**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 30.10.2013**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Second Appeal No. 111 of 2010

**Shitla Prasad ...Appellant**
**Versus**
**Banwari & Ors. ...Opp. Parties**

**Counsel for the Petitioner:**
Sri T.N. Tiwari, Sri M.K. Gupta, Sri Manish Goyal

**Counsel for the Respondents:**
Sri O.P. Shukla, Sri Rakesh Pande, Sri Prashant Pande, Sri Akhilesh Kumar, Sri Rajendra Singh, Sri Anil Sharma Sri Chandrasen Pal

**C.P.C.-Section-100-Second Appeal-Suit for cancellation of sale deed and injunction-dismissed by Trail Court-decreed by lower appellate court-with specific finding of fraud-as the serial number on stamp bears different with different dates-defendant failed to explain about this diversity instead of 2 dismal in 24000/- 24 dismal written with collusion of registry-old construction and shop proved to constructed by plantiff-land having much and more potential value can not be for such nominal amount-over writing in deed bears no initial finding of fact recorded by LAC can not be without evidence-appeal dismissed.**

**Held: Para-39**
**I may look this matter from another angle and consider certain other facts. The defendants knowing it well that the land in question was not being used for agricultural purposes and already construction was raised thereon, yet claims that it is an agricultural land. He also took a stand that construction was raised by him though it has come on record and proved by evidence that the construction was old and could not have been raised by defendants. All these facts show that the conduct of defendant in the entire case was neither straight nor honest. It is true that in respect of market value of the land, over which finding has been recorded by LAC, it may be said that there was no evidence, but the land in question at the time of execution of sale deed was of much higher value, as is evident from the fact that it was transferred for a consideration of Rs. 24,000/- but for the purpose of stamp duty, much higher value has been mentioned and that too when it was taken as agricultural land. It is in these facts, the finding recorded by LAC that value of the land would have been much more than Rs. 24,000/-, it cannot be said that a prudent vender could have sold 24 dismal of land for just Rs. 24,000/-, when almost 20 years back he has purchased the land for a consideration of Rs. 5,000/-. In entirety and the backdrop of all these facts, it cannot be said to be without any evidence or perverse.**

**Case Law discussed:**
AIR 2006 SC 3672; AIR 2009 SC (Supp) 1218; AIR 1951 SC 280; AIR 1941 PC 93; AIR 1965 SC 1738; (2006) 7 SCC 756; AIR 1977 SC 615; AIR 1982 SC 84; JT 1996(7) SC 135; AIR 2005 SC 3110; JT 2011(9) SC 505; (1996) 5 SCC 550; (2005) 11 SCC 314; 2006(5) SCC 638; AIR 2009 SC (Supp) 1218; AIR 1951 SC 280.

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

1. This is defendant's appeal under Section 100 C.P.C. This Court formulated following substantial questions of law after hearing under Order 41 Rule 11 C.P.C.:

"i. Whether the lower Appellate Court is justified in reversing the findings of Trial Court that plaintiff failed to prove fraud warranting cancellation of sale deed and reasoning given by lower Appellate court are founded on legally admissible evidence?

ii. Whether the plaint disclose requisite facts needed to be pleaded for making a case of fraud?"

2. Sri Manish Goyal, Advocate, has made his indepth threadbare arguments covering the entire aspects of the matter relevant for adjudication of the aforesaid questions of law with great ability, and, Sri Anil Sharma, learned counsel appearing for respondents, has met the plaintiff's case by advancing his arguments with a similar ability and that is how both the sides have placed enough material as also a number of precedential authorities to make it convenient for this Court to arrive at a just conclusion.

3. Now before proceeding further, I find it appropriate to have a brief factual matrix of the entire litigation, which would be of much help for correct appreciation of the legal issues.

Plaint case:

4. Banwari, son of Sukhdev, now deceased and substituted by his legal heirs, i.e., plaintiffs (respondents in this appeal), held a land comprising plot no. 705 area 24 dismal, situate on the main road leading from Varanasi to Baluwa, falling in Gaura Bazar. He got ownership rights pursuant to a sale-deed dated 23.9.1974, executed by earlier owner Smt. Kumari Devi, wife of Lakhnu Sav. The old Bandobast Arazi number of disputed land was 299/2 area, 25 dismal. The land had its commercial value. The plaintiff, Banwari, got ten permanent shops constructed on the road side, over disputed land. The shops were let out to various persons on rent. There was vacant land on the back side of shops which was surrounded by a boundary wall made of bricks and on the western side of the wall, an iron gate was installed. The land on the back side of shops was not used for any agricultural purpose. The defendant-appellant had a shop on eastern corner, north facing, to plot no. 705, appurtenant to road. He, however, was facing problem for residential accommodation. He requested for two dismal of land from plaintiff Banwari for consideration of Rs. 24,000/- which was acceded to by plaintiff and possession was given to him. The defendant-appellant constructed a Kothari and started enjoyment of land, given in his possession, with the promise that sale-deed shall be executed in August' 1995, by which time, he shall arrange requisite funds. On 23.8.1995, both the parties went to registry office, executed sale deed for a consideration of Rs. 24,000/-, in respect of land measuring 2 dismal only. The actual handing over of consideration amount did not take place since defendant-appellant promised to pay aforesaid amount at the residence, and, plaintiff, believing on such promise, executed sale deed.

5. Since then, neither any amount was paid by defendant-appellant nor he vacated disputed land. Instead, he proceeded to extend possession over the entire land measuring 24 dismal. Consequently, Original Suit No. 360 of 1996 was instituted by Banwari, vide plaint dated 9.4.1996, wherein he levelled allegation of fraud in the registered sale deed. He said that page mentioning area of land under transaction, was replaced by another page, wherein area was mentioned as 24 dismal instead of 2 dismal. This fraud is sought to be proved on the basis of application form and affidavit submitted in registry department, before execution of aforesaid sale-deed in which area mentioned was 2 dismal. Plaintiff claims himself an illiterate, aged, old and sick man and hence had suffered fraud committed by defendant.

6. The suit was filed seeking a declaration of sale deed dated 23.8.1995 registered on 6.10.1995 as illegal and non est, and for cancellation thereof. An injunction was also sought against defendant claiming any right on the basis of aforesaid sale deed.

7. During pendency of aforesaid suit, plaintiff Banwari died on 16.12.1998 and his legal heirs, thus, were substituted.

8. The suit was contested by defendant-appellant filing a written statement in which all allegations were denied. He pleaded that sale deed was executed for 24 dismal area and there is no forgery etc. in the sale deed, as averred by plaintiff.

9. The then 4th Addl. Civil Judge (Senior Division) Varanasi, i.e., Trial Court (hereinafter referred to as "TC"), formulated 10 issues, and relevant issues no. 1, 2, 5, 6, and 9 as under:

1. क्या वादी वाद पत्र के कथनानुसार विवादित दस्तावेज बैनामा को निरस्त करवा पाने का अधिकारी है?

2. क्या वादी विवादित भूमि का मालिक व काबिज होने के कारण प्रतिवादी द्वारा किसी हस्तक्षेप को रोकवा पाने का अधिकारी है?

5. क्या दावा धारा 34 विशिष्ट अनुतोष अधिनियम से बाधित है?

6. क्या वादी को दावा प्रस्तुत करने का अधिकार है?

9. क्या दौरान मुकदमा प्रतिवादीगण द्वारा विवादित भूमि पर कोई निर्माण कराया गया है यदि हां तो प्रभाव?

English Translation by the Court:

"1. Whether the Plaintiff is entitled to secure cancellation of the disputed sale-deed as claimed in the plaint?

2. Whether the Plaintiff being owner and in possession of the disputed land is entitled to get any interference of the defendant restrained.

5. Whether the claim is barred by Section 34 of Specific Relief Act.

6. Whether the Plaintiff has a right to institute the claim.

9. Whether any construction on the disputed land has been carried out by the defendants during pendency of the case. If yes, its effect.

10. The Issues no. 3, 4 and 10 relating to jurisdiction, Court fee etc. were decided as preliminary issues in favour of plaintiff, vide orders dated 19.7.1997 and 16.7.2008, which subsequently formed part of judgment and decree dated 19.8.2009.

11. The real substantial issues no. 1 and 2, were returned in negative, i.e., against plaintiff. Consequently, vide judgment and decree dated 19.8.2009, the TC dismissed the suit. Aggrieved thereto, plaintiff preferred Civil Appeal No. 88 of 2009, which has been decided vide judgment and decree dated 11.12.2009, by Sri Umesh Chandra Sharma, Additional District Judge, Court No. 9, Varanasi, i.e., Lower Appellate Court (hereinafter referred to as "LAC").

12. LAC partly allowed appeal and sale-deed dated 23.8.1995, registered on 6.10.1995, has been held valid insofar as it transfers title in the property in dispute, to the extent of 2 dismal, but, in respect of 22 dismal of arazi no. 705, the sale deed has been held illegal and non est. The LAC has issued a permanent/mandatory injunction against defendant-appellant from interfering in the possession, etc., of

arazi no. 705 area 22 dismal, and direction has also been issued to demolish construction raised thereon and handing over possession of that part of land to plaintiffs.

13. Sri Manish Goyal contended that the plaint lacks material particulars, in respect whereto the matter has been examined by LAC it has formed opinion in favour of plaintiff so as to reverse findings of TC. The degree of proof required in a case alleging fraud was neither discharged nor evidence adduced, yet LAC, has recorded a finding and thus committed manifest error. The finding recorded by LAC is not supported by evidence. A registered sale-deed carries a presumption in respect of various steps underwent by registry authorities. To unfold and rebut such presumption, requisite evidence and material is not on record. Hence, findings recorded by LAC is not founded on valid or admissible evidence, or any evidence whatsoever. In respect of attestation and inadequate consideration, relevant aspects have not been taken into consideration by LAC and, therefore also, its finding is vitiated in law. The same argument he advanced to contend about collusion with registry officials. Reliance is placed on Ramesh B. Desai Vs. Bipin Vadilal Mehta AIR 2006 SC 3672, Ranganayakamma & Anr. Vs. K.S. Prakash AIR 2009 SC (Supp) 1218, Bishundeo Narain Vs. Seogeni Rai AIR 1951 SC 280, Narayanan Chettyar Vs. Official Assignee, High Court Rangoon AIR 1941 PC 93, Kumar Harish Chandra Singh Deo Vs. Bansidhar Mohanty AIR 1965 SC 1738, Jai Narain Parasurampuria (Dead) & Ors Vs. Pushpa Devi Saraf and Ors.(2006) 7 SCC 756, Varanasaya Sanskrit Vishwavidyalaya Vs. Dr. Rajkishore Tripathi AIR 1977 SC 615.

14. Besides, he also cited Phipson on Evidence (Sixteen Edition), Chapter 6, Page 55 to show degree of proof required to sustain a plea of fraud. He contended that even if every thing goes in favour of plaintiff and it is held that there are certain pages in the sale-deed, which raise a serious doubt, and those pages are ignored, the rest of deed itself would show that transaction subjected thereto was for the entire piece of land and not for only 2 dismal, as pleaded by plaintiff.

15. Sri Anil Sharma, learned counsel for respondents (plaintiff), defending judgment of LAC, referred to Order 6 Rule 2 stating, if certain facts are pleaded, and, founded thereon, an issue is raised and evidence adduced, it cannot be said that the plaint suffers defect of lack of material facts. He drew my attention to Registration Rules, and in particular, Rule 87-A, 88, 200 and 328B and urged that a perusal of registered document shows that sale deed sought to be executed between parties was only for 2 dismal of land, but, subsequently, by committing forgery and manipulation, certain papers were changed, and, instead of 2 dismal, it was made for entire 24 dismal. Since fraud vitiates everything, LAC has rightly reversed finding of TC, after discussing entire material on its own which is based on valid piece of evidence and both questions need be answered in favour of plaintiff. He argued that a finding of fact has been recorded by LAC which is neither perverse nor based on no evidence, therefore, no interference would be justified in an appeal under Section 100 C.P.C. He placed reliance on Prasad Vs. V. Govindaswami Mudaliar AIR 1982 SC 84, Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd. JT 1996 (7) SC 135, State of Andhra Pradesh Vs.

T. Suryachandra Rao AIR 2005 SC 3110, Ramesh Kumar and Anr. Vs. Furu Ram and Anr. JT 2011 (9) SC 505.

16. First of all I would like to advert to a basic question raised by Sri Goyal, learned counsel for appellant, that the material particulars needed to be pleaded in a case founded on 'fraud' are lacking in the plaint, and, therefore, LAC was not justified in decreeing the suit by holding sale-deed in question, illegal in respect of the disputed land to the extent of area of 22 dismal.

17. The term "fraud" has been defined in Section 17 of Indian Contract Act, 1872 (hereinafter referred to as "Act, 1872") as under:

"17. Fraud" defined.- "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation - Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

18. In Derry Vs. Peek-(1986-90) All E.R. Reporter 1, what constitute fraud was described as under:

"Fraud is proved when it is shown that the a representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false".

19. It is stated when a document has been forged, it amounts to a fraud. In Webster's Comprehensive Dictionary, International Edn., "forgery' is defined as:

"The act of falsely making or materially altering, with intent to defraud; any writing which, if genuine, might be of legal efficacy or the foundation of a legal liability."

20. Thus forgery is false making of any written document for the purpose of fraud or deceit. Its definition has been quoted with approval in Indian Bank Vs. Satyam Fibres (India) Pvt Ltd. (1996) 5 SCC 550 (Paras 26 and 27). The Apex Court in para 28 has said that fraud is an essential ingredient of forgery. It further held:

"since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which

prejudices a part, the court has the inherent power to recall its order."

21. In the action in law making out a case of fraud, special provisions have been made, taking care that a person who suffers fraud played upon him, if not provided special benefits in the matter of limitation etc, is bound to suffer for the reason that an allegation of fraud can come only when it becomes known to the person who suffers such fraud. I find that not only in the Act, 1872, separate provisions are there to deal with the issues pertaining to fraud, but in the Code of Civil Procedure (hereinafter referred to as "CPC") and also the Limitation Act, 1963 (hereinafter referred to as "Act, 1963") sufficient provisions have been made as to how one shall plead a case founded on fraud. Extension in the matter of limitation in such cases is also provided under Act, 1963.

22. Order 6 deals with pleadings in general. Rule 2 thereof requires that the pleading shall contain statement in concise form of the material fact on which the party, pleading fraud, relies for his claim. It need not to plead evidence by which the material facts needed to be pleaded are to be proved. Then in respect of cases involving grounds of fraud or misrepresentation, there is a specific provision, i.e. order 6 Rule 4, which reads as under:

"4. Particulars to be given where necessary.- In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with date and items if necessary) shall be stated in the pleading."

23. Sri Goyal contended that the requirement of Rule 4 is that the plaintiff must have pleaded, how, on which date, when and who was instrumental and did commit fraud and the modus operandi thereof. He said, since all these pleadings are absent, therefore here is a case where there was no material pleading with respect to the facts constituting the allegation of fraud.

24. Considering Order 6 Rule 4 CPC in Sangramsing P. Gaekwad and others Vs. Shantadevi P. Gaekwad and others (2005) 11 SCC 314, the Court said that the plaintiff is bound to give particulars of the case where he relies on misrepresentation, fraud, breach of trust etc. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and there cannot be a thumb rule.

25. In Ramesh B. Desai and others Vs. Bipin Vadilal Mehta and others 2006 (5) SCC 638, the Court in reference to Order 6 Rule 4 said that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard.

26. In Ranganayakamma and another Vs. K.S. Pakash AIR 2009 SC (Supp) 1218, the execution of power of attorney was sought to be assailed on the ground that it was prepared fraudulently. It was pleaded that defendants therein used to take signatures of plaintiffs on the misrepresentation that the same were required for payment of tax and managing properties. Due to faith, the plaintiffs had

in their brothers, they used to sign. The power of attorney was executed by playing a fraud and taking advantage of innocence and ignorance of the sisters. It was executed in the Office of an Advocate and on the basis of said fraudulent misrepresentation, defendants got a deed of partition executed subsequently. Considering the nature of allegations, Court found that the plea of fraud was general in nature and vague. It was alleged that signatures were obtained on several papers on one pretext or other and they have signed in good faith believing the representations made by respondents, which, in fact was a fraudulent representation. However, when such representations were made, what was the nature of representation, who made the representations and what type of representations were made are some of the material fact which were not stated. Similarly the document were signed either in the office of Advocate or before the Sub-Registrar, i.e., at public place and signatures were not obtained on blank papers. That being so, the onus was upon the plaintiffs to show, who had taken advantage and at what point of time, but all these facts were not pleaded. The Court found statement of plaintiffs farfetched and beyond ordinary human conduct. It is in these facts, Court said that in absence of any particulars, having been furnished with respect to fraud and misrepresentation, the documents in question would not be void.

27. In Bishundeo Narain and another Vs. Seogeni Rai and others AIR 1951 SC 280, the Court said that in case of fraud, undue influence and coercion, the party's pleadings must set forth full particulars. The case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even if amount to an averment of fraud of which any Court ought not to take notice howsoever strong the language in which they are couched may be.

28. In Ramesh B. Desai (supra), the kind of pleadings for the purpose of order 6 Rule 4 has been highlighted and it would be useful to quote para 19 thereof as under:

"19. Undoubtedly, Order VI Rule 4 CPC requires that complete particulars of fraud shall be stated in the pleadings. The particulars of alleged fraud, which are required to be stated in the plaint, will depend upon the facts of each particular case and no abstract principle can be laid down in this regard. Where some transaction of money takes place to which 'A', 'B' and 'C' are parties and payment is made by cheques, in normal circumstances a third party 'X' may not get knowledge of the said transaction unless he is informed about it by someone who has knowledge of the transaction or he gets an opportunity to see the accounts of the concerned parties in the Bank. In such a case an assertion by 'X' that he got no knowledge of the transaction when it took place and that he came to know about it subsequently through some proceedings in court cannot be said to be insufficient pleading for the purpose of Order VI Rule 4 CPC. In such a case 'X' can only plead that he got no knowledge of the transaction and nothing more. Having regard to the circumstances of the case, we are of the opinion that the High Court was in error in holding that there was no proper pleading of fraud."

29. In the background of the above exposition of law, I would now look into plaint's averments to find out whether appropriate pleadings with regard to

question of fraud have been made by the plaintiff or not. To my mind, the pleadings from para 5 to 17 contain facts alleging fraud in execution of sale deed making it for entire 24 dismal of the land instead of 2 dismal and the same read as under:

ष5. यह कि मुद्दईयान के भूखण्ड संख्या 705 के पूरबी किनारे के उत्तर जानिब सड़क की पटरी से लगे मुद्दालेह की निजी दुकान है, और उसे रहाइश की वेहद किल्लत थी इसलिए उसने अपने पीछे स्थित मुद्दईयान की .02 डि0 जमीन को आज से 3–4 साल पहले रहाइश के लिए 24,000/– मूल्य तय करके मांगा और मुद्दईयान से अनुनय विनय करके उस पर कब्जा कर कोठरी बनाकर आबाद हो गया तथा गरीबी की बात कहकर बैनामा तहरीर कराने हेतु आपसी व्यवहार व ताल्लुक के आधार पर समय लेता गया।

6. यह कि किसी तरह पिछले वर्ष अगस्त माह यानी अगस्त 1995 में मुद्दईयान से मुद्दालेह बैनामा तहरीर करने की बात कहा और परमीशन हेतु कुछ कागजात पर मुद्दई का हसताक्षर भी कराया।

7. यह कि 23 अगस्त सन् 95 को मुद्दालेह मुद्दईयान से बैनामा तहरीर कराने हेतु उसे कचहरी ले गया तथा अपने अधिवक्ता व पहले से बुलाए गए कुछ आदमियों की राय से स्टैम्प आदि खरीदकर मसविदा बनवाया तथा उस पर मुद्दईयान के हस्ताक्षर व अपने गवाहान के हस्ताक्षर कराने के वाद रजिस्ट्री दफ्तर में प्रस्तुत किया तथा कहा कि पैसा 24000/– हम लाए हैं यहां लेकर आप कैसे सभांलेंगे रजिस्ट्रार साहब के समक्ष पैसा मिलना कबूल कर लीजिएगा और पैसा घर पर गौरा कलां बाजार में ले लीजिएगा। चूंकि दो साल पहले ही मुद्दई के दाहिने अंग में फालिज का असर हो चुका था और वह दाहिने हाथ से लिखना या अन्य कोई कार्य भी नहीं कर सकता था इसलिए और अपने साथ अन्य कोई घर का न होने की वजह से मुद्दालेह की बात पर यकीन करके रजिस्ट्रार के समक्ष .02 डि0 जमीन 24,000/– में बेचना व पैसा पा जाना बबूल कर लिया, और रजिस्ट्री कर लिया गया। लेकिन बाद में बावजूद तकादा मुद्दालेह ने आज तक एक भी पैसा जर वैनामा का नहीं दिया टाल मटोल करता चला आया।

8. यह कि बैनामा दिनांक 23.8.95 के बाद .02 डि0 जमीन पर पहले से काबिज मुद्दालेह ने पूरी .02 दो डि0 जमीन को ईट की कच्ची वाउण्डरी से घेर लिया और मुद्दई ने पूरब से .02 दो डि0 जमीन मुद्दालेह को देकर सीमा पर अपनी भी वाउण्डरी अक्षर य, र नक्शा मुन्सलिका अर्जीनालिश के स्थान पर बना लिया तथा शेष .22 डि0 रकवे व तामीर पर मुद्दईयान का तनहा वेरोक टोक कब्जा मालिकाना पूर्ववत चला आ रहा है।

8अ. यह कि दौरान मुकदमा वादी वनवारी पुत्र सुखदेव दिनांक 16.12.1998 ई0 को मौत कर गये हैं। मृतक बनवारी के उत्तराधिकारी प्रार्थीगण देवराज व राधेश्याम पुत्रगण स्व0 बनवारी व चन्द्रावती देवी उर्फ चनरा देवी पत्नी स्व0 बनवारी हैं अन्य कोई परिवार सख्ज उत्तराधिकारी नहीं है।

9. यह कि यकायक दिनांक 18.3.96 ई0 को मुद्दालेह ने रात को मुद्दईयान की चहार दीवारी य, र तोड़ दिया उसके ईट को खुद अपने सहन में रख लिया और सुबह पूछने पर कहने लगा कि कैसी दीवाल कैसी वाउण्डरी पूरी जमीन मेरी है, और मैने पूरे रकवे – 24 डि0 का वैनामा करा लिया हे, भाग जाओं नहीं तो हाथ पांव तोड़ देगें। यह सुनकर मुद्दई के पैरो के नीचे की जमीन ही खिसक गई ओर उसे घोर आश्चर्य हुआ।

10. यह कि उसी दिन मुद्दई अपने बड़े बेटे के साथ कचहरी आया तथा रजिस्ट्री दफ्तर में बैनामे का श्री जयन्त कुशवाहा एडवोकेट के जरिये पता लगाया तो और भी आश्चर्य हुआ तथा मुद्दालेह के वास्तविक फरेब व जाल साजी का पता चला कि उसने रजिस्ट्री दफ्तर में बाबुओं को मिलाकर अथवा उन्हें भी धोखा देकर 02 डि0 वाले दस्तावेज के पृष्ठ निकाल कर उसके स्थान पर दूसरा पृष्ठ असल व फोटो स्टेट लगा दिया हे, लेकिन आनन फानन में मुद्दालेह रजिस्ट्री हेतु प्रस्तुत होने वाले आवेदन एवं एक प्रस्तुत शपश पत्र में हेरा फेरी करना भूल गया जिसमें विक्रय सम्पत्ति .02 डि0 ही अंकित है।

11. यह कि मुद्दईयान ने दिनांक 20.3.96 ई0 को फर्जी बैनामें की सत्य प्रतिलिपि हेतु आवेदन किया तथा बाद में आवेदन प्रस्तुत कर संबंधित प्रार्थना पत्र व शपथ पत्र सील करा दिया ताकि उसे मुद्दालेह नष्ट न कर सके अथवा काट पीट न सके।

12. यह कि संबंधित सब रजिस्ट्रार श्री पटेल ने भी मुद्दईयान एवं उसके अधिवक्ता से संबंधित जालसाजी एवं फरेब पर घोर आश्चर्य व्यक्त किया तथा कागजात सील करके सुरक्षित लाक में रख दिया।

13. यह कि वास्तव में मुद्दईयान ने मात्र .02 डि0 जमीन की वावत ही दस्तावेज तहरीर किया था और रजिस्ट्रार साहब ने भी .02 दो डि0 जमीन के विक्रय व 24,000/– मूल्य की बात मुद्दई से पूछा था लेकिन मुद्दालेह ने रजिस्ट्री हो जाने के बाद में दस्तावेज एवं उसके फोटो स्टेट पेज जो कि उसने मुद्दई के लगभग दो सौ हस्ताक्षर कराते समय करा लिया होगा, को .24 डि0 की वावत लगा दिया और वास्तविक .02 वाले पेज को निकाल लिया।

14. यह कि मुद्दई द्वारा तहरीर किया गया .02 डि0 की वावत बैनामा यद्यपि कि आस्तित्व में नहीं रह गया है, फिर भी यदि बराय अदालत .02 डि0 की वावत बैनामा माना भी जाय तो भी शेष रकवे .22 डि0 की वावत मुद्दईयान का हक दावा महफूज है।

15. यह कि बैनामा तहरीर के समय परमिशन प्राप्त न होने की वजह से दस्तावेज स्थगित रखा गया था इसलिए भी मुद्दालेह को जाल साजी और फरेब करने का जयादा अवसर मिला।

16. यह कि मुद्दई एक अनपढ़, वृद्ध, बीमार व सीधा सादा व्यक्ति है, इसलिए उसने मुद्दालेह पर विश्वास करके उसके द्वारा तहरीर व मात्र .02 डि0 की वावत बैनामा पढ़कर सुनाने के कारण उसने मुद्दालेह द्वारा तैयार लगभग 200 पृष्ठों पर अपना हस्ताक्षर बना दिया था।

17. यह कि मुद्दालेह मुद्दईयान का पड़ोसी है तथा उसके अति विश्वास दिलाने के कारण मुद्दईयान उस पर विश्वास किया लेकिन मुद्दालेह ने धोखा व फरेब किया।''

English translation by the Court:

"5. That the defendant has a shop of his own along the roadside to the north of eastern corner of the plaintiffs' plot no. 705. Since he had utter scarcity of residence 3-4 years back, for residential purposes he demanded plaintiffs'.02 Dismal land situated at the back of his own land at the settled rate of Rs. 24,000; and after making entities to the plaintiffs, he settled there by taking possession thereof and raising a 'Kothri' thereon; and on the pretext of his poverty continued to take buy for execution of sale deed on the basis of mutual terms ad relations.

6. That in the month of August last year i.e. August 1995 the Defendant somehow spoke to the Plaintiffs for execution of the sale-deed and also obtained signature of the Plaintiff on some papers for securing permission.

7. That on 23rd August 1995, Defendant took the Plaintiffs to court premises to get the sale-deed executed by them and he, at the instance of his counsel and some other people, already called there, got a draft prepared after purchasing Stamps etc and obtained plaintiffs' signatures and that of the witnesses from his side on it and submitted the same to the Registry Office and said, "We have come with Rs. 24,000/- with us. How will you handle the money if it is paid here in the office? You please admit receipt of money before the Registrar and collect money from us at home in Gaura Kalan Bazaar. Since the Plaintiff had suffered paralysis of the right side, two years ago and was unable to write or even do any other work with his right hand, hence for the said reason and also due to not being accompanied by any person from his home, he by trusting the version of the Defendant admitted to have sold .02 D. land for a consideration of Rs. 24,000/- and to have received the said amount before the Registrar; which led to the registration. But later on, despite requests the Defendant did not make any payment so far towards the sale-deed and has kept on making excuses.

8. That after the execution of the sale deed dated 23.08.1995, the defendant, being already in possession of the .02 land, bounded the whole of the said land by erecting a brick boundary with the help of mud mixture. After giving .02 Di land from the east to the defendant, the plaintiff erected his boundary marked as 'Ya' 'Ra' at the place shown in the enclosed application and the plaintiffs have as usual been enjoying the sole unhindered ownership of the remaining .22 D. area of the land and construction thereon.

8A. That during pendency of the case, the Plaintiff Banwari S/o Sukhdev expired on 16.12.1998. The successors of

the deceased Banwari are the applicants Devraj and Radhey Shyam Sons of Late Banwari; and Chanadrawati Devi alias Chanra Devi W/o Late Banwari and that no other family is his successor.

9. That all of a sudden on the night of 18.3.96, the Defendant demolished the boundary-walls 'Ya' & 'R' of the Plaintiffs and himself took its bricks away to his courtyard and on being asked in the morning, he started saying, "Which wall, which boundary are you talking about? The entire land is mine and I have got sale-deed executed of the entire area 24 Di. Go off or else I will break your limbs." On hearing this, the Plaintiff got stunned and utterly surprised.

10. That on the same day the Plaintiff alongwith his elder son came to district court and he was further surprised when he inquired about the sale-deed in the Registry Office through Mr. Jayant Kushwaha, Advocate and he came to know about actual cheating, fraud & forgery committed by the Defendant that he has, with the help of clerks of Registry Office or by cheating even them, removed the pages of 02 Di. document and in its place annexed another page in original with photocopy but the Defendant being in a hurry forgot to tamper with the application and affidavit that were submitted requesting for Registry; and in both these documents sale property .02 Di only is recorded.

11. That on 20.03.96, the Plaintiffs had applied for certified copy of the forged sale-deed and later they on an application got the relevant application and affidavit sealed so that the Defendant may not destroy or alter them.

12. That the concerned Sub-Registrar Mr. Patel also expressed utter surprise to the Plaintiff and his counsel over the fraud, cheating & forgery in question and sealed the papers and put them safely under the lock.

13. That actually the Plaintiff had executed document only for .02 Di land and even the Registrar had also asked the Plaintiff about the sale of .02 Di land and about Rs. 24,000/- only in consideration thereof; but after execution of registry the Defendant had placed a document and its photostat page for 24 Di that he might have got signed by the Plaintiff while getting around 200 signatures and removed the actual page for .02.

14. That the sale-deed for .02 Di executed by the Plaintiff has not remained to be in actual existence; however, if the sale-deed for .02 Di is considered valid by the court even then the claim of the Plaintiffs for the remaining portion .22 Di remains intact.

15. That at the time of execution of the sale-deed, document was kept in abeyance for lack of permission and for this reason as well the Defendant got ample opportunity to commit cheating, fraud and forgery.

16. That the Plaintiff is an illiterate, aged, sick and innocent person. Hence, he placed trust on the Defendant and put his signatures on around 200 pages prepared by the Defendant when the sale-deed only for .02 Di. was prepared by him and the contents thereof were read over to the Plaintiff.

17. That the Defendant is the neighbour of the Plaintiffs; and on his assurances the Plaintiffs placed trust on him. However, he committed cheating & fraud."

30. Thus, the case set up by plaintiff is that the document actually executed was for 2 dismal but subsequent manipulation in the record has changed it to 24 dismal. The modus operandi of above change obviously cannot be expected to be known to plaintiff and therefore, whatever fact he was expected to know or he could have known, are pleaded and rest are to be seen by this Court. It is for this reason and as pleaded also, the record of office of Sub-Registrar and Ceiling Authorities was summoned and sealed. The case set up by plaintiff is that as per his knowledge and understanding, the sale-deed was executed for transfer of 2 dismal of the land in dispute, to the defendant-appellant, but later on, he came to know that the sale-deed actually registered mentions 24 dismal. How it happened, is not very sure but it appears that some manipulation has been done in collusion with registry officials. These facts, considering the kind of fraud pleaded in this case, in my view, would constitute sufficient material facts so as to make a case of fraud and it cannot be said that the material facts are not pleaded. The arguments, advanced otherwise, by Sri Goyal, consequently, are negatived. The question no. 2 is returned in favour of the plaintiff-respondents by holding that though it cannot be doubted that a plaint must disclose requisite facts for making a case of fraud but, in the present case, those facts have been pleaded and hence the requirement of Order 6 Rule 4 is well satisfied. On that account the plaintiff cannot be non-suited.

31. Now I straightway come to question no. 1, which is real and substantial issue in this case. This Court would like to first discuss the evidence, available on record.

32. PW-2 and 4 have admitted that they are in possession of shops as tenants and the plaintiff is the landlord. The Commissioner's report (Paper No. 14C and 15C) prove existence of ten shops, let out to various persons, except one, which is in possession of the plaintiff. Advocate Commissioner has recorded that during his inspection, all the shop keepers/ tenants stated that those shops were constructed by plaintiff and that they are tenants of plaintiff.

33. The sale-deed in question was executed on 23.8.1995 and registered on 6.10.1995. Suit in question has been instituted vide plaint dated 9.4.1996. The earliest Commissioner report and site map are dated 16.4.1996 and 12.4.1996. The Commissioner's report was accepted by the Trial Court and became part of evidence pursuant to Trial Court's order dated 3.2.2003.

34. The sale-deed in question is a registered document. In order to prove forgery therein, sale deed itself along with record of Registry office as also Ceiling Authorities were summoned. The same has also been looked into at this stage so as to find out whether it can be inferred therefrom that the sale-deed in question was actually for two dismal or 24 dismal.

35. Plaintiff filed an affidavit before Sub-Registrar, Varanasi dated 23.8.1995 and in para 2 thereof has stated that he is Bhumidhar and owner of Arazi No. 705 (Old No.299/2) area 2 situated at Gaura Kalan, Pergana Jalhupur, District Varanasi. The aforesaid land was is agricultural and registered as such in the revenue record. Aforesaid land sought to be sold to Shitla Prasad son of Lakhan Sav, who would perform agricultural work therein. An application seeking permission from the Competent

Authority, Urban Land Ceiling, Varanasi was also submitted but no permission was received and it was said that as soon as permission is received, the same shall be submitted to the office of Sub-Registrar for transferring the land.

36. The competent authority's letter no. 4484 dated 28.8.1995 is also available for perusal which mentions details of entire property i.e. land no. 705 area 24 dismal. It does not throw any light on the question, whether transfer was contemplated or permission was granted for 2 dismal or 24 dismal. At the bottom, separately words "2 dismal/5.10.95" are mentioned but it does not appear to have been made by the competent authority for the reason that the date on which the competent authority signed the aforesaid document is 26.8.1995 and it was issued on 28.8.1995, therefore mention of above words on 5.10.1995 did not explain any reason and it is also not clear as to who has done it.

37. Now straightway I come to the original sale-deed. It has been written on 91 stamp papers of following denominations:

| Value of Stamp Paper | Number of Papers |
|---|---|
| Rs.5000/- | 1 |
| Rs.50/- | 89 |
| Rs.5/- | 1 |

38. All the stamp papers have been purchased by appellant Shitla Prasad in his name. The stamp paper worth Rs. 5000/- has been issued from Treasury itself on 22.8.1995. Rest of Stamp Papers have been purchased through Ram Gopal Stamp Vikreta, Diwani Nyayalaya, Varanasi. It is interesting to note that the stamp papers which form part of sale-deed from pages no. 2 to 85 bear sl. No. 4692 to 4775 and the date of purchase mentioned twice, one against the name of purchaser i.e. Shitala Prasad and another under the signature of Stamp Vender and everywhere it is mentioned as 22.8.1995. Then the stamp papers which form part of the sale deed at pages 86, 87, 88 and 89 are from different lot bearing similar number 3495, 3494, 3493 and 3492. The date of purchase mentioned is 19.8.1995. The stamp vender is the same. Then again the stamp paper forming part of the sale deed at page no. 90 went back to original series of 22.8.1995 bearing Sl. No. 4776 which is in continuation of the stamp at page 85 of sale deed. It is also dated 22.8.1995. The last stamp paper of. 5/- rupees denomination bearing sl. No. 4777 is dated 22.8.1995. It is, thus, evident that the entire set of stamp papers were purchased on 22.8.1995 in a running serial but 4 pages, which are now part of original sale deed, i.e. pages 86, 87, 88 and 89, have disturbed the chain and come from a different lot, having been purchased on 19.8.1995, bearing different serial number. I could not find any reason or explanation for this change in the date and serial number of these stamp papers of just four pages which had to be explained by defendants. It is also true that on all these four stamp papers, the date 19 has overwriting. On a careful perusal it appears to be 28.8.1995. Only these 4 pages have overwriting and none else. The area of plot sought to be transferred vide the aforesaid sale-deed is mentioned on page 88 which is one of these four pages. The overwriting also has no initials. Since the documents were purchased by defendant-appellant, he had to explain reason of this change/overwriting etc. and also distinct date and serial number from the otherwise uniform stream of the documents coming in a row.

39. I may look this matter from another angle and consider certain other facts. The defendants knowing it well that the land in question was not being used for

agricultural purposes and already construction was raised thereon, yet claims that it is an agricultural land. He also took a stand that construction was raised by him though it has come on record and proved by evidence that the construction was old and could not have been raised by defendants. All these facts show that the conduct of defendant in the entire case was neither straight nor honest. It is true that in respect of market value of the land, over which finding has been recorded by LAC, it may be said that there was no evidence, but the land in question at the time of execution of sale deed was of much higher value, as is evident from the fact that it was transferred for a consideration of Rs. 24,000/- but for the purpose of stamp duty, much higher value has been mentioned and that too when it was taken as agricultural land. It is in these facts, the finding recorded by LAC that value of the land would have been much more than Rs. 24,000/-, it cannot be said that a prudent vender could have sold 24 dismal of land for just Rs. 24,000/-, when almost 20 years back he has purchased the land for a consideration of Rs. 5,000/-. In entirety and the backdrop of all these facts, it cannot be said to be without any evidence or perverse.

40. In view thereof, I do not find that LAC erred in law or otherwise by reversing the finding of the Trial Court. The question no. 1, in my view, deserves to be answered in affirmative and returned accordingly in favour of plaintiff-respondents.

41. In view of above, the appeal, as a consequence, has to fail. It is, accordingly, dismissed.

42. No costs.

---

**ORIGINAL JURISDICTION**

**CIVIL SIDE**
**DATED: LUCKNOW 29.10.2013**

**BEFORE**
**THE HON'BLE SHRI NARAYAN SHUKLA, J.**

Writ Petition No. 341(MS) of 2006

**Smt. Sheela Dubey ...Petitioner**
**Versus**
**Debt Recovery Appellate Tribunal & Ors. ...Opp. Parties**

**Counsel for the Petitioner:**
Sri Jaspreet Singh

**Counsel for the Respondents:**
Sri N.K. Seth , C.S.C. , Sri D.K. Pathak
Sri Ravi Shanker Tiwari, Sri Shashank Pathak.

**Recovery of Debt due to Banks & financial Institutions Act-1993, Section 22-readwith order XXII Rule 4 C.P.C.-Substitution of legal heirs-suit for recovery-pending before civil court-during pendency of suit D-4 died-due to creation of Tribunal-no substitution application could be brought on record-tribunal allowed substitution application-considering recovery-belongs to public exchequer-recoverable from debtor and its guarantor-liability being joint and several-proceeding not going to abated-held sub-application not require to consider technically to defeat the very purpose of enactment of Act itself-petition dismissed.**

**Held: Para-13**
**The money which is due for recovery belongs to the public exchequer and is liable to be recovered from the debtor as well as its guarantors, therefore, I am of the view that the principles of natural justice demands to bring the legal representatives of the debtors and or the guarantors on record. It is also pertinent to mention here that the liability being joint and several, the suit for recovery is not going to be abated as a whole, thus once the suit survives even after non impleadment of the legal representatives of the defendant No.4 and**

**money is recoverable from any or all of the defendants as a whole, there is no harm to allow the application for substitution of the legal representatives of defendant No.4. Therefore, I am of the view that the application for substitution of the legal representatives of the defendant No.4 moved by the respondent-bank does not require to be dealt with so technically as it may defeat the purpose of the Act.**

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr.Jaspreet Singh, learned counsel for the petitioner as well as Mr.D.K.Pathak, learned counsel for the respondents.

2. The petitioner has assailed the order dated 23.7.2003, passed by the Debts Recovery Tribunal, Lucknow in case No.TA 291 of 2002 (Annexure No.2) as also the order dated 7.12.2005, passed by the Debts Recovery Appellate Tribunal, Allahabad in appeal, upholding the order passed by the Tribunal of the original jurisdiction.

