occurrence and the Inspector and the Deputy Director shall deal with it in the manner mentioned in sub-rules (3) and (4) and within 10 days of its receipt by them.

(6) (i) Where the Management has for any recruitment year, failed to notify the vacancy or the vacancies by the date specified in sub-rules (2) (4) or (5) or has failed to notify the vacancy or the vacancies in the manner prescribed in rule 4 or Rule 9 the Commission may require the Inspector to notify the vacancy or the vacancies in the institution under his jurisdiction to the Commission by such date as the Commission may specify.

(ii) Where the Commission requires the Inspector to notify the vacancy or the vacancies under paragraph (1) of this sub-rule the Inspector shall notify the same in accordance with Rule 4 or as the case may be Rule 9 of these rules and the vacancy or the vacancies so notified shall be deemed to be notified by the Management.

5. <u>Notification of vacancies</u>- The Commission shall, in respect of vacancies to be filled by direct recruitment advertise the vacancies in at least two newspapers having wide circulation in the State and

shall also notify the same to the Deputy Director. Such advertisement or notifications shall, inter alia mention the names of the institutions and places where they are situated and shall require the candidates to give, if he so desires the choice of not more than five institutions in order to preference. Where a candidate wishes to be considered for particular institution or institutions only and for no other institution, he shall mention the fact in his application.

6. Procedure for recruitment- The Commission shall scrutinize the applications and having regard to the need of securing due representation of candidate belonging to the Scheduled Castes and Scheduled Tribes and other categories referred to in Rule 4 call for interview such number of candidate as it may consider proper:

Provided that in respect of the post of the head of an institution the Commission shall also call for interview two senior most teachers of the institution whose name are forwarded by the management under sub-rule (1) Rule (4):
Provided further that if on account of excess number of applications or for any other reasons, the Commission considers it desirable to limit the number of candidates to be called for interview, if may-

(i) in the case of the post of a teacher, not being the post of the head of an institution, either hold preliminary screening on the basis of academic record or hold a competitive examination; and
(ii) in the case of the post of the head of an institution hold preliminary screening on the basis of academic record, teaching and administrative experience.

Provided also that the number of candidates to be called for interview for any category of post shall, as far as possible, be not less than five times the number of vacancies.

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

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

(2) the Panel prepared under sub-rule (1) shall hold good for one year from the date of its notification by the Commission.

8. Notification of selected candidate-(1) The Commission shall forward the panel referred to in Rule 7 in quadruplicate to the Deputy Director and shall also notify the same on its notice board and publish it in such other manner as it may consider proper.
(2) Within 15 days of the receipt of the panel by him, the Deputy Director shall notify it on his notice board and publish it in such other manner as it may consider proper.
(2) Within 15 days of the receipt of the panel by him, the Deputy Director shall notify it on his notice board and send two copies thereof to the Inspector.
(3) Within 10 days of the receipt of the panel by him, the Inspector shall-

(i) notify it on the notice board:
(ii) Intimate the name of selected candidates, standing first in order of merit and where there are more than one vacancies as many names in order of merit as there are vacancies to the Manager of the concerned institution with directions that no authorisation under resolution of the Management an order of appointment in the proforma given in Appendix "B" be issued to the candidate by registered post within one month of the receipt of intimation requiring him to join duty within 10 days of the receipt of the order or within such extended time, as may be allowed to him by the Management and also intimating him that on his failure to join within the specified time his appointment will be liable to be cancelled.
(iii) Send an intimation to the candidate, referred to in clause (ii) with directions to report to the Management within 10 days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him by the Management.
(4) The Manager shall comply with the directions given under sub-rule (3) and report compliance to the Commission through the Inspector.
(5) When the candidate referred to in sub-rule (3), fails to join the post within the time allowed in the letter of appointment or within such extended time as the management may allow in this behalf or where such candidate is not available for appointment the Inspector may on the request of the management send fresh name or names standing next in order or merit on the panel under intimation to the Deputy Director and the Commission and the provisions of sub-rules (3) and (4) shall mutatis mutandis apply.

9. Procedure for appointment by promotion- (1) Where any vacancy is to be filled by promotion all teachers working in L.T. Or C.T grade who possess the minimum qualifications and have put in at least 5 years continuous service as teacher on the date of occurrence of vacancy shall be considered for promotion to the Lecturer or L.T. Grade as the case may be without their having applied for the same.

Note- For the purpose of this sub-rule service rendered in any other recognised institution shall count for eligibility, unless interrupted by removal dismissal or reduction to a lower post.
(2) The criterion for promotion shall be seniority subject to the rejection of unfit.
(3) The Management shall prepare a list of teachers referred to in sub-rule (1) and forward it to the Commission through the Inspector with a copy of seniority list, service records (including the character rolls0 and a statement in the proforma given in Appendix 'A'
(4) Within three weeks of the receipt of the list from the Management under sub-rule (3) the Inspector shall verify the facts and forward the list to the Commission.
(5) The Commission shall after calling for such additional information as it may consider necessary, intimate the name of selected candidate or candidates to the Inspector with a copy to the Manager of the Institution.
(6) Within ten days of the receipt of the intimation from the Commission under sub-rule (5) the Inspector shall send the name of the selected candidate (s) to the Manager of the concerned institution and the provisions of sub-rules (3) and (4) of Rule 8 shall mutatis mutandis apply]

12. A bare perusal of Section 10 and 11 of U.P. Act No. 5 of 1982 and Rules would go to show that Management has been enjoined upon to determine and intimate vacancies to the Commission in the proforma given in Appendix 'A and number of vacancy existing or likely to fall vacant during the year of recruitment as well as number of vacancy to be reserved for candidate belongs to S.C./S.T. and other category of persons in accordance with the rules or orders issued by the Government in this behalf in regard to the educational institutions. Said statement of vacancies are to be sent within 15 September of the year of recruitment and District Inspector of Schools after verification of the same is enjoined upon to forward two copies of the same to the Deputy Director of Education. Deputy Director of Education thereafter is enjoined upon to forward the statement received by him under sub-rule (2) alongwith a consolidated subject-wise statement of various categories of vacancies to the Commission. Where Commission has failed to notify the vacancy in the manner prescribed the Commission may require the Inspector to notify the vacancy and vacancies in the institution under his jurisdiction to the to Commission by such date as the Commission may specify. Rule 5 deals with notification of vacancy. Rule 6 provides the procedure for recruitment and thereafter it has been provided that in respect of the post of the Head of an institution the Commission shall also call for interview two senior-most-teachers of the institution whose names are forwarded by the management under sub-rule (1) of Rule 4. Rule 7 deals with preparation of panel. Rule 8 deals with notification of selected candidate. Rule 9 deals with procedure for appointment by promotion. Said rule provides that where any vacancy is to be filled by promotion all teachers working in L.T. Or C.T. Grade, who possess the minimum qualifications and have put in at least five year continuous service as teacher on the date of occurrence of vacancy shall be considered for promotion for the same Lecturer or L.T. Grade as the case may be without their having applied for the same. The criterion for promotion shall be seniority subject to the rejection of unfit. In that event management is obliged to prepare the list of teachers referred to in sub-rule (1) and forward it to the Commission through the Inspector with a copy of seniority list, service records including the character rolls and a statement in the proforma given in Appendix "A" thereafter Inspector has to verify the facts and forward the list to the Commission and Commission thereafter after calling for such additional information as it considers necessary, intimate the name of selected candidate or candidates and thereafter within ten days for the date of receipt of the intimation from the Commission to the Inspector shall send the name of the selected candidates to the Manager of the Institution.

13. Thereafter Chapter III of U.P. Act No. V of 1982 containing Section 12, 12A,12B, 12C,13 14,15 and 15-A have been omitted by U.P. Act No. 15 of 1995 w.e.f. 28.12.1994 new set of Rules known as U.P. Secondary Education Services Commission Rules 1995 were brought in force. Relevant extract of 1995 Rules are being quoted below:

U.P. Secondary Education Services Commission Rules 1995:-

10. Source of recruitment- Recruitment to various categories of teachers shall be made from the following sourses:

(a) Principal of an Intermediate College or Headmaster of a High School - By Direct recruitment
(b) Teachers of lecturers grade
(i) 50 percent by direct recruitment
(ii) 50 percent by promotion from amongst substantively appointed teachers of the trained graduates (L.T) grade
(c) Teachers of trained graduate (L.T.) grade
(i) 50 percent by direct recruitment
(ii) 50 percent by promotion from amongst substantively appointed teachers of the trained graduates (C.T) grade

Provided that it in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled in by direct recruitment;

Provided further that if in calculating respective percentages of posts under this rule there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post.

11. Determination and notification of vacancies--(1) The management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 of the Act and notify them through the Inspector to the Commission in the manner hereinafter provided.

(2) The statement of vacancies for each category of posts to be filled in by direct recruitment or by promotion, including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in separately in quadruplicate, in the pro forma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of lecturer grade and groupwise in respect of vacancies of trained graduates(L.T) grade. The consolidated statement so prepared shall, alongwith the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director.

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1995, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by June 15,1995 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by June 30, 1995.

Explanation- For the purposes of this sub-rule the word "group-wise' in respect to the trained graduates (L.T) grade means in accordance with the

following groups, namely:

(a) Language	This group consist of the subjects of Hindi, Sanskrit, Urdu, Persian and Arabic
(b) Science	This group consists of the subjects of Science and Mathematics.
(c) Art and Craft	
(d) Music	
(e) Agriculture	
(f) Home Science	
(g) Physical Education	
(h) General	This group consists of the subjects not covered in any of the foregoing groups.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send if to the Commission

(4). Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 15 of the Act and notify them to the Commission in the manner and by the date referred on in the said sub-rule. The vacancies notified to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.

12. **Procedure for direct recruitment-** (1) The Commission shall, in respect of the vacancies to be filled by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled castes, Scheduled Tribes and Other Backward Classes of citizens in at lest two daily newspapers, having wide circulation in the State, and call for the applications for being considered for reservation in the proforma published in the advertisement. For the post of Principal of an Intermediate College or the Head Master of a High School, the name and place of the institution shall be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wished to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.

(2) The Commission shall scrutinize the applications and prepare list for each category of posts on the basis quality point specified in Appendix B C or D as the case may be and having regard to the need for securing due representation of the candidates belonging to the Scheduled Caste, Scheduled Tribes and Other Backward Classes of citizens in respect of the posts of teacher in lecturers and trained graduates (L.T.) grade, call for interview such candidate who have secured the maximum quality points in such manner that the number of candidates shall not exceed five times the number of vacancies.]

(3) The Commission shall hold interview of the candidates and for each category of post prepare panel of those found most suitable for appointment in order to merit as disclosed by the marks obtained by them in the interview. The panel for the post of Principal or Headmaster shall be prepared institutionwise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whetheras for the posts in the lecturers and trained graduates (LT) grade, if shall be prepared subjectwise and groupwise respectively. If two or more candidates obtain equal marks in interview, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the interview as well as the quality points of two or more candidates are equal the name of the candidate who is older in age shall be placed higher, In the panel for the post of Principal or Headmaster, the number of names shall be three times of the number of the vacancy and for the post of teachers in the lecturers in the lecturers and trained graduates (LT) grade, it shall be larged (but not larger than twenty-five percent) then the number of vacancies.

Explanation- For the purposes of this sub-rule the word groupwise means menas in accordance with the groups specified in the Explanation to sub-rule (2) of rule 11.

(4) At the time of interview of candidates, for the post of teachers in lecturers and trained graduates (LT) grade the Commission shall, after showing the list of the institution which have notified the vacancy to it, require the candidate to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

(5)

(5) The Commission shall after preparing the panel in accordance with sub-rule (3), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates (LT) grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (4). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them. The commission may allocate any institution to him as it may deem fit.]

(6) The commission shall forward the panel prepared under sub-rule (3) alongwith the name of the institutions allocated to selected candidates in accordance with sub-rule (5) to the Inspector with a copy thereof to the Deputy Director and also notify them on its notice board.

13. Intimation of names of selected candidates--(1) The Inspector shall, within ten days of the receipt of the panel and the allocation of institution under Rule 12,--

(i) notify it on the notice-board of his office.
(ii) Intimate the name of selected candidate to the Management of the institution, which has notified the vacancy, with the director, that, on

authorization under resolution under resolution of the management, an order of appointment, in the pro forma given in Appendix "E' be issued to the candidate by registered post within fifteen days of the receipt of intimation requiring him to joint duty within fifteen days of the receipt of the order or within such extended time, as may be allowed to him by the Management, and also intimating him that on his failure to join within the specified time his appointment will be liable to be cancelled.

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

(2) the Management shall comply with the directions, give under sub-rule (1) and report compliance thereof to the Board through the Inspector.

(3) Where the candidate, referred to in sub-rule (1), fails to join the post within the time allowed in the letter of appointment or within such extended time as the Management may allow in this behalf or where such candidate is otherwise not available for appointment, the Inspector may, on the request of the Management, intimate fresh name or names standing next in order of merit on the panel, under intimation to the Joint Director and the Board, and the provisions of such-rule (1) and (2) shall mutatis mutaindis apply.

(4) The Joint Director shall monitor and ensure that the candidates selected by the Board join the institution in the specified time and for this purpose, he may issue such directions to the Inspector as he thinks proper."

"14. Procedure for recruitment by promotion- (1) Where any vacancy is to be filled by promotion all teachers working in trained graduates (L.T) grade or certificate of Training (C.T.) grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates (L.T) grade, as the case may be, without their having applied for the same.

14. Even as per 1995 Rules, Rule 10 dealt with source of recruitment by providing that post of Principal of Intermediate College/Headmaster of High School is to be filled up by way of direct recruitment. Lecturers are to be appointed 50% of the post by way of direct recruitment and fifty percent by promotion from amongst substantively appointed teachers of L.T. Grade. Similarly in respect of the L.T. Grade teacher, 50% of the post is to be filled up by way of direct recruitment and 50% by way of promotion from amongst substantively appointed teachers of C.T. Grade. It has also been provided for, that it in any year of recruitment suitable eligible candidates are not available for recruitment by way of promotion, the post may be filled up by way of direct recruitment. Rule 11 obligates the Management to determine the number of vacancies in accordance with sub-section 1 of Section 10 of Act and to notify the same to Commission. Rule 12 deals with procedure for direct recruitment. Rule 13 deals with intimation of name of selected

candidate. Rule 14 deals with promotion, by mentioned that where any vacancy is to be filled up by promotion all teachers working in L.T. Grade or C.T. Grade if any who possess the qualification prescribed for the post and have completed five years continuous service as such on the first day of year of recruitment shall be considered for promotion to the Lecturers Grade or Trained Graduate (LT) grade, as the case may be without their having applied for the same.

Thereafter w.e.f 20.04.1998, by means of U.P. Act No. 25 of 1998 Section 10,11and 12 has been substituted and further new set of Rules have been enforced namely U.P. Secondary Education Services Selection Board Rules 1998. Section 2(l) and Section 10,11 and 12 substituted by U.P. Act No. 25 of 1998 and Rules 10, 11,12 14 are being quoted below:-

U.P. Act No. V of 1982(Section 10,11 and 12 substituted by U.P. Act No. 25 of 1998)

Section 2(l):

"(1) " Year of recruitment' means a period of twelve months a period of twelve months commencing from July 1st of a calendar year.

Section 10: Procedure of selection by direct recruitment- (1) For the purpose of making appointment of a teacher by direct recruitment, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of a post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and other Backward Classes of citizen in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994, and notify the vacancies to the Board in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed;

Provided that the Board shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1).]

Section 11:- Panel of candidates- (1) The Board shall, as soon as as may be after the vacancy is notified under sub-Section (1) of Section 10 hold examinations, where necessary and interviews of the candidates and prepare a panel of those found most suitable for appointment.

(2) The panel referred to in sub-section (1) shall be forwarded by the Board to the officer or authority referred to in sub-section (1) of Section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under sub-section (2) the officer or authority concerned shall, in the prescribed manner, intimate the Management of the Institution the names of the selected candidates in respect of the vacancies notified under sub-section (1) of Section 10.

(4) The management shall, within a period of one month from the date of receipt of such intimation, issue appointment letter to such selected candidate.

(5) Where such selected candidate fails to join the post in such Institution within the time allowed in the appointment letter or within such extended time as the

Management may allow in this behalf or where such candidate is otherwise not available for appointment, the officer or authority concerned may, on the request of the Management, intimate in the prescribed manner, fresh name or names from the panel forwarded by the Board under sub0-section (2).

Section 12:- Procedure of Selection by promotion- (1) For each region, there shall be a Selection Committee, for making selection of candidates for promotion to the post of a teacher comprising-

(i) Regional Joint Director of Eduction- Chairman

(ii) Senior-most Principal of Government Inter College in the region -- Member

(iii) Concerned District Inspector of Schools- Member Secretary

(2) The procedure of selection of candidates for promotion to the post of a teacher shall be such as may be prescribed.

U.P. Secondary Education Services Selection Board Rules 1998

10. Source of recruitment- Recruitment to various categories of teachers:

(a) Principal of an Intermediate College or Headmaster of a High School - By Direct recruitment

(b) Teachers of lecturers grade

(i) 50 percent by direct recruitment

(iii) 50 percent by promotion from amongst substantively appointed teachers of the trained graduates grade

(c) Teachers of trained graduate grade Promotion from amongst the substantive appointed teachers of Certificate of Teaching grade;

Provided that it in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts may be filled in by direct recruitment;

Provided further that if in calculating respective percentages of posts under this rule there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post.

11. Determination and notification of vacancies--(1) For the purposes of direct recruitment to the post of teacher, the Management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 and notify the vacancies through the Inspector, to the Board in the manner hereinafter provided.

(2) (a) The statement of vacancies for each category of posts to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the pro forma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subject-wise in respect of the vacancies of lecturer grade and group-wise in respect of vacancies of trained graduates grade. The consolidated statement so prepared

shall, alongwith the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director.

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by July 20,1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998.

Explanation- For the purposes of this sub-rule the word "group-wise' in respect to the trained graduates grade means in accordance with the following groups, namely:

(a) Language	This group consist of the subjects of Hindi, Sanskrit, Urdu, Persian and Arabic
(b) Science	This group consists of the subjects of Science and Mathematics.
(c) Art and Craft	
(d) Music	
(e) Agriculture	
(f) Home Science	
(g) Physical Education	
(h) General	This group consists of the subjects not covered in any of the foregoing groups.

(b) With regard to the post of Principal or Headmaster, the Management shall also forward the names of two senior-most teachers, alongwith copies of their service records (including character rolls) and such other records or particulars as the Board may require, from time to time.

Explanation- For the purpose of this sub-rule " senior most teacher" means the senior-most teacher in the post of the highest grade in the institution, irrespective of total service put in the institution.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send if to the Board.

(4). Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 10 and notify them to the Board in the manner and by the date referred on in the said sub-rule. The vacancies notified to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.

12. Procedure for direct recruitment- (1) The Board shall, in respect of the vacancies to be filled by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled castes, Scheduled Tribes and Other Backward Classes of citizens in at lest two daily newspapers, having wide circulation in the State, and call for the applications for being considered for reservation in the proforma published in the advertisement. For the post of Principal of an Intermediate College or the Head Master of a High Scholl, the name and place of the institution shall be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wishes to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.

(2) The Board shall scrutinize the applications and in respect of the post of teacher in lecturers and trained graduates grade, shall conduct written examination. The written examination shall consist of one paper of general aptitude test of two hours duration based ion the subject. The centres for conducting written examination shall be fixed in district head quarters only and the invigilators shall be paid honorarium at such rate as, the Board may like to fix.

(3) The Board shall evaluate the answer sheets through examiner to be appointed by the Board or through Computer and the examiner shall be paid honorarium at the rate to be fixed by the Board.

(4) The Board shall prepare lists for each category of posts on the basis of quality points specified in appendix "B' or Appendix "C', as the case may be, marks in written examination and marks for experience as follows:

2.30m per cent marks on the basis of quality points;
3.30m per cent marks on the basis of of written examination; and
4.20 per cent marks for experience more than the required experience in such manner that 4 marks shall be given for each year of such experience with maximum of 16 marks.

Notes:- (1) The teaching experience for this purpose shall be counted only for the recognised High School/Intermediate College(s) or Junior High Scholl and such certificate shall actually mention the date of appointment, date of joining and the scale of pay and duly signed by the Principal/Head Master and counter signed by the District Inspector of Schools or Zila Basic Shiksha Adhikari, as the case may be, with full name of the countersigning authority;

(2) Any wrong information submitted in this regard shall make the applications of such candidates liable to be rejected and for this the candidate himself shall be solely responsible.

(5) The Board shall, in respect to the selection for the post of Head master and Principal, allot the marks in the following manner:

(i) 60 per cent marks on the basis of quality point specified in Appendix "D'

(ii) 20 per cent marks for having experience more than the required experience. 1 mark for each research paper published with a maximum of 4 marks and 2 marks for each year of such experience with a maximum of 16 marks; and

(iii) 10 per cent marks for having doctorate degree.

Note- For the purpose of calculating experience, the service rendered as Head Master of Junior High School or as Assistant teacher of a High School/Intermediate College shall be counted in the case of selection of head Master and for selection of Principal, the service rendered as Head Master of a High School or as a lecturer shall only be counted. The provision of sub rule (4) of Rue 12 regarding the certificate of experience shall mutatis mutandis apply.

(6) The Board, having regard to the need fort securing the representation of the candidates belonging to the Scheduled Castes/Scheduled Tribes and Other Backward Classes of citizen in respect of the post of teacher in lecturers grade and trained graduates grade, call for interview such candidates who have secured the maximum marks under sub-rule (4) above/and for the post of Principal/Head Master, call for interview such candidates who have secured maximum marks under sub clause (5) above in such manner that the number of candidates shall not be less than three and not more than five times of the number of vacancies:

Provided that in respect of the post of principal or Head Master of an institution the Board shall also in addition call, for interview two senior most teachers of the institution whose names are forwarded by the Management through Inspector under clause (b) of sub rule (2) of Rule 11.

(7) The Board shall hold interview of the candidates and 10 per cent marks shall be allotted for interview. The marks obtained in the written test and the quality point by the eligible candidates shall not be disclosed to the members of the Interview Board:

Provided further that in the interview, ten per cent marks shall be divided in the following manner:
2.4 per cent marks on the basis of subject/general knowledge;
3.3 per cent marks on the basis of personality; and
4.3 per cent marks on the basis of ability and experience.
(8) The Board then, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under sub-clause (4) or sub-clause (5) above, as the case may be with the marks obtained in the interview. The panel for the post of Principal or Head Master shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for posts in the lecturers and trained graduates grader, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the quality p0oints are also equal, then the name of candidate who is older in age shall be placed higher. In the panel for the post of Principal or Head Master, the number of names shall

be three times of the number of vacancy and for the post of teachers in the lacquerers and trained graduates grade, it shall be larger (but nor larger than twenty five per cent) then the number of vacancies.

Explanation: For the purpose of this sub-rule the word "group-wise' means in accordance with the groups specified in the Explanation to sub-rule (2) of Rule 11.

(9) At the time of interview of candidates, for the post of teachers in lecturers and trained graduates grade the Board shall, after showing the list of the institutions which have notified the vacancy to it, require the candidate to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

(10) The Board shall after preparing the panel in accordance with sub-rule (8), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated any institution to him as it may deem fit.

(11) The Board shall forward the panel prepared under sub-rule (8) alongwith the name of the institutions allocated to selected candidates in accordance with sub-rule (10) to the Inspector with a copy thereof to the joint Director and also notify them on its notice-board.

13. Intimation of names of selected candidates--(1) The Inspector shall, within ten days of the receipt of the panel and the allocation of institution under Rule 12,--
(iv) notify it on the notice-board of his office.
(v) Intimate the name of selected candidate to the Management of the institution, which has notified the vacancy, with the director, that, on authorization under resolution under resolution of the management, an order of appointment, in the pro forma given in Appendix "E' be issued to the candidate by registered post within fifteen days of the receipt of intimation requiring him to joint duty within fifteen days of the receipt of the order or within such extended time, as may be allowed to him by the Management, and also intimating him that on his failure to join within the specified time his appointment will be liable to be cancelled.
(vi) Send an intimation to the candidate, referred to in clause (ii) with the direction to report to the Manager within fifteen days of the receipt of the order of appointment by him from the Manager or within such extended time as may be allowed to him, by the Management.

(2) the Management shall comply with the directions, give under sub-rule (1) and report compliance thereof to the Board through the Inspector.
(3) Where the candidate, referred to in sub-rule (1), fails to join the post within the time allowed in the letter of appointment or within such extended time as the Management may allow in this behalf or where such candidate is

otherwise not available for appointment, the Inspector may, on the request of the Management, intimate fresh name or names standing next in order of merit on the panel, under intimation to the Joint Director and the Board, and the provisions of such-rule (1) and (2) shall mutatis mutaindis apply.

(4) The Joint Director shall monitor and ensure that the candidates selected by the Board join the institution in the specified time and for this purpose, he may issue such directions to the Inspector as he thinks proper."

"14. Procedure for recruitment by promotion- (1) Where any vacancy is to be filled by promotion all teachers working in trained graduates grade or certificate of Training grade, if any, who possess the qualification prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be, without their having applied for the same.

15. Section 2 (l) of the Act defines year of recruitment, as meaning a period of twelve months' commencing from July 1st of calendar year. Section 10 of the Act obligates the Management to determine number of vacancies existing or likely to fall vacant, during the year of recruitment and notify the vacancies to the Board. Section 10 (2) provides that procedure of selection of candidates for direct recruitment, shall be such as may be prescribed. Proviso to the said section, talks of wide publicity to invite talented persons. Rule 4 provides that a candidate for direct recruitment must have attained age of 21 years on 1st day of July of calendar year when vacancy is advertised. Rule 5 deals with academic qualifications. Rule 10 deals with source of recruitment and as far as post of Lecturers and LT grade teachers are concerned 50% of the vacancies, in respective grade is to be filled up by way of promotion and 50% by way of direct recruitment. Said Section further provides that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the post may be filled up by direct recruitment. Rule 11 deals with determination of vacancies, in terms of Section 10(1) of the Act. Rule 11(2) (a), talks of statement of vacancies, to be filled by direct recruitment, including vacancies that are likely to arise on account of retirement on the last day of year of recruitment to be sent by Inspector by July 15 of the year of recruitment and thereafter by the Inspector to the Board by 31st July. Rule 11 (4), in the event of failure on the part of Management, empowers the District Inspector of Schools, to determine and notify the vacancies, and this action of District Inspector of Schools is to be treated as action on behalf of Management. Rule 12 deals with procedure for direct recruitment. Rule 13 deals with intimation of name of selected candidates Rule 14 deals with procedure for promotion. Rule 16 deals with ad-hoc promotion.

16. At this place relevant provision of U.P. Act No. 4 of 1994 and the Government Orders which cover the field are also been looked into and quoted below:

U.P Act No. 4 of 1994: Section 2 (c)- "public services and posts" means the services and posts in connection with the

affairs of the State and includes services and posts in

(i) a local authority;
(ii) a co-operative society as defined in clause (f) of Section 2 of the Uttar pradesh Co-operative Societies Act 1965 in which not less than fifty-one percent of the share capital of the society is held by the State Government;
(iii) a Board or a Corporation or a statutory body established by or under a Central or Uttar Pradesh Act which is owned and controlled by the State Government or a Government company as defined in Section 617 of the Companies Act 1956 in which not less than fifty one percent of the paid -up share capital is held by the State Government;
(iv) an educational institution owned and controlled by the State Government or which receives grants in aid from the State Government including a university established by or under a Uttar Pradesh Act except an institution established and administered by minorities referred to in clause (1) of Article 30 of the Constitution.
(v) Respect of which reservation was applicable by Government orders on the date of the commencement of this Act and which are not covered under sub-clauses (i) to (iv).

Section 3 (1)- Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes- (1) In public services and posts, there shall be reserved at the stage of direct recruitment the following percentages of valencies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens
(a) in the case of Scheduled Caste- Twenty one percent
(b) in the case of Scheduled Tribes- two percentage
(C) in the case of the other Backward Classes of citizens Twenty seven percent

Provided that the reservation under Clause (c) shall not apply to the category of other backward classes of citizens specified in Scheduled II.
(2) If, even in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, special recruitment shall be made for such number of times, not exceeding three, as may be considered necessary to fill such vacancy from amongst the persons belonging to that category.
(3) if in the third such recruitment referred to in sub-section (2), suitable candidates belonging to the Scheduled Tribes are not available to fill the vacancy reserved for them such vacancy shall be filed by persons belonging to the Scheduled Caste.
(4) Where, due to non-availability of suitable candidates any of the vacancies served under sub-section (1) remains unfilled even after special recruitment referred to in sub-section (2) it may be carried over to the next year commencing from first of July, in which recruitment is to be made, subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in sub-section (1) shall not exceed fifty percent of the total vacancies.
(5) the State Government shall for applying the reservation under sub-section

(1) by a notified order issue a roster which shall be continuously applied till it is exhausted.
(6) If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit in an open competition with general candidates he shall not be adjusted against the vacancies reserved for such category under sub-section (1).
(7) if one the date of commencement of this Act, reservation was in force under Governments Orders for appointment to posts to be filled by promotion such Government Orders shall continue to be applicable till they are modified.

Governments Orders:
Government Order dated 12th July 1978

प्रेषक,
श्री आत्म प्रकाश,
उप सचिव,
उत्तर प्रदेश शासन ।

सेवा में,
शिक्षा निदेशक,
उत्तर प्रदेश,
इलाहाबाद/लखनऊ।

शिक्षा ख(७ख) अनुभाग लखनऊः:दिनांक १२ जुलाई, १९७८

विषयः- मान्यता प्राप्त अशासकीय सहायकता प्राप्त उ.मा. विद्यालयों में नियुक्ति हेतु अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को आरक्षण ।

महोदय,

मुझे यह कहने का निदेश हुआ है कि प्रदेश में सरकारी उच्चतर माध्यमिक विद्यालयों में नियुक्ति हेतु अभी तक अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को कोई आरक्षण प्राप्त नहीं है । अशासकीय सहायता प्राप्त उ. मा. विद्यालयों में भी अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को आरक्षण प्रदान करने का प्रश्न काफी समय से शासन के विचाराधीन था । अतः शासन ने इस मामले में सम्यक विचारोपरान्त यह निर्णय लिया है कि प्रदेश के सभी अशासकीय उ.मा. विद्य
ालयों को, जो कि इस समय अनुदान सूची पर हैं या जो भविष्य में अनुदान सूची पर लाये जायें, राज्य सरकार द्वारा देय अनुदान के जारी रखे जाने अथवा उनके अनुदान सूची पर बने रहने की एक अनिवार्य शर्त यह रहेगी कि वे अपने यहॉ नियुक्तियों में अनुसूचित जातियों, अनुसूचित जनजातियों तथा पिछड़े वर्गो के सदस्यों की संलग्न नियमावली के अनुसार आरक्षण प्रदान करेंगे।

ख(२ख) अतः मुझे आपसे यह अनुरोध करना है कि आप संलग्न नियमावली की एक प्रति सभी सहायता प्राप्त उ. मा. विद्यालयों को भेजते हुये उन्हें शासन के उपर्युक्त निर्णय से अवगत करा दें और उन्हे यह स्पष्ट कर दें कि उन्हे इस नियमावली का पालन करना अनिवार्य होगा अन्यथा उनके विरूद्ध आवश्यक कार्यवाही की जायेगी ।

सहायता प्राप्त अशासकीय, सहायता प्राप्त उ. मा. विद्यालयों में नियुक्ति
हेतु अनुसूचित जातियों, जनजातियों एवं पिछड़े वर्गो को
आरक्षण प्रदान करने हेतु नियमावली

ख(१ख) प्रत्येक अशासकीय सहायता प्राप्त उ. मा. विद्यालय ख(जिसे आगे विद्यालय कहा गया हैख) में अध्यापकों ख(जिसके अन्तर्गत संस्था का प्रधान सम्मिलित नहीं है ख) के प्रत्येक पदईघ्म के पदों पर निम्नांकित वर्गो के ऐसे व्यक्तियों के लिये जो कि उस पद हेतु न्यूनतम निर्धारित योग्यता रखते हों, आरक्षित होगा जो कि प्रत्येक वर्ग के सम्मुख अंकित है :-

अनुसूचित जाति .....१८ प्रतिशत
अनुसूचित जनजाति ..... २ प्रतिशत
पिछड़े वर्ग ..... १५ प्रतिशत
ख(जिनकी सूची परिशिष्ट ''क'' में दी हुई है ख) के लिये

प्रतिबन्ध यह है कि किसी भी पदईघ्म के पदों में किसी भी वर्ग के आरक्षित पदों की गणना हेतु आधे से कम भाग छोड़ दिया जायेगा और आधा या आधा से अधिक भाग को एक गिना जायेगा ।
ख(२ख) यदि किसी विद्यालय में, किसी समय में, किसी पदईघ्म के अध्यापको के पदों पर उपरोक्त वर्गो के अध्यापकों की संख्या उन वर्गो के लिये निर्धरित प्रतिशत से कम होगी तो जब तक उस वर्ग के लिये उक्त निर्धरित कोटा पूर्ण न हो जाय, पहली रिक्ति तथा प्रत्येक एकान्तर रिक्तियॉ ख(.....
.....ख) ख(चाहे वह पदोन्नति से भरी जाय अथवा सीधी भर्ती सेख) आरक्षित समझी जायेगी ।
ख(३ख) किसी वर्ग विशेष के न्यूनतम योग्यताधारी अभ्यार्थियों की उपलब्धता के अधीन रहते हुये,-

ख(कख) जहॉ उपर्युक्त वर्गो में से किसी एक वर्ग का निर्धारित कोटा अपूर्ण हो, वहॉ आरक्षित पदों को उसी वर्ग विशेष के अभ्यार्थियों से भरा जायेगा, और

ख(खख) जहॉ उपर्युक्त वर्गो में से एक से अधिक वर्गो का निर्धारित कोटा अपूर्ण हो, वहॉ आरक्षित पदों का उस प्रत्येक वर्ग के अभ्यार्थियों से उसी ईघ्म में भरा जायेगा । इस ईघ्म में इन वर्गो का उल्लेख नियम ख(१ख) दिया हुआ है । यह प्रईघ्या तब तक दोहराई जाती रहेगी जब तक कि सभी आरक्षित पद भर न जॉयें ।

ख(४ख) यदि उपर्युक्त वर्गो में से किसी वर्ग का कोटा पूर्ण न हुआ हो और उस वर्ग का सम्बन्धित पद हेतु न्यूनतम योग्यताधारी कोई अभ्यर्थी भी उपलब्ध न हो तो ऐसी दशा में आरक्षित पद की रिक्ति उस वर्ग के बाद वाले ऐसे वर्ग के अभ्यर्थी से, जिसका कोटा अपूर्ण हो, भरी जायेगी ।

ख(५ख) जहॉ उपर्युक्त वर्गो में से कोई भी ऐसा वर्ग न हो जिसका कोटा अपूर्ण हो, अथवा जहॉ कोई ऐसा वर्ग हो जिसका कोटा अपूर्ण हो किन्तु उस वर्ग का कोई निर्धरित योग्यताधारी अभ्यर्थी उपलब्ध न हो, तो उस दशा में वह रिक्ति सामान्य अभ्यर्थियों से भरी जायेगी ।

ख(६ख) जहॉ सीधी भर्ती से भरा जाने वाला कोई पद इनमें से किसी भी वर्ग के लिये आरक्षित हो, तो उस पद के विज्ञापन में इस बात का अवश्यमेव उल्लेख किया जायेगा कि वह पद उस वर्ग के लिये आरक्षित है ।
ख(७ख) उपरोक्त व्यवस्थ लिपिकीय तथा चतुर्थ श्रेणी कर्मचारियों के सम्बन्ध में भी लागू होगी ।

ख(८ख) ये नियम उन पदों के सम्बन्ध में लागू नहीं होंगे जिन पर उत्तर प्रदेश हाईस्कूल तथा इंटर कालेज ख(आरक्षित समूह अध्यापक ख) अध्यादेश, १९७८ के अन्तर्गत आरक्षित समूह अध्यापकों का आमेलन किया जायेगा ।

परिशिष्ठ ''क''

शासनादेश सं.-१३१४/छब्बीस-७८१-१९५८, दिनांक १७ सितम्बर, १९५८ के अनुसार उत्तर प्रदेश में पिछड़ी जातियों की सूची ।

हिन्दू

१-अहीर २०-कहार
२-अरख २१-कैवट या मल्लाह
३-बंजाा २२-किसान
४-बढ़ई २३-कोहरी
५-बारी २४-कोरीख(आगरा, मेरठ और रूहेलखण्ड डिवीजन मेंख)
६-बैरागी
७-भर २५-कुम्हार
८-भोटिया २६-कुर्मी
९-भूर्जी या भड़भूजा २७-लोध
१०-बिन्द २८-लोहार
११-छीपी २९-लोनिया
१२-दर्जी ३०-माली
१३-धीवर ३१-मनिहार
१४-गड़रिया ३२-मुराव या मुराई
१५-गोसाई ३३-नाई
१६-गूजर ३४-नायक
१७-हलवाई ३५-सोनार
१९-काछी ३६-तमाली
३७-तेली

मुस्लिम

१-भठियारा १२-किसान
२-बढ़ई १३-मनिहार
३-चिकवाख(कस्साजख) १४-भिरासी
४-दर्जी १५-मौमिनख(अंसारख)
५-डुाली १६-मुस्लिम कायस्थ
६-फकीर १७-नद्दाफ ख(धुनियाख)
७-गद्दी १८-नक्काल
८-हज्जामख(नाईख) १९-नट
९-झीका २०-रंगरेज
१०-कुसगर २१-स्वीपर
११-कुंजड़ा

नोटः- कुमायू डिवीजन में मारछा, नायक, गिरी और पिछड़े मुसलमान भी पिछड़ी जातियों में ही माने जायेंगे ।

उत्तर प्रदेश सरकार
शिक्षा अनुभाग-७
संख्या : ४३८०/१५-७-१ख(१२२ख)/८१
लखनईघ, दिनांक अक्अूबर २५,१९८२
अधिसूचना

उत्तर प्रदेश माध्यमिक शिक्षा सेवा आयोग और चयन बोर्ड अधिनियम, १९८२ ख(उत्तर प्रदेश अधिनियम संख्या ५ सन् १९८२ख) की धारा ३ के अधीन शक्ति का प्रयोग करके राज्यपाल, दिनांक १ नवम्बर १९८२ से ''उत्तर प्रदेश माध्यमिक शिक्षा सेवा आयोग'' स्थापित करते है और निदेश देते हैं कि उक्त आयोग का मुख्यालय इलाहाबाद मं होगा ।
ख(२ख)- राज्यपाल, अग्रतर, उक्त अधिनियम की धारा ४ के अधीन शक्ति का प्रयोग करके निम्नलिखित व्यक्तियों को, कार्य

भार ग्रहण करने के दिनांक से, उक्त आयोग का अध्यक्ष और सदस्य नियुक्त करते है :-

१-श्री नरोत्तम प्रसाद त्रिपाठी अध्यक्ष
२-श्री जमूना प्रदास सिंह सदस्य
ख(धारा ४ की उपधाराख(२ख) के खण्ड
ख(कख) के अधीनख)

Government Order dated 26th April 1983

आरक्षण में नियुक्ति सम्बन्धी नीति

सं० मा०/ १६८५/१५-७-१६८३-१२ ३२/८३
विषय-७ अनुभाग लखनउं, दिनांक २६ अप्रैल, १६८३

विषय :- अशासकीय सहायता प्राप्त उ० मा० विद्यालयों में नियुक्ति हेतु अनुसूचित जातियों/ जनजातियों एवं पिछडे वर्गो को आरक्षण !

महोदय,

मान्यता प्राप्त साहाय्यिक उच्चतम माध्यमिक विद्यालयों में विभिन्न पदों में की जाने वाली नियुक्तियों में अनुसूचित जातियों, अनुसूचित जनजातियों एवं पिछडे वर्गो के अभ्यर्थियों के लिये किये जाने वाले आरक्षण से सम्बन्धित शासनादेश संख्या मा०/२६४२/१५-७-१७ -७१- दिनांक १२-७-७८ के अनुक्रम में मुझे यह कहने का निर्देश हुआ है कि उक्त शासनादेशों से संलग्न निर्देशों में अन्य बातों के साथ यह इंगित किया गया था कि आरक्षित वर्ग के अभ्यर्थियों की नियुक्ति के प्रसंग में ऐसे अभ्यर्थियों के पद हेतु निर्धारण योग्यता का वर्तमान सेवा भाग पर्याप्त समझा जायेगा और यदि वह प्रतिबन्ध पूरा है तो सम्बन्धित अभ्यर्थी को प्रश्नगत पद में आरक्षित कोटा के पद पर नियुक्त किया जा सकता है ! मामले में पुनर्विचारोपरान्त शासन ने यह निर्णय लिया है कि आरक्षित कोटा के पदों में नियुक्ति हेतु अर्ह्द अभ्यर्थियों द्वारा चाहे ऐसी नियुक्ति सीधी भर्ती द्वारा की जा रही हो अथवा प्रोन्नति, द्वारा पद हेतु निर्धारण न्यूनतम योग्यता का अवधारण मांग पर्याप्त न समझा जायेगा बल्कि साथ ही ऐसे अभ्यर्थी का चयन करने वाले प्राधिकारी/ निकाय के दृष्टिकोण से पद से नियुक्ति हेतु उपर्युक्त होना भी आवश्यक होगा !

२- जहॉ तक प्रोन्नतियों द्वारा की जाने वाली नियुक्तियों का सम्बन्ध है शासन ने यह निर्णय लिया है कि ऐसी नियुक्तियों में पिछडे वर्गो के अभ्यर्थियों के लिए कोई आरक्षण न होगा !

३- मुझे यह कहना है कि शासनादेश सं० २६४२/१५-७-१२ ७१/७४ दिनांक १२ जुलाई, १६८३ में संलग्न निर्देश पूर्व प्रस्तरों में उल्लिखित आवेशों की सीमा तक संशोधित समझे जायेगे !

४- कृपया समस्त संस्थाधारियों को शासन के उपर्युक्त आदेशों ने यथाशीध्र अवगत कराने का कष्ट करें और यह सुनिश्चित करें कि आरक्षण सम्बन्धी आदेशों का परिपालन उनके द्वारा तद्नुसार किया जाय ! कृपया जारी किये गये अपने निदेशों की ५० प्रतियां शासन को भी शीध्र भेजने का कष्ट करें!

भवदीय,
राम लाल शर्मा
उप सचिव

क्रम संख्या -१
संख्या २२/२५/८२-कार्मिक-२

Government Order dated 7th February 1990

प्रेषकः
श्री राज कुमार भार्गव
मुख्य सचिव,
उत्तर प्रदेश शासन !

सेवा में,

१- समस्त प्रमुख सचिव/ सचिव/ विशेश सचिव, उत्तर प्रदेश शासन !

२- समस्त विभागाध्यक्ष एवं प्रमुख कार्यालयाध्यक्ष, उत्तर प्रदेश !

३- समस्त मण्डलायुक्त/जिलाधिकारी, उत्तर प्रदेश !

लखनउ, दिनांक ७ फरवरी, १६६० !

विषय :- सेवाओं में अनुसूचित जाति के प्रतिनिधित्व/अनारक्षित डी-रिजर्वेशन नियिम का पुनर्विलोकन !

महोदय,

मुझे यह कहने का निदेश हुआ है कि उपर्युक्त विषयक समसंख्यक शासनादेश दिनांक ३१ जनवरी, १६८६ में यह आदेश प्रसारित किये गये थे कि अनुसूचित जाति/ जनजाति के उपयुक्त अभ्यर्थी की अनुपलब्धता की दशा में आरक्षित रिक्तियों को अन्य वर्ग के अभयर्थियों से न भरा जाये तथा केवल प्रशासनिक अपेक्षाओं की पूर्ति के लिये यदि अपरिहार्य हो तो माननीय मुख्य मंत्री जी का पूर्वानुमोदन प्राप्त करने के उपरान्त ही ऐसा किया जा सकता है !

