ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2013

BEFORE
THE HON'BLE VIJAY PRAKASH PATHAK, J.

Criminal Misc. Application No. 37 of 2013

Siya Ram ...Petitioner
Versus
State Of U.P. And Another ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Pandey

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure, Section 173 (8)-after submission of investigation report under section 173 (2)-police can further investigate with formal permission of Magistrate-but Magistrate has no power to direct for fresh investigation or re-investigations.

Held: Para-9

After considering the aforesaid verdict of Hon'ble Apex Court as well as Hon'ble Kerala High Court, it is apparent that even the police after completion of investigation under sub-section (2) of Section 173 of the Code has right to further investigate under sub-section (8) of Section 173 of the Code and the Magistrate can give formal permission to make further investigation to police when fresh facts come to light (When police informs and seek permission of the court).

Case Law discussed:
2008-LAWS (SC)-5-95; LAS (KER)-2001-11-88

(Delivered by Hon'ble Vijay Prakash Pathak, J.)

1. Heard learned counsel for the applicant and learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed with the prayer to quash the order dated 01.08.2012 passed by the Additional Chief Judicial Magistrate Ist, Mathura permitting for reinvestigation in connection with case crime No.67 of 2012, under Sections 147, 148, 149, 307, 336, 323, 363, 224, 225, 504, 427, 186 IPC, P.S. Chhata, District Mathura.

3. The brief facts of the case are that an FIR was got lodged by opposite party no.2 Gajendra Singh, S.I., P.S. Kankhal, District Haridwar against 24 named persons and certain unknown persons including gents and ladies in which the applicant's name is shown at Serial No.5 with the allegations that the accused persons were interrupting the official work of recovering certain vehicles involved in the theft and also fired upon the police personnel. The said FIR was registered as case crime no.67 of of 2012, under Sections 147, 148, 149, 307, 336, 332, 353, 186, 224, 225 and 186 IPC. After investigation in the matter, the charge sheet was submitted only against five persons but not against the applicant. On submission of the said charge sheet, the learned Magistrate took cognizance vide order dated 04.05.2012, thereafter the matter was proceeded. In the meantime, on 01.08.2012 a report has been submitted by the S.I.S. Branch Mathura before the learned Court below to the effect that in case crime no.67 of 2012 an order has been received from S.S.P., Mathura to S.I.S. Branch Mathura for reinvestigation, hence the order for reinvestigation may be passed. On the said application, the learned Court below passed the order on the same day i.e. on 01.08.2012 as "permitted".

4. Learned counsel for the applicant has mainly contended that the Magistrate has no power to pass an order directing to permit for fresh investigation or reinvestigation, hence the order passed by the learned Magistrate is erroneous. Learned counsel cited the verdict of the Hon'ble Apex Court given in **Ramachandran Vs. Udhayakumar reported in 2008-LAWS (SC)-5-95.**

5. Learned AGA submitted that as there was allegation against the applicant also but he has absconded at that time, hence in the interest of justice, the investigation was necessary in the matter, which has rightly been directed by the Magistrate.

6. I have considered the said argument and perused the materials on record including the impugned order. I have also perused the aforesaid verdict of the Hon'ble Apex Court given in Ramachandran Vs. Udhayakumar (Supra). The Hon'ble Apex Court in para 6 of the aforesaid verdict has observed as under:

"(6) ***At this juncture it would be necessary to take note of section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or re-investigation. This was highlighted by this Court in K. Chandrasekhar v. State of Kerala and ors (1998 (5) SCC 223). It was, inter alia, observed as follows:***

"24. The dictionary meaning of "further" (when used as an adjective) is "additional; more; supplemental" "further" investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we heave also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a "further" report or reports -- and not fresh report or reports -- regarding the "further" evidence obtained during such investigation."

7. In view of the aforesaid decision of the Hon'ble Apex Court, the police has right to further investigate the matter under sub-section (8) of Section 173 Cr.P.C. even after completion of investigation under sub-section (2) of Section 173 of the Code but no fresh investigation or reinvestigation.

8. Learned counsel has also cited the verdict of Hon'ble Kerala High Court given in **K.N. Natarajan Vs. Sasidharan reported in LAWS (KER)-2001-11-88**. In the said verdict, Hon'ble Kerala High Court has been pleased to hold that the Magistrate is not competent to order for reinvestigation.

9. After considering the aforesaid verdict of Hon'ble Apex Court as well as Hon'ble Kerala High Court, it is apparent that even the police after completion of investigation under sub-section (2) of Section 173 of the Code has right to further investigate under sub-section (8) of Section 173 of the Code and the Magistrate can give formal permission to make further investigation to police when

fresh facts come to light (When police informs and seek permission of the court).

10. In view of the aforesaid consideration, the order dated 01.08.2012 passed by the learned Magistrate permitting for reinvestigation on a police report cannot be sustained. Accordingly, this petition is allowed and order dated 01.08.2012 passed by the learned Magistrate for reinvestigation is set aside. However, the learned Magistrate may permit for further investigation in the matter if so requires on fresh facts informed by the police.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2013

BEFORE
THE HON'BLE AMAR SARAN,J.
THE HON'BLE DINESH GUPTA,J.

CRIMINAL MISC. WRIT PETITION No. - 62 of 2013

Anil Kumar Sharma ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Hitesh Pachori

Counsel for the Respondents:
Govt. Advocate

(A) Constitution of India, Article 226-21-Speedy Trail-fundamental Rights of an accused-for strict compliance of mandate of Section 170 (1), 173 (2) 41 and 470 (4-b) Cr.P.C. By letter and spirit-direction to install 2 photo machine either on circle level or Police Station itself-necessary fund and circular be issued promptly.

Held: Para-8
We, therefore, want the Director General of Police to get a comprehensive circular issued by the next listing for ensuring that either the accused are arrested or they are given notice to appear before the Magistrate concerned on the date fixed for submitting the report under section 173(2) Cr.P.C as per the requirement in different situations alluded to above.

(B) Code of Criminal Procedure-Section 309 as amended by Act No. 5 of 2009-effective from 31.12.09-for strict compliance and fixing liaility of judicial officer-certian guidelines issued Registrar General to ensure strict compliance-inform by action taken on next date.

Held: Para 29 and 30

We would like the presence of the Registrar General on the next listing to inform the Court that a proper circular has been issued and to produce the same before this Court, and to give feedback on our suggestion made above that papers required under section 207 Cr.P.C. be prepared by the police and how the impediments on the police preparing the said papers be overcome.

We would also like to have feedback from the District Judges regarding the extent to which compliance is being made by the trial Courts with the provisions of section 309 Cr.P.C as also the directions of the Apex Court and this Court and the impediments, if any for ensuring compliance of the aforesaid legislative mandate

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

1. Counter affidavit filed today by the Investigating Officer on behalf of the State is taken on record. The investigating officer states that the investigation is still pending.

2. The investigating officer shall again be present on the next date of listing and inform this Court about the progress made in completing the investigation.

3. Another issue raised in this petition is for issuance of directions for taking steps for expediting the process of producing or directing the accused to appear before the Magistrate concerned at the time of submission of the report under section 173(2) Cr.P.C.

4. The tardiness of the investigating and the trial process is not only violative of the Fundamental Rights of an accused for a speedy trial under Article 21 of the Constitution of India, but it is also prejudicial to the prosecution. If the trial is allowed to be prolonged for a long period of time, the witnesses lose interest or they are won over by the accused and justice is the casualty in either case.

5. Specifically by the earlier two orders dated 7.1.2013 and 17.1.2013, we had directed the State for issuance of the circular at the level of the police for ensuring that the accused is present when the police submit a report under section 173(2) Cr.P.C. for complying with the mandate of sections 170(1), 173(2), 41 and 470(4)(b) Cr.P.C. in letter and spirit and also for ensuring that the accused appear before the trial court at the time when the report under section 173(2) Cr.P.C. is submitted against them so that the trial may commence against them without hindrance. In case the accused has been directed to appear before the Magistrate on the date when the report under section 173(2) Cr.P.C. is to be submitted and he fails to appear, then it is expected that the police and also the concerned Magistrate will take all coercive steps for the arrest of the accused by initiating proceedings under sections 82 and 83 Cr.P.C. and taking all the necessary and consequential coercive steps for arresting the accused. It is expected that different directions would be needed if the accused have never been arrested and no order staying their arrest is operative, if the accused have already allowed bail, or if an order staying their arrest till submission of charge sheet is operative.

6. As we have been finding that a very significant part of the delay in trial takes place after the reports under section 173(2) Cr.P.C. are filed in the Magistrate's Court without producing the accused or directing the accused to appear before the court concerned on the date the charge sheet is submitted. Thereafter the police disassociate themselves from the matter and the case goes into the back burner either because of routine or systemic delays or because of the wily connivance of the accused with the officials, who prevent the report under section 173(2) Cr.P.C. being placed before the Magistrate concerned for long periods of times, which in some cases extends to one or two years.

7. Issuance of a circular by the DGP for meeting the aforesaid contingency was, therefore, directed by the previous order. The learned Government Advocate and AGA pointed out that such a circular is under preparation by the police authorities and they have sought some further time for issuance of the same.

8. **We, therefore, want the Director General of Police to get a comprehensive circular issued by the next listing for ensuring that either the**

accused are arrested or they are given notice to appear before the Magistrate concerned on the date fixed for submitting the report under section 173(2) Cr.P.C as per the requirement in different situations alluded to above.

9. The other issue raised in this case relate to the problem of supplying of copies of the police report required under section 207 Cr.P.C. simultaneously with the production or the appearance of the accused before the Magistrate concerned on the date when the report under section 173(2) Cr.P.C. is submitted.

10. We had asked the learned AGA to enquire from the police and the home departments as to the impediments in the police getting the said papers photocopies or otherwise copied out for supplying to the accused as the courts are already overburdened for supplying the copies of different kinds of papers in a very large number of cases. It is our impression that if one or two photocopies machines could be provided either at the police stations or the Circle Officers level and that adequate provisions be made by the home and finance departments for the same, then the said papers could easily be handed over to the accused by the police when he is produced or appears in response to the notice to appear on the date when a report under section 173(2) Cr.P.C. is submitted. The police at present point out to some lack of resources with the police department for preparing the copies and also that the Courts have been furnishing the copies to the accused so far and not the police.

11. **In this connection, we think that the Principal Secretary (Home), Principal Secretary (Law) and the Principal Secretary (Finance) as well as Director General of Police or other senior officers in the aforesaid departments, who are authorised to take decisions in such a matters may be present before the Court on the next listing to inform this Court about the steps that are being taken for achieving the objectives and how the difficulties that are being envisaged may be overcome.**

12. **We also want that an opinion be called for from all the District Judges as to the feasibility and propriety of this Court issuing directions to all the Magistrate concerned where reports under section 173(2) Cr.P.C. are submitted restraining them from taking cognizance on the said reports or accepting the said reports unless the accused are arrested or otherwise appear before the Magistrate on the date fixed so that the delay in the conduct of the trial that are caused on account of non-appearance of the accused at this stage may be eliminated and the legislative mandate of section 170(1), 173(2), 41 and 470 (4)(b) Cr.P.C. may be complied with in letter and spirit and for ensuring that the trial commences promptly after submission of the report under section 173(2) Cr.P.C.**

13. The learned District Judges may also make other suggestions to this Court for expediting the trial.

14. We would also like a response on the next date from the Secretary (Law) and the Secretary (Home), UP as well as the Union Law Commission of India and the Law Commission of U.P.,

as to the feasibility of amending or deleting section 209 Cr.P.C. and for amending the Code of Criminal Procedure either in U.P or at the Central Government level so that police may submit its report directly to the Sessions Judge in case the case is a Sessions triable matter without compelling the police officer to first submit a report of the case which appears triable exclusively by the Sessions Court, before the Magistrate, who in turn has to commit the same under section 209 Cr.P.C. to the Court of Sessions. It should be kept in mind the fact that it is open under section 228(a)(a) Cr.P.C. for the Sessions Court to transfer the case for a trial before the C.J.M. even after framing of the charges if he is of the opinion that the case is not exclusively triable by the Court of Sessions.

15. This procedure of submitting the charge sheet of Sessions Triable cases directly to the Sessions Judge is a time saving measure and is similar to the provisions of submitting the charge sheet directly under the UP Gangsters Act to the Special Judge (Gangsters Act) in accordance with section 10(1) of the UP Gangsters Act.

16. **We would also like to get details from the State Government as well as from the District Judges of all the districts regarding the number of cases in which the reports under section 173(2) Cr.P.C. have been submitted, but the accused persons have not appeared for <u>periods upto three months, six months, nine months, 12 month and two years or more.</u>**

17. Another issue raised by the previous order was that compliance of the provisions of section 309 Cr.P.C. have been observed more in the breach.

18. Section 309 Cr.P.C. is quoted below in extenso:

"309. Power to postpone or adjourn proceedings.-

(1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:

[Provided that when the inquiry or trial relates to an offence under sections 376 to 376 D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.] ***(vide amendment by Act No. 5 of 2009, effective from 31.12.2009).***

(2) If the court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for, special reasons to be recorded in writing:

*1[Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.] (**vide Act No. 45 of 1978, effective from 18.12.1978).***

2[Provided also that-

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

*(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it think fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.] **(vide amendment by Act No. 5 of 2009, effective from 1.11.2010).***

Explanation-1.If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

19. In this connection the Apex Court in the cases of **Akil alias Javed Vs. State of NCT of Delhi, reported in 2012 (11) SCALE 709, in paras 27 to 36; State of UP Vs. Shambhu Nath Singh and Others, reported in 2001 (4) SCC 667; Raj Deo Sharma Vs. State of Bihar, 1999 Cr.L.J. 4541 and Lt. Col. S.J. Chaudhari Vs. State (Delhi) Administration, (1984)1 SCC 722,** has called for strict action against the defaulting party as well as the lawyers in case the trial is not conducted as expeditiously as possible, including by cancelling the bail of the accused or by imposing heavy costs commensurate with the loss of earning of the witness who appears for giving evidence in the case, and especially when the examination of the witnesses has once begun, the same has to be carried out on a day to day basis unless all the witnesses in attendance are examined and unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded for a period it considers reasonable, and may by a warrant remand the accused if in custody for a period not exceeding fifteen days.

20. By the Amendment Act 5 of 2009, effective from 1.11.2010, it has further been provided that no adjournment shall be granted at the request of a party, except where the circumstances are

beyond the control of that party. The fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment or where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross examine the witness, the Court may record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

21. When examination of witnesses has begun and the witnesses are in attendance, the trial may be adjourned without examining the witnesses only for special reasons (i.e. for exceptional and not ordinary reasons) to be recorded in writing.

22. It is also provided that adjournment or postponement can be made, in a proper case, on payment of sufficient costs on the party seeking the adjournment.

23. The Apex Court (in *Rajdeo Sharma v State of Bihar (supra)* as approved in *Akil @ Javed,* (para 34) has given a direction to the High Courts to remind trial Judges of the need to comply with section 309 of the Code in letter and spirit. The High Courts have been directed to take administrative action against the delinquent judicial officer who violates the above legislative mandate.

24. More particularly, by virtue of Amendment Act 5 of 2009, effective from 31.12.2009, so far as the trial under sections 376 to 376D of the IPC are concerned, it should be concluded as far as possible within a period of two months from the date of commencement of the examination of the witnesses.

25. In this connection, we had asked the Registrar General of this Court by the previous order dated 17.1.2013 to inform this Court about the circulars relating to section 309 Cr.P.C., which have been issued by the Court pursuant to the directions of the Apex Court and this Court. The circulars dated 23.11.1992, 6.12.2000 pursuant to the order passed in Criminal Misc. Application No. 6475 of 2000 have been produced. We regret to note that the said circulars are very brief and do not contain the specific points made in the order of the Apex Court as well as by this Court and lack teeth. In this connection the comprehensive circular No. 1/87 issued by the High Court of Delhi dated 12.1.1987 has been cited in extenso in paragraph 27 in *Akil @ Javed (supra)*: The aforesaid paragraph 27 reads as under:

"27. In this context it will also be worthwhile to refer to a circular issued by the High Court of Delhi in Circular No. 1/87 dated 12th January 1987. Clause 24A of the said circular reads as under: "24A disturbing trend of trial of Sessions cases being adjourned , in some cases to suit convenience of counsel and in some others because the prosecution is not fully ready, has come to the notice of the High Court. Such adjournments delay disposal of Sessions cases.

The High Court considers it necessary to draw the attention of all the Sessions Judges and Assistant Sessions Judges once again to the following provisions of the Code of Criminal Proceudre, 1973, Criminal Rules of Practice, Kerala 1982 and Circulars and

instructions on the list system issued earlier, in order to ensure the speedy disposal of Sessions cases.

1(a). In every enquiry or trial, the proceedings shall be held as expeditiously as possible and, in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. (Section 309 (1) Crl.P.C.).

(b) After the commencement of the trial, if the court finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable. If witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded, in writing. (Section 309(2) Cr.P.C.).

2. Whenever more than three months have elapsed between the date of apprehension of the accused and the close of the trial in the Court of Sessions, an explanation of the cause of delay, (in whatever court it may have occurred) shall be furnished, while transmitting the copy of the judgment. (Rule 147 Crl. Rules of Practice).

3. Sessions cases should be disposed of within six weeks of their institution, the date of commitment being taken as the date of institution in Sessions Cases. Cases pending for longer periods should be regarded as old cases in respect of which explanations should be furnished in the calendar statements and in the periodical returns. (High Court Circular No. 25/ 61 dated 26th October 1961).

4. Sessions cases should be given precedence over all other work and no other work should be taken up on sessions days until the sessions work for the day is completed. A Sessions case once posted should not be postponed unless that is unavoidable, and once the trial has begun, it should proceed continuously from day to day till it is completed. If for any reason, a case has to be adjourned or postponed, intimation should be given forthwith to both sides and immediate steps be taken to stop the witnesses and secure their presence on the adjourned date.

26. On receipt of the order of commitment the case should be posted for trial to as early a date as possible, sufficient time, say three weeks, being allowed for securing the witnesses. Ordinarily it should be possible to post two sessions cases a week, the first on Monday and the second on Thursday but sufficient time should be allowed for each case so that one case does not telescope into the next. Every endeavour should be made to avoid telescoping and for this, if necessary, the court should commence sitting earlier and continue sitting later than the normal hours. Judgment in the case begun on Monday should ordinarily be pronounced in the course of the week and that begun on Thursday the following Monday. (Instructions on the list system contained in the O.M dated 8th March 1984).

27. All the Sessions Judges and the Assistant Sessions Judges are directed to adhere strictly to the above provisions and instructions while granting adjournment in Sessions Cases."

28. We would also like some more effective circular to be issued highlighting the directions in this case and the directions of the Apex Court and the provisions of section 309 of the Code as amended from time to time, and the said circular should not simply contain vague and diffuse terms to the effect that the provisions of section 309 of the Code, or that the decisions of this Court as well as Apex Court may be complied with.

29. **We would like the presence of the Registrar General on the next listing to inform the Court that a proper circular has been issued and to produce the same before this Court, and to give feedback on our suggestion made above that papers required under section 207 Cr.P.C. be prepared by the police and how the impediments on the police preparing the said papers be overcome.**

30. **We would also like to have feedback from the District Judges regarding the extent to which compliance is being made by the trial Courts with the provisions of section 309 Cr.P.C as also the directions of the Apex Court and this Court and the impediments, if any for ensuring compliance of the aforesaid legislative mandate**

31. List this case on 08.03.2013.

32. Interim order shall continue till the next date of listing.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.02.2013

BEFORE
THE HON'BLE VISNHU CHANDRA GUPTA,J.

Criminal Revision 123 of 2012

Irfan Amhad, S/O Late Shah Mohammad and others ...Revisionists
Versus
State of U.P. ...Opposite Party

Counsel for the Petitioner:
Mohd. Abdul Rafey Siddiqui, Advocate
Mohd. Rehan Ahmad Siddiqui, Advocate

Counsel for the Respondents:
Govt. Advocate,

Criminal Procedure Code-397/401-order of re-trail by Appellate Court-conviction without trail-not sustainable-if Appellate Court found that appellant was not tried-no charge sheet framed-judgment of Trail Court can be modified-but direction to re-write judgment-held-appellate Court committed manifest error of law-revision allowed-order of re-writing judgment quashed.

Held: Para-9

So far trial of Israil is concerned it is evident from the record of the case that he was not tried, no charge has been framed against him because his trial was separated. Therefore, recording of conviction against him by the Trial Court can be rectified by the Appellate Court and for that the remand of the matter was not at all necessary.

Case Law discussed:
AIR 1963 (SC) 1531; 1961 (1) Crl.L.J. 398

(Delivered by Hon'ble Visnhu Chandra Gupta, J.)

J U D G M E NT

1. In this revision u/s 397/401 of Criminal Procedure Code (for short 'Cr.P.C.') revisionists have prayed to set aside the impugned direction issued to learned Magistrate concerned to pass fresh judgment in pursuance of order passed by the learned Appellate Court vide its judgment and order dated 23-3-2012.

2. The brief facts of this case for deciding the revision are that Irfan Ahmad, Mohammad Israil, Smt. Anwari, Mohd. Islam, Km. Ruqaiya and Habib were accused persons in Criminal Case No. 2924 of 2009, arising out of case Crime No. C-10 of 2003. After trial of the aforesaid case these persons were convicted u/s 498A of Indian Penal Code (for short 'IPC') with simple imprisonment of 2 years and a fine of Rs. 1,000/- each. These persons were also convicted under section 3 of Dowry Prohibition Act and sentenced with simple imprisonment of one year each. In case of default of payment of fine, these accused persons were directed to undergo a further imprisonment of one month. The judgment passed by Ist Addl. Chief Judicial Magistrate, Gonda convicting and sentencing the revisionists was challenged in appeal before the Court of Sessions. Out of six only five persons challenged the conviction and sentence awarded against them by preferring the appeal having Criminal Appeal No. 24 of 2011. The name of appellants are Irfan Ahmad, Mohammad Islam, Smt. Anwari, Km. Ruqaiya and Habib. It appears from perusal of the order of Appellate Court that Habib died during the pendency of appeal and the case stand abated against him. However, it appears that Mohd. Israil did not prefer any appeal. The Appellate Court considered the submissions of both the side and allowed the appeal after setting aside the judgement dated 11.3.2011. The matter was remanded back to decide the case in the light of the direction issued by the Appellate Court after giving opportunity of hearing to accused persons and prosecution.

3. From perusal of the impugned order of the Appellate Court it appears that accused Israil did not face trial but the learned Magistrate passed the order of conviction against Israil also. It was further observed by the Appellate Court that the charge for the offence u/s 323 I.P.C.was also framed against the accused persons but no finding had been recorded regarding acquittal or conviction of the accused persons u/s 323 I.P.C. It was further observed in respect of the accused Israil that during trial he absconded and his file was separated, consequently charges were not framed against Israil. Therefore, the learned Trial Court has committed an error convicting Israil without trial and his conviction cannot sustain. Consequently, without going into the merit of the case or making any comment on merit the Appellate Court straight way sent back the matter after setting aside the judgment of the Trial Court and directed to pass an appropriate order after giving opportunity of hearing to both the sides.

4. Learned counsel for the revisionist after relying upon the judgment of Hon'ble Apex Court reported in **AIR 1963 (SC) 1531 (Ukha Kolhe Vs. State of Maharashtra)** submitted that order of retrial to fill-up the lacuna by

means of taking additional evidence would not be proper and on this strength it has been submitted that the order of remand is not sustainable.

5. After relying upon the judgment of Mysore High Court reported in **1961(1) Crl.L.J. 398 (State Vs. Ranganagouda Venkanagourda Thimmanagpudar)**, the learned A.G.A.pointed out that the retrial is permissible not only from the point of time at which the error in trial has been committed. It can even proceed from earlier stage in a particular case.

6. I have considered the submission of both the side and the authorities relied upon by the parties and also perused the material available on record.

7. From perusal of the order under challenged it reveals that the Appellate Court directed the Trial Court to record the finding in regard to the charge framed under section 323 I.P.C. The appellate Court also asked the Trial Court that when Israil was not tried by the court how the conviction was recorded and therefore, the Appellate Court after setting aside the entire judgment without touching the merit of the case sent back the matter for deciding the matter on the basis of the existing evidence.

8. If the Appellate Court was of the view that no finding has been recorded by the Trial Court for charge u/s 323 I.P.C., he may pass an order directing the trial court to give its finding on charge framed u/s 323 I.P.C. keeping the appeal pending in its court and after receipt of the finding given by the Trial Court, the appeal as a whole may be decided.

9. So far trial of Israil is concerned it is evident from the record of the case that he was not tried, no charge has been framed against him because his trial was separated. Therefore, recording of conviction against him by the Trial Court can be rectified by the Appellate Court and for that the remand of the matter was not at all necessary.

10. Section 386 of the Criminal Procedure Code gives ample power to Appellate Court to make any amendment or pass any consequential or incidental order that may be just and proper because, clause (e) of Section 386 applies in all the cases provided in Clause (a)(b)(c) and (d), i,e., when Appellate Court dealing with appeal against an order for acquittal or considering the appeal from conviction or dealing an appeal for enhancement of sentence or in any appeal from any other order.

11. In view of aforesaid legal aspect of the matter this court is of the view that Appellate Court has committed manifest error of law while setting aside the finding of conviction without going through the merit of the case and in directing the Trial Court to re-write the Judgment. In such situation this court is of the view that if the Trial Court has not given any finding in respect of the charge framed u/s 323 I.P.C. the Appellate Court may sent back the record of the Trial Court to give a finding in respect of guilt or of innocence of the accused, as the case may be, on the basis of material available on record and after receipt of the finding of the Trial Court u/s 323 I.P.C. the Appellate Court should decide the whole appeal after considering the merit of the case.

12. So far as conviction of Irfan is concerned the Appellate Court was ample power to set aside that portion of the judgment by which the conviction of Irfan was recorded without trial.

13. Consequentially, the revision is allowed. Impugned order dated 23.3.2012 passed by Special Judge, EC Act, Gonda in Criminal Appeal No. 24 of 2011 (by which judgment of Trial Court dated 10.03.2011 passed by Addl Chief Judicial Magistrate, Ist, Gonda in Crl. Case No. 2924 of 2009 was set aside) is set aside. The matter is remanded back to the Appellate Court with direction to restore the Appeal on its own number. After re-registering the appeal on its own number the appellate court shall send back the record to the Trial Court to record the finding in respect of charge framed against accused persons under section 323 I.P.C. The Trial Court shall send back the record with finding recorded in respect of charge u/s 323 I.P.C. to the Appellate Court. After receipt of the finding recorded by the Trial Court, the Appellate Court shall decide the Appeal on merit after giving opportunity of being heard to accused persons and prosecution.

14. The appellants shall remain on bail during pendency of appeal in terms of the order earlier passed. If bonds are cancelled the appellants may file the bonds as per order of the appellate court.

15. The appellants / accused shall appear in person before appellate court on 6th of March, 2013.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2013

BEFORE

THE HON'BLE ANIL KUMAR, J.

SERVICE SINGLE No. - 124 of 2010

Shiv Swaroop Trivedi S/O Late Deen Dayal Trivedi ...Petitioner

Versus

State Of U.P. Thru Secy. Gramya Vikas & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.P. Singh Vatsa
Sri Vashu Deo Mishra
Sri Vinod Kumar Verma

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- recovery of excess amount -paid in particular pay scale after completing 40 years of service-after retirement-it was noticed that petitioner can not be given the salary in that pay scale-no allegation of fraud or misrepresentation-or being instrumental in getting that pay scale-held-can not be recovered without affording opportunity of hearing.

Held: Para-38

In the present case, promotional scale has been given to the petitioner in pursuance to the Government Order dated 11.8.1983 by his employer voluntary in bona fide manner without there being any element of fraud on his part subsequently cannot be recovered from him when he is retired from service after attaining the age of superannuation on the ground that same has wrongly been given to him by the employer because his case comes within the ambit and scope of the category of those employee from whom if the excess amount paid cannot be recovered as mentioned in the case of Chandi Prasad Uniyal (supra).

Case Law discussed:
2012 (3) LBESR 692 (SC); (1994) 2 SCC 521; 1995 (1) LBESR 206 (SC) ; (2006) 11 SCC

709; (2009) 3 SCC 475; AIR 1974 SC 602; AIR 1990 SC 313; (1976) 1 WLR 1255; (1970) 2 QB 417; (1971) 2 QB 175; (1969) 2 SCC 262; (1978) 1 SCC 148; (1987) 4 SCC 431; AIR 1978 SC 851; (1970) 1 SCC 121; (2008) 3 UPLBEC 2517; (1996) 3 UPLBEC 1340; 2005 (23) LCD 177; (2002) 10 SCC 99; 1979 ALJ 184; AIR 1994 Supreme Court 2480

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

1. Heard Shri Vashu Deo Mishra, learned counsel for the petitioner, Shri Abhinav Narain Trivedi, learned Addl. Chief Standing Counsel and perused the record.

2. Shiv Swaroop Trivedi/petitioner was appointed on 12.11.1968 on the post of Junior Clerk in the department of Gramya Vikas, State of U.P. and was posted at Unnao. While he was working in the department a new pay scale was given to him as per the Government Order dated 11.8.1983 vide G.O. No.Ve.Aa.-1-1802-Dus-34-(M)-83. After completing 40 years of successfully services, petitioner retired on 28.2.2009 from service after attaining the age of superannuation from the post of Assistant Accountant.

3. While he was enjoining retiral life, the impugned order dated 28.8.2009 (Annexure No.1) was passed by the opposite party no.4/District Development Officer, Hardoi thereby directing to recover the amount along with interest as mentioned therein as the same had been paid to him in excess as he was not entitled for promotional scale given to him in view of the Government Order dated 11.8.1983.

4. Aggrieved by the same, petitioner made a representation dated 2.11.2009 before the opposite part no.3/Chief Development Officer, Hardoi, but no heed was paid. Hence, he filed Writ Petition No.124 (SS) of 2010 before this Court.

5. During the pendency of the present writ petition, vide order dated 28.1.2010 the District Development Officer, Hardoi rejected the representation of the petitioner, as a result of which the post retiral dues of the petitioner including his General provident fund etc. have been declined to be paid to him. So, petitioner filed Writ Petition No.1686 (SS) of 2010.

6. Thereafter, Writ Petition No.1686 (SS) of 2010 and Writ Petition No.124 (SS) of 2010 were connected together and were disposed of by order dated 27.4.2010, relevant portion quoted herein below:-

"From the record, it alleges that some excess payment was made to the petitioner by fixing wrong pay, as appears from the impugned order dated 28.01.2010. The excess payment will have to be recovered by the opposite parties. But how much this is a question of accounting. At this stage, learned counsel for the petitioner is not ready with the computation of arrears of excess payment. So, the same cannot be verified.

In the circumstances, I direct the petitioner to approach the respondent no.3 i.e. Chief Development Officer, Hardoi who with the help of opposite parties no. 4 & 5 verified the excess payment and computation etc. by providing the opportunity to the petitioner. The excess payment, if any, will have to be recovered by way of adjustment from the retiral dues of the

petitioner. Thereafter, the entire retiral dues will have to be released in favour of the petitioner. This exercise will have to be completed within four weeks after receiving the certified copy of this order.

With the aforesaid direction, both the writ petitions are disposed of."

7. Aggrieved by the said order, petitioner filed a Special Appeal No.787 of 2010, disposed of by order dated 4.1.2012, the relevant portion is reproduced herein below:-

"Counsel for the appellant has submitted that in view of catena of judgments of this Court as well as the Apex Court. Since there was no misrepresentation by the appellant in the matter of fixation of his pay, even if wrong pay was fixed by the department on its own and the salary was paid accordingly, the excess amount so paid could not be ordered to be recovered, though the correct fixation could have been done and the consequential retirement benefits could have been awarded as per the correct fixation.

We have gone through the record and we find that the learned Single Judge has not touched the merits of the claim of the appellant at all and rather has presumed that since some excess amount has been paid, therefore, it has to be refunded. He has only directed calculation of the aforesaid amount and refund thereof.

We are of considered view that since the order does not bear any reason or finding as to whether the appellant was responsible for refund of the excess amount or not, the order cannot be sustained. It is hereby set aside and the matter is directed to be listed before the learned Single Judge having jurisdiction to decide the claim of the appellant on merit afresh.

Counter affidavit may be filed by the State within three weeks.

List the writ petition for orders/hearing in the month of February, 2012.

In the meantime, if any adjustment is made that shall be subject to the final orders passed in the writ petition.

The special appeal stands disposed of."

8. In view of the abovesaid facts, Writ Petition Nos.124 (SS) of 2010 and 1686 (SS) of 2010 again came up for hearing before this Court.

9. After hearing learned counsel for the parties and going through the records, the position which emerges out is that while petitioner was in service, new pay scale/promotional scale was given to him as per the Government Order dated 11.8.1983 which he received till he attain the age of superannuation.

10. Further, the said pay scale/promotional scale given to him voluntarily by the employer without there being any fraud or misrepresentation on his part sought to be recovered, so question arises in the present case that if the said benefit is being given to him by an employer voluntary in bona fide manner in view of the Government Order dated 11.8.1983 can be recovered from the petitioner subsequently merely on the

ground that some mistake of interpretation of rules have been committed by the employer in regard to payment of the same, for which the petitioner could not be held responsible.

11. Answer to the said question find place in the judgment of the Hon'ble Supreme Court in the case of ***Chandi Prasad Uniyal & Ors. vs. State of Uttarakhand & Ors. 2012 (3) LBESR 692 (SC)*** wherein after considering the earlier judgment passed on the point in issue in the case of ***Shyam Babu Verma v Union of India (1994) 2 SCC 521, Sahib Ram v. State of Haryana 1995 (1) LBESR 206 (SC), Col. B. J. Akkara (Retd.) v. Government of India & Ors. (2006) 11 SCC 709 and Syed Abdul Qadir & Ors. v. State of Bihar & Ors. (2009) 3 SCC 475*** in paragraph nos.7 to 18 it has been held as under:-

*" **Para 7** - Appellants herein are some of the teachers named in that letter; similar communications had gone to few other institutions, where appellants work.*

Para 8 *- We may point out indisputedly, the appellants 1 and 2 herein were not in the pay scale of Rs.4,250-6,400 as such they could not have got the revised pay scale of Rs.10,000-15,200/- w.e.f. 01.07.2001. Only if they were getting pay scale of Rs.8000-13,500/- on 01.01.1996, they would have been entitled to be placed in the pay scale of 10,000-15,200 as on 01.07.2001. Further, appellants 3 to 5 were working as Assistant Teachers and drawing in pay scale of Rs.3,600-5,350/- as on 01.01.1996 and were placed in the pay scale of Rs.5,500-9,000 as on 01.07.2001. Further, it was noticed that none of the appellants were working as principals and were never placed in the pay scale of 8,000-15,500 as on 01.01.1996 to get the benefit of the pay scale of 10,000-15,200 as on 01.07.2001. We also find only few persons like the appellants have been getting higher pay scale in the district of Haridwar w.e.f. 01.07.2001 and similarly situated persons in the rest of Uttarakhand are getting the same pay scale of Rs.10,000- 15,200 only from 11.12.2007 and it was to rectify this anomaly, the District Education Officer, Haridwar passed the order dated 24.10.2009.*

Para 9 *- We may also indicate that when the revised pay scale/pay fixation was fixed on the basis of the 5th Central Pay Scale, a condition was superimposed which reads as follows:*

"In the condition of irregular/wrong pay fixation, the institution shall be responsible for recovery of the amount received in excess from the salary/pension."

Para 10 *- The appellants are further bound by that condition as well. The facts, mentioned hereinabove, would clearly demonstrate that the excess salary was paid due to irregular/wrong pay fixation by the concerned District Education Officer. The question is whether the appellants can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on their part, as contended.*

Para 11 *- We are of the considered view, after going through various judgments*

cited at the bar, that this court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.

Para 12 *- Shyam Babu Verma case (supra) was a three-Judge Bench judgment, in that case the higher pay scale was erroneously paid in the year 1973, the same was sought to be recovered in the year 1984 after a period of eleven years. The court felt that the sudden deduction of the pay scale from Rs.330-560 to Rs.330-480 after several years of implementation of said pay scale had not only affected financially but even the seniority of the petitioners. Under such circumstance, this Court had taken the view that it would not be just and proper to recover any excess amount paid.*

Para 13 *- In Sahib Ram case (supra), a two-Judge Bench of this Court noticed that the appellants therein did not possess the required educational qualification and consequently would not be entitled to the relaxation but having granted the relaxation and having paid the salary on the revised scales, it was ordered that the excess payment should not be recovered applying the principle of equal pay for equal work. In our view, this judgment is inapplicable to the facts of this case. In Yogeshwar Prasad case (supra), a two-Judge Bench of this Court after referring to the above mentioned judgments took the view that the grant of higher pay could not be recovered unless it was a case of misrepresentation or fraud. On facts, neither misrepresentation nor fraud could be attributed to appellants therein and hence, restrained the recovery of excess amount paid.*

Para 14 *- We may in this respect refer to the judgment of two-Judge Bench of this Court in Col. B.J. Akkara (retd.) case (supra) where this Court after referring to Shyam Babu Verma case, Sahib Ram case (supra) and few other decisions held as follows:*

"Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

Para 15 *- Later, a three-Judge Bench in Syed Abdul Qadir case (supra) after referring to Shyam Babu Verma, Col. B.J. Akkara (retd.) etc. restrained the department from recovery of excess amount paid, but held as follows:*

"Undoubtedly, the excess amount that has been paid to the appellants-teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned Counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made.

Para 16 *- We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.*

Para 17 *- We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.*

Para 18 *- We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."*

12. Accordingly, in view of the said judgment passed by Hon'ble the Supreme

Court in the case of Chandi Prasad Uniyal (supra), the law on the point can be summarized that if salary or wages hav been paid to an employee by an employer voluntary in bona fide manner without there being any element of ***fraud or misrepresentation on his part can be recovered from the employee but the same cannot be recovered in two circumstances (a) if an employee has retired (b) on the verge of retirement .***

13. Besides above, the next question which is to be considered by the Court in the the present case is that if an employee does not fall in the two exceptional categories (as mentioned above) can excess amount paid be recovered from the employee merely on the ground that some mistake in regard to the interpretation of the rules might have been committed by the employer and that too without affording any opportunity of being heard.

14. In order to decide the said controversy on one hand it should be kept in mind that an average employee is considered to have no saving capacity except through forced savings, such as, contribution to Provident Fund or premium towards Life Insurance etc. He is expected to consume his pay packet in meeting the daily needs for himself and his family. If by mistake the employer makes over payments and such mistake is not induced by any representation from the employee can he be held guilty, thus liable to pay back the amount.

15. However, on the other hand, there is a theory of "Unjust Enrichment" as per the said theory where the employee has received payments which is not his entitlement, such receipt of excess payments implies a corresponding duty in the recipient to refund. In case a demand is made for refund/recovery by the authority which made the payment under influence of any mistake or misrepresentation or undue influence, the employee is by law bound to make the refund.

16. In ***Thomas Abraham v. National Tyre & Rubber Co. (AIR 1974 SC 602),*** Hon'ble the Supreme Court held that it is an established principle in common law that an action for recovery of money unduly received is a practical and useful instrument to prevent unjust enrichment. The law implies an obligation to repay the money which is an unjust benefit. So, it may be pleaded on behalf of the authorities that the employee cannot retain any monies paid to him by mistake or erroneous considerations.

