ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.07.2014

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

Misc. Single No. 50 of 2000

Union of India ...Petitioner
Versus
XIII A.D.J. Lko & Others ...Respondents

Counsel for the Petitioner:
Sri Ved Prakash, Bans Raj Yadav

Counsel for the Respondents:
C.S.C., Mohd. Ilyas, Shree Pal Singh

Payment of wages Act 1936-Section 17(i)-applicability of limitation Act-Appeal filed beyond 30 days-whether can the delay in filing appeal-be condoned by appellate authority-held-'no'-provision of Section 5 of limitation not applicable.

Held: Para-15
From the above discussions and reasons stated by the Supreme Court in the case of decision of Hongo India (Supra) and decision of this court in Hind Majdoor Sabha, U.P versus State of U.P and others (supra), it has to be held that provisions of Section 5 of the Limitation Act will not be applicable to the provisions of Section 17 of the Payment of Wages Act and appellate court has no power to condone the delay and except the appeal beyond limitation provided in that. The court of appeal has rightly rejected the application for condonation of delay and no interference is required in that order rejected. Hence, the petition is liable to dismissed and it is hereby by dismissed.

Case Law discussed:
1998 (3) AWC 2216 All. 1970 LAB 1 C 1982 (Vol. 3 CN 235);

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

1. Heard Shri Ved Prakash, learned counsel for the petitioner representing the Union of India.

2. Even after revision of list, none appeared from the side of opposite party no.3.

3. This writ petition has been filed by the Union of India challenging the order dated 20.11.1999 by which application for condoning the delay has been rejected.

4. It was submitted by learned counsel for the petitioner Union of India Shri Ved Prakash submitted that though Section 17 of the Payment of Wages Act provides only 30 days for filing of appeal but it nowhere excludes the jurisdiction of the Court to condone the delay under Section 5 of the Limitation Act. It was further submitted that it was a central act. Karnataka and Madhya Pradesh have added a provision under Section 17 and made provisions of Section 5 of the Limitation Act applicable to appeals under this section.. It was further submitted that a full bench of this court 1990 (8) LCD, 253 Ram Swaroop versus Board of Revenue, this court has held that Indian Limitation Act will apply before any court of law and Section 5 of the Limitation Act is applicable. It was further submitted that the appellate court u/s 17 of the Act is also a 'Court' and hence Section 5 of the Limitation Act is applicable.

5. Before dealing with the matter, it is necessary to have a glance for the provision of Section 17 of the Payment of Wages Act, 1936 which is produced below:-

17. Appeal-(1) [An appeal against an order dismissing either wholly or in part

an application made under sub-section (2) of section 15, or against a direction made under sub-section (3) or sub-section (4) of that section] may be preferred, within thirty days of the date on which [the order or direction] was made, in a Presidency-town before the Court of Small Causes and elsewhere before the District Court-

(a) by the employer or other person responsible for the payment of wages under section 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees 1[or such direction has the effect of imposing on the employer or the other person a financial liability exceeding one thousand rupees], or

[(b) by an employed person or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act, or any other person permitted by the authority to make an application under sub-section (2) of section 15, if the total amount of wages claimed to have been withheld from the employed person exceeds twenty rupees or from the unpaid group to which the employed person belongs or belonged exceeds fifty rupees, or]

(C) by any person directed to pay a penalty under [sub sec-section (4)] of Section 15.

6. The words "the order or direction" occurring after the words "within thirty days of the date on which" was inserted in the Act on 1.4.1998.

7. It is also appropriate to refer to the second proviso of Section 15(2) of the Payment of Wages Act which is reproduced below:-

"Provided further that any application may be admitted after the said period of 1[twelve months] when the applicant satisfies the authority that he had sufficient cause for not making the application within such period."

8. The issue that whether Section 5 of Limitation Act is applicable to the provisions of Section 17 of the Payment of Wages Act was decided by this court in Case of Vijai Kumar Bhalla versus District Judtge, Bharaich and another reported in 1998 (3) AWC 2216 All, in that case it was held in paras 9, 10, 11, 12 and 13 as under:

"9. In the Hyderabad Chemicals and Fertilizers v. Mohammad Basheer Hahan and another, 1970 LAB 1C 1982 (Vol. 3 CN 235), a Division Bench of Andhra Pradesh High Court observed that Section 5 of the Limitation Act does not apply to the appeals preferred under Section 17. It was further observed that-

"If it is found that special law provides a different period of limitation for an appeal then not only Section 3 of the Limitation Act will apply because of Section 29(2) but Sections 4, 9 to 18 and 22 would also apply unless their application Is expressly excluded by the special Act. Clause (b) of Section 29(2). however, makes the other provisions of the Limitation Act inapplicable. It cannot be in doubt that the special Act by itself or under a valid rule can make, anyone of the provisions Including Section 5 of the Limitation Act which are excluded by virtue of Section 29(2)(b), applicable. However, Section 5 of the Limitation Act is not made applicable by the Payment of Wages Act or the Rules made thereunder."

"It cannot, further, be said that since the primary authority under the Payment

of Wages Act exercises certain powers under the Civil Procedure Code, the appeals from the order of such an authority should be deemed to be an appeal under Section 96 of the Civil Code and thus attracts the provisions of Section 5."

10. The Andhra Pradesh High Court while indicating the aforesaid observations followed AIR 1964 SC 1099, where it was observed that :

"The words "period prescribed therefor" in Section 29(2) mean prescribed for that particular appeal. Consequently, it cannot be said that since the period of 30 days prescribed by Section 17 happens to be the same as is provided in Article 152 of the Limitation Act for an appeal under the Civil Code the other provisions of Limitation Act, including Section 5 would automatically apply to an appeal under Section 17. There is no justification for any such construction of Section 29(2).

It may be that Section 3 says that subject to Sections 4 to 25 the question has to be considered whether a particular appeal is barred by limitation. It can only mean wherever these sections are made applicable to cases arising under the special law. Section 3 is not an enabling provision which automatically makes Sections 4 to 25 applicable to a case where Section 3 is applied. Whether the other provisions of the Limitation Act are excluded under Section 29(2)(a) or are made applicable to an appeal arising under a special or local law will have to be determined keeping in view not the provisions of Section 3 of the Limitation Act but the second part of Section 29(2).

It cannot, further, be said that since the primary authority under the Payment

of Wages Act exercises certain powers under the Civil Procedure Code, the appeals from the order of such an authority should be deemed to be an appeal under Section 96 of the Civil Code and thus attracts the provisions of Section 5."

11. In Anwari Basavaraj Patil and others v. Siddaramaiah and others, AIR 1994 SC 512, where the question of Limitation Act to a recrimination notes given under Section 97 of the-Representation of People Act, 1951 was involved, Hon'ble Supreme Court observed in para 8 of the report :--

8. In H. N. Yadav, L.N. Misra, (1974) 3 SCR 31 : AIR 1974 SC 480, this Court held that the words "expressly excluded" occurring in Section 29(2) of the Limitation Act do not mean that there must necessarily be express reference in the special or local law to the specific provisions of the Limitation Act, the operation of which is sought to be excluded. It was held that if on an examination of the relevant provisions of the Special Act, it is clear that the provisions of the Limitation Act are necessarily excluded then the benefits conferred by the Limitation Act cannot be called in aid to supplement the provisions of the Special Act. That too was a case arising under the Representation of the People Act and the question was whether Section 5 of the Limitation Act is applicable to the filing of the election petition. The test to determine whether the provisions of the Limitation Act applied to proceedings under Representation of People Act by virtue of Section 29(2) was stated in the following words :

"The applicability of these provisions has, therefore, to be judged not from the

terms of the Limitation Act but by the provisions of the Act relating to the filing of election petitions and their trial to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in Section 29(2) of that Act."

12. It was next observed in para 10 of the Act that :

"10. This decision, in our view, practically concludes the question before us inasmuch as the Act equates a recrimination notice to an election petition. The language of Section 97 makes the said fact abundantly clear. The relevant words are : "the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election." The proviso to subsection (1) applies the provisions of Sections 117 and 118 to such a recrimination notice. It may be noticed that for non-compliance with the requirement of Section 117 an election petition is liable to be dismissed by virtue of sub-section (1) of Section 86. Sub-section (2) of Section 97 further says that the "notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by Section 83 in the case of an election petition and shall be signed and verified in like manner". We may also say that the proviso to sub-section (1) of Section 97 which requires such a notice to be given to the High Court within fourteen days of the "date fixed for the respondents to appear before the High Court to answer the claim or claims" (reading the definition of "commencement of trial" into it) has also a particular meaning and object behind it. The idea is that the recrimination notice, if any, should be filed at the earliest possible time so that both the election petition and the recrimination notice are tried at the same time. The recrimination notice is thus comparable to an election petition. If Section 5 does not apply to the filing of an election petition, it does not equally apply to the filing of the recrimination notice."

13. I am definitely of the view that Payment of Wages Act, 1936 provides a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in Section 29(2) of that Act. Section 17 is very clear that the appeal may be preferred within 30 days of the day on which the order or direction was made. It does not provide that the appeal may be preferred within 30 days of the date, on which any party derived the knowledge of the order or direction made by the Prescribed Authority. Certainly in those cases where the Indian Limitation Act is applicable, the limitation shall run from the date of the knowledge of the order but where a special Act specifically contains a provision that an appeal can be filed within a specific time from the date of the order or direction, the appeal must be filed within the aforesaid period and the provisions of Section 5 of the Indian Limitation Act cannot be made applicable. '

9. The same issue came up again in another case Hind Majdoor Sabha, U.P versus State of U.P and others. 1999 (1) AWC 126 All, and this court has again held that power of condonation of delay from the Appellate Authority has been withheld by the legislature.

10. The apex court has in the case of Commissioner of Customs and Central Excise versus Hongo India Private Limited and another 2009 (5) SCC 791 while deciding the applicability of Section 5 of the Limitation Act 1963 in the proceeding under Section 35 (H) (1) of Central Excise Act held that the applicability of the provisions of Limitation Act, therefore, to be judged not from the terms of Limitation Act, but by provisions of Central Excise Act relating to filing of reference application to the High Court. The apex court has further held that high court has no power to condone the delay in filing the reference application filed by the commissioner under unamended Section 35(H)(1) of the Central Excise Act, 1944 beyond the prescribed period of 180 days.

11. Section 35(H)(1) of Central Excise Act speaks about the reference application to the high court and in this section it has been mentioned that application for reference is to be made to the high court within 180 days.

12. In the case of Union of India versus M/s Popular Construction Company, AIR 2001 SC 4010, the apex court while considering the Section 34 Arbitration Act, 1996 held that in para 15 as under:-

"Furthermore, section 34(1) itself provides that recourse to a court against an arbitral award may be made only by an application for setting aside such award "in accordance with" sub Section 2 and sub Section 3. Sub Section 2 relates to grounds for setting aside an award and is not relevant for our purposes. But an application filed beyond the period mentioned in Section 34, sub section (3) would not be an application "in accordance with" that sub section. Consequently by virtue of Section 34 (1), recourse to the court against an arbitral award cannot be made beyond the period prescribed. The importance of the period fixed under Section 34 is emphasised by the provisions of Section 36 which provide that "where the time for making an application to set aside the arbitral award under Section 34 has expired.....the award shall be enforced and the Code of Civil Procedure, 1908 in the same manner as if it were a decree of a court". This is a significant departure from the provisions of the Arbitration Act, 1940. Under the 1940 Act, after the time to set aside the award expired, the court was required to "proceed to pronounce judgment according to the award and upon (he judgment so pronounced a decree shall follow". Now the consequence of the time expiring under Section 34 of the 1996 Act is that the award becomes immediately enforceable without any further act of the Court. 5. If there were any residual doubt on the interpretation of the language used in Section 34, the scheme of the 1996 Act would resolve the issue in favour of curtailment of the Court's powers by the exclusion of the operation of Section 5 of the Limitation Act."

13. Going by the above principles, this court has again in the case of Smt. Sharda Devi versus State of U.P and others, 2013 (3) ALJ 186, followed the decision of this court in Hind Majdoor Sabha, U.P versus State of U.P and others (supra).

14. So far as the decision of full bench of this court in Ram Swaroop versus Board of Revenue and others, the

sole question which was to be decided by the full bench was that whether proceedings held on application to set aside the sole irregularity etc. are judicial proceedings amenable to revisional jurisdiction of the Board of Revenue. The full bench has held that commissioner while deciding the objection under Rule 285-I of U.P. ZA&LR Rules will be a 'court' and the proceedings taken before him will deemed judicial proceedings. The issue, whether provisions of Section 5 of the Limitation Act is applicable to the provision of Section 17 of the Payment of Wages Act, has not been discussed and decided.

15. From the above discussions and reasons stated by the Supreme Court in the case of decision of Hongo India (Supra) and decision of this court in Hind Majdoor Sabha, U.P versus State of U.P and others (supra), it has to be held that provisions of Section 5 of the Limitation Act will not be applicable to the provisions of Section 17 of the Payment of Wages Act and appellate court has no power to condone the delay and except the appeal beyond limitation provided in that. The court of appeal has rightly rejected the application for condonation of delay and no interference is required in that order rejected. Hence, the petition is liable to dismissed and it is hereby by dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.07.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Criminal Misc. Application No. 193240 of 2014 in Criminal Appeal No. 119 of 1986

Phool Chand & Ors. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Sri P.N. Mishra, Sri Apul Mishra, Sri K.N. Pandey

Counsel for the Respondents:
A.G.A.

Juvenile Justice(Care & Protection), Act-2000, Section-7-A- Application to hold enquiry-plea of juvenile-at appellate stage-claim based upon statement of appellant under Section 313 Cr.P.C.-in absence of other material-age disclosed in statement-being tentive observation from physical appearance-can not be basis for enquiry-rejected.