२- इस सम्बन्ध में ऐसे प्रकरण सामने आये हैं जिनमें ऐसे प्रस्ताव माननीय मुख्य मन्त्री जी के अनुमोदनार्थ प्रस्ततुत

किये गये जो अपरिहार्य नहीं थे अथवा आरक्षित रिक्ति के विरूद्ध सामान्य अभ्यर्थियों से व्यवस्था किये जाने का प्रस्ताव किया गया था! यह स्थिति शासन की मंशा के अनुकूल नहीं है ! इस सम्बन्ध में शासन ने समुचित विचारोपरान्त निम्नांकित निर्णय लिये हैं :-

१- अनुसूचित जाति/ जनजाति के उपयुक्त अभ्यर्थी उपलब्ध न होने की दशा में केवल नितान्त अपरिहार्य मामलों में ही काम चलाउ व्यवस्था के रूप में वित्तीय वर्ष के लिये केवल सीनापन्न/अस्थाई व्यवस्था के लिये माननीय मुख्य मंत्री जी के पूर्वानुमोदन हेतु प्रस्ताव प्रस्तुत किये जा सकते हैं !

२- सामान्य चयन से पूर्व ही आरक्षित कोटे की रिक्तियों के विरूद्ध पात्र अभयर्थियों की अनुपलब्धता के कारण उन्हें सामान्य अभयर्थियों से भरने की अपरिहार्यता स्पष्ट हो जाती है अतः उसे प्रस्ताव में अंकित किया जाय ! विशेष परिस्थितियों में चयनोपरान्त संज्ञान में आने वाले मामलों में माननीय मुख्य मंत्री जी का पूर्वानुमोदन विभागीय मंत्री के अनुमोदन के पश्चात तत्समय प्राप्त किया जाय, परन्तु दोनों ही अवसरों पर पद विशेष पर सामान्य चयन हेतु निर्धारित प्रक्रिया के अनुसार ही चयन किया जाय !

३- कृपया उक्त स्थिति से अपने अधीनस्थ समस्त सम्बन्धित अधिकारियों को अवगत कराने का कष्ट करें !

भवदीय
राज कुमार भार्गव
मुख्य सचिव

संख्या २२/२५/८२ /१/ कार्मिक-२ तद्दिनांक

प्रतिलिपि लिम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित :-
१- सचिवालय के समस्त अनुभाग !
२- राज्यपाल के सचिव !
३- सचिव, लोक सेवा आयोग, उत्तर प्रदेश, इलाहाबाद !
४- सचिव, उत्तर प्रदेश अधीनस्थ सेवा चयन बोर्ड, लखनउ !
५- मुख्य कार्यालय निरीक्षक, उत्तर प्रदेश, इलाहाबाद !
६- निबन्धक, उच्च न्यायालय, उत्तर प्रदेश, इलाहाबाद!
७- समस्त जिला हरिजन एवं समाज कल्याण अधिकारी, उत्तर प्रदेश !
८- सचिव, विधान सभा/ विधान परिषद, उत्तर प्रदेश !

आज्ञा से,
नीरा यादव,
सचिव !

Government Order dated 18-12.1990

कार्मिक अनुभाग-२, शासनादेश संख्या २२/५८/८२-कार्मिक-२/६०, दिनांक १८ दिसंबर, १९९०

विषय : राज्याधीन आदि सेवाओं के पदोन्नति कोटे में अनुसूचित जाति/ जनजाति के अभ्यर्थियों की बिना भरी हुए आरक्षित रिक्तियों की पूर्ति !

शासन के संज्ञान में यह आया है कि पोषक संवर्ग में अनुसूचित जाति/जनजाति के अर्ह उपयुक्त अभ्यर्थियों की अनुपलब्धता के कारण या तो ऐसे पदों को लम्बी अवधि तक खाली रखना पडता है अथवा उन्हें अस्थई/स्थनापन्न रूप से सामान्य वर्ग के अभ्यर्थियों से भरे जाने के प्रस्ताव प्राप्त होते हैं ! फलतः आरक्षित पदोन्नति कोटे के पदों पर आरक्षण कोटे की पूर्ति नहीं हो पाती है तथा आरक्षित वर्ग के अभ्यर्थी उच्च पदों पर सेवा के अवसर पाने से वंचित रह जाते है। ! आरक्षित पदों को प्राथमिकता के आधार पर आरक्षित वर्ग के अभ्यर्थियों से भरने के उद्देश्य से शासन द्वारा सम्यक विचारोपरान्त निम्नांकित निर्णय लिये गये हैं :-

१- जिन सेवाओं में सीधी भर्ती तथा पदोन्नति दोनों कोटा निर्धारित है उनमें पोषक संदर्भ में अनुसूचित जाति/ जनजाति के अर्ह अभ्यर्थियों के पदोन्नति हेतु अनुपलब्धता पर उक्त रिक्तियॉ अस्थाई रूप से सीधी भर्ती के कोटे में परिवर्तित की जा सकेंगी !

२- पोषक संवर्ग में अनुसूचित जाति/जनजाति के अर्ह अभ्यर्थियों के उपलब्ध होने के बाद सीधी भर्ती कोटे में आरक्षित रिक्तियों को पुनः पदोन्नति कोटे में स्थानान्तरित किया जाये ताकि भर्ती के दोनों स्त्रोतों में संतुलन बना रहे !

३- सीधी भर्ती के पदों पर आगामी चयन आयोजित करने हेतु तद्नुसार अधियायन भेजे जायें, और यदि पूर्व में अधियायन भेजे जा चुके हों तो उनमें वांछित संशोधन कर दिये जायें !

४- उक्त आदेश तात्कालिक प्रभाव से लागू होंगे और इस संदर्भ में पूर्व प्रसारित समस्त आदेश इस सीमा तक संशोधित समझे जायें !

२- कृपया उपरोक्तानुसार कार्यवाही सुनिश्चित करने हेतु अपने अधीन समस्त नियुक्ति प्राधिकारियों को निर्देशित करने का कष्ट करें !

३- यह आदेश तात्कालिक प्रभाव से लागू होंगे !

17. After all these provisions have been noticed, the first question is to be

seen is as to whether reservation policy is applicable in case where the post is to be filled up by way of promotion, when there is no mention of providing reservation either under the U.P. Act No. V of 1982 or Rules framed thereunder in respect of promotion. Both under the un-amended and amended U.P. Act No. V of 1982 specific mention has been made in respect of providing of reservation in the matter of direct recruitment but there is no mention of reservation in the matter of promotion and in this background relevant provisions are being looked into. State Government as far as back on 12.07.1978 had issued an order providing reservation of post for S.C/S.T. And Other Back ward Classes of citizens where the vacancies were to be filled up by way of promotion. Said Government Order contained condition No. 5 wherein it has been mentioned that in case in aforementioned relevant year of recruitment no one was available in the next lower grade then in that event said post could be filled by way of direct recruitment. Validity of aforementioned Government Order had been considered by a Division Bench of this Court in the case of **Krishna Pal Singh Vs. Government of U.P. and others** reported in 1981 UPLBEC 521 wherein this Court took the view that said Government Order has statutory force and same will have to be effective notwithstanding any regulation framed by the Board. Division Bench of this Court while considering the provision of the Chapter-II Regulation 6 of U.P. Intermediate Education Act 1921 alongwith the Government Order dated 12.07.1978 concluded that if the vacancy occurs in the L.T. Grade then that should be filled up by way of promotion from member of Scheduled Castes, Scheduled Tribes or Backward Classes if he posses the minimum requisite qualifications. Subsequent to the said Government Order another Government Order dated 26.04.1983 has been issued and the same has modified the earlier Government Order dated 12.07.1978 and promotion benefit has been withdrawn qua "OBC" category candidates. State Government as policy decision took the view that in the matter of promotion there would be no reservation qua Other Backward Class category candidate. Thereafter Government Order dated 31.01.1989 had been issued mentioning therein, that in case no one from SC/ST category is available then the said post shall not be filled from candidate of other categories and only when there is administrative requirement and same cannot be awaited, then after taking concurrence from Hon'ble Chief Minister, candidate from other category could be appointed. This Government Order has been further clarified in Government Order dated 07.02.1990. In Government Order dated 07.02.1990 it has been mentioned that where candidate from Scheduled Caste/Scheduled Tribe category is not available then in that event said post shall not be filled up from other category candidate and only when there would be administrative exigency then in that event same may be filled up from other category of candidates after obtaining prior permission from the Chief Minister and it was also mentioned therein it would be treated as merely stop gap arrangement. It was also mentioned that after permission was accorded by the Chief Minister then same can be filled by following procedure provided for. Subsequent to this Government Order dated 18.12.1990 has been issued and therein it has been mentioned that State Government has acquired knowledge that

in the feeder cadre, on account of non-availability of Scheduled Caste/Scheduled Tribes candidates posts are lying vacant for long period and further resolutions are being received to fill up the said post on temporary/stop gap basis from amongst General category candidates and net effect of the same is that posts reserved are not filled up from amongst reserve category candidate. In this background State Government took decision providing therein that where quota both by way of direct recruitment and promotion has been provided for and there is no candidate available in feeder Cadre from amongst Scheduled Caste/Scheduled Tribes category then in that event said vacancies can be converted on temporary basis to be filled by way of direct recruitment and the moment in the feeder Cadre Scheduled Caste/Scheduled Tribes category candidates are available then in that event the post reserved under direct recruitment quota would be transferred to promotional quota so that balance is there in between direct recruitment quota and promotion quota. It has been mentioned in the Government Order dated 18.12.1990 that earlier Government Order issued in this respect shall stand cancelled. Said Government Order dated 12.07.1978 in its modified form dated 18.12.1990 still holds the field and till date said Government Order has not been rescinded, modified or revoked. In the case of ***Indra Sawhney and others Vs. Union of India and others*** reported in 1992 Supp. (3) SCC 217, reservation, in the matter of promotion was disapproved, however it was mentioned that in case there are existing provision giving benefit of reservation in the matter of promotion then same be permitted to be continued for a period of five years. State Government came out with U.P. Act No. 4 of 1994 with a view to provide reservation in public service and post in favour of persons belonging to SC/ST/ and OBC category and therein sub-section (7) of Section 3 had been inserted by mentioning that Government Orders which provided for reservation in promotion as on the date of commencement of the Act, would continue to be applicable till they are modified or revoked. Constitutional amendment was also made by inserting Clause (4-A) in Article 16 of Constitution w.e.f. 17.06.1995 which enjoined State Government to make provision for reservations in favour of SC/ST category candidate.

18. Validity of Section 3 (7) of U.P. Act No. 4 of 1994 has been subject matter of challenge before Division Bench of this court, in the case of ***Sudhir Kumar Anand Vs. U.P. State Electricity Board*** reported in 2001 (1) UPLBEC 708 and this court has upheld validity of the same. Relevant extract of the said judgement is being quoted below:

"5. The validity of Sub-Section (7) of Section 3 of U.P. Act No. 4 of 1994 has been questioned by Sri Ravi Kiran Jain on the ground that the State Legislature was not competent to enact sub-section (7) of Section 3 of the U.P. Act No.4 of 1994 in view of the pronouncement by the Apex Court in ***Indra Swhney's*** case. The arguments is mis-conceived. It is evident that sub-section (7) of Section 3 by itself does not provide for any reservation. Rather it simply visualises that the Government Orders providing for reservations in promotion, as on the date of commencement of the Act will continue to be applicable till they are modified or revoked. Accordingly, we are

of the view that the Government Orders on the subject of reservation in favour of Scheduled Castes for appointment to posts to be filled by promotion in favour of Scheduled Castes for appointment to posts to be filled by promotion in force on the date of commencement of the Act were capable for being invoked indecently of sub-section (7) of Section 3 of U.P. Act No. 4 of 1994 by virtue the directions contained in ***Indra Swhney's case*** and after insertion of the clause (4-A) in Article 16 of the Constitution of w.e.f. 17.06.1995, no exception can be taken to the provisions contained in sub-section (7) of Section 3 of the Act which became valid and operative by strength of clause (4-A) of Article 16 of the Constitution. It is true that but for insertion of clause (4-A) in Article 16, sub-section (7) of Section 3 would not have been available for being invoked on expiration of period of five years from 15.11.1993 but now after insertion of clause (4-A) in Article 16 of the Constitution, Section 3 (7) of U.P. Act No. 4 of 1994 has become a valid law and, therefore, it cannot be struck down a violative of Articles 14 and 16 of the constitution. It may be pertinently observed that now after insertion of clause (4-A) in Article 16 of the Constitution the appropriate Government can, in exercise of its executive powers under Articles 73 and 162 of the Constitution, as the case may be, can provide for reservation in favour of Scheduled Castes/ Scheduled Tribes in matters of promotion of any class or classes of posts in the services under the State Government Order dated 31.03.1996 (Annexure CA-7) and other Government Orders referred to therein were issued by the State Government in exercise of its executive power under the Constitution.

19. Earlier percentage of reservation for SC category candidate was 18% and same was extended to 21% the said extension of quota from 18% to 21% has been subject matter of challenge before this Court in Full Bench judgement of this Court in the case of **V.K. Bannerji Vs. State of U.P. and others** reported 1999 (1) ESC 644 wherein Full Bench of this Court has upheld the validity of the Government Order dated 10.10.1994 increasing reservation quota in promotion in favour of Scheduled Castes candidates from 18% to 21% under Section 3 of the Reservation Act 1994.This Court in the case of **Sunil Kumar Mishra Vs. Regional Selection Committee and others** reported in 2004 (2) UPLBEC 1520 has taken the same view after considering various Government Orders, that reservation is applicable with full force in the matter of promotion upto 21% of the cadre strength. In yet another judgement of this Court in the case of **Asha Jaiswal (Smt.) Vs Joint Director of Education, Varanasi and others** reported in 2004 (2) UPLBEC 1837 this Court has taken the view that under U.P. Secondary Eduction Services Selection Board Act 1982 and the Rules framed there under no reservation has been provided for as such there is no provision for reservation in promotion. Said judgement has not taken note of existing Government Orders which still covered the field and which had not been modified or revoked in respect of promotion of SC/ST category candidate in terms of Section 3 (7) of U.P. Act No. 4 of 1994. Said judgement has been passed ignoring the Government Order and the correct position is mentioned in the case of **Sunil Kumar Mishra Vs. Regional Selection**

Committee and others reported in 2004 (2) UPLBEC 1520.

20. The logical conclusion on the basis of reference made above is that though in the matter of promotion under U.P. Act No. 5 of 1982 and the Rules framed thereunder there is no mention for providing any reservation, but as promotion is to be made in "public service and post" as defined under Section 2(c) and 2(c) (iv) of U.P. Act No. 4 of 1994 then in terms of Section 3 (7) of U.P. Act No. 4 of 1994, the Government Orders which covered the field of promotion qua SC/ST category candidates, continue to be applicable till they are modified or revoked. As till date said Government Orders have not been revoked or modified, net effect of the same would be that 21% of vacancies is to be filled by way of promotion from amongst SC category and 2% of vacancies from amongst ST category candidates.

21. Now the second question posed is being looked into that in the absence of Schedule caste/Scheduled Tribes category candidate being available in the feeder cadre, can the post be offered to General category candidate from promotion quota or same shall be filled by by way of direct recruitment, from amongst reserve category candidate. State Government in its wisdom had chosen to provide reservation in promotion to SC/ST category candidates and has also prepared roster for implementation of the aforementioned policy of promotion. Provision of promotion with roster for promotion of SC/ST employees was already there when U.P. Act No. 4 of 1994 had been enforced. On 16.10.1994 percentage of reservation was increased qua SC candidates and of the same date fresh roster was published. Thereafter another roster for promotion of SC/ST employees was prepared on 15.12.2001 but same was cancelled on 23.11.2001 and fresh roster has been introduced on 25.06.2002. Thus, provision of promotion of SC/ST category candidate with roster has been inexistence both before enforcement of U.P. Act No. 4 of 1994 and after enforcement of U.P. Act No. 4 of 1994. The purpose of providing roster has been considered by Hon'ble Apex Court in the case of ***R.K.Sabharwal and others Vs. State of Punjab and others*** reported in 1995 (2) Supreme Court Cases 745. Relevant paragraphs of aforementioned Constitutional Bench judgement 4,5,6 and 10 are being quoted below:

"4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts and in the event of their appoint to the said posts their number cannot be added and taken into consideration for working out the percentage or reservation. Article 16 (4) of the Constitution of India permits the State Government to make any provisions for the reservation of appointments or post in favour of any backward Class of citizens which in the opinion of the State is not adequately represented in the Services under the State. It is, therefore incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State services. While doing so the State

Government may take the total population of a particular backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Classes have already been appointed/ promoted against the general seats. As mentioned above the roster point which is reserved for a backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidates can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/ rules providing certain percentage of reservations for the Backward Classes are operative the same have be followed. Despite any number of appointees/promotes belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same.

5. We see considerable force in the second contention raised by the learned counsel for the petitioners. The reservations provided under the impugned Government instructions are to be operated in accordance with the roster to be maintained in each department. The roster is implemented in the form of running account from year to year. The purpose of "running account" is to make sure that the Scheduled Castes/ Schedule Tribes and Backward Classes get their percentage of reserved posts. The concept of "running account" in the impugned instructions has to be so interpreted that it does not result in excessive reservation. " 16% of the posts..... are reserved for members of the Scheduled Caste and Backward Classes. In a lot of 100 posts those falling at Serial Numbers 1,7,15,22,30,37,44,51,58,65,72,80,87 and 91 have been reserved and earmarked in the roster for the Scheduled Castes. Roster points 26 and 76 are reserved for the members of the Backward Classes. It is thus obvious that when recruitment to a cadre starts then 14 posts earmarked in the roster are to be filled from amongst the members of the Scheduled Castes. To illustrate, first post in a cadre must go to the Scheduled Caste and thereafter the said class is entitled to 7th, 15th 22nd and onwards up to 91st post. When the total number of posts in a cadre are filled by the operation of the roster then the result envisaged by the impugned instructions is achieved. In other words, in a cadre of 100 posts when the posts earmarked in the roster for the Scheduled Castes and the Backward Classes are filled the percentage of reservation provided for the reserved category is achieved. We see no justification to operate the roster thereafter. The "running account" is to operate only till the quota provided under the impugned instructions is reached and no thereafter. Once the prescribed percentage of posts is filled the numerical test of adequacy is satisfied and thereafter the roster does not survive. The percentage of reservation is the desired

representation of the Backward Classes in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation of their population. The numerical quota of post is not a shifting boundary but represents a figure with due application of mind. Therefore, the only way to assure equality of opportunity to the Backward Classes and the general category is to permit the roster to operate till the time the respective appointees/promotees occupy the posts meant for them in the roster. The operation of the roster and the 'running account' must come to an end thereafter. The vacancies arising in the cadre, after the initial posts are filled, will pose no difficulty. As and when there is a vacancy whether permanent or temporary in a particular post the same has to be filled from amongst the category to which the post belonged in the roster. For example the Scheduled Caste persons holding the posts at roster points 1,7, 15 retire then these slots are to be filled from amongst the persons belonging to the Scheduled Castes. Similarly, if the persons holding the post at points 8 to 14 or 23 to 29 retire then these slots are to be filled from among the general category. By following this procedure there shall neither be shortfall nor excess in the percentage of reservation.

6. The expressions 'post' and vacancies, often used in the executive instructions providing for reservations are rather problematical. The word "post means an appointment, job, office, or employment. A position to which a person is appointed. 'Vacancy' means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre. As a consequence the percentage of reservations has to be worked out in relation to the number of posts which form the cadre-strength. The concept of 'vacancy' has no relevance in operating the percentage of reservation.

10. We may examine the likely result if the roster is permitted to operate in respect of the vacancies arising after the total posts in a cadre are filled. In a 100 point roster., 14 posts at various roster points are filled from amongst the Scheduled Caste/Scheduled Tribe candidates, 2 posts are filled from amongst the Backward Classes and the remaining 84 posts are filled from amongst the general category. Suppose all the posts in a cadre consisting of 100 posts are filled in accordance with the roster by 31.12.1994. Thereafter in the year 1995, 25 general category persons (out of the 84) retire. Again in the year 1996, 25 more persons belonging to the general category retire. The position which would emerge would be that the Scheduled Castes and Backward Classes would claim 16% share out of the 50 vacancies. If 8 vacancies are given to them then in the cadre of 100 posts the reserve categories would be holding 24 posts thereby increasing the reservation from 16% to 24%. On the contrary if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc. caused the vacancies then the balance between the reserve category and the general category shall always be maintained. We make it clear that in the event of non-availability of a reserve candidate at the roster point it

would be open to the State Government to forward the point in a just and fair manner."

22. As per the said judgment reservation has to be done in relation to the number of post comprising the cadre and not in relation to vacancies. The Word "posts" means an appointment, job, office or employment a position to which person is appointed. On the other hand, Vacancy means an unoccupied post or office. The place meaning of the two expressions makes it clear that there must be a 'post' in existence to enable the vacancy to occur. The cadre-strength is always measured by the number of posts comprising the cadre. The roster indicates the reserve points, when percentage for reservation is fixed in respect of a particular cadre and same has to be taken that the posts shown at the reserve points are to be filled up from amongst the members of reserve category candidates and the candidates belonging general category are not entitled to be considered for the reserved posts. State Government, however has been vested with the authority in the event of non-availability of reserved candidate at the roster point to carry forward the point in just and fair manner. Thus, this much is clear that when the point is fixed for reserved category candidates by way of roster then same has to be filled from amongst the members of reserve category and the candidates belonging to General category are not entitled to be considered on the reserved post and the Sate Government has discretion to carry forward the point in just and fair manner. Thus, reserved post cannot be offered to other category candidate and State Government is empowered to carry forward the said point in just and fair manner.

23. In the case of ***Ajit Singh and others Vs. State of Punjab and others*** reported in 1999 (7) Supreme Court Cases 209 Hon'ble Apex Court while considering the question as to whether right to be considered for promotion is a fundamental right granted under Article 16 (1) or mere statutory right has taken the view that right to be considered for promotion is fundamental right and further that the provision as contained under Article 16 (4), 16(4-A) of the Constitution is in the nature of enabling provisions and there is no directive or command implicit in it and same vest discretion in the State to consider providing reservation. In the said judgement itself after noticing Article 16(1) dealing with fundamental right and Article 16(4) and 16(4-A) as enabling provisions, the exercise of balancing Article 16(1) and Article 16 (4) and 16(4-A) has been undertaken and in this direction earlier judgement of Hon'ble Apex Court has been referred to where in balancing principles has been enunciated. Constitutional Bench judgement reported in AIR 1963 SC 649 **M.R. Balaji Vs. State of Mysore** has been referred to wherein it has been stated that the interests of reserved classes must be balanced against the interests of other segments of society. Further observations made in the case of **Indra Sawhney and others Vs. Union of India and others** reported in 1992 Supp. (3) SCC 217 has been extracted by mentioning that provisions under Article 16(4) has been conceived in the interest of certain sections of society and same should be balanced against the guarantee of equality enshrined in Clause 1 of Article 16 held out to every citizens and to the entire society, and the Court has to ensure that

in the matters relating to affirmative action by the State, the rights under Article 14 and 16 of the Constitution of India of an individual to equality of opportunity are not affected. A reasonable balance has to be struck so that affirmative action does not lead to reverse discrimination. These two decisions of Hon'ble Apex Court has been followed in the case **PGI of Medical Educations Research Chandigarh vs. Faculty Education** reported in 1998 (4) SCC. Relevant paragraph 31 and 32 is being quoted below:

31. There is no difficulty in appreciating that there is need for reservation for the members of the Scheduled Castes and Scheduled Tribes and Other Backward Classes and such reservation is not confined to the initial appointment in a cadre by also to the appointment in a promotional post. It cannot however be lost sight of that in the anxiety for such reservation for the backward classes, a situation should not be brought about by which the chance of appointment is completely taken away so far as the members of the other segments of the society are concerned by making such a single post cent percent reserved for the reserved categories to the exclusi8on of other members of the community even when such a member is senior in service and is otherwise more meritorious.
32. Articles 14, 15 and 16 including Articles 16(4), 16(4-A) must be applied in such a manner so that the balance is struck in the matter of appointments by creating reasonable opportunities for the reserved classes and also for the other members of the community who do not belong to reserved classes. Such view has been indicated in the Constitution Bench decision of this Court in **M.R. Balaji Vs. State of Mysore** reported in AIR 1963 SC 649 and ***T Devadasan Vs. Union of India*** reported in AIR 1964 SC 179 and ***R.K. Sabharwal and others Vs. State of Punjab and others*** reported in 1995 (2) Supreme Court Cases 745. Even in ***Indra Sawhney and others Vs. Union of India and others*** reported in 1992 Supp. (3) SCC 217 the same view has been held by indicating that only a limited reservation not exceeding 50% is permissible. It is to be appreciated that Article 15 (4) is an enabling provision like Article 16(4) and the reservation under either provision should not exceed legitimate limits. In making reservations for the backward classes, the State cannot ignore the fundamental rights of the rest of the citizens. The special provision under Article 15 (4) [sic 16 (4)] must therefore strike a balance between several relevant considerations and proceed objectively. In this connection reference may be made to the decisions of this Court in ***State of A.P. Vs. U.S.V Balram*** reported in 1972 1 SCC 660 and ***C.A Rajendran Vs. Union of India*** AIR 1968 SC 507. It has been indicated in **Indra Swhney** case that clause (4) of Article 16 is not in the nature of an exception to classes (1) and (2) of Article 16 but in an instance of classification permitted by Clause (1). It has also been indicated in the said decision that Clause (4) of Article 16 does not cover the entire filed covered by Clauses (1) and (2) of Article. In Indra Swhney this court has also indicated that in the interest of the backward classes of citizens, the State cannot reserve all the appointments under the State of even a majority of

them. The doctrine of equality of opportunity in clause (1) of Article 16 is to be reconciled in favour of backward classes under clause (4) of Article 16 in such a manner that the latter while serving the cause of backward classes shall not unreasonably encroach upon the field of equality.

24. Article 14, 15 and 16 including Articles 16(4) and Article 16 (4-A) has to be applied in such a manner so that balance is struck in the matter of appointments, by creating reasonable opportunities for reserved class both in the matter of direct appointment and in promotion for SC/ST category candidate, as well as candidates from other segments of society, State Government in order to provide adequate representation to SC/ST category candidates has chosen to provide reservation t0 SC/ST category candidate, and the same has been sought to be extended in the matter of promotion also. State Government in its wisdom has published roster, qua the promotion and therein, fixed points have been provided for. Roster points are nothing else but the indicator of balance which has been sought to be maintained qua candidates of other category. By preparation of roster, balance has been struck qua the interest of reserve category candidate and other segments of the Society. Managing Committee of every institution is obliged to prepare roster, qua their respective institution grade wise as per model roster, prescribing fixed points, and the concerned District Inspector of Schools has full authority to see and supervise that said roster has been prepared strictly in consonance with the model roster and its implementation is also in accordance to the same. If this is ensured, the parties will know their position and there will be no much room of grievance on the part of both category of candidates in this respect as it would be maintaining balance between the demands of merit and social justice. Once a particular point for a particular section under the roster has been declared, then the post at the said point would be offered to candidate from the said category and to no one else. Roster would operate, only till all the roster points in cadre are filled and quota prescribed in instruction are achieved. The same would be in the form of running account, from year to year, and subsequent vacancies are to be filled from the categories to which the post belonged. The operations of roster, for filling cadre strength by itself ensures that reservations remains, within 50% limit so that balance is not disturbed and right of General Category candidates is not defeated. Right of consideration of candidature for promotion has been held to be fundamental right, but said right will come into play, when incumbent falls within the zone of consideration. Once post in question is reserved by providing fix point, then general category candidate is excluded from the zone of consideration. This is the rigor of roster point. Thus, post meant for SC/ST candidate, shown in roster has to be offered to SC/ST candidate and as mentioned in **R.K. Sabarwals (supra)** case, roster cannot be changed or altered and said point post has to be filled up only from the said category and State Government can only forward the said point and here State Government has taken decision, that in the event of non availability of reserve category candidate, in the matter of promotion, the said post would be shifted to direct recruitment quota and in future, if candidates are

available in feeder cadre, then necessary adjustment would be made .

Now taking the case in hand it is reflected that Deputy Director of Education in the present case at no point of time has adverted to all these aspects of the matter that there was existing Government Order which covered the field of reservation in the matter of promotion and there was an exiting roster. In the present case as Deputy Director of Eduction has not undertaken any exercise while directing promotion of Rama Kant Mishra whereas Deputy Director of Education was enjoined upon to see as to whether post in question was reserved for Scheduled Caste/Scheduled Tribes or not. As no exercise whatsoever has been done in the present case as such entire proceedings undertaken by the Deputy Director of Education is clearly vitiated and is unsustainable.

25. Consequently, writ petition filed by Management is allowed and two writ petitions filed by Ramakant Mishra are dismissed. Joint Director of Education, Allahabad is directed to decide the matter afresh, after providing opportunity to Management as well as Sri Rama Kant Mishra.

No orders as to cost.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2006

BEFORE
THEHON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 45547 of 2004

M/s United Provincial Transport Agency, Allahabad ...Petitioner

Versus

Presiding Officer, Labour Court, U.P., Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Vijay Agrawal
Sri Piyush Bhargava

Counsel for the Respondents:
Sri Shyam Narain
Sri Sudhanshu Narain
S.C.

Indian Evidence Act 1888-Section-62-Secondary evidence-workman filed Photocopy-employer despite of direction taken plea the very existence of such register-in as much as the engagement of workman-rather than-the driver of the truck itself engaged the freelance labourer-labour court neither called for inspection report, nor the Original documents produced for comparison-adverse inference drawn against the firm can not survive. Finding of Labour Court based on inadmissible evidence and irrelevant materials-held-wholly erroneous, misconsidered and perverse.

Held: Para 67

Thus in view of discussions made herein before, I am of considered opinion that the respondent-workman has failed to discharge his burden of proof to establish relationship between him and petitioner as of employee and employer and master and servant. The Photostat copies of attendance and wage register were not admissible in evidence as secondary evidence for the reasons given herein before. Similarly the Photostat copy of silver coin is also not admissible in evidence for the same reasons and absence of proof of identity of recipients were liable to be excluded from consideration to establish such master and servant relationship between the petitioner and respondent-workman, therefore, the findings of labour court

based on inadmissible evidence and irrelevant materials are wholly erroneous, misconceived and perverse and cannot be sustained and liable to be quashed. Accordingly same are hereby quashed. Consequently the reference in question is also held to be incompetent and bad in law.

Case law discussed:

1973 Lab.I.C. 398
1976 Lab.IC. 202
AIR 1967 SC-884
1977 (Vol.3) SCR 678
1983 (2) SCC-33
2001 J.T. (4) SC-145
AIR 1964 SC-355
2003 (98) FLR 826
AIR 2004 SC-1639
AIR 1933 P.C.-87
AIR 1967 SC-450
JT 2003 (6) SC-14
AIR 1953 Mad. 780
AIR 1954 SC-606
AIR 1966 SC-1457
AIR 1955 SC-404
AIR 1957 SC-264
1964 (2) LLJ 633
AIR 1970 SC-66
1974 (3) SCC-498
AIR 1978 SC-1410
1983 (4) SCC 464
AIR 1984 SC-23
AIR 1992 SC-1452
1996 (3) SCC-267
2000 (4) SCC-245
2001 (3) SCC-36
AIR 2001 SC-3527
1997 (9) SCC-377
1974 (1) SCC-596
2003 (7) J.J. SC-95
AIR 1992 SC-457
JT 2002 (4) SC-115

(Delivered by Hon'ble Sabhajeet Yadav, J.)

By this petition, petitioner has challenged the award of the Labour Court, Allahabad dated 19.1.2004 published on 24.8.2004 contained in Annexure-1 of the writ petition inter alia on the grounds mentioned in the writ petition.

2. The relevant facts having material bearing with the question in controversy involved in the case are that the petitioner is transport agency (not transporter) in which goods are booked and are sent through trucks hired from transporters to different cities within the country as well as it receive goods from different transporters of the country and deliver it. The agency does not have any trucks/vehicles of its own and has a small office and a godown at Transport Nagar, Allahabad. The nature of business is such that the petitioner does not require more than two permanent employees in its establishment. The business of the petitioner being totally uncertain and is dependent upon the arrival of the truck loaded with goods booked to the agency of petitioner. Since the agency does not have any labourers of its own the work of loading and unloading is mostly done by freelance labourers engaged by the truck drivers themselves who reimburse these freelance labourers directly for the work taken from them as per terms settled with the transporters and the petitioner agency the work of loading and unloading the trucks hired from transporters is done by a batch of freelance labourers engaged by and through a mate available in the Transport Nagar area. This batch of labourers work directly under the supervision and control of the mate engaging them and the petitioner does not exercise any control over them. The payments are made to the mates directly either per quintal or per truck load depending upon the terms settled with the mate who in turn engage freelance labourer to carry out the job. The batch of labourers who do the work of loading and unloading are paid through mate as per terms settled between them. Some time

the payments are made to one of the labourers of the group when the mate is not available. It is further stated that there is no system of recording any attendance of these freelance labourers engaged by or through a mate for loading and unloading of the goods received/dispatched by the petitioner agency as in case of such agencies, business not being regular but being uncertain dependant upon arrival of trucks. These freelance labourers work for more than one or two agencies on the same day depending upon availability of work on arrival of trucks in other agencies in Transport Nagar area. These freelance labourers are not bound to work in one establishment nor the agencies like petitioner can exercise any control or take disciplinary action against them. Neither the petitioner nor other agencies in the area engaged in the business ever employs labourers of this nature on regular basis and there is no employer-employee relationship between the agencies and these hired of freelance labourers. It is also not feasible to engage them on regular basis otherwise the transport agency business itself would not be viable.

3. It is further stated that one Pyare Lal respondent no.2 was one of such freelance labourer engaged by different mates to do the work of loading and unloading who had occasionally worked in the establishment of petitioner under their supervision and control. The petitioner did not have any control and supervision over the respondent no.2 nor had any right to take disciplinary action against him nor was respondent no.2 bound to work in the establishment of the petitioner and there was no relationship of master and servant between the petitioner and respondent no. 2. It is stated that the petitioner does not require any separate godown-keeper and the work relating to godown have been managed by two employees of petitioner agency. The dispute arose on account of fact that aforesaid Pyare Lal raised an industrial dispute that he was employed as a godown-keeper to the petitioner agency and that his services have been illegally terminated w.e.f. 7th July 2001. The petitioner did not receive any notice of conciliation proceeding and came to know about the alleged dispute when the petitioner received summons from the Labour Court, Allahabad. The said dispute referred to the Presiding Officer, Labour Court, Allahabad respondent no. 1 was registered as Adjudication Case No. 37 of 2002. Respondent no. 2 filed his written statement before the Labour Court, Allahabad stating that he was appointed on a post of godown keeper/helper on 5.4.1975 and had continuously worked till 6.7.2001 and was drawing wage amounting Rs.2110/- per month and his services have been illegally terminated w.e.f. 7.7.2001. A copy of written statement of respondent no. 2 is on record as Annexure-2 of the writ petition. On receipt of summons from the Labour Court with respect to the alleged dispute raised by respondent no.2 the petitioner filed its written statement before the Labour Court raising a preliminary objection as to the maintainability of order of reference by clearly taking the stand that there is no relationship of master and servant between the petitioner agency and the respondent no. 2 and therefore there does not exists any industrial dispute between the two and the order of reference made by State Government is bad in law. The petitioner further submitted that the order of reference made by the State

Government is also without application of mind and it has wrongly presumed that respondent no. 2 was the workman of the petitioner and therefore the order of reference is bad on this ground too. The petitioner had stated that it has a transport agency and for the purpose of loading and unloading the loaders are engaged by truck drivers from the local area and are reimbursed by them and the petitioner has nothing to do with their business. A copy of written statement filed by petitioner is on record as Annexure-3 of the writ petition. The respondent no. 2 filed rejoinder statement denying the facts of the written statement of petitioner. A copy of which is on record as Annexure-4 of the writ petition. The petitioner filed its rejoinder statement to the written statement of workman denying the facts stated therein clearly stating that respondent no.2 was never employed as a godown keeper/helper or any of the categories in the petitioner agency. A copy of rejoinder statement filed by petitioner is on record as Annexure-5 of the writ petition.

4. The respondent no.2 filed an application before Presiding Officer, Labour Court calling for the petitioner to file the records of attendance and wage register from 1995 to 6.7.2001, besides other documents. The petitioner filed an affidavit in its reply to the application for summoning the documents clearly stating that it has got a very small office and the documents summoned are not maintained by the petitioner and are not in existence and are therefore not in a position to file the same. A true copy of the objection filed by the petitioner to the application of respondent no. 2 for summoning the documents is filed as Annexure-6 of the writ petition. Thereafter the respondent no.2 filed 24 photostat copies of Form "G' Register of Attendance and Wages prescribed under Rule 18 (1) (b) & (c) of U.P. Dookan Aur Vanijya Adhisthan Niyamavali, 1963 attendance registers of different period showing his attendance and a photostat copy of the coin distributed by United Provincial Transport Company. The Photostat copies of the alleged attendance registers filed by respondent no. 2 are collectively filed as Annexure-7 and photo copy of silver coin filed by respondent no. 2 is filed as Annexure-7-A of the writ petition. It is further stated that the documents filed by respondent no. 2 alleging to be attendance register of petitioner agency are forged and fabricated documents as the petitioner does not maintain attendance register for such type of freelance labourers engaged by and through different mates from time to time. The said documents are not of petitioner's agency and on a bare perusal of attendance register purported to be of petitioner's agency would reveal that the alleged attendance registers of different period are manufactured and produced by respondent no. 2 as it does not bear signature of any of the partners of the petitioner's agency or any of permanent staff of petitioner's agency. In fact the Form "G' Register of Attendance and Wages prescribed under Rule 18(1)(b) & (c) of U.P. Dookan Aur Vaniya Adhisthan Niyamavali, 1963 are freely available in the stationary shops and it is most likely that respondent no.2 had purchased the said Form "G' Register of Attendance & Wages from one of the stationary shops in market and manufactured his attendance for the purpose of setting up a claim of employment in the petitioner's agency.

5. The respondent no.2 adduced his oral evidence before the Labour Court

stating that he was working as a godown helper in the petitioner's agency and his services had been terminated w.e.f. 7.7.2001. A true copy of oral evidence adduced by the respondent no.2 is on record as Annexure-8 of the writ petition. Sri S.M. Mishra adduced his oral evidence on behalf of petitioner in support of its case who has categorically stated besides other things that the documents filed by respondent no.2 are not of petitioner's agency. A true copy of oral evidence adduced by Sri Shyam Murari is filed as Annexure-9 of the writ petition. The Labour Court made impugned award reinstating respondent no.2 with full back wages. It is stated that subsequent to passing of the award and prior to its publication the establishment of petitioner has been permanently closed down w.e.f. 1.4.2004. A copy of intimation letter of closure served upon the Office of Deputy Labour Commissioner, Allahabad is filed as Annexure-10 of the writ petition. In view of fact the closure has taken place the relief of reinstatement granted by respondent no. 1 is not possible in facts and circumstances of the case. Had the change taken place prior to passing of the award the petitioner would have brought it to the knowledge of Labour Court and it would not have passed the award to the extent of reinstatement of respondent no. 2.

6. A detail counter affidavit has been filed wherein it has been stated that the respondent no. 2 was employed by the petitioner as a godown keeper/helper on 5.4.1975 and continued as such till 6.7.2001 when his services were illegally terminated without giving him any notice and compensation as required under Section 6-N of U.P. Industrial Disputes Act. He was paid wages at the rate of Rs. 2110/- per month before the date of termination of his services. It is stated that there are three Partners of the petitioner firm, namely Sri Girdhar Gopal Gulati, Sri Jagdish Kumar Gulati and Sri Satya Pal Gulati which owns a fleet of about 15 trucks and the same operate under and for the petitioner. Since the petitioner's trucks operate throughout most part of the country and bring goods to Allahabad, the petitioner has to unload the same in its godown to be sent to their destinations in different parts of the city. The existence of godown is admitted by the petitioner itself. It is wrong to allege that the respondent no.2 was freelance labourer and was engaged through different mates to work at the petitioner's establishment. It is further wrong to allege that the petitioner did not require a godown keeper and that the work of godown could be managed by two employees of the petitioner. The loaded trucks come to petitioner's godown throughout 24 hours including at night and their goods were unloaded and stored in the godown under the supervision and watch of deponent of the affidavit and other employees of petitioner during their duty hours. The copies of attendance register filed by the deponent are genuine documents and not forged and manufactured. Under the Act the petitioner was required to maintain it and produce before the respondent no. 1 but the petitioner did not produce them before the Labour Court despite its order in this regard. It is further stated that there is no suggestion in cross-examination of the deponent by the petitioner that the copies of attendance and payment register filed by the deponent are forged and fabricated and purchased from the market. Copies of attendance and payment register filed before the respondent no. 1 are true Photostat copies of attendance

and payment register maintained by the petitioner and bear the signatures of the deponent making his attendance and payment of his wages and maintained by the petitioner. It is incorrect to say that the petitioner has closed down its business rather it is still operating and running its business.

7. Heard Sri Vijai Ratan Agrawal, Advocate, learned Senior Counsel assisted by Sri Piyush Bhargava, Advocate for the petitioner and Sri Shyam Narain, Advocate for respondents. Since affidavits have been exchanged between the parties and case was ripped for final disposal on merits, therefore, with the consent of the learned counsels for the parties the case was heard for final disposal under the rules of the Court.

8. The thrust of the submission of learned counsel of the petitioner is that before the Labour Court it was categorically stated that respondent no.2 was neither appointed by the petitioner nor paid wages directly by the petitioner and in fact was a freelance labourer and there was no employer and employee relationship between the petitioner agency and the respondent no. 2, therefore, the award passed by Labour Court is wholly misconceived, perverse and erroneous without jurisdiction. The Photostat copy filed by respondent no.2 before the Labour Court purporting to be copy of attendance register of petitioner agency has not been proved at all in accordance with law, particularly when it was specifically denied by the petitioner that the aforesaid Photostat copy of alleged attendance register is not of the petitioner's agency yet the respondent no. 1 has illegally relied upon the said inadmissible evidence in coming to the conclusion on the said basis that respondent no. 2 was an employee of petitioner's agency which is absolutely erroneous and perverse. The Labour Court has further misdirected itself in holding that silver coin produced by respondent no. 2 is of petitioner agency. A bare perusal of photocopy of silver coin would go to show that silver coin is of United Provincial Transport Co. (Registered) and not of petitioner agency. The United Provincial Transport Company is engaged in the business of transport having its own trucks. The two concerns are totally separate and distinct. In any case merely having a possession of silver coin of United Provincial Transport Company distributed once by United Provincial Transport Company during Deepawali to its customers does not go to show at all that respondent no. 2 was an employee of petitioner agency. It has also been stated in writ petition and submitted that it was not the case of respondent no.2 that he was not gainfully employed, neither any issue were framed by Labour Court nor any finding has been recorded in this regard but has mechanically granted full back wages without application of mind and thus the award granting relief to the full back wages is liable to be set aside on this ground alone. Thus the impugned award passed by Labour Court is patently erroneous, misconceived being based on conjectures and surmises and suffers from vice of perversity and illegality and accordingly is liable to be quashed. Besides this it is further submitted that subsequent to passing of award and prior to its publication the establishment of the petitioner has been completely closed down w.e.f. 1.4.2004. In view of fact the closure has taken place, the relief of reinstatement granted by respondent no. 1 is not possible in facts and circumstances

of the case. Had the aforesaid change taken place prior to passing of award, the petitioner would have brought it to the notice of Labour Court and it would not have passed the award granting the relief of reinstatement of respondent no.2. Thus on this count also the award of Labour Court is not sustainable in the eyes of law and is liable to be quashed by this Hon'ble Court.