17. Unjust Enrichment is provided under Section 72 of the Indian Contract Act 1872. The Section runs:-

"72 ***Liability of person to whom money is paid, or thing delivered, by mistake or under coercion*** - *A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.*

Illustrations

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C. is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum

charged in order to obtain the goods. He is entitled to recover so much of the charges as was illegally excessive."

18. The ingredients of the principle of unjust enrichment has been enumerated while interpreting the theory of Unjust Enrichment by Hon'ble the Apex Court in Mahavir Kishore v. State of M.P. (AIR 1990 SC 313) held as under:

First, that the defendant has been 'enriched' by the receipt of a 'benefit';

secondly, that this enrichment is 'at the expense of the plaintiff' ; and

Thirdly, that the retention of the enrichment is unjust.

19. Enrichment may take the form of direct advantage to the recipient' s wealth such as by the receipt of money or indirect benefit, for instance, where inevitable expense has been saved.

20. Further an order passed for recovery of an amount is purely an administrative order. But even so, justice requires that notice to the employee can not be dispensed with prior to the recovery of the same. As no one can be deny that an order passed would vitally affects the employee from whom the recovery is made on the ground that he is not entitled for the same on the arounds of misinterpretation of the rules etc. due to mistake on the part of the employer for which employee could not be responsible. This aspect, by itself without more, should convince us all that it would be not only just but also necessary that such employee should be given opportunity of hearing before order of recovery of the excess amount which initially was wrongly paid to him without fraud or misrepresentation on his part by the employer. Because it is a basic principle of our jurisprudence, which requires prior notice to a person wherever decisions are taken tending to affect vitally. This principle has been held to govern the action not only for courts of law, but also tribunals and administrative authorities etc., even in the absence of express provision in the enacted law concerning notice to the affected party. As by all standards, rules of natural justice are great assurances of justice and fairness. There are certain basic values which a man has cherished throughout the ages, they can be described as natural law or divine law. A man, as a reasonable being, must apply this part of law to human affairs.

21. Apart from philosphical aspect, the concept of natural justice has made invaluable contribution to the development of positive law. It helped to transform the rigidity of jus civile of the Romans into more equitable system based on the theory of jus gentinum. It inspired the movement for codification of law in order to formulate ideas derived from the concept of natural law into detailed rules.

22. The object underlying the rules of natural justice is to protect fundamental liberties and civil and political rights. They, therefore, should be interpreted liberally so that they may conform, grow and tailor to serve public interest and respond to the demands of an evolving society. The principles of natural justice are essential to the framework of Indian legal system.

23. Generally, no provision is found in any statute requiring observance of the principles of natural justice by

adjudicating authorities. The question then arises whether the adjudicating authority is bound to follow the principles of natural justice.

24. Lord Russell in the case of ***Fairmount Investment Ltd. v. Secy. To State for Environment (1976) I WLR 1255*** held that it is to be implied unless the contrary appears, that Parliament does not authorize by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles.

25. Lord Denning in the case of ***R. v. Gaming Board for Great Britain, (1970) 2 QB 417*** observed that at one time it was said that the principles of natural justice applied only to judicial proceedings and not to administrative proceedings, but "that heresy was scotched". So the principles of natural justice are applicable to almost the whole range of administrative powers. The presumption is that it will always apply, however silent about it the statute may be.

26. Further in the case of ***Breen v. Amalgamated Engg. Union (I971) 2 QB I75*** Lord Denning observed that a statutory body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi- judicial on the one hand, or as administrative on the other hand.

27. In the historic case of ***A.K. Kraipak v. Union of India (1969) 2 SCC 262*** Hon'ble the Supreme Court held that the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.

28. In ***Maneka Gandhi v. Union of India (1978) I SCC 248*** it has been held that it is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual the duty to give reasonable opportunity to be heard will be implied from the nature of the functions to be performed by the authority which has the power to take punitive or damaging actions.

29. In ***K.I. Shephard v. Union of India (1987) 4 SCC 431*** Hon'ble the Apex Court held that formerly the presumption had been that there was no obligation to give a hearing unless the statute itself indicated such an obligation; now the presumption is that there is such an obligation unless the statute clearly excludes it, notwithstanding the vesting of a power, in subjective terms.

30. In the words of Hon'ble Mr. Justice Krishna Iyer, in the case of ***Mohinder Singh Gill v. Chief Election Commr. AIR 1978 SC 851*** held that *"what is a civil consequence, let us ask ourselves, by passing verbal boobytraps? 'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages."*

31. Thus, principles of natural justice are applicable to almost the whole

range of administrative powers. The presumption is that it will always apply, however silent about it the statute may be because if we desire a society governed by the rule of law. (See ***Board of High School and Intermediate Education v. Chitra Srivastava (I970) I SCC I2I)***.

32. Applying this fundamental principles of natural justice to a wide variety of proceedings in cases classified by academic writers under the head "Administrative law". And the learned Judges have had no hesitation in setting aside orders passed in the exercise of quasi-judicial power, wherever there was want of notice to the party affected. Recent trends in court-decisions show that this principle of natural justice must be applied even to purely administrative decision-making if that should affect an individual employee.

33. In the case of ***Shiv Prakash Richaria vs. State of U.P. and Ors. (2008) 3 UPLBEC 2517*** this court while quashing an order of recovery against an employee who has been paid excess amount voluntarily by the employer without there being any element of fraud or misrepresentation on his part held as under:-

"Another ground on which the impugned order is liable to be set aside is that no opportunity of hearing was afforded by the respondents to the petitioner prior to passing of the impugned order."

34. A Division Bench of this Court in the case of Harish Chandra Srivastava vs. State of Uttar Pradesh and Ors. (1996) 3 UPLBEC 1340 while quashing an order of recovery of an excess amount paid to an employee without any fault on his part in paragraph no.19, (the relevant portion quoted) has held as under:-

"Para 19*- The order impugned to this writ petition is, therefore, liable to be quashed not only on the ground of want of affording reasonable opportunity of being heard to the petitioner but also on the ground that the petitioner cannot be held responsible for securing promotion on the higher scale of pay by misleading the Department and therefore the payment of salary cannot be recoverd."*

35. In the case of ***Awadh Nath Tripathi vs. Chief Development Officer, Sant Kabir Nagar and Ors. 2005 (23) LCD 177*** after taking into consideration the law as laid down by Hon'ble Supreme Court in the case of ***Bihar State Electricity Board and another v. Vijay Bahadur and another (2002) 10 SCC 99,*** and by this Court in the case of ***Bindeshwari Sahai Srivastava v. Chief Engineer, Irrigation Department, Lucknow and others 1996 AWC 947 and B.N.Singh v. State of U.P. 1979 ALJ 184*** it has been held that if wages have been paid to an employee by an employer voluntarily in a bona fide manner without there being any element of fault or mis-representation on the part of the employee, subsequently the same cannot be recovered by the employer on the ground that the same has been wrongly paid to the employee, without affording any opportunity of hearing to him.

36. In the case of ***Bhagwan Shukla, v. Union of India and others AIR 1994 Supreme Court 2480*** wherein paragraph no.3 held as under:-

"We have heard learned counsel for the parties. That the petitioner's basic payhad been fixed since 1970 at Rs.190/- p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs.181/- p.m. from Rs.190/- p.m. in 1991 retrospectively w.e.f. 18-12-1970. the appellant has obviously been visited with civil consequence but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There, has, thus been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being hears. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequence should be passed without putting the concerned to notice and giving him a hearing in the matter."

37. Thus, in the light of the abovesaid facts, if an employee has been paid excess amount voluntarily by the employer without there being any fault or misrepresentation on his part and he does not fall in the categories of employee as given in the case of Chandi Prasad Uniyal (supra) from whom the said amount can not be recovered then from such employee the same can be recovered ***but before doing so he may be given an opportunity of hearing to put forward his case/defence.***

38. In the present case, promotional scale has been given to the petitioner in pursuance to the Government Order dated 11.8.1983 by his employer voluntary in bona fide manner without there being any element of fraud on his part subsequently cannot be recovered from him when he is retired from service after attaining the age of superannuation on the ground that same has wrongly been given to him by the employer because his case comes within the ambit and scope of the category of those employee from whom if the excess amount paid cannot be recovered as mentioned in the case of Chandi Prasad Uniyal (supra).

39. For the foregoing reasons, the impugned order dated 28.8.2009 (Annexure No.1) passed by the opposite party no.4/District Development Officer, Hardoi in Writ Petition No.124 (SS) of 2010 as well as order dated 28.1.2010 passed by District Development Officer, Hardoi in Writ Petition No.1686 (SS) of 2010 are set aside. Furhter, if any amount has been recovered from the petitioner in pursuance to the impugned orders under challenge in the present writ petition, the same shall be refund to him by the official respondent and they are also directed to release all the post retiral dues to the petitioner for which he is entitled but withheld by themt in pursuance to the impugned orders, the said exercise shall be done within a period of four weeks from the date of receiving a certified copy of this order .

40. With the above observations, both writ petitions are allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2013

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE VIRENDRA KUMAR DIXIT, J.

MISC. BENCH No. - 182 of 2013

Shailendra Pandey ...Petitioner
Versus
State Of U.P.Thr.Prin.Secy.Nagar Vikas Vibhag,Lko.& Others ...Respondents

Counsel for the Petitioner:
Sri Aditya Narayan
Sri Harish Chandra

Counsel for the Respondents:
C.S.C.

(A) Constitution of India, Article 226-Territorial Jurisdiction-license to collect parking fee of vehicle-granted by Nagar Panchayat Basti-impugned order to cancel the contract-passed by Special Secretary-Lucknow Bench can entertain petition.

(B) Constitution of India, Article 226-Principle of natural Justice-contract to collect parking fee of vehicle-given by Nagar Panchayat-can be canceled for any reason only by Nagar Panchahayt Basti-Special Secretary no where in picture-even without notice opportunity-order without jurisdiction quashed.

Held: Para-8

On due consideration of rival submissions, we find considerable force in the grounds of writ petition as well as the arguments of learned counsel for petitioner that the Special Secretary, who passed the order, directing the District Magistrate, Basti, to take action against the petitioner where under the District Magistrate directed the Nagar Panchayat concerned to proceed, was not competent to pass the order for the reason that the Special Secretary was not a party nor an authority to grant the contract in favour of the petitioner and secondly, it would reflect upon and interfere with the independence/autonomy of local bodies.
Case Law discussed:
(1975) 2 SCC 671

(Delivered by Hon'ble Uma Nath Singh, J.)

Order (Oral)

1. We have heard learned counsel for parties and perused the pleadings of writ petition.

2. Vide our order dated 09.01.2013, State was granted a week's time to seek instructions but till date no instructions have been received from the Department. However, learned State counsel took objection to the maintainability of the writ petition on the ground that the matter relates to Nagar Panchayat Basti which comes within the territorial jurisdiction of Allahabad Bench.

3. As the relevant order which is impugned herein namely Annexure No.3 has been passed by the Special Secretary, Government of U.P., Nagar Vikas Vibhag, the part of cause of action has arisen in terms of judgment of a Constitution Bench of Hon'ble the Apex Court passed in the matter of Sri Nasiruddin Vs. State Transport Appellate Tribunal, which is reported in (1975) 2 SCC 671. Paragraphs 37 and 38 of the judgment are reproduced as under :-

"37. The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in oudh. It may be that the original

order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action is well-known. If the cause of action arises wholly or in part at a place within the specified oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arises wholly within the specified oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen part within specified areas in oudh and part outside the specified oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court rightly attracted by the alleged cause of action.

38. To sum up, our conclusions are as follows. First there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in oudh from time to time. The areas in oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third. the Chief Justice has power under the second proviso to paragraph 14 of the order to direct in his discretion that any case or class of cases arising in oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in oudh areas shall be instituted or filed at Allahabad, instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the order be directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matter means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the cause of action arises wholly within oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place."

4. Thus, we reject the objection raised by the learned State Counsel.

5. The brief facts giving rise to filing of this writ petition are that Nagar Panchayat, Babhnan Bazar, Basti, issued public notice for auction and award of contract/licence to collect the parking fee for the year 2012-13 at the taxi stands situated within the municipal limit of the Nagar Panchayat, in the newspaper. The petitioner is an enlisted civil contractor with Irrigation Department. According to him, due to some pre-occupations he could not participate in the auction held on 18.04.2012 and, as such, had authorized Shri Nagendra Kumar Singh, son of late Shri Shyam Nath Singh, resident of village Ramapur, district Basti, to participate on his behalf in the auction process. The petitioner quoted Rs.2,99,100/- as the highest rate and, as such, vide order dated 18.04.2012, issued by the Executive Officer, Nagar Panchayat, he was awarded contract/licence for collecting the parking fees. In terms of the order dated 18.04.2012, the petitioner deposited 1/4th of the quoted amount with the Nagar Panchayat and started the work of collection in accordance with the Rules. A baseless and frivolous complaint was made by someone that the petitioner has been realizing entry fee from all the vehicles. The matter was enquired into by the Sub-Divisional Magistrate, Harriya, Basti. He submitted his enquiry report dated 02.12.2012 to the District Magistrate, Basti, holding that (i) entry fees from vehicles were being realized and (ii) the collection was being done by one Shri Paras Nath Yadav and not the petitioner. On the basis of the above inquiry report, the Special Secretary, Govt. of U.P., Nagar Vikas Vibhag, Lucknow, issued the letter no.4949/01-1-12-380 Sa/12 dated 13.12.2012 directing the District Magistrate, Basti, to take action against the petitioner/Shri Paras Nath Yadav. The District Magistrate, thus, vide letter no.90/LBC dated 15.12.2012, directed the Nagar Panchayat, Babhnan Bazar, Basti, to take action against the petitioner/Shri Paras Nath Yadav, in terms of directions issued by the aforesaid Special Secretary, Government of U.P. Opposite parties 5 and 6 without application of mind in a mechanical manner issued the impugned letter/order No.347 (6)/Na.pa.Ba.ba./2012-13 dated 20th December 2012 and letter/order no.348/Na.pa.Ba.ba./2012-13 dated 20th December 2012. It is also the averment that the enquiry report is an ex-parte report and it is illegal, arbitrary and against the principles of natural justice. Besides, though the impugned orders have been passed on the basis of the letter dated 13.12.2012 (Annexure No.3) of the Special Secretary but he was not empowered to issue any direction in the matter and, as such, the impugned orders deserved to be quashed. It is submitted that the contract was given to the petitioner by the Nagar Palika and thus only the said Palika is empowered to take a decision in the matter. However, it has not taken any independent decision and in following the order of the Special Secretary, it has acted mechanically and without application of mind. Thus, according to the petitioner, the action of the State Government is in contravention of the provisions of Section 35 (1) of the Nagar Palika Adhiniyam, 1916.

6. Learned counsel for petitioner in oral submission before the Court

reiterated the grounds taken in the writ petition.

7. On the other hand, learned State counsel submitted that the contract in question was not cancelled by the Special Secretary but he had only issued some directions to the District Magistrate, Basti, to take appropriate action on the enquiry report.

8. On due consideration of rival submissions, we find considerable force in the grounds of writ petition as well as the arguments of learned counsel for petitioner that the Special Secretary, who passed the order, directing the District Magistrate, Basti, to take action against the petitioner where under the District Magistrate directed the Nagar Panchayat concerned to proceed, was not competent to pass the order for the reason that the Special Secretary was not a party nor an authority to grant the contract in favour of the petitioner and secondly, it would reflect upon and interfere with the independence/autonomy of local bodies.

9. Impugned order (Annexure no.3) passed by the Special Secretary, Government of U.P., suffers from inherent infirmities of incompetence. Besides, the petitioner has not been left with any remedy of filing an statutory appeal or revision, if any, on the administrative side. The contract had been alloted by the Nagar Panchayat, Babhnan Bazar, Basti through the Executive Officer, therefore, the said officer should be the appropriate authority unless the law governing the field specifically prohibits. That apart, the enquiry and the enquiry report which formed the basis of further action were carried out ex-parte without giving opportunity to the petitioner.

10. In view of all the aforesaid, the order dated 13.12.2012 and all other consequential orders leading to cancellation of the contract granted in favour of the petitioner are hereby quashed. Thus, the writ petition is allowed.

11. However, it would be open for the Nagar Panchayat-competent authority to start the proceedings afresh on the complaint made against the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.02.2013

BEFORE
THE HON'BLE ANIL KUMAR,J.

SERVICE SINGLE No. - 635 of 2013

Pradeep Kumar Sonker ...Petitioner
Versus
District Judge Faizabad And Another ...Respondents

Counsel for the Petitioner:
Sri Kapil Muni Dubey

Counsel for the Respondents:
Sri Manish Kumar

Constitution of India, Article 226-resignation-effects from the date of acceptance by the competent authorities-after acceptance-not open to take 'U' turn in any manner-petition-dismissed.

Held: Para-21

Thus, in view of the facts stated hereinabvoe, as per the law, admittedly, in the present case, the petitioner had submitted his resignation from service on 15.02.2010 on personal grounds and the same has been accepted by the O.P. No. 1 on 07.06.2012. Accordingly, once

the same has been accepted, it is not open to the petitioner to withdraw the same subsequently hence there is no illegality or infirmity in the impugned order dated 07.06.2012 passed by O.P. No. 1/District Judge, Faizabad which is under challenge in the present writ petition.

Case Law discussed:

AIR 1978 SC 694; AIR 1981 SC 789; (1993) 2 SCC 725; (2001) 1 SCC 158; (2003) 1 SCC 701; (2005) 5 SCC 455

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

1. Heard Sri Kapil Muni Dubey, learned counsel for petitioner, Sri Manish Kumar, learned counsel for opposite parties and perused the record.

2. By means of the present writ petition, the petitioner has challenged the impugned order dated 07.06.2012 (Annexure No. 1) passed by District Judge, Faizabad.

3. Facts of the present case are that on 06.01.2000 the petitioner was initially appointed on the Class-III post in the office of District Judge, Banda. On his own request, transferred on 28.07.2001 to Faizabad.

4. On 15.02.2010, he tendered his resignation from service to the District Judge, Faizabad on personal ground. The District Judge, Faizabad on the said application has called a report from the concerned officer and thereafter in the matter in question certain correspondents have been taken place.

5. Lastly by an order dated 07.06.2012 (Annexure No. 1) the application of petitioner for resignation from service has been accepted by the O.P.No. 1/District Judge, Faizabad, the findings which given while accepting the same is as under:-

"अतः श्री सोनकर का पद एवं कार्यभार से मुक्त होने के सन्दर्भ में दिनांक १५-०२-२०१० की प्रस्तुत प्रथ्नापत्र/त्यागपत्र आज दिनांक ०७-०६-२०१२ को स्वीकार किया जाता है तथा आज की तिथि से उनसे सेवामुक्त किया जाता है। श्री सोनकर द्वारा दिनांक २७-०२-२०१० तक कार्य किया गया है। दिनांक २८-०२-२०१० को अवकाश था ०१-०३-२०१० से आज तक बिना किसी अवकाश के अनुपस्थित रहे है। उनके द्वारा पदेन सेवा दायित्व की पूर्ति में कोई कार्य नहीं किया गया है, इसलिए दिनांक ०१-०३-२०१० से वेतन का कोई लाभ उन्हें नहीं मिलेगा तथा उत्तरप्रदेश वितीय हस्तपुस्तिका खंड--दो, भाग-२ से ४ के मुल्नियम-५६ (ग) के प्राविधान के अनुसार पेंशन से सम्बंधित कोई लाभ श्री सोनकर को, सेवाकाल बीस वर्ष से कम हिने के कारन, देय नहीं होगा।

सर्वसम्बंधित तदनुसार सूचित हो।"

6. Thereafter, as per the version of the petitioner, who was ill and under medical treatment uptill 17.08.2012. On 18.08.2012, the Doctor declared him medically fit, So, on 21.08.2012 he went to join his duties along with medical certificate and fitness certificate and he was not allowed to join his duties on the ground that resignation given by him on 15.02.2010 has been accepted by the authority concerned on 07.06.2012.

7. In view of the abovesaid factual background, present writ petition has been filed by the petitioner thereby challenging

the impugned order dated 07.06.2012 (Annexure No. 1) passed by District Judge, Faizabad.

8. I have heard learned counsel for parties and perused the record.

9. The word 'Resignation' in relation to an office connotes the act of giving up or relinquishment of the office. To relinquish office means to cease to hold office or to lose hold of the office. Therefore, it means that the employees wants to sever his relation from the employer without any riders and then only it would amount to resignation.

10. Corpus Juris Secundum Vol. 77 page 311 defines the words 'resign' and 'resignation' as under:

"RESIGN" To give up; to surrender by a formal act; to yield; to relinquish; to give up one's office or position; to withdrawn from. The word" resign" in its ordinary and usual sense, imports a voluntary act, and has been held not to include the act of one whose continuance in a position has been terminated by death or by induction into the armed forces under th Selective Service Act.

"RESIGNATION. It has been said that "resignation" is a term of legal art, having legal connotation which describe certain legal results. It is characteristically the voluntary surrender of a position by the one resigning, , made freely and not duress, and the word is defined generally as meaning the act of resigning or giving up, as a claim, possession, or position."

11. In Words and Phrases(permanent Edn.) Vol. 37 at page 473, the word 'Resign' denoting voluntarily act, relinquish to give up , surrender by formal out, yield, relinquish , give up ones' office or position , or withdraw from it. Further at age 436 the word resignation has been define as :

" To constitute a ' resignation', it must be unconditional and with an intent to operate as such. There must be an intention to relinquish a portion of the term of office accompanied by an act of relinquishment. It is to give back, to give up in a formal manner, an office."

12. Black's Law Dictionary Sixth Edition Page 1310 defines the resignation as formal renouncement or relinquishment of an office. It must be made with intention of relinquishing the office accompanied by act of relinquishment . It is said that resignatio est juris proprii spontanea refutatio i.e. resignation is spontaneous relinquishment of one's own right thus the term of resignation implies voluntarily surrender of the position by a person resigning and acting freely not under duress and it becomes effective when the authority competent to make appointment accept it.

13. Moreover the resignation must be unambiguous and where an ambiguous letter of resignation is submitted, the authority should right to the employee to explain or clear the ambiguity instead of proceeding to accept the same. Further, the resignation becomes absolute when it is accepted by the appointing authority , date of communication of acceptance to him is not material .

14. Once the appointing authority accepts the resignation submitted by the Government servant, it becomes absolute

and cannot be withdrawn thereafter. The date on which he was informed of the such acceptance is not material for the purpose till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant has locus poenitentiae but not thereafter.

15. Hon'ble Supreme Court while considering the meaning of the word"resigning office" in the case of ***Union of India etc. Vs Gopal Chandra Misra and others, AIR 1978 SC 694*** held as under:-

" In the general juristic: sense, also the meaning of " resigning office" is not different. There also , as a rule, both, the intention to give up or relinquish the office and the concomitant act of its relinquishment, are necessary to constitute a complete and operative resignation (see, e.g. American Jurisprudence, 2nd Edition Volume 15A , page 80) although the act of relinquishment may take different forms or assume a unilateral or bilateral character , depending on the nature of the office and the conditions governing it. Thus, resigning office necessarily involves relinquishment of the office , which implies cessation or termination of, or cutting as under from the office . Indeed the completion of the resignation and the vacation of the office , are the causal and effectual aspects of one and the same event."

Further in para 42 of the aforesaid judgment the Hon'ble Apex Court approving the principle of withdrawal before the relationship of the employer and the employee held as under:-

" The general principle that emerges from the foregoing conspectus is that in the absence of anything to the contrary in the provisions governing the terms and conditions of the office post, an intimation in writing sent to the ; competent authority by the incumbent, of his intention or proposal to resign his office/post from a future specific date, can be withdrawn by him at any time before it becomes effective, i.e. before it effects termination of the tenure of the office/post or the employment."

16. In the case of ***P. Kasilingam V. P.S.G. College of Technology, AIR 1981 SC 789***, Hon'ble Supreme Court has held that :-

" It may be conceded that it is open to a servant to make his resignation operative from a future date and to withdraw such resignation before its acceptance. The question as to when a Government servant's resignation becomes effect came up for consideration by this Court in Raj Kumar Vs. Union of India , (1968) 3 SCR 857; (AIR 1969 SC, 180) . It was held that the services of a Government servant normally stand terminated form the date on which the letter of resignation is accepted by the appropriate authority, unless there is any law or statutory rule governing the conditions of services to the contrary. There is no reason why the same principle should not apply to the case."

17. In ***Moti Ram Vs. Param Dev (1993) 2 SCC 725,*** this Court observed as hereunder:-

" As pointed out by this Court, 'resignation' means the spontaneous relinquishment of one's own right and in

relation to an office, it connotes the act of giving up or relinquishing the office. It has been held that in the general juristic sense, in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. It has also been observed that the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it, Union of India Vs. Gopal Chandra Misra (1978) 2SCC 301, If the act of relinquishment is of unilateral character, it comes into effect when such act indicating the intention to relinquish the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect from the date of such communication where the resignation is intended to operate in praesenti. A resignation may also be prospective to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish, e.g. acceptance of the said request to relinquish the office, and in such a case the relinquishment does not become effective or operative till such action is taken. As to whether the act of relinquishment of an office is unilateral or bilateral in character would depend upon the nature of the office and the conditions governing it."

18. In ***Union of India Vs. Wing Commender T Porthasarathy (2001) 1 SCC 158***, the Apex Court has held that when a public servant has tendered resignation his service normally stands terminated from the date on which the letter of his request is accepted by the appropriate authority and the absence of any law or statutory rule governing the condition of his service contrary to the delay not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority.

19. In the case of ***Dr. Prabha Atri Vs. State of U.P. and other, (2003) 1 SCC 701***, Hon'ble Supreme Court has observed that letter when constitutes resignation , such a letter , held must be unconditional and intending to operate as such. Where an employee, required to submit his explanation for a certain lapse on his part, while submitting his explanation added that if the explanation was found to be not acceptable he would have no option left but to tender his resignation with immediate effect, held, such a letter did not amount to resignation. At best it could amount to a threatened offer to resign. The words "with immediate effect" in the said letter , held , could not be given undue importance dehors the context tenor of the language used, the purport of the letter and the portion of the letter indicating the circumstances in which the letter was written. Moreover, stopping the domestic enquiry by the management consequent to acceptance of the alleged resignation, held , had not significance in ascertaining the true or real intention of the said letter.

20. The Supreme Court in ***(2005) 5 SCC 455, North Zone Cultural Center and another v. Vedpathi Dinesh Kumar***

has observed that the resignation becomes effective on acceptance even if not communicated. Non Communication of the acceptance does not make the resignation inoperative provided there is in fact on acceptance before the withdrawal when the relevant rules not postulating communication of acceptance as a condition precedent for coming into effect of resignation. Employee tendering resignation with immediate effect and employer accepting the same on the same day but communicating the acceptance to the employee after 13 days. During the intervening period, the employee withdrawing his resignation. Such delay of mere 13 days, held , not an undue delay so as to infer that resignation had not already been accepted. Even the continued attendance to duty and signing of attendance register by the said employee during the intervening period held, of no assistance to claim that the resignation had not taken effect. More so, when there was no responsible officer in the office during that time and taking the advantage of that situation the employee had marked his attendance, hence the High Court's decision holding that communication of the acceptance of resignation subsequent to withdrawal of the resignation by the employee had become redundant was held improper.

21. Thus, in view of the facts stated hereinabvoe, as per the law, admittedly, in the present case, the petitioner had submitted his resignation from service on 15.02.2010 on personal grounds and the same has been accepted by the O.P. No. 1 on 07.06.2012. Accordingly, once the same has been accepted, it is not open to the petitioner to withdraw the same subsequently hence there is no illegality or infirmity in the impugned order dated 07.06.2012 passed by O.P. No. 1/District Judge, Faizabad which is under challenge in the present writ petition.

22. In the result, the writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

MISC. SINGLE No. - 878 of 1995

Sardar Jasbir Singh and Others ...Petitioner
Versus
IV Additional District Judge Unnao and Others ...Respondents

Counsel for the Petitioner:
Sri Govind Saran Nigam

Counsel for the Respondents:
C S C
Sri Malay Shukla
Sri P K Srivastava
Sri Ramesh Kumar Singh
Sri Sanjay Shukla
Sri Sushil Kumar

U.P. Consolidation of Holding Act 1953-Section 5(2) (a)-abatement of suit for injunction-without declaration of right or title-held-in view of Division Bench case of Banwarilal-followed by Single Judge in K Kanchan Kumar Chowdhary and Radha Krishna-would not stand abated.

Held: Para-25

In view of Division Bench judgment in Banwarilal & Others (supra) and the two Single Judge authority of this Court, following aforesaid Division Bench judgment in Kanchan Kumar Chowdhary (supra) and Radha Krishna & others (supra), I am clearly of the view that suit in question is simply a suit for

permanent injunction and would not stand abated by Section 5(2) of Act, 1953.

Case Law discussed:

AIR 1968 SC 714; 1971 RD 331; 1983 RD 29; 1984 RD 156; AIR 1966 SC 1718; 2005 (1) AWC 660; 1979 All.L.J. 675=1979 RD 136; 1990 (1) CRC 466; 1999 (1) AWC 152

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

1. Heard Sri G.S.Nigam, learned counsel for the petitioner and perused the record.

2. The respondent no.2 instituted a suit under Section 229-B of U.P.Zamindari Abolition & Land Reforms Act, 1951 *(hereinafter referred to as "Act, 1951")* impleading Gaon Sabha, Mahinaura and State of Uttar Pradesh seeking declaration that disputed plot no.1259 area 10 bigha 7 biswa is his bhumidhari land with transferable rights. A notification under Section 4 of Consolidation of Holdings Act, 1953 (*hereinafter referred to as "Act, 1953")* was issued and thereafter aforesaid suit stood abated on 17th February, 1992 under Section 5(2) of Act, 1953.

3. Thereafter aforesaid respondent no.2 instituted another suit in the Court of Munsiff, North, Unnao against petitioners seeking an injunction restraining petitioners from forcibly interfereing in peaceful enjoyment and possession of respondent no.2 upon the land no.1259 (old no.1477) measuring 10 bigha 7 biswa situated in Gram Mahnaura, Pargana Gosinda Parsandan, Tehsil Hasanganj, District Unnao.

4. The petitioners put in appearance and filed their objections stating that dispute relates to a property which is actually owned by petitioners and since there is a title dispute, suit is not maintainable and must be held to be abated under Section 5(2) of the Act, 1953. The objection raised by petitioners found favour with Trial Court and it passed order dated 21st May, 1994 abating the suit under Section 5(2) of Act, 1953. But the aforesaid decision has been reversed by lower Appellate Court by allowing civil appeal no.72 of 1994 filed by respondent no.2.

5. Learned counsel for the petitioners submitted that in the present case unless dispute/issue of title is decided, no injunction can be granted and therefore judgment of Trial Court abating suit was perfectly right but lower Appellate Court has committed error in taking a view otherwise. He placed reliance on Apex Court's decision in **Ram Adhar Singh Vs. Ramroop Singh & Ors., AIR 1968 SC 714** and this Court's decisions in **Zor Singh & Ors. Vs. Hukum Singh & Anr., 1971 RD 331, Ram Lakhan & Ors. Vs. Gaon Sabha Kusmahara, & Ors., 1983 RD 29 and Smt. Barsatiya Vs. District Judge, Ghazipur, 1984 RD 156** and contended that in view of aforesaid authoritative pronouncement of Apex Court and this Court, judgment of lower Appellate Court is liable to be set aside.

6. The only issue up for consideration, whether suit in question would stand abated by Section 5(2) of Act, 1953.

7. Section 5(2)(a) of Act, 1953, relevant for our purpose of Act, 1953, reads as under:

"(2) Upon the said publication the notification under Sub-section (2) of Section 4, the following further consequences shall ensure in the area to which the notification relates, namely :

(a) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any Court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending, stand abated :

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard :

Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated."

8. A perusal of above shows that upon publication of notification under Section 4(2) of Act, 1953, suit and proceedings of specified nature pending before any Court or authority shall abate. The kinds of cases which would stand abated by virtue of Section 5(2) upon publication of notification issued under Section 4(2) of Act, 1953 are :

(I) Proceedings for correction of records,

(II) Suits or proceedings in respect of declaration of rights or interest in any land.

(III) Suits or proceedings for declaration or adjudication of any other right in regard to which proceeding can or ought to be taken under this Act.

9. Exposition of law is well settled that a statute ousting the jurisdiction of a Court must be construed strictly. (See **Abdul Waheed Khan Vs. Bhawani & Ors., AIR 1966 SC 1718**). Thus the jurisdiction of Court or authority, as the case may be, which would stand affected by virtue of Section 5(2), have to be seen strictly whether they are within the ambit of aforesaid provision or not.

10. This Court in **Radha Krishna & Ors. Vs. Brij Kishore and Ors. 2005(1)AWC 660** said:

"12. The section being exhaustive will only apply to suits or proceedings specified therein, and no other. It cannot be stretched to bring within its ambit the suit or proceedings which the Legislature did not intend to abate on the on set of consolidation operations. Thus, unless the suit or proceedings fall within three above-mentioned categories, the jurisdiction of the Court or authority, otherwise, empowered to decide the same cannot be excluded or ousted."

11. In **Ram Adhar Singh Vs. Ramroop Singh and others, AIR 1968 SC 714**, the Court construed Section 5(2) as amended by U.P. Act 21 of 1966 and said that a suit filed for recovery of

possession of a property on the ground that the opposite party is a trespasser and has no right to remain in possession of property ex facie would include a dispute relating to title. Therefore, the expression 'every suit and proceedings in respect of declaration of rights or interest in any land', is comprehensive enough to take in suits for possession of land, because, before a claim for recovery of possession is accepted, the Court will have necessarily to adjudicate upon the right or interest of the plaintiff, in respect to the disputed property, taking into account the claim of opposite party and such a suit would hit by Section 5 (2) of Act, 1953.

12. Therein the Court had no occasion to consider whether a suit for mere injunction would also come within the ambit of Section 5(2) of Act, 1953.

13. This issue came up for consideration in **Zor Singh & Ors. (supra)** but the facts of the case show that though the suit was filed for permanent injunction, but plaintiff himself admitted that defendant had dispossessed him and therefore the Court took a view that if that being so, no suit for mere injunction was maintainable and the suit should have been for possession. Once a suit for possession has to be filed, a dispute with regard to title over the land has to be decided by the Court and in such circumstances the suit would be covered by Section 5(2) of Act, 1953 after a notification has been issued under Section 4(2) of the Act, 1953.

14. Referring to the Apex Court's decision in **Ram Adhar Singh (supra)**, the Court also observed, where right or title to the land is not involved, a suit for injunction would fall outside the provision of Section 5(2) of Act, 1953. The relevant observations are :

"....Even a suit for an injunction implies a declaration of right or title to hold land. In my opinion, even a suit for an injunction, which involves a declaration of title or right or interest in land, would be struck by Section 5 of the U.P. Consolidation of Holdings Act. ***A suit for an injunction which does not involve such a declaration, but is based on an alleged right of easement, may fall outside the provisions of Section 5." (emphasis added)***

15. The issue, however, has been settled by a Division Bench of this Court in **Banwarilal & Ors. Vs. Tulsi Ram & Ors., 1979 All.L.J. 675=1979 RD 136** wherein it was held that in a suit where plaintiff does not desire adjudication of his rights and the only relief claimed is that of permanent injunction, and the suit is not of a kind which necessitates adjudication of rights before relief could be granted, such a suit would not abate by virtue of Section 5(2) of Act, 1953.

16. In the context of Civil Court and Revenue Court's jurisdiction, Apex Court has also held in **Heera Lal & Anr. Vs. Carjan Singh & Ors., 1990(1) CRC 466** that in a suit for permanent injunction the question of title arises only incidentally, and it is the civil court which has exclusive jurisdiction to try such suits.

17. If the suit, in the present case, is looked into in view of above exposition of law, this Court finds that plaintiff has set up a case that he is in possession of 10 bigha 7 biswa land of plot no.1259 (old no.1477) situated at Gram Mahnaura, Pargana Gosinda Parsandan, Tehsil

Hasanganj, District Unnao and is continuously cultivating the land. His crop is standing thereon but the defendants are trying to cut his crop by threats etc. and therefore, they should be restrained from taking forceful possession of property in dispute and should not damage standing crop and peaceful enjoyment and possession of plaintiff. The defendants though disputed the claim set up by plaintiff, but, admits in written statement that there are entries in revenue records which are in the name of plaintiff and plot no.1259 is a very big plot of which 133 bigha and 18 biswa was registered in the name of a agricultural society and defendants are cultivating thereupon. The entry in revenue records in respect to plaintiff is not disputed but it is challenged alleging that it is a forged entry.

18. Looking to the nature of allegations contained in the plaint and relief sought by plaintiff, in my view, the suit as it stands neither seeks any correction of record nor any declaration of rights or interest in the land. Suit for declaration of rights and interest in any land necessarily implies relief by way of declaration of rights in the said land and unless a relief is claimed, the suit cannot be said to be one for declaration of rights or interest in the land.

19. When a suit for recovery is filed, interest in the land is claimed and that is how it has been held to be covered by Section 5(2), which is not the case here. No such relief in the present case has been sought by plaintiff. It thus cannot be termed to be a suit in respect to declaration of rights or interest in the land.

20. In respect to injunction suit in **Radha Krishna & Ors. (supra)** this Court further said:

"Further, under the scheme of the Act, since the authorities are not vested with any power to grant injunction, the suit cannot be termed as one for declaration or adjudication of any such rights in regard to which proceedings can or ought to be taken under this Act."

21. In the present case, the plaint as it stands does not fit in any of the three classes of suits or proceedings specified under Section 5 (2) of the Act, 1953 which the Legislature intended to abate on the on set of consolidation operation. Any finding with regard to title or interest of the plaintiff in the property in such a suit for injunction will only be incidental for the purpose of granting injunction without any declaration of such rights of plaintiff in the land, and hence not liable to be abated.

22. Considering the authorities cited at the Bar, I find that in **Ram Lakhan & Ors. (supra),** the Court simply held the suit stand abated under Section 5(2) of the Act, 1953 on the ground that land in question is covered by definition of 'land' under Act, 1953 but it has not noticed Division Bench judgment in **Banwarilal & Ors. (supra**) rendered earlier and the same being a judgment of Larger Bench, binding on this Court.

23. The decision in **Smt. Barsatiya (supra)** has followed dictum laid down in **Zor Singh & others (supra)** where this Court has held that a suit for injunction, which involves a declaration of title or right or interest in land, would stand abated under Section 5(2) of Act, 1953;

but it has clearly said that suit for injunction, which does not involve a declaration of title or right etc., but is based on an alleged right of easement, may fall outside the provision of Section 5(2) of the Act, 1953.

24. The decision in **Banwarilal (supra)** has also been followed by this Court in **Kanchan Kumar Chowdhary Vs. District Judge, Mau, 1999 (1) AWC 152.**

25. In view of Division Bench judgment in **Banwarilal & Others (supra)** and the two Single Judge authority of this Court, following aforesaid Division Bench judgment in **Kanchan Kumar Chowdhary (supra) and Radha Krishna & others (supra)**, I am clearly of the view that suit in question is simply a suit for permanent injunction and would not stand abated by Section 5(2) of Act, 1953.