3. Briefly the facts of the case are that the respondent No.3, State Bank of India, being plaintiff filed a regular suit before the court of Civil Judge, Lucknow, which was registered as Regular Suit No.215 of 1991 for recovery of a sum of Rs.18,49,822/- against the respondent No.4, Company as well as its guarantors.

4. During the pendencey of the suit before the Civil Court two defendants i.e. defendant No.2 Shri B.R.Dubey and defendant No.4 Shri D.R.Dubey died. In the case at hand the controversy relates to the substitution of legal heirs of Mr.D.R.Dubey, defendant No.4, who died on 24th of December, 1997. The learned counsel for the answering respondent submits that the information of death of Shri D.R.Dubey, was conveyed by the other defendants to the plaintiff in Civil Court on 28.1.1998, whereas vide notification dated 7th of April, 1998 the Debts Recovery Tribunal, Jabalpur was created and the jurisdiction of the Civil Court ceased w.e.f. that date, therefore, the Bank moved an application before the Civil Court on 20.7.1998 for transfer of the case to Debts Recovery Tribunal, Jabalpur and the case was transferred. Then again it was transferred to Debts Recovery Tribunal, Allahabad and thus the Bank moved the application for substitution of legal heirs of defendant No.4 on 31.1.2002 before the Debts Recovery Tribunal, Allahabad.

5. The defendants raised objection against the maintainability of the said application being barred by time as according to them the provisions of Order 22 Rule 4 of the Code of Civil Procedure are applicable in case of death of one of several defendants or of sole defendant, for which there is a provision to make legal representation of the deceased as party and to proceed with the suit. However, sub rule (3) CPC provides that where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant. Order 22 Rule 4 CPC is extracted below:-

"4. Procedure in case of death of one of several defendants or of sole defendant.- (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the

deceased defendant to be made a party and shall proceed with the suit.

(2)Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place]

(5) Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the grounds that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the court shall, in considering the application under the said section 5 have due regard to the fact of such ignorance, if proved.]"

6. He further submits that under Limitation Act, 1963 the time given to make a party of the legal representative of the deceased-plaintiff or appellant or defendant or respondent, as the case may be, is provided as 90 days from the date of death. Therefore, the application moved by the plaintiff-bank was barred by time. He further contends that Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short Recovery of Debts Act, 1993) provides that the Tribunal shall have power to regulate its own procedure. The Regulations have been formulated and notified, which are called as the Debts Recovery Tribunal Regulations of Practice, 1996. It came into effect on 2.12.1996. Regulation 89 of which confers the power and makes the provisions of Order 22 of the Code of Civil Procedure applicable in so far as moving an application for legal representative of the deceased as party to the proceeding. Regulation 89 is extracted below:-

"89.Application for making legal representative of deceased persons as parties to proceedings:- Application by or against legal representatives shall be made within 90 days from the date of death of the party or person concerned and for such purpose the provisions of Order 22 of the Code of Civil Procedure, may as far as may be and with necessary modifications be followed."

7. Thus, he submits that once the Regulation limits the period for filing an application as 90 days to bring on record the legal heirs of the deceased-defendant, the application, moved by the Bank beyond, it definitely has become time barred. Thus, he submits that the Debt Recovery Tribunal as well as the Appellate Tribunal have failed to

appreciate the law framed to entertain the application to bring on record the legal representatives of the deceased-defendant correctly, therefore, the orders passed by the Tribunal are unsustainable and are liable to be quashed.

8. Per contra Mr.D.K.Pathak, learned counsel for the Bank submitted that Section 22 of the Recovery of Debts Act, 1993 provides that the Tribunal and appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice. He further submits that Section 22 of the Recovery of Debts Act, 1993 further provides that the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they have their sitting. No doubt the Tribunal has been assigned the same powers as are vested in the Civil Court under the Code of Civil Procedure while trying the suit, but those are extracted for certain purposes as is provided under Sub-section (2) of Section 22 of the Act. Section 22 of the Act is extracted below:-

"22.Procedure and powers of the Tribunal and the Appellate Tribunal:- (1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purpose of discharging their functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:-

(a) summoning an enforcing the attendance of any person and examining him in oath;

(b) requiring the discovery and production of documents;

(c ) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;

(h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

9. In the light of the aforesaid provisions he submits that there is no iota of doubt that the procedure provided under Order 22 Rule 4 of the Code of Civil Procedure as well as under Article 120 of the Limitation Act are not applicable. So far as the Regulations framed by the Tribunal which provides the limitation of 90 days to move such application is concerned, he submits that the regulations 1996 as referred by the petitioner have been framed for the particular Tribunals, which are not applicable to the Tribunals established either at Allahabad or Lucknow. In support of his

submissions he also placed on record one other Regulation of practice 2010, which has been framed in exercise of power conferred by sub Section (1) of Section 22 of the Act, 1993 to regulate the procedure by the Debts Recovery Tribunals at Ahmadabad, Aurangahad, Mumbai, Nagpur and Pune, whereas till date the Tribunals established either at Allahabad or at Lucknow has not framed any such regulation. Therefore, it has to proceed in its own wisdom guided by the principles of natural justice and subject to the other provisions of the Act and Rules framed thereunder.

10. In addition to the aforesaid pleas he further submitted that it is a recovery of public money and the debtor Company as well as other guarantors are on record and in default of payment of loan the liabilities of the debtor as well as the guarantors is joint and several, therefore, the delay, if any, in moving such an application does not affect the proceeding of the case. Since the money is a public money the principles of natural justice demands to incorporate the legal representatives of the deceased party. It is further stated that the respondent-bank has not committed default in making the application as soon as it was informed by the other defendant with respect to the death of defendant No.4 on 28.1.1998, who died on 24.12.1997, he tried to move the application, but since by creation of Debt Recovery Tribunal at Jabalpur by means of Notification dated 7th of April, 1998, the Civil Court ceased its power to proceed with the suit, therefore, the bank could not move the application.

11. In connection of constitution of Debts Recovery Tribunals after some time of creation of Debt Recovery Tribunal, Jabalpur, the Debt Recovery Tribunal, Allahabad was created, where ultimately the jurisdiction vested for trial of this case and the respondent-bank moved the application, without fail, therefore, the same is not liable to be thrown out being barred by time under the provisions of the Code of Civil Procedure or the Regulations framed for the particular Tribunals.

12. After considering the rival submissions of learned counsels for the parties as well as the provisions of the Act, I find that by Section 22 of the Recovery of Debts Act, 1993 the Debt Recovery Tribunals are not bound by the procedure laid down by the Code of Civil Procedure. Indisputedly the Tribunals are vested with the same powers as of the Civil Court under the Code of Civil Procedure, while trying the suit, which are extracted for certain proceedings as envisaged in sub section (2) of Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, but after reading the said provisions, it is clear that that does not include to deal with the application to bring on record the legal representatives of the defendants.

13. So far as the Regulations 1996 are concerned, definitely i.e. applicable for the particular Tribunals. Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has empowered the Tribunals to regulate their own procedure. Indisputedly the Tribunal established at Allahabad or at Lucknow has not framed any such Regulations, therefore, in proceeding with the matter, it has to be guided by the principles of natural justice as well as by some other provisions of the Act and Rules framed thereunder. The petitioner has failed to report any violation of the provisions of the Act or Rules made thereunder or even the principles of natural justice. The money which is due for recovery

belongs to the public exchequer and is liable to be recovered from the debtor as well as its guarantors, therefore, I am of the view that the principles of natural justice demands to bring the legal representatives of the debtors and or the guarantors on record. It is also pertinent to mention here that the liability being joint and several, the suit for recovery is not going to be abated as a whole, thus once the suit survives even after non impleadment of the legal representatives of the defendant No.4 and money is recoverable from any or all of the defendants as a whole, there is no harm to allow the application for substitution of the legal representatives of defendant No.4. Therefore, I am of the view that the application for substitution of the legal representatives of the defendant No.4 moved by the respondent-bank does not require to be dealt with so technically as it may defeat the purpose of the Act.

14. The parties also cited some decisions in support of their submissions on the point of abatement of case due to non impleadment of legal representatives of the deceased within time, but in the light of the observations made as above, I do not think it necessary to deal with those cases.

15. Therefore, no interference is warranted in the orders impugned. In the result the writ petition stands dismissed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 09.10.2013**

**BEFORE**
**THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.**

Civil Misc. Writ Petition No.381of 2006

**Smt. Anaro Devi ...Petitioner**

**Versus**

**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri M.K. Gupta, Sri Pankaj Agarwal

**Counsel for the Respondents:**
C.S.C., Sri A.K. Yadav

**C.P.C.-Order XLI-Rule-27-Additional Evidence-at appellate stage-after two years application filed-allowed by Lower appellate court without considering the reasons-precluded to file before Trail Court-additional evidence can not be-as a matter of right-held-finding of appellate court is skeletal-not sustainable-direction for fresh consideration given.**

**Held: Para-10**

**In the present case the defendant/appellant wanted to file the public documents i.e. a government order and in its application for non-production of those documents in the trial court no valid reason has been mentioned. It is presumed that the government order of the department was in the knowledge of the officer concerned, but it was not filed before the trial court. In the application also no reason has been mentioned that why the papers were not filed earlier. A party cannot claim to file additional document as a matter of right. It has to comply the ingredients of the provisions of the law. The appellate court in a casual manner has allowed the application on the ground that taking the documents on the record is in the interest of justice without assigning any reason why additional document can be accepted at the appellate stage. It was obligatory on the appellate court to record the reasons why it was necessary to allow the application.**

**Case Law discussed:**
AIR 2008 SC 579; AIR 1998 SC 2276; (2012) 8 SCC 148; 2013(3) AWC 3137(SC); AIR 2008 SC 579.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner is aggrieved by the order of Additional District Judge dated 07.10.2005, allowing the application of the defendant-respondent under Order XLI Rule 27 of the Code of Civil Procedure, 1908 (for short, "CPC") to bring the additional evidence on the record.

2. The essential facts are; the petitioner-plaintiff filed a Civil Suit No. 208 of 1998 in the court of Additional Civil Judge for permanent injunction restraining the officials and employees of Forest Department from interfering in her fishing right. She also claimed a sum of Rs. 45100/- as an alternative relief. In brief her case was that defendant-Irrigation Department had granted her lease on 29.04.1997 for a year but other defendants, employee of forest department were causing interference in carrying out her business. The plaintiff/ petitioner's suit was decreed by the Trial Court on 30.11.2002 only in respect of payment of a sum of Rs. 35100/- with 5% interest from 29.04.1997 till actual payment made. But the Trial Court refused to issue permanent injunction. The State-defendant feeling aggrieved by the said decree, preferred an appeal before the learned District Judge, which was registered as Civil Appeal No. 44 of 2003. In the appeal, the State-defendant moved an application under Order XLI Rule 27 CPC to bring some map and government order on the record after a gap of two years time when the appeal was pending the said application dated 14.09.2005 was filed by the respondent.

3. Learned District Judge by the impugned order dated 07.10.2005, in the interest of justice, allowed the application filed under Order XLI Rule 27 of CPC, of the State-defendant.

4. I have heard Sri Pankaj Agarwal, learned Counsel for the petitioner and Sri A.K. Yadav, learned Standing Counsel.

5. The learned Counsel for the petitioner Sri Agarwal has placed reliance on the judgment of Supreme Court in the case of K.R. Mohan Reddy v. M/s Net Work Inc. Rep. Tr. M.D. AIR 2008 SC 579 and AIR 1998 SC 2276, P.K. Ramchandran v. State of Kerala and another. Sri Agarwal further submits that the learned appellate court failed to consider that no reason has been assigned by the respondent as to why the document sought to be adduced, could not be adduced by them before the trial court despite due diligence, though the same was within their knowledge, which is a pre-requisite condition for moving the application under Order XLI Rule 27 CPC. He further urged even otherwise it is the duty of the court considering the application under Order XLI Rule 27 CPC to record reason satisfying the condition laid down for considering the application under the said provision. He further urged that the appellate court has not recorded any reason for allowing the application of the defendant-appellant. Lastly he submits that the application was moved after almost two years while the appeal was pending. No explanation has been mentioned for filing the application after two years.

6. Learned Standing Counsel submits that the defendant-appellant/State had moved the application only to bring on record a government order and a relevant map on the record as additional evidence. Thus there was no prejudice caused to the plaintiff/respondent and the appellate court has exercised its discretion in the interest of justice.

7. I have considered the rival submissions of the respective parties and perused the record.

8. The plaintiff's suit was decreed only in respect of payment of compensation. The trial court refused to issue permanent injunction. Feeling aggrieved by the judgment and decree of the trial court the State filed the appeal and after two years an application dated 14.09.2005 (annexure-2 to the writ petition). From the perusal of said document it is evident that no averment has been made in the application that with the best efforts such additional evidence could not have been adduced at the first instance. It is only mentioned in the application that it is necessary to bring on record those documents and the documents would clarify the position.

9. The scope of Order XLI Rule 27 CPC is is well settled in a catena of decisions of the Supreme Court and the High Courts. It is a trite law that Order XLI Rule 27 CPC is an exception to general rule that the appellate court should not travel outside the record of trial court and a parity cannot be allowed to fill the lacuna in its evidence.

10. In the present case the defendant/appellant wanted to file the public documents i.e. a government order and in its application for non-production of those documents in the trial court no valid reason has been mentioned. It is presumed that the government order of the department was in the knowledge of the officer concerned, but it was not filed before the trial court. In the application also no reason has been mentioned that why the papers were not filed earlier. A party cannot claim to file additional document as a matter of right. It has to comply the ingredients of the provisions of the law. The appellate court in a casual manner has allowed the application on the ground that taking the documents on the record is in the interest of justice without assigning any reason why additional document can be accepted at the appellate stage. It was obligatory on the appellate court to record the reasons why it was necessary to allow the application.

11. Recently this question fell for consideration before the Supreme Court in the case of Union of India v. Ibrahim Uddin and another, (2012) 8 SCC 148. The Supreme Court held that the appellate court has the power to allow a document to be produced but it must be limited to those cases where it reaches on the conclusion that such evidence is necessary for enabling it to pronounce judgment. The Court further held that this provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. Therefore, in absence of a satisfactory reason for non-production of the evidence in the trial court, the additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court, is not entitled to give further evidence. The Court further observed as under;

"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not

entitled, as of right, to the admission of such evidence. Thus, the provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the Rule itself.

49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the court. (Vide: Arjan Singh v. Kartar Singh, and Natha Singh v. Financial Commr., Taxation.)"

12. The Supreme Court has taken similar view in the cases of Mashyak Grihnirman Sahakari Sanstha Maryadit v. Usman Habib Dhuka and others, 2013(3) AWC 3137 (SC) and K.R. Mohan Reddy v. M/s Net Work Inc. Rep. Tr. M.D., AIR 2008 SC 579. Para-15 of the judgment in the case of K.R. Mohan Reddy (supra) reads as under;

"15. The High Court, in our opinion, failed to apply the provisions of Order 41 Rule 27 of CPC in its correct perspective. Clauses (a), (aa) and (b) of sub-rule (1) of Rule 27 of Order XLI refer to three different situations. Power of the appellate court to pass any order thereunder is limited. For exercising its jurisdiction thereunder, the appellate Court must arrive at a finding that one or the other conditions enumerated thereunder is satisfied. A good reason must also be shown as to why the evidence was not produced in the trial Court."

13. In the present case the finding of the appellate court is skeletal and without any reason. The recording of the reason is essential feature of dispensation of justice. The Supreme Court in the case of Assistant Commissioner Commercial Tax Department, Works Contract and Lessee v. Shukla and brothers1 has said a litigant is entitled to know the reason for grant or rejection of his prayer. The reasons are the soul of orders. In case a reason is not recorded, it may cause prejudice to the affected party and secondly it hamper the proper administration of justice. These principles have been extended by the Supreme Court to administrative and the executive actions also. These principles apply with equal force and in fact with greater degree of rescission to judicial pronouncement.

14. After careful consideration, I am of the view, that the appellate court has not considered the application moved by the defendants in proper perspective. The order of the appellate court, for the aforestated reasons, needs to be set aside. Accordingly, it is set aside. The matter is

remitted to the appellate court to consider the application of the defendants/State afresh in the light of the judgments mentioned hereinabove.

15. Thus, writ petition is allowed.

16. No order as to costs.

---

**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 01.10.2013**

**BEFORE**
**THE HON'BLE ANURAG KUMAR, J.**

Criminal Appeal No. 986 of 2010

**Sushil Sharma... Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Petitioner:**
Sri Piyush Kumar Mishra, Sri A.K. Tewari
Sri Jai Prakash Singh, Sri R.P. Mishra
Sri S.P. Singh Somvanshi, Sri Yashwant Singh

**Counsel for the Respondent:**
Govt. Advocate

**Cr.P.C.-Section 374(2), 389-Appeal against conviction-offence under section 376 IPC-on grounds of false implication, no corboration of statements of victim and delay in lodging FIR-held-such harm physical and psychological is much more harm than physical-where dignity of such minor girl involve-delay in lodging FIR no material-on day of accident victim was in school copy of attendance register-not proved by class teacher-not admissible-appeal no force-dismissed-conviction held-proper**

**Held: Para-16**
**From the evidence of prosecutrix P.W.2 it is quite clear that the accused-appellant committed sexual intercourse with her. The age of the victim is very material. She is a minor girl aged 12 years old. There is no reason to falsely implicate any person in such type of cases. The defence evidence in this regard that accused-appellant was falsely implicated due to enmity could not inspire much confidence.**

**Case Law discussed:**
2004(7) SCC 775; 1990(11)1 SCC 550; 1983(3) SCC 217.

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

1. This is an appeal preferred by the accused-appellant Sushil Sharma under Section 374(2) read with Section 389 of the Criminal Procedure Code against the judgment and order dated 27.3.2010 passed by Additional Sessions Judge, Room No. 4, District Pratapgarh in Sessions Trial No. 156 of 2008, arising out of case crime no. 128 of 2007 under Section 376 I.P.C., Police Station Mandhata, District Pratapgarh, convicting and sentencing the accused-appellant under Section 376 I.P.C. for seven years rigorous imprisonment and a fine of Rs.5,000/- and in default of payment of fine additional conviction of two months.

2. Prosecution version in nutshell is that on an application moved by the informant Smt. Suman Sharma under Section 156(3) Cr.P.C. on 5.5.2007 by Court order F.I.R. was registered against the accused-appellant Sushil Sharma under Section 376 I.P.C. on 25.5.2007 at Police Station Mandhata, District Pratapgarh with the allegation that on 12.3.2007 when informant went to her field for collecting peas at 11.00 a.m. accused-appellant Sushil Sharma went into the house of informant on pretext that whether there is whey in the house, he needs it, and committed sexual intercourse with her daughter Km. Roshni Sharma aged about 12-13 years, when her daughter tried to shout, he closed her

mouth. On her return from the field her daughter-victim narrated the whole story to her. Informant's husband was at Ahmadabad (Gujarat) in connection with his livelihood. The informant told her husband about the incident. Informant's husband advised her to give information at police station. Informant given a written information on 15.3.2007 at police station Mandhata. The F.I.R. was not registered and only assurance was given to her that an F.I.R. will be registered after enquiry but no action was taken then she called her husband and on 17.4.2007 after coming from Ahmadabad her husband along with informant went to police station Mandhata on 18.4.2007 for lodging of the FIR even then no action was taken, then an application was given to Deputy Superintendent of Police, Pratapgarh as Superintendent of Police was not at the station, even then no action was taken, then application under Section 156(3) Cr.P.C. was moved before the court concerned. After registration of F.I.R. statement of victim was recorded under Section 164 Cr.P.C. and victim was also examined by the doctor and as per medical report her age was about 12 years. After completion of investigation charge-sheet was submitted against the accused-appellant Sushil Sharma under Section 376/511 I.P.C. The case was committed by the Magistrate to the Court of Sessions and charge under Section 376 I.P.C. was framed against the accused-appellant.

3. Prosecution examined P.W.1 Suman Sharma-informant, who proved application under Section 156(3) Cr.P.C. as Ext. Ka-1 and application to Deputy Superintendent of Police as Ext. Ka-2, P.W. 2 Kumari Roshni Sharma victim, P.W. 3 Dr. R.S. Verma, who proved medical report Ext. Ka-4, P.W. 4 Dr. Shail Prabha Srivastava, who examined victim and proved report Ext-Ka-5 and Supplementary report Ext-Ka-6, P.W. 6 Constable Moharrir Gaya Prasad Patel, who proved F.I.R. and G.D. entry Ext. Ka-7 and Ka-8, P.W.7 S.I. Virendra Kumar Singh, Investigating Officer of the case, who proved site plan Ext. Ka-9, memo of taking victim into custody Ext-Ka-10, memo of giving custody of victim to informant as Ext. Ka-11 and charge-sheet Ext. Ka-12.

4. Accused-appellant was examined under Section 313 Cr.P.C. In the statement recorded under Section 313 Cr.P.C. accused-appellant denied the allegation and said that he was falsely implicated due to property dispute. At the time of incident victim was in school and in fact, no such incident took place. In defence accused-appellant examined D.W.1 Sri Har Prasad Tripathi, principal of the school where victim was studying, who proved copy of attendance register Ext. Kha-1, D.W. 2 Sri Harinath Singh, who is an witness of enmity between parties.

5. Hearing the arguments of both sides, learned trial court by his impugned judgment and order dated 27.3.2010 convicted the accused-appellant under Section 376 I.P.C. for seven years rigorous imprisonment and a fine of Rs.5,000/- and in default of payment of fine two months imprisonment.

6. Aggrieved by the said judgment present appeal has been filed by the accused-appellant, mainly, on the ground that applicant was convicted by the lower court without appreciating the evidence on record. There is a delay in lodging of the first information report. No such occurrence took place as victim was in school at the time of incident.

7. Heard Sri R.P. Mishra, learned counsel for accused-appellant as well as Sri S.P. Singh, learned Additional Government Advocate for the State and perused the lower court records.

8. In support of appeal learned counsel for accused-appellant submitted that prosecution version is highly improbable. Accused-appellant was falsely implicated due to enmity. There is a delay of two months in lodging of the first information report. Medical evidence did not support the prosecution version. At the time of incident victim was in school. There is single testimony of victim in support of prosecution case that too is not supported by medical evidence and the evidence of the prosecutrix-victim lacks confidence. Learned Sessions Judge without sufficient evidence wrongly held the accused-appellant guilty under Section 376 I.P.C.

9. Per-contra learned Additional Government Advocate submitted that prosecution fully proved its case beyond all reasonable doubts. He further submitted that a minor girl would not tornish or damage her own reputation or image merely because of a family dispute. The accused-appellant voluntarily alleged false implication that she had been raped. From the evidence of the victim who is a minor girl of 12 years old has no reason to falsely implicate the accused-appellant. Medical evidence is two and half months after the incident and is not of much value. The evidence of the victim alone is sufficient to prove prosecution case. Learned trial court after well discussion rightly held the accused-appellant guilty under Section 376 of the I.P.C.

10. As per prosecution case incident was of 12.3.2007 and admittedly the F.I.R. was registered on 22.5.2007, as such, there is a delay of about two months and ten days in lodging the F.I.R. The explanation given by the prosecution is clear by the application under Section 156(3) Cr.P.C. on the basis of which F.I.R. was registered against the accused-appellant. At the time of incident the father of the victim was at Ahmadabad (Gujarat) in connection with his employment and the victim and her mother alone were in the village. The informant informed her husband, who advised her to move an application at police station Mandhata, district Pratapgarh. The informant moved an application to the police station concerned but no action was taken and false assurance was given to her that firstly they will enquire into the matter and then they will lodge the F.I.R. Informant called her husband and on his arrival they again went to the police station and when no action was taken then they moved an application before Deputy Superintendent of Police, Pratapgarh which was proved as Ext. Ka-2. Even on that application when no action was taken then application under Section 156(3) Cr.P.C. was moved, thus, the explanation given by the prosecution is sufficient. In spite of delay in lodging the F.I.R., in a case of sexual assault delay is not of much value because the dignity of a female was involved in such type of cases.

11. The Hon'ble Apex Court in the case of Sri Narayan Saha and another Vs. State of Tripura [2004(7) Supreme Court Cases 775] in para-5 held as under:

"5.We wish to first deal with the plea relating to the delayed lodging of the F.I.R. As held in a large number of cases, mere delay in lodging the FIR is really of no consequence, if the reason is explained. In the instant case, the

evidence of P.W.3, the victim and that of her husband, P.W.4, clearly shows that there was initial reluctance to report the matter to the police by P.W.4. He, in fact, had taken his wife to task for the incident and had slapped her." Thus, the delay in lodging the F.I.R. was reasonably explained.

12. The next submission of learned counsel for accused-appellant is that there are major contradictions in the statement of victim. There is no corroboration of her evidence. Even the medical report did not support the prosecution version. As per statement of victim the accused-appellant committed sexual intercourse for 2-3 minutes and the hymen of the victim was found intact and as per evidence of P.W.4 Dr. Shail Prabha Srivastava, if there is sexual intercourse for 2-3 minutes, hymen must be torned. Victim in her statement never stated that accused-appellant committed sexual intercourse with her for 2-3 minutes. She only stated that accused-appellant was lying over her for 2-3 minutes, which does not mean that for 2-3 minutes accused-appellant has committed sexual intercourse with the victim. The law is very clear in this respect that in a case of rape prosecutrix complaining of having been a victim of the offence of rape is not an accomplice to the crime. There is no rule of law that her testimony cannot be acted without corroboration of any material particulars. She stands at higher pedestral then an injured witness in the later case there is injury on the physical form while in the former it is both physical as well as psychological and emotional.

13. In State of Maharashtra vs. Chandraprakash Kewalchand Jain [1990(11) 1 SCC 550] it was held that "A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

24. In 1996 SCC (Cri) 316, State of Punjab vs. Gurmit Singh, the Hon'ble

Apex Court made the following weighty observations in paras 8 & 21.

"8.....The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.... The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self- respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.... Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.....

21.....The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

14. In Vijay Vs. State of M.P. 2010 (3) SCC (Cri) 639decided recently, Hon'ble Apex Court referred to the above two decisions of this Court in Chandraprakash Kewalchand Jain and Gurmit Singh and also few other decisions and observed as follows :

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

15. Thus, the important thing that the Court has to bear in mind that what is lost by a victim held is this, the victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries.

16. From the evidence of prosecutrix P.W.2 it is quite clear that the accused-appellant committed sexual intercourse with her. The age of the victim is very material. She is a minor girl aged 12 years old. There is no reason to falsely implicate any person in such type of cases. The defence evidence in this regard that accused-appellant was falsely implicated due to enmity could not inspire much confidence.

17. The Hon'ble Apex Court in Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat [1983(3) SCC 217] in paragraph-10 held as under:

"10. Without the fear of making too wide a statements or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural Society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because-

(1) A girl or a woman in the tradition bound non- permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracized by the Society or being looked down by the Society including by her own family members, relatives, friends and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination

by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

18. The next contention of learned counsel for appellant is that the victim was in the school at the time of alleged incident as she was studying in class-7th in Tikari Babaganj Purva Madhyamik Vidyalaya. The principal of the said school, D.W.1 proved the attendance register and as per attendance register victim was present in the school on the date and time of the alleged occurrence and as such the said incident is not possible.

19. D.W.1, who proved the attendance register is the principal of the school and not the class teacher of the said school. From his evidence it is not clear that class teacher at the relevant time of the class Sri Sheetla Bux, who is alive and still working in the school and why he was not produced as witness to prove the attendance of the victim. As per evidence of D.W.1 he has given evidence only on the basis of entry in the attendance register and he has no personal knowledge of the presence of the victim on the said date and time. From the perusal of the photostat copy of the said attendance register it is clear that all entries were filled up simultaneously and the evidence of defence not clearly proves that the victim was not present at the place of incident and in fact she was in her school. The defence totally failed to prove that the victim was present in the school. The entries in the attendance register is not reliable and best witness who has personal knowledge of the presence of the victim in the school was not produced, thus, from the above discussion, I do not find any force in the said argument of the appellant counsel.

20. From the above discussion it is quite clear that the appeal lacks merit and is liable to be dismissed. It is accordingly dismissed.

21. Let lower courts record along with a copy of this judgment be send for compliance and necessary action.

---

**APPELLATE JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.10.2013**

**BEFORE**
**THE HON'BLE RITU RAJ AWASTHI, J.**

First Appeal From Order No. 1376 of 2010

**Union of India ...Appellant**
**Versus**
**Shiv Nath Singh & Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Brijesh Kumar Shukla

**Counsel for the Respondents:**
Sri R.B. Verma

**Motor Vehicle Act 1988-Section 163-A-Claim petition-accident took place on collusion between train and motor vehicle-accident Tribunal fastened liability of 40% upon railway-argument that railway is not motor vehicle-accident claim tribunal-no jurisdiction-held-misconceived-various reason disclosed-claim petition -held maintainable appeal dismissed.**

**Held: Para-19**

**In the present case, it was the specific case of the respondents-claimants, which has also not been disputed by the present appellant, that there were sufficient pleadings before the Tribunal that there was negligence on the part of driver of the motor vehicle as well as railway administration and the learned Tribunal has come to conclusion that there was negligence on the part of Railway Administration as well as driver of the motor vehicle and the train, as such, I am of the view that in view of the law laid down by the Apex Court in the case of Union of India Vs. Bhagwari Prasad and Others (supra) the claim petition filed by the claimants was fully maintainable.**

**Case Law discussed:**

(2012) 4 SCC 552; (2004) 5 SCC 385; 2002(2) T.A.C. 1 (S.C.); Claim Petition No. 44/2008.

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard Mr. Brijesh Kumar Shukla, learned counsel for appellant as well as Mr. R.B. Verma, learned counsel for respondent nos. 1 to 3 and perused the record.

2. No one has appeared on behalf of respondent no. 4-owner of the vehicle.

3. This first appeal from order has been filed under Section 173 of Motor Vehicles Act, 1988 (for short 'the Act') against the judgment and order dated 31.8.2010 passed by the Motor Accident Claims Tribunal in Claim Petition No. 44/2008 (Shiv Nath Singh & Others Vs. Ram Charan Singh and Others) whereby 40% liability to pay compensation of the awarded amount has been fastened on the appellant.

4. Learned counsel for appellant submitted that the alleged accident had taken place between a motor vehicle i.e. Jeep bearing Registration No. UP 50-B/6586 and a train carrying passenger. The deceased was a passenger in the motor vehicle who had died due to the said accident.

5. It is submitted that the claim petition filed under Section 163-A of the Act against the appellant-Indian Railways was not maintainable as Section 163-A of the Act clearly provides that the owner of the motor vehicle or the authorized insurer shall be liable to pay compensation, in case of death or permanent disability due to the accident arising out of 'the use of motor vehicle' to the legal heirs or victim as the case may be.

6. Submission is that the claim petition filed under Section 163-A of the Act which is meant for no fault liability relates to the use of motor vehicle only. The definition of motor vehicle has been provided under definition clause under Section 2 of the Act and it does not include railways.

7. It is submitted that the learned Tribunal has failed to consider the aforesaid legal issue while deciding the claim petition and has wrongly awarded the compensation in favour of the claimants and against the appellant.

8. In support of his submissions, Mr. Brijesh Kumar Shukla, learned counsel for appellant has relied on the judgment of the Apex Court in the case of Surender Kumar Arora & another Vs. Dr. Manoj Bisla & others; (2012) 4 SCC 552, particularly paragraph 10, wherein it has been observed as under:

"10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in Oriental Insurance Co. Ltd. Vs. Meena Variyal, 2007 ACJ 1284 (SC). In the said decision the Court stated (SCC pp. 445-46, para 27):

"....Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of

the Schedule without calling upon the victim or his dependents to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

9. He has also relied on the judgment of the Apex Court in the case of Deepal Girishbhai Soni and Others Vs. United India Insurance Company Ltd. Baroda; (2004) 5 SCC 385, particularly paragraph 57, wherein it has been observed as under:

"57. We, therefore, are of the opinion that the remedy for payment of compensation both under Sections 163-A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. One, thus, must opt/elect to go either for a proceeding under Section 163-A or under Section 166 of the Act, but not under both."

10. Learned counsel for appellant also submitted that there was no negligence on the part of the appellant as all precautionary measures were taken by the appellant. The alleged accident had taken place near village Piparidih, district Mau at railway crossing no. 6 at KM 79/6-7 on 12.10.2007 at 14:55 hours between Piparidh-Dulhpur Railway Station at an unmanned railway crossing.

11. It is submitted that the negligence was solely on the part of the driver of the motor vehicle and the appellant cannot be held liable to pay compensation, however, the Tribunal has wrongly held 40% liability on the present appellant to pay compensation which has been determined to the tune of Rs. 3,21,500/- along with 9% interest in case of default.

12. Learned counsel for respondents-claimants, on the other hand, submitted that the claim petition filed under Section 163-A of the Act was fully maintainable. It is submitted that in the case of claim petition filed under Section 163-A of the Act, the claimants are not required to plead or establish that the death or permanent disability in respect of which claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or any other person. It is also submitted that as held by the Apex Court in the case of Union of India Vs. Bhagwati Prasad and Others; 2002 (2) T.A.C. 1 (S.C.) the claim petition filed under Motor Vehicles Act involving accident by motor vehicle with railway train is fully maintainable. The claim petition against the Indian Railways was as such maintainable.

13. I have considered the submissions made by the parties' counsel and gone through the record.

14. The sole question for consideration before this Court is whether the claim petition filed under Section 163-A of the Act involving accident by a motor vehicle with a train wherein the deceased being passenger of motor vehicle was maintainable against the Railway Administration or not.

15. From perusal of the impugned judgment, it is evident that it was the case of the claimants that the alleged accident had taken place at an unmanned railway crossing between Piparidih-Dulhpur railway station on 12.10.2007 at 14:55 hours in which the deceased Lalsa Devi aged about 48 years had sustained injuries and died. It was specifically pleaded in the claim

petition that the said accident had taken place due to negligence on the part of the driver of motor vehicle as well as the employees of railway administration.

16. It has been held by the Apex Court in the case of Union of India Vs. Bhagwati Prasad and Others (supra) that once it is established that the accident had taken place involving a motor vehicle and a train the Motor Accident Claims Tribunal has the jurisdiction to entertain the claim petition. Even if at a later stage it is established that there is negligence of other joint tort-feasor and not negligence of motor vehicle in accident, the claim petition would be maintainable. If the claim has been filed due to sustained injuries or death in an accident arising out of the use of motor vehicle then the Tribunal will have the jurisdiction to entertain the application for claim not only against owner or insurer of vehicle but also against the Railway Administration. Relevant paragraphs 3 & 4 of the judgment on reproduction read as under:

"3. On account of the rapid development of road transport and increase in number of Motor Vehicles on the road the incidence of road accidents by Motor Vehicles having increased enormously the Motor Vehicles Act enacted by the Parliament was amended and the provisions were inserted for payment of compensation in certain cases of accidents without proof or fault or negligence on the part of the driver of the vehicle. The claim for compensation in respect of the accidents involving death or bodily injury to persons arising out of the use of Motor Vehicles as well as the insurance of the Motor Vehicles against the third party risk and the liability of the insurer are contained in Chapter VIII of the Motor Vehicles Act. The State Government has been empowered under Section 110(1) of the Act to constitute one or more Motor Vehicles Accidents Claim Tribunals by notification in the Official Gazette. Section 110-A provides for filing an application for compensation and Section 110-B is the power of the Claims Tribunal to pass an award on receiving an application for compensation made under sub-section (A) of Section 110. The procedure and powers of the Claims Tribunal are enumerated in Section 110-C of the Act. It is not necessary for adjudicating the point in issue to examine and notice any other provision of the Act. In the case of Union of India vs. United India Insurance Company (supra) applications for compensation had been filed either by the injured passengers or the dependent of the deceased passengers travelling in the ill-fated Motor Vehicle both against the insurer of the Motor Vehicle as well as against the Railway Administration and one of the contention which had been raised before this Court by the Railway Administration was whether a claim for compensation would at all be maintainable before the Tribunal against other persons or agencies which are held to be guilty of composite negligence or are joint tort-feasors, and if the same arose out of the use of the Motor Vehicle. On consideration of different provisions of the Motor Vehicles Act this Court ultimately came to hold that, "We hold that the claim for compensation is maintainable before the Tribunal against other persons or agencies which are held to be guilty of composite negligence or are joint tort-feasors, and if arising out of use of the motor vehicle. We hold that the Tribunal and the High Court were right in holding that an award could be passed against the Railways if its negligence in relation to the same accident was also proved." The Court also came to hold that the views expressed by Gauhati, Orissa, and Madras High Courts to the effect that no award can be passed against

others except the owner/driver or insurer of the motor vehicle are not correct, and on the other hand the view taken by the Allahabad, Punjab and Haryana, Gujarat, Kerala and Rajasthan High Courts to the effect that the claim lies before the Tribunal even against another joint tort-feasor connected with the same accident or against whom composite negligence is alleged. We are in respectful agreement with the aforesaid conclusion of the Court in the aforesaid case. Having said so it was further held that if it is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of other parties/agencies then on that finding the claim would go out of Section 110 of the Act because the case would become exclusive negligence of Railways and again if the accident had arisen only on account of the negligence of persons other than the driver/ owner of the motor vehicle the claim would not be maintainable before the Tribunal. It is this observation of the Court in the aforesaid case which is strongly relied upon by Mrs. Indira Sawhney , the learned counsel appearing for the Railway Administration and it is this observation with which the two learned Judges hearing the appeal did not prima facie agree with for which the reference has been made to this larger Bench. The question that arises for consideration, therefore, is whether an application filed before a Claims Tribunal for compensation in respect of accidents involving the death or bodily injury to persons arising out of the use of Motor Vehicle and the claim is made both against the insurer, owner and driver of the motor vehicle as well as the other joint tort-feasors, if a finding on hearing is reached that it is solely the negligence of the joint tort-feasor and not the driver of the Motor Vehicle then would the Tribunal loose the jurisdiction to award compensation against the joint tort-feasor. It is not disputed, and as has been already held by this court in the case of Union of India vs. United India Insurance Co. Ltd.(supra) that a claim for compensation on account of the accident arising out of the use of a Motor Vehicle could be filed before a Tribunal constituted under the Motor Vehicles Act not only against the owner or insurer of the Motor Vehicle but also against another joint tort-feasor connected with the accident or against whom composite negligence is alleged. A combined reading of Section 110, 110-A, which deal with the Constitution of one or more Motor Accidents Claims Tribunal and application for compensation arising out of an accident, as specified in sub-section (1) of Section 110 unequivocally indicates that Claims Tribunal would have the jurisdiction to entertain application for compensation both by the persons injured or legal representatives of the deceased when the accident arose out of the use of Motor Vehicle. The crucial expression conferring jurisdiction upon the Claims Tribunal constituted under the Motor Vehicles Act is the accident arising out of use of Motor Vehicle, and therefore, if there has been a collision between the Motor Vehicle and Railway train then all those persons injured or died could make application for compensation before the Claims Tribunal not only against the owner, driver or insurer of the Motor Vehicle but also against the Railway Administration. Once such an application is held to be maintainable and the Tribunal entertains such an application, if in course of enquiry the Tribunal comes to a finding that it is the other joint tort-feasor connected with the accident who was responsible and not the owner or driver of the Motor Vehicle then the Tribunal cannot be held to be denuded of its jurisdiction which it had initially. In other words, in such a case also the Motor Vehicle Claims Tribunal

would be entitled to award compensation against the other joint tort-feasor, and in the case in hand, it would be fully justified to award compensation against the Railway Administration if ultimately it is held that it was the sole negligence on the part of the Railway Administration. To denude the Tribunal of its jurisdiction on a finding that the driver of the Motor Vehicle was not negligent, would cause undue hardship to every claimant and we see no justification to interpret the provisions of the Act in that manner. The jurisdiction of the Tribunal to entertain application for compensation flows from the provisions contained in Section 110-A read with sub-section (1) of Section 110. Once the jurisdiction is invoked and is exercised the said jurisdiction cannot be divested of on any subsequent finding about the negligence of the tort-feasor concerned. It would be immaterial if the finding is arrived at that it is only other joint tort-feasor who was negligent in causing accident and not the driver of the Motor Vehicle. In our considered opinion the jurisdiction of the Tribunal to entertain application for claim of compensation in respect of an accident arising out of the use of Motor Vehicle depends essentially on the fact whether there had been any use of Motor Vehicle and once that is established the Tribunal's jurisdiction cannot be held to be ousted on a finding being arrived at at a later point of time that it is the negligence of the other joint tort-feasor and not the negligence of the Motor Vehicle in question. We are therefore, of the considered opinion that the conclusion of the Court in the case of Union of India vs. United India Insurance Co. Ltd. (supra) to the effect-

"It is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agenncies, then on that finding, the claim would go out of Section 110(1) of the Act because the case would then become one of the exclusive negligence of Railways. Again if the accident had arisen only on account of the negligence of persons other than the driver/owner of the motor vehicle, the claim would not be maintainable before the Tribunal" is not correct in law and to that extent the aforesaid decision must be held to have not been correctly decided.