9. Contrary to it learned counsel for respondent no. 2 has submitted that on the basis of material available on record there exists employer and employee relationship between the petitioner and respondent no.2. It is incorrect to say that such relationship does not exist between them. It is also submitted that since the petitioner did not raise any plea before the labour court that respondent no. 2 has been gainfully employed after termination of his service by the petitioner. In absence of any such plea of gainful employment by the petitioner labour court was not required to frame any issue on this point and labour court has legally granted the relief of full back wages to the respondent no.2. The respondent no. 2 could not require prove before the labour court in negative. It is further submitted that no plea before the labour court has been taken by the petitioner that respondent no. 2 was freelance labourer. It is for the first time that this plea has been taken by the petitioner before this Court. In given facts and circumstances of the case the award made by labour court is fully justified and does not call for any interference by this Court in the process of judicial review under Article 226 of the Constitution of India.

10. I have gone through the rival contentions and submission of the parties and also perused the record. Thus on the basis of rival contentions and submissions of the parties the questions arise for consideration before this Court are as to whether on the basis of material available on record there exists master and servant relationship or employer and employee relationship between the petitioner and the respondent no. 2? If it is so as to whether the labour court was justified in granting relief of full back wages to the respondent no.2 while making his reinstatement with continuity in service?

11. Although in order to answer the question as to whether there exist relationship of master and servant or employer and employee, between the petitioner and respondent no. 2 it is necessary to examine that what was material before the labour court to establish such relationship between them. But before such inquiry is made it is necessary to examine which of the party was required to prove and establish such relationship. In this connection it is necessary to point out that it is well settled that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him to prove the same. In this regard it would be useful to refer some cases having material bearing on the issue.

12. In **N. C. John Vs. Secretary, Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and others (1973 Lab IC 398)**, the Kerala High Court held:

"The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books

of accounts they would have proved employer-employee relationship."

13. In **Swapan Das Gupta and others Vs. The First Labour Court of West Bengal and others** (1976 Lab IC 202) it has been held:

"Where a person asserts that he was a workman of the Company, and it is denied by the Company. It is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

14. Thus in view of the aforesaid legal position it is clear that the burden lies upon respondent no. 2 to establish relationship of master and servant or employer and employee between him and the petitioner. The question whether the relationship exists between the parties is one of the employer and employee is a pure question of fact. Ordinarily this Court while exercising its power of judicial review under Article 226 does not interfere with the findings of Labour Courts or Tribunal unless it is found that findings are manifestly erroneous or perverse or based no evidence or other parameters and norms of judicial review as settled by Hon'ble Apex Court from time to time in this regard. Thus now question arises to be considered by this Court as to whether the respondent no. 2 has discharged the burden of proof and onus lies upon him to establish relationship of master and servant or employer and employee between him and the petitioner or not? Before an enquiry is made in this regard it is necessary to examine legal aspect of the matter, having material bearing on the issue. The question as to when a person can be said to servant or employee of another person (employer or master) in a context of fact when a person can be said to be holder of a civil post has been subject matter of consideration before Hon'ble Apex Court on numerous occasions wherein the phenomenon of Master and servant relationship have been dealt with in quite detail.

15. In **State of Assam and others Vs. Kanak Chandra Dutta,** AIR 1967 S.C. 884 in para 9 and 11 of the decision a Constitution Bench of Hon'ble Apex Court has held that in order to determine the relationship of master and servant between the employer and employee certain relevant factors are necessary to be considered. In para 9 and 11 of the decision the Hon'ble Apex Court has held as under:

"(9) . . . . . .The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post."

"(11) Judged in this light, a Mauzadar in the Assam Valley is the holder of a civil post under the State. The state has the power and the right to select and appoint a Mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way of

remuneration and commission on his collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side of the administration to which specific and onerous duties in connection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government Mauzadars in the Assam Valley are appointed Revenue Officers and ex officio Assistant Settlement Officers. Originally, a Mauzadar may have been a revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State."

16. In case of **Superintendent of Post Offices etc. etc. Vs. P.K. Rajamma etc. etc. reported in 1977 (Vol. 3) SCR 678** Hon'ble Apex Court has held as under:

"For the appellants it is contended that the relationship between the postal authorities and the extra departmental agents is not of master and servant, but really of principal and agent. The difference between the relations of master and servant and principal and agent was pointed out by this Court in Lakshminarayan Ram Gopal and Son Ltd. Vs. The Government of Hyderabad (1955) 1 S.C.R. 393. On page 401 of the report the following lines from Halsbury's Laws of England (Hailsham edition) Volume 1, at page 193, article 345, were quoted with approval in explaining the difference:

"An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work, an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

The rules make it clear that these extra departmental agents work under the direct control and supervision of the authorities who obviously have the right to control the manner in which they must carry out their duties. There can be no doubt therefore that the relationship between the postal authorities and the extra departmental agents is one of master and servant."

17. In **State of Gujarat and another Vs. Raman Lal Keshav Lal Soni & others (1983) 2 S.C.C. 33** in para 27 of the decision a Constitution Bench of Hon'ble Apex Court has held as under:

"27. We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On

the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant."

18. The aforesaid decisions of Hon'ble Apex Court have been followed by Hon'ble Apex Court again in **State of U.P. Vs. Chandra Prakash Pandey and others, J.T. 2001 (4) S.C. 145,** wherein the Kurk Amins appointed on commission basis were held Government servant. For ready reference para 13 and 14 of the decision of Hon'ble Apex Court rendered in aforesaid case is reproduced as under :

"13. In the light of the foregoing discussions, we consider these appeals. In the impugned judgment under Civil Apeal Nos. 8467-68 of 1995, the Division Bench of the High Court after due consideration recorded its conclusion which runs thus:-

"It appears that the Collector was the appointing authority and the petitioners were being paid out the cost recovered according to provisions for the recovery of land revenue and that they had been given revised scale of pay having been performing the same duties and responsibilities as other Kurk Amins of other departments and that their counterparts on salary basis having been so found to hold civil posts by the Hon'ble Supreme Court, as referred to hereinbefore, and that the petitioners were working under the control and supervision of Assistant Registrar of Co-operative Society and are performing public duties."

"14. Likewise, in another detailed judgment under Civil Appeal No. 6075 of 1997, rendered by another Division Bench of the High Court upon the matter being remanded by this Court, the Court after due consideration came to the following conclusion:-

"It is not disputed that the appointing authority in case of both is the District Magistrate/Collector, the power to terminate the service of both the categories vests in the same authority, they are amenable to same disciplinary authority, the nature of their duties is the same and they exercise similar power. The Kurk Amin appointed on commission basis similarly enjoys and exercises the power to arrest a person, who is defaulter, can attach his property, which he can put to auction like his counterpart on regular basis. A Kurk Amin on commission basis and on regular basis similarly follows the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1951 and U.P. Land Revenue Act, 1901 insofar as the recovery of land revenue.

Once the District Magistrate issues a recovery citation, both the sets of Kurk Amins, in order to execute the recovery, follow the same procedure and exercise the powers and they are under the control of one and same authority. The Kurk Amin be on commission basis or on regular basis, gets his salary from the Government Exchequer out of 10 per cent collection charges realized as arrears of land revenue. It is, thus, clear that both

the sets of Kurk Amins work in the same capacity under the control of the State Government and their appointment and duties fully comply with the tests laid down by the Supreme Court in the decision of State of Gujarat and another Vs. Raman Lal Keshav Lal Soni and others, {1983 (2) SCC 33}"

19. Thus, on the basis of aforesaid discussion and the principles enunciated by Hon'ble Apex Court it is clear that in order to determine the relationship of master and servant between the employer and employee there are several factors which may indicate such relationship but none of the factor alone may be conclusive. In other words no single factor may be considered absolutely essential. The presence of all or some of the factors, such as, right to select for appointment, right to appoint, right to terminate the employment, right to take other disciplinary action, right to prescribe conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, right to issue directions and right to determine and source from which wages or salary are paid or any such other circumstances are required to be considered to determine the existence of the relationship of master and servant. But these principles are of general in nature and applies generally to the Government employees and employees of other Corporations and Establishments. The position in the Labour Laws enactment are slightly different and much complicated and comprehensive which requires to be considered by this Court in some detail.

20. In this connection while placing reliance upon clause (iv) of Section 2 (i) of the U.P. Industrial Disputes Act, 1947 the learned counsel for the respondent no. 2 Sri Shyam Narain has submitted that having regard to the extensive definition of expression "employer" as provided in clause (iv) of the aforesaid definition clause where the owner of industry in course of or for the purpose of conducting the industry contracts with any person for the purpose of execution by or under such person of whole or any part of any work which is ordinarily part of industry, the owner of such industry would be employer of such person. Elaborating his submission Sri Shyam Narain further submitted that in this connection the contract of service between the employer and employees has to be looked into by lifting the veil of sham or camouflage contracts entered into between employer and third person (contractor) who brought the employee into relationship of employer. In order to determine real nature of employment the tribunal or labour court has to examine the contract entered into between employer and contractor. Learned counsel for respondent no. 2 has submitted that since respondent employee was being engaged through Mates for loading and unloading work of petitioner, therefore, he would be deemed to be employee of petitioner under broader sweep of description provided under Section 2(i) (iv) of U.P. Industrial Disputes Act. In support of his submission the learned counsel for respondent no. 2 has placed reliance upon the decisions rendered by Hon'ble Apex Court in **M/s. Basti Sugar Mills Ltd. Vs. Ram Ujagar & others, AIR 1964 S.C. 355**, and **M/s. Bharat Heavy Electricals Ltd. Vs. State of U.P. and others, 2003(98) FLR 826** and on a decision rendered by a learned Single Judge of this Court on 11.3.2005 in Writ Petition No.

2226 of 2001, **National Fertilizer Ltd. Vs. Labour Court and others**. The aforesaid cases cited by learned counsel for respondent no. 2 shall be dealt with in seriatim hereinafter at relevant place.

21. Contrary to it learned Senior Counsel Sri Vijai Ratan Agrawal has submitted that the arguments of Sri Shyam Narain to the effect that the respondent no. 2 was being engaged through mates for loading and unloading work of petitioner, therefore, he would be deemed to be as employee of petitioner by virtue of Section 2 (i) (iv) of U.P. Industrial Disputes Act, is not available for him for the simple reason that this point was never raised by respondent at any stage and no foundation either before the Labour Court or before this Court through counter affidavit filed in the writ petition has been laid by the respondent-workman, therefore, this question cannot be permitted to be raised for the first time during the arguments in the writ proceeding before this Court. However, he submitted that the submission of learned counsel for respondent no. 2 in given facts and circumstances of the case is wholly incorrect and misconceived and in support of his submission he placed reliance upon the decision of Apex Court rendered in **Workmen of Nilgiri Co-operative Mkt. Society Ltd. Vs. State of Tamil Nadu and others J.T. 2004 (2) SC 51=A.I.R. 2004 S.C. 1639 (2004 Labour & Industrial Cases) 905 (S.C.).**

22. In order to appreciate the submissions of learned counsels of the parties it is necessary to reproduce Section 2 (i) of U.P. Industrial Disputes Act, 1947 as under:

"(i) "Employer' includes –

(i) an association or a group of employers;

(ii) where an industry is conducted or carried on by a department of the State Government, the authority specified in that behalf, and where no such authority has been specified, the head of such department;

(iii) where an industry is conducted or carried on by or on behalf of a local authority, the chief executive officer of such authority;

(iv) where the owner of any industry in the course of or for the purpose of conducting the industry contracts with any person for the execution by or under such person of the whole or any part of any work which is ordinarily part of the industry, the owner of such industry;"

23. Thus in view of the rival submissions of learned counsels of the parties the question arises for consideration as to whether the contract is contract of service or contract for service and whether the concerned employee is employee of the contractor or employee of employer? Although this question is very much comprehensive and it is not easy task to formulate the factors or principles for determination of such relationship having universal application in all the cases but the question has received consideration of Hon'ble Apex Court at numerous occasion. I would like to refer some cases having material bearing on the issue hereinafter.

24. In **Shivnandan Sharma Vs. Punjab National Bank Ltd., AIR 1955 SC 404**, the test to determine the relationship between two parties as master and servant or employer and employee have been dealt with by Hon'ble Apex

Courtin detail in para 14 and 15 of the decision which is reproduced as under:

"(14) If the Treasurers' relation to the Bank was that of servants to a master, simply because the servants were authorized to appoint and dismiss the ministerial staff of the Cash Department would not make the employees in the Cash Department independent of the Bank. In that situation the ultimate employer would be the Bank through the agency of the Treasurers. . . . .

(15). It would thus appear that the question as to whose employee a particular person was has to be determined with reference to the facts and circumstances of each individual case. Lord Porter in the course of his speech in the reported case (supra) at page 17 has observed as follows:

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged."

25. In **Dharangadhra Chemical Works Ltd. Vs. State of Saurashtra & others, AIR 1957 SC 264**, the Hon'ble Apex Court has again considered the question of determination of relationship of master and servant in detail and has drawn distinction between the employees and independent contractor. In this connection it would be useful to refer para 9,10,11,12,13,15 and 16 of the decisions as under:

"(9). The principles according to which the relationship as between employer and employee or master and servant has got to be determined are well settled. The test which is uniformly applied in order to determine the relationship is the existence of a right of control in respect of the manner in which the work is to be done. A distinction is also drawn between a contract for services and a contract of service and that distinction is put in this way: "In the one case the master can order or require what is to be done while in the other case he can not only order or require what is to be done but how itself it shall be done". (Per Hilbery, J. in Collins Vs. Hertfordshire County Council, 1947 KB 598 at page 615(A)).

(10). The test is, however, not accepted as universally correct. The following observations of Denning L.J., at pp. 110, 111 in Stevenson, Jordan and Harrison Ltd. Vs. Macdonald and Evans, 1952-1 TLR 101 at p. 111 (B) are apposite in this context:

"But in Cassidy Vs. Ministry of Health, 1951-1 TLR 539 at p. 543: 1951-2 KB 343 at pp. 35203 (C), Somervell L.J. pointed out that test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done as in the case of a captain of a ship. Lord Justice Somervell went on to say: One perhaps cannot get much beyond this: "Was the contract as contract of service within the meaning which an ordinary man would give under the words? I respectfully agree. As my Lord has said, it is almost impossible to give a precise definition of the distinction. It is

often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it"

(11). We may also refer to a pronouncement of the House of Lords in Short Vs. J. & W. Henderson, Ltd., 1946-62 TLR 427 at p. 429 (D), where Lord Thankerton recapitulated the four indicia of a contract of service which had been referred to in the judgment under appeal, viz., (a) the master's power of selection of his servant, (b) the payment of wages or other remuneration, (c) the master's right to control the method of doing the work, and (d) the master's right of suspension or dismissal, but observed:

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and restate these indicia. For example, (a), (b) and (d) and probably also (c), are affected by the statutory provisions and rules which restrict the master's choice to men supplied by the labour bureaux, or directed to him under the Essential Work provisions, and his power of suspension or dismissal is similarly affected. These matters are also affected by trade union rules which are at least primarily made for the protection of wage-earners".

(12). Even in that case, the House of Lords considered the right of supervision and control retained by the employers as the only method if occasion arose of securing the proper and efficient discharge of the cargo as sufficiently determinative of the relationship between the parties and affirmed that "the principal requirement of a contract of service is the right of master in some reasonable sense to control the method of doing the work and this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of relationship".

(13). The position in-law is thus summarized in Halsbury's Laws of England, Hailsham edition, Vol. 22, page 112, para 191:-

"Whether or not, in any given case, the relation of master and servant, exists is a question of fact; but in all cases the relation imports the existence of power in the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done.";
and until the position is restated as contemplated in Short Vs. J. & W. Henderson Ltd., (D), supra, we may take it as the prima facie test for determining the relationship between master and servant.

(15). The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. As has been noted above, recent pronouncements of the Court of Appeal in England have

even expressed the view that it is not necessary for holding that a person is an employee, that the employer should be proved to have exercised control over his work, that the test of control was not one of universal application and that there were many contracts in which the master could not control the manner in which the work was done (Vide observations of Somervelle, L. J. in Cassidy Vs. Ministry of Health (C), (supra), and Denning, L. J. in Stevenson, Jordan and Harrison Ltd. Vs. Macdonald and Evans (B), (supra).

(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 Vs. Heath Laundry Co., 1910-1 KB 543 at pp. 549, 550 (F):-

"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 grounds for holding it to be a contract of service, and similarly the greater the degree the probability that the services rendered are of the nature of professional services and that the contract is not one of service"."

26. **D. C. Dewan Mohideen Sahib and Sons Vs. The Industrial Tribunal, Madras {(1964) (7) SCR 646 : 1964 (2) LLJ 633)** is a case which involved workers who used to take leaves home for cutting them in proper shape. However, the actual rolling by filling the leaves with tobacco took place in places what were called contractors' factories. The bidis so rolled would be delivered to the appellant and nobody else. The price of the raw-material as also the finished product would remain the same as fixed by the appellant therein. The Hon'ble Apex Court having regard to the materials on records has held that the intermediaries were mere agents or branch managers appointed by the management and the relationship of employer and employee subsisted between the appellant and the bidi rollers, inter alia, on the ground that the so-called independent contractors served no particular duties and discharged no special functions and had no independence at all. They were impecunious persons who could hardly afford to have any factory of their own and in fact some of them were ex-employees of the appellant.

27. In ***V.P. Gopala Rao Vs. Public Prosecutor, Andhra Pradesh, AIR 1970 SC 66***, while taking note of earlier decision of Apex Court and decisions of Courts in England in context of the relationship of master and servant in para 8 and 11 of the decision Hon'ble Apex Court held as under:

"(8). In Chintaman Rao Vs. State of Madhya Pradesh, 1958 SCR 1340 at page 1349= (AIR 1958 SC 388 at pp. 392-393) the Court gave a restricted meaning to the words "directly or through an agency" in Section 2 (1) and held that a worker was a person employed by the management and that there must be a contract of service and a relationship of master and servant between them. On the facts of that case the Court held that certain Sattedars were independent contractors and that they and the coolies engaged by them for rolling bidis were not "workers".

(11). . .There is no abstract a priori test of the work control required for establishing a contract of service.... . ."

28. In **Silver Jubilee Tailoring House and others Vs. Chief Inspector of Shops and Establishments and another {(1974) 3 SCC 498},** the job required to be performed was skilled and professional in nature. His Lordship Hon'ble Mr. Justice Mathew, (as he then was) speaking for the Bench observed that the test of right to control the manner of doing the work as traditionally formulated cannot be treated as an exclusive test. The Apex Court applied organization test in the fact situation obtaining therein laying importance on the fact that the employer provides the equipment and stating that where a person hires out a piece of work to an independent contractor, he expects the contractor to provide all the necessary tools and equipments, whereas if he employs a servant he expects to provide the same himself. The supply of machine was highlighted having regard to that fact that the sewing machine on which the workers do the work generally belong to the employer is an important consideration for deciding the relationship of master and servant. Besides the same the right of the employer to reject the end product and directing the worker to restitch it also led Hon'ble Apex Court to conclude that the element of control and supervision was also present.

29. In **Hussainbhai, Calicut Vs. The Alath Factory Thozhilali Union, Kozhikode AIR 1978 S.C. 1410**, a number of workmen were engaged in the petitioner's factory to make ropes. But they were hired by contractors who had executed agreements with the petitioners to get such work done. When 29 of these workmen were denied employment, an industrial dispute was referred by the State Government. The Industrial Tribunal held them to be workmen of the petitioner. This award was challenged by the petitioner before the High Court and the learned single Judge held that the petitioner was the employer and the workmen were employees under the petitioner. The Division Bench of the High Court upheld this decision. While dismissing the special leave petition against the said decision, Hon'ble Apex Court observed that the facts found were that the work done by the workmen was an integral part of the industry concerned. The raw material was supplied by the management, the factory premises belonged to the management, the equipment used also belonged to the management and the finished product was taken by the management for its own trade. The workmen were broadly under the control of the management and the defective articles were directed to be rectified by the management. These circumstances were conclusive to prove that the workmen were workmen of the petitioner. The Hon'ble Apex Court further held that if the livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of the enterprise, the absence of direct relationship or the presence of dubious intermediaries cannot snap the real life bond. If however, there is total dissociation between the management and the workmen, the employer is in substance and in real life terms another. The true test is where the workers or group of workers labour to produce goods or services and these goods or services are for the business of another, that another is in fact, the employer. He has economic

control over the workers' skill, subsistence, and continue employment. If for any reason, he chokes off, the workers are virtually laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex-contractual is of no consequence when on lifting the veil or looking at the conspectus of factors governing employment, the naked truth is discerned and especially since it is one of the myriad devices restorted to by the management to avoid responsibility when labour legislation casts welfare obligations on real employer based on Articles 38, 39, 42 and 43 of the Constitution.

30. In **M/s. Shining Tailors Vs. Industrial Tribunal II, U.P. Lucknow and others {(1983) 4 SCC 464= AIR 1984 S.C. 23}**, payments used to be made to the workmen on piece-rates in a big tailoring establishment, Hon'ble Mr. Justice Desai (as he then was) in the facts and circumstances of the case observed that right of removal of the workmen or not to give the work had the element of control and supervision which had been amply satisfied in that case. The question which arose for consideration was as to whether merely because the concerned workman was paid on piece rate was itself indicative of the fact that there existed a relationship of principal employer and independent contractor is not correct. For ready reference para 5 of the decision reads as under:

"5.....If every piece rated workman is an independent contractor, lakhs and lakhs of workmen in various industries where payment is correlated to production would be carved out of the expression "workman' as defined in the Industrial Disputes Act. In the past the test to determine the relationship of employer and the workman was the test of control and not the method of payment..... Piece rate payment meaning thereby payment correlated to production is a well-recognised mode of payment to industrial workmen. In fact, wherever possible that method of payment has to be encouraged so that there is utmost sincerity, efficiency and single minded devotion to increase production which would be beneficial both to the employer, the workmen and the nation at large. But the test employed in the past was one of determining the degree of control that the employer wielded over the workmen. However, in the identical situation in Silver Jubilee Tailoring House Vs. Chief Inspector of Shops and Establishments (1974) 1 SCR 747: (Air 1974 SC 37), Mathew, J. speaking for the Court observed that the control idea was more suited to the agricultural society prior to Industrial Revolution and during the last two decades the emphasis in the field is shifted from and no longer rests exclusively or strongly upon the question of control. It was further observed that a search for a formula in the nature of a single test will not serve any useful purpose, and all factors that have been referred to in the cases on topics, should be considered to tell a contract of service. Approaching the matter from this angle, the Court observed that the employer's right to reject the end product if it does not conform to the instructions of the employer speaks for the element of control and supervision So also the right of removal of the workman or not to give the work has the element of control and supervision. If these aspects are considered decisive, they are amply satisfied in the facts of this case.....".

31. In **Management of M/s. Puri Urban Co-operative Bank Vs. Madhusudan Sahu and another (AIR 1992 SC 1452)**, the Hon'ble Apex Court has observed:

".....It stands established that Industrial Law revolves on the axis of master and servant relationship and by a catena of precedents it stands established that the prime facie test of relationship of master and servant is the existence of the right in the master to supervise and control the work done by the servant (the measure of supervision and control apart) 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....."

32. At this juncture it is necessary to point out that there cannot be any doubt whatsoever that where a person is engaged through an intermediary or otherwise for getting a job done, a question may arise as the appointment of an intermediary was merely sham and nominal rather camouflage where a definite plea is raised in Industrial Tribunal or the Labour Court, as the case may be, and in that event, it would be entitled to pierce the veil and arrive at a finding that the justification relating to appointment of a contractor is sham or nominal and in effect and substance there exists a direct relationship of employer and employee between the principal employer and the workman.

33. In this connection it would be useful to refer the decision of Hon'ble Apex Court rendered in *Gujarat Electricity Board, Thermal Power Station, Ukai, Vs. Hind Mazdoor Sabha and others, AIR 1995 S.C. 1893*; wherein Apex Court has held that if there is genuine labour contract between the principal employer and contractor the authority to abolish contract labour vests in appropriate government and not in any court including industrial adjudicator. If the appropriate government abolishes the contract labour system in respect of establishment the industrial adjudicator would after giving opportunity to the parties to place material before it decide whether the workmen be absorbed by the principal employer, if so how many of them and what terms, but if the appropriate government decline to abolish the contract labour, the industrial adjudicator has to reject the reference. If however so called contract is not genuine but is sham and camouflage to hide the reality, the court or industrial adjudicator would have jurisdiction to entertain such a dispute and grant necessary relief.

34. In **Employers in relation to the Management of Reserve Bank of India Vs. Workmen {(1996) 3 SCC 267}**, it was held by the Hon'ble Apex Court that in the absence of statutory or other legal obligations and in the absence of any right in the Bank to supervise and control the work or details there in any manner regarding the canteen workers employed in the three types of canteens, it cannot be said that relationship of master and servant existed between the Bank and the various persons employed in the three types of canteens and in that situation, the demand for regularisation was considered to be unsustainable.

35. In **Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers' Union and another {(2000) 4 SCC 245}**, the Hon'ble Apex Court observed:

"The standards and nature of tests to be applied for finding out the existence of master and servant relationship cannot be confined to or concretized into fixed formula (e) for universal application, invariably in all class or category of cases. Though some common standards can be devised, the mere availability of any one or more or their absence in a given case cannot by itself be held to be decisive of the whole issue, since it may depend upon each case to case and the peculiar device adopted by the employer to get his needs fulfilled without rendering him liable. That being the position, in order to safeguard the welfare of the workmen, the veil may have to be pierced to get at the realities. Therefore, it would be not only impossible but also not desirable to lay down abstract principles or rules to serve as a ready reckoner for all situations and thereby attempt to compartmentalize and peg them into any pigeonhole formulae, to be insisted upon as proof of such perpetuate practicing unfair labour practices than rendering substantial justice to the class of persons who are invariably exploited on account of their inability to dictate terms relating to conditions of their service. Neither all the tests nor guidelines indicated as having been followed in the decisions noticed above should be invariably insisted upon in every case, nor the mere absence of any one of such criteria could be held to be decisive of the matter. A cumulative consideration of a few or more of them, by themselves or in combination with any other relevant aspects, may also serve to be a safe and effective method to ultimately decide this often agitated question. Expecting similarity or identity of facts of all such variety or class of cases involving different type of establishment and in dealing with different employers would mean seeking for things, which are only impossible to find."

36. In **Indian Banks Association Vs. Workmen of Syndicate Bank and others (2001) 3 SCC 36)**, the question which arose for consideration was as to whether the deposit collectors who received commission is in reality a wage which would depend on the productivity. Such commission was paid for promoting the business of the bank. Having regard to the fact that the banks have control over the deposit collectors, they were considered to be their own workers.

37. In **Steel Authority of India Ltd. and others Vs. National Union Water Front Workers and others AIR 2001 S.C. 3527** a Constitution Bench of the Hon'ble Apex Court while considering the question as to whether having regard to the provisions contained in S. 10 of the Contract Labour (Regulation and Abolition) Act, the workmen employed by the contractors in the event of abolition of contract labour were entitled to be automatically absorbed in the services of the principal employer. While answering the question in the negative the Hon'ble Apex Court reversed the earlier decision rendered in Air India Statutory Corporation and others Vs. United Labour Union and others {(1997) 9 SCC 377}. The Hon'ble Apex Court referring to a large number of decisions and tracing the history of the Contract Labour (Regulation and Abolition) Act, noticed that the Industrial Tribunal although prior to coming into force could issue directions for such regularisation but such directions could not be issued after coming into force of the Act. In view of the Constitution Bench decision in M/s.

Gammon India Ltd. and others etc. Vs. Union of India and others (1974) 1 SCC 596), the Apex Court held that although the principle that a beneficial legislation needs to be construed liberally in favour of the class for whose favour it is intended, the same would not extend to reading in the provisions of the Act what the Legislature has not provided whether expressly or by necessary implication, or substituting remedy or benefits for that provided by the Legislature. Upon analyzing the case law, the categories of cases were sub-divided into three as under:

"An analysis of the cases, discussed above, shows that they fall in three classes: (i) where contract labour is engaged in or in connection with the work of an establishment and employment of contract labour is prohibited either because the industrial adjudicator/Court ordered abolition of contract labour or because the appropriate Government issued notification under Section 10(1) of the CLRA Act, no automatic absorption of the contract labour working in the establishment was ordered; (ii) where the contract was found to be a sham and nominal, rather a camouflage, in which case the contract labour working in the establishment of the principal employer were held, in fact and in reality, the employees of the principal employer himself. Indeed, such cases do not relate to abolition of contract labour but present instances wherein the Court pierced the veil and declared the correct position as a fact at the stage after employment of contract labour stood prohibited; (iii) wherein discharge of a statutory obligation of maintaining a canteen in an establishment the principal employer availed the services of a contractor the Courts have held that the contract labour would indeed be the employees of the principal employer."

38. In **Mishra Dhatu Nigam Ltd., etc. Vs. M. Venkataiah and others etc. etc. (2003 (7) JT (SC) 95)**, as the appellants were required by the Factories Act to provide canteen facilities and since the workers engaged through the contractors had been held to be the employees of the principal employers, the Hon'ble Supreme Court held that the workers engaged through contractors were entitled to regularisation of their services.

39. In **Workmen of Nilgiri Co-operative Mkt. Society's case (supra)** Hon'ble Apex Court has surveyed the case laws almost exhaustively on the question in issue and laid down that for determination of relationship of employer and employee certain factors may be considered as relevant factors. For ready reference para 37, 38 and 39 of the aforesaid decision is reproduced as under:

"37. The control test and the organization test, therefore, are not the only factors which can be said to decisive. With a view of elicit the answer, the Court is required to consider several factors which would have a bearing on the result: (a) who is appointing authority; (b) who is the pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job, e.g. whether, it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby

integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.

39. I.T. Smith and J.C. Wood in "Industrial Law', third edition, at pages 8-10 stated:

"In spite of the obvious importance of the distinction between an employee and an independent contractor, the tests to be applied are vague and may, in a borderline case, be difficult to apply. Historically, the solution lay in applying the "control' test, i.e. could the employer control not just what the person was to do, but also the manner of this doing it - if so, that person was his employee. In the context in which it mainly arose in the nineteenth century, of domestic, agricultural and manual workers, this test had much to commend it, but with the increased sophistication of industrial processes and the greater numbers of professional and skilled people being in salaried employment, it soon became obvious that the test was insufficient (for example in the case of a doctor, architect, skilled engineer, pilot, etc.) and so, despite certain attempts to modernize it, it is now accepted that in itself control is no longer the sole test, though it does remain a factor and perhaps, in some cases, a decisive one. In the search for a substitute test, ideas have been put forward of an "integration' test, i.e. whether the person was fully integrated into the employer's concern, or remained apart from and independent of it. Once again, this is not now viewed as a sufficient test in itself, but rather as a potential factor (which may be useful in allowing a Court to take a wider and more realistic view). The modern approach has been to abandon the search for a single test, and instead to take a multiple or "pragmatic' approach, weighing upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually of importance are as follows - the power to select and dismiss, the direct payment of some form of remuneration, deduction of PAYE and national insurance contributions, the organization of the workplace, the supply of tools and materials (though there can still be a labour-only sub-contract) and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be "in business on his own account'). A further development in the recent case law (particularly concerning typical employments) has been the idea of "mutuality of obligations' as a possible factor, i.e. whether the course of dealings between the parties demonstrates sufficient such mutuality for there to be an overall employment relationship."

40. In the aforesaid case while concluding the judgement in para 98 and 100, Hon'ble Apex Court has held as under:

"98. It has been found that the employment of the workmen for doing a particular piece of work is at the instance of the producer or the merchants on an ad hoc basis or job to job basis and, thus, the same may not lead to the conclusion that relationship of employer and employee has come into being. Furthermore, when an employee has a right to work or not when an offer is made to him in this behalf by the producer or by the merchants will also assume significance.

100. .....In a situation of this nature and particularly having regard to the fact that the respondent is a co-operative society which only renders services to its own members and despite the fact that in relation thereto it receives commission at the rate of one percent, both from the farmers as also the traders; it does not involve in any trading activity. Although rendition of such service may amount to carrying out an industrial activity within the meaning of the provisions of the Industrial Disputes Act, 1947 but we are in this case not concerned with the said question. What we are concerned with is as to whether the concerned workmen have been able to prove that they are workmen of the Society. They have not."

41. Thus from a conspectus of whole issue, it is clear that in order to determine the relationship of master and servant between employer and employee the judicial approach should not be confined to supervision and control test and organization test as only factors which can be said to be decisive. Rather the court or tribunal is required to consider several factors which would have bearing on the question in controversy; such as (1) who is appointing authority (2) who is paymaster (3) who can dismiss (4) how long alternative service lasts (5) the extent of control and supervision (6) nature of job e.g. whether it is professional or skilled work (7) nature of establishment (8) right to reject. But in some problematic cases these factors either collectively or severally could not be found sufficient to solve the problem, therefore, in search of for a substitute test ideas have been put forward of an integration test i.e. whether the person was fully integrated into employer's concern or remained apart from and independent of it. Although this is not now viewed as sufficient test in itself but rather as a potential factor which may be useful in allowing the court to take a wider and more realistic view. Therefore, in order to have pragmatic approach besides the aforesaid factors other factors such as direct payment of some form of remuneration, deduction of pay and national insurance contributions, the organization of work-place, supply of tools and materials and economic realities bears the risk of loss and has the chance of profit and whether the employee can be said to be in business on his own account may also be taken into consideration.

42. Now applying the principles deduced from the aforesaid enunciation of law herein before in facts of the case in hand it is to be seen that the respondent no. 2 was under obligation to prove the existence of relationship of master and servant between him and petitioner with the assistance of relevant factors discussed herein before. But from the perusal of material available on record, it appears that before the Labour Court the respondent no. 2 did not produce either any appointment letter or any other record to show that he was selected and appointed by the petitioner and working in his supervision and control and was being paid his remuneration by the petitioner and he was fully integrated into the work and business of petitioner alone and has no other independent work or business apart from the petitioner's concern. The only material on record has been placed by the respondent no.2 before the labour court to establish relationship of master and servant between him and the petitioner are certain papers of Photostat copies of alleged staff

attendance and payment of wage register prescribed on a format "G' under Rule 18(1) (b) & (c) of U.P. Dookan Aur Vanijya Adhisthan Niyamavali, 1963. According to the petitioner the aforesaid Photostat copy of form "G" does neither bears signature of employer nor signature of any permanent employee rather it was fabricated by the respondent no.2 by purchasing the prescribed form from stationary shops as available in the market, therefore, such Photostat copies produced by the respondent no.2 is neither copy of any real and existing register with the petitioner nor admissible in evidence, as such finding of labour court on the basis of the aforesaid Photostat copies filed by the respondent no.2 is wholly erroneous and not sustainable.

43. Contrary to it the learned counsel for respondent no.2 has submitted that since the petitioner was required to maintain attendance register of employees under the provisions of Uttar Pradesh Dookan Aur Vanijya Adhisthan Adhiniyam-1962 and rules framed thereunder and since the employer has failed to produced the record of attendance register and payment register of the respondent no.2 before the labour court, therefore, the labour court had no option but to draw adverse inference against the petitioner and rightly accepted the Photostat copies filed by respondent no.2 as secondary evidence and the reliance placed by labour court on the aforesaid Photostat copies in this regard cannot be found faulty on that score.

44. On the basis of aforesaid submissions of the learned counsel for the parties another incidental question arises for consideration as to whether the petitioner was required to maintain the staff attendance and wage register under the provisions of Uttar Pradesh Dookan Aur Vanijya Adhisthan Adhiniyam, 1962 and the rules framed thereunder? In case the petitioner fails to maintain such register and does not produce before the labour court as to whether the labour court could be justified in drawing adverse inference against the petitioner and could be further justified to accept the photostat copy of Form "G' prescribed under the rules framed under the aforesaid Adhiniyam 1962 as secondary evidence? Putting the aforesaid questions differently basically two incidental questions are required to be considered by this Court viz ;(i) as to whether Photostat copy of alleged staff attendance and payment of wage register is admissible as secondary evidence; and (ii) as to whether failure to produce the original attendance and payment of wage register by the petitioner before the Labour Court would permit the Labour Court to raise a presumption that the petitioner must have possessed original record of the aforesaid register and on failure to produce the same the Labour Court was entitled to draw adverse inference against the petitioner?

45. Since answer of first question is dependant upon the answer of second question to some extent, therefore, I would like to deal second question first. In this connection it is necessary to point out that under section 32 of Uttar Pradesh Dookan Aur Vinijya Adhishthan Adhiniyam, 1962 hereinafter referred to as Act 1962 an employer is required to maintain such registers and records and display such notices, as may be prescribed. Under Section 33 of the aforesaid Act any person, who contravenes, or fails to comply with any

of the provisions of the aforesaid Act, or of the rules made thereunder, other than those of sub-section (1) of Section 20, shall be guilty of an offence under the aforesaid Act. Section 35 of the Act provides punishment of an offence under the Act and provisions have been made to the effect that any person guilty of an offence under this Act shall be liable to fine which may, for the first offence, extend to one hundred rupees and, for every subsequent offence, to five hundred rupees. Besides the aforesaid provisions under Section 29 of the Act the State Government is empowered to appoint Inspectors i.e. Chief Inspector and Deputy Chief Inspector, for whole of the Uttar Pradesh, and as many Inspectors for different areas thereof as may be considered necessary. Under Section 30 of the Act the power of Inspectors have been given which inter alia provides that the Inspector can make necessary inspection of the shop or commercial establishment for the purpose of examining the registers, records or other documents kept therein to insure the compliance of provisions of Act and Rules made thereunder. Under Section 40 of the Act, the rule-making power has been given to the State Government for carrying out the purposes of the Act by making rules in this regard and particularly in respect of the registers and records to be maintained by an employer.

46. It appears that in exercise of the rule-making power the State Government has framed the rules namely Uttar Pradesh Dookan Aur Vanijya Adhishthan Niyamavali, 1963. Rule 18 has been framed to carry out the purpose and object of Section 32 of the Act which provides that (1) Every employer shall -(a) .....;(b) Employing employees exceeding ten but not exceeding twenty-five shall maintain the register of attendance and wages in Form "G' and also maintain a register of leave in Form "H'; (c) Employing employees exceeding 25 shall be required to maintain a register of attendance and wages in Form "G', a register of leave in Form "H', a register of deductions from wages in Form "D'. The Form "G' contains 17 columns and a foot format for the purpose of signature of employee and employer on payment and receipt of the wages. For ready reference Form "G' prescribed under rule 18 (1) (b) and (c) is reproduced as under:

FORM "G"

{See Rule 18(1)(b) and (c)}

(Uttar Pradesh Dookan Aur Vinijya Adhishthan Niyamawali, 1963)

Register of Attendance and Wages

Name of employee. . . . . Man/Woman/Young Persons/Child,

Father/Husband's name. . . . . Address. . . . . .

Address. . . . . Nature of employment. . . . . ..Whether employed on daily, monthly, contract or piece-rate wages with rate. . . . . .

Wage period . . . . . .Date of Employment . . . . . .

Date	Work begins	Rest		Work ends	Overtime worked	Wages earned		
		From	To			Basic	DFA	Overtime
1	2	3	4	5	6	7	8	9

Signature of thumb-impression of Employee	Advance			
	Amount Advanced		Amount recovered.	Balance
	Amount	Date		
10	11	12	13	14

Fines or other deduction vide Forms D and E	Net Amount due	Signature or thumb-impression of employee
15	16	17

Received Rs. . . . . P . . . . . .in words Rupees . . . . . .on account of wages for the wage period from . . . . . to . . . . . .

Signature of employee. . . . . Signature of employer. . . . . .

47. Thus from a bare perusal of aforesaid provisions of Act it is clear that if employer fails to maintain register as prescribed under the rules i.e. rule 18 of Rules, the employer shall be guilty of contravention of the provisions of Act and rules made thereunder and as such liable to be punished under Section 35 of the Act, but merely on account of fact that shop and commercial establishment is registered under the Act, it cannot leads to a necessary conclusion that the provisions

of the Act and Rules made thereunder in respect of maintenance of records and registers has also been complied with by the employer, otherwise the provisions for taking punitive action for non-compliance and contravention of the provisions of Act and Rules made thereunder would not have been made under the Act itself. Section 38 of the Act would also be relevant and assumes significance in this regard which deals with the presumption under the Act and provides that whenever a shop or commercial establishment is actually opened, it shall be presumed that it is opened for the service of any customer or for the business, trade or manufacture normally carried on in the shop or commercial establishment except the aforesaid presumption, the Act does not permit any other type of presumption to be raised under the provisions of the Act.

48. In a similar facts and circumstances of the case, Hon'ble Apex Court had occasion to consider the question as to whether due to non-compliance of the provisions of registration and license by principal employer and/or contractor under Contract Labour (Regulation and Abolition Act) 1970 and rules made thereunder, the contractor's employee would be deemed to be employee of principal employer in case of **Denanath and others Vs. National Fertilisers Ltd. and others AIR 1992 S.C. 457.** There were differences in opinions amongst the High Courts. While resolving the controversy Hon'ble Apex Court has answered the question in negative, holding that the only consequence provided in the Act where either the Principal Employer or the labour contractor violates the provision of Section 9 and 12 respectively is the penal provision as envisaged under the Act for which reference may be made to section 23 and section 25 of the Act. But merely because the contractor or the employer had violated any provision of the Act or rules the court could not issue any mandamus for deeming the contract labourers as having become the employee of the principal employer.

49. In **Municipal Corporation of Greater Mumbai Vs. K.V. Shramik Sangh & others, JT 2002 (4) S.C. 115** in para 19 of the decision Hon'ble Apex Court has held as under:

"19.....It appears to us that the High Court proceeded to conclude that the labour contract was not genuine and the workers of the Union were employees of the corporation because the corporation and the contractors did not comply with the provisions of the CLRA Act. Conclusion that the contract was sham or it was only camouflage cannot be arrived at as a matter of law for noncompliance of the provisions of the CLRA Act but a finding must be recorded based on evidence particularly when disputed by an industrial adjudicator as laid down in various decisions of this Court including the constitution bench judgment in ***SAIL*****....."**

50. Now testing the matter from different and another angle at the anvil of general principles of presumption a question arises to be considered that as to whether the Court would be justified in raising presumption under Section 114 Illustration "G' of Evidence Act, which provides that "evidence which would be and is not produced would if produced be unfavourable to the person who withholds

it". In this regard it is necessary to point out that before an adverse inference can be drawn by raising presumption under Section 114 Illustration "G' of Evidence Act court must be satisfied that documents exist and could be produced but the same has not been produced by the party who is in possession of such documents. In this connection a reference can be made to decision of their Lordship of Privy Council rendered in **Mahabir Singh Vs. Rohini Ramanadhwaj Prasad Singh AIR 1933 Privy Council 87**, wherein at page 91 of the report Their Lordship of Privy Council held as under:

"It is right to refer to the absence of certain evidence, which the Subordinate Judge regarded as justifying inferences unfavourable to the respondent. As regards the horoscope and the books of account there seems little doubt that these existed and that if still available and produced, they would have been of importance as evidence. But the circumstances under which the Court would be entitled to draw inferences unfavourable to the respondent are provided for by Section 114 (g), Evidence Act, and the Court must be satisfied that the evidence could be produced. The appellant has not attempted to prove that the account books are in existence and could be produced. It is most regrettable that the right of discovery is not fully taken advantage of in such a case as this, where documentary evidence, if it is still available, might afford valuable evidence. But the appellant's failure to exhaust this source cannot be used against the respondent. Similarly, in the case of the horoscope, Rani Basant Kunwar named the person in whose possession it might be, put the appellant made no attempt to pursue enquiries as to its existence."