Held: Para-7
We have examined the application made by Heera and we find that except for referring to the statement under Section 313 Cr.P.C. no other material has been brought on record which may have same bearing on the issue of age of the appellant Heera. So far as the statement made under Section 313 Cr.P.C. is concerned, the Apex Court in the case of Abuzar Hossain Alias Gulam Hossain (Supra) itself in paragraph 14 has recorded that the statement recorded under Section 313 Cr.P.C. is only a tentative observation based on physical appearance which is hardly determinative of age and such statement cannot be regarded as sufficient for even a prima facie impression being formed qua the accused being a juvenile on the date of incident.

Case Law discussed:
2012(79) ACC, 991(SC)

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

1. Application No. 193240 of 2014 has been filed by the appellant no. 4, Heera in Criminal Appeal No. 119 of 1986 with the prayer that an enquiry may be got conducted in respect of juvenility of the convict having regard to the fact that in his statement under Section 313 Cr.P.C. he had disclosed his age as 20

years and he would be aged about 18 years 2 months and 1 day on the date of incident i.e. 17.12.1983.

2. In paragraph 10 of the affidavit filed in support of the application it is stated that there is a chance that the applicant may be less than 18 years on the date of incident and, therefore, an enquiry, to ascertain the age of appellant no. 4, is necessary. In view of the amendment introduced in Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in the year 2006 with the addition of Section 7-A to the Act.

3. We may record that except for the reliance on the statement recorded under Section 313 Cr.P.C. before the Trial Court, no other document or evidence has been brought on record by Heera to support his plea of his being juvenile within the meaning of Section 7-A read with Section 20 of the Act, 2000 on the date of incident.

4. In support of his contention, counsel for the appellant has placed reliance upon the judgment of the Apex Court in the case of Abuzar Hossain Alias Gulam Hossain vs. State of West Bengal reported in 2012 (79) ACC, 991 (SC), specifically paragraph 8.

5. We have heard Shri Apul Mishra on behalf of the appellant and the learned Government Advocate.

6. The Apex Court in the case of Abuzar Hossain Alias Gulam Hossain (Supra) in paragraph 16 has held that the claim of juvenility can be raised in appeal even if it was not pressed before the Trial Court or had not been so raised before the Trial Court. However, the Apex Court has gone on to explain that if the plea of juvenility is raised for the first time in the appeal after conviction then the initial burden is to be discharged by the person who claims to be juvenile and only if this burden is discharged and a prima facie case is made out, the Appellate Court has the power to direct an enquiry or require the Magistrate to hold an enquiry into the claim of juvenility. However, the Apex Court has clarified that there must be some material worth consideration for issuing such a direction. For ready reference the legal position as summarized by the Apex Court in the said judgment, in paragraph 16, is being quoted herein below :

?(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court. (ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility. (iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i)

to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh2 and Pawan8 these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, mark-sheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability. (vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised.?

7. We have examined the application made by Heera and we find that except for referring to the statement under Section 313 Cr.P.C. no other material has been brought on record which may have same bearing on the issue of age of the appellant Heera. So far as the statement made under Section 313 Cr.P.C. is concerned, the Apex Court in the case of Abuzar Hossain Alias Gulam Hossain (Supra) itself in paragraph 14 has recorded that the statement recorded under Section 313 Cr.P.C. is only a tentative observation based on physical appearance which is hardly determinative of age and such statement cannot be regarded as sufficient for even a prima facie impression being formed qua the accused being a juvenile on the date of incident.

8. In view of the said legal position and the facts discharged in the application made by the counsel for the appellant Heera, we do not find that there is any material on record even on prima facie basis for an enquiry being directed into the claim of juvenility of Heera.

9. The application is, therefore, rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
HON'BLE ARVIND KUMAR TRIPATHI (II), J.

Special Appeal Defective No. 387 of 2014

Pramod Kumar Dixit 3125(S/S) 2012
...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.K. Verma

Counsel for the Respondents:
C.S.C.

U.P. Police Regulation-Regulation 505- Resignation-when accepted within 2 month from tender-whether bad-held-'No'.

Held: Para-6
It is thus clear that the authority is empowered to accept a resignation even prior to the expiry of the period of two months. We therefore in addition to the reasons given by the learned Single Judge uphold the judgment for the conclusions drawn hereinabove.

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

1. Heard learned counsel for the parties on the merits of the appeal after having condoned the delay.

2. Learned counsel for the appellant has urged two points. Firstly, that the resignation tendered by the appellant was not voluntarily and secondly there is a provision namely Regulation 505 of the U.P. Police Regulations which mandates that the personnel against whom any enquiry is pending shall not be permitted to resign.

3. Having considered the submissions raised as well as having gone through the judgment of the learned Single Judge, we find that the learned Single Judge has categorically recorded the following finding in Paragraph 13:-

"13.Sequence of events noticed above clearly indicates that the petitioner submitted his resignation letter on 16th of February, 2005. An enquiry was held as to whether resignation was voluntary, or not. Concerned Circle Officer reported that resignation letter furnished by the petitioner was a result of voluntary act. On verification of the said fact, vide order dated 24th of February, 2005, resignation of the petitioner was accepted w.e.f. 28th of February, 2005."

4. This recital in the judgment could not be successfully assailed nor any such ground has been taken that the recital of the facts as noted by the learned Single Judge suffers from any infirmity against records. Consequently, the resignation was given voluntarily as recorded by the learned Single Judge and we do not find any material so as to differ from the said view.

5. The second submission raised by the learned counsel is not legally tenable, inasmuch as, the option in relation to the employee does not bar the authority from accepting the resignation in terms of the proviso to Regulation 505. The law is settled by this court in the case of Ram Dhar Pandey Vs. State of U.P., Special Appeal No. 88 of 2004 decided on 18th July, 2012 where this court has held as under:-

".....However, the first proviso to the said provision permits the authority to accept the resignation even prior to the date of expiry of the notice, i.e. two months. In the case in hand, the resignation has been accepted by the Inspector General of Police, Research, Policy Planning, Rules and Manuals, U.P., Lucknow under whose establishment the appellant was working as Constable before expiry of two months....."

6. It is thus clear that the authority is empowered to accept a resignation even prior to the expiry of the period of two months. We therefore in addition to the reasons given by the learned Single Judge uphold the judgment for the conclusions drawn hereinabove.

7. There is no merit in this appeal and is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2014

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Special Appeal No. 621 of 2014

State of U.P. & Ors. ..Appellants
Versus
Smt. Pushpa Devi ... Respondent

Counsel for the Appellants:
Sri A.K. Roy, S.C.

Counsel for the Respondents:
Sri K.K. Tripathi, Sri Manish Pandey

Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974- Compassionate appointment on class 4th post given-subsequently-revoked and recovery of salary on ground-as her husband was work charge employee-can not given regular appointment-held-Single Judge rightly quashed full Bench will not came in way already appointed-Appeal dismissed.

Held: Para-6
Any appointment made under the Dying in Harness Rules can only be on a permanent post and not on temporary or work charge post. That being the position, the option exercised by the State in down-grading the appointment of the petitioner from that of a permanent class IV employee to a work charge employee and also a direction for recovery of the excess amount paid to the writ-petitioner cannot be justified in law.

Case Law discussed:
(2010) 4 UPLBEC 2633

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

1. In brief the facts of this case are that the husband of the sole respondent-writ petitioner Smt. Pushpa Devi was an employee of the Public Works Department who died in harness on 30.6.1991. The respondent-writ petitioner applied for appointment on compassionate ground under The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred as the "Dying in Harness Rules"). On her application, she was given appointment on 24.4.1993 as a permanent class IV employee. By order dated 18.2.2005 passed by the Executive Engineer, Public Works Department, the appointment of the respondent-writ petitioner was down-graded from that of a permanent employee to a work charge employee on the ground that her husband was a work charge employee, and not a permanent employee. Further, recovery of the difference of salary from the date of initial appointment i.e. 24.4.1993 till the

date of passing of the order i.e. 18.2.2005 was also directed. Challenging the same, the respondent-writ petitioner filed Civil Misc. Writ Petition No. 12190 of 2005 which was allowed by a learned Single Judge vide his order dated 10.8.2011. Challenging the same, this special appeal has been filed by the State.

2. We have heard Sri C.B.Yadav, learned Additional Advocate General appearing along with Sri A.K.Roy, learned Standing Counsel, learned counsel appearing for the appellants and Sri Manish Pandey, learned counsel holding brief of Sri K.K.Tripathi, learned counsel for the respondent-writ petitioner and have perused the record.

3. The submission of the learned Additional Advocate General is primarily that since the husband of the writ-petitioner was a work charge employee, the writ-petitioner would not have been entitled to the benefit of Dying in Harness Rules but on misrepresentation of the writ-petitioner that her husband was a permanent employee of the Public Works Department, the appointment was wrongly given to her and on coming to know of the correct facts regarding her misrepresentation at the time of seeking appointment, her appointment as a permanent employee has been down-graded to that of a work charge employee, on which position the husband of the writ-petitioner was working.

4. Learned counsel for the appellants has relied on the Full Bench decision of this Court in the case of Pawan Kumar Yadav vs. State of U.P. (2010) 4 UPLBEC 2633 in support of his contention that a work charge employee would not be entitled to the benefit of the Dying in Harness Rules. There is no dispute about such proposition and we accept the said submission of the learned counsel for the appellants.

5. The contention of the learned counsel for the appellants in so far as it relates to the grant of appointment to a dependent of a work charge employee under the Dying in Harness Rules is perfectly justified. A work charge employee, who is not a permanent employee, cannot be given the benefit of the Dying in Harness Rules. However, as far as the present case is concerned, the writ-petitioner had been granted appointment under the Dying in Harness Rules way back on 24.4.1993 and it is presumed that the said appointment was given after verification of the documents which had been filed by the writ-petitioner. After more than a decade if it had come to the light of the appellants that the appointment was obtained by the writ-petitioner on misrepresentation or fraud i.e. by wrongly showing her husband to be a permanent employee of the department instead of correctly placing his position as that of a work charge employee, the option which could have been available to the appellants would be that of cancellation of the appointment and not to down-grade the same from that of a permanent employee to a work charge employee. We say so because appointment under the Dying in Harness Rules can only be given to the dependent of a permanent employee and not to a dependent of a work charge employee or temporary employee. Once the appointment had been given, it is presumed that the writ-petitioner had fulfilled all the conditions of grant of compassionate appointment under the Dying in Harness Rules. Once the

authorities have given such appointment to the writ-petitioner, the same cannot be down-graded to that of a work charge or temporary employee on the ground that the initial appointment was incorrectly provided. If the writ-petitioner was not entitled to the appointment under the Dying in Harness Rules because of her husband being a work charge employee, the option available to the State was not to place her as a work charge employee as there is no provision in law for appointment as a work charge employee under the Dying in Harness Rules. Any appointment made under the Dying in Harness Rules can only be on a permanent post and not on temporary or work charge post. That being the position, the option exercised by the State in down-grading the appointment of the petitioner from that of a permanent class IV employee to a work charge employee and also a direction for recovery of the excess amount paid to the writ-petitioner cannot be justified in law.

6. As such, this appeal stands dismissed. No order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.07.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
HON'BLE ARVIND KUMAR TRIPATHI (II), J.

Special Appeal No. 767 of 2012

District Judge Hardoi 6215(S/S) 2009 ...Appellant

Versus

Saurabh Kumar ...Respondent

Counsel for the Petitioner:
Sri Manish Kumar

Counsel for the Respondents:
Sri M.S. Rathore

U.P. Recruitment of Dependents of Government Servant (Dying in Harness) Rules 1974-Rule-5 readwith evidence Act, Section 107, 108-Compassionate appointment-claim on based on presumptions of death-decree by Civil Court became final-father of petitioner /respondent class IV employee-on election duty in the year 1996-not turned up-declaration made by Civil Court on 31.05.2008 got finally-Single Judge rightly directed for compassionate appointment-within two month preferably-appeal dismissed.

Held: Para-35

For the reasons discussed hereinabove, the presumption drawn by the Hon'ble Single Judge with regard to death of Om Prakash, seems to be not incorrect. Rather, it is based on sound principles of law. Accordingly, the impugned judgment and order passed by the Hon'ble Single Judge does not seem to suffer from any infirmity or illegality.

Case Law discussed:

(1951) 2 ALL.E.R. 587; (1881) 17 CHD 746; AIR 1953 SC 244; AIR 1955 SC 661; AIR 1959 SC 352; AIR 1966 SC 719; AIR 1975 SC 164; AIR 1973 SC 1056; AIR 1978 SC 1099; (1985) 2 SCC 321; (1995) 1 SCC 537; (1997) 1 SCC 650; (1999) 6 SCC 275; (2000) 2 SCC 699; JT (2003) 9 SC 477; (2004) 6 SCC 59; (2005) 3 SCC 161; (2008) 5 SCC 257; [(1998) 2 UPLBEC 1'1'83]; 2011(4) ALJ 234.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Heard Sri Manish Kumar, learned counsel for the appellant and Sri Krishna Kumar Singh, holding brief of Sri M.S. Rathore Advocate.

2. Late Om Prakash, father of the respondent, while working as Class-III employee in Civil Court district Hardoi, was assigned duty in Election of the year 1996. It appears that late Om Prakash had gone to attend Election duty on 3.10.1996 but he did not turn up. Thus, he is missing since 1996.