4. In the aforesaid premises, we do not find any infirmity with the impugned judgment of the Division Bench of Allahabad High Court requiring interference of this Court. These appeals fail and are dismissed."

17. The provision of Section 163-A of the Act is a special provision as to payment of compensation on structured formula basis. In the claim petition filed under Section 163-A of the Act the claimant is not required to establish wrongful act or neglect or default of the owner of a vehicle or vehicles concerned or of any other person. It is meant for such cases where there is no sufficient evidence to establish the negligence on the part of the offending vehicle. The provision is meant for above such cases where the accident due to which permanent disability or death occurred is ascertained, however, there is no sufficient evidence to establish the wrongful act or neglect or default of the motor vehicle involved.

18. Bare reading of Section 163-A of the Act makes the above points very much clear. Section 163-A of the Act for convenience is reproduced below:

"163-A. Special provisions as to payment of compensation on structured

formula basis.-(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may.

Explanation.-For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the official Gazette, from time to time amend the Second Schedule."

19. In the present case, it was the specific case of the respondents-claimants, which has also not been disputed by the present appellant, that there were sufficient pleadings before the Tribunal that there was negligence on the part of driver of the motor vehicle as well as railway administration and the learned Tribunal has come to conclusion that there was negligence on the part of Railway Administration as well as driver of the motor vehicle and the train, as such, I am of the view that in view of the law laid down by the Apex Court in the case of Union of India Vs. Bhagwari Prasad and Others (supra) the claim petition filed by the claimants was fully maintainable.

20. So far as the judgments relied by learned counsel for appellants is concerned, they do not relate to the question involved in the present appeal, as such, they are of no help to the appellants.

21. The appeal as such having no force is dismissed.

22. The judgment dated 31.8.2010 passed by the Motor Accident Claims Tribunal in Claim Petition No. 44/2008 (Shiv Nath Singh & Others Vs. Ram Charan Singh and Others) is affirmed. The appellant shall comply the judgment of the learned Tribunal and pay the compensation as awarded by the learned Tribunal.

23. It is informed by learned counsel for appellant that the liability to pay compensation as fastened by the learned Tribunal on the present appellant was only to the tune of 40% of the awarded amount i.e. 3,21,500/-. The entire amount has been deposited before the Tribunal.

24. The amount so deposited shall be released in favour of the respondents-claimants.

25. The statutory amount deposited before this Court at the time of filing of the appeal shall be remitted back to the Tribunal forthwith for the aforesaid purpose.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 23.10.2013**

**BEFORE**
**THE HON'BLE SHRI NARAYAN SHUKLA, J.**

Writ Petition No.1516 (M/S) of 2006

**Smt. Sahnaz Parveen ...Petitioner**

**Versus**
**Addl. District Judge & Ors. ...Opp.Parties**

**Counsel for the Petitioner:**
Sri Surya Kant

**Counsel for the Respondents:**
C.S.C., Sri A.R. Khan, Sri Aasif Razzaque Khan, Sri Ravi Nath Tihari

**Constitution of India, Art.-226-read with order VI Rule 17 C.P.C.-Amendment in written statement-after framing issues-dated fixed for evidence-trail court rejected with finding the trail started-Revisional Court set-a-side the order with specific findings that after issues no evidence filed by either parties-hence-trail yet to commence-writ court declined to interfere.**

**Held: Para-11**
**In the light of the principles for amendment of the written statement as above when I considered the facts of the present case, I find that in the case at hand the issues have been framed and the date was fixed for production of evidence. Meanwhile, the respondent/defendant moved an application for amendment of written statement. The Hon'ble Supreme Court in the cases of Baldeo Singh (supra) and Major General Madan Lal Yadav (supra) has clearly held that the trial commences with an examination of the facts or law put in issue in a cause for the purpose of determination of such issue.**

**Case Law discussed:**
AIR 2004 Delhi 99; Civil Appeal No. 7251 of 2008; (2006) 6 SCC 498.

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr Surya Kant, learned counsel for the petitioner as well as Mr A.R. Khan, learned counsel for the respondents.

2. This writ petition is directed against the order dated 1.3.2006, passed by the Additional District Judge, Lucknow in Civil Revision No.374 of 2005. By means of order impugned the petitioner's revision filed against the order dated 6th July, 2005, passed by the Civil Judge ( Senior Division ) has been rejected with the direction to the trial court to dispose of the application for amendment A-30 as per direction issued by the revisional court.

3. The facts of the case, in brief, are that the petitioner filed a regular suit no. 573 of 2004 for declaration and mandatory injunction on 21/23.8.2004 in the court of Civil Judge ( Senior Division), Lucknow. The respondent-defendant filed written statement on 13.10.2004. Thereafter the petitioner-plaintiff filed replication on 29 th November,2004. Thereafter on 24 th January, 2005 after hearing the learned counsel for the parties the trial court framed five issues for determination and fixed the matter to lead the evidence by the parties on 28.2.2005.

4. On the next date fixed on 28.2.2005 the respondent no.1/ defendant no. 1 filed an application under Order 6 Rule 17 read with Section 151 C.P.C. for amendment of the written statement on the ground that inadvertently due to incidental slip he could not mention the facts of the proposed amendment in his written statement. The trial court by means of order dated 6.7.2003 rejected the application for amendment saving certain clerical amendments on the ground that the application for amendment was presented after commencement of trial. Further the respondent/ defendant no. 1 has failed to establish that he was diligent but could not raise these pleas before the commencement of trial due to inadvertent mistake. The trial court further observed that in the matter the issues have been framed and thus the trial has commenced. Aggrieved defendant challenged the order of the trial

court before the Court of the District Judge, Lucknow through Civil Revision No.374 of 2005.

5. Learned revisional court allowed the same on the ground that since the defendant had moved the application for amendment before the date fixed for evidence the same shall be treated as moved before commencement of trial court. He relied upon the decision of Delhi High Court rendered in the case of Mrs Suneel Sodhi and others Vs. M.L. Sodhi and others reported in AIR 2004 Delhi 99.

6. The petitioner/ plaintiff has challenged the said order before this Court by referring the definition of trial in certain dictionaries. The legal Glossary published by the Ministry of Law Government of India defines it as under;

" Trial" (1) A judicial examination in accordance with law, of a cause either civil or criminal of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it.

(2)These subjugation of a person or thing to test or examination.

Law Lexicon

(1) A judicial examination in accordance with law, of a cause either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it. ( S.407 (1) (C) (iii) Cr.P.C. (2) The subjugation of a person or thing to test or examination.

Chamber's Dictionary

Examination by a Court to determine a question of law or facts.

In support of his submission he also cited some decisions as under;

(1)Union of India and others Vs. Major General Madan Lal Yadav ( Retd.) 1996 Supreme Court 1340.

7. In this case Hon'ble the Supreme Court has considered the meaning of word " trial commenced". Relevant paragraphs are extracted below;

14.According to Ballentine's Law Dictionary ( 2nd ed.)' trial means:

" an examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a Court hears and determines any issue of fact or law for the purpose of determining the right of the parties, it may be considered a trial."

15.In Block's Law Dictionary ( sixth edition) Centennial Edition, the word " trial is defined thus:

" A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a Court that has jurisdiction... A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or facts before a court that has proper jurisdiction.

16.In Webster's Comprehensive Dictionary - International Edition at page 1339, the word" trial is defined thus:

... "The examination, before a Tribunal having assigned jurisdiction, of the facts or law involved in an issue in order to

determine that issue. A former method of determining guilt or innocence by subjecting accused to physical tests of endurance, as by ordeal or by combat with his accuser.... in the process of being tried or tested... made or performed in the course of trying or testing. "

17.The word' commence' is defined in Collins English Dictionary to mean," to start or begin ; come or cause to come into being, operation etc." In Black's Law dictionary, it is defined to mean:

" To initiate by performing the first act or step. To begin, institute or start. Civil Action in most jurisdiction commenced by filing a complaint with the court... Criminal action is commenced within statute of limitation at time' preliminary complaint or information is filed with Magistrate in good faith and a warrant issued thereon.... A criminal prosecution is" commenced".(1) when information is laid before Magistrate charging commission of crime, and a warrant of arrest is issued or (2) when grand jury has returned an indictment.

18.In the " Words and Phrases" ( Permanent Edition ) vol. 42 A at page 171, under the head" commencement" it is stated that" A "trial' commences at least from the time when work of empaneling of a jury begins."

19.It would, therefore, be clear that trial means act of proving or judicial examination determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with performance of the first or steps necessary or essential to proceed with trial.

8. Hon'ble Supreme Court in the case of Vidyabai and others Vs. Padmalatha and another decided on 12 th December, 2008 in Civil Appeal No. 7251 of 2008 has held that the trial is deemed to have commenced when the issues are settled and the case is set down for recording of the evidence . In the case of Baldev Singh and others Vs. Manohar Singh and another reported in (2006) 6 Supreme Court Cases 498 the Hon'ble Supreme Court has discussed the principles applicable to the amendment of the written statement. Relevant paragraph 17 is quoted below;

" Before we part with this order, we may also notice that proviso to Order 6 Rule 17 C.P.C. provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. A noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 C.P.C. which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings."

9. In the case of Mrs. Suneel Sodhi ( supra) the trial court on 22.7.2002 the trial court fixed the dates of trial from 22 nd to 25

th October, 2002 and parties were directed to take steps for filing evidence by way of affidavit etc. The High Court of Delhi expressed the opinion that it can safely be concluded that the actual trial commences from 22nd October 2002 to 25 th October, 2002. The present application ( application for amendment) was made on 8 th October, 2002 and hence would not fall within the prohibition of amended Order VI Rule 17 C.P.C.

10. Order VI Rule 17 reads as under:

"Amendment of pleadings: 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.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial."

11. In the light of the principles for amendment of the written statement as above when I considered the facts of the present case, I find that in the case at hand the issues have been framed and the date was fixed for production of evidence. Meanwhile, the respondent/defendant moved an application for amendment of written statement. The Hon'ble Supreme Court in the cases of Baldeo Singh (supra) and Major General Madan Lal Yadav (supra) has clearly held that the trial commences with an examination of the facts or law put in issue in a cause for the purpose of determination of such issue.

12. In the light of the aforesaid proposition laid down by Hon'ble the Supreme Court, I am of the considered opinion that in the case at hand the trial is yet to commence. Therefore, I do not find error in the order impugned, passed by the revisional court.

13. In the result, the writ petition is dismissed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 30.10.2013**

**BEFORE**
**THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.**

Service Single No. 1605 of 2010

**Surendra Singh Thakur ..Petitioner**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Petitioner:**
Sri Ravi Singh, Sri N.C. Upadhyaya

**Counsel for the Respondents:**
C.S.C.

**U.P. Police Officers of the Subordinate Ranks(Punishment & Appeal) Rules 1991-Rule8(2)(a) readwith 14(1)- Punishment dismissal on account of conviction by criminal court-appeal pending-conviction order suspended-enlarged on bail-punishment followed by show cause notice and reply-without charge sheet without finding regarding moral turpitude-allegations-on refusal of repair to cycle due to non payment of Rs. 100/--petitioner abused by addressing cost-and tried to beat by can-held penalty of dismissal for such petty attractions-wholly unwarranted-reinstatement with half back wages.-given.**

**Held: Para-26**

**The incident involving the petitioner which resulted in his conviction by the learned trial court, on the face of it, appears to have occurred on account of sudden anger which the petitioner might have been filled with on account of demand of Rs.100/- which he owed to the complainant for getting his bicycle repaired. The offence, though entails criminal liability and if proved, is punishable, is the result of some petty altercation which took place between the petitioner and the complainant. The conduct of the petitioner in criminal law, if established, may be unpardonable, however, imposing major penalty of dismissal from service, in my considered opinion, in the facts and circumstances of the case, is wholly unwarranted.**

**Case Law discussed:**

AIR 1985 SC 1416; (1985) 2 SCC 358

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Sri N.C. Upadhyay, learned counsel for the petitioner and learned Standing Counsel appearing for the State.

2. The facts of the case which are not in dispute are that the petitioner while posted as Constable in the year 1998 at 30th Bn. P.A.C., Gonda proceeded on sanctioned earned leave for a period of 30 days w.e.f. 28.4.1998. During the period of leave, arising out of an incident which occurred on 20.05.1998 involving the petitioner, an F.I.R. was lodged at Case Crime No. 141 of 1998, under Sections 323, 504, 506 I.P.C. and Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 against the petitioner at Police Station Kulhui, District Mahrajganj. The said case crime No.141 of 1998 resulted in petitioner being charge-sheeted for the aforesaid offences and ultimately the learned Special Judge/Additional District Judge (FTC), Court No.1, District Mahrajganj, vide judgment and order dated 20.03.2009 convicted the petitioner of six months' rigorous imprisonment with fine of Rs. 2,000/-, default whereof was to result in an additional three months' rigorous imprisonment.

3. The said conviction order dated 20.03.2009 is under challenge before this Court in Criminal Appeal No.1675 of 2009 wherein an order has been passed on 27.03.2009 whereby petitioner was ordered to be released on bail during pendency of appeal. In the said appeal, this Court further passed an order on 08.04.2009 providing therein that execution of sentence awarded to the petitioner by the trial court shall remain suspended till the disposal of appeal.

4. It is based on the aforesaid conviction order that the petitioner has been dismissed from service by the impugned order dated 27.01.2010, passed by the Commandant, 30th Bn. P.A.C., Gonda.

5. The impugned order mentions that departmental proceedings under Rule 14 (1) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991(hereinafter referred to 'Rules, 1991') were initiated against the petitioner and concluded by the Assistant Commandant/Presiding Officer, 30th Bn. P.A.C., Gonda who submitted his findings on 20.08.2009 whereby recommendation was made to dismiss the petitioner as provided under Para 481 of the Police Regulations.

6. The impugned order further states that after receiving the findings from the Assistant Commandant/Presiding Officer, a

show cause notice dated 17.11.2009 was issued proposing dismissal of the petitioner from service and again petitioner was served with show cause notice proposing the punishment along with findings of the Assistant Commandant/Presiding Officer dated 20.08.2009 on 18.11.2009. Petitioner in response to the aforesaid show cause notice and findings dated 20.08.2009, after seeking time on several occasions, submitted his written explanation dated 22.01.2010 in which he stated that his past service records of 23 years have all along been spot-less and unblemished and further that the incident involving him in criminal case was a result of an old enmity in the village and he is victim of the circumstances on account of conspiracy hatched against him by his Pattidar.

7. The impugned order further states that during the period of earned leave on 20.05.1998 at around 8.00 A.M. some altercation took place between the complainant-Ram Charan Prasad, S/o Adharey Harijan concerning repair of bicycle and further that petitioner, though, had been getting his bicycle repaired yet he did not pay the repair charges to the complainant and owed Rs.100/- to him. When, on account of unpaid Rs. 100/-, the complainant refused to repair the bicycle of the petitioner again, same was objected to by the petitioner by calling names. The impugned order also records that on objection by the complainant, he was beaten by cane by the petitioner and based on this incident an F.I.R. was registered against the petitioner under Sections 323, 504, 506 I.P.C. and 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 on 21.05.1998.

8. The plea of pendency of the criminal appeal and the interim order by which sentence awarded to petitioner by the learned trial court was suspended was also taken by the petitioner in his written submission, which too appears to have been considered in the impugned order. However, placing reliance on the Government Order dated 12.10.1979, the Commandant, 30th Bn. P.A.C., Gonda rejected the aforesaid claim based on pendency of appeal and suspension of the sentence by stating that it is very well permissible in law to conduct departmental proceedings without waiting for final result of the appeal filed against the order of conviction.

9. It is noticeable that impugned order categorically mentions that after the petitioner was convicted in the criminal case with six months' rigorous imprisonment coupled with a fine of Rs. 2,000/-,departmental proceedings under Section 14(1) of aforementioned Rules, 1991 were conducted and statement of the petitioner was also recorded and thereafter he was furnished with the copy of the findings along with show cause notice requiring him to give reply. The Commandant while passing the impugned order has stated that for conducting departmental proceedings, it is not necessary that conduct of the employee concerned complained against should relate to his duty; rather any misconduct by government employee outside his duty can also be subject matter of departmental proceedings. The impugned order further states that even during departmental proceedings, statement of the petitioner was recorded by the Presiding Officer and at that time petitioner did not make any request to get any witness examined. The impugned order, thus, states that the petitioner is dismissed under Rule 4(1)(a) (i) of Rules, 1991 as per the provisions contained in Para 481 of the Police Regulations.

10. From the aforementioned facts as culled from perusal of the impugned

order and pleadings on record, solitary issue which emanates for consideration by the Court is as to whether the instant case can be said to be a case of punishment of dismissal under Rule 8 (2) (a) of Rules, 1991 or is it punishment of dismissal referable to Rule 14(1) of the Rules, 1991.

11. Though, the departmental proceedings are said to have been instituted and conducted purportedly following the provisions of Rule 14 (1) of the Rules, 1991 but perusal of the record produced by the respondents to the Court reveals that no such departmental proceedings were conducted along the lines of the provisions contained under Rule 14(1) of the Rules, 1991. At this juncture, it is relevant to observe that the procedure for conducting departmental proceedings in cases referred to in Rule 5(1) of the Rules, 1991 against any subordinate police officer is required to be conducted in accordance with the procedure laid down in Appendix-I of the Rules, 1991. Rule 5(1) of the Rules, 1991 provides that the cases in which major punishments of dismissal or removal from service or reduction in rank including reduction to a lower scale or to a lower stage in a time scale is to be passed shall be dealt with in accordance with the procedure laid down in sub-rule (1) of Rule 14 of the Rules, 1991.

12. In the instant case, punishment of dismissal from service is referable to Rule 4 (a) (i) and as such, if it is a case of departmental proceedings, not covered by Rule 8(2)(a) of the Rules,1991, then procedure as prescribed in Appendix-I appended to Rule 14(1) of the Rules 1991 was required to be followed. Appendix-I appended to Rule 14(1) of the Rules, 1991 is being quoted below:-

Appendix I

PROCEDURE RELATING TO THE CONDUCT OF DEPARTMENTAL PROCEEDINGS AGAINST POLICE OFFICER

[See Rule 14(1)]

"Upon institution of a formal enquiry such police officer against whom the enquiry has been instituted shall be informed in writing of the grounds on which it is proposed to take action and shall be afforded an adequate opportunity of depending himself. The grounds on which it is proposed to take action shall be used in the form of a definite charge or charges as in form 1 appended to these Rules which shall be communicated to the charged police officer and which shall be so clear and precise as to give sufficient indication to the charged police officer of the facts and circumstances against him. He shall be required, within a reasonable time, to put in, in a written statement of his defence and to state whether he desires to be heard in person. If he so desires, or if the Inquiry Officer so directs an oral enquiry shall be held in respect of such of the allegation as are not admitted. At that enquiry such oral evidence will be recorded as the Inquiry Officer considers necessary. The charged police officer shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called as he may wish: provided that the Inquiry Officer may, for sufficient reasons to be recorded in writing, refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the ground thereof. The Inquiry Officer may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged police officer."

13. A perusal of the aforesaid provision contained in Appendix-I appended to the Rules, 1991 reveals that on institution of a formal enquiry, the delinquent subordinate police officer is required to be informed in writing the grounds on which action is proposed to be taken. It further provides that the grounds on which action is proposed to be taken shall be in the form of a definite charge or charges, meaning thereby, in case of departmental proceedings instituted or initiated under Rule 14(1) of the Rules, 1991, the delinquent subordinate police officer will be served with a charge sheet. The said provision further provides that charge so deduced in writing against the charged officer shall be so clear and precise as to give sufficient indication to the charged police officer of the facts and circumstances against him. The provision further provides that written statement of defence will be required to be submitted on behalf of the charged officer and further, evidence etc. is required to be recorded by the Inquiry Officer. The charged subordinate police officer is also entitled to cross-examine the witnesses and to give his own evidence. The proceedings so conducted are required to contain sufficient record of the evidence and statement of the findings and the grounds etc.

14. It does appear from perusal of the impugned order that the matter at hand was treated a case of departmental proceedings by the respondents against the petitioner referable to Rule 14(1) of the Rules, 1991, as such what was legally incumbent upon the respondents was that the petitioner ought to have been served with charge sheet as mandated in Appendix-I appended to the Rules, 1991. Admittedly, no charge sheet to the petitioner was ever served as per requirement of Appendix-I appended to Rule 14(1) inasmuch as petitioner was not served with any charge sheet wherein the charges against him, based on which action was proposed to be taken, were definite, clear or precise. What appears to have been done in the instant case is that after conviction order against the petitioner was passed by the learned trial court on 20.03.2009, departmental proceedings were said to have been instituted under Rule 14(1) of the Rules, 1991 and certain findings of the Presiding Officer along with show cause notice are also said to have been served upon the petitioner. The petitioner, however, was never served with any charge sheet, neither any opportunity to him was given to submit his written statement of defence as mandated by the provision contained in Appendix-I appended to Rule 14(1) of the Rules, 1991.

15. Thus, I have no hesitation to hold that before passing impugned order of dismissal from service, the procedure prescribed for imposition of major penalty of dismissal from service under Rule 5(1) read with Rule 14(1)) and the Appendix-I appended to Rules,1991 has not been followed by the respondents in this case. In such a situation, if it is assumed that it is a case referable to Rule 14(1) of the Rules, 1991 as is reflected from perusal of the impugned order, the impugned order is not liable to be sustained for want of adherence to the procedure prescribed for major penalties under the Appendix-I appended to the Rules, 1991, which makes the impugned order completely vitiated.

16. Coming to the issue as to whether the impugned order of dismissal can be saved looking to the provisions contained in Rule 8 (2) )(a) of the Rules,1991 which provides that where the subordinate police

officer is inflicted with either of the major penalty or dismissal or removal or reduction in rank on the ground of his conduct which has led to his conviction on a criminal charge, the Court may observe that in such cases what needs to be examined while judicially scrutinizing such dismissal order is as to whether the penalty imposed is arbitrary or grossly excessive being out of proportion to the offence committed or whether the penalty is not called for under the facts and circumstances of the case.

17. In a case where punishment order is passed under Rule 8 (2)(a) of the Rules, 1991, departmental proceedings as contemplated by the Rules, 1991 are not required to be instituted or conducted. In other words, if a person is dismissed on the ground of his misconduct leading to his conviction on a criminal charge, no departmental enquiry needs to be conducted.

18. It is to be noticed, however, that in the instant case the departmental proceedings were conducted though, as observed above, these proceedings were not in consonance with the requirement of Appendix-I appended to the Rules, 1991.

19. Rule 8(2) (a) of the Rules, 1991 appears to be in pari- materia with the provision contained in Article 311 (2) (a) of the Constitution of India which provides that in case a government employee is dismissed or removed or reduced in rank on the ground of his conduct which has led to his conviction on a criminal charge, departmental proceedings were not required to be conducted.

20. In the instant case, if it is assumed that it is a case of punishment under Rule 8 (2) (a) of the Rules, 1991, what needs to be considered by the Court is as to whether conduct of the petitioner leading to his conviction in the criminal case was such which warrants imposition of penalty of dismissal from service.

21. In the leading case pertaining to the aforesaid issue, Hon'ble Apex Court in the case of Union of India and another Vs. Tulsiram Patel, reported in AIR 1985 Supreme Court 1416 has observed that where it comes to notice of the disciplinary authority that government servant has been convicted on a criminal charge, the disciplinary authority must consider whether his conduct which has led to his conviction was such as it warrants imposition of the penalty and, if so, what penalty should be imposed. The relevant observation made by the Hon'ble Apex Court in the case of Union of India and another Vs. Tulsiram Patel (Supra) in para 127 is quoted below:-

"127. Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case (AIR 1975 SC 2216). This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself

and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass v. Union of India and another, [1985] 2 S.C.C. 358,: (AIR1985 SC 772) this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the Court should always order reinstatement. The Court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

22. It is well settled that conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the government employee concerned. What needs to be considered by the disciplinary authority, if he proceeds to impose penalty under Article 311 (2) (a) of the Constitution of India or under Rule 8(2) (a) of the Rules, 1991, is as to whether the conduct leading to conviction of the government servant in a criminal case is such which will justify the penalty, major or minor, to be imposed on the government employee concerned. Further, in order to arrive at such a decision, the disciplinary authority/appointing authority is required to consider the decision of the criminal court as well as other facts and circumstances of the case which led to his conviction. It may also be observed that while arriving at the decision of imposition of either of the major penalties, in such case, the disciplinary authority/appointing authority should keep in mind the settled legal proposition that conviction in every offence does not justify imposition of penalty. Disciplinary Authority should also bear in mind that the punishment imposed should not be excessive, that is to say, it must be commensurate with the gravity of the conduct which led to the conviction of the government servant on criminal charge.

23. It is settled that it is not the conviction itself which should be the basis of any of the major penalty under Rule 8(2)(a) of the Rules, 1991, rather it is the nature of conduct leading to conviction in a criminal case on which decision of the appointing/disciplinary authority should be based. To put it differently, every conviction will not result in imposition of a major penalty under Rule 8(2)(a) of the Rules, 1991; rather it is the nature of conduct leading to conviction in the criminal case

which will be the determining factor for taking a decision either to impose any of the major penalties or any lessor penalty.

24. In the instant case, if the impugned order is tested on the aforesaid legal principal, the Court comes to the definite conclusion that imposition of major penalty of dismissal imposed upon the petitioner was not warranted. The incident which led to petitioner's conviction in the criminal case appears to have arisen on account of a trivial dispute of alleged non-payment of Rs. 100/- which, according to the prosecution, the petitioner owed to the complainant as repair charges for getting his bicycle repaired.

25. Hon'ble Apex Court in the Case of Shankar Dass Vs. Union of India, reported in [1985] 2 SCC 358 has observed that appointing authority cannot be permitted to dismiss the government employee under Clause (a) of the second proviso appended to Article 311 (2) of the Constitution of India in a huff. It specifically lays down that dismissal order can be passed only on the ground of conduct which has led to conviction of the employee concerned on a criminal charge. However, putting a word of caution, Hon'ble Apex Court in the aforementioned case of Shankar Dass Vs. Union of India (Supra) further observed that power of dismissal in such cases, like every other power, has to be exercised fairly, justly and reasonably. The relevant portion of the judgement of Hon'ble Apex Court in the case of Shankar Dass Vs. Union of India (Supra), which is embodied in para-7 of the report, is extracted hereinbelow:-

"7. It is to be lamented that despite these observations of the learned Magistrate, the Government chose to dismiss the appellant in a huff, without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service career was concerned. Clause (a) of the second proviso to Article 311 (2) of the Constitution confers on the Government the power to dismiss a person from service "on the ground of conduct which has led to his conviction on a criminal charge". But, that power, like every other power, has to be exercised fairly, justly and reasonably. Surely the Constitution does not contemplate that a Government servant who is convicted for parking his scooter in a non- parking area should be dismissed from service. He may, perhaps, not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical."

26. The incident involving the petitioner which resulted in his conviction by the learned trial court, on the face of it, appears to have occurred on account of sudden anger which the petitioner might have been filled with on account of demand of Rs.100/- which he owed to the complainant for getting his bicycle repaired. The offence, though entails criminal liability and if proved, is punishable, is the result of some petty altercation which took place between the petitioner and the complainant. The conduct of the petitioner in criminal law, if established, may be unpardonable, however, imposing major penalty of dismissal from service, in my considered opinion, in the facts and circumstances of the case, is wholly unwarranted.

27. For the reasons given above, the impugned order dated 27.01.2010, passed by the Commandant, 30th Bn. P.A.C., Gonda deserves to be quashed

28. Accordingly, writ petition is allowed and the impugned order of dismissal dated 27.01.2010, passed by the Commandant, 30th Bn. P.A.C., Gonda as contained in Annexure No.1 to the writ petition is hereby quashed with a further direction to the respondents to reinstate the petitioner in service forthwith, say within a period of six weeks from the date certified copy of this judgement is served up on the competent authority.

29. Regarding the back wages to be paid to the petitioner from the date of order of dismissal i.e. w.e.f. 27.01.2010 till his reinstatement, the Court feels that interest of justice would be served if the petitioner is paid half of the total amount which would have accrued to him had he continued in service during this period. The said wages to the petitioner shall be paid within a period of three months from the date of production of a certified copy of this judgment.

30. There will be no order as to cost.

---

**APPELLATE JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 12.11.2013**

**BEFORE**
**THE HON'BLE ARVIND KUMAR TRIPATHI(II),J.**

Criminal Appeal (D) No. 2024 of 2011

**Jawahar ...Appellant**
**Versus**
**State of U.P. ...Respondent**

**Counsel for the Petitioner:**
Sri M.P. Yadav, Sri Brijesh Yadav 'Vijay'
Sri Satish Kumar Srivastava
**Counsel for the Respondents:**
G.A.

**Criminal Appeal-against conviction under section 498-A 304-B, 506 IPC read with 3/4 D.P. Act-in dying declaration nothing whisper about demand of dowry-even in FIR no such allegation found-demand of money for consuming liquor-on denial pouring kerosin oil and put fire on body of deceased-offence under section 302 mad out-according by conviction set-a-side-with direction to frame additional charges under section 302 IPC-conclude trail within 6 months-appeal allowed.**

**Held: Para-10 & 11**

**10. A perusal of dying declaration, which has been proved by PW-6 clearly reveals that it is a case in which death occurred due to simple reason of some dispute between husband and wife, and husband poured kerosene oil and set her on fire and prosecution has implicated four more persons under Sections 498-A, 304-B, 506 IPC and Section ¾ of the Dowry Prohibition while the FIR and dying declaration does not support the theory of demand of dowry and cruelty for payment of dowry.**

**11. It is a case in which trial court should have framed an additional charge of Section 302 IPC against Jawahar, but the trial court has failed to do so even after dying declaration of the deceased. Since Section 302 IPC is graver offence than Section 304-B IPC, hence conviction of accused Jawahar under Section 304-B IPC cannot be converted in convicted of Section 302 IPC without framing charge under Section 302 IPC.**

**Case Law discussed:**
Crl. M.P. No. 23051 of 2010

(Delivered by Hon'ble Arvind Kumar Tripathi (II), J.)

1. Instant criminal appeal has been filed by the appellant Jawahar challenging the order dated 25.7.2011 passed by the Additional Sessions Judge/Special Judge, E.C. Act, Court No.9, Sultanpur in Sessions Trial No.7 of 2007 (Crime No.1001 of 2006, under Sections 498-A, 304-B, 506 IPC and Section 3/4 of the Dowry Prohibition Act, Police Station Gosainganj, District

Sultanpur) by which the appellant was convicted under Sections 498-A, 304-B IPC and Section 4 of the Dowry Prohibition Act, and was directed to undergo 3 years RI and fine of Rs.500/-, 10 years RI and six months RI and fine of Rs.500/- respectively. In default of payment of fine, two months further imprisonment.

2. The facts, in short, are that Videshi brother of the deceased moved an application before the Superintendent of Police, Sultanpur that his sister Kewla Devi was married with Jawahar son of Bihari, resident of village Sonvatara, police station Gosainganj, District Sultanpur, who is addicted to alcohol. His elder brother Hira Lal is also addicted to alcohol and Kewla Devi, when forbade them from consuming alcohol, was beaten by those persons. On 31.8.2005 at about 8 A.M. he received information that Kewla Devi has been burnt, then he along with other relatives went to the matrimonial house of Kewla Devi and saw her in badly burnt condition. She told him that on 30.8.2005 at about 4/5 P.M. Hira Lal and Jawahar had demanded money for consumption of alcohol, when she resisted Hira Lal exhorted Jawahar to kill her, as she is a spoil sport. On this Jawahar poured kerosene oil upon Kewla Devi. When she tried to run away Hira Lal caught hold of her and Jawahar lit fire in her clothes due to which she started burning. On alarm being raised, the villagers tried to save her, then Ram Lal and Moti Lal threatened them that, whoever will come to rescue, will be killed. Kewla was admitted in hospital, and is in precarious condition. The Magistrate has recorded her statement. On this application, the Superintendent of Police directed the Station Officer, Police Station Gosainganj, Sultanpur to lodge FIR. On his direction, case crime no.1001 of 2006, under Section Sections 498-A, 307, 506 IPC, was registered at police station Gosainganj against Jawahar, Hira Lal, Ram Lal and Moti Lal. During investigation Kewla Devi died on 17.9.2006, so inquest report was prepared and dead body was sent for post mortem, and case was converted under Sections 498-A, 304-B, 506 IPC and Section ¾ of the Dowry Prohibition. After investigation charge sheet was submitted. Case was committed and charge was framed against all the accused persons. The accused persons pleaded innocence and claimed to be tired. The prosecution examined Videshi as PW-1, Ramkesh as PW-2, Mangaroo as PW-3, Dr. C.B.N. Singh Tripathi as PW-4, Dr. K.V. Singh as PW-5, Rajendra Chandra, Naib Tehsildar as PW-6, Martand Prakash Singh, Circle Officer as PW-7, Dwarika Prasad Yadav, C.P. No.916 as PW-8, and Tulsiram, C.P. 51 as PW-9. The statement of the accused person was recorded under Section 313 Cr.P.C. Marriage was admitted, but all other facts were denied.

3. The court below has, after going through the evidence on record, convicted the accused Jawahar Sections 498-A, 304-B, 506 IPC and Section ¾ of the Dowry Prohibition Act and Section 4 of the Dowry Prohibition Act and acquitted Ram Lal, Hira Lal and, Moti Lal from all the charged offences. Feeling aggrieved, this appeal has been filed by Jawahar.

4. Learned counsel for the appellant argued that no case is made out, as in the FIR there is no mention of demand of dowry. The demand of Rs.10,000/- is not in connection with the marriage, so the ingredients of the evidence are not proved, and conviction under Sections 498-A, 304-B, 506 IPC is not justified. It was further argued that there is no evidence that the deceased was tortured or was subjected to cruelty soon before her death.

5. Learned AGA argued that as demand of dowry, and killing of wife for non-fulfillment of demand of dowry is heinous offence and a crime against the woman and children, hence conviction awarded by the trial court is justified and no interference is warranted.

6. A perusal of FIR dated 13.9.2006, which is Ex.Ka.1, reveals that no date of marriage has been mentioned. Simply, it has been stated that Jawahar is addicted to alcohol, and his brother Hira Lal persuaded him to drink alcohol and Kewla Devi always tried that Jawahar leave the habit, but they used to assault Kewla Devi. It has been mentioned that after Kewla Devi was burnt, he was informed by Kewla Devi herself that on that day Hira Lal and Jawahar had come to demand money for taking alcohol and when she refused Jawahar poured kerosene oil on her. Hira Lal caught hold of her and Jawahar put her to fire. A perusal of FIR clearly reveals that not a single word of demand of dowry has been mentioned.

7. There is dying declaration of the deceased also, which was recorded by Rajendra Chandra, Naib Tehsildar PW-6. This dying declaration is on record, and has been marked as Ex.Ka.21. There is categorical statement of Kewla Devi - the deceased, in it, which is as follows: -

"मैं केवला देवी, पत्नी जवाहिर उम्र लगभग 25 वर्ष निवासी ग्राम सोनूतारा, थाना गोसाईगंज, जिला सुलतानपुर बयान करती हूँ कि दिनांक 30–8–2006 को दिन में लगभग 3 बजे मेरे पति श्री जवाहिर, सुत बिहारी से घर में विवाद होने पर उन्होंने मेरे ऊपर मिट्टी का तेल डालकर आग लगा दिया जिससे मैं बुरी तरह से जल गयी।"

8. This also goes to show that even in her dying declaration nothing has been mentioned about the demand of dowry and torture or harassment for non-fulfillment of demand of dowry. Videshi PW-1, when appeared before the court for evidence, he developed the story, and has stated that whenever his sister came to her parental house, she used to tell them that the accused persons are demanding Rs.10,000/- as dowry. When controverted from the facts, mentioned in the FIR, he has stated that whatever has been mentioned in the FIR is correct. He has further stated that the fact, which he has narrated in the statement that the accused persons harassed her for bringing Rs.10,000/- from her parental house, is also correct. He has further stated that he is unable to tell that whether demand of Rs.10,000/- has been mentioned in the FIR or not.

9. One more thing is very important. It has no where been stated when the marriage ceremony was performed. It has simply been stated by Videshi PW-1 that Gauna ceremony was performed six years prior to the incident. PW-2 is also the brother of the deceased, and he has also stated same thing, but he has not stated the date of marriage. PW-3 is the father of the deceased, but he has also not stated that when and in which year or how much prior to the incident, marriage of Kewla Devi took place. He has simply stated that Gauna was performed about six years earlier.

10. A perusal of dying declaration, which has been proved by PW-6 clearly reveals that it is a case in which death occurred due to simple reason of some dispute between husband and wife, and husband poured kerosene oil and set her on fire and prosecution has implicated four more persons under Sections 498-A, 304-B, 506 IPC and Section ¾ of the Dowry

Prohibition while the FIR and dying declaration does not support the theory of demand of dowry and cruelty for payment of dowry.

11. It is a case in which trial court should have framed an additional charge of Section 302 IPC against Jawahar, but the trial court has failed to do so even after dying declaration of the deceased. Since Section 302 IPC is graver offence than Section 304-B IPC, hence conviction of accused Jawahar under Section 304-B IPC cannot be converted in convicted of Section 302 IPC without framing charge under Section 302 IPC.

12. The Apex Court in Rajbir @ Raju v. State of Haryana, Crl.M.P. No.23051 of 2010 dated 22.11.2010 has directed the trial courts in India to ordinarily add Section 302 to the charge of Section 304-B, but the trial court has not complied with the directions of the Apex Court The decision of the Apex Court is most appropriate for the instant case in the prevailing circumstances, as there is an evidence under Section 32 of the Indian Evidence Act, in form of dying declaration, which, at present does not reveals demand of dowry and harassment or cruelty due to non-fulfillment of demand of dowry.

13. In view of the above, I deem it fit to quash the judgment and conviction of Jawahar, and remand the matter with the direction to the trial court to frame additional charge of Section 302 IPC, and proceed with the trial in accordance with law within a specific period.

14. In view of the above, without making any comments on the offence under Sections 304-B and 498-A IPC, and without any comments on their conviction and without commenting on the judgment and conviction under Section 4 of the Dowry Prohibition Act, the judgment is liable to be quashed and the sentence of the appellant Jawahar is liable to be set aside, and the appeal is liable to be allowed.

15. In the result, the criminal appeal is allowed. The conviction and sentence of the appellant Jawahar is quashed. The matter is remanded back to the trial court to frame additional charge under Section 302 IPC, and to proceed with the trial in accordance with law. The trial court is directed to decide the sessions trial expeditiously, preferably within a period of six months from the date of communication of this order. It is also directed that the trial court shall not be prejudiced by any observations made in this judgment.

16. The Registrar, High Court Lucknow Bench is directed to communicate the order immediately to the Sessions Judge of the trial court. Record be also transmitted along with communication so that trial may start earlier.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.10.2013**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No.3283 of 2012

**Bindhyachal Kumar Singh ...Petitioner**
**Versus**
**Union of India & Ors. ....Respondents**

**Counsel for the Petitioner:**
Sri Sanjay Kumar

**Counsel for the Respondents:**

A.S.G.I., Sri K.J. Shukla, Sri R.B. Singhal Sri K.J. Khare.