26. The writ petition is, therefore, dismissed.

27. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.02.2013

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Bail Application No. 1803 of 2013

Dinesh Kumar Sahni @ Dinesh Sahni
...Applicant
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar
Sri Kundan Pal

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure, Section 439-three different bail applications-by same petitioner-three different Counsel-concealing earlier bail applications-even the counsel facing embarrassing situation tendered unconditional apology-exemplary cost of Rs. 10,000 imposed-with direction to make declaration filing any earlier writ, bail, appeal, revision or 482 applications

Held: Para-11

Before parting with the case, the Court requests the members of the Bar to make sure from the litigants and their Pairokars etc. that before filing any writ petition, application under Section 482 Cr.P.C., bail application, revision, appeal, etc. before this Court whether any such matters have not been earlier filed by the respective parties before this Court so that such an embarrassing situation may not arise again before the learned counsel and this Court may not be flooded with multiplicity of litigations on behalf of one party for same cause of action and precious time of the Court be wasted which has large number of cases pending for disposal and litigants are waiting for disposal of their cases. It has been noticed by the Court on various occasions while sitting in different jurisdiction that such instances have become the order of the day in spite of various computerized methods adopted by the Registry of this Court to check such instances but sometimes it also escapes from their notice. Thus, the co-operation from the Bar is also required to save the institution from such malpractices.

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Heard Sri Raj Kumar and Sri Kundan Rai, learned counsel for the applicant and learned A.G.A. for the State.

2. At the very outset, Sri Raj Kumar, learned counsel for the applicant states that the notice of the present bail application on behalf of the applicant which has been moved in Case Crime No. 124 of 2012 under Section 376 I.P.C., police station Jansa, District Varanasi, was given through him on 5.10.2012 to the Office of Government Advocate U.P. which was numbered as Notice No. 27069 of 2012. The deponent of the said bail application is one Ghasi S/o-Bhaggal, R/o-House No. 36, Village/Mohalla Ghamahapur, Tehsil Sadar, District Varanasi, who is the father of the applicant. Thereafter another bail application was moved on behalf of the same applicant in same case crime number and notice of the said application was given by Sri Kundan Rai, Advocate, who is also present in the Court today to the Office of Government Advocate U.P. on 24.11.2012 which was numbered as Notice No. 32368 of 2012. The deponent of the said bail application is also Ghasi, father of the applicant, who had earlier instructed Sri Raj Kumar to file the bail application on behalf of the applicant.

3. These two bail applications have come up before this Court as fresh as they have been assigned to this Bench and are being heard and disposed of by a common order.

4. In the other bail application which has been filed on behalf of the applicant through Sri Kundan Rai, Advocate, the deponent has not disclosed the fact that he had already approached to this Court and a notice of the bail application on behalf of the applicant has been given through another counsel Sri Raj Kumar to Government Advocate in the same crime number.

5. On being asked about the said fact, learned counsel for the applicant Sri Raj Kumar and Sri Kundan Rai could not give a satisfactory reply. Instead they have tendered apology on behalf of their client for aforesaid misconduct/misinformation thereby misleading this Court and wasting its precious time.

6. Both learned counsel for the applicant in the respective bail application prayed that the present applications may be dismissed on this count alone by imposing exemplary cost which this Court may deem fit so that no further complication may arise in the matter as the Court taking serious note of the matter wanted to get an enquiry done about the genuineness of the affidavit of the deponent Ghasi in two bail applications.

7. In view of the above, the present two bail applications are dismissed for concealing material fact by the deponent that he has already approached this Court and given notice to the Office of Government Advocate of the bail application on behalf of the applicant on 5.10.2012 and did not disclose the said fact to his counsel Sri Kundan Rai and also filed another bail application and gave notice of the same to the Office of Government Advocate on 24.11.2012 which has also been filed in the Court and has also came today before the Court for disposal and has put both the counsel in an embarrassing position before the Court and further misleading the Court by his

deceitful conduct and not approaching the Court with clean hands, with an exemplory cost of Rs. 10,000/- which shall be realized from the deponent within a period of one month from today. The amount if so realized by the deponent shall be transmitted to the concerned District Legal Authority.

8. Office is directed to send a certified copy of this order to the C.J.M. Varanasi for realizing the said amount from the deponent as directed above. If the amount of fine is not deposited in the aforesaid period, the deponent shall be taken into custody and shall be sent to jail to undergo simple imprisonment for a period of two months from the date of his arrest.

9. Learned counsel for the applicant is at liberty to file second bail application on behalf of the applicant after the aforesaid amount of cost is deposited or the deponent Ghasi is sent to jail and release after serving out the sentence as the case may be.

10. Office is further directed to tag the record of Criminal Misc. Bail Application No. 1744 of 2013, Dinesh Kumar Sahni @ Dinesh Sahni vs. State of U.P. along with the present bail application.

11. Before parting with the case, the Court requests the members of the Bar to make sure from the litigants and their Pairokars etc. that before filing any writ petition, application under Section 482 Cr.P.C., bail application, revision, appeal, etc. before this Court whether any such matters have not been earlier filed by the respective parties before this Court so that such an embarrassing situation may not arise again before the learned counsel and this Court may not be flooded with multiplicity of litigations on behalf of one party for same cause of action and precious time of the Court be wasted which has large number of cases pending for disposal and litigants are waiting for disposal of their cases. It has been noticed by the Court on various occasions while sitting in different jurisdiction that such instances have become the order of the day in spite of various computerized methods adopted by the Registry of this Court to check such instances but sometimes it also escapes from their notice. Thus, the co-operation from the Bar is also required to save the institution from such malpractices.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.02.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL,J.

Criminal Revision No. 1950 of 2010

Smt. Prabha Awasthi & Others...Petitioner
Versus
State Of U.P. & Another ...Respondents

Counsel for the Petitioner:
Sri Surendra Tiwari
Sri Dileep Kumar
Sri Rajiv Gupta
Sri Rajrishi Gupta
Sri Ravi Kant
Sri Surendra Tripathi

Counsel for the Respondents:
Sri D.P.Singh
Sri Dr. Nisha Richariya
Sri Vishnu Gupta
A.G.A.

Code of Criminal Procedure-397-revision against summoning order-offence under section 467, 468, 471 I.P.C.-dispute pure civil nature-civil court given finding that power of attorney executed by complainant-no fraud on part of revisionist fund-appeal still pending before Apex Court-at the time of issue of summon on taking cognizance-decision of civil court not disclosed-order quashed.

Held: Para-25

For the aforesaid reasons, I am of the opinion that the civil dispute between the parties has been given a criminal colour and in the complaint sent to the Home Minister, Government of India and this fact has been concealed that civil suit regarding the said plot is also pending in a competent court. The pendency of the civil suit has also not been brought into the notice of the court which has passed the summoning order.

Case Law discussed:

2009 (67) ACC 886; 2008 (60) ACC 1; 2009 (66) ACC 28; (2011) 3 SCC 351; (2006) 6 SCC 736; (2009) 8 SCC 751

(Delivered by Hon'ble Aditya Nath Mittal,J)

1. Heard learned counsel for the revisionists and learned A.G.A. Opposite party No. 2 (in person) has argued her matter.

2. This Criminal Revision has been filed against the order dated 23.2.2010 passed by III Addl. Chief Judicial Magistrate, Gautam Budh Nagar in case No. 1423 of 2009 by which the revisionists have been summoned to face the trial for the offence punishable under sections 467, 468 and 471 I.P.C.

3. Learned counsel for the revisionists has submitted that the present dispute is of civil nature and no forgery has been committed by the revisionists but the court below has committed manifest error in passing the summoning order. It has also been submitted that the opposite party No. 2 had executed power of attorney and an agreement to sell regarding which a civil suit No. 584 of 2005 was filed but because the agreement to sell was unregistered, therefore the relief of specific performance was not granted but the civil court vide its judgment dated 27.3.2010 has directed to refund the amount of Rs. 7,64,795/- along with interest of 6%. It has also been submitted that the said judgment of the civil court was challenged by both the parties before this Court and the appeal has also been dismissed by Division Bench but now the matter is pending before Hon. Apex Court.

4. Learned counsel for the revisionist further submitted that there are clear cut finding of the civil court that there was no forgery of the signatures. Therefore the alleged criminal offence is not made out.

5. Learned A.G.A. has defended the order. Opposite party No. 2 appearing in person has submitted that the revisionists have committed forgery with her and have forgedly prepared the said power of attorney and an agreement to sell which do not contain her signatures. Therefore there is no illegality in the impugned order.

6. Opposite party No. 2 had lodged an F.I.R. challenging the genuineness of agreement to sell dated 18.5.2005 and in view of the conclusion in civil suit No. 584 of 2005 and considering other evidence, the police submitted final report on 1.3.2007 which was challenged by

protest petition. After recording statement u/s 200 and 202 Cr.P.C., the revisionists have been summoned to face the trial for the offence punishable u/s 467, 468, 471 I.P.C.

7. The whole controversy is regarding execution of agreement to sell dated 18.5.2005. The revisionists have alleged that said agreement to sell as well as power of attorney was executed by opposite party No. 2 while the opposite party No. 2 alleges that said documents are forged and they do not contain the signature of opposite party No. 2.

8. A civil suit No. 584 of 2005 was filed by revisionist No. 1 before Civil Judge (SD) Gautam Budh Nagar in which it was alleged that whole of the amount regarding disputed plot was deposited by her on the assurance of opposite party No. 2 that the said plot shall be transferred to revisionist No. 1 but due to dishonesty the opposite party No. 2 who was defendant No. 1 in the civil suit denied the execution of sale deed as well as the power of attorney. The said civil suit was contested by opposite party No. 2 and after considering the evidence of both the parties, the civil court came to the conclusion that the agreement to sell dated 18.5.2005 has been executed by defendant No. 1 who is opposite party No. 2 in the present revision and it contains the signature of defendant No. 1. The civil court also came to the conclusion that there was no evidence to prove that the power of attorney was a forged document and because it was also not registered, therefore the plaintiff do not get any right over the property in dispute. Learned civil court also came to the conclusion that the agreement to sell was not registered in terms of section 17 of the Indian Registration Act, therefore the plaintiff do not get any right by the said agreement to sell but it was found that whole of the amount regarding the disputed plot was deposited by the plaintiff in the office of Noida authority, therefore the plaintiff was entitled to get refund her money.

9. Admittedly the plaintiff in the civil suit and the defendant No. 1 are real sisters.

10. During the pendency of civil suit, the opposite party No. 2 had moved an application to the Home Minister, Government of India alleging that she has deposited whole of the amount regarding the disputed plot for which she is a lease deed holder but the accused persons have forged a power of attorney and agreement to sell and want to take her property. The investigation was made in the matter and the Investigating Officer came to the conclusion that parties are real sisters and in the judicial order dated 7.12.2005, it has been found that there is similarity in the signatures. Therefore the allegation of forgery was not proved and the final report was submitted.

11. It appears from the judgment of the civil suit No. 584 of 2005 that both the parties had adduced their evidence and the reports of handwriting and finger print experts were also submitted by both the parties but the defendant Smt. Nisha Richhariya had not examined the handwriting and finger print expert while the plaintiff who is revisionist No. 1 had examined the handwriting and finger expert Sri R.K. Jaiswal as P.W. 8. Learned civil court after considering the evidence on record has come to the conclusion that the statement of handwriting and finger print expert is

supported by the statements of P.W. 3 and P.W. 4 and the defendant No. 1 has not examined any handwriting and finger print expert in her defence and there was similarity in the signatures on the agreement to sell, therefore it was found that said agreement to sell was not a forged document.

12. Learned counsel for the revisionists has relied upon **Devendra and others Vs. State of U.P. and another 2009 (67) ACC 886** in which Hon. Apex Court has considered the civil wrong and criminal wrong and has held as under:-

"We may, however, notice that the said decision has been considered recently by this Court in Mahesh Choudhary v. State of Rajasthan & another, 2009 (4) SCC 66 wherein it was noticed:

"Recently in R. Kalyani v. Janak C. Mehta and Ors. JT 2008 (12) SC 279 this Court laid down the law in the following terms:

9. Propositions of law which emerge from the said decisions are:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.

10. It is furthermore well known that no hard and fast rule can be laid down. Each case has to be considered on its own merits. The Court, while exercising its inherent jurisdiction, although would not interfere with a genuine complaint keeping in view the purport and object for which the 15 provisions of Sections 482 and 483 of the Code of Criminal Procedure had been introduced by the Parliament but would not hesitate to exercise its jurisdiction in appropriate cases. One of the paramount duties of the Superior Courts is to see that a person who is apparently innocent is not subjected to persecution and humiliation on the basis of a false and wholly untenable complaint.

16. The charge-sheet, in our opinion, prima facie discloses commission of offences. A fair investigation was carried out by the Investigating Officer. The charge-sheet is a detailed one. If an order of cognizance has been passed relying on or on the basis thereof by the learned Magistrate, in our opinion, no exception thereto can be taken.

We, therefore, do not find any legal infirmity in the impugned orders."

13. Learned counsel for the revisionists has further relied upon **Inder Mohan Goswami and another Vs. State of Uttaranchal and others 2008 (60) ACC 1** in which Hon. the Apex Court has held as under::-

"The veracity of the facts alleged by the appellants and the respondents can only be ascertained on the basis of evidence and documents by a Civil Court of competent jurisdiction. The dispute in question is purely of civil nature and respondent No. 3 has already instituted a civil suit in the court of Civil Judge. In the facts and circumstances of this case, initiating criminal proceedings by the respondents against the appellants is clearly an abuse of the process of the Court."

14. Learned counsel for the revisionists has further relied upon Hira Lal and others Vs. State of U.P. and others 2009 (66) ACC 28 in which Hon. the Apex Court has held :-

"The question as to whether the transactions are genuine or not would fall for consideration before the Civil Court as indisputably the respondent No. 3 has filed a civil suit in the Court of Civil Judge, Gautam Budh Nagar wherein allegedly an interim injunction has been granted. What was the share of the respective co-sharers is a question which is purely a civil dispute; a criminal court cannot determine the same."

15. Learned counsel for the revisionists has relied upon **Harshendra Kumar D. Vs. Rebatilata Kolley and others (2011) 3 SCC 351** in which Hon'ble the Supreme Court has held that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstances, can be looked into by the High Court In exercise of its jurisdiction under section 482 or for that matter in exercise of revisional jurisdiction under section 397 of the Code.

16. Hon'ble Apex Court has further held that it is clearly settled that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction under section 397 of the Code in a criminal case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations.

17. Learned counsel for the revisionists has further relied upon In**dian Oil Corporation Vs. NEPC India Ltd. and others (2006) 6 SCC 736** in which Hon'ble Apex Court considering the judgment of Hridaya Ranjan Prasad Verma has observed as follows:-

18. In Hridaya Ranjan Prasad Verma, this Court held :

"On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to

do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

19. In **Mohd. Ibrahim and others Vs. State of Bihar and another (2009) 8 SCC 751** the Hon. Apex Court has held that if what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the Code are attracted.

20. In the present case , admittedly the application to Home Minister, Government of India was moved during the pendency of the aforesaid civil suit No. 584 of 2005. In the aforesaid civil suit the parties were given full opportunity to adduce their evidence and it was proved by the evidence of the plaintiff who is revisionist No. 1 that the said agreement to sell and the power of attorney are not forged documents. The opposite party No. 2 who was defendant No. 1 in the said civil suit had filed the report of handwriting and finger print expert but the said expert was not examined in the evidence. Learned civil court after considering the evidence on record as well as the handwriting and finger print expert report came to the conclusion that the agreement to sell contains the signature of defendant No. 1 Smt. Nisha Richhria who is complainant in the present case.

21. The first appeal of both the parties has already been dismissed by Division Bench of this Court and now SLP is pending before the Hon. Apex Court.

22. In view of the above decisions of the Hon"ble Apex Court it is clear that the purely civil dispute has been admitted to give the cloak of criminal offences which cannot be permitted to settling the scores or to pressurize the parties to settle civil dispute. In the present case it is a pure civil dispute in which the agreement to sell and the power of attorney were challenged and after considering the evidence of both the parties, it has been held that signatures on the power of attorney and the agreement to sell are not forged. It clearly indicates that prima facie the signatures of Smt. Nisha Richharia are not forged and thus no forgery has been committed upon her.

23. Hon'ble Supreme Court in Indian Oil Corporation Vs. NEPC India Ltd.

(2006) 6 scc 736 (Supra) has further held that any effort to settle the dispute and claim which do not involved any criminal offence, by applying pressure through criminal prosecution, should be deprecated and discouraged.

24. In criminal proceedings, the complainant had filed the report of Hand Writing and Finger Print expert which was also produced in civil proceedings but which has not been proved in the civil proceedings while she had full opportunity to prove the said report to prove her case as well as to rebut the handwriting and finger print expert report submitted and proved by the revisionists. In this way, the opposite party No. 2 has relied upon such a document which she was having opportunity to prove but has failed to prove without any plausible reason and thus also cancealed this fact from the court which passed the impugned order. While on the other hand, the civil court has found that power of attorney and the agreement to sell have been executed by the complainant. The findings of civil court have been affirmed by Division Bench of this Court in First appeals, filed by both the parties.

25. For the aforesaid reasons, I am of the opinion that the civil dispute between the parties has been given a criminal colour and in the complaint sent to the Home Minister, Government of India and this fact has been concealed that civil suit regarding the said plot is also pending in a competent court. The pendency of the civil suit has also not been brought into the notice of the court which has passed the summoning order.

26. In the circumstances the revision is allowed and the order dated 23.2.2010 passed by III Addl. Chief Judicial Magistrate, Gautam Budh Nagar in complaint case No. 423 of 2009 summoning the revisionists for the offence punishable under sections 467, 468 and 471 I.P.C. is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN,J

Civil Misc. Writ Petition No. 2801 of 1998

M/S Tej Shoe Factory
...Petitioner
Versus
P.O., Industrial Tribunal-Iv, Agra And Anr ...Respondents

Counsel for the Petitioner:
Sri Ranjit Saxena
Sri Amit Kumar Mishra
Sri B.L. Verma

Counsel for the Respondents:
S.C.
Sri Jamal Khan
Sri Vinod Swaroop

Constitution of India, Article 226-Labor Court award reinstatement with Full Back Wages-on basis of 3 years working-while for the 26 years out of job-order of reinstatement modified with compensation of 1, 50,000/-payable within 2 month-on failure from the date of award till actual payment 2 % interest shall be paid.

Held: Para-10

Even though this principle of award of consolidated damages/ compensation is mainly resorted to in case of daily wagers engaged by government or governmental agencies however there is no reason for not applying the same

principle to private employers and their workmen in suitable cases like the present one. Respondent No.2 worked for only three years and for 26 years she is not working with the petitioner. In this regard reference may be made to para-5 of AIR 2008 (Supp.) SC 1885 which arose out of a dispute between private employer and its workman. Last part of the para is quoted below:

Case Law discussed:

AIR 2010 SC 2140; (2009) 15 SCC 327; AIR 2008 (Supp.) SC 1885

(Delivered by Hon'ble Sibghat Ullah Khan,J.)

1. Heard learned counsel for the parties.

2. This writ petition by the employer is directed against award dated 19.02.1997 by Presiding Officer, Industrial Tribunal (IV), U.P. Agra in Adjucation Case No.15 of 1988. The matter which was referred to the labour court was as to whether action of petitioner employer terminating the services of its workman respondent No.2, Smt. Lila Devi w.e.f. 28.08.1986 was just and valid or not. The workman contended that she was continuously working from 01.05.1983 till 17.08.1986 and that since 18.08.1986 due to illness she was not going on duty after recovery, she intended to join on 25.08.1986 but she was orally told that she was no more required to work. The case of the employer petitioner was that since 18.08.1986 respondent No.2 was absent unauthorisedly and that her behaviour was unruly, she abused and threatened and levelled indecent charges against the managed and even though she was required to join the duties, however she failed to do so and her services were terminated on 29.09.1986.

3. Admittedly, no retrenchment compensation was paid to respondent No.2 and no inquiry was held. Regarding inquiry the employer pleaded that holding inquiry would have been detrimental as it would have resulted in indecent charges by the respondent No.2 against the Manager. Labour Court held that the employer continuously wrote to respondent No.2 to join but she did not come on work. Ultimately, termination was held illegal on the ground that no retrenchment compensation as directed to be paid by Section 6-N of U.P. Industrial Disputes Act had been paid. Accordingly, reinstatement with full back wages was directed.

4. It is not clear that why matter remained pending from 1988 to 1997. In this writ petition through interim order dated 29.01.1998 execution of the impugned award was completely stayed.

5. Written statement filed by the petitioner employer before the labour court is Annexure-2 to the writ petition stating that services were not terminated on 25.08.1986 but on 29.09.1986. It was admitted that respondent No.2 was employed w.e.f. 01.05.1983 as helper. In the written statement exchange of letters between the petitioner and respondent No.2 has been mentioned. It is also mentioned that on 17.09.1986, respondent No.2 quarrelled with Sri R.K. Sharma, manager of petitioner and abused him. It is also stated that she was not reporting on duty but she was coming to the factory and using filthy language. It is mentioned that management had lost confidence in her. It is also stated that retrenchment compensation was sent through money order, which was refused. Thereafter, subsequent letters of respondent No.2 to

City Magistrate and other authorities have been mentioned.

6. Annexure-3 to the writ petition is the written statement of respondent No.2. In para-6 of the written statement, respondent No.2 mentioned that she sent notice on 29.09.1986 to the employer for sitting on dharna w.e.f. 30.10.1986 and another letter was sent to the administrative authority of the district on 06.10.1986 for permission to sit on dharna on 15.10.1986, which was not granted to her. In para-10 of the written statement she admitted that she was sent a money order of Rs.1473.25, however she refused to accept the same as it was short by Rs.82/- and this fact was admitted by the employers themselves as afterwards on 30.09.1986 they informed her that due to fault of the clerk, the amount which was earlier sent was short by Rs.82/- which was again being sent.

7. Admittedly no inquiry was held. Some amount was sent as retrenchment compensation. There is no finding by the labour court that whether it was complete as alleged by the employers or incomplete as alleged by the respondent No.2 on the ground of which she refused to accept the same. Learned counsel for the petitioner has argued that it was a case of loss of confidence. However the said point is not fully established and in any case confidence may be lost on the ground of some proven facts. Without inquiry it cannot be said that anything was proved.

8. Respondent No.2 admits that some amount was sent through money order which she refused, however she has asserted that she was justified in refusing the same as it was short.

9. From the allegations made in the written statements by both the parties against each other, it is quite clear that it was a case of distrust of each other against each other. The relationship was more than strained or irretrievably broken. Accordingly, it was not congenial for any of the parties to direct reinstatement. In such situation, the best course would be to award reasonable compensation/ damages to the workman. Supreme Court in several authorities has held that in case of violation of Section 25-F of Industrial Disputes Act (equivalent to Section 6-N of U.P. I.D. Act), it is not always necessary to direct reinstatement with full back wages in some suitable cases award of consolidated damages/ compensation may be the most appropriate relief. In this regard, reference may be made to paragraphs 6, 7 & 8 of the Supreme Court judgment reported in **AIR 2010 SC 2140**, which are quoted below:

"6. In last few years it has been consistently held by this Court that relief by way of reinstatement with back wages is not automatic even if termination of an employee is found to be illegal or is in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate, (See U.P. State Brassware Corpn. Ltd. & Anr. v. Uday Narain Pandey (2006) 1 SCC 479; Uttaranchal Forest Development Corpn. v. M.C. Joshi (2007) 9 SCC 353; State of M.P. & Ors. v. Lalit Kumar Verma (2007) 1 SCC 575; Madhya Pradesh Administration v. Tribhuban (2007) 9 SCC 748; Sita Ram & Ors. v. Moti Lal Nehru Farmers Training Institute (2008) 5 SCC 75; Jaipur Development Authority v. Ramsahai & Anr. (2006) 11 SCC 684; Ghaziabad Development Authority &

Anr. v. Ashok Kumar & Anr. (2008) 4 SCC 261 and Mahboob Deepak v. Nagar Panchayat, Gajraula & Anr. (2008) 1 SCC 575).

7. In a recent judgment authored by one of us (R.M. Lodha, J.) in the case of Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr. (2009) 15 SCC 327, the aforesaid decisions were noticed and it was stated:

*"7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice. * * * * * * * * * * 14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee".*

8.In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice. In our considered view, the compensation of Rs. 40,000/- to each of the workmen (respondent nos. 1 to 14) shall meet the ends of justice. We order accordingly. Such payment shall be made within 6 weeks from today failing which the same shall carry interest at the rate of 9 per cent per annum."

10. Even though this principle of award of consolidated damages/ compensation is mainly resorted to in case of daily wagers engaged by government or governmental agencies however there is no reason for not applying the same principle to private employers and their workmen in suitable cases like the present one. Respondent No.2 worked for only three years and for 26 years she is not working with the petitioner. In this regard reference may be made to para-5 of **AIR 2008 (Supp.) SC 1885** which arose out of a dispute between private employer and its workman. Last part of the para is quoted below:

"We are of the opinion that consequent upon the bitter relations between the parties and as even the High Court has found the charges proved though 'trivial' and the fact that the respondent has not been on duty with the appellant-management since the year 1981, it would be inappropriate to foist a

cantankerous and abrasive workman on it. We accordingly dismiss the appeal but direct that instead of reinstatement the respondent would be entitled to the payment of Rs.10,00,000/- as compensation as full and final settlement with respect to his entire claim."

11. Accordingly, writ petition is allowed. Impugned award is set aside and substituted by a direction to the petitioner to pay Rs.1,50,000/- to respondent No.2 as consolidated damages/ compensation within two months from today by depositing the same before the Deputy Labour Commissioner for immediate payment to the respondent No.2. In case of failure 2% per month interest shall be payable upon the said amount since after two months till actual deposit/ recovery.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2013

BEFORE
THE HON'BLE HET SINGH YADAV,J.

CRIMINAL REVISION No. - 3335 of 2010

Manoj Kumar ...Revisionist
Versus
State Of U.P. & Another ...Opposite Parties

Counsel for the Petitioner:
Sri Madan Singh

Counsel for the Respondents:
Govt. Advocate
Sri J.P.S.Chauhan

Criminal Procedure Code 1973-Criminal Revision against the order passed under Section 125 granting interim maintenance of Rs. 1500/-Revisionist a graduate man doing private job-whereas the wife is simply class XII standard-contention of husband about earning of wife from tuition and tailoring not proved by evidence-finding of fact recorded by the Magistrate about the wife to be unable to maintain herself confirmed-monthly allowance of Rs. 2500/-can not be said excessive-in view of high inflation-proposal to maintain the wife if she join the company of revisionist-held-not available-Revision dismissed.

Held: Para-19

In this case as aforementioned, the family background of the Revisionist is sound enough studded with the fact that the revision is educated and he has completed his graduation. On the other hand, his wife is a daughter of a teacher. She is also maintaining the minor legitimate child of the Revisionist, who is a school going boy. Therefore, the monthly allowance of Rs. 2,500/- in all as maintenance is not excessive particularly in view of these days of high inflation. Moreover, this is equally a finding of fact and based on evidence and material available on record before the Magistrate and the same does not suffer from any illegality as such, is not liable to be interfered with in the Revision.

Case Law discussed:
AIR 1926 Mad 346 (A); AIR 1955 Allahabad 320; 1963 Cr.L.J. 1153; 2005 Cr.L.J. 2141; AIR 1929 PC 128; 1971 AIR 234; [2006(63) ALR 543]; 1981 Cri.L.J. 1439; (1982) 2 Supreme Court Cases 373

(Delivered by Hon'ble Het Singh Yadav,J.)

1. Challenge in this revision is to the order dated 5.5.2008 rendered by the Judicial Magistrate, (Court No. 3), Bijnor on the application of the wife of the Revisionist arrayed as Respondent No. 2 in the instant revision, purported to be under Section 125 of the Criminal Procedure Code, 1973 (In short the Code) whereby the learned Magistrate has

ordered payment of monthly allowances of Rs. 1,500/- for the maintenance of the wife and Rs. 1,000/- for the maintenance of the minor son, is impugned in this Revision.

2. Filtering out unnecessary details, the facts leading to the filling of this revision are that the marriage between the Revisionist and the Respondent No. 2 was solemnized on 10.6.1989 according to the Hindu rites and rituals. From the said wedlock, a male child viz. Prashant Kumar was born, who was about 10 year at the time of filing the application. Unfortunately, their marriage wrecked on the bedrock of estranged relations. The allegations substantially in the application for maintenance by the wife are that her husband and her in-laws ill-treated her and subjected her to cruelty and harassment for being unable to meet the gratuitous dowry demand. It is further alleged that when the dowry demand could not be satisfied, the revisionist turned her out from his home in the year, 2004 and there being no alternative, she came to live with her parents and has been residing with her parents along with her minor child.

3. The matrix of necessary facts as would crystallize from allegations and counter allegations substantially are that the revisionist neglected to maintain the respondent No. 2 (his wife) and his legitimate minor child; and therefore, she was compelled to take recourse to the provisions of Section 125 of the Code by moving an application for maintenance against the Revisionist in the court of Judicial Magistrate, Bijnor. The Revisionist filed his objections against the application for maintenance of his wife in which he refuted the allegations and submitted that his wife was not entitled to any maintenance from him on the ground that he did not have sufficient means to maintain them, that his wife was able to maintain herself and lastly, that without sufficient reason, she refused to live with him. It is also alleged that she was leading an adulterous life. The learned Magistrate, however, by the impugned order, allowed the application and ordered the Revisionist to pay monthly allowances as aforementioned, which is under challenge in this revision.

4. I have heard learned counsel for the parties at considerable length and have also been taken through the materials on record.

5. Learned counsel for the Revisionist in his submissions made a bid to assail the impugned order on factual grounds. It is contended that the Revisionist is a casual labourer and his means are not such as to afford maintenance at the rate granted by the court below. On the other hand, it is contended that his wife has means to maintain herself and her child. To be precise, he gave details about the income stating that she was earning to the tune of Rs. 5000/- per month from tuition and tailoring work etc. Thus, it is argued, she cannot be said to be unable to maintain herself. It is also argued that the Respondent No. 2 has produced no evidence not to speak of any satisfactory evidence to prove the income of the Revisionist followed by the submission that the learned Magistrate without any cogent material on record in proof of the income of the Revisionist, passed the impugned order in a perfunctory manner directing him to pay maintenance as aforementioned to his wife and his minor

son. It is also submitted that the learned Magistrate has taken into account the income of the Revisionist from the holdings of his father, which according to him, is absolutely incorrect. The learned Magistrate, not only committed gross error in holding that the Revisionist had sufficient means and has neglected to maintain his wife and minor son but also committed illegality in observing that the wife was unable to maintain herself.

6. The learned counsel further contended that the learned Magistrate has eschewed from consideration that the wife has refused to live with her husband without any cogent and convincing reason. It has also not been considered by the learned Magistrate that she was living in adultery. Thus, the learned Magistrate ignoring the significant provisions of Section 125 of the Code has proceeded to pass the impugned order- taking a lop-sided view by taking into reckoning the case of the wife alone. The learned counsel also assailed the impugned order over the quantum of maintenance allowed to the wife.

7. Learned A.G.A refuting the arguments of the learned counsel for the Revisionist has submitted that in this case, it brooks no dispute that the Respondent no. 2 is the legally wedded wife of the Revisionist and the minor is his legitimate son. He also contended that it goes without saying that both are unable to maintain themselves. He also contended that the Revisionist is an able bodied man and is a graduate. During his cross-examination it is stated by him that he is doing job with Jilao Firm, Loco Road, Moradabad. It was also stated that his father was possessed of sufficient agricultural land. Thus, it leaves no manner of doubt that his family background is sound. Indisputably, the respondent No. 2 is living separately from him along with the legitimate child for the last many years. The revisionist, it is submitted, despite having sufficient means has neglected to maintain his wife and his legitimate minor child, who are unable to maintain themselves. It is on record that the Revisionist and his parents had treated Revisionist's wife with cruelty in furtherance of their demand for more dowry. In these circumstances, there may be apprehension in her mind that she is likely to be physically harmed. Such apprehension also would furnish reasonable justification for her refusal to live with her husband. Besides the revisionist has made allegations that his wife is leading an adulterous life without any valid proof, which is equally a ground for separate living of his wife. The learned A.G.A. has supported the impugned order contending that the learned Magistrate has committed no illegality apparent on the face of the record in granting the maintenance allowances to the wife and the legitimate minor child.

8. I have given my thoughtful consideration to the rival submissions made on behalf of learned counsel for both the parties. The first and foremost question that crops up for consideration is -whether the Revisionist is not having sufficient means to maintain his wife and his legitimate minor child. In dealing with this question I feel called to refer to the submissions of the learned counsel for the Revisionist which is that the revisionist happens to be a casual labourer and thus he is not having sufficient means to maintain his wife and his minor child. It has not been disputed that the Revisionist

is an able bodied and physically sound person. He is a graduate. As per his own admission elicited during cross-examination before the Magistrate that he was employed with Jilao Firm, Loco Road, Moradabad. What lends further credence to the case of the respondent no 2 is that she has produced before the Magistrate the extracts of Khatunees in order to establish that Revisionist's father is possessed of sufficient agricultural land. Thus, it is sought to be established that the revisionist is having good family background. Having considered all these facts, it leaves no manner of doubt that the revisionist has sufficient means to maintain his wife and his minor child.

9. Before I proceed further, it be appropriate to refer to certain ex-cathedra decision on the point. The first decision on the point is ***Kandasami Chetty, AIR 1926 Mad 346 (A)*** i*n which Madra High Court held that the word "means" used in the Section did not mean that the husband should be possessed of any tangible property, but if a man was healthy and able bodied he must be taken to have the means to support his wife.*

10. The above view was followed by this Court in ***Dhani Ram Vs. Ram Dei, AIR 1955 Allahabad 320,*** held that the *word 'means' includes earning capacity. Hence, when a man is healthy and able bodied he must be taken to have the means to support his wife.*

11. In ***Chander Prakash Boadh Raj v. Sheila Rani Chander Prakash, 1963 Cr.LJ. 1153,*** Delhi High Court held that *an able bodied young man has to be presumed to be capable of earning sufficient money reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn to be able to maintain them according to the family standard.*

12. *The apex court in* ***Savitaben Somabhai Vs. Sate of Gujarat and Others, 2005 Cr.L.J. 2141*** *held:*

" the provision is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the constitutional sweep of Article 15 (3) reinforced by Article 39 of the Constitution of India, 1950 (in short Constitution). The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintenance themselves."

If the submissions advance across the bar by the learned counsel for the revisionist is viewed analytically in the light of the above rulings, there is no force in the submissions of the learned counsel simply for the reason that the wife of the Revisionist had not produced any evidence to prove the income of the Revisionist before the learned Magistrate or that the Magistrate erred in observing that the Revisionist was having sufficient means to maintain his wife and the minor child. The Revisionist is not only able bodied and physically sound person but also he is a graduate and as per his own contention he is doing private job. His family background is also sound and therefore, the finding of fact recorded by the Magistrate that the Revisionist is having sufficient means is not liable to be disturbed in this Revision.

13. The next point involved in this revision is whether the wife of the Revisionist is able to maintain herself. His

wife (Respondent no. 2) in her application as well as during her evidence before the Magistrate has categorically stated that she has studied upto 8th standard; and therefore, she is unable to get any job. She is having no sufficient means of her livelihood and therefore, she is unable to maintain herself and the legitimate minor child of the Revisionist. The Revisionist in his objection though stated that his wife is earning Rs. 5000/- per month from tuition, tailoring work etc. but he failed to adduce any evidence to prove the income of his wife as alleged by him. It may be mentioned here that the apex court in ***Savitaben Somabhai (Supra)*** held that Section 125 of the Code is enacted for social justice to protect woman and children etc. and the provision gives effect to the natural and fundamental duty of a man to maintain his wife and children etc. so long as they are unable to maintain themselves.

14. Thus, the burden of proof that the Revisionist is able to maintain herself, squarely lies on the Revisionist. In this regard, it is sufficient for the wife to say that she is unable to maintain herself and the wife is not supposed to prove this by any clinching evidence. Since the Revisionist has failed to produce evidence to prove that his wife is able to maintain herself, and the learned Magistrate has rightly held that the wife is unable to maintain herself. In this view of the matter, I am not inclined to interfere with the finding of fact in the revisional jurisdiction of this Court.

15. The next point raised by the learned counsel for the Revisionist is that the quantum of the maintenance is highly excessive and is not in accordance with the financial and social status of the parties particularly in view of that the Revisionist is having no sufficient means. What should be amount of maintenance is a finding of fact based on evidence and the material produced on record by both the sides. The quantum depends upon the position or status of the parties including the financial position of the husband.

16. In connection with the above submission, I feel called to advert to the decision in ***EKradeshwari vs. Homeshwar AIR 1929 PC 128*** in which the Privy Council observed *that maintenance depends upon a gathering together of all the facts and the situation, amount of free estate, the past life of the married parties and the family and survey of the members, on reasonable view of change of circumstances, possibly required in future, regard having of course be given to the scale and mode of living and the age, habits and wants and class of life of the parties.*

17. The apex court upheld the above observation of the Privy Council in ***Kulbhushan Vs. Raj Kumari, 1971 AIR 234*** that the amount of maintenance should be so-much that it should aid the wife to live in a similar style as she enjoyed in the matrimonial home.

18. This Court in ***Smt. Veena Panda Vs. Devendra Kumar Panda [2006 (63) ALR 543]*** case under Section 24 of Hindu Marriage Act, 1955 held:

"The gamut of all the aforesaid case laws is that as long as matrimonial ties subsists between the parties, the wife is entitled to live in the matrimonial house or in separate building. The wife should not be relegated to a lower standard of living than that the husband enjoys. She

should be given maintenance according to status of her husband. While considering the question of 'maintenance pendente lite' under Section 24 of the Hindu Marriage Act its definition as given in Hindu Adoption and Maintenance Act should be adopted and some significant points should necessarily be taken into account such as (i) position and status of the parties, (ii) reasonable wants of the claimant, towards food, clothing, shelter and medical attendance etc., (iii) income of the respondent, (iv) income, if any, of the claimant, (v) number of persons the respondent is obliged to maintain. As regards quantum of maintenance it may be from 1/3rd to 50% of the income of the respondent but no rigid formula can be fixed."

19. In this case as aforementioned, the family background of the Revisionist is sound enough studded with the fact that the revision is educated and he has completed his graduation. On the other hand, his wife is a daughter of a teacher. She is also maintaining the minor legitimate child of the Revisionist, who is a school going boy. Therefore, the monthly allowance of Rs. 2,500/- in all as maintenance is not excessive particularly in view of these days of high inflation. Moreover, this is equally a finding of fact and based on evidence and material available on record before the Magistrate and the same does not suffer from any illegality as such, is not liable to be interfered with in the Revision.

20. The next point raised by the learned counsel for the Revisionist is that the Revisionist offered to maintain his wife on condition of her living with him but she refused to live with him without any just ground. The learned Magistrate was, therefore, bound to consider the ground of refusal sated by the wife and he should have made an order in this regard. The learned Magistrate, however, failed to consider this important aspect of the case while deciding the maintenance application, and by this reckoning, it is argued, the impugned order suffers from the blemish of patent error and illegality and deserves to be set aside.