3. A Regular Suit No.56 of 2008 was filed by the wife of Om Prakash in the Court of Civil Judge (Jr. Div.) West, Hardoi, to declare Om Prakash her husband, as dead. The suit was decreed by the learned Civil Judge (Jr. Div.), West Hardoi on 31.5.2008. The operative portion of the judgment and decree dated 31.5.2008 is reproduced as under:

"दावा याचीगण विरूद्ध प्रतिवादी सव्यय डिक्री किया जाता है। जरिये डिक्री घोषणात्मक ओम प्रकाश पुत्र स्व0 रिदार सिंह निवासी ग्राम भटपुरवा मजरा फरीदापुर परगना बंगर थाना सरुसा तहसील व जिला हरदोई को मृत घोषित किया जाता है।"

4. From the aforesaid declaration, it is evident from the record that by decree and order dated 31.5.2008, Om Prakash, husband of Savitri Devi, resident of village Bhatpurwa, Majra Faridapur, Pargana Bangar, Police Station Sursa, Tahsil and district Hardoi, was declared as dead by the Civil Court.

5. In spite of declaration by the Civil Court no compassionate appointment was made by the District Judge, Hardoi. Hence the respondent Saurabh Kumar son of late Om Prakash, preferred Writ Petition No.6215 (S/S) of 2009. The writ petition was allowed by Hon'ble Single Judge of this Court with the finding that with regard to appointment on compassionate ground, the judgment and decree passed by the Civil Court, should have been taken into account. Feeling aggrieved, the present special appeal has been preferred.

6. Sri Manish Kumar, learned counsel for the petitioner while assailing the impugned order passed by Honble Single Judge, submits that under Rule 5 of the Uttar Pradesh Recruitment of Dependants of Government Servants (Dying in Harness) Rules, 1974 (in short, "the Rules"), it has been provided that death means actual death and not death arising out of presumption. Attention has been invited to Rule 5 of the Rules. For convenience, Rule 5 of the Rules, is reproduced as under:

"5. Recruitment of a member of the family of the deceased. - (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person -

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant :

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any

particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner."

7. Submission is that in sub-rule (1) of Rule 5 of the Rules, the word used by the Legislature is 'death' hence, death by presumption could not be taken into account for appointment on compassionate ground. The argument advanced by the learned counsel for the appellant seems to be misconceived. Legislature to their wisdom, has used the word, 'dies' and not the word, 'actual death', as argued.

8. Section 56 of the Indian Evidence Act, 1872 provides that no fact of which the Court will take judicial notice need to be proved. For convenience, Section 56 of the Indian Evidence Act is reproduced as under:

"56. Fact judicially noticeable need not be proved.--No fact of which the Court will take judicial notice need to be proved."

9. In view of the above, keeping in view the provisions contained in Section 56 of the Indian Evidence Act, it was incumbent on the authorities to take note of the judgment and decree whereby, Om Prakash has been declared dead. No court or authority have right to take a decision contrary to the judgment and decree of the Court which admittedly attained finality (supra).

10. Apart from the above, Section 107 of the Indian Evidence Act provides that whether a man is alive or dead, and he was alive within thirty years, then the burden of proving dead is on the person who affirms it. Section 108 of Indian Evidence Act further provides that where a person is alive or dead and it is shown that he has not been heard of for seven years by those who would naturally have heard of him of he had been alive, the burden of proving him dead, is restricted to the person who affirms it. For convenience, Section 107 and 108 are reproduced as under:-

"107. Burden of proving death of person known to have been alive within thirty years.--When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years.--[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it."

11. In view of the above, burden to prove that the person is alive, comes on the State Government but the State Government has not preferred appeal against the judgment and decree. In view of Section 56 of the Indian Evidence Act, it shall be incumbent on the State Government to take note of the judgment and decree of the Civil Court whereby Om Prakash has been declared to be dead.

12. One of the argument advanced by the learned counsel for the appellant is with regard to using the word, 'death', in the Rules (supra). Argument of petitioner's counsel is not sustainable for the reason that by fiction of law, Om

Prakash shall be deemed to be dead that too, followed by a decree of the competent court of law. It means, after declaration by Civil Court that Om Prakash is dead, he shall be deemed to be dead and shall mean to substitute the provisions contained in the Rules in case dispute arises with regard to death or aliveness of Om Prakash.

13. In the case reported in (1951) 2 All.E.R 587: East and Dwellings Co. Ltd. Vs. Finsbury Borough Council, Lord Asquith J. stated that the law relating to legal fiction in the following manner:

"if you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it." The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

14. In the case reported in (1881) 17 CHD 746: Exparte Walten, In Re Levy, it was observed by James L.J. "when a statute enacts that some thing shall be deemed to have been done, which infact and in truth was not done, the court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to."

15. In AIR 1953 SC 244: State of Bombay vs. Pandurang Vinayak, Hon'ble Supreme court has held that, when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. (Para5).

16. In AIR 1955 SC 661 : Bengal Immunity Co. Ltd. vs. State of Bihar, the Apex court has held that, legal fictions are created only for some definite purpose and it is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field.

17. In AIR 1959 SC 352 : CIT vs. S. Teja Singh, Hon'ble Supreme Court has held that, it is a rule of interpretation well settled that in construing the scope of legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. (Para 6).

18. In AIR 1966 SC 719: CIT vs. Shakuntala, Hon'ble Supreme Court has held that the fiction created by the legislature must be restricted by the plain terms of statue. The principle that a legal fiction must be carried to its logical conclusion does not require the court to travel beyond the terms of the section or give the expression a meaning which it does not obviously bear.(para 6).

19. In AIR 1975 SC 164: Boucher Pierre Andre vs. Supdt. Central Jail, Hon'ble Supreme Court has held that, where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion.

20. In AIR 1973 SC 1056: CIT vs. Maharaj Kumar Kamal Singh, Hon'be apex court held that, it is true that a legal

fiction should not be extended beyond the purpose for which it is created; but it does not mean that the court should not give full effect to that fiction.(Para 7).

21. In the case reported in AIR 1978 SC 1099 : Cambay Electric Supply Industrial Co. vs. CIT, the apex court held that legal fictions are created for a definite purpose and they should be limited to the purpose for which they were created and should not be extended beyond the legitimate field.(Para 8).

22. In the case reported in (1985)2 SCC 321: State of Maharashtra vs. Narayan Rao, Hon'ble Supreme Court has held that, a legal fiction should ordinarily be carried out to its logical conclusion and to carry out the purposes for which it is created but it can not be carried beyond that.

23. In the case reported in (1995) 1 SCC 537: Harish Tandon vs. ADM, Hon'ble Supreme Court has held that, when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion.(Para 13).

24. In the case reported in (1997) 1 SCC 650: Gajraj Singh vs. STAT, Hon'ble Supreme court has held that a legal fiction is one which is not an actual reality and which the law recognizes and the court accepts as a reality. Therefore in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but a presumption of the existence of the state of affairs which in reality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances. (Para 22).

25. In the case reported in (1999) 6 SCC 275: Lokmat Newspapers (P)Ltd. Vs. Shankarprasad, It was observed by the Hon'ble Supreme court that, while giving effect to the legal fiction for the purpose for which it is created by legislature, it has to be given fully play for fructifying the said legislative intention.(Para 27&29).

26. In the case reported in (2000)2 SCC 699: State of Maharashtra vs. Laljit Rajshi Shah, Hon'ble Supreme court has held that it is the well settled principle of construction that in interpreting a provision creating legal fiction, the court is to ascertain for what purpose the fiction is to be created, and after ascertaining it, the court is to assume all those facts and circumstances which are incidental or inevitable corollaries to giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created or beyond the language of the section by which it is created. A legal fiction in terms enacted for the purpose of one act is normally restricted to that act and can not be extended to cover another act. (Para 6).

27. In the case reported in JT(2003) 9 SC 477 : Prafulla Kumar Das and others vs. State of Orissa, Hon'ble Supreme court has held that, the purpose and object of creating legal fiction in the statute is well-known, when a legal fiction is created, it must be given full effect.(para39).

28. In the case reported in (2004) 6 SCC 59: State of W.B. vs. Sadan K.

Bormal , Hon'ble Supreme court has held that so far as interpretation of legal fiction is concerned, it is trite that the court must ascertain the purpose for which the fiction is created and having done so must assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction.(Para 25).

29. In the case reported in (2005) 3 SCC 161: State of A.P vs. Pensioner's Association, Hon'ble Supreme court has held that if the provision it self provides a limitation to operation of legal fiction created by it, consequences flowing from the legal fiction have to be understood in the light of limitations imposed.(Para 28&30).

30 In the case reported in (2008) 5 SCC 257: UCO Bank vs. Rajinder Lal Kapoor, it has been held by the Apex court that, when a legal fiction is created , although it is required to be taken to logical conclusion, but the same would not mean that the effect thereof would be extended so as to transgress the scope and purport for which it is created.(Para 23).

31. In view of the above and keeping in view the decree of competent court (supra), Om Prakash shall be deemed to be dead and his dependants shall be entitled for appointment on compassionate ground. The provision contained in the Rules, shall be deemed to be encompass such cases where a decretal order has been passed by the Civil Court pronouncing death of a person. In such a situation, it shall be incumbent on the competent authority to consider and appoint the dependant of the deceased employee on compassionate ground.

32. Attention has been invited by the learned counsel for the appellant to the judgment in the case reported in [(1998) 2 UPLBEC 1`1`83]: Ravi Shankar Tewari. Vs. Police Maha-Nideshak, U.P. and others. The case of Ravi Shankar Tewari (supra) deals with different facts and circumstances of the case where the employee had not submitted decree of Civil Court. Further, the provisions contained in Section 107 and 108 of Indian Evidence Act, have not been correctly interpreted by the Hon'ble Single Judge while deciding the case of Om Prakash. In view of the above, we are of the view that the case of Ravi Shankar Tewari (supra) seems to be dealt with different facts and circumstances of the case and is not applicable to the present controversy.

33. With profound respect, we are in respectful disagreement with the judgment and proposition of law dealt with by the Hon'ble Single Judge in the case of Ravi Shankar Tewari (supra). The doubt expressed by the Hon'ble Single Judge in the case of Ravi Shankar Tewari (supra) seems to be not correct. The doubt has been raised in para 12 of the judgment that in case a person comes back being alive after seven years, the situation will be anomalous. Respectfully, we would like to express our opinion that it is not for the Court to raise a presumption on unfounded ground. Provisions contained in Section 107 and 108 read with Section 56 of Indian Evidence Act dealt with the public interest and for welfare of people. Any presumption drawn, which go against the spirit of Section 107 and 108 of Indian Evidence Act, shall not be correct. Ordinarily, in case it is found that a person is missing for more than seven years, then the statutory provisions under Section 107 and 108 should be given effect. The right flowing from statutory

provisions may not be taken away on a presumption based on unfounded ground. What will happen in due course of time in case statutory provision is implemented affects adversely should be looked into by the Legislature and not by the Courts.

34. Learned counsel for the respondent has relied upon a Division Bench judgment of this Court in the case reported in 2011 (4) ALJ 234: Ramakant Singh v. State of U.P. & Ors., wherein it has been held that even if no suit is filed, presumption may be drawn with regard to civil death. For convenience, relevant portion of para 11 and 12 of the aforesaid judgment are reproduced as under:

"11. We find that the learned single Judge did not consider that even if the suit was not filed, the presumption could be drawn, if the conditions imperative for raising the presumption were satisfied. Once a presumption of civil death is raised on the satisfaction of the conditions given in Section 108 of the Indian Evidence Act, the burden of proof that he is alive, is then shifted to the person who affirms that the person reported missing was seen and is alive.

12. In Ajay Kumar Tewari v. Dy. Inspector General of Police (Establishment) Police Headquarter, U.P., Allahabad, and others [2005 ESC (Alld) 671) [delivered by one of us (Hon'ble Sunil Ambwani, J)], it has been held that the provision of Section 108 of Evidence Act would be applied for claiming compassionate appointment."

35. For the reasons discussed hereinabove, the presumption drawn by the Hon'ble Single Judge with regard to death of Om Prakash, seems to be not incorrect. Rather, it is based on sound principles of law. Accordingly, the impugned judgment and order passed by the Hon'ble Single Judge does not seem to suffer from any infirmity or illegality.

36. In view of the above, the appellant shall appoint the respondent on compassionate ground expeditiously say, within a period of two months from the date of receipt of a certified copy of the present judgment with all consequential benefits.

37. The impugned judgment and order passed by the learned Single Judge is affirmed accordingly and subject to above, the appeal is decided finally.

No orders as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE AKHTAR HUSAIN KHAN, J.

Criminal Appeal No. 1047 of 1989

Rashid & Ors. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Sr Preetpal Singh Rathore, Sri R.C. Kandpal, Sri M. Islam, Sri G.S. Hazela

Counsel for the Respondent:
A.G.A., Smt. Raj Laxmi Sinha

Criminal Appeal-Conviction of life imprisonment under Section 302, 323/34 IPC and one month rigorous imprisonment under section 323/34 IPC-on ground of minor discrepancies in statement of prosecution witness-place

of incident and presence of accused-admitted-death caused from knife injury on chest-prosecution story supported by ocular evidence as well as medical evidence-held-minor discrepancies bound to occur in statement of truthful witness-no interference called for -appeal dismissed.

Held: Para-28
We may record that minor discrepancies, which have been sought to be projected by the counsel for the appellants with reference to the testimony of P.W.-1, P.W.-2 and P.W.-3 pertaining to incident in question are only trivial in nature. Trivial discrepancies will not result in the prosecution version being disbelieved, as has been laid down by the Apex Court in the judgment reported in (2012) 4 SCC 124; Sampath Kumar vs. Inspector of Police, Krishnagiri. It has been held that minor contradictions are bound to appear in statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

Case Law discussed:
(2012) 4 SCC 124; (2013) 12 SCC 796; (2013) 12 SCC 294.