51. Similar view has also been taken by the Hon'ble Apex Court in case of **Srichand K. Khetwani Vs. The State of Maharashtra AIR 1967 S.C. 450 (453)**, wherein it has been held by Hon'ble Apex Court that an adverse inference can be drawn only if there is withholding of evidence and not on account of failure to obtain evidence. For ready reference para 8 and 9 of the decision is reproduced as under:

"8. .....The High Court cannot be said to have been in error in taking these further reasons into consideration and holding that no adverse inference can be drawn against the prosecution from the fact that the opinion of the handwriting expert has not been obtained with respect to the endorsement on the acknowledgment receipt.

9. Further, an adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. When no such evidence has been obtained, it cannot be said what that evidence would have been and, therefore, no question of presuming that that evidence would have been against the prosecution, under Section 114, Illustration (g) of the Evidence Act, can arise."

52. Thus from the aforesaid settled legal position it is clear that before an adverse inference can be drawn in respect of withholding of evidence against party concerned it is necessary for the court to be satisfied about the existence of the documents in possession of party against whom adverse inference sought to be drawn, until and unless such satisfaction is arrived at on the basis of necessary

enquiry made in this regard, no presumption and adverse inference against the party in question can be drawn by the court. Applying the aforesaid settled legal principle in case in question it is clear that before drawing adverse inference against the petitioner Labour Court did not make any inquiry to ascertain the fact as to whether the register of attendance and wages prescribed under Rule 18 (1) (b) and (c) on Form "G' has been maintained by the petitioner and as to whether it is actually in existence and in possession of the petitioner or not? In order to ascertain this fact the Labour Court could direct the Inspectors for making inspection of shop or commercial establishment and examine the Inspector appointed under the Act having assigned the duties of inspecting the shops and commercial establishment in the area in question but without undertaking such exercise and making any inquiry in this regard it appears that since the petitioner's shop has been registered under the provisions of Act, 1962, therefore, Labour Court has erroneously assumed that the owner of commercial shop and establishment must also have maintained the aforesaid alleged register of attendance and wage without any proof of the existence of the same. Thus, I have no hesitation to hold that the adverse inference and presumption drawn by Labour Court in this regard against the petitioner is wholly erroneous, misconceived and not sustainable.

53. Contrary to it learned counsel for the respondent no. 2 Sri Shyam Narain, Advocate has placed reliance upon a decision of Hon'ble Apex Court rendered in this regard in **M/s. Bharat Electrical Ltd. Vs. State of U.P. & others, J.T. 2003(6) S.C. 14**. In para 6 of the decision Hon'ble Apex Court had taken note of the findings of facts recorded by High Court in impugned judgment, wherein it was observed that respondent- workmen were engaged for working as gardeners in the Factory premises campus and residential colony of the appellant. Ram Swarup, Head Mali was admittedly employed by appellant, he use to supervise the work of the respondent-workmen. Another employee of the appellant namely Sadhuram use to maintain the record of the attendance of the respondent-workmen, he destroyed the attendance register by tearing it off at the instance of one Mr. Varshney who was working as Manager with the appellant. Further if the respondent-workmen were engaged by independent contractors the record of their attendance should have been maintained by them. Thus considering the facts and circumstances and finding of facts recorded by labour court, High Court maintained the award of labour court which was not disturbed by the Hon'ble Apex Court. Thus the facts of the instant case is quite distinguishable from the aforesaid case. In the aforesaid case the facts of existence of attendance register and tearing it off was found proved from evidence adduced before the labour court, therefore, the aforesaid case can be of no assistance to the case of respondent-workman.

54. Now first and remaining incidental question arises for consideration as to whether the Photostat copy of alleged attendance and wage register relied upon by the Labour Court is admissible in evidence or not? In this connection it is necessary to point out that Section 62 of the Evidence Act provides for primary evidence which means the document itself produced for the

inspection of the Court and Section 63 of the Evidence Act deals with the secondary evidence which means and includes-

(1) Certified copies given under the provisions hereinafter contained;
(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
(3) Copies made from or compared with the original;
(4) Counterparts of documents as against the parties who did not execute them;
(5) Oral accounts of the contents of a document given by some person who has himself seen it.

55. Illustration (a) of Section 63 of Evidence Act provides that a photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original. Illustration (b) provides that a copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original. Thus from a bare reading of the aforesaid illustrations appended to section it is clear that mere filing of Photostat copy of document unless it is proved by other evidence showing that same is copied or prepared from original documents the same cannot be treated to be secondary evidence and accordingly can not be admissible as such in evidence but from perusal of impugned award of Labour Court there is nothing to show that the Photostat copy filed by the respondent no.2 was proved that it was photographed from the original record by adducing any other oral evidence in this regard. Therefore, the Photostat copy filed by respondent no.2 cannot be said to be copy of original record in absence of proof of the same, particularly when the petitioner has disputed and emphatically denied the existence of alleged attendance and wage register filed before the Labour Court and it was also alleged to have been fabricated by the respondent no.2 himself which does not bear the signature of employer. From the perusal of format "G' of attendance and wage register it is clear that at the foot of format the signatures of employee and employer are essential. The Photostat copies filed by the respondent no. 2 does not bear such signature of employer, therefore, the submission of learned counsel of petitioner in this regard that it is fabricated document, have some substance. **In my considered opinion aforesaid Photostat copy can not be treated to be secondary evidence and admissible in evidence as such and accordingly cannot be made basis for recording any finding to establish the relationship of master and servant between the petitioner and the respondent no.2**. Thus the finding recorded by Labour Court in this regard on that basis is wholly misconceived, perverse, erroneous and not sustainable.

56. In this connection it is also necessary to point out that under section 64 of Evidence Act the provision has been made to the effect that the documents must be proved by primary evidence except in the cases hereinafter mentioned. Section 65 provides the cases in which secondary evidence relating to documents may be given and clearly stipulates that - secondary evidence may be given of the existence, condition or contents of a document in the following cases:-

(a) when the original is shown or appears to be in the possession or power -

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court,

or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India) to be given in evidence;

(g) when the original consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

57. Thus from a bare reading of the aforesaid provisions contained in Section 65 of Evidence Act it is clear that no secondary evidence of a document is permissible, unless any of the condition mentioned in aforesaid section are satisfied. In this regard a reference can be made to a case decided by Madras High Court in **Akottapalli Raghaviah, AIR 1953 Madras 780**. In para 2 of the decision Madras High Court has held as under :

"(2). .....Under Section 64, Evidence Act the order must be proved by filing an order itself. No secondary evidence of the order is permissible unless the conditions mentioned in Section 65 are satisfied. It is not the case of the prosecution that their action falls within the scope of Section 65, Evidence Act. The evidence of a newspaper in which it was stated that a person was wanted is not sufficient, especially when knowledge or reason to believe has to be proved by prosecution. The case is covered by the Privy Council ruling in -Iswaramurthi Goundan Vs. Emperer, reported in Air 1944 P.C. 54."

58. It is also well settled that before reception of secondary evidence it is necessary that a foundation must be laid for reception of such secondary evidence. In this connection a reference can be made of a decision of Hon'ble Apex Court

rendered in **Sital Das Vs. Sant Ram and others, AIR 1954 S.C. 606** wherein in para 16 of the decision Hon'ble Apex Court has held as under:

"(16) .....If the document produced is a copy, admissible as secondary evidence under Section 65 of the Evidence Act and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy is not sufficient to raise the presumption of the due execution of the original (Vide - "Basant Singh Vs. Brij Raj Saran Singh, AIR 1935 PC 132(C). In this case no foundation was laid for reception of secondary evidence under section65 of the Evidence Act, nor can the copy produced be regarded as secondary evidence within the meaning of section 63. In these circumstances, we must hold that the will alleged to have been executed by Kishore Das in the year 1911 has not been proved and the translation of an alleged copy of it which has been produced in this case should be excluded from consideration."

59. Similarly in **The Roman Catholic Mission & another Vs. State of Madras & another, AIR 1966 S.C. 1457** in para 8 of the decision Hon'ble Apex Court has held as under :

"(8) .....The originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence. The High Court rejected them and it was plainly right in so deciding. If we leave these documents out of consideration, the other documents do not show that the inam comprised the kudi-waram also..... "

60. Thus from the aforesaid discussion, it is clear that before adducing the Photostat copies aforesaid as secondary evidence, none of the conditions existing under section 65 of Evidence Act were satisfied nor necessary foundation has been laid by the party seeking to adduce them as secondary evidence nor can the copy produced be regarded as secondary evidence within the meaning of section 63 of the Evidence Act, as such acceptance of such Photostat copies by the Labour Court as secondary evidence is wholly illegal, erroneous and could not be accepted as admissible evidence for the purpose to prove content of the documents, therefore, liable to be excluded from the consideration.

61. Thus on the basis of aforesaid discussions, it is clear that respondent no. 2 has failed to establish employer-employee/master and servant relation with the petitioner and himself. The Photostat copies of attendance and wage register filed by him is inadmissible in evidence in given facts and circumstances of the case discussed herein before. No other document or evidence has been adduced in support to establish such relationship. The Photostat copy of coin given by the United Provincial Transport Company-petitioner to customers of his agency, which is different concern bearing different registration having different business could also not be accepted as proof to establish master-servant relationship between the petitioner and the respondent no. 2. Since the respondent no. 2 has come forward with a specific case before the Labour Court that he was Godown Keeper/Helper in the shop/establishment of the petitioner but he could not prove the same by adducing legal and admissible evidence before the

Labour Court, therefore, I have no hesitation to hold that the respondent-workman has failed to prove that master and servant or employer and employee relationship was existing between the petitioner and respondent-workman before termination of his services as such. Accordingly the reference in question made by State Government before labour court is incompetent and bad in law on that count. Consequently findings of labour court in this regard is not sustainable at all.

62. Before parting with the issue it is also necessary to deal with the submissions of learned counsel of respondent-workman and decisions relied upon by him. He submitted inter alia that that since the respondent-workman was being engaged through Mates for loading and unloading work of the petitioner's shop and godown, therefore, he would be deemed to be employee of petitioner under broader sweep of description of "employer" as provided under Section 2 (i) (iv) of U.P. Industrial Disputes Act. Whereas learned counsel for the petitioner Sri Vijai Ratan Agrawal has encountered the aforesaid arguments of Sri Shyam Narain submitting that it is not available to him for the simple reason that this point has never been raised by the respondent at any stage of proceeding and no foundation either before the Labour Court and before this Court also in counter affidavit filed in the writ petition has been laid by the respondent-workman, therefore, this question cannot be permitted to be raised for the first time at the stage of arguments in writ proceeding before this Court. Thus, it is necessary to examine the pleading and other materials placed by respondent-workman before the labour court but before such examination is made, I would like to deal first the case law relied upon by learned counsel for respondent-workman.

63. In **Basti Sugar Mills case** (supra) a Constitution Bench of Hon'ble Apex Court has considered the controversy in context of reference of an industrial dispute Act under the Uttar Pradesh Industrial Disputes Act, 1947, wherein the appellant Sugar Mills entrusted the work of removal of press mud to a contractor who engaged the respondents therein (contract labour) in connection with that work. The services of the respondents were terminated by the contractor and they claimed that they should be reinstated in the service of the appellant. The Constitution Bench held.

"The words of the definition of workmen in Section 2(z) to mean "any person (including an apprentice) employed in any industry to do one skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied" are by themselves sufficiently wide to bring in persons doing work in an industry whether the employment was by the management or by the contractor or the management. Unless however, the definition of the word "employer' included the management of the industry even when the employment was by the contractor the workmen employed by the contractor could not get the benefit of the Act since a dispute between them and the management would not be an industrial dispute between "employer" and workmen. It was with a view to remove this difficulty in the way of workmen employed by contractors that the definition of employer has been extended by sub clause (iv) of Section 2 (i). The position thus is; (a) that the

respondents are workmen within the meaning of Section 2(z), being person employed in the industry to do manual work for reward, and (b) they were employed by a contractor with whom the appellant-company had contracted in the course of conducting the industry for the execution by the said contractor of the work of removal of pressmud which is ordinarily a part of the industry. It follows therefore, from Section 2(z) read with sub-clause (iv) of Section 2(i) of the Act they are workmen of the appellant-company is their employer."

64. Although there can be no quarrel with the legal proposition which is now well settled in catena of the decisions of Hon'ble Apex Court, but the facts of the instant case is quite distinct and distinguishable from the facts of the aforesaid case. In the aforesaid case the employee was brought to employment of the employer through the contractor and it was found as a matter of fact that aforesaid contract was sham and camouflage and unreal. Thus employee was held employee of employer, that is appellants company.

65. Similarly in **M/s. Bharat Electrical Ltd. case** (supra) also as stated herein before, the respondent-workman was found as employee of appellant though he was brought under the employment of the appellant through contractor but the aforesaid contract was found as sham and camouflage and unreal contract. In the aforesaid case the manner and mode of appointment and bringing the workman to the employment of the appellant was found proved as a matter of fact on the basis of materials placed before the labour court. Thus, the facts of the aforesaid case is also distinguishable from the facts of the instant case. Similarly in **National Fertilizer Ltd. case** (supra) the workman was admittedly brought under the employment of the employer through contractor and having regard to the facts and circumstances of the case, the tribunal on appreciation of evidence on record came to the conclusion that he was employee of the petitioner. In that facts and situation of the case learned Single Judge of this Court on placing reliance upon the decisions rendered by Apex Court referred in the judgment has held that the findings of the labour court holding the respondent no. 3 as employee of the petitioner is justified and action taken by the petitioner by removing the respondent no.3 was illegal, therefore, the award passed by labour court was maintained to the extent of reinstatement of respondent no.3 with back wage. The facts of the aforesaid case is also distinguishable from the facts of the instant case hence can be of no assistance to the case of respondent-workman.

66. Thus in view of the aforesaid discussion, it is necessary to examine the facts of the case of respondent-workman pleaded before the Labour Court in his written statement filed before it, which is already on record as Annexure-2 of the writ petition, wherein it has been stated that the respondent-workman was appointed in the establishment of petitioner as Godown Keeper/Helper on 5.4.1975 and he was continuing as such on the aforesaid post till 6.7.2001. He was paid a sum of Rs. 2110/- per month as wage but his services were terminated illegally on 7.7.2001. Before his termination as such he has continuously worked for a period of 240 days. While terminating his services the provisions of

Section 6-N of U.P. Industrial Disputes Act was not complied with either by serving him any statutory notice of retrenchment or payment in lieu thereof and retrenchment compensation towards the services rendered by him. Oral evidence adduced by the respondent-workman before Labour Court is also on record as Annexure-8 of the writ petition wherein the same facts have been reiterated by the respondent-workman. From the perusal of written statement as well as statement in chief of respondent-workman recorded before the labour court there is nothing to show that any statement of fact has been made to the effect that the respondent-workman was engaged through the mates and brought to the employment of the employer i.e. petitioner by the mates and he was fully integrated into the petitioner's establishment as full time worker and any contract of employer with third person was sham and camouflage rather unreal. There appears no such pleadings and proof before the labour court. The counter affidavit filed in the writ petition also does not indicate that the respondent-workman was engaged through mates as a full time employee of the petitioner and fully integrated into the employer concern and remained under direct control and supervision of employer till the date of termination of his services contrary to it in para 6 (b) of main counter affidavit filed by respondent-workman it has been specifically stated that it is wrong to alleged that respondent was freelance labourer and was engaged through different mates to work in petitioner's establishment. Although such pleading can not be permitted to be made first time in the writ petition as it involves the adjudication of factual question by appreciation of evidence which cannot be appropriately appreciated in such proceedings. The phenomena of relationship of master and servant and employer and employee as indicated earlier is pure question of fact. Whether the contract entered into between the employer and contractor is sham or camouflage or unreal or genuine or bonafide is also a question of fact is to be decided by the Labour Court on the basis of pleadings and evidence adduced before it. The aforesaid relationship cannot be established on the basis of pure legal fiction and assumption and the same cannot be decided before this Court first time in writ proceeding without any factual foundation for the same. However it is for the Industrial Tribunal or Labour Court to determine the question of relationship of master and servant or employer and employee by applying various relevant factors as laid down from time to time by Hon'ble Apex Court and High Courts but same cannot be decided first time in the writ proceeding for reasons indicated herein before. Thus, the submission of learned counsel for respondent-workman that respondent no. 2 should be deemed to be employee of petitioner under the broader sweep of definition of "employer" given under Section 2(i) (iv) of U.P. Industrial Disputes Act, 1947 in my considered opinion is wholly misconceived and not tenable at all. Accordingly the point raised by Sri Shyam Narain in this regard during the course of hearing and arguments first time in the writ petition is without any factual foundation and cannot be permitted to be raised first time during the course of argument in the writ petition in question.

67. Thus in view of discussions made herein before, I am of considered

opinion that the respondent-workman has failed to discharge his burden of proof to establish relationship between him and petitioner as of employee and employer and master and servant. The Photostat copies of attendance and wage register were not admissible in evidence as secondary evidence for the reasons given herein before. Similarly the Photostat copy of silver coin is also not admissible in evidence for the same reasons and absence of proof of identity of recipients were liable to be excluded from consideration to establish such master and servant relationship between the petitioner and respondent-workman, therefore, the in service? In this regard it is necessary to point out that since I have taken the view that respondent-workman has failed to establish the relationship of master and servant or employer and employee between the petitioner and himself, holding that reference was incompetent and bad in law, consequently findings of labour court is not sustainable in the eyes of law and unless such relationship is found established according to law, no further question would arise to be considered as to whether the termination of service of respondent-workman was according to law or not. Accordingly the question of consequential relief of reinstatement with full back wage or any other quantum of back wage as a result of setting aside the order of termination of respondent-workman does not necessarily arise to be considered in given facts and circumstances of the case.

69. Similarly another submission made by learned counsel for the petitioner that the establishment has been closed down after award of the Labour Court and before its publication and the petitioner has informed about the closure of findings of labour court based on inadmissible evidence and irrelevant materials are wholly erroneous, misconceived and perverse and cannot be sustained and liable to be quashed. Accordingly same are hereby quashed. Consequently the reference in question is also held to be incompetent and bad in law.

68. Now the next question arises for consideration as to whether the Labour Court was justified in given facts and circumstances of the case to grant the relief of full back wage to the respondent no.2 while reinstating him with continuity establishment to the concerned officer of Labour Department of Government of Uttar Pradesh and on the basis of aforesaid facts the learned counsel for the petitioner has submitted that in case the establishment would have been closed down before the award of Labour Court, the matter would have been brought to the notice of Labour Court and in such a situation the Labour Court would have not possibly made the award granting relief of reinstatement of respondent-workman. Although the fact of closure of establishment has been denied and disputed by the respondent-workman but having regard to the facts and circumstances of the case, since the question requires investigation of facts and appreciation of evidence to be brought on record inasmuch as since I have already taken a view whereby the award of Labour Court has been held to be not sustainable, therefore, at the moment this question does not arise to be decided either before this Court or before any appropriate forum under Industrial Disputes Act but the same shall be left open for the parties to agitate at

appropriate time and forum as and when occasion would arise.

70. Thus in view of foregoing discussions and observations made herein above, the impugned award passed by Labour Court in Adjudication Case No. 37 of 2002 on 19.01.2004 published on 24.08.2004 is hereby quashed and the writ petition succeeds and stands allowed.

71. There shall be no order as to costs. **Petition Allowed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2005

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 17300 of 1984

Sushil Kumar Srivastava ...Petitioner
Versus
IVth Addl.District Judge, Gorakhpur ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri S.R. Misra
Sri H.R. Misra
Sri P.K. Misra, S.C.

U.P. Urban Building (Regulation of letting Rent & Eviction) Act 1972-Section 20 (4)- Arrear of rent-for more than 4 months-inspite of notice demanding rent-instead of depositing the same-Tenant started raising technical plea about validity of notice itself-deposit under Section 30-can not be held proper-unless denial by land lord established-held-benefit of Section 20 (4) can not be given-finding recorded by the Court below neither controverted nor challenged-ejectment held proper.

Held: Para 9 & 14

Since the suit filed in the present case was based exclusively and solely on question of arrears of rent under Section 20(2)(a) of the Act, a notice to vacate where a tenant was in arrears of more than four months of rent and had failed to deposit within one month from the date of service of notice, would be sufficient. Relying upon the judgment of the Supreme Court referred to above and Division bench of 1974 in Abdul Jalil case, I hold that the notice given in the present case was valid notice. The finding of both the Courts below on this question is therefore correct and does not warrant any interference.

In the present case there is categorical finding recorded by both the Courts below that the tenant never tendered the rent after receipt of notice and there was no denial/refusal by the landlord to accept the rent after notice was given. This finding is not challenged by the petitioner nor is there any averment in the petition that rent was tendered after receipt of notice and the landlord refused to accept the same and therefore, the deposit under section 30(1) of the Act continued. I am, therefore of the view that petitioner was not entitled to the benefit of deposit made by the petitioner under section 30 of the Act In the circumstances the Courts below rightly disallowed the benefit of the deposits made under section 30(1) of the Act by the tenant

Case law discussed:
AIR 1988 A.P.-193
AIR 1971 Alld.-302
AIR 1964 Alld.-260
1980 ARC-1
2004 (2) ARC-118
AIR 1974 Alld-402
AIR 1984 SC-143
1985 (2) ARC-331
1997 (1) ARC-139
2004 ARC (1) 580

(Delivered by Hon'ble Vikram Nath J.)

1. This writ petition by the tenant is directed against the judgment and orders dated 17.09.1984 and 30.09.1982 passed by IV Addl. District Judge, Gorakhpur and the Judge Small Causes Court, Gorakhpur whereby the suit of the respondent no.3 Devendra Bahadur Srivastava for recovery of arrears of rent and ejectment of the petitioners has been decreed and the revision of the tenant petitioner against the same has been dismissed.

2. The dispute relates to residential portion in the tenancy of the petitioners situate at 414 Ismailpur, Gorakhpur which is owned by the respondent no.3. The petitioner was a tenant at monthly rent of Rs.50/- in the upper northeast portion of the said building (hereinafter referred to as the premises in dispute). The petitioner committed default in payment of rent from March 1978 despite request by the respondent no.3. As the arrears were not paid, the respondent no.3 gave notice dated 22.09.1979 demanding the arrears and to vacate the premises within 30 days. The petitioner failed to satisfy the demand and replied denying the contents of the notice. The respondent no.3 thereafter filed JSCC Suit No. 367 of 1979 in the Court of Judge Small Causes, Court, Gorakhpur. The petitioner contested the suit and raised the following issues: Firstly that the notice under section 106 of Transfer of Property Act was invalid, secondly there was no dues against the petitioner and he was not in arrears; thirdly the landlord by conduct had waived the notice which was the basis for filing the suit, as such there being no subsequent notice the present suit was liable to be dismissed and lastly that he had made the deposits under section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent And Eviction) Act, 1972 (in short referred to as the Act) and was entitled to benefit of Section 20(4) of the Act having deposited the arrears before the first date of hearing. Both the parties led evidence in support of their contentions. The trial court vide judgment dated 30.4.1982 while decreeing the suit recorded the following findings: Firstly that the notice was a valid notice, secondly the liability to pay the water tax and the house tax was on the petitioner; thirdly there was default of more than four months rent on the part of the petitioner; fourthly the petitioner was not entitled to the deposit made under section 30 of the Act and as such no protection under section 20 (4) of the Act could be given to the tenant.

3. Aggrieved by the same the petitioner filed revision under section 25 of Provincial Small Causes Court Act which was registered as Civil Revision No. 266 of 1982 Sushil Kumar Srivastava Vs. Devendra Bahadur Srivastava. The revisional Court vide judgment dated 17.09.1984 agreed with all the findings of the trial court except that it allowed one months benefit with regard to the arrears of rent to the petitioner tenant and modified the decree to the extent that the liability to pay the rent would begin from April 1978 and not from March 1978 as claimed in the plaint and as decreed by the trial court. Aggrieved by the aforesaid two judgments the tenant has filed the present writ petition.

4. I have heard Sri Arvind Srivastava, learned counsel for the petitioner and Sri P.K. Misra learned counsel for the respondent no.3 landlord.

5. The first contention of learned counsel for the petitioner is that the notice dated 22.09.1979 (Annexure- 4 to the petition) was in praesenti and therefore invalid. According to the counsel for the petitioner, the language used in the notice was that the tenancy was terminated from the date of issue of notice, which is not legally permissible, and the tenancy could be terminated only after a period of 30 days from the service of the notice, therefore, it was invalid. For proper adjudication of the issue para 4 of the notice is quoted hereunder:

"That my client does not want to keep you as tenant and hereby terminates your tenancy through this notice and you are hereby requested to pay Rs.1395.40 to my client and vacate the premises after residing there for 30 days, failing which a suit may be filed against you and in that case you will be liable for the whole expenses of the case also."

Great stress has been given by the learned counsel for the petitioner on the word "hereby terminates your tenancy through this notice"

6. In support of his contention, the counsel for the petitioner has relied upon the following three decisions: Firstly, ***AIR 1988 Andhra Pradesh page 193 Y. Krishna Murthy Vs. A. Subba Rao***. In the said case the language used in the notice was similar to that of the present notice and Andhra Pradesh High Court held that the tenancy could be determined only after the expiry of 15 days and any language contrary to it would render the notice invalid. The next case relied upon by the counsel for the petitioner is ***AIR 1971 Allahabad page 302, Hakim Jiaul Islam Vs. Mohd.Raf***i. In the said case the language used in the notice was the termination of tenancy with effect from today. The said notice and the present notice being differently worded the said judgment cannot help the petitioner. The third case relied upon by the petitioner is ***AIR 1964 Allahabad page 260 (Full Bench decision) in the case of Gorakhlal Vs. Maha Prasad Narain Singh***. According to this decision it was held that the termination of tenancy in law and to vacate the premises would be different things. Relying upon these cases, the counsel for the petitioner has sought to further explain that Section 20 of the Act has to be read in consonance with the provisions of the Transfer of Property Act. It is not a dispute that the notice of demand and the notice to vacate can be a combined notice. The question is what are the essential of such a combined notice and when such notice could be held to be valid or invalid based upon the language of the notice.

7. Learned counsel for the respondent has relied upon Constitution Bench of Supreme Court in the case of ***V. Dhanpal Chettier Vs. Yashodai Ammal reported in 1980 A.R.C. page 1*** wherein the Supreme Court taking a broader and liberal view with regard to interpretation of notice has held that notice cannot be thrown out on technicalities and further where the provisions of Rent Act come into play, it is not necessary to give a notice to quit under section 106 of the Transfer of Property Act. The Apex Court held that what is required is only the termination of tenancy under the Rent Act would be sufficient. Further, reliance has been placed upon ***2004(2) ARC page 118 Shanti Devi Nigam Vs. Madan Lal Gupta*** in which the Supreme Court has

held that under the provision of Section 20(2)(a) of the Act a notice demanding arrears of rent and seeking eviction was sufficient and there was no requirement of a notice under section 106 of Transfer of Property Act.

8. In another case decided by a Division Bench of this Court in ***Abdul Jalil versus Haji Abdul Jalil reported in AIR 1974 All. 402*** after giving illustration of different language used in the notice has held a similar notice as in the present case to be a valid notice.

9. Since the suit filed in the present case was based exclusively and solely on question of arrears of rent under Section 20(2)(a) of the Act, a notice to vacate where a tenant was in arrears of more than four months of rent and had failed to deposit within one month from the date of service of notice, would be sufficient. Relying upon the judgment of the Supreme Court referred to above and Division bench of 1974 in Abdul Jalil case, I hold that the notice given in the present case was valid notice. The finding of both the Courts below on this question is therefore correct and does not warrant any interference.

10. The next contention of learned counsel for the petitioner is that the respondent no.3 having waived the notice dated 22.09.1979 and there being no fresh notice, demanding rent up to 30.11.1979, the proceedings were vitiated in law. The counsel for the petitioner has pointed out that in the notice dated 22.09.1979 the rent from March 1978 up to 31.08.1979 was claimed. It is not disputed that this notice was served upon the petitioner on 26.09.1979. In the plaint the rent was claimed for the period from March 1978 up to 30.11.1979 and therefore, the petitioner alleges that the respondent no.3 had waived the previous notice, in as much as the respondent no.3 treated /accepted the petitioner to be tenant up to 30.11.1979. According to the petitioner, the notice having been served on 26.09.1979, and period of one month expired on 25.10.1979; therefore, the claim of rent up to 30.11.1979 is not inconformity with the notice issued to the petitioner, as such the suit must fail. In support of his contention, the petitioner has relied upon the judgment of the Supreme Court in the case of ***Satish Chand Vs. Goverdhan Das reported in AIR 1984 S.C. page 143*** which was dealing with the case of the notice under section 106 Transfer of Property Act and where the facts were totally different which cannot be compared with the facts of the present case which required only a notice as contemplated under section 20(2)(a) of the Act. The said judgment of the Supreme Court cannot be of any help to the petitioner and more so when the Supreme Court has already held in case of ***Shanti Devi Nigam (Supra)*** that where Rent Act has come into play there was no requirement of notice under section 106 of the Transfer of Property Act.

11. The next contention of the learned counsel for the petitioner is that the Courts below illegally and wrongly disallowed the benefit of the deposit made under section 30 of the Act. It is urged that in case the deposits under section 30(1) of the Act were taken into consideration there would be no default and the petitioner would have been entitled to protection from eviction under section 20(4) of the Act. The petitioner has deposited rent under section 30(1) of the Act for the period August 1979 till June 1980. It is not in dispute that notice

demanding rent was given in September 1979, which is also accepted by the petitioner. There was no justification for depositing rent under section 30 of the Act once the landlord had shown willingness to accept the rent by giving notice. This is what is clearly intended by section 30(1) of the Act. For sake of convenience the section 30(1) of the Act is quoted below.

30. Deposit of rent in court in certain circumstances. (1) If any person claiming to be a tenant of a building tenders any amount as rent in respect of the building to its alleged landlord and the alleged landlord refuses to accept the same then the former may deposit such amount in the prescribed manner and continue to deposit any rent which he alleges to be due for any subsequent period in respect of such building until the landlord in the meantime signifies by notice in writing to the tenant his willingness to accept it.

12. Learned counsel for the petitioner has relied upon ***1985(2) ARC 331 Shankar Lal Sharma V. Ram Adhar and others, 1997(1) ARC 139 Mahendra Nath Tandon v. VI A.D.J. Kanpur Nagar and others and 2004(1) ARC 580 Babu Ram and others v. Special Judge/ Additional District Judge, Bijnor*** for the said proposition. In all these cases the landlord had either refused to accept rent when it was tendered by the tenant after receipt of notice or had with drawn the amount deposited under section 30 of the Act and therefore, the deposit made under section 30 (1) of the Act after expiry of notice was held to be a valid deposit. They are of no help to the petitioner.

13. On the other hand learned counsel for the respondent relying upon the contents of section 30 (1) of the Act contended that once notice for demand was given which clearly indicates the willingness of the landlord to accept the arrears of rent there is no justification for continuing to deposit rent under section 30 (1) of the Act. Any such deposit would be illegal and no benefit can accrue to the petitioner tenant. Reliance is placed upon a decision of this Court in the case of **Ayodhya Nath Dubey Versus XIII the Addl. District & Sessions Judge, Kanpur Nagar reported in 1991(1) ARC 268** wherein this Court held that once willingness is expressed by the landlord to accept the rent and the tenant despite the same continues to deposit in Court under section 30 (1) of the Act, the tenant would not be entitled to claim benefit of such deposit.

14. In the present case there is categorical finding recorded by both the Courts below that the tenant never tendered the rent after receipt of notice and there was no denial/refusal by the landlord to accept the rent after notice was given. This finding is not challenged by the petitioner nor is there any averment in the petition that rent was tendered after receipt of notice and the landlord refused to accept the same and therefore, the deposit under section 30(1) of the Act continued. I am, therefore of the view that petitioner was not entitled to the benefit of deposit made by the petitioner under section 30 of the Act In the circumstances the Courts below rightly disallowed the benefit of the deposits made under section 30(1) of the Act by the tenant

15. The last contention of the petitioner is that electricity charges could

not have been included while determining the validity and sufficiency of the deposit made under section 20(4) of the Act and even if considered the deficit would be very small and could be ignored in order to advance substantial justice and the petitioner would be entitled to benefit of the protection from eviction under section 20 (4) of the Act. This contention loses its significance in view of the finding recorded with regard to benefit of the deposit under section 30(1) of the Act.

16. In the result the writ petition fails and is accordingly dismissed, however there will be no order as to costs.

Petition Dismissed.

Counsel for the Respondents:
Sri J.N. Tiwari
Sri Gopal Misra

<u>Constitution of India, Art. 226-Voluntary Retirement Scheme</u>-Petitioner applied-provided entire dues is given modified voluntary retirement Scheme on 12.7.02-03.03.03 petitioner applied for cancellation of the condition under offer as the Respondents failed to clear the dues-continued working-held-entitled for every consequential benefits-if new Victoria Mills Kanpur closed and such scheme for absorption of others employees is in existence-petitioner also may be considered.

Held: Para 7

Having heard learned counsel for the parties and considering the facts and circumstances of this case, in my view this writ petition deserves to be allowed and the impugned order dated 14.7.2003 passed by the respondent M/s New Victoria Mills, Kanpur is liable to be quashed only in so far as it relates to the case of the petitioner, and that the petitioner would be entitled to all consequential benefits.

<u>Case law discussed:</u>

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 16587 of 2004

Shri Kant Arya ...Petitioner
Versus
M/s New Victoria Mills, Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri P.K. Tripathi

2002 AIR SCW 1165
2003 AIR SCW 313
AIR 1999 SC-1571
2003 FLR I
2003 PRSCW 2989
2004 SCC ( ) 428

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

1. The petitioner was initially appointed in the year 1985 as Supervisor Maintenance on probation in Atherton Mills of the National Textile Corporation. Thereafter vide order dated 27.7.1991 he was transferred to New Victoria Mills of the National Textile Corporation at Kanpur. He joined at New Victoria Mills, Kanpur on 29.7.1991. In the year 2001 some dispute arose with regard to his provident fund account. According to the petitioner, his employer (respondents) had wrongly got an account opened in the name of Shri Kant Misra instead of the petitioner's actual name which was Shri Kant Arya. The provident fund amount of the petitioner was thus deposited in a wrong name.

2. However, before the said dispute could be resolved, the Respondent-Mill came up with a Modified Voluntary Retirement Scheme. By his offer dated 12.7.2002 the petitioner opted for voluntary retirement under the said scheme but subject to the condition that his entire dues (which included the provident fund dues) may be paid along with his said resignation letter. No formal order accepting the offer of the petitioner had been passed by the respondents. In the meantime, on 3.3.2003, the petitioner wrote to the Respondent-Mill that since his provident fund account had not been regularized and the amounts had not been deposited by the employer in his account, and further that after acceptance of his resignation, the realization of the said amount would become impossible, the petitioner wrote that his conditional offer under the Modified Voluntary Retirement Scheme may remain in abeyance. A further request was made by the same letter that his provident fund account may be regularized within 30 days. The respondents again did not thereafter send any reply/communication to the petitioner. However, vide letter/order dated 28/31.5.2003 passed by Respondent no.1 M/s New Victoria Mills, the cut off date for the acceptance of the resignation/offer of the petitioner and three other employees under the Modified voluntary Retirement Scheme was given as 1.6.2003. Then on 2.6.2003 the Respondent no.1 informed that due to certain unavoidable circumstances the cut off date fixed as 1.6.2003 had been cancelled and a new cut off date would be informed. All along, the petitioner was permitted to continue to work. Before the new cut off date could be announced, on 1.7.2003 the petitioner wrote to the Respondent-Mill that his offer for resignation under the Modified Voluntary Retirement Scheme may be treated as cancelled. It is not disputed that till such date the condition laid down by the petitioner in his offer dated 12.7.2002 and 3.3.2003 of regularizing his provident fund account had not been fulfilled by the respondents. However, no orders had also been passed on any of the communications of the petitioner i.e. 12.7.2002; 3.3.2003 and 1.7.2003. Then on 14.7.2003, the Respondent-Mill passed a fresh order, stating that the cut off date for acceptance of the offer of the petitioner and six other employees for resignation under the Modified Voluntary Retirement Scheme would be 16.7.2003.

3. Aggrieved by the said order the petitioner has filed this writ petition with the prayer that after quashing the order dated 14.7.2003, a direction be issued to the Respondents to allow the petitioner to join his duties on the post of Supervisor Weaving Maintenance and pay him all emoluments for which he is entitled; and also to pay him back wages since 16.7.2003, and further permit the petitioner to work on such post till the age of his superannuation and thereafter pay him his retiral benefits.

4. I have heard Sri P.K. Tripathi, learned counsel for the petitioner and Sri J.N. Tiwari, learned Senior counsel assisted by Sri Gopal Misra, learned counsel appearing on behalf of the respondents and have perused the record. Counter and rejoinder affidavits have been exchanged between the parties and with their consent this writ petition is being disposed of at the admission stage itself.

5. The facts as narrated above are not disputed by the parties. The contention of Sri Tripathi, learned counsel for the petitioner, is that since the offer made by the petitioner was always a conditional offer which had not been fulfilled by the respondents, and the said offer had been withdrawn by the petitioner prior to the final cut off date and also prior to the fulfillment of the conditions made in that offer, hence the inclusion of the name of the petitioner, without passing any order on the conditional offer made by the petitioner for accepting his offer/resignation under the Modified Voluntary Retirement Scheme of the Mill, is totally unjustified and liable to be quashed. In support of his contention that the acceptance of the offer/resignation of the petitioner in such circumstances was wrong and illegal, learned counsel for the petitioner has relied upon the decision of the Apex Court in the case of **Shambhu Murari Sinha v. Project and Development India Ltd. and another** 2002 AIR SCW 1165; **Bank of India and others vs. O.P. Swaranakar** 2003 AIR SCW 313; and **J.N. Srivastava Vs. Union of India** AIR 1999 S.C.1571

6. Sri J.N. Tiwari, learned Senior counsel appearing for the respondents, has, however, submitted that once the offer of voluntary retirement made by the respondent-Mill had been accepted by the petitioner, the same could not be withdrawn specially when the initial cut off date of 1.6.2003 had already been announced, which was prior to the final letter of withdrawal of his resignation submitted by the petitioner on 1.7.2003. In support of his said submissions, the respondents have relied upon the decision of the Apex Court rendered in the following cases: **A.K. Bindal vs. Union of India** 2003 F.L.R. 1; **Vice Chairman and Managing director, APSIDC Ltd. and another vs. R. Varaprasad and others** 2003 (98) FLR 104 = 2003 AIR SCW 2989; and **State Bank of Patiala vs. Romesh Chander Kanoji and others** 2004 SCC (L&S) 428. Sri Tiwari has further submitted that since by notification of the Central Government dated 9.3.2004 issued during the pendency of this writ petition, the respondent New Victoria Mills, Kanpur has been closed down, the petitioner cannot now be reinstated in service.

7. Having heard learned counsel for the parties and considering the facts and circumstances of this case, in my view this writ petition deserves to be allowed and the impugned order dated 14.7.2003 passed by the respondent M/s New Victoria Mills, Kanpur is liable to be quashed only in so far as it relates to the case of the petitioner, and that the petitioner would be entitled to all consequential benefits.

8. From the record it is not clear that at any point of time the petitioner had ever given an unconditional offer of resignation under the Modified Voluntary Retirement Scheme of the respondent-mill. His offer/resignation was only on the condition that his entire dues, which included the provident fund dues, should first be cleared and paid to him. From the record it is also clear that till the date of acceptance of his resignation (i.e. either 28/31.5.2003 or 14.7.2003) the said dues of the petitioner had not been settled by the respondents. Admittedly the petitioner was allowed to continue to work till 14.7.2003, when his offer of resignation is said to have been accepted by the

respondent-mill. It is also established from the record that prior to the said date, on 1.7.2003, the petitioner had already withdrawn his offer of resignation.

9. The Apex Court in the case of ***Bank of India*** *(supra)* has held that such voluntary retirement schemes are only an invitation to offer, and the application filed by the employee under the said scheme could then be termed as an offer which the employee can withdraw before its acceptance. The decisions of the Supreme Court as relied upon by the learned counsel for the respondents are distinguishable on facts.

10. In ***A.K. Bindal*** *(supra)* the Supreme Court was dealing with a case where, the employee had accepted the voluntary retirement scheme of the employer and taken the money to which he was then found entitled to under the scheme out of his own sweet-will and without any compulsion. In such facts, it was held that such person then ceases to be under employment of the company and cannot agitate for any kind of his past right with his erstwhile employer. In the case of ***R. Varaprashad*** *(supra)* also it was held by the Supreme Court that once the employee had opted for voluntary retirement of his own choice, which had been accepted, then he could not claim anything contrary to the terms of the scheme that had been accepted by him.

11. Similarly the case of ***Romesh Chander Kanoji*** is also distinguishable on facts as it was a different scheme which the Supreme Court was dealing with, to the effect that under the said scheme an opportunity of 15 days was given to the employee/applicant to withdraw from the scheme. In the present case the respondents have not been able to show any such condition in the voluntary retirement scheme which is being considered by this Court. As such, all the aforesaid decisions which have been relied upon by the learned counsel for the respondents do not help them.

12. The modified voluntary retirement scheme of the respondent-mill, can only be said to be an invitation to an offer. In response to the same, the offer was made by the petitioner on 12.7.2002, which was only a conditional offer and was subject to fulfillment of certain condition. As such, no agreement or contract could be said to have been concluded unless offer was accepted. It is not disputed that neither the condition had been fulfilled by the respondents as had been imposed by the petitioner in his offer, nor his offer had been accepted by the respondent-mill prior to the date of the withdrawal of his offer of resignation, which was 1.7.2003.

13. In ***Shambhu Murari Sinha*** *(supra)* the Supreme Court was dealing with a case where the letter of acceptance was a conditional one, inasmuch as though option of the appellant for the voluntary retirement under the scheme was accepted, but it was stated that the "release memo alongwith detailed particulars would follow", and before the appellant was actually released from the service, he withdrew his option for voluntary retirement by sending two letters to which there was no response from the respondents. It was after the withdrawal of the option for voluntary retirement that the respondents directed for release of the employee from the service, and that too from the next date. The employee was paid his salaries etc. till his date of actual release and it was

therefore held that *"the jural relationship of employee and employer between the appellant and the respondents did not come to an end on the date of acceptance of the voluntary retirement and said relationship continued till 26th of September, 1997. The appellant admittedly sent two letters withdrawing his voluntary retirement before his actual date of release from service. Therefore, in view of the settled position of the law and the terms of the letter of acceptance, the appellant had locus poenitentiae to withdraw his proposal for voluntary retirement before the relationship of employer and employee came to an end.*"

14. In the case of ***J.N. Srivastava*** *(supra)* the employee had offered for voluntary retirement on 3.10.1989 but with effect from 31.1.1990. His offer was accepted by the authorities on 2.11.1989 itself, but thereafter, before 31.1.1990 was reached, the appellant, on 11.12.1989, wrote letter to withdraw his voluntary retirement proposal, which was rejected by the authority vide communication dated 26.12.1989. The employee had also given up his charge of the post as per his memo relinquishing the charge. In such facts it was held by the Supreme Court that *"it is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement."*

15. In my view, the case in hand is on a better footing, as the offer made by the petitioner under the modified voluntary retirement scheme of the respondent was only conditional and such condition has admittedly not yet been fulfilled by the respondent mill. The petitioner, first on 3.3.2003, had written to the respondent mill that since his provident fund account had not been regularized, which was a condition made in his offer of resignation under the scheme, it was specifically stated by the petitioner that the conditional offer tendered by him under the scheme may remain in abeyance. Admittedly, the petitioner continued to work and the jural relationship of employee and employer between the petitioner and the respondent mill continued. Even though the respondent mill may have intimated by communication dated 28/31.5.2003 that the cut off date for acceptance of the resignation/offer of the petitioner would be 1.6.2003, but the same is to be ignored in the case of the petitioner for two reasons; firstly, the petitioner had already (on 3.3.2003) made a request for keeping his offer of resignation in abeyance; and secondly, the cut off date as fixed for 1.6.2003 had been cancelled by the respondent mill itself, and the new cut off date was to be informed subsequently which was then on 14.7.2003 intimated to be as 16.7.2003 and prior to that, on 1.7.2003, the petitioner had already communicated to the respondent mill that his offer for resignation under the scheme may be treated as cancelled.

