ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2006

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

Civil Misc. Writ Petition No. 40736 of 2002

Manoj Kumar Pandey & others ...Petitioners
Versus
State of U.P. and another ...Opp. parties

Counsel for the Petitioners:
Sri S.P. Pandey
Sri D.P. Shukla

Counsel for the Opposite Parties:
Sri B.N. Singh

Constitution of India, Art. 226-Right to appointment-petitioner appeared in competative examination-held for the Post of A.P.O. result declared on 20.3.99-State Government send requisition 26.7.01-petition filed in September 2002 e.g. much after expiry of the life of waiting list-parity can not be claimed.

Held: Para 9 & 10

The Hon'ble Apex Court while considering the case has granted relief only to those persons who had approached the Court and those were the persons who had filed the writ petition before this Court within one year from the date on which the last recommendation had been made. Therefore, those persons had approached the Court when the select list/merit list was alive. The case of the petitioners is quite distinguishable as they have approached this Court after more than two months of the expiry of the select list. Therefore, petitioners cannot claim the relief which had been granted to other persons by the Hon'ble Apex Court.

If some person has taken a relief from this Court by filing a Writ Petition immediately after the cause of action had arisen, petitioners cannot take the benefit thereof by filing a writ petition belatedly. They cannot take any benefit thereof at such a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

Case law discussed:
2004 (2) ESC-256
AIR 1979 SC-765
AIR 1981 SC-487
AIR 1983 SC-580
1990 (3) SCC-468
1993 (Suppl.) 1 SCC-632
1997 (6) SCC-721
1996 (3) SCC-225
AIR 1996 SC-1145
AIR 1996 SC-2173
1999 (1) SCC-330
2003 (3) SCC-669
1006 (6) SCC-267

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

1. This petition has been filed for a direction upon the U.P. Public Service Commission, Allahabad to recommend the names of the waiting list-candidates against the existing vacancies of Assistant Prosecuting Officers, which had been advertised by Advertisement No. A-5/E-1/1997-98.

2. Learned counsel for the petitioners has submitted that all the petitioners had appeared in the written examination and were also called for interview. The final select list was declared on 20th March, 1999 and even though the names of the petitioners were not included in the main select list, but they are hopeful that their names would be included in the waiting list. The State Government had sent a requisition to the Commission to recommend the names of

the candidates next in order of merit, as certain candidates did not join the post, but the Commission expressed its inability as the life of the waiting list had expired. This decision of the Commission was challenged by 11 candidates by filing a writ petition in this Court which was dismissed. The Supreme Court however granted relief to them by directing that they shall be considered by the Commission and the State Government, and would be appointed if otherwise found suitable and eligible. The said decision was rendered in Sheo Shyam & Ors. Vs. State of U.P. & Ors., (2004) 2 ESC 256. The Supreme Court in the said decision held that the life of the waiting list which is of one year should be reckoned from the last date when the recommendation was made by the State Government. However, in view of the fact that after the decision of the Commission not to send the names to the State Government as the waiting list had expired, which decision was the subject matter of the writ petition before the High Court, the State Government itself had sent a requisition of 56 posts, including 11 posts to which the dispute related, and examinations were held subsequently on 9th November, 2003, the Supreme Court observed that the career of 11 candidates cannot be jeopardised, and therefore in these peculiar circumstances, it directed that the appointment shall be considered by the Commission and the State Government.

3. Learned counsel for the petitioners submitted that the same relief should be granted to the petitioners. From a perusal of the judgment of the Supreme Court we find that because of the peculiar facts and circumstances of the case that the Supreme Court had granted relief to the 11 appellants only. The Supreme Court could have granted relief to all the candidates in the waiting list subject to the availability of the vacancies.

4. In the State of Kerla Vs. Kumari T.P. Roshana & Ors., AIR 1979 SC 765, the Hon'ble Supreme Court considered this aspect and observed as under:-

"The root of the grievance and the fruit of the writ are not individual but collective and while the "adversary system' makes the Judge a mere umpire, traditionally speaking, the community orientation of the judicial function, so desirable in the Third World remedial jurisprudence, transforms the Court's power into affirmative structuring of redress so as to make it personally meaningful and socially relevant. Frustration of invalidity is part of the judicial duty; fulfilment of legality is complementary. Selection of these thirty students will not be confined to those who have moved this Court or the High Court by way of writ petition or appeal. The measure is academic excellence, not litigating persistence. It will be thrown open to the first thirty strictly according to merit measure by marks secured."

5. The same view has been expressed by the Apex Court in Ajay Hasia & Ors. Vs. Khalid Mujib Sehravardi & Ors., AIR 1981 SC 487; and Punjab Engineering College, Chandigarh Vs. Sanjay Gulati & Ors., AIR 1983 SC 580. In Thaper Institute of Engineering & Technology, Patiala Vs. Abhinav Taneja & Ors., (1990) 3 SCC 468, the Apex court considered a case where the High Court had issued directions to admit the students who had approached the writ Court,

ignoring the merit of the students who had not approached the Court.

The Hon'ble Supreme Court observed as under:-

"The High Court should have directed only two students to be admitted and that too on merit. Admittedly, there were more meritorious students than the respondents, waiting in queue. The High Court, thus, travelled beyond its jurisdiction and not only directed more students than the institute could absorb but also students who were less meritorious, to be admitted. No reasons whatsoever have been given by the High Court for exercising its extraordinary writ jurisdiction so peremptorily which has resulted in injustice, both to the appellant-institution as well as to the students who stood higher in merit than all most all the respondent- students. We refrain from making any further comment on the impugned judgment."

6. Similarly, general directions were issued to give benefit to the students strictly in accordance with the merit, in Srawan Kumar & Ors Vs. Director General of Health Services & Ors, 1993 (Supp) 1 SCC 632. In K.C. Sharma & Ors. Vs. Union of India & Ors., (1997) 6 SCC 721, a Constitution Bench of the Hon'ble Supreme Court has considered the aspect of giving benefit to a particular person and refusal to grant such benefit by the High Court to other similarly situated only on the ground that they had approached the Court at a belated stage. The Apex Court held that in such a case the judgement has to be rendered in rem and benefit of the judgment should be given to all other similarly situated persons.

7. However as seen above, the Supreme Court in Sheo Shyam & Ors (Supra) restricted the relief to 11 appointments only. In this view of the matter we would not be justified in granting any relief to the petitioners. This apart, it must also be noticed that no specific averment has been made by the petitioners that their names were included in the waiting list. All that they have stated is that they expect that their names would be included in the waiting list.

8. Further the present petitioners have filed this writ petition only in September, 2002 much after the expiry of one year from the date when the last recommendation was made on 26th July, 2001. This petition has been filed after the life of the waiting list came to an end. It is settled legal proposition that no relief can be granted to the candidate if he approaches the Court after expiry of the Select List. (Vide J. Ashok Kumar Vs. State of Andhra Pradesh & Ors., JT (1996) 3 SCC 225; State of Bihar & Ors. Vs. Md. Kalimuddin & Ors., AIR 1996 SC 1145; State of U.P. & Ors. Vs. Harish Chandra & Ors., AIR 1996 SC 2173; Sushma Suri Vs. Government of National Capital Territory of Delhi & Anr., (1999) 1 SCC 330; & State of U.P. & Ors. Vs. Ram Swarup Saroj, (2003) 3 SCC 699). It has been held therein that if the selection process is over, select list had expired and appointments had been made, no relief can be granted by the Court at a belated stage.

9. The Hon'ble Apex Court while considering the case has granted relief only to those persons who had approached the Court and those were the persons who had filed the writ petition before this Court within one year from the date on

which the last recommendation had been made. Therefore, those persons had approached the Court when the select list/merit list was alive. The case of the petitioners is quite distinguishable as they have approached this Court after more than two months of the expiry of the select list. Therefore, petitioners cannot claim the relief which had been granted to other persons by the Hon'ble Apex Court.

10. If some person has taken a relief from this Court by filing a Writ Petition immediately after the cause of action had arisen, petitioners cannot take the benefit thereof by filing a writ petition belatedly. They cannot take any benefit thereof at such a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

11. In State of Karnataka & Ors. Vs. S.M. Kotrayya & Ors., (1996) 6 SCC 267, the Hon'ble Supreme Court rejected the contention that a petition should be considered ignoring the delay and laches on the ground that he filed the petition just after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. The Court observed that such a plea is wholly unjustified and cannot furnish any ground for ignoring delay and laches.

12. Same view has been reiterated by the Hon'ble Supreme Court in Jagdish Lal & Ors. Vs. State of Haryana & Ors., AIR 1997 SC 2366, observing as under:-

"Suffice it to state that appellants may be sleeping over their rights for long and elected to wake-up when they had impetus from Veerpal Chauhan and Ajit Singh's ratio.... desperate attempts of the appellants to re-do the seniority, held by them in various cadre.... are not amenable to the judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well."

13. In M/s. Roop Diamonds & Ors. Vs. Union of India & Ors., AIR 1989 SC 674, the Hon'ble Supreme Court considered a case where petitioner wanted to get the relief on the basis of the judgment of the Supreme Court wherein a particular law had been declared ultra vires. The Court rejected the petition on the ground of delay and latches observing as under:-

"There is one more ground which basically sets the present case apart. Petitioners are re-agitating claims which they have not persued for several years. Petitioners were not vigilant but were content to be dormant and close to sit on the fence till somebody else's case came to be decided."

14. Thus, petitioner was not entitled to claim any benefit of the said judgment of this Court.

15. In view of the above, we are of the considered opinion that no relief can be granted to the petitioners. Petition lacks merit and is accordingly dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 1, 2004

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE PRAKASH KRISHNA, J.

I.T.R. No.55 of 1988

The Commissioner of Income Tax(Central), Kanpur ...Applicant
Versus
Shri Padampat Singhania (HUF,) Kanpur ...Respondent

Counsel for the Applicant:
Sri Shambhoo Chopra
S.C.

Counsel for the Respondent:
Sri V.K. Upadhyay

Income Tax Act-1922-Section-28 (1)(C)-Imposition of penalty of Rs.50,000/- by order dated 7.12.76 on reference of assessment year 1947-48-Appellate Assistant Commissioner deleted the penalty on the ground of 20 years inordinate delay-held-proper.

Held: Para 10

Applying the principles laid down in the aforesaid cases to the facts of the present case, we find that by no stretch of imagination long period of 20 years can be said to be a reasonable time for imposing penalty. The explanation given by the Department for the inordinate delay did not amount to reasonable cause. In this view of the matter, we are considered opinion that the Tribunal has not committed any error in cancelling the penalty imposed under Section 28 (1)(c) of the Act.

Case law discussed:
(1962) 46 ITR 452
(1870) 76 ITR 653
(1967) 65 ITR 491
(1970) 75 ITR 698

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

1. The Income Tax Appellate Tribunal, Allahabad has referred the following questions of law under Section 256(2) of the Income Tax Act, 1961, hereinafter referred to as the Act, for opinion to this Court.

> "(1) Whether on the facts and in the circumstances of the case, the penalty under section 28(1)(c) has rightly been cancelled by the Tribunal?
>
> (2) Whether on the facts and in the circumstances of the case, the Tribunal is justified in ignoring the reasonable cause for inordinate delay in imposing penalty under section 28 (1)(c) and in holding that the case of the assessee falls within the purview of the decisions of the Hon'ble High Court in the case of Ram Kishan Baldeo Prasad Vs. CIT(65 I.T.R.-491) and in the case of Bisheshwar Lal Vs. ITO(75 ITR-698)?"

Briefly stated the facts giving rise to the present Reference are as follows:-

2. The reference relates to the Assessment Year 1947-48. The Income Tax Officer completed the assessment for the aforementioned assessment year under Section 23(3)/34 of the Indian Income Tax Act, 1922, hereinafter referred to as the Act of 1922 on 28th March, 1956. The status of the respondent was taken as HUF. The addition of Rs.1,20,000/- was added to the total income. The Income Tax Officer initiated the proceedings under Section 28(1)(c) under the Act of 1922. He imposed a sum of Rs.50,000/- as penalty vide order dated 7.12.1976.

Feeling aggrieved the respondent preferred an appeal before the Appellate Assistant Commissioner, who deleted the penalty on the ground that there was an inordinate delay in the imposition of penalty inasmuch as the assessment was made on 28th March, 1956 while the penalty was imposed on 7.12.1976. The Revenue feeling aggrieved preferred an appeal before the Income Tax Appellate Tribunal, Allahabad. The two members differed in their views. The Accountant Member was of the view that the order cancelling the order passed by the Appellate Assistant Commissioner has to be restored whereas the Judicial Member disagreeing with the conclusion of the Accountant Member held that the proceedings have been unduly delayed by the Income Tax Officer for about 20 years and, therefore, the respondent-assessee was entitled to claim cancellation of the penalty imposed. As there was difference of opinion, the matter was referred to the third Member. The third Member dealt with the different aspects of the matter and agreed with the view expressed by the Judicial Member to the effect that for the inordinate delay there was no explanation and, therefore, the penalty has rightly been cancelled. The Tribunal has passed the order in conformity with the opinion expressed by the third Member and had upheld the order passed by the Appellate Assistant Commissioner cancelling the penalty.

3. We have heard Sri Shambhoo Chopra, learned Standing Counsel appearing for the Revenue and Sri V.K. Upadhyay, learned counsel appearing for the respondent.

4. The learned counsel for the Revenue submitted that there was sufficient explanation for the inordinate delay in imposition of penalty and, therefore, it could not have been cancelled only on the ground of the order having been passed after more than 20 years. According to him, this was a case where the total income itself and the tax thereon was the subject matter of multifarious proceeding by way of appeal to the Appellate Assistant Commissioner, to the Appellate Tribunal, revision before the Commissioner and various rectifications arising out of the appellate orders in the case of the company of which the respondent was a shareholder and change in the total income and consequently the respondent's share therefrom the various firms of which the respondent was a partner as a result of the appellate orders in the case of the company and firms. He further submitted that penalty under Section 28 (1)(c) of the Act of 1922 depended on the amount of income tax and super tax which would have been avoided if the income as returned had been accepted as the correct income and this figure could not be determined till the total income and the tax thereon was finally worked out. He further submitted that the last order was passed on 2nd February, 1975 and in these circumstances, if the penalty was imposed on 7th December, 1976, the delay in the imposition of the penalty cannot be said to be without reasonable cause. He, therefore, submitted that no adverse inference can be drawn on account of the mere so called inordinate delay in the imposition of the penalty.

5. Learned counsel appearing for the respondent, however, submitted that the assessment order having been passed on 28th March, 1956 and the penalty order having been passed on 7th December,

1976, there was an inordinate delay of more than 20 years and, therefore, the Tribunal has rightly upheld the order passed by the Appellate Assistant Commissioner cancelling the penalty. He submitted that reliance placed by the learned counsel for the Revenue on the various proceedings, which did not relate to the respondent, would not come to his rescue for explaining the delay. He further submitted that the Tribunal had not committed any illegality.

6. Having heard the learned counsel for the parties we find that the facts are not in dispute. The assessment order for the Assessment Year 1947-48 was admittedly passed on 31st March, 1956 and the penalty proceeding was also initiated during the course of the assessment proceedings. However, the penalty was imposed vide order dated 7.12.1976 i.e. after more than 20 years. It is not clear from the record as to whether any proceeding in respect of the present respondent was continued upto the year 1976 or not. Even though no period of limitation for imposing the penalty under the Act of 1922 had been provided but action for imposing penalty is to be within a reasonable time. The imposition of penalty after more than 20 years cannot be said to be justified. This Court in the case of Mohd. Atiq v. Income-Tax Officer, District II(V), Kanpur, (1962) 46 ITR 452 has held that even though no period of limitation is prescribed for imposing penalty, proceedings for levy of penalty must be taken within a reasonable time. Where proceedings for levy of penalty for non-compliance with notices issued under sub-sections (2) and (4) of Section 22 of the Act of 1922 were taken after the expiry of about fourteen years, this Court has held that there was unreasonable delay in commencing the proceedings and consequently the proceedings were quashed. Similar view has been taken by this Court in the case of Income-Tax Officer, Gonda v. Bisheshwar Lal, (1970) 76 ITR 653.

7. In the case of **Bharat Steel Tubes Ltd. & Anr. v. The State of Haryana & Anr.,** JT 1988(2) S.C.320 the Apex Court has held that in absence of any prescribed period of limitation, the assessment has to be completed within a reasonable period. What such reasonable period would be, would depend upon facts of each case.

8. In the Case of **Ram Kishan Baldeo Prasad v. Commissioner of Income-tax, U.P.,** (1967) 65 ITR 491, this court has held that even though no period of limitation has been prescribed for imposing a penalty, and a penalty in respect of the assessment year 1945-46 could have been imposed in August, 1957, propriety required the changed circumstances to be taken into consideration and the responsibility for the inordinate delay should be considered and fastened before levying the penalty or upholding it. This Court had also referred the decision in the case of **Mohd. Atiq** (supra) and had held that where there is no prescribed period of limitation, the delay can only be factor, albeit a very relevant factor, to be taken into consideration in determining the propriety of the order and where the assessee is not to blame for the inordinate delay in completing penalty proceedings and the sword of Damocles has been kept hanging over his head for many a year without any rhyme or reason., it will certainly be a factor, amongst others, for the Tribunal to consider whether the order passed by the Income-tax Officer was a proper one.

9. In the case of **Bisheshwar Lal v. Income Tax Officer, Gonda**, (1970) 75 ITR 698, this Court had quashed the penalty notices which were issued to the petitioner between 1949 and 1961 in respect of the assessment years 1944-45, 1945-46, 1946-47 and 1948-49 were kept pending till 1963 holding that as the department did not explain why the proceedings could not be completed during the interval of 14 years, the proceedings were vexatious and amounted to an abuse of the powers conferred on the Income-tax Officer under Section 28 (1)(c) of the Act of 1922.

10. Applying the principles laid down in the aforesaid cases to the facts of the present case, we find that by no stretch of imagination long period of 20 years can be said to be a reasonable time for imposing penalty. The explanation given by the Department for the inordinate delay did not amount to reasonable cause. In this view of the matter, we are considered opinion that the Tribunal has not committed any error in cancelling the penalty imposed under Section 28 (1)(c) of the Act.

11. In view of the forgoing discussion, we answer both the questions referred to us in the affirmative i.e. In favour of the assessee and against the Revenue. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 36498 of 2003

Narendra Singh and others ...Petitioners
Versus
State of U.P.and others ...Respondents

Counsel for the Petitioners:
Sri Sunil Kumar Srivastava
Sri Vishnu Priya

Counsel for the Respondents:
S.C.

Indian Stamp Act-Section 37/47A-Stamp duty at the time of execution of sale deed-petitioner supplied stamp duty much and more than what actually required-demand of additional amount alongwith penalty of Rs.10000/- on assumption that in future the building shall be used for commercial purpose-held-not justified in changing more stamp duty that what has been already given.

Held: Para 5

Merely on surmises that the said land may be used for commercial purposes, the value of the transaction has been enhanced and deficiency of stamp duty has been assessed, on which penalty has also been directed to be paid. In the absence of any proof of the petitioner having paid a higher amount than that shown in the sale deed or that as per the circle rate for residential plot, the respondents are not justified in charging more stamp duty than that what has already been paid.

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

1. The petitioners purchased a plot of land measuring 614.55 Square metres situate at Delhi-Saharanpur road in district Saharanpur for a consideration of Rs.4,00,000/- only, on which the requisite stamp duty of Rs.81,500/- was paid at the market value assessed at Rs. 8,15,800/-, which was on the basis of the circle rate fixed by the Collector for residential area. Thereafter the petitioners had also got sanctioned a map from Saharanpur Development Authority for construction of residential house on the said plot. Subsequently on 28.9.2002, the Respondent no.3 issued notices to the petitioners under section 37/47A/33 of the Indian Stamp Act, to which the petitioners filed their objections. By order dated 13.3.2003, the Respondent no.3 Additional Collector (Finance & Revenue), Saharanpur rejected the objections of the petitioners and held that the value of the property should be assessed at the circle rate fixed for commercial area, which was at Rs. 5,000/- per sq. metre and on such basis assessed the value of the plot to be Rs. 30,73,000/,- on which stamp duty of Rs.3,07,300/- was assessed to be payable. After deducting the stamp duty of Rs. 81,500/- already paid by the petitioners, the deficiency of the stamp duty payable by the petitioners was held to be Rs. 2,25,800/-. On the said amount, a further sum of Rs.1,00,000/- was directed to be paid as penalty. Such direction regarding penalty was given only in the operative portion of the order and nothing regarding the s+ame had been mentioned in the body of the order and as such the same was done without discussing as to how the said amount of penalty was arrived at. Challenging the said order, the petitioners filed an appeal before the Commissioner, Saharanpur Division, Saharanpur which has been dismissed by the Respondent no.2 vide order dated 20.6.2003.

2. Aggrieved by the aforesaid orders dated 13.3.2002 passed by Respondent no.3 and 20.6.2003 passed by Respondent no.2 the petitioners have filed this writ petition.

3. I have heard learned counsel for the parties and perused the record. Counter and rejoinder affidavits have been exchanged between the parties and with consent of the learned counsel for the parties this writ petition is being disposed of at the admission stage itself.

4. The orders impugned in this writ petition have been passed merely on the ground that the plot of land purchased by the petitioners has the potential of being used for commercial purpose. It is not the case of the respondents that the said plot falls within the area declared as commercial area by the respondents or the Saharanpur Development Authority or that the same is being actually used for commercial purpose. On the contrary, the Development Authority had sanctioned the plan for the said plot, which was for residential purposes. The authorities below have merely observed that since the land is situated on the main highway and could be used for commercial purpose, hence the circle rate for commercial plot should be applied for assessing the market value of the property in question.

5. The aforesaid reasons for increasing the value of the property in question do not appear to be justified. What is to be seen is the value of the land at the time of its purchase and not the

potentiality of the land or projected value of the land. No doubt, the land may have the potential of being used for commercial purposes in future, but in case if the person purchases a plot of land in a residential area for residential purposes (for which the sanctioned plan has also been passed by the Development Authority), the value of the same has to be assessed as of a residential plot and not as a commercial or industrial plot for which purpose it may be used in future. The stamp duty charged is on the value of transaction for sale and not for the value, which might be increased in future because of the development of the area. Here it is not the case of the respondents that the petitioners have actually paid higher amount for purchase of the said plot. Merely on surmises that the said land may be used for commercial purposes, the value of the transaction has been enhanced and deficiency of stamp duty has been assessed, on which penalty has also been directed to be paid. In the absence of any proof of the petitioner having paid a higher amount than that shown in the sale deed or that as per the circle rate for residential plot, the respondents are not justified in charging more stamp duty than that what has already been paid. The impugned orders having been passed merely on the projected value of the plot on the basis that it has potential for being used for commercial purposes, is not justified and is liable to be set aside.

6. Accordingly, for the aforesaid reasons, this writ petition stands allowed and the impugned orders dated 20.6.2003 and 13.3.2003 passed by Respondent nos. 2 and 3 respectively are hereby quashed. It is further provided that any amount which has been deposited in pursuance of the aforesaid orders shall be refunded to the petitioners forthwith.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 15451 of 2006

Constable 756 CP Charan Singh and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri Satya Prakash Pandey

Counsel for the Respondents:
S.C.

U.P. Police Regulations-Reg. 525-Transfer order-Petitioner working as Police Constable civil Branch-Transferred to arms branch by S.P.-objection without sanction of Inspector General of Police-can not be transferred as they have completed more than 10 years service-held-such order can not be illegal on the ground of no want of sanction to the sanction by I.G.-sanction may be recorded on concerned file-not necessary to mention in the order of Transfer-direction issued to the I.G. to consider and decide himself as the whether the sanction be granted or not.

Held: Para 9, 10 and 11

In view of the aforesaid, the contention raised on behalf of the petitioners that they cannot be transferred from one branch to another as they have put in ten years of service as constable in Civil Branch, cannot be accepted. This Court holds that constables, who have put in more than ten years of service are

covered by the 2nd paragraph of Regulation-525 and such constables can also be transferred from one branch to another, subject, however, to the conditions mentioned in the 2nd paragraph of Regulation-525.

Therefore, the order of transfer cannot be said to be illegal merely on the ground that the same does not contain any recital to the effect that sanction has been granted by the Inspector General of Police. Further such sanction may be recorded on the concerned file and it is not necessary that recital to that effect must be made in the order itself. If is not the case of the petitioner that such sanction has been refused by the Inspector General.

However, the Inspector General of Police is required to consider and decide for himself as to whether sanction should be granted or not and therefore, it is necessary that records in respect of transfer of police officers over ten years of service, be placed before the Inspector General of Police for consideration of the issue as to whether the sanction is to be granted in the facts of the case or not at the earliest.

Case law discussed:

2003 (3) UPLBEC 2038-distingished

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

1. Learned counsel for the petitioners is permitted to implead Inspector General of Police, Kanpur Zone, Kanpur as respondent no.3 during the course of the day.

2. Heard Sri Satya Prakash Pandey, Advocate on behalf of the petitioners and learned Standing Counsel on behalf of respondents.

3. The petitioners, who are working as Constables in civil branch of the U.P. Police Subordinate Services, are aggrieved by an order of transfer, dated 5th March, 2006, passed by the Senior Superintendent of Police, Muzaffarnagar, where under the petitioner has been transferred, for a period of six months, to the armed branch of U.P. Police.

4. On behalf of the petitioners it is contended that the impugned order of transfer, runs contrary to Regulation 525 of the U.P. Police Manual and therefore, is unsustainable in the eyes of law. The petitioners have put in more than ten years of service in Civil Police, therefore they cannot be transferred to any other branch and in support thereof reliance has been placed upon the judgment of this Court in the case of **CN. 141 CP Kaushlesh Singh & others Vs. State of U.P. & others; (2003) 3 UPLBEC 2038.** In the alternative it is submitted that even if the petitioner could be transferred from one branch to another of the U.P. Police, since they had completed more than ten years of service, such transfers would necessarily require sanction of the Inspector General of Police and in absence of any recital to that effect in the impugned order, the same cannot be legally sustained.

5. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

6. With due respect to the judgment of this Court relied upon by the petitioners in the case of **CN. 141 CP Kaushlesh Singh & Ors. (Supra),** this Court is of the opinion that the 2nd paragraph of Rules 525 of the U.P. Police Manual has not taken care of in the aforesaid judgment.

7. For considering the controversy raised by the petitioners, it would be relevant to re-produce Regulation-525 of the Police Manual, which reads as follows:

"525 Constable of less than two years' service may be transferred by the Superintendent of Police from the armed to the Civil Police or *vice versa. Foot Police constables may be transferred to the mounted police at their won request. Any civil Police constable of more than two and less than ten years' service may be transferred to the armed police and vice versa by the Superintendent for a period not exceeding six months in any one year. All armed police constables of over two years' service and civil police constables of over two and under ten years' service may be transferred to the other branch of the force for any period with the permission of the Deputy Inspector-General.*

In all other cases the transfer of Police Officers from one branch of the force to another or from the police service of other Provinces to the Uttar Pradesh requires the sanction of the Inspector-General"

8. From a bare reading of the Regulation-525 it is established that the same is in three parts:

(i) First parts deals with constables, who have put in two years of service only.
(ii) Second parts deals with constables, who have put in more than two years but less than ten years of service.
(iii) Third parts deals with all other cases of transfer of Police officers, which includes constable, not covered by the first and second clauses of Regulation-525, inasmuch as the second paragraph of Regulation 525 starts that the words 'in all other cases', meaning thereby that the categories of police officers not covered by the first-two clauses, can be transferred under last clauses of Regulation-525.

9. In view of the aforesaid, the contention raised on behalf of the petitioners that they cannot be transferred from one branch to another as they have put in ten years of service as constable in Civil Branch, cannot be accepted. This Court holds that constables, who have put in more than ten years of service are covered by the 2nd paragraph of Regulation-525 and such constables can also be transferred from one branch to another, subject, however, to the conditions mentioned in the 2nd paragraph of Regulation-525.

10. The 2nd Paragraph of Regulation-525, however, provides that in all such cases, transfer requires the sanction of the Inspector General of Police, it is to be kept in mind that the word 'prior' is not prefixed to the word 'sanction. Meaning thereby that prior sanction of the Inspector General of Police is not contemplated by the 2nd Paragraph of Regulation-525 and therefore, such sanction can be obtained/granted by the Inspector General of Police subsequent to the issuance of the order of transfer in respect of police officers, covered by 2nd Paragraph of Regulation-525. Therefore, the order of transfer cannot be said to be illegal merely on the ground that the same does not contain any recital to the effect that sanction has been granted by the Inspector General of Police. Further such sanction may be recorded on the

concerned file and it is not necessary that recital to that effect must be made in the order itself. If is not the case of the petitioner that such sanction has been refused by the Inspector General.

11. However, the Inspector General of Police is required to consider and decide for himself as to whether sanction should be granted or not and therefore, it is necessary that records in respect of transfer of police officers over ten years of service, be placed before the Inspector General of Police for consideration of the issue as to whether the sanction is to be granted in the facts of the case or not at the earliest.

12. In view of the aforesaid, the present writ petition is devoid of merits and is accordingly dismissed subject to the observations that the Senior Superintendent of Police, Muzaffarnagar shall transmit all the records pertaining to the transfer of the petitioner and other constable, who have put in more than ten years of service from one branch to another for being placed before the concerned Inspector General of Police for consideration of the sanction in accordance with Regulation-525 of the U.P. Police Manual, preferably within two weeks, from the date a certified copy of this order is filed before the Senior Superintendent of Police, Muzaffarnagar. On receipt of the aforesaid, the concerned Inspector General of Police shall apply his mind to the facts of the present case and shall pass appropriate orders either refusing or sanctioning the transfer, by means of a reasoned speaking order, at the earliest possible. The aforesaid exercise must be completed within four weeks from the date the papers are so received by the concerned Inspector General of Police. The petitioners shall at liberty to file such objection before the Inspector General of Police for being retained in their parent branch i.e. Civil Branch. The Inspector General of Police shall also consider the objections of the petitioners while deciding the issue of sanction.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2006

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 23946 of 1996

Vishwaraj Kumar Singh and another
...Petitioners
Versus
District Judge, Muzaffarnagar
...Opposite Party

Counsel for the Petitioners:
Sri Raj Kumar Jain
Sri R.C. Gupta
Sri Amit Daga
Sri R.B. Singhal

Counsel for the Opposite Party:
Sri K.R. Sirohi
S.C.

(A) Subordinate Civil Courts Ministerial Establishment Rules 1947-Rule-16-Right of Appointment-Petitioners name found place in approved roster list in March, 1991,-appointment against leave vacancy before expiry of one year-No right can be created-such appointment should be on vacant post.

Held: Para 7

Rule-16 relied by learned counsel for the petitioners does not help the petitioners. The mention of appointment in Rule-16 obviously has to be appointment on a

vacant post. Present is a case where petitioners received appointment on leave vacancy which were the posts actually held by other persons. No right can be created by a person appointed on leave vacancy. Rule 16 does not help the petitioners in any manner.

(B) Constitution of India Act 14 and 16- appointment as class III employee-basis of claim so many persons below in merit given appointment-even after expiry of the life of the list-No prayer for quashing such appointment-nor impleaded as party No particulars of their appointment brought on record-held-illegal and un warranted order-can not be basis for issue of mandamus.

Held: Para 10

The basis of the submission of the petitioners' counsel is that since with regard to persons mentioned above appointment was made by the District Judge on regular basis, the petitioners are also entitled for the same treatment. For seeking a mandamus from this Court on the basis of certain orders passed by authorities with regard to other persons, the petitioners must satisfy the Court that orders passed in favour of those persons with whom parity is sought is legal and in accordance with law. The Apex Court in *Chandigarh Administration and another Vs. Jagjit Singh and another; (1995) 1 S.C.C. 745* has held that generally speaking the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, such illegal and unwarranted order can be not made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order.

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

Heard counsel for the petitioners.

1. By this writ petition, the petitioner has prayed for a writ of mandamus commanding the respondents to appoint the petitioners as Class-III employee in the Muzaffarnagar Judgeship.

2. Brief facts necessary for deciding the writ petition are; Twenty-seven vacancies were advertised in the year 1990 of Class III employees in the Judgeship of Muzaffarnagar. The petitioners also applied in pursuance of the advertisement. Add the Quick Launcher on Panel list was prepared by the District Judge. The list was notified on 30th March, 1991. The petitioners have filed approved list which contains the names of petitioner No. 2, Kiran Pal Singh, at Serial No. 42 and petitioner No.1, Vishwaraj Kumar, at Serial No. 49. The said list is titled as "Roster List 1991". Twenty-seven persons out of the list were appointed against the vacancies. The petitioners were also given short term appointment on leave vacancies. Petitioners were given appointment on 19.11.1991 and 31.10.1991 respectively and were relieved when leave vacancy came to an end. The petitioners submitted representation to the District Judge that they be given appointment on the basis of their name being included in the select list. Several representations are said to have been given and thereafter the writ petition has been filed on 26th July, 1996 praying for mandamus.

3. Add the Quick Launcher on Panel counter affidavit has been filed on behalf of the respondent. In the counter affidavit it has been categorically stated that the life of the select list prepared on 30.3.1991 expired on 30.3.1994 even after extension granted by this Court from one year to three years. It is stated in the counter affidavit that the petitioners were not given any appointment during the currency of the list, hence their names stand automatically removed after expiry of the list.

4. Learned counsel for the petitioner, in support of the writ petition, submitted that petitioners having been given appointment within one year from the preparation of the select list, though on the leave vacancy, are entitled for regular appointment. It has further been submitted that persons whose names were lower than the petitioners in the approved list have been given regular appointment even after expiry of the period of the list as claimed by the respondent. It is submitted that one Janak Pal Singh, who was also given appointment on leave vacancy in the year 1991 was appointed on regular basis on 2.1.1995, which is apparent from Annexure-1 to the rejoinder affidavit filed by the petitioners dated 20th March, 2001. He further submits that other persons whose names find place at Serial No.43, 44 and 45 were also given appointment on regular basis, hence petitioners have made out a claim for appointment on regular basis.

I have considered the submissions and perused the record.

5. The recruitment took place for filling up 27 vacancies. The 27 persons were appointed on the basis of the approved list. Certain more persons were appointed subsequently utilizing the same list. The first submission of counsel for the petitioner is that petitioners having been appointed on leave vacancy within a period of one year they must be deemed to have been appointed on regular basis. Learned counsel for the petitioner has also placed reliance on Rule-16 of the Subordinate Civil Courts Ministerial Establishment Rules, 1947. Rule 16 of the said rule is quoted below:-

"16. Retention of selected candidates of approved service.-*If a selected candidate has once received an appointment and his work has given satisfaction, his name shall not be removed from the register of recruited candidates in the event of his reversion."*

6. The submission, which has been raised by counsel for the petitioners is not res integra. The two Division Benches of this Court have already considered the issue and on the issue and on the basis of the Division Bench judgment, the High Court issued circular letter dated 24th August, 1994 to all the District Judges. The Division Bench in Special Appeal No.235 of 1993 had occasion to consider the effect of persons getting appointment on leave vacancy before expiry of the period of one year. The Division Bench held that appointment against leave vacancy within one year of their empanelment gives no right to claim continuance. In Special Appeal No. 278 of 1993 (A.K. Ashthana Vs. State of U.P.) the Division Bench deprecated the practice of giving short term appointment on leave vacancy to empanelled candidates. The Division Bench, in fact, has termed the said device as maneuvered proceeding en masse-on medical leave

and creating thereby leave vacancies in order that persons selected as Paid Apprentices could be appointed to such leave vacancies and thereby claim regular appointment. Following observations were made by the Division Bench in the said judgment:-

"*The manoeuvred device of regular employees proceeding en masse on medical leave and creating thereby leave vacancies in order that persons selected as Paid Apprentices, for whom no posts were available, could be appointed to such leave vacancies and thereby claim regular appointment, is what was resorted to, to help the appellant (one of the petitioners in the writ petition) achieve the object. It is now on this basis that the appellant seeks regular appointment."*

Their Lordships have also observed as under:-

"*Appointment to the civil courts is governed by U.P. Subordinate Civil Courts, Ministerial Establishment Rules, 1947 (hereinafter referred to as 'the Rules'). Add the Quick Launcher on Panel Rule 14 leaves no manner of doubt that the select list is to ensure for only a period of one year…" It follows that a candidate on the select list can claim to be appointed only in respect of vacancies in the year for which the select list had been prepared and finalized. In the present case the relevant year was 1993.*

Such being the circumstances, no exception can indeed be taken to the judgment of the learned Single Judge which is accordingly hereby upheld and affirmed and this special appeal is thus dismissed."

7. Rule-16 relied by learned counsel for the petitioners does not help the petitioners. The mention of appointment in Rule-16 obviously has to be appointment on a vacant post. Present is a case where petitioners received appointment on leave vacancy which were the posts actually held by other persons. No right can be created by a person appointed on leave vacancy. Rule 16 does not help the petitioners in any manner.

8. The next submission of counsel for the petitioner is that persons who were lower in the select list were offered appointment. He has made reference of Janak Pal Singh, whose name was at Serial no. 35 in Annexure-1 to the writ petition. The petitioners' case is that subsequently Wasim Akhtar Siddiqui, Laxmi Kant and Nimesh Kumar Jain, whose names are at Serial No.43, 44 and 45, have been given appointment. Learned counsel for the petitioner has referred to paragraph 14 of the counter affidavit in which it has been stated that the name of the aforesaid persons were mentioned in the roster list. There is no date of appointment of these three persons as mentioned above whereas the date of appointment of these three persons as mentioned above whereas the date of appointment of Janak Pal Singh has been brought on the record by the petitioners themselves by Annexure RA-1 to the rejoinder affidavit as 2.1.1995. In the roster list as well as in the approved list Janak Pal Singh is much above the petitioners and also above the aforesaid three persons. Janak Pal Singh having been appointed on 2.1.1995 on regular basis, the persons whose names are mentioned below Janak Pal Singh must have received their appointment

subsequent to 2.1.1995. The submission, which has been build up by the petitioners' counsel is that persons who were lower in the roster/approved list having been given regular appointment after 2.1.1995 and after the list came to an end, the petitioners are also entitled for appointment. The petitioners' counsel also stated that there is discrimination violating Articles 14 and 16 of the Constitutions. The said submission of the counsel for the petitioners needs consideration from two point of view. Firstly the appointment of the said persons has not been attacked in the writ petition nor there is any prayer for quashing their appointment. It is not necessary for this Court to express any opinion in this writ petition as to what was the basis of their appointment. The submission remains with regard to discrimination violating Articles 14 and 16 of the Constitution.

9. In the counter affidavit it has been specifically stated that select list came to an end on 30th March, 1994. It is well settled that after select list has come to an end no appointment can be made utilizing the select list and no person including the petitioner can claim utilization of the select list. The appointment of persons whose names have been mentioned above were made subsequent to expiry of the select list and the same cannot be said to be inconformity with the Rules. Further the 27 vacancies were advertised and 27 posts were filled up before even offering appointment to above mentioned persons. After the advertised vacancy being filled up, the select list cannot be utilized for any other vacancy. On this score also the select list cannot be made basis for issuing appointment over and above the advertised vacancies. The Division Bench of this Court in a recent judgment in 2005(2) E.S.C. 1509; ***District Judge, Baghpath Vs. Anurag Kumar*** has laid down that select list cannot be utilized from above the vacancies advertised and after its life has come to an end.

10. The basis of the submission of the petitioners' counsel is that since with regard to persons mentioned above appointment was made by the District Judge on regular basis, the petitioners are also entitled for the same treatment. For seeking a mandamus from this Court on the basis of certain orders passed by authorities with regard to other persons, the petitioners must satisfy the Court that orders passed in favour of those persons with whom parity is sought is legal and in accordance with law. The Apex Court in ***Chandigarh Administration and another Vs. Jagjit Singh and another; (1995) 1 S.C.C. 745*** has held that generally speaking the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, such illegal and unwarranted order can be not made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order.

11. As observed above, the life of select list having come to an end and all

advertised vacancy having been filled up, there is no justification of giving appointment after expiry of the select list. In the event certain persons were appointed after expiry of the select list, the same cannot be made basis for issuing a mandamus in favour of the petitioners at such distance of time.

12. None of the submissions raised by counsel for the petitioners has any substance. On the basis of the aforesaid submissions mandamus cannot be issued to the respondents to give appointment to the petitioners as Class-III employee.

The writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2005

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

Criminal Misc. Application No.6067 of 2005

Pankaj and another ...Applicants
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicants:
Sri V.K. Singh
Sri A.K. Singh

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

Juvenile Justice (Care of Protection of Children) Act 2000-Section 6 (2)-Application claiming benefit of juvenile justice Act-rejected by session judge-on the ground of constitution of Juvenile Justice Board-held-the session judge is bound to hold enquiry –keeping in view of beneficial legislation socially orinted to ensure every kind for reformative measures- direction issued to move fresh application-the session court to hold enquiry on basis of evidence.
Case law discussed:
1997 (35) ACC-835

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

Heard learned counsel for the applicants and learned A.G.A. for the State.

1. This application has been filed challenging the order dated entertain an application moved on behalf of the applicants claiming to be a juvenile and is entitled for protection under the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred as the Act). A copy of the application has been annexed as Annexure-5 to the affidavit, stating therein that the two sessions trial were amalgamated and S.T. No. 425 of 2003 is the leading case. The applicants Pankaj and Neeraj claimed to be minor and in the circumstances, a separate trial was liable to be conducted. It was stated in the application that the were students at the time of occurrence. The date of birth of the applicant Pankaj son of Sri Charan Singh Saroha is 27.3.1986 according to High School Certificate and the applicant no. 2 son of Sri Raj Singh was born on 22.11.1987 as recorded in the School Leaving Certificate. The application was moved on 6.5.2005 that common trial should not proceed but the application was not entertained on the ground that since the Juvenile Justice Board has been constituted at Meerut, it is the jurisdiction of the Board to decide and declare an accused as juvenile. This application has been moved challenging the said order. It has been argued that Section 7 of the Act prescribes procedure to be followed by a

Magistrate not empowered under the Act. Sub clause (1) of Section 7 provides that when any Magistrate not empowered to exercise the powers of a Board constituted under the Act is of the opinion that a person brought before him under any of the provisions of the Act is a juvenile or the 'child', he shall without any delay record such opinion and forward the juvenile to the competent authority having jurisdiction over the proceeding. Sub clause (2) of Section 7 provides that the competent authority to which such proceedings are forwarded under sub section (1) shall hold the inquiry as if the juvenile or the child had originally been brought before it. In the circumstances, it was the duty of the court to have ascertained and formed an opinion whether the person, such as the applicants in the instant case, was a juvenile in his opinion or not. He could not have thrown away the applicants and refused to entertain it only because a Juvenile Justice Board has now been constituted as Meerut. It is also relevant to point out that Section 6 sub clause (2) of the Act provides that the powers conferred on the Board by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise. In the present case, this application was moved before the learned Sessions Judge, Baghpat and, therefore, he was bound to make preliminary inquiry and come to a conclusion, instead of relegating the applicants to approach the Board. It is also noteworthy that the Juvenile Justice Board constituted under the Act do not meet each and every day as a regular sitting of the court and in the circumstances, the learned Sessions Judge, Baghpat should have at least examined the matter and if he was of an opinion that the applicants were juvenile then an appropriate order should have been passed, which the court had failed to do so. In the case of **Bhola Bhagat and others Vs. State of Bihar 1997 (35, A.C.C., 835**, the Apex Court had held that whenever a plea is raised by an accused that he was 'child' and the court entertains any doubt about the age, it has to hold an inquiry itself for determination of age or cause an inquiry to be held and seek a report. It becomes obligatory for the court, in case it entertains any doubt about the age as claimed by the accused, it was necessary for the court to hold an inquiry itself. This legislation is a beneficial legislation and socially oriented so as to ensure every kind for reformative measures to be taken in respect of an accused who is a 'child' within the meaning of the Act. In the instant case, nothing has been done by the learned Sessions Judge, Baghpat. It is not a case where he completely lacked jurisdiction to even conduct a preliminary inquiry regarding authenticity of the claim made by the applicants that they were juvenile within the meaning of the Act. The court was itself competent in view of the Section 6 (2) of the Act to have conducted an inquiry but it appears that the application was not even entertained only because Juvenile Justice Board was constituted. This order can not be upheld and is, therefore, quashed. The applicants are permitted to move another application and the learned Sessions Judge, Baghpat shall make a preliminary inquiry as provided under the Act and only if he comes to a definite conclusion that the applicants are not juvenile on the basis of the evidence produced before him, can proceed with the joint trial in the event, there is an iota of doubt regarding the age of the applicants and the court feels that

the applicants are minor children within the meaning of the Act, he shall proceed to make an inquiry in accordance with law and refer the matter to the Board or act in accordance with Section 6 (2) of the Act.

2. In the circumstances, this application is allowed and the impugned order dated 6.5.2005 is set aside. The matter is sent back for a decision on merit. Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2006

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

Civil Misc. Writ Petition No.12458 of 2006

Purusottam Giri ...Petitioner
Versus
Deputy Director of Consolidation, Bulandshahr and others ...Respondents

Counsel for the Petitioner:
Sri V.S. Rajpoot
Sri H.M. Srivastava

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

High Court Rules, 1952-Chapter XXIV-rule 2-A-Vakalatnama-in absence of particular of full name, of counsel, complete address of chamber/office and residence-including Phone number, date of sign and enrollment number general mandamus issued-not to accept such vakalatnama-necessary direction issued to all the District Judges, Tribunal, Lower Court etc. to ensure the proper implementation.

Held: Para 9, 10 & 11

Since in the instant case, the learned counsel was asked to remove defect and he has since removed the defects consistent with the mandate of Rule 2 A of the Rules of the Court, I am disinclined to proceed further in this regard. However, in the facts and circumstances, considering that the Courts are deluged with Vakalatnamas/memos of appearance incomplete in requisite details I feel called to issue judicial flat directing stamp reporter not to accept Vakalatnama/memo of appearance in any case unless they are complete in all requisite details as embodied in Rule 2-A of the Rules of Court.

In the above conspectus, it is hereby mandated that the Stamp reporter of the Court/Office shall scrutinize the Vakalatnama very closely and unless they are complete in all requisite details as embodied in Rule 2-A of the Rules of the Court, he will not allow the petition to be processed for being presented before the Court.

In my considered view there is compelling need to amend the statutory Rules pertaining to subordinate courts as well on similar lines. Till such amendments are effected in the statutory rules, it would be in the fitness of things to circulate a copy of this judgment to all the District Judges/all the Chairmen of the Tribunals/Chief Secretary, U.P. Shasan Lucknow for strict compliance with the resolution of the Bar Council of the State of U.P.. It may be suggested that the District Judges and all authorities concerned in State of U.P. shall maintain a register docketing complete details about the lawyers practicing, which may be duly prepared upon verification of original enrolment certificates of an Advocate and whenever any Vakalatnama is filed and in case of any suspicion about the authenticity of registration/enrolment number may be processed for being presented before the Courts/Tribunals etc.

Case law discussed:

AIR 1976 SC-242

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

1. While hearing the above petition on 28.2.2006, it surfaced to my notice that power/Vakalatnama filed by the learned counsel for the petitioner was wanting in requisite/necessary details and hence following order was passed directing the learned counsel for the petitioner to make good the shortcomings in the power/vakalatnama and the case was ordered to be posted up for today. The order passed by the Court is quoted below:-

"It was pointed out to learned counsel for the petitioner that Vakalatnama is not filled in accordance with Bar Council Rules and amended High Court Rules. He prays for and is granted 24 hours time to make necessary correction in the Vakalatnama.

Put up on 3.3.2006."

2. In connection with the above, it may be noticed that the High Court Rules were appropriately amended vide Notification No.450-VIII-C2 dated Sept 16, 2005 which was published in U.P. Gazette (Part II) dated 11.6.2005 by which new Rule 2 Add the Quick Launcher on Panel was added after Rule 2 of Chapter XXIV of the Rules of Court 1952 in the following manner:-

"Rule 2-Add the Quick Launcher on Panel: Vakalatnama or Memorandum of Appearance to contain full name, address etc. of the counsel- The Stamp Reporter/Office shall not accept any Vakalatnama or memorandum of appearance unless it bears full name of the counsel, his complete address both of High Court, chamber/office, if any and residence including telephone number (s) if any, date of signing Vakalatnama enrolment number etc."

Reverting to the defect in the Vakalatnama, it was noticed by the Court that the Vakalatnama filed in the case by the learned counsel for the petitioner neither contained full name of the counsel nor other requisite details like the full addresses of office/chamber, residence including telephone number etc. The Court feels constrained to say that in majority of Vakalatnamas being fined in the cases before this Court, requisite details as contemplated in Rule 2-A aforesaid of the Rules of the Court are conspicuous by their absence and a result, the learned counsels for the other side often find it harrowing and difficult to locate the learned counsel ostensibly for the purposes of exchanging affidavits, serving notice/counter affidavit etc. or apprising them of any information required by the Court to be given in writing in the course of a proceeding before the Court.

3. Besides amendment in the Rules of the Court as aforesaid, Bar Council of Uttar Pradesh passed a resolution on 10.12.1989 taking cognizance of the fact that the courts are being tricked or misled by certain unscrupulous elements impersonating themselves as lawyers which in consequence has lowered the status/dignity of the lawyers in the estimation of the society, directing that the lawyers appearing in a particular case shall invariably disclose/mention registration number/enrolment number. It was further resolved in the resolution that failure on the part of lawyers in mentioning their registration/enrolment

number shall be treated as professional misconduct. The resolution so passed is excerpted below for ready reference.