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

1. This appeal is directed against the judgment and order of the Additional District and Sessions Judge/Special Judge (E.C. Act), Budaun dated 01.05.1989 passed is Sessions Trial No. 119 of 1986, being Case Crime No. 2 of 1986.

2. Appellant no. 1 Rashid has been convicted of an offence under Section 302 and 323/34 I.P.C. He has been sentenced to undergo rigorous imprisonment for life under Section 302 I.P.C. and 1 month rigorous imprisonment for the offence under Section 323/34 I.P.C.

3. Appellants Adil, Kamil and Nasir have been found guilty of an offence under Section 302/34 I.P.C. and have been sentenced to undergo rigorous imprisonment for life.

4. Appellant Kamil has also been found guilty of an offence under Section 323 I.P.C. and has been sentenced to undergo rigorous imprisonment for one month, while accused Adil and Nasir have been further found guilty of offence under Section 323/34 I.P.C. and have been sentenced for rigorous imprisonment of one month. All the sentences have been directed to run concurrently.

5. The prosecution case, as has been disclosed on the record, is as follows:

6. An oral first information report was lodged by Baboo Khan maternal uncle of deceased Akhlaq on 03.01.1986 at 4.45 p.m. with the police station Kotwali, district Budaun. It was stated that the informant Baboo s/o Ansar Husain is Shekh Ansari by caste and is a resident of Mohalla-Uparpara, Police Station-Kotwali, Budaun. The accused Rasid, Adil and Nasir sons of Wali Mohammad and Kamil s/o Banno are Ansari by caste and were also residents of the same Mohalla. On the date of information at around 9.00 a.m. the sister's daughter of the informant Parveen had gone to fetch water from the tank there Rashid and Adil had misbehaved with her. This resulted in hot talks between Akhlaq Husain s/o Asrar Husain sister's son of informant. However, no further action was taken for the sake of reputation. Today at 4.00 p.m. when the informant along with Akhlaq and nephew Aadil Husain s/o Rahamat Husain was proceeding from his residence to the timber shop situate at Mohalla-Jogipura and had reached Mandir (temple) near

Lalpul crossing when Rashid, Adil, Nasir and Kamil met them. Kamil had a Danda in his hand, Rashid had a knife and Nasir had a Hockey in his hand, they surrounded the informant, Akhlaq and Aadil. Kamil stated that in the morning they had used foul language. The nephew of the informant asked to stop abusing otherwise consequences will follow, at this point of time Kamil assaulted Adil with the Danda in his hand. The informant snatched the Danda from the hand of Kamil and tried to retaliate him with the same. At this point of time Nasir and Adil got hold of Akhlaq and Kamil shouted 'finish them'. Immediately, Rashid pierced the knife in the chest of Akhlaq. Akhlaq dropped on the ground because of the injury. The informant shouted for help. Witnesses Jamal Uddin s/o Abdul Gani, r/o Jaldhari Sarai, Afsar Ali Khan s/o Hashmat Ali Khan r/o Mushtafaganj and Shamshad r/o Aljha Sarai, who were having tea at the nearby stall and had seen the incident, ran for help. The accused ran towards west. The knife lay penetrated in the chest of Akhlaq. He was taken to the hospital immediately for treatment on a Rickshaw, where he expired. The dead body and the knife were lying in the hospital.

7. The first information report was registered as Case Crime No. 2 of 1986, police station-Kotwali, district-Budaun. The distance between the place of occurrence and the police station was one kilometer.

8. On registration of the first information report, S.I. Lakhan Singh Yadav rushed to the District Hospital Budaun. The weapon (knife) was taken in possession and sealed in the presence of Dr. R.M.L. Srivastava and compounder Chander Prakash. The memo (Ext. Ka-5) was prepared. The knife was found lying on Patia in front of Outdoor Patient Room. It had been taken out from the chest of deceased by the complainant at the hospital at time the victim was struggling for his life. On 04.01.1986 the S.I. Prepared the inquest report as well as other connected papers and arranged for the dead body to be sent for post-mortem through constable Munish Kumar. The post-mortem of the deceased was performed by Dr. T.N. Sharma. The injuries suffered by Aadil were examined by Dr. R.M.L. Srivastava. The investigation of the case was conducted by S.S.I. Vidha Dhar Pandey, who prepared the site plan and also interrogated the witnesses and also recorded the statements of the complainant and others. The investigation officer submitted the charge-sheet against the accused Rashid, Nasir and Adil (Ext. Ka-14) and on 27.01.1986 he submitted the charge-sheet against accused Kamil (Ext. Ka-15).

9. The case was committed for trial Session. The prosecution in support of its case examined Jamal Uddin the eye witness as P.W.-1, Adil Husain injured witness as P.W.-2, Baboo Khan injured eye witness as P.W.-3, Head constable Om Prakash as P.W.-4, S.I. Lakhan Singh Yadav, who proved the recovery of the knife and inquest report etc., was examined as P.W.-5, Dr. T.N. Sharma, who conducted the post-mortem on the dead body of Akhlaq, was examined as P.W.-6, Dr. R.M.L. Srivastava, who examined the injuries suffered by Adil Husain, was examined as P.W.-7, S.I. B.S. Yadav was examined as P.W.-8, he proved the handwriting of the S.S.I. Vidya Dhar Pandey, who had conducted

the investigation. Sri Vidya Dhar Pandey could not be produced as he was reported to be suffering from cancer and was at Bombay for his treatment.

10. The injury caused on the person of Adil as per the injury report were as follows:

1. Contusion 2 cm x 1.5 cm on the mid of skull in left parietal bone 1 Cm lateral to saggital sature. The colour of injury was raddish.

2. Contusion 2 cm x 1.5 cm on back of skull in left occipital region. The injury was reported to be red in colour.

11. According to Dr. Srivastava the injured at the time of examination was also complaining of pain on lower part of 1/3rd portion of left leg. According to him all the injuries were simple and were caused by some blunt object. According to him the injuries were fresh at the time of examination.

12. The ante-mortem injuries on the body of the deceased as per the post-mortem report submitted by Dr. T.N. Sharma were as follows:

1. Lacerated wound 1½ Cm x 0.2 Cm x bone deep on the back of head at the level of occipal.

2. One stabbled wound 2.3 Cm x 0.5 Cm x Cavity deep with clean cut margin, obliquely placed at the 6th inter costal space 4.5 Cm below the left nipple at 5 O' clock position under injury inter costed. Walls were found clean cut and a hole of 2 Cm x 0.5 Cm was present in the lower lobe to left lung under the injury. He found a hole 2 Cm x 0.5 Cm x left vertical of the heart. The wound was found directing towards middle and backwards.

13. On internal examination of the body Dr. Sharma found about 2 litres of blood in the cavity of chest. Both chambers of the heart were found empty.

14. According to Dr. Sharma cause of death was due to shock and haemorrhage and on account of ante-mortem injury no. 2 caused on the deceased.

15. Injury no. 2 has been caused by some sharp edged weapon, while injury no. 1 could have been caused by a Danda. Injury no. 2 was sufficient to cause death. The possible time when the injury has been caused on the deceased was recorded as about 4.00 p.m. on 03.01.1986. The clothes worn by the deceased and knife recovered were sent for chemical examination. The chemical examination report recorded that some blood stains were found on these articles.

16. The accused in their statements recorded under Section 313 Cr.P.C. pleaded not guilty and denied their participation in the alleged crime. It was stated that they have been falsely implicated in the case because of enmity. Accused Rashid has submitted that his real sister had come from Pilibhit on the occasion of 'Ghiyarwin Shareef' on the date and time of incident. She was travelling in a rickshaw when Munna, Akhlaq and Waseem took her photographs to which Rashid and his other family members objected. According to him the camera was snatched. Akhlaq, Waseem and Munna made an attempt to take back the camera.

He and his brothers were surrounded by them. According to Rashid, he took out the reel from the camera. A quarrel took place between the persons present. Waseem assaulted Rashid with a knife which incidentally hit Akhlaq. The photograph prepared out of the reel were produced before the Court.

17. Accused Kamil pleaded that on the date of occurrence he was out of Budaun. It was also claimed that the witness Jamal Uddin is relative of Baboo Khan and was earlier employed in his timber shop. Accused Nasir and Adil also repeated the same version of defence.

18. The accused produced D.W.-1 Naresh Pal as the defence witness, who claimed that he was residing at about 40-50 steps from three road crossing of Lalpul. At the date and time of incident he was going for tuition, when he reached the three road crossing of Lalpul he saw a cycle-rickshaw carrying three girls. Rashid was following the Rickshaw. Waseem, Akhlaq and Munna took photographs of these girls to which accused Rashid objected. Rashid also tried to snatch the camera from the hands of Akhlaq. The parties got involved in scuffle. Waseem pulled out a knife and tried to assault Rashid. Rashid incidently escaped unhurt, the knife pierced into the chest of Akhlaq.

19. Shaukat Ali was produced as D.W.-2. He is stated to be Qazi. He produced the record of Nikahnama as per the Nikah Register of 1955 for the purposes of establishing that Jamal Uddin had married one Kanizun Nisah. Copies of the photographs were marked as Ext. Ka-1 and Ext. Ka-2. On behalf of the accused copy of the personal bond filed by Jamal Uddin in case under Section 107/116 was also filed as other documentary evidence.

20. The Trial Court, after considering the evidence led by the parties, specifically held that time and place of occurrence of the incident is not in controversy. Presence of accused Rashid, Adil, Kamil, Nasir and deceased Akhlaq on the spot is also admitted. The weapon, which pierce the heart of the deceased is also not in dispute. Death was caused to Akhlaq because of the assault with knife was not in controversy. The only difference between the parties was in the manner in which the incident took place because of which the deceased Akhlaq received the injury.

21. The Trial Court, after considering the evidence tendered by the defence witnesses, found that the story as stated by them was full of discrepancies and therefore he did not accept the same. It has been recorded that while Rashid claimed that his sister had come from Pilibhit, D.W.-1 stated that there were three girls on the Rickshaw and that Rashid was following the Rickshaw. The Court has recorded that if only the sister of Rashid, who came from Pilibhit, was on the Rickshaw, there was no occasion for Rashid to follow the Rickshaw and not to sit on the same. It has further been recorded that if the sister had come from Pilibhit, as suggested by Rashid and P.W.-1, from bus, then there is no reason for Akhlaq, Waseem and Munna to have gone to the place of occurrence in the expectation of her arrival at Budaun with the camera for taking photographs.

22. It has been held that absolutely no explanation could be given as to where

the camera has gone. It has also been recorded that if Waseem had actually assaulted Akhlaq with knife then there was no occasion for the informant to have not disclosed the involvement of Waseem in the incident, as he had no relationship with the complainant Baboo Khan. The Trial Court has, therefore, rejected the version of the incident as set up by the defence.

23. So far as the version pleaded by the prosecution is concerned, it has specifically been recorded that the first information report has been lodged within a short duration of 45 minute from the time of accident. The prosecution version is well supported by eye witness account of Jamal Uddin, eye witness account of Adil injured witness and the eye witness account of Baboo Khan (P.W.-3) the informant. It has further been recorded that the ocular evidence of the prosecution is will supported by the medical evidence, specifically the ante-mortem injury suffered by the deceased and the injury report of Adil Husain.

24. The Trial Court has, therefore, come to a conclusion that the prosecution in the facts of the case has been able to establish the charges against the accused with certainty and accordingly it has convicted the accused and has sentenced them for the offences as detailed above.

25. Sri G.S. Hajela, learned counsel for the appellants made an attempt to challenge the findings recorded by the Trial Court by pointing out the minor discrepancies in the statements of the prosecution witnesses. He further submitted that in the facts of the case instigators of the fight were the complainant and not the accused. He repeated the version of the incident as was disclosed by Rashid, Adil and defence witness D.W.-1. Lastly he submitted that even if the entire case of the prosecution is accepted, then Rashid alone could have been convicted of an offence under Section 302 I.P.C. in as much as the blow as alleged to have been inflicted by him upon Akhlaq has proved fatal and it was Rashid who alone had inflicted said blow. He, therefore, submitted that other accused could not have been convicted under Section 302 with the help of Section 34 Cr.P.C., as there has been on premeditated decision between the co-accused nor they had any common intention on the spur of the moment so as to be held proportionally liable under Section 34 I.P.C.

26. Learned A.G.A. on the contrary submits that the first information report has been lodged promptly within 45 minutes of the incident. The prosecution story is well established from the ocular evidence of eye witness P.W.-1, injured eye witness P.W.-2 and informant eye witness Baboo Khan P.W.-3. Ocular evidence is also supported by the medical evidence. Therefore, in the facts of the case the Trial Court has rightly held that the prosecution has been able to establish the charge with certainty. He reiterated the reasons recorded in the order of the Trial Court and that the defence version of the incident has rightly not been accepted.

27. We have heard learned counsel for the parties and have gone through the records.

28. We may record that minor discrepancies, which have been sought to be projected by the counsel for the

appellants with reference to the testimony of P.W.-1, P.W.-2 and P.W.-3 pertaining to incident in question are only trivial in nature. Trivial discrepancies will not result in the prosecution version being disbelieved, as has been laid down by the Apex Court in the judgment reported in (2012) 4 SCC 124; Sampath Kumar vs. Inspector of Police, Krishnagiri. It has been held that minor contradictions are bound to appear in statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

29. What is material omission and material discrepancy, which may be relevant for discrediting the evidence of a prosecution witness, has been explained by the Apex Court in the judgment reported in (2013) 12 SCC 796; Mritunjoy Biswas vs. Pranab alias Kuti Biswas and another (para 28).

30. It was contended by the counsel for the appellants that the informant only in order to lend colour the story in his statement suggested that the knife was taken out from the body of Akhlaq by him in the hospital, while the deceased was still struggling for his life. It is stated that there was no reason as to why the knife was not taken out from the body of the deceased immediately and why it was permitted to remain in the body of the deceased till the injured reached the hospital.