**Constitution of India, Art.-14&16-Service Law-Cancellation of candidature-on ground of failure to give option in column 17 of the application form-no rule-regulation or G.O. produced in support of cancellation-held-once petitioner obtained 46 marks and other with lesser marks send for training-petitioner can not be denied by treating automatic preference in order of ABCD-but can not cancel the candidature-if found selected and any candidate with lesser mark already got selection-the appointment shall relate back to the date of appointment of last candidate-approach of authorities-patently arbitrary held violation of Art. 14 and 16(1) of constitution.**

**Held: Para-22**
**Despite repeated query, respondents could not tell as to why the candidates like petitioners, who did not fill in column no. 17 of the application form, with respect to preference, ought not have been considered for the main select list by treating all those applications to have given preference in order of the codes, i.e., A, B, C, D or 1, 2, 3, 4, as the case may be, which they have applied admittedly, by considering these candidates, while preparing reserve list, for the reason that this fault on the part of candidates like petitioner has not been treated fatal, so as to result in rejection of candidature or the application form, but treating this fault to be a mere irregularity, a default deemed option clause has been applied by respondents, but confined only for reserve list and not the select list. The approach of respondents, therefore, is patently arbitrary and violative of Articles 14 and 16 (1) of the Constitution of India.**

**Case Law discussed:**
1978(1979) 1 SCC 380; AIR 1967 SC 1889; 1974(1) SCC 19;AIR 2010 SC 1001.

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

1. Heard Sri Sanjay Kumar, learned counsel for petitioner, and Sri K.J. Shukla, learned counsel appearing of respondent-Union of India.

2. Petitioner, Bindhayachal Kumar Singh, has competed in the selection/ recruitment to the post of Constable (G.D.) in various Para-Military Forces (termed by respondents as "Central Police Organizations, i.e. "CPO"), like, Border Security Force (in short "BSF"), Central Industrial Security Force (in short "CISF"), Central Reserve Police Force (in short "CRPF") and Sashastra Sima Bal (in short "SSB") conducted by Staff Selection Commission (hereinafter referred to as "SSC"). He claims to have secured 46 marks in final merit list declared on 2.12.2011, but has not been sent for training though it is alleged by him that certain candidates, who had secured lesser marks, i.e., 38, 39, 41, 42 and 45, have been shown selected and sent for training and that is how he has been discriminated. Accordingly, he has sought a writ of mandamus commanding respondents 1 to 4 to send him for training and appoint on the post of Constable (G.D.), in any of the aforesaid Forces, for which a combined recruitment was held.

3. Facts, in brief, giving rise to the present dispute, are as under.

4. SSC published an advertisement on 5.2.2011, inviting applications for recruitment and appointment on the post of Constable (G.D.) in CPOs, referred to above. The examination centres spread across the Country. The total number of vacancies, notified, was 49080. The candidates were required to submit applications to the concerned Regional Office of SSC under whose jurisdiction the centre of examination, selected by him/her, falls. Candidates were supposed to make a single application and

multiple applications were liable to be rejected, outright, without any notice to the candidate. The vacancies available were State-wise and as per the domiciliation of candidate concerned, in the respective State. The candidates who domiciled in naxal and militancy affected areas were provided separate reservation. The details of vacancies was given in para 2 of the instructions which provided State-wise break up of vacancies in all the four CPOs, with further fragmentation of vacancies under reserved categories and unreserved. The allotment of respective organization to the candidates selected from each State depended on "merit-cum-option" as well as availability of vacancy in each CPO, earmarked for the State.

5. The candidates were required to indicate preference of CPOs and it was also provided that option once exercised will be final and no change will be allowed under any circumstances. SSC gave code to the above CPOs, as under:

| Code | Organization |
|---|---|
| (i)A | BSF |
| (ii) B | CISF |
| (iii) C | CRPF |
| (iv) D | SSB |

6. The final result was processed by SSC in consultation with Ministry of Home Affairs and as per the guidelines communicated by the Ministry, which read as under:

"(i) Select list has been prepared as per state-wise vacancies with further reservation for candidates of Border Districts/ Naxal or Militancy affected districts within the state. Vacancies in Border/ Naxal or Militancy affected districts remaining unfilled in a state have been filled with the surplus candidates available in the respective state. Candidates belonging to Border/Naxal or Militancy affected districts have been considered against vacancies in such areas or in the State concerned as may be advantageous to them. However, it has been ensured that only candidates from a State/UT are considered against vacancies in such State/UT, for inclusion in the Select List. Allocation to various CAPFs has been done as per merit cum option of the candidates, subject to availability of vacancies in State/UT concerned and category-wise reservation.

(ii) MHA has advised that unfilled vacancies in Jammu & Kashmir, North Eastern States (Assam, Arunachal Pradesh, Manipur, Mizoram, Meghalaya, Nagaland, Sikkim, Tripura), Naxal and Militancy affected states (Andhra Pradesh, Bihar, Orissa, Jharkhand, Chhattisgarh, Madhya Pradesh, Maharashtra, Uttar Pradesh, West Bengal) should not be filled with candidates from surplus States/UTs. Therefore, such vacancies were not taken into consideration after preparation of the Select List while allotting surplus candidates against vacancies in deficit States/ UTs. Surplus candidates securing marks above the highest cut off marks fixed in the written examination for their respective categories were considered for allocation against the unfilled vacancies other than in the State mentioned above, for inclusion in the Reserve List.

(iii) In order to ensure that candidates selected in the reserve list are not allocated to a better preference as compared to the candidates with higher merit order in the select list, such candidates who are getting better preference while being considered against vacancies meant for other States are included in reserve list.

(iv) Some candidates did not get allocated in the select list due to blank/ invalid option. These candidates were also considered for allocation in the reserve list after substituting their preference as ABCD i.e. orders of preference in the Notice."

7. The final result declared 44152 candidates successful, which included 6460 in the reserve list, for appointment to the post of Constable (G.D.) in the above CPOs.

8. Petitioner, admittedly, is an unreserved category candidate with Roll No. 3206023174. He applied for the post allotted in militancy/naxal affected Districts of Bihar. Though the petitioner claims to have filled in column pertaining to option, but the case set up by respondents is that the said column was left blank and petitioner did not give preferences to the organizations, though he ought to have done so. It is in these circumstances, he was considered to be placed only in reserve list, but since marks secured by him were less than the last candidate selected and placed in reserved list, petitioner, in the ultimate result, has not been selected.

9. The case set up by respondents is that since petitioner did not mention his option for the respective services and left the column meant for that purpose, blank, his merit could not be compared with those candidates who had filled in the column pertaining to option and who were considered for different services on the basis of the merit-cum-preference which was the criteria to be adopted by SSC, as per the instructions contained in the advertisement.

10. Though petitioner has seriously disputed the fact about filling of column no. 17 of the application form and insisted that he had filled in the preference of posts for CPOs, but could not produce any evidence in support of his claim. On the contrary, respondents, along with counter affidavit, have filed a photocopy of petitioner's application form as Annexure-3 and a bare perusal thereof makes it clear that column no. 17 thereof is blank. The respondents, therefore, are right in stating that petitioner did not fill in column no. 17 in the application form and left the column, pertaining to preference of posts for CPOs, blank. It is in these circumstances, this Court has to examine whether non selection of petitioner in the case in hand is justified or not.

11. Respondents' case is that the candidates, who did not fill in the preference column, they could not have been considered in the selection, based on merit-cut-option. The mere fact that the persons securing marks lesser than petitioner have been selected, therefore, would make no difference inasmuch they are the candidates who have exercised their option which the petitioner has failed. They are differently placed. It is, however, admitted that the forms having column no. 17 blank or invalidly filled in, have not been rejected outright. On the other hand, therein the respondents have substituted a suo moto/automatic preference in order of A, B, C, D, as per the codes prescribed for respective CPOs, and thereby, those candidates have been considered only for the purpose of allocation in reserve list and not in the select list.

12. The first issue need be considered by this Court is, whether this process adopted by respondents can be said to be per se arbitrary, or, in the facts and circumstances, is just and reasonable and warrants no interference.

13. There is no condition or instruction published by respondents that, any column in the application form, if left blank or not correctly filled in, that by itself shall be a sufficient error, illegality, or mistake, sufficient enough with the consequence of rejection of application form. The two conditions which empower SSC to reject applications form mentioned, are; (1) where more than one application are submitted; and, (2) if the eligibility conditions disclosed by the candidate are found incorrect. If candidate is not found eligible, his candidature is liable to be cancelled by SSC.

14. Leaving column no. 17 or any other column which is not concerned with the eligibility etc. may result suo motu in rejection of the candidature is neither prescribed in the instructions or conditions informed to the candidates, nor, it is the case of respondents hereat. What they claim is that the preference column, if not filled in by the candidate, would not enable him to be considered in merit, either with a deemed preference, applied due to default, or for any other reason, only for the purpose of "main list/ select list", but such candidate can be considered for "reserve list" by applying deemed option in order of codes, i.e. A, B, C, D.

15. It clearly shows that the result of leaving column no. 17 blank is not fatal. The respondents do not find it sufficient or justified to reject an application form or the candidature of the candidate concerned for all purposes. They confined it for considering in preparation of reserve list and not select list. It is also not in dispute that for the preparation of merit list of the candidates against respective vacancies, State-wise etc., the criteria is merit-cum-option. This criterion is common for reserve list also. The respondents have prepared select list and the so called "reserve list". Despite repeated query, respondents' counsel could not tell any logical or substantial difference between a "select list" and a "reserve list" when the total number of candidates selected and recommended in the two lists are less than the total notified vacancies. As already noticed above, the number of vacancies, advertised in four CPOs is 49080, while the number of candidates, declared successful, in total, are 44152 which included 6460 placed in reserve list.

16. Meaning thereby the number of candidates declared successful and kept in select list is 37692, which is almost 11 thousand and odd, less than the total number of vacancies advertised. Therefore, for all practical purposes, the reserve list candidates which included 6460 successful candidates is at par with the select list and all the candidates placed in reserve list are almost sure and bound to get appointment. Here the status of "reserve list" is not that of a wait list, where the candidates selected and recommended is beyond the advertised number of vacancies, to the extent whereof select list is prepared. Here the "reserve list" as well as the "select list", both include candidates whose aggregate number is much less than the total number of vacancies advertised. Why the respondents prepared a reserve list of lesser candidates, I do not find any reason either in the counter affidavit or otherwise placed before me.

17. It is not disputed that petitioner fulfil all the eligibility conditions with respect to physical requirements, medical requirements as also merit requirements. Had he filled in column no. 17, in own

words of the respondents, petitioner could have been placed in the main select list, prepared on the criteria of merit-cum-option, since number of candidates selected therein have secured marks lesser than petitioner. Therefore, so far as petitioner, as an individual is concerned, he lack, neither eligibility nor efficiency nor physical capability needed for appointment in an organization like CPOs, as above, nor his academic and otherwise merit is inferior to any of those who are already selected and appointed. The only reason for denial of such selection and appointment, comes from the fact that respondents in their own wisdom decided to consider candidates who are otherwise eligible and possess requisite merit but have failed to fill in column no. 17 of application form, for the purpose of only reserve list and not the select list. This differentiation, in my view, is patently irrational, illogical and does not disclose any rational classification vis-à-vis object sought to be achieved.

18. Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. In re the Special Courts Bill, 1978 (1979) 1 SCC 380, Chandrachud, C.J., speaking for majority of the Court adverted to large number of judicial precedents involving interpretation of Article 14 and culled out several propositions including the following:

(i) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

(ii) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.

(iii) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(iv) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the

charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

(v) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(vi) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

19. In Roshan Lal Tandon Vs. Union of India AIR 1967 SC 1889, one of the questions fell for consideration was whether the promotees and direct recruits who formed one class in Grade 'D' could thereafter be classified again depending upon the source from which they were drawn for the purpose of promotion to the next higher Grade 'C'. This Court observed:

"In our opinion, the constitutional objection taken by the petitioner to this part of the notification is well-founded and must be accepted as correct. At the time when the petitioner and the direct recruits were appointed to Grade 'D', there was one class in Grade 'D' formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C'. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'."

20. The ratio of the decision in Roshan Lal Tandon (supra) was reiterated in State of Jammu and Kashmir v. Shri Triloki Nath Khosa and Ors. 1974 (1) SCC 19 in the following words:

44.The key words of the judgment are: "The recruits from both the sources to Grade 'D' were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade 'C', (emphasis supplied). By this was meant that in the matter of promotional opportunities to Grade 'C', no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn. That is to say, if apprentice train examiners who were recruited directly to Grade 'D' as train examiners formed one common class with skilled artisans who were promoted to Grade 'D' as train examiners, no favoured treatment could be given to the former

merely because they were directly recruited as train examiners and no discrimination could be made as against the latter merely because they were promotees. This is the true meaning of the observation extracted above and no more than this can be read into the sentence next following: "To put it differently, once the direct recruits and promotees are absorbed into one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher Grade 'C'." In terms, this was just a different way of putting what had preceded.

21. Referring to above authorities, Apex Court in B. Manmad Reddy and Ors. Vs. Chandra Prakash Reddy and Ors. AIR 2010 SC 1001 observed:

"There is no gainsaying that classification must rest on a reasonable and intelligible basis and the same must bear a nexus to the object sought to be achieved by the statute. By its very nature classification can and is often fraught with the danger of resulting in artificial inequalities which make it necessary to subject the power to classify to restraints lest the guarantee of equality becomes illusory on account of classifications being fanciful instead of fair, intelligible or reasonable." (emphasis added)

22. Despite repeated query, respondents could not tell as to why the candidates like petitioners, who did not fill in column no. 17 of the application form, with respect to preference, ought not have been considered for the main select list by treating all those applications to have given preference in order of the codes, i.e., A, B, C, D or 1, 2, 3, 4, as the case may be, which they have applied admittedly, by considering these candidates, while preparing reserve list, for the reason that this fault on the part of candidates like petitioner has not been treated fatal, so as to result in rejection of candidature or the application form, but treating this fault to be a mere irregularity, a default deemed option clause has been applied by respondents, but confined only for reserve list and not the select list. The approach of respondents, therefore, is patently arbitrary and violative of Articles 14 and 16 (1) of the Constitution of India.

23. The view, I am taking above, would obviously vitiate the process of preparation of final result by the respondents in its entirety, but since recruitment in question pertains to thousand of candidates and against 49 thousand and odd vacancies, 44 thousand and odd have been declared successful as long back as in 2011, leaving sufficient number of vacancies unfilled, therefore, I am confining relief in this case to the present petitioner only and direct respondents to treat petitioner's preference/ option in respect to CPOs in order of A, B, C, D for the purpose of select list and thereby consider whether amongst the general category candidates, and the post(s) for which petitioner has applied, he is entitled to be declared successful. If a person securing lesser marks to him has been declared successful and included in select list, petitioner shall also be declared successful and further steps for his appointment/ sending for training, as the case may be, shall be taken without any further delay. This exercise, in any case, shall be completed within two months from the date of production of a certified copy of this judgment.

24. It is also made clear that in case petitioner is appointed, his appointment shall relate back to the date on which person next lower to him in merit was

appointed, with all consequential benefits for the purpose of pay fixation, seniority, increment etc. except of actual arrears of salary, which shall be paid to petitioner from the date he is actually appointed.

25. The writ petition is allowed in the manner, as above.

26. The petitioner shall also be entitled to cost, which I quantify to Rs. 5,000/- (Rupees five thousand).

---

**ORIGINAL JURISDICTION**
**CRIMINAL SIDE**
**DATED: LUCKNOW 08.10.2013**

**BEFORE**
**THE HON'BLE SAAED-UZ-ZAMAN SIDDIQI, J.**

U/S 482/378/407 No. 4823 of 2013

**Karm Raj Dubey ...Applicant**
**Versus**
**The State of U.P. & Anr. ...Opp. Parties**

**Counsel for the Applicant:**
Karm Raj Dubey(In-Person)

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

**Criminal Revision-Dismissal-as not pressed-without opposition-held-once revision filed against-can be decided either way only on its merit-such order of dismissal-is no order -in eye of law.**

**Held: Para-15&16**

**15. In view of these authorities, it appears that the concerned Revisional Court has adopted obviously less tedious approach in dismissing the revision only because the application was moved that the revision may be dismissed as not pressed.**

**16. In either case, a criminal revision or a criminal appeal has to be disposed of by the Revisional Court/Appellate Court on merits and not otherwise. Neither it may be dismissed in default nor it can be dismissed as the revisionist/appellant did not wish to proceed with the revision/appeal.**

**Case Law discussed:**
(2007) 7 SCC 623; (2004) 4 SCC 158; (1978) 1 SCC 579; S.L.P. (Cri.) No. 9816 of 2009; 1992 Supp. 2 SCR 305; 1993(3)SCALE 312; (1996) 9 SCC 372; AIR 1987 SC 1500; AIR 1938 Sind 171; (1996) 4 SCC 720.

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. By means of this petition, the petitioner has prayed for quashing of the order dated 13.08.2013 passed by the Learned Sessions Judge, Faizabad in Criminal Revision No. 265 of 2011, by which the revision has been dismissed as not pressed.

2. I have heard learned counsel for the petitioner as well Learned AGA.

3. Brief facts of the case are that the petitioner and opposite party no. 2 are closely related with each other and a large number of civil disputes are pending between them before Civil Courts. Opposite party no. 2 initiated a criminal proceeding against the petitioner and his two sons and another person. There was a cross-case for which FIR No. 235 of 2011 was also lodged at P.S.- Kotwali Nagar. Writ petition no. 6426 (DB) of 2011 was also filed which was dismissed vide order dated 03.05.2011. The learned Judicial Magistrate, Faizabad passed order on 27.08.2011, which was challenged through the revision, which was numbered as Criminal Revision No. 265 of 2011. The copy of order dated 13.08.2013 shows that an application was moved by the revisionist that he wishes to withdraw the revision as not pressed,

which was not opposed by the opposite party. The learned Sessions Judge allowed the application paper No. 31-A and criminal revision was dismissed as not pressed, which has been assailed before this Court under Section 482 Cr.P.C. The learned Sessions Judge has not entered into the merits of the revision nor has passed any order relating to the merits of the case.

4. The settled legal position is that when a criminal revision is admitted it cannot be dismissed in default or as not pressed or otherwise it has to be decided on merits, in a legal manner, and, as such, the impugned order passed by learned Sessions Judge is no order in the eyes of law.

5. In the case of Madan Lal Kapoor vs. Rajiv Thapar & Ors. [(2007) 7 SCC 623], Hon'ble the Apex Court has held, which is as under:-

"The matter relates to administration of criminal justice. As held by this Court, a criminal matter cannot be dismissed for default and it must be decided on merits. Only on that ground the appeal deserves to be allowed."

6. Due to this legal requirement, there is no need to issue notice to opposite party no. 2.

7. It may be mentioned here that the judicial system cannot be taken to ransom by having resort to grounds beyond the purview of law. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any order, which weakens the system and shaken the faith of the common man in the justice dispensation system has to be discouraged.

8. While holding this, this court relies upon the law laid down by Hon'ble the Apex Court in the case of Zahira Habibulla H.Sheikh v. State of Gujarat [(2004) 4 SCC 158], in which it was held as under :-

"Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it."

9. Before concluding, I may hold that in a democratic set-up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casualty. A litigant expects a reasoned verdict from a temperate Judge but does not intent to and rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned

with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose.

10. In an earlier decision, in the case of Babu Singh v. State of U.P. [(1978) 1 SCC 579], Hon'ble Krishna Iyer, J had stated thus:-

"Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to 'fair trial', whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."

11. The same proposition is applicable to criminal appeal as held by Hon'ble the Apex Court in the case of Surya Baksh Singh vs. State of Uttar Pradesh passed in Criminal Appeal No. 1680 of 2013 [Arising out of S.L.P. (Cri.) No. 9816 of 2009).

12. This legal proposition is constantly been followed by all the Courts right from its inception in pre-independence era.

13. The legislature has cast an obligation on the Appellate Court to decide an appeal on its merits only in the case of Death Reference, regardless of whether or not an appeal has been preferred by the convict.

14. A three Judge Bench in Kishan Singh vs. State of U.P. [1992] Supp. 2 SCR 305: 1993 (3) SCALE 312: (1996) 9 SCC 372 decided on November 2, 1992. The Bench overruled the observations in the dismissal order passed in Ram Naresh Yadav v. State of Bihar [AIR 1987 SC 1500] and approved Shyam Deo Pandey; it also adverted to similar opinions expressed in Emperor v. Balumal Hotchand AIR 1938 Sind 171. It noted the disparate language in Section 384 of the Cr.P.C. and Order 41 Rule 17 of the CPC before quoting that it is the duty of the Appellate Court to consider the appeal as well as the judgment under challenge on its merits.

15. In view of these authorities, it appears that the concerned Revisional Court has adopted obviously less tedious approach in dismissing the revision only because the application was moved that the revision may be dismissed as not pressed.

16. In either case, a criminal revision or a criminal appeal has to be disposed of by the Revisional Court/Appellate Court on merits and not otherwise. Neither it may be dismissed in default nor it can be dismissed as the revisionist/appellant did not wish to proceed with the revision/appeal.

17. In the case of Bani Singh vs. State of U.P. [(1996) 4 SCC 720], a three Judge Bench of this Court held that a criminal appeal should not be dismissed in defaut but should be decided on merits. It despite notice neither the appellant nor his counsel is present, the court should decide the appeal on merits.

18. In view of above, the petition is allowed and the order dated 13.08.2013 passed by the Learned Sessions Judge, Faizabad is hereby quashed.

19. The Learned Sessions Judge, Faizabad is directed to decide the criminal revision in accordance with law after

affording opportunity of being heard to the parties.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: LUCKNOW 19.11.2013**

**BEFORE**
**THE HON'BLE SIBGHAT ULLAH KHAN, J.**

Rent Control No.5886 of 1987

**Smt. Satyawati Devi & Ors. ...Petitioners**
**Versus**
**Ist. A.D.J. and Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri U.K. Srivastava, Sri K.C. Gupta
Sri Umesh Kumar Srivastava

**Counsel for the Respondents:**
C.S.C., Sri O.P. Misra

**U.P. Urban Building(Regulation of Letting Rent and Eviction) Act 1973-Section 21-Eviction on ground of bona fide need-both the authorities below-held-need of land lord not bonafide-during pendancy of writ petition land lord died-writ court can not consider the bonafide need of heirs of land lord-expect the prescribed authority-petition dismissed as infructous with liberty to file fresh application-till such application decided-tenant to give enhanced rent-as per dictum of Apex Court.**

**Held: Para-9**
**However, as both the courts below held that his need was not bona fide hence there is absolutely no occasion to consider in this writ petition as to whether the deceased (Shankar Lal) had proved his need or not. It would be purely academic. Learned counsel for petitioners argued that petitioners belong to business community and need for the sons of Shankar Lal may be presumed. However need has to be proved and not presumed. It will be highly improper to decide as to whether substituted legal representatives of Shankar Lal have got any bona fide need in the writ petition for the first time. This is basically the job of the Prescribed Authority.**

**Case Law discussed:**
2006(1) ARC 157; 2004(2) ARC 64; AIR 1997 SC 2510.

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

1. Heard Sri U.K. Srivastava, learned counsel for petitioners and Sri O.P. Mishra, learned counsel for contesting respondent tenant.

2. This is landlords' writ petition arising out of eviction/ release proceedings initiated by them under Section 21 of U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as U.P. Act No.13 of 1972) on the ground of bona fide need. Release application was filed by Shanker Lal and Babu Ram, both real brothers and their mother Smt. Bitana in the form of P.A. Case No.31 of 1976, Babu Ram and others Vs. Om Prkash. Smt. Bitana died during pendency of release applications and was survived by the other two applicants, hence her name was deleted. Sri Babu Ram also died on 25.11.1983 and was substituted by his widow Smt. Stayawati, original petitioner No.1. Both the petitioners i.e. Smt. Satyawati and Sri Shanker Lal died during pendency of the writ petition and were substituted by their legal representatives. Original tenant respondent No.3, Om Prakash also died during pendency of writ petition and was substituted by his legal representatives.

3. Twice the matter was remanded by the lower appellate court. After second remand, the Prescribed Authority, Munsif Barabanki dismissed the release application on 22.08.1984. Against the said order, original petitioners filed Rent

Control Appeal No.5 of 1984. First A.D.J. Barabanki dismissed the appeal on 04.04.1987, hence this writ petition.

4. The need set up in the release application was for Shanker Lal, original petitioner No.2. It was stated that he proposed to start business in the shop in dispute. The courts below held that his need was not bona fide.

5. In the release application it was stated that Shaker Lal had a large family to look after, however the need for any of his sons/ daughters was not set up. It was also not pleaded that any of his sons or daughters will assist him in the business.

6. The findings recorded by the courts below were challenged by learned counsel for petitioners and learned counsel for contesting respondents had defended the same.

7. In my opinion, there is no need to decide the correctness of the findings of the courts below for the reason that Sri Shankar Lal for whose need release application was filed died during pendency of this writ petition.

8. Learned counsel for both the parties have cited several authorities in respect of subsequent events, their effect and power of court to take them into consideration. I have discussed this aspect in an authority reported in Dipti Singh Vs. II A.D.J., Mainpuri, 2006 (1) ARC 157. Para-8 of the said authority is quoted below:

"In Shakuntala Bai Vs. Narain Das, AIR 2004 SC 3484 decided on 5.5.2004, it was held that subsequent event of death of landlord is not to be taken into consideration. However in another authority decided on 13.10.2004 reported in K.N.Agarwal Vs. Dhanraji Devi, 2004 (2) ARC 764 a contrary view was taken and it was held by the Supreme Court that death of the landlord during pendency of the writ petition for whose need the shop in dispute was released by the courts below made the release order passed by the courts below ineffective and inexecutable as due to the death of the landlord the need vanished and in case his heirs were interested in doing business they could file a fresh release application. Unfortunately in the later authority of K.N.Agarwal the earlier authority of Shakuntala Bai was not considered. In Kamleshwar Prasad Vs. B.Agarwal AIR 1997 SC 2399 also it was held that death of the landlord does not make any difference. The said case arose out of U.P Rent Control Act and was considered in Shakuntala Bai's case."

9. If need of Shanker Lal had been found bona fide by the courts below, it might have been necessary to decide that what would be the effect of his death during pendency of the writ petition. However, as both the courts below held that his need was not bona fide hence there is absolutely no occasion to consider in this writ petition as to whether the deceased (Shankar Lal) had proved his need or not. It would be purely academic. Learned counsel for petitioners argued that petitioners belong to business community and need for the sons of Shankar Lal may be presumed. However need has to be proved and not presumed. It will be highly improper to decide as to whether substituted legal representatives of Shankar Lal have got any bona fide need in the writ petition for the first time. This is basically the job of the Prescribed Authority.

10. Accordingly, without entering into the merit of the case, writ petition is to be dismissed as infructuous only on the ground that the person for whose need release application was filed and rejected died during pendnecy of the writ petition. Any of the legal representatives of Shankar Lal or any other landlord(s) may file fresh release application for his/ their need. If such an application is filed, it shall be decided on the basis of evidence brought on record and in accordance with law. Any finding recorded in the impugned orders challenged through this writ petition whether of fact or law shall not be either treated as binding or even taken into consideration while deciding the release application, which may be filed by any of the present landlords.

11. I have held in Khursheeda Versus A.D.J, 2004 (2) ARC 64 and H.M.Kichlu Vs. A.D.J 2004(2) ARC 652 that while granting relief to the tenant against eviction or maintaining the said relief already granted by the court below in respect of building covered by Rent Control Act, writ court is empowered to enhance the rent to a reasonable extent. Under somewhat similar circumstances the Supreme Court in the authority reported in A.K Bhatt Vs. R.M Shah AIR 1997 SC 2510 enhanced the rent from Rs. 101/- per month to Rs. 3500/- per month with effect from the date of the judgment of the Supreme Court. For the period during which appeal remained pending before the Supreme Court rent was enhanced to Rs. 2000/- per month for some of the period and Rs. 2500/- per month for rest of the period. In the said authority release application of the landlord had been allowed by the courts below. The Supreme Court held that the landlord who had sought release of the building when he was about 54 years of age had become 87 years of age when the matter was decided by the Supreme Court hence he was not in a position to do any business. This fact of old age of the landlord was taken into consideration as relevant subsequent event by the Supreme Court.

12. Property in dispute is a shop situate in the main market near Dharmshala Barabanki as stated in para-1 of the release application.

13. Accordingly, it is directed that w.e.f. December, 2013 onward tenants respondents shall pay rent to the landlords petitioners at the rate of Rs.1000/- per month. (Existing rent is Rs.60/- per month as stated in para-9 of the release application, which is virtually as well as actually no rent for a shop.) This enhancement of rent is irrespective of the claim of enhanced rent made in S.C.C. Suit No.1/13, Harish Chandra Gupta Vs. Rajendra Kumar, stated to be pending before J.S.C.C./ Civil Judge (S.D.), Court No.20, Barabanki. The matter subjudice in the said suit shall be decided in accordance with evidence brought on record therein and the legal position.

14. Writ Petition is accordingly dismissed as infructuous with the above observations and directions.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 04.10.2013**

**BEFORE**
**THE HON'BLE MANOJ MISRA, J.**

Civil Misc. Writ Petition No. 8511 of 2007

**The Nagar Panchayat, Sirauli, Bareilly & Ors. ...Petitioners**

**Versus**
**The State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Anil Bhushan, Miss Rashmi Tripathi
Sri Adarsh Bhushan

**Counsel for the Respondents:**
C.S.C., Sri S.S. Nigam, Sri Alok Kumar Srivastava

**Constitution of India, Art.-226-Award of Labor Court-reinstatement with 50% back wages-challenge made on ground of delay in reference before labor court no objection filed by employer-held-delay in reference-immaterial-reinstatement-direction based upon admission of employer regarding working of workman from 2000 to 2006-direction of reinstatement proper-50% back wages-in absence of finding about no gainfully employed during termination-order not sustainable-direction for fresh consideration given-petition partly allowed.**

**Held: Para-14**
**In view of the above, the Court is of the view that although the Labour Court was justified in denying back wages for the period up to the date of reference, on account of the delay, but for the period commencing from the date of reference up to the date of reinstatement, before awarding the back wages, the labour court ought to have address itself to the issue as to whether the respondent-workman was gainfully employed or not during the intervening period and then it ought to have taken a decision, dependent on the facts and circumstances, whether to award or not to award the back wages and if so, to what extent. As there is a serious lis between the parties on this issue, which would require assessment of evidence, the Court is of the view that the said issue will have to be remitted to the labour court for determination.**

**Case Law discussed:**
(2000) 2 SCC 45; (2013) 2 UPLBEC 1255; (1996) 6 SCC 82; (2001) 6 SCC 222; (2005) 2 SCC 363; (2001) 2 SCC 54.

(Delivered by Hon'ble Manoj Misra, J.)

1. Heard Sri Adarsh Bhushan, holding brief of Sri Anil Bhushan, learned counsel for the petitioners and Sri Alok Kumar Srivastava, holding brief of Sri S.S. Nigam, learned counsel for respondent-workman.

2. As parties have exchanged their affidavits, with the consent of learned counsel for the parties, the petition is being decided finally at the admission stage itself.

3. By this petition, the petitioners have challenged the award dated 14th July, 2006, passed by the Presiding Officer, Labour Court, Bareilly in adjudication case no.14 of 1999, which was published on 28th September, 2006, whereby termination of service of the respondent-workman on 1st March, 1989 has been held to be illegal and it has been ordered that the respondent-workman would be reinstated in service. However, with regard to back wages, it was provided that from the date of termination of service up to the date of reference i.e. 17.02.1999, the respondent-workman would not be entitled for any back wages whereas from the date of reference up to the date of reinstatement he would be entitled to 50% of the wages, which he was getting immediately prior to the date of his termination.

4. Learned counsel for the petitioners has assailed the award of the Labour Court on three grounds: (a) that reference was made on 17.02.1999 that is after 9 years and 6 months from the date of termination of the workman and on ground of delay alone, the respondent-workman was not entitled to any relief; (b) that even if the termination amounted to retrenchment and was in violation of provisions of Section 6-N of the

U.P. Industrial Dispute Act, 1947, there was no justification to grant relief of reinstatement in service as award of compensation would have been sufficient; and (c) that there was no justification to award 50% of back wages from the date of the reference up to the date of reinstatement, inasmuch as, no finding has been recorded that during this period the respondent-workman was not gainfully employed elsewhere.

5. In support of his submission that because of the delay reference itself was bad, the learned counsel for the petitioners cited judgment of the apex court in the case of Nedungadi Bank Ltd. Vs. K.P. Madhavankutty and others, reported in (2000) 2 SCC 45. Whereas to support his plea that there should not be automatic reinstatement, and instead compensation can be awarded, in the event of there being violation of the procedure provided under section 6-N, the learned counsel for the petitioners cited a single judge decision of this court in the case of Nagar Palika Parishad, Mughalsarai Vs. State of U.P. and others reported in (2013) 2 UPLBEC, 1255. Further, relying on averments made in paragraph no.15 of the writ petition, the learned counsel for the petitioners submitted that the respondent-workman had worked with the petitioners from the year 2000 up to the year 2006 and has also been paid wages, which fact was concealed by the respondent-workman, therefore, in any case, he was not entitled to the back wages as has been awarded by the labour court. It has been submitted that the aforesaid plea could not be placed before the labour court inasmuch as the officers of the petitioners' establishment were in collusion with the respondent workman.

6. The learned counsel for the respondent-workman sought to justify the award. He also cited apex court's decision in the case of Ajaib Singh V. Sirhind Cooperative Marketing Cum-Processing Service Society Ltd & Another: (1996) 6 SCC 82, so as to contend that there is no limitation for making a reference and that employer's plea of delay in seeking reference, unless coupled with proof of real prejudice to him, is not sufficient to deny relief to the workman. In addition thereto, the decision of the apex court in the case of Sapan Kumar Pandit v. U.P. State Electricity Board & others: (2001) 6 SCC 222 was relied so as to contend that the opinion as to the existence of the dispute has to be formed by the Government alone and none else. It was submitted that in the said case the validity of a reference made after 15 long years of termination was upheld.

7. Having considered the rival submissions, the submission of the petitioners' counsel that as the reference was highly belated, therefore, no relief ought to have been granted, cannot be accepted, inasmuch as, in paragraph 7 of the award it has been specifically observed that no objection with regards to delay was taken by the employers before the labour court. The labour court has also noticed certain authorities, wherein it has been provided that there is no limitation for making a reference of an industrial dispute to which, there can be no objection. In view of the above, as also for the reason that no prejudice has been shown to have been caused to the petitioners on account of the delay, this Court is of the view that the award of the labour court cannot be set aside on the ground of delay.

8. Further, in paragraph 3 of the award, it has been noted that the employers admitted that the respondent-workman was employed as Peon with

them from 1st May, 1985 up to 28th February, 1989 and that due to their mistake, the name of respondent-workman could not be sent to the Government for regularization and when the same was sent subsequently, the Government had refused sanction for regularization. The correctness of the aforesaid observations have not been assailed as being without any basis. Thus, in view of the admitted position, it is not a case where delay would have caused serious prejudice to the employers.

9. A careful perusal of the award further reveals that there is no dispute that the respondent-workman had worked for a period of 3 years, 9 months and 27 days and that he had completed 240 days in each calendar year, before termination of his service. There is also no dispute that the retrenchment procedure, as is required by section 6-N of the U.P. I.D. Act, was not followed.

10. In view of the above, I do not find any reason to disagree with the finding recorded by the labour court that the termination of service of the respondent-workman, on 01.03.1989, was neither justified nor legally valid.

11. So far as the plea of the petitioners' counsel that instead of reinstatement only compensation ought to have been awarded, suffice it to say that the same does not lie in the mouth of the petitioners as they have themselves admitted in paragraph no.15 of the writ petition that the respondent-workman had been working in their establishment and had been drawing salary right from the year 2000 up to the year 2006. Thus, there is no reason why reinstatement should not be provided. More so, when the petitioners have admitted before the labour court that the name of the respondent-workman was not sent for regularization due to their mistake and that when it was sent later, the sanction was not received. Taking a conspectus of the facts and circumstances, the Court is of the view that it would not be proper to deprive the respondent-workman of the benefit of reinstatement.

12. As far as the payment of back wages is concerned, there is no discussion by the labour court, in its award, as to whether the respondent- workman was gainfully employed or not during the intervening period. The submission of the learned counsel for the petitioner is that the respondent-workman was gainfully employed from the year 2000 up to the year 2006, in the petitioners' establishment itself, therefore, the award of back wages is not justified. Few documentary evidences have also been filed through supplementary affidavit to support the contention. The respondent-workman has not entirely disputed the aforesaid fact, but has submitted that he had worked, intermittently, from the year 2000 up to the year 2006, as a contract labour, the details of which have been given in paragraph 5 of the supplementary counter affidavit dated 29.07.2013.

13. The apex court in the case of Kendriya Vidyalaya Sangathan & another v. S.C. Sharma: (2005) 2 SCC 363, vide paragraph 16 of the report, observed as follows: "when the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After, and if, he places materials in that regard, the employer can bring on record materials to rebut the claim." Further, in P.G.I. of Medical Education and Research v. Raj Kumar: (2001) 2 SCC 54 in para 12, it was observed that "payment of

back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no strait-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back wages in its entirety." In para 9 thereof, it was observed that "it is not for the High Court to go into the factual aspects of the matter and there is an existing limitation on the High Court to that effect."

14. In view of the above, the Court is of the view that although the Labour Court was justified in denying back wages for the period up to the date of reference, on account of the delay, but for the period commencing from the date of reference up to the date of reinstatement, before awarding the back wages, the labour court ought to have address itself to the issue as to whether the respondent-workman was gainfully employed or not during the intervening period and then it ought to have taken a decision, dependent on the facts and circumstances, whether to award or not to award the back wages and if so, to what extent. As there is a serious lis between the parties on this issue, which would require assessment of evidence, the Court is of the view that the said issue will have to be remitted to the labour court for determination.

15. For the reasons aforesaid, the award dated 14th July, 2006, which was published on 28th September, 2006 (Annexure-'7' to the writ petition), is set aside only to the extent of award of back wages. The declaration in the award that the termination of service of the respondent-workman on 01.03.1989 was illegal and unjustified as well as the direction given in the award to reinstate the respondent-workman, is affirmed. The issue with regards to entitlement of the respondent-workman for back wages, with effect from the date of the reference up to the date of reinstatement, is remitted back to the labour court, which shall decide the same, in accordance with the law, preferably, within a period of three months from the date of production of certified copy of this order, by either side. Upon deciding the said issue, the labour court would pass an award in respect thereto, which will be treated as part of the earlier award dated 14th July, 2006. It is made clear that it will be open to the parties to lead their respective evidence with regards to gainful employment or otherwise of the respondent-workman, during the period between the date of reference up to the date of reinstatement, for the purpose of deciding the issue, which is being remitted to the labour court.

16. The writ petition is partly allowed to the extent indicated above.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 11.10.2013**

**BEFORE**
**THE HON'BLE SURYA PRAKASH KESARWANI, J.**

Civil Misc. Writ Petition No. 10967 of 2001

**Shri Sudhir Kumar ...Petitioner**
**Versus**
**The Union of India and Ors..Respondents**

**Counsel for the Petitioner:**
Sri Irshad Ali, Sri K.M. Asthana
Sri U.P. Singh, Sri Sanjay Misra

**Counsel for the Respondents:**
C.S.C., Sri K.C. Sinha, Sri K.M. Asthana, Sri R.N. Mishra, Sri Rajesh Khare, Sri N.C. Nishad

**Constitution of India, Art.-226- Compassionate Appointment-denied on ground of undue delay in disposed of claim-and elder son of deceased employee was already in service-apart from family pension by widow-held-in**

**view of law laid down by Apex Court in Smt. Anju Misra case-if claim filed within time-remain pending since long-appointment can not be denied-likewise in absence of contraction by department the elder son feeding the family can not be basis for rejection-order quashed direction for fresh consideration given.**

**Held: Para-12**

**It is also relevant to note that the petitioner has moved the application for compassionate appointment way back in the year 1996 which was followed by reminders. Thereafter, he filed a writ petition No. 35837 of 2000 which was disposed of by order dated 22.8.2000 directing the respondents to decide the petitioner's application within two months. Pursuant to the said direction, the respondent decided the petitioner's application by the impugned order dated 4.12.2000 (Annexure-7). Challenging the said order, the present writ petition has been filed in the year 2001 which remained pending for about twelve years and came to be heard now. In view of these facts the last submission of the counsel for the respondents that the claim of the petitioner for compassionate appointment is belated, is wholly misconceived and baseless. Such stand cannot be taken in view of the fact that this is not a ground in the impugned order for rejection of petitioner's application. In the case of Chief General Manager, SBI Vs. Durgesh Kumar Tiwari reported in 2004 (5) AWC 4838, a Division Bench of this Court followed earlier two judgments in Ajay Kumar Shebdy Vs. Chief Security Commissioner 2004 (2) UPLBEC 1503 and Smt. Anju Mishra Vs. General Manager, Kanpur 2004(1) UPLBEC 201 and held that if the application for compassionate appointment was filed within time then merely because the applicant was unnecessarily dragged from pillar to post for getting employment and for this cause resulting in delay, he should not be denied the appointment.**

**Case Law discussed:**

2006(6) SCC 493; 2004(5) AWC 4838; 2001(2) UPLBEC 1575; 2001(2) ESC 876; W.P. No. 37817 of 2001; 2011(4) SCC 209.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. In this writ petition, the petitioner has prayed for a writ order or direction in the nature of certiorari to quash the impugned order dated 4.12.2000 (Annexure-7) passed by the respondent no.1.