प्रस्ताव

"प्रायः यह देखने को मिल रहा है कि कुछ व्यक्ति अधिवक्ता न होते हुए भी न्यायालयों में अधिवक्ता बन कर वकालत का कार्य कर रहे हैं और वादकारियों तथा न्यायालयों को धोखा दे रहे हैं जिससे अधिवक्ता समाज की गरिमा भी गिर रही है। बार कौंसिल यह निश्चय करती है कि प्रत्येक अधिवक्ता अपने वकालतनामें में अथवा पर्चा एडवोकेट में अपना नाम स्पष्ट रूप से लिखेगा और साथ ही अधिवक्ता पंजीकरण संख्या भी लिखेगा। यह भी निश्चय हुआ कि इस प्रस्ताव की प्रतिलिपि प्रत्येक जनपद एवं समस्त न्यायाधिकरणों को समुचित कार्यवाही हेतु प्रेषित कर दी जाये"।

तदनुसार अधिवक्ताओं के आचरण सम्बन्धी नियम में निम्नलिखित नियम बनाये जाते हैं:-

"प्रत्येक अधिवक्ता किसी भी न्यायालय में अपना वकालतनामा या पर्चा मेमो दाखिल करते समय अपनी पंजीकरण संख्या स्पष्ट
रूप से उसमें अंकित करें और ऐसा न करना व्यवसायिक दुराचरण माना जायेगा"।

4. It would thus be clear that resolution of the Bar council followed by amendment in the Rules of the Court by adding Section 2A concurrently envisage that complete details including full name, complete address of office and residence including phone number, enrolment number have invariably to be disclosed. Both the Rules of the Court and resolution of the Bar council clearly postulate that no Vakalatnama or memorandum of appearance shall be accepted by courts or tribunals functioning in State of U.P. unless they are complete in all requisite details as provided. In this connection Section 35 of the Advocates Act may also be referred to which defines misconduct and speaks of disciplinary enquiry into the allegations of professional or other misconduct.

5. As stated supra, legal profession is a noble profession and a legal practitioner has been called an integral part of the justice system and he is thus in a sense a member of the body judicial. In **Bar Council of Maharasthra v. M.V. Dabholkar (AIR 1976 SC 242, Iyer, J.** said that "*the vital role of the lawyer depends upon his probity and professional life-style. The central function of the legal profession is to promote the administration of justice. As monopoly to legal profession has been statutory granted by the nation, it obligates the lawyer to observe scrupulously those norms, which make him worthy of confidence of community in him as a vehicle of social justice".* The preamble to the Bar Council of India Rules postulates that *"An advocate shall, at all times, comport himself in a manner befitting his status as an officer of the Court, a privileged member of the community, and a gentleman, bearing in the mind that what may be lawful and moral for a person who is not a member of the Bar, or for a member of the bar in his non-professional capacity may still be improper for an Advocate. Without prejudice to the generality of the foregoing obligations, an Advocate shall fearlessly uphold the interests of his client, and in his conduct conform to the rules hereinafter mentioned both in letter and spirit.*

6. The Bar Council has, in the matter of practice of professions of law mentioned in Section 30 of the Act, subjected the Advocates to certain restrictions. Section 1, Chapter II of the Bar council of India Rules mentions duty of an Advocate to the Court. Section II Chapter II mentions duty of an Advocate to the client and Section III mentions duty

of an Advocate to Opponent while Section IV postulates duty to colleagues. These duties have been envisaged with a view to protecting the dignity of the legal community besides upholding the confidence of general places in the efficacy of law. In the event of any breach by a member of legal profession, the Bar Council is authorized with the power to initiate disciplinary action/proceeding in order to protect the dignity of the legal profession. It is in this perspective, considering that unscrupulous elements posing themselves as lawyers are bringing disrepute to the legal profession, the Bar Council appropriately passed the resolution aforestated to put check on counterfeit lawyers. Besides the mandatory requirement as contemplated in the amended Rules of the Court, I find myself in completed in the amended Rules of the Court, I find myself in complete agreement with the resolution that though legal profession has been a noble profession such unscrupulous elements have crept into this profession and are bring disrepute to the profession. One such case has forced itself upon the notice of the Court in which Court was compelled to refer the matter to the Chief Judicial Magistrate Azamgarh for enquiry.

7. In writ petition no.43255 of 2001, which this Court is seized of, the disquieting feature noticed by the Court was that the said petition was filed by a person personating himself as Ram Kesh petition. Subsequently, a person swearing himself to be Ram Kesh appeared before the Court through Sri P.C. Srivastava, Advocate claiming himself to be Ram Kesh and stated that he never filed the aforesaid petition. Learned counsel who filed the petition on behalf of the petitioner on being asked to produce the petitioner, made a statement across the bar that despite his best efforts nobody has responded. It would however appear from a scrutiny of the Vakalatnama that the aforesaid Ram Kesh has been identified by one Lalta Yadav, who according to the petitioner's counsel is an Advocate though it is not disclosed as to where the aforesaid Lalta Yadav has been practicing. In the above perspective, the Court was compelled to refer the matter to Chief Judicial Magistrate, Azamgarh for enquiry and report.

8. Reverting to Rules of the Court, it is clearly postulated in Rule 2-Add the Quick Launcher on Panel of the Rules of Court that the Stamp reporter/office shall not accept any Vakalatnama or memorandum of appearance unless it bears full name of the counsel, his complete address both of High Court, chamber/office if any and residence including telephone number (s) if any, date of signing Vakalatnama, enrolment number etc.

9. Since in the instant case, the learned counsel was asked to remove defect and he has since removed the defects consistent with the mandate of Rule 2 A of the Rules of the Court, I am disinclined to proceed further in this regard. However, in the facts and circumstances, considering that the Courts are deluged with Vakalatnamas/memos of appearance incomplete in requisite details I feel called to issue judicial flat directing stamp reporter not to accept Vakalatnama/memo of appearance in any case unless they are complete in all requisite details as embodied in Rule 2-A of the Rules of Court.

10. In the above conspectus, it is hereby mandated that the Stamp reporter of the Court/Office shall scrutinize the Vakalatnama very closely and unless they are complete in all requisite details as embodied in Rule 2-A of the Rules of the Court, he will not allow the petition to be processed for being presented before the Court.

11. Similar disquieting, situation prevails in the subordinate courts where according to the Bar Council Resolution dated 10.12.1989, unscrupulous elements can be seen to be playing tricks with the Courts bringing disrepute to the judiciary as well as to the dignity of the lawyers community. In my considered view there is compelling need to amend the statutory Rules pertaining to subordinate courts as well on similar lines. Till such amendments are effected in the statutory rules, it would be in the fitness of things to circulate a copy of this judgment to all the District Judges/all the Chairmen of the Tribunals/Chief Secretary, U.P. Shasan Lucknow for strict compliance with the resolution of the Bar Council of the State of U.P.. It may be suggested that the District Judges and all authorities concerned in State of U.P. shall maintain a register docketing complete details about the lawyers practicing, which may be duly prepared upon verification of original enrolment certificates of an Advocate and whenever any Vakalatnama is filed and in case of any suspicion about the authenticity of registration/enrolment number may be processed for being presented before the Courts/Tribunals etc. It may be quipped here for edification that so far as High Court is concerned Rules of the Court have already been amended and in pursuance thereof list of Advocates is being processed.

12. Registrar General is directed to ensure strict compliance with the above directions henceforth. As stated supra, a copy of this judgment be circulated to all authorities including Chairmen of various Tribunals functioning in the State of U.P. and Chief Secretary, U.P. Shasan Lucknow for onward transmission and compliance in all courts including Revenue as well as consolidation courts within four months. The matter may be listed on 7.7.2006 for monitoring the compliance with the directions aforestated.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2006

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

Criminal Misc. Application no. 1591 of 2006

Manoj Kumar Swami ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri S.P. Singh Raghav
Sri Anil Raghav

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

Code of Criminal Procedure-Section 482-application to summon school record-by defence counsel during Trial of offence under Section 498-A/304 I.P.C.-on the ground that in dying declaration the deceased had made statement about her illiteracy-actually she had passed High School examination-Trail Court rejected on the ground that the statement of the deceased has been recorded in presence of Magistrate-cannot be disbelieved-held-deceased has right to summon any evidence to substantiate his defence-rejection-held not-proper.

Held: Para 4

Taking into consideration the allegation of the applicant that the deceased was an uneducated lady but she had given statement that she had passed High School examinati on, it is in the interest of justice that the application of the applicant to summon the relevant record to ascertain this fact whether she had passed High School examination or not, should have been granted by the learned Addl. Sessions Judge. The application, therefore, deserves to be allowed.

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

1. This is an application under section 482 Cr.P.C. for quashing the order dated 18.1.2006 passed by the Addl. Sessions Judge-VIth, Ghaziabad in S.T.No. 68 of 2001, State Vs. Manoj Swami and others, under sections 498-A, 304-B I.P.C. of police station Sihani Gate, Ghaziabad.

2. The facts relevant for disposal of this application are that the applicants, Manoj and other co-accused persons are facing trial under sections 498-A and 304-B I.P.C. in the aforesaid case. It appears from perusal of the order of the learned Addl. Sessions Judge that the prosecution evidence has been recorded and the case is fixed for defence evidence. The accused had moved an application for summoning the record of Kanya Vidyalaya Khurja for tenth class pertaining to the years from 1997 to 1999. Their allegation is that the deceased Shashi had stated in her dying declaration that she had passed High School examination from the aforesaid school three years ago. This statement was given by her on 8.9.2000. The applicant's allegation is that she was an uneducated lady and had not studied in any school. So in view of the statement made in the dying declaration he wants to summon the record of the said school. The learned Sessions Judge rejected the above application on the ground that the dying declaration was recorded by the S.D.M. and so there was no necessity to summon the above record.

3. Having heard learned counsel for the applicant as well as the learned A.G.A. for the State, I am of the view that the case is listed for defence evidence; and at the stage of defence, the accused has a right to summon any evidence which may be relevant for proper appreciation of the prosecution evidence and to substantiate his defence.

4. Taking into consideration the allegation of the applicant that the deceased was an uneducated lady but she had given statement that she had passed High School examination, it is in the interest of justice that the application of the applicant to summon the relevant record to ascertain this fact whether she had passed High School examination or not, should have been granted by the learned Addl. Sessions Judge. The application, therefore, deserves to be allowed.

5. The application is allowed and the Addl. Sessions Judge is directed to summon the relevant record to ascertain the fact whether the deceased had actually passed High School examination or not.

The applicant shall appear before the trial court on 25.2.2006.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2006

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

Civil Misc. Writ Petition No. 17190 of 2006

Sant Gadge Seva Niketan, U.P. and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Rakesh Kumar Shukla

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Practice and Procedure-direction to decide representation-without considering the merit of case-High Court should not issue such direction-otherwise a time barred claim may be decided-without provision of review.

Held: Para 7

A Division Bench of this Court to which one of us (Hon. Dr. B.S. Chauhan, J. was a party) in Writ Petition No. 8642 of 2003 (Rajendra Singh Vs. State of U.P. & Ors.) decided on 30.7.2003 has also held that without considering the merit of the case, the Court should not issue a direction to decide representation to any of the authorities for the reason that under the garb of getting the representation decided, the party may succeed in getting adjudicated a time barred claim, may be by an authority having no competence or by deciding the representation an order may be reviewed though remedy of review is not provided under the Statute. In the said case, under the garb of getting the representation decided, the party wanted the authority under the U.P. Motor Vehicles Taxation Act, 1997 to review its assessment.

Case law discussed:
2000 (6) SCC-293
AIR 2004 SC-510
J.T. 2006 (3) SC-189

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

1. This writ petition has been filed for disbursing the amount under a non-statutory contract. The Supreme Court has time and again examined this issue and observed that a writ petition does not lie for recovery of an amount under a contract and even though a Statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions but disputes arising out of the terms of such contracts have to be settled by the ordinary principles of law of contract and the fact that one of the parties to the agreement is a statutory or public body does not affect the principles to be applied. It has also been emphasised that such a contract is not a statutory contract and the disputes relating to interpretation of the terms and conditions of such a contract cannot be agitated in a writ petition under Article 226 of the Constitution. Thus, whether any amount is due or not and refusal to pay it is justified or not are not matters which can be agitated and decided in a writ petition.

2. In this connection reference may be made to the decision of the Supreme Court in ***Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil & Ors., (2000) 6 SCC 293***, wherein it was observed :-

"We find that there is a merit in the first contention of Mr. Raval. Learned counsel has rightly questioned the

maintainability of the writ petition. The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. *The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract.* ***The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India****. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract.* ***Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition****."* (emphasis supplied)

3. In ***State of Jammu & Kashmir Vs. Ghulam Mohd. Dar & Anr., AIR 2004 SC 510***, the Supreme Court observed:-

"Furthermore, the respondent herein filed the aforementioned writ petition for enforcing a contract qua contract. Although an objection has been taken as regards the maintainability of the writ petition by the appellant herein, the same unfortunately has not been considered by the High Court. It is well settled that writ of or in the nature of mandamus would not ordinarily issue for enforcing the terms and conditions of a contract qua contract. A writ of mandamus would issue when a question involving public law character arises for consideration."

4. In view of the aforesaid decisions, it is not possible for us to issue the directions as prayed for while exercising powers under Article 226 of the Constitution.

5. Learned counsel for the petitioners then submitted that this Court may pass an order for deciding the pending representation. It is a settled legal proposition that what cannot be done directly cannot be permitted to be done indirectly. The money in respect of a non-statutory contract cannot be recovered in a writ jurisdiction. It cannot, therefore, be recovered by issuing any direction to the respondents to decide the representation.

6. In this connection reference may also be made to the decision of the Supreme Court in ***A.P.S.R.T.C. & Ors. Vs. G. Srinivas Reddy & Ors,. JT 2006 (3) SC 189*** in which strong comments were made against issuance of direction to the authorities to decide the representations as under the garb of deciding the representations, time barred claims were entertained by the authorities. The relevant portion of the judgment is as under:-

"We may also note that sometimes the High Courts dispose of matter merely with a direction to the authority to "consider' the matter without examining the issue raised even though the facts necessary to decide the correctness of the order are available. Neither pressure of work nor the complexity of the issue can be a reason for the court, to avoid deciding the issue which requires to be decided, and disposing of the matter with a direction to "consider' the matter afresh. Be that as it may.

There are also several instances where unscrupulous petitioners with the connivance of "pliable' authorities have misused the direction "to consider' issued by court. We may illustrate by an example. A claim, which is stale, time-barred or untenable, is put forth in the form of a representation. On the ground that the authority has not disposed of the representation within a reasonable time, the person making the representation approaches the High Court with an innocuous prayer to direct the authority to "consider' and dispose of the representation. When the court disposes of the petition with a direction to "consider' the authority grants the relief, taking shelter under the order of the court directing him to "consider' the grant of relief. Instances are also not wanting where authorities, unfamiliar with the process and practice relating to writ proceedings and the nuances of judicial review, have interpreted or understood the order "to consider' as directing grant of relief sought in the representation and consequently granting reliefs which otherwise could not have been granted. Thus, action of the authorities granting undeserving relief, in pursuance of orders to "consider', may be on account of ignorance, or on account of bona fide belief that they should grant relief in view of court's direction to "consider' the claim, or on account of collusion/connivance between the person making the representation and the authority deciding it. Representations of daily wagers seeking regularization/absorption into regular service is a species of cases, where there has been a large scale misuse of the orders "to consider'."

7. A Division Bench of this Court to which one of us (Hon. Dr. B.S. Chauhan, J. was a party) in Writ Petition No. 8642 of 2003 (Rajendra Singh Vs. State of U.P. & Ors.) decided on 30.7.2003 has also held that without considering the merit of the case, the Court should not issue a direction to decide representation to any

of the authorities for the reason that under the garb of getting the representation decided, the party may succeed in getting adjudicated a time barred claim, may be by an authority having no competence or by deciding the representation an order may be reviewed though remedy of review is not provided under the Statute. In the said case, under the garb of getting the representation decided, the party wanted the authority under the U.P. Motor Vehicles Taxation Act, 1997 to review its assessment. This Court while rejecting the writ petition, held as under:-

"The review application is not maintainable against the assessment order nor any order of rectification is permissible asking the said authority to decide representation would amount to directing him to review the said order which is not permissible in law. Creation of a jurisdiction in a Court is a Legislative function and it cannot be conferred by any means by the Court. Reviews/Appeal is a creation of Statute and it cannot be created by acquiescence of a party or by the order of the Court vide ***United Commercial Bank Ltd. Vs. Their Workmen, AIR 1951 SC 230 and Kesar Singh & Ors. Vs. Sadhu, (1996) 7 SCC 711."***

8. In view of the above, we are afraid, no direction can be issued to the respondents to decide the representation filed by the petitioners.

9. Thus in view of the above, the writ petition is dismissed. It is made clear that we have not examined the merits of the case. However, if the petitioners are so advised, they may approach the appropriate Forum for the relief claimed in this petition. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2006

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No.39737 of 1999

Smt.Samapika Chatterjee ...Petitioner
Versus
State of U.P and another ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh

Counsel for the Respondents:
Sri N.P. Pandey
Sri Shiv Abhinav Upadhya
S.C.

Constitution of India-Art.-226-Grant of L.T. Grade Salary- G.O. 19.10.89 provides grant of L.T. Grade-after completing 10 years services in C.T. Grade on 1.1.86-Services of petitioner found satisfactory-held-entitled for L.T. grade salary from the date of completion of 10 years successful service as L.T. grade-Petitioner allowed with all consequential benefits.

Held: Para 11

It is relevant to note that in the order passed by Regional Inspectress of Girls School, it has not been stated that services of the petitioner are not satisfactory. The entitlement under the Government Order to get salary is based on satisfactory completion of 10 years of service. The petitioner having admittedly completed 10 years service on 1.1.1986, she is clearly entitled for fixation of salary in L.T grade from 1.1.1986. Consequently the writ petition is allowed. The order dated 26.8.1999 annexure-9 to the writ petition is quashed. A writ of mandamus is issued to the respondent to treat the petitioner in L.T grade with effect from 1.1.1986

and fix her salary accordingly. The petitioner is entitled to all her consequential benefits

Case law discussed:

1995 AWC-89

(Delivered by Hon'ble Ashok B hushan, J.)

1. Heard Shri V.K. Singh, learned counsel for the petitioner and Shri N.P. Pandey, learned standing counsel appearing for the respondents. Counter and rejoinder affidavits have been exchanged and with the consent of the parties, the writ petition is being finally decided.

2. By this writ petition, the petitioner has prayed for quashing order dated 26.8.1999 passed by Regional Inspectress of Girls School rejecting the representation of the petitioner claiming fixation of salary in the L.T grade. A writ of mandamus has also been sought directing the respondent No.2 to pay the salary to the petitioner along with arrears with effect from 1.1.1986 in L.T grade.

3. Brief facts for deciding the writ petition are; the petitioner was appointed vide appointment letter dated 31.10.1973 in B.T.C grade in the Primary Section of Indian Girls Inter College, Allahabad. The appointment of the petitioner was also approved by the Regional Inspectress of Girls School vide order dated 18.12.1973. The petitioner claimed entitlement for C.T grade from 1.11.1978 after completion of five years in B.T.C grade. The claim of the petitioner for grant of C.T grade was denied by the order of Regional Inspectress of Girls School dated 23.3.1987. The petitioner filed a writ petition No.14469 of 1987 claiming entitlement of grant of C.T grade. The case of the petitioner was contested in the writ petition. The writ petition of the petitioner was allowed vide judgement of this Court dated 7.2.1990. The claim of the petitioner to be treated into C.T grade with effect from 1.5.1980 was allowed. Operative portion of the judgement is as follows:

"of course, whatever amount has been paid to the petitioner with effect from 1.5.1980 will be adjustable. The arrears shall be paid to the petitioner within a period of four months from the date of presentation of a certified copy of this order by the petitioner before the Regional Inspectress. The arrears will include the salary etc. of the petitioner for the month of May, 1990. The respondents shall commence 'paying the salary to the petitioner as lady teacher in the C.T grade with all the increments etc. from the month of June, 1990 will become payable in the month of July, 90.

With these directions, this petition is disposed of finally.

The petitioner is entitled to her costs."

4. There is no dispute after the judgement of this Court dated 7.2.1990, the petitioner has been granted C.T grade from 1.5.1980 and was paid salary in C.T grade thereafter. Petitioner claims entitlement for grant of L.T grade with effect from 1.1.1986. The representations were submitted by the petitioner for fixation of salary in the L.T grade in pursuance of the Government Order dated 19.10.1989 and the order dated 2.12.1989. The judgement of this Court in ***Smt. Aruna Ghosh versus State of U.P*** in writ petition No. 16360 of 1991 decided on 8.2.1995 was also relied. Petitioner ultimately filed a writ petition No.14176 of 1991 for claiming fixation in the L.T

grade. The said writ petition was disposed of by this Court on 21.5.1999 directing the Regional Inspectress of Girls School to decide the representation, the Regional Inspectress of Girls School passed an order dated 26.8.1999 rejecting the representation of the petitioner. Two reasons were given in the order by Regional Inspectress of Girls School for refusing the grant of L.T grade. It has been stated in the order that from the Government Order dated 19.10.1989 it is clear that teachers are entitled for grant of L.T grade after 10 years of service. It has further been stated that teachers working in the Primary Schools which are attached with High School and Intermediate Colleges are not entitled for B.T.C /C.T/L.T grade. This writ petition has been filed challenging the said order.

5. Shri V.K.SIngh, learned counsel for the petitioner challenging the order contended that view taken by the Regional Inspectress of Girls School that teachers working in the Primary Institution which are attached with High School/Intermediate Colleges are not entitled for grant of B.T.C./C.T/L.T grade is clearly in teeth of earlier judgement of this Court in writ petition no. 14469 of 1987 of the petitioner herself. It is further contended that petitioner is entitled for fixation of L.T grade after completion of 10 years satisfactory service as clarified by order of the Director of Education dated 2.12.1989.

6. Shri N.P.Pandey learned standing counsel has supported the impugned order and has reiterated the grounds taken in the order. The learned standing counsel however, has not been, apart from the reasons mentioned in the order, able to point out any other reason which dis entitled the petitioner from grant of the L.T.grade.

7. I have considered the submissions of the learned counsel for the parties and perused the record. Between the parties, there is a final judgement of a Division Bench of this Court dated 7.2.1990 copy of which judgement has been filed as annexure-3. By the said judgement this Court has taken the view that petitioner was entitled for grant of C.T grade with effect from 1.5.1980. The State of U.P has also filed special leave petition against the said judgement which too has been dismissed on 31.1.1991. In the Division Bench judgment of this Court above mentioned the C.T grade has been granted to the petitioner on the basis of petitioner's having been appointed in B.T.C grade in the Primary Section attached to Intermediate College. This Court having already taken the view that the petitioner who was B.T.C grade teacher in Primary Section was entitled for grant of C.T grade, it is not open for the Regional Inspectress of Girls School to take the view that teachers working in the Primary School attached to High School/Intermediate College are not entitled to B.T.C/C.T/L.T grade. The said reasoning of the Regional Inspectress of Girls School is clearly in teeth of the above judgement of this Court and has to be strongly disapproved.

8. The next reason which is not expressly stated to be a reason for denial, but it has been stated in the order that according to the Government Order dated 19.10.1989 L.T grade can be given after 10 years of service. The said issue as to when a C.T grade teacher is entitled to be granted L.T grade has been considered by this Court in Smt. Aruna's Ghosh (supra)

in which case this Court considered the Government Order dated 19.10.1989 as well as subsequent order of the Director of Education dated 2.12.1989. This Court took the view that the C.T grade teachers are entitled for fixation in L.T grade after 10 years of satisfactory service out of which 5 years should be as C.T grade teacher. Another subsequent judgement of this Court in **Shakuntala Shukla's case** reported in 1995 AWC 89 again reiterated the same view. Following observations was made by this court in Shakuntala Shukla's case.

"4. ..... But the impugned order in so far as it holds that the petitioner would be entitled to L.T. Grade with effect from 1.7.90 i.e., after completion of 10 years' continuous satisfactory service in C. T. grade, is, to my mind, founded on misreading and is contrary to the intendment of the G. O. aforesaid. What is required in order to qualify for L. T. grade in accordance with the G. O. afore- stated is to have five years' service in C. T. Grade and 10 years overall satisfactory service. The words ' satisfactory service' (Santosh Janak Seva) occurring in G. O. aforesaid. In my opinion, include the service rendered by the petitioner in J. T. C. grade as well. 10 years' satisfactory service within the meaning of the G. O. aforesaid cannot be circumscribed to service rendered in C. T. Grade alone. That is how I have construed the G. O. aforesaid, which amended an earlier G. O. dated 19.10.1989, in writ petition No. 16360 of 1991 Smt. Aruna Ghosh v. State of U.P. and others decided on 8.2.1995. I am of the view that on a proper construction of the G. O. aforesaid, the petitioner would be entitled to get L. T. grade on completion of 5 years' service in C. T. grade and 10 years 'overall satisfactory service after the institution was upgraded to the level of High School. The impugned order, therefore, deserve to be modified to that extent."

9. Recently, I have also taken the same view in the judgement dated 13.2.2006 in writ petition No.39731 of 2000.

10. Taking into consideration the aforesaid fact and above view of the matter the order of the Regional Inspectress of Girls School cannot be sustained. The reasons given in the order for refusing grant of salary in the L.T grade cannot be sustained. At this stage, it is also relevant to advert one more reason given in the counter affidavit. It has been stated in the counter affidavit that petitioner was not promoted in C.T grade and she does not hold the C.T grade substantially and unless there is vacancy in the L.T grade petitioner is not entitled for LT grade. The said stand has been taken in paragraph 8 & 13.

11. In the present case, the petitioner's claim was for fixation of salary in accordance with the Government Order. The Court was neither called upon to consider the promotion or entitlement to hold the post. Under the Chapter III Regulation 42 of the U.P Intermediate Education Act the employees and teacher of aided Institutions are entitled to receive salary as fixed by State Government from time to time. The entitlement of teachers to receive salary flow from the government orders issued from time to time. In the present case, petitioner was claiming entitlement for fixation of salary. It is not necessary to even examine as to whether there was C.T grade post on which petitioner was granted C.T grade

and further there are L.T grade post. It is not a case seeking promotion from C.T grade to L.T. grade. The promotion from C.T grade to L.T grade is governed by Rules and Regulations. The requirement of vacancy is necessary when question of promotion is considered. I am not concerned in this case with regard to promotion in L.T grade, hence the vacancy existence or non existence is not relevant for purposes of present case. Thus the grounds taken in the counter affidavit also do not substantiate the plea taken by the State in denying the claim of the petitioner. It is relevant to note that in the order passed by Regional Inspectress of Girls School, it has not been stated that services of the petitioner are not satisfactory. The entitlement under the Government Order to get salary is based on satisfactory completion of 10 years of service. The petitioner having admittedly completed 10 years service on 1.1.1986, she is clearly entitled for fixation of salary in L.T grade from 1.1.1986. Consequently the writ petition is allowed. The order dated 26.8.1999 annexure-9 to the writ petition is quashed. A writ of mandamus is issued to the respondent to treat the petitioner in L.T grade with effect from 1.1.1986 and fix her salary accordingly. The petitioner is entitled to all her consequential benefits. The respondents are directed to pay arrears of salary within a period of six months from the date of production of a certified copy of this order.

12. The writ petition is allowed accordingly. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2005

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

Civil Misc. Writ Petition No. 70003 of 2005

Smt. Raphia ...Petitioner
Versus
State of U.P. through Secretary, Department of Revenue, U.P., at Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri B.R. Sharma

Counsel for the Respondents:
S.C.

<u>High Court Rules 1952, Chapter 22 Rule-5-readwith Code of Civil Procedure-Section 148-A (5)</u>-Caveat Application-once filed in writ proceeding or other proceeding not governed by C.P.C.-Stamp reporter can not ignore from reporting on the ground of expiry of 90 days-section 148-A C.P.C.-held not applicable in writ proceedings.

Held: Para 6 and 8

From a plain reading of Section 148A of the C.P.C., it is clear that this provision is applicable in a suit or proceeding instituted or about to be instituted in a Court. Section 148A of the C.P.C. will be applicable to the suits or proceedings governed by the C.P.C. and not in the other proceedings not governed by the C.P.C.

From perusal of the provisions of Rule 5 of Chapter XXII of The Allahabad High Court Rules, 1952, this Court is of the considered view that once a Caveat is filed in a writ petition or other proceedings not governed by the C.P.C., the Stamp Reporter is bound to make a report about filing of the Caveat. As

Section 148A of the C.P.C. will not be applicable to the writ petitions, the Stamp Reporter is not competent to ignore the Caveat filed in writ petitions on the ground that 90 days have expired.

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

1. When the case was taken, this was brought to the notice of the Court that the Caveat was reported by the Stamp Reporter when the writ petition was presented for reporting before him, but subsequently he scored out the same.

2. Learned counsel for the petitioner stated that Caveat was wrongly reported by the Stamp Reporter, but on his objection to the effect that Caveat remains effective for only 90 days, the report was scored out and another report to the effect that no Caveat has been filed was made by the Stamp Reporter. Learned Counsel for the petitioner referred Section 148-A (5) of the C.P.C. in support of his contention.

3. Learned counsel for Caveator, in reply, urged that provisions of C.P.C. will not be applicable with regard to lodging Caveat in writ petitions. The only provision under which Caveat could be lodged in writ petitions is Rule 5 of Chapter XXII of The Allahabad High Court Rules, 1952. He further urged that Caveat was rightly reported by the Stamp Reporter, but the report was wrongly and illegal scored out by Stamp Reporter at the instance of petitioner's counsel. He also urged that petitioner is entitled to be heard in opposition at the initial stage.

4. Considered arguments of learned counsel for the parties and relevant rules on the point.

5. Section 148A of the C.P.C. is being reproduced below for ready reference:-

"148A. Right to lodge a caveat.-(1) Where an application is expected to be made, or has been made, in a suit or proceeding instituted, or about to be instituted, in a Court, any person claiming a right to appear before the Court on the hearing of such application may lodge a caveat in respect thereof.

(2) Where a caveat has been lodged under sub-section (1), the person by whom the caveat has been lodged (hereinafter referred to as the caveator) shall serve a notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been, or is expected to be, made under sub-section (1).

(3) Where, after a caveat has been lodged under sub-section (1), any application is filed in any suit or proceeding, the Court, shall serve a notice of the application on the caveator.

(4) Where a notice of any caveat has been served on the applicant, he shall forthwith furnish the caveator at the caveator's expense, with a copy of the application made by him and also with copies of any paper or document which has been, or may be, filed by him in support of the application.

(5) Where a caveat has been lodged under sub-section (1), such caveat shall not remain in force after the expiry of ninety days from the date on which it was lodged unless the application referred to in sub-section (1) has been made before the expiry of the said period."

6. From a plain reading of Section 148A of the C.P.C., it is clear that this provision is applicable in a suit or

proceeding instituted or about to be instituted in a Court. Section 148A of the C.P.C. will be applicable to the suits or proceedings governed by the C.P.C. and not in the other proceedings not governed by the C.P.C.

7. I have also carefully gone through Rule 5 of Chapter XXII of The Allahabad High Court Rules, 1952, which is being reproduced below:-

"Lodging of Caveat.-(1) Where an application is expected to be made or has been made, any person claiming the right to oppose such an application, may, either personally or through his counsel, lodge a caveat in the Court in respect thereof.

(2) The caveator shall serve a notice of the caveat by registered post, acknowledgment due, on the person by whom the application is expected to be made and submit proof of service in Court.

(3) After the caveat has been lodged and the notice thereof has been served on the applicant's counsel, the applicant shall forthwith furnish to the caveator or his counsel, at the caveator's expense, with a copy of the application as well as any miscellaneous application made therein for interim relief.

(4) Where a caveat has been lodged and notice thereof has been served the applicant shall when presenting the application in Court, furnish proof of having given prior notice in writing to the caveator's counsel of the date on which the application is proposed to be presented."

8. From perusal of the provisions of Rule 5 of Chapter XXII of The Allahabad High Court Rules, 1952, this Court is of the considered view that once a Caveat is filed in a writ petition or other proceedings not governed by the C.P.C., the Stamp Reporter is bound to make a report about filing of the Caveat. As Section 148A of the C.P.C. will not be applicable to the writ petitions, the Stamp Reporter is not competent to ignore the Caveat filed in writ petitions on the ground that 90 days have expired.

9. Accordingly, I hold that Stamp Reporter on the objection raised by petitioner's counsel wrongly scored out the report which was rightly made earlier about filing of the Caveat by the Caveator's counsel.

10. Stamp Reporter shall take care of this in future while reporting Caveat filed in the writ petitions.

11. Registrar General of the Court is directed to take appropriate steps for compliance of this order.

As prayed, put up day after tomorrow for admission.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.02.2006

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 7739 of 2004

Nagendra Singh ...Petitioner
Versus
Board of Directors, Deoria-Kasaya Zila Sahkari Bank Limited, Head Office-Deoria, District Deoria through its Chairman and others ...Respondents

Counsel for the Petitioner:
Sri S.A. Gilan

Counsel for the Respondents:
Sri K.N. Mishra

Constitution of India, Art. 226- alternative remedy-petitioner-Branch Manager-facing disciplinary proceeding for certain financial irregularities-ultimately-after conclusion of disciplinary proceeding-show cause notice for proposed punishment for stoppage of two annual increments with permanent effect-petition filed-held-in view of the Hon'ble Supreme Court decision in Hindustan Steel Works Corporation-petitioner has statutory right to appeal before Registrar under section 86 of U.P. Cooperative Services Employees Regulations, 1975-writ not maintainable.
Held: Para 11 and 12

From the Regulation it is apparent that the relief of both the punishments awarded to the petitioner is provided by way of statutory appeal, which has not been exhausted by the petitioner.

It is the consistent view of Hon'ble Supreme Court that wherever an alternate remedy is available it should not be bye-passed and the petitioner has to approach this Court after availing alternate remedy. Reference in this regard may be made to Hindustan Steel Works Construction Ltd., and another Vs. Hindustan Steel Works Construction Ltd., Employees Union (2005) 6 SCC-725 and U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and another, (2005) 107 FLR 729.
Case law discussed:
2005 (6) SCC-725
2005 FLR (107) 729

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

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

The petitioner was appointed as Branch Manager at Branch Rudrapur of Deoria-Kasaya, Zila Sahkari Bank Limited.

2. It is alleged that on 13.11.2000 and 20.3.2001 two new accounts were opened when the petitioner was on field duty and was not present in the bank. When the balance sheet was being prepared it was came into light that Rs.46,000/- and Rs.33,000/- were fraudulently withdrawn from the bank through the aforesaid two new accounts without depositing any money.

3. On 26.10.2002 when the petitioner came to know about the aforesaid fact, he made a complaint to the Higher authorities. Sri Shyam Nawal Yadav, Senior Manager was appointed to conduct a preliminary enquiry and report of preliminary enquiry dated 26.10.2002 was submitted. On the direction of the superior officers, the petitioner made a complaint dated 29.10.2002 to the police along with Inquiry report dated 26.10.2002 and FIR was lodged on 2.11.2002.

4. Thereafter the respondents vide order dated 15.11.2002 asked 3 persons Arvind Kumar Singh, Rajendra Prasad and the petitioner to deposit certain amount. The petitioner protested and was served with a charge sheet dated 21.12.2002 to which he submitted reply.

5. It is also alleged that again a supplementary chargesheet dated 1.2.2003 was served on the petitioner to which he again submitted reply on 21.2.2003. Enquiry Officer was appointed in the matter who after conducting the enquiry submitted his report dated

25/26.6.2003. A show cause notice was served upon the petitioner on 26.8.2003 proposing for recovery of Rs. 1,27,427.00 with interest thereon and stoppage of one increment with permanent effect. The petitioner submitted his reply to the aforesaid show cause notice on 30.10.2003 and by order dated 24.1.2004 the petitioner was reinstated in service by awarding punishments proposed above in the show cause notice.

6. Aggrieved by the order dated 30.10.2003 this writ petition has been filed for the following reliefs:-

(i) To issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 24.1.2004 passed by the respondents (Annexure-12 to the writ petition);

(ii) To issue a writ, order or direction in the nature of mandamus directing the respondents not to recover any amount from the petitioner on the basis of impugned order dated 24.1.2004;

(iii) To issue a writ, order or direction in the nature of mandamus directing the respondents to treat the petitioner reinstated with all full pay, wages and other financial and promotional benefits to which the petitioner is entitled in accordance with law;

(iv) To issue any other writ, order or direction as this Court may deem fit and proper under the facts and circumstances of the case; and

(v) To issue award the cost of the petition to the petitioner.

7. A preliminary objection has been raised by Sri K.N. Mishra, counsel for the respondents that the terms and conditions of the employees of the respondents-Co-operative Bank are governed by the U.P. Co-operative Service Employees Regulations, 1975. He further submits that the petitioner has an efficacious and alternative remedy of filing an appeal under Regulation 84(1(d) of the aforesaid Regulations which has not been exhausted by the petitioner.

8. It is submitted that Regulation 84 of the U.P. Co-operative Service Employees Regulations, 1975 provides for penalty. Regulation 84(1)(d) also provides the punishment of recovery from the pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the Co-operative Society by the employee. It is further stated the aforesaid regulation also provides that if any employee is aggrieved by the order of the competent authority regarding recovery of loss from his pay under orders of the Committee of Management, the employee has an alternative remedy to challenge the validity of the aforesaid order before the Registrar, Co-operative Societies U.P. under Rule 86 of the aforesaid Regulations, 1975.

9. The counsel for the respondents further submits that the petitioner has been punished for stoppage of one increment by the Committee of Management which is also appealable before the U.P. Co-operative Institutional Service Board by way of appeal under Regulation 86 and other punishment of pecuninary loss from the pay is also appealable before the Registrar, hence the punishment imposed on the petitioner is appealable before the Registrar and the Board as such the writ petition is liable to be dismissed on the ground of alternative remedy of filing statutory appeal as provided in Service Regulations.

10. Regulations 84 (i)(d) and 86 of the aforesaid Regulations, 1975 are as under:-

"84-Penalties:- (i) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under Section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by any one of the following penalties-

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(d) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the Co-operative society by the employee's conduct.

86-Appeal- Orders imposing penalty under sub-clauses (a) to (d) of clause (1) of Regulation no. 84 shall be appleable to the authorities as mentioned in Appendix 'D'."

11. From the Regulation it is apparent that the relief of both the punishments awarded to the petitioner is provided by way of statutory appeal, which has not been exhausted by the petitioner.

12. It is the consistent view of Hon'ble Supreme Court that wherever an alternate remedy is available it should not be bye-passed and the petitioner has to approach this Court after availing alternate remedy. Reference in this regard may be made to **Hindustan Steel Works Construction Ltd., and another Vs. Hindustan Steel Works Construction Ltd., Employees Union (2005) 6 SCC-725 and U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and another, (2005) 107 FLR 729.**

13. For the reasons stated above, the writ petition is dismissed on the ground of alternative remedy.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2005

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

Special Appeal No. 1426 of 2005

District Basic Education Officer, Etah and another ...Appellants
Versus
Dhananjai kumar Shukla and another ...Respondents

Counsel for the Appellant:
Sri K. Shahi

Counsel for the Respondents:

Constitution of India, Art. 226-Practice of Procedure-Writ Petition-decided finally-without waiting for counter affidavit-despite of receiving the Notices-Counter affidavit not filed for a long period of 6 years-after the amendment of C.P.C. in the year 2002-Counter affidavit is to be filed within 30 days positively which can be extended in exceptional cases-Court can not permit to take the benefit of his own wrong committed by the appellant-held-Single Judge rightly decided the case on the basis of averment made in writ petition.

Held: Para 7 and 9

No explanation was ever furnished as to why the counter affidavit had not been filed. Appellants cannot be permitted to take advantage of their own mistake. A person alleging his own infamy cannot be heard at any forum, what to talk of a Writ Court, as explained by the legal maxim "allegans suam turpetudinem non est audiendus. If the appellants have committed a wrong by not filing the counter affidavit, they cannot be permitted to take the benefit of their own wrong.

In view of the above, if the counter affidavit was not filed, the Court was justified in deciding the case on the basis of the averments in the petition.

Case law discussed:

2005 (4) SCC-480
AIR 2005 SCC-3985
AIR 1977 SC-196
AIR 1985 SC-1019
AIR 1986 SC-638
1996 (6) SC-342
(1998) 3 SCC-112
1967 ALJ-410

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

1. This Special Appeal has been filed against the order dated 14.09.2005 of the learned Single Judge, by which the application for recalling the order dated 15.02.2005 passed in Writ Petition No.24957 of 1999, has been rejected.

2. The facts and circumstances giving rise to this case are that the aforesaid writ petition was dismissed vide order dated 15.02.2005. The application for recall was filed only on the ground that the present appellants could not file the counter affidavit. However, the learned Single Judge rejected the said application on the ground that recall of the order was not permissible on such a ground. Hence the present appeal.

3. Learned counsel for the appellants has fairly conceded that the present appellants have received the notice of the filing of the writ petition. However, inadvertently, the appellants could not file the counter affidavit for a period of six years. Therefore, the application for recall was filed and it has been rejected only on a technical ground.

4. Though the provisions of the Code of Civil Procedure, (hereinafter called the "C.P.C.') are not applicable in a writ jurisdiction but the principle enshrined therein are applicable. After the amendment in the C.P.C. in 2002, counter affidavit should be filed within 30 days from the date of receipt of notice. However, it can be extended by the Court in exceptional circumstances. (Vide Kailash Vs. Nankhu & Ors., (2005) 4 SCC 480; and Smt. Rani Kusum Vs. Smt. Kanchan Devi & Ors., 2005 AIR SCW 3985).

5. In State of Punjab Vs. V.P. Duggal & Ors., AIR 1977 SC 196, the Hon'ble Apex Court held that the Court has no right to force a party to file the counter affidavit. It is the will of the party to file the pleadings or not. Court may draw adverse inference or pass any order but it is not proper for the Court to issue any direction to a party to file the counter affidavit.

6. Under Order VIII Rule 5, C.P.C., a specific reply is to be given to the pleadings taken by the petitioner. However, sub-rule (2) thereof reads as under:-

"(2). Where the defendant has not filed a pleadings, it shall be lawful for the Court to pronounce judgment on the basis

of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved."

7. It is not the case of the appellants that they had been under disability nor the State instrumentalities can be said to be under some disability. No explanation was ever furnished as to why the counter affidavit had not been filed. Appellants cannot be permitted to take advantage of their own mistake. A person alleging his own infamy cannot be heard at any forum, what to talk of a Writ Court, as explained by the legal maxim "allegans suam turpetudinem non est audiendus. If the appellants have committed a wrong by not filing the counter affidavit, they cannot be permitted to take the benefit of their own wrong. (Vide G.S. Lamba & Ors. Vs. Union of India & Ors., AIR 1985 SC 1019; Narender Chadha & Ors. Vs. Union of India & Ors., AIR 1986 SC 638; Jose Vs. Alice & Anr., (1996) 6 SCC 342; and T. Srinivasan Vs. Mrs. T. Varalakshmi, (1998) 3 SCC 112).

8. In Ram Ji Lal Vs. Balwant Singh, 1967 ALJ 410 this Court held that the Court cannot recognize a claim or cause of action based on a turpitude. Therefore, a person approaching the Court has to satisfy that his action/inaction was lawful, otherwise, he cannot be heard. In such an eventuality, the legal maxim "ex turpi causa non oritur actio' applies.

9. In view of the above, if the counter affidavit was not filed, the Court was justified in deciding the case on the basis of the averments in the petition.

If the case is examined in the light of the aforesaid settled legal proposition and statutory provisions, no interference is called for. Appeal lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 6432 of 2006

Mohd. Rais Khan ...Petitioner
Versus
Shri Naseeb Ullah Khan and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Mehrotra
Sri Nishant Mehrotra

Counsel for the Respondents:
Sri Narayan Singh

Code of Civil Procedure-Section-115 Civil Revision-of Trail Court-under challenge-merely issuance of Notice on application for T.I. can not be termed as case decided, held revision not maintainable.

Held: Para 10

In view of the aforesaid settled position of law, an order directing issue of notice on a temporary injunction application under Order XXXIX, Rule 1 C.P.C. is definitely not an order, which though may come within the ambit of 'case decided' but it would not amount to dispose of the injunction application or terminate the proceedings of the temporary injunction. Obviously, as the law is settled on this point, the revision as was preferred before the District Judge by the plaintiff on the order passed by the trial court issuing notice on temporary injunction application, was definitely not maintainable and any order directing admission of such

revision and granting interim relief to the revisionist is, thus, unsustainable and requires to be quashed.

Case law discussed:
2005 (5) SCC-527
2006 (62) ALR-278
2005 (60) ALR 512
2004 (6) AWC-502

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

1. Heard learned counsel for the parties.

2. In this writ petition the petitioner has challenged the order dated 23.12.2005 passed by the revisional court.

3. A suit for permanent injunction filed by the contesting respondent No. 1 an application under Order XXXIX, Rule 1 and 2 C.P.C. was also moved for grant of temporary injunction. The trial court not being fully satisfied for granting exparte injunction order directed notices to be issued to the defendant petitioner as well as proforma respondents.

4. Aggrieved against that order Civil Revision No. 219 of 2005 was preferred by the plaintiff before the District Judge and by the impugned order the District Judge admitted the same and directed the notice to be issued to the petitioner defendant and proforma respondents/defendants. He has also passed the interim order directing both the parties to maintain status quo regarding property in question.

5. It has been submitted from the side of petitioner that the very order of entertaining the revision is illegal as the revision was not at all maintainable. The learned counsel has cited the case law of ***Gayatri Devi and others Vs. Shashi Pal Singh, (2005) 5 SCC 527, Rajpal SinghVs. Richh Pal Sing & others, (2006) 62 ALR 278, Bhagwati prasad Lohar and others Vs. State of U.P. through Secretary of Legal Department, Lucknow, U.P. and others, 2005 (60) ALR 512, Rajendra Singh and others Vs. Brij Mohan Agarwal and another, AIR 2003 Allahabad 180, Brij Bhushan Vs. District Judge, Saharanpur and others, 2004 (1) AWC 502 and Shiv Shakti Coop. Housing Society, Nagpur Vs. M/s Swaraj Developers, 2003 (4) Apex Decisions (S.C.) 238.*** With the strength of the aforesaid cases, the learned counsel has emphasised that an order directing issue of notices to the defendants on a temporary injunction matter by the court, is not revisable under Section 115 of C.P.C.

6. The provisions of Section 115 C.P.C. has been amended by Code of Civil Procedure (Amendment) Act, 1999 and in that proviso it has been added substituting earlier one and this Section for convenience is reproduced as below:

Revision.- *[(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears –*
(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section, vary or reverse

any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

[(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

[(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]

Explanation.-- In this section, the expression, "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.]

7. The aforesaid proviso, which has substituted the earlier proviso of Section 115 C.P.C., has been subject of interpretation in the aforesaid cases by the Hon'ble Apex Court as well as this Court. After this amendment of 1999, U.P. Amendment of Section 115 C.P.C. has been incorporated, which also for convenience is reproduced as below:-

"115. Revision.-- (1) A superior Court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate Court where no appeal lies against the order and where the subordinate Court has-

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise of its jurisdiction so vested; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district Court.

(3) The superior Court shall not, under this section, vary or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the Supreme Court.

Explanation I.- In this section, -

(i) the expression "superior Court" means--

(a) the district Court, where the valuation of a case decided by a Court subordinate to it does not exceed five lakh rupees;

(b) the High Court, where the order sought to be revised was passed in a case decided by the district Court or where the value of the original suit or other proceedings in a case decided by a Court subordinate to the Court exceed five lakh rupees.

(ii) the expression"order" includes an order deciding an issue in any original suit or other proceedings.

Explanation II.-- The provisions of this section shall also be applicable to

orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement."

8. The proviso, which substituted earlier proviso of Central Act introduced in the year 1999 (w.e.f. 01.07.2002) as reproduced above, mandates that no revision shall be cognizable by the High Court unless the order challenged is not to the effect of finally disposing of the suit or other proceeding. The substituted provision of the State amendment under Section 115 C.P.C. also contemplates in sub-rule (3) clause (i) that superior court shall not under this section vary or reverse any order made except where the order if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceeding. It is in this view of the matter that this court in the case of Rajendra Singh (supra) has held that an order of issue of notice on injunction application does not dispose of the suit. It also does not dispose of application either. In case the injunction application were to be rejected or allowed it would dispose of the application but such an order would be appealable and hence not open to revision. However, if an exparte injunction is not granted and only notice is issued on the injunction application it would not dispose of application as final orders in the matters are yet to be passed after inviting objections of the opposite party and the injunction application remains pending. The proviso as it now stands (after 1999 amendment) restrains the power of interference in revision to a situation where the case decided disposes of the suit or proceedings. While refusing exparte temporary injunction by merely issuing notice upon such application may amount to a case decided but the proviso restrains the power of the High Court and precludes it from interfering in revision in such a case as the order of exparte injunction would not have disposed of the injunction application or terminated the proceedings for temporary injunction. A revision against such an order is, therefore, not maintainable.

9. The same interpretation of the proviso has been given by this court in Rajpal Singh's case also after placing reliance on the case of Shiv Shakti (supra). In that case of Shiv Shakti (supra) also it has been propounded as below:-

"A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is of interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear, cannot be the subject matter of revision under Section 115. There is marked distinction in language of Section 97 (3) of the Old Amendment Act and Section 32 (2) (i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32 (2) (i). The amendment relates to procedure. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered the parties

are to proceed according to the altered mode, without exception, unless there is a different stipulation."

10. In view of the aforesaid settled position of law, an order directing issue of notice on a temporary injunction application under Order XXXIX, Rule 1 C.P.C. is definitely not an order, which though may come within the ambit of 'case decided' but it would not amount to dispose of the injunction application or terminate the proceedings of the temporary injunction. Obviously, as the law is settled on this point, the revision as was preferred before the District Judge by the plaintiff on the order passed by the trial court issuing notice on temporary injunction application, was definitely not maintainable and any order directing admission of such revision and granting interim relief to the revisionist is, thus, unsustainable and requires to be quashed.