31. We may record that the challenge so made is not of much substance. How will a witnesses act with in a given situation is not controlled by any settled norms. If the informant had taken out the knife only in the hospital from the body of the victim, no adverse inference can be drawn in respect of the prosecution story.

32. The Trial Court has rightly recorded that the place of incident, the presence of the victim, accused and injured Adil on the spot is admitted between the parties. It is also admitted to the parties that Akhlaq had expired because of the knife injury suffered by him in his chest. The defence version of the incident was not convincing. The Trial Court has accepted the prosecution story, which was well supported by the ocular evidence and medical evidence and has rightly convicted the accused of the offence under the sections noticed above.

33. So far as the plea of appellant Rashid alone being responsible for causing the injury and ultimate death of deceased Akhlaq and there being no premeditated decision between other co-accused to perform the particular criminal act is concerned, suffice is to record that the other accused have been held guilty on the principle of vicarious liability enshrined by Section 34 of I.P.C. The legal principle in that regard has been explained in the judgment reported in (2013) 12 SCC 294; Raghbir Chand and others vs. State of Punjab.

34. We from the records find that on the date and time of incident all the four accused remained in waiting for Akhlaq to teach him a lesson for having behaved in particular manner with Rashid and Adil in the morning of same day. All the four accused have surrounded Akhlaq along with his maternal uncle and injured Adil at 4.00 p.m. at the crossing of Lalpul. At the relevant time Rashid was armed with knife, Adil and Nasir were armed with Danda and Kamil was with them without any arm.

35. It is further established from the record that Akhlaq had been caught hold of by Nasir and Adil. Kamil exhorted

Rashid to finish him and at that time Rashid had inflicted the injury on the chest of Akhlaq with the help of knife. It is, therefore, clear that in the facts of the case there had been a premeditated decision between the co-accused and their common intention was to commit the crime. The law as explained in the case of Raghbir Chand (supra) does not support the accused for the facts noticed.

36. For the reasons recorded above, we find no good ground to interfere with the judgment and order passed by the Trial Court dated 01.05.1989.

37. The appellant no. 3, namely, Adil has since expired and his appeal has already been abated under order of the Court dated 04.07.2014.

38. The conviction of the appellant no. 1, namely, Rashid for an offence under Section 302 I.P.C., for having committed murder of deceased Akhlaq, and sentence to undergo rigorous imprisonment for life as well as his conviction for an offence under Section 323/34 I.P.C. and sentence with rigorous imprisonment for a period of 1 month respectively is affirmed.

39. The conviction of appellant nos. 2 and 4, namely, Nasir and Kamil for the offence under Section 302/34 I.P.C. and sentence to undergo rigorous imprisonment for life is affirmed.

40. Conviction of Kamil for the offence under Section 323 I.P.C. and sentence to undergo imprisonment for a term of one month is affirmed.

41. Conviction of Nasir for the offence under Section 323/34 I.P.C. and sentence to rigorous imprisonment for one month is affirmed.

42. The appeal lacks merit and is accordingly dismissed.

43. The appellants, namely, Rashid, Nasir and Kamil are on bail. Their bail bonds are cancelled. Sureties are discharged. They shall be taken into custody forthwith to serve out the sentence so awarded to them by the Trial Court.

44. The Chief Judicial Magistrate, Budaun may ensure compliance of the judgment delivered by this Court today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.07.2014

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.
HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.

Writ Petition No. 1078(M/B) of 2013

Love Care Foundation ...Petitioner
Versus
Union of India and Anr. ...Opp. Parties

Counsel for the Petitioner:
Sudeep Seth and Pushpila Bisht

Counsel for the Respondents:
C.S.C. & A.S.G.

Constitution of India, Art. 47 & 226- Pseudo mode of advertisement- attractive packing of cigarettes attracts youth smoking -contrary to objects contained in (Regulation of Production Supply and Distribution) Act 1975-duty cost upon state government under Art. 47-smoking cause of several disease- adversely affecting the health of

country-held-considering development of plain package in common form in Australia-General mandamus directing-government of India to consider implementation of Australian scheme at earliest possible.

Held: Para-23

Under Article 47 of the Constitution of India a duty is vested in the State to raise the level of nutrition and standard of living to improve public health as amongst its primary duties. There cannot be any doubt to the fact situation that smoking or consumption of tobacco products is extremely injurious to health and is cause of several diseases, so it adversely effects the general health of the country. At present, the cigarettes are being packed in India in very attractive colours, and the same are being displayed openly in open shops. Such colourful packaging draws the attention of the youths and it becomes an incentive in the mind of the immature youth to start smoking but if plain packaging scheme is implemented then all the cigarettes brand shall be packaged in a common form, in a common colour. Only on a restricted part of the packet the name shall be displayed. On the rest part of the packets the health warning as required under the Rules of 2008 have to be printed. This can be done only by strict regulation. We have been informed that after implementation of the plain packaging rules in Australia, the sale of cigarettes has considerably reduced. Australia has adopted plain packaging in the year 2013. If only in one year the sale of cigarettes starts decreasing then it is very positive sign to accept said plain packaging formula in India also. We found no harm in implementing this scheme. The State of U.P. has stated that certain amendments are still under consideration in the Act 2003 so while considering the State amendments the question of implementing the plain packaging may also be considered by Government of India and also by all the concerned authorities.

Case Law discussed:

(2001) 8 SCC 765.

(Delivered by Hon'ble S.V.S. Rathore, J.)

1. This petition has been filed on behalf of the Love Care Foundation, registered society, who has approached this Court with a pious object of reducing the growing tendency of smoking among the Indian youths and thereby to create a healthy society free from several diseases.

2. Initially, the prayer of the petitioner in the instant writ petition was as under:-

(i) A writ, order or direction in the nature of mandamus commanding the opposite parties to ban the distribution and sale of cigarette and other tobacco products in public and open market and to implement plain packaging rule in cigarette and other tobacco products by prohibiting the use of logos, colours, brand names or prominent information on packaging.

3. But during course of arguments, learned counsels for the petitioner have fairly conceded that they have restricted their prayer only to the extent of implementing plain packaging rule in cigarettes and other tobacco products by prohibiting use of logos, colours, brand names or prominent information on packaging.

4. The case of the petitioner is that an attractive packaging is a pseudo mode of advertisement. The cigarettes are being packed in such an attractive packaging that it attracts the youths for smoking. The ill effects of smoking are well known.

The statement of Objects and Reasons of the cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, inter alia, provides:

5. Smoking of cigarettes is a harmful habit and, in course of time, can lead to grave health hazards. Researches carried out in various parts of the world have confirmed that there is a relationship between smoking of cigarettes and lung cancer, chronic bronchitis; certain diseases of the heart and arteries; cancer of bladder, prostrate, mouth, pharynx and oesophagus; peptic ulcer etc., are also reported to be among the ill-effects of cigarette smoking."

(4) Similarly, the statement of Objects and Reasons of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001 provides:

"Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco related diseases and the loss of productivity caused therein cost the country almost Rs.13,500 crores annually, which more than offsets all the benefits accruing in the form of revenue and employement generated by tobacco industry."

In the case of Murli S. Deora Vs. Union of India and Others reported in (2001) 8 SCC 765 of that case, the question of passive smoking was before the court and Hon'ble Apex Court, keeping in view the hazardous of smoking had issued several directions to protect, the citizens from the ill effects of passive smoking. These directions read as under:-

(9) Realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, we direct and prohibit smoking in public places and issue directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places, namely:

(a) Auditoriums.
(b) Hospital buildings
(c) Health institutions
(d) Educational institutions
(e) Libraries
(f) Court buildings
(g) Public offices
(h) Public conveyance, including railways.

(10) Learned Attorney-General for India assured the Court that the Union of India shall take necessary effective steps to give wide publicity to this order by electronic as well as print media to make the general public aware of this order of prohibition of smoking.

6. After the aforementioned judgment of Hon'ble Apex Court the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production, Supply and Distribution) Act, 2003 was enacted and thereafter the cigarettes and other tobacco products rules 2008 were also framed and it provided for the health warning regarding the ill effects of tobacco use. By Act 2003 the advertisement of cigarettes was also restricted and stringent steps were taken regarding advertisement of cigarettes and smoking.

7. Submission of the learned counsel for the petitioner was that the very object of the aforesaid legislation was to prohibit the advertisement of cigarettes and

smoking that at present cigarettes are being packed in a very attractive packaging. Such attractive packets are being displayed in open shops which attracts the youths to smoke and if plain packaging is adopted, then it will definitely reduce the allurement among the youths towards smoking.

8. On behalf of the Union of India, counter affidavit has been filed before this Court and we consider it necessary to quote para 5 (i) of the counter affidavit filed on behalf of Union of India.

Para-5 (i) The use of tobacco is a prominent risk factor for 6 to 8 leading causes of death and almost 40% of the Non Communicable Diseases (NCD) including cancers, cardio-vascular diseases and lung disorders are directly attributable to tobacco use. The number of deaths every year in India which is attributable to tobacco use is almost 8-9 lakhs (Tobacco Control in India Report, 2004 of Ministry of Health & Family Welfare and WHO). If the current trends continue and if effective that by the year 2020, tobacco use will account for 13% of all deaths in India every year. Studies national and international reveal that tobacco is the only substance which if taken as intended by its seller over a period of time kills or incapacitates its consumer, therefore the tobacco industry looks for tapping new consumers, with special attention on youth and young children since they are of impressionable mind. Studies also report high prevalence of tobacco use amongst children and youth of the country. As per the Global Adult Tobacco Survey India Report 2010 (carried out by the Government of India), more than one-third (35%) of adults (15 years and above) in India (almost 29 crore in number) use tobacco in some form or the other. 14.6% of the youth in the age group of 13-15 years consume tobacco in some form or other (Global Youth Tobacco Survey, 2009). More than 5500 children /Adolescents start tobacco consumption daily. (Indian J Pediatr 1999; 66 : 817-824). (Emphasis added)

9. Respondent No.2, the State of U.P. has also filed its counter affidavit in which it has been stated that the Provisions of Act, 2003 and the rules are being implemented strictly in this State by the State Government. It has further been submitted in para 16 of the counter affidavit that the matter of amendment in the provisions of Act, 2003 is under consideration before the Government of India. Virtually neither the Union of India nor the State of U.P. has raised any objection against the prayer of the petitioner.

10. The object of Cigarettes and other Tobacco Products Act, 2003 reads as under:-

"An Act to prohibit the advertisement of and to provide for the regulation of trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products and for matters connected therewith or incidental thereto

Whereas, the Resolution passed by the 39th World Health Assembly (WHO), in its Fourteenth Plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so to implement the measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children

and young people from being addicted to the use of tobacco.

And whereas, the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, reiterated the concerns expressed in the Resolution passed in the 39th World Health Assembly and urged Member-States to consider in their tobacco control strategies, plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco;

And whereas, it is considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health;

And whereas, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by Article 47 of the Constitution;

And whereas, it is expedient to prohibit the advertisement of, and to provide for regulation of trade and commerce, production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto;

So, the object to implement the aforementioned Act shows the concern of the Government which was to implement measures to ensure effective protection to non-smokers and also to protect children and young people from being addicted to the use of tobacco. The instant petition has also been filed with the aforesaid objects. Government of Australia has implemented Tobacco Plain Packaging Regulation, 2011 instruments 2011 no.263 and in England a similar regulation is likely to be implemented in the near future.

11. The Plain Packaging Act, 2001", was challenged before the High Court of Australia and the petition was dismissed on 15.08.2012 and plain packaging was held to be constitutional. Copy of the order of Hon'ble High Court of Australia has been annexed as Annexure No.7 to the instant writ petition.

12. Now before proceedings further in the matter the first point to be considered is as to what is plain packaging and how it will keep the young citizens of India away from the allurement of smoking. The effect of plain packaging would be that the cigarette packets cannot carry brand, logos and colourful designs, even brand name and packets will be of a standard size, font and colour. The plain packaging will further advance the very purpose of "Cigarettes and other tobacco products packaging Act. If plain packaging is implemented in India, the cigarettes and other tobacco products packets will cease to be a market tool for advertising the brand image and promoting smoking as a status symbol. Instead it will become effective means of spreading public health message and discouraging consumption at no cost to the Government.

13. The young people get attracted to cigarettes packets because of the way

they present their lifestyle. Learned counsel for the petitioner has submitted that a sportier person would like to buy what he considers sportier brand and every time he takes packet of cigarettes out. He indirectly advertise that brand amongst the persons connected with the sports. A plain packaging brand products commodity, its ability to differentiate its product from better brands and thereby substantially diminishing the smokers in the country who look for a particular brand.

14. As per recent reports around 9 lacs people die in India from tobacco related diseases. World Health Organization, which supports the plain packaging, estimates that 5 million world wide died only from the diseases linked with tobacco and this figure is likely to become 9 million by 2030 provided necessary steps to reduce the growing tendency of smoking are not taken forthwith.

15. After implementation of the packaging in Australia a study was conducted regarding the effective of the Australian plain packaging policy on adult smokers. The introduction paragraph of the said report reads as under:-

Introduction

"From 1st September 2012, all tobacco manufactured for sale in Australia was required to be contained in plain dark brown packs, with 75% front-of-pack graphichealth warnings and the brand name and variant limited to a standardised font size and type.1 This requirement supplanted Australian legislation that had required 30% front-of-pack graphichealth warnings since 2006. The new plain packs with larger warnings began appearing for sale at retail outlets early in October and increasingly so during November, since from 1 December 2012, all tobacco sold at retail outlets was required to be contained in plain packs. The roll-out period of the new packs was accompanied by a nationally televised mass media campaign throughout November, promoting several serious harms of smoking that were also featured on the larger pack health warnings, including blindness, lung cancer and pregnancy-related harm. Other health warnings featured in the larger pack health warnings were peripheral vascular disease (gangrene), mouth (tongue) cancer and improvements to health from quitting.