21. These contentions of the learned counsel for the Revisionist do not commend to me for acceptance for the reason that there is nothing on record to establish that the Revisionist ever offered to maintain his wife on the condition of her living with him. On the contrary, it would transpire, he has filed Divorce Petition on 16.1.2004 in the court of competent jurisdiction much prior to the maintenance application of his wife. The Respondent No. 2 in her application and in her statement on oath before the Magistrate has categorically stated that she was subjected to cruelty by her husband and his parents in connection with dowry demand. Therefore, the wife had a reasonable apprehension arising from the conduct of the husband that she was likely to be physically harmed and such apprehension would furnish reasonable justification for her to refuse to live with her husband.

22. In ***Sirajmohmedkhan Janmohamadhkhan Vs. Hafizunnisa Yasinkhan reported in 1981 Cri L.J. 1439*** the apex court held thus:-

"A clear perusal of this provision manifestly shows that it was meant to give a clear instance of circumstances which may be treated as a just ground for refusal of the wife to live with her

husband. As already indicated by virtue of this provision, the proviso takes within its sweep all other circumstances similar to the contingencies contemplated in the Amending Provision as also other instances of physical, mental or legal cruelty not excluding the impotence of the husband. These circumstances, therefore, clearly show that the grounds on which the wife refuses to live with her husband should be just and reasonable as contemplated by the proviso. Similarly, where the wife has a reasonable apprehension arising from the conduct of the husband that she is likely to be physically harmed due to persistent demands of dowry from the husband's parents or relations, such apprehension also would be manifestly a reasonable justification for the wife's refusal to live with her husband. Instances of this nature may be multiplied but we have mentioned some of the circumstances to show the real scope and ambit of the proviso and the Amending provision which is, as already indicated, by no means exhaustive."

23. The Revisionist has already filed a divorce petition against his wife even prior to moving the maintenance application and therefore, this is also a sufficient ground for the wife to refuse to live with her husband.

24. In ***Mst. Khatoon Vs. Mohd. Yamin reported in (1982) 2 Supreme Court Cases 373*** the apex court held thus:

"It appears from the judgement of the Magistrate that the appellant had gone to the village to attend a marriage and there is nothing to show that she had actually lived with the husband and then returned. Even apart from that the very fact that the letter was couched in most discourteous terms and amounted to a clear threat to divorce the wife and sought to obtain her consent to live with him under duress, this was in our opinion a sufficient reason for the wife for refusing to live with her husband. On this ground, alone the order of the Sessions Judge was fully supportable in law and the High Court erred in interfering in revision."

25. Thus, in view of above discussion particularly taking in view the ratio flowing from the decisions of the apex court as aforesaid, the wife certainly has had just ground to refuse to live with her husband (Revisionist). Thus, there is no error or illegality permeating the impugned order.

26. The last point raised by the learned counsel for the Revisionist is that the learned Magistrate has failed to consider the plea taken by the Revisionist in his objections that his wife is living in adultery and therefore, as per subsections (4) and (5) of Section 125 of the Code she is not entitled to get maintenance, which it is argued, have been ignored by the learned Magistrate while allowing the application of the Respondent No. 2.

Sub-section (4) and Sub-section (5) of Section 125 are reproduced below:

Subsection (4) : No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

Subsection (5) : On proof that any wife in whose favour an order has been made under this Section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

27. A bare perusal of the aforesaid provisions undoubtedly shows that the wife shall not be entitled to receive any maintenance from her husband, if she is living in adultery. However, the maintenance can be denied on proof that the wife is living in adultery. In this case the Revisionist has made bald allegations against his wife but he has produced no proof in this regard. Learned Magistrate, therefore, rightly not considered the allegations of adultery made by the Revisionist.

28. In view of the discussion made above, the Revision has no merits and accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.02.2013

BEFORE
THE HON'BLE AJAI LAMBA,J.

U/S 482/378/407 No. - 3481 of 2011

Smt. Bhan Mati Devi ...Petitioner
Versus
The State Of U.P And Ors. ...Respondents

Counsel for the Petitioner:
Sri Prem Singh
Sri Angrej Nath Shukla
Sri Pawan Shukla
Sri Prashant Singh Atal

Counsel for the Respondents:
Govt. Advocate

<u>Code of Criminal Procedure-Section 482</u>-summoning order-without disclosing material-without giving reasons-seriously affects the rights of an accused-Revisional Court rightly set-a-side the order no interference called far-application rejected.

Held: Para-11

Considering the above, it becomes apparent that the order passed by the Magistrate summoning the respondent accused, is neither a reasoned order nor a speaking order. The order does not, even briefly, indicate the material brought by the complainant on record, in context of the ingredients of the offence allegedly committed. Sufficiency of reason to summon the petitioner as accused has not been shown. In this view of the matter, this Court does not find that the revisional court has committed any jurisdictional error in setting aside the order of summoning. This court does not trace any illegality in the order passed by the revisional court.
<u>Case Law discussed:</u>
(2004) 1 SCC 547; 1974 ICR 120 (NIRC); (1971) 2 QB 175

(Delivered by Hon'ble Ajai Lamba,J.)

1. It appears that Smt. Bhan Mati Devi, the petitioner instituted a complaint against respondent nos.2 to 9 briefly stating that her land has been subjected to sale by way of a forged sale deed and through cheating and conspiracy. Vide order Annexure No.3 dated 27.7.2010, the respondents were summoned to stand trial for commission of offence under Section 419, 420, 467, 468 I.P.C.

2. The respondent accused preferred a revision petition against order of summoning which has been allowed vide

impugned order dated 15.6.2011, Annexure No.5, passed by Additional Sessions Judge, Gonda essentially on the plea that order passed by the Magistrate does not disclose the reasons for summoning the respondents. It does not meet the test of a speaking order or a reasoned order. The case has been remanded back to the Magistrate for adjudication afresh.

3. When the contents of the order of summoning have been put to learned counsel for the petitioner, even learned counsel for the petitioner has not been able to show that even a brief mention has been made to the relevant material from the complaint and the statements of the witnesses recorded, in context of the ingredients of the offence allegedly committed by the respondent accused. Learned counsel has not been able to show from the order of summoning that relevant reasons, even briefly, have been given for summoning the respondent accused.

4. After a complaint is made, statements of relevant witnesses are recorded. While considering the pleadings in the complaint in context of the evidence that has come on record, the Magistrate is required to see whether ingredients of alleged offence are prima facie satisfied or not, so as to summon the accused. It serves two purposes ; the first being to see as to prima facie, what offence has been committed and ; secondly as to which of the alleged offender needs to be summoned.

5. An order of summoning, seriously affects the rights of an accused. After an accused is summoned to stand trial, such accused is generally subjected to protracted trial and is required to appear on every date fixed by the trial court. In a large number of cases baseless complaints are filed so as to settle old scores or to pressurize the other party to settle a civil dispute, in abuse of process of the Court and in abuse of process of the law.

6. There is another aspect of the matter viz an order of summoning is open to challenge in revisional jurisdiction or under Section 482 Cr.P.C. A Court speaks through its orders. If such an order is without giving any reason, the revisional court cannot possibly know as to what transpired in the mind of the summoning court so as to call for passing an order of summoning. Even the accused is not able to make out as to for what reasons, he has been summoned to stand trial for commission of a particular offence.

7. Considering the scope of an order of summoning, ordinarily material available on record is required to be considered in context of the ingredients of the offence allegedly committed.\ In case it is prime facie found that the ingredients of the offence are satisfied or complete, on going through the contents of the complaint and supporting evidence, the court would be required to summon the accused who have prima facie committed the offence for commission of that offence. The summoning court is not expected to summon an accused for commission of an offence without any application of mind, in a casual and cursory manner.

8. Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision makers to the controversy in question and the decision or conclusion arrived at. Reasons

substitute subjectivity by objectivity. Absence of reasons in an order render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system. The court is required to give reasons, at least sufficient to indicate an application of mind to the matter.

9. Another rationale in this context is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking order. In the above regards, reference may be made to (2004) 1 SCC 547 : State of Punjab Vs. Bhag Singh in which reference has been made to 1974 ICR 120 (NIRC) Alexander Machinery (Dudley) Ltd. Vs. Crabtree', and (1971) 2 QB 175, Breen v. Amalgamated' Engg. Union.

10. A heavily burdened judicial system would be further burdened with more cases, if without any good reason, a person is summoned to face long drawn litigation. One such case does not come in isolation. During the course of proceedings, various orders are passed which are amenable to revisional/appellate jurisdiction. Such burden of dispensable and avoidable litigation, thus, is also carried to higher courts.

11. Considering the above, it becomes apparent that the order passed by the Magistrate summoning the respondent accused, is neither a reasoned order nor a speaking order. The order does not, even briefly, indicate the material brought by the complainant on record, in context of the ingredients of the offence allegedly committed. Sufficiency of reason to summon the petitioner as accused has not been shown. In this view of the matter, this Court does not find that the revisional court has committed any jurisdictional error in setting aside the order of summoning. This court does not trace any illegality in the order passed by the revisional court.

12. The petition is accordingly dismissed.

13. Complainant is directed to appear before the Magistrate on the next date fixed by the Magistrate.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 4219 of 2011

Nirdosh Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Yadav
Sri S.K. Yadav

Counsel for the Respondents:
Sri Subhash Chandra
C.S.C.

Constitution of India, Article 226- domestic enquiry and criminal proceeding initiated for causing death of occupant-Indica car-the petitioner was driving motorcycle met with accident with Maruti car firing by official rifle amount to misused of his post - unlawfully used rifle by which the image

of police force tarnished-in domestic enquiry all the charges found proved-dismissal order confirmed by appellate as well as revisional authorities-dismissal order questioned on the ground acquittal by criminal court by giving benefit of doubt-held-domestic disciplinary proceeding being quite different and distinguished-in domestic enquiry stand proved-enquiry officer can came to different confusions than by criminal court on merit-petition dismissed.

Held: Para-12

In the instant case the Court finds that the charges mentioned in the domestic disciplinary proceedings are totally different and distinct. The Court finds that the charge of murder was slapped against the petitioner in the criminal proceedings where he was acquitted by giving him a benefit of doubt and it was not a clean acquittal. In the domestic inquiry, the charge against the petitioner was of misuse of his post and official rifle while on duty, which was proved.

Case Law discussed:

(1999) 3 SCC 679; 2006 (5) SCC 446; 2005 (2) UPLBEC 1802

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

1. An incident took place in the night of 29/30 August, 2004 wherein the petitioner in the course of his duty met with an accident with a Maruti Car while driving his motorcycle as a result of which, the petitioner fired from his official rifle injuring one occupant in the car, who eventually succumbed to his injuries in the hospital. On the basis of this incident, an F.I.R. was lodged against an unknown police officer and subsequently, upon investigation the petitioner's name surfaced and he was charge sheeted. On the otherhand, disciplinary proceedings were initiated against the petitioner on the charge that he had misused his post and had unlawfully used his rifle, which has tarnished the image of the police force. On the basis of this charge, a domestic inquiry proceeding was initiated and, after collecting the evidence, the inquiry officer submitted a report holding that the charge against the petitioner stood proved. The disciplinary authority issued a show cause notice and, after considering the reply, passed an order of dismissal. The petitioner, being aggrieved, filed an appeal, which was dismissed. The petitioner thereafter filed a revision, which met the same fate. The petitioner has now filed the present writ petition.

2. During the pendency of the writ petition, the petitioner was acquitted by the Criminal Court, by a judgment dated 3.5.2001, which has been brought on record.

3. In view of the acquittal, the contention of the petitioner is, that since the departmental proceedings and criminal proceedings were based on identical or same set of facts and the petitioner has been acquitted by a Criminal Court, consequently, the impugned order of dismissal and further the appellate and the revisional orders are liable to be set aside and the petitioner is liable to be reinstated.

4. In support of his submission the learned counsel for the petitioner has placed reliance upon a decision of the Supreme Court in **Captain M.Paul Anthony vs. Bharat Gold Mines Ltd. and others, (1999) 3 SCC 679.**

5. Having heard the learned counsel for the petitioner at some length, the

Court finds that the position of law is well settled, namely, that the departmental proceedings and the criminal proceedings can go on simultaneously, except where a departmental proceeding and a criminal proceeding are based on the same set of facts and evidence and where the witnesses are common in the said cases, the Court has to decide taking into account the said features of the case as to whether simultaneously continuance of both the proceedings would be appropriate and proper or not.

6. In **Captain M. Paul Anthony's case** (Supra) one of the ground where departmental proceedings could be kept in abeyance is:-

"based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case."

7. In G.M Tank Vs. State of Gujarat and Others, 2006 (5) SCC 446 the Supreme Court held that where departmental proceedings and criminal case are based on identical and similar set of facts and the charges in a departmental case against the applicant and the charges before the Criminal Court are one and the same, in which case, the departmental proceedings would be stayed till the disposal of the criminal case.

8. The Supreme Court in the aforesaid case has clearly stated that where the case is of a grave nature and involves questions of fact and law, in that event, it would be advisable for the Authority to await the decision of the criminal Court.

9. In the light of the aforesaid, there leaves no scope for doubt that there is no bar for simultaneous proceedings being taken against the delinquent employee in the form of a criminal action and also in the form of a disciplinary proceedings unless the charges are extremely serious and grave requiring judicial administration in preference to the verdict in domestic enquiry proceedings.

10. In the instant case there is nothing on record to suggest that the criminal proceedings and the domestic proceedings are based on same set of facts or similar set of facts. There is no evidence to indicate that the evidence and the witnesses were the same.

11. In the instant case a criminal action and disciplinary proceedings are not grounded upon the same set of facts. In the opinion of the Court, the purpose of the two proceedings are quite different. The object of the departmental proceedings is to ascertain whether the petitioner is required to be retained in service or not. On the other hand, the object of the criminal prosecution is to find out whether the offence in the penal statute has been made out or not. Therefore, in the opinion of the Court the area covered by the two proceedings are distinct and different and are not identical. The object of both the proceedings are different. Whereas the departmental proceedings are taken to maintain discipline in the service, the criminal proceedings is initiated to punish a person for committing an offence violating any public duty.

12. In the instant case the Court finds that the charges mentioned in the domestic disciplinary proceedings are totally different and distinct. The Court finds that the charge of murder was slapped against the petitioner in the criminal proceedings where he was acquitted by giving him a benefit of doubt and it was not a clean acquittal. In the domestic inquiry, the charge against the petitioner was of misuse of his post and official rifle while on duty, which was proved.

13. In **Abhay Raj Singh Vs. Bank of Baroda and another** 2005 (2) UPLBEC 1802, the Court held that:-

"it is well settled principle of law that the degree of proof required in a departmental enquiry is vastly different than the degree of proof required to prove a criminal charge. In the departmental enquiry the findings can be recorded in preponderance of probabilities and it is not necessary that the charge must be proved to the hilt. The departmental proceedings and the criminal proceedings are entirely different in nature. They operate in different fields and they have different objectives. The material or the evidence in the two proceedings may or may not be the same and, in some cases, at least, material or evidence which would be relevant or open for consideration in the departmental proceeding, may be irrelevant in the criminal proceeding. The Rules relating to the appreciation of the evidence in the two enquiries may also be different. The standard of proof, the mode of enquiry and the rules governing the enquiry and the trial in both the cases are entirely distinct and different.

The law is well settled that the Inquiry Officer can come to a different conclusion than arrived at by a Criminal Court and that it is immaterial whether the charges were identical or the witnesses were the same, as long as the power exercised by the Criminal Court and the inquiry under the relevant law and the service law and the distinct and separate. There is no bar for holding a disciplinary proceeding during the pendency of the trial though the basis may be one and the same. It is for the disciplinary authority to decide as to whether in a given case it should keep the domestic enquiry pending till the outcome of the criminal trial or not."

14. For the reasons stated aforesaid, the Court does not find any merit in the writ petition.

15. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA,J.

Civil Misc. Writ Petition No.4492 of 1999

S.N. Maheshwari ...Petitioner
Versus
The General Manager, Syndicate Bank and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Singh
Sri D.P. Singh
Sri Ravi Kiran Jain

Counsel for the Respondents:
Sri P.K. Singhal
C.S.C.

Constitution of India, Article 226- principle of Audi-Alteram-Partem (Natural Justice)-scope-explained-refusal to take service of lawyer-without pleading about untrained legal person having no idea of procedure-departmental proceeding-employer rightly rejected the request-the charges of embezzlement and fraud are not complicated-questions-by which assistance of lawyer required-no question of violation of Natural Justice.

Held: Para-33

The Court, from a perusal of the charge sheet, finds that the charges are not complicated nor does it involve any serious questions of law. No doubt the charges were one of embezzlement and fraud, which were serious in nature but nonetheless the charges were not complicated which required the assistance of a Lawyer.

Case Law discussed:

AIR 1991 SC 1221; AIR 1983 SC 109; 2006 (1) ESC 61; AIR 1960 SC 914; 1961 (2) LLJ 417; AIR 1965 SC 1392; 1997 (4) SCC 384

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

1. The petitioner, being aggrieved, by the order of dismissal of his services from the respondent-bank as well as aggrieved by the order of the Appellate Authority has filed the present writ petition.

2. The brief facts leading to the filing of the writ petition is, that the petitioner was appointed as a clerk and, at the relevant moment of time, was doing the work of a Cashier in the respondent-bank at Meerut. In the year 1995, the petitioner was suspended on account of certain charges. Subsequently, on 22nd August, 1995 the petitioner was served with a chargesheet in which various charges was levelled against him viz, for committing embezzlement, fraud and manipulation in the books of the bank.

3. In a nutshell, the charges were that while working as a Cashier, the account holders had handed over to the petitioner certain amounts inside and outside the bank premises for being deposited in their accounts, which had not been deposited or partially deposited or belatedly deposited. Further charges were that the petitioner made false entries in the saving bank account holders of the customers of the bank and also inflated their balance. There were charges of manipulation in the records and debiting accounts of the customers without valid vouchers or cheques. There were also charges of diversion of the amount of the customers to other accounts.

4. The petitioner was asked to submit his reply. The petitioner instead of submitting a reply asked for supply of various documents, which in due course was supplied to him, and inspite of supplying the documents, no reply to the chargesheet was filed. Eventually on 3rd January, 1996 an Inquiry Officer was appointed who proceeded to hold an oral inquiry. Notices were served upon the petitioner and the petitioner appeared before the Inquiry Officer. He was asked as to whether he would require to be presented through any defence representative, which he initially declined. At the behest of the petitioner several adjournments were sought before the Inquiry Officer, which were allowed and full opportunity was given to the petitioner to cross-examine the witnesses.

5. The inquiry report was submitted on 30th August, 1997 on the basis of which, the Disciplinary Authority issued a

show cause notice to which he submitted a reply and was also given an opportunity of personal hearing. The Disciplinary Authority, after considering the matter concurred with the findings of the Inquiry Officer and considering the gravity of the charges and seriousness of the offence passed an order of dismissal. The petitioner, being aggrieved, filed an appeal which was also dismissed. The petitioner, thereafter has filed the present writ petition.

6. Heard Sri Ravi Kiran Jain, the learned Senior Counsel assisted by Sri D.P. Singh, the learned counsel for the petitioner and Sri P.K. Singhal, the learned counsel for the respondent-bank.

7. The only point urged before this Court was that the petitioner was not allowed to engage a Lawyer and that his application was wrongly rejected and such rejection was violative of the principles of natural justice. In support of his case the learned counsel for the petitioner placed reliance upon a decision of the Supreme Court in ***AIR 1991 SC 1221, AIR 1983 SC 109*** and a Division Bench judgment of the Madras High Court in ***2006 (1) ESC 61.***

8. In support of his submission, the learned Senior Counsel appearing for the petitioner placed various documents before the Court to impress that there had been a miscarriage of justice and that the petitioner was being pitted against legally trained persons who were appointed as the presenting officer and the Inquiry Officer, and consequently, since serious questions of fact and law was involved it was not possible for the petitioner who was merely an employee and did not have any legal training to be denied the benefit of engaging a Lawyer.

9. The learned counsel for the petitioner vehemently submitted that this denial of engagement of a Lawyer for his defence was violative of the principles of natural justice.

10. In support of the aforesaid contention, the learned counsel for the petitioner invited the attention of the application dated 26th December, 1996 written by the petitioner to the Inquiry Officer in which it was indicated that since legal complications are involved he may be allowed to engage a Lawyer for his defence. This letter was forwarded by the Inquiry Officer to the Disciplinary Authority who duly considered it and, by an order dated 27th January, 1997, turned down the request of the petitioner on the ground that no legal complications or questions of law arose and that it would be open to the petitioner to utilize the service of a defence representative as per Clause 19.12 of the Bipartite Settlement Award.

11. The petitioner, being aggrieved, by the said order filed Writ Petition No.1476 of 1997, which was disposed of by an order dated 5th May, 1997 wherein the Court declined to interfere in the impugned order at that stage leaving it open to the petitioner to challenge the said order at the appropriate stage and take such objection available to him under law at the stage before the order of punishment was passed or even otherwise.

12. It transpires that pursuant to the order of the Court an objection dated 9th May, 1997 was raised by the petitioner for engagement of a Lawyer. Subsequently,

upon the submission of the inquiry report, the petitioner was given an opportunity of personal hearing and his request for engagement of a Lawyer and denial of natural justice was rejected by the Disciplinary Authority while passing the order of dismissal.

13. The issue that an employee needs to be represented by a trained legal person in a domestic inquiry has been a subject of debate in many decisions and the law on this has been fairly settled.

14. In ***N. Kalindi Vs. M/s Tata Locomotive and Engineering Company Ltd., Jamshedpur, AIR 1960 SC 914*** it was contended that since the workman was not allowed to be represented in the inquiry by a representative of a particular Union, the order of dismissal was not based upon a proper and valid inquiry and was violative of the principles of natural justice, such contention was repelled by the Supreme Court holding that:-

"It is helpful to consider in this connection the fact that ordinarily in enquiries before domestic tribunals the person accused of any misconduct conducts his own case. Rules have been framed by Government as regards the procedure to be followed in enquiries against their own employees. No provision is made in these rules that the person against whom an enquiry is held may be represented by anybody else. When the general practice adopted by domestic tribunals is that the person accused conducts his own case we are unable to accept an argument that natural justice demands that in the case of enquiries into a chargesheet of misconduct against a workman he should be represented by a member of his Union. Besides it is necessary to remember that if any enquiry is not otherwise fair, the workman concerned can challenge its validity in an industrial dispute."

15. The supreme Court held that a workman against whom an inquiry was being held had no right to be represented in such inquiry. Similar view was again upheld by Supreme Court in ***Brooke Bond India (Private) Ltd. Vs. Subba Raman (S) and another, 1961 (2) LLJ 417.***

16. In ***Dunlop Rubber Company (India) Ltd. Vs. Their Workman, AIR 1965 SC 1392*** the Supreme Court held:-

"The Tribunal was also wrong in thinking that there was a denial of natural justice because the workmen were refused that assistance of a representative of their own Union. Under the Standing Orders it is clearly provided that at such enquiries only a representative of a Union which is registered under the Indian Trade Unions Act and recognized by the Company can assist. Technically, therefore, the demand of the workmen that they should be represented by their own Union could not be accepted. But we cannot say that the action of the Enquiry Officer was for that reason illegal or amounted to a denial of natural justice. In this connection, we have repeatedly emphasised that in holding domestic enquiries, reasonable opportunity should be given to the delinquent employees to meet the charge framed against them and it is desirable that at such an enquiry the employees should be given liberty to represent their case, by person of their choice, if there is no standing order against such a curse being adopted and if there is nothing otherwise objectionable in the said

request. But as we have just indicated, in the circumstances of this case, we have no doubt that the failure of the Enquiry Officer to accede to the request made by the employees does not introduce any serious defect in the enquiry itself, and so, we have no hesitation in holding that the result of the said enquiry cannot be successfully challenged in the present proceedings."

17. The Supreme Court in the aforesaid decision held that even if the workman was entitled to be represented by a representative as per the standing order, the refusal to acceede to the request of the workman for insistence of a representative of their Union was held as not violative of the principles of natural justice, though it was observed that an employee should be given a liberty to represent their case by a person of their choice.

18. In ***Harinarayan Srivastav Vs. United Commercial Bank and another, 1997 (4) SCC 384*** the claim of an assistance of a Lawyer was rejected on the ground that Clause 19.12 of the Bipartite Settlement only provided an option to the employee to seek for a Lawyer's assistance. The Supreme Court while considering the said clause held that even if the Bipartite Settlement provided a clause enabling the petitioner to have a Lawyer assistance, it was only an option and that the same cannot be claimed as a matter of right.

19. In ***J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd. and others, AIR 1991 SC 1221*** the Supreme Court held that the right of representation by a Lawyer may not in all cases be held to be part of natural justice and that no general principle valid in all cases can be enunciated. However, the Supreme Court held that even though the rule only vests a discretion while exercising such discretion one of the relevant factors that should be considered is whether there is a likelihood of a combat being unequal entailing a failure or miscarriage of justice or a denial of rule a reasonable opportunity of defence by reason of the workman being pitted against a presenting officer who is trained in law.

20. In the light of the aforesaid, the Supreme Court, in the case of ***J.K. Aggarwal (supra)***, held that the refusal to sanction the service of the Lawyer in the inquiry was not a proper exercise of the discretion under the Rule leading it to a failure of natural justice. Similarly, in the case of ***Board of Trustees of the Port of Bombay Vs. Dilip Kumar Raghavendranath Nadkarni, AIR 1983 SC 109*** the Court held that where the request of an employee in an inquiry against him for being represented by a Lawyer was refused while legally trained officers were appointed as presenting officer of the employer, the inquiry would be deemed to be vitiated for denying the employee a reasonable opportunity of hearing especially when the request was not acceeded too.

21. In case of ***Chairman and Managing Director, Hindustan Teleprinters Ltd. Vs. M. Rajan Isaac, 2006 (1) ESC 61*** a Division Bench judgment of the Madras High Court after considering the relevant case laws on the subject held that for the purpose of the said case the denial of a lawyer to the workman was violative of the principles of natural justice, since he was pitted

against a legally trained person who was the presenting officer.

22. From the aforesaid decisions, it is clear that the general rule is, that in the absence of Rules, an employee has no right to seek the assistance of a Lawyer in a departmental inquiry and that the principles of natural justice is not violated nor does it postulate a right to be represented in a departmental proceedings but, there is an exception, and that is, that if the workman is pitted against a legally trained person in the departmental proceedings and the workman is not familiar with the legal procedures involved in the departmental inquiry, in such a scenario, the Rule of equity and natural justice clearly postulate that the employer must act in fairness and permit an employee to be represented by a Lawyer who is a legally trained person and is aware of the legal procedures involved in a departmental inquiry.

23. In the light of the aforesaid, the Court finds from a perusal of the inquiry proceedings which has been annexed in the counter affidavit that right from very inception, the Inquiry Officer directed the petitioner to engage a defence representative, which he declined and intimated the Inquiry Officer that as and when he requires he will engage a defence representative of his own choice. The inquiry proceedings indicate that at some stage the petitioner had engaged one Sri Anil Kumar Srivastava as his defence representative. By a letter dated 19th December, 1996, Sri Anil Kumar Srivastava who was a State Secretary of the Syndicate Bank Employees Union declined to represent the petitioner and advised him to engage a Lawyer. Based on that, the petitioner moved an application dated 26th December, 1996 before the Inquiry Officer indicating therein that since legal complications are involved, he may be permitted to engage a Lawyer. This application was forwarded to the Disciplinary Authority, who declined to accept the request and by an order dated 27th January, 1997 turned down the request on the ground that no legal complications are involved nor any questions of law are involved.

24. The Court further finds that pursuant to the disposal of the writ petition of the petitioner on 5th May, 1997 the petitioner appeared before the Disciplinary Authority pursuant to the show cause notice along with a defence representative and that they were given full opportunity of hearing.

25. From the aforesaid, the Court finds that no such averment was ever raised by the petitioner that he has been pitted against a presenting officer who is a legally trained person or that the petitioner was not aware of the legal procedures and, therefore, required the assistance of a Lawyer. The only ground urged was that legal complications were involved. Even before this Court, there is no averment in the writ petition to the extent that the Inquiry Officer or the presenting officer were trained legal experts or that he was pitted against persons of legal mind nor there is any averment to the extent that he was unaware of the legal procedures in the inquiry proceedings.

26. The only ground taken by the petitioner in paragraph 47 and 49 of the writ petition is, that the order of the Disciplinary Authority as well as of the appellate authority was violative of the

principles of natural justice and that the application of the petitioner for permitting to engage a Lawyer was illegally rejected by the bank. There is no averment to the effect that the petitioner was pitted against legally trained persons and, that justice required that he should be represented by a Lawyer.

27. In this regard before proceeding further, paragraph 19.12 of the Bipartite Settlement Award which is relevant to the issue in hand is extracted hereunder:

"Clause 19.12:- The procedure in such cases shall be as followed:-

(a) An employee against whom disciplinary action is proposed or likely to be taken shall be given a charge sheet clearly setting forth the circumstances appearing against him and a date shall be fixed for inquiry, sufficient time shall be fixed for enquiry, sufficient time being given to him to enable him to prepare and give his explanation as also to produce any evidence that he may wish to tender in his defence. He shall also be permitted to be defended.

(i) (x) by representative of a registered trade union of bank employees of which he is a member on the date first notified for the commencement of the inquiry.

(y) where the employee is not a member of any trade union of bank employee on the aforesaid date by a representative of a registered trade union of employees of the bank in which he is employed;

(ii) at the request of the said union by a representative of the state federation or all India Organisation to which such union is affiliated;

OR

(iii) with the Bank's permission, by a Lawyer."

28. This clause was interpreted by the Supreme Court in Harinarain Srivastav's case (Supra) wherein the Supreme Court held that even if the Bipartite Settlement provided a clause enabling the bank officer to have a Lawyer assistance it was only an option and, therefore, the same cannot be claimed as a matter of right.

29. In the light of the aforesaid, the Court finds that ample opportunity was given to the petitioner to defend himself. Full opportunity was given to the petitioner to cross examine the witnesses. Full opportunity was given to the petitioner to engage a defence representative as per Clasue 19.12 of the Bipartite Settlement Award. The Court finds that the petitioner initially declined to take a defence representative but subsequently, engaged a defence representative of his own choice, which was duly allowed. The request for engagement of a Lawyer was declined by the employer on the ground that no complicated questions of law arises.

30. The Court further finds that before the Inquiry Officer and before the Disciplinary Authority as well as before this Court, no such averment was ever raised that the Inquiry Officer or the presenting officer were legally trained, and that, the petitioner, being an untrained legal person, had and no knowledge of the procedure involved in the departmental

proceedings. Consequently, the Court is of the opinion that the request for engagement of a Lawyer was rightly turned down.

31. The decisions cited by the learned counsel for the petitioner are distinguishable and are not applicable to the present set and circumstances of the case.

32. The Court further finds that the petitioner did not submit any reply to the chargesheet and kept on asking for documents, which were duly supplied. The Court finds that when the charges has not been disputed or denied by the workman, the Disciplinary Authority could have concluded the matter there and then but chose to hold an oral inquiry. The Inquiry Officer proceeded with the inquiry and examined the relevant witnesses and documents after giving full opportunity to the petitioner. The Court finds from a perusal of the inquiry proceedings, which has been annexed to the counter affidavit that full opportunity was given to the petitioner to defend himself and that the principles of natural justice, as embodied under Article 14 of the Constitution of India, was fully complied with. There was no violation of the principles of *audi alteram partem.*

33. The Court, from a perusal of the charge sheet, finds that the charges are not complicated nor does it involve any serious questions of law. No doubt the charges were one of embezzlement and fraud, which were serious in nature but nonetheless the charges were not complicated which required the assistance of a Lawyer.

34. In the light of the aforesaid, the Court is of the opinion that failure to permit the petitioner to engage a Lawyer was not violative of the principles of natural justice in the instant case.

35. In the light of the aforesaid, the Court does not find any error in the impugned orders.

36. The writ petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA,J.

Civil Misc. Writ Petition No. 4537 of 2012

State Of U.P. Thru' Director, Printing and Stationary ...Petitioner
Versus
Gulrej Ahmad And Another ...Respondents

Counsel for the Petitioner:
Arvind Kumar
Addl. C.S.C

Counsel for the Respondents:
Sri Satish Mandhyan
S.C.
Sri Sharad Mandhyan
Sri Manoj Kumar Sharma

Constitution of India, Article 226-award directing reinstatement with 50 % back wages-challenged by employer-on ground no engagement by petitioner/employer-certificate by Deputy Director Govt. Press about working as Engraver-never issued by competent authority-by evidence prayed that original record still with employer-held-employer failed to prove their stand of written statement-direction for reinstatement with 50 % back wages-justified.

Held: Para-14

In the light of the aforesaid, the Court is of the opinion that the petitioner miserably failed to prove their stand as adopted in their written statement. On the other hand, the labour court rightly came to the conclusion that the respondent workman had worked as an Engraver in the petitioners' Press from 1991 to 2003 and that he was arbitrarily removed without complying with the provision of 6-N of U.P Industrial Disputes Act, 1947. The labour court in the facts and circumstances of the case was justified in reinstating the workman with continuity of service and with 50 per cent back wages.

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

1. This is second round of litigation. The petitioner has challenged the validity and legality of the award passed by the labour court directing reinstatement of the petitioner with 50 percent back wages.

2. The facts leading to the filing of the writ petition is, that the respondent workman alleged that he was appointed as an Engraver in the Government Press at Allahabad on 10th December, 1991 and continued to work till 1st of September, 2004. It was alleged that he worked for almost 13 years without any break in service and that he was arbitrarily removed without complying with the provisions of Section 6N of the U.P. Industrial Dispute Act, 1947. The respondents, accordingly prayed that he was liable to be reinstated with continuity of service and with full back wages.

3. The petitioner in the written statement has specifically taken a stand that the post of Engraver became vacant and was never filled up and that the respondent workman in question was never employed either as a regular employee or on a muster roll or on daily wage basis and that the respondent workman was running a shop of engraving and was doing his private business and that in exigency of work, the petitioner gave him work orders, which he executed it at his shop. However for certain work, on account of security reasons, he was allowed to do the said work in the foundry located inside the Government Press. The petitioners further took a stand that the respondent workman was paid for the work order and that he was never paid wages as a regular employee.

4. Initially, the labour court given an award holding that the respondent workman was not entitled to any relief. The workman, being aggrieved, filed a writ petition, which was allowed and the matter was remitted again to the labour court to decide the matter afresh.

5. The labour court after considering the material evidence on record, has now given a specific finding to the effect that the respondent workman was actually engaged as an Engraver by the Government Press and that he was working in that capacity for almost 13 years before he was arbitrarily removed. The labour court has also given a finding that the workman had worked for more than 240 days in a calender year and that retrenchment compensation etc. as specified under Section 6N of the U.P. Industrial Dispute Act, 1947 was not given nor paid before the respondent workman was discharged from the service of the Government Press. The labour court rejected the stand of the employer, namely, that he was employed on a contract basis. The labour court found that

the photocopies of the work orders, which were issued to the respondent workman could not be taken into consideration as it was not admissible in evidence, since the original copies were not produced. The labour court further relied upon a certificate dated 14th February, 2003 before the Deputy Director indicating that the respondent workman had worked from 1991 to 2003 in the foundry of the Government Press. On these findings, the labour court held that the order of termination passed by the employer was wholly illegal and accordingly directed the reinstatement with 50 per cent back wages. The petitioner, being aggrieved by the said award, has filed the present writ petition.

6. Heard the learned counsel for the parties.

7. The learned counsel for the petitioner has pressed upon the fact that the evidence filed by the employers were not considered by the labour court and that the labour Court, in a very cursory manner, has rejected the evidence on the pretext that the original document were not filed, when in fact, photocopies filed by the employer was duly proved by a witness. The learned counsel further submitted that the Deputy Director had issued another certificate on 11th January, 2005 denying the issuance of the earlier certificate of 2003. The learned counsel submitted that this certificate was never considered by the labour court.

8. Having heard the learned counsel for the parties at some length, this Court finds that the petitioner is not entitled for any relief. The Court is constrained to observe that the petitioners have completely failed in proving the allegations made by them in their statements for the reasons stated hereunder.

9. In the first instance, the Court finds that the petitioner has categorically come out with the stand that the respondent workman was never employed by them and he was only employed on work basis as per the work orders issued to him from time to time. In support of this stand, the petitioner's filed list 13- B which included various work orders issued to the workman. The Court finds that only photocopies of the work orders had been filed. A witness has deposed that the originals are available with the employer.

10. The law is very clear. Under Evidence Act, photocopy of the original document is permissible to be led as secondary evidence provided the original document is lost. In the instant case, the witness has established that the original document is still with the employers. This Court fails to understand as to under what compulsion, the employers were keeping the original with them and not producing the same before the labour court as evidence. It is settled law that photocopies of a document is not legally admissible in evidence, unless it is specifically contended that the originals are not available or are lost. Consequently, the labour court was justified in rejecting the photocopies of the work orders as not admissible in evidence.

11. The Court finds that no effort was made by the employer to produce the evidence to the extent that payments pursuant to the work orders were given and paid to the workman through various vouchers for which an appropriate receipt

was given by the workman. No effort was made by the employers to prove the signature of the workman in the so-called pre-receipted vouchers or the work orders given by him. The Court finds that the employers miserably failed to prove their stand, namely, that the workman respondent was not employed by them and that he was only given work orders, which he executed on payment basis. On the other hand, the Deputy Director in his evidence has admitted that by various work orders, the respondent workman was allowed to work in the foundry. Evidence has come to the fore that the respondent workman continued to work over a considerable period of time in the foundry.

12. A Government Press is a secured place, where outsider are not permitted to enter for security reason except the workers, who are employed by the Government Press. The Government Press admits that the respondent workman was allowed to execute the work in foundry raises a presumption that the petitioner had engaged the respondent as a workman. This view of the Court is fortified by the certificate dated 14.2.2003 issued by the Deputy Director of the Government Press indicating that the respondent had worked as an Engraver from 1991 to 2003 and that he was done various kind of works in the foundry of the Government Press.

13. The Court finds that no effort was made by the petitioner to produce the Deputy Directer before the labour court as a witness to deny the execution of this certificate. The Deputy Director did not have the strength to appear before the labour court and deny his signatures on the said certificates. The learned counsel, however, made a submission that the Deputy Director had issued another certificate of 2005 denying the execution of any certificate issued by him in the year 2003. The Court is constrained to observe that this certificate has been obtained by the petitioner to save their neck. This certificate has been obtained or rather procured, which can not be considered at this stage for the reasons that the Court finds that this certificate of 2005 was never filed before the labour court and has been filed for the first time before this Court in a writ jurisdiction without seeking liberty to file this evidence as an additional evidence. The Court is of the opinion that only the evidence which was filed before the labour court could be considered in a writ jurisdiction.

14. In the light of the aforesaid, the Court is of the opinion that the petitioner miserably failed to prove their stand as adopted in their written statement. On the other hand, the labour court rightly came to the conclusion that the respondent workman had worked as an Engraver in the petitioners' Press from 1991 to 2003 and that he was arbitrarily removed without complying with the provision of 6-N of U.P Industrial Disputes Act, 1947. The labour court in the facts and circumstances of the case was justified in reinstating the workman with continuity of service and with 50 per cent back wages.