11. In the aforesaid facts and circumstances, this writ petition is allowed and the impugned order dated 23.12.2005 is hereby quashed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2006

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 7424 of 2001

Ramesh Kumar Srivastava ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri B.G. Yadav
Sri R.K. Nigam

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

U.P. Fundamental Rules-Rule 56 (C)- Compulsory retirement-Order passed by the competent authority-after scrutinizing the entire service record-Court itself perused the original service record-held order compulsory retirement is perfectally justified-can not be interfered.

Held: Para 20

In view of the aforesaid fact the controversy regarding an order passing the compulsory retirement cannot be said to be illegal, malafide, if the same has been passed by the competent authority after scrutinizing the entire service record of an employee. As mentioned above, the Court has perused the complete service record of the petitioner, therefore, the contention of the petitioner to this effect cannot be accepted that the order of compulsory retirement against the petitioner is in any way illegal, punitive and has been passed without taking into consideration the performance of the petitioner.

Case law discussed:
AIR 1995 SC-111
1992 SCD-155
AIR 1992 SC-1020
AIR 1995 SC-1161
2005 A.D.J. IX ?
AIR 1999 SC-1661
AIR 1973 SC-1065
1999 (5) SCC-529
AIR 1995 SC-1161

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

1. The present writ petition has been filed for quashing the order-dated 3.2.2001; Annexure-1 to the writ petition passed by respondent no.2 and further for quashing the Government Order dated

24.8.1977, Annexure-2 issued by respondent no.1.

2. The brief facts arising out of the present writ petition are that by means of the present writ petition the petitioner has challenged the order-dated 23.2.2001 by which the petitioner was compulsory retired. The petitioner was appointed as a clerk in the Court of District Judge, Hamirpur by order-dated 9.2.1971 and the petitioner joined his duties on 18.2.1971. After creation of new Mahoba district, the petitioner's services were transferred to judgeship of Mahoba. The petitioner was promoted on the post of Administrative Clerk on 16.8.1997. The work and conduct of the petitioner was always satisfactory and he was working to his best ability and integrity since his appointment. There was no complaint whatsoever against the petitioner and the work and conduct of the petitioner was always appreciated by the higher authorities. The petitioner was served with an order on 3.2.2001 by which the petitioner has been retired compulsorily on the said date and in lieu thereof the petitioner was awarded three months' salary. It is clear from the order that respondent no.2 has passed the impugned order under Section 56-C of the Financial Hand Book. Under Rule 56 an employee can be compulsory retired after attaining the age of 55 years but by the Government Order dated 24.8.1977, the State Government has substituted the age of compulsory retirement as 50 years in place of 55 years. The petitioner submits that the said Government Order dated 24.8.1977 is absolutely illegal. The Government Order cannot be given precedence over the statutory rules. Before passing the aforesaid order no notice or opportunity has been given to the petitioner, as such the order is against the principles of natural justice. The persons aged than the petitioner are being retained in service though the work and conduct of those persons are not satisfactory in comparison to the petitioner. In normal course the petitioner would have attained the age of superannuation in the year 2007 but the respondents without any justification has passed an order compulsorily retiring the petitioner in a most arbitrary manner.

3. The submission raised on behalf of the petitioner is that according to the Fundamental Rule 56-C, there is no dispute to this effect that the State Government has been conferred power to retire its employee compulsorily but the decision of the government to compulsory retire its employee should be bonafide and should not be malicious and should be based upon over all performance and assessment of the work and conduct of the employee, that has not been done as such the order passed by the respondent is liable to be set aside. Further submission made on behalf of the petitioner is that there was no adverse entry and if some adverse entry was awarded and subsequently, the petitioner has been promoted on a higher post. As such for the purpose of consideration of order compulsory retiring the petitioner, the same cannot be taken into consideration. Reliance has been placed upon a judgment reported in AIR 1995 SC 111 **S. Ram Chandran Raju Vs. State of Orissa** and has submitted that though the order of compulsory retirement is not a punishment but the Government must exercise its power only in the public interest to effectuate the efficiency of the service. The entire service record or character roll or confidential reports

maintained would furnish the backdrop material for consideration by the Government or the Review Committee or the appropriate authority and the same cannot be passed only on a solitary entry or taking into consideration the performance of one year. Further reliance has been placed by the counsel for the petitioner upon the two judgments of this Court reported in 1992 Selected Civil Decisions Page 155 **Santosh Kumar Gaur Vs. State of U.P. and others and another** judgment 1992 Selected Civil Decisions Page 165 **Committee of Management Uchchattar Madhyamik Viddyalaya Newaria, District Jaunpur Vs. Deputy Director of Education, Varanasi**. Further reliance has been placed by the counsel for the petitioner on the Apex Court judgment reported in A.I.R. 1992 SC Page 1020, **Baikunth Nath Das and others Vs. Chief District Medical Officer and others** and has submitted that if the order is passed malafide or in the arbitrary manner and is against the principles of natural justice, the order of compulsory retirement will be treated to be bad in law and is liable to be set aside.

4. On the other hand the counsel for the respondents Sri Amit Sthalekar has submitted that the order passed by the respondents retiring the petitioner compulsorily cannot be treated to be an order of punishment. The decision has been taken on the basis of the consideration of the entire service record and the same has been taken bonafide and in public interest, therefore, on this ground no different view can be taken. Reliance has been placed upon a judgment of the Apex Court reported in A.I.R. 1995 SC 1161 **State of U.P. and others Vs. Bihari Lal. Sri Amit Sthalekar**, Advocate has submitted that it is not necessary in view of the aforesaid judgment that each and every adverse remarks should be communicated and non-communication of the entries cannot be taken into consideration for the purpose of reaching a conclusion whether the Government servant should be compulsorily retired in public interest. In appropriate cases there may not be tangible material but the reputation of the officer built around him can be such that his further continuance would imperil the efficiency of the public servant and would breed indiscipline amongst other public servants.

5. Further reliance has been placed by the learned counsel for the respondents on a case reported in 2005 A.D.J. IX, Allahabad **Narendra Singh Vs. High Court of Judicature at Allahabad**. A submission has been made by the learned counsel for the respondent that in view of the aforesaid fact no conclusion can be drawn that the order of compulsory retirement of the petitioner is in any way punitive, malafide and arbitrary as such no interference is called for and the writ petition is liable to be dismissed.

6. As the counter and rejoinder affidavits have been exchanged, with the consent of the parties, the writ petition is being disposed of finally. The Court had directed to produce the original service record of the petitioner. The same was produced by Sri Amit Sthalekar, advocate before this Court and this Court has perused the same. From the record it is clear that during 1986-87 an entry was given to the petitioner regarding that his work is unsatisfactory and regarding his conduct, the entry has been given "undisciplined' and the same have been

approved in the year 1989-90. His integrity was not certified, working was unsatisfactory and regarding his conduct it was mentioned that he is an undisciplined man though it has been stated that the competent authority has expunged the said adverse entry. In the year 1993 he was again awarded an adverse entry and a remark to that effect was given by the District Judge "He is incompetent, negligent in discharge of his duties and is not acquainted with the rules." In 1997-98 also he was not awarded a good entry.

7. I have considered the submissions made by the learned counsel for the parties and have also perused the service record produced before me.

Rule 56 (C) of the U.P. Fundamental Rules reads as under:-

"56 (c) Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such government servant may, by notice to the appointing authority, voluntarily retire at any time after attaining the age of forty five years after he has completed qualifying service for twenty years."

Thus, it is evident that the aforesaid Rule empowers the Competent Authority to compulsorily retire an Officer, if the conditions mentioned therein are fulfilled.

8. In **Baikuntha Nath Das & Another Vs. Chief District Medical Officer, Baripada and Another**, A.I.R. 1992 SC 1020, the Hon'ble Supreme Court has laid down certain criteria for the Courts, on which it can interfere and they included mala fide, order if based on no evidence, order is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material, i.e. if it is found to be a perverse order. The Hon'ble Apex Court observed that the order of compulsory retirement is not a punishment, it implies no stigma nor any suggestion of misbehaviours, the order should be passed in public interest on subjective satisfaction of the Authority and while reviewing the service record, the entire service record is to be considered. However, the record of the later years should be given more importance and even un-communicated adverse entries may be taken into consideration. The Apex Court held as under:

"(i) An order or compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary in the

sense that no reasonable person would form the requisite opinion on the given material in short, it is found to be a perverse order.

(iv) The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a Government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order or compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it un-communicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

9. Similar view has been reiterated in Posts and Telegraphs Board & Others Vs. C.S.N. Murthy, A.I.R. 1992 SC 1368; Sukhdeo Vs. Commissioner Amravati Division, Amravati & another, (1996) 5 SCC 103; State of Orissa & Others vs. Ram Chandra Das, AIR 19967 SC 2436; and M.S. Bindra Vs. Union of India & Others., AIR 1998 SC 3058.

10. In **Rajat Baran Roy & Others Vs. State of West Bengal & Others**, A.I.R. 1999 SC 1661, the Hon'ble Supreme Court held that there is a very limited scope of judicial review in a case of compulsory retirement and it is permissible only on the grounds of non-application of mind and want of material particulars.

11. In **Krishena Kumar Vs. S.P. Saksena & others**, AIR 1973 SC 1065, Hon'ble Apex Court held that what is to be seen by the Court at the time of judicial review, as to whether the Appointing Authority has formed its opinion objectively and whether the order had been passed by the Competent Authority and for such a purpose, constitution of a Committee is permissible, as held by Hon'ble Apex Court in High Court of Judicature for Rajasthan Vs. P.P. Singh & Another, A.I.R. 2003 SC 1029.

12. In **State of Gujarat & Another versus Suryakant Chunilal Shah**, (1999) 1 SCC 529, the Hon'ble Supreme Court held that while considering the case of an employee for compulsory retirement, the public interest is of paramount importance. A dishonest, corrupt and dead-wood deserves to be dispensed with, how much efficient and honest an employee is, it is to be assessed on the basis of material on record which may also be ascertained from confidential reports. However, there must be some tangible material against the employee warranting him retirement.

13. In **State of U.P. & another Vs. Bihari Lal**, AIR 1995 SC 1161, the Apex Court held that if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be given compulsory retirement in public interest and judicial review of such order is permissible only on limited grounds. The Court further

held that "what is needed to be looked into, is the bona fide decision taken in public interest to augment efficiency in the public service."

14. In **I.K. Mishra Vs. Union of India & others** (1997) 6 SCC 228, the Hon'ble Supreme Court observed as under:-

"Power to retire compulsorily a Government servant in terms of Service Rules is absolute, provided the authority concerned forms an opinion bona fide that compulsory retirement is in public interest."

15. In **Prabodh Sagar Vs. Punjab State Electricity Board and others**. AIR 2000 SC 1684, the Hon'ble Supreme Court held that employee's unsatisfactory performance, coupled with the tendency to resort to litigation, most of which was unsuccessful, rendered him a liability to his employer, and he was rightly retired in public interest. In the said case, allegation of mala fide was also rejected for want of particular material.

16. Similar view has been reiterated in **Ramesh Chandra Acharya Vs. Registrar, High Court of Orissa & another**, AIR 2000 SC 2168 while dealing with a case of judicial officer.

17. In **State of U.P. Vs. Vijay Kumar Jain**, AIR 2002 SC 1345, the Hon'ble Supreme Court placed reliance upon its earlier judgments in Shyamlal Vs. State of Uttar Pradesh, AIR 1954 SC 369, wherein it has been held that an order of compulsory retirement is neither a punishment nor any stigma attached to it, rather, further services of a person are dispensed with in public interest. The Apex Court held that if an employee has been given the adverse entries regarding his integrity at any stage of his service career, he loses the right of continuation in service, and compulsory retirement, if given, should not be interfered with.

18. In **Union of India Vs. J.N. Sinha & another** AIR 1971 SC 40, the Apex Court held that an employee compulsorily retired does not lose any right acquired by him before retirement, as the compulsory retirement is not intended for taking any personal action against the Government servant, and the order so passed can be challenged on the ground that either the order is arbitrary or it is not in public interest. No other ground can be available to the government servant who is sought to be compulsorily retired from service. However, it may be subject to the conditions provided under the statutory provisions.

19. In **Jugal Chandra Saikia Vs. State of Assam & another**, AIR 2003 SC 1362, the Apex Court held that where the screening committee is consisting of responsible officers of the State and they have examined/assessed the entire service record and form the opinion objectively as to whether any employee is fit to be retained in service or not. In absence of any allegation of mala fide, there is no scope of a judicial review against such an order. While deciding the said case, reliance had been placed upon a large number of judgments, particularly, upon judgments in S. Ramachandra Raju Vs. State of Orissa, AIR 1995 SC 111; and M.S. Bindra Vs. Union of India & others (Supra).

20. In view of the aforesaid fact the controversy regarding an order passing the compulsory retirement cannot be said to be illegal, malafide, if the same has been passed by the competent authority after scrutinizing the entire service record of an employee. As mentioned above, the Court has perused the complete service record of the petitioner, therefore, the contention of the petitioner to this effect cannot be accepted that the order of compulsory retirement against the petitioner is in any way illegal, punitive and has been passed without taking into consideration the performance of the petitioner.

21. The writ petition is devoid of merit and is hereby dismissed. No order as to costs. Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2005

BEFORE
THE HON'BLE S.RAFAT ALAM
THE HON'BLE SUDHIR AGARWAL

Special Appeal No. 335 of 2005

Ashok Kumar ...Appellant
Versus
D.I.G., C.R.P.F. Group Centre, phaphamau, Allahabad and others ...Respondents

Counsel for the Appellant:
Sri Ranjit Saxena
Sri Shekhar Srivastava
Sri B.L. Verma

Counsel for the Respondent:
Sri K.C. Sinha, S.S.C.
Sri S.F.A. Naqvi
S.C.

Central Reserve Police Force Act 1949- Section 11 (1) read with C.R.P.C. Rules 1955- rule-27-Dismissal from Service- on ground of false declaration-given in para-12-A of the form-regarding criminal activities-On verification petitioner found involved in criminal case under section 366/376 I.P.C.- he was released on bail by the javehill court at the age of 14 years- surrender before the court- amounts taking the accused on judicial custody held false declaration given in verification form dismissal held proper.

Held: Para 18

Thus, we are of the view that the appellant is guilty of suppression of material fact i .e. suppressio veri and suggestio falsi which in view of the declaration made in verification form rendered him liable dismissal from service by the competent authority.

Case law discussed:
2003 (3) SCC 437
2005 (2) SCC 742
2003 (c) 482 BEC- 441
2003 ALJ-2962
1996 (11) SCC-605
2001 (U) E.S.C.-1837
2005 (7) SCC-177
2005 (11) 482 BEC 1684
2005 (2) 482 BEC-1682
2003 IPC BEC (1) 269

(Delivered by Hon'ble Sudhir Agarwal, J.)

1. This special appeal has been filed against the judgment dated 16.2.2005 dismissing appellant's writ petition No. 5718 of 2005.

2. In pursuance to the advertisement dated for the post of constable in C.R.P.F. the appellant was selected and appointed by order dated 19.4.2001. Thereafter he was required to fill in a verification form which he submitted on 13.6.2001. In para-' 12A of the said form the following information was required to be furnished:

"Have you ever been arrested, prosecuted, kept under detention or bound down/fined, convicted by a court of law for any offence or debarred/ disqualified by any Public Service Commission from appearing at its examination/selection, or debarred from taking any examination/rusticated by any University or any other education authority/ institution?"

3. The appellant replied the said column by mentioning **'no'**. subsequently vide the District Magistrate, Allahabad letter dated 13.7.2004, it came to the notice of the respondents that the appellant was involved and prosecuted in a criminal case. F.I.R. was lodged against the appellant on 10.2.1994 and registered as case Crime No. 33 of 1994 under section 366, 376 I.P.C. Police after making investigation submitted a chargesheet. The appellant was prosecuted in Crime Case No. 260 of 1999 in the Juvenile Court, Allahabad. The case was registered by the Court on 10.10.1998. At the time when the selection and appointment was made, criminal prosecution was going on. It appears that the witness Km. Sheela deposed her statement on 8.11.2002 wherein she retracted from her earlier statement and denied that the appellant committed any rape on her. Ultimately the appellant was acquitted in the aforesaid case by the Court of A.C.J.M vide order dated 11.10.2002.

4. However, the prosecution was going on in 2001 when the appellant submitted his verification denying that he was ever arrested, prosecuted, kept under detention or punished/ fined/ convicted by court of law for any offence or disqualified by any court from appearing it examination etc. and thus the said information furnished by the appellant was false and therefore, disciplinary proceedings were initiated against the appellant. A chargesheet was issued and after holding an enquiry, inquiry report was submitted holding appellant guilty of making false declaration. Accordingly the Commander 23rd Battalion, CR.P.F. passed order dated 18.1.2005 dismissing appellant from service by exercising his powers under section 11(1) of CR.P.F.Act,1949 read with Rule 27(A) of CR.P.F. Rules 1955.

5. The appellant approached this court by means of writ petition No. 5718 assailing dismissal order contending that since he was acquitted in the criminal case on the date when departmental chargesheet was issued and the impugned order was passed no criminal case was pending against him, hence the order passed by the authorities is illegal. Writ petition has been dismissed by the Hon'ble Single Judge. Hence this special appeal.

6. The learned counsel for the appellant contended that there was no concealment of fact on the part of the appellant in as much as at the time of appointment on 19.4.2001 he was not aware of the fact that a criminal case was pending against him, since he had not received any notice or information regarding the said case. Hence, there was no occasion of giving any false information on his part. He brought to the notice of this court order sheet of the trial court in criminal case No. 260 of 1999 showing that after the case was registered on 10.10.1998, the summons were issued vide order dated 10.12.1998 but he got information later on since he appeared in

the trial court only on 18.1.2002, 23.11.2001, 14.12.2001 and 21.12.2001. Learned counsel for the petitioner further submits that at the time of alleged offence having been committed, his age was only 14 years. The appellant neither was arrested nor surrendered for bail. Thus it can not be said that he was ever arrested. Learned counsel for the appellant also submitted that in any case once the criminal case resulted in acquittal, his dismissal from service was totally unwarranted and illegal. In support of this submission, he relied upon the following judgments of this court as well as Apex Court:

1. 2003(3) S.C.C. 437Kendriya Vidya Sangthan Vs. Ram Ratan Yadav.
2. 2005(2) S.C.C. 742 Secretary Delhi Development Authority Vs. B. Chinmaynaidu.
3. 2003(1) UPLBEC 441 Bheekham Singh Vs. Union of India.
4. 2003 A.L.J 2962 Lal Ji Pandey Vs. Director General.C.R.P.F.

7. Sri K.C. Sinha, learned Assistant Solicitor General appearing for respondents No. 1 and 4, however submitted that after selection and appointment in the force, the appellant was required to furnish certain information in the form of 'Verification' as required under Rule 34(b) of C.R.P.F. Rules. The said verification was submitted by the appellant on 13.6.2001 wherein column No. 12(a) was answered in negative. However on verification from District Magistrate, Allahabad, he informed vide letter dated 13.7.2004 that a criminal case No. 33 of 1994 under section 366, 376 was registered against the appellant. On the basis of the aforesaid information the matter was further enquired and after collecting the details of the prosecution a chargesheet (Annexure-4) was issued to the appellant. A disciplinary enquiry was conducted, the appellant was found guilty of furnishing false information and submitting false verification. In para-l of the verification Form, the learned counsel for the respondents submitted that it was already mentioned that furnishing of false information or submission of any factual information in the verification Form would be a disqualification for retention of candidate in employment under the government. Accordingly on the basis of disciplinary enquiry report, the order dismissing the appellant from the service has rightly been passed by the competent authority. He submitted that writ petition has rightly been dismissed by the Hon'ble Single Judge and it does not require any interference in appeal.

We have heard learned counsel for the parties and perused the record.

8. The first question to be decided is whether appellant furnished any false or suppressed information in his verification Form. He claimed that at the time of appointment or submitting verification Form he was not aware of the pendency of the criminal case, as he had not received any information about the same. He further submits that so far as the arrest is concerned, he never surrendered for bail nor was ever arrested and therefore in this regard also no false information was furnished by the appellant, hence it can not be said that he was guilty of making false verification. However we found that the appellant neither in the affidavit filed in support of the stay application nor in the supplementary affidavit which he has filed has stated anywhere as to on which

date he received notice/summons or information regarding the criminal case registered against him in pursuance to the chargesheet submitted by the Police. Vague averments have been made by the appellant that he never applied for bail nor surrendered for bail and never came to know about the pending criminal case as evident from para 23 of the affidavit which reads as under:

"23….the fact is that there has been no information of the petitioner of Criminal case No. 260 of 1999 registered at Police Station Tharwai, District Allahabad and the question of concealment of fact would have come had the petitioner got the information. And thus in the instant case the allegations of the respondents about the concealment of facts was totally incorrect and baseless and therefore the order of the dismissal was bad in law. It may also be noted here that the petitioner never applied for Bail and at the time of alleged offence the age of the petitioner was only 14 years and neither and petitioner surrendered for Bail nor the petitioner has ever come to know about the Criminal Case pending against his and petitioner came to know about the Criminal Case only after the appointment in C.R.P.F. and by that time the petitioner was already appointed..... "

9. The learned counsel for the appellant admitted that he surrendered before the Trial Court and was released on bail on the same date by the Juvenile Court, Allahabad. It may be true that at the time when F.I.R. was lodged against the appellant he was only 14 years of age, but after seven years when he appeared for the selection for appointment to the post of constable in C.R.P.F. he was 21 years of age and well aware of the pendency of the Criminal Case and its consequences. The fact that appellant was released on bail itself shows that he surrendered and taken in judicial custody, whereafter released on bail by the court may be on the same day. Surrender before the court amounts to taking accused in judicial Gustody. Only thereafter, the question of releasing the accused on bail would arise. Clause 12-A of the verification Form is wide enough to cover all aspects of the criminal matter and there is nothing to show that the appellant in the year 2001 was not aware that a criminal case was registered against him in which he was released on bail and has not been discharged or acquitted till that date. It was incumbent upon him to furnish information in positive in clause 12-A of the verification roll. However his reply in negative shows made him guilty of concealment of relevant information. The appellant was appointed in disciplined force and is expected to maintain highest standard of moral and character. He is supposed to possess a character above board since his services are to be utilized for maintaining law and order.

10. It is a matter of common knowledge that when the appointment to a public office is made, the character and antecedents of a person, who is to be appointed, are verified to judge his suitability to the post. It is more so important when the appointment is to be made to uniformed cadre i.e. disciplined force.

In the case of **Delhi Administration through its Chief Secretary and others Vs. Sushil Kumar, 1996 (11) SCC 605**, the Apex Court observed as follows:

"It is seen that verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted."

11. Whenever a person is appointed in the Government service some times he himself is required to furnish information regarding his character and antecedents, and some times besides his own information, it is also verified through administrative authorities of the concerned area. In the present case after selection and appointment of the petitioner, he was required to furnish information regarding his character and antecedents with a clear warning if any information is found to be incorrect, it may render him disqualified for employment. Undaunted with this caution, the appellant decided to furnish wrong information though he was not only arrested but was also being prosecuted for serious offences under Section 366 and 376 LP.C. He concealed the said information and made a wrong declaration.

Learned counsel for the petitioner, however, contended that he was not aware of the pendency of the criminal case at the time of his appointment and further since he was not arrested by Police at any point of time, therefore, he did not furnish any wrong information. It is admitted by him that he was released on bail when he surrendered before the Magistrate. The requirement under clause 12 in verification form covers very wide information in respect of any criminal matter if any, initiated against an individual. The question whether he was arrested or not does not mean that only he was to be arrested by the Police. When he was enlarged on bail by the Magistrate obviously and the natural consequence that he was taken into custody by the Court and that is one of the form of arrest of a person. Further, the petitioner was appointed on 19th April, 2001 but he filled in verification clause on 13th June, 2001. The order sheet of the trial court which has been filed by the petitioner shows that criminal case was registered against the petitioner on 10th October, 1998 and the summon was issued to the accused on 10th December, 1998 and again on 7th June, 1999. On 7th January, 2002 the order sheet mentions as herein under:

"07.01.2000.

Called out. Accused about under surending

dated 7.3.2000 for app

J. M."

12. This shows that the petitioner had received the summon at least on or before 7th January, 2000. The petitioner has also not stated any where that he did not receive summon on or before filling the verification form. The only averments made by the petitioner in paragraph 23 of the writ petition is that at the time of appointment on 19th April, 2001 he did not have the information of the pendency of the aforesaid case. More interesting thing is that the facts stated in the said application are not verified by filing any valid affidavit in as much as the affidavit

annexed in support of the aforesaid application is not complete and the paragraphs are not filled in the original affidavit. Therefore, in the eyes of law, there is no affidavit filed by the petitioner. Even otherwise, the petitioner has no where stated and has placed anything on record to show that he did not have any information about the aforesaid case till the date he filled in verification form and has also not stated as to when he received information. Further regarding his arrest, the petitioner was well aware that he was released on bail al]d, therefore, as to why he gave a wrong information in column no.12 which is very widely worded. No explanation is forthcoming:In these circumstances, the contents of the petitioner that he was not aware of the criminal case is neither factual correct not can otherwise be believable.

13. The second question is the effect of such wrong declaration which has to be considered by this Court.

A Full Bench of the Rajasthan High Court in the case of **Dharam Pal Singh Vs. State of Rajasthan, 2001 (4), Education Service Cases 1837** considered the following issues:

(i) Whether the fact that a candidate was prosecuted or subjected to investigation on a criminal charge is a material fact, suppression of which would entitle an employer to deny employment to a candidate on that ground?
(ii) Whether the ultimate acquittal of a candidate who was prosecuted on a criminal charge would condone or wash out the consequences of suppression of the fact the he was prosecuted ?
(iii) Whether the suppression of the material fact would not by itself disentitle a candidate from being appointed in service?

The aforesaid questions were replied in paragraph 26 as hereunder:

"In the light of the facts stated and the discussion made above, we answer the questions 1 to 3 aforementioned as follows:

1. That a candidate was prosecuted or subjected to investigation on a criminal charge is a material fact. suppression of which would entitle an employer to deny employment to a candidate on that ground.
2. That ultimate acquittal of a candidate, who was prosecuted on a criminal charge, would not condone or wash out the consequences of suppression of the fact that he was prosecuted.
3. That suppression of material fact would by itself, disentitle a candidate from being appointed in service.

14. Very recently in the case of **Andra Pradesh Public Service Commission Vs. Koneti Venkateswarulu and others, 2005 (7) SCC 177**, following the judgment of the Apex Court in Ram Ratan Yadav' case (supra), it was held as under:

"at no point of time did the first respondent inform the appellant Commission that there was a bona fide mistake by him in filling up the application form, or that there was inadvertence on his part in doing so. It is only when the appellant Commission discovered by itself that there was suppressio veri and suggestio falsi on the part of the first respondent in the

application that the respondent came forward with an excuse that it was due to inadvertence. That there has been suppressio veri and suggestio falsi incontrovertible. The explanation that it was irrelevant or emanated from inadvertence, is unacceptable. In our view, the appellant was justified in relying upon the ration of Kendriya Vidyalaya Sangathan (supra) and contending that a person who indulges in such suppressio veri and suggestio falsi and obtains employment by false pretence does not deserve any public employment. We completely endorse this view.

15. The Apex Court in the case of Kendriya Vidyalaya Sangathan (Supra) considered almost similar case where Ram Ratan Yadav was selected for the post of Physical Education teacher and was issued appointment order on 16.12.1997. He was required to file attestation form and in column 12(1) of the said form, the information was required as to whether any criminal case was pending against him, which he replied by mentioning 'No'. Subsequently, it was disclosed that a criminal case was actually pending against him under Sections 323, 341, 294, 506-B read with Section 34 I.P.C. and on the ground of suppression of factual information, his services were terminated vide order dated 7th April/8th April, 1999. In the said case also, subsequently the said criminal case was withdrawn by the Government and in these circumstances, his writ petition was allowed by the High Court. Reversing the judgment of the High Court, the Apex Court held as hereunder:

"The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify the character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had the discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 was not to find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature. In the present case the respondent was to serve as a Physical Education Teacher in Kendriya Vidyalaya. The character, conduct and antecedents of a teacher will have some impact on the minds of the students of impressionable age. The appellants having considered all the aspects passed the order of dismissal of the respondent from service. The Tribunal after due consideration rightly recorded a finding of fact in upholding the order of dismissal passed by the appellants. The High Court was clearly in error in upsetting the order of the Tribunal. The High Court was again not right in taking note of the withdrawal of the case by the State Government and that the case was not of a serious nature to set aside the order of the Tribunal on that ground as well."

This judgment relied by the learned counsel for appellant in fact supports the respondents and is against the appellant.

16. The next case relied by the appellant Secretary, Department of Home Secretary, A. P. and others Vs. B. Chinnam Naidu (Supra) and on its strength he contended that even if he mentioned a wrong fact in the verification form, since he was ultimately acquitted in the criminal case, therefore, his dismissal from service is illegal. The contention is wide off the mark. The facts of the case of B. Chinnam Naidu are totally different. In the said case column 12 of the attestation form was in the following words:

"Column 12- Have you ever been convicted by a court of law or detained under any State/Central preventive detention laws for any offence whether such conviction sustained in court of appeal or set aside by the appellate court if appealed against."

17. The aforesaid column clearly shows that the candidate was required to indicate as to whether he was ever convicted by the court of law or detained under any State or Central Preventive Law for any offence whether such conviction sustained in court of appeal or set aside by the appellate court if appealed against. Candidate was not required to indicate as to whether he has been arrested in any case or as to whether any case was pending. The Apex court in the light of the language of column 12 of the attestation form as involved in Naidu's case, thus noted that the candidate since was not required to indicate his arrest or pendency of criminal case, hence Naidu by giving information in negative did not conceal or suppress any material fact since neither he was arrested nor any criminal case was pending against him. The observation of the Apex Court distinguishing the said case is evident from the following:

"There was no specific requirement to mention as to whether any case is pending or whether the applicant had been arrested. In view of the specific language so far as column 12 is concerned the respondent cannot be found guilty of any suppression." (Para-g)

18. However, in the case in hand, column 12-A of the verification clause is very wide as it not only required the candidate to inform as to whether he was convicted by court of law etc. but it also required to disclose as to whether he was ever arrested, prosecution, kept under detention or bound down/fine, convicted etc. The fact that the petitioner was released on bail by the Magistrate pursuant to the lodging of the first information report under Section 366 /376 I.P.C. itself was an information which ought to have been disclosed in column 12-A, since it is covered by the information required to be furnished by the candidate. Thus, we are of the view that the appellant is guilty of suppression of material fact i .e. suppressio veri and suggestio falsi which in view of the declaration made in verification form rendered him liable dismissal from service by the competent authority.

19. Learned counsel for the respondents has referred to two judgments of this Court rendered by an Hon'ble Single Judge, reported in 2005 (2) UPLBEC 1682, Ramesh Chandra Saroj Vs. Union of India and others; and a Division Bench judgment in the case of

Ajay Kumar Vs. Officer Incharge, Samyukt Karyalaya, Firozabad and others, reported in 2005 (2) UPLBEC page 1684.

20. In the case of Ramesh Chandra Saroj (Supra), a similar controversy involved wherein due to furnishing of wrong information, the petitioner, who was appointed as Constable in CRPF, was terminated. Following the judgment of the Apex Court in Ram Ratan Yadav and Delhi Administration case, the Hon'ble Single Judge upheld the aforesaid action of the authorities and dismissed the writ petition. We are agree with the view taken by the Hon'ble Single Judge in Ram Ratan Yadav's case.

21. In the later case one Ajay Kumar was appointed on probation, although, he was undergoing trial under Section 302 I.P.c. He was terminated by an order of termination simplicitor. The Division Bench while dismissing his appeal in paragraph 12 observed as under:

"In this case the respondents cannot be visited with any such adverse decision or finding. They had on their hands a probationer who was under trial on a very serious criminal charge, it was to within their power to decide the criminal case or to have it decided within any reasonable time. They had to make a choice in 1991: whether that choice was right or wrong, would never be before the Writ Court: the only point before the Writ Court would be whether that choice was reasonable. Nobody can today doubt that the choice was reasonable. It was quite open to the respondents, as it would be open to any public respondents, at any time, not to make a probationer a permanent employee, when it becomes known that he is facing a very serious criminal charge, from which he might or might not be acquitted."

22. The last submission made by the learned counsel for the appellant is that the dismissal of service is very serious punishment imposed upon him since fault on the part of the appellant regarding non furnishing of correct information cannot be considered to be such a serious offence warranting dismissal from service. In support of the above contention, he has relied upon the judgment of the apex court in the case of State of U. P. Vs. Rama Kant Yadav, reported in 2003 (1) UPLBEC 269. We are surprised to see that the aforesaid judgment does not help the appellant at all and it appears that the photo copy of the aforesaid judgment has been made available to us by the learned counsel for the appellant without checking it. The apex court in the case of Rama Kant allowed the appeal of the State and the judgment of the High Court was set aside which had interfered with the punishment inflicted upon Rama Kant on the ground of being disproportionate. The apex court held that the charges are quite grave and need no interference from the court. In the present case, the Apex court in Ram Ratan Yadav's case and Andra Pradesh Public Service commission (supra) has also upheld the termination and dismissal of the employees for the "suppressio veri and suggestio falsi" and in the light of the aforesaid judgment, it cannot be said that the order passed by the authorities disproportionate to the gravity of the charge and require any interference from this Court. This submission thus is also negated. No other argument has been advanced before us.

23. Thus, we are of the view that the Hon'ble Single Judge has rightly dismissed the writ petition of the appellant and the judgment under appeal needs no interference.

24. In the circumstances, the appeal fails and is hereby dismissed. No order as to costs. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2006

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No.35289 of 2001

S.N. Vishwakarma & others ...Petitioners
Versus
State of U.P and others ...Respondents

Counsel for the Petitioners:
Sri L.C. Srivastava

Counsel for the Respondents:
Sri Vijendra Singh Yadav
S.C.

Constitution of India Art. 226- Salary fixation -work charge employees-regularised between 1996 to December 97-revise pay scale salary fixed on the basis of G.O. 23.12.97 and 31.12.97-all the petitioner given salary benefits-by subsequent G.O. 26.8.99-by order dated 20.9.01 again fixation made denying the benefit of 40% D.A, interim reliefs etc.-held-the authorities can not recover the excess amount on two counts firatly when fixation made-only G.O. 31.12.97 was in existence-secondly No case of mis representation on part of Petitioners-thirdly before impugned fixation no notice or opportunity given-impugned order quashed-with consequential direction.

Held: Para 8

I have perused the government order dated 26.8.1999. The said government order provides for maximum ceiling of salary of work charge employees. No other specific provision in the government order is made that work charge employee shall not be entitled for the dearness allowance or interim relief or their salary shall be fixed in a particular manner. The counsel for the respondent has submitted that the government order dated 23.12.1997 specifically provided that 40% of salary will be added with regard to government employees which provisions is not available for the work charge employee as per government order dated 26.8.1999. There is no specific mention in the government order dated 26.8.1999 that work charge employees shall not be entitled for 40% of salary. However, without entering into any further discussion on the said issue there are two reasons on which I am satisfied that respondents are not entitled for recovery of any amount from the petitioner. Firstly, the government order dated 26.8.1999 was issued subsequent to the fixation which was already made on 28.1.1998. The dispute of payment of salary in the present case relates only to the period dated 1.1.1996 till regularisation of the petitioners i.e between 1996 to 31.12.1997. At the time when fixation of the petitioners was made the government order dated 23.12.1997 and dated 31.12.1997 were the only government order providing for fixation and the salary of the petitioners was fixed in accordance with the said government order. There is no case of any mis-representation on part of the petitioners in getting their salary fixed. Hence, no recovery can be made from the amount which was already paid to be petitioners in pursuance of the fixation made by the Executive Engineer dated 28.1.1998.

Case law discussed:
AIR 1994 SC-2480 SC
W.P. No. 7201 of 04 decided on 5.6.05

W.P. No.31466 of 03 decided on 28.10.05

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

1. Heard counsel for the petitioners and Shri Vijendra Singh Yadav, Additional Chief Standing Counsel appearing for the respondents. Counter and rejoinder affidavits have been exchanged and with the consent of the parties, the writ petition is being finally disposed of.

2. By this writ petition, the petitioners have prayed for a writ of certiorari quashing impugned fixation order dated 20.9.2001. A writ of mandamus has also been sought commanding the respondent to pay the salary to the petitioners as per fixation order dated 28.1.1998. It is further prayed that the direction be issued to the respondents restraining them from making any recovery pursuant to the impugned order.

3. Brief facts necessary for deciding the writ petition are; All the petitioners were working as work charge employees in the Irrigation Department of the State. All the petitioners are working as Class-IV employee on different post. The petitioners were appointed on various date between 1.8.1977 to December 1979. All the petitioners have also been regularised in the regular establishment of the Irrigation Department from different dates in the year 1996-1997. On the basis of recommendations of Vth Pay Commission, the pay scale of the Work Charge employees was revised with effect from 1.1.1996 vide Government Order dated 26.8.1999. The Government Order dated 26.8.1999 also provided a maximum ceiling of salary with regard to work charge employees which maximum ceiling had been fixed from time to time by various earlier government orders. Apart from these work charge employees on the basis of Vth pay Commission, the pay scale of all other Government employees in the irrigation department were revised. The Government orders were issued for fixation of salary in the revised pay scale dated 23.12.1997 and 31.12.1997 providing the manner and procedure of fixation of salary in the revised pay scale. The petitioners salary was fixed by order dated 28.1.1998 on the basis of Government Order dated 31.12.1997 and 21.12.1997 with effect from 1.1.1996. The petitioners were being paid salary in accordance with fixation dated 20.1.1998.

4. The petitioners were subsequently also regularised on Class-IV establishment with effect from different dates in the year 1996-1997. After their regularisation the petitioners are getting their salary in the revised pay scale and there is no dispute in the present writ petition with regard to fixation and payment of salary to the petitioners after they have been regularised in Class-IV establishment. It appears that on the basis of audit objection, the petitioner's salary were re-fixed with effect from 1.1.1996 by an order dated 20.9.2001. By subsequent order dated 20.9.2001 the petitioners salary was re fixed from 1.1.1996. The salary fixed by subsequent order dated 20.9.2001 is less than the salary which was earlier fixed by order dated 28th of January 1998. After the said fixation, the petitioner submitted a representation dated 11.10.2001 to the Executive Engineer objecting to re fixation of their salary and reduction of their salary with effect from 1.1.1996.

The petitioner objected to re-fixation dated 20.9.2001 and prayed that their fixation as made on 28.1.1998 be allowed to continue.

5. The learned counsel for the petitioner challenging the impugned order submitted that petitioners' salary was rightly fixed on 28.1.1998 in pursuance of the Government order dated 23.12.1997 and 31.12.1997. He further submits that with regard to fixation of salary of Work Charge employees, there was no other Government Orders and the same manner and procedure is applicable with regard to the fixation of salary of work charge employees. He further submits that in any view of the matter, no recovery can be made from the petitioner since there was no fraud or mis representation at the instance of the petitioner in their fixation dated 20.1.1998 and the fixation dated 20.1.1998 was made by the respondent themselves applying the Government Order dated 23.12.1997 and dated 31.12.1998. The counsel for the petitioner further submits that several employees who were also work charge employees and were regularised along with the petitioners, no recovery has been directed where as from the petitioners the recovery has been directed, the said averments have been made in paragraph-7 of the rejoinder affidavit.

6. Shri Vijendra Singh Yadav, learned Chief Standing Counsel appearing for the respondents refuted the submission of the counsel for the petitioner and submitted that subsequent fixation has rightly been made. He submits that with regard to fixation of salary of work charge employees another Government Order dated 26.8.1999 has been issued and the salary of the work charge employees was required to be fixed in accordance with the Government Order dated 26.8.1999 and in view of the Government Order dated 26.8.1999, the fixation of the petitioners was rightly modified. The learned counsel for the respondents further submits that petitioners who were working as work charge employees before regularisation in the year 1996-1997, they were not entitled 40% of their basic which was payable to the regular government employees. He further submits that the salary of the work charge employee was subject to maximum ceiling as prescribed by the government order dated 26.8.1999. The counsel for the respondents further submitted that petitioners were not even government employees, hence they were not entitled for the benefit of fixation which was applicable to the government order dated 23.12.1997 and 31.12.1997.

7. I have considered the submissions of the counsel for the petitioners and perused the record.

8. There is no dispute between the parties that petitioners were working as work charge employees on 1.1.1996 and they were regularised in regular establishment of the irrigation department from different dates in the year 1996-1997. The issue which has been raised in the writ petition is with regard to fixation of salary of the work charge employees with effect from 1.1.1996.The fixation of the petitioners salary was made by order of the Executive Engineer dated 20.1.1998. Copy of which order has been filed as annexure 6 to the writ petition. The fixation was made from 1.1.1996 in the revised pay scale which was applicable to the work charge employees with effect from 1.1.1996. It is not the case of the parties that salary of work

charge employees was not revised from 1.1.1996. Salary of regular employees working in the Irrigation Department as well as work charge employees working in the Irrigation Department was revised from 1.1.1996. The question arises only of fixation. The Government Order dated 23.12.1997 and dated 31.12.1997 have been issued by the State Government for fixation of salary of the Government employees. The said government orders are on the record. The Government Order dated 23.12.1997 was issued for fixation of salary to the government employees with effect from 1.1.1996 in pursuance of recommendation of the Vth Pay Commissioner which was approved by the State Government by the government order dated 23.12.1997. The salary of petitioners was also fixed in accordance with the government order dated 23.12.1997 and 31.12.1997. There was no other government order at the time when petitioners salary was fixed apart from the aforesaid government order dated 23.12.1997 and 28.12.1997. The submission of Additional Chief Standing Counsel that petitioners were not government employees cannot be accepted. Petitioners were working in the work charge establishment of Irrigation Department. The petitioners were very much the government employees may be working on the work charge establishment. The appointments were made by Government Officers, their salary was paid through state fund and this submission has no substance that they were not Government employees. Much reliance has been placed on the Government Order dated 26.8.1999 which according to learned counsel for the respondents provides for different manner of the fixation of salary of the work charge employees. I have perused the government order dated 26.8.1999. The said government order provides for maximum ceiling of salary of work charge employees. No other specific provision in the government order is made that work charge employee shall not be entitled for the dearness allowance or interim relief or their salary shall be fixed in a particular manner. The counsel for the respondent has submitted that the government order dated 23.12.1997 specifically provided that 40% of salary will be added with regard to government employees which provisions is not available for the work charge employee as per government order dated 26.8.1999. There is no specific mention in the government order dated 26.8.1999 that work charge employees shall not be entitled for 40% of salary. However, without entering into any further discussion on the said issue there are two reasons on which I am satisfied that respondents are not entitled for recovery of any amount from the petitioner. Firstly, the government order dated 26.8.1999 was issued subsequent to the fixation which was already made on 28.1.1998. The dispute of payment of salary in the present case relates only to the period dated 1.1.1996 till regularisation of the petitioners i.e between 1996 to 31.12.1997. At the time when fixation of the petitioners was made the government order dated 23.12.1997 and dated 31.12.1997 were the only government order providing for fixation and the salary of the petitioners was fixed in accordance with the said government order. There is no case of any mis-representation on part of the petitioners in getting their salary fixed. Hence, no recovery can be made from the amount which was already paid to be petitioners in pursuance of the fixation made by the Executive Engineer

dated 28.1.1998. This view of mine finds support from the Division Bench judgement of this Court in writ petition No.31466 of 2003 **Naseem Ahmed versus State of U.P & others** decided on 28.10.2005. The Division Bench of this Court relying on two apex court judgements have laid down-

"From the aforesaid decisions of the apex court, it is clear that if any amount has been paid to the petitioner by the respondents and there was no misrepresentation made by the petitioner then the amount already paid could not be recovered. There is no material on the record to establish that any misrepresentation was made by the petitioner. The payment of arrears of salary has been made by the Assistant Soil Survey Officer on his own after fixing the pay of the petitioner. We are of the opinion that in view of the law laid down by the apex court the respondents could not recover the amount of arrears of salary already paid to the petitioner on 1.2.2003 in pursuance of the order dated 9.12.2002, therefore, the impugned order dated 28.4.2003 and 18.6.2003 cannot be maintained."

9. With regard to the maximum ceiling as provided by the government order dated 26.8.1999, a recent judgement of this Court has taken the view that putting of maximum ceiling of payment of salary to the work charge employee is arbitrary. The said view has been taken by this Court in writ petition No.7201 of 2004 (s/s) **Yogesh Prasad and others versus State of U.P & others** decided on 6.5.2005. However, the learned counsel for the respondents has fairly conceded that in the present case, there is no dispute regarding the ceiling as prescribed by the government order dated 26.8.1999.

10. It is further to be noted that while reducing the fixation made on 28.1.1998 petitioners were never put to any notice or opportunity. The order for reduction of their fixation as ex parte made. The Apex Court in **Bhagwan Shukla & others versus Union of India** 1994 SC AIR 2480 has held that reduction of salary with retrospective effect cannot be made without giving any opportunity to the employee.

11. In view of the foregoing discussion, the petitioners have made out a case for grant of relief. The order dated 20.9.2001 annexure-8 to the writ petition is quashed. The respondents are directed not to recover any amount already paid to the petitioners in pursuance of the fixation dated 28.1.1998. The parties shall bear their own cost. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2006

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

Civil Misc. Writ Petition No. 7520 of 2006

Brahm Prakash ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Akhtar Ali

Counsel for the Respondents:
Sri Q.R. Siddiqui
C.S.C.

Constitution of India, Art. 226 Writ Petition-delay in writ petition-petitioners are junior engineer or the Asstt. Engineers retired between 30.4.04 to 31.3.05, petitions filed between 29.7.05 to 26.2.06-Apex court in Harwindra Kumar's case granted relief of full salary-who were not permitted by Jal Nigam after 58 years-the relief claimed-otherwise admissible-not barred by any statute or limitation-denial to similar relief-not serve any cause of justice rather whittle down law of land declared by the Apex Court.

Held: Para 41

It is no doubt true that petitioners have woke up when they got impetus from the some decisions of this court in the month of May 2005, but merely on that count alone it would not be just to reject their writ petitions when the relief claimed therein is otherwise admissible as discussed herein before and not barred by any statute or law of limitations or when they did not waive and acquiesce their right by the time they approached this Court, or in case of grant of relief which has been earlier granted by this Court and finally by Hon'ble Apex Court, would ultimately upset the administration of affairs of Nigam or there exist similar other situations justifying refusal of such relief, the denial to grant similar relief to the petitioners in our mind would not serve any cause of justice rather defeat it and would also whittle down law of land declared by Hon'ble Apex Court in Harwindra Kumar's case and be subversive to the judicial discipline.

Case law discussed:

(1901) PC-259, 1901 AC-495 (502, AIR 1990 SC-1782, AIR 2002 SC-834, AIR 1989 SC-674, AIR 1997 SC-2366, 1996 (6) SCC-267, 1990 (3) SCC-682, AIR 1989 SC-38, 1955 AER-708, 1985 (3) SCR-26, AIR 1985 SC-1293, AIR 1988 SC-1531, 2005 E.S.C.-2600, J.T. 2005 (10) SC-32, 2002 UPLBEC (2) 1511, AIR 1991 SC-471, AIR 1991 SC-1676, AIR 1986 SC-589, AIR 1981 SC-271, AIR 1967 SC-1643, AIR 1986 SC-180, AIR 1959 SC-149, 1955 (1) SCR-613, AIR 1994 SC-2608, AIR 1974 SC-1631, AIR 1974 SC-1, AIR 1968 SC-349, AIR 1967 SC-839, J.T. 2005 (10) SC-32, AIR 1962 SC-36, AIR 1974 SC-2177, AIR 1925 Cal. 1107, AIR 1952 Mysore-117, AIR 1950 Nag.-22, 1988 (Supp.) SCC-55, 1920 (28) CLR-305, 1867 (2) HL-43, AIR 1979 SC-621, 1969 (1) SCR-808, 1874 (5) PC-221, AIR 1995 SC-1991, W.P. No. 5242/06 decided on 21.1.06, W.P.No. 57044/05 decided on 19.1.2006, J.T. 2005 (10) SC-32

(B) U.P. Jal Nigam Engineers (Public Health Branch) Service Regulations 1978 Reg. 31 read with U.P. Fundamental (Amendment) Rules 2002-Rule 56 (a)-Retirement age-Junior Engineers as well as the Asstt. Engineers entitled to work up to the age of 60 years-whether are such employees who never allowed to work after 58 years entitled for arrear of salary and other consequential benefit without working? Held-'yes' as per law laid down by Apex Court in Harwindra Kumar's Case.

Held: Para 12

Thus in view of the aforesaid discussion it is clear that the question in issue and controversy is covered by law laid down by the Hon'ble Apex Court in Harvindra Kumar's case (supra) has been followed and applied by a Division Bench of this Court in Bihangesh Nandan Saran and others case (supra). The aforesaid decisions are also binding upon this court, therefore, we are in complete agreement with the view taken herein before in the aforesaid cases on the question in issue, the same is answered accordingly.

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

The questions which arise for our consideration in these batch of cases are as to whether amendment made in Rule 56 (a) of Uttar Pradesh Fundamental Rules (in short "the Rules') by Notification dated June 27, 2002

enhancing age of superannuation of government servants from 58 years to 60 years would be applicable to the employees of Uttar Pradesh Jal Nigam (hereinafter referred to as "the Nigam'). And as to whether the petitioners are entitled for the same and/or similar relief which is granted in **Harwindra Kumar Vs. Chief Engineer Karmic and others J.T. 2005(10) S.C. 32** or their conduct in approaching the court at belated stage disentitled them for such relief and their writ petitions are liable to be dismissed on the ground of delay and latches?