Conclusions of the aforesaid study is as under:-

The early indication is that plain packaging is associated with lower smoking appeal, more support for the policy and more urgency to quit among adult smokers.

16. Some of the paragraphs of discussion regarding the aforesaid study are necessary to be reproduced which reads as under:-

Discussion

Compared with branded pack smokers, smokers who were smoking from plain packs rated their cigarettes as being lower in quality and as tending to be less satisfying than 1 year ago. These appeal outcomes were sensitive to the extent to which plain packaging had rolled out among the smoker population

over the survey period, with responses from brandedpack smokers approaching those of plain pack smokers, once 80% of survey respondents were smoking from plain packs 1-2 weeks before the December implementation date. Among brandloyal smokers, effects were in the same direction but not significant. In all analyses, plain pack smokers were more likely to think often or very often about quitting in the past week and to rate quitting as a higher priority in their lives, compared with branded pack smokers. There were no significant differences in the proportion of plain and branded pack smokers who thought frequently about the harms of smoking or thought smoking harms had been exaggerated. While a similar proportion of plain and branded pack smokers supported the larger graphichealth warnings, a significantly greater proportion of plain pack smokers approved of plain packaging.

The observed pattern of findings in relation to brand appeal and the direction of findings relating to perceived harms is consistent with those of experimental studies of plain packaging conducted in Australia, UK, and other countries and also with the Australian government's pretesting of mocked-up plain packs. The finding that smokers smoking from a plain pack evidenced more frequent thoughts about and priority for quitting than branded pack smokers is important, since frequency of thoughts about quitting has strong predictive validity in prospective studies for actually making a quit attempt. Past research on graphic health warnings has found that the larger size of warnings is associated with more message recall, greater perceived effectiveness and risks of smoking and less appeal. Also, noticing pictorial health warnings on others' tobacco packs reduced the risk of relapse in recent quitters in a cohort study. Our study is not able to tease apart the independent contributions of plain packaging and the new larger health warnings, since they co-occurred. These responses are unlikely to be due to any media campaign effects since we adjusted for campaign recall and, in other analyses, determined that campaign recall was unrelated to the frequency of thoughts of harm and quitting intentions and importance.

We noted that the proportion who thought the harms had been exaggerated was not higher for plain pack smokers with the larger graphic warnings, than for branded pack smokers. We also found similar proportions of branded and plain pack smokers who supported the larger graphic health warnings, with a majority supporting it. Interestingly, those smoking from plain packs were more likely to approve of plain packaging than those smoking from branded packs. Given that 73% of Australian smokers intend to quit and over 90% regret having started, smokers may acknowledge such packaging changes as a source of motivation or reminder for quitting, and/or as being important to reduce the appeal of smoking for young people. This pattern of differences in approval is similar to the pattern of increase in public support that is observed when smoke-free laws and display bans have been implemented."

17. The impact of plain packaging of cigarettes products among the Brazilian young women and experimental study was conducted in the year 2012. The background of the said study was as under:-

(1-A) Tobacco use is responsible for 5.4 million deaths every year worldwide and is a leading cause of preventable death. The burden of these deaths is rapidly shifting to low and middle-income countries, such as Brazil. Brazil has prohibited most forms of tobacco advertising; however, the cigarette pack remains a primary source of marketing. The current study examined how tobacco packaging influences brand appeal and perceptions of health risk among young women in Brazil.

Methods

A between subjects experiment was conducted in which 640 Brazilian women aged 16-26 participated in an online survey. Participants were randomized to view 10 cigarette packages according to one of three experimental conditions: standard branded packages, the same packs without brand imagery ("plain packaging"), or the same packs without brand imagery or descriptors (e.g., flavors). Participants rated packages on perceived appeal, taste, health risk, smoothness, and smoker attributes. Finally, participants were shown a range of branded and plain packs from which they could select one as a free gift, which constituted a behavioral measure of appeal."

18. The result and conclusions of the said study was as under:-

Results

Branded packs were rated as significantly more appealing, better tasting, and smoother on the throat than plain packs. Branded packs were also associated with a greater number of positive smoker attributes including style and sophistication, and were perceived as more likely to be smoked by females than the plain packs. Removing descriptors from the plain packs further decreased the ratings of appeal, taste and smoothness, and also reduced associations with positive attributes. In the pack offer, participants were three times more likely to select branded packs than plain packs."

Conclusion:

Plain packaging and removal of descriptors may reduce the appeal of smoking for youth and young adults, and consequently reduce smoking susceptibility. Overall, the findings provide support for plain packaging regulations, such as those in Australia.

Cigarettes taste and flavor also influence cigarette appeal and make initial experience of smoking less aversive to youth. Brands targeted at youth are typically marketed as smoother and less harsh, and include flavors that may be more palatable such as mint, or strawberry. The names of these flavors are often featured in the package descriptors and may increase smoking appeal.

Brand descriptors and imagery on cigarette packaging can falsely reassure consumers about the potential risks of their products. Studies have shown that many smokers mistakenly believe that cigarettes labeled as "light" or "mind" actually deliver less tar and are less harmful to smokers, and consequently are "healthier" than regular cigarettes. Although Brazil banned the use of these misleading descriptors in 2001, a number of brands use alternative terms such as

"fresh" or references to lighter colors such as "gold" or "silver". Elements such as the pack color and shape can also reinforce false beliefs among smokers.

Plain packaging has been recommended by the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) as a component of marketing restrictions. Plain packaging regulations would prohibit logos, colors, and images from appearing on packages. Manufacturers would only be permitted to print the brand name and descriptors in a standard font and size against a standard background color. In December 2012, Australia will become the first country in the world to introduce plain packaging.

Research in "Western" countries has indicated that plain packaging has the potential to impact youth smoking perceptions and behaviors. Youth perceive plain packages as less appealing and have more negative expectations of cigarette taste. They are also less likely to associate brands in plain packages with favorable personality traits such as being trendy and sociable. Additionally, individuals shown plain packages are less likely to falsely believe that certain brands are less harmful, deliver less tar, or are easier to quit. However, the effect of packaging has yet to be systematically tested in other markets, including Latin American countries such as Brazil.

19. The result of the aforesaid study of plain packaging on the Brazilian women was as under:-

Overall, the findings support the recommendations for plain packaging in the WHO Framework Convention on Tobacco Control and Australia's recent plain packaging regulation.

20.Ireland has also stepforward for implementing the plain packaging. In the news, "Minister for Health Ireland" has pressed the need of plain packaging. The abstract of the said news reads as under:-

(4-A) Cabinet approval for draft laws to compel tobacco companies to use plain packaging on all the products they sell in the Republic represents a significant public health initiative and reaffirms this country's reputation as a global leader in tobacco control. When enacted, the new law would ban the use of any logos on cigarette packs. Graphic warnings would be mandatory on all packaging, and terms such as "low tar" would be forbidden.

As the first EU member state to introduce plain packaging legislation, stern opposition to the law from the global tobacco industry can be expected. Indeed the lobbying has already commenced; the Taoiseach has been approached by American business and political interests who argue the plain packaging initiative would convey an adverse message to foreign investors.

According to the Minister for Health, the objective of the Public Health (Standardised Packaging of Tobacco) Bill 2014 is to make tobacco packs look less attractive to consumers; to make health warnings more prominent; and to reduce the ability of the packs to mislead people, especially children about the harmful effects of smoking.

By targeting children under the age of 18, the tobacco industry knows that, due to the challenge of giving up

cigarettes in later life, it can exploit an opportunity to ensure a customer base for many years to come. Out of more than 4,000 chemicals in tobacco smoke, at least 250 are known to be harmful and more than 50 are known to cause cancer.

21. Even the developed countries have taken steps to implement plain packaging the reasons given therefor are in our considered opinion are compelling, we know that the dangers of smoking are not acceptable to allow the tobacco industry to use deceptive market to allure the children keeping this deadly attractive and to deceive the current smokers about the impact of their reduction. We are of the view that the introduction of standards packaging will remove the final way from tobacco company to permit their deadly product in an implied manner and the cigarettes packets, after implementation of the plain packaging will no longer be a mobile advertisement for the tobacco industry. Tobacco plain packaging measure would be a long term investment to safeguard the health of the Indian youth. The plain packaging aims to reduce the attractiveness of tobacco products. The noticeability and effectiveness of mandatory health warning and plain packaging reduce the ability of attractive packaging to mislead consumer about the harms of smoking.

22. These measures are based on safe research and are also supported by leading public health experts world wide. World Health Organization (WHO) has strongly welcomed the landmark decision of Australian High Court to dismiss the legal challenge from tobacco industry and calls on the rest of the world to follow Australia's tough stand on tobacco marketing.

23. Under Article 47 of the Constitution of India a duty is vested in the State to raise the level of nutrition and standard of living to improve public health as amongst its primary duties. There cannot be any doubt to the fact situation that smoking or consumption of tobacco products is extremely injurious to health and is cause of several diseases, so it adversely effects the general health of the country. At present, the cigarettes are being packed in India in very attractive colours, and the same are being displayed openly in open shops. Such colourful packaging draws the attention of the youths and it becomes an incentive in the mind of the immature youth to start smoking but if plain packaging scheme is implemented then all the cigarettes brand shall be packaged in a common form, in a common colour. Only on a restricted part of the packet the name shall be displayed. On the rest part of the packets the health warning as required under the Rules of 2008 have to be printed. This can be done only by strict regulation. We have been informed that after implementation of the plain packaging rules in Australia, the sale of cigarettes has considerably reduced. Australia has adopted plain packaging in the year 2013. If only in one year the sale of cigarettes starts decreasing then it is very positive sign to accept said plain packaging formula in India also. We found no harm in implementing this scheme. The State of U.P. has stated that certain amendments are still under consideration in the Act 2003 so while considering the State amendments the question of implementing the plain packaging may also be considered by Government of India and also by all the concerned authorities.

24. Keeping in view the discussion made hereinabove, we are of the considered view that this writ petition

deserves to be allowed and is hereby allowed. The scheme of plain packaging must be welcomed by all concerned and the Government of India must consider to implement the said scheme at the earliest. We therefore, strongly recommend to the Government of India to consider the feasibility of implementing the plain packaging of cigarettes and other tobacco products. We hope and trust that necessary steps shall be taken by the Union of India, at the earliest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.07.2014

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

Service Single No. 3793 of 2014

Manphool ...Petitioner
Versus
U.P. Jal Nigam & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Savita Jain

Counsel for the Respondents:
Sri I.P. Singh

Constitution of India, Art.-226-Post Retiral benefits-class 4th employee-in Jal Nigam-retirement age-of 58 years or 60 years-in Jaswant Singh case-although retirement age fixed 60 years-with two classification firstly who already approached before Court whether got interim order or not-entitled for arrears of salary alongwith all consequential benefit-the other one who not filed any writ petition-shall get pensionary benefit treating retirement age as 60 years-without arrears of salary-petitioner's case fallen under Para 38 (b) of the Apex Court.

Held: Para-8

The only question in the present case is whether the claim of the petitioner was barred by laches and no relief could be granted by this Court in view of the judgment in the case of Jaswant Singh (supra). However, the judgment of Jaswant Singh has already been considered by the Supreme Court in the case of Dayanand Chakrawarty (supra) which was a case relating to the employees of the Jal Nigam and it is only thereafter that the Supreme Court has given directions in para-38 of that judgment.

Case Law discussed:
2005 (13) SCC 300; (2006) 11 SCC 464; Civil Appeal No. 5527 of 2012; AIR 1997 SC 2366; (1996) 6 SCC 267; AIR 1989 SC 674

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

1. Heard Ms.Savita Jain, learned counsel for the petitioner and Sri I.P.Singh, learned counsel for the respondents.

2. The petitioner in this writ petition is seeking a direction to the respondents to calculate his retiral dues treating his retirment age as 60 years and also to pay him arrears of pension and other dues.

3. According to the avements made in the writ petition, the petitioner was a Class IV employee in the U. P. Jal Nigam. It is stated that earlier the age of retirement was 58 years but subsequently by G.O. dated 28.11.2001 it was enhanced to 60 years by the State Government in all the departments of the State Government. A query was raised by the Jal Nigam as to whether the age of retirement of the employees of the Nigam would be 58 years or 60 years. The State Government through its letter dated 22.1.2002 informed the Nigam that age of the employees of the Nigam would be 58 years and not 60 years and that the G.O.

enhancing the age to 60 years would be applicable in the State Government and not in the Nigam. Certain employees raised their grievance with regard to age of retirement. The matter went upto the Supreme Court in the case of Harwindra Kumar vs. Chief Engineer, Karmik and others reported in 2005 (13) SCC 300 and the Supreme Court by order dated 18.11.2005 directed the Nigam to continue the petitioner therein till he attains the age of 60 years i.e. on 30.8.2005. The State Government issued G.O. dated 8.12.2005 and 30.8.2005 enhancing the age of retirement from 58 years to 60 years for the employees, who were employed in the Local Self Government Engineering Department and were transferred to the U.P. Jal Nigam but so far as the employees, who were directly appointed in the U.P. Jal Nigam were concerned, the age of retirement would be 58 years. In the judgment of Harwindra Kumar (supra) the Supreme Court has held that the age of retirement of Government Servants employed under the State of U.P. and who were transferred in the Nigam would remain 60 years and so far as the employees of the Nigam were concerned, liberty was given to the Nigam to make suitable amendment in Regulation 31 of Uttar Pradesh Jal Nigam Employees (Retirement on the age of Superannuation) Regulations 2005.