15. The Court does not find error in the order. The writ petition fails and is dismissed. The Court finds that pursuant to an interim order, a sum of Rs. 3,00,000 (Three lacs) was deposited by the petitioner towards 50 percent of the back wages. Since the writ petition is being

dismissed, it would be open to the respondents workman to withdraw this amount upon an application being filed before the Labour Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2013

BEFORE
THE HON'BLE SUNIL AMBWANI,J.
THE HON'BLE BHARAT BHUSHAN,J.

Civil Misc. Writ Petition No. 5348 of 2013

Brij Mohan Mishra And Others ...Petitioner
Versus
The State Of U.P. Thru Secy. And Others ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha
Sri Ratnakar Upadhyay

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

Constitution of India, Article 226-demolition of construction-encroachment of public pond-after survey report-encroachment established-order of demolition following direction of Hinch Lal Tiwari Case passed-petition on ground of opportunity or taking recourse of ejectment under section 122-B of U.P.Z.A.L.R. Act-held-not available-when encroachment established-demolition and ejectment -proper

Held: Para-14

In this case on the admitted position that the petitioner has encroached upon the land recorded as pond, which were verified on the spot inspection by the ADM (F & R), Jaunpur on 8.2.2010, such constructions must be demolished and the pond restored to the villagers.

Case Law discussed:
AIR 2001 SC 3215; AIR 2011 SC 1123

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

1. We have heard Shri R.K. Ojha, learned counsel appearing for the petitioner. Learned Standing Counsel appears for the State respondents. Shri Navin Sinha, Sr. Advocate assisted by Shri P.C. Pathak appears for respondent no.5.

2. On a complaint made by Shri Prem Shanker Mishra, the cousin brother of the petitioners, proceedings were initiated against the petitioner for having illegally encroached on the village pond situate in Plot No.611/0-348 hects. in Village Dhania Mau. The Sub Divisional Magistrate directed the complaint to be enquired. After taking measurements and receiving the report an order was passed by the Sub Divisional Magistrate, Badlapur, Jaunpur on 18th January, 2013 directing encroachments made by the petitioner, on the land recorded as pond to be removed giving rise to this writ petition.

3. Learned counsel appearing for the petitioner submits that the proceedings have been taken exparte against the petitioner. No notice was given, nor any action was initiated under Section 122B of the UPZA & LR Act, which prescribes a procedure for eviction from the Gaon Sabha land including pond. The orders passed for demolition and eviction will cause serious civil consequences. It is also stated that the orders have been passed in violation of the principles of natural justice.

4. Shri Navin Sinha on the other hand submits that the proceedings were

actually initiated in the year 2010 on the complaint of Smt. Barfi Devi, President of Jal Prabandhak Samiti, Dhaniamau, Baksha, Teh. Badlapur, Jaunpur. Enquiries were made on the complaint on 5.4.2010 on which it was verified that Plot No.611 area 0-3480 hects. in Village Dhania Mau, Block Baksha, Tehsil Badlapur, Distt. Jaunpur recorded as pond, has been encroached by the petitioners. On such verification directions were issued by the Addl. District Magistrate, Finance & Revenue, Jaunpur on 9.2.2010, after he also caused inspections on 8.2.2010, and verified the encroachment, to demolish the constructions made over the pond and to evict them.

5. Shri Navin Sinha submits that in the present case it is not denied that the plot in question is recorded as pond. It is also not denied that the petitioner have house adjacent to the pond and that he has made construction in the pond by raising pillars. The objections of the petitioner that they had constructed their house on the disputed portion of the land in the year 1945-50 is wholly misconceived in as much as no evidence whatsoever has been placed nor any objection was filed to that effect against the orders passed on 10.2.2010 and the orders challenged in this writ petition passed on 18th January, 2013.

6. In the present case it is not denied by the petitioner that the land in question is recorded as pond. The petitioner's house is adjacent to the pond and that there are constructions over the pond made by the petitioners.

7. The petitioner has made vague statement in para 9 of the writ petition that the constructions were made in 1945-50 prior to the date of vesting (when the Zamindari in the State of U.P. were abolished). He has not enclosed any document of proof, nor has he filed any objection before the Sub Divisional Magistrate or the District Magistrate.

8. The Supreme Court in Hinch Lal Tiwari v. Kamala Devi & Ors., AIR 2001 SC 3215 held that ponds are part of habitat of the village. The water reservoirs repeatedly encroached by the villagers, raise important environmental issues, which must be addressed by discouraging and demolishing such constructions and restoring land to the common use by the villagers.

9. In Jagpal Singh & Ors. v. State of Punjab & Ors., AIR 2011 SC 1123 the Supreme Court observed in paragraphs 16, 18 and 22 as follows:-

"16. The present is a case of land recorded as a village pond. This Court in Hinch Lal Tiwari vs. Kamala Devi, AIR 2001 SC 3215 (followed by the Madras High Court in L. Krishnan vs. State of Tamil Nadu, 2005(4) 9 CTC 1 Madras) held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

18. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This

has contributed to the water shortages in the country.

22. Before parting with this case we give directions to all the State Governments in the country that they should prepare schemes for eviction of illegal/ unauthorized occupants of Gram Sabha/Gram Panchayat/Poramboke/Shamlat land and these must be restored to the Gram Sabha/Gram Panchayat for the common use of villagers of the village. For this purpose the Chief Secretaries of all State Governments/Union Territories in India are directed to do the needful, taking the help of other senior officers of the Governments. The said scheme should provide for the speedy eviction of such illegal occupant, after giving him a show cause notice and a brief hearing. Long duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession. Regularization should only be permitted in exceptional cases e.g. where lease has been granted under some Government notification to landless labourers or members of Scheduled Castes/Scheduled Tribes, or where there is already a school, dispensary or other public utility on the land."

10. In the present case we may observe that the petitioner has admitted that construction of his house over part of land, which has been recorded as pond. He has not challenged the extent of the encroachment nor has he questioned the complaint of encroachment made by his own family members. The order is challenged only on the ground that the constructions are existing since prior to the date of vesting. We do not find that there is any proof of the objection nor any such objection was raised before the competent authority.

11. The zamindari was abolished in the State of U.P., with the date of vesting as 1st April, 1951. It is difficult to believe that since thereafter, if there were any constructions, on the pond, they were not recorded nor any effort was made to get such old constructions, if they were really old, to be so recorded or documented at any time. On the contrary the entry of the pond on the land has continued.

12. We are of the opinion that the plea that constructions are old has been taken only to avoid the demolition of the unauthorised constructions over the pond. There is no substance in the plea.

13. Before parting with the case, we may observe that the Division Bench of this Court in PIL No.63380 of 2012, Prem Singh v. State of U.P. & Ors. has also issued directions in this regard as follows:-

"After the judgement of the Supreme Court in the case of Jagpal Singh and others vs. State of Punjab and others, reported in AIR 2011 SC 1123 followed by some other judgments, upon directions of this Court, the Commissioner-cum-Secretary, Board of Revenue, U.P. Lucknow has issued a circular dated 4th October, 2012. Para-1 of that circular simply refers to certain directions of this Court in a writ petition bearing number 6472 (M/B) of 2012 (Om Prakash Verma & Others vs. State of U.P. and others) and judgements of the Apex Court including that in the case of Jagpal Singh's case (supra), but Para-2 is

relevant for the purpose. The same runs as hereunder:-

"इस सम्बन्ध में मुझें यह कहने का निदेश हुआ है, कि ग्राम सभाओं की भूमि पर तालाब/पोखर/चारागाह एवं कब्रिस्तान पर अवैध कब्जा/ अतिक्रमण को हटवाने के सम्बन्ध में प्रमुख सचिव, राजस्व विभाग, उत्तर प्रदेश शासन की अध्यक्षता में बहुसदस्यीय समिति का गठन किया गया है (छाया प्रति संलग्न)। अतः अनुरोध है कि उक्त गठित समिति का प्रचार प्रसार अपने क्षेत्र के दैनिक समाचार पत्रों/केबल चैनलों पर नियमित आधार पर कराना सुनिश्चित करें, तथा अपने अपने मण्डल / जनपद के समस्त ग्राम सभाओं के सदस्यों से अवैध कब्जा /अतिक्रमण की शिकायतें प्राप्त कर समयबद्ध रूप से जॉच की कार्यवाही सुनिश्चित कर कृत कार्यवाही की प्रगति से अपने मण्डलायुक्त के माध्यम से परिषद को पाक्षिक रूप से उपलब्ध कराना सुनिश्चित करें "

We have noticed that large number of similar writ petitions are being filed only for enforcement of law laid down in the case of Jagpal Singh (supra) and some subsequent judgements.

In view of direction noticed in the aforesaid circular, we are of the considered view that if complaints regarding unauthorized occupation over the public ponds or other similar public lands are received by the District Magistrate of a District, he should take all the required actions in view of law already settled in the case of Jagpal Singh and others.

In case, the District Magistrate finds some good reasons to seek guidance from the Members Committee indicated in Para-2 of the aforesaid circular, then he may refer the matter and seek guidance in appropriate cases.

So far as the present writ petition is concerned, we grant liberty to the petitioner to approach respondents no. 2 and 3 again with a certified copy of this order. The concerned respondents shall get appropriate inquiry made and take required action to protect public ponds as per law laid down by the Apex Court, expeditiously.

Let a copy of this order be furnished to the learned Standing Counsel for the State for communication to the Principal Secretary, Revenue, Government of Uttar Pradesh, who shall circulate a copy of this order to all the Divisional Commissioners as well as the District Magistrates so that number of such types of cases coming to this Court may be checked.

The petition is, accordingly, disposed of."

14. In this case on the admitted position that the petitioner has encroached upon the land recorded as pond, which were verified on the spot inspection by the ADM (F & R), Jaunpur on 8.2.2010, such constructions must be demolished and the pond restored to the villagers.

15. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN,J.

Civil Misc. Writ Petition No. 5393 of 2013

Smt. Rama Gangwar And Others...Petitioner
Versus
Shanker Lal And Others ...Respondents

Counsel for the Petitioner:
Dr. G.S.D. Mishra, Sri Balendra Prata Singh

Counsel for the Respondents:

.....

Constitution of India, Article 226-Civil Suit-for deceleration of rights-relating to agricultural Land? -whether maintainable before Civil Court?-held-'Yes'.

Held: Para-9

Accordingly, there is no error in the findings of the courts below holding the suit to be maintainable before the civil court.

Case Law discussed:

1989 AWC 290; AIR 1990 SC 540; 2010 (7) ADJ 384

(Delivered by Hon'ble Sibghat Ullah Khan,J.)

1. Heard learned counsel for the petitioners.

2. Smt. Kokila Devi instituted O.S. No.343 of 2000 against Smt. Rama Gangwar, petitioner No.1, Ganga Devi since deceased and survived by petitioners No.2/1 to 2/5, Charan Singh and Netram, who are respondents No.2 & 3 in this writ petition. The suit is pending. The relief claimed in the suit was for cancellation of three sale deeds dated 01.10.1999 executed by the plaintiff in favour of Rama Gangwar, defendant petitioner No.1. In the plaint, it was stated that Shanker Lal was nephew of the plaintiff and she wanted to execute Will deed in favour of Shanker Lal and Shanker Lal's wife, however, after obtaining the khatauni, it transpired that her name had been expunged from the revenue record on the basis of sale deeds dated 01.10.1999 which she had never executed and she only signed/ fixed her thumb impression on certain papers for some other purpose. The sale deeds pertained to agricultural land. After filing of the suit, plaintiff died. Shanker Lal respondent No.1 filed application for substitution stating therein that plaintiff had executed a Will in his favour. The application was allowed.

3. In the suit issues were framed. Issues No.4, 5 and 9 were decided as preliminary issues by the trial court/ First Additional Civil Judge (J.D.), Pilibhit on 30.04.2011 in favour of the plaintiff holding that the suit was maintainable before civil court and it was not barred by Section 331 of U.P.Z.A. & L.R. Act. Against the said order, defendants filed Civil Revision No.25 of 2012, which was dismissed by A.D.J. Court No.1 Pilibhit on 18.10.2012, hence this writ petition.

4. Defendants petitioners had contended that the suit as filed was not maintainable before Civil Court as it was basically a suit for declaration of rights in agricultural land. It was also contended that Shanker Lal, who had got himself substituted on the basis of Will had no right to continue to the suit in the civil court as the very basis of his substitution i.e. Will was denied by the defendants and that too required a declaration. It was also contended that after execution of the sale deed name of the defendant No.1 had been mutated in the revenue record hence suit even by original plaintiff was not maintainable.

5. Shanker Lal stated that original plaintiff executed Will in his favour on 24.08.2000. In the plaint, plaintiff had described Shanker Lal as her nephew.

6. The original plaintiff before her death had been examined as witness.

7. In view of full Bench authority of this Court reported in **Ram Padarath Vs. A.D.J., 1989 AWC 290** such suit is maintainable before the civil court. The said full Bench authority has been approved by the Supreme Court in **Smt. Bismillah vs. Janeshwar Prasad and Ors., AIR 1990 SC 540.**

8. The facts in the Supreme Court authority of **Bismillah** were that the plaintiff had stated that she had appointed defendants No.1 to 3 as her agents to manage the Estate through instrument of agency dated 17.04.1969, however later on it transpired that defendants respondents No.1 to 3 had got executed a sale deed instead of deed of agency. Supreme Court held that suit before civil court was maintainable. Last sentence of para-6 of the Supreme Court authority is quoted below:

"In the instant case, prima facie appellant seems to proceed on the premise that she cannot ignore the sales but that the sales require to be set aside before she is entitled to possession and other consequential reliefs."

Para-7 of the said authority is quoted below:

"7. Even in cases where the transaction was assailed as, void, the High Court of Allahabad in India Dev v. Ram Pyari 1982 All LJ 1308, held the Civil Court's jurisdiction not barred. The facts in that case were that:

...plaintiff-appellants claimed a decree for cancellation of the sale deed dated 10-7-1969 executed by Smt. Ram Pyari Devi, mother of appellant 1 Indra Dev, minor, in favour of Bramha Nand respondent I in respect of certain agricultural plots. The cancellation was sought on the ground that Smt. Ram Pyari had no interest in the property in suit and, therefore, she was not entitled to execute the sale deed....

In that case the learned District Judge had held that the allegations made in the plaint amounted to saying that the sale deed was a void document. The civil Court was held to have no jurisdiction.

The High Court, allowing the plaintiff's appeal and reversing the finding of the District Judge, held:

A survey of the above decisions shows that the consistent view of this Court is that the cause of action in a suit for cancellation of sale deed is not the denial of plaintiff's title which may be said to be implicit in the execution of the sale deed by the defendant but is the execution of the deed itself.

...Therefore, under the provisions of the Act itself, the jurisdiction of the Civil Court would not be barred when declaration is sought against a person who has transferred agricultural property which the plaintiff claims to be his. Section 229B does not contemplate all kinds of declaratory suits. It deals with declaratory suits of the specific type hereinbefore mentioned....

This case has since been approved by a full Bench of that Court in Ram Padarath v. Second Addl. Dist. Judge, Sultanpur, W.P. No. 1732 of 1982 decided on 26-9-1988 : reported in 1989 AWC 290. The Full Bench held (Para 41):

We are of the view that the case of India Deo v. Smt. Ram Pyari 1982 All LJ 1308 has been correctly decided and the said decision requires no consideration, while the Division Bench case, Dr. Ayodhya Prasad v. Gangotri 1981 All LJ 647 is regarding the jurisdiction of consolidation authorities, but so far as it holds that suit in respect of void document will lie in the Revenue Court it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the Civil Court and a party cannot be deprived of his right getting this relief permissible under law except when a declaration of right or status and a tenure-holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. A recorded tenure-holder having prima facie title in his favour can hardly be directed to approach the Revenue Court in respect of seeking relief for cancellation of a void document which made him to approach the Court of law and in such case he can also claim ancillary relief even though the same can be granted by the Revenue Court.

In any view of the matter, the present action would be covered by the pronouncement of the Full Bench. It is not necessary to go into the correctness of the view of the Full Bench as its correctness was not assailed before us."

9. Accordingly, there is no error in the findings of the courts below holding the suit to be maintainable before the civil court.

10. Learned counsel for the petitioner has referred to an authority of this court reported in **Tara Chand Vs. A.D.J., 2010 (7) ADJ 384.** In the said authority, it has been held that if a suit is filed by a stranger for cancellation of sale deed of agricultural land then it may not be maintainable before the civil court. However, in the instant case, the suit was filed by the executant of the sale deed herself who was recorded tenure holder till the execution of the sale deed. After her death Shanker Lal was substituted at her place on the basis of Will. If during the life time of the executant of the sale deed, any other persons would have filed the suit for cancellation of the sale deed or declaration of the same as void then it would not have been maintainable before civil court.

11. Accordingly, there is no merit in the writ petition, hence it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 5833 of 2013

Bodda ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri Ram Swaroop Singh
Sri Shivakant Singh

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holding Act, 1953 section 48 (2)-revision against condonation of delay in filing appeal-dismissed being interlocutory order-revision mot maintainable-held-misconceived condonation of delay give right to the parties to address themselves in appeal-could mean

attaching finality-D.D.C. Committed mistake by holding revision as not maintainable-order quashed-consequential direction issued.

Held: Para-13

Here in this case, the delay has been condoned, meaning thereby, the other side had right to pursue the appeal. Had the delay not been condoned, the right of pursuing appeal would have never arisen, as unless the delay is condoned, there can be no appeal. Explanation (2) of section 48 of the Act explains the interlocutory order, here the effect of allowing the application filed under section 5 of the Limitation Act would mean attaching the finality to the proceeding, therefore, such order will not fall in the ambit of interlocutory order and the revision was maintainable. The learned DDC has erred in dismissing the revision as not maintainable.

Case Law discussed:
AIR 1977 SC 2185; AIR 1980 SC 962; AIR 1978 SC 47; 1990 RD 162; 2006 RD 646

(Delivered by Hon'ble Ran Vijai Singh,J.)

1. Heard Sri Ram Swaroop Singh, alongwith Sri Shivakant Singh, learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

2. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 8.1.2013 passed by the Deputy Director of Consolidation (in short, 'DDC') in revision no. 156 (Bodda Vs. Raghuvir and Others), by which the DDC has dismissed the revision of the petitioner holding it as not maintainable.

3. While assailing this order, Sri Singh contends that the Settlement Officer of Consolidation has erred in condoning the delay of 23 years in the appeal filed by the other side challenging the order dated 23.3.1987 passed by the Assistant Consolidation Officer. It is also contended that the delay was condoned ignoring the objection to the delay condonation application. The DDC has dismissed the revision on the ground that the revision, being against an interlocutory order, is not maintainable. In the submissions of learned counsel for the petitioner, an order condoning the delay in filing the appeal would fall in the ambit of final order and not interlocutory order and revision would be maintainable.

4. I have heard learned counsel for the parties and perused the record.

5. With the consent of learned counsel for the parties, the writ petition is taken up for final disposal with a liberty to respondent nos. 4 to 7 to file an application for recall, variation or modification of the order, which is being passed today.

6. The facts giving rise to this case are that it appears, against the order dated 23.7.1987 passed by the Assistant Consolidation Officer, an appeal was filed in the year 2012, being appeal no. 121. The said appeal was barred by time, therefore, an application for condonation of delay was also filed. The other side has filed an objection on the ground that appeal was not maintainable after notification under section 52 of the U.P. Consolidation of Holdings Act, 1953 (in short, 'the Act'). It was also contended that 23 years delay has not been properly explained. The Settlement Officer of Consolidation, ignoring the petitioner's objection, has condoned the delay vide

order dated 8.8.2012. Aggrieved by this order, the petitioner herein has filed revision, which was numbered as revision no. 156. The learned DDC dismissed the revision as not maintainable being against an interlocutory order.

7. For appreciating the controversy in hand, it would be useful to look into the provisions contained under sub-section (1) of section 48 of the Act and explanation (2) thereto, which confers a right of revision under the U.P. Consolidation of Holdings Act, 1953. The same is reproduced hereinunder:

"48(1). The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order other than an interlocutory order passed by such authority in the case or proceedings, may, after allowing the parties concerned an opportunity of being heard, made such order in the case or proceedings as he thinks fit.

Explanation (2) - For the purposes of this section thte expression 'interlocutory order' in relation to a case or proceeding, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding."

8. From the perusal of sub-section (1) of section 48 of the Act, it would transpire that the revision would be maintainable against any order except interlocutory order and the interlocutory orders have been explained in explanation (2), which means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

9. The literal meaning of the word 'interlocutory order' has been defined in various dictionaries as under:

"(1) ***Law Lexicon (P. Ramanath Ayer) 1997 Edition****: Interlocutory order: An interlocutory order is one which is made pending the case and before a final hearing on the merits.*

An interlocutory order is made to secure some end and purpose necessary and essential to the progress of the suit, and generally collateral to the issues formed by the pleadings and not connected with the final judgment.

(2) ***Halsbury's Law of England, 4th Edition,*** *Vol. 26, Paragraph 506:*

Interlocutory order: An order which does not deal with the final rights of the parties, but either - (1) is made before judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinates matter with which / ideals.

(3) ***Concise Oxford English Dictionary, 11th Edition****:*

Interlocutory: (of a decree or judgment) given provisionally during the course of a legal action."

10. On bare perusal of the meaning of the word 'interlocutory order', it would transpire that an order, which does not have the effect of finality of the proceedings. In other words, an order in a pending proceeding, which is made during the progress of an action and which does not finally dispose of the rights of the parties.

11. The word 'interlocutory order' has also been used in section 397 of Code of Criminal Procedure and the same came up for consideration before the apex Court in the case of ***Amar Nath Vs. State of Haryana*** AIR 1977 SC 2185, where the apex Court has held that the term 'interlocutory order' merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. In the case of ***V.C. Shukla Vs. State through CBI***, AIR 1980 SC 962, the apex Court held that the interlocutory order has to be construed in contradiction to or in contrast with final order, it means not a final order, but an intermediate order. It is made between the commencement of an action and the entry of the judgment.

12. In ***Madhu Limaye Vs. State of Maharashtra*** AIR 1978 SC 47, while considering meaning of expression 'interlocutory order' their lordships of Supreme Court observed as follows:

"But in our judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so, it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by S. 397(1). On such a strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chap. XXIX of the Code."

13. Here in this case, the delay has been condoned, meaning thereby, the other side had right to pursue the appeal. Had the delay not been condoned, the right of pursuing appeal would have never arisen, as unless the delay is condoned, there can be no appeal. Explanation (2) of section 48 of the Act explains the interlocutory order, here the effect of allowing the application filed under section 5 of the Limitation Act would mean attaching the finality to the proceeding, therefore, such order will not fall in the ambit of interlocutory order and the revision was maintainable. The learned DDC has erred in dismissing the revision as not maintainable.

14. The view taken by me finds support from the judgments of this Court in ***Bhagwat and Others Vs. Deputy Director of Consolidation and Others*** 1990 RD 162 and in ***Meharban and Others Vs. Deputy Director of Consolidation and Others*** 2006 RD 646.

15. In the result, the writ petition succeeds and is allowed. The impugned order dated 8.1.2013 passed by the DDC in revision no. 156 (Bodda Vs. Raghuvir and Others) is hereby quashed. The DDC is directed to pass a fresh order, treating the revision as maintainable, on merit in accordance with law after due notice to the parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2013

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 5979 of 2013

Gopal Chandra ...Petitioner
Versus
Kundan Lal Gulati ...Respondents

Counsel for the Petitioner:
Sri Lalit Kumar

Counsel for the Respondents:
Sri R.K.Pandey

Code of Civil Procedure, Order 6 Rule 17- amendment of plaint-on highly belated stage of evidence-facts sought to be brought-already in written statement-nothing whisper about no knowledge of this fact earlier-if such amendment liberally allowed-would be no end of litigation-Trial Court rightly rejected-no interference call for.

Held: Para-15

In the case in hand, the facts sought to be added by way of amendment by the petitioner were either already existing in the written statement or were not germane and irrelevant to the controversy. Further, the application was moved after the trial had commenced without specifying the reasons that the facts could not be raised or mentioned in the pleadings before the commencement of trial. The only reason mentioned in the amendment application and the affidavit filed in support thereof is that at the time of preparation of the case, it transpired that facts were left out from being mentioned in the written statement. Petitioner has not even asserted that facts were not within his knowledge as such despite due diligence could not be mentioned in the written statement.

Case Law discussed:
{2012 (3) ARC 619}

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

1. This writ petition is directed against order dated 05.10.2012 passed by Prescribed Authority in P. A. Case no. 02 of 2011 under Section 21 (1) (a) of U. P. Act No. 13 of 1972, (herein after referred to as the "Act") rejecting the application moved by the tenant-petitioner under Order VI Rule 17 CPC seeking amendment in the written statement.

2. I have heard learned counsel for the petitioner and Sri R. K. Pandey, learned counsel appearing for the respondents.

3. Brief facts as emerge out from the pleadings of the writ petition are that respondent-landlord filed an application under Section 21 (1) (a) of the Act for the release of the shop in dispute on the ground of need to establish the business for his younger son. The application was contested by the petitioner-tenant by filing written statement. During the pendency of the proceedings after the trial had commenced and the matter was being fixed for hearing an application under Order VI Rule 17 CPC seeking amendment in the written statement was moved which was rejected.

4. It has been contended by the learned counsel for the petitioner that parties are at liberty to amend their pleadings which is necessary and essential for adjudication of the dispute and the same is to be allowed liberally and the Prescribed Authority committed an error of law in rejecting the amendment application. Reliance in support of the

contention has been placed on the judgment of Hon'ble Apex Court in the case of ***Abdul Rehman and another Vs. Mohd. Ruldu & others, {2012 (3) ARC 619}.***

5. In reply, it has been submitted on behalf of the respondent that facts sought to be brought on record by way of amendment were already existing in the written statement and the amendment was moved at a highly belated stage when the trial had already commenced with sole intention to delay the proceedings and the same has rightly been rejected by the Prescribed Authority.

6. I have considered the rival submissions and perused the record.

7. Release application was filed by respondent-landlord on the allegation that shop was genuinely and bonafidely required for establishing his younger son in the business of mobile repairing and recharging of the mobile connections. It was also pleaded that petitioner-tenant was already having a shop of his own which is just adjacent to the shop in dispute where he is running sweet shop in the name and style of "Gopal Sweet House" and there was no requirement and the shop was being occupied by him. It was also pleaded that just about 15-20 yards from the shop in question, petitioner-tenant has constructed a huge residential house wherein also there are two shops which have been let out at high rent.

8. Allegations made in the release application were denied by the petitioner-tenant in his written statement. It was pleaded that because of the old age, landlord-respondent was not in a position to run any business and the existing business of mobile repairing at tenanted shop at Gandhi Road was actually being looked after by his younger son and there was no need to set up a separate business for him.

9. After the stage of evidence was over and the matter was being fixed for hearing, petitioner-tenant moved an application under Order VI Rule 17 CPC seeking to amend written statement by adding certain paragraphs. Through the amendment application, following facts were sought to be added in the written statement :

(i)that the applicant-landlord in P. A. Case no. 03 of 1994 initiated by landlord for his ejectment had set up a case that present shop was not suited for his business as it is situated in a lane where he could not carry the business successfully.

(ii)that the shop in dispute was not suited for the business to be set up for his son as the said business cannot be carried out in a small shop;

(iii)that earlier case no. 03 of 1994 was initiated by the landlord of the shop seeking ejectment of the respondent, herein, was collusive as despite the application having been allowed till date landlord of the said shop has not taken over possession;

(iv)that son of the respondent for whose need the release of the shop in question has been set up is not unemployed as he has purchased two plots on 06.04.2010 and has raised construction thereon.

10. Prescribed Authority has rejected the amendment application on the finding that facts sought to be added by way of amendment that landlord-respondent in earlier case no. 03 of 1994 has set up the case that the present shop in dispute was not suited for his business was irrelevant in as much as in the present case, release of the shop was sought for the business of his younger son and not for his own business. In respect to the amendment sought with respect to the shop in dispute being small and unfit for establishing the proposed business, the fact has already been mentioned in paragraphs 28 and 29 of the written statement. Facts being brought on record by way of amendment in respect of there being collusion between the respondent, herein and the landlord of the shop at Gandhi Road in which he was a tenant being collusive has been rejected on the ground that there is no relevance in as much as the release of shop in dispute was sought on the ground of need of his son and not for his own business. The other amendment sought with regard to the fact that son of the landlord-respondent has purchased two plots and has raised construction is already contained in the written statement and thus, the said amendment was also not required.

11. Order VI Rule 17 CPC provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. However, in view of the proviso, no application for amendment is liable to be allowed after the trial has commenced, unless the Court comes to the conclusion that parties seeking amendment could not have raised the matter before the commencement of trial inspite of due diligence.

12. The object of the rule is that Court should try and adjudicate the case on merits and allow all amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice or prejudice to other side.

13. It is, no doubt, correct that Hon'ble Apex Court in series of decision has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. Even in the case of ***Abdul Rehman and another Vs. Mohd. Ruldu and others*** (supra) relied upon by the learned counsel for the petitioner, the same view has been expressed. It may be relevant to quote paragraph 7 of the said reports :

"It is clear that parties to the suit are permitted to bring forward amendment of their pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them. The Courts have to be liberal in accepting the same, if the same is made prior to the commencement of the trial. If such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

14. The concept that all the amendments should be liberally allowed does not mean that any amendment sought by the party in the pleadings

irrespective of the fact the same already exists or is irrelevant and not germane to the controversy requiring adjudication is also to be allowed. If this interpretation is given to the concept then litigation between the parties would never come to an end. It is only where amendments are necessary for proper and effective adjudication of dispute between the parties on merits then the same should not be rejected on technical ground. The amendments if allowed in any given case may require fresh evidence which would unnecessarily delay the disposal of the proceedings and for this reason, the Legislature put a rider by enacting a proviso to Order VI Rule 17 providing that after the commencement of trial litigant seeking amendment in the pleadings has to demonstrate that despite due diligence, the fact could not be mentioned in the pleadings. Obvious purpose of enacting the proviso is to discourage unwarranted amendments being sought in the pleadings with the purpose of delaying the disposal of the proceedings.

15. In the case in hand, the facts sought to be added by way of amendment by the petitioner were either already existing in the written statement or were not germane and irrelevant to the controversy. Further, the application was moved after the trial had commenced without specifying the reasons that the facts could not be raised or mentioned in the pleadings before the commencement of trial. The only reason mentioned in the amendment application and the affidavit filed in support thereof is that at the time of preparation of the case, it transpired that facts were left out from being mentioned in the written statement. Petitioner has not even asserted that facts were not within his knowledge as such despite due diligence could not be mentioned in the written statement.

16. Thus, it appears that amendment application was not bonafide and was made at a highly belated stage after the trial had commenced only with sole intention to delay disposal of the proceedings and the same has rightly been rejected by the Prescribed Authority.

17. In view of the above facts and discussions, no illegality is reflected in the impugned order which may require any interference by this Court.

18. Writ petition accordingly fails and stands dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 6837 of 2013

Vivek Singh And Another ...Petitioner
Versus
State Of U.P.Thru Secy & Ors. ..Respondents

Counsel for the Petitioner:
Sri Siddharth Khare
Sri Ashok Khare

Counsel for the Respondents:
C.S.C.

U.P. Subordinate Educational (Trained granted grade) Service Rules 1983- appointment of T.G.T. Hindi teacher in Government College-essential qualification-graduate in Hindi plus one subject as Sanskrit in intermediate-held- contention of petitioner possessing

degree in Sanskrit and Hindi both-hence over qualification-can not come in way of petitioner-as such discriminatory as in private schools said over qualification-accepted but in Government College-ignored.

Held: Para-11

Coming to the decision in State of Haryana V. Abdul Gaffar Khan (supra) the same indicates that the consideration of higher qualification is not expressly excluded. The ratio of the decision again is not attracted, inasmuch as in the instant case what the petitioner in essence desires is that the additional lesser qualifications of Intermediate with Sanskrit should be ignored as against the higher qualification of B.A. With Hindi and Sanskrit. In effect the submission is that even if a candidate did not have Hindi and Sanskrit at the Intermediate level, yet if he possesses graduation with the said subjects the qualification should be deemed to be possessed by the candidate. This ground of equivalence or possession of a higher qualification cannot be inferred by any fiction. The absence of the qualification required at the lesser does not fall within the wisdom of this Court to eliminate or discard an eligibility which is specifically provided for. The judgment in the case of State of Haryana does not rule to that effect.

Case Law discussed:

2000 (2) SCC 606; 2006 (11) SCC 153; 2012 (3) SCC 129; 2011 (1) ESC 115 (FB)

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. The petitioners are assailing the additional qualification of Intermediate with Sanskrit from the U.P. Board or an equivalent examination of Sanskrit as provided for the post of Assistant teacher in Hindi in Government Schools governed by the provisions of the U.P. Subordinate Educational (Trained graduates Grade)Service Rules, 1983.

2. The submission of Sri Khare was noted in the order dated 6.2.2013 when the petition was entertained as quoted herein under.

"The contention raised by Sri Ashok Khare learned senior counsel is that the petitioners have applied for being appointed against the post of Assistant Teacher in T.G.T. grade for Hindi subject and that they possess graduation degree with Hindi and Sanskrit as one of the subject. The petitioners candidature is not being considered or not likely to be considered on account of the qualification prescribed for the said purpose inasmuch as the requirement is that the candidates have to possess a bachelor's degree with Hindi **and Intermediate with Sanskrit from the U.P. Board or an equivalent examination with Sanskrit.**

Sri Khare contends that the petitioners firstly are in possession of higher qualifications as they are graduates in Hindi and Sanskrit. He secondly submits that the same category of education is being imparted in privately managed institutions under the U.P. Intermediate Education Act,, 1921. The qualification prescribed under Appendix 'A' for appointment against such category of post does not have any such requirement.

The submission of Sri Khare is that their qualifications are graduation with Hindi and Sanskrit as one of the subject. He contends that there is an anomaly in the matter of qualification for the same teachers imparting education in different category for the same course. He contends that the course of Hindi and Sanskrit at

that level either in a government school or a privately managed school is one and the same and in such circumstances if the higher qualification of graduation has been accepted in private schools then in the instant case the insistence of possession of a lesser qualification is arbitrary and violates Article 14 of the Constitution.

Accordingly Sri Khare has even made a prayer questioning the correctness of the rules and challenged the vires thereof on the basis of the aforesaid submissions. He prays time to assists the Court with authorities.

Put up on Friday next. "

3. Sri Khare has further advanced his submission by relying on four judgments to urge that the possession of a higher qualification of the same line does not disqualify the petitioners even if they do not possess the lesser qualification at the Intermediate level. The judgments relied upon are (i) 2000(2) SCC 606 Mohd. Riazul Usman Gani Vs. District & Sessions Judge,Nagpur, (ii) 2006(11) SCC 153 State of Haryana Vs. Abdul Gaffar Khan, (iii) 2012(3) SCC 129 Para 7 Chandrakala Trivedi Vs. State of Rajasthan and (iv) 2011(1) ESC 115(FB) Manjit Singh Vs.State of Punjab.

4. I have also heard Sri Tomar learned standing counsel who has relied on the decision in the case of Chet Ram Gangwar Vs. State of U.P. reported in 2009(4) ESC 2569 to contend that the requisite qualifications are required to be possessed and the same cannot be eliminated on the basis of arguments advanced.

5. Having heard learned counsel for the parties the first argument of Sri Khare that the rule is ultra vires cannot be accepted. The rule making authority has the competence to make the rule and the same has been standing for long. Apart from this it does not offend any of the fundamental right guaranteed under the Constitution.

6. The contention of Sri Khare that there is no justification to have a different qualification in government schools as against that of privately managed schools also cannot be accepted as they belong to different sources of establishment. It is open to the State Govt. to frame a separate rule for these two classes of institutions unless it can be shown that it results in discrimination. The petitioners if find the rule to be harsh they can apply for appointment in a privately managed institution, the selections whereof are conducted by a different body altogether governed by the provisions of U.P. Secondary Education Service Selection Board Act, 1982 and the Rules and Regulations framed thereunder.

7. In addition to this, the qualification of Intermediate with Sanskrit or equivalent examination is an additional qualification which the employer has a right to provide for. Merely f because only higher qualifications have been prescribed for privately managed institutions, the same cannot be termed to be discriminatory or violation of Article 14 of the Constitution of India. The mode of recruitment in both the said institutions is different and their promotional avenues are also different. Their separate existence as a class of teachers with separate modes of recruitment remains undisputed.

8. The contention of Sri Khare that since the government Intermediate college and privately managed teach the same subject and same course therefore a teacher employed in either of the institutions cannot have different qualifications have to be rejected, inasmuch as, pointed out they are a different class and governed by different set of rules.

9. Sri Khare has then vehemently urged on the basis of the decisions referred to herein above to contend that the petitioner has a higher qualification in the same line of the subject concerned. He contends that as against these judgments, some other decisions of the Apex Court provide a distinction between where the academic qualifications and the training qualifications that have been separately dealt with which do not apply in the present case.

10. I have perused the judgments noted above and in my opinion none of them come to the aid of the petitioners. The reason given in paras 7,8 and 9 in the case of Chandrakala (supra) is that the word 'equivalent' shall be given a reasonable meaning which means that there is some degree of flexibility or adjustment which does not lower the stated requirement. In my opinion providing for an additional lower qualification specifying the subject is an additional qualification and the ratio of the interpretation of the word 'equivalent' in the judgment referred to herein above is no where attracted in the present case. Apart from this para 9 of the said judgment categorically records that it was a judgment under Article 142 of the Constitution of India on specific facts of that case. Accordingly it does not support the submission of Sri Khare.

11. Coming to the decision in State of Haryana V. Abdul Gaffar Khan (supra) the same indicates that the consideration of higher qualification is not expressly excluded. The ratio of the decision again is not attracted, inasmuch as in the instant case what the petitioner in essence desires is that the additional lesser qualifications of Intermediate with Sanskrit should be ignored as against the higher qualification of B.A. With Hindi and Sanskrit. In effect the submission is that even if a candidate did not have Hindi and Sanskrit at the Intermediate level, yet if he possesses graduation with the said subjects the qualification should be deemed to be possessed by the candidate. This ground of equivalence or possession of a higher qualification cannot be inferred by any fiction. The absence of the qualification required at the lesser does not fall within the wisdom of this Court to eliminate or discard an eligibility which is specifically provided for. The judgment in the case of State of Haryana does not rule to that effect.

12. Coming to the third decision in the case of Full Bench judgment of the Rajasthan High Court the court therein was concerned with the possession of a higher qualification in the same line and held that it cannot be excluded from consideration from selection. In none of these cases the present situation exists where the higher qualification and the lesser qualification have been provided for specifically in the same line. It was the wisdom of the rule making authority to clearly provide that in addition to the graduate level degree, the candidate has to possess the knowledge of the Intermediate level of the subject as well. In such circumstances none of the judgments as referred to above by Sri Khare come to the aid of his alternative arguments in

relation to possessing a higher qualification.