2. The petitioners of these batch of writ petitions while working on the posts of Assistant Engineers/Executive Engineers in the Nigam have been made to retire from service on attaining 58 years of their age of superannuation. Since identical question in controversy based on similar facts are involved in this batch of writ petitions, therefore, these writ petitions are taken up together for hearing and disposal.

3. The brief facts having material bearing with the question in controversy involved in the case are that the petitioners were initially employed in the Local Self Government, Engineering Department of Government of Uttar Pradesh. In the year 1975, the State Legislature enacted an Act, viz., Uttar Pradesh Water Supply & Sewerage Act, 1975 (hereinafter referred to as "the Act'), under Section 3 whereof, the State Government was empowered to issue notification to constitute a corporation by the name of the Uttar Pradesh Jal Nigam pursuant to which a notification was issued establishing the same with effect from 18th June, 1975. From the date of the establishment of the Nigam, which is the appointed date as enumerated in Section 31 of the Act, all properties and assets which immediately before the appointed date were vested in the State Government for the purposes of Local Self Government Engineering Department were vested in and stood transferred to the Nigam and all rights, liabilities and obligations of the state Government pertaining to the said Department became the rights, liabilities and obligations of the Nigam. Under Section 37 of the Act, every person who was employed in the Local Self Government Engineering Department of the State of Uttar Pradesh shall on and from the appointed date, i.e., 18th June, 1975 would become employee of the Nigam and shall hold his office or service therein by the same tenure, at the same remuneration and upon same other terms and conditions and with the same rights and privileges as to pension, gratuity and other matters as he would have held the same on the appointed date if this Act had not come into force and shall continue to do so until his remuneration or other terms and conditions of service are revised or altered by the Nigam under or in pursuance of any law or in accordance with any provision which for the time being governed his service.

4. Before the appointed date i.e. 18th June, 1975, the age of superannuation of these employees under Rule 56(a) of the rules was 58 years which could be extended in exceptional circumstances up to the age of 60 years. Thereafter, the State Government issued order to the Nigam under its letter dated October 31, 1975 wherein it was clearly stated that in accordance with Section 37 of the Act the service conditions of such employees of the Nigam would continue to remain the

same so long the same are not altered by the Nigam in accordance with law. Thereupon, Nigam took a decision on 4th April, 1977 in conformity with the provisions of Section 37 of the Act wherein it was specifically mentioned that the rights and responsibilities as were enjoyed by the officers of the then Local Self Government Engineering Department under the Financial Hand Book, PWD Manuals, Manual of Government Orders, Civil Services Regulations, Government Conduct Rules and other Manuals of Government Orders that have been passed or shall be passed by the Government from time to time shall be deemed to be applicable to the officers of the Nigam provided any other order in this regard is not passed by the Nigam.

5. Section 97 (2) (c) confers power upon the Nigam to make regulations with the previous approval of the State Government on matters, inter alia, the salaries and allowances and other conditions of service of employees of the Nigam. In exercise of the aforesaid powers under Section 97 of the Act, regulations were framed by the Nigam on 1st September, 1978 as Uttar Pradesh Jal Nigam Engineers (Public Health Branch) Service Regulations, 1978 (hereinafter referred to as the Regulations) which came into force with immediate effect and Regulation 31 thereof laid down that the pay, allowances, pension, leave, imposition of penalty and other terms and conditions of service of the employees of the Nigam shall be governed by such rules, regulations and orders which are equally applicable to other serving government servants functioning in the State. On 17th July, 1985, the State Government issued a general order under its Memo No. 665/44-1/85 directing thereunder that the public sector undertakings should not give the benefit of extension of age as provided to the government servants under Rule 56 (a) of the Rules without the permission of the State Government.

6. On 28th November, 2001, the State Government issued a notification notifying thereunder approval of the Governor for increasing the age of superannuation of government servants from 58 years to 60 years in public interest and steps were required to be taken for making suitable amendment in Rule 56 (a) of the Rules, pursuant to which rules were amended by Uttar Pradesh Fundamental (Amendment) Rules, 2002 by notification dated 27th June, 2002 which came into force with effect from 28th November, 2001 and thereunder the age of retirement of government servants was enhanced from 58 years to 60 years. In the meantime, after the issuance of notification dated 28th November, 2001, on behalf of Nigam a letter was written to the State Government on 31st December, 2001 making inquiry thereunder as to whether enhancement in the age of superannuation from 58 years to 60 years would be applicable to the employees of Nigam and in reply thereto, on 22nd January, 2002, Special Secretary to the Government in the Department of Local Self Government communicated that the employees of the Nigam shall not be entitled to enhancement of superannuation age from 58 years to 60 years as the same would be applicable only to the government servants. On receipt of the said order, the Nigam resolved on 11th July, 2002 that enhancement in the age of superannuation from 58 years to 60 years would not be applicable to the employees of the Nigam.

Thereupon orders were issued to the petitioners in the writ petitions to the effect that they would retire upon completing the age of 58 years.

7. We have heard learned counsel for the petitioners and Sri Q.H. Siddiqui appearing for the Nigam as well as learned Standing Counsel for the State Government and also perused the records.

8. To appreciate the question in controversy it would be useful to refer the date of notice asking the petitioners to retire from service on attaining their age of 58 years on the date stipulated in the notice and respective dates of filing of writ petitions by them.

S. No.	Name	Date of Notice of retirement	Date of retirement	Date of filing of writ petition
1.	Brahm Prakash	8.12. 04	31.1.05	2.2.06
2.	Ram Ratan Agrawal	31.8.04	31.8.04	9.8.05
3.	Yogendra Nath Shukla	29.5.05	31.12.04	1.8.05
4.	Prem Narain Pandey	8.12.04	31.1.05	8.8.05
5.	G.K. Varshney	25.9.04	31.12.04	9.8.05
6.	P.K. Tyagi	28.7.04	30.9.04	16.9.05
7.	Krishna Gopal	13.8.04	31.10.04	16.9.05
8.	A.K. Gupta	10.2.05	31.3.05	22.7.05
9.	Yatindra Prakash Singhal	18.3.04	30.4.04	29.7.05

9. It is necessary to point out that it is not in dispute that the petitioners were initially employed in the Local Self Government, Engineering Department of the Government of U.P.. On establishment of Nigam their services stood transferred from the aforesaid department of Government to the Nigam by virtue of section 37 of the Act from the appointed date, consequently they became employee of the Nigam and since then they were continuously working on their respectives posts of Assistant Engineers and/or Executive Engineers. It is also not in dispute that the petitioners were working on their respective posts on the date of commencement of the amended Fundamental Rules 56 (a), which came into force w.e.f. 28th November 2001 but they were retired from service after the aforesaid cut of date on attaining 58 years of their age, without permitting them to continue in service till attaining 60 years age of superannuation.

10. Now so far as first question is concerned it is necessary to point out that similar controversy has been dealt with by the Hon'ble Apex Court in **Harwindra Kumar Vs. Chief Engineer, Karmik & others, JT 2005 (10) SC 32**, wherein after discussing the relevant provisions of statute applicable to the facts and circumstances of the case Hon'ble Apex Court in Para 11 and 12 of the decision held as under:-

"11. For the foregoing reasons, we are of the view that so long Regulation 31 of the Regulations is not amended, 60 years which is the age of superannuation of government servants employed under the State of Uttar Pradesh shall be applicable to the employees of the Nigam. However, it would be open to the Nigam

with the previous approval of the State Government to make suitable amendment in Regulation 31 and alter service conditions of employees of the Nigam, including their age of superannuation. It is needless to say that if it is so done, the same shall be prospective.

12. For the foregoing reasons, the appeals as well as writ petitions are allowed, orders passed by the High Court dismissing the writ petitions as well as those by the Nigam directing that the appellants of the civil appeals and petitioners of the writ petitions would superannuate upon completion of the age of 58 years are set aside and it is directed that in case the employees have been allowed to continue upto the age of 60 years by virtue of some interim order, no recovery shall be made from them but in case, however, they have not been allowed to continue after completing the age of 58 years by virtue of erroneous decision taken by the Nigam for no fault of theirs, they would be entitled to payment of salary for the remaining period upto the age of 60 years which must be paid to them within a period of three months from the date of receipt of copy of this order by the Nigam. There shall be no order as to costs."

11. Relying upon the aforesaid decision of Hon'ble Apex Court a Division Bench of this Court in para 12, 13 and 14 of the decision rendered in batch of the writ petitions namely Civil Misc.Writ Petition No. 57044 of 2005, ***Bihangesh Nandan Sharan and others Vs. State of U.P. and others along with the connected writ petitions decided on 9.1.2006*** has held as under:-

"12. Thus in given facts and circumstances of the case, we are of the considered opinion that the law laid down by the Hon'ble Apex Court is fully applicable and squarely covers the case of petitioners, therefore, we have no hesitation to hold that the amendment made in Rule 56 (a) of Fundamental Rules referred herein before shall equally apply to the employees of Nigam covered by aforesaid Regulations by virtue of Regulation 31, and the petitioners would be entitled to be superannuated on attaining their age of 60 years. The decision of Nigam dated 11.7.2002 resolving not to apply 60 years enhanced age of superannuation to the petitioners and pursuant impugned order passed by Nigam retiring the petitioners earlier to attaining the age of 60 years i.e. on attaining the age of 58 years only are not sustainable being contrary to law and decision rendered by Hon'ble Apex Court. Accordingly, the decision of Nigam dated 11.7.2002 and orders passed by Nigam retiring the petitioners from service on attaining their age 58 years are hereby quashed.

13. However, it is made clear that since we have interpreted the provisions of Regulation 31 of Regulations in context of provisions of Act and in connection of applicability of amendment made in Rule-56 (a) of U.P. Fundamental Rules by Notification dated 27.6.2002, which have retrospective operation with effect from 28th November 2001, therefore, the observations made in our decision should be understood in context of only those provisions meaning thereby it shall apply to only those employees of the Nigam who are governed by Regulations referred herein before and were in service of the Nigam till the date of commencement of amended provisions of aforesaid Fundamental Rules and have been superannuated on or after 28th November

2001 but in view of the proviso second of amended Rule-56(a) if a Government servant who has attained the age of 58 years on or before the first day of November 2001 and is on extension in service shall be retired from service on expiry of his extended period of service. Thus he would not be entitled to take benefits of amended fundamental Rules.

14. In the result, the petitioners are entitled to be continued in service on their respective posts till attaining 60 years age of their superannuation. In case the petitioners were permitted to continue in service after attaining their age of 58 years at the strength of any interim order passed by this Court and they have also been paid their salary, the respondents are directed to continue them in service till attaining their age of 60 years and pay their salary admissible to their respective posts by treating their age of retirement 60 years. If any of the petitioner has not been permitted to continue in service in absence of any interim order and has not been paid his salary without his fault, the Nigam is directed to reinstate him on his post for remaining period till attaining his age of 60 years and pay his salary alongwith arrears of remaining period within a period of three months from the date of production of certified copy of the order passed by this Court before the Nigam. The Nigam is further directed to finalize post retiral benefits of the petitioners by treating their age of retirement 60 years. With the aforesaid directions, the writ petition succeeds and allowed."

12. Thus in view of the aforesaid discussion it is clear that the question in issue and controversy is covered by law laid down by the Hon'ble Apex Court in Harvindra Kumar's case (supra) has been followed and applied by a Division Bench of this Court in Bihangesh Nandan Saran and others case (supra). The aforesaid decisions are also binding upon this court, therefore, we are in complete agreement with the view taken herein before in the aforesaid cases on the question in issue, the same is answered accordingly.

13. Now so far as next question is concerned, the learned counsel for Nigam has vehemently argued that since the petitioners have approached this court after expiry of much time from their respective dates of retirement as such they are not entitled for similar relief as granted in Harvindra Kumar's case and other cases referred herein before as their blameworthy conduct disentitled them to seek such relief. Thus he urged that the petitioners are not entitled for discretionary and equitable relief under Article 226 of the Constitution of India and the petitions are liable to be dismissed on the ground of delay and latches alone. In support of his contention learned counsel for Nigam has placed strong reliance upon a decision rendered by a Division Bench of this court in Writ Petition No. 5242 of 2006 **Radha Krishna Gupta Vs. State of U.P. & others decided on 27.1.2006** wherein this court has refused to entertain the petition and dismissed the same on the ground of unexplained undue delay and latches alone without entering into merits of the writ petition The petitioner of the aforesaid case was Assistant Engineer of the Nigam and has been retired from service on attaining 58 years of his age on 30.1.2004. He approached this court after lapse of almost about two years and had claimed two years salary. Thus before dealing with the case in detail we would

like to deal with legal position in this regard.

14. The issue in question is not res-integra rather has received consideration of Hon'ble Apex court on several occasions. In **State of Maharashtra Vs. Digamber A.I.R. 1995 S.C. 1991**, the Hon'ble Apex Court has dealt with the issue at length by taking note of earlier decisions of Hon'ble Apex Court and Court in England and in para 12,18,19 and 20 of the decision Hon'ble Apex Court has held as under:

"12. . . .. . . Where the relief sought under Article 226 of the Constitution by a person against the welfare State is founded on its alleged illegal or wrongful executive action, the need to explain latches or undue delay on his part to obtain such relief, should, if anything, be more stringent than in other cases, for the reason that the State due to latches or undue delay on the part of the person seeking relief, may not be able to show that the executive action complained of was legal or correct for want of records pertaining to the action or for the officers who were responsible for such action, not being available later on. Further, where granting of relief is claimed against the State on alleged, unwarranted executive action, is bound to result in loss to the public exchequer of the State or in damage to other public interest, the High Court before granting such relief is required to satisfy itself that the delay or latches on the part of a citizen or any other person in approaching for relief under Article 226 of the Constitution on the alleged violation of his legal right, was wholly justified in the facts and circumstances, instead of ignoring the same or leniently considering it. Thus, in our view, persons seeking relief against the State under Article 226 of the Constitution, be they citizens or otherwise, cannot get discretionary relief obtainable thereunder unless they fully satisfy the High Court that the facts and circumstances of the case clearly justified the latches or undue delay on their part in approaching the Court for grant of such discretionary relief. Therefore, where a High Court grants relief to a citizen or any other person under Article 226 of the Constitution against any person including the State without considering his blame-worthy conduct, such as latches or undue delay, acquiescence or waiver, the relief so granted becomes unsustainable even if the relief was granted in respect of alleged deprivation of his legal right by the State.

18. Latches or undue delay, the blame-worthy conduct of a person in approaching a Court of Equity in England for obtaining discretionary relief which disentitled him for grant of such relief was explained succinctly by ***Sir Barnes Peacock****, long ago, in* ***Lindsay Petroleum Co. Vs. Prosper Armstrong (1874) 5 PC 221),*** *thus:*

"Now the doctrine of latches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation, in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute or

limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of Justice or injustice in taking the one course or the other, so far as it relates to the remedy."

19. Whether the above doctrine of latches which disentitled grant of relief to a party by Equity Court of England, could disentitle the grant of relief to a person by the High Court in exercise of its power under Article 226 of the Constitution, when came up for consideration before a Constitution Bench of this Court in ***Moon Mills Ltd. Vs. M.R. Meher, President Industrial Court, Bombay, (AIR 1967 SC 1450)*** *it was regarded as a principle that disentitled a party for grant of relief from a High Court in exercise of its discretionary power under Article 226 of the Constitution.*

20. A three-Judge Bench of this Court in ***Maharashtra State Raod Transport Corporation Vs. Shri Balwant Regular Motor Service, Amravati, (1969 (1) SCR 808),*** *reiterated the said principle of latches or undue delay as that which applied in, exercise of power by the High Court under Article 226 of the Constitution.*

15. Thus from the aforesaid settled legal position, it is clear that before granting discretionary relief under Article 226 of the Constitution it is necessary for this court to examine as to whether the conduct of petitioners on account of latches or undue delay, acquiescence or waiver, disentitles him for such reliefs. For that purpose it is necessary to examine that as to whether it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it or whether by his conduct and neglect, he has, though perhaps not waiving that remedy, yet, put the other party in a situation, in which it would not be reasonable to place him if the remedy were afterward to be asserted. While examining the matter it should also be kept in mind that in every case if an argument against relief which otherwise would be just, is founded upon mere delay that delay of course not amounting to a bar by any statute or limitations, waiver and acquiescence the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as it relates to the remedy. Where the relief is claimed against the unwarranted executive action of the State, the need to explain the delay and latches are more stringent than in other cases for the simple reason that state due to latches or undue delay on the part of person seeking relief may not be able to show that executive action complained of was legal or correct for want of the record pertaining to the action or for the officers who were responsible for such action not being available later on. Further where the relief is claimed against the state on alleged unwarranted executive action is bound to result loss of public exchequer of state or in damage to other public interest, this court before granting such relief is required to satisfy itself that the delay or latches on the part of citizen or any other person in approaching for relief under Article 226 of the Constitution on alleged

violation of his legal right was wholly justified in facts and circumstances of the case. Therefore, before examining the case within aforesaid parameters, it is necessary to consider the true content and meaning of expression, "waiver' and "doctrine of acquiescence'.

16. In this connection a reference can be made to a decision of Hon'ble Apex Court rendered in **Motilal Padampat Sugar Mills Co. Ltd. Vs. The State of U.P. and others, AIR 1979 S.C. 621**, wherein in para 6 of the decision Hon'ble Apex Court has explained the meaning of the expression "waiver' known in the legal parlance as under:

"6. . . . . Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge" per ***Lord Chelmsford, L.C. in Earl of Darnley Vs. London, Chatham and Dover Rly. Co., (1867) 2 HL 43 at P. 57****. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out in* ***Halsbury's Laws of England (4th ed.) Vol . 16 in para 1472 at p. 994*** *that for a "waiver to be effectual it is essential that the person granting it should be fully informed as to his rights" and* ***Isaacs, J.*** *delivering the judgment of the High Court of Australia in* ***Craine Vs. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305*** *has also emphasised that waiver "must be with knowledge, an essential supported by many authorities."*

The Hon'ble Apex Court has further observed as under;

Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement; there is no such maxim known to the law. Over a hundred and thirty years ago, Maule J., pointed out in ***Martindale Vs. Falkner, (1846) 2 Constitution Bench 706*** *"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so". Scrutton, L.J., also once said: "It is impossible to know all the statutory law, and not very possible to know all the common law." But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in* ***Evans V. Bartlam, 1937 Authorised Controller 473****"....the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application. It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government."*

17. In **Municipal Corporation of Greater Bombay Vs. Dr. Hakimwadi Tenants' Association and others 1988 (Supp) S.C.C. 55** in para 14 of the decision Hon'ble Apex Court observed as under:

"14. . .. . In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The

essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case. . .. ."

18. Now coming to the meaning of expression "acquiescence' it is pointed out that in para 1473 (page 994-995) **Halsbury's Laws of England** Fourth Edition Volume 16, the meaning and import of the expression "acquiescence' has been given as under:

"1473. Estoppel and acquiescence. *The term "acquiescence" is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time, and in that sense acquiescence is an element in latches. Subject to this, a person whose rights have been infringed without any knowledge or assent on his part has vested in him a right of action which, as a general rule, cannot be divested without accord and satisfaction or release under seal.*

The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the Act. In that sense the doctrine of acquiescence may be defined as quiescence under such circumstances that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct, the principle of estoppel by representation applying both at law and in equity, although its application to acquiescence is equitable". The estoppel rests upon the circumstances that the person standing by in effect makes a misrepresentation as to a fact, namely, his own title' a mere statement that he intends to do something, for example to abandon his right, is not enough. Furthermore, equitable estoppel is not applied in favour of a volunteer."

19. In **Govindsa Marotisa Vs. Ismail and another A.I.R. 1950 Nag. 22 (Division Bench)** while explaining the meaning of the acquiescence **Hidayatullah (J)** (as he then was) observed that acquiescence proper is nothing more than absolute or positive waiver. It amount to abandonment of right. In **Sidde Gowda Vs. Nadakala Sidda Naika and others, A.I.R. 1952 Mysore 117**, it was held that acquiescence is founded on conduct with knowledge of one's own legal right. In **Gobinda Ramanuj Das Mohanta Vs. Ram Charan Das and another, A.I.R. 1925 Calcutta 1107**, a Division Bench of Calcutta High Court has held that estoppel by acquiescence connotes that the person estopped in effect has represented to the person who is infringing his right that he is not entitled to complain that his right is being invaded and that the party relying upon this representation has altered his position to his detriment.

20. In **K. Ramdas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and others, A.I.R. 1974 S.C. 2177,** in para 30 of the decision Hon'ble Apex Court has held that an excess of statutory power cannot be validated by acquiescence in or by the

operation of an estoppel. The Hon'ble Apex Court observed as under:

"30. The High Court was not correct in holding that though the impeached resolution sanctioning plan for conversion of building into a cinema was in violation of the Town Planning Scheme yet it could not be disturbed because the third respondent is likely to have spent money. An excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. ***Lord Selborne in Maddison Vs. Alderson, (1883) 8 App Cas 467*** *said that courts of equity would not permit the statute to be made an instrument of fraud. The impeached resolution of the Municipality has no legal foundation. The High Court was wrong in not quashing the resolution on the surmise that money might have been spent. Illegality is incurable."*

21. Now further question arises for consideration that what is legal nature of right of petitioners, which was allegedly invaded and is sought to be enforced in these writ petitions? In this regard it is necessary to point out that a Constitution Bench of the Hon'ble Apex Court while explaining the scope of phrase "matters relating to employment" as enshrined under Article 16(1) of the Constitution of India in **General Manager, Southern Railway and another Vs. Rangachari A.I.R. 1962 S.C. 36** in para 14 and 16 of the decision has held as under:

"14. Article 16(1) reads thus:

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

If the words used in the Article are wide in their import they must be liberally construed in all their amplitude. Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Art. 16(1) to the initial employment and nothing else; but that clearly is only one of the matters relating to employment would inevitably be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. These are all matters relating to employment and they are, and must be, deemed to be included in the expression "matters relating to employment" in Art. 16(1). What Art. 16(1) guarantees is equality of opportunity to all citizens in respect of all the matters relating to employment illustrated by us as well as to an appointment to any office as explained by us.

16. If the narrow construction of the expression "matters relating to employment" is accepted, it would make the fundamental right guaranteed by Art. 16 (1) illusory. In that case it would be open to the State to comply with the formal requirements of Art. 16(1) by affording equality of opportunity to all citizens in the matter of initial employment and then to defeat its very aim and object by introducing discriminatory provisions in respect of employees soon after their employment. Would it, for instance, be open to the State to prescribe different scales of salary for the same or similar posts, different

terms of leave or superannuation for the same or similar posts? On the narrow construction of Art. 16(1), even if such a discriminatory course is adopted by the State in respect of its employees that would not be violative of the equality of opportunity guaranteed by Art. 15(1). Such a result could not obviously have been intended by the Constitution. In this connection it may be relevant to remember that Art. 16(1) and (2) really give effect to the equality before law guaranteed by Art. 14 and to the prohibition of discrimination guaranteed by Art. 15 (1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment."

22. The same view has been reiterated by subsequent Constitution Benches of Hon'ble Apex Court in **Govind Dattatray Kelkar and others Vs. Chief Controller of Imports and Exports & others A.I.R. 1967 S.C. 839, in State of Mysore and another Vs. P. Narasinga Rao, AIR 1968 S.C. 349, in State of Jammu and Kashmir Vs. Triloki Nath Khosa and others, A.I.R. 1974 S.C. 1** and in **Mohammad Shujat Ali & others Vs. Union of India & others, AIR 1974 S.C. 1631**, with further elucidation that Art. 16 of the Constitution is only an incident of the application of the concept of the equality enshrined in Art. 14. It gives effect to the doctrine of equality in the matters of employment, follows that there can be reasonable classification of the employees for the purpose of appointment and other incidents of the service including the age of retirement or superannuation and state can not make any discrimination in identically circumstanced employees.

23. In this connection a further reference can be made to the decision of Hon'ble Apex Court in **H.R. Adyanthaya etc.etc. Vs. Sandoz (India) Ltd. etc.etc. A.I.R. 1994 S.C. 2608** wherein in para 6 of the decision Hon'ble Apex Court has observed that although the service conditions and their protection are not fundamental right, but they are creatures of either of statute or contract of employment. What service conditions would be available to a particular employees, whether they are liable to be varied, and to what extent are matters governed either by the statute or the terms of the contract. The legislature cannot be mandated to prescribe any particular service conditions to the employees or to a particular set of employees and legislature is free to prescribe particular service condition applicable to the particular set of employees and it cannot be faulted so long as the classification made is intelligible and has a rational nexus with the object sought to be achieved. For ready reference para 6 of the decision is reproduced as under:

"6. . . . . .The service conditions and their protection are not fundamental rights. They are creatures either of statute or of the contract of employment. What service conditions would be available to particular employees, whether they are liable to be varied, and to what extent are matters governed either by the statute or the terms of the contract. The legislature cannot be mandated to prescribe and

secure particular service conditions to the employees or to a particular set of employees. The service conditions and the extent of their protection as well as the set of employees in respect of which they may be prescribed and protected, are all matters to be left to the legislature. Hence when a legislation extends protective umbrella to the employees of a particular class, it cannot be faulted so long as the classification made is intelligible and has a rational nexus with the object sought to be achieved. . . . . "

24. Now further question arises for consideration as to whether a fundamental right can be waived or not? In this connection it is necessary to point out that in ***Behram Vs. State of Bombay (1955) 1 S.C.R. 613*** a Constitution Bench of Hon'ble Apex Court without finally deciding the question the majority of the Judges of Hon'ble Apex Court expressed the view that fundamental rights though primarily for the benefit of the individual have been put into our constitution on the ground of public policy and in pursuance of the objective declared in the preamble of the Constitution hence none of them can be waived. Similarly in ***Basheshar Vs. Commissioner of Income Tax AIR 1959 S.C. 149*** a constitution Bench of Hon'ble Apex Court has held that fundamental right being in the nature of prohibition addressed to the State, none of the fundamental rights in our constitution can be waived by an individual. Subsequently in ***Olga Tellis Vs. Bombay Corporation A.I.R. 1986 S.C. 180*** a constitution Bench of Hon'ble Apex Court has unanimously held by upholding the foregoing view that there cannot be any estoppel against the constitution, the paramount law of land and that a person cannot waive any of the fundamental rights conferred upon him by the Constitution in Part III by any act of his. Thus in view of the aforesaid discussion it is clear that the age of superannuation of an employee of State Government or Corporation owned and controlled by the State Government like Nigam in question, is governed by statutory Rules referred hereinabove, but the discrimination amongst the employees on the part of Nigam which is state agency or State Government would certainly amount to encroachment of fundamental rights of individual employee so discriminated.

25. Now at this juncture it would be useful to examine the decision of Hon'ble Apex Court rendered in case of **Harwindra Kumar (supra)**. From a close analysis of observation made by Hon'ble Apex Court in para 11 and 12 of the deicision it is clear that Apex Court has held that so long as regulation 31 is not amended, 60 years, which is age of superannuation of government servants employed under State of U.P. shall be applicable to the employees of Nigam. However if the Regulations are amended with previous approval of the State Government it is needless to say that same shall be prospective. In the operative portion of the decision it was further held that if the appellant and petitioners have not been allowed to continue after completing 58 years by virtue of erroneous decision taken by Nigam for no fault of their, they would be entitled to payment of salary for remaining period upto 60 years Thus in para 11 of the decision Hon'ble Apex Court has laid down the law in respect of question in controversy involved in the aforesaid case by interpreting the provisions of Regulations 31 of the Regulations in context of the relevant

provision of the Act and amended rule 56(a) of U.P. Fundamental Rules, whereas in para 12 of the decision, necessary directions were issued in respect of Appellant and petitioners who were before Hon'ble Apex Court, since the law laid down by Hon'ble Apex Court is declaratory/clarificatory in nature, therefore, it is retrospective in operation unless Hon'ble Apex Court itself has made it clear and intended to apply prospectively. Accordingly, it would cover the cases of retirement of employee of Nigam governed by Regulation 31 w.e.f. the date of commencement of the amended Rule 56 (a) of U.P. Fundamental Rules. But this court has no jurisdiction or power to restrict the application of law declared by Hon'ble Apex Court under Art. 141 of the Constitution of India. In this connection it would be useful to refer some case law on the point.

26. In **L.C. Golak Nath Vs. State of Punjab A.I.R. 1967 S.C. 1643**, in para 51 of the decision while dealing with the question as to whether the decision in that case should be given prospective or retrospective operation, Eleven Judges Constitution Bench of the Hon'ble Apex Court laid down following propositions:

(1) The doctrine of prospective overruling can be invoked only in matters arising under our constitution; (2) It can be applied only by the highest court of the country i.e. Supreme Court as it has the constitutional jurisdiction to declare law binding on all courts in India; (3) The scope of retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matters before it. Hon'ble Apex Court then declared that the said decision will not affect the validity of (Seventeenth Amendment) Act 1964 or other amendments made to the Constitution taking away or abridging the fundamental rights. Thereafter in **Woman Rao Vs. Union of India A.I.R. 1981 S.C. 271, in Atma Prakash Vs. State of Haryana A.I.R. 1986 S.C. 859, in Orissa Cement Ltd. Vs. State of Orissa A.I.R. 1991 S.C. 1676 and in Union of India Vs. Mohd. Ramzan Khan A.I.R. 1991 S.C. 471**, the Hon'ble Apex Court has evolved and applied the same doctrine of prospective overruling. Thus in given facts and circumstances of the case, there appears no scope for restricting or limiting the scope of law laid down by Hon'ble Court in Harwindra Kumar's case in its application to the cases arising out after the said decision of Apex Court only.

27. Now applying the law enunciated herein before it is to be seen that the petitioners have been retired from service in the year 2004 and 2005 on different dates indicated against their names in date chart shown in the earlier part of this judgment. They have filed their respective writ petitions in the year 2005 on different dates as indicated in the aforesaid date chart. It is not the submission of the learned counsel for the respondents that relief claimed in the writ petitions is either barred by time under any statute or law of limitation. It is also not or cannot be the submission of the learned counsel for the respondents that because of delay and latches, the Nigam would not be able to show that action was legal and correct for want of the record pertaining to aforesaid unwarranted action or for the officers who were responsible for such action are not available. The only

submission he can put forth that the relief claimed in the writ petitions is bound to result loss of public exchequer of state or Nigam, thus this court is required to balance the hardship and grievances of respective parties. But before doing so at this juncture it is also necessary to examine as to whether the petitioners have waived or acquiesced their right by their own conduct in approaching the court after expiry of much time from the date of their respective retirements?

28. In this connection it is necessary to point out that as observed by Hon'ble Apex Court in M.P. Sugar Mills Co. Ltd. (supra) while taking note of observation made by the courts abroad outside the country that there is no presumption that every person knows the law but for the sake of argument even if it is presumed that the petitioners were aware of the commencement of amended F.R. 56 (a) from the date of its publication in the official gazette of state government on 27th June 2002, even then with regard to its applicability in respect of their retirement no presumption can be drawn for the simple reason that even Nigam administration was not sure about it as revealed from the correspondence made between Nigam and State Government itself as indicated herein before. On the basis of directions given by State Government the Nigam has ultimately decided that the benefits of enhanced age of retirement applicable to employees of State Government shall not be extended to the employees of Nigam vide its decision dated 11.7.2002. The direction of State Government dated 15.1.2002 issued in this regard have been challenged before this Court in batch of writs. A Division Bench of this court on March 20, 2002 has decided the aforesaid batch of writ petition in **Harwindra Kumar Vs. Chief Engineer, Karmik, U.P. Jal Nigam and others (2002) 2 UPLBEC 1511** along with connected writ petitions, upholding the direction of State Government and decision of Nigam to retire its employees on attaining 58 years. Thereafter it appears that being unsuccessful before this court, Sri Harvindra Kumar and other aggrieved employees of the Nigam have approached Hon'ble Apex Court, thereupon Hon'ble Supreme Court has decided the Appeal and writ petitions on 18.11.2005 reported in **J.T. 2005 (10) S.C. 32**. Meanwhile it appears that two Division Benches of this court, one comprising of Hon'ble The Chief Justice Mr. Ajoy Nath Ray and Hon'ble Mr. Justice Ashok Bhusan in Special Appeal No. 559 of 2005 decided on 10.5.2005 and another Division Bench comprising of both of us in Vijai Bahadur Rai Vs. State of U.P. & others **2005 E.S.C. 2600** vide detail reasoned interim order dated 27.5.2005, have held the decision of earlier Division Bench rendered in Harwindra Kumar's case (supra) (2002) 2 U.P.L.B.E.C. 1511 as per incuriam and permitted the petitioner to continue in service till attaining 60 years age of superannuation. Therefore in the aforesaid back drop of the case it cannot be said that petitioners were aware of their right to be retired from service on attaining 60 years of their age earlier to the aforesaid decisions of Division Benches of this Court rendered in the month of May 2005 and legal position authoritatively settled and crystallised by the Hon'ble Apex Court in Harwindra Kumar's case (supra) J.T. 2005 (10) S.C. 32, decided on 18.11.2005. Thus for this simple reason, we have no hesitation to hold that earlier to the aforesaid decisions since the petitioners were not aware of their

aforesaid right, hence it cannot be held that they have abandoned or relinquished or waived and also acquiesced their right by the time they approached this court. Accordingly their conduct cannot be held to be blameworthy on account of delay and latches in approaching this court, rather in given facts and circumstances of the case they are fully justified in approaching the court at such belated stage.

29. Further as indicated earlier, since the law declared by the Hon'ble Apex Court in Harwindra Kumar's case (supra) cannot be limited in its application in respect of cases arising out after the aforesaid decision only rather it has to be applied from the date of commencement of amended provisions of Rule 56 (a) of Fundamental Rules. Therefore, it is not legally permissible to make any distinction amongst the employees of Nigam covered by the Regulation 31 and amended provisions of F.R. 56(a) of the aforesaid rules so far as remedy is concern. It is also because of the reason that such distinction among them would in fact be discrimination and would violate not only statutory rights of employees but would also infringe their fundamental rights which cannot be said to be waived and acquiesced by them and accordingly they cannot be estopped from challenging their retirement on account of alleged waiver and acquiescence. It would be needless to say that even excess of statutory power cannot be validated by acquiescence of the aggrieved party.

30. Besides this, in the aforesaid decision of Harwindra Kumar Hon'ble Apex Court itself has granted relief of full salary to the employees of Nigam who were not permitted to continue in service after 58 years till they attained 60 years of their age in absence of any interim order in their favour, on account of erroneous decision taken by Nigam, for no fault of theirs and they were held entitled to payment of salary for remaining period upto 60 years, without saying any thing more, thus it cannot be held that the employees of the Nigam who have approached this court, and are otherwise entitled to continue service till attaining 60 years are to be denied the aforesaid benefits without any justification under law merely on account of fact that they have approached this court at belated stage for which we have already held that they have full justification. Making any further classification amongst the employees of Nigam covered by Regulation 31 of regulations and amended proviso of F.R. 56(a) of U.P. Fundamental Rule to deny similar benefits without any rational basis merely on the basis of micro distinction that some of them approached this court and remaining have come after expiry of some time would be overdoing and would be an artificial classification among them particularly when their relief is otherwise not barred by time under any statute or law of limitation shown to us. Thus in our considered opinion in given facts and circumstances of the case any alleged loss of public exchequer of Nigam and/or of State Government would also not disentitle the petitioners to relief claimed in the writ petition. The denial of similar relief would be justified only in cases of unexplained, inordinate delay or latches, where the relief would be barred by time under any statute or law of limitations or in others situations referred herein before or grant of relief would upset the settled existing situation since long back and cause undue hardship to

administration of affairs of the Nigam or in other similar situations.

31. Now examining the issue from another angle it is to be pointed out that even in cases of disciplinary inquiries where very conduct of employees are under trial or examination in such proceedings, after conclusion of such inquiry if the employee is exonerated from the charges levelled against him, under relevant rules such employees are entitled to full salary for the period of suspension and/or for the period under which they remain out of employment on account of such disciplinary action. The case of petitioners are on better footing than those of aforesaid employees. Their conduct has never been in question in any such proceedings, they have been prevented from discharging their duties and availing the amenities and privilege of their office, not because of their any questionable conduct rather because of the erroneous decision taken by the Nigam and respondents authorities, therefore, there can be no justification under law to punish them for wrongful and unwarranted action of respondents authorities. In our considered opinion, the denial of legitimate relief to the petitioners would amount to grant of premium to the respondents for their unwarranted action, which would be against both justice and equity.

32. Thus in view of foregoing discussions, we are of the considered opinion that while deciding the case of Sri Radha Krishna Gupta (supra) the Division Bench of this court did not consider the binding precedents on the question in issue referred herein before and has completely ignored the same, therefore, the decision so rendered by Division Bench of this court with all respect may be treated as given "per incuriam", and cannot be binding upon us.

33. When a decision can be said to be given "per incuriam" has drawn attention of Hon'ble Apex Court on several occasions. A seven Judges Constitution Bench of Hon'ble Apex Court in **A.R. Antulay Vs. R.S. Nayak and another AIR 1988 S.C. 1531**, while taking note of various authorities and juristic opinions expressed in authoritative books on the subject in para 44 of the decision held as under:

"44. It appears that when this Court gave the aforesaid directions on 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in ***Anwar Ali Sarkar's case (AIR 1952 S.C. 75) (supra). See Halsbury's Laws of England, 4th Edn. Vol. 26 page 297, para 578 and page 300****, the relevant notes 8, 11 and 15; Dias on* ***Jurisprudence, 5th Edn. Pages 128 and 130; Young Vs. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293 at p. 300).*** *Also see the observations of* ***Lord Goddard in Moore V. Hewitt (1947) 2 All ER 270 at p. 272-A)*** *and* ***Penny V. Nicholas, (1950) 2 All ER 89, 92A.*** *"Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. See* ***Morelle Vs. Wakeling, (1955) 1 All ER 708, 718F****. Also see* ***State of Orissa V. Titaghur Paper Mills Co. Ltd., (1985) 3 SCR 26 :***

(Air 1985 SC 1293). *We are of the opinion that in view of the clear provisions of section 7(2) of the Criminal Lal Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong."*

34. In **Municipal Corporation Delhi Vs. Gurnam Kaur, AIR 1989 S.C. 38**, Hon'ble Apex Court has held that a decision treated as given per incuriam, when it is given in ignorance in terms of a statute or a rule having force of a statute, the observation made by Hon'ble Apex Court in para 11 of the decision is "A decision should be treated as given per incuriam when it is given in ignorance of the terms of a statute or of a rule having the force of a statute". In **Punjab Land Development and Reclamation Corporation Ltd. Vs. Presiding Officer, Labour Court (1990) 3 S.C.C. 682**, in para 40 of the decision Hon'ble Apex Court has held that a decision be said generally to be given per incuriam, when court has acted in ignorance of a previous decision of its own or when High Court has acted in ignorance of a decision of Supreme Court.

35. Now coming to the cases relied by Division Bench of this Court in **Radha Krishna Gupta's case (supra),** it is to be seen that in **State of Karnataka and others Vs. S.M. Kotrayya and others (1996) 6 Supreme Court Cases 267** Hon'ble Apex Court while dealing with the provisions of Section 21 of Administrative Tribunal Act, 1985 has held that having regard to the scheme of provisions of statute the petitioners are required to give satisfactory explanation for delay caused till the date of filing of application after expiry of period prescribed in sub-section (1) and sub-section (2) thereof and the Hon'ble Apex Court has further held that there is no proper explanation at all.

36. In **Jagdish Lal and others Vs. State of Haryana & others, A.I.R. 1997 S.C. 2366**, the question of determination of seniority and challenge to promotions were under consideration. The High Court has dismissed the writ petition of appellants before Apex Court on the ground of unexplained inordinate delay and on merits too. In appeal Hon'ble Apex Court has taken the same view and dismissed the appeal of writ petitioners holding that matter in issue has already attained finality accordingly cannot be reopened and also refused to direct the re-determination of seniority sought for in given facts and circumstances of the case in such belated stage.

37. In **M/s Rup Diamonds & others Vs. Union of India & others, A.I.R. 1989 S.C. 674**, the petitioners claim for revalidation and endorsement of six Imprest Licences for import of Open General Licence items upon fulfillment of their export obligation was rejected by the authorities on the grounds noted in para 6 of the decision that claim were made after 4 years and 7 months, and claim was also not acceptable on merits because of absence of provisions in Licence Policy under consideration to accept the claim after such lapse of time. The petitioners preferred writ petition before Hon'ble Apex Court under Article 32 of the Constitution basing its claim, on parity of decisions rendered by Bombay High Court against which special leave petitions were dismissed by Hon'ble Apex Court as noticed in para 7 of the decision. While dealing with legal effect of aforesaid decision in para 8 of the

decision, in para 9 Hon'ble Apex Court has observed that the claim of petitioner was not acceptable on account of inordinate delay before the authorities and before this Court also.

38. Thus in view of law laid down by Hon'ble Apex Court in **State Financial Corporation and another Vs. Jagdamba Oil Mills and another AIR 2002 S.C. 834**, the observations made by the Hon'ble Apex Court should be understood in context in which they appear. The observations made in para 19 of the decision is as under:

"19. Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments."

39. Further, what is ratio of the decision, and how it can be ascertained has been very clearly dealt with in **Krishna Kumar Vs. Union of India AIR 1990 S.C. 1782**. The observations made by Hon'ble Apex Court in para 18 and 19 of the decision are as under:

"18. The doctrine of precedent that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required." This was what ***Lord Selborne said in Caledonian Railway Co. v. Walker's Trustees (1882)(7) AC 259) and Lord Halsbury in Quinn v. Leathem (1901) AC 495(502), Sir Frederick Pollock*** *has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision."*

19. In other words, the enunciation of the reason or principle upon which a question before a Court has been decided is alone as a precedent. The ratio decidendi is the under-lying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case, which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration, if it is not clear, it is not the duty of the Court to spell it out with difficulty in order to be bound by it. In the words of Halsbury, 4th Edn. Vol.26 para 573:

"The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not

part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it, and it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case. If more reasons than one are given by a tribunal for its judgment all are taken as forming the ratio decidendi."

40. Thus in view of aforesaid discussion, it is clear that while rendering the decision in Radha Krishna Gupta's case earlier Division Bench of this court with all respect did neither ascertain the ratio of decisions referred in the judgment nor discussed, as to how the factual situation fits in with the fact and situation of the decision on which reliance was placed. Contrary to it the decision of Hon'ble Apex Court, which requires consideration of various, factors in this regard, referred herein before in our judgment has been completely ignored by the Division Bench, therefore, being a decision given per incuriam, cannot be held to be binding authority under law.

41. It is no doubt true that petitioners have woke up when they got impetus from the some decisions of this court in the month of May 2005, but merely on that count alone it would not be just to reject their writ petitions when the relief claimed therein is otherwise admissible as discussed herein before and not barred by any statute or law of limitations or when they did not waive and acquiesce their right by the time they approached this Court, or in case of grant of relief which has been earlier granted by this Court and finally by Hon'ble Apex Court, would ultimately upset the administration of affairs of Nigam or there exist similar other situations justifying refusal of such relief, the denial to grant similar relief to the petitioners in our mind would not serve any cause of justice rather defeat it and would also whittle down law of land declared by Hon'ble Apex Court in **Harwindra Kumar's** case and be subversive to the judicial discipline.

42. Thus having regard to the facts and circumstances of the case discussed herein before we are of the considered opinion that the writ petitions are not liable to be dismissed on the ground of delay, latches, waiver and acquiescence. The petitioners are entitled to similar relief as granted by Hon'ble Apex Court, with necessary modifications as we have held in our earlier decision rendered in batch of writ petition namely Writ Petition No. 57044 of 2005, Bihangesh Nandan Saran Vs. State of U.P. and others along with other connected cases decided on 9.1.2006. Thus the second question formulated herein before, is answered accordingly.

43. Thus in view of foregoing discussions, writ petitions succeed and allowed in the terms and directions given in the writ petition of Behangesh Nandan Saran and other connected cases decided by us on 9.1.2006, as noted in earlier part of our judgment.

There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2005

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

Special Appeal No.702 of 2005

The District Judge, Baghpat and another
...Respondents/Appellants
Versus
Sri Anurag Kumar and others
...Petitioners/ Respondents

Counsel for the Petitioner:
Sri Sudhir Agarwal
Sri Amit Sthalekar

Counsel for the Respondents:
Sri Vikrant Rana
Sri Anup Trivedi

Constitution of India, Art. 14, 16-Selection list-against 10 post Class III employee-more than 20 candidates prepared-held-absolutely illegal-contrary to rule-in contravention of Art. 14 and 16 of the Constitution.

Held: Para 12

The petitioners are admittedly much below the 20 candidates in the merit list dated 05.04.2000 and as such they could not have been included in the list prepared by the District Judge. Their very inclusion is invalid. The same is the position with regard to such other candidates who stand on a similar footing. The District Judge proceeded to place 52 persons in the select list in excess of 20 names, including that of the petitioners, and subsequently appointed them which appointments are also invalid, as they are from the same invalid list. We, therefore, hold that the preparation of the select list in excess of 20 names was absolutely illegal and contrary to the Rules applicable. The question of preparing the select list of more than 20 or filling up the vacancies against more than 10 posts is in contravention of Articles 14 and 16 of the Constitution of India.

(B) Practice of Procedure-Service Jurisdiction-Power of the appointing authority-once the entire vacancies as per advertisement full filled-selection process stood exhausted-the authority became function officio any appointment beyond that-held- without jurisdiction-a nullity unenforceable in law-even after the vacancy caused due to resignation, death of a sucesseful candidate after his joining.

Held: Para 22 and 23

In view of the above, we are of the considered opinion that as only ten vacancies had been advertised, there could be no justification for the authority concerned to fill up more than ten vacancies as it included the then existing as well as vacancies likely to occur in the course of the year. Once ten vacancies had been filled up, the selection process stood exhausted, and the authority concerned become functus officio. Any appointment made by him beyond that number, is without jurisdiction, therefore a nullity, inexecutable and un-enforceable in law.

In such an eventuality after issuing appointment letters to ten candidates, the select list/waiting list stood exhausted and could not have been used as perennial source for appointment against any other vacancy. There can be no controversy to the settled legal proposition that even if a successful candidate joins the post and resigns or dies or stands transferred, his vacancy stands exhausted merely by his joining and the post could not be filled up from the waiting list as the statutory rules do not provide for such a course.

(C) Constitution of India, Art. 226-Writ court-while granting interim order-

provisions of C.P.C. under order 39 rule I be kept in mind-not as a matter of right or in the form of final relief.

Held: Para 37

In Union of India Vs. Era Educational Trust, (2000) 5 SCC 57, the Hon'ble Supreme Court after considering its large number of judgments held that while passing interim order in exercise of writ jurisdiction under Article 226 of the Constitution, principles laid down for granting interim relief under Order XXXIX of Code of Civil Procedure, 1908 should be kept in mind. It can neither be issued as a matter of right nor it should be in the form which can be granted only as final relief.

Case law discussed:

AIR 1996 SC-976, 1994 (Suppl.-II) SCC599, 1996 (4) SCC-319, 1992 (Suppl.) (3) SCC-984, AIR 1994 SC-736, AIR 1998 SC-18, AIR 1998 SC-1021, 2001 (10) SCC-237, AIR 2001 SC-2900, 2005 (4) SCC-, AIR 1995 SC-277, 1996 (7) SCC-118, AIR 1997 SC-3456, AIR 1997 SC-3464, 1993 (2) SCC-213, 1995 (Supp.)(4)-SCC-706, 2005 (4) SCC-209, AIR 1994 SC-1654, AIR 1985 SC-330, AIR 1985 SC-1289, AIR 1986 SC-1490, 1992 (4) SCC-167, 1992 (Supp.)(1) SCC-680, AIR 1993 SC-2412, AIR 1995 SC-1499, 1995 (Supp)(2) SCC-593, 1995 (Supp)(2) SCC-726, AIR 1995 SC-1368, 1998 (8) SCC-347, AIR 1997 SC-993, 2000 (7) SCC-521, 2004 AIR SCW-6955

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

1. The District Judgeship of Baghpat, which came into existence on account of the newly created District of Baghpat, has engaged the attention of the High Court continuously on account of un-ending controversies surrounding the appointments made in the Ministerial Cadre and has given rise to litigation which, in turn, has been the subject matter of adjudication on the judicial side of this Court. The present litigation is the second in the series of the recent controversial appointments made which have been scrutinized on the judicial side and we have been again called upon to pronounce a verdict which, as the facts would disclose hereinafter, contain a disclosure of unsavoury acts which are not only unsustainable in the eyes of law but have also provided an opportunity to this Court to again seriously think over to provide for remedial measures in order to prevent any future mishaps which might tarnish the image of our system.

2. This newly created Judgeship has become a site of alternate unlawful invasions, by unscrupulous officers as if it was their favourite hunting resort, which historically Baghpat was during the Moghul period, and which requires an immediate favourable treatment from this Court in order to bring to an end this scene of perpetual infamous attempts made to defame the system.

3. The genesis of this litigation is to be found with the creation of new posts in the year 1998-1999 in the Ministerial Cadre in the District Judgeship of Baghpat. We are presently concerned with such Class-III posts which carry with them a pay-scale of Rs. 3050-4590/-. Even though the present controversy is in respect of four persons, yet this decision pronounces upon the legal position that shall be applicable in respect of all such appointments, as that of the four petitioners of the writ petition giving rise to the present Special Appeal.

4. We have heard Shri Sudhir Agarwal, learned Additional Advocate General assisted by Shri Amit Sthalekar on behalf of the appellants and Shri Vikrant Rana, holding brief of Shri Anup Trivedi, on behalf of the respondents.

With the consent of the parties, we have also summoned the records of the writ petition and we are proceeding to decide the fate of the writ petition along with this Special Appeal as well, to which learned counsel for the parties have no objection.