2. On 17.1.2010, this Court passed the following order :

"This writ petition relates to the employee of the Defence Services as the Tribunal has already been constituted and in view of Section 34 of the aforesaid Act, as such the file of this case be transmitted to the Tribunal.

The office is directed to sent the file to the Tribunal sitting at Lucknow within a period of one month from today. This order has been passed in the presence of Shri N.C. Nishad, learned counsel appearing for the respondents."

3. Pursuant to the afore quoted order the records were sent to the Armed Forces Tribunal Regional Bench, Lucknow and it was numbered as T.A. No. 25 of 2010. Vide order dated 20.8.2010, the Armed Forces Tribunal Regional Bench, Lucknow remitted back the records of the writ petition to this Court on the ground that neither the father of the applicant nor the applicant was himself subject to Army Act, Navy Act 1957 or Air force Act 1950 and as such this Tribunal has no jurisdiction to adjudicate upon the dispute raised in the petition. In these circumstances, this writ petition was again listed in this Court and is now being heard.

4. Briefly stated the facts of the present case are that Sri Gandhi Prasad, father of the petitioner was working on the post of

Laboratory Attendant in the office of the respondent no.3. He died on 15.5.1989 while in service, leaving behind his wife Smt. Chando Devi, two unmarried daughters and two minor unemployed sons namely, Sri Sudhir Kumar and Sri Ranjit and one major son Sri Sunil Kumar who was already in employment w.e.f. 26.2.1989 as Lab Attendant in the office of Controller of Quality Assurance (PP), Kanpur and alleged to be living separately. The case of the petitioner is that at the time of death of his father, he was minor and after he attained the majority, an application dated 30.12.1996 followed by further applications dated 4.3.1997, 10.4.1997 and 25.11.1999 (Annexure Nos .1, 2, 4 and 5) respectively were submitted before respondent no.1 for compassionate appointment in accordance with Rules/Government Orders. Since the respondent no.1 did not consider the case of the petitioner for compassionate appointment, the petitioner filed a Civil Misc. Writ Petition No. 35837 of 2000 which was disposed of vide order dated 22.8.2000 directing the competent authority to consider and dispose of the petitioner's application dated 10.4.1997 and 25.11.1999 as early as possible preferably within a period of two months from the date of production of certified copy of the order. Thereafter respondent no.1 considered the application of the petitioner dated 10.4.1997 and 25.11.1999 and rejected the same by the impugned order dated 4.12.2000 (Annexure No.-7)on the following grounds :

" (i) The widow of the deceased employee has been getting a family pension of Rs. 484/- (pre - revised) per month.

(ii) Following terminal benefits were received immediately after the death of the deceased i.e. DCRG Rs. 16,120, CHEIS Rs. 10,958/-.

(iii) One son is already working as Laboratory Attendant CQA (PP), Kanpur. As an earning member of the family, he is obliged to also look after his mother and other members of his father's family, more so when he has no other reported responsibilities of his own.

(iv) With the support of one earning member of the family and the benefits given, the family would not be considered to be in penury and without any means of livelihood."

5. The petitioner and his mother have been contending from the very beginning that the eldest son Sri Sunil Kumar is living separately and is not supporting the family and as such after the death of Sri Gandhi Prasad (father of the petitioner), there is no one to support the family and they are in extreme economic crisis and whatever money was received on the death of the father of the petitioner, the same was spent in the marriage of one daughter. In the counter affidavit respondents reiterated and supported the stand taken in the impugned order dated 4.12.2000 (Annexure-7). There is no dispute that the petitioner moved an application for compassionate appointment as aforementioned. In paragraph-15 of the counter affidavit, it has been stated on behalf of the respondent that the petitioner was not found fit for compassionate appointment under the norms of O.M. No. 14014/6/1994-Est.(D) dated 9.10.1998 issued by the Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Personnel and Training) New Delhi, which is the scheme of compassionate appointment under the Central Government. Paragraph -10 and 16 (c) of the aforesaid

O.M. dated 9.10.1998 are reproduced below :

"10. Where there is an earning member :

(a) In deserving cases even where there is already an earning member in the family, a dependent family member may be considered for compassionate appointment with prior approval of the Secretary of the Department/Ministry concerned who, before approving such appointment, will satisfy himself that grant of compassionate appointment is justified having regard to number of dependants, assets and liabilities left by the Government servant, income of the earning member as also his liabilities including the fact that the earning member is residing with the family of the Government servant and whether he should not be a source of support to other members of the family.

(b) In cases where any member of the family of the deceased or medically retired Government servant is already in employment and is not supporting the other members of the family of the Government servant, extreme caution has to be observed in ascertaining the economic distress of the members of the family of the Government servant so that the facility of appointment on compassionate ground is not circumvented and misused by putting forward the ground that the member of the family already employed is not supporting the family.

16 (c) The scheme of compassionate appointments was conceived as far beck as 1958. Since then a number of welfare measures have been introduced by the Government which have made a significant difference in the financial position of the families of the Government servants dying in harness/retired on medical grounds. An application for compassionate appointment should, however, not be rejected merely on the ground that the family of the Government servant has received the benefits under the various welfare schemes. While considering a request for appointment on compassionate ground a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities (including the benefits received under the various welfare schemes mentioned above) and all other relevant factors such as the presence of an earning member, size of the family, ages of the children and the essential needs of the family, etc."

6. I have heard Sri U.P.Singh, Advocate holding brief of Sri Irshad Ali, learned counsel for the petitioner and Sri Rajesh Khare, learned counsel appearing for the respondents and perused the records.

Findings

7. Ground No. (i) and (ii) taken in the impugned order to reject the application for compassionate appointment of the petitioner is wholly misconceived and in conflict with para 16 (c) of the scheme of compassionate appointment which provides that an application for compassionate appointment should not be rejected merely on the ground that the family of the government servant has received the benefits under the various welfare schemes. In the case of Balbir Kaur and another Vs. Steel Authority of India Ltd. and others reported in 2000(6) SCC 493, Para 13, the Hon'ble Supreme Court has observed as under :-

"the family benefit scheme cannot in any way be acquitted with the benefit of compassionate appointment. The stand jerk in the family by the reason of the death of bread earner can only be observed by lump sum amount being made available to the family. This is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the bread earner and any security thereafter, reigns and it is at that juncture that if lump sum amount is made available with a compassionate appointment, the grief stricken family may find some solace to the mental agony and manage its affair in the normal course of events. It is not that monitory benefit would be replacement of the bread earner but that would undoubtedly bring solace to the situation."

8. Thus the ground no. (i) and (ii) taken in the impugned order to reject the application of the petitioner for compassionate appointment is wholly misconceived and cannot be sustained. This view taken by me is also fortified by the law laid down by this Court in Chief General Manager, State Bank of India Vs. Durgesh Kumar Tiwari 2004 (5) AWC 4838, Ram Piyari VS. State Bank of India 2001 (2) UPLBEC 1575, State Bank of India Vs. Ram Piyari 2001(2) ESC 876 and Smt. Padma Pathak Vs. Managing Director, PNB in writ petition no. 37817 of 2001 decided on 3.3.2003 wherein it has been held that payment of family pension and dues of the deceased cannot be a ground for rejecting the claim for compassionate appointment.

9. The ground no. (iii) and (iv) mentioned in the impugned order for rejecting the application of the petitioner for compassionate appointment is also without any foundation of facts and enquiry in the matter of support to the family by the eldest son Sri Sunil Kumar who was already in employment when the father of the petitioner died. The stand of the petitioner from the very beginning is that Sri Sunil Kumar is living separately and he does not support his mother, two sisters and two brothers. Para 10 (reproduced above) of the scheme of compassionate appointment as filed and relied by the respondents itself clearly provides that even where there is already an earning member in the family, a dependent family member may be considered for compassionate appointment with prior approval of the Secretary, Department/Ministry concerned, who before approving such appointment will satisfy himself that grant of compassionate appointment is justified having regard to the number of dependants, assets and liabilities left by the government servant, income of the family member as also his liabilities including the fact that family member is residing with the family of the government servant whether he should not be a source of support to other members of the family and where he is not supporting the other members of the family of the government servant extreme caution has to be observed in ascertaining the economic distress of the members of the family of the government servant so that the facility of appointment on compassionate ground is not circumvented and misused by putting forward the ground that the member of the family already employed is not supporting the family.

10. Perusal of the impugned order would show that none of the guiding factors as provided in paragraph-10 of the scheme and discussed above have been considered by the respondent no.1 and nothing relevant has been even discussed or mentioned in the impugned order while rejecting the

application of the petitioner on the ground that his elder brother is an earning member. The respondents have also completely ignored the clear stand of the petitioner and his mother right from the beginning that Sri Sunil Kumar the eldest son of the deceased came in employment during the lifetime of his father and was living separately and is not supporting the family. In the impugned order, it has been merely observed that Sri Sunil Kumar is obliged to also look after his mother and other members of his father's family. The respondents have not recorded any finding that Sri Sunil Kumar, the eldest son of the deceased is actually supporting his mother and other members of his father's family. Thus, in view of paragraph-10 of the scheme of compassionate appointment, the grounds no. (iii) and (iv) of the impugned order taken for rejecting the application of the petitioner for compassionate appointment, are wholly arbitrary, misconceived and cannot be sustained.

11. The law of compassionate appointment is well settled. In a recent judgment in the case of Bhawani Prasad Sonkar Vs. Union of India and others reported in 2011 (4) SCC 209, para 20, the Hon'ble Supreme Court observed as under :

"20. Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts."

12. I have already discussed in detail the relevant provisions of the scheme of compassionate appointment referred and relied by the respondents themselves in the counter affidavit and came to the conclusion that the grounds of rejection in the impugned order are wholly unsustainable in view of paragraphs 10 and 16 (c) of the scheme of compassionate appointment. It is also relevant to note that the petitioner has moved the application for compassionate appointment way back in the year 1996 which was followed by reminders. Thereafter, he filed a writ petition No. 35837 of 2000 which was disposed of by order dated 22.8.2000 directing the respondents to decide the petitioner's application within two months. Pursuant to the said direction, the respondent decided the petitioner's application by the impugned order dated 4.12.2000 (Annexure-7). Challenging

the said order, the present writ petition has been filed in the year 2001 which remained pending for about twelve years and came to be heard now. In view of these facts the last submission of the counsel for the respondents that the claim of the petitioner for compassionate appointment is belated, is wholly misconceived and baseless. Such stand cannot be taken in view of the fact that this is not a ground in the impugned order for rejection of petitioner's application. In the case of Chief General Manager, SBI Vs. Durgesh Kumar Tiwari reported in 2004 (5) AWC 4838, a Division Bench of this Court followed earlier two judgments in Ajay Kumar Shebdy Vs. Chief Security Commissioner 2004 (2) UPLBEC 1503 and Smt. Anju Mishra Vs. General Manager, Kanpur 2004(1) UPLBEC 201 and held that if the application for compassionate appointment was filed within time then merely because the applicant was unnecessarily dragged from pillar to post for getting employment and for this cause resulting in delay, he should not be denied the appointment.

13. In view of the discussions made above, the writ petition succeeds and is hereby allowed. The impugned order dated 4.12.2000 (Annexure-7) passed by the respondent no.1 is set aside. The matter is remitted back to the respondent no.1 with direction to reconsider the application of the petitioner and pass appropriate order in accordance with law in the light of the observations made above, within a period of two months from the date a certified copy of this order is filed by the petitioner before him.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 05.10.2013**

**BEFORE**
**THE HON'BLE RAJES KUMAR, J.**
**THE HON'BLE MAHESH CHANDRA TRIPATHI,J.**

Civil Misc. Writ Petition No. 12574 of 2013

**Narendra Kumar Singh ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Nisheeth Yadav

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Art.-226-Service Law-full pension-interim pension given on ground-against the adverse entry-appellate authority will set-a-side the order liberty given to initiate fresh departmental proceeding-against charge sheet in criminal proceeding-hence interim pension-held-no G.O. or circular provides withholding pension-while Hon'ble High Court already given protection from taking coercive action-held-entitled for full pension.**

**Held: Para-15**
**We have also perused the Government Order dated 28.10.1980, annexure-CA-1 to the counter affidavit, which has been made basis for withholding the part of the pension and allowing the interim pension. This Government Order provides the payment of interim pension where the departmental proceeding are pending. None of the circular, Government Order or any provision has been referred before us, which provides that where no departmental proceeding is pending, still the pension can be withheld.**

**Case Law discussed:**
2007(10) ADJ, 561; 2009(7) ADJ 379; 2012(1) ESC, 57(Alld.); AIR 1971 SC 1409; (1983) 1 SCC 305; 2005(5) SCC 245.

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

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

2. By means of the present writ petition, the petitioner is challenging the order dated 07.01.2013 passed by the Inspector General of Police, Department

of Intelligence, by which interim pension of the petitioner has been allowed to the extent of Rs.15,010/- on the ground that in a criminal case, charge sheet has been submitted against the petitioner, which is pending before the Court.

3. Brief facts of the case are that the petitioner retired on 31.07.2012 from the post of Deputy Superintendent of Police. It appears that when the petitioner was posted as Inspector at Mainpuri in 2001, a first information report has been lodged by one Sri Bharat Singh Chauhan against Updesh Singh Chauhan and Prempal Singh. The charge-sheet was submitted and the investigation has been transferred to the C.B.(C.I.D). In the enquiry proceedings, the C.B.(C.I.D) found that the petitioner did not take any preventive measures, rather in collusion with Updesh Singh Chauhan, intended to get the house occupied/grabbed. For such charges, charge-sheet has been submitted against the petitioner. The petitioner filed Criminal Misc. Application under Section 482 Cr.P.C. being No.10149 of 2009, Narendra Kumar Singh Vs. State of U.P. and another before this Court. This Court vide order dated 06.05.2009 after recording the reasons, passed an interim order that no coercive action shall be taken against the applicant. According to the petitioner, the aforesaid Criminal Misc. Application, under Section 482 Cr.P.C. is pending. It appears that on the basis of the charge-sheet filed by C.B.(C.I.D) in the enquiry report, a departmental proceedings has been initiated against the petitioner and vide order dated 03.06.2003 passed by Superintendent of Police, Mainpuri , the integrity of the petitioner has been withheld. Against the said order, the petitioner filed appeal before the D.I.G., Agra, which has been allowed and the integrity has been certified. However, it has been observed that after the decision in the criminal case, it will be open to the department to initiate a fresh proceeding.

4. The contention of the petitioner is that no departmental proceeding is pending against the petitioner at present and, therefore, submission is that the petitioner is entitled for full pension. It is further submitted that mere pendency of criminal proceeding will not disentitle the petitioner to get full pension, inasmuch as there is no charge of the financial irregularities. Reliance is placed on the Division Bench decision of this Court in the case of Mahesh Bal Bhardwaj Vs. U.P. Cr-operative Federation Ltd. and another, reported in 2007(10) ADJ, 561 and the decision of learned Single Judge in the case of Radhey Shyam Shukla Vs. State of U.P. and another, reported in 2009 (7) ADJ, 379 and Division Bench decision of this Court in the case of Lal Sharan Vs. State of U.P. and others, reported in 2012 (1) ESC, 57 (Alld.).

5. Learned Standing Counsel states that it is true that at present no department proceeding is pending against the petitioner but if the petitioner will be punished in the criminal proceedings, the liberty has been given by the appellate authority, to initiate a fresh proceeding and, therefore, the interim pension allowed to the petitioner is wholly justified.

6. We have considered the rival submissions. Admittedly, there is nothing on record to suggest that any departmental proceeding is pending against the petitioner. There is no such averment in the counter affidavit. Merely because a criminal case is pending that too of a charge that he has not taken any preventive action, full pension can not be withheld. There is no charge of any financial irregularities.

7. We are of the view that on the facts and circumstances, full pension can not be denied.

8. In the case of Deoki Nandan Shan Vs. State of U.P., reported in in AIR 1971 SC, 1409, the Apex Court ruled that the pension is a right and payment of it does not depend upon the discretion of the Government but is governed by the Rules and the Government servant coming within those Rules is entitled to claim pension and grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount, having regard to service and other allied matters, that it may be necessary for the authority to pass an order to that effrect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was further affirmed by the Apex Court in the case of State of Punjab Vs. Iqbal Singh, reported in AIR 1976, SC, 667.

9. In the case of D.S.Nakara Vs. Union of India, reported in (1983) 1 SCC, 305, the Apex Court has observed as under :

"From the discussion three things emerge : (1) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 Rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to article 309 and clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch....."

10. The ratio laid down in these cases had been subsequently followed by the Apex Court in series of its decisions including the case of Secretary, O.N.G.C. Limited Vs. V.U.Warrier, reported in 2005 (5) SCC, 245.

11. Division Bench of this Court in the case of Mahesh Bal Bhardwaj Vs. U.P. Co-operative Federation Ltd. and another (Supra) has held that gratuity and other post retiral dues, which the petitioner is otherwise entitled under the Rules, could not have been withheld either on the pretext that criminal proceedings were pending against the petitioner or for the reason that on the outcome of the criminal trial, some more punishment was intended to be awarded.

12. Learned Single Judge of this Court in the case of Radhey Shyam Shukla Vs. State of U.P. and another (Supra) has also taken the similar view and has held that mere pendency of the criminal proceedings would not authorize withholding of gratuity.

13. Division Bench of this Court in the case of Lal Sharan Vs. State of U.P. and others (Supra) has held that mere intention to obtain sanction for initiating disciplinary enquiry could not be basis for withholding the post retiral dues unless sanctioned, granted and the disciplinary proceedings started.

14. Apex Court in the case of State of Punjab and another Vs. Iqbal Singh, (Supra) has further held that since the cut of the pension and the gratuity adversely affects the retired employee as such order can not be passed without giving reasonable opportunity of making his defence.

15. We have also perused the Government Order dated 28.10.1980, annexure-CA-1 to the counter affidavit, which has been made basis for withholding

the part of the pension and allowing the interim pension. This Government Order provides the payment of interim pension where the departmental proceeding are pending. None of the circular, Government Order or any provision has been referred before us, which provides that where no departmental proceeding is pending, still the pension can be withheld.

16. In view of the above, the writ petition is allowed and mandamus is being issued to the respondents to pay full pension to the petitioner within a period of two months from the date of presentation of the certified copy of this order. However, it will be open to the department to proceed afresh after the decision in the criminal case as observed by the appellate authority while certifying the integrity of the petitioner in accordance to law.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 21.10.2013**

**BEFORE**
**THE HON'BLE RAJES KUMAR, J.**
**THE HON'BLE MAHESH CHANDRA TRIPATHI,J.**

Civil Misc. Writ Petition No.40847 of 2013

**S.P. Shukla ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Keshari Nath Tripathi, Sri K.N. Mishra
Sri Abhishek Mishra

**Counsel for the Respondents:**
C.S.C., Sri Shivaji Singh

**Constitution of India, Art.-226-Transfer order on letter of MLA for adjustment of his relative-letter not denied-held-such order neither in Public interest nor on administrative exigencies-quashed-with cost of Rs. 10,000.**

**Held: Para-5 & 6**

**5. The endorsement/direction given by Sri Jagdev Singh, O.S.D., on 15.7.2013 has not been disputed. On the facts and circumstances, it is apparent that the petitioner has been transferred at the behest of sitting M.L.A. of Ruling Party to accommodate his relative, who is respondent no. 3 within 15 days of his posting at Kanpur.**

**6. On the facts and circumstances, we are of the view that the transfer order is full of malafide and is not sustainable. Such type of transfer is not expected from the Government and authorities should restrain themselves from passing such order on the dictate of politicians, contrary to the Government policy.**

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

1. Heard Sri K.N. Mishra, learned counsel for the petitioner, Sri Y.K. Yadav, learned Standing Counsel appears on behalf of respondent nos. 1 and 2 and Sri Shivaji Singh, Advocate appears on behalf of respondent no. 3.

2. By means of the present petition, the petitioner has challenged the transfer order dated 24.7.2013 by which the petitioner has been transferred from Kanpur to Devipatan.

3. It is the case of the petitioner that by the transfer order dated 9.7.2013, he has been transferred from Gorakhpur to Kanpur as a Deputy Labour Commissioner. He took the charge at Kanpur and was working there. By the impugned order, the petitioner has been transferred from Kanpur to Devipatan. The petitioner has challenged the transfer order. By the interim order dated 29.7.2013, impugned transfer order has been stayed.

4. Learned counsel for the petitioner submitted that the petitioner has been transferred on the basis of the letter of Sri

Kailash Yadav, a sitting M.L.A., which is Annexure-7 to the writ petition. In the said letter, he recommended the posting of one Sri Ramesh Chand Yadav on the post of Deputy Labour Commissioner stating therein that he is a close relative. The contents of the letter are as follows:

"कैलाश यादव सी–5 दारूलशफा,
विधायक सपा लखनऊ ।
जंगीपुर मो0 9415209750
8765955075

सेवा में,
माननीय मुख्यमंत्री जी,

उत्तर प्रदेश सरकार,
लखनऊ ।

महोदय,

श्री रमेश चन्द यादव–नव प्रोन्नत उप श्रमायुक्त एक ईमानदार, परिश्रमी एवं निष्ठावान अधिकारी हैं। इनका कार्य अत्यन्त सराहनीय एवं प्रशंसनीय है। यह मेरे करीबी रिश्तेदार है।

अतः आपसे सादर निवेदन है कि श्री रमेश चन्द यादव उप श्रमायुक्त की पदस्थापना लखनऊ क्षेत्र लखनऊ अथवा कानपुर क्षेत्र, कानपुर में कराने का आदेश प्रदान करने की कृपा करें।

सादर,
भवदीय,

ह0 अपठित
15.7.2013
(कैलाश यादव)

प्रमुख सचिव श्रम

यथानुरोध समायोजित करने की अपेक्षा की गई है।

ह0 अपठित
15.7.13
(जगदेव सिंह)
विशेष कार्याधिकारी मुख्यमंत्री
उत्तर प्रदेश शासन''

5. The letter dated 15.7.2013 was addressed to the Hon'ble Chief Minister. On the said letter, O.S.D. attached to the Chief Minister, has requested the Secretary, Labour Commissioner to adjust Sri Ramesh Chand Yadav. This averment has been made in para-7 of the counter affidavit. In the counter affidavit filed by the State, the aforesaid para-7 has been replied by para-10 of the counter affidavit. The averments made in para-7 of the counter affidavit has not been denied and it has only been stated that the petitioner has been transferred in public interest/Government work. The respondent no. 3 filed counter affidavit and replied para-7 by para-10 of the counter affidavit stating therein that the contents of para-7 of the writ petition is a matter of record, but further stated that averments made in the said paragraph that the local M.L.A. is the relative of the respondent no. 3 is totally false and the letter annexed in the writ petition by the petitioner is totally forged letter. No evidence has been adduced to show that the letter is forged. The endorsement/direction given by Sri Jagdev Singh, O.S.D., on 15.7.2013 has not been disputed. On the facts and circumstances, it is apparent that the petitioner has been transferred at the behest of sitting M.L.A. of Ruling Party to accommodate his relative, who is respondent no. 3 within 15 days of his posting at Kanpur.

6. On the facts and circumstances, we are of the view that the transfer order is full of malafide and is not sustainable. Such type of transfer is not expected from the Government and authorities should restrain themselves from passing such order on the dictate of politicians, contrary to the Government policy.

7. In view of the above, the writ petition is allowed with the cost of Rs.10,000/-. The impugned transfer order dated 24.7.2013, Annexure-2 to the writ petition, is hereby quashed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 25.10.2013**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No.44105 of 2011

**Ram Naresh ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Pankaj Srivastava

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Art.-226- Regularization-daily wages working in forest depot-engaged prior to 29.06.97 and working in December 2001-no denial-entitled for consideration strict in accordance with seniority list prepared under rule 4(1) of Rules-subject to fulfillment of academic qualification-against existing vacancy in December 2001-future vacancy occurred after December 2001 shall not be clubbed-order being contrary to rule-ultra virus-quashed-direction issued accordingly.**

**Held: Para-54**
**The discussion made above leaves no manner of doubt that petitioner in the case in hand is entitled to be considered for regularisation, subject to the conditions, that, his seniority entitles him for consideration for regularisation against vacancies available on the date of commencement of Rule 2001**

**Case Law discussed:**
(2002) 2 UPLBEC 1595; Spl. Leave Petition No. 26664 of 2010; Writ A-58886 of 2009; 2008(1) ADJ 371; 2011(2) ADJ 594; 2007(4) ADJ 186; 2008(2) ESC 1359; Writ A No. 61444 of 2007; 2006(4) SCC 1; 2007(2) SCC 230; 2011(5) AWC 5075; 2011(2) SCC 429; 2011(4) SCC 200; 2012(6) SCC 502; 2013(3) SCC 705; 1992(Suppl) 3 SCC 217; JT 2001(8) SC 171; 1998(8) SCC 469; 1998(8) SCC 154; 2007(10) SCC 684; 2008(4) SCC 171; Civil Appeal NO. 4483-4485 of 2013; 2007(7) SCC 140; 2012(13) SCALE 124; Spl. Appeal No. 375 of 2005.

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

1. Heard Sri Pankaj Srivastava for the petitioner and learned Standing Counsel for respondents. Since pleadings are complete, as requested and agreed by learned counsel for the parties, I have proceeded to hear and decide it, under the Rules of the Court, at this stage.

2. Though there are several reliefs sought in this writ petition but in effect, petitioner's claim is three fold: (i) regularisation on a group 'D' post in Forest Department (ii) payment of salary at minimum of regular pay scale so long he is not regularised as per the decision in State of U.P. Vs. Putti Lal (2002) 2 UPLBEC 1595 and (iii) not to be terminated orally or otherwise.

3. Besides above, there is an additional issue in this matter. The petitioner has assailed an order dated 24.06.2011 (Annexure 16 to writ petition), which is a letter issued by Principal Conservator of Forest (Administration), U.P., Lucknow (hereinafter referred to as the "PCF (Admn.)") to the Principal Conservator , (Wildlife), U.P., Lucknow and all Chief Conservator of Forest, U.P. stating that not only vacancies newly created as supernumerary, by Government Order dated 23.06.2011, ought to be utilized for regularisation of employees in Group 'D' posts, under U.P. Regularisation of Daily Wage Appointments on Group 'D' posts Rules 2001 (hereinafter referred to as "

Rules 2001") and on Group 'C' posts under U.P. Regularisation of Daily Wages Appointment on Group 'C' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 1998 (hereinafter referred to as "Rules 1998") and all those daily wage employees who are working since 29th June 1991 are to be regularised but if any vacancy has occurred due to retirement etc., and, is existing, the same would also be utilised for such regularisation. Thus validity of this order dated 24.06.2011 is to be tested in the light of Rules, 2001 and 1998.

4. The facts in brief as per petitioner's version in the writ petition, are, that the petitioner was engaged as a Group 'D' employee in February, 1989 and continuing till the date of filing of the writ petition. He claims to be eligible for regularisation as per directions of Apex Court in State of U.P. Vs. Putti Lal (Supra) and also in view of statutory provisions contained in the Rules, 2001. The State Government took a policy decision to implement judgment in State of U.P. Vs. Putti Lal (Supra), as communicated by Principal Chief Conservator of Forest, U.P., Lucknow (hereinafter referred to as the "PCCF") vide letter dated 07.09.2002, to all Chief Conservators of Forest, U.P., Conservators of Forest/Regional Director and Divisional Forest Officers, U.P., directing to follow and comply Court's decision in State of U.P. Vs. Putti Lal (Supra). The Divisional Forest Officers of concerned areas, who are appointing authorities, however, proceeded illegally by making rampant, arbitrary and whimsical regularisations, without caring for length of engagement of individual daily wage employees and without preparing any seniority list vis-a-vis the vacancies available. A complaint was made to State Government that available vacancies for regularisation have been diverted elsewhere, so as to deprive daily wage employees of the benefit of regularisation. In this regard, detailed information was sought by State Government vide order dated 20.05.2002 (Annexure 5 to the writ petition) from all the Divisional Forest Officers/Divisional Directors. It drew attention of this Court also when an Hon'ble Single Judge, dealing Contempt Petition No.1632 of2009 (Laxmi Chandra Vs. N.K. Janu), vide orders dated 03.12.2009, 26.02.2010 and 28.08.2010, sought detailed information from PCCF. The proceedings could not continue since in the meantime, some of the officers concerned went in appeal before Apex Court in Special Leave Petition No. 26664-26665 of 2010 (Chanchal Kumar Tiwari and others vs. Narayan Singh) and the Hon'ble Court, vide order dated 16.09.2010, stayed contempt proceedings. Similar stay order in all contempt proceedings was passed in SLP NO. 26571-26572 of 2010 on 27.09.2010.

5. Petitioner further pleads that one Sri Pratap Singh son of Jhunni Lal has been regularised by order dated 11.02.2011. The same benefit should be extended to petitioner also. Salary payable to daily wage employees, yet not regularised, has also been revised, implementing recommendation of VII Pay Commission by order dated 11.03.2010 (Anenxure 11 to writ petition). Non-preparation of a combined eligibility and seniority list by respondents, before considering daily wage employees for regularisation in Forest Department, is illegal and arbitrary. It amounts to deliberate and intentional attempt to

circumvent judgment in State of U.P. Vs. Putti Lal (Supra). It is gross abuse of power so as to deny benefit of regularisation in accordance with Rules 2001, to the concerned workers. Further that, now work of Forest Department has been reduced by granting exemption to forest produce, peat, surface soil, rock and minerals etc., mentioned in sub-clause (iv) of Clause (b) of Sub-Section (4) of Section 2 of Indian Forest Act 1927, excavated from non forest land and moved from forest area, for operation of U.P. Transit of Timber and other Forest Produce Rules, 1978, so as to help forest Mafias, causing loss of revenue to the department. Much of work, which earlier, used to be done by Forest Department has now been transferred to Gram Panchayat etc. and is being done under National Rural Employment Guarantee Act, 2005 (hereinafter referred to as "NREG Act, 2005"). The petitioner is now being engaged under aforesaid NREG Act 2005. This has also resulted in denying continuity of engagement to petitioner as Group 'D' employee in Forest Department. This action is clearly illegal, arbitrary and with an intention of victimisation of daily wage employees, like the petitioner. The change of mode of payment of wages by applying NREG Act 2005 and deviating from the procedure prescribed under Rules 98 to 100 of Forest Accounts Rules, Part VII, is wholly arbitrary and illegal. Lastly, it is said that in order to absorb daily wage workers in Group 'D' vacancies, the State Government created 2022 posts for regularisation in Group 'D' and 37 in Group 'C' vide Government Order dated 23.06.2011 with clear direction that these posts shall be utilised for the purpose of regularisation of daily wage employees. The posts having been created as supernumerary, shall go on abolition as soon as regular posts are available to the concerned employees. The petitioner, therefore, is entitled for regularisation against the aforesaid newly created supernumerary Group 'D' posts, following the procedure prescribed in Rules 2001.

6. Respondents have filed a counter affidavit wherein basic facts about engagement of petitioner, as stated in the writ petition, have been denied. The petitioner's claim that he is working since February 1989 continuously and at least, till date of filing of writ petition in 2011 is denied. The averment made in para 4 of writ petition, has been denied in para 12 of counter affidavit, stating that petitioner has not placed any material on record to show that he was entitled to regularisation under Rules 2001. It is, however, said that the petitioner worked as daily wager for one month in 1982, 5 months in 1983, five months in 1984, 12 months in 1985, 11 months in 1986, 10 months in 1987, 9 months in 1988, 12 months in 1989, 12 months in 1990, 3 months in 1991, 9 months in 1996, 7 months in 1997 and 7 months in 2001. Right to claim regularisation has been denied on the ground that that he has not worked continuously from the date of his initial engagement till commencement of Rules 2001 i.e., upto 21st December 2001. In para 16 of counter affidavit it is also averred that only those daily wage employees were eligible for consideration of regularisation under Rules, 2001 who were engaged on daily wage basis on or before 29.06.1991 and continuing to work on the date of commencement of Rules 2001, i.e., 21.12.2001. The petitioner was ineligible under the aforesaid Rules, hence, not considered for regularisation. There was no occasion for placing his

name in the list, in order of seniority, for the purpose of regularisation since he does not fulfil requirement under Rule 4(1) of Rules 2001. Nobody could have been compelled to work under NREG Act, as the scheme thereunder is totally different and has nothing to do with Forest Department as such.

7. A very bulky and voluminous rejoinder affidavit has been filed by petitioner. In para 8 thereof, it is said that petitioner has been working at Chakar Nagar Forest Range, Etawah throughout. Photo copies of cash books commencing from February 1989 have been filed as Anenxures 1 and 2 to rejoinder affidavit to show continuous working of petitioner.

8. Sri Pankaj Srivastava, learned counsel for the petitioner vehemently argued that unless a list of daily wage employees engaged, in Forest Department, before 29.06.1991, for the purpose of regularisation, is prepared, in order of seniority, Rules 2001 cannot be applied and implemented truly. In the present case, since no list has been prepared, this indicates how respondent authorities have acted illegally so as to deny benefit of regularisation to petitioner and similarly placed other employees. He reiterated various grounds, as set up in the writ petition and mentioned above, placing reliance on Apex Court's decision in State of U.P. and others Vs. Putti Lal (supra). He also complained on non payment of salary as directed by Court in above decision in Putti Lal.

9. Learned counsel for petitioner contended that in order dated 24.06.2011 direction is in the teeth of statutory rules inasmuch as, in both the sets of Rules, namely, Rules 2001 and Rules 1998 only those vacancies as were available on the date of commencement of Rules , could have been utilised for the purpose of regularisation, any vacancy subsequently created or occurred in whatever manner, it is, but the same cannot be utilised for the purpose of regularisation under the aforesaid Rules. Learned Standing Counsel, however, apparently found it difficult to defend impugned order dated 24.06.2011 (Annexure 16 to writ petition), but simply said that whatever has been said therein, he supports it and rest is for the Court to decide.

10. Learned Standing Counsel on the contrary, submitted that the petitioner did not fulfil all the conditions precedent, required under Rule 4(1) of Rules, 2001, therefore, he was not entitled to be considered for regularisation. It is further said that the petitioner since long is not working in Forest Department and as admitted by him, has been engaged under NREG Act, 2005 by the concerned authorities and not by Forest Department. Refuting the complaint about salary, he argued that petitioner, as per his own admission, is engaged under NREG Scheme hence the direction in Putti Lal (supra) does not apply on such engagement.

11. in view of rival contentions, adjudication of this writ petition requires answer of the following questions:

(1) Whether petitioner fulfilled requisite eligibility conditions, making him eligible for consideration for regularisation under Rules, 2001 ?

(2) Whether preparation/non-preparation of seniority list of Group 'D' employees has any relevance for the purpose of claim of petitioner for

regularisation, if question no. (1)is answered against him ?

(3) Whether claim of petitioner, presently, for payment of salary at minimum of regular pay scale, is admissible and applicable, when admittedly, he is discharging duty having been employed under NREG Act, 2005, after enforcement of the aforesaid Act ?

(4) Whether the respondents are justified in utilising any vacancy occurred or created, after commencement of Rules 1998 and 2001, for the purpose of regularisation, under the aforesaid Rules and whether the order/letter dated 24.06.2011 is valid?

12. First, I propose to consider question no.1. For that purpose, suffice it to mention that a person can claim right of consideration for regularisation under Rules, 2001, only if, he fulfils requisite conditions, provided in Rule 4(1) thereof. This Rule (1) reads as under:

"4. Regularisation of daily wages appointments on Group "D' posts.- (1) Any person who-

(a)was directly appointed on daily wage basis on a Group "D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b)possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group "D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

(2) In making regular appointments under these rules, reservations for the candidates belonging to the Schedule Castes, Schedule Tribes, Other Backward Classes of citizens and other categories shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Schedule Caste, Schedule Tribes and Other Backward Classes ) Act, 1994 and the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen ) Act, 1993 as amended from time to time and the orders of the Government in force at the time of regularisation under these rules.

(3) For the purpose of sub-rule (1) the Appointing Authority shall constitute a Selection Committee in accordance with the relevant provisions of the service rules.

(4) The Appointing Authority shall, having regard to the provisions of sub rule (1), prepare an eligibility list of the candidates, arrange in order of seniority as determined from the date of order of Appointment on daily wage basis and if two or more persons are appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with such relevant records pertaining to the candidates, as may be considered necessary, to asses their suitability.

(5) The Selection Committee shall consider the cases of the candidates on the basis of their record referred to in sub-rule (4), and if it considers necessary, it may interview the candidates also.

(6) The Selection Committee shall prepare a list of selected candidates in order of seniority, and forward the same

to the Appointing Authority." (emphasis added)

13. A bare perusal of Rule 4(1) of 2001 Rules makes it clear that only such daily wager is entitled to be considered for regularisation, who ;

(A) was appointed on daily wage basis on a group 'D' post in Government Service before 29th June 1991;

(B) continuing in service as such i.e., in his capacity as daily wager, on the date of commencement of Rules, i.e. 21.12.2001;

(C) possessed requisite qualification prescribed for regular appointment for that post at the time of initial appointment on daily wage basis; and,

(D) a permanent or temporary vacancy in Group 'D' post is available on the date of commencement of Rules, i.e. 21.12.2001.

14. The two crucial dates have to be satisfied by daily wage employee, namely, employment before 29th June 1991 and continuing in service on 21.12.2001. This condition is mandatory. If either of the two conditions, is found missing, in any particular case, such incumbent shall not be eligible for consideration for regularisation under Rules, 2001.

15. Similarly, Rule 4(1)(b) makes it clear that the incumbent must possess requisite qualification prescribed for the post or against which he was appointed on daily wage basis, but further right of regularisation is confined vide Rule 4(1)(a), only against such vacancies as were available on the date of commencement of Rules, 2001, namely, 21.12.2001 and not against any vacancy occurring subsequently. This is one time benefit made available to Group 'D' employees, who fulfil requisite conditions under Rule 4(1). It is not a perennial source of recruitment so as to induct a person by way of regularisation as and when the vacancies are available, either due to creation of post or otherwise, on any date, subsequent to 21.12.2001. On this aspect also, matter has been considered in Santosh Kumar Bajpai Vs. State Of U.P. & Others (Writ - A No. - 58886 of 2009, decided on 18.11.2009) and it has been held in para 11:

"11. A perusal of 2001 Rules thus makes it clear that it is applicable to only such vacancies as were existing on the date of commencement of said Rules, i.e., 21.12.2001. As soon as such vacancies are filled in and get exhausted, no further regularisation is permissible. The rules are one time measure and shall render otiose as soon as the vacancies existing on 21.12.2001 are filled in. If that be so, it would be difficult to construe the word "generally applicable" so as to include such rules made for Government servants which have application only for a limited period or which are one time measure..... ....." (emphasis added)

16. In Rakesh Chandra Srivastava Vs. State of U.P. & Ors., 2008 (1) ADJ 371 wherein Rule 4 of U.P. Regularization of Daily Wages Appointments on Group 'D' Posts Rules, 2001 came up for consideration, the Court looking all the aspects of Rule 4(1), said :

"A bare perusal of Rule 4 (1) (a) & (b) makes it clear that it confers a right of consideration for regularization upon such daily wage employees who: (1) were appointed on daily wage basis on a Group 'D' post in the Government service before

29th June, 1991 and (2) is continuing in service as such on the date of commencement of these rules and (3) possesses requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, and (4) a person who fulfils all the above qualifications shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group 'D' post on the date of commencement of the said rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

Therefore, the vacancy against which right of consideration for regularization is available are only those which were available on the date of commencement of the rules, namely, 2001 Rules and against such vacancies only, if the incumbent fulfils the aforementioned qualifications and eligibility, would be entitled for regularization before any regular appointment is made in such vacancy in accordance with relevant service rules or orders. There is no provision under 2001 Rules which permits right of regularization to a daily wage employee against any vacancy which may occur in future or subsequent to 21st December 2001. The rules of regularization being in the nature of exceptional provisions having overriding effect over other provisions of normal procedure of selection in accordance with rules, can be allowed and permitted to apply strictly in accordance with the rules and not otherwise...." (emphasis added)

17. The above decision has been followed in Ram Dayal Vs. State of U.P., 2011 (2) ADJ 594 and in a number of other cases.