16. In such circumstances, the relationship of employer and employee continued between the petitioner and the respondent mill. During this period the petitioner had already withdrawn his offer for resignation under the scheme, and the condition spelled out in the initial offer of the petitioner had never at any stage been fulfilled by the respondent. In the absence of the same having been fulfilled, or the

offer of the petitioner having been accepted by the respondent mill, no contract or agreement could be said to have been finalized between the petitioner and the respondent mill so as to voluntarily retire the petitioner on the basis of his offer made on 12.7.2002.

17. Accordingly, for the foregoing reasons, the impugned order dated 14.7.2003 cannot be said to be justified in the case of the petitioner and this writ petition is liable to be allowed. The impugned order dated 14.7.2003, setting out the cut off date of resignation of the petitioner under the modified voluntary retirement scheme, is quashed, but however only in so far as it relates to the petitioner. It is provided that the petitioner shall be treated as on duty with effect from 16.7.2003, and shall be entitled to all consequential benefits including payment of back wages etc. If the respondent mill has been closed down in pursuance of the notification of the Central Government dated 9.3.2004 (as has been submitted by the learned counsel for the respondent-mill), it is directed that, after the closure of the said mill, the petitioner shall be entitled to all such benefits as other employees were to get who were working with the respondent mill as on the date of its closure.

18. In the end learned counsel for the petitioner made an oral prayer that the case of the petitioner for absorption in any other mill of the respondent-National Textile Corporation may be considered. The submission is that the petitioner was initially appointed in Atherton Mills of the National Textile Corporation which is still in operation and it was only by virtue of the petitioner being transferred to the New Victoria Mills, which has been closed down, that the petitioner would have to face the consequences of retrenchment. In the aforesaid circumstances, it is directed that in case if there is any such scheme for absorption of the employees of New Victoria Mills, Kanpur and also in case if other employees of the said New Victoria Mills, Kanpur have been so absorbed after closure of the said mill, the case of the petitioner for absorption in some other mill of the respondent-National Textile Corporation may also be considered by the Corporation, as expeditiously as possible.

19. With the aforesaid observations/directions, this writ petition stands allowed. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 13076 of 2003

Shiv Shanker Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Krishna Mohan

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226- Compensation-petitioner a retired senior Auditor-applied for medical reimbursement of Rs.44,277/- dt. 7.11.96 the Director Medical Care send the original bills to Joint Director Local

Funds Accounts Allahabad-4.3.97 to June, 2003 nothing done-despite of court's order payment not made-27.4.04 petitioner died due to want of fund-heirs claimed compensation to the tune of Rs. 6 Lakhs-Courts expressed its great concern with such sad state of affairs prevalent in the government offices-Court can not sit silent and be mute spectator for the harassment caused to the citizens-for the loss caused to the family on account of negligence of the Public Officer 3 lakhs compensation would be sufficient-payable within 3 months, alongwith Rs.44,272/- as cost of the pace maker installed in 1995 with 9 % simple interest-keeping it open to the State Government to fixed responsibility and take appropriate disciplinary action for recovery etc. authorities, the citizens will have no place to lodge complaint and seek redressal.

The petitioner has prayed for damages of Rs. Six lakhs for untimely loss of his father, and the hardship caused to him before his death. I find that half the amount of the damages would compensate, for the loss caused to the family on account of negligence of the office of Director General, Medical and Health, U.P. shall be sufficient in the interest of justice. This would also have deterrent effect on the officers and warn them of such claims in future.

The writ petition is allowed. The respondents are directed to pay Rs.44,272/- as cost of the pace maker installed in 1995, along with 9% simple interest per annum to the petitioner. A writ of mandamus is also issued to the respondents to pay compensation to the family of the petitioner of Rs. Three Lakhs for the untimely loss of his father harassment, mental agony and hardships caused to the family to be paid to his son substituted as petitioner in this writ petition. The entire amount shall be paid to him for the benefit of the family of the deceased, within three months from the

Held: Para 19,20 and 21

I find that Sri Shiv Shanker Srivastava, a retired servant, was not only deprived of the basis medical facilities, he was also rendered helpless. He could not fight the red tapism and the corruption prevalent in the system. Had he gone to the office of the Director General, Medical and Health at Lucknow and bribed the concerned persons, he may have been reimbursed with the cost of the pace maker and saved his life. This is the way the Government function these days. The Court takes judicial notice of the state of affairs prevalent in the offices of the government of Uttar Pradesh. If the Courts also sit silent and be mute spectator to such harassment by public date of production of certified copy of this order before the respondents.

Case law discussed:

AIR 1967 SC-1885
1973 (c) SCC-788
1878 (3) P.C.-430 (H.C.)
1964 I A.E.R. 367
2004 (5) SCC-65

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

1. Heard Sri Krishna Mohan, learned counsel for the petitioner and learned standing counsel for respondents.

2. The amendment application dated 21.3.2005 was allowed on 22.3.2005. The petitioner has carried out the amendments and has filed the amended petition. On the same date, the time was granted to the learned standing counsel to file reply amended petition. The respondent has not cared to file any reply nor have sought further time for that purpose.

3. Sri Shiv Shanker Srivastava, the petitioner died on 26.7.2004 due to heart failure leaving behind only son Sri Ajai Kumar. The substitution application filed

by Sri Ajai Kumar dated 31.8.2004 is allowed. The necessary endorsement shall be made in the array of the parties.

4. Brief facts giving rise to this writ petition are that Sri Shiv Shanker Srivastava, the petitioner retired as Senior Auditor on 30.6.1993 from the office of Local Funds Account, Allahabad. He suffered a heart attack on 10.6.1995. On medical advise a permanent pace maker Simence Pace Setter Model 2040-T Serial No. 5140-62132 and Endo Cordial-G Model 1400-T Serial No. 044073252 Rs.41,000/- was installed on the body of the petitioner. The petitioner submitted a medical claim of Rs. 44,277/- as the total cost of the pace maker and other medical procedures.

5. He Director, Local Funds Account, Allahabad forwarded the bills on 26.6.96 for reimbursement to the Director/Additional Director (Medical Care) Swastha Bhawan, Lucknow, and on 7.11.1996 (Annexure No. CA-1) the Joint Director, Local Funds Accounts, Allahabad sent the application for medical claim of the petitioner along with original documents to Under Secretary, Finance (Local Funds Accounts) Department, Government of U.P. for orders. The Under Secretary, Finance (Local Funds Accounts) by his letter dated 4.1.1997 returned the original bills/vouchers to be examined by Additional Director (Medical Care) Swastha Bhawan, Lucknow along with essentiality certificate on prescribed forms to be counter signed by the Director General, Medical and Health, U.P.

6. Upon receipt of the letter from the State Government dated 4.1.1997 the Joint Director, Local Funds Accounts, Allahabad sent the original bills/vouchers to the Director (Medical Care) Swastha Bhawan, Lucknow along with covering letter dated 4.3.1997 with a request to send the approval to the State Government. At this stage the matter came to standstill. The documents were lying in the office of Director (Medical Care) Swastha Lucknow from March, 1997 to June, 2003 (six years and three months). In between the Director, Local Funds Account, Allahabad sent number of reminders. Annexure 4 to 10 to the writ petition are these reminders dated 12.9.1997, 28.10.1997, 30.11.1998, 3.7.1999, 22.12.1999, 6.1.2001 and 18.6.2003.

7. In July, 2003 petitioner Shiv Shanker Srivastava was advised to get pace maker replaced urgently as the machine had become old, as it was installed in 1995. In the circumstances, the petitioner filed this writ petition with the prayer to direct to respondents to re-reimburse the medical bills relating to the pace maker along with 18% interest. On 16.7.2003 this Court passed following orders;

"A counter affidavit has been filed by Sri Satendra Kumar Srivastava, Joint Director, Local Fund Account, Audit Department, U.P. Allahabad stating that petitioner's request for purchase of pace maker has been accepted on the recommendation of the Medical Specialist and for which a bill for a sum of Rs.44,527/- was submitted to the State Government. The entire documents have been sent on 7.11.1996. The State Government has required the department vide its letter dated 9.1.1997 to send the original bills/vouchers for examination by the Additional Director (Chikitsa Upchar)

Swasthya Bhawan, Lucknow and to submit the essentiality certificate counter signed by the Director General of Medical & Health. The Department has snt the original bills/vouchers along with essentiality certificate to the Additional Director (Chikitsa Upchar) on 4.3.1997, and thereafter reminders have been sent on 12.9.1997, 28.10.1997, 30.11.1998, 3.7.1999, 22.12.1999, 6.1.2001 and 18.6.2003 but no response has been received from the office of Director General, Medical Health/Additional Director (Chikitsa Upchar) Lucknow. It is contended that pace maker was installed in the year 1995 and it needs urgent replacement on receipt of payment of old pace maker which was installed in 1995, and in case petitioner does not receive the amount he will not be able to purchase new pace maker. Petitioner is facing serious financial difficulties.

Looking to the facts and circumstances of the case, as an interim measure, a direction is issued to the Director General Medical and Health Services U.P. at Lucknow to issue necessary orders in this regard for examination of original bills and vouchers and to countersign the essentiality certificate within a week of service of certified copy of this order upon him. In case any untoward thing happens to the petitioner, in the meantime, the Director General Medical & Health, U.P. shall be held responsible for which his office is already responsible for unreasonable delay.

List on 31.7.2003"

8. A counter affidavit of Sri Satendra Kumar Srivastava, Joint Director, Local Funds Accounts, U.P. Allahabad was filed on 15.7.2003. In paragraph 3 it was stated that inspite of repeated reminders Director General, Medical and Health/Additional Director (Medical Care) did not return the bills/vouchers after verification on which further action could not be taken. The reminders sent to Additional Director (Medical Care) Swastha Bhawan, Lucknow dated 4.3.1997, 12.9.1997, 28.10.1997, 30.11.1998, 3.7.1999, 22.12.1999, 6.1.2001 and 18.6.2003 have been annexed to Annexure CA-2 to CA-10 respectively.

9. Sri Shiv Shanker Srivatava died on 26.7.2004 due to heart failure. Dr. Gopal Ji Srivastava certified that Sri Shiv Shanker Srivastava died at his residence on 26.7.2004 at 08.10 AM due to heart attack. His son Sri Ajai Kumar has applied for substitution, which has been allowed.

10. The paragraph 11-A to 11-3 of the amended petition, the writ petition as follows:-

"11-A That due to inaction/action of the respondents above referred the medical claims of Shiv Shanker Srivastava (now deceased) was not paid to him consequently no replacement of pace maker could be possible due to paucity of funds by the petitioner from his own source. Ultimately Shiv Shanker Srivastava died due to heart failure on 26.7.2004. Dr. Gopal Ji Srivastava issued death certificate dated 28.7.2004. The true and correct photocopy and its typed copy of death certificate dated 28.7.2004 is filed as Annexure-I of this application.

11-B That Shiv Shanker Srivastava prior to his death was subjected medical examinations time to time which reflected that his heart was not healthy. The

applicant undertakes to place all the documents before this Hon'ble Court as and when it is required for its perusal.

11-C That the facts as have been stated above are sufficient to demonstrate that Shiv Sha nker Srivastava (now deceased) met his death only due to inaction/action of the respondents as they did not release medical claims inspite of Hon'ble High Court's order dated 16.7.2003 as such due to paucity of funds no replacement of the out lived pace maker could be done by the petitioner from his own source.

11-D That Shiv Shanker Srivastava (now deceased) died due to collousness of the respondents. Their action/inactions compelled the dependants of Shiv Shanker Srivastava (now deceased) to suffer financially and emotionally as his financial supports was only source of the lively hood of the dependants and his family.

11-E That Shiv Shanker Srivastava was getting Rs.4308.50 paisa pension per month and died at the age of 69 years. The father of Shiv Shanker Srivastava the petitioner died at the age of 78 years and his mother died at the age of 82 years. In case the due replacement could be provided, Shiv Shanker Srivastava would have lived at least 10 years more. Thus the dependants of the deceased Shiv Shanker Srivastava are entitled to get compensation to the tune rupees six lakhs from the respondents."

11. The petitioner has also amended the prayers and has prayed for compensation to a tune of Rs. 6 lakhs. The Director General, Medical and Health, U.P. Lucknow respondent no. 2 is represented by learned standing counsel. He has not cared to file any counter affidavit. The petitioner has filed an application on 31.8.2004 for a direction to the respondents to send sanction orders for payment to respondent no. 5. Along with this application, a letter of Joint Director, (Medical and Care) dated 25.5.2004 addressed to the Director, Local Funds Accounts, U.P. Lucknow has been annexed, in which it is stated that on 30.8.1997 by letter No. 114/4893 the original documents were sent to the Director, Local Funds Accounts, Allahabad for removing objections. The office of Director, Local Funds Accounts has denied the receipt of the letter. The Joint Director has given his opinion that the claim has been misplaced in the transit and in compliance with the orders dated 16.7.2003, photocopy of the essentiality certificate for Rs.44,272/- has been returned with a caution that carte must be taken that double payment may not be made.

12. The Joint Director, Medical Care has not denied the receipt of various reminders. His first letter dated 25.5.2004 does not refer to any of these reminders. He has made a mention of his letter dated 30.8.1997 by which the bills/vouchers were sent back for removal of objections. The letter dated 30.8.1997, however, has not been filed on record nor the details of the objections which were sought to be removed have been mentioned. The Joint Director, Medical Care has also not disclosed the source from which he received photocopy of the essentiality certificate. This circumstances clearly demonstrates that having realised the delay caused in his office, the Joint Director, Medical Care has in order to comply with the orders of this Court sent

the letter dated 25.5.2004 to cover up the gross negligence caused by his office.

13. The Court in its order dated 16.7.2003 made it absolutely clear that in case essentiality certificate is not given within a week of service of certified copy of this order upon the Director General, Medical & Health, U.P., he shall be held responsible for any untoward happening, which unfortunately happened.

14. The fact and circumstances clearly without any doubt demonstrate that the office of Director General, Medical and Health, U.P. was responsible for delay of seven years in medical reimbursement of the pace maker. The petitioner could not get the medical reimbursement within his life time and on account of which new pace maker could not be installed and the petitioner in the meantime died due to heart attack. The office of Director General, Medical and Health, U.P. did not wake up inspite of the warning issued by the Court on 16.7.2003.

15. It is now accepted by the Supreme Court that the State is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees. In **State of Gujarat Vs. Menon Mahomed Haji Hasam AIR 1967 SC 1885**, the order of the High Court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of the decision in appeal was upheld both on the principals of bailee's 'legal obligation to preserve the property intact and also the obligation to take reasonable care of it to return it in the same condition in which it was seized' and also because the Government was 'bound to return the said property by reason of its statutory obligation, or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants. In **Lala Bishamber Nath vs. Agra Nagar Mahapalika, Agra (1973) 1 SCC 788** the Supreme Court held that where the authorities could not have taken any action against the dealer for withholding flour for sale and their order was illegal, it is immaterial that the respondents had acted bonafide and in the interest of preservation of public health. Their motive may be good but their action was illegal and thus in tort they would ordinarily be liable for any loss caused to the appellants by their actions.

16. The concept that King can do no wrong has been abandoned in England, and the State is now held responsible for tortious act of its servant. The old distinction between sovereign and non-sovereign functions is no longer invoked to determine State liability. In **Geddis vs. Proprietors of Bann Reservoir (1878) 3 AC 430 (HC)** it was observed that no action would lie for doing that which the Legislature has authorised, if it be done without negligence, although it does not occasion damage to any one; but an occasion will lie for doing what the Legislature has authorised if it be done negligently, and causes loss to a person.

17. The word 'compensation' is of very wide connotation. In legal sense it may constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss. It has to be construed widely to enable the Courts to determine compensation for any loss or damage suffered by a person. The State Government has not denied that the

retired employees have a right for medical reimbursement, subject to admissible deductions and limits.

18. The present case can be brought within the purview of misfeasance in public office, which has been explained by Wade in his book of Administrative Law as follows;

"Even where there is no ministerial duty as above, and even where no recognised tort such as trespass, nuisance, or negligence is committed, public authorities or officers may be liable in damages for malicious, deliberate or injurious wrongdoing. There is thus a tort which has been called misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury."

19. In **Rooks vs. Barnard (1964) 1 All ER 367**, it was observed by Lord Devlin, 'the servants of the Government are also the servants of the people and the use of their power must always be subordinate to their duty of service. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of such power but its abuse. No law provides protection against it. He, who is responsible for it, must suffer it. There is, however, an exception and that is where the public functionary has discharged his duties honestly and bonafide.

In **Ghaziabad Development Authority vs. Balbir Singh (2004) 5 SCC 65**, the liability of the State authorities to pay compensation for misfeasance in public offices has been given due recognition and the State liability in tort has been accepted. Taking the case in hand, I find that Sri Shiv Shanker Srivastava, a retired servant, was not only deprived of the basis medical facilities, he was also rendered helpless. He could not fight the red tapism and the corruption prevalent in the system. Had he gone to the office of the Director General, Medical and Health at Lucknow and bribed the concerned persons, he may have been reimbursed with the cost of the pace maker and saved his life. This is the way the Government function these days. The Court takes judicial notice of the state of affairs prevalent in the offices of the government of Uttar Pradesh. If the Courts also sit silent and be mute spectator to such harassment by public authorities, the citizens will have no place to lodge complaint and seek redressal.

20. In the matter of medical reimbursement the Government officers must be made responsible for the delay in settling the claims. The Court is not aware as to how many such claims are pending and does not intend to cause any enquiry as office of Director General, Medical and Health, U.P. must take care of such delays in his office. The death in this case could be avoided if the medical reimbursement due to the deceased was allowed within reasonable time. The life expectancy in the family of the petitioner given in the amended paragraph 11-J of the writ petition has not been denied. Sri Shiv Shanker Srivastava died at the age of 69 years whereas his father and mother has died at the age of 78 and 82 years respectively. Not only his life was cut short, he must also have suffered a lot. The harassment caused to a retired employee suffering with ailments, in the delay of reimbursement of his medical

bills, which are claimed as a matter of right can hardly be measured in terms of money. In this case the Joint Director, (Medical Care) Government of U.P. who works under and in the office of Director General, Medical and Health, Government of U.P., was authorised to verify the bills/vouchers and to countersign the essentiality certificate. He was squarely liable for delay, for hardships and harassment caused to the petitioner and the consequential loss to his family. The petitioner has prayed for damages of Rs. Six lakhs for untimely loss of his father, and the hardship caused to him before his death. I find that half the amount of the damages would compensate, for the loss caused to the caused to the family to be paid to his son substituted as petitioner in this writ petition. The entire amount shall be paid to him for the benefit of the family of the deceased, within three months from the date of production of certified copy of this order before the respondents. It will be open to the State Government to fix the responsibility on the officers for the delay and damages, and to take appropriate disciplinary action for punishment/recovery against such persons. **Petition Allowed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 30291 of 2002

Rajani Pandey ...Petitioner
Versus
The Chief of the Army Staff, New Delhi and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Sanjai Srivastava

Counsel for the Respondents:
Sri B.N. Singh
Sri H.R. Bist
Sri A.K. Misra
Sri R.K. Misra
Sri K.C. Sinha

Constitution of India, Art. 226-Service Law-Right to Appointment-Posts of Stenographer advertised by Rajpoot Regimental Centre-essential qualification prescribed as matriculation with shorthand speed of 150 words per minute and Typing Speed of 40 words per minute-petitioner qualified the written test and placed at serial No. 2 in merit list-appointment denied on the ground-petitioner possessed two years course certificate-held-it was neither essential non preferential Qualification-non production of additional qualification by the last date-could not be ground to deny the appointment.

Held: Para 8

The requirement of valid certificate from technical education Board/University

family on account of negligence of the office of Director General, Medical and Health, U.P. shall be sufficient in the interest of justice. This would also have deterrent effect on the officers and warn them of such claims in future.

21. The writ petition is allowed. The respondents are directed to pay Rs.44,272/- as cost of the pace maker installed in 1995, along with 9% simple interest per annum to the petitioner. A writ of mandamus is also issued to the respondents to pay compensation to the family of the petitioner of Rs. Three Lakhs for the untimely loss of his father harassment, mental agony and hardships

was neither prescribed in the rules nor in the advertisement. The authority issuing call letters for written test and interview was not competent authority to lay down the essential qualification for the post. The petitioner was fully qualified and had attained the required speed in short hand and typing. She had secured second position in the merit list. The fact that she possessed only first year mark sheet in diploma in Office Management and Secretarial Practice from Government Girls Polytechnic, Gorakhpur was not of any consequence as this was neither essential qualification nor preferential qualification for appointment to the post. When a candidate holds the minimum qualification provided in the rules and in the advertisement the fact that she could not produce the certificate of the additional qualification by the last date provided by the appointment authority could not be a ground to deny appointment to her.

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

1. Heard Sri Sanjai Srivastava, learned counsel for the petitioner and Sri H.R.S. Bist for respondents 1, 2 and 3. Sri A.K. Misra appears for respondent no. 4 and 5. He had put appearance in the year 2002 but has not filed any counter affidavit. His request for adjournment was not accepted.

2. The petitioner was an applicant for the two posts of stenographers advertised by Rajput Regimental Centre, Fatehgarh along with other posts. The publication declared the posts to be in the pay scale of Rs.4000-6000/-; the age of the candidate to be between 18-25 years and qualifications to be matriculate with shorthand speed of 150 word per minute, and typing speed of 40 word per minute (English). The note appended to the advertisement required applications along with testimonials to reach the Quarter Master, Rajput Regimental Centre, Fatehgarh, U.P. by 15.2.2002. The petitioner had passed Secondary School Examination in the year 1994 from Central Board of Secondary Education and had passed the first year of the two year Diploma course in Modern Office Management and Secretarial Practice vide certificate dated 2.8.2001. She applied and was selected and placed at serial no. 2 in the select list. By letter dated 17.6.2002 she was sent a medical certificate form and was informed by Lt. Col. of Officiating Quarter Master for Commandant that her police verification papers have been forwarded to the Superintendent of Police, District Ghazipur and that her appointment will be considered subject to production of Technical Diploma Certificate (short hand) by 29.6.2002.

3. The petitioner by her letter dated 20.6.2002 made a representation to Chief of Army Staff, Army Headquarters, New Delhi stating that the advertisement provided the qualifications to be matriculate with requisite speed of short hand and typing. The concerned officer has raised a doubt on his first year Diploma Certificate issued by Government Girls, Polytechnic, Gorakhpur. Inspite of medical examination and police verification completed on 26.6.2002, she was not considered for appointment. She requested that since she will complete the maximum age of 25 years of age on 11.8.2002, the appointment letter be issued to her.

4. By this writ petition, she has prayed for a writ of certiorari calling for the record and quashing the letter/order

dated 17.6.2002 requiring her to produce two years diploma certificate and for a direction to decide her representation. By an amendment vide order dated 2.1.2003, she has prayed for quashing the whole selection/appointments made in pursuance of advertisement dated 9.2.2002 and to direct the respondent no. 2 to appoint petitioner on the post of Stenographer in Rajput Regimental Centre, Fatehgarh.

5. In the counter affidavit, it is stated that two posts of stenographers were authorised in the peace establishment of the centre on 31.7.1997, but no stenographers were posted. The Army Headquarters gave sanction for direct recruitment of two stenographers vide letter dated 26.6.2001 with validity of six months only. On receipt of no objection certificate from Department of Personnel and Training, DGI and Ministry of Labour, Jam Nagar House, New Delhi, the vacancies were notified to District Employment Exchange vide letter dated 24.9.2001. The required number of candidates did not respond. The vacancies were, therefore, again notified in local news paper "Dainik Jagran' on 5.12.2001. Once again the required number of candidates did not apply and thus the Army Headquarters was approached to extend the validity of sanction. The validity was extended till 31.3.2002. Once again since required number of candidates were not available and thus on a request the validity was again extended and the posts were advertised. A total number of 60 candidates applied for the post of stenographer Group III and were issued call letters to report to Rejput Regimental Centre on 9.3.2002 for written test and interview. The technical educational certificate were required to be produced by the candidates. Sri Ravindra Singh Rathor and Rajni Pandey (petitioner) and Sri Jitendra Kumar Singh in the order to merit passed the written test and interview and were called vide call letter for final scrutiny of documents on 15.5.2002. The petitioner was found to possess first year diploma of two years diploma course on Modern Office Management and Secretarial Practice from Government Mahila Polytechnic, Gorakhpur. She had not completed the course, and could not produce the certificate of technical qualification from the qualifications testing board. The office had not instructed the candidates to produce two years Diploma Certificate. She was asked to produce valid technical qualification, short hand (English) and Type writing (English) certificate issued by the Board of Technical Education. The Army Headquarters had extended the validity of sanction for recruitment on 30.6.2002. The petitioner could not produce the valid certificate by 29.6.2002 and thus the results were announced and her name were struck out of the merit list and the next reserved candidates was considered for appointments.

6. Learned counsel for the petitioner states that there was no requirement of any technical educational qualification for the post to be certified by any technical education board. The Recruitment Rules for Stenographers Group III issued by Adjutant, General Branch at CRG-4 (CIB) (a) do not provide for any technical qualification. The recruitment rules issued on 12.1.1994 provide the educational and other qualifications required for direct recruitment, to be matriculate or equivalent and that the candidate must possess a speed of 80 word per minute either in English or in Hindi to be translated and typed within the time

prescribed for the purpose. The petitioner had completed the second year course and the certificate was issued to her only a few days later than 30.6.2002. Her name, however, was arbitrarily struck off from the select list and the next person was given appointment. It is contended that where a technical qualification is not necessary, the insistence to produce the second year certificate was illegal and arbitrary and was made only to favour the reserve candidate. Lastly it is contended that the sanction of the post to fill up the post was extended on 30.6.2002 could not be a ground to reject the candidature of a selected candidate awaiting appointment orders.

7. After hearing parties and perusing the relevant rules including the general guidelines/procedural formalities to be followed for filling up Group C & D vacancies through direct recruitment, I find that a technical certificate issued by technical education board was not the essential qualification for appointment. The Rules and guidelines for recruitment as well as the advertisement did not provide for possessing any such technical qualification. The qualification announced as essential for the post of stenographers was matriculate with short hand speed of 100 per minute (English) and typing speed of 40 word per minute (English). In the supplementary counter affidavit of Lt. Col. M.S. Raju, Quarter Master for Commandant, Rajput Regimental Central, Fatehgarh, it is clearly stated in paragraph 5 that the requisite qualifications were not amended and no corrigendum was issued. The requirement of valid certificate from technical education board/universities was insisted only in the call letter issued for written test and interview dated 26.2.2002. The petitioner was required to submit the original certificates by 29.6.2002. She was thus illegally disqualified.

8. The requirement of valid certificate from technical education Board/University was neither prescribed in the rules nor in the advertisement. The authority issuing call letters for written test and interview was not competent authority to lay down the essential qualification for the post. The petitioner was fully qualified and had attained the required speed in short hand and typing. She had secured second position in the merit list. The fact that she possessed only first year mark sheet in diploma in Office Management and Secretarial Practice from Government Girls Polytechnic, Gorakhpur was not of any consequence as this was neither essential qualification nor preferential qualification for appointment to the post. When a candidate holds the minimum qualification provided in the rules and in the advertisement the fact that she could not produce the certificate of the additional qualification by the last date provided by the appointment authority could not be a ground to deny appointment to her. The affidavit of the petitioner accompanying the application dated 13.11.2002, discloses that she has completed two years Diploma Course and her result was available on the Internet before 29.6.2002 and she expected to be issued the certificate in the first week of August, 2002. She in fact received the certificate of the two years course on 1.8.2002 and the mark sheet on 13.8.2002 which has been brought on record. The respondents, however, did not accept the certificate as the post was sanctioned to be filled up only upto 30.6.2002. In my opinion the petitioner was treated arbitrarily in rejecting her candidate and

refusing her request to produce the certificate, the result of which was available on the Internet. Even otherwise this certificate of the course pursued by her as additional qualification was not essential for appointment. She had passed the test and was declared selected. She, therefore, could not be refused appointment.

9. The writ petition is allowed. The order of appointment of Sri Jitendra Kumar, respondent no. 4 placed at third in the merit list is set aside. The petitioner shall be given appointment without any delay with seniority with effect from the date she was entitled to be appointed if her candidature was not struck out.

Counsel for the Respondents:
Sri S.N. Singh
Sri Vishnu Pratap
S.C.

Constitution of India, Art. 226-Grant of mining lease-Petitioner discovered new area of mining applied for grant of lease-Application remained pending for 8 yrs.-decided only after the interference of High Court-the G.O. 25.05.1995 relied by petitioner-modified by subsequent G.O. dated 16.10.04-No such provision to grant lease to those who discovered new mines-during this period the person to whom lease granted-not impleaded-No malafide allegation against the authority-Court declined to interfere.

Held: Para 12

Thus, the District Magistrate, Deoria was required to consider the provisions of Government Order applicable on the date the decision was to be taken. From the records, we find that by Government Order dated 27th August, 2002, the Government had taken a decision not to grant mining lease in future on the basis of the earlier Government Order dated 25th May, 1995 and even in the subsequent Government Order dated 16th October, 2004, there is no provision for grant of mining lease in favour of a person who has discovered the mining lease. The District Magistrate, Deoria has passed a detailed order rejecting the representation of the petitioner on this ground. We see no infirmity in the said order.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2005

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

Civil Misc. Writ Petition No.49394 of 2004

Smt. Srikanti Nishad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Singh

Case law discussed:
1997 (7) SCC-314
AIR 1981 SC-711
1999 (1) SCC-475
2004 (1) SCC-663
1992 (3) SCC-455
1995 (5) SCC-125
1998 ACJ 590

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

1. This writ petition has been filed for quashing the order dated 8th November, 2004 passed by the District Magistrate, Deoria rejecting the representation filed by the petitioner for grant of mining lease and for a direction upon the respondents to grant the mining

lease to the petitioner on the basis of the Government Order dated 25th May, 1995.

2. The facts and circumstances giving rise to this case are that the petitioner discovered a mining area measuring 7.50 acres in Mahal Nadi of Chhoti Gandak situate in Majhauliraj, Tahsil Salempur, District Deoria and on the basis of the Government Order dated 25th May, 1995, submitted an application on 4th June, 1996 for grant of mining lease in her favour. However, instead of granting mining lease to the petitioner, the District Magistrate, Deoria passed an order granting the mining lease in favour of one Shri Mundrika Prasad Nishad for a period of three years. This order was challenged by the petitioner in Writ Petition No. 3566 of 1989, which was dismissed as infructuous vide judgment and order dated 01.04.2004 but liberty was given to the petitioner to make a representation as permissible under law for grant of mining rights. The petitioner then submitted an application dated 15th May, 2004 before the District Magistrate, Deoria for grant of mining lease on the basis of Government Order dated 25th May, 1995. This application was rejected by the District Magistrate vide order dated 19th August, 2004. The petitioner then filed Writ Petition No.40990 of 2004 for quashing the order dated 9th August, 2004. The petition was dismissed by this Court vide order dated 6th October, 2004 since the petitioner did not press the petition as he had already approached the concerned authority. The Court, however, observed that the representation filed by the petitioner would be decided within three weeks from the date of receipt of the order. The representation filed by the petitioner was rejected by the District Magistrate, Deoria vide order dated 8th November, 2004. Hence the present petition.

3. Mr. A.K. Singh, learned counsel for the petitioner submitted that the petitioner is entitled to grant of mining lease in her favour on the basis of the Government Order dated 25th May, 1995 as she had discovered the mining area in question and, therefore, the District Magistrate was not justified in rejecting her representation. He further submitted that the application for grant of mining lease had been filed on 4.6.1996, though it had been considered and rejected on 1st April, 2004 after expiry of an unreasonable power of 8 years. The petitioner is entitled to get her application disposed of as per the law existing on the submission of her application.

4. Learned Standing Counsel, on the other hand, submitted that in view of the subsequent Government Order dated 27th August, 2002, the mining lease could not have been granted in favour of the petitioner merely on account of the fact that she had discovered the mining area and even the subsequent Government Order dated 16th October, 2004 does not provide for grant of any such mining lease. He further submitted that there was no error in the order dated 8th November, 2004 passed by the District Magistrate, Deoria rejecting the representation of the petitioner on the ground that the earlier Government Order dated 25th May, 1995 did not survive after the issuance of Government Orders dated 27th August, 2002 and 16th October, 2004.

We have carefully considered the rival submissions advanced on behalf of the learned counsel for the parties and have perused the record.

5. The sole contention raised by the learned counsel for the petitioner is that she is entitled to grant of mining lease on the basis of the Government Order dated 25th May, 1995 as she has discovered the mining area. The application for grant of such mining lease was considered by the District Magistrate, Deoria on 8th November, 2004. The Hon'ble Supreme Court in Union of India & Ors. Vs. Indian Charge Chrome & Anr., (1997) 7 SCC 314 has clearly held that the law which is to be applied in a case is the law prevailing on the date of decision making.

6. In State of Tamil Nadu Vs. M/s. Hind Stone & Ors., AIR 1981 SC 711, while dealing with a similar issue the Hon'ble Supreme Court held that mere pendency of an application does not create any legal right in favour of the applicant and the application is to be decided as per the law applicable on the date of decision. The Court held as under:-

"While it is true that such application should be dealt with within a reasonable time, it cannot on that account be said that right to have an application disposed of in a reasonable time, clothes an applicant for a lease with a right to have the application disposed of on the basis of rules in force at the time of making of the application. No one has a vested right to the grant or renewal of a lease and none can claim a vested right to have an application for the grant or renewal of a lease dealt with in a particular way, by applying particular provisions. In the absence of any vested rights in any one, an application for a lease has necessarily to be dealt with according to rules in force on the date of the disposal of the application despite the fact that there is a long delay since the making of application."

7. The said judgment has been approved and a similar view has been reiterated by the Hon'ble Supreme Court in V. Karnal Durai Vs. District Collector, Tuticorin & Anr., (1999) 1 SCC 475, wherein it has been held that if during the pendency of an application for grant of a mining lease the rules are amended, the application is to be decided as per the amended rules.

8. Similar view has been reiterated in Howrah Municipal Corporation & Ors. Vs. Ganges Rope Company Ltd. & Ors., (2004) 1 SCC 663, wherein reliance had been placed on the judgment of its earlier judgment in Usman Ganij. Khatri of Bombay Vs. Cantonment Board & Ors., (1992) 3 SCC 455 and State of West Bengal Vs. Terra Firma Investment & Trading Pvt. Ltd, (1995) 1 SCC 125, wherein the Apex Court had held that application is to be decided on the basis of the law existing on the date of decision and not on the basis of the law prevailing on the date of submission of the application.

9. In view of the above, we are of the considered opinion that even if the application of the petitioner has been filed on 4.6.1996 and was disposed of after a lapse of 8 years, and that is too by the direction of this Court, mere pendency of her application for 8 years could not create any vested right in her favour to get the application decided as per the law existing on the date of submission of her application.

10. Learned counsel for the petitioner has placed a very heavy

reliance upon the Division Bench judgment of this case in Jagmohan Dutt Sharma & Ors. Vs. State of U.P. & Ors., 1998 All. C.J. 590, wherein this Court has taken a view that a person if discovers a new area, he shall be entitled for grant of mining lease in his favour by virtue of the provisions of Government Order dated 25.5.1995.

11. In view of the fact that the said Government Order was not in existence on the date of consideration of her application, petitioner cannot derive any benefit of the said judgment. The law laid down by the said judgment that is Jagmohan Dutt Sharma (Supra) has lost its rigor on 27th August, 2002, the date on which the State Government issued another order not issuing a direction not to grant any lease in pursuance of the Government Order dated 25th May, 1995.

12. Thus, the District Magistrate, Deoria was required to consider the provisions of Government Order applicable on the date the decision was to be taken. From the records, we find that by Government Order dated 27th August, 2002, the Government had taken a decision not to grant mining lease in future on the basis of the earlier Government Order dated 25th May, 1995 and even in the subsequent Government Order dated 16th October, 2004, there is no provision for grant of mining lease in favour of a person who has discovered the mining lease. The District Magistrate, Deoria has passed a detailed order rejecting the representation of the petitioner on this ground. We see no infirmity in the said order.

13. Petitioner herself has mentioned in paragraph 14 of her petition that instead of granting the lease in the said area, the mining lease of the same land had been granted in favour of Shri Mundrika Prasad Nishad vide order dated 18.9.1996. We fail to understand under what circumstances petitioner could claim any relief if in respect of the same land mining lease had been granted in favour of the said person, that is too without impleading him as a respondent. The respondent no. 4 Mining Officer has been impleaded by him, but no allegations of mala fides have been alleged against him. We could not understand the purpose of impleading the respondent no. 4 by him as a party is required to be impleaded by name also in case there are allegations of mala fide against him.

In view of the above, we do not find any ground to interfere with. Petition lacks merit and is accordingly dismissed. There shall be no order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2005

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

Civil Misc. Writ Petition No. 48778 of 2005

Smt. Sukhraji Devi ...Petitioner
Versus
Babu Ram Kanaujia and others
Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Singh

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Practice of Procedure-order of status Quo-passed by S.D.M. to maintain the peace aggrieved party can file separate suit or to take the recourse of filing application under Order 39 rule I C.P.C.-but can not be interfered under writ jurisdiction-various reasons disclosed.

Held: Para 14

In view of the above, we reach inescapable conclusion that in a matter where the issue of title is involved, the party has to get the grievance redressed through the Civil Court. Petitioner ought to have resorted to the same, and it is still open to him, even today, to do so.

Case law discussed:
1995 Suppli. (2) SCC-290
AIR 1968 SC-1165
AIR 1962 SC 527
1972 ALJ 379
AIR 1989 Ker. 81
AIR 1995 Ker. 74
AIR 1989 Ker. 164
AIR 1975 Ker. 137
AIR 1955 SC-566
AIR 1971 SC-1244
AIR 1996 SC-339
2002 (8) SCC-87
AIR 1982 SC-1081

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

1. This writ petition has been filed for quashing the order dated 05.06.2005 (Annex.18) passed by the Sub Divisional Magistrate, Gyanpur, Sant Ravidas Nagar; holding an enquiry and till then to maintain status quo regarding possession, over the property in dispute.

2. The facts and circumstances giving rise to this case are that the petitioner on the one hand and the respondents no. 4 and 5 on the other, have a dispute in respect of a particular piece of land. The petitioner claims that she had been granted a Patta in respect of the said land under the scheme of Family Planning and she is in possession thereof. Respondents no. 4 and 5 claim ownership over the said land and filed a Civil Suit No. 525 of 2004 for permanent injunction against the present petitioner. However, their application for interim relief under Order XXXIX Rule 1 of the Code of Civil Procedure (hereinafter called the "C.P.C.') is still pending and no order has yet been passed. The respondents no. 4 and 5 approached the Sub Divisional Magistrate, Gyanpur and the Sub Divisional Magistrate has passed the order dated 05.06.2005 that the parties shall maintain status quo. Hence, the present petition.

3. Learned counsel for the petitioner has submitted that the order passed by the Sub Divisional Magistrate is without jurisdiction and nullity. No order could be passed by him as no interim order has yet been passed in favour of the said plaintiff-

respondents. Thus, the petition deserves to be allowed and the order dated 05.06.2005 is liable to be quashed.

4. Learned Standing Counsel has submitted that the Civil Suit is still pending wherein the present petitioner is the defendant and in case the respondents no. 4 and 5 herein could not succeed in getting an interim injunction, there is no bar in law for the present petitioner to file an application for interim relief before the said Court. Even otherwise, if she apprehends any threat to her property, she may maintain an independent suit. More so, the order passed by the Sub Divisional Magistrate is in order to maintain the law and order situation, as is evident from the language of the order itself and once the Civil Court passes an order, the order passed by the Sub Divisional Magistrate will stand superceded. Thus, the petition should not be entertained.

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

5. The petitioner herself claims to be in possession of the land. The order impugned also provides for maintaining the status quo. We fail to understand how the order impugned is adversely affecting the petitioner and what grievance she can have. More so, if petitioner feels any kind of apprehension, there is no bar in law for her to file a separate and independent suit against the said respondents or to apply for interim relief in the said suit and once she succeeds in getting the interim relief from the Civil Court, either by moving an application in the same suit or by filing an independent suit, the order passed by the Sub Divisional Magistrate will stand superceded. In the peculiar facts and circumstances of the case, the Civil Court can grant an interim relief even if the case does not fall within the ambit of Order XXXIX Rules 1 and 2, C.P.C.

6. The Hon'ble Supreme Court in Manohar Lal Chopra Vs. Raj Bahadur Rai Raja Seth Hira Lal, AIR 1962 SC 527 held that the Civil Court has a power to grant interim injunction in exercise of its inherent jurisdiction even if the case does not fall within the ambit of provisions of Order 39 CPC while delivering the judgment the Hon'ble Apex Court considered the scope of application of the provisions of Section 94 CPC and observed as under:-

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression 'if it is so prescribed' in Sec. 94 is only this that when the rules in Order 39, Civil P.C. prescribe the circumstances in which the temporary injunction can be issued, ordinarily the Court is not to use its inherent powers to make the necessary orders in the interests of justice, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Sec. 94 were not there in the Code, the Court could still issue temporary injunctions, but it could do that in the exercise of its inherent jurisdiction. It is in the incident of the exercise of the power of the Court to issue temporary injunction that the provisions of Sec. 94 of the Code have their effect and not in taking away the right of the Court to exercise its inherent power."

7. The said judgment has been followed by this Court in Dileep Kumar Vs. Ram Saran, 1972 All LJ 379 as well as the Patna High Court in Bhagelu Mian Vs. Mahboob Chik, AIR 1978 Pat 318.

In exercise of the power under Order 39, Rule 1, C.P.C., injunction can also be passed against the plaintiff, as the last two clauses of the Rule refer to orders of injunction against defendants, whereas the clause (a) does not confine to application filed by the plaintiffs. The words "by any party to the suit" in the said clause are sufficient enough to indicate that the Legislature intended such orders to be passed even on applications filed by the defendants. The purpose for granting temporary injunction is to maintain status quo. (Vide Vincent Vs. Aisumma, AIR 1989 Ker 81; Sathyabhama Amma Vs. Vijaya Amma, AIR 1995 Ker 74; and Shiv Ram Singh Vs. Mangara, AIR 1989 All 164).

8. In Dr. Ashish Ranjan Das Vs. Rajendra Nath Mullick, AIR 1982 Cal 529 a similar view has been reiterated. However, it was clarified that the defendant can pray for interim relief only if the cause of action of the defendant is the same as that of the plaintiff, otherwise not.

9. In Suganda Bai Vs. Sulu Bai & Ors., AIR 1975 Kar 137, the Division Bench of the Karnataka High Court had taken the same view observing that for granting the relief to the defendant the cause of action of the defendant as well as the plaintiff must be the same.