13. For the reasons aforesaid the contention raised by the learned counsel for the petitioners cannot be accepted.

14. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 7562 of 2013

Raj Pal ...Petitioner
Versus
Dist.Inspector of Schools And Ors.
...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh

Counsel for the Respondents:
C.S.C.
Sri Prabhakar Awasthi

U.P. Intermediate Education Act 1921, Chapter III Regulation 2-appointment by promotion post of class III employee-D.I.O.S. held as petitioner does not possess typing test as required by Group-D Employees Service Rules in U.P. Subordinate Offices 2001-can not be appointed and R-4 already appointed no compassionate ground-hence no vacancy-held-D.I.O.S. Can not borrow qualification other than Act-by travelling beyond authority-order quashed-D.I.O.S. To consider appointment of R-4 in any other institution.

Held: Para-16

In the aforesaid circumstances, the District Inspector of Schools has travelled beyond his authority in invoking the rules meant for subordinate services of the state government for the purpose of qualification to the extent as indicated in the impugned order which is unjustified. The order, therefore, having proceeded on an erroneous assumption of law cannot be sustained.

Case Law discussed:
2000 Volume 2 ESC Page 820

(Delivered by Hon'ble Amreshwar Pratap Sahi,J.)

1. Heard Sri Indra Raj Singh, learned counsel for the petitioner, Sri Prabhakar Awasthi, learned counsel for the respondent No.4 and the learned Standing Counsel for the Respondent No.1 and 2.

2. The contest in this petition is in relation to post of a clerk (class 3 post) in an Intermediate College governed by the provisions of the U.P. Intermediate Education Act, 1921 and the regulations framed thereunder.

3. The petitioner is a Class-IV employee who is seeking promotion on the said post in terms of Chapter 3 Regulation2 of the Regulations framed under the 1921 Act.

4. He is aggrieved by the direction of the District Inspector of Schools ordering appointment of the respondent no.4 against the post available in the institution on compassionate basis in terms of the regulation aforesaid. The petitioner contends that there is only one post of Class-III available in the institution which has to be filled up by way of promotion keeping in view the law laid down by this Court in the case of Jai Bhagwan Singh Vs. District Inspector of Schools, Gautambudh Nagar and others 2006 volume 9 ADJ Page 292.

5. It is further his contention that a post of promotion cannot be filled up by way of direct recruitment and, therefore, the recommendation of the Respondent No.4 for being appointed on compassionate basis being one under the direct recruitment process, cannot be permitted as per the law laid down in the case of Hiraman Vs. State of U.P. and others AIR 1997 SC Page 3288.

6. The petitioner contends that while his claim is still under consideration before the committee of management, the District Inspector of Schools straight away passed an order on 19th September, 2012 appointing the respondent No.4 on compassionate basis. Aggrieved the petitioner filed writ petition no. 57563 of 2012 that was disposed of by this Court on 5th November, 2012. A copy of the judgment is Annexure-7 to the writ petition. The District Inspector of Schools was called upon to take a fresh decision in the matter.

7. Accordingly, the District Inspector of Schools by the impugned order dated 26th January, 2013 has proceeded to hear the parties including the committee of management and has passed the impugned order non-suiting the petitioner on the ground that the petitioner does not possess the knowledge of typing in terms of Group-D Employees Service Rules in the Uttar Pradesh Subordinate Offices, 2001. The District Inspector of Schools has relied on the government order dated 22nd December, 2001 to record the said finding.

8. Sri Indra Raj Singh, learned counsel for the petitioner, submits that the said rules are not applicable inasmuch as they have been framed under Article 309 of the Constitution of India which is meant for government servants and the same have not been applied either by way of reference or through any statutory provision in the case of Class-III employees of privately managed institutions covered under the 1921 Act. Sri Singh has invited the attention of the Court to Chapter III Regulation 2 as also the provision of qualification required for the said purpose and dealt with by a learned Single Judge of this Court in the case of M.P. Chaukidar Sardar Ballabh Bhai Junior High School Vs. District Basic Education Officer, Fatehpur and others, 2000 Volume 1 LB ESR Page 969. He has further relied on the Division Bench judgment in the case of Rajiv Kumar and others Vs. State of U.P. reported in 2011 Volume 2 ESC Page 820 to substantiate the submission that the 2001 Rules as relied upon by the District Inspector of Schools is not applicable.

9. Replying to the aforesaid submission Sri Prabhakar Awasthi for the respondent no.4 states that he does not propose to file any counter affidavit and the matter be disposed of on merit inasmuch as the respondent no.4 is otherwise also entitled for appointment, if not in this institution, then in some other institution of the District as per the regulations contained in Chapter-III.

10. Learned standing counsel also does not propose to file any counter affidavit as the issue involved is purely legal. In the aforesaid circumstances, it is not necessary to issue notice to the Respondent No.3, Committee of Management, at this stage inasmuch as the matter will have to be considered by the District Inspector of Schools once

again in view of the nature of the order that is proposed to be passed.

11. Having examined the provisions as relied upon by the learned counsel for the parties and having considered the submissions raised as well as the decisions applicable to the controversy, the post had to be filled by way of promotion as already observed by the learned Single Judge in the judgment dated 5.11.2012. The decision in the case of Jai Bhagwan Singh (supra) was binding on the District Inspector of Schools.

12. The District Inspector of Schools has, however, non suited the petitioner on the ground of not possessing the qualification of typing. For this reliance has been placed by the District Inspector of Schools on the notification dated 22.12.2001 which has been placed by Sri Awasthi before this Court. I have perused the same and it is more than clear that the said notification is in relation to Group-D employees of the subordinate offices of the State Government. The said rules are, therefore, in relation to such employees and covered by Article 309 of the Constitution of India.

13. The institution where the appointment or promotion is being claimed by the petitioner is a privately managed institution governed by the U.P. Intermediate Education Act, 1921 where Government Service Rules have not been made applicable to this extent as opined by the District Inspector of Schools. In the absence of any provision enforcing the government order dated 22.12.2001 in privately managed institutions, the District Inspector of Schools clearly fell into error by invoking the same for the purpose of adjudicating the qualification the petitioner.

14. In the considered opinion of the Court the District Inspector of Schools could not have borrowed the qualifications in relation to government servants for the purpose of adjudicating the eligibility conditions as involved in the present controversy. To that extent the Division Bench judgment in the case of Rajiv Kumar (supra) clearly comes to the aid of the petitioner.

15. Sri Awasthi submits that the correctness of the said decision has been referred for an authoritative pronouncement by a Larger Bench. A merely reference to a Larger Bench will not take away the impact of the Division Bench judgment aforesaid which is binding on me.

16. In the aforesaid circumstances, the District Inspector of Schools has travelled beyond his authority in invoking the rules meant for subordinate services of the state government for the purpose of qualification to the extent as indicated in the impugned order which is unjustified. The order, therefore, having proceeded on an erroneous assumption of law cannot be sustained.

17. Accordingly, the order dated 26.1.2012 is quashed. The writ petition is allowed. The post which is being claimed by the petitioner has to be filled up by way of promotion as observed hereinabove. Accordingly, the claim of the petitioner will now be considered against the said post in accordance with the observations made hereinabove. The District Inspector of Schools shall pass an order within six weeks of the date of

presentation of a certified copy of this order before him.

18. So far as the respondent No.4, Sri Ajai Pal Singh is concerned, his appointment by the District Inspector of Schools through the order dated 19.9.2012 cannot be sustained insofar as it relates to appointment on the post in question in Lala Hariram Inter College, Khudaganj, Shahjahan. The same is accordingly set aside with a direction that the claim of the respondent no.4 shall be considered by the District Inspector of Schools for being appointed in some other institution where the vacancy is available in accordance with the provisions of Regulation 101 to 107 of the U.P. Intermediate Education Act contained in Chapter III thereof.

19. The writ petition is accordingly allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.
THE HON'BLE ABHINAVA UPADHYA,J.

Civil Misc. Writ Petition No. 8308 of2013

Garahan Ram ...Petitioner
Versus
State Of U.P. Thru Secy. And Others ...Respondents

Counsel for the Petitioner:
Sri Amit Kumar Singh

Counsel for the Respondents:
C.S.C.

Essential Commodities Act 1955-State Govt. issued U.P. Scheduled Commodities Distribution Order 2004-Power of suspension and cancellation of fair price shop given by G.O. 30.09.2004-suspension of fair price shop by D.S.O.-questioned on ground in rural areas-D.S.O. Has no power-held-misconceived G.O. 30.09.2004 empowers the District Magistrate as well as D.S.O. To carry out the inspection of fair price shop in rural areas-and to take final action including suspension and cancellation.

Held: Para-6
The U.P. Scheduled Commodity Distribution Order, 2004 has been issued by the State Government in exercise of powers under section 3 of the Essential Commodities Act, 1955. Under the said order of 2004, the State Government is empowered to issue orders regulating inspection and monitoring of the fair price shops. The power of the State Government is clearly provided for in clauses 21 and 23 of 2004 Order. The State Government having specifically provided for empowering the District Supply Officer and the District Magistrate to take all action including suspension and cancellation, the submission of the petitioner that the District Supply Officer has no jurisdiction to suspend the fair price shop agreement is without any substance.

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

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

2. By the consent of the counsel for the parties, the petition is finally disposed of.

3. By this writ petition, the petitioner has prayed for quashing the order dated 1.2.2013 passed by the District Supply Officer by which order,

the petitioner's fair price shop agreement has been suspended.

4. Learned counsel for the petitioner challenging the order contended that the petitioner was appointed as fair price shop dealer by the order of Sub Divisional Officer and the District Supply Officer has no jurisdiction to suspend the fair price shop agreement.

5. Learned Standing Counsel was allowed time to obtain instruction by the order dated 14.2.2013. Learned Standing Counsel after instruction has submitted that the District Supply Officer is fully empowered to suspend a fair price shop agreement. He submits that the Government Order dated 30.9.2004 has been issued by the Government which has clearly provided that the District Magistrate and the District Supply Officer are entitled to carry out inspection and to take final action including suspension and cancellation of fair price shop agreement situate in rural or urban areas. Para 2 of the said Government Order provided as follows:

"Vibhinn Zilo Dwara Shashan Se Gramin Kshetra Evam Shahari Kshetra Mein Uchit Dar Dukano Ke Dandatmak Karyawahi (Nilamban/Nirastikaran Aadi) Ke Adhikar Ki Stithi Spashta Karne Ke Sambandh Mein Margdarshan Ki Apeksha Ki Gayi Hai. Ukt Ke Pariprekshya Mein Mujhse Yah Kahne Ki Apeksha Ki Gayi Hai Kii Zila Adhikari Tatha Zilapurti Adhikari Ko Sampoorna Zile Ke (Jisme Nagriya Evam Gramin Dono Kshetra Sammilit Honge) Lakshit Jan Vitran Pranali Ke Sabhi Dukaon Ke Nirikshan Tatha Unke Virudhdh Dandatmak Karyahi (Nilamban/Niristikaran Aadi) Karne Ka Adhikar Hoga. Up Zila Adhikari Ko Apne Tehsil Mein Stith Sabhi Dukaon Ke Nirikshan Tatha Unke Virudhdh Dandatmak Karyahi (Nilamban/Nirastikaran Aadi) Karne Ka Adhikar Yathawat Rahega."

6. The U.P. Scheduled Commodity Distribution Order, 2004 has been issued by the State Government in exercise of powers under section 3 of the Essential Commodities Act, 1955. Under the said order of 2004, the State Government is empowered to issue orders regulating inspection and monitoring of the fair price shops. The power of the State Government is clearly provided for in clauses 21 and 23 of 2004 Order. The State Government having specifically provided for empowering the District Supply Officer and the District Magistrate to take all action including suspension and cancellation, the submission of the petitioner that the District Supply Officer has no jurisdiction to suspend the fair price shop agreement is without any substance.

7. Learned counsel for the petitioner submits that the petitioner be allowed some time to submit reply to the show cause notice as required by the order dated 1.2.2013. The petitioner may submit his reply along with evidence within ten days and the District Supply Officer after considering the reply shall take a final decision according to Government Order dated 30.9.2004.

8. With these observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA,J.

Civil Misc. Writ Petition No. 9505 of 2013

Kedar Nath IInd ...Petitioner
Versus
Presiding Officer, Labour Court, Bareillyand Others ...Respondents

Counsel for the Petitioner:
Sri Satyendra Kumar Pandey

Counsel for the Respondents:
C.S.C.
Sri Samir Sharma
Sri A.K. Saxena

Constitution of India, Article 226-Award with direction to reinstatement and in leu of back wages compensation of Rs. 50,000-received without protest-whether can be allowed to challenge?-held-"no"-apart from finding regarding successful working during this period-not specifically denied-can not be interfered by Writ Court.

Held: Para-5
The Court further finds that compensation in lieu of back wages has already been received by the petitioner without any protest. Once the award has been complied with and the amount of compensation has been received by the workman without any protest, it is no longer open for him to turn around and approach the writ court questioning the denial of back wages. Such practice at the behest of the workman at this belated stage is deprecated.

Case Law discussed:
2009 Labour Industrial Cases 415; 2005 (5) SCC 591; 2005 (2) SCC 363

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

1. Heard the learned counsel for the petitioner and Sri A.K.Saxena for the respondents.

2. The award of the Labour Court was published in the year 2009 directing reinstatement of the workman and in lieu of back wages compensation of Rs.50,000/- was awarded. The services of the petitioner workman was terminated in the year 1991, which was referred for adjudication in the year 1993. The award was given in the year 2009. The employers have accepted the award and have reinstated the workman and has also paid the compensation of Rs.50000/- in lieu of back wages.

3. The petitioner has now approached this Court challenging that part of the award by which back wages has been denied.

4. After hearing the learned counsel for the petitioner, the Court is of the opinion, that the petitioner is not entitled for any relief. In the first instance the Court finds, that the award was made in the year 2009. No explanation has been given by the petitioner as to why he has approached the Court belatedly. Consequently, on the ground of laches, the Court is not inclined to interfere in the impugned award.

5. The Court further finds that compensation in lieu of back wages has already been received by the petitioner without any protest. Once the award has been complied with and the amount of compensation has been received by the workman without any protest, it is no longer open for him to turn around and approach the writ court questioning the denial of back wages. Such practice at the behest of the workman at this belated stage is deprecated.

6. The learned counsel for the petitioner submitted that the parameter evolved by the Supreme Court in the case of **Kanpur Electric Supply Company Ltd. Vs. Shamim Mirza,** 2009 Lab our Industrial Cases 415, has not been taken into consideration by the Labour Court while denying the grant of back wages. In the said decision the Supreme Court held as under:

"It is true that once the order of termination of service of an employee is set aside, ordinarily the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. While dealing with the prayer of back- wages, factual scenario, equity and good conscience and a number of other factors, like the manner of selection; nature of appointment; the period for which the employee has worked with the employer etc.; have to be kept in view. All these factors are illustrative and no precise formula can be laid down as to under what circumstances full or partial back-wages should be awarded. It depends upon the facts and circumstances of each case."

7. Similarly in **General Manager, Haryana Roadways vs. Rudhan Singh,** 2005 (5) SCC 591, the Supreme Court held that there cannot be a straight jacket formula for awarding the relief of back wages and that an order of back wages should not be passed in a mechanical manner. A host of factors like manner, method of selection and appointment and nature of appointment whether adhoc, short term daily wages, temporary or permanent and length of service should be taken into consideration before granting back wages.

8. Similarly in **Kendriya Vidyalaya Sanghatan and another vs. S.C.Sharma**, 2005(2)SCC 363, the Supreme Court held that applying the aforesaid principle the inevitable conclusion is, that the respondent was not entitled to full back wages. For determining the entitlement of back wages the employee has to show that he was not gainfully employed and that the initial burden was on him.

9. In the instance case the Labour Court has held that there is a presumption that the workman was gainfully employed as he was a driver. No evidence has been filed by the Workman before the Labour Court to indicate that he was not gainfully employed during the intervening period. Further, there is nothing on record to show the nature of the appointment of the workman, the length of appointment and whether the workman was appointed on a temporary or a permanent post. In the absence of all these evidence, this Court does not find any reason to interfere in the impugned award.

10. Writ petition fails summarily and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 10307 of 2013

Priyanka Pandey And Anr. ...Petitioner
Versus
State Of U.P.Thru Secy & Ors...Respondents

Counsel for the Petitioner:
Sri S.K.S.Kushwaha
Sri M.A.Ausaf

Counsel for the Respondents:
C.S.C.
Sri R.B.Pradhan

Constitution of India , Article 226-prayer for rejoining on th post of Shikshamitra-on her own she abandoned the teaching job-due to inter cast marriage-after two years after searching the case of Sunita Devi who was permitted to rejoin in similar circumstances in 2009-now the scheme of Shikshamitra abandoned with effect from 02.06.2010-law can not prevent them for doing so-discovery of theoretical incident can not be ground part discrimination-petition dismissed.

Held: Para-5
The discretion exercised by the District Magistrate in the matter of Sunaina Devi was in 2009 when the Scheme of Shiksha Mitra was in existence. The scheme has now been abandoned on 2.6.2010. No doubt the petitioner may have a case to press into service on the alleged ground of discrimination but the same does not appear to be a legal ground. The background of a romantic runaway marriage may have been condoned by the District Magistrate treating the period of absence as a honeymoon holiday, but it does not have any lawful foundation so as to draw a similar inference. The claim appears to be more of a movie script than a genuine legal pursuit. If the petitioners gave up their source of livelihood by abandoning it for some bigger sacrifice, the law cannot prevent them from doing so or extend any benevolence. The petitioners are therefore not entitled to any sympathy. A reunion on the post of Shiksha Mitra in this cinematic background after a lapse of several months through a writ petition filed after more than two years, on a discovery of a similar theatrical incident, does not raise a legal ground to examine discrimination.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Sri Kushwaha for the petitioner and Sri R.B.Pradhan for the respondent. This is a case from the eastern conservative district of Ghazipur.

2. The petitioners appear to be engaged as Shiksha Mitra in the year 2008. They worked and received their honraria. It appears that the petitioners came closer and also got married. It is alleged that the tying of the nuptial knot was against the wishes of their families,as it was an inter caste union and this pressure compelled them to leave the Village in 2010 thereby abandoning their teaching job.

3. Learned counsel for the petitioner contends that in a similar matter of Sunaina Devi and her husband, the District Magistrate passed an order permitting them to rejoin the institution. It is alleged that in the said case also the Shiksha Mitra and her husband had married against the wishes of their parents.

4. One wonders what happens in primary schools where some other forms of friendship flourish between Shiksha Mitra's of the opposite sex at the cost of basic education. Such activities should not be encouraged by conceding in favour of romanticism. This is not to criticize about any body's private life, but to prevent any wrong message flowing from a public performance that too in the School of tiny tots. After all a decent level of morality has to be maintained especially in a primary education institution where the first foundations of an innocent mind are laid. To allow this form of preaching to be

visibly practiced before youngsters between the age of 5 and 12, is to add to their mental misery that is already beset with pitfalls of daily television viewing at home. It might have an adverse effect added and topped up with the parents and guardians contributing to this exercise. Modern advances in life, like the freedom of choice of a life partner, is too serious a subject matter to be made a gossip between children of an unripe and premature age.

5. The discretion exercised by the District Magistrate in the matter of Sunaina Devi was in 2009 when the Scheme of Shiksha Mitra was in existence. The scheme has now been abandoned on 2.6.2010. No doubt the petitioner may have a case to press into service on the alleged ground of discrimination but the same does not appear to be a legal ground. The background of a romantic runaway marriage may have been condoned by the District Magistrate treating the period of absence as a honeymoon holiday, but it does not have any lawful foundation so as to draw a similar inference. The claim appears to be more of a movie script than a genuine legal pursuit. If the petitioners gave up their source of livelihood by abandoning it for some bigger sacrifice, the law cannot prevent them from doing so or extend any benevolence. The petitioners are therefore not entitled to any sympathy. A reunion on the post of Shiksha Mitra in this cinematic background after a lapse of several months through a writ petition filed after more than two years, on a discovery of a similar theatrical incident, does not raise a legal ground to examine discrimination.

6. The scheme of Shiksha Mitra having been abandoned the claim of the petitioners cannot succeed.

7. The writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2013

BEFORE
THE HON'BLE B. AMIT STHALEKAR,J.

Civil Misc. Writ Petition No. 13889 of 2003

Lakhan Lal Mishra & Another...Petitioner
Versus
State Of U.P. Thru' Agricultural & Revenue Secretary & Ors ....Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh
Sri Pradeep Upadhyay

Counsel for the Respondents:
C.S.C.

U.P. Imposition of Ceiling and Land Holding Act 1960 Section 10(2)-second notice ignoring earlier order dated 25.11.1976 by which the proceeding between same tender holder in respect of same plot in absence of additional fact under section 13-A of the Act-second notice not maintainable-petition allowed.

Held: Para-7

From a perusal of the impugned notice dated 4.3.2003, it is not indicated as to what fresh grounds have been taken by the Authority for reopening the case for declaration of land of the petitioner tenure holder or his heirs as surplus and therefore it is not a case whether the respondent could have resorted to proceedings under Section 13 -A of the Act, 1960. This fact has not been disputed by the learned Standing Counsel either.

Case Law discussed:
(1999) 1 SCC 71; 2012 (4) ADJ 613; 2012 (5) ADJ 441

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. In this writ petition the petitioners are challenging the impugned notice dated 4.3.2003 issued under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as 'the Act) for declaring of the land of the petitioners as surplus.

2. The contention of the petitioner is that in respect of the same plots of the tenure holder the same authority had earlier issued notices and proceedings were commenced under Section 10 of the Act, 1960 and those proceedings had concluded by the order dated 25.11.1976 passed by the Prescribed Authority filed as Annexure-1 to the writ petition. Therefore, second proceedings on the same ground cannot be resorted too.

3. I have heard Sri Indra Raj Singh, learned counsel for the petitioners and learned Addl. Chief Standing Counsel for the State-respondents.

4. From a perusal of the Annexure-1 to the writ petition, there is absolutely no dispute regarding the fact that proceedings in respects of the same plots and between the same tenure holder had already been concluded by the order dated 25.11.1976 and those proceedings have become final between the parties and therefore, the second notice under Section 10(2) by the impugned notice dated 4.3.2003 could not have been issued. This controversy had come up before the Supreme Court in the case reported in **(1999) 1 SCC 71 (Devendra Nath Singh (dead) through L.Rs. and others Vs. Civil Judge and others),** wherein the Supreme Court interpreting the provisions of Section 10 (2) read with Section 14-8 (B) of the Act, 1960 has held that once proceedings have been concluded between the parties no fresh notices could have been issued by the Prescribed Authority under Section 10 (2) in respect of the same plots on the question relating to the majority of the two sons of the tenure holder. Para 1 and 2 of the said judgment read as follows:

"1. The sole question for consideration in this appeal is whether the Prescribed Authority in exercise of his powers under Section 13-A of the U.P. Imposition of Ceiling on Land holdings Act, 1960 can reopen a matter already decided and readjudicate the question whether the two sons of the original land holder, deceased Devendra Nath Singh, namely, Hamendra and Shailendra were major or minor. On a proceeding being initiated, pursuance to notice under Section 10(2) of the Act, the Prescribed Authority by his order dated 30th January, 1975 came to the conclusion that the deceased Devendra Nath Singh had no surplus land in his possession inasmuch as the two major sons Hamendra And Shailendra were entitled to their share in the property. Shortly thereafter a fresh notice was issued by the said Prescribed Authority in purported exercise of his power under Section 13-A of the Act, intimating thereunder that some other land has not been taken into account. In course of the subsequent proceeding which stood initiated, the Prescribed Authority came to the conclusion that the two sons of the deceased Devendra Nath, namely, Shailendra And Hamendra were not

major on the appointed date and, therefore, they would not be entitled to any share while computing the surplus land in the hands of deceased Devendra Nath Singh, the land holder contested the proceeding on several grounds including the grounds that the Prescribed Authority had no jurisdiction to reopen the question of majority of the two sons, in exercise of his power under Section 13-A of the Act. The said contention, however, was negatived by the Authorities under the Act as well as by the High Court on the ground that Section 38-B clearly indicates that no finding or decision given before the commencement of the said section can be treated as bar against the principle of res judicate and, therefore, the Prescribed Authority could annual its earlier decision on the question of majority of the two sons, Hamendra and Shailendra.

2. The learned counsel appearing for the appellants contends that the power under Section 38-B will not enlarge the power of redetermination of surplus land conferred on the Prescribed Authority under Section 13-A of the Act and, therefore, the Prescribed Authority did not have the jurisdiction to reopen the question of the majority of the two sons. The learned counsel appearing for the respondent on the other hand contended that the land holder having subjected himself to the jurisdiction of the Prescribed Authority and having lead evidence in the proceeding after the matter was reopened, is not entitled to challenge the jurisdiction of the authority and, therefore, the findings arrived at by those authorities cannot be annulled at this point of time."

5. This judgment subsequently has been followed by this Court in the case reported in **2012 (4) ADJ 613 (Kailash Babu Vs. Commissioner, Kanpur Division Kanpur and Another),** wherein, also this Court has held that once the proceedings under Section 10 (2) have been initiated against the tenure holder and have been concluded and attained finality between the parties the second notice cannot be issued. Similar view has been taken by this Court in another case reported in **2012 (5) ADJ 441 (Amar Jeet Singh and others Vs. Upper Ayukta, Chitrakoot Dham, Banda Mandal, Banda and others)**. Paras 21 and 22 of the said judgment read as follows:

"21. Having heard learned counsel for the parties and having considered the submissions raised the issue relating to the power of the Prescribed Authority to reopen a matter has to be considered in the light of the provisions of Section 13-A of the 1960 Act. The provisions of the said Act make it more than clear that it is only an empowerment to correct or rectify any error apparent on the fact of record and not a power of review. It is for this reason that the provisions for issuing a notice to the tenure holder is contained therein with a recital that such a notice should be issued only if the declared surplus land is sought to be increased. In such a situation, it would be in the nature of a fresh objection and for the said reason Sub Section (2) of Section 13-A provides for applicability of the other provisions mutatis mutandis. In that event, it will not be an exercise of review but a fresh decision of any future objections in the light of Section 29 of the 1960 Act.

22. In the instant case the same objection on the same issue had already been decided vide order dated 31st

August, 1976. The issue relating to the parentage of the petitioners was very much raised and decided after giving opportunity of leading evidence to the petitioners and to the State. In such a situation, the question is, can that issue be permitted to be re-agitated under the garb of Section 13-A. The answer on the basis of the reasoning already given by the Apex Court in the case of Devendra Nath Singh (supra) would be in the negative. The State will have no power to re-agitate or re-examine the question which has been finally decided as held by the Apex Court in paragraph 3 of the aforesaid judgment.

Not only this the same has been relied by a learned Single Judge in the case of Yashpal Singh (supra) and I see no reason or any novel argument raised by the respondent, to disagree from the view so taken. Accordingly, it is held that the Prescribed

Authority had no power to invoke the provisions of Section 13-A and review the decision dated 31.8.1976.

Not only this, it appears that the Prescribed Authority had realized this legal impediment and had itself in the order dated 26.7.2007 indicated that this was not a case of error. Once the Prescribed Authority had admitted that it was not a case of any rectification or error then powers under Section 13-A could not have been invoked. Apart from this, the bar of limitation as prescribed under Section 13-A also stares on the face of it. The power under the aforesaid section can be exercised only within two years of the passing of the order. In the instant case, it is obvious that the said power was sought to be exercised after 31 years. This according to the Section itself was impermissible."

6. Learned Standing Counsel has raised an objection that the notice under Section 10(2) is not required to state all the new facts and ground on which the second show cause notice is being issued. This submission is absolutely fallacious inasmuch as by the second notice under Section 10 (2) an explanation has been called for from the tenure-holder/tenure-holders and unless they are informed of the fact of which they have to submit an explanation how would they submit their explanation. Even otherwise, it is not possible to give an explanation to a vague notice. Besides the earlier adjudication proceedings have attained finality in the year 1996, and the second show cause notice of 2003 would be barred by limitation prescribed under Section 13(A) of the Act, 1960.

7. From a perusal of the impugned notice dated 4.3.2003, it is not indicated as to what fresh grounds have been taken by the Authority for reopening the case for declaration of land of the petitioner tenure holder or his heirs as surplus and therefore it is not a case whether the respondent could have resorted to proceedings under Section 13 -A of the Act, 1960. This fact has not been disputed by the learned Standing Counsel either.

8. In this view of the matter the impugned show cause notice dated 4.3.2003 is quashed.

9. The writ petition is allowed. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA,J.

CIVIL MISC. WRIT PETITION NO. 20576 of 2009

Ganga Ram ...Petitioner
Versus
Labour Court, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Singh

Counsel for the Respondents:
Sri Pramod Kumar Srivastava

Industrial Dispute Act 1947, Section 6-N- retirement of workman/petitioner without following principle of "First Came last go"-before Labor Court workman filed resolution by which engaged-completed 240 days-filed application to summon the original record-employer failed to produce-Labor Court committed great illegality by saying workman nor discharge its burden to proof-whereas in plaint-in examination in chief supported with document stated about 240 days working -not controverted in cross-examination-it is for employer to discharge the burden of proof-order quashed -matter remitted back for reconsideration within 4 month

Held: Para-11

In the light of the aforesaid, the Court finds, that the initial burden to prove a fact, was upon the petitioner, which had been done substantially and thereafter the onus shifted upon the employer, which, in the instance case, an opportunity was given and which the employers failed to discharge. Consequently, the finding of the Labour Court, that the burden to prove the fact was not discharged by the petitioner was patently erroneous. The best evidence, namely, the resolutions of the Nagar Panchayat and the Payment and Attendance Register was with the employers. The petitioner had no access to it. If the employer failed to produce the documents, which are in their custody, adverse inference had to be drawn against the employers.

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

1. List has been revised. The learned counsel for the respondent is not present.

2. Heard Sri Rajesh Kumar Singh, the learned counsel for the petitioner.

3. The petitioner is a workman, appointed as an electrician, in the Nagar Panchayat, Handia and his services were arbitrarily dispensed with on 1.7.2001. Accordingly, the petitioner raised an Industrial Dispute, which was referred to the Labour Court, Allahabad for adjudication. The terms of the reference order was whether the employers were justified in terminating the services of the workman w.e.f. 1.7.2001 ? If not, to what relief the workman was entitled to.

4. Before the Labour Court the petitioner contended that he was appointed on 27.1.1998 and had worked continuously without any break in service till he was removed on 1.7.2001. The petitioner categorically stated that he had completed 240 days of continuous service in a calendar year and that while dispensing his services, the provisions of Section 6-N of the U.P. Industrial Disputes Act had not been complied with. Further, juniors to the petitioner, who were similarly situated, were continuing in service and that the principle

enunciated under Section 6-P, namely, "last come first to go" had also not been adhered to. The petitioner contended that the services of the petitioner has been dispensed with in violation of the U.P. Industrial Disputes Act and therefore, he should be reinstated with continuity of service and with back wages.

5. The respondents filed a written statement and contended that the petitioner was never appointed in a permanent capacity nor in a regular capacity but admitted that the petitioner was appointed for a limited part of time on exigencies of work on a daily rate basis. The respondents denied the fact that the petitioner had worked for more than 240 days in a calendar year.

6. In support of his case, the petitioner filed various documents, namely, resolutions of the Nagar Panchayat to indicate, that a decision was taken to appoint the petitioner as an electrician. There is another resolution of the Nagar Panchayat indicating that the petitioner's services on daily wage basis be regularized. The Court finds, that the petitioner had filed an application praying that the original resolution of the Nagar Panchayat should be placed by the respondents and that the attendance and payment register for the year 1999, 2000 and 2001 be also placed for perusal of the Labour Court to verify as to whether the petitioner had worked and had been paid for the period in question.

7. Inspite of the application being filed and inspite of the direction being issued by the Labour Court to the respondent Nagar Panchayat, to produce the record, the same was not done. The Labour Court also debarred the employer from cross-examining the workman.

8. The Labour Court, after hearing the parties, rejected the claim of the petitioner, on the ground, that no cogent proof of his working as an electrician, nor proof of the fact that he had worked for 240 days in a calendar year, was filed and accordingly dismissed the claim of the petitioner.

9. Having heard the learned counsel for the petitioner at some length, the Court finds, that the Labour Court committed a manifest error in rejecting the claim of the petitioner and in placing the burden entirely upon the workman. No doubt, it is a settled principle of law, that the burden to prove the case is upon the plaintiff, namely, the workman in the instant case who has filed the claim before the Labour Court. In the instant case, the petitioner has filed a copy of the resolution of the Nagar Panchayat and has also proved this resolution in his evidence-in-chief indicating that the Nagar Panchayat had passed a resolution for appointing the petitioner as an electrician on daily wage basis. To this extent the petitioner has proved his case that he was appointed as an electrician. However, the petitioner had contended that he had worked continuously for more than 240 days in a calendar year. This fact has been stated in his written statement and has also been stated in his evidence, which has not been rebutted in his cross-examination.

10. In support of his stand, the petitioner had also filed an application seeking a direction that the Nagar Panchayat be directed to produce the original record, namely, the original

resolutions, as well as the attendance and payment register to prove the fact that the petitioner had worked continuously without break in service for the period 1999, 2000 and 2001. Inspite of a direction being given by the Labour Court, no record was produced.

11. In the light of the aforesaid, the Court finds, that the initial burden to prove a fact, was upon the petitioner, which had been done substantially and thereafter the onus shifted upon the employer, which, in the instance case, an opportunity was given and which the employers failed to discharge. Consequently, the finding of the Labour Court, that the burden to prove the fact was not discharged by the petitioner was patently erroneous. The best evidence, namely, the resolutions of the Nagar Panchayat and the Payment and Attendance Register was with the employers. The petitioner had no access to it. If the employer failed to produce the documents, which are in their custody, adverse inference had to be drawn against the employers.

12. In the light of the aforesaid, the Court is of the opinion that the impugned award cannot be sustained and is quashed. The writ petition is allowed and the matter is remitted to the Labour Court again to re-decide the matter from the stage where it had left within four months from the date of the production of a certified copy of this order. Even though the employers were debarred from cross-examining the petitioner, it would be open to the parties to file fresh evidence in support of their case

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2013

BEFORE
THE HON'BLE B. AMIT STHALEKAR,J.

Civil Misc. Writ Petition No. 22263 of 2007

Arun Kumar ...Petitioner
Versus
D.I.O.S And Others ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh

Counsel for the Respondents:
C.S.C.
Sri Alok Dwivedi
Sri P.C. Shukla

U.P. Intermediate Education Act 1921-Regulation 101, Chapter III-appointment of peon in recognized-aided intermediate college-approval refused in garb of G.O. Dated 09.02.2007-which requires approval from Chief Minister-held-G.O. Illegal, contrary to statutory provisions-quashed-consequential directions given.

Held: Para-6
Thus where a particular authority has been mentioned in the Regulations and conferred with the power of granting approval for recruitment of class III and class IV, that authority can not be divested of that power, nor can that power be usurped by any other authority, be it the Chief Minister, except by way of amendment of the existing statutory rules. In the present case the alleged G.O. dated 9.2.2007 is only an Executive Order and as held by the Supreme Court in the case of Naseem Bano (supra), Executive Orders will not supersede the statutory rules.

Case Law discussed:
1993 Supp (4) Supreme Court Cases 46; 2004 (2) CRC 664; 1995 Supp (3) Supreme Court Cases 332; (1997) 4 SCC 301

(Delivered by Hon'ble B. Amit Sthalekar,J.)

1. By this writ petition the petitioner is seeking quashing of the G.O. dated 9.2.2007 filed as Annexure-3 to the writ petition and the order dated 21.2.2007 by which the approval of the appointment of the petitioner as class IV against the general category vacancy in the Dayanand Intermediate College, Said Nagli, Jyotiba Phule Nagar, has not been granted.

2. The facts of the case, in brief, are that there is an intermediate educational institution known as Dayanand Intermediate College, Said Nagli, Jyotiba Phule Nagar (hereinafter referred to as the Institution). The institution was governed by the provisions of the U.P. Intermediate Education Act, 1921 as well as the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of the Teachers and Other Employees) Act, 1971. According to the petitioner, a post of Daftari fell vacant on 15.1.2007 on account of promotion of Sri Subhash Chandra Verma on the post of clerk. Against the said vacancy one Sri Dev, peon of the institution was promoted as Daftari on 16.1.2007, which was approved by the District Inspector of Schools, Jyotiba Phule Nagar vide order dated 14.2.2007. The existing vacancy in class IV on account of promotion of Sri Dev was intimated by the Principal of the Dayanand Intermediate College to the District Inspector of Schools and permission was sought to fill up the said post. The District Inspector of Schools, however, relying upon G.O. dated 9.2.2007 filed as Annexure-3 to the writ petition declined to grant approval and on 21.2.2007 a notice was issued to the Principal, Dayanand Intermediate College, Said Nagli, Jyotiba Phule Nagar, respondent no.4 to show cause as to why the post in general category of class-IV was advertised in contravention of G.O. dated 9.2.2007. For reference it may be mentioned the vacancy of class-IV was advertised in two newspapers on 20.2.2007 namely 'Amar Ujala' and 'Yug Bandhu' and applications were invited from eligible candidates upto 28.2.2007. A Selection Committee was also constituted on 5.3.2007 and the petitioner was found to be the most suitable candidate for appointment and the Selection Committee thereupon recommended the name of the petitioner for appointment on the class-IV post in the institution. Letter of appointment was also issued to him on 6.3.2007. The petitioner joined the class IV post on 9.3.2007 and he is stated to be working since then.

3. I have heard Sri Indra Raj Singh, learned counsel for the petitioner and the learned standing counsel appearing for the respondent nos.1 and 2. On behalf of respondent nos.3 and 4 counter affidavit has been filed by Sri Alok Dwivedi, whose name has also been shown. List has been revised. None appears for respondent nos.3 and 4.

4. From a perusal of the impugned G.O. dated 9.2.2007 it will be seen that a complete ban was imposed on recruitment in class III and IV posts but clause ?3 of the G.O. mentions that this ban would not be a hindrance in the direct recruitment of S.C.& S.T. and O.B.C. candidates. Clause-4 of the G.O. also mentions that in class-IV category, appointments may be made only with the approval of the Chief Minister. This condition in the matter of direct recruitment of Class III and Class IV that permission of the Chief Minister

has to be taken borders on the bizzare. Under Regulation 101 of Chapter III of the U.P. Intermediate Education Act, 1921, appointment in class-IV is to be made by the Principal of the Institution with the prior approval of the District Inspector of Schools and there is no role to be played in such appointments by the Chief Minister. Regulations to the U.P. Intermediate Education Act, 1921 have been framed by the Board of High School and Intermediate Education in exercise of power under Section 15 of the U.P. Intermediate Education Act, 1921 and are statutory in nature.