18. A Division Bench of this Court (of which I was also a member) in Dukhi Singh Vs. State of U.P. and others , 2007(4) ADJ 186 also took a similar view.

19. Whether a daily wager is continuously and without break/gap employed in between two cut off dates or not, is not of any relevance. This question, whether Rule 4(1)(a) of Regularisation Rules 2001 mandated that a daily wage employee, after his engagement/appointment before 29.06.1991, should continue to work throughout till the date of commencement of Rules i.e., 21.12.2001 has been considered and answered already in various authorities.

20. In Janardan Yadav Vs. State of U.P. & others, 2008 (2) ESC 1359 this Court in paras 5, 6 and 8 of the judgment said:

"5. Since the facts are not in dispute and it is also not disputed that the petitioner was engaged on daily wage basis in 1984, i.e., before 29.6.1991 and was also working on the date of commencement of Rules 2001, i.e, on 21.12.2001, thus it is evident that he was entitled to be considered for regularization under the said Rules. The only question up for consideration is whether the said Rules require continuous service throughout, i.e., from the date of initial engagement till the commencement of the Rules. In my view, there is no such requirement under the Rules as is apparent from perusal thereof.

6. The only requirement under Rule 4(1)(a) are that the incumbent was directly appointed on daily wage basis on a Group 'D' Post in a Government Service before 29.6.1991 and is continuing in service as such on the date of

commencement of the said Rules. The further requirement under Clause (b) of Rule 4(1) is that he must have possessed requisite qualification required for regular appointment on that post at the time of such employment on daily wage basis."

"8. The said stand is contrary to the Rules and it amounts to reading certain words in Rule 4(1) which is not provided therein by the Rule framing authority. The rule framing authority has not framed the aforesaid Rules in manner as are being read by the respondents. Since the Rules are applicable only to daily wage employees, the Rules framing authority was aware that such employee could not have worked continuously throughout and, therefore, has clearly provided that the engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rules. If a daily wage engagement has been made before 29.6.2001 and was continuing on 21.12.2001, meaning thereby the daily wage engagement remained necessity of the department or the requirement thereof for more than 10 years, for such a person only, the benefit of regularization under 2001 Rules has been provided, and it nowhere requires further that the incumbent must have worked continuously from the date of initial engagement till the commencement of these Rules and to read these words would amount to legislation, which is not permissible in law. While interpreting the statute, it is well settled that neither any word shall be added nor be subtracted but if a plain reading of the statute is clear and unambiguous, the same has to be followed as such. This Court does not find any ambiguity in Rule-4(1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules."

21. Following the law laid down in Janardan Yadav (Supra), this Court in Pooran Lal Vs. State of U.P. through Ministry of Forest and others (Writ A No. 61444 of 2007) decided on 1.8.2013 held as under:

"In view of the law laid down in Janardan Yadav (supra) it is evident that continuous service through out is not a requirement in the Rules, 2001 and thus, the reason given by respondents that the petitioner did not work for certain period is wholly incorrect and misconceived for the reason that Rules, 2001 nowhere require that a daily wage employee ought to have worked continuously to get the benefit of the said Rules. The order impugned in this writ petition has been passed by the respondents by reading something in the Rules which in fact is not provided therein. The respondents, therefore, have acted wholly without jurisdiction and exceeding the powers by reading a statutory provision in his own way and to the extent of reading certain words therein though it is not there. The respondents cannot sit over the wisdom of the rule framing authority to find out something which is not in the rule. The manner in which the respondents have considered this aspect is wholly erroneous and, therefore, the impugned order cannot sustain."

22. I find it my duty to make certain aspects relating to regularisation, clear, at this stage. The appointments in public services are made in various ways. The purest form of appointment is one which is made following the procedure laid down in statute consistent with Article 16 of the Constitution of India. When a vacancy on a civil/public post is available, it is made known to every one, eligible and willing, to apply therefor, so as to be considered thereagainst. It conforms the

fundamental right of equal opportunity of employment to all qualified and willing persons for such employment. When this opportunity is given and appointment is made after following procedure prescribed in statute, the appointment is absolutely just, valid and called the purest form of appointment.

23. Then comes an appointment, where vacancies are advertised, consideration for employment is afforded to all qualified and willing but in the process of selection and appointment there is some procedural defect which may not affect the very appointment to its root. Such an appointment, at the best may be an irregular appointment which would confer a right upon the appointee to continue and hold the post subject to subsequent rectification or validation by competent authority, expressly or impliedly.

24. Then comes an appointment made, fortuitous in nature, in certain exigencies. For example, a short term, stop gap, officiating, daily wage etc. appointments, which normally is opted when requirement and tenure is precarious and by the time, procedure is followed, very purpose would stand frustrated. Such appointments are made normally by pick and choose method, i.e., whosoever come and apply, whether after getting knowledge on his own or otherwise, is given opportunity to serve for the limited purpose and tenure, which is called, sudden requirement and exigency of situation. Such appointments do not confer any right upon the appointee, either to hold post for a long time or to get the post in substantive manner. Above exception has been pleaded and allowed though it deprives right of equal opportunity of consideration to all eligible and willing persons by advertising the vacancy etc. only for the reason that requirement is sudden, tenure precarious and delay shall cause greater public loss, otherwise such appointments, in other words, comes in the category of illegal when tested on the anvil of Article 14 and 16 of the Constitution. One can say that applying doctrine of reasonable classification and considering fortuitous nature of requirement and process followed for its achievement, per se it may not be termed as illegal so long as that requirement is there but in case it is extended so as to confer a benefit more than such requirement, it will cross the dotted line of validity and will enter in the realm of illegality. Such appointments have been held void ab initio and not entitled to confer any right upon appointee so as to claim a substantive right on the post in his holding, in whatever capacity, whether daily wager, officiating, ad hoc etc.

25. The Constitution Bench in Secretary, State of Karnataka Vs. Uma Devi 2006 (4) SCC 1 has held that such illegal appointments cannot be asked to be regularized as that would amount to violating the fundamental right of equal opportunity of employment to those who have been denied such opportunity. The Constitution Bench decision has overruled dozens of earlier decisions taking a view otherwise so as to show sympathy in favour of those who got or managed their appointments illegally, i.e., without complying the requirement of equal opportunity of employment to all others, came to the office on account of their individual resources and managing continuance for quite some time or long time, and then claim a substantive right on the basis of long tenure, they have managed to continue. In other words, the incumbent comes to the office by virtue of a pick and choose method, usurps office by back door or whatever other term one may use, despite it being short of compliance of requirement

of Article 16(1) of the Constitution, but having maintained such benefit to continue for quite some time, which normally has the support of appointing authorities also, the beneficiary comes to claim a sense of sympathy on the basis of such long continued usurpation of office. In other words, a violator of law claims a substantive right for having violated law continuously for quite a long time with regard to a public office.

26. In the matter of appointment there is no principle of adverse possession but a plea somewhat similar thereto many a times is raised that since he has continued to work for quite long time, now he should be allowed to stay in the office for rest of tenure otherwise his family would suffer. A situation is created where sympathy is sought not in favour of victims, i.e., those who were denied right of equal opportunity of employment but in favour of those who have violated law, contravened it, breached it with impunity, and, have continued to do so for quite some time, and now, boldly and blatantly claiming a kind of right to retain such benefit of breach of law for all times to come and for that purpose various pleas in the name of equity, sympathy, compassion etc. are raised and pleaded and many a times find favour in the Courts of Law. Fortunately, Constitution Bench, after having a retrospect of all earlier authorities, took a clear stand against such kind of favour shown to those who have come in public office, by denying right of equal opportunity to others. The Court in unequivocal terms observed that any favour shown to such violators would be a misplaced sympathy.

27. The maxim dura lex, sed lex, which means "law is hard but it is the law", in my view, aptly applies in the cases where incumbents have come to an office not following procedure consistent with constitutional requirement of Article 16(1) but otherwise and thereafter claim equitable and other consideration for sustaining their entry and occupancy of the office for all times to come. In Raghunath Rai Bareja and another Vs. Punjab National Bank and others, 2007(2) SCC 230 it is said:

"When there is a conflict between law and equity, it is the law which has to prevail . . . . . Equity can only supplement the law, but it cannot supplant or override it."

28. It has been followed in State of Uttaranchal and Anr. Vs. Rajendra Singh Kandwal 2011(5) AWC 5075 (SC).

29. After Uma Devi (supra) there is a chain of authorities wherein the above view has been followed and some of the authorities which tried to take a different view, subsequently, have been overruled and clarified.

30. The Regularisation Rules is an attempt to give a cover to such illegal appointments and, therefore, may have to be tested on the anvil of constitutional validity under Article 14 and 16(1) of the Constitution. However, in the present case, since validity of regularization rules is not in question, therefore, for the purpose of present case I am following Rules, 2001 or Rules, 1998, as the case may be, as they are, but has no hesitation in observing that benefit thereunder will have to be construed very strictly. Unless and until every indicia is satisfied, one cannot be given benefit under Rules, 2001 or 1998. In other words, every requirement entitling a persons to be considered for regularization must be held to be mandatory and any deviation therefrom will either disentitle the claimant from such

benefit or any attempt by executive otherwise would render such action of even executive authority, ultra vires.

31. Some of the recent authorities, in this regard, just to recapitulate and remind the exposition of law with regard to regularisation may be referred to hereat.

32. Commenting upon one time scheme of regularization, in State of Rajasthan and others Vs. Daya Lal & others, 2011(2) SCC 429, the Court in para 12 of the judgment said:

"12. The decision relied upon by the High Court namely the decision in Anshkalin Samaj Kalyan Sangh of the High Court no doubt directed the state government to frame a scheme for regularization of part-time cooks and chowkidars. It is clear from the said decision, that such scheme was intended to be an one-time measure. Further said decision was rendered by the High Court prior to Uma Devi, relying upon the decision of this Court in Daily Rated Casual Labour v. Union of India 1988 (1) SCC 122, Bhagwati Prasad v. Delhi State Mineral Development Corporation 1990 (1) SCC 361 and Dharwad District PWD Literate Dalit Wage Employees Association v. State of Karnataka 1990 (2) SCC 396. These directions were considered, explained and in fact, overruled by the Constitution Bench in Uma Devi. The decision in Anshkalin Samay Kalyan Singh is no longer good law. At all events, even if there was an one time scheme for regularisation of those who were in service prior to 1.5.1995, there cannot obviously be successive directions for scheme after scheme for regularization of irregular or part-time appointments. Therefore the said decision is of no assistance."

33. In Union of India and others Vs. Vartak Labour Union, 2011(4) SCC 200 in para 16 of the judgment the Court said:

"16. We are of the opinion that the Respondent Union's claim for regularization of its members merely because they have been working for BRO for a considerable period of time cannot be granted in light of several decisions of this Court, wherein it has been consistently held that casual employment terminates when the same is discontinued, and merely because a temporary or casual worker has been engaged beyond the period of his employment, he would not be entitled to be absorbed in regular service or made permanent, if the original appointment was not in terms of the process envisaged by the relevant rules. (See: Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors. (2006) 4 SCC 1; Official Liquidator v. Dayanand and Ors. (2008) 10 SCC 1; State of Karnataka and Ors. v. Ganapathi Chaya Nayak and Ors. (2010) 3 SCC 115; Union of India and Anr. v. Kartick Chandra Mondal and Anr.; Satya Prakash and Ors. v. State of Bihar and Ors. (2010) 4 SCC 179 and Rameshwar Dayal v. Indian Railway Construction Company Limited and Ors. 2010) 11 SCC 733."

34. In Brij Mohan Lal Vs. Union of India and others, 2012(6) SCC 502, dealing with the Fast Track Courts, the Court referred to the Constitution Bench decision in Uma Devi (supra) and said that therein the principle has been laid down that in matters of public employment, absorption, regularization or permanent continuance of temporary, contractual or casual daily wage or ad hoc employees appointed and continued for long in such public employment would be

de hors the constitutional scheme of public employment and would be improper.

35. In University of Rajasthan and another Vs. Prem Lata Agarwal, 2013(3) SCC 705 after referring to the dictum in Uma Devi (supra), the court observed, that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by relevant rules/procedure, he is aware of the consequences of appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed on a post when an appointment on the post could be made only by following proper procedure.

36. In the light of above discussion now it has to be seen whether the petitioner fulfilled requisite conditions under Rule 4(1) of Rules, 2001 or not. He claimed that he was engaged and continuing to work since February 1989. Assertion to this effect made in para 4 of the writ petition has been denied by respondents in para 12 of counter affidavit. To meet this objection, in para 8 of the rejoinder affidavit, read with annexures 1 and 2 thereto, petitioner has placed on record certain documents showing payment of salary for certain period. A perusal thereof would show that payment of salary, shown to have been made to petitioner is for the following period:

| Sl. | Period | Page no. in the rejoinder affidavit |
|---|---|---|
| 1. | April 1989 to March 1991 | 26A |
| 2. | April 1996 to January 1997 | 27A |
| 3. | April 1997 to September 1997 | 27B |
| 4. | June 2001 to February 2002 | 27C |

37. A reading of the Rules, exposition of law and the fact about engagement/employment of petitioner on various days as daily wager as discussed above, make it very clear that in the present case, the petitioner was engaged as a daily wager before 29th June 1991 and was in employment in the month of December 2001 and on the date when Rules 2001 came into force. Due to vague reply on the part of respondents that the petitioner was engaged in the entire month but without any date etc. this Court would be justified to infer that on the date of commencement of Rules 2001 i.e., 21.12.2001, the petitioner was in employment, as a daily wager, with the respondent, hence was eligible and entitled to be considered for regularisation in a vacancy on a Group 'D' post, existing or available, on the date of commencement of Rules 2001. It goes without saying that the aforesaid entitlement of petitioner would be subject to condition that he also possessed qualification for Group 'D' post, as prescribed on the date of engagement on daily wage basis. The respondents have not disputed that no vacancy existed on the date of commencement of Rules, 2001 so as to consider petitioner for regularisation thereagainst. Question no. 1, thus, is answered accordingly, and, in favour of petitioner.

38. Now coming to question no.2, once it is clear that the petitioner was eligible and entitled to be considered for regularisation under Rules 2001, it goes without saying that respondents were under obligation to prepare a list of all eligible candidates, entitled to be considered for regularisation, in order of seniority, for the reason that the senior incumbent, having been employed for a longer period, is entitled to be considered for regularisation, in preference to a person who had a lessor period of employment as daily wager. If number of vacancies available is more than the number of candidates eligible

for regularisation, respondents practically may not prepare a seniority list for the reason that all eligible daily wagers, entitled for consideration for regularisation, could have been considered, but where number of candidates exceed the number of available vacancies, process of regularisation makes it obligatory upon respondents to prepare a seniority list. This is so contemplated in Rules 2001 also.

39. Sub rule (4) of Rule 4 says that an eligibility list of candidates, arranged in order of seniority will have to be prepared by appointing authority. The said list of seniority shall contain all eligible candidates who satisfy requirement of Rule 4(1) of Rules 2001. Reckoning point for seniority will be the date on which the incumbent was initially appointed on daily wage basis, irrespective of number of days for which a daily wager was employed. It is the point of time of his engagement, which will govern his seniority. A person appointed earlier in point of time, will be senior to that appointed/employed, as daily wager, subsequently. The number of days in which daily wager is employed is not relevant for the purpose of seniority, in view of clear language used by Rule framing authority in Rule 4(4) of Rules 2001. The words "arranged in order of seniority as determined from the date of order of appointment on daily wage basis" make it very clear that seniority list, which shall be prepared, determining seniority of eligible candidates must be with reference to the date of order of appointment on daily wage basis. When rule itself contemplates a particular reckoning point for seniority, without doing any violence or providing individual's rationality, the wisdom of the legislature has to be given effect to. The appointing authority is obliged to follow it, verbatim, and, in true spirit.

40. It also goes without saying that process of regularisation cannot begin, unless, first, eligibility of candidates is determined and, second, those candidates are enlisted/arranged in order of seniority. The only inconsequential exception, which may be conceived, giving a minor leverage to appointing authority of not preparing list in order of seniority, would be, where number of vacancies, available for regularisation, is greater than the number of eligible candidates.

41. However, this Court does not intend to say that the appointing authority, invariably, may not prepare list of eligible candidates in order of seniority, if number of vacancies is greater than the number of eligible candidates, inasmuch as, the actual order of regularisation and consequential seniority of candidates would also depend on the date of order of their regularisation and I have no hesitation, in holding that a person, who is senior, is entitled to be regularised first and maintain his seniority after regularisation, over another daily wager, who is also regularised, but junior to him as daily wager, and, therefore, as regularised employee also he must stand junior to him.

42. Practically, preparation of seniority list, since, excludes any discrimination or arbitrariness, therefore, it must be prepared, truly and faithfully. The appointing authority therefore, before proceeding to make regularisation, must prepare a list of eligible candidates, in order of seniority, as contemplated in Rule 4(4) of Rules 2001. Any process of regularisation without following mandate of Rule 4(4) would be illegal, particularly , if it has resulted in non consideration of senior person(s) for regularisation before junior is considered therefor.

43. Question no.2 in this case, therefore, is answered accordingly. It is held

that the respondents are obliged to prepare a list of eligible candidates, in order of seniority, in accordance with Rule 4(4) of Rules 2001, before proceeding to make any regularisation, against available vacancies under Rules 2001.

44. Now coming to question no. 3, learned counsel for petitioner could not show anything as to how work rendered by petitioner in the beneficial scheme under NREG Act 2005 can be connected with Forest Department so as to treat his engagement as daily wage employee on Group 'D' post in Forest Department. The purpose, objective and methodology, operating under NREG Act, 2005 is totally different. It would have no concern vis a vis engagement of a person as daily wager against a Group 'D' post in Forest department itself. The kind of engagement in the two is totally different. It has no co relation. Nothing could be shown otherwise by learned counsel for the petitioner than whatever said above. Question no.3, thus is answered in negative i.e. against the petitioner.

45. Then comes question no.4. As has already been discussed, the words "permanent or temporary vacancy, as may be available in Group 'D' post, on the commencement of these Rules" in Rule 4(1)(b) of Rules 2001 make it very clear that Rules 2001 contemplate regularisation only against such vacancies, as were available on the date of commencement of the said Rules. By virtue of Rule 1(2) it came into force at once, w.e.f. 21.12.2001. The aforesaid Rules commenced on the said date. Therefore, all the vacancies of Group 'D' as were available on 21.12.2001 shall be consumed for the purpose of regularisation under Rules 2001. The vacancies which occurred subsequently, either due to new creation or retirement of existing employees or death etc., whatever may be the reason, such vacancies cannot be utilised for the purpose of regularisation of daily wage employees under Rules 2001. This exposition of law has also been discussed above while considering question no.1, above.

46. Rule 4(1) of Rules 1998 is also pari materia to Rule 4(1) of Rules 2001 so far as this aspect of the matter is concerned. Therefore, what has been said with respect to Rule 4(1), Rules 2001 shall ipso facto apply for considering regularisation under Rules 1998.

47. Now in this line of the matter, I have to examine whether direction contained in impugned letter dated 24.06.2011, issued by respondent no.2, is legal and valid, or not. The answer is quite evident and obvious. The direction contained in the letter dated 24.06.2011 is clearly in the teeth of aforesaid Rule 4(1) of the two sets of Rules. Respondent no.2 has said that not only those vacancies which were created on 23.06.2011 be utilised for regularisation under Rules 2001 and Rules 1998, but even the vacancies, which occurred in the recent past, be also consumed for such regularisation and if any supernumerary post created by the Government Order dated 24.06.2011, remains unfilled due to non-availability of eligible candidates, such vacancies/posts be surrendered.

48. It appears that before issuing aforesaid direction, the concerned respondents did not care to have a careful glance of relevant Rules. The unambiguous and clear language thereof would have led them to understand in correct perspective that no vacancy which would come into existence/occur, subsequent to the date of commencement of Rules 2001 or Rules 1998, as the case may be, can be/would be

utilised for regularisation, under the two sets of Rules.

49. In other words, as also said earlier, process of regularisation under the aforesaid Rules is not perennial reservoir which has to continue for an indefinite time in perpetuity. The reason is quite obvious. Incumbents, for whose benefit, the aforesaid rules are promulgated, are those who have been appointed illegally, i.e without following the process of recruitment, prescribed in the statutory Rules i.e. recruitment and appointment on Group 'C' and 'D' posts, as the case may be. Taking a sympathetic view of the matter and looking to the fact that such persons have continued to work for quite a long time, the rule framing authority, as one time measure, decided to make such appointees, regular, subject to certain conditions, provided under the aforesaid two sets of Rules, That is how this process of regularisation, being a kind of exception to normal procedure of recruitment, has been treated as one time event, i.e. to be considered and applied only against available vacancies on the date of commencement of Rules and not to be extended to vacancies which may become available subsequently. Any other view may put the aforesaid Rules, susceptible of being challenged as violative of Articles 14 and 16 of Constitution of India.

50. Be that as it may, while implementing statutory provision, neither its ambit can be extended by Court or executive who is under an obligation to act strictly in accordance with statute, nor it can be altered in any other manner. Respondent no.2, in my view had no authority at all to proceed to make regularisation under Rules 2001 and 1998 by taking into account vacancies of Group 'C' and 'D' posts, which had occurred either due to creation or otherwise after the commencement of said Rules, whatever, as that would be in complete disregard of requirement of Rule 4(1) of the aforesaid Rules. The Government Order, creating new posts without any simultaneous amendments in the statutory Rules will not have the effect of amendment or modification of statutory Rules. To this extent the Government Order/executive order is inconsistent to Rules, would be inoperative, ineffective and inconsequential, being ultra vires of statutory Rules and non est to that extent.

51. The law is well settled that an executive order cannot have effect of statutory Rules nor prevail over the statutory rules. Mere executive decision cannot authorize the authorities concerned to do something which is not otherwise permitted under statutory rules. It is well settled that an executive order cannot prevail over statutory rules. In Indra Sawhney and others Vs. Union of India and others, 1992 (Suppl) 3 SCC 217 the Apex Court held that though the executive orders can be issued to fill up the gaps in the rules if the rules are silent on the subject but the executive orders cannot be issued which are inconsistent with the statutory rules already framed. In Laxman Dundappa Dhamanekar and another Vs. Management of Vishwa Bharata Seva Smithi and another, JT 2001 (8) SC 171 also the same view was taken. In K. Kuppusamy and another Vs. State of T.N. And others, 1998 (8) SCC 469 the Court said that statutory rules cannot be overridden by executive orders or executive practice and merely because the government has taken a decision to amend the rules, it does not mean that the rule stood obligated. So long as rules are not amended in accordance with the procedure prescribed under law the same would continue to apply and would have to be observed in words and spirit. In Chandra

Prakash Madhavrao Dadwa and others Vs. Union of India and others, 1998(8) SCC 154 also the Apex Court expressed the same view holding that the executive orders cannot conflict and override the statutory rules. The executive instructions cannot supplant rules, held in Indian Airlines Officers' Association Vs. Indian Airlines Ltd. and Ors., 2007(10) SCC 684; Dhananjay Malik and Ors. Vs. State of Uttaranchal and Ors., 2008(4) SCC 171; and, S. Sivaguru Vs. State of Tamil Nadu and others, (Civil Appeal Nos. 4483-4485 of 2013, decided on 07.05.2013).

52. In State of Kerala and Ors. Vs. K. Prasad and another, 2007(7) SCC 140 the Court said that even an executive order is required to be made strictly in consonance with the Rules. Therefore, when an executive order is called in question, while exercising power of judicial review, the Court is required to see whether government has departed from such Rules, and if so, the action, of the government is liable to be struck down. It has been followed in The Accountant General, M.P. Vs. S.K. Dubey and another, 2012(3) SCALE 124. The same view has been taken by a Division Bench of this Court (of which I was also a Member) in Shiv Raj Singh Yadav Vs. State Of U.P. And Others Special Appeal No. 375 of 2005, decided on 27th May 2011.

53. In view thereof, question no.4 is answered in favour of petitioner and it is held that impugned order dated 24.06.2011 (Annexure 16 to writ petition), is illegal, in so far as it has directed for regularisation in Group 'C' and 'D' posts with respect to vacancies which occurred/existed/created after commencement of Rule 1998 and 2001.

54. The discussion made above leaves no manner of doubt that petitioner in the case in hand is entitled to be considered for regularisation, subject to the conditions, that, his seniority entitles him for consideration for regularisation against vacancies available on the date of commencement of Rule 2001. The writ petition deserves to be allowed partly, in the following manner:-

(i) The impugned order dated 24.06.2011 (Annexure 16 to writ petition), is hereby declared illegal and is quashed, in so far it has directed for considering regularisation of a daily wager against a vacancy occurring subsequent to the date of commencement of Regularisation Rules, 1998 and 2001 (as amended from time to time), as the case may be.

(ii) The petitioner shall be considered for regularisation.

(iii) For the said purpose:

(a) the respondents shall prepare a list of eligible candidates in order of seniority;

(b) eligible candidates in order of seniority shall be considered against vacancies available on the date of commencement of 2001 Rules, following the procedure prescribed therein;

(c) regularisation, if any, already made by respondents in complete disregard of Rules 2001, as read and interpreted above, shall be subject to ultimate orders of regularisation, passed pursuant to this order.

(iv) The order(s) of regularisation, made/issued, without following procedure of preparation of seniority list etc., as discussed above, would confer no right upon individual(s) concerned. The respondents competent authority shall review all such cases, and after giving an opportunity of hearing to all concerned parties, shall pass appropriate orders so as to ultimately implement, apply and follow

the Rules 2001, strictly, and in true spirit thereof.

55. The petitioner shall be entitled to cost, which I quantify at Rs.2000/-

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED:ALLAHABAD 11.10.2013**

**BEFORE**
**THE HON'BLE RAJES KUMAR, J.**
**THE HON'BLE MANOJ MISRA, J.**

Civil Misc. Writ Petition No. 52089 of 2013

**Ashish Kumar Chaurasia ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Ashok Khare, Sri Siddharth Khare

**Counsel for the Respondents:**
C.S.C., Sri Ayank Mishra

**U.P. State Electricity Board(Procedure & conduct of Business)Regulation 1978-Regulation-30,31 and 74- Advertisement-vacancy of Assistant Engineer-minimum eligibility of qualification-60% in degree/diploma in concern trade-validity of such requirement amounts to denial of opportunity to participate in competitive examination-who even otherwise eligible-held-such requirement contrary to regulation-not sustainable-quashed-consequential direction given.**

**Held: Para-13**
**Thus the purpose of shortlisting would be achieved without prescribing any minimum cut-off marks. Further, we may observe that where there is a written competitive examination, providing higher cut off marks at the threshold, by changing the minimum qualifications, to exclude the candidates, who fulfill the minimum qualification, from even applying is not at all justified in absence of a specific power provided for that purpose under the Statutory Rules/Regulations. As no statutory Rule/Regulation has been shown to us and, particularly, when the advertisement itself provides for a written test, we do not find any rational basis to provide for cut off marks of 60% for the General and OBC candidates and 55% marks for SC/ST candidates for being eligible to apply for undergoing the recruitment process.**

**Case law discussed:**
(2003) 11 SCC 559; 2010 (78) ALR 525

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

1. We have heard Sri Ashok Khare, learned senior counsel, assisted by Sri Siddharth Khare for the petitioner, learned Standing Counsel for the respondent No.1 and Sri Ayank Mishra for the respondent Nos. 2 and 3.

2. By the instant petition, the petitioner, who claims himself to be the member of the other backward classes, has challenged the condition No. 4(C) of Advertisement No.03/VSA/2003, dated 02.09.2013, issued by the Electricity Service Commission, U.P. Power Corporation Ltd., Lucknow whereby applications have been invited for filling up a large number of posts of Assistant Engineer (Trainee) in different branches of Engineering including (Civil Engineering). As per the advertisement, a candidate amongst others was required to possess a Bachelors Degree in Electrical Engineering/ Electronics Engineering/ Computer Science Engineering/Information Technology and Civil Engineering from a University or institution established by law in Uttar Pradesh or from any other institution recognized by the State Government or a degree recognized as equivalent thereto by the State Government OR Part A & B examinations conducted by the Institution of Engineers (India). (Same branch as

Engineering Branch of post being applied for). Sub-clause (C) of Condition No.4 of the advertisement provided that General and OBC candidates having minimum 60% marks and SC/ ST candidates having minimum 55% marks in aggregate in Engineering Degree are only eligible to apply for the above post. It is this condition which has been challenged in the instant petition.

3. The learned counsel for the petitioner submitted that the aforesaid condition is arbitrary and amounts to changing the eligibility criteria provided by the service regulations. It was submitted that recruitment to the post of Assistant Engineer in the aforesaid service is governed by U.P. State Electricity Board Service of Engineers Regulations, 1970 (hereinafter referred to as the Service Regulations), which have been notified on 08.12.1970 by the then U.P. State Electricity Board, in exercise of power under Sections 79(C) of the Electricity (Supply) Act, 1948. It was submitted that Regulation 10, provides for the qualifications, as under:-

"10. Qualification.- A candidate for direct recruitment as Trainee Engineer must besides having a through knowledge-of Hindi in Devnagri script, hold the following qualifications-

(i) a Degree in electrical/mechanical/tele-communication/instrumentation engineering from a University or Institution established by law in Uttar Pradesh or from any other Institution recognized by the State Government or a degree or diploma recognized as equivalent thereto by the State Government;

or

(ii) Sections 'A' and 'B' of the Associate Membership of the Institution of Engineers (India).

or

be an Associate, Member of the Institution of Electrical Engineers (London)."

4. It was submitted that Appendix-B of the Service Regulations, provides for the procedure for direct recruitment, which requires holding of a written test followed by an interview for selection of the candidates. It was submitted that fixing minimum cut off marks over and above the minimum eligibility criteria provided by the Service Regulations, at the threshold of the recruitment process, by the Electricity Service Commission for determining eligibility to apply for the post is totally arbitrary and unjustified, particularly, when a written test is there for entering the second stage of the examination i.e. the interview. It was submitted that it is well settled that in the event of conflict between the statutory regulations/rules and the terms and conditions of the advertisement relating to eligibility, it would always be the statutory regulations/rules that would prevail. It has thus been submitted that the aforesaid condition in the advertisement is liable to be quashed and that a direction be issued to the respondents to issue an advertisement by way of corrigendum inviting applications from all those candidates who hold minimum qualifications as per the Service Regulations.

6. Considering the nature of the controversy, which does not involve any factual dispute as well as the fact that the probable date for the written examinations was shown to be on 26.10.2013/ 27.10.2013, instead of calling for a counter affidavit, we required Sri Ayank Mishra, learned counsel for the Corporation as well as the Commission, to seek instructions in the matter so as to inform the Court about the legal basis of

such a condition put by the Electricity Service Commission at the threshold of the recruitment process.

7. Sri Ayank Mishra, did not dispute the minimum eligibility conditions provided by Regulation 10 of the Service Regulations, which we have noticed herein above, but, on 25.09.2013, when the matter was taken up, Sri Ayank Mishra produced before us Electricity Service Commission, U.P. State Electricity Board (Procedure and Conduct of Business) Regulations, 1978 (hereinafter referred to as the Business Regulations), notified in exercise of power under Clause (c) of Section 79 of the Electricity (Supply) Act, 1948, which governs the procedure and conduct of business of the Electricity Service Commission, U.P. State Electricity Board, so as to contend that under the residuary powers provided by Regulation 70 of the Business Regulations, the Commission could have taken such a decision. Sri Mishra, however, could not produce before us any specific provision in either the Service Regulations or the Business Regulations where under the Electricity Service Commission had the power of prescribing minimum cut off marks in the qualifying examination as an eligibility criterion to participate in the recruitment process. Regulation 70 of the Business Regulations on which Sri Mishra placed reliance to justify the action of the Commission, provides as follows:-

"Commission may deal in such manner as they deem fit with any matter not specifically provided for in these Regulations."

8. We were also taken through the various provisions of the Business Regulations. Regulations 30, 31 and 74 of the Business Regulations appeared to be relevant for the controversy in issue, which we are reproducing herein below:-

"30. Examinations and conduct of Examination-

(i) The Commission shall conduct examinations for the various posts to be filled by competitive examinations.

(ii)The examination may be held at one or more centres at any place or places in Uttar Pradesh as the Commission may decide. The Commission shall appoint an incharge for each centre who shall be responsible for conduct of examination at his centre.

(iii)The Commission may hold combined competitive examinations for selection to various posts under the purview of the Commission.

31. The Commission shall advertise the vacancies for which selections are to be made in the manner and through the medium/media prescribed by them, and invite applications from eligible candidates.

74. Where selection is based on written examination and interview the Commission shall call candidates for interview on the basis of merit as disclosed at the written test. The Commission shall decide the number of candidates to be called for interview, subject to the condition that if the number of candidates who pass the examination is less than double the number of vacancies, all the candidates shall be called for interview."

9. A perusal of Regulation 31 of the Business Regulations would go to show that the Commission is required to

advertise the vacancies for which selections are to be made in the manner and through medium/media prescribed by them and invite applications from eligible candidates. Regulation 30 provides for the manner in which the examinations are to be conducted by the Commission as also that the Commission may hold combined competitive examination for selection to various posts under the purview of the Commission. Regulation 74 reveals that where selection is based on written examination and interview, the Commission shall call the candidates for interview on the basis of merit as disclosed on the written test and that it is for the Commission to decide the number of candidates to be called for interview, subject to the condition that if the number of candidates who pass the examination is less than double the number of vacancies all the candidates shall be called for interview.

10. Thus, from the Business Regulations it does not appear that at the threshold of the recruitment process, the Commission can prescribe for a condition, higher than the prescribed eligibility, for being eligible to apply under the advertisement.

11. No doubt, by various judicial pronouncements short-listing or screening has been accepted as a pretext to limit the number of candidates to be called for interview. Two methods are generally adopted for screening and short-listing: (a) by holding competitive examination and calling candidates for interview on the basis of merit in such competitive examination; and (b) by screening the applications on the basis of certain procedure and criteria thereby limiting the number of candidates to be called for interview.

12. In State of Punjab and others Vs. Manjit Singh and others: (2003) 11 SCC 559 the Apex Court took the view that the Commission cannot lay down the cut off marks so as to exclude the candidate fulfilling the minimum qualification as per the relevant rules at the threshold itself as the same would amount to altering the minimum qualification as laid down in the relevant rules for which the Commission had no power. The relevant observations of the Apex Court are found in paragraph nos.7, 8, 10 and 11 of the report, which are reproduced herein below:-

"7. Now adverting to the point under consideration, it may be observed that so far the powers and functions of the Commission in shortlisting of candidates is concerned, there can certainly be no doubt about it. Say for example 10,000 candidates apply for recruitment to 100 posts, it would obviously not be possible to take full test /examination and interview of such large number of applicants, though eligible. In that event shortlisting of the candidates by screening out those, in respect of whom it would serve no purpose to call them for further test, may be excluded by adopting the method of screening test. Generally speaking a ratio of 3-5 candidates for one post is normally accepted depending upon the number of seats. Therefore, for 100 posts the selecting body may in order of merit take out about first 500 candidates for further tests/interview. The rest of the candidates would be screened out. No candidate excluded by adopting such a method for shortlisting can raise any grievance whatsoever.

8. But for such shortlisting as indicated above, it is not necessary to fix any minimum qualifying marks. Any candidate on the top of the list at number 1 down upto 500 would obviously constitute

the shortlisted zone of consideration for selection. For the purpose of elaboration it may be observed that in case some cut-off marks is fixed in the name of shortlisting of the candidates and the number of candidates obtaining such minimum marks, suppose is less than 100 in that event screening test itself will amount to a selection by excluding those who though possess the prescribed qualification and are eligible for consideration but they would be out of the field of consideration by reason of not crossing the cut-off marks as may be fixed by the recruiting body. This would not be a case of shortlisting. In shortlisting, as observed above, any number of candidates required in certain proportion of the number of vacancies, they may be shortlisted in order of merit from serial no. 1 upto the number of candidates required.

10. As observed earlier, for the purpose of shortlisting it would not at all be necessary to provide cut-off marks. Any number of given candidates could be taken out from the top of the list upto the number of the candidates required in order of merit. For example, there may be a situation where more than required number of candidates may obtain marks above the cutoff marks say for example out of 10,000 if 8,000 or 6,000 candidates obtain 45% marks then all of them may have to be called for further tests and interview etc. It would in that event not serve the purpose of shortlisting by this method to obtain the given ratio of candidates, and the vacancy available. For 100 vacancies at the most 500 candidates need be called. If that is so any candidate who is otherwise eligible upto the 500th position whatever be the percentage above or below the fixed percentage would be eligible to be called for further tests. Thus the purpose of shortlisting would be achieved without prescribing any minimum cut-off marks.

11. In the case in hand, it was not for the Commission to have fixed any cut- off marks in respect of reserved category candidates. The result has evidently been that candidates otherwise qualified for interview stand rejected on the basis of merit say, they do not have the upto the mark merit, as prescribed by the Commission. The selection was by interview of the eligible candidates. It is certainly the responsibility of the Commission to make the selection of efficient people amongst those who are eligible for consideration. The unsuitable candidates could well be rejected in the selection by interview. It is not the question of subservience but there are certain matters of policies, on which the decision is to be taken by the Government. The Commission derives its powers under Article 320 of the Constitution as well as its limits too. Independent and fair working of the Commission is of utmost importance. It is also not supposed to function under any pressure of the government, as submitted on behalf of the appellant Commission. But at the same time it has to conform to the provisions of the law and has also to abide by the rules and regulations on the subject and to take into account the policy decisions which are within the domain of the State Government. It cannot impose its own policy decision in a matter beyond its purview."

12. A Full Bench of this Court in Gaurav Tripathi Vs. State of U.P. and others: 2010 (78) ALR 525, after considering various judgments, summarized the law with regards to screening and short-listing applicants /candidates to be called for interview. The relevant paragraph of the Full Bench judgment is being quoted herein below:-

"114. We may summarize the principles in regard to the question of screening and short-listing the applicants

by laying down the procedure and the criteria in order to restrict the number of candidates to be called for interview:

(1) (a) Even if it is not provided for in the Rules/Advertisement etc., the Selection Body may resort to screening and short-listing in order to restrict the number of candidates to be called for interview.

(b) For this purpose, the Selection Body may lay down the procedure and the criteria.

(c) The procedure and the criteria for screening and short-listing must be rational and reasonable.

(d) In case, the relevant rules prescribe minimum qualifications for recruitment, the criteria for short-listing must be based on such minimum qualifications. Thus, if minimum qualifications contemplate "academic qualification", the criteria may prescribe higher academic qualifications for short-listing. Similarly, if minimum qualifications contemplate "experience" then the criteria may provide for higher experience for short-listing.

(e) "Experience" is an objective, reasonable and rational criterion. But if minimum qualifications do not require "experience" then this may not be a criterion for screening and short-listing.

(f) The candidates who fulfill the minimum qualifications, cannot be excluded at the threshold by changing the minimum qualifications or providing for cut-off marks. However, it is open to the Selection Body to provide certain marks for higher qualifications - i.e., for higher academic qualifications where minimum qualifications provide for academic qualifications, or for higher experience where minimum qualifications provide for experience. It is also open to the Selection Body to prepare a merit list on the basis of minimum qualifications, and then call requisite number of candidates for interview on the basis of such merit list.