10. We are not impressed by the submissions made by learned counsel for the petitioner that the order passed by the Sub Divisional Magistrate is without jurisdiction, as the order impugned itself made it clear that the order was being passed in order to maintain the piece. Thus, it is evident that it has been passed in exercise of powers under Section 145 of the Code of Criminal Procedure and it has nothing to do with the determination, title, right or interest of the parties in the land in dispute. Even otherwise, the findings recorded by the Criminal Court in this respect are not final for determining the right, interest or title, nor binding on the Civil Court. On the other hand, the findings recorded by the Civil Courts in such matters are binding on Criminal Courts. (Vide Anil Behari Ghosh Vs. Smt. Latika Bala Dassi & Ors., AIR 1955 SC 566; and M/s. Karamchand Ganga Persad & Anr. Vs. Union of India & Ors., AIR 1971 SC 1244). It is settled law that decisions of Civil Courts are binding on Criminal Courts but converse is not true.

11. In V.M. Shah Vs. State of Maharastra & Anr., AIR 1996 SC 339, the Apex Court held that findings of the Criminal Court, particularly in summary proceedings, cannot be taken note of in Civil Court for recording the findings on an issue. The Apex Court in K.G. Premshankar Vs. Inspector of Police, (2002) 8 SCC 87, reconsidered the aforesaid cases and held that the rule does not apply universally and finding recorded by the Civil Court would not supersede the finding recorded by the Criminal Court. The issue involved therein had been as to whether dismissal of the suit for damages filed by the complainant against the accused, would bring the criminal proceedings to end. The reply had been in negative observing

that criminal proceedings would not be dropped. Thus, it depends as to what extent the previous judgments are binding in subsequent proceedings under Sections 40, 41, 42 and 43 of the Evidence Act.

12. Issue of title cannot be determined in summary proceedings even under the Statutes like the Public Premises Act, Urban Development Act, Municipalities Act, and for determination of such an issue, recourse has to be taken to the Civil Court. (Vide Govt. of Andhra Pradesh Vs. Thummala Krishna Rao & Anr., AIR 1982 SC 1081; State of Rajasthan Vs. Padmavati Devi & Ors, 1995 Supp (2) SCC 290; and Mohammed Yunus Vs. Improvement Trust Jodhpur, AIR 1999 Raj 334).

13. Even in a suit under Section 6 of the Specific Relief Act, the question of title is not much relevant and matter for that purpose has to be agitated before the Civil Court separately. Presumption of title on the basis of possession under Section 110 of the Evidence Act can be drawn only where facts disclose no title in any party. (Vide New Service Society Ltd. Vs. K.C. Alexendar & Ors., AIR 1968 SC 1165).

14. In view of the above, we reach inescapable conclusion that in a matter where the issue of title is involved, the party has to get the grievance redressed through the Civil Court. Petitioner ought to have resorted to the same, and it is still open to him, even today, to do so.

15. In view of the above, it is not a fit case for indulgence in writ jurisdiction and the petitioner may approach the Civil Court for redressal of her grievances.

With the aforesaid observations, the petition is dismissed. **Petition Dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2005

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

Civil Misc. Writ Petition No.55898 of 2004

Shiv Kumar Akela, Advocate and others ...Petitioners

Versus

The Registrar, Societies Firms and Chits, Allahabad and others ...Respondents

Counsel for the Petitioners:
Shiv Kumar Akela
Sadhna Upadhya
S.S.Rathore
(in person)

Counsel for the Respondents:
Sri S.M.A. Kazmi, C.S.C.
Sri Ranvijay Singh, S.C.
Sri V.B. Upadhyaya
Sri T.P. Singh
Sri Sidharth Singh
Sri Amit Shalekar
Sri S. Prakash

Constitution of India, Art.-226-maintainability-Writ Petition against High Court Bar Association Allahabad-being registered under Societies Registration Act-member of the society are the Advocates-an officer of Court-an indispensable constituent of "justice delivery system"-enjoys privileged position-references/ condolences-being Court proceeding at the request of Bar Association-bar ensure proper and smooth functioning of Courts hence a public functionary-writ petition held-maintainable.

Held: Para 10,19 & 23

Court has provided accommodation to the High Court Bar Association and Advocate Association. Court provides various other facilities- with no charges. Court holds 'References' on the request of High Court Bar Association- which are Court proceedings. All this ultimately concerns the welfare of the 'Public' and 'BAR is nothing but a 'Public' 'functionary'. It also shows that concept of 'Bar' Association itself has emerged from the solemn object to ensure proper and smooth functioning of the Courts so that 'justice' may be dispensed with to the public at large, which is possible only when 'BAR' maintains a minimum desired standard both from the point of view of professional ethics and professional proficiency.

Second objection regarding maintainability of the Writ Petition on this ground that High Court Bar Association being registered under Societies Registration Act is not amenable to writ jurisdiction under Article 226, Constitution of India, it will suffice to mention that at this stage writ petition does lie and is maintainable against respondent nos.1, 5, 6, 7, 8 & 9. Curiously, none of the respondents except respondent no.2, 3, & 4 have raised objection regarding maintainability of the writ Petition.

In view of the view (both majority and minority) Writ Petition against a registered Society consisting of Advocates (members of the High Court Bar) is maintainable.

Case law discussed:

AIR 2005 SC-2473
1992 (4) SCC-305
1994 Supp. SCC(2) 115
2005 (4) SCC-649
1995 (5) SCC-716
AIR 1996 SC-98
1995 (1) SCC-732
1995 AIR SCW-473
1995 (3) SCC-619
1995 AIR SCW 2203
1995 Crl. L.J. 2910

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

ORDER

1. Respondent nos. 3 & 4, impleaded as President and Secretary of High Court Bar Association, for short 'HCBA'. Respondent no.2 at the outset of the hearing of the case raised, 'Preliminary Objection' regarding maintainability of the present Writ Petition under Article 226, Constitution of India, on two counts, namely;-

(i) present Writ Petition can not be entrtained as 'Public Interest Litigation' (PIL), and ,

(ii) 'High Court Bar Association, Allahabad' (HCBA), is a 'Society' registered under Societies Registration Act, (whose 'Bye-laws'/Rules have no statutory force), and hence not amenable to High Court jurisdiction under Article 226, Constitution of India.

2. It is conspicuous to note that none of the other Respondents (viz. The Registrar, Societies Firms and Chits-under Societies Registration Act, 1860, Allahabad/Respondent No.1, Uttar Pradesh Bar Council /Respondent No.5, Bar Council of India through its Chairman, New Delhi/ Respondent no. 6, Advocate General, State of Uttar Pradesh, Lucknow/Respondent no.7, High Court of Judicature at Allahabad through its Registrar General/Respondent no. 8 and The Advocate Association, 4th floor, New Building (High Court Allahabad)/Respondent 9) have joined the Respondent Nos. 2, 3, & 4 on the above 'Preliminary Objection' regarding maintainability of the Writ Petition, rather directly or indirectly they support the petitioners and seek court intervention to

ensure proper functioning of High Court Bar Association.

3. To appreciate 'Preliminary Objection', we may refer to the reliefs claimed in the Writ Petition which read-

"(i) issue, a writ order or direction in the nature of mandamus for constituting a committee of Former Presidents HCBA presently practising in the High Court for weeding out non-practising advocates and to prepare final list of genuine voters who are regular practitioners in this Hon'ble Court and to hold elections of the General Body of the HCBA for the term 2004-2005 immediately thereafter.

(ii) issue, a writ, order or direction in the nature of mandamus ceasing the financial powers of the respondent number 3 & 4 other than disbursement of salary to HCBA staff until holding of the HCBA General Body elections 2004-2005.

(iii) issue, a writ order or direction in the nature of ad-interim mandamus ceasing the financial powers of the respondent number 3 & 4other than disbursement of salary to HCBA staff until holding of the HCBA General Body Elections 2004-2005, and/or during the pendency of the present writ petition before this Hon'ble Court, besides constituting a committee of Former Presidents HCBA presently practising in the High Court for weeding out non-practising advocates and to prepare final list of genuine voters who are regular practitioners in this Hon'ble Court and to hold elections of the General Body of the HCBA for the term 2004-2005 immediately thereafter, so as to secure the ends of justice, or else the petitioner as well as the 'institution' shall suffer irreparable harm and injury.

(iv) issue, any such other or further orders as this Hon'ble Court deems fit and proper in the present facts and circumstances of the case so as to secure the ends of justice."

4. We shall now examine the status of the petitioners in the wake of the reliefs (quoted above) claimed in the Writ-Petition.

5. Undisputedly, Petitioners before the Court are Advocates who belong to legal profession. They are-members of the High Court Bar Association (HCBA), practising regularly as Advocate in High Court, Allahabad. They are ordinary members with right to vote to elect Governing Council of High Court Bar Association under relevant Bye-laws/Rules of the High Court Bar Association. Smt. Sadhana Upadhyay, Petitioner No.3, is an 'ex-office bearer' of High Court Bar Association.

6. Issues raised by the petitioners in the present Writ Petition concerns, in general, functioning of the 'justice delivery system' and, in particular, functioning of the 'High Court' (which is an essential component of the said system and vital organ of administration of justice in the State). Quality of dispensation of justice is directly dependant upon professional standards of ethics and discipline amongst the members of legal profession. One cannot expect the system to function smoothly and deliver desired fruits unless all its wings (Bar is one of it) is healthy and maintains dignity of the noble profession.

7. Bye-law/Rule No.3 & 17 containing objects and composition of

'Governing Body' of High Court Bar Association read-

"Objects

3. *The objects of the Association are:*

(a) to promote the development of legal science and studies and to watch legislation for the purpose of assisting in the progress of sound legislation;

(b) to safeguard and promote the interest of the legal profession and its members in general and of the members of the Association in particular.

(c) to promote a high professional tone, standard and conduct amongst the members of the legal profession and to check unprofessional practices;

(d) to maintain a library of legal literature and of other subjects likely to be useful to the members of the Association;

(e) to provide a meeting place for the members of the Association particularly for study and discussion of law;

(f) to bring to the notice of the Bar Council, the High Court, the Supreme Court or the Central or State Governments matters affecting the legal profession in general of the members of the Association in particular;

(g) to prepare and implement schemes for giving assistance to members of their families in distress circumstances;

(h) to establish and maintain a printing press for the printing and publication of the Cause list and the promotion of other objects of the association, and

(i) to do all such acts or take such steps as might be necessary for the well being of the Association, or for the fulfilment of these objects.

Governing Council

17. *The affairs of the Association shall be managed and its entire business including the investment of the funds shall lbe conducted by and under the control of Governing Council consisting of:*

(i) office bearers elected under Rule 16;

(ii) 12 other members to be elected from amongst the members of the Association in the Annual General Meeting of the Association;

(iii) The Advocate General, U.P., Ex-officio.

(iv) The Ex-Presidents of the Association are Ex-officio."

8. Inclusion of Advocate-General, U.P. (Ex. Officio) shows that it is not ordinary registered society and its existence is with an object to ensure proper functioning of Courts and to provide legal expertise to public at large so that justice is dispensed in real sense. It is *prima facie*, a function having all the flavours of public utility service and basically a public function.

9. High Court Bar Association is also affiliated and recognised by U.P. Bar Council, Allahabad. It is, thus under supervision and control of 'Bar Council of U.P.' a 'statutory body' under Advocates Act. This is clear from 'Certificate of Affiliation' brought on record by U.P. Bar Council.

10. Very object of providing 'Bar Association' at all level of the Courts/with affiliation/recognition extended by State Bar Council, regulating members of legal profession under Advocates' Act, 1961 and Rules framed thereunder, initiation of various statutory Welfare Schemes under control of U.P. Bar Council and State of U.P., to arrange for 'library' for the use by its members to save and promote intend

of legal profession and its members, to promote high professional tone, standard and conduct amongst members of legal profession, to promote and develop legal science, to watch legislation for the purpose of assisting in the progress of sound legislation and to print 'Cause List', leave one in no doubt that it has to perform a very onerous duty to ensure healthy functioning of the 'Apparatus' meant for 'justice delivery-system', namely the Courts. Court has provided accommodation to the High Court Bar Association and Advocate Association. Court provides various other facilities- with no charges. Court holds 'References' on the request of High Court Bar Association- which are Court proceedings. All this ultimately concerns the welfare of the 'Public' and 'BAR is nothing but a 'Public' 'functionary'. It also shows that concept of 'Bar' Association itself has emerged from the solemn object to ensure proper and smooth functioning of the Courts so that 'justice' may be dispensed with to the public at large, which is possible only when 'BAR' maintains a minimum desired standard both from the point of view of professional ethics and professional proficiency. 'BAR' in England in its formative period considered of 'Clergy' which was supposed to do public service. Our 'Gown' owes its origin to the 'Gown' of a clergymen.

11. Apex Court in the case of ***Rajendra Sail Verus Madhya Pradesh High Court Bar Association and others, AIR 2005 Supreme Court 2473*** (Para 32) has noted-

"32. .....The confidence of people in the institutive of judiciary is necessary to be preserved at any cost. That is its main asset. Loss of confidence in institution of judiciary would be end of Rule of law. Therefore, any act which has such tendency deserves to be firmly curbed. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected."

12. In that back ground, concern shown by the petitioners cannot be said to be without foundation or that of a stranger of Bye-passers.

13. It may be noted that Bar Council of U.P. has joined the petitioners on the issues raised in the Writ-Petition and disapproves present functioning of the Bar Association, particularly enrolment of non practising Advocates and those who are not regularly practising in the High Court (i.e. those who are enrolled solely for the purpose of elections to create pseudo majority of a particular candidate).

14. Advocate General, U.P. has also joined the issue raised in the Writ Petition when he made a statement that Court should intervene in order to remedy the malady/malaise to save the judicial institution.

15. Petitioners, thus, have vital interest in the result of the Writ Petition and undisputely got *locus standi* to approach the Court by maintaining 'Public Interest Litigation'. Their endeavour shows their genuine and *bonafide* concern in the functioning of Courts. Endeavour of the petitioners, is to protect the genuine legal practitioner in the High Court and ensure disciple in the High Court premises. By no stretch it can be said that

petitioners have raised frivolous issues for personal gain only.

16. Petitioners, in absence of any material to the contrary on record, successfully proved their *bonafide* in prosecuting the writ petition.

17. We are satisfied that petitioners have approached this Court with clean hands and clear hearts for the relief which does not concern only High Court Bar Association or its members alone but also concerns the management and functioning of the Court and 'justice delivery system' in the State of U.P.

18. In support of our conclusion, reference may be made to the cases-***The Janta Dal Versus H.S. Chowdhary 1992 (4) SCC 305 and Kazi Lhendup Dorji Versus Central Bureau of Investigation 1994 Supp (2) SCC 115.***

19. Second objection regarding maintainability of the Writ Petition on this ground that High Court Bar Association being registered under Societies Registration Act is not amenable to writ jurisdiction under Article 226, Constitution of India, it will suffice to mention that at this stage writ petition does lie and is maintainable against respondent nos.1, 5, 6, 7, 8 & 9. Curiously, none of the respondents except respondent no.2, 3, & 4 have raised objection regarding maintainability of the writ Petition.

20. Moreover, the Writ Petition is maintainable against respondent no.2 in view of the judgement dated February 2, 2005 in the case of ***M/S Zee Telefilms Ltd. & Another Versus Union Of India and others, 2005 (4) SCC 649***.

21. Vide para 31 of the aforesaid reported majority judgement (Hon. N. Santosh Hegde, J, Hon. B.P. Singh, J and Hon. H.K. Sema, J.) it is held-

"Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or right of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for violation of aright of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

This Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. Vs. V.R. Rudani & Ors. (1982 2 SCC 691) has held:

"Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writ can be issued to " any person or authority". The term " authority" used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of fundamental

rights under Article 32, Article 226 confers powers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words " any person or authority " used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in Pradeep Kumar Biswas case (supra) hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable."

22. **In the minority judgement, Hon'ble Judges of the Apex Court (Hon. S.N. Variava, J. and Hon S. B. Sinha, J.) have noted-**.

*"**Para 171**.....What is, therefore, relevant and material is the nature of the function.*

***Para 172.** In our view, the complex problem has to be resolved keeping in view the following further tests:*

*(i) When **the body acts as a public authority and has a public duty to perform'***
(ii) When it is bound to protect human rights.
*(iii) **When it regulates a profession** or vocation of a citizen which is otherwise a fundamental right under a statute or its or its own rule.*
(iv) When it regulates the right of a citizen contained in Article 19(1)(a) of the Constitution of India available to the general public and viewers of the game of cricket in particular.
*(v) **When it exercises a de facto or a de jure monopoly'***
(vi) When the State out-sources its legislative power in its favour;
*(vii) When **it has a positive obligation of public nature**.*

These tests as such had not been considered independently in any other decision of this Court.

.....

***Para 173**. The traditional tests of a body controlled financially and administratively by the Government as laid down in Pradeep Kumar Biswas (supra) would have application only when a body is created by the State itself for different purposes but incorporated under the Indian Companies Act or Societies Registration Act.....*

An Authority necessarily need not be a creature of the statute.....

Applying the tests laid down hereinbefore to the facts of the present

case, the Board, in our considered opinion, fits the said description. It discharges a public function. It has its duties towards the public. The public at large will look forward to the Board for selection of the best team to represent the country. It must manage its housekeeping in such a manner so as to fulfil the hopes and aspirations of millions. It has, thus, a duty to act fairly. It cannot act arbitrarily, whimsically or capriciously. Public interest is, thus, involved in the activities of the Board. It is, thus, a State actor. We, therefore, are of the opinion that law requires to be expanded in this field and it must be held that the Board answers the description of "Other Authorities" as contained in Article 12 of the Constitution of India and satisfied the requisite legal tests, as noticed hereinbefore. It would therefore, be a 'State'."

23. In view of the view (both majority and minority) Writ Petition against a registered Society consisting of Advocates (members of the High Court Bar) is maintainable.

Section 34 (1) of the Advocates Act reads-

"34 (1) The High Court may make rules laying down the conditions subject to which an advocate shall be permitted to practise in the High court and the courts subordinate thereto."

The above provision also supports our view taken above.

24. In (1995) 5 SCC 716: AIR 1996 SC 98, U.P. Sales Tax Service Association Versus Taxation Bar Association, Agra and others Apex Court has held-

" .....

11. It is fundamental that if rule of law is to have any meaning and content, the authority of the Court or a statutory authority of the Court and the confidence of the public in them should not be allowed to be shaken, diluted or undermined. The Courts of justice and all tribunals exercising judicial functions from the highest to the lowest are by their constitution entrusted with functions directly connected with the administration of justice. It is that expectation and confidence of all those, who have or are likely to have business in that Court or tribunal, which should be maintained so that the court/tribunal perform all their functions on a higher level of rectitude without fear or favour affection or ill-will. .....The protection to the judges/judicial officer/authority is not personal but accorded to protect the institution of the judiciary from undermining the public confidence in the efficacy of judicial process. The protection, therefore, is for fearless curial process.....".

25. In ***Indian Council of Legal Aid and Advice Versus Bar Council of India reported in (1995) 1 SCC 732: (AIR 1995 SC 691): (1995 AIR SCW 473,Supreme Court observed-***

" ..... the duty of a lawyer is to assist the Court in the administration of justice, the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct. ....."

Again in *Sanjeev Datta reported in (1995) 3 SCC 619: (1995 AIR SCW 2203); 1995 Cri LJ 2910*, Supreme Court observed-

"20..... The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. .....If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible."

26. The Apex Court while dealing with the case of ***Ex- Capt. Harish Uppal versus Union of India and another, AIR 2003 Supreme Court 739*** while referred to the above decision, in para 31,32,33, 34 and 36 observed-

"31. *It must also be remembered that an Advocate is an officer of the Court and enjoys special status in society. Advocates have obligations and duties to ensure smooth functioning of the Court. .....The principles is that those who have duties to discharge in a Court of justice are protected by the law and are shielded by the law to discharge those duties, the advocates in return have duty to protect the Courts. .....*

32. *It was expected that having known the well-settled law and having been that repeated strikes and boycotts have shaken the confidence of the public in the legal profession and affected administration of justice, there would be self regulation. The above mentioned interim order was passed in the hope that with self restraint and self regulation the lawyers would retrieve their profession from lost social respect. The hope has not fructified. Unfortunately strikes and boycott calls are becoming a frequent spectacle.....The judicial system is being held to ransom. Administration of law and justice is threatened. The rule of law is undermined.*

33. *It is held that submission made on behalf of Bar Councils of U.P. merely need to be stated to be rejected. .....Bar Council of India is enjoined with the duty of laying down standards of professional conduct and etiquette for advocates. This would mean that the Bar Council of India ensures that Advocates do not behave in unprofessional and unbecoming manner. Section 48 A gives a right to Bar Council of India to give directions to State Bar Councils. The Bar Associations may be separate bodies but all Advocates who are members of such Association are under4 disciplinary jurisdiction of the Bar Councils and thus the Bar Councils can always control their conduct. .....*

34. *In the case of Abhay Prakash Sahay Lalan V. High Court of Judicature at Patna reported in AIR 1998 Patna 75, it has been held that Section 34(1) of the Advocates Act empowers High Courts to frame rules laying down conditions subject to which an Advocate shall be permitted to practice in the High Court and Courts subordinate thereto. It has been held that the power under Section 34 of the Advocates Act is similar to the power under Article 145 of the Constitution of India. It is held that other Sections of the Advocates Act cannot be read in a manner which would render Section 34 ineffective."*

36. *It must be noted that Courts are not powerless or helpless. Section 38 of the Advocates Act provides that even in disciplinary matters the final Appellate Authority is the Supreme Court. Thus even if the Bar Councils do not rise to the occasion and perform their duties by taking disciplinary action on a complaint from a client against an advocate for non-appearance by reason of a call for strike or boycott, on an Appeal the Supreme Court can and will, apart from this, as set out in Romans Services' case, every Court now should and must mulct. Advocates who hold Vakalats but still refrain from attending Courts in pursuance of a strike call with costs,. Such costs would be in addition to the damages which the Advocate may have to pay for the loss suffered by his client by reason of his non-appearance.*

Bar Association. Similarly, Writ Petition lie against Respondent nos. 5,6,7, 8 & 9.

29. The question, as to what extent this court can issue 'Writ' against Respondent Nos. 2, 3 & 4, shall be seen while hearing and deciding the case finally on merit.

30. Objections, regarding maintainability of the Writ Petition are not tenable at this stage.

31. These objections shall, however, be dealt finally in detail while deciding the Writ Petition on merit.

Prima facie Writ Petition is maintainable. **Petition Maintainable**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2005

27. Advocate is an officer of the Court. He is an indispensable constituent of the 'justice delivery system'. He enjoys special status by virtue of his being enrolled as Advocate. He enjoys privileged position in Court (as well as in public). In High Court he is provided place to sit in Court premises. High Court has given large accommodation in the High Court Building to High Court Bar Association for chambers, canteen etc. High Court holds references/ condolences on the request made by the High Court Bar Association, and these proceedings are Court proceedings.

28. There is no dispute or doubt that Writ Petition lies against Respondent No.1/Registrar, Societies Registration who is responsible for proper functioning of a 'Society' (registered under Societies Registration Act) including High Court

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 8397 of 1980

Ram Vriksha ...Petitioner
Versus
The Asstt. Director of Consolidation, Gorakhpur and another ...Respondents

Counsel for the Petitioner:
Sri R.S. Misra

Counsel for the Respondents:
Sri Swaraj Prakash
S.C.

(A) Hindu Minority & Guardianship Act 1956-Section 11 read with U.P. Consolidation of Holding Act 1962-Section 9-A-Sale deed executed by grand mother-minor's father and mother already died-at the age of 2 yrs. Notification under Section 4 of Consolidation of Holding Act made in the

year 1972-minor attain majority in Act 1968-6 yrs. period of limitation would expire in 1974-plea of adverse possession not available.

Held: Para 16 & 17

On the basis of evidence brought on record in the form of voter list of 1973 and Parivar register the Settlement Officer Consolidation held that the petitioner attained majority either in 1968 or in 1972. The said finding of the Settlement Officer of Consolidation is based on the voter list wherein the age of the petitioner is recorded as 24 year and the parivar register wherein his date of birth is 25.2.1954. Thus in any case even if the starting point of limitation is taken to be 1968 when the petitioner attained majority, six year period would expire in 1974. Admittedly the attained majority, six year period would expire in 1974. Admittedly the village was notified for consolidation operation on 20.5.1972. After commencement of the consolidation operation no suit under Section 209 of U.P.Z.A. & L.R. Act can be filed, the jurisdiction being barred and hence non filing of suit would confirm no rights on the person who was in possession on the date the consolidation proceedings started if the limitation for a suit under Section 209 of U.P.Z.A. & L.R. Act has not, till then run out. In other words if before the expiry of the prescribed period of limitation consolidation intervenes then the limitation prescribed by Section 209 stands arrested.

In view of the above legal position the period of six years from the time petitioner attained majority having not expired before the commencement of the Consolidation proceedings, the respondent no. 4 would not acquire any title or right by adverse possession. The remand order made by Deputy Director of Consolidation cannot be said to be justified in any manner in the aforesaid facts and circumstances.
Case law discussed:

2001 (45) ALR 820

(B) Constitution of India Art. 226-Writ petition against remand order-generally the court refused to interfere-but where the interference become necessary-court not to refused on technical ground-finding of facts recorded by the S.O.C. without setting aside the same-where the sale transaction made by defects guardian found void-remand order on illegal presumption of avoidable document by the D.D.C.-can not be held justified-Such order deserves to be interfered.

Held: Para 18

If the court normally does not interfere with the remand order, it does not mean that there is any lack of power or the writ petition is not maintainable. The court can interfere if it finds the circumstances to be extraordinary or the interference necessary in the interest of justice. In the present case on the material available on the record the Settlement Officer Consolidation recorded a finding of fact regarding the age of the petitioner, the Deputy Director of Consolidation without even referring to the said documents or setting aside the finding of fact recorded by Settlement Officer has remanded the case back and that too on the illegal presumption that the sale deed was a viodable document.

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

1. This petition under Article 226 of the Constitution of India is directed against the judgment and order dated 26.8.1980 passed by Deputy Director of Consolidation by which the case has been remanded back to the Settlement Officer Consolidation.

2. The dispute arises out of proceeding under Section 9 A (2) of the

U.P. Consolidation of Holdings Act (for short the Act) and relates to plot no. 102/65 and khat no. 175. The undisputed facts are that one Raj Bali, father of the petitioner was recorded as sirdar of the land in dispute. He died in 1956 when the petitioner was minor, aged about 2 years. Vide order dated 11.4.1956 passed by Naib Tehsildar, the name of the petitioner was mutated in revenue record in place of his deceased father. Shortly, after the death of the petitioner's father his mother also died. The petitioner was under care and supervision of his grand mother. On account of his disability, being a minor, the petitioner was not able to cultivate the land himself as such it was let out to one Sawaroo, the father of respondent no. 4 on "BATAI" (crop sharing basis). Later on the grand-mother of the petitioner executed a sale deed of the disputed plot in favour of Sawaroo on 11.5.1959, on behalf of the petitioner as his guardian. The name of Sawaroo also came to be mutated in the revenue record.

3. On attaining majority when the petitioner came to know about the entries in the revenue records he filed objection under Section 9 A (2) of the Act for expunging the name of Sawaroo on the ground that sale deed executed by his grand mother dureing his minority was void as she was not the natural guardian. The objection was contested by respondent no. 4 on the ground that since no suit was filed for cancellation of the sale deed by the petitioner within limitation, after attaining majority his rights in the land in dispute were extinguished and in the alternate it was pleaded that he has perfected rights by being in possession for about 20 years.

4. The Consolidation Officer vide order dated 24.4.1978 dismissed the objection filed by the petitioner. Appeal filed against the said order was allowed by the Settlement Officer Consolidation vide order dated 9.3.1997. Aggrieved the respondent no. 4 filed a revision which was allowed by the Deputy Director of Consolidation and the case was remanded back to the Settlement Officer Consolidation.

5. The Consolidation Officer held that petitioner did not file suit for cancellation of sale deed within three years of attaining the majority and the objection has also been filed by him after more than one year of publication of notification under Section 4 of the Act and the consolidation courts have no power to cancel the sale deed hence the objection is liable to be dismissed. In appeal the Settlement Officer Consolidation held that since the sale deed was not executed by natural guardian of minor hence it is hit by Section 11 of Hindu Minority and Guardianship Act and is void. He also recorded a fining that consolidation intervened before the respondent no. 4 could perfect his rights by adverse possession as such he is not entitled to any rights in the property in dispute.

6. The Deputy Director of Consolidation was however of the view since the sale deed was executed without obtaining permission of District Judge as such it was only a voidable document. He further held that it is not clear when the petitioner attained majority and without ascertaining the age of the petitioner the question whether the petitioner took steps within limitation after attaining majority cannot be decided. Thus he directed the case back to Settlement Officer Consolidation to re-determine the age of

the petitioner and accordingly ascertain whether objection was field by him within prescribed period of limitation after attaining majority.

7. It has been urged by the learned counsel for the petitioner that sale deed executed by grand mother of the petitioner who was not natural guardian was void and hit by Section 11 of the Hindu Minority and Guardianship Act. The Deputy Director of Consolidation has wrongly and illegally held it to be a voidable document. It has further been urged that there was no justification to remand the case back for recording a finding about the age of the petitioner as there was enough material available on the record on the basis of which Consolidation Officer and Settlement Officer both recorded a fining of fact about the date of birth and age of the petitioner. The Deputy Director of Consolidation without considering the said evidence remanded the matter back for no rhyme and reason.

8. In reply the learned counsel for the respondents while justifying the remand order contended that writ petition is not maintainable against the remand order.

9. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

10. The twin questions which arise for adjudication are (i) the competence of the grand mother of the petitioner to execute the sale deed as his guardian (ii) whether the respondent no. 4 would perfect rights by adverse possession.

11. In so far as first question is concerned Section 11 of the Hindu Minor and Guardianship Act 1956 is a complete answer. The said Section provides that the De Facto Guardian has no right or authority to dispose of or deal with the property of the minor. Section 11 of the Act reads as follows:

"De Facto Guardian not to deal with minor's property- **After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de-facto guardian of the minor"**

12. A plain reading of Section goes to show that after commencement of the Act no person is entitled to transfer, alienate or deal with the property of the minor on the ground of his or her being the De Facto Guardian.

13. The Hon'ble Apex Court in the case of **Madhegowda (D) by L.Rs. Vs. Ankegowda (D) by L.Rs. and others 2001 (45) ALR SC** has ruled that transfer of a minor's property in violation of Section 11 of the Act is void ab initio void. It has been observed as follows:

"*From the statutory provisions noted above, it is clear that with the avowed object of saving the minor's estate being mis-appropriated or squandered by any person, by a relation or a family friend claiming to be a well wisher of the minor, Section 11 was enacted to prohibit any such person from alienating the property of the minor. Even a natural guardian is required to seek permission of the court before alienating any part of the estate of the minor and the court is not to grant such permission to the natural guardian except in case of necessity or for an evident advantage to the minor. So far as*

de facto guardian or de facto manager is concerned, the statute has in no uncertain terms prohibited any transfer of any part of minor's estate by such a person. In view of the clear statutory mandate, there is little scope for doubt that any transfer in violation of the prohibition incorporated in Section 11 of the Act is ab initio void."

14. From the aforesaid settled legal position, it is clear that the sale deed executed by the grand mother of the petitioner was a void document and the Deputy Director of Consolidation wrongly held it to be viodable.

15. In view of the fact that since the sale deed was a void document, the judgment of the Deputy Director of Consolidation remanding the case back to the Settlement Officer Consolidation to find out the age of the petitioner to ascertaining whether proceedings were initiated by him within limitation after attaining majority also cannot be sustained for the simple reason that void document does not require any cancellation and can be ignored by the consolidation authorities. The Limitation provided under general law for cancellation of a document would not stand in the way of the consolidation authorities in case the document in question is a void document.

16. In so far as the second question is concerned admittedly the respondent no. 4 came in possession in 1959, on the basis of sale deed executed during the minority of the petitioner. The limitation of six years as prescribed at the relevant time, for perfecting rights by adverse possession would start running after the petitioner had attained majority. On the basis of evidence brought on record in the form of voter list of 1973 and Parivar register the Settlement Officer Consolidation held that the petitioner attained majority either in 1968 or in 1972. The said finding of the Settlement Officer of Consolidation is based on the voter list wherein the age of the petitioner is recorded as 24 year and the parivar register wherein his date of birth is 25.2.1954. Thus in any case even if the starting point of limitation is taken to be 1968 when the petitioner attained majority, six year period would expire in 1974. Admittedly the attained majority, six year period would expire in 1974. Admittedly the village was notified for consolidation operation on 20.5.1972. After commencement of the consolidation operation no suit under Section 209 of U.P.Z.A. & L.R. Act can be filed, the jurisdiction being barred and hence non filing of suit would confirm no rights on the person who was in possession on the date the consolidation proceedings started if the limitation for a suit under Section 209 of U.P.Z.A. & L.R. Act has not, till then run out. In other words if before the expiry of the prescribed period of limitation consolidation intervenes then the limitation prescribed by Section 209 stands arrested. The view taken by me finds support from a division bench judgment of our court in the case of **Smt. K. Devi Vs. Joint Director of Consolidation U.P. & ors. 1973 ALJ 365**.

17. In view of the above legal position the period of six years from the time petitioner attained majority having not expired before the commencement of the Consolidation proceedings, the respondent no. 4 would not acquire any title or right by adverse possession. The remand order made by Deputy Director of

Consolidation cannot be said to be justified in any manner in the aforesaid facts and circumstances.

18. The objection raised by learned counsel for the respondents that writ petition challenging remand order is not maintainable, is also not liable to be accepted. It cannot be said that as a rule writ petition against remand order is not maintainable. Generally, the court refused to interfere or issue a writ of certiorari against a remand order for there is no final adjudication. If the court normally does not interfere with the remand order, it does not mean that there is any lack of power or the writ petition is not maintainable. The court can interfere if it finds the circumstances to be extraordinary or the interference necessary in the interest of justice. In the present case on the material available on the record the Settlement Officer Consolidation recorded a finding of fact regarding the age of the petitioner, the Deputy Director of Consolidation without even referring to the said documents or setting aside the finding of fact recorded by Settlement Officer has remanded the case back and that too on the illegal presumption that the sale deed was a viodable document. Thus the remand order in no way can be said to be justified. The approach of the Deputy Director of Consolidation is totally contrary to the law and the order deserves to be interfered and quashed by this court.

19. In the result writ petition succeeds and is allowed. The impugned order of Deputy Director of Consolidation dated 26.8.1980 stands quashed and that of Settlement Officer Consolidation dated 9.3.1979 stands affirmed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.7.2005

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 48682 of 2005

Kripal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.R. Singh

Counsel for the Respondents:
Chief Standing Counsel
Sri V.K. Singh (S.C.)
(Gaon Sabha)

U.P. Zamindari Abolition and Land Reform Act-Section 122-B (4-f)- Settlement of Gaon Sabha Land- petitioner alleging himself to belonging to scheduled Cost Candidates-on the basis of compromise the village Pradhan- given the land in question for construction of 'Barat Ghar'-No material produced regarding plea of agricultural labour-the man possessing financial status to construct a 'Barat Ghar' can not be agricultural labour-compromise between the petitioner and the Gaon Panchayat-unsustainable-court expressed its great concern-D.M. concerned to initiate appropriate proceeding against the concerned revenue officials.

Held: Para 14,15 and 16

The property in question vests in Gaon Panchayat and is not a private property of Gram Pradhan. Gram Pradhan is only custodian of such property. Any property

vested in Gaon Sabha is the property of entire village commynity. The order dated 2.2.2005 by which petitioner was permitted to make construction of Barat Ghar on the basis of compromise between the petitioner and Gram Pradhan on the property of Gaon Panchyat is wholly unsustainable in law. This Court is also of the opinion that if a person is having capacity to construct Barat Ghar, he cannot be considered to be a landless agricultural labourer under the U.P.Z.A. & L.R. Act and is a person of sufficient means.

For admission of a person as a Bhumidhar under Section 122-B (4-F) of the Act, the first condition to be satisfied is that the person must be an agricultural labourer. In order to prove that he is an agricultural labourer, applicant claiming benefit under Section 122-B(4-F) of the Act is required to prove that his main source of livelihood is agricultural labour. For this purpose he shall also have to prove the facts giving 29.0.2004 of Assistant Collector, Bharthana, District Etawah rejecting petitioner's application refusing to provide benefit of Section 122-B(4-F) of the U.P.Z.A. & L.R. Act (hereinafter referred to as the Act) in allotment of land involved in Suit. A revision preferred by petitioner against the said order was also rejected by the judgment dated 14.3.2005.

2. Heard learned counsel for the petitioner, learned Standing Counsel as well as learned counsel for Gaon Sabha.

3. Learned counsel for the petitioner urged that the order passed by the authorities below are vitiated in law. As petitioner was an landless agricultural labourer belonging to the Scheduled Caste in actual possession of the land in dispute on 1st May, 2002, he will acquire rights under Section 122-B(4-F) of the Act. He further urged that the findings of the

details such as where and in whose field he is working as an agricultural labour as well as his total income received from working as an agriculture labour and other relevant facts. Second important factum required to be proved is that the main source of livelihood of a person claiming benefit under Section 122-B (4-F) of the U.P.Z.A. & L.R. Act is agriculture labour.

In the present case neither there is any evidence on record to show that petitioner was ever engaged or working as an agricultural labour or his main source of livelihood was income from agricultural labour. The report of the Revenue Inspector dated 5.7.2003 does not mention petitioner as an agricultural labourer on the relevant date.

(Delivered by Hon'ble S.N. Srivastava, J.)

1. This writ petition is directed against the judgment and order dated authorities below to the contrary are unsustainable in law and the impugned orders were not passed in accordance with law.

4. In reply to the same, learned Standing Counsel urged that the orders passed by the authorities below were passed in accordance with law. Petitioner cannot get any right under Section 122-B(4-F) of the Act.

5. In rejoinder learned counsel for the petitioner referred judgment dated 2.2.2005 of the Sub Divisional Officer, Bharthana, District Etawah passed on the basis of some compromise entered into between Gram Pradhan and petitioner and urged that under the compromise land in dispute, total area .37 acre, was settled in favour of petitioner for construction of Barat Ghar. He also urged that at least petitioner may be given benefit of Section

122-B(4-F) of the Act for that part of the land, out of total area of land of .74 acre.

Considered the arguments of learned counsel for the petitioner and learned Standing Counsel.

6. Benefit of Section 122-B (4-F) of the Act is available to a person who is a landless agriculture labourer belonging to the category mentioned therein. Section 122-B(4-F) of the Act being reproduced below for ready reference:-

Section 122-B(4-F) of the U.P.Z.A. & L.R. Act

"122-B(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before (May 1, 2002), and the land so occupied together with land, if any, held by him from before the said date as Bhumidhar, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and it shall be deemed that he has been admitted as bhumidhar with non-transferable rights of that land under Section 195.

Explanation- The expression 'agricultural labourer' shall have the meaning assigned to it in section 198."

Explanation (1) & (2) to Section 198 of the U.P.Z.A. & L.R. Act defines landless agricultural labourer, same are being quoted below:-

"Explanation (1) 'landless' refers to a person who or whose spouse or minor children held no land as bhumidhar or asami and also held no land as such within two years immediately preceding the date of allotment; and

Explanation (2) 'agricultural labourer' means a person whose main source of livelihood is agricultural labour."

7. From perusal of the record and findings recorded by the authorities below, it is clear that land in Plot Nos. 2035/1, area .12 acre, 2037/2, area .12 acre, 2037, area .14 acre, 2039/3, area .34 acre and 2039/4, area .02 acre total .74 acre were recorded as Bhumidhari land in the name of petitioner's father Sone Lal. It is also borne out that during consolidation proceedings by the order dated 12.12.2002 passed by the Deputy Director, Consolidation, Etawah petitioner's father was allotted other land in lieu of aforesaid plots and aforesaid plots were reserved as Bachat land and vested in the Gaon Panchayat. The land dispute was not Bachat land vested in Gaon Panchayat on relevant date and petitioner could not be in possession of the land in dispute against the law on the relevant date i.e. 1st May, 2002.

8. In view of the above, petitioner cannot claim any benefit of Section 122-B(4-F) of the Act of the Bachat land on 1st May, 2002, as the land in dispute was not in possession of petitioner on the relevant date.

9. It is clear from the record that in order to grab the property of Gaon Sabha, some collusive proceedings appears to

have been initiated by the petitioner in collusion with the revenue authorities on the basis of the manipulated report of Revenue Inspector.

10. The authorities below rightly considered the entire materials and rightly rejected petitioner's claim in land in dispute on the ground that benefit of Section 122-B(4-F) of the Act could not be granted to the petitioner. The Revisional authority rightly affirmed said order.

11. The another aspect of the matter is that petitioner tried to grab the land of Gaon Panchayat in collusion with the Gram Pradhan and some concerned revenue authorities. The property of Gaon Panchayat is the property of the entire village community and the Gram Pradhan and concerned Land Management Committee are only custodian of such property and are authorized to manage the same in accordance with relevant law and procedure prescribed.

12. Aims and Object of the U.P.Z.A. & L.R. Act clearly shows intention of the legislature while enacting U.P.Z.A. & L.R. Act in the matter of properties vested in Gaon Sabha. Relevant portion of Aims and Object of U.P.Z.A. & L.R. Act is being quoted below:-

"All lands of common utility, such as abadi sites, pathways, waste-lands, forests, fisheries, public wells, tanks and water channels, will be vested in the village community or the Gaon Samaj consisting of all the residents of the village as well the pahikasht cultivators. The Gaon Panchayat acting on behalf of the village community has been entrusted with wide powers of land management. This measure which makes the village a small republic and a co-operative community is intended to facilitate economic and social development and to encourage the growth of social responsibility and community is intended to facilitate economic and social development and to encourage the growth of social responsibility and community spirit."

13. From perusal of the order dated 2.2.2005, passed by the Sub Divisional Officer, Bharthana it transpires that on the basis of some compromise entered into between the Gram Pradhan and the petitioner, this order was passed permitting petitioner to construct Barat Ghar on plots aforementioned. There is nothing on record to show that compromise was entered into between the petitioner and the Gram Pradhan with prior permission of the competent authority by any resolution of the Land Management Committee.

14. The property in question vests in Gaon Panchayat and is not a private property of Gram Pradhan. Gram Pradhan is only custodian of such property. Any property vested in Gaon Sabha is the property of entire village commynity. The order dated 2.2.2005 by which petitioner was permitted to make construction of Barat Ghar on the basis of compromise between the petitioner and Gram Pradhan on the property of Gaon Panchyat is wholly unsustainable in law. This Court is also of the opinion that if a person is having capacity to construct Barat Ghar, he cannot be considered to be a landless agricultural labourer under the U.P.Z.A. & L.R. Act and is a person of sufficient means.

15. For admission of a person as a Bhumidhar under Section 122-B (4-F) of the Act, the first condition to be satisfied is that the person must be an agricultural labourer. In order to prove that he is an agricultural labourer, applicant claiming benefit under Section 122-B(4-F) of the Act is required to prove that his main source of livelihood is agricultural labour. For this purpose he shall also have to prove the facts giving details such as where and in whose field he is working as an agricultural labour as well as his total income received from working as an agriculture labour and other relevant facts. Second important factum required to be proved is that the main source of livelihood of a person claiming benefit under Section 122-B (4-F) of the U.P.Z.A. & L.R. Act is agriculture labour.

16. In the present case neither there is any evidence on record to show that petitioner was ever engaged or working as an agricultural labour or his main source of livelihood was income from agricultural labour. The report of the Revenue Inspector dated 5.7.2003 does not mention petitioner as an agricultural labourer on the relevant date could not be deemed to be settled in his favour under Section 122-B (4-F) of the U.P.Z.A. & L.R. Act.

17. In view of the above facts where petitioner tried to usurp the property of Gaon Panchayat, this Court is of the view that appropriate proceedings be initiated against the petitioner, Gram Pradhan and the concerned Revenue Inspector/other Tehsil authorities in whose collusion orders were passed in favour of petitioner. Consequently, the District Magistrate, Etawah shall initiate appropriate proceedings against the concerned revenue officials/inspector alongwith Gram Pradhan and the petitioner immediately.