5. In ***1993 Supp (4) Supreme Court Cases 46, Naseem Bano (Smt.) vs. State of U.P. and others*** the Supreme Court has held the regulations framed under the U.P. Intermediate Education Act, 1921 to be statutory in nature and has also held that any G.O. or Executive Order contrary to the same cannot override the Regulations. Para 6 of the judgement reads as follows:-

"6. The High Court has found that the appellant was not eligible for promotion to L.T. grade on August 29,1977 when the post of L.T. grade teacher in Home Science was created for the reason that the appellant was not a trained graduate on the relevant date as required under notification dated October 3, 1974. In the view of the High Court, by holding the qualifications mentioned in Appendix 'A' of the Regulations, a person could claim appointment only in the C.T. Grade. We find it difficult to subscribe to this view. Promotion from C.T. Grade to L.T. grade is governed by clause (1) of Regulation 6 which postulates: (I) having a minimum five years' continuous substantive service on the date of occurrence of the vacancy; and (ii) possessing the prescribed minimum qualifications for teaching the subject in which the teacher in the lecturer grade or in the L.T. grade is required. The prescribed minimum qualifications referred to in clause (1) of Regulation 6 are the minimum qualification which are prescribed in the Regulations for appointment as teacher to teach the concerned subject which would mean the minimum qualification as laid down in the appendix to the Regulations. Clause (1)of Regulation 6 cannot be construed as referring to the notification dated October 3, 1974 because the notification, is only an executive order and the qualifications prescribed therein cannot override the qualifications prescribed in the Regulations which are statutory in character. The notification can, therefore, have no application to promotion to L.T. grade dealt with in Regulation 6 (1) and must be confined in its application to appointment by direct recruitment only."

6. Thus where a particular authority has been mentioned in the Regulations and conferred with the power of granting approval for recruitment of class III and class IV, that authority can not be divested of that power, nor can that power be usurped by any other authority, be it the Chief Minister, except by way of amendment of the existing statutory rules. In the present case the alleged G.O. dated 9.2.2007 is only an Executive Order and as held by the Supreme Court in the case of Naseem Bano (supra), Executive Orders will not supersede the statutory rules.

7. In this regard Sri Indra Raj Singh has relied upon a Full Bench decision of this Court reported in ***2004 (2) CRC 664, R. B. Dixit vs. Union of India and others***

wherein the Full Bench has held as follows:-

"6. We have held in Smart Chip v. State of U.P., 2002 (49) ALR 419, that in every legal system there is a hierarchy of norms as noted by the eminent jurist Kelsen in his Pure Theory of Law. In the Indian legal system this hierarchy is as follows:

1.The Constitution.

2.Statutory law, which may either be made by the Parliament or by the State legislature.

3.Delegated legislation, which may be either in the form of rules, regulations or statutes made under the Act.

4.Executive instructions or Government orders.

7.In the above hierarchy if there is conflict between a higher law and a lower law then the higher law will prevail. The executive instructions as part of the fourth layer in the hierarchy, which is at the lowest level, whereas an Act is part of the second layer and the Statutes made under the Act are delegated legislation and hence part of the third layer. The letters dated 31.8.1999 and 30.3.1999 are only executive instructions and hence they belong to the fourth layer. Hence they are neither Act nor Statutes. Hence in our opinion the age of retirement of an employee of the Indian Institute of Technology is 60 years and not 62 years vide Section 3 (2). We therefore respectfully disagree with the decision in Raja Ram Verma's case."

8. The Supreme Court in the case reported in ***1995 Supp (3) Supreme Court Cases 332, Subhash s/o Shriram Dhonde vs. State of Maharashtra and another*** has held as follows:-

"2. The Tribunal has dismissed the appellant's application only on the ground that the appellant had acquired the working experience of one year prior to acquisition of the basic qualifications which in this case is diploma in Automobile Engineering. For this purpose, the Tribunal relied upon the circular issued by the Government. The rules, namely, the Motor Vehicles Department (Recruitment) Rules, 1991 framed under Article 309 of the Constitution show that a mere possession of the working experience of at least one year in a reputed Automobile Workshop as mentioned under Rule 3(e) is enough. The rule does not make any difference between acquisition of such experience prior to or after the acquisition of the basic qualification. What is further, the record shows that even after the acquisition of the basic qualification as mentioned in Rule 3(c), the appellant has acquired the additional experience of one year in a reputed Automobile Workshop as required even by the said circular. The Tribunal has committed an error in relying upon the circular which cannot replace the rules framed under Article 309 of the Constitution. We are, therefore, of the view that the Tribunal's decision is incorrect. Since the appellant satisfies the qualifications required by the rules, the decision of the Tribunal has to be set aside. We accordingly set aside the impugned decision of the Tribunal and direct the respondent to consider the appellant for appointment, if otherwise he satisfies the requisite qualifications

including the marks obtained in the written test and the interview already held. The appeal is allowed with no order as to costs."

9. Again in the case reported in ***(1997) 4 SCC 301, P. Sadagopan and others vs. Food Corporation of India, Zonal Officer (South Zone) and another*** the same principle has been laid down by the Supreme Court in para-3. Para-3 of the said judgement reads as follows:-

"The Regulation provides that such of the candidates who have put in three years' experience as Assistant, Category I are eligible to be considered for promotion as Assistant Managers in Category II post. It is now settled legal position that executive instructions cannot be issued in derogation of the statutory Regulations. In view of the fact that the statutory Regulations require that experience of three years is a pre-condition to consideration for promotion to Category II post from Category I post, it would be obvious that any relaxation was in defeasance of the above Regulations. The Division Bench, therefore, was not right in upholding the power of the Board in directing relaxation of the statutory regulations and consideration of the cases without considering the claims of all the eligible persons. Moreover, later the Board itself cancelled the 1970 panel. The Regulation issued for promotion of the Scheduled Castes and Scheduled Tribes should also be considered. Admittedly,they were not considered. Since the claims of all the persons are not before us, we do not propose to close the matter at this end. Accordingly, we set aside the order of the Division Bench and direct the authorities concerned to determine the promotions of all the eligible persons in accordance with the statutory regulations and pass appropriate orders within a period of six months from the date of the receipt of the order."

10. Thus the G.O. dated 9.2.2007 is absolutely illegal and arbitrary and contrary to statutory Regulations framed under the U.P. Intermediate Education Act, 1921 and has no legs to stand and is accordingly quashed. The impugned order dated 21.2.2007 based upon the G.O. dated 9.2.2007 is also illegal and is accordingly quashed.

11. The writ petition is allowed.

12. Sri Indra Raj Singh submitted that the petitioner has not been paid salary in view of the G.O. dated 9.2.2007 and impugned order dated 21.2.2007. In this regard the petitioner may make a representation to the District Inspector of Schools within a period of ten days from today. If such representation is filed, respondent no.1, the District Inspector of Schools, Jyotiba Phule Nagar shall decide the same within a period of one month thereof regarding financial approval for payment of salary to the petitioner.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2013

BEFORE
THE HON'BLE RAMESH SINHA,J.

Criminal Misc. Application No. 26656 of 2012

Khusnuma Khatoon And Others...Applicants
Versus
State Of U.P. And Anr. ...Opposite Parties

Counsel for the Petitioner:
Sri Vijay Shanker Singh

Counsel for the Respondents:
Govt. Advocate

Criminal Procedure Code Section 482-application for quashing proceeding of complaint case-offence under section 498-A, 323, 506 I.P.C. And ¾ D.P. Act-from bare perusal of statement under section 200 and 202-general allegation against the applicants-who are sister-in-law or brother-in-law living separately-dragged only because belongs to family of the husband of complainant-no allegation of cruelty or demand of dowry-proceeding quashed.

Held: Para-11

Considered the submissions made by learned counsel for the parties. From the perusal of the complaint and the statement of the complainant and it's witnesses recorded u/s 200 and 202 Cr.P.C., it is apparent that only general allegations have been levelled against the applicants who married sisters and brother-in-law of the husband Zubair Ahmed. The applicants are living separately from the husband of opposite party no.2 which is evident from the documents annexed with the present application. The said fact also finds mention in para no.5 and 6 of the affidavit of the present application which is unrebutted by the opposite party no.2 has also not appeared before this court to contest the matter in spite of the service of notice of the application. The propositions of law laid down in the case of Preeti Gupta Vs. State of Jharkhand (Supra) and Smt. Geeta Mehrotra Vs. State of U.P (Supra) is fully applicable in the instant case as the applicants who are sister-in-laws and brother-in-law of the complainant have been simply dragged in the present case as they are family members of the husband Zubair Ahmed excepting bald allegations against them in the complaint and in the statement of the complainant and her witnesses there is nothing on record which may show any overt act on their part subjecting the complainant to cruelty to satisfy unlawful demands of dowry. Thus, it is a fit case for exercise of inherent power of this Court u/s 482 Cr.P.C for quashing of the proceedings against the applicants.

Case Law discussed:
2010 SCC (Cr.) Volume III page 473; 2012 (10) ADJ page 464; (2000) 3 SCC 693; AIR 2003 SC 1386

(Delivered by Hon'ble Ramesh Sinha,J.)

1. Heard Smt Kamla Singh, holding brief of Sri Vijay Shanker Singh, learned counsel for the applicants and learned A.G.A. for the State.

2. The applicants, through the present application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with a prayer to quash the proceeding in Complaint Case No.1282 of 2011, u/s 498-A, 323, 506 IPC and 3/4 D.P.Act, P.S. Haldharpur, district Mau pending before the Judicial Magistrate, Mau.

3. As per office report dated 4.2.2013, it has been reported that the notice issued to opposite party no.2 has been received back after unserved as she refused to receive the notice. Hence the notice to her about the present case is deemed to be sufficient.

4. The prosecution case as stated in the application u/s156(3) Cr.P.C by Smt. Reshma Bano that her marriage was solemnized on 19.4.2009 with Zubair Ahmad in accordance with Islamic rituals at Azamgarh. In the marriage, certain gifts were given by her father according to his resources. The wife performed her

matrimonial obligations but after the marriage when the complainant went to her in-laws house, her in-laws i.e. mother-in-law Sageera, Khushnuma Khatoon, Shabnam Khatoon daughters of late Jainuddin and the two Jethani's namely Guddi and Parveen, R/o Gojha Devkali, P.S. Bubarakpur and Nandoi Asaf Khan, S/o Shabbir, R/o Nava Sarai, P.S. Gosi, district Mau started harassing the complainant for bringing less dowry from her house and further stated that in dowry if motorcycle and Rs.50,000/- is not brought by her, then she will not be allowed to live at her in-laws place. The complainant told about poverty of her parents to meet the demand and she informed about the said harassment for want of dowry to her parents but they consoled her by saying that everything will be in order. The harassment of the in-laws by the complainant increased day by day and she was beaten very often and was not given food. The complainant at several occasions had gone to her parents house and thereafter used to return to her in-laws place but the behaviour of the in-laws towards her was not good and their harassment was mounting regularly. After the festival of Eid, the husband Zubair Ahmad and her Jethani and Nanad had ousted her after beating her and took away all her articles. Somehow, the complainant reached her parents house and narrated all the story of harassment to them, some times during her stay at her parents house there were talks for settling the issue but the in-laws were adamant to their demand for motorcycle and Rs.50,000/- from the parents of the complainant and they were not ready to keep her. After 15 days, she had gone with her father to her in-laws house, then all of them started assaulting her and she was threatened for her life and property. She and her father managed to come back and informed the Police about the incident but her FIR was not lodged against the accused persons. On 20.5.2011, she sent on information to Superintendent of Police informing about the incident by registered post.

5. When the FIR of the complainant was not lodged, then she moved application on 5.6.2011 before the C.J.M., Mau for directing the concerned officer of the Police Station for registering an FIR against the accused persons and get the case investigated. The learned Magistrate treated the said application as complaint and directed that the matter be registered as complaint case. The statement of complainant Reshma Bano was recorded u/s 200 Cr.P.C. and her witness Mohd. Ayub and Rafi Ullah u/s 202 Cr.P.C respectively. On 2.6.2012, the learned Magistrate finding a prima-facie offence disclosed against the co-accused persons including applicants summoned them for trial u/s 498-A, 323, 506 and 3/4 Dowry Prohibition Act.

6. It has been submitted by learned counsel for the applicants that the marriage between the Zubair Ahmad who is the brother of the applicant no.1 and complainant Reshma Bano was solemnized on 19.4.2009. The applicant no.1 Khusnuma Khatoon and applicant no.2 Asif Khan are the sister-in-law and brother-in-law whereas applicant no.3 Shabnam Khatoon is also married sister-in-law of complainant and are living separately with their husbands. It is submitted that the applicant no.1 Khushnuma Khatoon was married with applicant no.2 Asif Khan in the year 1998 and they are having two children namely Mohd. Arshan and Falak Khatoon who

are 11 years and 8 years respectively Applicant no.3 Shabnam was married with Anis Khan 20 years ago and they are having a minor son aged about 12 years. The applicant no.1 is residing separately from her brother who is married to complainant in district Mau. Similarly applicant no.3 is also living separately and they have also filed ration card as documentary proof of separate living.

7. It is further contended by learned counsel for the applicant that the application 156(3) Cr.P.C, which was treated as complaint by the Magistrate as well as the statement of the complainant and it's witnesses u/s 200 and 202 Cr.P.C, the allegations which have been levelled against the applicant are general and vague in nature and no specific allegations have been levelled against them along with other co-accused persons who are the family members of the husband of complaint/opposite party no.2. The complainant due to some dispute with her husband has left her house and went to her parents house and the applicants have no concern with their disputes.

8. Learned counsel for the applicant has placed reliance on the judgment of the Apex Court in the case of **Preeti Gupta Vs. State of Jharkhand reported in 2010 SCC (Cr.) Volume III page 473 and Geeta Mehrotra Vs. State of U.P reported in 2012 (10) ADJ, page 464** and has submitted that the the prosecution of the applicants is malicious and misuse of process of law and no offence whatsoever is made out against the applicants. She has placed reliance of the following paragraphs of the judgment of **Geeta Mehrotra Case (Supra):-**

17. Their Lordships of the Supreme Court in this matter had been pleased to hold that the bald allegations made against the sister in law by the complainant appeared to suggest the anxiety of the informant to rope in as many of the husband's relatives as possible. It was held that neither the FIR nor the charge sheet furnished the legal basis for the magistrate to take cognizance of the offences alleged against the appellants. The learned Judges were pleased to hold that looking to the allegations in the FIR and the contents of the charge sheet, none of the alleged offences under Section 498 A, 406 and Section 4 of the Dowry Prohibition Act were made against the married sister of the complainant's husband who was undisputedly not living with the family of the complainant's husband. Their Lordships of the Supreme Court were pleased to hold that the High Court ought not to have relegated the sister in law to the ordeal of trial. Accordingly, the proceedings against the appellants were quashed and the appeal was allowed.

19.Coming to the facts of this case, when the contents of the FIR is perused, it is apparent that there are no allegations against Kumari Geeta Mehrotra and Ramji Mehrotra except casual reference of their names who have been included in the FIR but mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially if it happens soon after the wedding.

20. It would be relevant at this stage to take note of an apt observation of this Court recorded in the matter of ***G.V. Rao vs. L.H.V. Prasad and others reported in (2000) 3 SCC 693*** *wherein also in a matrimonial dispute, this Court had held that the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside. Their Lordships observed therein with which we entirely agree that:*

"there has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different courts."

The view taken by the judges in this matter was that the courts would not encourage such disputes.

21. In yet another case in the matter of ***B.S. Joshi and others vs. State of Haryana and another (reported in AIR 2003 SC 1386),*** *it was observed that there is no doubt that the object of introducing Chapter XXA containing Section 498A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498A was added with a view to punish the husband and his relatives who harass or torture the wife to coerce her relatives to satisfy unlawful demands of dowry. But if the proceedings are initiated by the wife under Section 498A against the husband and his relatives and subsequently she has settled her disputes with her husband and his relatives and the wife and husband agreed for mutual divorce, refusal to exercise inherent powers by the High Court would not be proper as it would prevent woman from settling earlier. Thus for the purpose of securing the ends of justice quashing of FIR becomes necessary, Section 320 Cr.P.C. would not be a bar to the exercise of power of quashing. It would however be a different matter depending upon the facts and circumstances of each case whether to exercise or not to exercise such a power.*

24. However, we deem it appropriate to add by way of caution that we may not be misunderstood so as to infer that even if there are allegation of overt act indicating the complicity of the members of the family named in the FIR in a given case, cognizance would be unjustified but what we wish to emphasize by highlighting is that, if the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial

unless of course the FIR discloses specific allegations which would persuade the court to take cognizance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law. Simultaneously, the courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while settling down in her new matrimonial surrounding.

9. Learned AGA has tried to justify the summoning order passed by the learned Magistrate but could not point out any specific allegations against the applicants.

10. Considered the submissions made by learned counsel for the parties. From the perusal of the complaint and the statement of the complainant and it's witnesses recorded u/s 200 and 202 Cr.P.C., it is apparent that only general allegations have been levelled against the applicants who married sisters and brother-in-law of the husband Zubair Ahmed. The applicants are living separately from the husband of opposite party no.2 which is evident from the documents annexed with the present application. The said fact also finds mention in para no.5 and 6 of the affidavit of the present application which is unrebutted by the opposite party no.2 has also not appeared before this court to contest the matter in spite of the service of notice of the application. The propositions of law laid down in the case of **Preeti Gupta Vs. State of Jharkhand (Supra) and Smt. Geeta Mehrotra Vs. State of U.P (Supra)** is fully applicable in the instant case as the applicants who are sister-in-laws and brother-in-law of the complainant have been simply dragged in the present case as they are family members of the husband Zubair Ahmed excepting bald allegations against them in the complaint and in the statement of the complainant and her witnesses there is nothing on record which may show any overt act on their part subjecting the complainant to cruelty to satisfy unlawful demands of dowry. Thus, it is a fit case for exercise of inherent power of this Court u/s 482 Cr.P.C for quashing of the proceedings against the applicants.

11. In this view of the matter, so far as applicants Khusnuma Khatoon, Ashif Khan and Shabnam Khatoon is concerned, the proceedings of the Complaint Case No.1282 of 2011, u/s 498-A, 323, 506 IPC and 3/4 D.P.Act, P.S. Haldharpur, district Mau pending before the Judicial Magistrate, Mau is hereby quashed and the petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2013

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 34193 of 1999

Bishambhar Singh ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar
Sri Anil Sharma
Sri Anil Srivastava,
Sri □shutosh Shukla
Sri M.A. Khan

Counsel for the Respondents:
C.S.C.
Sri Amrish Sahai
Sri R.B. Sahai

Constitution of India, Article 226-payment of interest-petitioner took loan for purchase of Tractor-on default-as per direction of Court deposited entire outstanding amount-but interest w.e.f. 08.09.1993 to 13.07.1999 remained un-paid-held-interest is merely assertion of wealth on principle amount-court can not interfere-petition dismissed.

Held: Para-7

Interest is only an accretion of wealth on a principal amount and even if the petitioner claimed that he has paid the amount due against him as upto 1993 or upto 1999, the statement of account does not show the interest during that period and it is only in the SCA-3 of the supplementary counter affidavit dated 20.6.2011 that the amount of interest has been shown as Rs. 1,59,575/- for the period from 8.9.1993 to 31.7.1999., This amount has also not been deposited by the petitioner and interest has continued to pile up during the pendency of the writ petition.

Case Law discussed:
JT 1999 (1) SC 145; Special Appeal no. 96 of 2000 (State Bank of India Vs. Ram Bahal and others; (2010) 8 SCC 129

(Delivered by Hon'ble B. Amit Sthalekar,J.)

1. This writ petition has been filed by the petitioner seeking a direction in the nature of mandamus to release the attached property of the petitioner which according to him has been auctioned for Rs.1/- in favour of the State after cancelling the auction proceedings.

2. The petitioner took a Tractor Loan of Rs. 57,000/- and Rs. 9000/- for other agricultural activities, a total sum of Rs. 66,000/- from the Bank-respondent no. 5 in the year 1986-87. From the admitted facts in the writ petition he deposited a sum of Rs. 10,000/- in the year 1992-93 and thereafter a sum of Rs.30,000/- on 9.1.1993. A recovery certificate in Form 'F' was issued by the Bank under Rule 27 of the Banking Rules on 8.9.1993 for recovery of outstanding demand of Rs.1,20,287/-. A notice was issued to the petitioner by the Tehsildar filed as Annexure-3 to the writ petition, calling upon the petitioner to deposit a sum of Rs.97,939 + interest and recovery charges and fixed 27.3.1998 for the sale of attached property. On 27.3.1998, the petitioner deposited a sum of Rs.16,500/- and thereafter requested that he is ready to deposit a further sum of Rs.20,000/- but the District Magistrate directed him to deposit Rs.25,000/-. There is nothing in the writ petition to show that this amount of Rs.25,000/- was deposited by the petitioner. Thereafter the matter was referred by the District Magistrate to S.D.M.-respondent no. 2 and thereafter the property and other holdings of the petitioner were attached in pursuance of the recovery proceedings initiated earlier. The property of the petitioner is also stated to have been auctioned by the respondent no. 4 Tehsildar on 28.4.1998. Aggrieved the petitioner filed writ petitoin no. 30069 of 1998, which was

disposed of by this Court by the order dated 17.9.1998.

3. After this the petitioner is stated to have been provided with the statement of account by the respondent -bank which he has filed as Annexure-7 to the writ petition, wherein an amount of Rs.27,415/- is stated to be outstanding against the petitioner. According to the petitioner this amount has also been deposited by him on 19.8.1999 but thereafter the statement of account which was issued by the respondent-bank mentioned that the interest from 8.9.1993 to 31.7.1999 of Rs.1,59,575/- was further due against the petitioner.

4. I have heard Shri M.A. Khan, learned counsel for the petitioner, Shri Amrish Sahai, learned counsel appearing for the respondent-bank and the learned standing counsel for the other respondents.

5. According to the learned counsel for the petitioner, the petitioner initially took a loan of Rs.66,000/- of which he has deposited certain amounts, as already noted above and when he approached this court by means of writ petition no. 30069 of 1998 he was directed to deposit the remaining amount in trimonthly instalments by this Court's order dated 17.9.1998. According to him the statement of account provided by the bank filed as Annexure-7 to the writ petition shows the outstanding amount as Rs.27,415/- which he has deposited on 19.8.1999. However the statement of account filed as Annexure-7 to the writ petition, does not show the interest due on the loan amount. Thereafter another statement of account was issued to the petitioner which has been filed by the respondent no. 5 through a supplementary affidavit dated 20.6.2011 and Annexure SCA-3 to the said affidavit is the statement of account showing the calculation of interest from 8.9.1993 to 31.7.1999 as Rs.1,59,575/-. This amount has not been paid by the petitioner. This statement of account showing an outstanding amount of Rs.1,59,575/- has also been filed as Annexure-1 to the counter affidavit of respondent no. 5.

6. The admitted position emerging from the arguments of learned counsel at the bar is that the amount of Rs.1,59,575/- has also not been deposited at the time of filing of this writ petition. Thereafter the respondent no. 5 has filed another supplementary counter affidavit dated 11.7.2012 wherein a statement of account has been filed wherein total outstanding dues against the petitioner from 15.1.2000 upto 30.6.2012 has been shown as Rs. 10,24,049/-. At no stage of the pendency of the writ petition has the petitioner opted for payment of any outstanding amount or for negotiating or arriving at a settlement with the bank for payment of any lesser amount.

7. Interest is only an accretion of wealth on a principal amount and even if the petitioner claimed that he has paid the amount due against him as upto 1993 or upto 1999, the statement of account does not show the interest during that period and it is only in the SCA-3 of the supplementary counter affidavit dated 20.6.2011 that the amount of interest has been shown as Rs. 1,59,575/- for the period from 8.9.1993 to 31.7.1999., This amount has also not been deposited by the petitioner and interest has continued to pile up during the pendency of the writ petition.

8. The Supreme Court in the case reported in ***JT 1999 (1) SC 145 State Bank of India Vs. Yasangi Venkateswara Rao*** has held in paragraph 8 as under:

"We also find it difficult to agree with the observation of the High Court that normally when a security is offered in the case of mortgage of property, charging of compound interest would be regarded as excessive. Entering into a mortgage is a matter of contract between the parties. If the parties agree that in respect of the amount advanced against a mortgage compound interest will be paid, we fail to understand as to how the court can possibly interfere and reduce the amount of interest agreed to be paid on the loan so taken. The mortgaging of a property is with a view to secure the loan and has no relation whatsoever with the quantum of interest o be charged."

9. A Division Bench of this Court while deciding the ***Special Appeal no. 96 of 2000 (State Bank of India Vs. Ram Bahal and others)*** has, following the judgment of the Supreme Court in the case of Yasangi Venkateshwara Rao (supra), held in paragraphs 5 and 6 that interest is a matter of contract between the parties and courts cannot interfere in the same. Writ petitioners are bound to pay interest in accordance with the agreement. Paragraphs 5 and 6 of the said judgment read as under:

"5. Having heard learned Counsel for the parties, we are of the opinion,that the direction given by the learned Single Judge that the bank will charge simple interest from the petitioners cannot be legally sustained in view of Section 21-A of the Banking Companies Regulation Act. The writ petitioners are bound to pay interest in accordance with the agreement.

6. The Special Appeal is partly allowed and the direction given by the learned Single Judge to the effect that simple interest will be charge from the writ petitioner is set aside. The appellant-State Bank of India will be entitled to charge interest in accordance with the agreement which was executed by the parties at the time when the loan was given to the writ petitioners."

10. The Supreme Court in the case reported in ***(2010) 8 SCC 129 INdian Bank Vs. Blue Jaggers Estates Limited and others*** has held in paragraphs 22, 23, 24 and 25 as under:

"22. The argument of the learned counsel for the respondents that the rate of interest is unconscionable, expropriatory and contrary to law also merits rejection because at no stage the respondents had questioned the terms on which loan and other financial facilities were extended by the appellant. That apart, after having enjoyed those facilities for more than one decade, the respondents cannot turn around and raise an argument based on the judgments of this Court in Central Inland Water Transport Corpn. V. Brojo Nath Ganguly and Delhi Transport Corpn. V. D.T.C. Mazdoor Congress.

23. It must be remembered that the respondents were not in a position of disadvantage vis-a-vis the appellant. If they so wanter, the respondents could have declined to avail loan and other financial facilities made available by the appellant. However, the fact of the matter is that they had signed the agreement with

open eyes and agreed to abide by the terms on which the loan, etc. was offered by the appellant. Therefore, the doctrine of unconscionable contract cannot be invoked for frustrating the action initiated by the appellant for recovery of its dues.

24. The respondents' accusation that the appellant had not treated them fairly sans credibility. It is they who had failed to repay the outstanding dues. Not only this, after signing two compromise deeds, they failed to fulfil their commitment and delayed the payment of Rs.63.5 lakhs by almost three years. We have not felt impressed by the submission of the learned Senior Counsel appearing for the respondents that the default amount was too small to warrant initiation of proceedings under Section 13 of the Act.

24. The Court cannot lose sight of the fact that the bank is a trustee of public funds. It cannot compromise the public interest for benefiting private individuals. Those who take loan and avail financial facilities from the bank are duty-bound to repay the amount strictly in accordance with the terms of the contract. Any lapse in such matters has to be viewed seriously and the bank is not only entitled but duty-bound to recover the amount by adopting all legally permissible methods. Parliament enacted the Act because it was found that legal mechanism available till then was wholly insufficient for recovery of the outstanding dues of banks and financial institutions. Reference in this connection deserves to be made to the judgments of this Court in Delhi Transport Corpn. V. D.T.C. Mazdoor Congress, Central Bank of India V. State of Kerala and united Bank of India Vs. Satyawati Tondon. "

10. In view of the facts of the present case and weight of the judicial pronouncements of the Supreme Court as well as of this Court, the petition lacks merit and is accordingly dismissed.

11. The petitioner may, if so advised, seek settlement of his dues with the respondent no. 5-Bank, in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA,J.

Civil Misc. Writ Petition No. 35086 of 1998

State of U.P., through Executive Engineer, Nichali Ganga Nahar, Phoolpur, Kanpur ...Petitioner
Versus
The Labour Court (II), U.P. Kanpur and another ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
Sri P.C. Jhingan, Sri Krishan Ji Khare
Sri G.C. Upadhyay, Sri R.K. Singh Rajput
S.C.

Constitution of India, Article 226- U.P. Industrial Dispute Act award -directions to reinstatement 50 % back wages-challenged on ground as per law laid down by Apex Court-Irrigation department is not factory as such award given without jurisdiction-held-in absence of any evidence either before Labor Court or before High Court Writ Jurisdiction performed by department legal or sovereign-in view of law laid down by Supreme Court in R.M. Yellati case-such judgment can not be accepted-petition dismissed.

Held: Para-27

The Supreme Court in R.M.Yellatti vs. Assistant Executive Engineer vs. Assistant Executive Engineer, 2006(1) SCC 106 was faced with the same dilemma wherein it was contended before the Supreme Court that the matter should be adjourned since the judgment of the Supreme Court in Bangalore Water Supply was referred to a Larger Bench by a referral order, dated 5.5.2005 in State of U.P. vs. Jaibir Singh, 2005 (5)SCC 1. The Supreme Court declined to adjourn the matter sine die, in view of the fact that there was nothing on record to indicate that the Management had argued the point in question. Taking clue from the Supreme Court itself, the Court finds, that there is nothing on record indicating that the petitioner is not an "industry". Merely by alleging that the petitioner is not an "industry" does not take them outside the realm of the U.P. Industrial Disputes Act. The dominant nature test as illustrated in Bangalore Water Supply case (supra) has not been followed. Consequently, the Court is of the opinion, that the matter cannot be adjourned sine die.

Case Law discussed:
1978 (36) F.L.R. 266; 1988 (57) FLR 176; 1997 (5) SCC 434; 1995 Supp. (4) SCC 672; 1996 (7) SCC 562; 1998 (78) FLR 143; 2006 (1) SCC 106; 2005 (5) SCC 1

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

1. The petitioner has challenged the validity and legality of the award passed by the Labour Court directing reinstatement of the workman with 50% back wages.

2. The facts leading to the filing of the writ petition is, that in 1986 the workman was appointed as a Sinchpal and that his services was terminated on 31.12.1987. In 1992, the dispute was referred under Section 4-K of the U.P. Industrial Disputes Act (hereinafter referred to as the 'Act') with regard to the validity and legality of the order of termination. It transpires that an exparte award dated 20.3.1993 was given in favour of the workman, but, subsequently on an application for recall filed on behalf of the employers, the exparte award was set aside by an order dated 18.3.1994. Pursuant thereto, the employers were allowed to file the written statement.

3. The employers, as per their written statement, contended that the workman was employed on exigencies of service on a daily rate basis @ Rs.14/- per day and that he worked intermittently from 1.1.1987 to 31.1.1987, from 1.6.1987 to 4.7.1987 and from 1.8.1987 to 31.12.1987. The employers contended that the workman had never worked for more than 240 days in a calendar year and therefore, the provisions of Section 6-N was not applicable. The employers further submitted that the Irrigation Department is not an "Industry" as defined under Section 2(k) of the Act and, therefore, no industrial dispute could be referred to the Labour Court.

4. The workman on the other hand contended that he was appointed on 15.8.1986 and that he worked continuously without any break in service till 31.12.1987 and therefore, had completed 240 days in a calendar year. The workman contended that he was not given any compensation as per Section 6-N of the Act nor any notice was given and consequently, the order of termination was illegal and that an order of termination was liable to be set aside.

5. On behalf of the workman, an application was filed for summoning the documents, which were in exclusive possession of the employers, namely, the muster roll register, the attendance and payment register from the date of appointment of the petitioner till the date of his termination. This application was filed in order to strengthen the ground of the workman, namely, that he had worked continuously from 15.8.1986 onwards. Inspite of repeated time being granted and several opportunities being given, the employers did not file any document. A witnesses of the employer, P.W.-1, in his deposition admitted that between August,1986 to December, 1986 the workman had worked for some period of time.

6. The Labour Court, after considering the material evidence on record held, that the employer, namely, the Irrigation Department of the State of U.P. is an industry as defined under Section 2(k) of the Act. The Labour Court, on the basis of the evidence, came to the conclusion that the workman had worked continuously for more than 240 days in a calendar year and that the termination of the services of the workman without complying with the provisions of Section 6-N of the U.P. Industrial Disputes Act was wholly illegal. The Labour Court also came to the conclusion that juniors to the petitioner had been retained and the principle of "last come first to go' was not followed and that there was a violation of the provision of Section 6-P of the U.P. Industrial Disputes Act. The Labour Court also drew adverse inference against the employer for not filing the documents. The employer, being aggrieved by the said award, has filed the present writ petition.

7. This petition was heard and dismissed by a judgment dated 23.5.2002. The Court agreed with the finding recorded by the Labour Court to the effect that the workman had worked for more than 240 days and accordingly, affirmed the award. It transpires that against the judgment of the High Court, the petitioners filed a Special Leave Petition before the Supreme Court of India, which was allowed by a judgement dated 31.10.2003, on the short ground that the petitioner had raised a plea with regard to the fact as to whether the department of Irrigation, namely, the petitioner was not an Industry as defined under the Act and, on that short ground, the S.L.P. has allowed and the matter was remitted again to the High Court.

8. Heard Sri Anoop Kumar Srivastava, the learned Chief Standing Counsel for the employer-petitioner and Sri Krishnaji Khare for the workman-respondent.

9. The learned standing counsel for the petitioner laid stress upon Annexure 1 to the writ petition contending that, as per the written statement, a document had been filed as Annexure to the written statement, which indicated the period of service of the workman which fact had not been considered by the labour court. The learned counsel stressed that the finding of the Labour Court that the workman had worked for 240 days in a calendar year is against the material evidence on record and that adverse interfere drawn against the petitioner was wholly illegal and illusory.

10. The submission of the learned counsel for the petitioner is patently erroneous and cannot be taken into consideration. Annexure-1 to the writ petition is not the written statement of the employer/petitioner. It is only a narrative and it is not known as to whether this narrative was ever filed before the Labour Court or not. No such proof has been filed before this Court. The written statement has not been filed and therefore, the stand of the petitioner can only be culled out as recorded in the award, which only indicates that the petitioner had worked for certain period from January, 1987 to December, 1987 and contended that the workman had not worked for 240 days in a calendar year. No proof was given by the petitioner in their written statement with regard to the fact that he did not work from August, 1986 to December 1986.

11. However, this Court finds, that one of the witness of the employers admitted that the workman had worked for some period of time from August, 1986 to December,1986. Since the documents, which were in possession of the employers were not filed, an adverse inference was rightly drawn by the Labour Court, to the effect, that the workman had worked for more than 240 days in a calender year. This Court has perused the award and finds that the Labour Court had rightly drawn an adverse interference and had rightly concluded that the workman had worked for more than 240 days in a calendar year, and that, the provisions of Section 6-N had not been complied with by the employer. The petitioner had the best evidence in its possession, namely, the Muster Roll Register, the Attendance and Payment Register. These registers would have proved the number of days the workman had worked. The best evidence was not produced inspite of repeated time being granted. Consequently, the Labour Court was justified in drawing an adverse inference against the petitioner. The Labour Court was also justified in giving a finding of violation of the provisions of Section 6-P of the Industrial Disputes Act.

12. On the question as to whether the Irrigation Department of the State of Uttar Pradesh is an "industry" or not as defined under Section 2(k) of the U.P. Industrial Disputes Act, the Court at the outset makes it clear that the petitioner in their written statement, as culled out from the award, has only made a bald statement, namely, that the petitioner is not an Industry as defined under the Act. No detail of its activity as to whether they are performing any regal or sovereign functions or whether they are performing any commercial activities, has been specified. Even before this Court, nothing has been indicated in the writ petition, namely, as to whether the petitioner are performing any regal or sovereign function or whether they are performing commercial activities. There is nothing to indicate whether the petitioner's have framed any service rules, which are applicable upon the workman nor have they indicated that there are no service rules for daily rated employees. Consequently, merely alleging that the petitioner is not an Industry does not mean that they will not be covered under the U.P. Industrial Disputes Acts.

13. Section 2(k) of the Act defines "Industry". For facility the said provision is extracted herein:

"(k) *'Industry'* means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workman;

14. Under Section 2 (c) of the Amending Act No.46 of 1992, the definition of Industry was amended in the Industrial Dispute Act, 1947 which till date has not yet been enforced. But no such amendment has been made in the U.P. Act and therefore, the definition of "Industry" as specified in 2(k) still holds the field.

15. The law on Industry was reviewed by a Seven Bench of the Supreme Court in **Bangalore Water Supply vs. A. Rajappa**, 1978(36) F.L.R. 266, in which the Supreme Court laid down the dominant nature test to establish whether the employer comes within the ambit of Industry or not. For facility, paragraph 143 of the said decision is extracted hereunder:

"143. The dominant nature test:

(a) Where a complex of activities, some of which qualify for exemption, others not, involves employees on the total undertaking, some of whom are not `workmen' as in the University of Delhi case (supra) or some departments are not productive of goods and services if isolated, even then, the predominant nature of the services and the integrated nature of the departments as explained in the Corporation of Nagpur (supra), will be the true test. The whole undertaking will be `industry' although those who are not `workmen' by definition may not benefit by the status.

(b) Notwithstanding the previous clauses, sovereign functions, strictly understood, (alone) qualify for exemption, not the welfare activities or economic adventures undertaken by government or statutory bodies.

(c) Even in departments discharging sovereign functions, if there are units which are industries and they are substantially severable, then they can be considered to come within Section 2(j).

(d) Constitutional and competently enacted legislative provisions may well remove from the scope of the Act categories which otherwise may be covered thereby."

16. Subsequently, the Supreme Court considered the Irrigation Department of the Punjab and Haryana Government in **Desh Raj and others vs. State of Punjab** and others, 1988 (57) FLR 176 and, after reviewing all the decisions, held that the Irrigation Department was an Industry and over ruled the Full Bench Decision of the Punjab and Haryana High Court.

17. The Supreme Court in **Executive Engineer (State of Karnataka) vs. K. Somasetty and others,** 1997(5) SCC 434 held, that the Telecommunication Department and the Irrigation Department are not an "industry" under the Industrial Disputes Act and while coming to the conclusion relied upon the decision of the Supreme Court in **Union of India vs. Jai Narain Singh**, 1995 Supp.(4)SCC 672 and **State of U.P. Vs. Suresh Kumar Verma and another,** 1996(7)SCC 562 For facility, paragraph 3 of the said judgment is extracted hereunder:

"It is not well-settled legal position that the Irrigation Department and Telecommunication Department are not an "industry" within the meaning of definition under the Industrial Disputes Act as held in Union of India vs. Jai Narain Singh and in State of H.P. vs. Suresh Kumar Verma. The function of public welfare of the State is a sovereign function. It is the constitutional mandate under the Directive Principles, that the Government should bring about welfare State is not an "industry" under the Industrial Disputes Act. Even optherwise, since the Project has been closed, the respondent has no right to the post since he had been appointed on daily wages. It is brought to our notice that the respondent has been reinstated. The order of the reinstatement has been placed before us which indicates that at the threat of contempt of court, the order has been enforced. It is stated therein that it is subject to the final order of this Court in this appeal."

18. The question whether the Telecommunication Department was an Industry or not was again considered and referred to a three Bench decision of the Supreme Court in the case of **G.M. Telecom vs. S. Srinivasan Rao and others**, 1998(78) FLR 143. The Supreme Court held that this question has to be answered in accordance with the decision of the Court in Bangalore Water Supply (supra) which is a binding precedent and that the dominant nature test specified therein was required to be considered. The Supreme Court, after applying the test laid down in Bangalore Water Supply held, that the Telecommunication Department of the Union of India is an "industry" within the definition since it is engaged in a commercial activity and that the department was not engaged in discharging any of the sovereign functions of the State.

19. It was argued that Somasetty decision stands impliedly over ruled in so far as it relates to the Telecommunication Department, but, the decision continues to remain in existence in so far as it relates to the Irrigation Department.