In short, the minimum qualifications cannot be changed by the Selection Body so as to exclude the candidates fulfilling such minimum qualifications. However, for screening and short-listing, the Selection Body may provide marks for higher qualifications, or may prepare merit list on the basis of such minimum qualifications and call requisite number of candidates for interview on the basis of such merit list.

2. If the Rules/Advertisement provide for screening and short-listing, and lay down the procedure and the criteria in this regard, then such procedure and criteria must be strictly adhered to for screening and short-listing. No deviation is permissible from such procedure or criteria."

13. Taking a conspectus of the law governing the principles to be followed for screening/short-listing of candidates, it is well settled that for shortlisting, it is not necessary to fix any minimum qualifying marks at the threshold. The candidates who fulfill the minimum qualifications, cannot be excluded at the threshold by changing the minimum qualifications or providing for cut-off marks. Although it is open to the recruitment body to prepare merit list on the basis of such minimum qualifications and call requisite number of candidates for interview on the basis of such merit list, but it cannot provide higher cut off marks to exclude eligible candidates at the threshold. As provided by the apex court, vide para 10 of the judgment in the case of State of Punjab v. Manjit Singh (supra), for the purpose of shortlisting it would not at all be necessary to provide cut-off marks. Any number of given candidates could be taken out from the top of the list up to the

number of the candidates required in order of merit. For example, there may be a situation where more than required number of candidates may obtain marks above the cutoff marks say for example out of 10,000 if 8,000 or 6,000 candidates obtain the cut off marks then all of them may have to be called for further tests and interview etc. It would in that event not serve the purpose of shortlisting by this method to obtain the given ratio of candidates, and the vacancy available. For example, for 100 vacancies if, at the most, 500 candidates need be called then any candidate who is otherwise eligible up to the 500th position whatever be the percentage above or below the fixed percentage would be eligible to be called for further tests. Thus the purpose of shortlisting would be achieved without prescribing any minimum cut-off marks. Further, we may observe that where there is a written competitive examination, providing higher cut off marks at the threshold, by changing the minimum qualifications, to exclude the candidates, who fulfill the minimum qualification, from even applying is not at all justified in absence of a specific power provided for that purpose under the Statutory Rules/Regulations. As no statutory Rule/Regulation has been shown to us and, particularly, when the advertisement itself provides for a written test, we do not find any rational basis to provide for cut off marks of 60% for the General and OBC candidates and 55% marks for SC/ST candidates for being eligible to apply for undergoing the recruitment process.

14. For the reasons mentioned above, the writ petition deserves to be allowed and is, accordingly, allowed. The condition No.4 (C) in the Advertisement No.03/VSA/2013 (Annexure No.2 to the writ petition) is hereby quashed. The respondent no.3 is directed to issue and publish an advertisement by way of corrigendum thereby providing reasonable time to the eligible candidates to apply and it will also notify a fresh date for the written examination thereby giving all candidates a reasonable opportunity.

15. It is made clear that we have not adjudicated on the right of the Electricity Service Commission to adopt a rational screening/short-listing process after receiving the applications from all the eligible candidates, as is permissible in law.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 10.10.2013**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No. 52468 of 2013

**Sunil Kumar Sinol ...Petitioner**
**Versus**
**The State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Vijay Gautam

**Counsel for the Respondents:**
C.S.C.

**U.P. Chikitsa Evam Swasthya Vibhag Dark Room Sahayak(Arajpatrit) Sewa Niyamawali 1998-Rule-8-Minimum qualification-intermediate with science-mode of sort listing-ignoring intermediate candidate-giving preference to graduate candidate-held-arbitrary-unreasonable-such mode of sort listing-unknown in service jurisprudence-direction to allowe participation in selection process-issued-in accordance with observations.**

**Held: Para-14**
**The idea of short listing in the present case on the part of respondents is nothing but a kind of conferring absolute preference to the persons possessing higher qualification. Such preference, which excludes other candidates**

**though lessor qualified but possessing minimum requisite qualification, in absence of any rationality, would be per se illegal.**

**Case Law discussed:**
2013(7) SCC 150; 2003(5) SCC 341

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

1. In compliance of this Court's order, respondents have file counter affidavit. Counsel for the petitioner does not propose to file rejoinder affidavit. As agreed and requested by learned counsel for the parties, I proceed to decide the matter finally at this stage under the Rules of the Court.

2. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

3. The minimum prescribed educational qualification as per Rule 8 of U.P.Chikitsa Evam Swasthya Vibhag Dark Room Sahayak (Arajpatrit) Sewa Niyamawali, 1998 (hereinafter referred to "Rules, 1998") is Intermediate with Science or equivalent qualification duly recognized by Government.

4. Sri R.C.Yadav, learned Standing Counsel did not dispute that petitioner possess requisite minimum qualification. He however, submitted that respondents have made a shortlisting of eligible candidates and therefore, have confined initial selection to those candidates, who are graduate and that is why, petitioner has not been allowed to participate in the selection.

5. The question whether in the present case shortlisting by respondents can be said to be valid and consistent with the procedure of recruitment under the rules.

6. The system of shortlisting where a very large number of candidates have applied, in certain circumstances, has been recognized and upheld but it all depends on procedure of recruitment and some other relevant factor, which I would discuss in detail hereinbelow.

7. In Government of Andhra Pradesh Vs. P.Dilip Kumar, 1993 (2) SCC 310, the Court said that method of shortlisting can be validly adopted by the selection body. It was reiterated in M.P. Public Service Commission v. Navnit Kumar Potdar AIR 1995 SC 77.

8. However, in what circumstances, the procedure adopted can be said to be valid would depend upon the nature of recruitment, the procedure prescribed for recruitment under the Rules and various other similar relevant factors. In a case where recruitment process includes written competitive test having objective-type questions, mere qualification, even if it is higher, by itself would not be a controlling factor to make such person possessing higher qualification of better merit. At least one opportunity in such case of competition must be available to all such persons who possess minimum requisite qualification unless and until it can be shown that number of candidates applying is so large that holding of competitive examination in peculiar facts and circumstances of that particular case is not practically possible or probable or may cause extreme difficulty to the examining body. There can be no thumb rule in all these aspects.

9. A recruitment process founded on an open competition involving a written test would not justify shortlisting for the reason that persons, who possess minimum qualification, have right to compete with persons possessing higher qualification and can equally prove their merit so as to be selected and appointed over and above a person possessing higher qualification. We

have seen such kind of example in various public services. For example recruitment held by Union Public Service for All India Services is open to all candidates. The selection process includes written test, interview etc. The minimum qualification is graduate. We have seen many times that simple graduate has excelled over candidates who are highly qualified.

10. Once a person possess requisite qualification, apparently there does not appear to be any just and valid reason to deprive him an opportunity of competition unless there are just, valid and rational grounds for justifying it otherwise. In the present case, learned Standing Counsel fairly stated that apparently there does not appear to be any justification for such shortlisting, moreso, in the light of recruitment process contemplated in the rules. The procedure for recruitment of Dark Room Assistant has been provided in Rule 15 of U.P.Chikitsa Evam Swasthya Vibhag Dark Room Sahayak (Arajpatrit) Sewa Niyamawali, 1998 (hereinafter referred to "Rules, 1998"), and it reads as under:

''सीधी भर्ती की प्रक्रिया–सेवा में डार्करूम सहायक के पद पर सीधी भर्ती समय समय यथासंशोधित उ0प्र0 (उ0प्र0 लोक सेवा आयोग के क्षेत्र के बाहर) समूह ''ग'' के पदों पर सीधी भर्ती की प्रक्रिया नियमावली, 1998 के उपबन्धों के अनुसार की जायेगी।''

11. The aforesaid rules takes this Court to U.P. Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Uttar Pradesh Public Service Commission) Rules, 1998. Therein, it is rule 5, which provides 'procedure'. It contemplates a written test and thereafter interview.

12. When a written test consisting of objective-type written examination in the subjects like General Hindi, General Knowledge and General Studies is contemplated in the rules, I do not appreciate as to how exclusion of those candidates, who are simply intermediate with science, which is a minimum qualification, would help the respondents in selecting best meritorious candidates. The merit is not directly proportionate to qualification possessed by individual though there may be a presumption that a person possessing higher qualification may be knowing more than the person possessing lower qualification but in the concept of general merit, mere possession of higher qualification cannot entitle such person to claim better than the person possessing lessor qualification.

13. Be that as it may, once there is no procedure for shortlisting under the rules and in the facts and circumstances of this Court, respondents are not able to justify such shortlisting, I do not find action of respondents to be just and valid in proceeding with recruitment by shortlisting the candidates confining it only to graduates.

14. The idea of short listing in the present case on the part of respondents is nothing but a kind of conferring absolute preference to the persons possessing higher qualification. Such preference, which excludes other candidates though lessor qualified but possessing minimum requisite qualification, in absence of any rationality, would be per se illegal.

15. In G.Jayalal Vs. Union of India & Ors., 2013 (7) SCC 150, the Court said that conceptual preference, fundamentally, would mean that all aspects, namely, merit, suitability, fitness, etc. being equal, preference is given, regard being had to some other higher qualifications or experience, etc.

16. In Secretary, A.P. Public Service Commission Vs. Y.V.V.R. Srinivasulu and others, 2003(5) SCC 341, the Court observed

that whenever, a selection is to be made based on merit performance involving competition, the person possessing additional qualification cannot be provided preference to the exclusion of all others for the reason that in the context of all such competitive scheme of selection it would mean that other things being qualitatively and quantitatively equal, those with additional qualification may be preferred, that too only when rules provide possession of an additional qualification or factor of preference.

17. In the present case, shortlisting is not in the nature of screening of candidates by giving an opportunity to them to compete among themselves and thereafter to shortlist the candidates for further stage of recruitment but despite possession of minimum qualification, candidates like petitioner are being denied opportunity of participation i.e. equal opportunity of employment only on the ground that person possessing higher qualification are available and therefore, recruitment would be confined to those higher qualified candidates.

18. In the present case, post is that of Dark Room Assistant, a Group 'C' post. It is a little bit technical post but includes menial job also. Therefore, suitability and merit of candidate would depend upon various aspects. Mere higher qualification cannot be a sole governing factor. The exclusion of petitioner, therefore, from the field of competition in the name of shortlisting, in my view, is patently illegal and arbitrary.

19. In the result the writ petition is allowed. The respondents shall permit petitioner to participate in the selection and for this purpose shall issue admit card to the petitioner forthwith, and, in any case, within ten days from the date of receipt of a certified copy of this order before respondent no.3

20. The petitioner shall also be entitled to cost, which I quantify to Rs.2,000/-.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 01.10.2013**

**BEFORE**
**THE HON'BLE AMRESHWAR PRATAP SAHI, J.**

Civil Misc. Writ Petition No.54062 of 2013

**Jagat Narain & Ors. ...Petitioners**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Ajay Srivastava

**Counsel for the Respondents:**
C.S.C., Sri Ashish Kr. Srivastava

**U.P.Z.A. & L.R. Act-Section 122-B-Eviction of unauthorized occupant on small piece of Gaon Sabha land-Single Judge taken view in Budhee, Ajanta, Udyog Mandal Kishore Singh-in which after realization of certain amount their possession be regularized-while another Single Judge in Pratap Singh Sishodiya case taken contrary view-matter referred to Chief Justice for constitution larger bench-as to which one is correct view-direction issued accordingly.**

**Held: Para-21**
**Having noted the aforesaid decisions and the provisions aforesaid, I am unable to persuade myself to extend the benefit of a mandamus as prayed for by the petitioners, but since there are a large number of decisions that have been noticed hereinabove and a contrary view in the case of Pratap Singh Shishodia (supra), it would be more appropriate that such issues should be decided authoritatively by a larger bench that may finally rest this dispute on the basis of the statutory provisions that exist under the U.P. Z.A. & L.R. Act, 1950.**

**Case Law discussed:**

W.P. No. 39068 of 2008; W.P. No. 4775 of 1983; 2005 (98) RD 741; W.P. No. 47268 of 2004; 2005(98) RD 741; 2007(102)RD 83; 2007(102) RD 303; 2007(103) RD 210; 1986 RD Pg. 298; 2007(103)RD; 2008(1) AWC 380; W.P. No. 48874 of 2012.

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

1. The petitioners have sought for a relief that a direction be issued to the District Magistrate, Firozabad to consider the claim of the petitioners and settle the land in their possession on the basis of a lease that may be granted in terms of the judgment dated 9.3.2007 passed in Writ Petition No.39068 of 2008, Brijesh Kumar Upadhayay & others Vs. State of U.P. & others.

2. The case of the petitioner no. 1 and 2 are distinguishable from the other petitioners. The causes of action and foundation of claim on facts are different but all the petitioners have joined together to pray for a common relief.

3. Having heard the learned counsel for the petitioners and having perused the judgment referred to hereinabove, it appears that in proceedings under Section 122-B of the U.P.Z.A. & L.R. Act, 1950 certain occupants thereon claimed that they should be settled with the land and the proceedings for having encroached on Gaon Sabha Land against them under Section 122-B of the 1950 Act should be dropped. The judgment also refers to a judgment in the case of Ram Charan & others Vs. Additional Collector (Prashashan), Firozabad & another, Civil Misc. Writ Petition No.4775 of 1983 decided on 9.3.2007. A copy of the said judgment has also been filed on record.

4. Having considered the facts of the said decision also, I find that the learned Judge in turn has referred to the judgment in the case of Budhaee Vs. Collector, Fatehpur, reported in 2005 (98) RD 741, where it has been held that if on a small portion of a Gaon Sabha land some individual in possession for long and has made constructions, then instead of eviction or penalty, damages equivalent to the market value of the land should be realized as it would be a more appropriate relief and accordingly the land should be settled with that person. It was further directed therein that the amount so realized should be deposited in the Gaon Sabha Fund under Section 125-A of the U.P.Z.A. & L.R. Act for its utilization.

5. Thus, a method relating to grant of a sort of free hold rights over the said land was enunciated in the aforesaid decisions of the learned Single Judge, on the basis whereof the petitioners herein also claim that the land should accordingly be settled in their favour. It is for the said purpose that they have filed an application before the Collector and have also prayed for a mandamus to that effect.

6. Having considered the aforesaid submissions raised, in the opinion of the Court, there is no such provision under the U.P. Z.A. & L.R. Act, 1950 that may empower the authorities or this Court to grant any such tenurial rights or confer any such benefit over Gaon Sabha Land.

7. The petitioners in Paragraphs 5 to 8 of the writ petition have claimed allotment of the disputed holding as an abadi site for residential purposes. The claim, that they are in long standing possession and therefore they are entitled for such settlement is founded on the decisions referred to in this order. They also rely on certain decisions in relation to summary proceedings under the 1950 Act as also in a civil suit to urge that they have perfected their rights and in such

circumstances the petitioners are entitled for the regularization of their occupation in terms of the judgment dated 9th March, 2007 referred to hereinabove in the case of Brijesh Kumar Upadhyay and Ram Charan and others (supra). It is for this reason that they have prayed for a direction to be given to the District Magistrate to extend such benefit.

8. Learned counsel for the petitioners has been unable to point out any statutory provision under the U.P. Z.A. & L.R. Act, 1950 to that effect in order to issue a mandamus. Nonetheless since heavy reliance has been placed on the judgment in the case of Ram Charan (supra), it would be apt to refer to the decisions on this count.

9. A learned Single Judge of this Court in the case of Ajanta Udyog Mandal Vidyalaya Vs. State of U.P. and others, writ petition no. 47268 of 2004 decided on 28th January, 2005 held that since a school was running and was in occupation of Gaon Sabha land having been constructed 25 years hence, the said occupation was regularized on payment of Rs. 1, 75,000/- as damages instead of evicting the institution.

10. The same learned Single Judge while deciding the case of Budhaee Vs. Collector, Fatehpur and others, 2005 (98) RD 741 relying on the aforesaid decision decided another case where the petitioner was in occupation of the Gaon Sabha land unauthorizedly that had been earmarked and entered in the revenue record as a Basic Primary School. The learned Single Judge recorded that there was nothing to indicate the existence of the School and since the petitioner in that case was in occupation of the said land it was found appropriate not to evict him and the award of damages was held to be the proper relief. While allowing the writ petition on the payment of the damages as fixed therein the learned Single Judge made observations in Paragraphs 5 to 7 indicating ingredients which require to be assessed while regularising such occupations on payment of damages. The learned Single Judge also noted that unauthorized occupation of Gaon Sabha land can be settled in favour of the Scheduled Caste and Other Backward Category or of the General Category in accordance with the preference as prescribed under the Act and Rules under the amended provisions of Section 123 of the U.P. Z.A. & L.R. Act, 1950 and the provisions of Section 122-A, B and C of the said Act.

11. It appears that the learned Single Judge drew an analogy that since the Legislature had permitted the regularization of unauthorized occupied land in favour of such category of persons provided they were in possession in accordance with the Rules and the cut-off-date mentioned therein, such a course was acceptable.

12. It is the said judgment which has been again relied upon by the same learned Single Judge in the cases of Ram Charan and Brijesh Kumar Upadhyay (supra).

13. Three other decisions have also relied on the aforesaid ratio to grant relief to unauthorized occupants in the case of Sukhdeo Vs. Collector, Banda and others, 2007 (102) RD 83; Kishore Singh Vs. Additional Collector, Agra and others, 2007 (102) RD 303 and reiterated in the decision of Siya Ram and others Vs.

Additional Commissioner (Adm.) Kanpur and another, 2007 (103) RD 210.

14. In the case of Sukhdeo Vs. Collector (supra), the same learned Single Judge in Paragraph 3 of the said decision has indicated that even if there is no limitation for initiating the eviction proceedings, a delay of 30 years is sufficient to refuse to pass such order of eviction and again relying on the case of Budhaee awarded damages and allowed the regularisation of unauthorized occupants over Gaon Sabha land. In the case of Kishore Singh (supra) also the land which was recorded as "Navin Parti" and was found to be in possession to the petitioner therein was settled by awarding damages in favour of the petitioner.

15. Having perused the aforesaid decisions and having perused the provisions of Section 122-B, 122-C and Section 123, I find that there are specific provisions under which unauthorized occupation has been legalized and regularised. I however do not find any such regularisation or acceptance of lawful possession in respect of land as presently involved through any provision under the U.P. Z.A. & L.R. Act, 1950 recommended by the Legislature in a general way to all unauthorised occupants. The decisions aforesaid therefore appear to have been guided by pure equity without there being any legal provision under which such unauthorized occupation could be regularised after award of damages.

16. There is yet another dimension relating to the problem. The Gaon Sabha has been empowered to file a suit for ejectment against unlawful occupation under Section 209 of the 1950 Act. The consequences of non-filing of a suit are prescribed in Section 210 thereof. The learned Single Judge in the case of Sukhdeo Vs. Collector (supra) has referred to the period of limitation and the consequence of a suit not being filed within a reasonable time. The said observation appears to find support from the decision in the case of Shish Ram Vs. Board of Revenue 1986 RD Pg. 298 even though the same has not been referred to. It would however be useful to note the decision in the case of Rakshpal Singh Vs. Board of Revenue 2007 (103) RD Pg. 49 where, after considering the amendments with retrospective effect in Section 210 of the 1950 Act, the court has held that no period of limitation arrests of the right of the Gaon Sabha to file a suit for eviction. Thus the observations made in Sukhdeo's case may require a reconsideration on this aspect for an authoritative view.

17. The courts in my opinion, and on settled principles of interpretation, "can iron out the creases and not weave a new texture." A general observation and successive decisions based on the same principle of settling land on payment of damages may not be in consonance with the law as codified under the 1950 Act.

18. Learned Standing Counsel for the State has submitted that the decisions aforesaid do not therefore come to the aid of the petitioners as they are not backed up by any statutory provision. It is also urged that the Court in the exercise of powers under Article 226 of the Constitution of India can interpret the law as laid down by the Legislature but a new provision cannot be created for regularising unauthorized occupancy by awarding damages as has been done by

the learned Single Judge in the aforesaid cases.

19. The learned Standing Counsel has relied on a contrary view expressed by another learned Single Judge in the case of Pratap Singh Shishodia Vs. Board of Revenue, Allahabad and others, 2008 (1) AWC 380 (Paragraphs 10 and 11). The learned Single Judge in that case was also urged to extend such benefit in the alternative relying on the decisions in the case of Sukhdeo and Kishore Singh (supra) which in turn rely on the decision in the case of Budhaee (supra). The learned Single Judge noted the said decisions and submissions in Paragraph 5 and then answered the same in the negative in Paragraph 11 of the said judgment. It was held that the reliefs granted in the aforesaid decisions were on the facts of that particular case but the learned Single Judge opined that if such a method is permitted, it will give an opportunity to mighty persons to encroach upon Gaon Sabha land through a back door process and as such the Court rejected the claim of the petitioner therein for settling the land on any premium basis.

20. Another learned Single Judge in the case of Neresh Kumar and others Vs. State of U.P. and others, Writ Petition No. 48874 of 2012, decided on 21.9.2012 has opted not to follow the decisions in the case of Siya Ram (supra) and Budhaee (supra), even though on issues based on facts involved therein, copy whereof has been placed before the Court by the learned Standing Counsel.

21. Having noted the aforesaid decisions and the provisions aforesaid, I am unable to persuade myself to extend the benefit of a mandamus as prayed for by the petitioners, but since there are a large number of decisions that have been noticed hereinabove and a contrary view in the case of Pratap Singh Shishodia (supra), it would be more appropriate that such issues should be decided authoritatively by a larger bench that may finally rest this dispute on the basis of the statutory provisions that exist under the U.P. Z.A. & L.R. Act, 1950.

22. Consequently, the following questions are framed for such consideration in view of the conflict of the decisions referred to hereinabove, as against the opinion of the learned Single Judge in the case of Pratap Singh Shishodia (supra) and Rakshpal Singh (supra):-

1. Whether the law laid down by the learned Single Judge in the cases of Ajanta Udyog Mandal Vidyalay (supra), Budhaee (supra), Sukhdeo (supra), Kishore Singh (supra) and Siya Ram (supra), are in direct conflict with the view taken by another learned Single Judge in the case of Pratap Singh Shishodia (supra) and consequently;

2. As to which of the said decisions lay down the law correctly keeping in view the provisions referred to hereinabove of the U.P. Z.A. & L.R. Act, 1950.

3. Whether the view expressed in the case of Sukhdeo (supra) on the issue of limitation runs counter to the view taken in the case of Rakshpal Singh (supra)?

23. Learned Standing Counsel for the respondent no. 1, 2 and 3 and the learned counsel for the Gaon Sabha - Respondent No. 4, are directed to file a counter affidavit in response to the writ petition and also submissions in relation to the reference made hereinabove.

24. Let the papers be placed before Hon'ble the Chief Justice for passing appropriate orders for referring the matter to a larger bench to resolve the aforesaid conflict, and for an authoritative pronouncement on the issues raised at the earliest.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 08.10.2013**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No. 55902 of 2013

**Abdul Rahman Ansari ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri R.C. Singh

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Art.-226-Service law-seniority-challenged after 7 years-neither seniority list challenged nor the affected persons impleaded-consequent to upward placement of petitioner relief for proper placement-can not be granted.**

**Held: Para-18**
**Even today, neither seniority list has been challenged and there is no writ of certiorari quashing seniority list is prayed for nor the persons likely to be affected in case petitioner's name is directed to move upward in seniority have been impleaded and therefore, this writ petition also suffers from the vice of impleadment of necessary parties.**

**Case Law discussed:**
(1991) 1 UPLBEC 250; AIR 1970 SC 470; AIR 1970 SC 898; AIR 1974 SC 259; AIR 1974 SC 2271; (1998) 8 SCC 685; (2003) 1 SCC 335; AIR 1982 SC 101; AIR 1984 SC 850; AIR 1986 SC 2086; AIR 1988 SC 268; AIR 1999 SC 1510; (2001) 6 SCC 292; JT 2009(14) SC 298.

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

1. Heard Sri R.C.Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Admittedly, final seniority list was published in 2006 wherein petitioner's name finds place at serial no.95 though, according to him, that was wrong placement in the seniority list. Admittedly, he did not challenge the same throughout and for seven years, the matter remained unchallenged.

3. It is no doubt true if seniority of two or more individuals has been determined long back and a person placed lower in seniority did not feel aggrieved to challenge the same within a reasonable time, he shall be non suited to do so after a long time since it may result in unsettling so many settled things. It is said that scrambled eggs cannot be unscrambled after process is complete. Challenge must come within a reasonable time. There is a long chain of decisions on this aspect.

4. A Full Bench of this Court in Smt. S.K. Chaudhari Vs. Manager, Committee of Management, Vidyawati Darbari Girls Inter College, Lookerganj, Allahabad & others (1991) 1 UPLBEC 250 said that seniority list existing for the last 15 years would not be quashed after such a long time. It observed, "The law is well settled that the Court will not interfere with a seniority list which had remained in existence for a long time and which had become final."

5. In Rabindranath Bose and others Vs. Union of India and others AIR 1970

SC 470 the Court held, "It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years."

6. In Tilokchand and Motichand and others Vs. H.B. Munshi and another AIR 1970 SC 898, the Court held that the rights which have accrued to others by reason of delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for delay. It further says, "The party claiming Fundamental Rights must move the Court before other rights come into existence. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court."

7. In Ramchandra Shankar Deodhar and others Vs. State of Maharashtra and others AIR 1974 SC 259 the Court said that any claim of seniority at belated stage should be rejected inasmuch it disturb rights of other persons regarding seniority, rank and promotion which have accrued to them during intervening period.

8. In P. S. Sadasivaswamy Vs. State of Tamilnadu AIR 1974 SC 2271, the Court declined to interfere with an order of promotion made 14 years back. It said, "A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion." The Court also said that it is not a case of lack of power of Court, but it is consistent with sound policy of public interest that a person who has not been vigilant for protection of his rights should not be allowed to agitate his rights as and when he finds it convenient irrespective of length of time. Such a litigant should not be helped by Court by invoking its jurisdiction under Article 226 of the Constitution which is equitable and discretionary both. To the same effect are the observations made in State of U.P. and others Vs. Raj Bahadur Singh and another (1998) 8 SCC 685, Northern Indian Glass Industries Vs. Jaswant Singh and others (2003) 1 SCC 335.

9. In R.S. Makashi Vs. I.M. Menon and others AIR 1982 SC 101, the Court held that a dispute regarding seniority can be denied to be agitated on account of delay and laches unless a plausible and adequate explanation is furnished. The Court relied on its earlier decision in State of Madhya Pradesh Vs. Bhailal Bhai and others AIR 1964 SC 1006.

10. In Dayaram Asanand Gursahani Vs. State of Maharashtra and others AIR 1984 SC 850, the Court said that in absence of satisfactory explanation of inordinate delay of nearly nine years on the part of appellant in questioning the seniority list, writ petition under Article 226 of the Constitution challenging validity of seniority and promotion assigned to other employees cannot be entertained.

11. In K.R. Mudgal and others Vs. R.P. Singh and others AIR 1986 SC 2086, it was observed :

"A Government servant who is appointed to any post ordinarily should at least after a period of 3 or 4 years of his appointment be allowed to attend to the duties attached to his post peacefully and without any sense of insecurity. ...

Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that any one who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately in this case even after nearly 32 years the dispute regarding the appointment of some of the respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laches."

12. In G.C. Gupta & others Vs. N.K. Pandey & others AIR 1988 SC 268, the Court observed:

"...It has been observed that the attack to the seniority list prepared on the basis of 1952 rules 15 years after the rules were promulgated and effect given to the seniority list prepared on Aug. 1, 1953 should not be allowed because of the inordinate delay and laches in challenging the said rule.

30. Similar observations have been made by this Court in the case of State of Orissa v. Pyarimohan Samantaray, (1977) 3 SCC 396 : (AIR 1976 SC 2617); State of M. P. v. Nandial Jaiswal, AIR 1987 SC 251, Ramanna Dayaram Shetty v. International Airport Authority of' India, (1979) 3 SCR 1014 : (AIR 1979 SC 1628), Ashok Kumar v. Collector, Raipur. AIR 1980 SC 112 : (1980) 1 SCR 491, K. R. Mudgal v. R. P. Singh, (1986) 4 SCC 531 (AIR 1986 SC 2086) and R. S. Makashi v. I. M. Menon, (1982) 1 SCC 379 : (AIR 1982 SC 101) where relief was refused on the ground of laches in moving the Court for redress of the grievances after lapse of a period of years after the cause of action arose. It has been observed in State of M. P. v. Nandlal Jaiswal (AIR 1987 SC 251 at p. 272) (supra) :-

"Now, it is well settled that the power of the High Court to issue an appropriate writ under Art. 226 of the Constitution' is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. 'The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction."

31. In this case the challenge to the seniority of the appellants which was determined by order dt. 20th July, 1956 was made in 1973 i.e. after nearly 17 years and they have sought relief for re-determination of the seniority in accordance with the provisions of the aforesaid Service Rules. This cannot be permitted as it would amount to unjust deprivation of the rights of the appellants which had accrued to them in the meantime. The observation that 'Every person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years as made in the above case (Rabindra Nath Bose v. Union of India (AIR 1970 SC 470)) will be applicable to this case." (emphasis added)

13. In B.S. Bajwa & another Vs. State of Punjab & others AIR 1999 SC 1510, the Court said, "It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."

14. K.A. Abdul Majeed Vs. State of Kerala and others (2001) 6 SCC 292 was another case where the Court declined to intervene in such a dispute raised after a long time.

15. In Shiba Shankar Mohapatra & others Vs. State of Orissa & others, JT 2009 (14) SC 298, the Apex Court held, "it is well settled, fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the laches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum."

16. The Court in Shiba Shankar Mohapatra (supra) further held, "... the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained."

17. As a matter of proposition, I have no reason to take a different view. Rather the exposition of law with regard to self imposed restriction in a belated dispute is binding on this Court.

18. Even today, neither seniority list has been challenged and there is no writ of certiorari quashing seniority list is prayed for nor the persons likely to be affected in case petitioner's name is directed to move upward in seniority have been impleaded and therefore, this writ petition also suffers from the vice of impleadment of necessary parties.

19. It is again contended that in any case, petitioner's seniority was determined in 2012 also. Thereafter he moved representation though his seniority has not been corrected. Here again question arise that neither seniority list as such has been challenged in the writ petition nor the person likely to be affected has been impleaded.

20. In absence of challenge to the seniority list as also for non impleadment of necessary party, no relief, as sought in the writ petition, can be granted.

21. Dismissed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 10.10.2013**

**BEFORE**
**THE HON'BLE A.P.SAHI, J.**

Civil Misc. Writ Petition No.56738 of 2013

**Saurang ..Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Rajiv Kumar Mishra

**Counsel for the Respondents:**
C.S.C., Sri S.C. Verma, Sri R.C. Upadhyaya,Sri Ajay K. Singh, Sri A.N. Pandey, Nilam Pandey

**Constitution of India-Art.-226-Declaration of title under provisions 122-B(4F) of U.P.Z.A.L.R. Act-made in favour of respondent-petitioner being real brother of respondent-putting same claim along with them-filed application for restoration of proceeding-allowed by SDO-revisional court taken view that after 11 years can not be re-opened-but instead of remand for consideration of latches touch the merit of case-held such order without jurisdiction-at the same time declaration can be sought on establishment of fact of possession-order passed by commissioner quashed-with liberty to file suit for declaration of his right petition partly allowed.**

**Held: Para-11**
**However, in the present case, it appears that the petitioner is claiming rights which is in the nature of a cotenancy on the ground that he was also in possession alongwith his brothers. This becomes a disputed question of fact which has to be established by leading evidence, and in the circumstances, this could not have been done by the method of a restoration application. However, the petitioner has a right to establish his possession by way of filing a suit.**

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard learned counsel for the petitioner, Rajiv Kumar Mishra, Sri R.C. Upadhyay for the Gaon Sabha and the learned Standing Counsel for the respondent nos. 1, 2 and 3. Sri S.C. Verma for the respondent no. 4 and Sri Ajay Kumar Singh for the respondent no. 5 and 6 have also been heard.

2. This is an unfortunate dispute between the real brothers who claim to be in possession over the disputed land but the benefits of the possession over the land have been acknowledged only in favour of the contesting respondents hence one of the brothers is aggrieved and is before this Court under Article 226 of the Constitution of India praying for setting aside the revisional order impugned herein dated 11.9.2013 whereby his claim has been reversed.

3. The facts in brief are that undisputedly the petitioner and the respondent no. 4 to 6 are the sons of the same father. The disputed holding was being claimed to be in occupation by the contesting respondents no. 4 and 5 and subsequently they filed an application for acknowledging their rights in terms of Section 122-B(4F) of the U.P. Z.A. & L.R. Act, 1950. The said claim appears to have been acknowledged in favour of the respondent nos. 4 and 5 only vide order dated 17.6.1995.

4. The petitioner contends that this order was obtained surreptitiously by their real brothers without informing him and therefore an application for restoring the proceedings in January, 2006 was filed by the petitioner with a prayer that the order should be modified by recording the name of the petitioner as well alongwith his brothers. On this proceeding a report was called for and the Sub-Divisional Officer proceeded to pass orders on 30th May, 2008, accepting the claim of the petitioner.

5. The opposite parties aggrieved by the said order filed a revision and the learned Additional Commissioner has set aside the order on two grounds, namely, that the proceedings for getting his name recorded and for restoring the matter was time barred having been filed after 11 years of the passing of the order and secondly such a claim on merits also was not admissible.

6. Sri Mishra, learned counsel for the petitioner submits, that if the learned Commissioner was of the opinion that delay ought to have been condoned separately before proceeding on merits, then the case should have been remanded for consideration on the issue of delay, and no finding should have been recorded on the merits of the claim of the petitioner. He further contends that even otherwise on merits, the reports in favour of the petitioner do indicate that he was also in possession and therefore was entitled to the benefit of Section 122-B(4F) of the 1950 Act. He has further relied on the apex court decision in the case of Manorey @ Manohar Vs. Board of Revenue (U.P.) and others reported in 2003 (94) RD 538 to urge that such rights are available by operation of law and do not require any declaration by filing a suit once the possession is established. He therefore submits that the impugned order deserves to be set aside and the claim of the petitioner deserves to be upheld.

7. On the issue of knowledge, learned counsel has further submitted that the proceedings that had terminated in favour of the respondents in 1995 were without any opportunity to the petitioner.

8. Sri S.C. Verma and Sri Ajay Kumar Singh for the contesting respondents urge that the petitioner had full and complete knowledge of the said order and the recording of the names of the answering respondents in the relevant revenue records but he did not raise any objection and after 11 years the petitioner filed the application which was not maintainable, inasmuch as, the proceedings that culminated in 1995 were on the strength of an administrative order and as such a restoration was not maintainable. He further submits that limitation was also staring on the face of the petitioner which was not explained on day to day basis and therefore even otherwise the restoration application has been rightly rejected by the revisional court. He further submits that in the event the petitioner is seeking any declaration of his rights interse as against the answering respondents then the remedy of the petitioner is to file a suit.

9. All the learned counsel for the respondents submit that they do not propose to file any counter affidavit and the matter be disposed of finally at this stage as the facts on the basis whereof the submissions have been raised are already contained in the impugned order.

10. Having heard learned Standing Counsel and Sri Upadhya for the Gaon Sabha what appears is that the benefit of

Section 122-B (4F) was acknowledged in favour of the respondent nos. 4 and 5 only under an order of the Sub-Divisional Officer dated 17.6.1995. This order can be termed to be administrative in nature if it does not adjudicate any dispute or controversy and is founded on the basis of possession which is not disputed by the State. It is in these circumstances that the apex court in the case of Manore (supra) observed that filing of a suit was not necessary.

11. However, in the present case, it appears that the petitioner is claiming rights which is in the nature of a cotenancy on the ground that he was also in possession alongwith his brothers. This becomes a disputed question of fact which has to be established by leading evidence, and in the circumstances, this could not have been done by the method of a restoration application. However, the petitioner has a right to establish his possession by way of filing a suit.

12. Learned Commissioner while reversing the order of the Sub-Divisional Officer has made observations on the merits of the claim of the petitioner which can adversely affect him in the event the petitioner files a suit. This is because the said revision has been filed by the respondents under Section 333 of U.P. Z.A. & L.R. Act, 1950 and any finding made by the Commissioner shall become binding on a subordinate authority if a suit is tried by the Sub-Divisional Officer or by any such court of competent jurisdiction. In the circumstances, the Additional Commissioner fell in error by proceeding to record findings on merits when he had refused to accept the explanation for delay given by the petitioner in moving the restoration application. To that extent, Sri Rajiv Kumar Mishra is correct in his submission that the learned Commissioner has exceeded in his jurisdiction.

13. Sri S.C. Verma, learned counsel for the respondent has been unable to dispute the aforesaid proposition to the aforesaid extent and therefore this writ petition is partly allowed setting aside the order dated 11.9.2013 in so far as it seeks to declare the rights of the petitioner as against the claim of the respondent nos. 4 and 5.

14. The petitioner shall now be at liberty to file a suit and seek his declaration against the respondent nos. 4 and 5, if he is able to establish his possession alongwith them.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 22.10.2013**

**BEFORE**
**THE HON'BLE AMRESHWAR PRATAP SAHI, J.**

Civil Misc. Writ Petition No. 57762 of 2013

**Ishaq Khan & Ors. ...Petitioners**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri Ram Jee Saxena, Sri Raghuvansh chandra

**Counsel for the Respondents:**
C.S.C., Sri Anuj Kumar

**Constitution of India, Art.-226- Appeal-against the order passed under order 9 Rule 13 C.P.C.-Appeal by such person not party suit for partition and declaration-submission that appeal itself not maintainable as applicant was not party-held-misconceived-any aggrieved person**

**can maintain the appeal-whether contesting respondent within definition of aggrieved person or not still open to be decided-petitioner will have opportunity to raise such objection-petition dismissed.**

**Held: Para-6 & 7**

**6-Sri Saxena urged that the appeal had been filed only against the rejection of the application under Order IX Rule 13. This submission of Sri Saxena is not correct inasmuch as the prayer made in the appeal, copy whereof is Annexure-4 to the writ petition, is clearly to the extent to set aside the judgment and decree dated 11.8.2009.**

**7-Thus, whether the respondents are aggrieved persons or not is still open for consideration by the appellate court which is yet to hear the appeal. In the circumstances, the said opportunity to the petitioners is still available to raise this issue as to whether the respondent Nos. 4 and 5 fall within the definition of aggrieved person or not.**

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

1. Heard learned counsel for the petitioners.

2. The contention raised by Sri Saxena is that the appeal filed by the defendant - respondent under Section 331 (3) of the U.P. Zamindari Abolition & Land Reforms Act, 1950, is not maintainable and, therefore, the impugned order, being cursory in nature without considering the argument raised, deserves to be set aside.

3. It appears that a Suit filed by the petitioners - plaintiffs under Sections 176/229-B was decreed. The petitioners contend that the defendants - respondents were not parties to the Suit. They filed an application under Order 9 Rule 13 CPC which was rejected. Thereafter, they have filed an Appeal. The contention of Sri Saxena is that the Appeal was not entertainable against the rejection of the said application and even otherwise on merits, the defendants were not aggrieved person. In such circumstances, the objection of the petitioner has been cursorily dealt with while rejecting the said plea vide order dated 17.11.2012.

4. I have considered the submissions raised and I have also perused the memo of appeal, copy whereof has been filed as Annexure-4.

5. So far as the first contention of Sri Saxena that an application under Order 9 Rule 13 CPC cannot be filed by a person who was not a party to the Suit appears to be correct but at the same time such a person can always file an appeal provided he/she falls within the definition of an aggrieved person. The defendant can file an application under Order IX Rule 13 in the Suit whereas an appeal can be filed by any aggrieved person. This is the distinction in the scope of these two remedies.

6. Sri Saxena urged that the appeal had been filed only against the rejection of the application under Order IX Rule 13. This submission of Sri Saxena is not correct inasmuch as the prayer made in the appeal, copy whereof is Annexure-4 to the writ petition, is clearly to the extent to set aside the judgment and decree dated 11.8.2009.

7. Thus, whether the respondents are aggrieved persons or not is still open for consideration by the appellate court which is yet to hear the appeal. In the circumstances, the said opportunity to the

petitioners is still available to raise this issue as to whether the respondent Nos. 4 and 5 fall within the definition of aggrieved person or not.