With above directions, writ petition is dismissed. **Petition Dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2005

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

Civil Misc. Writ Petition No. 47307 of 2005

Chaudhary Chandan Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ch. Chandan Singh (In person)

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-read with Saw Mill Rules 1998-rule 5,6 and 7 alongwith Notification dt. 3.6.02-Grant of Saw Mill licence-Regional Director Samagik Vaniki Van Prabhag-rejected the application for renewal-challenge the made on the ground placing reliance upon the decision of Supreme Court in Jawahar Lal case reported in J.T. 2002 (1) S.C. 413-held-subsequent decisions of the Apex Court not brought-before the Supreme Court-by which-it is mandatory that the application for licence to be placed before the Central Empowered Committee-Regional Director rightly rejected the application-call for no interference by High Court.

Held: Para 18 and 23
It is upon a consideration of the aforesaid provision of the Rules and the orders of the Supreme Court that the Regional Director has rejected the

application of the petitioner for grant of licence. It has been noticed that the licence had never been issued in favour of the petitioner prior to 4th March, 1997 but even without the issue of such licence the petitioner had been depositing the licence fee. It has further been noticed that the Central Empowered Committee in its recommendations placed before the Supreme Court had made it clear that the licence cannot be granted merely upon deposit of the licence fee and in such circumstances, the petitioner cannot take the benefit of the decision given by this Court in Nand Lal Vs. State of U.P. & Ors,. 2002 ALJ 1255. The Regional Director has also referred to the directions issued by the Supreme Court that no State Government or the Union of India shall permit the opening of saw-mill without prior permission of the Central Empowered Committee. In such circumstances the Regional Director has concluded that the licence could not be issued but it has been observed that in case the petitioner desired he could place his application before the Central Empowered Committee.

In the present case the licence of the saw mill of the petitioner had not been renewed prior to 4th March, 1997. The directions of the Supreme Court make it obligatory in such cases, for the applicants to place their application before the Central Empowered Committee. This is precisely what has been observed in the order of the Regional Director.

Case law discussed:

1997 (2) SCC-267
1997 (3) SCC-312
1997 (7) SCC-440
2002 ALJ-1255

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

1. This writ petition has been filed for quashing the order dated 6th April, 2005 which has been passed by the Regional Director, Samajik Vaniki Van Prabhag, Fatehpur (hereinafter referred to as the 'Regional Director') rejecting the application filed by the petitioner for grant of Saw Mill licence. The said order was passed pursuant to the directions issued by this Court on 21st January, 2005 in Writ Petition No. 27395 of 2004.

2. The facts stated in the petition reveal that earlier the Saw Mill belonged to Sri Ram Agarwal who had been granted a licence to run saw mill. The saw mill was sold to one Sri Narendra Kumar Singh on 2nd February, 1989 and thereafter it was sold by Sri Narendra Kumar Singh to the petitioner for a consideration of Rs. 25,000/-. The petitioner then submitted an application dated 2nd April, 1989 to the Range Officer for transfer of the licence in his favour and for permission to deposit the renewal licence fee. It appears on the basis of the aforesaid application, the petitioner deposited the licence fee of Rs. 1,000/- in 1990, 1991 and 1992. The licence was, however, not renewed and, therefore, the petitioner filed a writ petition in this Court which was disposed of on 20th October, 2003 with a direction to decide the representation of the petitioner. The application of the petitioner for renewal of the licence was rejected and this was challenged by the petitioner by filing a writ petition being Writ Petition No. 12350 of 2004 which was disposed of on 25th March, 2004 with a direction that the application filed by the petitioner for grant of saw mill licence shall be considered afresh in accordance with law. By the order dated 24th June, 2004 the application was again rejected. Feeling aggrieved, the petitioner filed yet another

Writ Petition No. 27395 of 2004. The Court by means of the judgment and order dated 28th January, 2005 set aside the order dated 24th June, 2004 and remanded the matter back to the Regional Director to decide it afresh in accordance with law. Pursuant to the aforesaid directions of this Court, the matter has been considered at length by the Regional Director in the order dated 6th April, 2005 which has been impugned in the present petition.

3. We have heard the petitioner in person and the learned Standing Counsel appearing for the respondents and have perused the materials available on record.

4. The petitioner in person has assailed the order dated 6th April, 2005 contending that once the petitioner was permitted to deposit the licence fee, the respondents could not have refused the grant of the licence and in any view of the matter, the order of the Supreme Court has not been correctly interpreted by the Regional Director. Learned Standing Counsel on the other hand has supported the impugned order and has submitted that there is no infirmity as it is based upon the orders issued by the Supreme Court from time to time.

5. We have carefully considered the submissions advanced by the parties. Before examining the rival contentions, we consider it proper to refer to the Rules framed by the State Government and to the orders passed by the Supreme Court from time to time with regard to the grant of licence to the saw mills.

6. The State Government has framed the "Uttar Pradesh Establishment and Regulation of Saw-mills Rules, 1978 (hereinafter referred to as the 'Rules'). Rule 2 defines 'Saw-mills' to mean and include any mechanical device whether operating with electric power, fuel power or man-power for the purpose of cutting, sawing or converting, timber and wood into pieces or the like acts. Rule 3 provides that no person shall establish, erect or operate any saw-mill or machinery for converting or cutting timber and wood without obtaining a licence from the Divisional Forest Officer concerned. Under Rule 4 an application has to be submitted by any person desiring to establish, erect or operate any existing saw-mill to the Divisional Forest Officer concerned for obtaining a licence in the form given in the Schedule I appended to the Rules. Rule 5 deals with grant of licence by the Divisional Forest Officer after satisfying himself with regard to the factors enumerated. Rule 7 deals with renewal of licence.

7. The matter regarding protection and conservation of forest was considered by the Supreme Court in T.N. Godavarman Thirumulkpad Vs. Union of India & Ors., (1997) 2 SCC 267 and we reproduce the relevant general directions issued by the Supreme Court contained in paragraph 5 of the judgment.

"1. In view of the meaning of the word "forest" in the Act, it is obvious that prior approval of the Central Government is required for any non-forest activity within the area of any "forest". In accordance with Section 2 of the Act, all on-going activity within any forest in any State throughout the country, without the prior approval of the Central Government, must cease forthwith. It is, therefore, clear that the running of saw mills of any kind including veneer or plywood mills, and mining of any mineral

are non-forest purposes and are, therefore, not permissible without prior approval of the Central Government. Accordingly, any such activity is prima facie violation of the provisions of the Forest Conservation Act, 1980. Every State Government must promptly ensure total cessation of all such activities forthwith.

…….

3. The felling of trees in all forests is to remain suspended except in accordance with the working plans of the State Governments, as approved by the Central Government. In the absence of any working plan in any particular State, such as Arunachal Pradesh, where the permit system exists, the felling under the permits can be done only by the Forest Department of the State Government or the State Forest Corporation.

……

6. Each State Government should within two months, file a report regarding:

(i) the number of saw mills, veneer and plywood mills actually operating within the State, with particulars of their real ownership;

(ii) the licensed and actual capacity of these mills for stock and sawing;

(iii) their proximity to the nearest forest;

(iv) their source of timber.

7. Each State Government should constitute within one month, an Expert Committee to assess:

(i) the sustainable capacity of the forests of the State qua saw mills and timber-based industry;

(ii) the number of existing saw mills which can safely be sustained in the State;

(iii) the optimum distance from the forest, qua that State, at which the saw mill should be located."

8. Certain minor variations were made in the aforesaid order and the same are reported in (1997) 3 SCC 312, T.N. Godavarman Thirumulkpad Vs. Union of India & Ors. and are as follows:-

"All unlicensed saw mills, veneer and plywood industries in the State of Maharashtra and the State of Uttar Pradesh are to be closed forthwith and the State Government would not remove or relax the condition for grant of permission/licence for the opening of any such saw mill, veneer and plywood industry and it shall also not grant any fresh permission/licence for this purpose. The Chief Secretary of the State will ensure strict compliance of this direction and file a compliance report within two weeks."

9. Thereafter certain applications were filed in the aforesaid case of T.N. Godavarman Thirumulkpad in which directions were issued. These are reported in (1997) 7 SCC 440 and the relevant direction is reproduced below:-

"After hearing the learned amicus curiae, the learned Attorney General and the other learned counsel, we direct as under:

A. In the State of Uttar Pradesh the following is permitted-

1. Principal Chief Conservator of Forest (PCCF) may, on a case-to-case basis, consider grant of permission to an existing licensed sawmill to relocate

itself, provided that the relocated site is not within 10 kms of any existing forest."

10. In the meantime the State Government made various amendments in the Rules in the year 1998. The definition of 'Saw-mill' was amended to mean and include any mechanical device whether operating with electric power, fuel power or man-power for the purpose of cutting, sawing or converting, timber and wood into pieces or the like acts, but would not include such mechanical device whose engine power is up to 3 H.P.

11. The amended Rules, 5, 6 and 7 which deal with grant of licence, period of validity of licence and renewal of licence are as follows:-

"5. Grant of licence.- On receipt of an application under Rule 4 the Divisional Forest Officer shall acknowledge the same and thereafter shall make such enquiries as he may deem fit and after satisfying himself with regard to following factors, grant the licence in the form given in Schedule II appended to these rules:-

(i) that the required quantity of timber through legitimate means would be available at the proposed venue of the saw-mill without causing any damage to the tree-growth in the forests under the control of the Government and the adjacent rural areas;
(ii) that the applicant has acquired or is in a position to acquire necessary area for erecting and running a saw mill in accordance with the conditions specified in the licence;
(iii) that the necessary machinery, power etc, is available or is likely to be available to the applicant;
(iv) that the applicant has obtained a "No Objection Certificate"

In case the Divisional Forest Officer is not satisfied he may reject the application within sixty days of its receipt:

Provided that in case the said application is not disposed of within sixty days from the date of the receipt of the application by the Divisional Forest Officer, the licence shall be deemed to have been granted to the applicant under this rule on the terms and conditions as laid down in Schedule II appended to these rules with effect from the expiry of the said sixty days and in that event the acknowledgement, shall be adequate proof of the licence.

Provided further that the aforesaid proviso shall not apply to saw mills situated within ten kilometre area of any existing forest.

Explanation.- In this rule existing forest shall not include trees situated on either side of the roads and the railway tracks.

"6. Period of validity of licence.- Every licence granted under Rule 5 or renewed under Rule 7 shall remain valid for such period not exceeding three years from the date of issue or renewal as may be specified in the licence:

Provided that, in case of a licence referred to in the proviso to Rule 5 or Rule 7 the period of validity shall be three years."

"7. Renewal of licence.- On an application made to the Divisional Forest Officer concerned for renewal of the licence granted under Rule, 5 he may renew the same indicating thereon the

period for which it has been renewed. The renewal application for licence shall be disposed of within sixty days of its receipt:

Provided that in case the application is not disposed of within sixty days, from the date of the receipt of the application by the Divisional Forest Officer, the licence shall be deemed to have been renewed for a period of three years:

Provided further that the aforesaid proviso shall not apply to saw mills situated within ten kilometers of any existing forest.

Explanation:- In this rule existing forest shall not include trees situated on either side of the roads and the railway tracks.

Failure to get the licence renewed before the expiry of date will make the licensee liable to punishment in accordance with Section 77 of the Indian Forest Act, 1927 for operating the saw mills without licence."

12. The aforesaid Rules along with the 1998 amendments came up for consideration before the Supreme Court in the aforesaid case of T.N. Godavarman Thirumulkpad on 30th April, 2002 and the relevant portion of the order is quoted below:-

"Our attention has been drawn to the rules which have been amended by the State of Uttar Pradesh on 6th June, 1998 permitting saw mills having engine power of 3 HP not to have a licence. This amendment was made after this Court's order dated 4th March, 1997 directing closure of all unlicensed saw mill in the State of Uttar Pradesh and Maharasthra. It is quite obvious that with a view to circumvent this Court's order dated 4th March, 1997 the State of Uttar Pradesh has used the device of changing the law. That this was done with view to help the saw mills, is quite evident from the affidavit of Shri Anup Malik Forest Utilization Officer, U.P. Lucknow who in paragraph 4 of the affidavits states that three saw mills, namely M/s. Punjab Saw Mill, M/s. Rana Saw Mill and M/s. Nur Handicraft heaving saw mills of 15 HP, 10 HP and 8 HP respectively within the municipal limits of Saharanpur were sealed pursuant to the orders of this Court dated 4th March, 1997. This affidavit further goes to show that presently these very saw mills are in operation using power less than 3 HP. We refuse to believe that the saw mills which were having 15 HP, 10 HP, and 8 HP, would today be functioning using less than 3 HP. It is only the State of Uttar Pradesh which can be fallible, willingly, or unwillingly, to accept this. We, therefore, set aside the amendment of the U.P. Establishment and Regulation of Saw Mills Rules 1978 which was effected on 26th June, 1998 in so far as it exempts saw mills using mechanical devices with the use of power up to 3 HP from obtaining a licence. As a result of the order passed today each and every saw mill running in the State of Uttar Pradesh would require a licence, whether the saw mill is running with the aid of power or otherwise. The rule which provides for deemed licence in the event of the application for the grant of licence not being dealt with contained in the Saw Mills Rules, being Rule 7, is also held to be contrary to the letter and spirit of the Indian Forest Act, and the order of this Court and is accordingly set aside."

13. On 9th May, 2002 the Supreme Court issued further directions in the aforesaid case of T.N. Godavarman Thirumulkpad and Writ Petition No. 171 of 1996 and the same are as follows:-

"After hearing the learned Amicus Curie, counsel for the parties and taking into consideration the suggestions placed before us by the learned Attorney General, we pass the following order:-

"(1) It is submitted that till the Central Government constitutes a statutory agency as contemplated by Section 3 of the Environment (Protection) Act, 1986 it is necessary and expedient that an authority be constituted at the National level to be called Central Empowered Committee (hereinafter the 'Empowered Committee') for monitoring of implementation of Hon'ble Court's order and to place the non compliance cases before it, including in respect of encroachment removals, implementations of working plans, Compensatory afforestation, plantations and other conservation issues."

14. By a notification dated 3rd June, 2002 the Government constituted the Central Empowered Committee and the powers and functions were defined as follows:-

"The power and functions of the Committee as per the order of the Hon'ble Supreme Court of India are as under:-

……

"(3) Pending interlocutory application in these two writ petitions as well as the report and affidavit filed by the State in response to the orders made by the Court shall be examined by the Committee, and their recommendations will be placed before Hon'ble Court for orders.

(4) Any individual having any grievance against steps taken by the Government or any other Authority in purported compliance with the order passed by this Hon'ble Court will be at liberty to move the Committee for seeking suitable relief. The Committee may dispose of such applications in conformity with the orders passed by Hon'ble Court. Any application which cannot be appropriately disposed of by the Committee may be referred by it to this Hon'ble Court.

(5) The Committee shall have the power to:-

(a) Call for any documents from any persons of the Government of the Union or the State or any other official.
(b) Summon any person and receive evidence from such person on oath either on affidavit or otherwise.
(c) Seek assistance/presence of any person(s) official(s) required by it in relation to its work."

15. The aforesaid Central Empowered Committee considered the cases of those saw mills where the licence fee had been deposited prior to the restrictions placed by the Supreme Court in its order dated 4th March, 1997 but the licence to operate the saw-mill had not been issued. It submitted its report dated 3rd October, 2002 and the relevant portion of the report is as follows:-

"Further as per the Uttar Pradesh Establishments and Regulations of Saw Mills Rules, provides that on application being made, the Divisional Forest Officer

is empowered to grant the licence for any Saw Mill only after satisfying himself that the required quantity of timber is available for the Saw Mill through legal sources besides a No Objection Certificate will have to be obtained by the applicant Saw Mill from the concerned District Magistrate. The documents made available do not establish fulfillment of this vital requirement. Mere deposition money for registration does not mean that a valid licence for running of the Saw Mill has been granted by the Competent Authority.

It is, therefore, concluded that the applicant Saw Mill were not having valid licence for running the Mill on the relevant date i.e. 4.3.1997 and were required to be closed forthwith as per the order dated 4.3.1997."

16. The matter was again considered by the Supreme Court on 29/30th October, 2002 and the following order was passed.

"No State or Union Territory shall permit any unlicensed Saw Mills, veneer, plywood industry to operate and they are directed to close all such unlicensed unit forthwith. No State Government or Union Territory will permit the opening of any Saw Mills, veneer or plywood industry without prior permission of the Central Empowered Committee. The Chief Secretary of each State will ensure strict compliance of this direction. There shall also be no relaxation of rules with regard of licence without previous concurrence of Central Empowered Committee. It shall be open to apply to this Court for relaxation and or appropriate modification or orders que plantations or grant of licenses."

17. Despite the aforesaid directions contained in the order dated 29/30th October, 2002 certain licences were granted to five saw-mills by the Divisional Forest Officer, Puri Division, Khurda, Orissa on 23rd December, 2002. In these matter the Supreme Court issued suo motu contempt notice. The following order was passed by the Supreme Court on 19th December, 2003 in the said matter:-

"The respondent has tried to overreach this Court by violating the order dated 30th October, 2002 and is clearly guilty of contempt of court. Having regard to the facts abovenoted, we are unable to accept the apology tendered by the respondent. Having bestowed anxious considerations on the aspect of punishment, considering that respondent had joined as DFO only few days before grant of licences and it to being a case of first lapse on his part, on the facts of the case, in our view the ends of justice would be met by reprimanding the respondent and by issue of a warning to him so that he will be careful in future so as not to repeat such an act and also by imposing on him heavy amount which can be utilized for protection of environments. We order accordingly and impose a cost of Rs.50,000/-, which shall be deposited by the respondent in the Registry within four weeks. The suo motu petition is disposed of accordingly."

18. It is upon a consideration of the aforesaid provision of the Rules and the orders of the Supreme Court that the Regional Director has rejected the application of the petitioner for grant of licence. It has been noticed that the licence had never been issued in favour of the petitioner prior to 4th March, 1997 but

even without the issue of such licence the petitioner had been depositing the licence fee. It has further been noticed that the Central Empowered Committee in its recommendations placed before the Supreme Court had made it clear that the licence cannot be granted merely upon deposit of the licence fee and in such circumstances, the petitioner cannot take the benefit of the decision given by this Court in Nand Lal Vs. State of U.P. & Ors,. 2002 ALJ 1255. The Regional Director has also referred to the directions issued by the Supreme Court that no State Government or the Union of India shall permit the opening of saw-mill without prior permission of the Central Empowered Committee. In such circumstances the Regional Director has concluded that the licence could not be issued but it has been observed that in case the petitioner desired he could place his application before the Central Empowered Committee.

19. It is this order dated 6th April, 2005 of the Regional Director which has been challenged in this writ petition. The petitioner in person has placed reliance upon the decision of the Supreme Court in the case of Jawahar Lal Sharma & Anr. Vs. Divisional Forest Officer, U.P. & Anr., JT 2002 (1) SC 413, and upon the decision of this Court in Nand Lal Vs. State of U.P. & Ors., 2002 All. L.J. 1255.

20. In the case of Jawahar Lal Sharma (supra) the Supreme Court in paragraph 6 of the said decision observed as follows:-

"No order or direction made by the Supreme Court of India to the effect that even existing licences shall not be renewed, has been brought to our notice. On the contrary, the learned counsel for the appellants has invited our attention to orders dated 24.01.2000 passed in Civil Misc. Writ Petition No. 991/2000, Gyaneshwar Prasad Singh Vs. Van Sanrakshak, Varanasi Vritya, Varanasi & Ors., order dated 19.02.2000 in Civil Misc. Writ Petition No. 9148 of 2000, Kanwal Deen Chauhan and Ors. Vs. Conservator of Forests and Ors., order dated 31.3.2000 in Civil Misc. Writ Petition No. 15002/2000, Vishwa Bhandar Saw Mills Vs. Divisional Forest Officer & Anr., wherein having noticed the directions made by this Court in T.N. Godavaraman Thirumulkpad Vs. Union of India & Ors., [(1997) 3 SCC 312], the High Court of Allahabad has, in similar circumstances quashed the orders passed by the respondents and directed that on completing all the necessary formalities by the petitioners therein and depositing the licence renewal fee for all the previous years as well as the current years, licences to run the saw mill in favour of the petitioner therein shall be granted of there be no legal impediment. The learned counsel submitted that there is no reason why the same High Court should not have taken a similar view in the cases of these appellants. We find merit in the submission of the learned counsel."

21. It is clear from the observations made above that the subsequent orders/directions of the Supreme Court were not placed before the Court. We have referred to the orders/directions of the Supreme Court which make it mandatory for the licensee to place his application before the Central Empowered Committee for grant of licence.

In the case of Nand lal (supra) the Court observed as follows:-

"The Apex Court was only clarifying that no fresh licence should be granted in violation of the provisions of the Forest Conservation Act, 1980. It did not prohibit that licence to operate saw mills should not be granted on any condition."

22. The decision of this Court in the case of Nand Lal have also not taken note of the subsequent orders/directions of the Supreme Court in the case of T.N. Godavaraman Thirumulkpad (supra).

23. In the present case the licence of the saw mill of the petitioner had not been renewed prior to 4th March, 1997. The directions of the Supreme Court make it obligatory in such cases, for the applicants to place their application before the Central Empowered Committee. This is precisely what has been observed in the order of the Regional Director.

24. Such being the position, there is no infirmity in the order dated 6th April, 2005 passed by the Regional Director rejecting the application filed by the petitioner for grant of saw mill licence.

25. The writ petition is, accordingly, dismissed. **Petition dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2005

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 45747 of 2000

Pan Kumari ...Petitioner
Versus
Board of Revenue and others ...Respondents

Counsel for the Petitioner:
Sri G.N. Verma
Sri R.C. Singh
Sri S.D. Pandey

Counsel for the Respondents:
Sri Anuj Kumar, A.S.C.
Sri Radhey Shyam
Sri H.R. Misra
Sri Treveni Shanker
Smt. Sarita Dubey

U.P.Z.A. & L.R. Act 1956-Section 18, 229-B(4), 209- Limitation for filing suit ancestors of petitioner recorded 1281F and 1320F to 1359 F- continuous possession established-after the date of vasting became Bhumidhar-No limitation for institution of Suit except the land covered under Section 189-if already dispossessed-Suit shall be filed under Section 209.

Held: Para 5

The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If however a person is in possession his right can not be extinguished unless the case is covered by Clauses (a) (aa) and (b) of Section 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 209 U.P.Z.A./ & L.R. Act. Appendix III provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 229-B would be barred by

limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation.

Case law discussed:
1985 RD 444 relied on

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

1. A suit under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act was filed by the plaintiffs/respondents Kailash Nath Tewari, Surya Mani Tewari and Chandra Mani Tewari against the Gaon Sabha. The petitioner Pan Kumari was also impleaded in the suit on an application filed by her. The case of the petitioner is that the ancestors of the petitioner were recorded in 1281-F and from 1320 fasali to 1359 fasali and the petitioners are in possession over the disputed land of which they were grove-holders on the date of vesting and consequently they became Bhumidhar under Section 18 of the U.P. Zamindari Abolition and Land Reforms Act. The suit was contested by the Gaon Sabha and by the petitioner. The trial court decreed the suit. Against the decree two appeals were filed one by the Gaon Sabha and the other by the petitioner. Both the appeals were dismissed by the Commissioner. Two second appeals were filed. The Board of Revenue dismissed both the appeals. Against the order of the Board of Revenue a writ petition was filed by the Gaon Sabha numbered as Civil Misc. Writ Petition No. 50461 of 2000, which was also dismissed as withdrawn. The present writ petition has been filed by Pan Kumari.

2. I have heard Sri R. C. Singh, learned counsel for the petitioner and Sri Radhey Shyam, learned counsel for the respondents.

3. It is submitted by Sri R.C. Singh that the suit filed by the plaintiffs/ respondents was barred by Section 49 of the Consolidation of Holdings Act in as much as no objection was raised in the consolidation proceedings by the plaintiffs/respondents. The other submission is that the suit is barred by limitation. On the question that the suit was barred by Section 49 of Consolidation of Holdings Act the finding recorded by the trial court is that on the date of the publication of the notice under Section 9 of the Consolidation of Holdings Act the plaintiffs/respondents were minors. The appellate court also affirmed the said finding. Sri R.C. Singh submitted that from the reading of the orders passed by the trial court and the appellate court it is clear that there is no specific finding upon the point of minority of the plaintiffs/respondents, which they were required to record in view of the directions in an earlier writ petition No. 41280 of 1996. I have examined the judgement of the trial court. It appears that before the trial court the plaintiffs/respondents had filed evidence showing the age of the plaintiffs. In the passport the date of birth of Chandra Mani Tewari is 25.9.1963 and in the High School Certificate of Kailash Nath Tewari his date of birth is 13.9.1958 and of Sruya Mani Tewari in his High School certificate is 25.8.1948. Oral evidence on behalf of the plaintiffs/respondents was also adduced. The trial court found that the documentary evidence filed by the plaintiffs/respondents was unrebutted. In effect this is a finding of minority as the trial court found that the plaintiff's evidence of minority was unrebutted. The appellate court has affirmed the finding that the plaintiffs/respondents were

minors and consequently they could not file the objections within the time permissible under Section 9 of the Consolidation of Holdings Act. Sri R.C.Singh was unable to refer to any document filed by the defendant/petitioner in the trial court or in the Ist Appellate Court regarding the age of the plaintiffs/respondents. He however submitted that in the Board of Revenue an application for additional evidence was filed by the petitioner in which certain documents including C.H. Form 11 showing Surya Mani as major and guardian of the other plaintiffs were sought to be filed but the Board of Revenue did not pass any order on that application. In reply it has been stated in para 19 of the counter affidavit that the appeal was heard by the Board on 6.9.2000 and no such application was pressed or filed until the judgment on 21.9.2000. According to the respondents even the court fee stamps on the application have not been cancelled, which would indicate that the application was never filed. In rejoinder affidavit the averments made in the counter affidavit have been denied. In C.H. Form 11 copy of which has been filed in this petition there is an entry showing Kailash Nath Tewari the plaintiff as aged 6 years (minor) and Chandra Mani Tewari as aged 5 years (minor) whereas Surya Mani Tewari is shown as major and guardian of the minors.

4. Sri Radhey Shyam, learned counsel for the respondents submitted that the Board of Revenue had no occasion to pass any order on the application under Order 41 Rule 27 because the same was never pressed and it was filed subsequently after the arguments were over. There is a dispute upon this fact. The point does not find mention in the order of the Board of Revenue. Ordinarily it would be treated that all the points that were raised before the Board of Revenue were considered by it. There is no affidavit of the counsel who argued the case before the Board of Revenue that the application under Order 41 Rule 27 was pressed. That apart in the face of the direct evidence in the nature of the High School Certificate that was available on the record not much weight can be attached to the entry in C.H. Form 11. The finding on the question of minority recorded by the authorities below is a finding of fact. No ground for interference has been made out.

5. It is submitted by Sri Radhey Shyam, learned counsel for the respondents that the order of the Board of Revenue has become final. The Gaon Sabha had filed a writ petition against that order but had withdrawn the same. It is not disputed by Sri R.C. Singh that in this case the petitioner is not claiming title in herself but is setting up the title of the Gaon Sabha. The Gaon Sabha having already lost in the Board of Revenue and having withdrawn the writ petition the matter between the Gaon Sabha and the plaintiffs/respondents has become final. The petitioner is litigating under the same title and consequently even otherwise the principle of res-judicata would be applicable. The view finds support from the decision of the Apex Court in 1996 Allahabad Civil Journal 824 (Singhal Lal Chand Jain Vs. Rashtriya Swayam Sewak Sangh, Panna and other). In that case a decree for eviction was passed against the Sangh. An objection under Section 47 C.P.C. in execution proceeding was filed by a member of the Sangh. The Apex Court held that the principles of res

judicata were applicable as a member of the Sangh is litigating under the same title as the Sangh.

Sri R.C. Singh submits that the suit under Section 229-B was barred by limitation. In support of this contention he relies upon Section 341 of the U.P. Zamindari Abolition and Land Reforms Act, which provides that the Limitation Act would be applicable to proceedings under the U.P. Zamindari Abolition and Land Reforms Act and limitation in a suit for declaration would be governed by Article 137 of Schedule 1 of the Limitation Act as there is no period prescribed for such a suit under the U.P.Z.A. & L.R. Act. Section 341 itself provides that the provisions of certain Acts including the Limitation Act shall apply to the proceedings under the U.P. Z.A. & L. R. Act unless otherwise provided in the U.P.Z.A. & L.R. Act. Rule 338 of the U.P.Z.A. and L.R. Rules provides that the suits, applications and other proceedings specified in Appendix III shall be instituted within the time specified therein for them respectively. Recourse to the provisions of the Limitation Act would be available only if there is no provision under Rules in respect of the period of limitation for the different classes of suits or proceedings mentioned therein. In Appendix III the period of limitation provided for different classes of suits has been given. As regards suits under Section 229-B column 4, which prescribes the period of limitation for different classes of suit says "none". It would therefore be treated that there is no limitation for filing a suit under Section 229-B. Section 9 of the Civil Procedure Code provides that all suits of civil nature shall be instituted in the civil court except those, which have been excepted. A suit under Section 229-B falls within the excepted category and such suits even though they involve declaration are suits of a special character. Article 137 of the Limitation Act relied upon by Sri Singh in any case is applicable only to applications and not to suits and therefore has no play. When the rule making authority has provided different periods of limitation for different classes of suits it would be treated that provisions prescribing period of limitation in the Limitation Act would not be applicable to suits under the U.P.Z. A. & L.R. Act. Section 189 U.P.Z.A. & L. R. Act sets out the circumstances in which the interest of a bhumidar is extinguished. Clauses (a) (aa) and (b) relate to cases where the bhumidar dies leaving no heir, or where he has let out his holding in contravention of the provisions of the Act or where the land is acquired. Sub Section (C) of Section 189 provides that where a bhumidar has lost possession the bhumidari right would extinguish when the right to recover possession is lost. In Ram Naresh Vs. Board of Revenue 1985 R.D. 444 relied upon by Sri R. C. Singh it was held that the provisions of Section 27 of the Limitation Act would be attracted to suits instituted under Section 229-B. Section 27 provides that on the determination of the period limited for instituting a suit for possession the right to such property shall be extinguished. The rule is an exception to the general rule that limitation bars the remedy but does not extinguish the right. If however a person is in possession his right can not be extinguished unless the case is covered by Clauses (a) (aa) and (b) of Section 189. He can therefore seek a declaration of his right at any point of time. If a person has been dispossessed he would have to institute a suit under Section 209 U.P.Z.A./ & L.R. Act. Appendix III

provides the period for limitation for filing a suit under Section 209. It would follow therefore that a suit under Section 229-B would be barred by limitation the bhumidar is out of possession and his right to file a suit under Section 209 is barred by limitation. The finding of fact recorded on the question of possession is that the plaintiffs have established their continuous possession over the disputed land. The finding is not shown to be vitiated by any error. As the rights of the plaintiff were never extinguished no question of limitation arises. For the reasons given above the writ petition lacks merit and is dismissed.

30.8.2005. **Petition dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2005

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No.33685 of 2002

Akhilesh Kumar Chaubey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.M. Pandey
Sri Ramesh Chand
Sri K.K. Misra

Counsel for the Respondents:
C.S.C.

Dying in Harness Rules 1974 rule 2 (a) (iii)-employer though not regularly appointed-3yrs. Service on regular vacancy-The dependant of such employee entitled for the benefit of Compassionate appointment-12 yrs. Continuous service-benefit of leave etc. given-held requirement was perpetual and regular in nature hence come under the definition of Govt. servant for the purpose of appointment on compassionate ground.

Held: Para 13 and 14

Taking the present case it is not disputed that the petitioner's father was appointed in 1987 and he continued to work continuously till he died on 20.8.99. The appointment of the petitioner's father was initially for a period of three years on being selected by a Selection Committee. The said appointment was then converted and he was appointed as tube well assistant in 1992 also for three years. He continued to work and was paid his salary regularly and there was no break in his service. This fact is also not denied by the respondents. The fact that the respondents required the services of the petitioner's father continuously since 1987 to 1999 is indicative of the fact that the requirement was of a perpetual and regular nature. It is not the case of the respondents that the work of tube well operators no more exists. It has also not been pleaded that such tube well operators are no more required. On a vacancy which may occur of a part time tube well operator the tube well still has to be operated, therefore, the nature of work is existing day to day and the respondents have taken the services of the petitioner's father due to existence of work since 1987 continuously. During this period of nearly 12 years the salary has been disbursed by the respondents month to month. The nature of work required to be performed by the petitioner's father was of a regular nature as is apparent from a reading of the appointment letter dated 20.5.92 wherein the duties of the petitioner have been prescribed. It is also not disputed by the learned Standing Counsel that the part time tube well operators are being paid the same salary as regularly appointed tube well operators on the principle of 'equal pay for equal work.' The duties, qualifications and hours of working of

part time tube well operators and regular tube well operators are identical has been held by this court and the Hon'ble Supreme Court in SLP (c) No.16219 of 1994 decided on 22.3.1995.

For the aforesaid reasons and the facts of this case it is concluded that the Government Order dated 26.10.1998 would not be applicable in the present case in as much as the petitioner's father would come under the definition of 'Government Servant' as defined under Rule 2(a) (iii) of the Rules for the purpose of appointment of his dependants on compassionate grounds.

Case law discussed:

2005 (1) UPLBEC-1
2003 (1) LBESR-410
2005 (1) LBESR-571

(Delivered by Hon'ble Sanjay Misra, J.)

1. Heard the learned counsel for the petitioner and the learned Standing Counsel appearing on behalf of the respondents.

2. By means of this writ petition the petitioner seeks quashing of order dated 25.1.2000 communicated by letter dated 28.1.2000 passed by respondent no.2 (Annexure-12 to the writ petition) whereby the claim for appointment of the petitioner under Dying in Harness Rules, 1974 has been refused. It has been stated by the petitioner that in the aforesaid communication, no reason has been given for such denial and as such the same is liable to be quashed by this court. It is further stated that the petitioner is entitled for compassionate appointment in place of his deceased father who was a Tube-well Operator having been given appointment in the year 1987. The appointment letter dated 19.3.87 has been filed as Annexure-4 to the writ petition. The appointment was temporary for a period of three years and he could be considered for re-appointment. Prior to joining he was to be given fifteen days training and his salary was fixed at Rs.299.00 per month. He was also entitled to leave as per conditions given in the appointment letter.

3. It has been stated that late Kashi Nath Chaube had filed a writ petition no. 9507 of 1996 claiming parity of pay with other regular tube well operators in view of the decision of this court in Writ Petition No.3558 (S/S) 1992. By an order dated 20.5.92 he was posted as Tube-well Assistant on a salary of Rs.550.00 per month and the nature of his duties was also defined. It is stated that the petitioner's late father was posted as Gram Panchayat Vikas Adhikari by virtue of G.O. dated 30.6.99and his name finds place at serial no.40 of the list dated 9.7.99 prepared by the District Magistrate. It is the contention of the petitioner that his late father had worked for a period of nearly 12 years whereafter he died on 20.8.99 while in active service. The petitioner made an application dated 29.12.99 for appointment of the petitioner on compassionate ground claiming that the petitioner's qualification is Intermediate.

4. A counter affidavit has been filed by the respondent wherein the facts as averred by the petitioner have not been disputed. However, it has been stated that by virtue of Government Order dated 26.10.98 (filed as Annexure-4 to the counter affidavit) the dependants of part time Tube-well Operators are not entitled to the benefits of compassionate appointment under the Dying in Harness Rules, 1974.

5. Learned Standing counsel has placed reliance on the decision of Apex court reported in 2005 Vol.I U.P LBEC page 1 State of U.P. and another Vs. Ram Sukhi Devi and has contended that the G.O. dated 26.10.98 was not considered in that case by the High Court while passing an interim order and Hon'ble Supreme Court was pleased to set aside the order of High Court. Paragraph 6 of the judgment is quoted hereunder:-

"To say the least, approach of the learned Single Judge and the Division Bench is judicially unsustainable and indefensible. The final relief sought for in the writ petition has been granted as an interim measure. There was no reason indicated by learned Single Judge as to why the Government Order dated 26.10.1998 was to be ignored. Whether the writ petitioner was entitled to any relief in the writ petition has to be adjudicated at the time of final disposal of the writ petition. This court has no numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable Government Order has to be ignored. Time and again this court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations. (See Assistant Collector of Central Excise, West Bengal Vs. Dunlop India Ltd., (1985) 1 SCC 260, State of Rajasthan Vs.M/S Swaika Properties; (1985) 3 SCC 217, State of U.P. and othersVisheswar, (1985) Suppl (3) SCC 590, Bharatbhushan Sonaeji Kshirsagar Vs. (Dr) Abdul Khalik Mohd. Musa and others, (1995) Suppl (2) SCC; Shiv Shanker and others Vs. Board of Directors, U.P.S.R.T.C. and another; (1995) Supp (2) SCC 726 and Commissioner/ Secretary to Govt. Health and Medical Education Department Civil Sectt. Jammu Vs. Dr.Ashok Kumar Kohli ,JT 1995 (8) SC 403). No basis has been indicated as to why learned Single Judge though the course as directed was necessary to be adopted. Even it was not indicated that a prima facie case was made out though as noted above that itself is not sufficient. We, therefore, set aside the order passed by learned Single Judge as affirmed by the Division Bench without expressing any opinion on the merits of the case we have interfered primarily on the ground that the final relief has been granted at an interim stage without justifiable reason. Since the controversy lies within a very narrow compass, we request the High Court to dispose of the matter as early as practicable preferably within six months from the date of receipt of this judgment."

6. Learned counsel for the petitioner on the other hand has argued that Rule 2(a) (iii) of the Dying in Harness Rules provides that even though an employee is not regularly appointed but he has put in three years service in regular vacancy the benefits of said Rules flow to the dependant of the deceased employee. Learned counsel for the petitioner has relied upon the decision of this court in Sunil Kumar Vs. State of U.P. reported in 2003 (1) LBESR 410 Allahabad wherein this court considered the Dying in Harness Rules 1974 and held that a daily

wage employee working against a permanent requirement of Nagar Nigam for more than three years in the vacancy existing for more than 13 years even though he continued to wear the badge of daily wage employee his dependant would be entitled for the benefits under Dying in Harness Rules. In the aforesaid case this court has considered the G.O. dated 18.10.98 to the effect that the benefits under Dying in Harness Rules would be applicable to work -charge employee. Learned counsel for the petitioner has placed reliance upon a decision of this court in Writ Petition No.52395 of 2004 (Shiv Sagar Vs. State of U.P. and others) wherein it was held by this court that although the petitioner's father was a Collection Amin and was not a permanent employee but had worked for 11 years even then the petitioner was entitled for the benefits of Dying in Harness Rules by virtue of Rule 2 (a) (iii) of the said Rules.

7. Learned counsel for the petitioner has also relied upon on the decision reported in 2005 (1) LBESR page 571 (Rajesh Kumar Vs. State of U.P. and others) wherein the benefit of Dying in Harness Rules was extended to the dependant of a deceased work charged employee.

8. It is admitted between the parties that the petitioner's father was initially appointed as part time tube well operator for a period of three years and that thereafter his appointment was extended and he worked as such from 1987 upto 1999 without any break in service. In the year 1999 he was sent to Gram Panchayat by virtue of a G.O. dated 30.6.99 and was designated as Gram Panchayat Vikas Adhikari and he worked till his death on 20.8.1999. The parent department of the petitioner's father was the Irrigation Department of the State and he has worked since 1987 continuously although he was designated as part time tuber well operator and since 1992 he was designated as tube well Assistant. He was retained in employment for nearly 12 years by the respondents for their requirement to operate tube wells. Such employment given by the respondents to the petitioner's father continued without break since 1987 to 1999. Having taken work and kept him on the rolls for such a long period of 12 years goes to show that the requirement of the respondents for the petitioner's services existed continuously and at no point of time the petitioners father was removed.

9. The Government order dated 26.10.98 has been brought on record by the respondents. It provides that there is no provision in the Dying in Harness Rules 1974 for giving benefit of the said Rules to dependants of part time tube well operators. On the basis of this government order the respondents have rejected the claim of the petitioner for appointment under the Rules. The order dated 25.1.2000 (Annexure- CA2) states that in view of the letter dated 7.11.98 the petitioner cannot be given benefit of compassionate appointment. The letter dated 7.11.98 refers to the G.O. dated 26.10.98. In the counter affidavit the plea taken by the respondents is to the same effect that the benefit of the Rules of 1974 cannot be extended to the petitioner in view of the G.O. dated 26.10.98.

10. The Dying in Harness Rules 1974 have been made in exercise of powers under Article 309 of the Constitution of India. They came into

force on 21.12.1973. Rule 2 defines Government servant as under:-

"2. Definitions:- In these rules, unless the context otherwise requires:
(a) "Government servant" means a Government servant employed in connection with the affairs of Uttar Pradesh who-
(i) was permanent in such employment; or
(ii) though temporary had been regularly appointed in such employment; or
(iii) though not regularly appointed, had put in three years' continuous service in regular vacancy in such employment."

11. It is apparent from a reading of Rule 2 (a)(iii) that a person though not regularly appointed but has put in three years continuous service in a regular vacancy in such employment he would come within the ambit of definition of 'Government servant' for the purpose of these Rules. Such person need not be regularly appointed but must have put in three years continuous service in a regular vacancy. The Rules no where provide the specific categories of persons who can avail benefit of the Rules. The provision in the Rules are applicable to such persons who may be covered within the definition of 'Government servant' as defined in Rule 2(a). Therefore, in order to be covered under the definition of ' Government servant' for the purpose of these Rules the conditions as contemplated therein have to be satisfied. The G.O. dated 26.10.98 states that part time tube well operators are not entitled to the benefit of the Rulers of 1974 in as much as there is no provision in the said Rules relating to part time tube well operators. The G.O. has been issued on the aforesaid reason alone.

12. Whether a part time tube well operator would satisfy the conditions to be included in the definition of 'Government Servant' as defined in the Rules of 1974 would depend on the facts of the case wherein such claim is made for taking benefit of the Rules of 1974. The claimant would have to demonstrate that the deceased employee satisfied the requirements of Rule 2 (a) (iii) and therefore was a 'Government servant' for the purpose of these Rules. If such a test is satisfied in a case then definitely the benefit of the Rule of 1974 would flow to the claimant who is dependant of a deceased employee. The G.O. dated 26.10.98 would therefore, apply only to those part time tube well operators who do not qualify the test for being included in the definition of 'Government servant' as defined in the Rules of 1974. However, in case any employee, may be part time tube well operator or a daily wager or a work charged employee, satisfies the conditions as inumerated in Rule 2 (a)(i)(ii) and (iii) then he would be a 'Government servant' for the purposes of these Rules.

13. Taking the present case it is not disputed that the petitioner's father was appointed in 1987 and he continued to work continuously till he died on 20.8.99. The appointment of the petitioner's father was initially for a period of three years on being selected by a Selection Committee. The said appointment was then converted and he was appointed as tube well assistant in 1992 also for three years. He continued to work and was paid his salary regularly and there was no break in his service. This fact is also not denied by the respondents. The fact that the respondents required the services of the petitioner's father continuously since 1987 to 1999 is

indicative of the fact that the requirement was of a perpetual and regular nature. It is not the case of the respondents that the work of tube well operators no more exists. It has also not been pleaded that such tube well operators are no more required. On a vacancy which may occur of a part time tube well operator the tube well still has to be operated, therefore, the nature of work is existing day to day and the respondents have taken the services of the petitioner's father due to existence of work since 1987 continuously. During this period of nearly 12 years the salary has been disbursed by the respondents month to month. The nature of work required to be performed by the petitioner's father was of a regular nature as is apparent from a reading of the appointment letter dated 20.5.92 wherein the duties of the petitioner have been prescribed. It is also not disputed by the learned Standing Counsel that the part time tube well operators are being paid the same salary as regularly appointed tube well operators on the principle of 'equal pay for equal work.' The duties, qualifications and hours of working of part time tube well operators and regular tube well operators are identical has been held by this court and the Hon'ble Supreme Court in SLP © No.16219 of 1994 decided on 22.3.1995.