5. Reverting back to the facts of this case, the appointments in respect of the posts in question are governed by The Subordinate Civil Courts Ministerial Establishment Rules, 1947 (hereinafter called the "1947 Rules) read with the Uttar Pradesh Rules for the Recruitment of Ministerial Staff of the Subordinate Offices in Uttar Pradesh, 1950 (hereinafter called the "1950 Rules). The 1950 Rules have been considered by the Apex Court in the case of O.P. Shukla Vs. A.K. Shukla, AIR1986 SC 1043 and it has been held that these Rules are complementary to the 1947 Rules and are applicable for the selection of Ministerial posts in Subordinate Judiciary. It is also admitted to the parties that the posts, against which the writ petitioners are claiming continuance, were advertised on 23rd December, 1999. A copy of the advertisement has been appended along with the writ petition as Annexure-1, which indicates the availability of 10 posts of Clerks and four posts of Stenographers with the rider that the posts are likely to increase or decrease. We are presently concerned with the posts of Clerks in the pay scale of Rs. 3050-4590/- . The records further disclose the undisputed position that the date of examination was 5th March, 2000 and the list of selected candidates which is the subject matter of present controversy was declared on 05.04.2000. This list which is the source of all trouble enlists 72 persons against 10 posts of Clerks which were advertised. 32 persons out of these 72 were given immediate appointments on 5th April, 2000. However, the four petitioners, who are before us, were not amongst the said 32 persons. The petitioners no. 1 and 2, namely, Anurag Kumar and Deepak Nigam have themselves disclosed their dates of appointments as 02.02.2002. The petitioner no.3 Shri N.K. Khare has disclosed his date of appointment as 16.05.2001 and the petitioner no.4, Mr. T.P. Yadav has disclosed his date of appointment as 04.02.2002.

6. The first question that calls for determination in this controversy is as to whether the aforesaid four petitioners could have been offered appointments. This necessarily brings us to the question as to whether the declaration of the list on 05.04.2000 was in accordance with the Rules or not and as to whether the said list, even if found to be competent on the date of its declaration, could survive on the date when the petitioners were offered appointment or not.

7. The Rules, in our opinion, are absolutely clear and which have made our task easier to pointedly answer the aforesaid questions. Shri Sudhir Agarwal, learned counsel appearing for the appellants invited our attention to Rules 9,10,11,14 and 15 of the 1947 Rules, referred to hereinabove. Rule 9 empowers the District Judges to recruit as many candidates as are required for the vacancies "likely to occur in the course of the year'. The exercise has to be commenced early in each year or as the circumstances may require. This entails an exercise by the District Judges of identifying the number of vacancies existing or likely to occur in the course of the year. This is in conformity with the

Rule 4 of the 1945 Rules, referred to hereinabove, which requires that such vacancies shall be calculated and necessary steps shall be taken to make this fact generally known. What follows is that the advertisement to be made has to be preceded by an exercise by calculating the number of vacancies in the manner indicated hereinabove.

8. Then comes Rule 10 of the 1947 Rules which provides for an advertisement inviting applications in a particular form which should particularly disclose the number of candidates to be recruited. The advertisement, therefore, will be presumed to have included only such number of vacancies/posts which are available in accordance with the calculation made under Rule 9 and no other future vacancy. The Rule does not contemplate advertisement of future vacancies which can be taken into account after the advertisement has been made.

9. The recruitment thereafter is to be made on the basis of the result of the examination under Rule 11 and for the said purposes, the list of selected candidates has to be entered in a register in order of merit to be maintained by the District Judges under Rule 14. Sub-rule 3 of Rule 14, in no uncertain terms, provides that in case a candidate who has not been offered appointment in accordance with the said list within one year from the date of his recruitment, his name shall automatically be removed from the register.

10. A perusal of the aforesaid Rules would establish that the number of vacancies which have to be advertised are to be in accordance with the Rule 9 and, therefore, the recital in the advertisement that the vacancies are likely to increase or decrease has to be strictly construed in accordance with the aforesaid Rules. What logically follows is that the District Judge is not at liberty to prepare a list dehors the number of vacancies advertised. This position stands further clarified by the Circular Letter No. 9/VIIb-104 Admin. Dated 29.04.1999 issued by the High Court which clearly states that the select list shall not be prepared by the District Judges for more than the double of the vacancies advertised. The said Circular has been referred to in the report of the then learned Administrative Judge, Baghpat in his report which has been appended as Annexure-1 to the stay application in this appeal. In the instant case, 72 persons were enlisted for recruitment on 05.04.2000 as against 10 vacancies, which stood advertised.

11. On the basis of the aforesaid provisions and the Circular, referred to hereinabove, it is explicit that the select list, which was prepared on 5th April, 2000, was in flagrant violation of the Rules, referred to above. The then District Judge has proceeded to prepare the list in an absolute arbitrary and whimsical fashion which list could not have included, by any means, more than 20 names. The first step of derailment of the process of selection seals the fate of all such candidates who are claiming themselves to have been appointed under the said list in excess of first twenty names and leaves no room for doubt that the select list was prepared with some oblique and ulterior motive.

12. The petitioners are admittedly much below the 20 candidates in the merit list dated 05.04.2000 and as such they

could not have been included in the list prepared by the District Judge. Their very inclusion is invalid. The same is the position with regard to such other candidates who stand on a similar footing. The District Judge proceeded to place 52 persons in the select list in excess of 20 names, including that of the petitioners, and subsequently appointed them which appointments are also invalid, as they are from the same invalid list. We, therefore, hold that the preparation of the select list in excess of 20 names was absolutely illegal and contrary to the Rules applicable. The question of preparing the select list of more than 20 or filling up the vacancies against more than 10 posts is in contravention of Articles 14 and 16 of the Constitution of India.

13. In Ashok Kumar & Ors. Vs. Chairman, Banking Service Recruitment Board & Ors., AIR 1996 SC 976, the Supreme Court held as under:-

"5. Article 14 read with Article 16 (1) of the Constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. ***The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 (1) of the Constitution****..... Boards should notify the existing and excepted vacancies and the Recruitment Board should get advertisement published and recruitment should strictly be made by the respective Boards in accordance with the procedure to the notified vacancies but not to any vacancies that may arise during the process of selection". (Emphasis added)*

14. In Gujarat State Deputy Executive Engineer's Association Vs. State of Gujarat & Ors., 1994 Suppl. (2) SCC 591, the Hon'ble Supreme Court quashed the appointments made over and above the vacancies advertised holding that such an action was neither permissible nor desirable for the reason that it would amount to 'improper exercise of power' and only in a rare and exceptional circumstance and in emergent situation, this rule can be deviated from and it can be done only after adopting policy decision based on some rational as the authority cannot fill up more posts than advertised as a matter of course.

In Prem Singh & Ors. Vs. Haryana State electricity Board & Ors., (1996) 4 SCC 319, the Apex court observed as under-

".....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****..... State can deviate from the advertisement and make appointments on the posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf." (Emphasis added).*

16. The said judgment in Prem Singh was followed with approval by the Hon'ble Supreme Court in Virendrer

Singh Hooda Vs. State of Haryana, AIR 1999 SC 1701.

17. In Union of India & Ors. Vs. Ishwar Singh Khatri & Ors, 1992 Suppl. (3) SCC 84, the Court held that selected candidate have right to appointment only against 'vacancies notified' and that too during the life of the select list as the panel of selected candidate cannot be valid of indefinite period. Moreover, impanelled candidates "In any event cannot have a right against future vacancies." In State of Bihar & Ors. Vs. The Secretariat, Assistant S.E. Union, 1986 & Ors, AIR 1994 SC 736, the Apex court held that " a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rules say to the contrary." In the said case as the selection process was completed in five years after the publication of the advertisement, the contention was raised that the empanelled candidates deserved to be appointed **over and above the vacancies notified.** The Hon'ble Supreme Court rejected the contention observing that keeping the selection process pending for long and not issuing any fresh advertisement in between, may not be justified but offering the posts in such a manner would adversely prejudice the cause of those candidates who achieved eligibility in the meantime.

18. In Surinder Singh & Ors. Vs. State of Punjab & Ors., AIR 1998 SC 18, the Apex Court Court held as under:-

"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 persons 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 became eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as infinite stock for appointment, there is danger that the State may resort to the device of not holding the 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 perpetuating the 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.....Exercise of such power has to be tested on the touch-stone of reasonableness.....**It is not a matter of course that the authority can fill up more posts than advertised.**" (Emphasis added).

19. In Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta & Ors., AIR 1998 SC 1021, the Apex Court similarly observed as under:-

"As per the scheme of the Act and the aforesaid provisions, for each academic year in question, the management has to intimate the existing vacancies and vacancies likely to be caused by the end of the ensuing academic year in question. Thereafter, the Director shall notify the same to the Commission and the Commission, in turn, will invite applications by giving wide publicity in the State of such vacancies. **The vacancies cannot be filled except by following the procedure as contained therein.** Sub-section (1) of Section 12 has incorporated in strong words that any appointment made in contravention of the provisions of the Act shall be void. This was to ensure to back-door entry but selection only as provided under the said sections." (Emphasis added).

20. Similar view has been reiterated by the Hon'ble Supreme Court in Sri Kant Tripathi Vs. State of U.P. & Ors., (2001) 10 SCC 237; and State of J&K Vs. Sanjeev Kumar & Ors., (2005) 4 SCC 148.

21. In State of Punjab Vs. Raghbir Chand Sharma & Ors., AIR 2001 SC 2900, the Apex Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No.1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:-

"With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."

22. In view of the above, we are of the considered opinion that as only ten vacancies had been advertised, there could be no justification for the authority concerned to fill up more than ten vacancies as it included the then existing as well as vacancies likely to occur in the course of the year. Once ten vacancies had been filled up, the selection process stood exhausted, and the authority concerned become functus officio. Any appointment made by him beyond that number, is without jurisdiction, therefore a nullity, inexecutable and un-enforceable in law.

23. In such an eventuality after issuing appointment letters to ten candidates, the select list/waiting list stood exhausted and could not have been used as perennial source for appointment against any other vacancy. There can be no controversy to the settled legal proposition that even if a successful candidate joins the post and resigns or dies or stands transferred, his vacancy stands exhausted merely by his joining and the post could not be filled up from the waiting list as the statutory rules do not provide for such a course.

24. In the instant case, the candidates appointed against those vacancies had been transferred to different Judgeships and vacancies were created time and again artificially and the

select list which could not have been for more than 20 names, had been used as a reservoir by the statutory authority for making illegal appointments. The Court being the custodian of law cannot close its eyes where the facts are so startling that it shocks the conscience of the Court. However, we restrain ourselves to hold that appointments could have been made on extraneous considerations only for the reason that the then District Judge is not a party by name before us. We are told that though the officer has retired but he is facing Departmental Enquiry on such charges.

25. The question of appointment dehors the Rules has been considered by the Hon'ble Supreme Court time and again and the Court held that such appointments are unenforceable and inexecutable. It is settled legal proposition that any appointment made de hors the Rules violates the Public Policy enshrined in the rules and, thus, being void, cannot be enforced. (Vide Smt. Ravinder Sharma & anr.. Vs. State of Punjab & ors., AIR 1995 SC 277; State of Madhya Pradesh Vs. Shyama Pardhi, (1996) 7 SCC 118; State of Rajasthan Vs. Hitendra Kumar Bhatt, (1997) 6 SCC 574; Patna University Vs. Dr. Amita Tiwari, AIR 1997 SC 3456; Madhya Pradesh Electricity Board Vs. S.S. Modh & ors., AIR 1997 SC 3464; and Chancellor Vs. Shankar Rao & ors., (1999) 6 SCC 255).

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

".....We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and by passing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commissions. It appears that since this Court has in some cases permitted regularisation of the irregularly recruited employees, some governments and authorities have been increasingly resorted to irregular recruitments. The result had been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course."

27. Deprecating the practice of making appointment de hors the Rules by the State or its instrumentalities in Dr. Arundhati A. Pargaonkar Vs. State of Maharashtra, AIR 1995 SC 962, the Court rejected the claim of the petitioner therein for regularisation on the ground of long continuous service observing as under:-

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

28. In Harpal Kaur Chahal Vs. Director Punjab Instructions, 1995 Supp

(4) SCC 706, a similar contention was rejected though the appellant therein had worked for about 24 years.

29. In Binod Kumar Gupta Vs. Ram Ashray Mahoto & Ors., (2005) 4 SCC 209, the Apex Court did not grant indulgence to an illegal appointee though he had worked for more than 15 years, observing as under:-

"The District Judge, who was ultimately responsible for the appointment of Class-IV staff violated all norms in making the appointments. It is regrettable that the instructions of the High Court were disregarded with impunity and a procedure evolved for appointment which cannot be said to be in any way fair or above board. The submission of the appellants that they had been validly appointed is in the circumstances unacceptable. Nor can we accede to their prayer to continue in service. No doubt, at the time of issuance of the notice on the special leave petition, this Court had restrained the termination of services of the appellants. However, having regard to the facts of the case as have emerged, we are of the opinion that this court cannot be called upon to sustain such an obvious disregard of the law and principles of conduct according to which every judge and anyone connected with the judicial system are required to function. If we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment."

30. The Hon'ble Supreme Court in State of U.P. & Ors. Vs. U.P. State Law Officers Association & Ors., AIR 1994 SC 1654 observed as under:-

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

31. Appointments made in contravention of the statutory provisions remain in-executable.

Coming to the next question with regard to the period for which the said select list survived, it is apparent that the list for recruitment was prepared finally on 05.04.2000. On a simple mathematical calculation, the period of one year, as per the Gregorian Calendar, cannot, in any circumstance, stretch beyond 04.04.2001. Thus, according to Rule 14 (3) of the 1947 Rules, all names that were existing up to 04.04.2001, stood automatically removed with effect from 05.04.2001 and no person could either have claimed appointment or could have been appointed by the District Judge under the said select list. The Rule, referred to hereinabove, is ruthless and negatively worded. It brings about automatic removal and is not subject to any relaxation. The word "automatic' in its ordinary sense means "on its own'. Thus, the removal of the name does not require any action to be taken and stands removed

accordingly. The removal of the name, therefore, brings about a complete and unqualified cessation of any semblance of claim under the select list. To put it otherwise, the District Judge looses all authority and jurisdiction and is completely forbidden from picking up any name out of the said list after the expiry of the aforesaid period of one year for appointment. In short, the District Judge becomes functus officio vis-à-vis to that extent. This position with regard to the existence of the select list and the automatic removal of the names from the list was subject matter of consideration of several decisions and the final pronouncement in this regard is in the case of D.N. Srivastava Vs. State of U.P., a Full Bench decision of our Court reported in 1996 (2) UPLBEC 1037. This view stands fortified by the judgments of the Hon'ble Apex Court in State of Bihar & Ors. Vs. Mohd. Kalimuddin, AIR 1996 SC 1145; State of U.P. & Ors. Vs. Harish Chandra & Ors., AIR 1996 SC 2173; and & State of U.P. & Ors. Vs. Ram Swarup Saroj, AIR 2000 SC 1097.

32. Examining the facts of the present case, as admitted to the petitioners themselves, the first appointment claimed is by the petitioner no.3 on 16.05.2001 and that by petitioners no. 1 and 2 on 02.02.2002 and by petitioner no.4 on 04.02.2002. To support the enlargement of the period of the life of the list, the petitioners (respondents herein) have relied on an order of then District Judge (Annex-3) whereby the District Judge himself has purported to extend the life of select list for one year, i.e. up to 05.04.2002. The aforesaid order of the District Judge is not only an order without authority of law but appears to be contemptuous as well. It is in teeth of the Circulars of this Court and the decisions pronounced on the judicial side. The District Judge, in our opinion, had no authority in law to give extension to the life of a list which not only, by operation of the Rules but also by declaration of law, stood exhausted. The District Judge, therefore, clearly tried to overreach the law and has acted malafidely by issuing such an order. The petitioners (respondents herein), therefore, cannot get any benefit out of the said letter issued by the District Judge and consequently, the appointments of all four petitioners are void being dehors the Rules. Their consequential transfers respectively to Barabanki, Kanpur, Lucknow and Meerut also cannot confer any benefit to them.

33. The petitioners contend that they were neither given any opportunity prior to the issuance of the termination orders dated 28.02.2005 inasmuch as inspite of the demand having been raised, no documents were supplied to them and the reply submitted by them has not received any consideration from the District Judge. The impugned orders terminating their services reflect non-application of mind and that no objection was ever raised in respect of the select list which was prepared on 05.04.2000. It has been further urged that the candidates out of the said list, whose names were in excess of the double the number of vacancies advertised, are still continuing in service and their services have not been terminated and as such the termination of the petitioners' services are accordingly violative of Article 14 of the Constitution of India, being discriminatory in nature. It has been further urged that the stay order granted in a similar writ petition being Writ Petition No.52654 of 2003 in respect of 15 employees out of the same list is

pending and operating and as such the learned Single Judge did not commit any error in extending the same benefit by granting the interim order in favour of the petitioners.

34. In reply, Shri Sudhir Agarwal, learned Senior Counsel and Additional Advocate General appearing on behalf of the appellants has urged that there were no posts in the pay scale of Rs. 3050-4590/- in existence and sanctioned against which the petitioners-respondents could have claimed appointments. He has further submitted that the petitioners were given an opportunity which they failed to avail and even before this Court, the petitioners have miserably failed to establish the validity of their selections and appointments. He has further submitted that the termination orders were issued on 28.02.2005 and after having remained out of employment for about two months, the petitioners were favoured with an interim order on 28.04.2005 which could not have been done as the termination orders have already been given effect to. He contends that by an interim order the petitioners could not have been allowed to continue in service and that the interim order amounts to granting the final relief which could not have been done in view of the settled position of law in this regard.

35. Coming to the first objection raised by Shri Sudhir Agarwal, it is settled that a final relief cannot be granted at the interim stage. We are, therefore, of the view that the interim order under appeal is unsustainable.

36. It is settled legal proposition that no interim relief at the initial stage which amounts to final relief should be granted. The Hon'ble Apex Court has consistently and persistently held that the Court should not pass an order at the interim stage, which can be granted only at the time of disposal of the petition. (Vide Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. & Ors., AIR 1985 SC 330; State of Rajasthan & Ors. Vs. M/s. Swaika Properties & Anr., AIR 1985 SC 1289; A.P. Christians Medical Educational Society Vs. Govt. of A.P., AIR 1986 SC 1490; State of Jammu & Kashmir Vs. Mohd Yakoob Khan & ors., 1992 (4) SCC 167; U.P. Junior Doctors Action Committee & Ors. Vs. Dr. B. Shital Nandwani, 1992 Suppl (1) SCC 680; Guru Nanak Dev University Vs. Parminder Kumar Bansal & Anr., AIR 1993 SC 2412; Saint John's Teachers Training Institute (for Women) & Ors. Vs. State of Tamil Nadu & Ors., 1993 (3) SCC 595; Burn Standard Co. Ltd. & Ors. Vs. Dinabandhu Majumdar & Anr., AIR 1995 SC 1499; Dr. B.S. Kshirsagar Vs. Abdul Khalik Mohd Musa, 1995 Suppl (2) SCC 593; Shiv Shankar & Ors. Vs. Board of Directtors, U.P.S.R.T.C. & Anr., 1995 Supp. (2) SCC 726; The Bank of Maharastra Vs. Race Shipping & Transport Co. (P) Ltd., AIR 1995 SC 1368; Commissioner/Secretary, Government of Health & Medical Education Department Vs. Dr. Ashok Kumar Kohli, 1995 Suppl (4) SCC 214; Union of India Vs. Shree Ganesh Steel Rolling Mills Ltd., (1996) 8 SCC 347; State of Madhya Pradesh Vs. M.V. Vyavsaya and Co., AIR 1997 SC 993; and C.B.S.E. & Anr.. Vs. P. Sunil Kumar & Ors., (1998) 5 SCC 377; Indian School Certificate Examination Vs. Isha Mittal & Anr., (2000) 7 SCC 521; Regional Officer, CBSE Vs. Km. Sheena Peethambaran & Ors., (2003) 7 SCC 719;

and State of U.P. Vs. Ram Sukhi Devi, 2004 AIR SCW 6955).

37. In Union of India Vs. Era Educational Trust, (2000) 5 SCC 57, the Hon'ble Supreme Court after considering its large number of judgments held that while passing interim order in exercise of writ jurisdiction under Article 226 of the Constitution, principles laid down for granting interim relief under Order XXXIX of Code of Civil Procedure, 1908 should be kept in mind. It can neither be issued as a matter of right nor it should be in the form which can be granted only as final relief.

38. In Morgan Stanley Mutual Fund Vs. Kartick Das, (1994) 4 SCC 225, the Hon'ble Apex Court held that ex-parte injunction could be granted only under exceptional circumstances. The factors which should weigh for grant of injunction are - (a) whether irreparable or serious mischief will ensue to the plaintiff; (b) whether the refusal of ex-parte injunction would involve greater injustice than grant of it would involve; (c) even if ex-parte injunction should be granted, it should only be for limited period of time; and (d) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

39. The logic behind this remains that the ill-conceived sympathy emasculates as interlocutory judgment exposing judicial discretion to criticism to de-generating private benevolence and the Court should not be guided by misplaced sympathy, rather it should pass interim orders making accurate assessment of even the prima facie legal position. The Court should not embrace the authorities under the Statute by taking over the functions to be performed by them.

40. Accordingly, the interim relief granted by the learned Single Judge is not justified as the petitioners did not have the prima facie case, more so, they could be compensated in terms of money, if they succeeded in the petition finally.

41. An interim order cannot be held to be having a binding force. (Vide Jay Pratap Singh Vs. State of U.P. & Ors., (2005) 29 AIC 157).

42. However, the Court is fully alive of the legal position that it should pass similar interim orders in the cases having similar facts and circumstances and which are governed by the similar statutory provisions.

43. In M/s. Vinod Trading Company Vs. Union of India, (1982) 2 SCC 40; and Bir Bajrang Kumar Vs. State of Bihar, AIR 1987 SC 1345, the Hon'ble Apex Court has expressed the view that the interim orders should not be contradictory to each other if the facts and circumstances of the cases are identical. Similarly, in Vishnu Traders Vs. State of Haryana, 1995 Suppl (1) SCC 461, the Supreme Court has observed as under:-

"In the matters of **interlocutory orders, principle of binding precedent cannot be said to apply**. However, the need for consistency approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievance of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different

treatment so that there is an assurance of consistency, uniformity, predictability and certainty of judicial approach."

44. Similar view has been taken by this Court in Smt. Rampati Jaiswal Vs. State of U.P., AIR 1997 All. 170.

45. Similarly, Article 14 is not meant to perpetuate an illegality. Therefore, we are not bound to direct any authority to repeat the wrong action done by it earlier. This view stands fortified by the judgments of the Hon'ble Apex Court e.g., Sneh Prabha Vs. State of U.P. & Ors., AIR 1996 SC 540; Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain & Ors., (1997) 1 SCC 35; State of Haryana & Ors. Vs. Ram Kumar Mann, (1997) 3 SCC 321; and Faridabad CT Scan Centre Vs. D.G. Health Services & Ors., (1997) 7 SCC 752.

46. In Finance Commissioner (Revenue) Vs. Gulab Chandra & Anr., 2001 AIR SCW 4774, the Hon'ble Apex Court rejected the contention that as other similarly situated persons had been retained in service, the petitioner could not have been discharged during the period of probation observing that if no action has been taken in a similar situation against similarly situated persons, it did not confer any legal right upon the petitioner therein.

47. In Jalandhar Improvement Trust Vs. Sampuran Singh, AIR 2001 SC 1877 and Union of India & Ors. Vs. Rakesh Kumar, AIR 2001 SC 1877 the Hon'ble Supreme Court held that Courts cannot issue a direction that the same mistake be perpetuated on the ground of discrimination or hardship.

48. In Harpal Kaur Chahal (supra), the Hon'ble Supreme Court examined a case where the High Court had wrongly extended the benefit to certain ineligible candidates considering them eligible and upheld their appointments. The Court held that such a judgment cannot be a ground for the Court to extend the benefit thereof to other candidates appointed illegally.

49. Any action/order contrary to law does not confer any right upon any person for similar treatment. (Vide State of Punjab & Ors. Vs. Dr. Rajeev Sarwal, (1999) 9 SCC 240; Yogesh Kumar & Ors Vs. Government of NCT Delhi & Ors., AIR 2003 SC 1241; and Union of India & Anr. Vs. International Trading Company & Anr., AIR 2003 SC 3983; M/s Anand Button Ltd. Vs. State of Haryana & Ors., 2005 AIR SCW 67). Even otherwise, Article 14 provides only for positive equality and not negative equality. Article 14 does not provide for passing wrong order, if it had been committed by an authority. No person can claim any right on the basis of division which is de hors the statutory rules, nor there can be any estopple.

50. Thus, the argument on behalf of the respondent-petitioners, that similarly situate 15 persons have been favoured with an interim order in Writ Petition No. 52654 of 2003, and as such they should not be discriminated, is an altogether misconceived argument, inasmuch there can be no claim of parity in illegality. In view of our findings, hereinabove, we see no reason to extend any such benefit. Even otherwise, interim orders are not precedent and have no binding effect, more so when this matter is being disposed of. As we are disposing of the Appeal finally, the plea so raised on

behalf of the respondents is not tenable and, thus, rejected being preposterous. Nor they can be permitted to contend that as they have been working for last several years, they cannot be removed even if they had illegally been appointed.

51. The question which remains to be answered by us is as to whether the orders of termination of the petitioners are in violation of principles of natural justice as not containing any reasons in support of the order. A plain reading of the impugned orders indicate that the same have been passed without recording any reasons and are cryptic and mechanical in nature. It is, by now, well settled that an order which determines any semblance of claim of a person, be it an administrative order, should record reasons.

52. It is also settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order. In Shrilekha Vidyarthi Vs. State of U.P. & Ors., AIR 1991 SC 537, the Apex Court has observed as under:-

"Every such action may be informed by reason and if follows that an act un-informed by reason is arbitrary, the rule of law contemplates governance by law and not by humour, whim or caprice of the men to whom the governance is entrusted for the time being. It is the trite law that "be you ever so high, the laws are above you." This is what a man in power must remember always."

53. In State of West Bengal Vs. Atul Krishna Shaw, 1991 (Suppl.) 1 SCC 414, the Supreme Court observed that "giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."

54. In S.N. Mukherjee Vs. Union of India, AIR 1990 SC 1984, it has been held that the object underlying the rules of natural justice is to prevent mis-carriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

55. In Krishna Swami Vs. Union of India & Ors., AIR1993 SC 1407, the Apex Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne-out from the record. The Court further observed that "reasons are the links between the material, the foundation for these erection and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and there rational nexus and syntheses with the facts considered and the conclusion reached. Lest it may not be arbitrary, unfair and unjust, violate Article 14 or unfair procedure offending Article 21."

56. Similar view has been taken by the Supreme Court in Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni & Ors., AIR 1983 SC 109; and Institute of Chartered

Accountants of India Vs. L.K. Ratna & Ors., (1986) 4 SCC 537.

57. In Vasant D. Bhavsar Vs. Bar Council of India & ors., (1999) 1 SCC 45, the Apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based. Similar view has been reiterated in M/s. Indian Charge Chrome Ltd. & Anr. Vs. Union of India & Ors., AIR 2003 SC 953; Secretary, Ministry of Chemicals & Fertilizers, Government of India Vs. Cipla Ltd. & Ors., AIR 2003 SC 3078; Union of India & Anr. Vs. International Trading Co. & Anr., (2003) 5 SCC 437; state of Rajasthan Vs. Sohan Lal & Ors., (2004) 5 SCC 573; and Cyril Lasrado Vs. Juliana Maria Lasrado & Ors., (2004) 7 SCC 431.

58. Since the impugned termination orders do not contain any reason, there is no option but to quash the same. We accordingly quash the said termination orders impugned in the writ petition with a direction to the District Judge, Baghpat to decide the matter again within a period of one month from today keeping in view the law enunciated by us hereinabove and after affording an opportunity to the petitioners-respondents. All the four petitioners are required to present themselves before the District Judge, Baghpat on 13th June, 2005 and the District Judge thereafter shall proceed to pass appropriate orders.

59. We further set aside the interim order dated 28.04.2005 granted by the learned Single Judge and allow this appeal as well as the writ petition to the extent, indicated hereinabove. We further direct that the petitioners of the writ petition shall be entitled to benefits which they are entitled in law as a consequence of the setting aside of the termination orders only till the final orders are passed by the District Judge, as directed hereinabove.

60. Before parting with the case, we find it absolutely necessary in the interest of the Institution, to strike a note with regard to the manner and functioning relating to appointments in Subordinate Judiciary. As already expressed in the opening paragraphs of this judgment, the District Judgeship of Baghpat had earlier been the subject matter of a similar controversy pertaining to appointments of Stenographers. This Court, in its decision rendered in the case of District and Sessions Judge, Baghpat Vs. Ratnesh Kumar Srivastava & Ors., Special Appeal No. 1582 of 2004 decided on 20.01.2005, by a Bench to which one of us (Hon'ble Dr. B.S. Chauhan, J.) was a Member, had the occasion to comment upon the favourtism and nepotism in matters of appointment resulting in lowering the standards of efficiency and bringing a bad name to the Institution. This Court expressed its view that under Article 235 of the Constitution of India, the High Courts exercise complete administrative control over the Subordinate Courts including the control over all functionaries such as Ministerial Staffs and Servants in the establishment of Subordinate Civil Courts. Remedial measures were suggested therein and the attention of the Hon'ble the Chief Justice has been invited for taking appropriate steps in this regard.

61. The present case is again a glaring example of the same species of malfunctioning in Subordinate Civil Courts which also requires serious

consideration by the High Court. To our mind, in order to prevent any such efforts being attempted in future, appropriate Rules be framed and the 1947 Rules be subjected to further amendment in order to include such powers to be made available to the High Court and Hon'ble the Chief Justice to weed out and check illegal and dubious methods of recruitment and appointment of Ministerial Staffs in the Subordinate Civil Courts. We would suggest that this matter be brought to the notice of Hon'ble the Chief Justice for deliberating upon this issue and for his kind consideration to bring about suitable amendments in the Rules empowering the Hon'ble Chief Justice and the High Court with powers suitable enough to meet such situations.

62. The aforesaid menace of illegal and unauthorised modes of recruitment have almost continued unabated for the past several years in other Districts also as well. To rectify the said malady, we strongly recommend and humbly suggest that Rules should be framed to provide for such appointments to be made subject to the approval of the Hon'ble Chief Justice/High Court and the same may also further provide for holding a combined examination for all Class-III and Ministerial posts through an examination to be conducted by the High Court or some other Agency like U.P. Public Service Commission. This would ensure better standards of recruitment and eliminate possibilities of nepotism and favouritism. This form of supervisory and administrative control by the High Court would ensure the availability of efficient hands and would also infuse confidence in the public at large in the matters of appointments in the Subordinate Civil Courts. We have no reason to doubt that in case such measures are taken, the same would not only enhance the prestige of the Institution but would also considerably reduce this form of litigation on which we have to frequently pronounce on the judicial side. It would further establish a new era of confidence in the minds of public at large and would also encourage honest and deserving people to offer themselves for appointments. We also feel that such measures deserve to be taken up immediately and are also long awaited, looking to the situation prevailing in the State. We have made this humble suggestions on the basis of our past experience and we hope and trust that the same would also find favour from all those who are concerned with the upliftment and standard of our judicial institutions.

In such circumstances, having quashed the termination orders in respect of the respondent-petitioners, the learned District Judge is further commanded to proceed in the following manner:-

(a) The decision in respect of the respondent-petitioners shall be taken by a speaking and reasoned order as per directions contained hereinabove by the District Judge, Baghpat.

(b) The District Judge shall withdraw all such similar termination orders in respect of such Class-III employees whose appointments were pursuant to the selections dated 05.04.2000, including those which are under challenge in various writ petitions before the High Court, and thereafter shall proceed to take a decision in the matter afresh after giving opportunity to the concerned employees in the same way as in the case of the

respondents herein. This exercise shall be completed within one month and compliance report shall be submitted immediately thereafter.

The appeal as well as the writ petition giving rise to this appeal are allowed and stand disposed off finally in accordance with directions contained hereinabove. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE (MRS.) SAROJ BALA, J.

Civil Misc. Writ Petition No.78955 of 2005

Ashok Kumar Anandani and others
...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Satya Prakash Singh

Counsel for the Respondents:
Sri Vishnu Pratap
Sri S. Rathi
S.C.

U.P. (Transport of Timber and other forest procedure) rule 1978-Transit Fee-petitioners having mining lease for excavation of stone ballast, Khanda boulder the village from where such activities going on neither reserved for forest nor any private forest-villagers question in shape of pathari having khanda and boulder etc.-They approached to the National Highway either from the private of land of formers or belongs to Gaon Sabha-whether are they liable to pay any levy and the demand of transit fee? Held-'yes'.

Held: Para 13

This Court in the case of Kumar Stone Works (supra) has held that the word "forest' would include all that goes with it and even the mines and quarries which remained beneath the surface of the earth with minerals, stones and other products locked up in the land, will form part of the forest. Such goods are being brought from the forest as during transportation they cross the forest, they would be covered under the definition of forest produce under sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act. Thus, the transit fee is payable on stone ballast, Khanda and boulder if they cross the forest during transportation. From the map filed alongwith the supplementary counter affidavit we find that there are several forest blocks along the national highway no.25 and merely because the petitioners are using the national highway no.25 for transportation of their produce to various destination situated in Jalaun, Etawah, Lucknow, Kanpur, Unnao etc., it cannot be said that the goods are not brought from the forest. They do pass through the forest and, therefore, the levy and demand of transit fee is perfectly within the four corners of the Transit Rules.

Case law discussed:
W.P. No.975/04 decided on 27.4.05
1997 (2) SCC-267
AIR 1978 Bomb. 110 (FB)

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

1. By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioners who are 15 in number, have sought the following reliefs:-

"(i) to issue a writ of certiorari, order or direction in the nature of certiorari quashing the orders dated

25.11.2005 and 29.11.2005 filed as Annexures 1 and 2 to the writ petition;

(ii) to issue a writ of mandamus, order or direction in the nature of mandamus commanding and directing the respondents not to realise transit fee from the petitioners or from any truck of the petitioners carrying excavated mineral from the lease hold area of the petitioners going to purchaser destination while using national highway passing through Jalaun-Auraiya road, Shivpuri-Bhignipur road, Orai-Rath road, Ate-Kotra road and Kalpi-Hamirpur road;

(iii) to issue any other writ, order or direction which this Hon'ble Court deem fit and proper under the facts and circumstances of the case and to which the petitioners are entitled in law;

(iv) to award cost of the petition to the petitioners."

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

According to the petitioners, they have been granted mining leases for excavation of stone ballast, Khanda and boulder under the provisions of the U.P. Minor Minerals Concession Rules, 1963 (hereinafter referred to as "the Rules"). The lease has been granted for a period of 10 years and is still subsisting either on account of its renewal or on account of initial grant. They are excavating stone ballast, Khanda and boulder from their respective areas. According to the petitioners, villages Digara, Gora Macchiya, Dunara, Bijauli, Dangriya, Palli Pohari and Khailar situate in Pargana, Tehsil and District Jhansi are outside the forest area. There is neither any reserved forest nor any protected forest nor any private forest adjoining to the aforementioned villages. These villages are in the shape of Pathari villages where Khanda and boulder are available. After the mining activities, the excavated minerals are lifted and transported from the mining site and are transported using Gaon Sabha road and thereafter it reaches the national highway no.25. These villages are situated near the national highway and there is no forest at all anywhere while transporting the mineral from the mining site of the lease holder areas and going to purchaser destination in Etawah, Jalaun, Lucknow, Kanpur, Unnao etc.

3. The mining leases have been granted to the petitioners after obtaining no objection from the Department of Forest in view of the directions given by the Apex Court in the matter of **T.N. Godavarman Thirumulkpad v. Union of India and others**, decided on 12.12.1996. According to the petitioners, prior to the judgment of this Court in the case of **Kumar Stone Works and others v. State of U.P. and others**, Civil Misc. Writ Petition No.975 of 2004, decided on 27.4.2005, no transit fee was being charged from the petitioners in respect of transportation of stone ballast, Khanda and boulder. The Conservator of Forest/Regional Director, Bundelkhand Region, Jhansi, vide order dated 25.11.2005, has directed for establishment of check post at various places in the district of Jalaun for checking/regulating the export of timber and other forest produce. By another order dated 29.11.2005, the Deputy Conservator of Forest, Orai, has directed the Forest Range Officer, Jalaun, Kalpi, Orai, Eta and Kadaura to act in accordance with the judgment of this Court in Civil Misc. Writ Petition No. 975 of 2004, dated 27.4.2005 wherein boulder, Gitti, sand, etc. have

been treated as forest produce. According to the petitioners, the order dated 29.11.2005 is wholly misconceived as the decision in Civil Misc. Writ Petition No.975 of 2004 are not applicable to the minerals excavated in the lease hold area which is outside the forest and transportation is through the State highway or the national Highway where the Forest Department has no concern. Stone ballast, Khanda and boulders are not and cannot be included within the definition of the forest produce as given in sub-section (4) of Section 2 of the Indian Forest Act, 1927 (hereinafter referred to as "the Act"). The petitioners have further claimed that they are lifting and transporting the minerals accompanied by Form MM 11 after depositing the royalty and other expenses in accordance with the provisions of the Rules and, therefore, the respondent authorities cannot charge any transit fee on the same in pursuance of the provisions of the U.P. (Transport of Timber and other Forest Produce) Rules, 1978 (hereinafter referred to as "the Transit Rules"). The sole purpose of the regulation of transit of minor minerals is to check illegal transit which is fully achieved by the Rules and there is no occasion for the Forest Department, U.P., to realise the transit fee for transporting the said minerals from the lease hold areas of the petitioners on the pretext that the said minor minerals comes within the definition of the forest produce and the Transit Rules are not applicable for transporting of minor minerals. The plea of violation of Articles 14 and 19 (1)(g) of the Constitution of India has also been raised. The petitioners have also assailed the levy and imposition of transit fee on the ground that no service is being rendered.

4. In the supplementary affidavit filed by the petitioners, it has been stated that they are using Gaon Sabha land or private land of the tenure holders before they reach the national highway no.25 and there is no forest road surrounding 25 Km. nor there is any forest while transporting the minerals from the mining site of the lease hold area and going to the purchaser destination in Jalaun, Etawah, Lucknow, Kanpur, Unnao, etc.

5. In the counter affidavit filed by Sri S.D.Pandey, Forest Range Officer, Chirgaon, Jhansi, on behalf of the respondent no.3, it has been stated that there are so many forest areas along the national highway no.25, for example, Baral Forest Block, Bhujaund Forest Block, Ghateshwar Forest Block, Karguan Forest Block etc. which are situated along the national highway no.25 in Jhansi Forest Division.

6. In the supplementary counter affidavit filed by Nagendra Bahadur Singh, Forest Range Officer, Jalaun, a copy of the map of Jhansi Forest Division has been filed to show the barriers of the Forest Department through which the petitioners and other persons transport their minor minerals.

7. In the rejoinder affidavit filed by Ashok Kumar to the counter affidavit of Sri S.P.Pandey, it has been stated that there may be several forest areas adjacent to the national highway no.25 but so far the area from where the petitioners are having the right of egress and ingress, there is no forest. They are not using any forest road but are using only Public Works Department road and the national highway and, therefore, there is no

question of applicability of transit fee over the petitioners.

8. We have heard Sri S.P. Singh, learned counsel for the petitioners, and Sri Vishnu Pratap, learned Standing Counsel.

At the outset it may be mentioned here that Sri S.P. Singh, learned counsel, did not question the correctness of the decision of this Court in the case of **Kumar Stone Works** (supra) and the arguments proceeded on the question of levy and demand of transit fee on transportation of stone ballast, Khanda and boulder in the light of the aforesaid decision.

9. Sri S.P. Singh, learned counsel, submitted that this Court in the case of **Kumar Stone Works** (supra) has not held as a rule that stone ballast, Khanda, boulder, rocks, sand, morrum to be the forest produce in general. It would become forest produce only when it is brought from the forest and would fall under sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act. As the petitioners had not transported the goods in question from any forest or through any forest land, they are not liable to pay any transit fee. The demand of transit fee from the petitioners on the assumption that this Court in the case of **Kumar Stone Works** (supra) has declared boulders, rocks, sand and morrum etc. to be forest produce under the Act and the Transit Rules, is wholly misconceived and on a wrong assumption.

10. Sri Vishnu Pratap, learned Standing Counsel, however, submitted that the national highway no.25 passes through forest as there are several forest blocks over the said national highway and transit fee is being realised at the check post only when the vehicles of the petitioners transporting the goods in question cross the forest area. Referring to the map filed alongwith the supplementary counter affidavit, he submitted that it is incorrect to state that there is no forest area along the national highway no.25 and, in fact, the said national highway passes through the forest. Thus, the levy of transit fee is in accordance with the judgment of this Court in the case of **Kumar Stone Works** (supra). According to him, if the petitioners are not transporting the goods from the forest, there would be no question of crossing the check post established by the Forest Department as these check posts have been established near the forest area.

11. Having given our thoughtful consideration to various points raised by the learned counsel for the parties, we find that in the case of **T.N. Godavarman Thirumulkpad v. Union of India and others**, (1997) 2 SCC 267, the Apex Court has held that the word "forest" must be understood according to its dictionary meaning which description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purposes of Section 2(1) of the Forest Conservation Act.

12. A Full Bench of the Bombay High Court in the case of **Janu Chandra Waghmare and others v. The State of Maharashtra and others**, AIR 1978 Bombay 110 (FB), has held that the expression "forests' in its normal and popular connotation includes all that goes with it, such as, tress with fruits on them, shrubs, bushes, woody vegetation, undergrowth, pastures, honey-combs

attached to trees, juices dried on trees, things embedded in the earth like mines and quarries with their produce locked up in the land, wild and stray animals (excluding domestic animals like cows, buffaloes, goats, sheep etc.) living in the forest. The Full Bench of the Bombay High Court has given a wide meaning to the term "forest'. It has held that if the mines and quarries remain beneath the surface of the earth with minerals, stones and other products locked up in the land, these will form part of the forest. While referring to the dictionary meaning given in Oxford English Dictionary, Vol. IV at page 422, the Full Bench has held that even the dictionary meaning clearly shows that forest means an extensive tract of land together with the trees and undergrowth which covers such tract and also includes pastures which intermingled with such tract.

13. This Court in the case of **Kumar Stone Works** (supra) has held that the word "forest' would include all that goes with it and even the mines and quarries which remained beneath the surface of the earth with minerals, stones and other products locked up in the land, will form part of the forest. Such goods are being brought from the forest as during transportation they cross the forest, they would be covered under the definition of forest produce under sub-clause (iv) of clause (b) of sub-section (4) of Section 2 of the Act. Thus, the transit fee is payable on stone ballast, Khanda and boulder if they cross the forest during transportation. From the map filed alongwith the supplementary counter affidavit we find that there are several forest blocks along the national highway no.25 and merely because the petitioners are using the national highway no.25 for transportation of their produce to various destination situated in Jalaun, Etawah, Lucknow, Kanpur, Unnao etc., it cannot be said that the goods are not brought from the forest. They do pass through the forest and, therefore, the levy and demand of transit fee is perfectly within the four corners of the Transit Rules.

14. So far as the question of creating the check posts by the Forest Department under the order dated 25.11.2005 is concerned, the learned counsel has not raised any grievance while making his submissions.

In view of the foregoing discussions, we do not find any merit in this petition. It is dismissed. Petition dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.03.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No.2373 of 2006

Sharda Prasad Tiwari & others ...Applicants
Versus
State of UP ...Opposite Party

Counsel for the Applicants:
Sri Jagdish Singh Sengar
Sri Sudhir Solanki

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

Code of Criminal Procedure-Section 204-Summoning order-contradiction of statements of witness-can be seen after the trail-even on strong suspicion against the accused-magistrate has to issue process-recording those reasons-while passing summoning order not necessary.

Held: Para 6 and 7

It has been held by the Supreme Court in case of State (Delhi Administration) versus I.K. Nangia, 1980SCC(Cr) 220, that the magistrate has to issue process even if, there is strong suspicion against the accused. I am also fortified in my view by the judgment the apex court rendered in AIR 2000 SC 1456 U.P. Pollution Control Board Vs. M/s Mohan Meakins Ltd. and others.

Thus the submission of the learned counsel that detail reasons has to be recorded while summoning does not command and against the law laid down by the Apex Court and hence is rejected.

Case law discussed:
1980 SCC(Crl.) 220
AIR 2000 SC-1456

(Delivered by Hon'ble Vinod Prasad J.)

1. Sharda Prasad Tiwari, Smt Vijai Lakshami, his wife and Deepak Tiwari, his son have filed the instant application, under section 482 Cr.P.C., hereinafter referred to as the Code, invoking the power of this court under the said section, with the prayer to quash the charge sheet No. 132 of 2005 dated 23.7.2005 relating to crime no. 480 of 2004 under section 498A/ 304B IPC and ¾ D.P. Act. Police Station Naini District Allahabad which has culminated into registration of case no. 25344 of 2005 State versus Deepak Tiwari and Others pending in the court of CJM Allahabad under the aforesaid sections. They have further prayed that during the pendency of this application further proceeding of the said case be stayed.

2. The facts are that Nand Kishore Sharma, resident of 123, Chaukhandi, Kidganj, Allahabad had married his daughter Gunja (deceased) with Deepak Tiwari @ Dipu (applicant no.3) son of Sharda Prasad Tiwari (applicant no.1) resident of Bakrana Tiwari (Ram Sagar), Chaka Block, Police Station Naini, Allahabad on 2.3.2001. He had given many domestic articles, jewelry and a car Maruti 800 according to the wishes of the applicants. On her return from the house of her-in-laws, Gunja told informant and other relatives her woes that the applicants demand more dowry of Rs. three lacs from her and on her refusal bet and tortured her mentally. The informant went to the applicants and pleaded his inability to pay such a huge amount. Applicant Deepak, on this came to the house of the informant and took Gunja to his house. After some time, informant went to the house of the applicants for bringing Gunja back for Rakshabandhan, when he was informed by Gunja that her woes continues if, the amount is not paid, then she will be done away with. The informant again went to the house of the applicants and requested them to stop the torture and showed his inability to pay the said amount. Gunja was again brought back by her husband Deepak and father-in- law Sharda Prasad Tiwari to their house on 12.9.04. On 13.10.04 informant's son Amit Sharma was informed by an unknown man that his sister, Gunja, had been badly burnt by gas leak and she had been carried to Swaroop Rani Hospital. The informant immediately rushed to the hospital along with his other relatives and there he found his aforesaid daughter unconscious and badly burnt. That night Gunja breathed her last. Of being sure that the applicants have bet and burnt Gunja that the informant lodged a FIR against the applicants at police station Naini District Allahabad under section 498A/ 304 B IPC and ¾ D.P. Act vide crime number 480 of

2004 (annexure 1) on 14.10.04 at 1.15 PM. The post mortem of the deceased was conducted on 14.10.04 which indicated that the deceased whole body was burnt and skin had peeled off. The investigation was conducted by Circle Officers of Naini, Sorao and Colonelganj. It transpires that, at the instance of the informant the investigation was transferred to Circle Officer, Colonelganj, Allahabad, but subsequently, at the instance of accused the same was retransferred to Circle Officer Sorao, Allahabad. During the course of investigation all the witnesses, including the informant, his sons Amit and Vivekanand, his wife Smt Kumud supported the FIR version. How ever it seems that the pressure was exerted on the informant and as a result of which the Maruti car given in marriage was returned to the informant and a LIC Policy of Rs. 5 lacs was got done, in favour of Riya, daughter of deceased with the help of Kamlesh Tiwari uncle of accused Deepak Tiwari applicants and brother of Sharda Parasad Tiwari applicants. It also transpires that the informant had moved applications also against the accused to Human Rights Commission. How ever because of pressure exerted on the informant and other witnesses, the family members of the deceased, filed affidavits denying the incident in the court of CJM, Allahabad. CJM, Allahabad also ordered for recording their statements under section 164 Cr.P.C. on 14.2.2004. The informant in the said statement stated that he had lodged the FIR and the version mentioned in it is correct. The statements of Amit Kumar Sharma and Vivekanand Sharma filed as annexure no.20, indicates that the affidavits were filed because of pressure and also because of a sought of compromise reached between the parties. The investigating officer finding prima facie case against the applicants submitted charge sheet against them in court on 23.7.2005, on the basis of which case number 25344 of 2005 was registered in the court of CJM, Allahabad on 6.10.2005 against the applicants. Hence this application for quashing of the case and the charge sheet.

3. I have heard Sri Jagdish Singh Sengar and Sri Sudhir Solanki advocates on behalf of applicants and the learned AGA in opposition at a great length and have perused the application and annexure appended therewith.

4. Sri Sengar contended that the charge sheet and proceeding be quashed because the informant and other witnesses have stated on affidavits and statements in court under Section 164 Cr.P.C. as well as statements recorded subsequently that they do not want to litigate the case. He further submitted that since there is contradictory evidence available on record and therefore it was the duty of the CJM, while summoning the applicants, to mention as to why he is accepting the version of the FIR and not subsequent statements of the witnesses. He contended that the if, there are contradictory evidences available on record then it is duty of the magistrate to record an finding as to why he is accepting one version favorable to the prosecution and against the accused and not the other and, only after that, he should summon the accused. Learned AGA on the other hand submitted that there is no such procedure as has been canvassed by the applicants counsel. He contended that, at the stage of summoning, only a prima facie case based on some admissible evidence is to be seen and nothing more. He contended that, at

the stage of summoning, the magistrate is not required to hold a pre trial exercise to fetch out the niceties of evidence and record a finding as to reliability of prosecution the statements on the basis of which he wants to summon the accused.