20. Such submission cannot be accepted for the reason that the reasoning given by the Supreme Court in Somasetty's case holding that Telecommunication Department and Irrigation Department has not been accepted by the Supreme Court in G.M. Telecom case (supra) as it did not consider the dominant nature test specified in Bangalore Water Supply's case (supra). The Supreme Court in G.M. Telecom case has itself held that it is not permissible for any Bench of lesser strength of the Supreme Court to take a view contrary to that in Bangalore Water Supply or to bye-pass that decision so long as it holds the field. The Supreme Court further held that judicial discipline requires the Court to follow the decision in Bangalore Water Supply case (supra).

21. In the light of the aforesaid, this Court has no hesitation in holding that the reasoning adopted by the Supreme Court in Somasetty's case holding the Telecommunication and Irrigation Department is not an Industry has been specifically over ruled by the Supreme Court itself in G.M. Telecom case.

22. In the light of the aforesaid, the dominant nature test as indicated in Bangalore Water Supply, is required to be taken into consideration in order to find out as to whether it is an "industry" or not.

23. In the instant case, there is nothing to indicate either in the writ petition or before the Labour Court to indicate that the Irrigation Department is carrying on sovereign function and therefore, they are not an Industry. There is nothing to indicate that the Irrigation Department is carrying on welfare activities nor anything has come on record to indicate that separate Service Rules has been made applicable to the employees of the Irrigation Department. In the absence of any activity of the Irrigation Department being brought on record, it is not possible to hold that the Irrigation Department is not an Industry.

24. This Court further finds that the petitioner had come out with the case that they are not an Industry. The Court is of the view that the initial burden was upon to the employers to prove that they are not an "industry". No such evidence has been filed either before the Labour Court or before the Writ Court to show that their activities were regal and sovereign functions. Merely by alleging that the Irrigation Department is not an Industry by itself was not sufficient to shift the burden upon the employee. The Court is of the opinion, that the burden remained with the employer and since it was not discharged the onus could not shift upon the workman.

25. In the light of the aforesaid, the contention of the petitioner that the Irrigation Department is not an Industry, is not fortified by any material evidence brought on record and cannot be accepted.

26. A submission was also made, that the question as to whether the Irrigation Department of the State of U.P. is an Industry or not, has been referred to a larger Bench and therefore the Court should await the decision of the larger Bench. The Court finds, that this question was referred by a learned Single Judge on 20.12.2002 in Writ Petition No.52256 of 2002. The Court has made an inquiry and has found that the matter is still pending before a Division Bench of this Court. The contention of the petitioner, that the matter should be kept in abeyance till the decision of the Division Bench is arrived at, is not accepted. Quite apart from the fact that the matter is pending before the Division Bench for the past 10 years, the Court finds, that the workman concerned is suffering unnecessarily for the past decade and a half. This matter was remitted by the Supreme Court in the year 2003 on the question as to whether the petitioner was an "industry" or not. The Court is constrained to observe that no evidence of any sort was filed either before the Labour Court or before this High Court in a writ jurisdiction to establish that they are performing regal or sovereign functions.

27. The Supreme Court in **R.M.Yellatti vs. Assistant Executive Engineer vs. Assistant Executive Engineer**, 2006(1) SCC 106 was faced with the same dilemma wherein it was contended before the Supreme Court that the matter should be adjourned since the judgment of the Supreme Court in Bangalore Water Supply was referred to a Larger Bench by a referral order, dated 5.5.2005 in **State of U.P. vs. Jaibir Singh**, 2005 (5)SCC 1. The Supreme Court declined to adjourn the matter sine die, in view of the fact that there was nothing on record to indicate that the Management had argued the point in question. Taking clue from the Supreme Court itself, the Court finds, that there is

nothing on record indicating that the petitioner is not an "industry". Merely by alleging that the petitioner is not an "industry" does not take them outside the realm of the U.P. Industrial Disputes Act. The dominant nature test as illustrated in Bangalore Water Supply case (supra) has not been followed. Consequently, the Court is of the opinion, that the matter cannot be adjourned sine die.

28. The writ petition consequently fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 35165 of 2010

Kailash Narain Trigunayat ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Singh
Sri Rajeshwar Singh

Counsel for the Respondents:
C.S.C.
Sri H.P. Mishra
Sri Pradeep Upadhyay
Sri V.K.S.Kushwaha

U.P. Intermediate Education Act 1921-Chapter III-regulation 21-retirement notice-retiring petition at the age of 60 years-on ground as per G.O. 17.02.99-not given option within one year from due date of retirement-direction to Regional Joint Diredtor to take appropriate decisions as per law laid down in Smt. Prabha Shanker case-within specific period.

Held: Para-7
In view of the aforesaid facts, let the Regional Joint Director of Education - Respondent No. 3, proceed to pass an appropriate order on the claim of the petitioner and in view of the law laid down hereinabove coupled with the provisions of the Government Order dated 17.2.1999 as well as taking in account the ratio of the decision in the case of Smt. Prabha Kakkar Vs. Joint Director of Education, Kanpur & others reported in 2000 (2) ESC Pg. 1118 within a period of three months from the date of production of a certified copy of this order before the said respondent after putting the Committee of Management also to notice in this respect and giving an opportunity of hearing.

Case Law discussed:
2000 (2) ESC Pg. 1118; Yamuna Narain Mishra Vs. State of U.P. Writ Petition No. 17574 of 2007

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. The petitioner has come up against the notice of retirement issued to him on the ground that the petitioner is not entitled to continue upto the age of 62 years as per Regulation 21 of Chapter III of the regulations framed under the U.P. Intermediate Education Act, 1921.

2. Notices were issued and counter affidavit has been filed by the respondent State as well as by the Committee of Management. Both the respondents have taken a stand that the petitioner had not exercised his option within time according to the Government Order dated 17.2.1999 within one year of his attaining 60 years and therefore he is not entitled to the benefits of continuance. They further contend that in the absence of any option having been exercised the petitioner

cannot be treated to be continuing in service or even for entitlement of salary. The counter affidavit of the District Inspector of Schools, Allahabad also takes the same stand.

3. The petitioner retired after attaining the age of 60 years on 1.7.2009. He continued thereafter till the end of the session i.e. upto 30.6.2010.

4. Learned counsel for the petitioner has invited the attention of the Court to the decision in the case of Yamuna Narain Mishra Vs. State of U.P. Writ Petition No. 17574 of 2007 which was in relation to the same institution. In the said case the option had been exercised but had not been communicated after being accepted by the competent authority. In essence in that case there was no reciprocation of the option.

5. The Court after taking notice of this fact came to the following conclusion:-

"It is, therefore, clear that the main thrust of the submission of the learned counsel for the respondents is based on the option exercised by the petitioner on 30th January, 1992 that his age of superannuation should be taken as 58 years. It is their contention that the petitioner had submitted this option form pursuant to the Government Order dated 4th November, 1991 and the option was accepted by the Regional Deputy Director of Education who thereafter sent the communication dated 25th March, 1992 to the Manager/Principal of the College conveying the acceptance. There is, however, nothing on the record to indicate that this acceptance was ever conveyed to the petitioner. It is for this reason that Sri V.K. Singh, learned counsel appearing for the petitioner submitted that in terms of the Full Bench decision of this Court in Smt. Prabha Kakkar (supra) wherein the acceptance of option by Regional Deputy Director of Education and its communication to the teacher concerned was found to be necessary, the option exercised by the petitioner is of no consequence and, therefore, the petitioner will attain the age of superannuation at 62 years in terms of Regulation 21 contained in Chapter III of the Act.

In view of the aforesaid Full Bench decision of this Court in Smt. Prabha Kakkar (supra), this contention of the learned counsel for the petitioner deserves to be accepted.

The petitioner may have opted that his age of superannuation should be 58 years by sending a communication dated 1st July, 2003 to the District Inspector of Schools but this option was never accepted by the Regional Deputy Director of Education and, therefore, acceptance by the District Inspector of Schools and its communication is of no consequence.

The inevitable conclusion, therefore, is that the petitioner will attain the age of superannuation in accordance with Regulation 21 contained in Chapter III of the Act at 62 years. The view to the contrary taken by the Director of Education in the impugned order dated 6th March, 2007 cannot be sustained. Accordingly, the order dated 6th March, 2007 passed by the Director of Education is set aside. The petitioner has attained the age of 62 years by now. It is, therefore, directed that the arrears of salary shall be paid to the petitioner

treating his age of superannuation to be 62 years within a period of three months from the date a certified copy of this order is produced by the petitioner before the District Inspector of Schools.

The writ petition, therefore, succeeds and is allowed to the extent indicated above."

6. In the instant case the respondents allege that there is no exercise of option in terms of the G.O. dated 17.2.1999.

7. In view of the aforesaid facts, let the Regional Joint Director of Education - Respondent No. 3, proceed to pass an appropriate order on the claim of the petitioner and in view of the law laid down hereinabove coupled with the provisions of the Government Order dated 17.2.1999 as well as taking in account the ratio of the decision in the case of Smt. Prabha Kakkar Vs. Joint Director of Education, Kanpur & others reported in 2000 (2) ESC Pg. 1118 within a period of three months from the date of production of a certified copy of this order before the said respondent after putting the Committee of Management also to notice in this respect and giving an opportunity of hearing.

8. The writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J

Civil Misc. Writ Petition No. 43331 of 2000

Sohan Lal ...Petitioner
Versus
U.P.Co-operative Federation Ltd. & Another ...Respondents

Counsel for the Petitioner:
Sri Vikram D. Chauhan

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

U.P. Cooperative Societies Employees Service Regulations 1975-regualtion 85-disciplinary proceeding-petitioner the District Manager in P.C.F. Given reply to show-cause notice-disciplinary authority punished with recovery of pecuniary loss with adverse entry-whether such punishment be awarded without oral enquiry-sustain for inflicting minor punishment oral enquiry not necessary-held-minor penalty can not dilute the legal right-enquiry must be in conformity with procedure prescribed-proceeding vitiated-order quashed.

Held: Para-34
Therefore, mere fact that lastly only minor penalty could have been inflicted upon petitioner, would not dilute his legal right that disciplinary inquiry when initiated must have been held in conformity with procedure prescribed, attracting provisions, applicable at the inception of inquiry.

(Delivered by Hon'ble Sudhir Agarwal, J)

1. The petitioner has preferred this Writ Petition for issuance of a writ of certiorari to quash the order dated 29th August, 2000, whereby the respondent no.2, the Managing Director, U.P. Co-operative Federation Ltd. Lucknow has imposed minor punishment of special adverse entry and a recovery of Rs. 3,19,984.99.

2. A brief reference to the factual aspects would suffice.

3. The petitioner was initially appointed as Assistant Clerk in the year 1964 in U.P. Co-operative Federation Ltd., (for short "Federation"). The federation is registered under the U.P. Co-operative Societies Act,1965 (for short "Act, 1965") and is an apex level society in terms of Section 2 (a-4) of the Act. Its area of operation extends to State of U.P. The Federation has its bye-laws and the employees of the Federation are governed by the Act,1965 and the rules framed thereunder. The State Government in exercise of power under section 122- A of the Act has constituted U.P. Co-operative Institutional Service Board. The said Service Board has framed the Regulations namely U.P. Co-operative Societies Employees Service Regulations, 1975 (for short "the Regulations,1975").

4. The petitioner earned his promotion from time to time. He was posted as a District Manager in the P.C.F. Mathura of the Federation from 15.10.1982 to 4.8.1984. The petitioner was subjected to the disciplinary proceedings. The Managing Director of the Federation placed him under suspension vide order dated 8.8.1984 (placed on the record as Annexure-1). The petitioner preferred a writ petition No. 11340 of 1984 to challenge suspension order dated 8th August, 1984. In the said writ petition interim order was passed on 12.11.1984 and suspension order of the petitioner was stayed. The Managing Director appointed an Inquiry Officer on 22nd May, 1985 and a charge sheet dated 23rd September, 1985 (Annexure-4 to the writ petition) was served on the petitioner. The charge sheet contained as many as thirteen charges against the petitioner and most of the charges pertain to his negligence, remissness in wheat procurement, as a consequence whereof Federation had to suffer monetary loss. The petitioner's several decision was alleged to infected with bad motives.

5. Relevant would it be to mention that the State Government had entrusted the Federation to purchase wheat from farmers to strengthen its Price Support Scheme of essential commodities. The Federation was to act as an Agent of the State Government for the purchase of wheat during the Rabi Crop Season 1984-85. The Federation was required to purchase wheat from different regions at its Regional and District Offices of all the districts.

6. In view of our proposed order which we are going to pass, we need not give details of the charges and reply submitted by the petitioner.

7. The petitioner submitted reply to the charge sheet on 15.12.1985. He denied all the charges made in the charge sheet. The petitioner had submitted applications (dated 12th August, 1986 and 4th December, 1986) for the change of Inquiry Officer on the ground that the Inquiry Officer himself was involved in approving proprietor of Transport Firm who was alleged to have misappropriated food-grain of Federation, in respect of which inquiry was conducted against petitioner. His applications did not find favour from the authority concerned. The Inquiry Officer submitted report on 10.3.1989 to disciplinary authority,who issued a show cause notice (Annexure-11 to the writ petition) to petitioner as to why major penalty mentioned in the show cause notice should not be inflicted upon him.

8. The petitioner submitted reply to the said show cause notice on 27.11.1986 wherein took a stand that the findings of Inquiry Officer in his report are not supported by any evidence and he was not guilty of the charges. He further stated that none of the charge has been established by documentary evidence much less oral evidence. The Disciplinary Authority was not satisfied with the reply submitted by petitioner and directed a recovery of Rs.3,19,984.99 from the pay and other benefits payable to the petitioner for causing pecuniary loss to the Federation and also awarded special adverse entry.

9. A counter affidavit has been filed on behalf of the respondent no.1 and 2. The stand taken in the counter affidavit is that the petitioner had illegally engaged some transporters at his own level for transportation of wheat and on account of his negligence the Contractor misappropriated huge quantity of wheat grain. It is also stated that the petitioner was offered full opportunity in the departmental proceedings but he did not participate in the enquiry and charges against him have been found proved.

10. We have heard Sri V.D.Chauhan, learned counsel for the petitioner Sri V.D.Chauhan and Sri V.C.Tripathi learned counsel for the respondent no.1 and 2 .

11. Learned counsel for the petitioner submitted that charges against him have not been proved as no witness was examined by department and no date, time and place was fixed by Inquiry Officer. He further urged that from perusal of the enquiry report it is established that the Inquiry Officer has merely referred the reply of petitioner and has held him guilty. In fact no inquiry at all has been conducted in terms of the provisions of Chapter VII of the 1975 Regulations which provides the procedure for the disciplinary proceedings and appeal.

12. Sri V.C.Tripathi learned counsel for the respondent 1 and 2 submitted that the petitioner failed to produce any evidence inspite of the fact that he was given opportunity and as such the Inquiry Officer on the basis of the material on record and after considering the reply submitted by petitioner had submitted enquiry report to the disciplinary authority. The petitioner was found guilty of serious negligence and as such no interference is called for under Article 226 of the Constitution.

13. The petitioner's service is governed by the Regulations, 1975. A detailed procedure for disciplinary proceedings is provided in Regulation 85. It is apposite at this stage to set out Rule, so far as material:-

"85. Disciplinary proceedings:- (i) The disciplinary proceedings against an employee shall be conducted by the Inquiry Officer (referred to in Clause (iv) below) with due observance of the principles of natural justice for which it shall be necessary-

(a) The employee shall be served with a charge-sheet containing specific charges and mention of evidence in support of each charge and he shall be required to submit explanation in respect of the charges within reasonable time which shall not be less than fifteen days;

(b) Such an employee shall also be given an opportunity to produce at his own cost or to cross examine witnesses in his defence and shall also be given an opportunity of being heard in person, if he so desires;

(c) If no explanation in respect of charge sheet is received or the explanation submitted is unsatisfactory, the competent authority may award him appropriate punishment considered necessary.

(ii)xxxx"

14. A close look at the gamut of the aforesaid Rule instantly brings out that observation of procedural safe guard is statutory requirement.

15. A long line of decisions have settled that even if the statutes are silent or there are no positive words requiring observance of Natural Justice, yet it would apply unless the statutes specifically provides its exclusion. In the case in hand the rule itself has used the word 'Natural Justice'

16. It is vehement contention of learned counsel for the petitioner that as procedure for major penalty was initiated, it was mandatory on the part of respondents authority to hold oral inquiry in the matter, but no such inquiry was conducted, therefore, entire proceedings including punishment order is vitiated.

17. The question that calls for determination is whether oral inquiry is necessary when the employer intents to impose major punishment.

18. We may usefully refer to a discussion on this issue by a recent judgments of the Supreme Court and a series of decisions of this Court. The authorities in abundance are available of this Court.

19. The Supreme Court in the State of Uttar Pradesh v. Saroj Kumar Sinha reported (2010) 2 SCC 772 held that :-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. **Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.**

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

20. Similar view was taken in Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570:-

"Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. **No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."**

21. This Court has also taken same view in Subhas Chandra Sharma v. Managing Director and another reported 2000(1) UPLBEC 541:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that **date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence.** If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. **All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."**

In Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719, the Supreme Court observed "It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted".

In S.C. Girotra v. United Commercial Bank 1995 Supp. (3) SCC 212, the Supreme Court set aside a dismissal order which was passed without giving the employee an opportunity of cross-examination. In State of U.P. v. C. S. Sharma, AIR 1968 SC 158, the **Supreme Court held that omission to give opportunity to the officer to**

produce his witnesses and lead evidence in his defence vitiates the proceedings. The Court also held that in the enquiry witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence. In Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160, (vide para 66) the Supreme Court held that in such enquiries evidence must be recorded in the presence of the charge-sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396, and in **Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC).**

Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex-parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All)."

22. The above judgment was followed by a Division Bench in Subhas Chandra Sharma v. U.P.Co-operative Spinning Mills and others reported 2001 (2) UPLBEC 1475 the Court held thus:

"In cases where a major punishment proposed to be imposed an oral enquiry is a must, whether the employee request, for it or not. For this it is necessary to issue a notice to the employee concerned intimating him date, time and place of the enquiry as held by the Division Bench of this Court in Subhash Chandra Sharma v. Managing Director, (2000) 1 UPLBEC 541, against which SLP has been dismissed by the Supreme Court on 16-8-2000."

23. One of us (Justice Sudhir Agarwal) in Rajesh Prasad Mishra v. Commissioner, Jhansi Division, Jhansi and others reported 2010 (1) UPLBEC 216 observed as under after detail analysis:

"Now coming to the question, what is the effect of non-holding of oral inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.

The question as to whether non holding of oral inquiry can vitiate the entire proceeding or not has also been considered in detail by a Division Bench of this Court (in which I was also a member) in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008(3) ESC 1667 and the Court has clearly held that non holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment."

24. The Division Bench of this Court in the case of Mahesh Narain Gupta

v. State of U.P. and others reported (2011) 2 ILR 570 had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in exparte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

25. In another case in Subhash Chandra Gupta v. State of U.P. reported 2012 (1) UPLBEC 166 the Division Bench of this Court after survey of law on this issue observed as under:

"It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules **for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof.** The view taken by us find support from the judgement of the Apex Court in State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.

. A Division Bench decision of this Court in the case of Salahuddin Ansari Vs. State of U.P. and others, 2008 (3) ESC 1667 **held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:-**

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the

question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma Vs. U.P.Cooperative Spinning Mills & others, 2001 (2) U.P.L.B.E.C. 1475 and Laturi Singh Vs U.P.Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

26. The principal of law emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

27. From the perusal of the enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents in the proceedings.

28. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in the enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case the charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

29. We may hasten to add that the a above mentioned law is subject to certain exception. When the facts are admitted or no real prejudice has been caused to employee or no other conclusion is possible, in such situation the order shall not be vitiated. Reference may be made to the some of the decision of Supreme Court in K.L.Tripathi v. State Bank of India reported AIR 1984 SC 273 ; State Bank of Patiala v. S.K. Sharma reported AIR 1996 SC 1669 and Biecco Lawrie Ltd. v. West Bengal reported (2009) 10 SCC 32.

30. In the present case the stand taken by the respondent are that the petitioner inspite of the opportunity given to him did not participate in the inquiry. Even if the said statement is assumed to be correct the obligation on the department to prove the charges is not discharged.

31. It was, however, pointed out on behalf of respondents that punishment actually awarded to petitioner is only recovery and censure/special adverse entry and both being minor punishment, the punishment order ought not be interfered on the ground that no oral inquiry is held since before imposing a minor punishment oral inquiry is not obligatory.

32. In our view the submission is thoroughly misconceived. From perusal of charge sheet it cannot be doubted that the charges, if have been proved, petitioner could have been liable to be awarded a major penalty. The competent authority also proceeded with an intention that charges, if proved, may result in major penalty and it is for this reason earlier he was suspended and then he appointed an Inquiry Officer. Appointment of Inquiry Officer for holding oral inquiry shows the intention of the disciplinary authority that the employee may suffer major penalty. In those cases where oral inquiry is necessary i.e. cases of major penalty, inquiry officer is ordinarily appointed otherwise simply by issuing a charge sheet and receiving reply, a minor penalty could have been awarded, which is not the case here.

33. The intention of disciplinary authority is further clear from the fact that petitioner was placed under suspension. Suspension is permissible only when charges are so serious so as to attract major penalty. Besides, even the show cause notice issued to petitioner proposed a major penalty.

34. We are clearly of the view that the ultimate result shall not govern the manner of preceding disciplinary proceedings inasmuch as the authorities, if found no proof of serious charges to justify major penalty, therefore, imposed minor penalty, it would not distract from the fact that proceedings were initiated for major penalty and despite denying adequate opportunity to delinquent employee, i.e., by not holding oral inquiry, he was able to show shallowness of charges which satisfy the disciplinary authority that major penalty is not warranted. If adequate opportunity would have been afforded to delinquent employee, he could have demonstrated that no penalty whatsoever is liable to be inflicted upon him, since, the charges in entirety, are baseless etc. It is the inception of proceedings which will govern the manner of disciplinary proceedings to be conducted and not the ultimate result. Therefore, mere fact that lastly only minor penalty could have been inflicted upon petitioner, would not dilute his legal right that disciplinary inquiry when initiated must have been held in conformity with procedure prescribed, attracting provisions, applicable at the inception of inquiry.

35. After careful consideration of the facts we are of the view that the disciplinary proceedings are vitiated for the aforestated reasons. The impugned order dated 29.8.2000 passed by respondent no.2 herein is liable to be quashed. Accordingly it is quashed.

36. However, the order shall not preclude the disciplinary authority from proceeding afresh in the light the observations made hereinabove and in accordance with law.

37. With the aforesaid directions/observations and in the manner, as above, this writ petition is allowed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

CIVIL MISC. WRIT PETITION NO. 49773 of 2006

Khayat Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri N.C. Srivastava
Sri L.C. Srivastava

Counsel for the Respondents:
C.S.C.
Sri Shashank Shekhar Singh

(A) Constitution of India , Article 226-Civil consequences-alteration of date of birth in service book-without notice opportunity-retiring 6 years prior to actual date of retirement-entails civil consequences-order impugned can not sustain.

Held: Para-15

The Court is of the opinion that any change in the service book of the petitioner entails civil consequences and consequently, it is imperative that if any change in the date of birth is made, the same can only be done after giving notice and an opportunity of hearing to the employee concerned. In the instant case, this has not been done. The action of the respondents, in changing the date of birth, was wholly arbitrary and without any authority of law.

(B) "No Work No Pay"-principle when applicable-explained-wrongful premature retirement-no fault of petitioner-50 % saalry for the period not allowed to work-proper-arrear of salary without deduction of income tax be paid.

Held: Para-18

Considering the fact that the petitioner has wrongly been retired coupled with the fact that the principle of ''no work and no pay' is also applicable, but, in the instant case, the fault solely lay with the respondents in wrongfully retiring the petitioner, the Court is of the opinion, that 50% of the salary should be paid to the petitioner.

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

1. Heard Sri N.C.Srivastava, the learned counsel for the petitioner and the learned standing counsel.

2. The present writ petition has been filed for the quashing of the order dated 16.1.2006 whereby the Executive Engineer informed the petitioner that he would retire w.e.f. 30.11.2006 as well as the order dated 29.7.2006 by which the representation of the petitioner was rejected by the Engineer-in-Chief.

3. The facts leading to the filing of the writ petition, as culled out from the affidavit that has been filed before the Court and the original service register that has been produced today is, that the petitioner was appointed on 18.11.1977 in the Irrigation Department. The Service Book of the petitioner was prepared in the year 1987 and, at that stage, the petitioner's age was recorded as 31 years. In 1987 the petitioner was directed to appear before the Chief Medical Officer with regard to the verification of his date of birth. The petitioner appeared and the Chief Medical Officer, on the basis of his medical examination, issued a certificate dated 1.9.1987 indicating that as on 1.9.1987 the age of the petitioner was 35 years. On the basis of this certificate, the entry of 31 years in the service register was deleted and was substituted by the words "thirty-five years as on 1.9.1987 according to the C.M.O., Bijnore". The original service book indicates that the petitioner as well as the Assistant

Engineer both have signed on 26.4.1996 acknowledging the aforesaid entry with regard to the date of birth.

4. On the basis of the entry made in the Service Book indicating that the petitioner's age is 35 years as on 1.9.1987, the date of birth would be 1st September, 1952. The age of superannuation of a Class-IV employee in government service is 60 years and consequently, the petitioner would reach the age of superannuation on 1.9.2012.

5. It transpires that some audit objections were reported for the year 2002-03 with regard to the entries of the date of birth in the Service Book of the petitioner and, on the basis this audit objection, the Executive Engineer instituted an inquiry by constituting a Committee. It further transpires that the committee submitted a report indicating that, on the basis of an application form alleged to have been written under the signature of the petitioner, his date of birth at the time of his appointment was 31 years and therefore, his date of birth should be 18th November, 1946. Based on this inquiry report, the Executive Engineer passed an order dated 19.4.2004 holding that the petitioner's date of birth is 18th November 1946.

6. The order of the Executive Engineer dated 19.4.2004 is pasted in the service book of the petitioner, which indicates that a copy of the said order was earmarked to the petitioner but nothing has been brought on record to indicate that the said order was duly served upon the petitioner.

7. Taking 18.11.1946 to be the date of birth of the petitioner, the Executive Engineer issued a notice dated 16.1.2006 intimating the petitioner that he would retire on 30.11.2006. The petitioner represented, contending that the date of birth as 18th November, 1946 is incorrect and that his date of birth is 1st September, 1952 and therefore, he could not retire on 13th November, 2006. His representation fell on deaf ears and accordingly, the petitioner filed Writ Petition No.2750 of 2006, which was disposed of by an order dated 18th May, 2006 directing the Engineer-in-Chief to decide the representation of the petitioner. Based on the said direction, the Engineer-in-Chief rejected the representation of the petitioner by the impugned order dated 29.7.2006. The petitioner, being aggrieved by the aforesaid order, has filed the present writ petition.

8. Counter affidavit and rejoinder affidavit have been exchanged and, when the matter was being heard, the Court was unable to get a clear picture and accordingly directed the respondents to file a legible copy of the Service Book of the petitioner. The Court, in this regard, passed orders dated 16.10.2012, 19.11.2012 and 11.12.2012. Inspite of these orders being passed, which the learned standing counsel had communicated to the respondent No.2 as well as to the other authorities, the legible copy of the service record was not filed. Consequently, by an order dated 15.1.2013, the Court directed the respondent No.2, i.e., the Engineer-in-Chief, Work Charge Establishment, Irrigation Department Lucknow, to appear in person along with his explanation as to why action be not taken against him for non-compliance of the order of the Court. A copy of this order was given to the learned Standing Counsel for necessary communication.

9. Inspite of the aforesaid order, the Engineer-in-Chief did not appear on 31.1.2013 nor filed a legible copy of the service record. The Court had no choice but to issue a non-bailable warrant through the Chief Judicial Magistrate, Lucknow to secure the presence of the Engineer-in-Chief, on the date fixed, i.e., today.

10. The report of the Chief Judicial Magistrate, Lucknow indicates that the non-bailable warrant could not be executed as the Engineer-in-Chief had left for Allahabad. Today, when the matter was taken up, the Engineer-in-Chief was present in the Court and, on his behalf, an exemption application along with an affidavit has been filed. A supplementary affidavit has also been filed annexing the copy of the service book of the petitioner. Both are taken on record. The Court directed the Registrar General to take the Engineer-in-Chief in custody and again produce him after lunch at 2.15 p.m. which was duly done.

11. The Court has heard the learned counsel for the petitioner and the learned standing counsel at some length. The Court has also perused the application for exemption of the petitioner and the affidavit accompanying it. Nothing has been stated by the Engineer-in-Chief that he was not aware of the orders of the Court dated 16.10.2012, 19.11.2012 and 11.12.2012 by which the Court had directed the respondents to file a legible copy of the service record of the petitioner. Further, the Engineer-in-Chief admits in paragraph 7 of the affidavit that the order dated 15.1.2013 requiring him to appear in person on 31.1.2013, was duly received in his office on 17.1.2013. The Engineer-in-Chief, in paragraph 11, further indicated that he conducted an inspection of a Canal Bridge on 31.1.2013, thereby contending that on account of this inspection he could not appear before the Court.

12. The Court is constrained to observe, that the Engineer-in-Chief chose deliberately not to appear and, on the other hand, chose to inspect a Canal Bridge, which amounts to contempt in the face of the Court, i.e., contempt which the Judge sees with his own eyes for which it requires no evidence or witness and which the Judge can deal with it himself at once. For this, the Court has the power to imprison the person without trial, which is necessary in order to maintain law and order, inasmuch as, the course of justice must not be deflected or interfered with by those who strike it or strike it at a very foundation of our society and, therefore, this Court is of the opinion, that the Judge must have the power at once to deal with those who offended it. This power of summary punishment is a necessary power so as to maintain the dignity and authority of the Court.

13. No one is above the law. The dignity and authority of the Court cannot be allowed to be tarnished, diminished or wiped out by contumacious behaviour of any person and, the only weapon for the Court to protect itself is, the long arm of the Contempt of Court. Whoever tends to undermine the authority of law and bring it in disrepute will come within the purview of the contempt proceedings and the exercise of this power is not to vindicate the dignity of the Judge, but to uphold the majesty of the law and of the administration of justice.

14. In the instant case, the Court finds that the action of the Engineer-in-Chief is totally contumacious. He has shown scant regard to the orders of the Court. Inspite of repeated direction, he did not file the service record nor appeared in person when directed. Consequently, the petitioner is guilty of Contempt of the Court. At this stage, the Court can punish him and send him to jail if required, but will not do so. The Court has a large heart and is magnanimous and will not be cowed down by the action of the respondent. There are other means by which the respondents could be penalized which the Court will deal with at a later stage.

15. Coming to the merits of the case, the Court finds that pursuant to the certificate issued by the Chief Medical Officer, the petitioner's date of birth was recorded in the service book in the year 1987 and the signatures of the petitioner and the Assistant Engineer were recorded again in the service book in 1994. The action of the respondents in retiring the petitioner w.e.f. 30.11.2006 is based upon the order of the Executive Engineer dated 19.4.2004. The Court is of the opinion, that the action taken by the respondent was patently erroneous and arbitrary. The Court finds that no opportunity or notice was given to the petitioner by the Executive Engineer before passing the order dated 19.4.2004. The inquiry proceeding was done behind the back of the petitioner. It is not known as to whether the order of the Executive Engineer dated 19.4.2004 was ever communicated to the petitioner. The Court is of the opinion that any change in the service book of the petitioner entails civil consequences and consequently, it is imperative that if any change in the date of birth is made, the same can only be done after giving notice and an opportunity of hearing to the employee concerned. In the instant case, this has not been done. The action of the respondents, in changing the date of birth, was wholly arbitrary and without any authority of law.

16. In the light of the aforesaid, the impugned notice dated 16.1.2006 and the order dated 29.7.2006 rejecting the representation of the petitioner cannot be sustained and is quashed. The writ petition is allowed.

17. The question is, what relief the petitioner can be granted at this stage. If the petitioner had continued in service on the basis of the original entry indicating that he was 35 years as on 1.9.1987, the petitioner would have continued to work till 1.9.2012. Consequently, as on date, the petitioner cannot be reinstated. The only relief which the Court can grant is to compensate him in terms of money for the loss which he has suffered with regard to his salary. It has been stated that at the time when the petitioner had retired, he was getting a salary approximately @ Rs.9000/- per month. The actual amount is not before the Court.

18. Considering the fact that the petitioner has wrongly been retired coupled with the fact that the principle of "no work and no pay' is also applicable, but, in the instant case, the fault solely lay with the respondents in wrongfully retiring the petitioner, the Court is of the opinion, that 50% of the salary should be paid to the petitioner.

19. Consequently, a writ of mandamus is issued commanding the

respondent Nos.2 and 3 to calculate the wages payable to the petitioner from the date of his retirement on 30.11.2006 till 1.9.2012 out of which 50% shall be paid to the petitioner within six weeks from today. The petitioner's length of service would be calculated keeping in mind that he would retire on 1.9.2012 and all post retirement dues, etc. would be re-calculated on that basis within the same period. Arrears, if any,would be paid accordingly within two months thereafter. In the event, the respondents are required to deduct income tax on the arrears of salary, the same shall not be deducted from the 50% of wages, but the component toward the income tax would be paid by the respondents to the income tax authorities in addition to the amount paid to the petitioner.

20. In view of the action of the Engineer-in-Chief in not complying with the orders of the Court, the Court imposes a cost of Rs.20,000/- upon the respondent No.2, i.e., the Engineer-in-Chief, who is present in the Court for his contumacious action, ignoring the dignity of this Court. The said amount shall be deposited before the Registrar General of this Court within three weeks from today, failing which, the Registrar General would initiate the recovery as arrears of land revenue. The amount so deposited will be deposited before the High Court Legal Services Committee.

21. The Court finds, that the Court had directed issuance of non-bailable warrant by its order dated 31.1.2013, notice of which was received by the Judicial Magistrate, Lucknow on 4.2.2013. The Court is constrained to observe that the non-bailable warrant could not be executed when there was ample time for the Magistrate to get the warrant executed. The Court is of the opinion, that a casual approach had been adopted by the Chief Judicial Magistrate. In future, the Chief Judicial Magistrate should be cautious and ensure that the orders of the Court are complied immediately.

22. In view of the fact that the respondent No.2, Engineer-in-Chief, has appeared before the Court, no further action is now required to be taken pursuant to the non-bailable warrant which was issued pursuant to the order dated 31.1.2013.

23. Registry to supply a copy of this order to the Registrar General within two weeks for necessary information and action and with a request to send the extract of the order to the Chief Judicial Magistrate concerned for necessary information and action. A copy of the order be also supplied by the Registry to the Administrative Judge concerned within the same period.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 75714 of 2010

Smt. Ranjana Tandon And Others...Petitioner
Versus
Bhel Educational Society And Another
...Respondents

Counsel for the Petitioner:
Sri Udayan Nandan
Sri Shashi Nandan

Counsel for the Respondents:
Sri H. N. Pandey
Sri A. Mishra
Sri K.N. Mishra
S.C.
Sri Santosh Kumar

Constitution of India, Article 226-maintainability of Writ Petition-petitioner working in institution-run by BHEL-claiming enforcement of 6th pay commission-as other institution of BHEL are getting but discrimination without rational basis-objection regarding maintainability-in view of Full Bench decision-upheld-petition not maintainable.

Held: Para-11

In the aforesaid circumstances, the claim of the petitioners cannot be enforced through a writ petition. The petition is therefore consigned to the record with liberty to approach a proper forum in the event they are able to establish that the 6th Pay Commission recommendations are applicable and have been enforced by the BHEL in relation to the employees in similarly situated institutions established by the bye-laws.

Case Law discussed:
2005 (4) ESC 2265; Union of India Vs. Dilip Kumar Pandey: Special Appeal No. 1074 of 2010, decided on 12.7.2010

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Mr Udayan Nandan, learned counsel for the petitioners, Mr Santosh Kumar, holding brief of Mr K.N. Misra, learned counsel appearing for the Bharat Heavy Electrical Ltd. (in short, BHEL) and Mr H.N. Pandey, learned counsel for the Central Board of Secondary Educataion (in short, CBSE).

2. This writ petition has been filed by the teachers of an institution established under a society created by BHEL at Jhansi. They have come up praying for enforcement of their rights to receive the benefits arising out of the Sixth Pay Commission Report (in short, the Pay Commission).

3. Mr Udayan Nandan submits that since the benefits of the Pay Commission have been extended to the employees and teachers of some institutions that have been established by BHEL; as such, there is no reason to discriminate the petitioners in this matter. He further contends that these benefits are even otherwise are admissible as the institution in question is affiliated to the CBSE, where also the terms of affiliation mandate public sector undertakings to extend such benefits.

4. Mr Udayan Nandan, therefore, contends that if the respondents are bound by the terms and conditions of affiliation by the CBSE, the petitioenrs, who are employees of the insitution, cannot be denied the said benefits. Documents have been brought on record by the petitioners to substantiate their pleadings.

5. The respondent-BHEL has taken a preliminary objection to the maintainability of the writ petition on the ground that the institution is a privately-managed institution and, being affiliated to the CBSE, its employees cannot maintain the writ petition. His submission, therefore, in short, is that the writ petition, being not maintainable under Article 226 of the Constitution, deserves to be dismissed.

6. In rejoinder Mr Udayan Nandan submits that this issue has also to be

viewed from the angle that M/s. BHEL is a Central Government public sector undertaking having its units throughout India where major finances are received from the Central Government. He contends that since the Central Government has a deep and pervasive control over BHEL; therefore, any institution established by it is also of the same category inasmuch as according to clause 12 of the bye-laws of the society the funds to the institution are to be made available by the BHEL itself. The submission, therefore, is that not only the administrative control is there with the respondents, but they have also the financial control, the funds wherein are received from the Central Government.

7. The aforesaid contentions have been disputed by the learned counsel for the respondents.Two counter affidavits explaining the status of the institution have been filed.

8. Having heard learned counsel for the parties, the preliminary objection in the present matter is to be upheld keeping in view the Full Bench decision of our Court in the case of **M.K. Gandhi Vs. Director of Eduction, reported in 2005 (4) ESC 2265.**

9. The issue of relating to maintainability of such petitions came up for consideration before this Court in the case of **Union of India Vs. Dilip Kumar Pandey: Special Appeal No. 1074 of 2010**, decided on 12.7.2010, relating to a school established by the Indian Airforce at Bumrauli, Allahabad. This Court held that a writ petition of an employee of such school would not be maintainable.

10. Apart from this, certain leverage has been provided in the decision of this Court in **M.K. Gandhi** (supra), but the Apex Court in appeal against this Full Bench judgement has set aside the observations made by the Full Bench; tberey clearly ruling that such a writ petition would ;not be maintainable. The said view of the Apex Court has been reiterated and followed by a learned single Judge in the case of Smt. Dr. Deepa Agarwal Vs. State of U.P.: CM WP No. 29743 of 2009, decided on 11.6.2009.

11. In the aforesaid circumstances, the claim of the petitioners cannot be enforced through a writ petition. The petition is therefore consigned to the record with liberty to approach a proper forum in the event they are able to establish that the 6th Pay Commission recommendations are applicable and have been enforced by the BHEL in relation to the employees in similarly situated institutions established by the bye-laws.

12. The writ petition is dismissed with the aforesaid observations.