14. For the aforesaid reasons and the facts of this case it is concluded that the Government Order dated 26.10.1998 would not be applicable in the present case in as much as the petitioner's father would come under the definition of 'Government Servant' as defined under Rule 2(a) (iii) of the Rules for the purpose of appointment of his dependants on compassionate grounds.

15. Consequently the writ petition deserves to be allowed. The impugned orders dated 25.1.2000 and 29.1.2000 passed by the respondent no.2 and no.3 respectively are quashed. The matter is remitted back to the respondent no.2 to re-consider the petitioner's application dated 29.12.99 under the Dying in Harness Rules 1974. The respondent no.2 will take a decision on the same after giving full opportunity to the petitioner within three months from the date of a certified copy of this order is produced before him.

16. The writ petition is allowed. No order is passed as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2005

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE RAJES KUMAR, J.

Income Tax Reference No. 127 of 1993

The Commissioner of Income Tax (Central), Kanpur ...Applicant
Versus
M/s Pateshwari Electrical & Associated Industries (Pvt.) Ltd., Gonda ...Respondent

Counsel for the Applicant:
Sri Shambhe Chopra
S.C.

Counsel for the Respondent:

Income Tax Act 1961-Section 256 (2)-Income from leasing of Balrampur lodge to S.B.I.-receipts from workshop, Cold Storage Motor garage, Raj Oil Pump of Development Division whether should be taxed under head of business income or the income from other sources?-held-should be taxed as income from

business-accordingly the question No. 1,2 and 3 answered affirmative.

Held: Para 14

So far as question no. 3 is concerned, Tribunal has given reasoning for coming to the conclusion that the rent from cold storage, motor garage, Raj Oil Mill and approval charges may be taxed under head income from business and not under head income from other sources. We do not find any error in the view of the Tribunal.

Case law discussed:
51 ITR 353
20 ITR 451
147 ITR 692
83 ITR 700
249 ITR 47
263 ITR 143
247 ITR 516

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

1. At the instance of Commissioner of Income Tax, Tribunal has referred three questions, 1, 2, 3 and at the instance of assessee Tribunal has referred the following question, which is marked as question no. 4 under Section 256 (2) of the Income Tax Act, 1961, (hereinafter referred to as "***the Act"***) for opinion of this Court relating to the assessment years 1987-88 and 88-89:

"1. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in holding that income from leasing of Balrampur Lodge to S.B.I., was assessable as business income and not as income from house property?
2. Whether on the facts and in the circumstances of the case, the Hon'ble I.T.A.T., was correct in holding that expenses incurred on Nainital Property be allowed as business expenses ignoring the fact that these expenses were not at all related to business activity?
3. Whether on the facts and in the circumstances of the case, the Hon'ble Tribunal was correct in holding that treatment of receipts from workshop, cold storage, motor garage, Raj Oil Pump and supervision charges, of Development Division should be taxed under the head Income from business and not under the head income from other sources?
4. Whether the Tribunal was justified in law in holding that the Bank interest on Fixed Deposits representing the particular amount received from U.P. State Electricity Board against a Bank Guarantee furnished by the assessee was taxable for the Assessment Years 1987-88 & 1988-89 on the particular facts and circumstances of the case?"

The brief facts of the case are follows:

2. The assessee company has income from letting out of house property at Nainital and in addition has lease rent from letting out of workshop, cold storage, motor garage, Raj Oil and interest income plus Miscellaneous Income. During the year under consideration the assessee's claimed income from letting out of Nainital Lodge to S.B.I. on monthly rent of Rs.22,500/- Rs.2,77,410/- as business income was rejected and assessed as income from property. Expenses on the property claimed as business expenses were also disallowed. Similarly, receipts from workshop, cold storage, motor garage, Raj Oil Pump, supervision charges of Development Division, amounting to Rs.10,416; Rs.45,000/-; Rs.11,321/-; Rs.9,000/- and

Rs.20,300/- for the A.Y. 1987-88 as well as Rs.6,250/-; Rs.72,000/-; Rs.18,781/- and Rs.12,000/- respectively for the A.Y. 1988-89 respectively were assessed as income from other sources. Aggrieved with the decision of the Assessing Officer, the assessee preferred appeal before the Ld. C.I.T. (Appeals), who vide his consolidated order dated 21.09.1992 has decided the issues against the assessee. Being dissatisfied with the decision of Ld. C.I.T. (A) the matter was taken up by assessee before I.T.A.T., who vide its consolidated order dated 21.09.1992 has decided the issue in favour of assessee.

3. The contention of the assessee before the Tribunal, which his referred in the order of the Tribunal were as follows:

"(i) The entire property is divided into two parts by a nalla, the main part comprising of the main building and the extensive grounds apourtenant thereto and the other part on the other side of the nalla comprising of outhouses and servant quarters.

(ii) Upto assessment year 1984-85 the main building was in the possession of the assessee and used as a guest house and was assessed to tax as a business assets.

(iii) The guest house and servant quarters were unauthorisedly occupied by Govt. servants, etc. the income from which was offered to tax under property. However, for the year under appeal, there is no property income, the assessee has filed eviction proceedings against the unauthorized occupants of the servant's quarters.

(iv) The assessee in conjunction with PICCUP had got the main building and the property surveyed by an expert and a report from him was received for the conversion of the property into a Hotel.

(v) During the process of conversion a proposal was received from S.B.I. for the main building and furniture with 30 beds accommodation for trainees alongwith other facilities for conducting a training centre.

(vi) As the activity was akin to hotel business, the offer was accepted especially in view of the fact that the offer was for use of the premises throughout the year in contract to the seasonal character of the tourist trade in Nainital.

(viii)A Sarai Licence was obtained from the D.M. for carrying on the above activity as Balrampur Lodge and also a licence from the District Health Officer. Such licences have been issued from year to year upto date.

(ix) The Municipality gave a notice for revision in the Municipal Taxes after the SBI started the Training Centre. The assessee represented their case for being assessed as a business activity as in the case of any hotel. The Nainital Municipality accepted the contention.

(x) Nearly 1/3rd of the main building is still in use of the assessee housing a Branch Office and the office of the Deputy Agent and quarters for the visiting Directors, Secretary and other staff of the Company, Gardeners, sweepers etc. have also been engaged for maintenance and upkeep of the property, the lawns and the garden which are in the exclusive possession of the assessee.

(xi) The assessee also relies on the fact that the lease with SBI was for a period of 5 years with an option for lease is for a temporary period and the assessee has already indicated to S.B.I.

that after the ten year period they want proper tourist facility.

(xii) It is the assessee's case that in view of the huge and continuous losses suffered by it over the past several years, the leasing of the property for a period of 10 years could be considered as a business activity as per decided case law.

(xiii) The assessee has also referred to the fact that it has set up another hotel at its headquarter in Balrampur from October, 1987, the income from which has been assessed to tax by the A.C. in the immediately succeeding assessment year 1989-90 under the head 'Business'. This according to the assessee is a pointer to the assessee's objective of conducting hotel and restaurant business.

(xiv) The Tribunal in its earlier order has missed on most of the points. It is argued that the authority under the Sarai Act is the D.M. and the Tribunal is obliged to accept the D.M.;s authority rather their find fault with the D.M.'s action. Besides, if the D.M. should order the closure of the establishment under the Sarai Act, the assessee is bound to close down the establishment of the Training Centre.

(xv) It is further pointed out that the assessment by the Nainital Municipality of the property as a business asset and that the assessee had suffered continuous and huge losses in the past and the lease to SBI was for a short duration were not kept in view in the earlier years.

(xvi) The recent Inspection report amply supports the above submissions.

(xvii) In any case, the lease to S.B.I. is not a lease of property simpliceter and its assessment under the head property for the earlier year appears to have been in error."

4. Apart from the aforesaid submissions, perusal of the assessment order for the assessment year 1987-88 shows that the assessee had also submitted that the assessee had to maintain a guest register, showing all details of guest like their names, address, date of arrival, period of stay, number of occupants, coming from, destination, room number etc.

Tribunal on the aforesaid fact held as follows:

"After hearing the rival submissions and after going through the material placed before us and also after on-the-spot inspection, we are of the view that it is a case of exploitation of an asset by a businessman for getting the maximum return on a commercial asset, although temporarily let out to State Bank of India with certain modification. At the time of inspection of the property, we noticed that there was a nalla passing through the land, which separates the main building from the quarters. Some rooms were still being used for housing the Administrative Office faculty Members' Office while others were used as hotel accommodation for the visiting trainees. It was also noticed that structural changes had been made in the building to suit the requirements of the visiting trainees. The licence granted by the District authorities under the Sarai Act was found displayed in the front portion of the building. The back portion of the building was housing the office of the company and the Resident Representative of the assessee-company was having his office. One room was being used as the office of the visiting Officers of the Company, two rooms were used for the stay of the Officers of the company visiting Nainital on

company's work. The lawns were found to be in the possession of the company and they are maintained by the employees of the company. The State Bank of India was not allowed to use the lawns. From the copy of the correspondence produced in the court, we notice that the Chief General Manager, State Bank of India, Moti Mahal Marg, Lucknow has already been informed to quit and vacate the premises by the end of the year, i.e. by 31.12.1992. Upto assessment year 1984-85 this Nainital Lodge property was used and accepted by the department as a business asset. The Expert Project report was commissioned with a view to convert the property into hotel. During the process of conversion of the property into a lodge house, an offer was received from S.B.I. to provide this place with furniture and fittings for the use of their training center with accommodation of 30 beds, for the visiting trainees. The hotel business in Nainital was seasonal and the offer of the S.B.I. was accepted. A Sarai licence was obtained from the District Magistrate, Nainital for carrying on the said business as also a licence from the District Health Officer and this licence has been renewed from year to year. Nearly 1/3rd of the accommodation was in the use of the assessee housing a Branch Office of the company. The Municipality of Nainital has assessed the property as a hotel establishment. This is clear from pages 121 to 124 of the Paper Book II. The servant's quarters on the other side of the nalla had been offered to tax under the head property, but those occupants were given notices to vacate and the assessee was not receiving anything from the under the head property income. The continuous losses incurred by the company in the past years seriously eroded the paid up capital of the company and in an effort to partly recour these losses with a short term lease agreement was entered into with S.B.I. The entire building came in the use of the S.B.I. from May, 1984 only indicating the temporary natura of the arrangement. In view of these facts, we are of the view that leasing out the National lodge to S.B.I. was nothing except exploitation of a business asset and the same was assessable as income from business. The assessee's contention in this regard are accepted by us for both the years under consideration, and the contention relied to the contrary on behalf of the department are found not tenable. This point is decided in favour of the assessee."

With regard to the question no. 3 Tribunal has recorded the following findings:

"The next controversy relates to the treatment of receipts from workshop, Cold Storage, Motor Garage, Raj Oil Pump and supervision charges of Development Division. It was argued before the first Appellate Authority that the income from commercial asset was treated as business income for earlier years, that the case laws cited by the Assessing Officer were not new and despite those case laws income from commercial asset was used as business income and was taxed as such in earlier years, that the leasing was not of house property but a complex operation involving machinery and plant etc. that no new facts were brought to the notice of the Assessing Officer and that his decision to assessee the income under the head "Other Sources" represented only a change of income, that the letting

out was a temporary phase and not a permanent arrangement, that the assessee possessed the cold storage, that the 'Supervision charges' received for supervision of Construction of Digvijaya Complex could not be assessed as income from "Other Sources". The C.I.T. (A) rejected the submission of the assessee and held that the income was a assessable under the head "Other Sources". We notice that the finding recorded by the learned first Appellate Authority in paragraph 14 of his order for these two years is not based on evidence when he says that the assessee's task was confined only to taking of lease rent without any intention to resume the business and that it could not be equated with the period of full or temporary exploitation of assets. From the whole lot of correspondence produced before us, it could not be said that it was a permanent arrangement in the case of the appellant-company. The inference of the Ld. C.I.T. (A) that it premises having been leased was almost appreciation of the facts and material on record. It is noted that the cold storage was re-possessed by the assessee. Therefore, the inference that it was a permanent arrangement stands automatically rebutted. Therefore, we are of the view that the treatment of receipts from workshop, cold storage etc. should be taxed under the head income from business and not under the head income from 'Other Sources'. This point is decided in favour of the assessee and contentions to the contrary raised by the learned Department Representative are found not tenable."

5. With regard to the question no. ---- referred at the instance of the assessee brief facts of the case as follows:

The assessee undertaking for the manufacture and distribution of electricity was acquired by UPSEB on 13.05.1964. A dispute arisen about the quantum of compensation payable by UPSEB to the assessee. The matter was referred to the Arbitrators who in addition to the compensation already paid, granted under their award dated 24.12.1973; further a sum of Rs.43,82,000/- with interest @ 6% from the date of the award until the date of payment of the additional compensation awarded. The UPSEB disputed the award before the District Judge and the High Court, who confirmed the award. Under the High Court's judgment the assessee was entitled to a sum of Rs.67,68,514/- inclusive of interest @ 6%. The UPSEB approached the Supreme Court under Special Leave of Appeal disputing, inter-alia, the award of 6% interest by the Arbitrators. The assessee approached the Supreme Court for interim relief and the Supreme Court by its order dated 04.05.1982 awarded 50% of the claim against provision of bank guarantee. The payment received from UPSEB was lodged in Fixed Deposit @ 10% interest against which the bank issued bank guarantee as required by Supreme Court. Assessee transferred the interest @ 6% interest earned from the fixed deposit to the suspense account in which a sum of Rs.33,84,257/- stood credited to the account of UPSEB until the final outcome of the decision before the Supreme Court. Supreme Court dismissed the appeal on 01.02.1991. In these facts, Tribunal held that the in view of the dismissal of the appeal filed by UPSEB, all doubt about the uncertainty of the accrual of interest of compensation has come to an end and it can not be argued by the assessee now that the compensation claim of the assessee is in

jeopardy. The argument raised on behalf of the assessee that the interest earned on the part of such compensation is in jeopardy and can not be rightly treated as income, has no legs to stand. Tribunal accordingly, held that the interest accrued on the fixed deposit was the income of the assessee.

6. Heard Sri Shambhu Chopra, learned Standing Counsel appearing on behalf or the Revenue. No one has appeared on behalf of the assessee.

7. We have perused the order of the Tribunal and the authorities below. We do not find any error in the order of the Tribunal. Before coming to the facts of the case, it would be appropriate to examine the various cases on the subject.

8. In the case of **Sultan Brothers Pvt. Ltd. Vs. CIT, reported in 51 ITR, 353**. The Apex Court while considering whether income from letting out a building is a business income or a property income. Apex Court observed as follows:

"whether a particular letting is business has to be decided in the circumstances of each case. Each case has to be looked at from a business point of view to find out whether the letting was the doing of a business or exploitation of his property by an owner."

9. In the case of **Commissioner of Excess Profits Tax, Bombay City Vs. Shri Lakshmi Silk Mills Limited, reported in 20 ITR 451,** the assessee company was manufacturer of silk cloth and as a part of its business it installed a plant for dying silk yarn. Due to the war the said plant was unused and was lying idle for sometime and therefore, was let out to a person on a monthly rent. The question for consideration was whether the rent received was chargeable to tax as profit of business or income from other sources. Apex Court held that it was chargeable to tax as income from business. While dealing with the aforesaid question. Apex Court observed as follows:

"We respectfully concur in the opinion if the learned Chief Justice that if the commercial asset is not capable of being used as such, then its being let out to others does not result in an income which is the income of the business, but we cannot accept the view that an asset which was acquired and used for the purpose of the business ceased to be a commercial asset of that business as soon as it was temporarily put out of use of let out to another person for use in his business or trade. The yield of income by a commercial asset is the profit of the business irrespective of the manner in which that asset is exploited by the owner of the business. He is entitled to exploit it to his best advantage and he may do no either by using it himself personally or by letting it out to somebody else. Suppose, for instance, in a manufacturing concern the use of its plant and machinery can advantageously be made owing to paucity of raw materials only for six hours in a working day, and in order to get the best yield out of it, another person who has got the requisite raw materials is allowed to use it as a licencee on payment of certain consideration for three hours; can it be said in such a situation with any justification that the mount realized from the licensee is not a part of the business income of the licensor. In this case the

company was incorporated purely as a manufacturing concern with the object of making profit. It installed plant and machinery for the purpose of its business, and it was open to it if any time it found that any part of its plant "for the time being" could not be advantageously employed for 4 earning profit by the company itself, to earn profit by leasing it to somebody else.

We are therefore of the opinion that it was a part of the normal activities of the assessee's business to earn money by making use of its machinery by either employing it in its own manufacturing concern or temporarily letting it to other for making profit for that business when for the time being it could not itself run it. The High Court therefore was in error in holding that the dyeing plant had ceased to be a commercial asset of the assessee and the income earned by it and received from the lessee Messrs. Parakh & Co. was not chargeable to excess profits tax."

10. In the case of **CIT Vs. Shanmygham, reported in 147 ITR 692.** Assessee constructed a building consisting of 68 rooms and provided various amenities therein for the purpose of letting them out individually. The assessee's claim that the rent received from the tenants by letting out the rooms should be assessed as business income was rejected by the **ITO**, who held that the same should be assessed as property income. Tribunal however, accepted the claim of the assessee. In reference, High Court has upheld the view of the Tribunal. High Court has held that it is not possible to have any axiomatic principle to find out whether in running a particular lodging house, the assessee had been carrying on a business or merely letting out the property and the question has to be decided on the basis of the facts of each case. In the instant case, the various features satisfied the requirements of the lodging house being run on a commercial basis rather than as the owner of a property. The Tribunal was therefore, right in its view that the income derived by the assessee by letting out the lodging house should be assessed as business income.

11. In the case of **S.G. Mercantile Corporation P. Ltd. Vs. CIT, reported in 83 ITR, 700**. Company was incorporated with the object specified in its memorandum of association to take on lease or otherwise acquire and to hold, improve, lease or otherwise dispose of land, houses and other real and personal property and to deal with the same commercially. Company took on lease a market place for initial term of 50 years spent Rs.5 lacs for the purpose of remodeling and repairing and sublet to the various persons. Question was whether the income arising from subletting was the business income. Apex Court held as follows:

i) that since the appellant-company was not the owner of the property or any part thereof, no question of making the assessment under section 9 arose;

ii) that the definition of "business" in section 2 (4) was of wide amplitude and it could embrace within itself dealing in real property as also the activity of taking a property on lease, setting up a market thereon and letting out shops and stalls in the market;

iii) that, on the facts, the taking of the property on lease and subletting

portions thereof was part of the business and trading activity of the appellant and the income of the appellant fell under section 10 of the Act."

11. In the present case Tribunal found that property in dispute was being used as a guest house upto the assessment year 1984-85 and this Nainital lodge was used and accepted by the department as a business property. The Expert Project report was commissioned with a view to convert the property into hotel. During the process of conversion of the property into a lodging house, an offer was received from SBI to provide this place with furniture and fitting for the use of their training center with accommodation of 30 beds for the visiting trainees. The hotel business in Nainital was seasonal and the offer of the SBI as accepted. A sarai licence was obtained from the District Magistrate, Nainital for carrying on the said business and had also licence from the District Health Officer and this licence has been renewed from year to year. The municipality of Nainital has assessed the property as a hotel establishment. It was also observed that continuous losses incurred by the company in the past years seriously croded the paid up capital of the company and in an effort to partly recoup these losses with a short term lease agreement was entered into with S.B.I. On these facts Tribunal held that leasing out the Nainital lodge to SBI was nothing except exploitation of a business asset and was assessable as income from business. It was also contended by the assessee before the assessing authority that they have also maintained a guest registration register in which details of the guest namely their names, address, date of arrival, number of occupant etc. have been maintained. This shows that as part of running of the lodge, the entire room of the lodge had been let out for the short period to SBI. Now it is seen that now a days it is common feature that the big hotels used to let out rooms to the various companies for year or more than year. Therefore, it appears that intent of the assessee was to run the lodge and letting out of the all rooms to SBI for a particular period was incidental and in as much as letting out of the all rooms to SBI for a particular period was incidental and in as much as letting out of the rooms to SBI for their trainees was a part of running of the lodge business. Therefore, Tribunal has rightly held that the receipt from SBI was liable to business income and the necessary expenditure incurred as business expenditure was liable to be allowed.

Decision cited by learned Standing Counsel are distinguishable on the facts of the case.

12. In the case of **CIT Vs. Shambhu Investment Pvt. Ltd. Reported in 249 ITR 47,** which has also been approved by the Apex Court in the case of **Shambhu Investment Pvt. Ltd. Vs. CIT, reported in 263 ITR 143.** A portion of the property was used by the assessee itself or its own business purpose, the rest of the property had been let out to various occupants with furniture and fixtures and air conditioners for being used as table space. The assessee provided services like watch and ward staff, electricity and water and other common amenities. Service rendered to the various occupants according to such agreement was not separately charged and the monthly rent payable was inclusive of all charges to the assessee. Calcutta High Court held that agreement shows that

assessee had let out office to the occupants on monthly rent which was inclusive of all charges to the assessee and the entire cost of the property was let out to the occupants and owner had been recovered as rent from premises by the assessee, therefore, could not be said that the assessee was exploiting the property for its commercial business activity.

13. In the case of **CIT Vs. Purshottam Dass, reported in 247 ITR 316** property constructed as a residential unit was let out to Government department was temporary used for office purpose earlier. Division Bench of Delhi High Court held that construction was made for residential purpose in a residential area and was mere temporary non-user as residence and consequent assessee we refuse to answer the said question in the absence of assessee.

16. In the result, question nos. 1,2 and 3 are answer in affirmative, i.e. in favour of the assessee and against the Revenue and question no.4 is returned unanswered. There shall be no order as to cost. **Question decided affirmative.**

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2005

BEFORE
THE HON'BLE MRS. POONAM SRIVASTVA, J.

Second Appeal No. 1561 of 2001

Aftab Ahmad ...Defendant-Appellant
Versus
Mohd. Soyab and others
...Plaintiff-Respondent

Counsel for the Appellant:
Sri Sankantha Rai
Sri Dr. Vinod Kumar Rai

temporary user for office purposes will not make the rent chargeable as business income. It has been held that liable to be taxed as property income.

14. So far as question no. 3 is concerned, Tribunal has given reasoning for coming to the conclusion that the rent from cold storage, motor garage, Raj Oil Mill and approval charges may be taxed under head income from business and not under head income from other sources. We do not find any error in the view of the Tribunal.

15. We accordingly, answer the question nos. 1,2 and 3 in affirmative, i.e. in favour of the assessee and against the Revenue. So far as question no.4, which has been referred at the instance of the Sri Vijay Kumar Rai

Counsel for the Respondents:
Sri K.N. Rai
Sri R.C. Upadhyay
Sri Vivek Mishra

(A) Indian Evidence Act, 1872-S.-62 and 68 readwith Mohammdan Law-Section 63, 118-unregistered will-executed-regarding entire property-while other natural heir were alive-whether can such will be treated a valid document-which has been executed against the personal law? Held-'No' unless the original will deed filed and attested-finding regarding title on the basis of such will can not sustained.

Held: Para 15

I now proceed to examine the effect of failure of the plaintiff to produce the original will which is the basis of the suit and its result. Admittedly in the present case neither the original unregistered will dated 3.11.1969 was filed by the plaintiff nor the execution and

attestation of the same was proved. The plaintiff's suit was decreed in clear violation of specific provisions of the Code as provided in Order 7 Rule 14. It is settled law that merely the presentation of the will is not sufficient unless the execution and its attestation is proved in accordance with law. The provisions of Sections 62 and 68 of the Indian Evidence Act, 1872 was not followed. The will was a primary evidence which was required to be proved in accordance with Evidence Act before any reliance could have been placed on the said will by the courts below. It was in clear violation of Sections 62 and 68 of the Indian Evidence Act and the court was led away by the fact that previously Mohd. Soyeb contested with his mother on the question of will and lost the case up till the stage of the High Court. The rights of the appellant was not considered, since he was not a party to the suit. The production of the will in the suit was all the more necessary for the reason that the will executed was against the specific provisions of the Personal Law. Late Shukarullah could not bequeath the entire property as his natural heir Smt. Kaneez Fatma was alive and had 1/2 share in the property of her father. In view of Sections 118 and 63 of Mohammadan Law the will could not be held to be valid whereas in the instant case the will itself was not produced in the court. In the circumstances, the court had no occasion to examine the contents of the will. The plaintiff was liable to prove the will. The courts below completely overlooked this material aspect specially when the case of the appellant was that no such will was executed by Late Shukarrullah. The Apex Court in its decision in the case of Madhukar D. Shende Vs. Tarabai Aba Shedage, J.T. 2002(1) S.C. 74 held that the requirement of proof of a will is the same as any other document except that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, conclusions can be arrived at only then the court could record a finding in respect of the will. It is well settled that one who propounds a will must establish the competence of the testator to make the 'will' at the time when it was executed. In the instant case, admittedly 'will' itself was not on record and the plaintiff asserted his claim on the basis of a 'will' on which the courts below had adjudicated previously in a suit to which the present appellant was admittedly not a party. More over since the document itself was not produced in the court, the courts below could not record a finding in favour of the plaintiff-respondent holding him to be an exclusive owner on the basis of the will. In another case Ravinder Singh Vs. Janmeja Singh and others, (2000) 8 Supreme Court Cases, 191, the Apex Court had said that no evidence can be led on the plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings. In the instant case, since the very document itself does not form a part of the record, there was no occasion of leading any evidence and in the circumstances, I come to a conclusion that non production of the original will dated 3.11.1969 is fatal to the plaintiff's case. First substantial question of law is, therefore, decided in favour of the appellant. The courts below committed a manifest illegality in decreeing the suit in absence of the original document i.e. 'will', which is the basis of the suit.

Case law discussed:

J.T. 2002 (1) SC-74
2000 (8) SCC-191
AIR 1965 SC-948
AIR 1953 SC-235
AIR 1983 SC-684

(B) Code of Civil Procedure Section 11- Res-judicata-in previous suit-appellant was not party-previous suit between the plaintiff and his mother-in absence of

the plea of collusive suit-provision of section 11 not attracted.

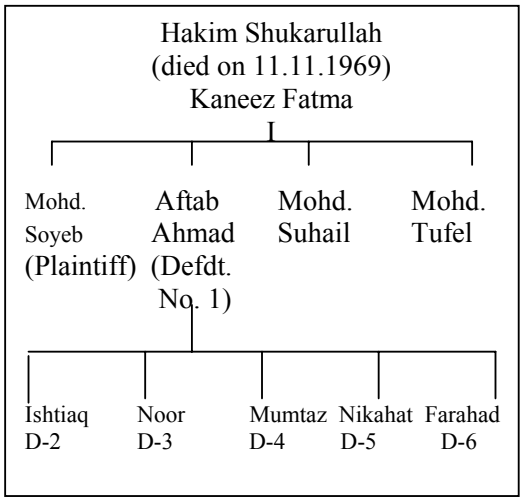
Held: Para 18

Case law discussed:

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Sankatha Rai Advocate, assisted by Sri Vinod Kumar Rai, Advocate, counsel for the appellant and Sri K.N. Rai, learned counsel for the respondents.

2. This is defendant's appeal. The plaintiff-respondents filed a suit No. 439 of 1982 against the appellant for a relief of possession over the house shown by figures 5,6,7,8,9,10,11,12,13,14,15 in the plaint. By way of amendment, relief of damages at the rate of Rs. 200/- per month from 15.9.1982 till the date of possession was also claimed. The appellant filed his written statement on 9.3.1987 disputing each and every allegations in the plaint. The Munsif West, Ballia vide judgment dated 10.8.1994 decreed the plaintiff's suit for relief of possession but dismissed the claim of damages. The appellant filed Civil Appeal No. 87 of 1994 and plaintiffs filed his cross objection. The Additional District Judge, Ballia vide judgment dated 26.11.2001 dismissed the appeal and cross objections.



3. The dispute is between the family member in respect of the house shown in the plaint. The admitted pedigree of the parties is detailed below:

4. The subject matter of the suit is a double storied Pakka house situated in village Firozpur, Pargana Kopachit Sharkee, District Ballia. The basis of the plaintiff's claim is an unregistered will dated 3.11.1969 alleged to be executed by Hakim Shukarullah (maternal grand-father of the plaintiff and defendant no. 1) in respect of the property in dispute. The will was in favour of the plaintiff and as such plaintiff claimed his sole ownership of the disputed property. Though it was pleaded that the parties were living in the house in dispute since life time of Shukarullah and even after his death, the defendant-appellant continued to live in the house with the permission of the plaintiff-respondents. On 12.9.1982 the plaintiff revoked the license and filed a suit for possession and damages. The defendant-appellant specifically denied the execution of the will by Shukarullah in favour of the plaintiff on several counts. The appellant pleaded that the will can not stand the test of law as according to Section 118 of the Muslim Law, a will can not be executed for more than one third share. The " term sharer" is defined under Section 63 of the Said Act. On 18.8.1992 the defendant-appellant filed additional written statement.

5. The plaintiff had filed another amendment application along with replication stating that the plaintiff's mother Kaneez Fatma, daughter of Shukarrullah had instituted Original Suit

No. 154 of 1975 in the court of Munsif West, Ballia for cancellation of the will which was dismissed on 14.3.1980. Thereafter a Civil Appeal No. 266 of 1980 was filed by Kaneez Fatma in the court of Additional District Judge, Ballia and the same was dismissed on 22.3.1982. A second appeal No. 2008 of 1982- Kaneez Fatma Vs. Mohd. Soyab was filed in this Court which was dismissed on 30.8.1989. However, it is admitted that the defendant-appellant was not a party in the said suit. The plaintiff claimed that it was the defendant-appellant who was doing pairvi on behalf of his mother Kaneez Fatma and as such the judgment of Original Suit No. 154 of 1975 which has been upheld upto the stage of High Court, will operate as resjudicata. The defendant-appellant also pleaded that in the year 1969 the plaintiff himself had filed a suit against Hakim Shukarullah and others under Section 229-B of U.P.Z.A. & L.R. Act. There was no mention of existence of a will in the suit and since in the year 1969 the plaintiff was litigating with Hakim Shukarullah it is absolutely beyond imagination that Shukarullah will execute a will in favour of plaintiff excluding share of his wife and the defendant.

6. The trial court framed as many as 8 issues, however no issue was framed by the trial court on the question as to whether any will dated 3.11.1969 was executed by Late Shukarrullah in favour of the plaintiff and also on the question of principles of resjudicata. The trial court decreed the suit of the plaintiff on 10.8.1994, though issue no. 6 was decided against him. In the circumstances, the claim of damages at the rate of Rs. 200/- per month w.e.f. 15.9.1982 was dismissed by the trial court. However, the defendant-appellant was directed to put the plaintiff in possession after vacating the premises within a period of one month. This judgment was challenged by the appellant by filing Civil Appeal No. 69 of 1994 which was also dismissed on 26.11.2001. Both the judgments have been challenged in the present second appeal which was admitted on two substantial questions of law.

(1) Whether the courts below committed manifest illegality in decreeing the suit of the plaintiff on the ground of failure of the plaintiff to produce original will dated 3.11.1969?
(2) Whether the courts below committed manifest illegality and its judgment and decree would be sustained, since the principle of resjudicata was not attracted in the facts of the instant case.

7. The first argument advanced on behalf of the defendant-appellant is that in view of the Order 7 Rule 14 C.P.C., when a suit is instituted on the basis of a document which is claimed to be in possession of the plaintiff, he shall enter the document in the list and shall produce in the court when the plaint is presented by him and copy there of is to be filed along with a plaint. In the instant case neither the original unregistered will dated 3.11.1969 was filed by the plaintiff nor the execution and attestation of the same was proved. In the circumstances, the learned counsel has laid emphasis that the provision of Section 62 of the Evidence Act, 1872 was not complied with. The document was necessarily to be proved by primary evidence, the plaintiff was liable to prove the same before the court, in absence of the same, no reliance could be placed on the document which

was never produced in the court. Under the provisions of Section 68 of the Indian Evidence Act and 63 of Indian Succession Act, it is mandatory that the original will should be brought before the Court and execution and attestation there of was liable to be proved which the plaintiffs have failed to do. The second ground for challenge that the will is not genuine and not worth placing any reliance is, that the will has been executed bequeathing the entire property which is against the specific provisions of Muslim Law. The provisions of Section 118 of Muslim Law is quoted below:-

"Limit of testamentary power:- *A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator (e)."*

8. Sri Sankatha Rai has also challenged the plaintiff's case alternatively that if the will is ignored then according to the order of inheritance when Shukarullah died on 3.11.1969, his natural heir was his daughter Smt. Kaneez Fatma who was entitled to inherit half share of the property of her father. The remaining half share would go to the other co-sharer i.e. sons of Kaneez Fatma. This argument has been advanced on the basis of Section 63 of Muslim Law. The scheduled along with Section 63 as detailed in the Act (Mohammadan Law of Mulla) provide distribution of respective shares. It has been argued that Smt. Kaneez Fatma, daughter of Late Shukarullah will inherit half share and the remaining half share would go to the sharers i.e. sons of Kaneez Fatma.

9. In the circumstances, counsel for the appellant has emphatically disputed the existence of the will which was not produced before the court and in absence of the same, the courts below committed a substantial error of law in accepting the version of the plaintiffs without there being any legal evidence to come to the conclusion that Late Shukarullah had bequeathed the entire property to the plaintiffs. Sri Rai has further submitted, assuming that the will would have been brought before the court even then it could not be accepted for the reason that it was against the specific provision of Personal Law. Only one third of the property could have been bequeathed and specially when the natural heir was alive, the entire property could not be given to the plaintiff to the exclusion of the other heirs who are legally entitled under the Personal Law. Besides the defendant is also entitled to his share in the remaining 1/2 share in absence of a will.

10. The claim of the appellant in the pleadings is that in the North of the disputed house he has got map sanctioned in the year 1969 on the open land and got the constructions made. The existence of the will was specifically denied. The plaintiff had amended his plaint subsequently and stated that the defendant-appellant was residing in the disputed premises as a licensee and since the permission has been withdrawn, they are no more entitled to remain in occupation. The appellant had also tried to dispute the will on an assertion that Hakim Shukarullah was insane before his death and his mental condition was precarious. He had not executed any will, therefore, the will is forged. Besides, the plea of adverse possession was taken by

the defendant which the courts below did not accept on the ground that the plea of adverse possession has not been taken in written statement and also extent of period and nature of adverse possession has also not been given. Since the appellant has failed to specify and establish as to on what date the adverse possession began, it can not be said that he has perfected his title, on the basis of said finding, the appeal was also dismissed.

11. The stand taken by the plaintiff-respondent on the question of resjudicata has been accepted by the courts below and it was concluded that since all the objections raised in respect of execution of a will was raised and decided in the previous proceedings vide Suit No. 154 of 1975- Kaneez Fatma Vs. Mohd Soyeb, Paper No. 19-C which was decreed in favour of Mohd. Soyeb. The appeal No. 206 of 1980-Kaneez Fatma Vs. Mohd Soyeb was dismissed by the appellate court vide judgment and decree dated 22.3.1982. The second appeal against the said order vide Appeal No. 2008 of 1982, Paper No. 112-C was also dismissed on 30.8.1989. In compliance of the said judgment, the mutation suit was filed which was also decided by the Naib Tehsildar, Ballia on 13.3.1989. The courts below concluded that the matter has already been decided up till the stage of Hon'ble High Court, it will operate as resjudicata and can not be gone into in the instant suit and consequently the defendant's appeal was dismissed.

12. Learned counsel for the appellant has argued that since the appellant was not a party to the previous suit, it would not operate as resjudicata and it can very well be adjudicated in the present appeal.

13. Since the appeal has been admitted on the two substantial questions of law, I proceed to decide the first question as to whether the courts below committed an illegality in decreeing the suit of the plaintiff even though he failed to produce original will dated 3.11.1969. It is admitted position that the original will was not produced by the plaintiff which was the basis of the suit. Learned counsel has emphatically argued that Order 7 Rule 14 C.P.C. clearly makes it mandatory that the plaintiff shall produce in the court a document which is the basis of the suit and it shall be filed along with plaint. For ready reference Order 7 Rule 14 C.P.C. is quoted below:-

*"**Production of document on which plaintiff sues or relies**-*

(1) Where a plaintiff sues upon a document or relies upon a document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in court when the plaint is presented by him, and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not without the leave of the

Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

14. Order 14 Rule 3 C.P.C. specifies that on what material issues may be framed in a suit. A perusal of the Order 14 Rule 3 C.P.C. specifies that the issues are to be framed on the basis of the allegations made by parties in the pleadings or in answers to interrogatories delivered in the suit and contents of documents produced by either party. Order 14 Rule 3 C.P.C. is quoted below:-

"Materials from which issues may be framed;- *The Court may frame the issues from all or any of the following materials:*

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party

15. I now proceed to examine the effect of failure of the plaintiff to produce the original will which is the basis of the suit and its result. Admittedly in the present case neither the original unregistered will dated 3.11.1969 was filed by the plaintiff nor the execution and attestation of the same was proved. The plaintiff's suit was decreed in clear violation of specific provisions of the Code as provided in Order 7 Rule 14. It is settled law that merely the presentation of the will is not sufficient unless the execution and its attestation is proved in accordance with law. The provisions of Sections 62 and 68 of the Indian Evidence Act, 1872 was not followed. The will was a primary evidence which was required to be proved in accordance with Evidence Act before any reliance could have been placed on the said will by the courts below. It was in clear violation of Sections 62 and 68 of the Indian Evidence Act and the court was led away by the fact that previously Mohd. Soyeb contested with his mother on the question of will and lost the case up till the stage of the High Court. The rights of the appellant was not considered, since he was not a party to the suit. The production of the will in the suit was all the more necessary for the reason that the will executed was against the specific provisions of the Personal Law. Late Shukarullah could not bequeath the entire property as his natural heir Smt. Kaneez Fatma was alive and had 1/2 share in the property of her father. In view of Sections 118 and 63 of Mohammadan Law the will could not be held to be valid whereas in the instant case the will itself was not produced in the court. In the circumstances, the court had no occasion to examine the contents of the will. The plaintiff was liable to prove the will. The courts below completely overlooked this material aspect specially when the case of the appellant was that no such will was executed by Late Shukarrullah. The Apex Court in its decision in the case of **Madhukar D. Shende Vs. Tarabai Aba Shedage, J.T. 2002(1) S.C. 74** held that the requirement of proof of a will is the same as any other document except that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian

Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, conclusions can be arrived at only then the court could record a finding in respect of the will. It is well settled that one who propounds a will must establish the competence of the testator to make the 'will' at the time when it was executed. In the instant case, admittedly 'will' itself was not on record and the plaintiff asserted his claim on the basis of a 'will' on which the courts below had adjudicated previously in a suit to which the present appellant was admittedly not a party. More over since the document itself was not produced in the court, the courts below could not record a finding in favour of the plaintiff-respondent holding him to be an exclusive owner on the basis of the will. In another case **Ravinder Singh Vs. Janmeja Singh and others, (2000) 8 Supreme Court Cases, 191**, the Apex Court had said that no evidence can be led on the plea not raised in the pleadings and no amount of evidence can cure defect in the pleadings. In the instant case, since the very document itself does not form a part of the record, there was no occasion of leading any evidence and in the circumstances, I come to a conclusion that non production of the original will dated 3.11.1969 is fatal to the plaintiff's case. First substantial question of law is, therefore, decided in favour of the appellant. The courts below committed a manifest illegality in decreeing the suit in absence of the original document i.e. 'will', which is the basis of the suit.

16. The second substantial question of law is regarding application of principles of resjudicata as the matter was already adjudicated upon in the previous Suit No. 154 of 1975. Section 11 of the Civil Procedure Code defines resjudicata which is quoted below:-

*"**Res Judicata**- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."*

17. The essence of the principles of resjudicata is that the matter should be directly and substantively an issue decided in a previous suit between the same parties. In the present case, it is admitted fact that the will was being contested by the mother of Smt. Kaneez Fatma with Mohd. Soyeb. A perusal of the two judgments of the courts below reveals that as many as 8 issues were framed but not a single issue was on the question of resjudicata. The lower appellate court itself has carved out a case and recorded a finding that since the previous suit was contested between Smt. Kaneez Fatma and Mohd. Soyeb up till the stage of High Court, the appellant can not agitate the same in the present appeal and held to be barred by resjudicata and finally on this ground alone dismissed the appeal. The trial court has also not framed any issue on the question of resjudicata but since the appeal has been dismissed on the ground of resjudicata alone, the court should have framed the issue and remanded the matter to the trial court. However since the second substantial

question of law is a legal plea and lower appellate court decided to consider the question of resjudicata was well within its right, but perusal of the impugned judgment shows that he has completely failed to consider and record a finding on the aspect that in the previous proceedings the appellant was not a party then in view of the settled principle enunciated by the Apex Court as well as various High Court that previous litigation should necessarily be between the same parties. He was led away on this question alone that since the matter has already been adjudicated upon in previous suit between the mother and the plaintiff, it need not be decided in the second suit. Counsel for the appellant has placed reliance on a number of decisions, **Isher Singh Vs. Sarwan Singh and others, A.I.R. 1965 S.C. page 948**. In the said case, the Apex Court while applying principles of Section 11 Civil Procedure Code had categorically held that all the five conditions necessary to attract the provisions of Section 11 C.P.C. was satisfied whereas in the present case the appellant was not a party to the suit and in the circumstances, no issue was framed in regard to right of the present appellant. No evidence was led on the said question as he was not a party and consequently no finding was recorded so for as the right and share of the appellant is concerned. The second case relied upon by the counsel for the appellant is **Trojan & Co. Vs. RM. N.N. Nagappa Chettiar, A.I.R. 1953 S.C. page 235.** The second argument so far the question of applicability of principle of resjudicata is concerned, as advanced by Sri Sankatha Rai Advocate that it is well settled principle of law that the judgment of the former suit is not covered by the provisions of Sections 40, 41, 42 and 43 of the Evidence Act and it is wholly irrelevant and not admissible in evidence. It is held by the Apex Court in the case of **State of Bihar and others Vs. Sri Radha Krishna Singh and others, A.I.R. 1983 S.C. page 684** that where there is a specific provision covering the admissibility of a document, it is not open to the court to call into aid other general provisions in order to make a particular document admissible. In other words, if a judgment is not admissible as not falling within the ambit of Sections 40 to 42, it must fulfil the conditions of Section 43 otherwise it cannot be relevant under Section 13 of the Evidence Act. It is, thus clear that former decision must be between the same parties otherwise the previous decision has no relevancy in the subsequent case. In another case **Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and others, A.I.R. S.C. page 89**, the Apex Court has held that it is well settled that the decision of a case cannot be based on grounds outside the plea of the parties, and in that it is the case pleaded which has to be found.

18. Learned counsel for the respondents had taken the plea that since the appellant has not come up with the case that the previous suit between Smt. Kaneez Fatma and Mohd Soyeb was collusive suit as such in absence of such plea the finding of the previous suit is not binding and Section 11 C.P.C. is not attracted. The question of validity of the 'will' can not be gone into for a second time as the appellant had taken a defence in the suit filed by the plaintiff-respondent.

19. Having heard the counsel for both the parties and after giving careful consideration to the entire facts and circumstances, I hold that the principle of

resjudicata is not applicable to the present case and second substantial question of law is also decided in favour of the appellant.

20. In view of the discussions above, the judgment and decree of the courts below dated 26.11.2001 and 10.8.1994 are set aside. The suit is dismissed and the present second appeal is allowed with costs. **Appeal Allowed.**