8. Consequently, I do not find any reason to entertain this writ petition. The writ petition is dismissed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 29.10.2013**

**BEFORE**
**THE HON'BLE SUDHIR AGARWAL, J.**

Civil Misc. Writ Petition No. 58418 of 2013

**Vishal Srivastava ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Kamal Dev Rai

**Counsel for the Respondents:**
C.S.C.

**Constitution of India, Art.-226-Compassionate appointment-can not be claimed by virtue of succession-as matter of right-father of petitioner died in 1995-when he was less than 5 years old-mother getting pension-never put any claim for her appointment-manage to educate her son and maintain herself alongwith two children-for such long time rightly rejected by authorities-even in writ petition nothing whisper regarding financial crisis-which still continuing in the year 2012-in absence of basic foundation about financial distress-power under proviso of Rule 5 can not be exercised-refusal to grant compassionate appointment-held-proper.**

**Held: Para-10**
**The proviso stressed on the words that relaxation has to be given in specific cases where undue hardship would cause on account of adherence to the provision relating to five years period within which the application ought to have been made. The language makes it very clear that the relaxation is not to be resorted lightly and frequently. The basic objective and purpose of compassionate appointment, therefore, has to be adhered. There is no scope for omission of this basic requirement that the family's sufferance on account of financial hardship etc. is continuing. When in a particular case, no ground or foundation is made out with respect to such financial distress, penurious condition etc., the question of invoking power under proviso to Rule 5 does not arise at all. In fact, the proviso at all would not be attracted in such case and denial of compassionate appointment in such case deserves to be sustained and would not be justified to be interfered by this Court.**

**Case Law discussed:**
2008(11) SCC 384; JT 2009(8) SC 135; JT 2009(6) SC 624; 2013(31) LCD 674; 2010(7) ADJ 1 (DB); W.P. No. 58401 of 2013.

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

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

2. Petitioner's claim for compassionate appointment has been rejected on the ground that the death of deceased employee took place in 17.3.1995 and after more than 17 years, there is no justification to provide compassionate appointment.

3. I do not find any irregularity or illegality in the view taken by the authorities concerned. It is well settled that if the family had sufficient means to carry on its affairs for long time, in such a case compassionate appointment cannot be made. The purpose of compassionate appointment is not to provide employment by succession but it is to meet immediate necessity arrived at due

to sudden demise of sole bread earner of the family leaving the legal heirs in penury.

4. In Mumtaz Yunus Mulani Vs. State of Maharashtra & Ors, 2008(11) SCC 384 the Court held that now a well settled principle of law is that appointment on compassionate ground is not a source of recruitment. The reason for making such a benevolent scheme by the State or public sector undertakings is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over sudden financial crises.

5. The purpose of compassionate appointment is not for providing a post against post. It is not reservation in service by virtue of succession. If the family is not in penury and capable to maintain itself for a long time, no mandamus would be issued after a long time for providing compassionate appointment to a legal heir of the deceased employee. Recently in Santosh Kumar Dubey Vs. State of U.P. and others, JT 2009(8) SC 135 and M/s Eastern Coalfields Ltd. Vs. Anil Badyakar & Ors., JT 2009(6) SC 624 the Apex Court has declined to issue any mandamus after expiry of a long time. In Santosh Kumar Dubey (Supra) after considering the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "Rules, 1974") the Apex Court said that if family of the deceased has been able to survive, after five years no mandamus or direction should be issued for giving compassionate appointment.

6. Learned counsel for petitioner, however, placed reliance on a decision of this Court in Pravesh Kumar Singh Vs. State of U.P. and others 2013 (31) LCD 674 wherein this Court has held that since there is a power of condonation of delay even if the application is moved after five years from the date of death, therefore whenever such an application is moved, it ought to be referred to State Government, since the power to condone the delay is vested in it and the application ought not to have been rejected by the appointing authority on its own unless and until the State Government has an occasion to apply its mind with regard to question as to whether the delay in filing the application should be condoned or not in exercise of its power under proviso to Rule 5 (1) of Rules, 1974.

7. As a proposition of law, there cannot be any exception of the fact that since there is a provision under Rule 5 of Rules, 1974, which empowers the State Government to relax the period of five years contemplated within which the dependent of deceased Government Servant should apply for compassionate appointment, but the said period cannot be relaxed provided it is satisfied that this time limit otherwise would cause undue hardship. The State Government's power of relaxation is with an object so that the case of the dependent may be considered in a just and equitable manner. This aspect has been considered by Apex Court also in Santosh Kumar Dubey (supra) and it has taken the view that if the family of deceased has been able to survive after five years for a long time, any mandamus or direction for compassionate appointment would frustrate the very objective and purpose of such appointment and that being so, the

question of relaxation of period by itself would become otiose.

8. In fact, a Division Bench of this Court in Vivek Yadav Vs. State of U.P. and others 2010 (7) ADJ 1 (DB) also held that if the power of relaxation is there, the Government must apply its mind, but the condition precedent for relaxation is that the family of the deceased employee continued to suffer the penurious condition and financial distress. This decision has been considered recently by this Court in Civil Misc. Writ Petition No. 58401 of 2013 (Vishwadeep Singh Vs. State Of U.P. & 3 others) decided on 24.10.2013 and the ratio laid down therein has been highlighted in para 6 of the judgment as under:

"6. Learned Counsel for petitioner, however, placed reliance on a Division Bench judgment of this Court in Vivek Yadav Vs. State of U.P. and others 2010 (7) ADJ 1 (DB) to show that mere fact that claim of compassionate appointment has been raised after more than five years by itself will not disentitle the legal heir of deceased employee from such appointment. Having gone through the aforesaid decision, however, I find that the wide amplitude sought to be given by learned counsel for petitioner to the said judgment is not correct. Therein it has been observed by the Court, if an application for compassionate appointment is not made since there was no eligible person to claim compassionate appointment in the family of the deceased and the child was minor, he can move such an application after attaining the majority, provided, the family of deceased, over long passage of time, continued to face hardship and this matter can be examined by the competent authority. The Court therein found, as a matter of fact, that the widow of deceased employee was uneducated or illiterate and the son was minor. This Court further held that power to relax requirement of five years pre-supposes consideration of matter in a particular case in a just and equitable manner. The test to be applied is "does family of the deceased continued to suffer financial distress and hardship occasioned by the death of the bread earner so as to relax the period within which the application could be made."

9. In the present case, petitioner's father died on 17.3.1995. Petitioner date of birth being 25.1.1990, admittedly he was a little less than five years of age at the time of death of his father. The deceased employee left behind widow and two minor sons Vishal, i.e. the petitioner and Chhotu, who is younger than the petitioner. The widow never claimed any financial hardship, distress and penurious condition of the family for the purpose of seeking compassionate appointment and instead maintained herself and both minor children, managing them to undergo education and also the other things. In the affidavit of the widow, placed on record as Annexure 3 to the writ petition, she has not mentioned that the appointment she intend to be given to the petitioner is on account of penurious condition and financial hardship of the family, but she has expressed her desire that after the death of husband, she intended to seek appointment for her elder son Vishal Srivastava, i.e., the petitioner. Even in the application submitted by petitioner on 28.6.2012 seeking compassionate appointment (Annexure 2 to the writ petition), there is not even a whisper about the hardship, financial distress or penurious conditions of the family of

deceased employee, who has died almost more that one and half decade back. Even in the entire writ petition, I do not find appropriate pleadings and material to show that the family of deceased employee throughout has suffered financial distress and hardship which is continuing even in 2012. It is in these facts and circumstances, the above decision cited in support of the writ petition, in my view does not help the petitioner for the reason that any other view would amount to treat the petitioner as if he has a right to hold a post reserved by way of succession after the death of his father to claim compassionate appointment irrespective of length of time and other relevant consideration. A reservation of post against post has consistently been condemned and deprecated by the Apex Court since it is contrary to concept of compassionate appointment. The view I am taking finds support from the language used in proviso to Rule 5 (1) of Rules, 1974. It may be noted that Rule 5, as it was initially framed, neither provided any period within which the application ought to have been submitted nor contain any power of relaxation with respect to such period. It, however, required that compassionate appointment shall be provided expeditiously and without any delay. This Rule 5 was amended by substitution vide U.P. Recruitment of Dependents of Government Servants Dying in Harness (Third Amendment) Rules, 1993 (hereinafter referred to as "Rules, 1993") published vide Notification dated 16.4.1993 and the substituted provision read as under:

''5–(1) यदि इस नियमावली के प्रारम्भ होने के पश्चात् किसी सरकारी सेवक की सेवाकाल में मृत्यु हो जाय तो उसके कुटुम्ब के ऐसे एक सदस्य को जो केन्द्रीय सरकार या राज्य सरकार के अथवा केन्द्रीय सरकार या राज्य सरकार के स्वामित्वाधीन या उसके द्वारा नियंत्रित किसी निगम के अधीन पहले से सेवायोजित न हो, इस प्रयोजन के लिये आवेदन करने पर भर्ती के सामान्य नियमों को शिथिल करते हुए, सरकारी सेवा में उपयुक्त सेवायोजन प्रदान किया जायेगा जो राज्य लोक सेवा आयोग के क्षेत्रान्तर्गत न हो, यदि ऐसा व्यक्ति–

(एक) पद के लिये विहित शैक्षिक अर्हता रखता हो,

(दो) अन्य प्रकार के सरकारी सेवा के लिए अर्ह हो, और

(तीन) सरकारी सेवक की मृत्यु के दिनांक के पांच वर्ष के भीतर सेवायोजन के लिये आवेदन करता है:

परन्तु जहॉ राज्य सरकार का यह समाधान हो जाय कि सेवायोजन के लिये आवेदन करने के लिये नियत समय से किसी विशिष्ट मामले में अनुचित कठिनाई होती है वहॉ वह अपेक्षाओं को जिन्हें वह मामले में न्यायसंगत और साम्यपूर्ण रीति से कार्यवाही करने के लिये आवश्यक समझे, अभिमुक्त या शिथिल कर सकती है।

(2) ऐसी नौकरी यथाशक्त उसी विभाग में दी जानी चाहिये जिसमें मृत सरकारी सेवक अपनी मृत्यु के पूर्व सेवायोजित था।''

10. The proviso stressed on the words that relaxation has to be given in specific cases where undue hardship would cause on account of adherence to the provision relating to five years period within which the application ought to have been made. The language makes it very clear that the relaxation is not to be resorted lightly and frequently. The basic objective and purpose of compassionate appointment, therefore, has to be adhered. There is no scope for omission of this basic requirement that the family's sufferance on account of financial hardship etc. is continuing. When in a particular case, no ground or foundation is made out with respect to such financial distress, penurious condition etc., the question of invoking power under proviso to Rule 5 does not arise at all. In fact, the proviso at all would not be attracted in

such case and denial of compassionate appointment in such case deserves to be sustained and would not be justified to be interfered by this Court.

11. In view of above discussion, I find no merit in the writ petition. Dismissed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 24.10.2013**

**BEFORE**
**THE HON'BLE RAJES KUMAR, J.**
**THE HON'BLE MAHESH CHANDRA TRIPATHI, J.**

Civil Misc. Writ Petition No. 58503 of 2013

**Balraj Singh Bhadauria ...Petitioner**
**Versus**
**State of U.P. and Ors. ...Respondents**

**Counsel for the Petitioner:**
Sri Rakesh Kumar Srivastava, Sri Pankaj Srivastava

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

**Constitution of India, Art.-226-Service Law-Reinstatement in service-dismissal order-became final in departmental appeal-acquittal in criminal proceeding-shall not give automatic reinstatement-in absence of challenge of dismissal-rightly refused to reinstate in service-warrant no interference by writ court.**

**Held: Para-19**
**As stated above, the petitioner has not challenged the punishment order. The punishment order has attained finality. The petitioner is not able to show any provisions under the service rules for reinstatement after acquittal in criminal proceeding, therefore, in view of the laws laid down by the Apex Court and this Court, referred herein-above, the petitioner is not entitled to be reinstated in service.**

**Case Law discussed:**
1999(82) FLR 627; (2005) 10 SCC 471; (2004) 8 SCC 200; (2007) 10 SCC 385; (2007) 9 SCC 755; (2013) 1 SCC 598; AIR 1964 SC 787.

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

1. Heard learned counsel for the petitioner and Sri R.N. Singh, learned counsel appearing on behalf of respondent nos. 2, 3 and 4.

2. By means of the present writ petition, the petitioner is challenging the order dated 1.2.2013 passed by the Regional Manager, Sarva U.P. Gramin Bank, 803/B-1, Gwalior Road, Jhansi as well as order dated 3.10.2013 passed by the Secretary Board, Sarva U.P. Gramin Bank, Head Office, Jhansi.

3. It appears that the petitioner has been punished by order dated 28.5.2003 and he has been terminated from the service against which appeal filed by the petitioner has been dismissed vide order dated 4.9.2003. The petitioner has not challenged the aforesaid two orders further and the aforesaid two orders have attained finality.

4. It appears that the petitioner has been acquitted in criminal proceeding vide order dated 29.2.2012. After the acquittal, the petitioner moved an application on 6.8.2012 for reinstatement, which has been refused vide order dated 1.2.2013, which is being challenged in the writ petition.

5. We do not find any merit in the writ petition.

6. Admittedly, the petitioner has not challenged the punishment order and the appellate order. Both the orders have become final and the punishment of the petitioner has attained finality. Merely because the petitioner has been acquitted in criminal proceeding, he cannot be entitled for his reinstatement.

7. It is settled principle of law that, both, disciplinary proceeding and the criminal proceeding are two separate proceedings and merely because the petitioner has been acquitted in criminal proceeding, he cannot be reinstated in service.

8. In the case of Capt. M Paul Anthony vs. Bharat Gold Mines Ltd., reported in 1999 (82) FLR 627, the Apex Court, after considering various decisions of the Apex Court, in paragraph 20, has formulated certain parameters with regard to departmental proceedings and the proceedings in a criminal case, which reads as under:

"20. The conclusions which are deductible from various decisions of this Court referred to above are:

(i)Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously though separately.

(ii)If the departmental proceedings and the criminal case are 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.

(iii)Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the chargesheet.

(iv)The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings, but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v)If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

9. In the case of State Bank of India and others vs. R.B Sharma, reported in (2004) 7 SCC 27, the Apex Court, in paragraph 8, 9, 10 and 11, held as follows:

"8. The purpose of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law

has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act 1872 (in short the 'Evidence Act'). Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the department enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances.

9. A three-judge Bench of this Court in Depot Manager, A.P. State Road Transport Corporation v. Mohd. Yousuf Miya and Ors., reported in (1997 (2) SCC 699) analysed the legal position in great detail on the above lines.

10. The aforesaid position was also noted in State of Rajasthan v. B.K. Meena, reported in (1996 (6) SCC 417).

11. There can be no straight jacket formula as to in which case the departmental proceedings are to be stayed. There may be cases where the trial of the case gets prolonged by the dilatory method adopted by delinquent official. He cannot be permitted to, on one hand, prolong criminal case and at the same time contend that the departmental proceedings should be stayed on the ground that the criminal case is pending."

10. In the case of State of Rajasthan vs. B.K. Meena, reported in (1996) 6 SCC 417, the Apex Court, in Paragraphs 14 and 17, has observed as follows:

"14. It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges. The staying of disciplinary proceedings, it is emphasised, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast rules can

enunciated in that behalf. The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is "that the defence of the employee in the criminal case may not be prejudiced." This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case. The ground indicated in D.C.M. and Tata Oil Mills is not also an invariable rule. It is only a factor which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending consideration is that the disciplinary enquiry cannot be - and should not be delayed unduly. So far as criminal cases are concerned, it is well-known that they drag on endlessly where high officials or persons holding high public offices involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion. That is the reality inspite of repeated advice and admonitions from this Court and the High Courts. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that the undesirable elements are thrown out and any charge of misdemeanor is enquired into promptly. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of the delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanor should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest. While it is not possible to enumerate the various factors, for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view the various principles laid down in the decisions referred to above.

17. There is yet another reason. The approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings the question is

whether offences registered against him under the Prevention of Corruption Act (and the Indian Penal Code, if any) are established and, if established, what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different. Staying of disciplinary proceedings pending criminal proceedings, to repeat, should not be matter of course but a considered decision. Even if stayed at one stage, the decision may require reconsideration if the criminal case gets unduly delayed."

11. The Apex Court in the case of Hindustan Petroleum Corporation Ltd. And others vs. Sarvesh Berry, reported in (2005) 10 SCC 471, has held as follows:

"14. That being the position, the High Court was not justified in directing stay of the departmental proceedings pending conclusion of the criminal charge. As noted in Capt. M. Paul Anthony's case (supra) where there is delay in the disposal of a criminal case the departmental proceedings can be proceeded with so that the conclusion can be arrived at an early date. If ultimately the employee is found not guilty his honour may be vindicated and in case he is found guilty the employer may get rid of him at the earliest."

12. The Apex Court, in the case of Krishnakali Tea Estate vs. Akhil Bharatiya Chah Mazdoor Sangh and another, reported in (2004) 8 SCC 200, held as follows:

"26. Learned counsel for the respondents in regard to the above contention relied on a judgment of this Court in the case of Capt. M. Paul Anthony (supra). In our opinion, even that case would not support the respondents herein because in the said case the evidence led in the criminal case, as well as in the domestic enquiry was one and the same and the criminal case having acquitted the workmen on the very same evidence, this Court came to the conclusion that the finding to the contrary on the very same evidence by the domestic enquiry would be unjust, unfair and rather oppressive. It is to be noted that in that case the finding by the tribunal was arrived in an ex parte departmental proceeding. In the case in hand, we have noticed that before the Labour Court the evidence led by the management was different from that led by the prosecution in the criminal case and the materials before the criminal court and the Labour Court were entirely different. Therefore, it was open to the Labour Court to have come to an independent conclusion de hors the finding of the criminal court. But at this stage it should be noted that it is not as if the Labour Court in the instant case was totally oblivious of the proceedings before the criminal court. The Labour Court has in fact perused the order of the Judicial Magistrate and the exhibits produced therein and come to an independent conclusion that the order of the criminal case has no bearing on the proceedings before it which finding of the Labour Court, in our opinion, is justified. It may be some use to us to refer at this stage to a judgment of this Court in the case of State of Rajasthan (supra) wherein it is held thus:

"There is yet another reason. The approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas

in the criminal proceedings the question is whether the offences registered against him under the Prevention of Corruption Act (and the Indian Penal Code, if any) are established and, if established, what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different."

27. From the above, it is seen that the approach and the objectives of the criminal proceedings and the disciplinary proceedings are altogether distinct and different. The observations therein indicate that the Labour Court is not bound by the findings of the criminal court."

13. In the case of Kendriya Vidyalaya Sangathan v. T. Srinivas, reported in (2004) 7 SCC 442, the Apex Court, in paragraphs 9, 10 and 11, held as follows:

9. In State of Rajasthan vs. B.K.Meena & Ors., reported in (1996) 6 SCC, the court held:

"The only ground suggested in the decisions of the Supreme Court as constituting a valid ground for staying the disciplinary proceedings is that "the defence of the employee in the criminal case may not be prejudiced". This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. It means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', desirability', or propriety, as the case may be, of staying the departmental enquiry has to be determined in each case taking into consideration all the facts and circumstances of the case. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view the various principles laid down in the Supreme Court's decisions." (Emphasis supplied)

10. From the above, it is clear that the advisability, desirability or propriety, as the case may be, in regard to a departmental enquiry has to be determined in each case taking into consideration all facts and circumstances of the case. This judgment also lays down that the stay of departmental proceedings cannot be and should not be a matter of course.

11.In the instant case, from the order of the tribunal as also from the impugned order of the High Court, we do not find that the two forums below have considered the special facts of this case which persuaded them to stay the departmental proceedings. On the contrary, reading of the two impugned orders indicates that both the tribunal and the High Court proceeded as if a departmental enquiry had to be stayed in every case where a criminal trial in regard to the same misconduct is pending. Neither the tribunal nor the High Court did take into consideration the seriousness of the charge which pertains to acceptance of illegal gratification and the desirability of continuing the respondent in service inspite of such serious charges levelled against him. This Court in the said case of State of Rajasthan (supra) has further observed that the approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. It held that in the disciplinary proceedings the question is whether the respondent is guilty of such

conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings the question is whether the offences registered against him are established and, if established, what sentence should be imposed upon him. The court in the above case further noted that the standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are distinct and different. On that basis, in the case of State of Rajasthan the facts which seem to be almost similar to the facts of this case held that the tribunal fell in error in staying the disciplinary proceedings."

14. The Apex Court, in the case of NOIDA Entrepreneurs Association vs. NOIDA and others, reported in (2007) 10 SCC 385, has observed has follows:

"11. A bare perusal of the order which has been quoted in its totality goes to show that the same is not based on any rational foundation. The conceptual difference between a departmental enquiry and criminal proceedings has not been kept in view. Even orders passed by the executive have to be tested on the touchstone of reasonableness. (See Tata Cellular v. Union of India and Teri Oat Estates (P) Ltd. v. U.T. Chandigarh). The conceptual difference between departmental proceedings and criminal proceedings have been highlighted by this Court in several cases. Reference may be made to Kendriya Vidyalaya Sangathan v. T. Srinivas, Hindustan Petroleum Corpn. Ltd. v. Sarvesh Berry and Uttaranchal RTC v. Mansaram Nainwal.

"8.....The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act 1872 (in short the 'Evidence Act'). Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the department enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case

depending on its own facts and circumstances."

15. A three-Judges Bench of this Court in Depot Manager, A.P. SRTC v. Mohd. Yousuf Miya (SCC pp.704-05, para 8) analysed the legal position in great detail on the above lines.

16. The standard of proof required in departmental proceedings is not the same as required to prove a criminal charge and even if there is an aquittal in the criminal proceedings, the same does not bar departmental proceedings. That being so, the order of the State Government declining not to continue the departmental proceeding is clearly untenable and is quashed. The departmental proceedings shall continue."

16. The Apex Court in the case of Pandiyan Roadways Corpn. Ltd. vs. N. Balakrishnan, reported in (2007) 9 SCC 755, observed as follows:

"21. There are evidently two lines of decisions of this Court operating in the field. One being the cases which would come within the purview of Capt. Paul Anthony v. Bharat Gold Mines Ltd. and Another [(1999) 3 SCC 679] and G.M. Tank v. State of Gujarat and Others [(2006) 5 SCC 446]. However, the second line of decisions show that an honourable acquittal in the criminal case itself may not be held to be determinative in respect of order of punishment meted out to the delinquent officer, inter alia, when : (i) the order of acquittal has not been passed on the same set of fact or same set of evidence; (ii) the effect of difference in the standard of proof in a criminal trial and disciplinary proceeding has not been considered. [See Commissioner of Police, New Delhi v. Narender Singh (2006) 4 SCC 265], or; where the delinquent officer was charged with something more than the subject-matter of the criminal case and/or covered by a decision of the Civil Court. [See G.M. Tank (supra), Jasbir Singh v. Punjab & Sind Bank and Others - 2006 (11) SCALE 204, and Noida Enterprises Assn. v. Noida & Others - 2007 (2) SCALE 131 Para 18]

22. In Narinder Mohan Arya v. United India Insurance Co. Ltd. and Others [(2006) 4 SCC 713], this Court held:

"39. Under certain circumstances, a decision of a civil court is also binding upon the criminal court although, converse is not true. (See Karam Chand Ganga Prasad v. Union of India). However, it is also true that the standard of proof in a criminal case and civil case is different.

40. We may notice that in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd., this Court observed: (SCC p. 695, para 35)

"35. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instance case."

41. We may not be understood to have laid down a law that in all such circumstances the decision of the civil court or the criminal court would be binding on the disciplinary authorities as this Court in large number of decisions points out that the same would depend upon other factors as well. See e.g. Krishnakali Tea Estate v. Akhil Bharatiya

Chah Mazdoor Sangh and Manager, Reserve bank of India v. S. Mani. Each case is, therefore, required to be considered on its own facts."

17. In the case of Deputy Inspector General of Police and another vs. S. Samuthiram, reported in (2013) 1 SCC 598, the Apex Court, in paragraphs 23 to 27, has observed as follows:

"23. We are of the view that the mere acquittal of an employee by a criminal court has no impact on the disciplinary proceedings initiated by the Department. The respondent, it may be noted, is a member of a disciplined force and non examination of two key witnesses before the criminal court that is Adiyodi and Peter, in our view, was a serious flaw in the conduct of the criminal case by the Prosecution. Considering the facts and circumstances of the case, the possibility of winning over P.Ws. 1 and 2 in the criminal case cannot be ruled out. We fail to see, why the Prosecution had not examined Head Constables 1368 Adiyodi and 1079 Peter of Tenkasi Police Station. It was these two Head Constables who took the respondent from the scene of occurrence along with P.Ws. 1 and 2, husband and wife, to the Tenkasi Police Station and it is in their presence that the complaint was registered. In fact, the criminal court has also opined that the signature of PW 1 (husband - complainant) is found in Ex.P1 - Complaint. Further, the Doctor P.W.8 has also clearly stated before the Enquiry Officer that the respondent was under the influence of liquor and that he had refused to undergo blood and urine tests. That being the factual situation, we are of the view that the respondent was not honourably acquitted by the criminal court, but only due to the fact that PW 1 and PW 2 turned hostile and other prosecution witnesses were not examined.

Honourable Acquittal

The meaning of the expression "honourable acquittal' came up for consideration before this Court in Reserve Bank of India, New Delhi v. Bhopal Singh Panchal (1994) 1 SCC 541. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions "honourable acquittal', "acquitted of blame', "fully exonerated' are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression "honourably acquitted'. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

25. In R.P. Kapoor v. Union of India, AIR 1964 SC 787, it was held even in the case of acquittal, departmental proceedings may follow where the acquittal is other than honourable. In State of Assam and another v. Raghava Rajgopalachari reported in 1972 SLR 45, this Court quoted with approval the views expressed by Lord Williams, J. in (1934) 61 ILR Cal. 168 which is as follows:

"The expression "honourably acquitted" is one which is unknown to court of justice. Apparently it is a form of order used in courts martial and other extra judicial tribunals. We said in our judgment that we

accepted the explanation given by the appellant believed it to be true and considered that it ought to have been accepted by the Government authorities and by the magistrate. Further, we decided that the appellant had not misappropriated the monies referred to in the charge. It is thus clear that the effect of our judgment was that the appellant was acquitted as fully and completely as it was possible for him to be acquitted. Presumably, this is equivalent to what Government authorities term "honourably acquitted"'.

26. As we have already indicated, in the absence of any provision in the service rule for reinstatement, if an employee is honourably acquitted by a Criminal Court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile etc. In the case on hand the prosecution did not take steps to examine many of the crucial witnesses on the ground that the complainant and his wife turned hostile. The court, therefore, acquitted the accused giving the benefit of doubt. We are not prepared to say in the instant case, the respondent was honourably acquitted by the criminal court and even if it is so, he is not entitled to claim reinstatement since the Tamil Nadu Service Rules do not provide so.

27. We have also come across cases where the service rules provide that on registration of a criminal case, an employee can be kept under suspension and on acquittal by the criminal court, he be reinstated. In such cases, the re-instatement is automatic. There may be cases where the service rules provide in spite of domestic enquiry, if the criminal court acquits an employee honourably, he could be reinstated. In other words, the issue whether an employee has to be reinstated in service or not depends upon the question whether the service rules contain any such provision for reinstatement and not as a matter of right. Such provisions are absent in the Tamil Nadu Service Rules."

18. On the consideration of the decisions of the Apex Court, referred herein-above, this Court in W.P. N0. 54159 of 2012, Mohd. Ismail Naqvi Vs. High Court of Judicature at Allahabad Through Registrar & another, decided on 23.5.2013 has summarised the principle of law as follows:

"(a) Departmental proceeding and the criminal proceeding are two different and distinct proceedings. The purpose of both the proceedings are different. The criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offence shall make satisfaction to the public whereas the departmental enquiry is meant to maintain discipline in the service and efficiency of public service.

(b) There would be no bar to proceed, simultaneously with departmental enquiry and the trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law.

(c)The enquiry in a departmental proceeding relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. The strict standard of proof or applicability of the Evidence Act stands excluded.

(d) The only ground for staying the disciplinary proceeding is "that the defence of the employee in the criminal case may not be prejudiced.

(e) 'Advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case. It is only a factor which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending consideration is that the disciplinary enquiry cannot be and should not be delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons holding high public offices involved.

(f) The interest of the administration and good governance demand that the proceedings are concluded expeditiously. It must be remembered that the interest of the administration demands that the undesirable element are thrown out on any charge of misdemeanour is enquired into promptly. The disciplinary proceedings are meant not really to punish the guilty, but to keep the administrative machinery unsullied by getting rid of bad elements in the services.

(g) It is not also in the interest of administration that persons accused of serious misdemeanor should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest.

(h) Stay of disciplinary proceedings cannot be, and should not be, a matter of course, but a considered decision. Even if it is stayed at one stage, the decision may require reconsideration, if the criminal case get unduly delayed.

(i) The standard of proof required in the departmental proceedings is not the same as is required to prove a criminal charge and even if there is an acquittal in the criminal proceedings, the same does not bar departmental proceedings.

(j) In the absence of any provision in the Service Rule for reinstatement, if an employee is honourably acquitted by a criminal court, even then no right is conferred on the employee to claim any benefit, including the reinstatement for reason that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond a reasonable doubt, the accused is assumed to be innocent.

(k) It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile etc., but it may not of any help in the disciplinary proceedings."

19. As stated above, the petitioner has not challenged the punishment order. The punishment order has attained finality. The

petitioner is not able to show any provisions under the service rules for reinstatement after acquittal in criminal proceeding, therefore, in view of the laws laid down by the Apex Court and this Court, referred herein-above, the petitioner is not entitled to be reinstated in service.

20. In view of the foregoing discussions and the facts and circumstances of the case, I do not see any reason to interfere in the matter. The writ petition fails and is dismissed.

---

**ORIGINAL JURISDICTION**
**CIVIL SIDE**
**DATED: ALLAHABAD 25.10.2013**

**BEFORE**
**THE HON'BLE ARUN TANDON, J.**
**THE HON'BLE ANAJANI KUMAR MISHRA, J.**

Civil Misc. Writ Petition No. 58778 of 2013

**Dalit Shoshit Samaj Sangharsh Samiti & Anr. ...Petitioners**
**Versus**
**Union of India & Ors. ...Respondents**

**Counsel for the Petitioners:**
Sri I.N. Singh, Sri Ajay Yadav, Sri Ravi Kant

**Counsel for the Respondents:**
A.S.G.I., Sri Tarun Verma, Sri Vikas Budhwar, Sri Ashish Agarwal.

**Constitution of India, Art.-226- Petitioner challenging of advertisement for L.P.G. gas dealership-on ground-requirement of 25x30 meter land's ownership-held-arbitrary-another requirement dealership should not be full time working service-also-held-misconceived if dealer not possess required land-agency shall be in hands of moneyed person, owner of land-and if dealer working full time service can not devote proper time in distribution-unless marketing guide lines challenged-advertisement can not be questioned.**

**Held: Para-16,17,18**

**16. A person possessed of land outside the limits defined, qua a particular location, is not qualified for being considered for grant of dealership in a particular municipal/town/village, as he will not be able to construct the godown in terms of the stipulations of the policy. The requirement of land separately for each location is, therefore, fair and just.**

**17. So far as the induction of the spouse as deemed co-owner to the extent of 50% is concerned, we find that such condition is in the larger public interest. The wives in poor country like India are mostly unemployed, and are dependent upon her husband for their livelihood. Their interest has to be protected and for this purpose the Oil Companies have come up with the stipulation that the spouse must be deemed to be a co-owner of 50% of the dealership. Such stipulation in our opinion need not be interfered by this Court, being in the larger interest of the society.**

**18. The stipulation with regard to the resignation from the employment by the applicant, on being selected as dealer, is also fair and just. Running of the dealership of L.P.G. is a whole time employment and a person cannot be expected to perform duties both as a dealer as well as an employee of a concern simultaneously. In these circumstances, the Oil Companies are justified in insisting that on being selected as dealer the person concerned must resign from the employment. The condition cannot be said to be arbitrary.**

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

1. Heard Sri Ravi Kant, Senior Advocate assisted by Sri I.N. Singh, Advocate on behalf of the petitioner, Sri Ashish Agrawal, Advocate on behalf of respondent no. 1, Sri Tarun Verma,

Advocate on behalf of respondent no. 2, Sri Vikas Budhwar, Advocate on behalf of respondent no. 4.

2. Petitioner no. 1 claims to be the society registered in the name and style of Dalit Shoshit Samaj Sangharsh Samiti (D.S. Four) Allahabad, while petitioner no. 2 is a member of the said society. The members of the petitioner society belong to the Scheduled Caste. Petitioner no. 1 society looks after their interest.

3. This petition has been filed challenging the advertisement, which has been published in terms of the guidelines framed by the Oil Marketing Companies in the matter of selection of regular L.P.G. Distributorship by the nationalized three oil companies, namely Indian Oil Corporation, Bharat Petroleum Corporation and Hindustan Petroleum Corporation.

4. The advertisement is challenged before this Court on following grounds:

(a) The requirement of land measuring 25 Meter x 30 Meter within 15 K.M. from the municipal/town/village limit of the location, for the purposes of construction of the godown for L.P.G., must be possessed by the applicant on the date of making of the application is arbitrary, inasmuch as members of the petitioner society are poor person. The purpose of providing reservation in their favour will be frustrated by imposing such condition. It is submitted that the corporation should insist on the land being provided after a particular candidate is selected and not at the time of making of the application.

(b) The requirement of separate land being possessed by the applicant in respect of each location for which he makes application, i.e. if an applicant makes applications for four locations, he has to possess land at four places in terms of the policy guidelines, is arbitrary.

(c) The condition under clause 5 of the advertisement, wherein the spouse has been declared to be a co-owner of the dealership to the extent of 50% on being awarded the dealership, is arbitrary, inasmuch as in a given case the selected applicant may not like his spouse to be made a partner. The respondent cannot curtail the rights of the selected person to carry on his trade and business in the dealership as he so desires.

(d) The reservation as provided under the advertisement is 22.5% for Scheduled Caste and Scheduled Tribes is incorrect, as under the Government Order it should be 22.5% for the Scheduled Caste exclusively.

(e) The roster as applied in the advertisement in fact works out reservation to the extent of 19% in favour of the Scheduled Caste, when as per the policy it should be 22.5%.

(f) The stipulation that on being selected and being appointed as a dealer of the Oil Companies the dealer has to resign from the employment, if he/she is so employed, is a bad condition, inasmuch as the dealer can continue in employment and carry on his business of dealership simultaneously.

5. Counsel for the Corporation in reply submits that all the conditions as incorporated in the advertisement are strictly in accordance with the policy guidelines, which are not under challenge in this petition. According to the respondents the petitioner society has no locus to challenge the policy laid down by the Oil Marketing Company in the matter of allotment of dealership by the Government Oil Companies. He further submits that the

guidelines as framed are in the larger interest of the public and in order to ensure that only bona fide applicants submit their application for being considered for dealership. The respondents explain that the reason for asking for ownership of land is in order to ensure that after being selected as a dealer the selected person surreptitiously do not induct owner of land for running of the dealership, as a result of which the dealership passes into the hands of moneyed people.

6. It is then submitted that there is no condition for the spouse to resign from the employment on her/his partner being selected as dealer. It is only the applicant who has to resign on being selected as a dealer.

7. The stipulation, for inducting the spouse as a co-owner, is to provide security to wives who are mostly housewife and are dependent for livelihood upon their husband.

8. It is lastly submitted that reservation of 22.5% has been provided strictly in accordance with the Government Order applicable. If there is any deficiency in the roster provided, the Oil Companies shall re-consider the same and if required necessary corrigendum shall be issued.

9. Counsel for the respondent has referred to the judgment of the Apex Court in the case of Mahindra Kumar Gupta vs. Union of India; 1995 SCC (1) 85, wherein it ha been laid down that the policy decision providing for the guidelines in the matter of award of dealership, distributorship of petroleum product by government undertaking cannot be subjected to challenge by an association, as it has no fundamental right under the Constitution of India.

10. Counsel for the petitioner in rejoinder referred to the judgment of the Apex Court reported in 2010 SCC (3) 274. It is contended that arbitrariness of a policy can always be challenged under Article 226 of the Constitution of India.

11. Having heard learned counsel for the parties and having examined the records, we find no substance in the contentions raised on behalf of the petitioners.

12. Before dealing with the grounds raised specifically, we may record that the petitioners, for the reasons best known to them, have not challenged the marketing guidelines under which the advertisement has been issued. They have only come forward to challenge the advertisement. The advertisement has been published in terms of the policy guidelines of the Oil Companies. The writ petition is liable to be dismissed on this ground alone. However, it would be appropriate that we may deal with specific objections raised point-wise.

13. The issues raised by the petitioners are to be examined in the legal background that the petitioners have no fundamental right to trade in L.P.G. They have only a right to be considered in the matter of grant of dealership in accordance with guidelines fixed by the Oil Marketing Companies and not de hors the same.

14. L.P.G. Is per se dangerous being explosive in nature. The dealer has to

obtain a licence from the explosive department in respect of the godown where the L.P.G. Cylinders are to be kept. Therefore, the oil companies are entitled to lay down norms for ensuring that trade by dealers in L.P.G. is safe and secure. Sufficiency of reasons or that there could be a better method for achieving the same purpose, as suggested by the petitioner, is no concern of writ Court under Article 226 of the Constitution of India in policy matters.

15. The first contention raised on behalf of the petitioner, qua applicant being possessed of the land measuring 25 meter x 30 meter at the time of the making of the application, in our opinion ignores the fact that such stipulation has only been made to ensure that only bona fide persons possessed of adequate land for construction of godown, where the L.P.G. Cylinders can be safely stored, submit their application. The counsel for the Oil Companies appears to be justified in submitting that this condition has been incorporated to avoid passing of the dealership into the hands of moneyed people after the selection of the person concerned. The requirement of the land, as mentioned, cannot be said to be without reason or arbitrary. It is for the authorities, providing for the policy guidelines, to decide as to what conditions must be satisfied by an applicant before his application can be entertained in the matter of selection for grant of dealership. Such policy decision can be questioned in a Court of law, only if it is demonstrated to be patently arbitrary. We find that the condition imposed is reasonable and for a purpose. Under the policy guidelines there is provision that for each location the applicant must have land separately, for construction of a godown, and that too within 15 km. from the limit of municipal/town/village in respect whereof the dealership is applied for. It is in this background that while submitting an application the candidate has to furnish details of his being owner of land measuring 25 Meter x 30 Meter for the particular location.

16. A person possessed of land outside the limits defined, qua a particular location, is not qualified for being considered for grant of dealership in a particular municipal/town/village, as he will not be able to construct the godown in terms of the stipulations of the policy. The requirement of land separately for each location is, therefore, fair and just.

17. So far as the induction of the spouse as deemed co-owner to the extent of 50% is concerned, we find that such condition is in the larger public interest. The wives in poor country like India are mostly unemployed, and are dependent upon her husband for their livelihood. Their interest has to be protected and for this purpose the Oil Companies have come up with the stipulation that the spouse must be deemed to be a co-owner of 50% of the dealership. Such stipulation in our opinion need not be interfered by this Court, being in the larger interest of the society.

18. The stipulation with regard to the resignation from the employment by the applicant, on being selected as dealer, is also fair and just. Running of the dealership of L.P.G. is a whole time employment and a person cannot be expected to perform duties both as a dealer as well as an employee of a concern simultaneously. In these circumstances, the Oil Companies are justified in insisting that on being selected

as dealer the person concerned must resign from the employment. The condition cannot be said to be arbitrary.

19. So far as the issue of extent of reservation being 22.5% in favour of Scheduled Caste category only is concerned, it may be recorded that the counsel for the petitioner has hopelessly failed to refer to any Government Order, which provided for 22.5% reservation for the Scheduled Caste candidate exclusively. The submission is therefore unfounded.

20. In respect of reservation of 22.5% having not been satisfied under the roster provided with the advertisement, we make it clear that if the petitioners have any such grievance, they may represent before the Coordinator of the Oil Companies within two weeks from today along with certified copy of this order. The Coordinator shall consider and decide the same by means of a reasoned speaking order, preferably within six weeks thereafter. All consequential action shall be taken accordingly in that regard.

21. Writ petition is disposed of subject to the observations made above.

---