5. From the submissions made above, the only point for determination is as to whether the magistrate is required to scan the contradictory evidence available in the case diary and record a finding as to why he is believing the statements favourable to the prosecution and not the other statement favourable to the accused before summoning the accused to stand the trial? But before adverting to the said question, a note on factual merit of the case. The FIR and the statements recorded at various stages of the investigation and even the statement under section 164 Cr.P.C. of informant and Amit Kuamr Sharma, it is clear that that there is clear cut allegation of demand of dowry against the applicants from the deceased and for causing her death, because of that, by burning her. The marriage has taken place only a month more that 3 and half years. Thus the ingredients of section 498A and 304 B IPC marriage within seven years of incident, demand of dowry by the accused and for causing death of the deceased because of the said demand, are present in the present case along with Section ¾ D.P. Act. Hence the case falls within the mischief of the said offences. Learned counsel for the applicants also did not seriously challenged the making out of the offence but contended that, since there is contradictory evidences therefore the magistrate must record it's satisfaction regarding acceptability of evidence against the applicant accused in the summoning order. Thus the material placed on the record of the case establishes prima facie offence against the applicants for which they have been summoned by the CJM, Allahabad.

6. Now, coming to the submission made by Sri Sengar, that the magistrate must record it's satisfaction, before summoning the accused, if there are contradictory evidences available on record of the case diary as to why he is accepting the version against the accused, is concerned I see no force in this submission and it has been canvassed only to be rejected. The contention is against the scheme of the "Code'. The summoning of the accused is done under section 204 of the "code'. That section provides that Section 204-"If in the opinion of the magistrate taking cognizance of an offence "*there is sufficient ground for proceeding*" the magistrate has to summon the accused. He has no choice in that event but to summon the accused. What is meant by *"If in the opinion of the Magistrate taking cognizance of the offence means?* Does it mean total congruent statements in the case diary, without any contradictions in it and then the magistrate should opine to summon the accused or contrarily, does it means a triable prima facie case only, leaving the contradictions to be tested at the stage of examination-in chief, cross-examination and re- examination. The answer is negative in respect of the first meaning and affirmative in respect of second meaning. If the first meaning is allowed to prevail then, it will amount to recording a pre-witness-examination finding regarding his statements. How can that be allowed? Every witness has to be tested on the anvil of probability of his evidence and his statement has to be accepted as to be true or false, to record a finding of guilt or innocence of the

accused and that can be done only after his examination in the case before the trial court is over. There is nothing in the scheme of the "code' which permits pre judging the contradictory statements before it is recorded and tested through examination in court. Contradictory statements of a witness/ witnesses has to tested for truthfulness for acceptance or negation, and that can be done only after the trial is over and the judgment is delivered or, in between, at the stage of charge, under various trial procedures provided under chapters XVIII, XIX, XX and XXI of the "Code', starting from Session's trail and ending at summary trial. Which of the two contradictory statements are correct requires examination without which it is not possible to accept one of them. There is yet, one another inherent defect in the submission of the counsel and that is if, the magistrate will record a finding as to which of the two statements he accepts at the stage of summoning to be believable and acceptable, then why and for what purpose the trial will take place. It will amount to accepting the prosecution version at the very thresh hold of the case or rejecting the same and at the same time forming an opinion regarding inadvertent of accused in the crime. This will make the rest of the trial procedure otiose. It has been held by the Supreme Court in case of State (Delhi Administration) versus I.K. Nangia, 1980SCC(Cr) 220, that the magistrate has to issue process even if, there is strong suspicion against the accused. I am also fortified in my view by the judgment the apex court rendered in AIR 2000 SC 1456 U.P. Pollution Control Board Vs. M/s Mohan Meakins Ltd. and others. In para 6 of the said judgment the Supreme Court has observed thus:

In a recent decision of the Supreme Court it has been pointed out that the legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a magistrate for passing detailed order while issuing summons vide Kani Bhadra Shah v. State of West Benghal (2000) 1 SCC 722 (2000 AIR SCW 52: AIR 2000 SC 522: 2000 Crl.LJ 746). The following passage will be apposite in this context (para 12).

"if there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the Court procedures and to chalk out measures to avert all read-blocks causing avoidable delays. If a magistrate is to write detailed orders at different stages, the snail-paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of Magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial."

7. Thus the submission of the learned counsel that detail reasons has to be recorded while summoning does not command and against the law laid down by the Apex Court and hence is rejected.

8. In the present case the charge sheet has already been laid in court against the present applicants and, from the material on record of the case, it can not be said that no offence disclosed at all against the present applicants. On the contrary there is more than sufficient evidence available against the accused to summon them. On the own showing of the applicants the witnesses have stated that they have given affidavits and statement, favourable to the accused, under section 164 Cr.P.C. on the basis of compromise reached between them out side the court. The said compromise is not lawful and has got no sanctity of law. It is only an arrangement between the parties, which is void and illegal in view of Section 17 of the Indian Contract Act such a compromise is against the provision of the 'code and cannot be commentated. Thus is cannot be said that the witnesses have resiled and have denied their earlier statement anointing offence against the present applicants. Their **revengeful** gesture will not absolve the accused from the crime committed by them. Hence the contention of the counsel for the applicant is devoid of any merit and deserves to be rejected and is rejected.

9. This application is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2005

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 29571 of 2000

Raj Bahadur and others ...Petitioners
Versus
Commissioner, Agra Division Agra and others ...Respondents

Counsel for the Petitioners;
Sri N.S. Chaudhary
Ansu Chaudhary

Counsel for the Respondents:
Sri K.R. Singh Jadaun
S.C.

Constitution of India, Art.-226-Practice and Procedure-Adjournment illness slip of counsel-fourth time illness-court has no option except to proceed with the matter-court can ignore such illness slip to present the abuse of process of court-the Advocates are the part and partial of the institution-not only as the officer of the court but also as minister of the courts-hence can be called upon to discharge their duty as per with judge putting illness slip indefinitely coursing difficulty to his own fellow members-court expressed its great concern.

Case law discussed:
AIR 1990 SC-3080

(Delivered by Hon'ble Amitava Lala, J.)

1. This High Court possess unique system of obtaining adjournments on account of purported illness. One can handover a slip to the officer of the Court and gets adjournment as a matter of course. No matter how many occasion it is. This is the fourth occasion when illness

slip has been produced in such manner. So far as the first, second and third illness slips are concerned, we have already granted time making certain observations so that one can engage fresh counsel or make alternative arrangement in the meantime particularly when a counsel seems to be perpetually ill on the basis of the illness slips. Observation was made by the Court irrespective of engagement of more than one counsel in the matter. Inspite of the same if time is sought in fourth occasion then the Court cannot have any other alternative but to proceed with the matter. We can not have any conflict with the judgement of the Supreme Court reported in AIR 1999 SC 3080 (Rais Ahmad Vs. State of U.P. and others). Such judgement speaks about tradition of the Court to which we can not have any difference of opinion. Leaving aside that part, factually solitary absence of the learned Counsel on the day of disposal of the matter in merit and further dismissal of the restoration application in connection thereto was the subject matter therein. Can it be said factual position is similar with that matter. Our answer is "No". Observation of the Supreme Court is made for the purpose of convenience of the Bench and Bar and in respect of cordial relationship amongst themselves but not for their inconvenience. Inspite of best effort if inconvenience is made to another set of counsels who are eager to get early disposal of the matters, one can not take advantage of such Supreme Court judgement. If no check and balance is made it will be treated to be greatest amount of abuse of process of Court of law. Court runs on two prospectives. Either it will run for the ends of the justice or it will run to prevent the abuse of process of Court of law. Therefore, this Court feels when one is perpetually ill time to be given to take the alternative measure without making any departure from the principle as laid down by the Supreme Court. In the occasion, where despite giving directions and/or making observations by the Court no one become careful, the Court will have to treat the same as an abuse of process of Court of law. In such case Court can very well ignore the illness slip to prevent the abuse of process of Court of law and proceed with the matter. Every one has first duty towards the Courts of law, second duty towards the litigants and third duty towards Bar. Therefore third duty in the garb of 'illness slip' can not supersede first and second duties. In further it is to be remembered that not only the Supreme Court but also all the High Courts are keen to dispose of the matters as many as possible at the earliest. This is the order of the day. Under such circumstances, this Court can not take any contrary stand on the basis of solitary case standing on a different fact situation. It is to be remembered that justice is not one way traffic. It is to be done upon both the litigating parties. If the justice is rendered to one on the basis of illness slip, it may cause injustice to others unless, of course, it is evidently proved. Normally, we have no practice to call for medical certificates of a counsel. According to the court of law oral submissions or the illness slip of a counsel is good enough because Court keeps trust upon the learned counsels. They are part and parcel of the institution not only as officers of the court but also as ministers of the Courts equally with the Judges. Therefore, we can call upon such ministers to discharge their first duty to the Court in the proper manner. We hope and trust that the members of the Bar will be able to understand the gravity of the situation and co-operate with the Court. It

is to be remembered that constitutionally we are bound about right vis- a- vis duty. We should not forget our duty. When the Court had shown leniency and thereafter prescribed a formula by giving adjournments on number of occasions, Court can also expect that the matter will be disposed of at the earliest and necessary co-operation from the members of the Bar will come to that extent. One should not be forgetful that by putting illness slip indefinitely, he is causing difficulty to his own fellow members at first. Interference of the Court of law comes later on. Unless and until we maintain ethics in discharging judicial functions both by the members of the Bench and Bar, glory of the High Court can not be maintained. On the other hand, if the fictitious illness slip are repeatedly taken as granted, the same will be mockery of the judicial system.

2. Under such circumstances, we think it proper that copy of this order be forwarded to the President and Secretary of the Bar Association and Advocates' Association for the purpose of effective circulation of the order.

3. However, the matter will be placed on 26th July, 2005 for effective disposal irrespective of any application or applications of the similar nature for which longest possible time is given hereunder. Petition disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ No. 54299 of 2004

Shoorveer Singh ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri P.K. Dwivedi

Counsel for the Respondents:
Sri N.P. Shukla
Sri B.N. Singh
Sri Subodh Kumar
S.S.C.

Constitution of India, Art. 226-Service Law-alternative remedy-petitioner a temporary Mazdoor-after enquiry-appointment obtained by fraud based on petitions document-held-the facts requires to be determined on the basis of evidence-not feasible under writ jurisdiction-after raising industrial dispute-the petitioner may approach under writ jurisdiction.

Held: Para 16

High Court should interfere in writ jurisdiction only when a very very strong case has been made out for not availing of alternative remedy and approaching the High Court bypassing hierarchy of the Courts. No such case as to why alternative remedy available to the petitioner is not efficacious has been made out by the petitioner in the instant petition, what to say of a very very strong case for interference in writ jurisdiction. It is not a case where pure question of law is to be determined. This is a case where questions of facts are to be determined on the basis of evidence. The controversy involved in the instant

case require findings of fact by adjudication/determination of the controversy on the basis of evidence, which is not feasible under Article 226 of the Constitution of India, as such the petitioner may approach High Court only after exhausting alternative remedy. The petitioner has an alternate and efficacious remedy of raising an industrial dispute.

Case law discussed:
2002 UPLBEC (2) 1953
AIR 1991 SC-2010
1996 (5) SCC-83
(2005) 107 FLR-729
AIR 1985 SC-192
AIR 1961 SC-609
AIR 1983 SC-603
1999 (Suppl.) 2 SCC-312
AIR 1999- SC-22
AIR 1999 SC-74
2001 (6) SCC-569
2004 (100) FLR-20
2005 (6) SCC-595
1976 (C) SCC-496
1995 (1) SC-74
2002 (5) SCC-521

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

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

The petitioner was a temporary Mazdoor working at Ghaziabad. His services have been terminated vide order dated 26.10.2004 after enquiry. In the enquiry proceedings, it has been found that the petitioner had obtained appointment by fraud by preparing fictitious documents.

2. In the present case, services of the petitioner were terminated as far back as in October, 2004 by the impugned order. There is serious dispute about the fact as to whether the petitioner obtained appointed by preparing forged and fictitious documents or not. A preliminary objection has been raised that writ petition is not maintaible as the petitioner has an alternate and efficacious remedy before the Labour Court.

3. Counsel for the petitioner has relied upon a Division Bench decision of this Court in ***Jitendra Nath Srivastava v. Union of India*** (2002) 2 UPLBEC-1453 wherein the Court had interfered in the order of termination. In that case also, the writ petitioner had come through Central Administrative Tribunal.

4. He has also relied upon a decision in ***Anupam Dubey V. Sachiv, Basic Siksha Parishad***-(2004)2 UPLBEC-1743. It was a case where the petitioner was given compassionate appointment under the Dying in Harness Rules and his services were terminated on the charge that he obtained the appointment by producing forged certificates. In fact, his father was never employed in the Education Department.

5. On the basis of aforesaid two decisions, counsel for the petitioner submits that the order of termination of the services of the petitionr has been passed in violation of principles of natural justice and this Court can interfere where violation of principles of natural justice is alleged.

6. Counsel for the petitioner also placed reliance on paragraph 15 of the writ petition wherein it has been averred that no charge sheet has been issued to the petitioner till date and major penalty has been imposed without holding domestic enquiry, as such, the petitioner has not been afforded any opportunity of defence. In support of his contention, he placed reliance upon a decision of Hon'ble the

Apex Court in ***Jankiram vs. Union of India and others***-AIR 1991 SC 2010 wherein it has been held that it is only after a charge memo in disciplinary proceedings or a charge sheet in a criminal proceeding is issued to the employee, he can be punished. He also cited the decision of Hon'ble the Supreme Court in ***Tagin Litin v. State of Arunachal Pradesh***-1996(5) SCC-83 wherein it has been held that an appointment to a post or office postulates a decision by the competent authority to appoint a particular person; incorporation of the said decision in an order of appointment; and communication of the order of appointment to the person who is being appointed.

7. Counsel for the petitioner submits that the petitioner made a comprehensive reply to the letter dated 14.5.2004 on 28.7.2004 in which he vehemently denied the allegation levelled against him and stated that he was innocent.

8. The Sub Division Engineer (EWSD) Noida issued a show cause notice dated 14.5.2004 to the petitioner to the effect that he made a statement that he had worked in the office of Assistant Engineer Satellite Communication Project Jwalapur (Haridwar) from 1.10.1989 to 30.9.1995, which was incorrect and he should show cause within 10 days otherwise, the disciplinary proceedings will be initiated.

9. The question as to whether High Court is justified in interfering in writ petition when alternative remedy is available under the Industrial Disputes Act, has been considered by Hon'ble the Supreme Court in ***U.P. State Spinning Co. Ltd. vs. R.S. Pandey and another***-(2005)107 FLR-729.

10. After considering the decisions of Constitution Benches ***in G.Verappa Pillai v. Ramand and Raman Ltd***- AIR 1952 SC-192; ***Assistant Collector of Central Excise Vs. Dunlop India Ltd.*** - AIR 1985 SC-192; ***Ramendra Kishore Biswas V.State of Tripura and others***-AIR 1999 SC-2281; ***C.A. Abraham v. I.T.O. Kottayam and others***-AIR 1961 SC-609; ***Titaghar Paper Mills Co. Ltd. Vs. State of Orissa and another***- AIR 1983 SC-603; ***H.B.Gandhi v. M/s. Gopinath and Sons*** 1999 (Suppl)2 SCC-312; ***Whirlpool Corporation Vs.Registrar of Trade Marks and others*** AIR 1999SC-22; ***Tin Plate Co. of India Ltd. V. State of Bihar and others***-AIR 1999 SC-74; ***Sheela Devi v. Jaspalsingh*** -AIR 1999(1)SCC-209 and ***Punjab National Bank v. O.C. Krishnan and others*** 2001(6) SCC-569, the Hon'ble Supreme Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction. Also after considering the law laid down in ***U.P.State Bridge Corporation Ltd. and others v. U.P. Rajya Setu Nigam S.Karmachari Sangh***-2004(100) FLR-1020=2004(16) AIC-692 and ***State of Himachal Pradesh and others v. M/s. Gujarat Ambuja Cement Ltd., and another***-2005(6) SCC-499, Hon'ble Suprme Court concluded as under :-

"19. Accordingly, the conclusion is inevitable that the High Court was not justified in entertaining the writ petition. Usually when writ petition is entertained notwithstanding availability of alternative remedy and issues are decided on merits, this Court is slow to interfere merely on

the ground of availability of alternative remedy. But the facts of the present case have special features, which warrant interference."

11. The law has been firmly enunciated that if a person approaches High Court without availing of alternative remedy, it has to be ensured by the Court that he has a very very strong case for requesting the Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution as the remedy of writ is purely discretionary. High Court may exercise its extraordinary jurisdiction if it comes to the conclusion that alternative remedy is not efficacious and that the Court is not required to adjudicate or to give finding of fact which necessarily requires adducing of oral and documentary evidence before the Court below. The writ petitioners, in such circumstances, are bound to give reasons and make out a strong case as to why alternative remedy is not efficacious. Merely stating that principles of natural justice have been violated or that procedures have not been followed may not be good ground for interference by High Court. The reason is obvious. If the employer has not adopted prescribed procedures or has violated principles of natural justice, the employee may agitate such irregularities under the machinery provided under the Industrial Disputes Act.

12. The contention of counsel for the petitioner that the High Court should interfere in order passed without holding domestic enquiry and against the principles of natural justice, without relegating to alternate remedy, has no force. The Hon'ble Supreme Court has laid guiding principles in this regard in paragraph 60 of ***Delhi General and Cloth Mill*** (1972) 1 SCC-595. They are :-

(i) If no domestic enquiry had been held by the management, or if domestic enquiry that may have been held by it, it is entitled to straightaway adduce evidence before the Tribunal justifying its action. The Tribunal is bound to consider that evidence so adduced before it, on merits, and give a decision thereon. In such a case, it is not necessary for the Tribunal to consider the validity of the domestic enquiry as the employer himself does not rely on it.

(ii) If a domestic enquiry had been held, it is open to the management to rely upon the domestic enquiry held by it, in the first instance, and alternatively and without prejudice to its plea that the enquiry is proper and binding, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case, no inference can be drawn, without anything more that the management has given up the enquiry conducted by it.

(iii) When the management relies on the enquiry conducted by it, and also simultaneously adduces evidence before the Tribunal, without prejudice to its plea that the enquiry proceedings are proper, it is the duty of the Tribunal, in the first instance to consider whether the enquiry proceedings conducted by the management are valid and proper. If the Tribunal is satisfied that the enquiry proceedings have been held properly and are valid, the question of considering the evidence adduced before it, on

merits, no longer survives. It is only when the Tribunal holds that the enquiry proceedings have not been properly held, that it derives jurisdiction to deal with the merits of the dispute and in such a case it has to consider the evidence adduced before it by the management and decide the matter on the basis of such evidence.

(iv) When a domestic enquiry has been held by the management and the management relies on the same, it is open to the latter to request the Tribunal to try the validity of the domestic enquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal, if the finding on the preliminary issue is against the management. However, elaborate and cumbersome the procedure may be, under such circumstances, it is open to the Tribunal to deal, in the first instance, as a preliminary issue the validity of the domestic enquiry. If its finding on the preliminary issue is in favour of the management, then no additional evidence need be cited by the management. But, if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to cite additional evidence and also give a similar opportunity to the employee to lead evidence contra, as the request to adduce evidence had been made by the management to the trial has come to an end. When the preliminary issue is decided against the management and the latter leads evidence before the Tribunal, the position, under such circumstances, will be, that the management is deprived of the benefit of having the finding of the domestic Tribunal being accepted as prima facie proof of the alleged misconduct. On the other hand, the management will have to prove, by adducing proper evidence, that the workman is guilty of misconduct and that the action taken by it is proper. It will not be just and fair either to the management or to the workman that the Tribunal should refuse to take evidence and thereby ask the management to make further application, after holding a proper enquiry, and deprive the workman of the benefit of the Tribunal itself being satisfied on evidence adduced before it, that he was or was not guilty of the alleged misconduct.

(v) The management has got a right to attempt to sustain its order by adducing independent evidence before the Tribunal. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of, or asked for by the management, before the proceedings are closed, the employer can make no grievance that the Tribunal did not provide such an opportunity. The Tribunal will have before it only the enquiry proceedings and it has to decide whether the proceedings have been held properly and the findings recorded therein are proper.

(vi) If the employer relies only on the domestic enquiry and does not simultaneously lead additional

evidence or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic enquiry as well as the finding recorded therein and decide the matter. If the Tribunal decides that the domestic enquiry has not been held property, it is not its function to invite suo moto the employer to adduce evidence before it to justify the action taken by it.

(vii) The above principles apply to the proceedings before the Tribunal, which have come before it either on a reference under Section 10 or by way of an application under Section 33 of the Act.

13. In **Premier Automobiles Ltd. V. Kamlekar Shantaram Wadke**[1976(1) SCC 496] the principles of alternative remedy, in so far as the dispute falling under the industrial adjudication are concerned, have been laid down by Hon'ble the Apex Court in paragraphs 23 and 24 of the judgment which are as under:-

"23. To sum up, the principles applicable to the jurisdiction of the civil court in relation to an industrial dispute may be stated thus:

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief, which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.

(4) If the right, which is sought to be enforced, is a right created under the Act such as Chapter V-A then the remedy for its enforcement is either Section 33-C or the raising of an industrial dispute, as the case may be.

24. We may, however, in relation to Principle no.2 stated above hasten to add that there will hardly be a dispute which will be an industrial dispute within the meaning of Section 2(k) of the Act and yet will be one arising out of a right or liability under the general or common law only and not under the Act. Such a contingency, for example, may arise in regard to the dismissal of an unsponsored workman which in view of the provision of law contained in Section 2-A of the Act will be an industrial dispute even though it may otherwise be an individual dispute, therefore, will have hardly an occasion to deal with the type of cases falling under Principle No.2. Cases of industrial disputes by and large, almost invariably, are bound to be covered by Principle No.3 stated above."

14. In **Rajasthan State Road Transport Corporation and another Vs. Krishna Kant and others** (1995 (V) SC-75), Hon'ble the Supreme Court has held that the question whether disputes involving observance, recognition or enforcement of rights and obligation created under the Industrial Disputes Act or its sister enactments such as Payment of Wages Act, Payment of Gratuity Act, Factories Act, Workmen Compensation

Act etc. including Industrial Employment (Standing Orders) Act, which do not provide any special ad judicatory forums are "industrial dispute' within the meaning of Section 2(k) or Section 2-A of Industrial Disputes Act or that such disputes treated as industrial disputes shall not be adjudicated by any other the forum except created by Industrial Disputes Act, i.e. and they shall be adjudicated only by forums created under the said Act.

15. To the same effect is the decision of Hon'ble the Apex Court in **Secretary, Minor Irrigation & Rural Engineering Services, U.P. & Others Vs Sahngoo Ram Arya & another**, (2002) 5 SCC 521, wherein it has been held that: -

"11. These appeals are preferred against the order made by the High Court of Judicature at Allahabad in Civil Misc. WP No. 47130 of 2000 etc. on 1-2-2001. A Division Bench of the High Court of Allahabad by the impugned judgment has held that the petitioner in the said writ petitions has an alternate remedy by way of petitions before the U.P. Public Services Tribunal (the Tribunal), and had permitted the writ petitioner therein to approach the Tribunal and directed the Tribunal to entertain any such petition to be filed by the writ petitioner without raising any objection as to limitation. There was a further direction to the Tribunal to decide the matter expeditiously."

16. It is true that some exceptions have been carved out by Hon'ble the Apex Court in a catena of decisions one of which is violation of principles of justice. However, in ***U.P. State Spinning Co. Ltd.*** (supra), Hon'ble the Supreme Court after relying upon a catena of Constitution Bench decisions has cautioned that High Court should interfere in writ jurisdiction only when a very very strong case has been made out for not availing of alternative remedy and approaching the High Court bypassing hierarchy of the Courts. No such case as to why alternative remedy available to the petitioner is not efficacious has been made out by the petitioner in the instant petition, what to say of a very very strong case for interference in writ jurisdiction. It is not a case where pure question of law is to be determined. This is a case where questions of facts are to be determined on the basis of evidence. The controversy involved in the instant case require findings of fact by adjudication/determination of the controversy on the basis of evidence, which is not feasible under Article 226 of the Constitution of India, as such the petitioner may approach High Court only after exhausting alternative remedy. The petitioner has an alternate and efficacious remedy of raising an industrial dispute. This Court is not required to enter into the controversy which requires findings of fact on the basis of evidence as such the petition is dismissed on ground of alternate remedy.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2007

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 20476 of 2001

Prashant Kumar ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
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Sri B.R. Mishra

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Sri Pushpendra Singh
Sri Sudhir Agarwal, A.G.A.
S.C.

U.P. Public Service (Reservation for Scheduled Caste, Scheduled Tribes and Other Backward Classes) Act 1994- existed as on 22.3.94. Section-15, readwith Public Service Commission Business Rules-Rule 37- Backward Caste-Combined State Subordinate Civil Services Examination advertisement published on 7.1.2000-Last date for submission of forms fixed 28.1.2000- petitioner belonging to 'Jaat Community'-Notified similarly calwar caste included in Schedule-I of Act No. 4 of 1994 on 7.7.2000-Kalwar Caste included in Scheduled I of U.P. Act No. 4 of 1994 25.5.2000 preliminary examination conducted-whether the benefit of reservation of O.B.C. can be given? Held-'No'-the benefit may be given to those who were interned in schedule I of the Act upto the last date of the submission of application form.

Held: Para 30

The benefit of reservation to 'Other Backward Class' candidates in selection in Public Services by direct recruitment as provided by U.P. Public Service (Reservation for Scheduled Caste/Scheduled Tribes and Other Backward Class) Act, 1994, is applicable, to only those categories or castes which are notified as Other Backward Classes entered in Schedule-I of the Act, upto the last date of filling up of the application form for such selections, provided there is no contrary provision in the Service Rules, the terms and conditions of recruitment, or in the advertisement.

Case law discussed:
1993 Supp. (2) SCC-611
1983 (3) SCC-284
1983 (3) SCC-33
AIR 1990 SC-405
1997 (1) AWC-415
J.T. 2001 (10) SC-5230
AIR 1988 SC-2068
AIR 1990 SC-1233
1993 (2) J.T. 15
1996 (11) SCC-242
W.P. No. 55266 of 03 decided on 24.2.05
AIR 1998 Supp. SCC-740
JT 2001 (10) SC-520
2002 (10) 704
2003 (9) SCC-519
1997 (4) SCC-18
2000 (5) SCC-262

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

1. On a reference dated 20.3.2002 made by the Division Bench in writ petition No. 20476 of 2001, Prashant Kumar Vs. State of U.P. and others, we have framed the following questions to be decided in the matter:-

"At what stage the caste of a candidate should be entered in the Schedule-I of the U.P. Public Services (Reservation for Scheduled Caste, Scheduled Tribes and other Backward Classes) Act, 1994 for him to get benefit as an OBC candidate; Should it be before the notification/advertisement of the selections, or the written test, or the oral test (in case of oral test only), or the declaration of the result?"

2. All the petitioners and private respondents appeared in the Combined State Subordinate Civil Service Examination, 2000 held by U.P. Public Service Commission. The Advertisement No. A-1/E-1/2000 inviting applications for selections was published by the Commission on 7.1.2000. The last date of submission of the forms was 28.1.2000. It was extended to 8.2.2000. The preliminary written examination was taken on 28.5.2000. The main written examination was taken on 11.10.2000 and 17.10.2000. The interviews were held on 21.4.2001, and the final result was declared on 16.5.2001.

3. In **Writ Petition No. 6250 (M/B) of 2000 Pramod Kumar and another Vs. State of U.P. and others**, the petitioners had claimed the benefit of the reservation as they belong to "Jaat' community which was notified on 10.3.2000 as 'Other Backward Class' (In short OBC) vide Notification amending the Schedule I appended to the U.P. Public Service (Reservation for Scheduled Caste/Scheduled Tribes & Other Backward Class) Act, 1994 (in short U.P. Act No. 4 of 1994). A Division Bench by its judgment dated 26.3.2001 dismissed the petition on the ground that the petitioners had appeared as general candidates. The recruitment process had started, when the notification amending the Schedule-I was published. The petitioners had participated in the selection as general candidate. Their status could not be altered during the process of selections, and that the process cannot be bifurcated by the Court.

4. In **Writ Petition No. 23193 of 2000, Km Amrita Singh and another Vs. State of U.P. and others**, the same benefit of reservation as "Jaat' as Other Backward Class vide Notification dated 10.3.2001 was claimed in the same examination. The Bench hearing the matter at Allahabad relied upon the provisions of Section 15 of U.P. Act No. 4 of 1994, and held that the process for selection shall be deemed to be initiated when the written test was taken. The preliminary written test was held on 28.5.2000, hence the petitioners were entitled to the benefit of reservation of 'Other Backward Class'. It was observed that if there are OBC candidates, who are more meritorious than the petitioner, then obviously the petitioners can be appointed only if such more meritorious candidates are absorbed and there are still some vacancies left in the reserved category of OBC.

5. In the cases at hand the petitioner in Civil Misc. Writ Petition No. 20476 of 2001, Prashanat Kumar Vs. State of U.P. and others, claims the benefit of the judgment in Km. Amrita Singh's case. The same Bench which had decided the writ petition No. 23193 of 2000, Km. Amrita Singh and others Vs. State of U.P. and others on 7.5.2001, found that the judgment in Pramod Kumar Singh's case by which the benefit of reservation to 'Jaat' Community, was denied to the

petitioners in the same selections, was not noticed by them, and that since there is a conflict between the two Division Benches, the matter should be decided by a larger Bench. By the referring the order dated 20.3.2002, the Division Bench directed that in the meantime one post of Sub Divisional Magistrate shall be kept vacant.

6. Before proceedings to deal with the question it would be appropriate to give in brief the facts of all the three writ petitions. In writ petition No. 20476 of 2001, the petitioner Prashant Kumar filled up his form for the Combined Civil Service Examination (Provincial), 2000 as a general candidate. He was declared successful in preliminary written examination, main written examination and was called for interview. He belongs to "Jaat' community. By a notification dated 10.3.2000 issued under section 13 of the U.P. Act No. 4 of 1994 the "Jaat' Community was included in Schedule-I in 'Other Backward Class' category vide entry No. 78. The petitioner made a request on 8.8.2000 at the time of filling his main examination form, to be treated in the Other Backward Class category. He secured 1092 marks. He was not given the benefit of reservation, and treating him in general category, he was given placement as a Trade Tax Officer. He has prayed for a direction to be treated as Other Backward Class category candidate in the examination and to be placed as per the merit of Other Backward Class candidate's. In the counter affidavit of Sri Subhash Chandra, Officer on Special Duty, Department of U.P. Lucknow and Sri Radhey Lal, Section Officer, U.P. Public Service Commission the petitioners claim has been denied. In paragraph 5 of the counter affidavit of Sri Radhey Lal, it is stated that the last date of receipt of application form was 8.2.2000 and that since a notification including "Jaat' Community as 'OBC' was published on 10.3.2000, the petitioner is not entitled to the benefit of reservation. He has relied upon the judgment in Pramod Kumar Singh's case decided on 26.3.2001. Km. Smrita Singh belonging to Other Backward Class category with 1096 marks and placed at Sl. No. 6 in the merit list has sought impleadment in this writ petition. It is contended by her that there were five vacancies for the post of Sub Divisional Magistrate in general category and one vacancy in OBC category. She is the first in order of merit in OBC category after five general category candidates and was sent for medical Attend examination. The writ petition No. 1352 (S/B) of 2002 filed by her at Lucknow Bench of this Court, her entitlement to be sent for medical examination and training was accepted. She was, however, not sent for training because of the interim orders passed in the referring order. She claims that even if the writ petition filed by Sri Pramod Kumar succeeds, he cannot be given placement as Sub Divisional Magistrate as, she has secured higher marks than him.

7. In writ petition 34731 of 2001, the petitioner Sri Sujeet Kumar Jaiswal had applied as a general category candidate. The 'Kalwar' caste was included in Schedule Attend -I of U.P. Act No. 4 of 1994 vide notification dated 7.7.2000 as Other Backward Class vide insertion of entry No. 79. A certificate that he belongs to Kalwar community was issued by Tahsildar, Ghoshi on 11.8.2000. The preliminary examination was conducted on 28.5.2000. He was declared

successful, in both the preliminary and main written examination and was called for interview. He was not treated as belonging to OBC category and was not selected as the 'Kalwar' caste was notified after the last date of submission of application forms for the examination. He has prayed for a direction to consider him in OBC category candidate and to give him placement as such. In the counter affidavit of Sri Radhey Lal, Section Officer, U.P. Public Service Commission, his claim is disputed, on the ground that the petitioner appeared as general category candidate. The last date of filling up the application form for the examination was 8.2.2000. The notification including 'Kalwar' caste as Other Backward Class was published on 7.7.2002 and did not have retrospective effect.

8. In writ petition No. 15116 of 2002, the petitioner Suraj Pal had appeared in the examination as general category candidate. He also claims to be belonging to "Jaat' community which was notified as Other Backward Class category vide amendment of Schedule I and addition of entry No. 78 by Notification dated 10.3.2000. He has also claimed the benefit of OBC category candidate in the examination and consequent placement in the select list and has relied upon Km. Amrita Singh's case. No counter affidavit has been filed by the respondents in this writ petition.

9. Sri Prakash Padia learned counsel for Sri Prashant Kumar in Writ Petition No. 20476 of 2001 submits that the advertisement was published on 7.1.2000. The notification including "Jaat' as OBC in Schedule I of the U.P. Act No. 4 of 1994 was issued on 10.3.2000. The petitioner made a request to the Commission on 8.8.2000 to treat him in the OBC category. Similar benefit was given to one Sri Gyanendra Prakash in writ petition No. 4707 of 2008 decided on 7.5.2001. The result was published on 16.5.2001. On the same day the petitioner made a representation on 16.5.2001, to treat him as a candidate belonging to OBC. The petitioner was recommended for the post of Trade Tax Officer. By an order dated 20.3.2002 passed in this writ petition noticing the conflict between the Division Benches of this Court and referring the matter to Full Bench, an interim order was passed for keeping one post of Sub Divisional Magistrate to be vacant.

10. Sri Padia submits that the U.P. Act No. 4 of 1994 defines the recruitment in paragraph 2(d). It applies in relation to a vacancy for a period of twelve months commencing from the 1st day of July of the year when the process of direct recruitment against the vacancies is initiated. In the present case since the advertisement was issued on 7.1.2000 and the last date of filling the form was 8.2.2000, the notification including "Jaat' in OBC category dated 10.3.2000, is applicable to the recruitment. The benefit of this notification is to apply to the vacancies between 1.7.1999 upto 30.6.2000. He has also relied upon Section 15 of the U.P. Act No. 4 of 1994 which provides as follows:

"15. Savings.- (1) The provisions of this Act shall not apply to cases in which selection process has been initiated before the commencement of this Act and such cases shall be dealt with in accordance with the provisions of law and

Government Orders as they stood before such commencement.

Explanation.- For the purposes of this sub section the selection process shall be deemed to have been initiated where, under the relevant service rules, recruitment is to be made on the basis of-

(i) Written test or interview only, the written test or the interview, as the case may be, has started, or

(ii) Both written test and interview, the written test has started.

(2) The provisions of this Act shall not apply to the appointment, to be made under the Uttar Pradesh Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974."

11. Sri Padia further submits that U.P. Act No. 4 of 1994 was amended by U.P. Public Service (Reservation for Scheduled Caste/Scheduled Tribes and Other Backward Classes) (Amendment) Act, 2001 (U.P. Act No. 21 of 2001) Section 6 of this Amendment Act provides as follows:

"6.Special Provision for pending recruitments.- The provisions of the principal Act as amended by this Act, shall also apply in respect of such recruitments to public services and posts as are pending on the date of the commencement of this Act.

Explanation.- For the purposes of this section ,-

(a) a recruitment shall be deemed to be pending if in pursuance of that recruitment no appointment has been made before such commencement;

(b) the expression "public services and posts" shall have the meaning assigned to it in the principal Act. "

12. It is submitted that by yet another amendment vide U.P. Act No. 1 of 2002, the U.P. Act No. 4 of 1994 was again amended but the provisions of Section 6 were left in tact, and accordingly, the recruitment which was pending on the date of commencement of U.P. Act No. 21 of 2001, will apply to the recruitment. He has relied upon the Judgments of this Court in Km. Amrita Singh and others Vs. State of U.P. and others in writ petition No. 23193 of 2000 decided on 7.5.2001, and Vice Chancellor University of Allahabad and others Vs. Dr. Anand Prakash Misra and others (para 12) holding that legislature is competent to make laws with retrospective effect. The Reservation Act applies to the existing vacancies on the date when the Act came into force. The process of selection was not started on that date. There is no vested right to any vacancy in a post. A person has a right only to be considered according to Rules in force as on the date of consideration. The process of selection, if it has started prior to that date, is required to be dealt with in accordance with the existing law. The selection process initiated after commencement of the Act has to be in conformity with the provisions of the Act. The vacancies which existed as on that date shall be required to be filled up, applying sub section (1) of Section 15 of the U.P. Act No. 4 of 1994.

13. Sri Padia has relied upon **Ashok Kumar Sharma and another Vs. Chandra Shekhar and another, 1993 Supp (2) SCC 611**, in which the Supreme Court was faced with the question about

the illegibility of the candidates for B.E. Examination. The result was declared on 21.8.1982, and the interviews were taken on 24.8.1982, and on the subsequent dates. It was held that where the appellant was qualified for being selected prior to the date of interview he could not held ineligible. Reliance is placed upon Rule 37 of Public Services Commission Business Rules, which are quoted as below:

"37. Applications of candidates, who have appeared in the examination, the passing of which may make them eligible to appear in an interview for recruitment to a post to be made otherwise than by a competitive examination, but results whereof have not been declared up to the date of making of the application, may be entertained provisionally, but no such candidate shall be permitted to take the interview, if he is declared as having failed in the examination, or if the results are not available on the date the viva-voce test is held."

14. Sri D.K.S. Rathor, learned counsel for Km. Smita Singh, impleaded as respondent no. 3, submits that the claim of Sri Prashant Kumar for benefit of reservation in OBC category, after completion of selection process is not legally sustainable. The amendment to the Schedule I of the U.P. Act No. 4 of 1996, is not retrospective in nature. The amended rule cannot affect the existing rights of the candidates who have been considered for selection. It does not effect substantive and vested rights of the parties, unless the amendment is made retrospective expressly or by necessary implication. Section 15 of U.P. Act No. 4 of 1994 provides that the selection process shall be deemed to have been initiated where the written test or interview has started or both the written test and interviews have started.

15. Sri Rathor has relied upon the judgment in the **A.V. Rangaith Vs. Shreeniwasa Rao and other, 1983(3) SCC 284 (para 8 & 9); Shyam Sunder and others Vs. Ram Kumar and others, (Constitution Bench) 2001(8) SCC 24 (para 28); A.A. Calton Vs. Director of Education and another, 1983(3) SCC 33 (para 5); P. Mahendra Vs. State of Kerala and others AIR 1990 SC 405 (paras 5,6,7 & 10),** and submits that the petitioner Pramod Kumar had secured 1092 marks. Km. Smita Singh was placed at Sl. No. 6 immediately after general category candidates, and was first position in OBC category with 1096 marks, and thus even if the writ petition filed by Pramod Kumar succeeds, he cannot secure the only Other Backward Class Category vacancy of Sub Divisional Magistrate. The writ petition, according to Sri Rathor, is liable to be dismissed on this ground alone.

16. Sri M.A. Qadeer, learned counsel, appearing for U.P. Public Service Commission submits that only those candidates are entitled to be considered in OBC category who were recognized as OBC on the last date of submission of application form, and had applied in that category. In this examination the last date for receipt of application form was 8.2.2000. Since the petitioner's caste was notified to be included as OBC on 10.3.2000 (Jaat) and 7.7.2000 (Kalwar/Kalar), and that the preliminary written examination was held on 28.5.2000, they cannot be given the benefit and place in the select list as OBC candidates. Sri Qadeer submits that the

provisions of Section 15(1) of the Act, have one time application. These cannot be extended to the selection which was not pending on the date of commencement of U.P. Act No. 4 of 1994. He has relied upon the judgment of Supreme Court in **Suresh Chandra Vs. Gulam Chisti, 1991(1) ARC (SC) 415** in which while interpreting the provisions of Section 39 of U.P. Urban Building (Regulation of Letting Rent and Eviction) Act, 1972, the Supreme Court held that the benefit of section 39,40 and 2(ii) of the Act, by which, the tenants in suits pending on that date of the commencement of the Act, in respect of the building to which the old Act did not apply could claim the protection of the Act by depositing the rent and other amounts within thirty days, were of one time application.

17. Sri Qadeer further submits that the eligibility or qualification of the candidates has to be reckoned on the last date of submission of application form. He has relied upon the judgment in **State of U.P. Vs. Vijay Kumar Misra, JT 2001 (10) SC 5230**. Sri Qadeer further submits that the advertisement clearly provided that "reservation shall be provided in accordance with the provisions of the then relevant Government Orders to Scheduled Caste/Scheduled Tribes/Other Backward Classes". Under the heading of "Important Instructions' in the advertisement, it was also provided that no change in the category, optional subject or of Centre (District) is permissible after receipt of application form in the office of Commission.

18. Sri Sudhir Agarwal, learned Additional Advocate General, appearing for the State, has relied upon Section 9.3(4) of the advertisement in which it was specifically provided that the benefit of reservation shall be applicable in accordance with the accordance with the existing Government Orders and if any candidate wants the benefit of reserved category, he must mention such category in the application form. He submits that there is nothing in U.P. Act No. 4 of 1994 to suggest that where the schedule is amended during the continuance of the process of direct recruitment, such amended schedule will apply to the selection. In the absence of any specific provisions in the Act, the directions in the advertisement have to be considered. The petitioner was not a candidate belonging to OBC Category on the date of submission of application form and hence he can not be allowed to take the advantage for recruitment in service on the basis of subsequent amendment to the Rules. Relying upon the judgment in **A.V. Rangaiah (supra), A.A. Calton (supra), P. Mahendra (supra) and P. Gyaneshwar Rao and another Vs. State of Andhra Pradesh, AIR 1988 SC 2068 (para 8,9 & 10), N.T. Devin Kutti Vs. Kerala Public Service Commission, AIR 1990 SC 1233 (para 11). P. Murugen Vs. State of Tamil Nadu, 1993(2) JT 115 (para 7) Ramesh Kumar Chaudhary Vs. State of Madhya Pradesh 1996 (11) SCC 242 (para 7) and a Full Bench of this Court in writ petition No. 55266 of 2003: Sarika Vs. State of U.P.** decided on 24.2.2005, he submits that the advertised vacancies are required to be filled up as per rules existing on the last date of submission of application form, unless the Rules have been specifically given retrospective effect.

19. Sri Agarwal further submits that Section 15 of U.P. Act No. 4 of 1994 has no application whatsoever to any selections initiated after the commencement of the Act. The explanation to Section 15 shows that the same is applicable only with respect to a situation given in sub section (1) of section 15 and not to any selection in future and for all time to come. The judgment dated 7.5.2001 in Amrita Singh's case does not lay down correct law. He submits that the candidates who had applied for the selections are liable to be treated for the same category to which they belong as per their application form submitted till the last date of submission of such forms, and any subsequent change will not entitle them to claim any benefit on the ground of change of category or status due to amendment in the relevant rules.

20. In **A.C. Caltan Vs. Director of Education,1983 (3) S.C.C. 33; A.V. Rangaiah Vs. J. Shreenivasa Rao, AIR SC 853; N.T. Bevin Kutti Vs. Karnataka Public Service Commission, S.C. 1233; P. Gyaneshwar Rao Vs. State of Andhra Pradesh 1998 Supp SCC 740 and P. Mahendran Vs. State of Karnakataka AIR 1990 SC 405**, the Supreme Court has reiterated the well accepted principles of applicability of statutory Rules to the selections as follows:

"It is a well accepted principle of construction that a statutory rules or Government order is prospective in nature unless it is expressly or by necessary implication made to have retrospective effect. Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the Government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended rules or the amended Government orders issued in exercise of its statutory power either by express provision or by necessary intendment indicate that amended Rules shall be applicable to the pending selections. See P. Mahendra Vs. State of Karnataka (1989) 4 JT 459; (AIR 1990 SC 405)."

21. In **State of U.P. Vs. Vijay Kumar Misra, JT 2001 (10) SC 520**, the Supreme Court held in paragraph 7 as follows:

"7. The position is fairly well settled that when a set of eligibility qualifications are prescribed under the rules and an applicant who does not possess the prescribed qualification for the post at the time of submission of application or by the cut off date, if any, described under the rules or stated in the advertisement, is not eligible to be considered for such post."

22. In **Mohan Kumar Lal Vs. Vinoba Bhave University and others (2002) 10 scc 704**, the appointment to the posts was advertised on 10.1.1990, and the last date of submission of application was 30.1.1990. The High Court was of the view that since the appointments were not factually made, the reservation policy introduced on 22.8.1993 could not apply. The Supreme Court held that the High Court erred in applying the reservation as the provisions of Section 57 which governed the field did not contain any

class for reservation and sub section (5) of Section 57 provide for reservation was introduced only on 22.8.1993.

23. In **Shanker Kumar Mandal Vs. State of Bihar (2003) 9 SCC 519**, the Supreme Court was faced with the recruitment of 2000 Primary Teachers in Bihar. The High Court had not considered as to what wre the applicable rules so far their eligibility was concerned. There was a concession made before the High Court that the appointees were over age on the date of initial appointment. There was no definite material as to what was the eligibility criteria so far as the age is concerned. The Supreme Court relying upon the judgment in **Ashok Kumar Sharma Vs. Chander Shekhar, (1997) 4 SCC 18; Bhupenderpal Singh Vs. State of Punjab, (2000) 5 SCC 262 and Jasbir Rani Vs. State of Punjab, (2002) 1 SCC 124**, culled out the principles of the applicability of the cut off date for the prescribed qualification relating to age by a candidate for appointment as follows:

"(1) The cut off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.

(2) If there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for application.

(3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority."

24. With these settled principles in hand, we find that in the present case the relevant service rules as well as U.P. Act No. 4 of 1994, do not provide for any cut off date for application of rules of reservation. In such cases the cut off date given in the advertisement becomes relevant. Here the advertisement clearly stipulates in para 3 as well as 'Important Instructions' contained in the advertisement, that the reservation for Scheduled Caste/Scheduled Tribes /Other Backward Classes, Physically Handicapped, Independents of Freedom Fighters, Ex-service-man and Woman Candidates shall be given as per existing Government orders for such reservation, and in clause 9(4) it was clearly stated that if a candidate belongs to reserved category, wants the benefit of such reservation, he should clearly state his category,/sub category(one for more than one as the case may be) in the reservation column. The 'Important Instruction' also clearly stated that no change in category, optional subject or of Centre (District) is permissible after receipt of application form in the office of Commission

25. Clause (3) of the prescribed form in the main examination provided that the certificates in respect of the reserved category/sub category for which the application was made at the time of preliminary examination should be submitted in accordance with the prescribed proforma in the advertisement A-1/E-1/2000 published on 1.1.2000 failing which the application form shall be rejected by the Commission. The advertisement, as such, clearly provided that the reservation shall be applicable in accordance with the existing Government orders. Since the category for reservation had to be mentioned in the application form, and para 3 of the advertisement mentioned 'existing Government Orders', the existing reservations were applicable

upto the last date of filling up of application forms. We thus find that the prescribed date for applicability of reservation in the subject selection was the last date of filling up the application form i.e. 8.2.2003, which was the extended date.

26. The reservation to any category under U.P. Act No. 4 of 1994 also provides some additional benefits namely relaxation in age. If the benefit of notification including any community in Schedule I of the Act, is to be given after the date of filling up of application forms, all those persons who could have applied taking the benefit of the relaxation in age, will be deprived of this benefit. In case the submission made by the petitioners are to be accepted and the reservations is made applicable to the candidates of those community who are included in Schedule-I of the Act after the last date of filling up of the application form, the persons who could also apply will be discriminated.

27. This brings up to the applicability of Section 15 of U.P. Act No. 4 of 1994 and Section 6 of the U.P. Act No. 21 of 2001 amended U.P. Act No. 4 of 1994. The savings clause in Section 15 is applicable to selection process which was initiated before the commencement of the Act. The explanation to Section 15 cannot stand on its own. It explains the expression, 'initiated before the commencement of this Act', and sub Section (1) of Section 15. It has no application to the pending selections which may be initiated after the commencement of the Act. The U.P. Act No. 4 of 1994 came into force on 22.3.1994, when it received the assent of the Governor. The object and the purpose of the saving clause in Section 15 was to apply the provisions of reservation to selection process which were initiated before the commencement of the Act, and such cases were to be dealt with in accordance with the provisions of the Act and Government orders as they stood before such commencement. It only means that the reservations were to be applied to pending selections for direct recruitment on 22.3.1994. Similarly Section 6 of the U.P. Act No. 21 of 2001 makes the provisions of the Principal Act as amended by the Act 21 of 2001 to apply to such recruitment to Public Service and posts and were pending on the date of commencement of the Act. The explanation in this case is not the same as in Section 15 (1) of the parent Act and provides for a deeming clause for the pendency of the recruitment namely that the recruitment shall be deemed to be pending if in pursuance of that recruitment no appointment has been made before such commencement (commencement of the U.P. Act No. 21 of 2001) October 5,2001). Section 6 of the U.P. Act 21 of 2001 as such is a special provision for pending recruitment, and by deeming clause it makes the amended provisions of the Act applicable, where no appointment have been made before commencement of the amended Act. This section 6 was not amended by the U.P. Act No. 1 of 2002, which subsequently amended U.P. Act No. 4 of 1994.