4. Another dispute relating to age of retirement of the employees of the Jal Nigam came up before the Supreme Court in the case of U.P. Jal Nigam and another vs. Jaswant Singh 3and another reported in (2006) 11 SCC 464 and the Supreme Court allowed the benefits of arrears of salary only to those employees of the Nigam, who had filed writ petition but denied the same to others, who had not moved before any court of law.

5. Thereafter another Bunch matter came up before the Supreme Court in the Civil Appeal No.5527 of 2012, State of U.P. vs. Dayanand Chakrawarty and others and other connected Civil Appeals wherein the directions given in the case of Jaswant Singh were considered by the Supreme Court. Para 38 of the said judgement reads as follows:-

"38. In these cases as we have already held that Regulation 31 shall be applicable and the age of superannuation of employees of the Nigam shall be 60 years; we are of the view that following consequential and pecuniary benefits should be allowed to different sets of employees who were ordered to retire at the age of 58 years:

(a) The employees including respondents who moved before a court of law irrespective of fact whether interim order was passed in their favour or not, shall be entitled for full salary up to the age of 60 years. The arrears of salary shall be paid to them after adjusting the amount if any paid.

(b) The employees, who never moved before any court of law and had to retire on attaining the age of superannuation, they shall not be entitled for arrears of salary. However, in view of Regulation 31 they will deem to have continued in service up to the age of 60 years. In their case, the appellants shall treat the age of superannuation at 60 years, fix the pay accordingly and re-fix the retirement benefits like pension, gratuity etc. On such calculation, they shall be entitled for arrears of retirement benefits after adjusting the amount already paid."

6. Sri I.P. Singh, however, does not dispute the factual matrix of the case but

he submits that the petitioner had retired in 2009 and admittedly he had not filed any writ petition or approached any court of law and, therefore, directions in the judgement of Jaswant Singh would wholly prevail and no relief can be granted to the petitioner. He has referred to the judgement of the Supreme Court in the case of Brijesh Kumar and others vs. State of Haryana & Others, Special Leave Petition Nos.6609-6613 of 2014, which matter arose out of an award under the Land Acquisition Act and the Supreme Court relying upon its earlier decisions in the cases of State of Karnataka v. S.M. Kotrayya (1996) 6 SCC 267, Jagdish Lal v State of Haryana, AIR 1997 SC 2366 and Rup Diamonds v. Union of India AIR 1989 SC 674 has rejected the claim of the petitioners on the ground that they had never agitated their matter before any court of law and had approached the Court only after the decision rendered by the Court in other cases, therefore, the claim was time barred and no relief could be granted.

7. I have considered the rival submissions of the learned counsel for the parties.

8. The only question in the present case is whether the claim of the petitioner was barred by laches and no relief could be granted by this Court in view of the judgment in the case of Jaswant Singh (supra). However, the judgment of Jaswant Singh has already been considered by the Supreme Court in the case of Dayanand Chakrawarty (supra) which was a case relating to the employees of the Jal Nigam and it is only thereafter that the Supreme Court has given directions in para-38 of that judgment.

9. In this view of the matter, it is not in dispute between the parties that the case of the petitioner squarely falls in category (b) of para 38 of the directions given by the Supreme Court in the case of Dayanand Chakrawarty (supra).

10. This writ petition is, therefore, allowed in the light of the directions given by the Supreme Court in paragraph 38 (b) of the judgement in the case of Dayanand Chakrawarty (supra).

11. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2014

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

Civil Misc. Writ Petition No. 4979 of 2009

Smt. Sheela Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Srivastava, Sri Ashok Khare, Sri R.P. Pandey

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

Constitution of India, Art.-226-Withholding post retiral benefit-petitioner while in service-punishment-withholding two increments by Board-writ against dismissed special appeal by management pending-argument that in absence of statutory provision to continue disciplinary proceeding even after retirement-due pendancy of special appeal makes no difference-held-order denying benefit by DIOS quashed-consequential direction given.

Held: Para-18

In view of the said facts the order of the DIOS dated 02.01.2009 is liable to be set aside. It is accordingly set aside. The petitioner is permitted to move a fresh application alongwith the certified copy of this order within two weeks giving details of her entitlement of the salary and retiral benefits and various dues, which have been mentioned in the writ petition, before the DIOS. The DIOS shall pass the appropriate order expeditiously but not later than three months from the date of communication of this order.

Case Law discussed:

2002(2) ESC 915(All.); 2004 (1) AWC 310; 2007 (6) ADJ 490.

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

1. The petitioner has laid challenge to the order passed by the District Inspector of Schools, Budaun (for short, "the DIOS") dated 02 January 2009, whereby the petitioner's post retiral benefits and other benefits have been withheld on the ground that a Special Appeal is pending. The said order has been passed by the DIOS on the basis of the opinion obtained by him from the District Government Counsel (Civil) [for short, "the DGC"].

2. The essential facts are that the Chiraunji Lal Dharmpal Kanya Uchchatar Madhyamik Vidyalaya, Dataganj, Budaun (for short, "the Institution") is a recognized and aided Institution. It receives aid up to the High School level. The provisions of the U.P. Intermediate Education Act, 1921 (U.P. Act No. II of 1921), U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971) and the U.P. Secondary Education (Services Selection Boards) Act, 1982 (U.P. Act No. 5 of 1982) are applicable to the Institution.

3. The petitioner was initially appointed in the Institution when the Institution was up to the level of Junior High School. She was appointed as Assistant Teacher in C.T. grade on 01 July 1974. After the upgradation of the Institution up to the level of High School she was absorbed as an Assistant Teacher in L.T. Grade in the Institution and from 10 December 1982 she was granted ad hoc promotion as Headmistress of the High School.

4. From the record it transpire that she was subjected to the disciplinary proceeding, the Committee of Management proposed dismissal of the petitioner. The said proposal was sent to the U.P. Secondary Education Services Selection Board (for short, "the Board") in terms of Section 21 of the U.P. Act No. 5 of 1982. The Board after affording opportunity to the petitioner and the Committee of Management modified the proposed punishment of dismissal by withholding two increments of the petitioner vide order dated 13 April 2007.

5. Aggrieved by the said order the Committee of Management preferred a Writ Petition No. 23585 of 2007. The said writ petition was dismissed by this Court vide order dated 07 June 2007. This Court has noticed the fact that the Commission was satisfied that there were minor lapses on the part of the petitioner and as such no illegality was found in awarding punishment of withholding of two increments on permanent basis, which is also one of the prescribed punishments under the U.P. Act No. II of 1921 and U.P. Act No. 5 of 1982.

6. Dissatisfied with the said order the Committee of Management preferred a Special Appeal No. 833 of 2007. It is stated that in the said Special Appeal no interim order was passed and it is still pending. In the meantime the petitioner reached her age of superannuation and she retired on 30 June 2009.

7. It is stated that the petitioner after her retirement is entitled for the revised pay scale applicable to the post of Headmistress of High School in terms of a Government Order dated 20 July 2001; further revision w.e.f. 01 July 2001; the arrears of salary from 14 October 2001 to July 2007 as during this period she was paid only subsistence allowance.

8. The petitioner had made several applications for the aforesaid relief as also in her representation dated 25 September 2008.

9. From the record it transpires that the DIOS on the application of the petitioner has sought legal opinion from the DGC vide his communication dated 10.11.2008. A copy of the said communication of the DIOS is on the record as annexure-6 to the writ petition. In response to the said communication the DGC has opined that since the Special Appeal is pending against the order of the learned Single Judge, therefore, all the dues of the petitioner should be paid after the disposal of the Special Appeal. The said communication has been made to the petitioner under the Right to Information Act on 02.01.2009.

10. Counter affidavit has been filed on behalf of the State Government. The only stand taken in the counter affidavit is that the Special Appeal is pending as such it would be appropriate to pay the petitioner after decision in the Special Appeal.

11. Sri Ashok Khare, learned Senior Advocate assisted by Sri Sunil Kumar Srivastava, learnedCounsel for the petitioner submits that in any view of the matter now the petitioner stood retired and under the provisions of the U.P. Act No. II of 1921 there is no provision to continue the disciplinary proceeding after the retirement, therefore, even if the Special Appeal is pending it would not make any difference for the aforesaid reason. He has placed reliance on the judgement of this Court in the case of Dr. R.B. Agnihotri v. State of U.P. and others, 2000(2) ESC 915 (All.) and; Ravindra Singh Rathore v. District Inspector of Schools, Etawah and others, 2004 (1) AWC 310.

12. Learned Standing Counsel has very fairly submitted that merely on the ground of pendency of the Special Appeal the petitioner's dues cannot be withheld.

13. Sri Chandra Prakash Yadav, learned Advocate holding brief of Sri V.K. Singh, learned Counsel for the respondent no. 4 states that he has no instructions in the matter.

14. I have heard learned Counsel for the respective parties and considered their submissions.

15. Section 21 of the U.P. Act No.5 of 1982 provides that any punishment proposed by the Committee of Management shall not take effect without approval of the Board. In the instant case the Board has considered the proposed punishment and has recorded the finding

that the allegations were minor in nature and, therefore, the proposal of dismissal was disproportionate to the charges levelled against the petitioner.

16. In view of the said finding the Board has awarded the punishment of only withholding of two increments on permanent basis. The decision of the Board has been upheld by this Court in Committee of Management, Chiraunji Lal Dharampal Kanya Ucchhatar Madhyamik Vidyalaya, Badaun and another v. State of U.P. and another v. State of U.P. and others, 2007 (6) ADJ 490. A copy of the said judgment is annexure-1 to the writ petition. The Special Appeal filed against the said judgment is pending but admittedly no interim order has been passed.

17. I find there is considerable merit in the contention urged by Sri Khare that in the U.P. Act No. II of 1921 and U.P. Act No. 5 of 1982 there is no provision for initiating or continuing disciplinary proceeding against a retired teacher, therefore, in absence of any provision in the U.P. Act No. II of 1921 and the U.P. Act No. 5 of 1982 to continue the disciplinary proceedings against the retired teacher, the pendency of the Special Appeal will have no effect after the retirement of the petitioner.

18. In view of the said facts the order of the DIOS dated 02.01.2009 is liable to be set aside. It is accordingly set aside. The petitioner is permitted to move a fresh application alongwith the certified copy of this order within two weeks giving details of her entitlement of the salary and retiral benefits and various dues, which have been mentioned in the writ petition, before the DIOS. The DIOS shall pass the appropriate order expeditiously but not later than three months from the date of communication of this order.

19. The DIOS shall have due regard to the fact that the petitioner is a retired teacher, therefore, all her dues may be paid expeditiously without any delay.

20. The writ petition is, accordingly, allowed.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 14572 of 2006

Constable 872 C.P. Gulab Singh ...Petitioner
Versus
Deputy Inspector General of Police & Ors., PHQ, Allahabad ...Respondents

Counsel for the Petitioner:
Sri Shailendra Mishra, Sri Manu Sharma
Sri H.K. Sharma

Counsel for the Respondents:
C.S.C.

Payment of Gratuity Act, 1972-Section-4(6)
Gratuity-withhold on ground of pendency of criminal case-admittedly till the date of superannuation-no departmental enquiry initiated-held-can not be withheld-consequential direction issued.

Held: Para-16
In the present matter, it is admitted case that in pursuance of the criminal proceeding, there was no departmental inquiry had ever

been initiated against the petitioner, infact for the same. In absence of any department inquiry, the payment towards the retiral dues can not be forfeited. The Hon'ble Apex Court in catena of decisions had clearly held that the criminal proceeding as well as departmental proceeding may go simultaneously. In peculiar facts and circumstances, if the facts are similar, the department may stop the disciplinary proceeding and wait for out come of criminal trial, but in the present matter no departmental inquiry had been initiated against the petitioner. Therefore, the stand taken by the respondent is contrary to the settled proposition of law and same is not sustainable and liable to be rejected.

Case Law discussed:
[(2000) 6 SCC 493]; 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 Mahesh Chandra Tripathi, J.)

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

2. By means of present writ petition, the petitioner has prayed for quashing the impugned order dated 06.02.2002 (Annexure No. 2 to the writ petition), by which gratuity of the petitioner was not paid and only interim pension was issued.

3. Learned counsel for the petitioner states that petitioner was working as constable in civil police. During the tenure of service career a criminal case no. 107/90 under sections 147, 302, 201 IPC, Police Station, Bairiya, District Ballia, was registered and the said case is reported to be pending against the petitioner and meanwhile petitioner was retired on 29.02.2000 and as per the record, there was no departmental proceeding against the petitioner. When the petitioner has not been paid gratuity and other retiral dues had filed Civil Misc. Writ Petition No. 39938 of 2001. The said writ petition was disposed of by this Court vide order dated 03.12.2001 directing the answering respondent to decide the claim of the petitioner strictly in accordance to the law.

there is no averments in the counter affidavit

4. In pursuance to the said direction the respondent had refused to release the gratuity vide order dated 06.02.2002 (Annexure No. 2 to the writ petition), on the ground that criminal trial is pending against the petitioner, therefore, in view of the Government Order dated 28.10.1980, the gratuity of the petitioner cannot be released. The said order dated 06.02.2002 was the subject matter to challenge before this Court.

5. Learned counsel for the petitioner states that petitioner is liable to receive the complete pensionery benefits including full gratuity, pension etc. and the answering respondent in the garb of Government Order dated 28.10.1980, cannot stop payment of gratuity and full pension of the petitioner, specially in the background where the petitioner had not faced any department inquiry.