28. Section 39 of U.P. Urban Building Regulation of Letting Rent and Eviction Act, 1972, provided for the applicability of the Act to such cases in respect of which suit of eviction was pending on the date of commencement of the Act. It gave protection from eviction, if the tenant deposited the entire amount of, rent and damages for use and

occupation together with interest as 9% and full cost of suit within one month from the date of such commencement, and in that case no decree for eviction could be passed except on the ground other than the ground mentioned in proviso to sub Section (1) or in clause (b) to (g) of Sub Section (2) of Section 20. of the Act. The Supreme Court held that the provisions of Section 39 will be applicable only where the suit is pending on the commencement of the Act and will not apply to those suits which are filed after such commencement. Ordinarily the rule of construction is that the same expression when it appears more than once in the same statute more-so, the same provision, must receive the same meaning unless the context suggests otherwise. The use of prefix 'before the commencement' will become redundant if the benefit is to be extended beyond one month or till the date the suits are filed, subsequent to that date. We are thus of the opinion that the provisions of Section 15 of U.P. Act No. 4 of 1994 were applicable only to those selections for direct recruitment which were initiated before the commencement of the Act No. 4 of 1994. We are further fortified in this view by the use of words 'this Act' in Section 15(1) after the words 'commencement of', and thereafter again the use the words as 'provision of law and Government Orders as they stood before such commencement'. Further we find that the explanation is confined only to the sub section (1) of Section 15 of the Act.

29. We thus find that the judgment in Km. Amrita Singh relying only upon the provisions of Section 15(1) of U.P. Act No. 4 of 1994, for giving benefits of the reservations to 'Jaat' community, which was declared as OBC and added to the Schedule-I of the Act by notification dated 10.3.2000, was incorrectly decided, and that the judgment in Pramod Kumar Singh's case is correct but not on the reasons given in the judgment. For the same reasons the benefit of inclusion of the 'Kalwar/Kalar' caste in the Schedule-I as Other Backward Class by notification dated 7.7.2000 also will not give benefit to such candidates as this notification was also published, after the last date of filling up of the application form for the selections.

30. We consequently answer the question as follows:

"The benefit of reservation to 'Other Backward Class' candidates in selection in Public Services by direct recruitment as provided by U.P. Public Service (Reservation for Scheduled Caste/Scheduled Tribes and Other Backward Class) Act, 1994, is applicable, to only those categories or castes which are notified as Other Backward Classes entered in Schedule-I of the Act, upto the last date of filling up of the application form for such selections, provided there is no contrary provision in the Service Rules, the terms and conditions of recruitment, or in the advertisement."

31. It is admitted to the parties that the merit position of Km Smrita Singh with 1096 marks was higher than the merit position of Prashant Kumar with 1092 marks for the only vacancy on the post of Sub Divisional Magistrate reserved for 'OBC' in the selections and as such Km Smrita Singh is entitled for appointment.

32. We consequently, dismiss all the petitions, with no order as to costs. The interim orders are discharged.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2006

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

Civil Misc. Writ Petition No.21638 of 2006

Ram Nagina Das Chela ...Petitioner
Versus
Dy. Director of Consolidation and another ...Opposite parties

Counsel for the Petitioner:
Sri O.P. Pandey

Counsel for the Opposite Parties:
Sri Chandra Prakash Mishra
S.C.

U.P. Consolidation Holding Act Section-3 (II)-Power of Consolidation authorities-confined to decide the right title, interest in Land of tenure holder-admittedly Sri Shanti Hanuman Ji (Deity) found recorded as Bhumidhar-with consolidation court has no concerns with the right of Sarverakarship-which can be adjudicated by only the Civil Court-Petition dismissed.

Held: Para 8

Admittedly, Sri Shanti Hanuman Ji (Deity) is Bhumidhar of the land in dispute. Bhumidhar is recorded through Sarvakar-Haridas. Actually petitioner is not disputing rights of Bhumidhar. He is disputing rights of Sarvakarship, which can be decided by Civil Court, and cannot be decided by the Consolidation authorities and as such Consolidation authorities rightly did not decide the question whether Sri Shanti Hanuman Ji, who is Deity, is liable to be represented through Haridas or through Ram Nagina Das-petitioner.

Case law discussed:
1971 R.D.-19 relied on

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

1. This writ petition is directed against the order dated 18th January, 2006, passed by Deputy Director of Consolidation, Deoria, Annexure-10 to the writ petition.

2. In the Basic year Sri Shanti Hanuman Ji (Deity) through Sarvakar Haridas was recorded as tenure-holder. It transpires from the record that in C.H. Form-23 some entries were made on the basis of an order allegedly passed in conciliation proceedings by Assistant Consolidation Officer. It further appears from the record that Haridas who was Sarvakar of the tenure-holder (Deity) moved an application that this is a forge entry as no order was passed by Assistant Consolidation Officer in conciliation proceeding and the same may be expunged. The matter came up before this Court in Writ Petition 32133 of 1999 wherein this Court while remanding the matter directed that petitioners are entitled to get opportunity on the question whether entry is forge or not. On remand, the matter was enquired into and it was found that entry made in consolidation record on the basis of alleged order passed by Assistant Consolidation Officer in conciliation proceeding was forged. Present petition is preferred against aforesaid order passed by the Deputy Director of Consolidation.

3. Heard learned counsel for petitioner as well as learned Standing Counsel.

4. Learned counsel for petitioner urged that the order passed by the Deputy Director of Consolidation suffers from error of law apparent on the face of record inasmuch as the finding of Deputy Director of Consolidation that there is no such order is perverse. The order was passed by Assistant Consolidation Officer in conciliation proceedings which was not taken into account by Deputy Director of Consolidation while passing the impugned order. Learned counsel for petitioner did not produce any certified copy of the alleged order passed by Assistant Consolidation Office in conciliation proceeding.

5. Considered arguments of learned counsel for petitioner as well as learned Standing Counsel and perused the record.

6. On careful consideration by the Consolidation authorities, it was found that entry made in favour of petitioner was forged as no such order passed by Assistant Consolidation Officer in conciliation proceeding. No material was brought to the notice of this Court by learned counsel for petitioner that any such order was ever passed on the basis of which entry was made in revenue record. Findings of Consolidation authorities are based on appraisal of evidence on record that entries were made in revenue record without any order passed by Assistant Consolidation Officer in conciliation proceeding. There is no error of law apparent on the face of record.

7. The Consolidation authorities are competent to decide right, title, interest and liability in relation to the land of a tenure holder. Tenure holder is defined under Section 3 (11) of the U.P. Consolidation of Holding Act, same is being quoted below:-

"3 (11) 'Tenureholder' means a (Bhumidhar with transferable rights or Bhumidhar with non-transferable rights), and includes-

(a) and asami,
(b) a Government lessee or Government grantee, or
(c) a Co-operative farming society satisfying such conditions as may be prescribed."

8. Admittedly, Sri Shanti Hanuman Ji (Deity) is Bhumidhar of the land in dispute. Bhumidhar is recorded through Sarvakar-Haridas. Actually petitioner is not disputing rights of Bhumidhar. He is disputing rights of Sarvakarship, which can be decided by Civil Court, and cannot be decided by the Consolidation authorities and as such Consolidation authorities rightly did not decide the question whether Sri Shanti Hanuman Ji, who is Deity, is liable to be represented through Haridas or through Ram Nagina Das-petitioner.

9. My view is supported by the judgment reported in 1971 R.D. 19, Mahant Rama Kant Das v. Deputy Director of Consolidation, relevant Paragraph of which is being reproduced below:-

".....It is, therefore, clear that the Consolidation authorities had jurisdiction only to decide questions relating to the rights of tenureholders. A dispute as to who is the Mahant or Sarbakar of Math is a dispute of a civil nature cognizable by a Civil Court. It cannot be said to be a dispute relating to the rights of

tenureholders. Upon the death of a Mahant or Sarbakar no question of mutation or succession to the right of the tenureholder arise. In my opinion, therefore, the dispute as to who is the Mahant or Sarbakar of a Match cannot be decided by the Consolidation authorities and is totally beyond their jurisdiction."

10. In view of the discussions made above, the impugned order was rightly passed in accordance with law. Impugned order does not suffer from any error of law. Writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2006

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE V.D. CHATURVEDI, J.

Shakeel ...Petitioner (In Jail)
Versus
Superintendent, District Jail, Ghaziabad and others ...Respondents

Counsel for the Petitioner:
Sri D.S. Misra
Sri C.K. Misra

Counsel for the Respondents:
Sri Durga Prasad Srivastava
Sri K.C. Sinha
Sri R.K. Shukla
Sri Arvind Tripathi

Constitution of India, Art. 226-Writ of Habeas Corpus-detention-on account of involvement of cutting of electric wire-on 21.5.05-representation made-7.9.05-detaining authority through Special messenger on 27.09.05 sent to ministry of Home Affairs-distence of the seat of Central Government about 20 Km. For interval between 28.9.05 to 3.10.05-No plausible explanation-held-vitiate the detention order.

Held: Para 6 & 7

It spills beyond comprehension that the representation sent by the detaining authority through special messenger on 27.9.2005 could take seven days in reaching the concerned desk in the Ministry of Home Affairs. Further, there is no explanation as to how the representation was dealt with on two days, i.e., 4th and 5th October, 2005. When the representation from the District Magistrate, Noida through special messenger could be received by the State Government at Lucknow on 28.9.2005, it would have definitely been delivered in the Central Government latest by 28th September 2005. The distance from Gautam Budh Nagar to the seat of Central Government was also about 20 kilometers. The interval between 28.9.2005 to 3.10.2005 goes by default by plausible explanation.

The delay was unreasonable with no explanation. Unexplained delay on the part of the Central Government in dealing with the representation of the detenu with all promptitude vitiates the detention order.

(Delivered by Hon'ble M.C. Jain, J.)

1. The petitioner has challenged the detention order dated 31.8.2005, passed by respondent no. 2, District Magistrate, Gautam Budh Nagar, under Section 3 (2) of the National Security Act 1980 and his continued detention thereunder.

2. The grounds of detention are contained in Annexure-2 to the writ petition. The genesis was the arrest of the petitioner on 21.5.2005 by the police party when he was allegedly engaged with his associates in cutting electricity wire at about 11 P.M. A case crime no. 36 of

2005 under section 379/411 I.P.C., P.S. Bisrakh, District Gautam Budh Nagar was registered against him. He was allegedly found to be involved in several other crimes, i.e. Crime No.s 30 of 2005, u/s379 I.P.C., 34 of 2005, u/s 379 I.P.C., 36 of 2005, u/s379/411 I.P.C., 57 of 2005, u/s2/3 Gangsters Act, 67 of 2005, u/s379/411 I.P.C., 189 of 2005, u/s 379 I.P.C. and 213 of 2005, u/s 379 I.P.C..

Counter and rejoinder affidavits have been exchanged.

3. We have heard Shri D.S. Misra for the Petitioner, Shri Arvind Tripathi A.G.A. and Shri D.P. Srivastava, counsel for Union of India-respondent no. 4.

It has first been argued for the petitioner that there was unexplained delay in deciding his representation by the Central Government and it vitiates his continued detention under the impugned detention order. We have examined the record in this behalf. As per the counter affidavit of the District Magistrate, namely, Sri Santosh Kumar Yadav, District Magistrate, Gautam Budh Nagar, the representation dated 7.9.2005 had actually been signed by the petitioner and given to jail authorities on 19.9.2005. On being received through jail authorities, the police report was called for on 20.9.2005 for preparation of parawise comments. The concerned Station officer submitted his report to the Superintendent of Police on 23.9.2005 and the S.P. forwarded the same to the office of the District Magistrate on 24.9.2005. There was holiday on 25.9.2005, being Sunday. Thereafter, parawise comments were prepared and the representation along with the comments was sent to the State Government as well as Central Government on 27.9.2005 through special messenger. It is apparent that the representation of the petitioner was continuously dealt with by the detaining authority and there was no delay on his part.

4. The counter affidavit of Shri Babu Lal, Under Secretary, Government of U.P. reveals that the representation of the detenu was received in concerned section of the State Government on 28.9.2005. The concerned section of the State Government examined the representation and submitted a detailed report on 29.9.2005. The Under Secretary examined it on 30.9.2005 and the Special Secretary examined it on 3.10.2005 as 1st and 2nd October 2005 were holidays on account of Saturday and Sunday. The Secretary submitted the representation to higher authorities for final orders on 3.10.2005 and within four days, the decision was taken by the State Government on 7.10.2005 with all expedition. After due consideration, the said representation was rejected on 7.10.2005. So, there was no delay on the part of State Government either.

5. However, the presentation received a rough deal with the Central Government. It would be recalled that as per the counter affidavit of the District Magistrate, the representation was sent to the Central Government also through special messenger on 27.9.2005, which was received by the Central Government in the concerned desk in the Ministry of Home Affairs on 4.10.2005. In para 6 of the counter affidavit filed by Smt. Rita Dogra on behalf of the Central Government, it has been stated thus:

"6. The representation was immediately processed for consideration and the case of the detenu was put up before the Under Secretary, Ministry of Home Affairs on 06.10.2005. The Under Secretary carefully considered the case and put up the same before the OSD (S) on 06.10.2005. The O.S.C. (S) carefully considered the same and with his comments put up the same before the Joint Secretary, Ministry of Home Affairs on 06.10.2005. The Joint Secretary carefully considered the case and forwarded the same to the Special Secretary, Ministry of Home Affairs on 07.10.2005. The Special Secretary considered the case and forwarded the same before the Union Home Secretary on 13.10.2005. The Union Home Secretary (who has been delegated powers by the Union Home Minister to decide such cases) considered the case of the detenu and rejected the representation of the detenu on 18.10.2005."

6. It spills beyond comprehension that the representation sent by the detaining authority through special messenger on 27.9.2005 could take seven days in reaching the concerned desk in the Ministry of Home Affairs. Further, there is no explanation as to how the representation was dealt with on two days, i.e., 4th and 5th October, 2005. When the representation from the District Magistrate, Noida through special messenger could be received by the State Government at Lucknow on 28.9.2005, it would have definitely been delivered in the Central Government latest by 28th September 2005. The distance from Gautam Budh Nagar to the seat of Central Government was also about 20 kilometers. The interval between 28.9.2005 to 3.10.2005 goes by default by plausible explanation.

7. The delay was unreasonable with no explanation. Unexplained delay on the part of the Central Government in dealing with the representation of the detenu with all promptitude vitiates the detention order.

8. Learned counsel for the petitioner also argued that all relevant materials, i.e., bail applications/bail orders of related case crimes had not been sent for consideration before the detaining authority and as such the detention order suffers from the vice of non-application of mind *de hors* of relevant material. It is not necessary to dilate on this aspect of the matter for the reason that the continued detention of the petitioner is rendered illegal because of unexplained delay in decision of his representation by the Central Government as stated above.

9. In net conclusion, we allow this writ petition. The continued detention of the petitioner is rendered illegal. We direct that the petitioner shall be set at liberty forthwith if not wanted in any other connection.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.05.2006

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

Criminal Misc. Transfer Application No. 161 of 2006

Azeem ...Applicant (In Jail)
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicant:
Sri R.S. Shukla

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

Code of Criminal Procedure-Section 408-Transfer of S.T. No. 198/02 u/s 302/307/504 I.P.C. with section 7 of Criminal Law Amendment Act-on the ground the same Special Judge who recorded the evidence of six witnesses is available as IIIrd Addl. Session Judge in the same district-Rejection on the ground of heavy pendancy-held no good ground-as evidence has already concluded-fit case for transfer-direction issued accordingly.

Held: Para 6

The Sessions Judge rejected the application on the ground of heavy pendency. This can not be a ground for rejecting the Transfer application as evidence in the case has already concluded and there was nothing much to be done.

Case law discussed:
1983 (20)-37 Punjab Singh"
1984 ACC-240
2006 SCC-204

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

1. The present transfer application has been moved on behalf of Azeem who is an accused in Session Trial No. 198/02, State Vs. Azeem under Section 302/207/504 IPC and Section 7 of Criminal Law Amendment Act, Police Station Rosa, District Shahjahanpur.

2. The allegations set forth in the application are that the above noted trial was pending in the court of Special Judge (EC Act) Court No. 9, Shahjahanpur, which was presided over by G.S. Chandel, who recorded the evidence of six witnesses. Thereafter Sri Chandel was posted in the court of Third Additional Sessions Judge and one Rajveer Sharma took over in the court of Special Judge (EC Act) in place of Sri G.S. Chandel. The contention of learned counsel for applicant is that as the major part of evidence was recorded by Sri G.S. Chandel and he is at the same Sessions division, i.e. the same district hence the case should be transferred and tried by Sri Chandel.

3. He approched the Sessions Judge for transfer but the prayer was declined and transfer application was rejected by order dated 21.3.2006.

4. Learned counsel for the petitioner has relied upon **Punjab Singh Vs. State of U.P. reported in 1983 (20) page 37** in which it was held that where whole or part of the evidence has been recorded by a particular judge who is available in the district the case may be transferred to that court.

5. Learned counsel for the applicant relied upon **Radhey Shyam and another Vs. State of U.P. reported in 1984 ACC 240** in which it was held that the Sessions Judge was empowered under Section 408 Cr.P.C. to transfer a part heard appeal from the court of Additional Sessions Judge to another Sessions Division, if it was expedient in the interest of justice and lastly he also relied upon **Abdul Nazar Madani Vs. State of Tamil Nadu 2006, SCC 204.** So far as the case of **Abdul Nazar Madani** (Supra) is concerned, it was held in this case that the relevant consideration for transfer should be the public confidence.

6. This is not the ground of the present application. The case of **Radhey Shyam and another Vs. State of U.P. (Supra)** relates about the power of the Sessions Judge. This is also not the ground for transfer of the present case. So far as the case of **Punjab Singh (Supra)** is concerned the evidence of six witnesses was reported by Sri G.S. Chandel when he ceased to have jurisdiction over that court. The Sessions Judge rejected the application on the ground of heavy pendency. This can not be a ground for rejecting the Transfer application ----as evidence in the case has already concluded and there was nothing much to be done.

7. Consequently, the transfer application is allowed and it is hereby directed that the Session Trial No. 198/02, State Vs. Azeem under Section 302/307/504 IPC and Section 7 of Criminal Law Amendment Act, Police Station Rosa, District Shahjahanpur, be transferred to the court of Additional Sessions Judge where Sri G.S. Chandel is presiding who shall conclude the trial and decide it according to law. Application Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2006

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 19512 of 1999

Vice Chancellor, Chandra Shekhar Azad Krishi Evam Prodyogiki Vishwavidayalaya, Kanpur ...Petitioner
Versus
Presiding Officer Industrial Tribunal (3) U.P. Kanpur and others ...Respondent

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

Counsel for the Respondents:
Sri Bhupendra Nath Singh
Sri Pradeep Chauhan
S.C.

Constitution of India Act 226-Regularisation- Workman engaged on 01.07.80 as Lab Assistant/Attendant–working continuously-Labour Court recorded specific finding juniors to the workman have been already regularized-denial of regularization amounts unfair labour practice finding of facts recorded by labour court can not be inter fund by writ court- petition dismissed.

Held-Pra 13 and 15 to be printer

I have heard the learned counsel for the petitioner and the 'Standing Counsel and have also perused the record. From the record it is clear that admittedly the respondent workman was first time engaged in the year 1980and is working continuously. There is no denial by the employer to this effect. A finding to this effect has also been recorded by the Labour Courtthat junior persons to respondent no.2 have been made regular. The Labour Court has also recorded a finding to this effect that some daily wagers had approached the High Court and the High Court has directed to consider their claim and various persons on the basis of the order passed by the High Court have been regularized. A finding to this effect has also been recorded by the Labour Court that from July 1980 to August 1983 respondent no.2 has worked on the post of Lab. Assistant I Attendant and the post of Lab Assistant is in the nature of permanent and from the record it also appears that there is not break in the service of respondent no.2. The Court has a perused the reference. From the reference it is clear that the Labour

Court has answered the reference, which was referred to the Labour Court. It is now well settled that in view of the judgment of the Apex Court reported in2005 SCC (L&S) 154, Mahendra Lal Jain Vs. Indore DevelopmentAuthority that the Labour Court can only decide the dispute referred to it and the Labour Court has got no jurisdiction to go beyond it. In such a way the Labour Court has decided the dispute according to the reference made before him. The Labour Court is bound to decide the said issue.

After perusal of the judgment passed by the Labour Court it is clear that the Labour Court has considered each and every aspect and has come to the conclusion that in spite of the fact that respondent workmen is working from 1980-and is being treated as daily wager, this clearly amount to unfair labour practice. The finding recorded by the Labour Court is a finding of fact in view of the judgment reported in 2005 (3) SCC 193, Management of Madurakattam' Cooperative Sugar Mills ltd. Vs. S. Vishwanathan, the Apex Court has clearly held that there is very little scope of interference in the finding recorded by the Labour Court. The finding recorded by the Labour Court is a finding of fact and unless and until it is proved beyond doubt that the Labour Court has exceeded its jurisdiction and the finding recorded by the Labour Court is against the evidence on record and is perverse then the High Court while exercising the jurisdiction under Article 226 of the Constitution of India has the jurisdiction to Interfere otherwise there is very little scope for interference.

Case Law discussed:

2003 (2) ESC-1007
1997(4) SEC-88
2005(1) SEC-639
AIR 1987 SC-117
1978 Lab 1 cases 437
1996 L82 IC 967
LLR 1993-45
2005 SEC (L & 5) 154
IT 2006(2) SC. I, 2005(3) SEC-193

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

1. This writ petition has been filed for quashing the award-dated 30.5.1998 passed by respondent no. 1 published on 25.2.1999, Annexure-6 to the writ petition.

2. The facts arising out of the writ petition is that the petitioner IS Chandra Shekhar Azad University of Agriculture and Technology, Kanpur (hereinafter referred to as the University) is State under Article 12 of the Constitution of India. Its basic object is to undertake various training and project for the betterment of the agriculture. It employs persons from time to time in respect of particular project. It is further respectfully submitted that the University is not an industry as defined in U.P. Industrial Disputes Act. Respondent no.2 was appointed on daily wage basis by the University on 1.7.1980 for a particular period and was working even today on daily wage basis. From 1.9.1980 to 6.8.1993 respondent no.2 worked as Lab.Assistant/attendant on daily wage basis which is a class-IV post. When the services of respondent no.2 were not regularized, he raised a dispute. The same was referred by the State Government before respondent no. 1, which was registered as Claim Petition No.30 of 1994 for a relief to declare him as a permanent and regular clerk of the University. A written statement was filed on behalf of the Administrative Officer of the University and a reply to that effect was also filed by respondent no.2 but the Labour court has illegally given an award dated 30.5.1998 with a direction that respondent no.2 will be treated to be regular from the date of award.

3. It has been submitted on behalf of the petitioner that respondent no. 1 has no power or jurisdiction to pass an award for the purpose of regularization of services of an employee. The Labour Court has exceeded its jurisdiction in terms of the reference. The Labour Court has wrongly held that the juniors have been regularized and the allegations to this effect made in the impugned order are absolutely vague as in the matter of regularization several factors are to be considered, as Articles 14 and 16 cannot be said to be applicable. It has clearly been stated in the written statement filed on behalf of the petitioner that there is no industrial dispute and the reference has been made without applying its mind and the reference is incompetent and is not maintainable for want of industrial dispute. It has also been stated that the employees are temporarily engaged on the basis of daily wage for specific job of casual nature which cannot be said to be regular work, as such respondent no. 1 has got no jurisdiction to direct the petitioner to pass an order of regularization. The reliance has been placed upon a judgment reported in 2003 (2) ESC 1007, **State of V.P. Vs. Presidin!! Officer~ Labour Court Meerut** and has placed reliance on para 25 of the said judgment which is reproduced below:

"25. In view of the above, the law of regularizations be summarized that the appointment should he made at initial stage in accordance with rules. Incumbent must possess the requisite qualification for the post on the date of appointment and if appointment had been made on temporary ad hoc basis, the workman should be permitted to continue for long rather the vacancies should be filled up on permanent basis in accordance with law. If the statutory provision or executive instruction provides for regularization after completing a particular period only then regularization is permissible. In special circumstances, Court may give direction to consider the case for regularization provided cOl1linuation on ad hoc basis is so long that it amounts to arbitrariness and provisions of Article J 4 are attracted. There must be sanctioned post against which regularization is sought. At the same time policy of the state enforcing the reservation for particular classes like S.C.,S. T., D.B.C. etc. and further for women, handicapped and ex-service men cannot be ignored. "

4. Further reliance has been placed upon (1997) 4 SCC 88, **State of V.P. and others Vs. Aiay Kumar** and has submitted that the Apex Court has clearly held t t High Court has no jurisdiction to hold that a daily wager isentitled for regularization. There must exist a post and either administrative instructions or statutory rules must he in operation to appoint a person to that post. Daily wage appointment will obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists. Further reliance has been placed by the counsel for the petitioner on (2005) I see 639, **Mahendra Lal Jain and others Vs. Indore Development Authority and others** and has placed reliance upon paras 18,19,29,33,34 and 35 which are reproduced below:

"18. The posts 0 Sub-Engineers in which the appellants were appointed, it is nobody's case, were sanctioned ones. Concededly the respondent Authority before making any appointment neither intimated the employment exchange about

the existing vacancies, if any, nor issued any advertisement in relation thereto. Indisputably, the conditions precedent for appointment of the officers and servants of the Authority. as contained in the service Rules had not been complied with. The appointments of the appellants were, therefore, void ab initio being opposed to public policy as. also violative of Articles 14 and 16 of the Constitution.

19. The question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularization of their services. The answer thereto must he rendered in the negative. Regularization cannot be claimed as a matter or right. An illegal appointment cannot be legalized by taking recourse to regularization. What can be regularized is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any hack-door appointment. A State he.fhre offering public service to a person must copy with the constitutional requirements of Articles 14 and 16 of the Constitution. A II actions of the State must conform to the constitutional requirements. A daily wager in the absence of a statutory provision in this behalf would not be entitled to regularization.(See State of U.P. v. Ajay Kumar and Jawahar lal Nehru Krishi Vishwa Vidyalaya V. Bal Kishan Soni).

29. I may be true that the appellants had been later on put on a monthly salary but there is nothing on record to how as to how the same was done. They might have been subjected to the provisions of the employees' provident fund and might have been granted the benefit of leave or given some employment code and their names might have found place in the seniority list amongst others, but thereby they cannot be said to have been given a permanent ticket. The so-called seniority list which is contained inAnnexureP-27, whereupon strong reliance has been placed by Dr. Dhavan merely itself goes to show that it was prepared in respect office muster employees. The said seniority list was not prepared in terms of the classification of employees within the meaning of the 1961 Actand the Rules framed thereunder but was based on the date of joining probably for the purpose of maintenance of records. The 1973 Actor the Rules framed thereunder do not provide for appointments on ad hoc basis or on daily wages. The 1961 Act itself shows that the employees are to be classified in six categories, namely permanent, permanent seasonal. Probationers, badlies, apprentices and temporary. The recruitments of the appellants do not fall in any of the said categories. With a view to become eligible to be considered as a permanent employee or a temporary employee, one must be appointed in terms thereof Permanent employee has been divided in two categories (i) who had been appointed against a clear vacancy in one or. more posts as probationers and otherwise; and (ii) whose name had been registered at muster roll and who has been given a ticket of permanent employee. A "ticket of permanent employee" was, thus, required to be issued in terms of Order 3 of the Standard Standing Orders. Grant of such ticket was imperative before permanency could be s claimed. The appellants have not produced any such ticket.

33. For the purpose of this mater, we would proceed on the basis that the 1961 Act is a special statute vis-a-vis the

1973 Act and the Rules framed thereunder. But in the absence of any conflict in the provisions of the said Act, the conditions of service including those relating to recruitment as provided for in the 1973 Act and 1987 Rules would apply. If by reasons of the latter, the appointment is invalid, the same cannot be validated by taking recourse to regularization. For the purpose of regularization which would confer on the employee concerned a permanent status, there must exist a post. However, we may hasten toad that regularization itself does not imply permanency. We have use the term keeping in view the provisions of the 1963 Rules.

34. We have noticed the provisions of the Act and the Rules. No case was made out by the appellants herein in their statements of claims that they became permanent employees in terms thereof There is also nothing on record to show that such a claim was put forward even in the demand raising the industrial dispute. Presumably, the appellants were aware of the statutory limitations in this hehalf Furthermore, the Labour court having derived its jurisdiction from the reference made by the State Government, it was found to act within the four corners thereof It could not enlarge the scope of the reference nor could deviate therefrom. A demand which was not raised at the time of raising the dispute could not have been gone into by the Labour court being not the subject matter thereof.

35. The questions which have been raised before us by Dr.Dhavan had not been raised before the Lahour Court. The Labour Court in the absence of any pleadings or any proof as regards application of the /96/ Act and the 1963 Rules had proceeded on the basis that they would become permanent employees in terms of Orders 2 (ii) and 2 (vi) of the annexure appended thereto. The appellants did not adduce any evidence as re15ard\' nature of their employment or the classification under which they were appointed. They have also not been able to show that they had been issued any permanent ticket. Dr. Dhavan is not correct in his submission that a separate ticket need /lot he issued and what was necessary was merely to show that the appellants had been recognized by the State as its employees having been provided with employment code. We have seen that their names had been appearing in the muster rolls maintained by the respondent. The scheme of the employees' provident fund or the leave rules would not alter the nature and character of their appointments. The nature of their employment continues save and except a case where a statute interdicts which in turn would be subject to the constitution imitations. For the purpose of obtaining a permanent status, constitutional and statutory conditions precedent therefore must be fulfilled.

5. In such a situation the counsel for the petitioner submits that in view of the aforesaid fact, the award of the Labour Court as it relates to the directions issued ill the award regarding regularization of the services of the respondent no.2 is liable to be set a side

6. Further it has been submitted on behalf of the petitioner that the Labour Court ought to have dismissed the case of respondent no.2 on the ground of delay and has placed reliance upon the judgment of the Apex Court reported in

Judgment Today 2006 Vol. (1) SC Page 4].

7. On the other hand Sri B.N. Singh who appears for the respondents has submitted that admittedly respondent no.2 was appointed in the year 1980 and he is being treated as daily wager though various persons junior to the respondent no.2 have been regularized as such the Labour Court has passed an award directing the petitioner to regularize the services of the respondent workman from the date of award. Further submission has been made on behalf of the respondent that from the perusal of the reference by the State Government, it is clear that issue involved in the present case was that whether the action of the petitioner regarding non-declaration of workman as regular is an illegal and unreasonable and if so, what relief he is entitled and from what date he is entitled to be regularized. The reference-dated 23.9.1994 is being reproduced below:

"क्या सेवायोजकों द्वारा अपने कर्मचारी कल्याण शरन पुत्र स्व० शिवदत्त पद लिपिक को स्थायी श्रमिक घोषित न किया जाना अनुचित एवं अवैधानिक है? यदि हां तो सम्बन्धित कर्मचारी का क्या लाभ/अनुतोष (रिफिल) पाने का अधिकारी है किस तिथि एवं अन्य किस विवरण सहित ?"

8. It has also been argued on behalf of the respondent that in view of the provisions of the Act, the action of the petitioner amounts to unfair labour practice. In such a situation the respondents submit that the writ petition is liable to be dismissed. Reliance has been placed upon a judgment reported in AIR 1987 SC 117, **Chandravalkar Vs. Ashalata P.S. Gauram** and has submitted that the Apex: Court has clearly held that if there is a finding of fact recorded by the Court. there should not be any interference by the Highcourt. Further reliance has been placed upon 1978 Labour and Industrial Cases 437 **M/S Swadeshi Cotton Mills Ltd. Vs. Labour Court** and has placed reliance upon paras 11,15 and 16 of the said judgment which are reproduced below:

"11.So far as the finding recorded by the Labour Court that the work of operating comptometer machine in petitioner's establishment is different from that of a clerk and that a clerk cannot fully operate such a machine unless he undergoes training for it is concerned, it is a finding of fact recorded on the basis of evidence produced in the case. The petitioners cannot question the correctness of this finding in a petition under Article 226 of the Constitution. On this finding, no exception can be taken to the conclusion of the Labour Court that the clerks who operate comptometer machine should he designated as camptometer operators-cum-clerks and should be paid salary in a pay scale higher than that is applicable to clerks.

15. Art. 226 of the Constitution as it stands after amendment made by the Constitution 42 Amendment Act 1976, empowers the High Court to issue writs for the following purposes only and for no other purpose:

(a) For the enforcement of any of the right conferred by the provisions of part III; or
(b) For the redress of any injury of a substantial nature by reason of the contravention of any other provision of the Constitution or any provision of any enactment or ordinance or any

order, rule, regulation, bye-law or other instrument made thereunder; or

(c) For the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-cl (b) where such illegality has resulted in substantial failure of justice. It is not the case of the petitioner that the impugned award has the effect of contravening rights conferred by Part III of the Constitution. He has also not been able to show that while making the award. The labour court has contravened ay provision of the Constitution or that of any enactment or ordinance, order, rule, regulation, bye-law or other instrument made thereunder. The case therefore does not fall either under cl. (a) or (b) of Art. 226 mentioned above. If at al!, the petitioner's grievance relates to some illegality alleged to have been committed by the Labour court· as envisaged by cl. (c) mentioned above. Redress for an injury as contemplated by cl. (c) mentioned above, can be granted in a petition under Art. 226 of the Constitution only where the illegality complained of has resulted in substantial failure of justice. Even assuming that as alleged by the petitioner the Labour Court was not justified in fixing the wages of the workmen in the pay scale of Rs.130/- to 352/- merely on the basis of the award given by it in 1ndustrial Dispute Case No. 72 of 1971, in as much as the industry run by British India Corporation in that case was not comparable to the Textile Mill run by the petitioner, and also because that award has since been set aside by the High court by its judgment D/- 28-10-1977 in writ petition no. 6710 of 1972(AIl), it will not be possible for this court to interfere with the impugned award unless it comes to the conclusion that there has been substantial failure of justice. Accordingly, we proceed to examine as to whether or not the award in this case has resulted in a substantial failure of justice.

16. A perusal of the impugned award shows that the clerical staff, in petitioner's establishment was drawing salary in the pay scale of Rs. 105/- to 313.75. As already indicated the Tribunal has found that the workman in question who were required to operate comptometer machines were to do work which was different from clerical work and that such workmen deserved a salary higher than that of a clerk. This is a finding of fact which cannot be interfered with in a petition under Art.226 of the constitution. Accordingly, the salary of the concerned workmen had to be fixed in a scale higher than the pay scale of Rs.1 05-313.75. The report of the Commissioner clearly shows that in other textile mills at Kanpur (it cannot he denied that those textile mills were engaged in an industry similar to that of the petitioner) pay scales applicable to similar workmen ranged between rs.6-/- to Rupees 268 and Rupees /50/- to Rupees 400/-. Accordingly, the salary of the workmen working on comptometer machines in petitioners establishment had to be fixed somewhere between the pay scale ranging between Rs.1 05/- to 31. 3.75, and Rs.150/- to Rupees 400/- Considering that in the case of petitioner's establishment, the workmen in question had to operate comptometer machines for about six hours, out of total

of eight hours per day, it cannot be said that in fixing the salary of the concerned workmen in the pay scale of Rs.130/-to 352 which lies almost mid-way in the pay scales of Rs.I05/- to Rs.313. 75 and Rs.150/- to Rs.400/- has resulted in any substantial failure of justice. It is therefore, not necessary for us to go into the question whether or not the tribunal has committed any illegality in relying upon the award given by the Labour Court in Industrial Dispute A case No.72 of 1971 specially when it has since been set aside,. In the view which we have taken, the fact that the award made by the Labour Court Kanpur in Industrial Dispute case No. 72 of/971 has been set aside by the High Court is not material and the application for amendment filed by the petitioner on 21.11.77 deserves to be rejected.

9. Reliance has also been placed upon the judgment or the Apex Court in 1996 Labor and Industrial Cases 967, **Chief Conservator of Forest Vs. Jagannath Kondhare** and has placed reliance upon paras 16 to 19 of the said judgment which are reproduced below:

"16 The aforesaid heing the crux of the scheme to implement which some of the respondents were employed, we are of the view that the same cannot be regarded as a part inalienable or inescapable function of the state f(H the reason that the scheme was intended even to fulfill the recreational and educational aspirations of the people. We are in no doubt that such a work could well be undertaken by an agency which is not required to be even an instrumentality of the State.

17. This being the position, we hold that the aforesaid scheme undertaken by the Forest Department cannot be regarded as a part of sovereign function of the State, and so, it was open to the respondents to invoke the provisions of the state Act. We would say the same qua the social foresting work undertaken in Ahmednagar district. There was, therefore, no threshold bar in knocking the door of the Industrial Courts by the respondents making a grievance about adoption of unfair labour practice by the appellants.

18. This takes us to the second main question as to whether on the facts of the present case would it be held that the appellants were guilty of adopting unfair labour practice. As already pointed out, the respondents alleged the aforesaid act by relying on what has been stated under item6 of Schedule IV of the State Act which reads as below:

"To employ employee as "badlis ", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees. "

I9. The Industrial court has found the appellants as having taken recourse to unfair labour practice in the present cases because the respondents-workmen who had approached the Court had admittedly been in the employment of the State for 5 to 6 years and in each year had worked for period ranging from 100 to 330 days. Ms. jaising draws our attention in this context to the statement filed by the appellants themselves before the Industrial Court, a copy of which is at pages 75 to 76 of CA. No. 4375/90. A perusal of the same shows that some of the respondents had worked for a few days only in 1977 and 1978, though subsequently they themselves had worked for longer period, which in case of Gitaji

Baban Kadam, whose name is at serial No.4 went up to 322 in 1982, though in 1978 he had worked for 4-1/2 days. (Similar is the position qua some other respondents.)

10. Further reliance has been placed on a division bench judgment of Gujrat High Court reported in LLR 1993 Page 45, **Kalol Munisipalitv and another Vs. Shantabem Kalidas** and others and has placed reliance upon paras 12 and 13 of the said judgment. The same are reproduced below:

"12. It is contended that the Tribunal ought not to have given direction, implementation of' which would require sanction of another authority, namely, the State Government of Gujarat. The argument is based on assumption that the direction given by the Tribunal cannot he implemented without the sanction of the State Government. There is no provision in the Municipal Act to which our attention is drawn by the learned Counsel for the petitioners that the award passed by the Labour Court or Industrial Tribunal cannot be implemented by the Municipality without the sanction of the State Government. However, it is contended that if the Municipality wished to change its permanent set up it would be required to amend the rules framed under Section 271 (d) of the Municipal Act. Proviso (a) to Section 271 of the Municipal Act inter alia provides that no rule or alteration or rescission of a rule made under this section shall have effect unless and until it has been approved by the State Government. Therefore, it is contended that unless the rules are altered and the same is approved by the State Government, the Municipality cannot treat the respondent-workmen as permanent employees.

13. As indicated hereinabove, the direction that may be given by the Labour Court or the Tribunal while deciding an industrial dispute may enable the Municipality to amend the rules framed by it under Section 271 of the Municipal Act. But if there is no provision in the rules or that the permanent set up fixed by the Municipality is already determined and the same is limited it cannot be set up as a defence by the Municipality that the Labour Court or the Industrial Tribunal cannot give direction which is not ill conformity with the rules framed by it. The rules framed by the Municipality are unilaterally framed without involving the workmen employed by it. Even the procedure for framing the rules laid down under, the Act, no where provides that the employees or representatives of the employees engaged by the Municipality shall be consulted at any stage before the rules are framed and got approved by the State Government. Thus unilateral determination of the number of staff by the Municipality cannot bind the workmen engaged by it. Such unilateral decision about the number of staff cannot truncate the powers of the Labour Court or that of the Industrial Tribunal to adjudicate the dispute referred to it in accordance with the provisions of the Act. In fact in many cases the root of the dispute would be the faulty determination of the number of permanent staff of the Municipality. If the argument is accepted it would amount to saying that unless the Municipality alters or amends its rules and increase the number of permanent staff and gets the approval of the State Government no workmen can be ordered to be made permanent or can be ordered to be given

permanency benefits by the Labour Court or the Industrial Tribunal as the case may be. If the argument is accepted if would lead to unreasonable and absurd consequences. It would amount to saying that no dispute is raised by workmen engaged by a Municipality in respect of which there is no provision in the rules framed by the Municipality. Moreover, even if such dispute is raised the Labour Court or Industrial Tribunal will have no power to give any direction to a Municipality which is not in conformity with the provisions of the rules framed by the Municipality. In short if 'would amount to saying that the unilateral decisions that may be taken by the Municipality while framing its rules would determine the scope of powers of the Labour Courts or Industrial tribunals.

Obviously, such intention could never he imputed to the legislature when it enacted the provisions ojSection271 of the Municipal Act and the relevant provisions of the J.D. act.

11. Reliance has also been placed upon a judgment of this Court reported in1997 (75) FLR Page 65 and has submitted that this Court has held that as the reference was made for deciding the scale and question of creation of post also impliedly referred, as such the same is ancillary to the reference and the writ petition filed by the employer was dismissed.

12. In view of the aforesaid fact the counsel for the respondents submitted that the Labour Court has no option except to decide the dispute in accordance with the reference made before him and the Labour Court has on the basis of the aforesaid reference come to the conclusion that the workman is admittedly working in the petitioner's organization continuously from 1.9.1990 to 6.8.1993 and he was also paid bonus for the year 1993-94.

A finding of fact has also been recorded that from the perusal of the muster roll it is also clear that the workman has completed above 240 days in one calendar year. The finding to this effect has also been recorded that junior to the workman respondent no.2 namely, Bachchu Singh and Anil Kumar Mishra have been confirmed. The story set up by the employer has also been disbelieved by the Labour Court that various persons senior to the respondent no.2 has not' been regularized. A finding of tact has also been recorded by the Labour Court that the workman is entitled to get the salary according to his work on the post on which he is working and as such he is also entitled for regularization.

13. I have heard the learned counsel for the petitioner and the 'Standing Counsel and have also perused the record. From the record it is clear that admittedly the respondent workman was first time engaged in the year 1980and is working continuously. There is no denial by the employer to this effect. A finding to this effect has also been recorded by the Labour Courtthat junior persons to respondent no.2 have been made regular. The Labour Court has also recorded a finding to this effect that some daily wagers had approached the High Court and th0igh Court has directed to consider their claim and various persons on the basis of the order passed by the High Court have been regularized. A finding to this effect has also been recorded by the Labour Court that from July 1980 to August 1983 respondent no.2 has worked

on the post of Lab. Assistant I Attendant and the post of Lab Assistant is in the nature of permanent and from the record it also appears that there is not break in the service of respondent no.2. The Court has a perused the reference. From the reference it is clear that the Labour Court has answered the reference, which was referred to the Labour Court. It is now well settled that in view of the judgment of the Apex Court reported in2005 SCC (L&S) 154, **Mahendra Lal Jain Vs. Indore DevelopmentAuthority** that the Labour Court can only decide the dispute referred to it and the Labour Court has got no jurisdiction to go beyond it. In such a way the Labour Court has decided the dispute according to the reference made before him. The Labour Court is bound to decide the said issue.

14. In the case of **The Workmen of Bhurkunda Colliery of MIS Central Coalfields Ltd. V. The Mana2ement of Bhurkunda Collie" of MIS Central Coalfields Ltd.** reported in JT 2006 (2) SC 1 the Apex Court has held that if the Labour court has passed an ord34r on the basis of evidence on record regarding continuous service and has directed for regularization, there is no necessity for interference. In paragraphs 21 and 22 the Apex Court has observed as under:

"21. The industrial jurisprudence, likewise, seeks to evolve a rational synthesis between the conflicting scheme of the employers and employees. In finding out solutions to industrial disputes great care is always taken, as it ought to be, to see that the settlement of industrial disputes does not go against the interests of the community as a whole. In the decision of major industrial disputes, three facts are thus involved. The interests of the employees which have received constitutional guarantees under the Directive Principles, the interests of the employers which have received a guarantee under Article /9 and other Articles of Part III, and the interests of the community at large which are so important in a Welfare State. It is on these lines that industrial jurisprudence has developed during the last few decades in our country.

22.When we modulate our thinking process and attitude according to the underlying philosophy of industrial and labour jurisprudence and apply the laws meant for industrial peace and harmony, then the conclusion becomes irresistible that the employees who have been working since 1973-74 are required to be regularized as expeditiously as possible. "

15. After perusal of the judgment passed by the Labour Court it is clear that the Labour Court has considered each and every aspect and has come to the conclusion that in spite of the fact that respondent workmen is working from 1980-and is being treated as daily wager, this clearly amount to unfair labour practice. The finding recorded by the Labour Court is a finding of fact in view of the judgment reported in 2005 (3) SCC 193, **Management of Madurakattam' Cooperative Sugar Mills ltd. Vs. S. Vishwanathan,** the Apex Court has clearly held that there is very little scope of interference in the finding recorded by the Labour Court. The finding recorded by the Labour Court is a finding of fact and unless and until it is proved beyond doubt that the Labour Court has exceeded its jurisdiction and the finding recorded by the Labour Court is against the evidence on record and is perverse then

the High Court while exercising the jurisdiction ~ under Article 226 of the Constitution of India has the jurisdiction to Interfere otherwise there is very little scope for interference.

In view of the aforesaid fact, I find no merit in the writ petition and the writ petition is hereby dismissed. There shall be no order as to costs. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2005

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

Civil Misc. Writ Petition No. 50577 of 2005

Chokhey Lal ...Petitioner
Versus
Board of Revenue, U.P. Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Harish Chandra Singh

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

U.P.Z.A. & L.R. Act-Section 122-B(4-F)- Petitioner being to Dhobi (Washer man) by caste-seeking benefit of the provision u/s 122-B (4-F) continuous possession over the plot in questionr-none of the courts below recorded findings regarding agricultural labourer-remand order by Board of Revenue-held-proper.

Held: Para 3

The order of remand was rightly passed in accordance with law. Now the petitioner will get full opportunity to establish that he is entitled to get benefit of Section 122-B(4-F) of the U.P.Z.A. & L.R. Act.

Case law discussed:
2003 (94) RD-538

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

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

Petitioner claims benefit of Section 122-B (4-F) of the U.P.Z.A. & L.R. Act.

2. None of the authorities below recorded finding whether petitioner is an agricultural labourer. The Board of Revenue after considering the entire material on record remanded matter to the Trial court to determine whether petitioner is an agricultural labourer as defined under Section 122-B(4-F) of the U.P.Z.A. & L.R. Act.

3. The order of remand was rightly passed in accordance with law. Now the petitioner will get full opportunity to establish that he is entitled to get benefit of Section 122-B(4-F) of the U.P.Z.A. & L.R. Act.

4. The case law cited by the learned counsel for the petitioner reported in 2003 (94) R.D. 538 Manorey @ Manohar Vs. Board of Revenue and others also supports the order of the Board of Revenue. This judgment also makes it clear that the relief could only be granted to a person, if it is established that he belongs to Scheduled Caste and is an agricultural labourer.

5. There was no finding of the authorities below that petitioner is an agricultural labourer. The report of the Lekhpal too states that petitioner belongs to Dhobi Caste, but this report does not

state that petitioner is an landless agricultural labourer. The case law cited by the petitioner will support the order of Board of Revenue.

6. However, in the facts and circumstances of the case, I direct that the Trial court shall decide the matter expeditiously.

With above direction, writ petition is finally disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2005

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

Special Appeal No. 870 of 2005

Zakir Hussain Constable No.901310895
...Appellant/Petitioner
Versus
The Commandant, 66th Battalion, Central Reserve Police Force B.R.S. Nagar, Ludhiana ...Respondent

Counsel for the Appellant:
Sri Manish Kumar Nigam
Sri Rahul Sahai

Counsel for the Respondent:
Sri Ajit Kumar Singh

Central Reserved Police Force Rules 1949-rule 9 (F)-dismissal on the ground of desertion-working under C.R.P.F. absent for 82 days-Inquiry officer submitted report-total exoneration with finding about no intention of desertion-being confusal state of mind-disciplinary authority imposed punishment-taken different view than the inquiry officer-No opportunity of hearing given-Order quashed maintaining findings of inquiry - in the light of observations made above.

Held: Para 5

It is absolutely iniquitous as held by the Supreme Court, for the disciplinary authority to reverse a favourable finding behind the back of the person who is to suffer final and heavy civil consequences. On the basis of this legal reason, the order under appeal is set-aside. The order of the Inquiry Officer, C.B. Baisoya, will remain on the record and shall not be interfered with in any manner. The order of the Commandant, R.C. Puri, dated 19th December, 1992 is cancelled and set-aside. The Commandant now in charge and jurisdiction will re-decide the matter on the basis of Balsoy's report and in accordance with law as indicated above.

Case law discussed:
1988 (7) SCC-84
2003 (2) SCC-449 SC

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

1. In this case the writ petitioner-appellant, Zakir Hussain, was serving in the Central Reserved Police Force at the material time. He was absent for 82 days. His case was that he had gone to play football match for the C.R.P.F. at Durgapur but he had to desert and attend to his ailing father, who was suffering from serious illness of infective hepatitis. One C.B. Baisoya D/C was appointed the Inquiry Officer. He submitted a report totally exonerating the writ petitioner. It was concluded that he did not have any intention of desertion; that he was only in a confused state of mind; that he should be given the benefit of doubt; that no act of gross misconduct or disobedience under Section 9 (f) of the C.R.P.F. Rules, 1949 had been proved.

2. As required by sub Rule (c) (6) of Rule 27 this inquiry, not being held by the Commandant, was forwarded by way of

the report to the Commandant, who was compelled under the said rule to record his findings and pass order.

3. The Commandant, Mr. R.C. Puri, recorded findings flatly contradctory to the findings of the Inquiry Officer. He held that the articles of the charges have been proved against Zakir Hussain, that he failed to reply the official correspondence and that he was thus guilty beyond any shadow of doubt. The Inquiry Officer, Baisoya, had also noted that Zakir Hussain had not received the letter of E/66 as he had gone to see his father in Calcutta.

4. The Supreme Court has laid down in the case of ***Punjab National Bank and others Vs. Kunj Behari Mishra***, reported at (1998) 7 SCC 84 and also in the case of the ***State Bank of India and others Vs. K.P. Narayanan Kutty***, reported at (2003) 2 SCC 449 that where the disciplinary authority empowered to impose punishment proposes to differ radically from the report given by the fact finding Inquiry Officer then and in that event, even if the concerned rule does not specifically require so, the punishment imposing authority is bound once again to hear the delinquent officer and he has to be given a second opportunity to defend both himself and the favourable report which he has obtained from the Inquiry Officer.

5. It is absolutely iniquitous as held by the Supreme Court, for the disciplinary authority to reverse a favourable finding behind the back of the person who is to suffer final and heavy civil consequences. On the basis of this legal reason, the order under appeal is set-aside. The order of the Inquiry Officer, C.B. Baisoya, will remain on the record and shall not be interfered with in any manner. The order of the Commandant, R.C. Puri, dated 19th December, 1992 is cancelled and set-aside. The Commandant now in charge and jurisdiction will re-decide the matter on the basis of Balsoy's report and in accordance with law as indicated above.

6. Until such decision is given, the writ petitioner-appellant shall be treated to be in service and shall be allowed to serve and draw pay; unless any adverse finding is recorded against the writ petitioner within a period of six weeks from the date hereof, it will be deemed that the Commandant has not reversed the finding of exoneration given by Baisoya and in that event all the arrears of the writ petitioner-appellant will be paid to him within three weeks thereafter.

7. The special appeal is allowed accordingly. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED; ALLAHABAD 15.07.2005

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

Criminal Misc. Application No.5779 of 1999

Smt. Begum and another ...Applicants
Versus
State of U.P. & another...Opposite Parties

Counsel for the Applicants:
Sri Anurag Khanna

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

Code of Criminal Procedure-S-482-Quashing of charge sheet and Criminal

proceeding-offence under Section 498-A,304-B, 201 I.P.C.-Trail of husband separated from the applicant-the mother-in-law and sister-in-law of the acquittal of husband at deceased the stage of framing charges-evidence produced in case of husband and applicant are common-deceased died due to prolong illness being a case of natural death-if the applicants relegated to the Trail Court to raise objection-on the basis of acquittal at the stage of framing charges-held-against the dictum of Apex Court-will amount to harassment-charge sheet along with criminal proceedings quashed.

Held: Para 6

In the circumstances, I agree with the argument of the counsel for the applicants that in case the applicants are relegated to the trial court to raise objection on the basis of acquittal at the stage of framing of the charge, it is against the dictum of the Apex Court in the case of State of Orissa Vs. Debendra Nath Padhi. It is also noteworthy that since the husband has been acquitted by the trial court for the reason that all the witnesses have been declared hostile and a finding has been recorded that the deceased died due to prolonged illness and it was a natural death, it is obvious that the fate of the trial of the present applicants will be the same and the proceedings if allowed to continue, will amount to harassment of the present applicants, no good result can come out even if the applicants are permitted to stand the trial. Since the Apex Court has said that the proceedings could be quashed if the material is produced before the High Court while exercising jurisdiction under Section 482 of the Code or 226 of the Constitution is of such a sterling quality and unimpeachable character then the Court is well within its right to quash the proceedings.

Case law discussed:

1996 (9) SCC-766
AIR 2005 SC-359

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

1. Heard learned counsel for the applicants and learned A.G.A.

2. Notices were issued to the opposite party no. 2 and office report dated 28.4.2005 shows that it has been returned back after service. The opposite party no. 2 has not put in appearance despite notices having been served. In the circumstances, I proceed to decide this application finally.

3. The applicants Smt. Begum and Rukhsana are mother-in-law and sister-in-law respectively. The son of the applicant no. 1 Shah Alam was married to Smt. Gulshan daughter of the opposite party no. 2 on 23.4.1998. Smt. Gulshan died on 10.6.1999. It has been submitted on behalf of the applicants that the death was due to prolonged illness and all the family members participated in her funeral. However, a first information report was lodged against the applicants and husband Shah Alam, under Section 498-A, 304-B,201 I.P.C. and 3/4 Dowry Prohibition Act. The case was registered at case Crime No. 14 of 1999. A copy of the F.I.R. has been annexed as Annexure-2 to the affidavit. The trial of the husband Shah Alam was separated from the applicants and it proceeded as Sessions Trial No.889 of 1999 in the court of VIIIth Additional Session Judge, Meerut. The trial ended in an acquittal and judgment was passed on 23.10.1999. A copy of the judgment has been annexed as Annexure-3 to the affidavit. The argument on behalf of the applicants is that since the husband has been acquitted, the charge sheet and proceedings arising out of the same case crime number is liable to be quashed.

4. I have gone through the judgment passed in Sessions Trial No. 889 of 1999 and on perusal of the same, it appears that all the witnesses produced by the prosecution were declared hostile and the learned Sessions Judge passed the judgment of acquittal coming to a conclusion that Smt. Gulshan died on account of illness and not in any abnormal circumstances, as such a clear order of acquittal was recorded. After hearing counsel for the applicants and learned A.G.A., it is evident that the police has submitted a charge sheet against the present applicants which is sought to be quashed in this application arising out of same F.I.R. in respect of which a judgment of acquittal has been passed in favour of the husband. In fact the evidence, which was produced in the Sessions Trial No. 889 of 1999, is common in the case of the applicants vide case No.13723/9/99. Previously the sessions court could consider the defence evidence at the stage of framing of the charge and if the court was of the view that there are sufficient grounds which goes to show that eventually the trial will end into an order of acquittal, the court could discharge. The position is not the same, the Apex Court has overruled the decision in the case of **Satish Mehta Vs. Delhi Administration (1996) 9, SCC 766**. It was ruled in the case of Satish Mehta (Supra) which was the decision of the two Judges Bench that if the accused succeeds in producing any reliable material at the stage of taking cognizance or framing of charge, which might fatally effect even the very sustainability of the case, then the court should look into those materials. It was ruled that Section 227 of the Code do enable the court to decide whether it is necessary to proceed to conduct the trial, meaning thereby the accused was not debarred from showing any material which could be said to be a defence at the stage of framing of the charge and in case the court was of the view that the accused were liable to be discharged on the basis of such material, it was fully competent to do so.

5. This decision has now been ruled by three Judges Bench in the case of **State of Orissa Vs. Debendra Nath Padhi, A.I.R. 2005 Supreme Court 359.** The Apex Court has very clearly refuted the argument on behalf of the accused and held that it would defeat the object of the court if the accused is permitted to adduce defence evidence at the stage of Section 227/228 Cr.P.C. It is further said that at the stage of framing of charge, the defence of the accused can not be put forth. This has never been intention of the law, Section 227 Cr.P.C. is to be understood to mean the hearing of the submission of the accused on the record of the case as filed by the prosecution and document submitted therewith and nothing more. In the circumstances, at the stage of framing of the charge, the judgment of acquittal passed in favour of the husband (Shah Alam) can not be looked into by the trial court and therefore, paragraph 29 of the aforesaid judgment of the Apex Court has been placed before me to lay emphasis that while parting with the judgment, the three Judges Bench of the Supreme Court observed that in such a case High Courts can exercise inherent powers. Paragraph 29 is quoted below:-

"*Regarding the argument of accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the*

High Court under Section 482 of the Code and Article 226 of Constitution of India is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal's case."

6. In the circumstances, I agree with the argument of the counsel for the applicants that in case the applicants are relegated to the trial court to raise objection on the basis of acquittal at the stage of framing of the charge, it is against the dictum of the Apex Court in the case of State of Orissa Vs. Debendra Nath Padhi. It is also noteworthy that since the husband has been acquitted by the trial court for the reason that all the witnesses have been declared hostile and a finding has been recorded that the deceased died due to prolonged illness and it was a natural death, it is obvious that the fate of the trial of the present applicants will be the same and the proceedings if allowed to continue, will amount to harassment of the present applicants, no good result can come out even if the applicants are permitted to stand the trial. Since the Apex Court has said that the proceedings could be quashed if the material is produced before the High Court while exercising jurisdiction under Section 482 of the Code or 226 of the Constitution is of such a sterling quality and unimpeachable character then the Court is well within its right to quash the proceedings.

7. After going through the entire record, I am of the view that the charge sheet filed in case Crime No. 145 of 1999 against the present applicants should be quashed as the Sessions Trial No. 889 of 1999 arising out of the same case crime number ended into a clear acquittal. The present charge sheet and proceedings in Criminal Case No. 13723/9/99 arising out of case Crime No. 145 of 1999, under Section 498-A, 304-B, 201 I.P.C. and 3/4 Dowry Prohibition Act, Police Station Jani, District Meerut, pending in the court of Chief Judicial Magistrate, Meerut, if allowed to continue, it is nothing short of abuse of process of the court and therefore, in the circumstances, the same is quashed to meet the ends of justice.

The application is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 7138 of 2005

Prem Krishna Sriavastava ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Singh Rajpoot

Counsel for the Respondents:
S.C.

U.P. Civil Service Regulations-Regulation-351-A- Disciplinary Proceeding-after retirement-on the ground of financial irregularity-after issuing show cause notice-Disciplinary proceeding initiated-No prior permission taken from governor-disciplinary proceeding quashed-direction issued to release the withheld amount within 3 month failing which 12% interest may be paid.

Held: Para 8

In view of the aforesaid, I find that the disciplinary proceedings initiated against the petitioner after his retirement was ex-facie, illegal as it did not have the sanction of the Governor. Consequently, the petitioner is entitled to be relief as moulded during the course of the hearing of the writ petition. Since no previous permission was obtained from the Governor, the disciplinary proceedings initiated against the petitioner is quashed. The amount withheld from the gratuity is liable to be paid to the petitioner. Consequently, a mandamus is issued directing the respondents to release the balance amount of the gratuity within three months from the date of production of the certified copy of this order. If the amount is released within the aforesaid period, no interest would be payable. However, if the amount is not paid within the aforesaid period, interest would be payable at the rate of 12% per annum from the date of withholding the amount till the date of payment. In the circumstances of the case, parties will bear their own costs. Writ petition stands allowed.

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

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

2. The petitioner retired from service on 31.12.1998. After his retirement, a show cause notice dated 27.9.1999 was issued and on this basis, a charge sheet dated 8.11.1999 was issued alleging a financial loss of Rs.36,517/- on the department. Thereafter, a departmental inquiry in pursuance of the charge sheet was initiated against the petitioner. This enquiry is still pending even after a lapse of six years.

3. The petitioner has filed the present writ petition praying that the amount of Rs.36,517/- had been illegally withheld from the gratuity of the petitioner and that this amount could not be withheld after the petitioner had retired since no previous sanction was obtained from the Governor under Regulation 351A of the Civil Service Regulations.

4. On the other hand, the learned standing counsel submitted that on the basis of certain audit objections, a charge sheet has been issued and that an enquiry is pending and, pending completion of the enquiry, a tentative amount of Rs.36,517/- has been withheld from the gratuity of the petitioner and, this amount has been withheld for the simple reason that, in the event, the petitioner was found guilty of the loss, the same would be recovered from the gratuity.

5. The question which arises for consideration is, whether this amount could be legally withheld from the gratuity that was payable to the petitioner upon his retirement? It is an admitted case, that no charge sheet or show cause notice was served upon the petitioner prior to his retirement. Regulation 351 A of the Civil Services Regulations contemplates that when a person has retired and disciplinary proceedings are to be initiated after his retirement, in that eventuality, such disciplinary proceedings could only be initiated after obtaining previous sanction from the Governor. Admittedly, from a perusal of the order dated 7.2.2000 issued by the respondents, it is clear that no previous sanction was obtained from the Governor.

6. The learned Standing Counsel further submits that Regulation 351A

contemplates the recovery of the amount from the pension, whereas, in the present case, the recovery has been sought from the gratuity, as such, Regulation 351A would not be applicable. In my opinion, the submission of the learned Standing Counsel is not correct. Regulation 351A of the Civil Service Regulations reads as follows:

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a special period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty or gave mis-conduct, or to have caused, pecuniary loss to government by misconduct or negligence, during his service, including service rendered on re-employment after retirement;

Provided that—

[a] such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

[i] shall not be instituted save with the sanction of the Governor."

Further, Regulation 41 of the Civil Service Regulations states as under:

"41. Pension- Except when the term "Pension is used in contradistinction to gratuity "Pension" includes Gratuity."

7. From the aforesaid of Regulation 41, it is clear that the usage of the word 'Pension' in Regulation 351A would include gratuity.

8. In view of the aforesaid, I find that the disciplinary proceedings initiated against the petitioner after his retirement was ex-facie, illegal as it did not have the sanction of the Governor. Consequently, the petitioner is entitled to be relief as moulded during the course of the hearing of the writ petition. Since no previous permission was obtained from the Governor, the disciplinary proceedings initiated against the petitioner is quashed. The amount withheld from the gratuity is liable to be paid to the petitioner. Consequently, a mandamus is issued directing the respondents to release the balance amount of the gratuity within three months from the date of production of the certified copy of this order. If the amount is released within the aforesaid period, no interest would be payable. However, if the amount is not paid within the aforesaid period, interest would be payable at the rate of 12% per annum from the date of withholding the amount till the date of payment. In the circumstances of the case, parties will bear their own costs. Writ petition stands allowed. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 49339 of 2005

Prem Jeet Singh Gujral ...Petitioner
Versus
Debt Recovery Appellate Tribunal and others ...Respondents

Counsel for the Petitioner:
Sri Sashi Nandan
Sri Anurag Jauhari

Counsel for the Respondents:
Sri Sanjeev Singh

Constitution of India, Art. 226-Writ Petition-maintainability-against the remand order passed by the Debt Recovery appellate Tribunal-order being interlocutory-can be challenged in appeal-petition not maintainable.

Held: Para 6

In view of the judgment of the Hon'ble Supreme Court the order of remand being an interlocutory order of the Court, which has not terminated the proceedings, and hence can always be challenged in an appeal from the final order by the petitioner after final judgment. The writ petition is accordingly dismissed. However, it shall be open to the petitioner to challenge the order of remand in an appeal from the final order as an when cause for same arises.

Case law discussed:
2005 (2) AWC-1305 (SC)
1981 (2) SCC-764
1960 (3) SCR-590

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

1. Heard Sri Sashi Nandan, Senior Advocate assisted by Sri Anurag Jauhari, Advocate on behalf of the petitioner, and Sri Sanjeev Singh, Advocate on behalf of respondent no. 2.

2. The Bank of Baroda, Fatehpur Main Branch though its Branch Manager (respondent no.2), which is a banking company duly constituted under the Banking Companies (Acquisition and Transfer of Undertakings), Act, 1970, filed a civil suit in the Judgeship of Fatehpur in the year 1995 for a money decree of Rs.28,41,263/-, against the principal-borrower, Sri Guru Bachan Singh as well as against the guarantor Sri Prem Jeet Sing Gujral. The suit was registered as Original Suit No. 84 of 1995. During the pendency of the said suit proceedings, a Tribunal was constituted under Section 3 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (hereinafter referred to as the 1993 Act) at Jabalpur. Accordingly the proceedings were transferred to the said Tribunal at Jabalpur. However, a Tribunal was constituted at Allahabad, the proceedings were therefore, transferred to the Tribunal at Allahabad under Section 31 of the 1993 Act.

3. The Presiding Officer, Debts Recovery Tribunal at Allahabad by means of the order dated 16th June, 2003 dismissed the suit filed by the Bank. Feeling aggrieved by the aforesaid order of the Presiding Officer Debts Recovery Tribunal, Allahabad the respondent-bank filed an appeal under Section 20 of the 1993 Act. The appeal was numbered as Appeal No. 323 of 2003. The Debt Recovery Appellate Tribunal, Allahabad by means of the judgment and order dated 3rd June, 2005 has allowed the appeal so filed by the respondent-bank and has remanded the matter for reconsideration to the Debt Recovery Tribunal, Allahabad. The said order of demand of the Debt Recovery Appellate Tribunal, Allahabad has been challenged by means of the present writ petition.

4. On behalf of the petitioner various pleas and grounds have been raised for the purposes of challenging the aforesaid judgment and order of remand passed by the Debt Recovery Appellate Tribunal, Allahabad.

5. However, this Court is not inclined to interfere with the order of

remand passed by the Debt Recovery Appellate Tribunal, Allahabad at this stage, inasmuch as the Hon'ble Supreme Court of India in its recent judgment in the case of **Mangla Prasad Tamoli (D) LRs. Versus Narvdeshwar Mishra (D) LRs. And others** reported in **2005 (2) AWC 1305 (SC) paras 13,14 and 15,** has held as follows:

"13. When we put to the learned counsel as to how, he could in the present appeal filed in the year 1999, challenge the order remand made by the judgment of the High Court on January 18, 1966 in Second Appeal No. 3033 of 58, the learned counsel drew out attention to the decision of this Court in **Kshitish Chandra Bose v. Commissioner of Ranchi, (1981) 2 SCC 764,** as authority for the proposition that an order of remand by the High Court being an interlocutory judgment, which did not terminate the proceedings, it is open to the aggrieved party to challenge it after the final judgment. This Court in **Satyadhyan Ghosal and others Vs. Smt. Deorajin Debi and another, (19960) 3 SCR 590,** under similar circumstances, took the view that an order of remand was an interlocutory judgment which did not terminate the proceedings and hence could be challenged in an appeal from the final order. This view was again reiterated in **K.C. Bose (Supra)** wherein it is observed (p.767)

"Mr. Sinha appearing for the respondent was unable to cite any authority of this Court taking a contrary view or overriding the decisions referred to above. In this view of the matter we are of the opinion that it is open to the appellant to assail the first judgment of the High Court and if we hold that this judgment was legally erroneous then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order of remand would become nonest."

14. Having considered the questions urged by the learned counsel, which appear to be backed by the two decisions of this Court, in the background of the facts of the case before us, we are satisfy that the appellants are entitled to succeed on both counts.

15. The trial court and the first appellate court had held that the suit for redemption brought by the plaintiff was premature and rightly dismissed it. It is the High Court, by its judgment dated 18.1.1966 in Second Appeal No.3033/58, which took an erroneous view that because of the plaintiff's advocate had stated that he would not seek delivery of possession before stipulated time (26.1.1968), the suit could be continued. It was on this wrong understanding of the legal position that the remand order dated January 18, 1966, came to be made by the High Court pursuant to which the appeal and further proceedings continued. If this remand order was bad in law, then all further proceedings consequent thereto would be non-est and have to be necessarily set aside. That the appellants are entitled to urge this point even at this point of time, is supported by the authority of this Court in Gangadhar (Supra)."

6. In view of the judgment of the Hon'ble Supreme Court the order of remand being an interlocutory order of the Court, which has not terminated the proceedings, and hence can always be challenged in an appeal from the final order by the petitioner after final

judgment. The writ petition is accordingly dismissed. However, it shall be open to the petitioner to challenge the order of remand in an appeal from the final order as an when cause for same arises.

7. It has been pointed out on behalf of the petitioner that the Presiding Officer Debt Recovery Tribunal, Allahabad has fixed today as the date for final hearing after remand. In the facts and circumstances of the Case it is provided that the petitioner may make a request to the Presiding Officer, Debts Recovery Tribunal, Allahabad for adjournment of the case to some other date so as to enable them to produce a copy of the order passed today before the Presiding Officer, D.R.T., Allahabad. On such request being made the Court has not room to doubt that the Presiding Officer, Debts Recovery Tribunal, Allahabad shall consider the request of the petitioner sympathetically. However, such adjournment may be granted for a week only.Petition dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2005

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

Criminal Misc. Writ Petition No. 2582 of 1998

Amar Nath Gupta and another
...Appellant/Petitioner
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Rajeev Gupta
Sri Dilip Kumar

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure- S-482- Quashing of Criminal Proceeding offence under N.D.P.S. Act admittedly 'Bhang'- recovered from the possession of applicant such narcotics substance not covered under N.D.P.S. No chance of conviction if proceeding allowed to continue nothing but short of abase of the process of the court charge sheet quashed.

Para 5 and 6

In the instant case, the allegations in the First Information Report is that the applicants were in possession of narcotics substance and the substance alleged by the prosecution is "Bhang", which is admittedly not covered under the N,D.P.S. Act. In the circumstances, there is no chance of conviction of the applicants by the Special Judge N.D.P.S. Act Etawah for the offence alleged against them and in case proceedings are allowed to continue, it is nothing short of abuse of the process of the court.

Thus it is absolutely clear that the second category is identical to the one detailed in R.P. Kapoor's case. The case at hand is admittedly covered under the categories carved out by the Apex Court detailed above. In the Circumstances, it is apparent that the proceedings against the applicants, if allowed to continue will only amount to harassment to the applicants and an abuse of the process of the court. In the circumstances, I come to the conclusion that there is no reason for continuation of the proceedings against the applicants. Thus in view of what has been discussed above and with a view to meet the ends of justice the charge sheet is quashed and the order dated 14.5.1998 issuing non-bailable warrants against the applicants is set aside. This application is accordingly, allowed.

Case law discussed:
1995 Alld- Criminal Ruling P-73
AIR 1960 SC-866
1982 (3) SCR-121
1991 (28) ACE-III (S.C.)

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

1. Heard learned counsel for the applicants and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed for quashing the entire proceeding in special criminal case no.32 of 1998, State Vs. Raj Bir and Amar Nath Gupta pending in the court of Special Judge, N.D.P.S. Act, Etawah. The applicants are, accused in the case registered at case crime no.176 of 1992 under Section 8/20 N.D.P.S. Act, Police Station Jaswant Nagar, Etawah. The First Information Report was registered on 20.6.1992 at 22:40 hours and the "occurrence is alleged to have taken place on 20.6.1992 at 21:30 hours. The recovery shown from possession of the applicants is of "Bhang". After completion of the investigation, police submitted final report n6: 7 of 1993 but the learned Magistrate refused to accept the final report and took cognizance, non bailable warrants were issued against the applicants vide order dated 14.5,1998, which is also under challenge. The applicants have submitted that after the First Information Report was lodged, the Sub Inspector proceeded with the investigation after converting the case under Section 60 Excise Act. Subsequently, on the direction of the Circle Officer, offence was investigated under the provisions of N.D.P.S. Act as well as under Section 60 Excise Act. The applicants have annexed Parcha of the case diary along with final report nO.7 of 1993 dated 18.4.1993 as annexure no.4 and 4-A to the affidavit. The order dated 14.5.1998 has been quoted in paragraph no.9 of the affidavit whereby non-bailable warrants were issued at the first instance.

3. Counsel for the applicants has argued that admitted position is only "Bhang" was recovered from possession of the applicants, which is not covered under the N.D.P.S. Act. In the circumstances, entire proceeding stands vitiated in law and is liable to be quashed. Counter affidavit has been filed by the State. It is admitted in paragraph no.8 of the counter affidavit that though the First Information Report was registered under Section 8/20 N.D.P.S. Act but the court had remanded the accused to jail custody under Section 60 Excise Act. However, it is admitted that "Bhang" which was recovered from possession of the applicants is not covered under the N.D.P.S. Act and the applicants are salesmen of the shop belonging to one Babu Ram and Rashmi Kumar, who have a valid licence for sale of "Bhang". Counsel for the applicants has cited a decision of this Court Samid Vs. State of V.P. 1995. Allahabad Criminal Rulings page 73, this decision is in a criminal appeal decided by this Court, where' it was held that "Bhang" is not covered under the Narcotics and Psychotropic drugs. In the circll1.nstances, possession of 'Bhang" does not constitute an offence within the meaning of provisions of Section 8/20 N.D.P.S. In the said case, it was held that possession of "Bhang" IS not an offence in view of the admitted position, sentence of the accused under Section 8/20 N.D.P.S. Act was set aside. After going through the entire record and hearing the respective counsels, it is evident that assuming each and every

words leveled by the prosecution, accepted to be correct, even then there is not even a remote chance of conviction of the applicants under the N.D.P.A. Act. Admitted position is that the applicants were salesmen in the shop owned by two persons, who were running the "Bhang" shop on the basis of a valid licence.

4. The Apex Court has held in a catena of decisions that where the charge leveled against the applicants if accepted as it is, chances of conviction are ab~01utely bleak then the Court in exercise of inherent powers can quash the proceedings. In the case of **R. P. Kapoor Vs. State of Puniab, A.I.R. 1960, S.C., 866,** three categories were carved out. Second category is

"(II) Where the allegations In the First Information Report or the complaint even If they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence 'arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is discloses or not?"

5. In the instant case, the allegations in the First Information Report is that the applicants were in possession of narcotics substance and the substance alleged by the prosecution is "Bhang", which is admittedly not covered under the N,D.P.S. Act. In the circumstances, there is no chance of conviction of the applicants by the Special Judge N.D.P.S. Act Etawah for the offence alleged against them and in case proceedings are allowed to continue, it is nothing short of abuse of the process of the court. Similar view has been envisaged in a number of other cases State of West Bengal and others Vs. Swapan Kumar Guha and others 1982 (3) SCR page 12 I, State of Haryana and others Vs. Chaudhary Bhaian Lal 1991 (28) ACC 111 (S.C.). The Apex Court has considered all the cases decided earlier and carved out seven categories in the case of Chaudhary Bhajan Lal (Supra). The very first category is

"Where the allegations made In the First information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused".

6. Thus it is absolutely clear that the second category is identical to the one detailed in R.P. Kapoor's case. The case at hand is admittedly covered under the categories carved out by the Apex Court detailed above. In the Circumstances, it is apparent that the proceedings against the applicants, if allowed to continue will only amount to harassment to the applicants and an abuse of the process of the court. In the circumstances, I come to the conclusion that there is no reason for continuation of the proceedings against the applicants. Thus in view of what has been discussed above and with a view to meet the ends of justice the charge sheet is quashed and the order dated 14.5.1998 issuing non-bailable warrants against the applicants is set aside. This application is accordingly, allowed. Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 6663 of 2005

Mukesh Singh Chauhan and others
...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioners:
Sri Y.K. Saxena

Counsel for the Respondents:
Sri Ravi Ranjan
Sri P.K. Prajapati
Sri Rajesh Kumar
Sri S.N. Singh
S.C.

Intermediate Education Act, 1921- Chapter II Regulation 20, Regulation 17(a) to (g) read with section 16 FF-(4)(5)- Appointment of L.T. grade teacher in minority institution after retirement of Regular L.T. grade teachers on 30.6.99 vacancy aroser on 2.9.99 management sought permission and granted by DIOS on 25.9.99 in 29.9.99 vacancy advertised in Amar Ujala as well as in statement on 6.10.2000 appointment and the intimation send DIOS for financial approval DIOS raised objection regarding post ought to have advertised on subject wise and not on category wise proceeding of selection not placed before DIOS the appointment was prior to the approval held the regulation 17 of chapter II are simply guidelines-an irregularity by selection committee such appointment can not be invalid provided the candidate otherwise eligible as per section 16-FF(u) consideration of DIOS during approval confined with minimum qualification and not otherwise order refusing approval quashed.

Case law discussed:
W.P. No. 35525 of 04
1994 AWC- 1108

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

1. Heard Sri Yogesh Kumar Saxena, the learned counsel for the petitioners, Sri Ravi Ranjan, the learned Standing Counsel appearing on behalf of respondent Nos. 1,2 and 3 and Sri Rajesh Kumar, Advocate holding the brief of Sri P.K.Prajapati, the learned counsel appearing for the respondent no.4.

2. Three teachers in L.T. Grade retired on reaching the age of superannuation on 30.6.99 in a minority institution known as Christian Inter College, Mainpuri. The vacancy arose on 1.7.1999.The Committee of Management vide letter dated 2.9.1999 sought permission from the District Inspector of Schools to advertise three posts in general subject. The District Inspector of Schools vide an order dated 25.9.19099 granted permission for advertising the posts and for the initiation of the selection process for the appointment of Assistant Teachers in L.T. Grade.

3. It transpires that an advertisement were issued in the Hindi Newspaper 'Amar Ujala' dated· 29.9.1999 and in the English newspaper 'Statesman' on 5.10.1999. Further, a Selection Committee was duly constituted and the said committee recommended the names of the petitioners for appointment as Assistant Teachers. The committee of management issued the appointment letters dated 6.10.2000 in favour of the petitioners and simultaneously sent the papers: to the District Inspector of Schools for financial approval.

4. It transpires that the District Inspector of Schools by an order dated 29.3.2003 refused to accord approval to the appointment of the petitioners on the ground that the advertisement was made after three months from the date of the occurrence of the vacancy and, therefore held that the selection was violative of Regulation 20 of Chapter the Regulations framed under the Intermediate Education Act 1921. The petitioners challenged the s '0 order of the District Inspector of Schools in Civil Misc. Writ Petition No.1940l of 2003, which was allowed by a judgment dated 4.10.2003 holding that the advertisement were made within the stipulated period of three months and remitted the matter back to the District Inspector of Schools to decide the matter afresh. The District Inspector of Schools by an order dated 19.1.2005 again rejected the claim of the petitioners on a variety of reasons. Consequently, the present writ petition.

5. The District Inspector of Schools in the impugned order has held that the advertisement was not issued as per the procedure contemplated under Regulation l7 [a] of Chapter II of the Regulations framed under the Intermediate Education Act and that the post ought to have been advertised subject wise instead of category wise. The District Inspector of Schools further held that the selection proceedings were against the provisions of Section 16-FF of the Intermediate Education Act read with Rule 17 [a] to 17 [g] of e Regulations under the Intermediate Education Act, and further held that the proceedings of the Selection Committee were not placed before the District Inspector of Schools. The District Inspector of Schools further found that the appointment given to the petitioners was prior to the approval sought from the District Inspector of Schools and therefore, the Committee of Management had committed a gross irregularity.

6. In my view, the District Inspector of Schools has proceeded on erroneous grounds and has gone on a witch hunt with the sole purpose of rejecting the claim of the petitioner for ulterior reasons best known to him. Initially, the District Inspector of Schools had refused to approve the appointments of the petitioners on the ground that the advertisement was made in violation of Chapter of the Regulations framed under the Intermediate Education Act and, now by the impugned order, has taken out new grounds, which were not available to him when the initial order was passed by him. In the opinion of the Court, the order passed by the District Inspector of Schools appears to be malafide.

7. Section 16-FF 0 f the Intermediate Education Act 1921 reads as follows:

"l6-FF. Savings as to minority institutions-

[1] Notwithstanding anything in sub-section [4] of Section 16-E, and Section 16-F, the Selection Committee for the appointment of a Head of Institution or a teacher of an institution established and adstered by a minority referred to in clause [1] of Article 30 of the Constitution shall consist of five members (including its Chairman) nominated by the Committee of Management:

Provided that one of the members of the Selection Committee shall--

a] in the case of appointment of the Head of an Institution, be an expert

selected by the committee of Management from a panel of experts prepared by the Director;

b] in the case of appointment of a teacher, be the Head of the institution concerned.

[2] The procedure to be followed by the Selection Committee referred to in sub-section (1) shall be such as may be prescribed.

3] No person selected under this section shall be appointed, uncles--

[a] in the case of the Head of an Institution the proposal of appointment has been approved by the Regional Deputy Director of Education ; and
[b] in the case of a teacher such proposal has been approved by the Inspector.

4] The Regional Deputy director of Education or the Inspector, as the case may be, shall not withhold approval for the selection made under this section where the person selected possesses the minimum qualifications prescribed and is otherwise eligible.
5]. Where the Regional Deputy Director of education or the Inspector, as, the case may be, does not approve of a candidate selected under this section, the committee of Management may, within three weeks from the date of receipt of such disapproval, make a representation to the directory in the case of the Head of Institution, and to the Regional Deputy Director of Education in the case of a teacher.

6] Every order passed by the Director or the Regional Deputy Director of Education on a representation under sub-section [5] shall be final."

Clause (4) of Section 16-FF indicates that the authority could not withhold the approval for the selection made where the persons selected possesses the minimum qualifications prescribed and was otherwise eligible. The impugned order does not speak about. The qualifications of the petitioners nor does it indicate that the petitioners did not possess the requisite qualifications. In the absence of a finding in t his regard, the District Inspector of Schools was therefore required to grant the approval of the appointments of the petitioners and could not go into the intricacies or irregularities alleged to have been made in the selection process, which otherwise did not exist, as would be clear hereinafter. In my opinion, the provision contemplated under Regulation 17 of Chapter II of the Regulations framed under the Intermediate Education Act; in my opinion, could not override Sub clause(4) of Section 16-FF of the Intermediate Education Act. In the opinion of the Court, Regulation 17 is only a guideline and any irregularity committed would not make a candidate ineligible when he was other wise eligible and qualified for an appointment as contemplated under Sub section [4] of Section 16-FF of the Act.

8. In **Karunesh Kumar Singh V s. State of U.P. and others** in Writ Petition No.35525 of 2004, decided on 27.5.2005, a learned Single Judge of this Court held-

"The scheme of the U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder for minority educational institutions provide for qualifications, eligibility and a method

of selection. Once these tests are satisfied, the approval of a teacher who is qualified and eligible cannot be withheld. Section 16FF (4) secures the guarantee under Article 30 (i) of the Constitution of India, and is in consonance with the rights of the minority to be established and administer educational institution. The Regulations are made under the Act. These cannot override or be inconsistent with the mandatory provisions of the Act. At best it may be said that the Regulation for minority institution are by way of guidelines to be followed for the benefit of the selection committee. Any further restriction namely, the assessment of comparative merit and to give reasons for selection from amongst those who are qualified and eligible will effect the choice of the selection committee and will infringe the freedom guaranteed under Article 30[i] of the Constitution of India."

9. I am in complete agreement with the aforesaid decision.

The District inspector of Schools further held that previous approval was not sought by the Committee before issuing the appointment letter. In **Smt. Ranjana Agrawal Vs. Regional lnspectress of Girls Schools, 1994 Awe - 1108** it was held that from a reading of the Regulations, it could not be inferred that no appointment could be made before an approval was granted by the District Inspector of Schools and that a candidate could be appointed in anticipation of the approval being granted by the District inspector of Schools.

10. From the aforesaid, it is clear that Regulation 17 of Chapter II of the Regulations framed under the Intermediate Education Act, are by way of guidelines to be followed by the Selection Committee and an irregularity committed by the Selection Committee could not make the appointments invalid, if the candidate was otherwise eligible as per section 16-FF [4] of the Intermediate Education Act 1921.

11. In case, the ground alleged by the District Inspector of Schools to the effect that the procedure evolved under Section 17 has been violated is patently erroneous. The impugned order indicates that the proceedings of the Selection Committee was not placed before the District Inspector of Schools. The petitioners in paragraph-8 of the writ petition had categorically stated that all the papers were sent to the District Inspector of Schools. This paragraph has not been denied by the respondent in paragraph-8 of the counter affidavit. The stand taken by the petitioners has also been supported by the committee of Management. In view of the aforesaid, the contention of the respondents that the proceedings of the Selection Committee were not sent to the District Inspector of Schools is patently erroneous.

12. In view of the aforesaid and in view of Sub-clause [4] of Section .16FF of the Act, which contemplates that the Power of the Regional Deputy Director of Education or the District inspector of Schools is restricted to withhold the approval of the selection made only when a candidate does not possess the prescribed minimum qualifications and is not eligible an In the absence of any finding of this aspect by the authority, the Court is of the opinion, that the impugned order cannot be sustained, and is, therefore quashed. The writ petition stands allowed.

13. It is pointless to send the matter back to the District inspector of Schools for reconsideration, as on two occasions the District inspector of Schools has gone on a witch hunt and rejected the claim of the petitioner. Consequently, a mandamus is issued to the District Inspector of Schools, Mainpuri, respondent no.3 to grant approval to the appointment of the petitioners within one month from 'the date of production of a certified copy of this order

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2005

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

Criminal Misc. Application No.15530 of 2005

Smt. Saroj Gupta & another ...Applicants
Versus
State of U.P. & another...Opposite Parties

Counsel for the Applicants:
Sri B.B. Jauhari

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

Code of Criminal Procedure-Section 256- not appearance of complainant-after filing the protest application-through counsel-the complainant died-presence of complainant not mandatory-complaint can not be dismissed out rightly.

Held: Para 8

In the circumstances, merely because the complainant is dead, the complaint can not be dismissed outright. Admittedly the complainant is being represented by a pleader and it is for the Magistrate to decide whether the attendance of the complainant is necessary, it is discretion of the Magistrate to dispense with his attendance and proceed in the case.

Case law discussed:
AIR 1967 SC-983
2005 (1) ACR-478 SC

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

1. Heard Sri B.B. Jauhari, learned counsel for the applicant and learned A.G.A. for the State.

2. Inherent power of this Court has been invoked challenging the proceedings in criminal case No.3674 of 2004, Ram Ratan Vs. Dev Nath Gupta and others, under Section 420, 467, 468, 471, 406 I.P.C. Police Station Sadar Bazar, District Shahjahanpur and also order dted 4.8.2005 passed by Additional Chief Judicial Magistrate, Shahjahanpur summoning the applicants.

3. The brief of the case are that one Sri Ram Ratan Gupta moved an application under Section 156 93) Cr.P.C. and an order was passed on 28.2.2003 for registration of the first information report and to investigate the matter. In pursuance to the order of the Magistrate, the police investigated and submitted a final report stating therein that no case is made out against the accused on 19.4.2003. A protest petition was filed by the complainant Ram Ratan Gupta but the proceedings on the basis of protest petition was being considerably lingered as such Sri Ram Ratan Gupta approached this Court for an expeditious disposal of the protest petition. A direction was given by this Court on 5.10.2004 to the Chief Judicial Magistrate, Shahjahanpur to decide the protest petition within a period of three months. Thereafter the case was

registered as complaint case by the Additional Chief Judicial Magistrate on 13.1.2005. The statement of the complainant was recorded under Section 200 Cr.P.C. on 20.1.2005. Sri Ram Ratan Gupta died on 8.5.2005 and after his death, the statement only on 22.6.2005. The statement under Section 200 and 202 Cr.P.C. is annexed as Annexure-6 to the affidavit. A perusal of the statement of PW-I Suresh Chandra Gupta shows that he has mentioned that Ram Ratan Gupta is dead. After the statement of the witnesses, the applicants were summoned vide order dated 4.8.2005 which is under challenge in this application.

4. It is emphatically argued by counsel for the applicants that since the complainant is dead and offences for which the applicants have been summoned, are cognizable offences and that charge has not been framed, therefore, on the death of the complainant, the proceedings of the complaint are liable to be dropped. The summoning order has been challenged on the ground that after the death of the complainant, the provisions of Section 302 Cr.P.C. will come into play because no permission was sought from the Chief Judicial Magistrate for conducting the prosecution after the death of the complainant. In the circumstances, the entire proceedings in the complaint case are liable to be quashed. In support of this contention; reliance has been placed on two decisions of the Apex Court, **Ashwin Nanubhai Vyas Vs. State of Maharashtra, A.I.R. 1967 S.C., 983.** This case deals with the offences under Section 493 and 496 I.P.C. and what happens on the death of the aggrieved person after filing of the complaint. The Apex Court dealt the matter relating to a matrimonial offence, as such I do not find any support to the argument advanced by the counsel for the applicant Reliance has also been placed on another decision, **Jimm Jahangir Madan Vs. Bolly Cariyappa Hindley (D) by legal representatives, 2005 (1) ACR 478 (S.C.)**. In this case the Supreme Court has dealt with question as to whether the prosecution could be conducted by a power of attorney executed by the heirs of the complainant after his death and the court can continue with the prosecution; Supreme Court answered in negative. This is not the fact in the present case where the heirs of the complainant have executed a power of attorney on the basis of which the prosecution is being conducted. In the circumstances, I feel that this decision also has no applicability to the facts of the present case, on the contrary, perusal of the observations of the Apex Court in the case of Jimmy Jahangir Madan (Supra) shows that Supreme Court was of the view that since an accused can abstain from the court during the proceedings after getting his personal appearance dispensed with under Section 205 Cr.P.C. and appearance through pleader as sufficient, likewise under Section 302 Cr.P.C. a person either by making an application himself or instead of taking steps personally, a party can be represented through a pleader.

5. The next submission on behalf of the applicants is that since the stage of Section 244 Cr.P.C. has not yet arrived as such the provisions of Section 245 (2) Cr.P.C. will not come into play. Learned A.G.A. has placed reliance on the provisions of Section 249 Cr.P.C. with corresponds to Section 259 of the Old Code, 1898. Section 249 Cr.P.C. gives a discretion to the Magistrate to compound

or discharge the accused in absence of the complainant but this can not be said to be mandatory under the old Code. The word 'complainant' was used under Section Cr.P.C. which corresponds to the new Section 244 Cr.P.C. The word 'complainant' has been substituted by word 'prosecution' therefore, the contention raised by learned counsel for the applicants challenging the summoning order merely because the complainant died after his statement was recorded under Section 200 Cr.P.C. can not be accepted. Section 256 Cr.P.C. is another provision which has been taken into consideration in the instant case. Section 256 Cr.P.C. is quoted below-

Non-appearance or death of complaint.- *(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day;*

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be apply also to cases where the non-appearance of the complainant is due to his death."

It is thus evident that the death of the complainant does not ipso facto put an end to a criminal prosecution.

"Actio personalis moritur cum persona:- *Death of complainant does not terminate a criminal prosecution. The maxim action personalis moritur cum persona of Section 306 of Succession Act, 1925 does not apply to criminal prosecution."*

6. There is no provisions of abatement of inquiries and trials in absence of the complainant although it provides abatement of appeal or trial on the death of the accused, therefore, what happens on the death of the complainant, in a case started on a complainant has to be inferred generally from the provisions of the Code.

7. In the instant case, I am also conscious of the fact that the protest petition was filed after submission of final report on 19.4.2003 but the Magistrate failed to record the statement until a direction was given on 5.10.2004 by this Court and thereafter the protest petition was registered on 13.1.2005 as a complaint case. The complainant recorded his statement on 20.1.2005, died on 8.5.2005 and thereafter the statement of other witnesses PW-1 and PW-2 were recorded only on 22.6.2005. Thus the complaint can not be dismissed on the death of the complainant specially where the other persons are represented by him.

8. In the circumstances, merely because the complainant is dead, the complaint can not be dismissed outright. Admittedly the complainant is being represented by a pleader and it is for the Magistrate to decide whether the attendance of the complainant is

necessary, it is discretion of the Magistrate to dispense with his attendance and proceed in the case. It is only in such cases where the complainant has failed to appear without any justifiable reason and the Presiding Officer is of the opinion that the allegations made in the complainant can not be established on account of absence of the complainant, the complaint can be rejected for want of complainant. In the instant case, the complainant is dead and it has already been noticed that the presence of the complainant is not mandatory and the proceedings can not be quashed in exercise of inherent powers only because the complainant is dead. This Court in exercise of jurisdiction under Section 482 Cr.P.C. can not prejudice the fate of the case immediately after the summons have been issued to the accused. I am of the considered opinion that the proceedings can not be quashed only for the reason that the complainant is dead.

9. In the circumstances, this application lacks merit and is accordingly rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2005

BEFORE
THE HON'BLE S.RAFAT ALAM, J.
THE HON'BLE VIKRAM NATH, J.

Special Appeal No. 194 of 1997

Munni Begum ...Appellant
Versus
The Secretary Basic Shiksha Parishad U.P. and others ...Respondents

Counsel for the Appellant:
Sri R.B. Singhal
Sri K.A. Ansari

Counsel for the Respondent:
Sri R.K. Tiwari
Sri B.P. Singh
S.C.

Service Law Reversion Order- Petitioner working as Asstt. Teacher in Junior High School Amroha since 1981- on her request posted as teacher in primary schoo later on vacancy in Junior High School-where she joined-without caused notice or opportunity can not be reverted particularly when one year left to her retirement entitled to continue at junior higher school Amroha.

Held- Para 6 and 7

However once the petitioner had joined the Junior High School at Amroha some semblance of a right again occurred to her to continue on such post and thereafter again sending her to Primary School would adversely affect her service conditions, which protection she was entitled to under law. Therefore, the order impugned in the writ petitioner adversely affecting her rights could not have been passed without notice or opportunity was given to her while reverting her from Junior High School to Primary School in Amroha. This aspect of the matter has not been considered by the learned single Judge, who was only swayed by the fact that the petitioner having once given her consent to even join as a teacher of Primary School in the event her request for transfer was accepted, lost her right for ever to be posted in a Junior High School even if a post was lying vacant where she could be adjusted. We are unable to agree with the reasoning of the learned single Judge to the extent indicated above. We are therefore, inclined to allow the appeal as well as the writ petition.

There is yet another reason we are not inclined to revert the petitioner/appellant to the primary school. The facts as are borne out from the records are that the petitioner-appellant is continuing in the Junior High School in Amroha since 1981, i.e. almost 24 years, under the interim orders of this Court. She has about a year left for retirement. As stated in the supplementary affidavit filed on 08.04.2004 that she has crossed 60 years of age but is only continuing on account of extended age of service up to 62 years. It would be appropriate in the interest of justice and in the facts of the case that appellant may continue in the Junior High School at Amroha.

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This appeal arises from the order of the learned single Judge dated 26.2.1997 in Writ Petition No. 13128/~981 whereby the writ petition was dismissed.

2. Heard Sri K.A. Ansari, learned counsel for the appellant and Sri R.K. Tiwari learned counsel for the respondents·

3. It appears that the petitioner-appellant was appointed as Astt. Teacher in Kanya Primary School, Hasanpur district Moradabad on 27.11.1969. She was thereafter promoted on 01.06.1971 as Asstt. Teacher in the Junior High School. Since her husband was in government service and was posted at Amroha, she moved an application in October 1980 and requested to give her posting at Amroha. The respondent 1 vide order dated 29.10.1980 allowed the request and she was posted as Asstt. Teacher in Panna Lal Balika, Primary School at Amroha. Later on it was realized that the appellant was a teacher of Junior High School which is admittedly higher in rank and had a higher pay scale then primary school teacher therefore it was directed vide order dated 04.02.1981 to post her in Junior High School. Pursuant thereto the respondent 3 posted her in Junior High School, Kanya Kirmottar Kala, Amroha on 23.2.1981 where she joined and started working. However, on 19.8.1981 all of sudden the respondent 2 recalled the order dated 04.02.1981 and posted her again at earlier place of service in Amroha i.e. Panna Lal Balika Primary School at Amroha. Being aggrieved, the petitioner preferred the Writ Petition on the ground of reduction 4 rank and emoluments of salary and that too without notice or opportunity. This Court granted interim order on 22.10.1981 which was confirmed on 08.04.1982. However, learned single Judge dismissed the writ petition on 26.02.1997 on the ground that since her transfer was on her own request and also on her consent to join Primary School and therefore, the same cannot be interfered with. In the special appeal also there was an interim order dated 08.04.1997 restraining the respondents from transferring the appellant. It is thus apparent that appellant has continued in Junior High School in Amroha since 1981.

4. Sri K.A. Ansari, learned counsel for the appellant urged that the transfer of appellant from Junior High School to Primary School is undisputedly adverse to her status and will also adversely affect the emoluments in salary. He further submitted that once she had been transferred to Junior High School at Amroha, the same could not be cancelled. An affidavit has also been filed on 12.2.2004 wherein it is stated that the appellant is continuing in Junior High

School by virtue of interim order of this Court initially passed in the writ petition and subsequently passed in appeal and she is now attaining the age of superannuation and is due to retire next year i.e. in 2006.

On the other hand, the learned Standing Counsel opposed the appeal and submitted that the appellant had applied for her transfer from Hasanpur to Amroha and had even given her consent for being posted in the primary school. It is further contended that the learned single Judge has also recorded a similar finding while dismissing the writ petition that the petitioner having prayed for transfer to Amroha even on the condition that she was willing to join the primary school as Asstt. Teacher cannot subsequently turn around and claim that posting in primary school was bad.

5. We have considered the submissions advanced on both sides and have also perused the record and the impugned order passed by the learned single Judge.

6. There is no dispute that the petitioner was a teacher in the Junior High School and was entitled to be posted in Junior High School. It is also not in dispute that the pay scale of a teacher in a Junior High School is higher than that of a teacher in Primary School. It is not disputed that when petitioner/appellant requested for transfer to Amroha she gave her consent for even joining in a Primary School as a teacher at a lower pay scale. This consent may have been given out of desperation and anxiety to join her husband at Amroha who was posted there. The petitioner/appellant also honoured her commitment to work at lower pay scale and joined the primary school as a teacher at Amroha. Later on as there was a vacancy in a Junior High School at Amroha she was offered that post and where she willingly joined. It is not the case of the respondents that Petitioner/appellant claimed salary of Junior High School teacher for the period she worked as Primary School teacher. However once the petitioner had joined the Junior High School at Amroha some semblance of a right again occurred to her to continue on such post and thereafter again sending her to Primary School would adversely affect her service conditions, which protection she was entitled to under law. Therefore, the order impugned in the writ petitioner adversely affecting her rights could not have been passed without notice or opportunity was given to her while reverting her from Junior High School to Primary School in Amroha. This aspect of the matter has not been considered by the learned single Judge, who was only swayed by the fact that the petitioner having once given her consent to even join as a teacher of Primary School in the event her request for transfer was accepted, lost her right for ever to be posted in a Junior High School even if a post was lying vacant where she could be adjusted. We are unable to agree with the reasoning of the learned single Judge to the extent indicated above. We are therefore, inclined to allow the appeal as well as the writ petition.

7. There is yet another reason we are not inclined to revert the petitioner/appellant to the primary school. The facts as are borne out from the records are that the petitioner-appellant is continuing in the Junior High School in Amroha since 1981, i.e. almost 24 years, under the interim orders of this Court. She

has about a year left for retirement. As stated in the supplementary affidavit filed on 08.04.2004 that she has crossed 60 years of age but is only continuing on account of extended age of service up to 62 years. It would be appropriate in the interest of justice and in the facts of the case that appellant may continue in the Junior High School at Amroha.

8. The special appeal therefore succeeds and is allowed and the judgment and order of the learned single Judge is set aside. The order dated 19.08.1981 passed by respondent 2 is hereby quashed and as a consequence the writ petition also succeeds.

However there shall be no order as costs. Petition Allowed.