6. Where as stand taken by the respondent that petitioner was subjected to criminal proceeding, which is reported to be pending. Therefore, in view of the Government Order dated 28.10.1980, petitioner is not entitle for payment of gratuity as well as full retiral dues. The relevant portion of the Government Order dated 28.10.1980 is quoted below:-

''ऐसे सरकारी सेवकों को, जिनके विरूद्ध सेवानिवृत्त के दिनांक को, विभागीय/न्यायिक अथवा

प्रशासनाधिकरण की जांच चल रही हो अथवा प्रशासनाधिकरण जांच किया जाना अपेक्षित हो शासनादेश संख्या सा–3–1879/दस–80–909–79 दिनांक 28.10.1980 के अनुसार अनन्तिम पेंशन का भुगतान कर दिया जायेगा किन्तु ग्रेच्युटी की पूर्ण धनराशि तब तक रोकी जायेगी जब तक ऐसी जांच का परिणाम प्राप्त न हो जाय.....''

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

8. The provision of Payment of Gratuity has been provided under Section 4 of the "Payment of Gratuity Act", 1972. Section 4 (1) says that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years-(a) on his superannuation; (b) on his retirement or resignation; or (c) on his death or disablement due to accident or disease; wherein sub Clause (6) spells out the conditions under which gratuity of an employee can be stopped or withheld. Section 4(6) of Payment of Gratuity Act 1972 is quoted below:-

(6) Notwithstanding anything contained in sub-section (1),----------

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited.

(i)if the services of such employee have been terminated for his riotous or disorderly conduct or any other act violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

9. While examining the import of the aforesaid section, it contemplates the following conditions on which Gratuity can be withheld (a) if the order of termination is based upon any act, wilful omission or negligence causing any damage or loss to the property belonging to the employer; (b) if the services of an employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; (c) if the employee is found guilty of moral turpitude provided that said offence has been committed during tenure of his service career. These are the only conditions which empowers the respondents to withhold the Gratuity of the petitioner.

10. In the present case what has been alleged that the petitioner was implicated in criminal case and trial is said to be pending, as such his gratuity cannot be released in his favour, while none of the conditions as aforesaid do exist as the petitioner's services were not terminated nor he falls under any of the conditions otherwise given in sub Section (6) and its sub clauses. Termination of services for any of the causes enumerated in Sub- section (6) of Section 4 of the Act, therefore, is imperative.

11. Perusal of the impugned order reveals that reliance has been placed on G.O. dated 20.10.1980 which contemplates the following things:-

(a) the provisional pension shall be authorized for the period commencing from the date of retirement up to including the date on which judicial proceedings of the departmental or administrative Tribunal, as the case may be, final orders are passed by the competent authority.

(b) No death cum retirement gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings or the enquiry by the Administrative Tribunal.

12. These rules are contrary to the Section 4(6) of the Act which does not prescribed any such conditions. Even though the expression judicial proceedings have been used for the purpose of any administrative action or which may have given rise to a judicial proceedings relating to the conduct of the Government Servant. One of the main object of withholding gratuity is to compensate the Government from the loss caused by the Government servant during his tenure in the service.

13. However, Section 14 of the Act provides that the provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act. The overriding effect of any law and amount of gratuity is protected by statutory provisions. Therefore, such amount cannot be denied by the employer to the employee or employer has no power to withhold or forfeit the said amount unless the provisions of Section 4(6) of Payment of Gratuity Act is satisfied. It is not the case of the respondents that procedure which is required under Section 4(6) of the Act was followed by the respondents because it is not the case of termination but it is the case of superannuation. Therefore, Section 4(6) of the Act procedure has not been followed by the respondents.

14. Hon'ble Apex Court in Balbir Kaur and Another v. Steel Authority of India Ltd. and Another [(2000) 6 SCC 493], has opined "...As regards the provisions of the Payment of Gratuity Act, 1972 (as amended from time to time) it is no longer in the realm of charity but a statutory right provided in favour of the employee..."

15. Perusal of the Act shows that it is a neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non-obstante clause vis-`-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of Sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. Conditions laid down therein are also not satisfied."

16. In the present matter, it is admitted case that in pursuance of the criminal proceeding, there was no departmental inquiry had ever been initiated against the petitioner, infact there is no averments in the counter affidavit for the same. In absence of any department inquiry, the payment towards the retiral dues can not be forfeited. The Hon'ble Apex Court in catena of decisions had clearly held that the criminal proceeding as well as departmental proceeding may go simultaneously. In peculiar facts and circumstances, if the facts are similar, the department may stop the disciplinary proceeding and wait for out come of criminal trial, but in the present matter no departmental inquiry had been initiated against the petitioner. Therefore, the stand taken by the respondent is contrary to the settled proposition of law and same is not sustainable and liable to be rejected.

17. 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.).

18. 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.

19. 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....."

20. The ratio laid down in these 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. In the aforementioned facts and circumstances, the impugned order dated 06.02.2002 (Annexure No. 2 to the writ petition) is hereby quashed. Respondents are directed to release the entire post retiral dues of the petitioner including the gratuity, pension, etc., within a period of three months from the date of production of certified copy of this order before him.The petitioner shall be allowed to continue to be paid the interim pension within the said period. The respondents shall fix the final pension and shall pay the same regularly thereafter. The petitioner shall also be entitled to interest at the rate of 6% per annum towards the delayed payment of gratuity, namely from the date when it became payable and till it is actually paid.

26. With the aforesaid observation, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 24892 of 2014

Yogesh Agarwal ...Petitioner
Versus
Sri Rajendra Goyel & Ors. ...Respondents

Counsel for the Petitioner:
Smt. Rama Goel Bansal

Counsel for the Respondents:
Sri Rahul Sahai

C.P.C.-Order XXXIX Rule-3-Grant of temporary injunction-general rule to grant ex-parte-injunction after hearing to defendant-only exception to record reasons-in absence of reasons -ex-parte injunction granted by Trail Court-rightly

interfered by Lower Appellate Court-warrant no interference-petition dismissed.

Held: Para-28

It is of utmost importance to note that an ex parte order of injunction is an exception, the general rule is that injunction order be passed only after notice to the defendant. It is only in rare cases where the court finds that the object of granting injunction would be defeated by delay, the court can grant injunction ex parte but that too only after recording reasons having regard to the mandatory provisions of rule 3 of Order 39, ex parte injunction is not routine matter and it must be borne in mind by the courts below.

Case Law discussed:

1995(1) ARC 80; 1989(1) ARC 351; AIR 2002 Allahabad 198; 2006 Law Suit (SC) 745; 2004 Law Suit (All.) 309; 1994(3) JT 654; AIR 1990 (All.) 134; 2007(2) AWC 1539; 1958 AIR 79; (1975) 1 All ER 504; (1992) 1 SCC 719; 1981 (2) SCC 766; (2012) 6 SCC 792; (2012) 5 SCC 370.

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

1. Heard Smt. Rama Goel Bansal, learned counsel for the petitioner as well as Sri Rahul Sahai, learned counsel for the respondents.

2. The petitioner filed Suit No. 445 of 2013 on 31.05.2013 for permanent prohibitory injunction against the defendant/respondents alongwith an application for temporary injunction. The plaintiff/petitioner on request got the suit adjourned for 04.07.2013 and again it was adjourned for 09.07.2013 and on the said date an ex parte injunction was granted. Aggrieved, the respondent/defendants preferred Misc. Appeal No. 93 of 2013 (Rajendra Goel and another Versus Yogesh Agarwal and others). The appellate court by the impugned order dated 16.12.2013 set aside the temporary injunction order dated 09.07.2013 passed by the trial court which is assailed in the present petition.

3. It is contended on behalf of the petitioner, that the trial court has assigned reasons as required under proviso to Order XXXIX Rule 3 while granting ex parte temporary injunction and it is the discretion of the Court to grant injunction, which ordinarily should not be interfered by the appellate court.

4. Learned counsel for the petitioner placed reliance upon the following judgments in support of her submission Smt. Chitra Agrawal Versus Jagdish Saran Goel1, Shiv Saran Goyal and others Versus M/s Kedar Nath Om Prakash and others2, Badri Prasad Versus VIIth Additional District Judge, Allahabad and others3, M Gurudas Versus Rasaranjan4, and Akbar Ali Versus District Judge5.

5. In rebuttal, Sri Rahul Sahai, learned counsel appearing for the respondents, submits that grant of ex parte injunction is exception to the general rule. The temporary injunction can be granted after notice to defendant inviting objections. No reason whatsoever has been assigned by the trial court for granting ex parte injunction, which is mandatory.

6. In support of his submission, learned counsel for the respondents has relied upon Morgan Stanley Mutual Fund Versus Kartick Das6, Road Flying Carrier and another Versus General Electric Company of India Ltd.7, Kan Construction and Colonizers Pvt. Ltd. Versus Allan Deo Noronha and another8.

7. Rival submissions fall for consideration.

8. The power to grant temporary injunction is the discretion of the Court. The discretion, however, should be exercised reasonably, judicially and on sound legal principles; ex parte injunction should not be lightly granted as it adversely affects the other side. The grant of injunction is in the nature of equitable relief.

9. The first rule is that the applicant must make out a prima facie case in support of the right claimed by him and the court must be satisfied that there is a bonafide dispute raised by the applicant, and there is a strong case for trial which needs investigation and a decision on merits and on the facts before the court there is a probability of the applicant being entitled to the relief claimed by him. The existence of a prima facie right and infraction of such right is a condition precedent for grant of temporary injunction.

10. The courts should not examine the merits of the case closely at that stage or try to restore a conflict of evidence nor decide complicated question of fact and law which call for detailed arguments and mature considerations. They are matters to be dealt with at trial. The grant or refusal of temporary injunction is not a mini trial.

11. In deciding a prima facie case, the court is to be guided by the plaintiff's case as revealed in the plaint, affidavits or other materials produced by him. Explaining the ambit and scope of the connotation "prima facie' case, in Martin Burn Limited Versus R.N. Banerjee.9, the Supreme Court observed as follows:-

"A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."

12. The existence of the prima facie case alone does not entitle the applicant for temporary injunction. The applicant must further satisfy the court about the second condition by showing that he may suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. The expression irreparable injury however does not mean that there should be no possibility of repairing the injury. It only means that the injury must be a material one, i.e., which can not be adequately compensated by damages.

13. In the leading case of American Cyanamid Co. V. Ethicon Ltd.10, the House of Lords has rightly pronounced the principle thus:

"[T]he governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately

compensated by an award of damages for the the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction."

14. The third condition of granting interim injunction is that the balance of convenience must be in favour of the applicant. In other words, the court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing injunction will be greater than that which is likely to be caused to the opposite party by granting it. If on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it.

15. In Dalpat Kumar Versus V. Prahlad Singh11, the Supreme Court stated as follows:-

"The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

16. In United Commercial Bank v. Bank of India12, the Court observed: (para 50 and 51)

"50. No injunction could be granted under Order 39, Rules 1 and 2 of the Code unless the plaintiffs establish that they had a prima facie case, meaning thereby that there was a bona fide contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case, there is a prima facie case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on the material on record that the plaintiffs have a prima facie case. It cannot be disputed that if the suit were to be brought by the Bank of India, the High Court would not have

granted any injunction as it was bound by the terms of the contract. What could not be done directly cannot be achieved indirectly in a suit brought by the plaintiffs.

51. Even if there was a serious question to be tried, the High Court had to consider the balance of convenience. We have no doubt that there is no reason to prevent the appellant from recalling the amount of Rs 85,84,456. The fact remains that the payment of Rs 36,52,960 against the first lot of 20 documents made by the appellant to the Bank of India was a payment under reserve while that of Rs 49,31,496 was also made under reserve as well as against the letter of guarantee or indemnity executed by it. A payment 'under reserve' is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted."

[Refer: Best Sellers Retail (India) Pvt. Ltd. Versus Aditya Birla Nuvo Ltd.13,]

17. Experience shows that once injunction is granted it is a nightmare for the defendant in getting it vacated. The court should be very careful in granting injunction. Ex parte injunction should be granted in case of grave urgency, safe and better course is to give short notice to the other side.

18. Supreme Court in Maria Margarida Sequeria Fernandes and others versus Erasmo Jack de Sequeria14, held as follows:-

"83. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant.

84. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction."

19. In Morgan Stanley Mutual Fund case (supra), the Supreme Court indicated the factors which should weigh with the court in the grant of an ex parte injunction:

"(a) whether irreparable or serious mischief will ensue to the plaintiff;

(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;

(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making

of improper order against a party in his absence is prevented;

(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;

(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.

(f) even if granted, the ex parte injunction would be for a limited period of time.

(g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court."

20. The court must weigh one need against another and determine where' the balance of convenience' lies.

21. The same principles/considerations apply to the defendant seeking vacation of injunction order. In Gujarat Bottling Co. Ltd. v. Coca Cola Co.15, the Supreme while rejecting the defendant's application for vacating the interim relief held as follows:-

"Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under order 39 Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings."

22. Rule 1 of Order 39, nowhere provides that no temporary injunction can be granted by the court unless the case falls within the circumstances enumerated therein, where the case is not covered by Order 39, interim injunction can be granted by the court in exercise of inherent powers under section 151 of the Code (Ref: Manohar Lal v. Seth Hiralal.16; ITO v. M.K. Mohd. Kunhi17; Tanusree v. Ishani Prasad18.

23. When the court proposes to grant ex parte injunction without issuing notice to opposite party, proviso to Rule 3 enjoins the court to record reasons for its opinion that the object of granting injunction would be defeated by delay. The requirement of recording of reasons is not a mere formality but a mandatory requirement.

24. In Shiv Kumar Chada Versus Municipal Corporation of Delhi19, the Supreme Court stated as under:

".....the court shall record the reasons why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In

this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule '1, the procedure prescribed under the proviso has been followed. The party which invokes the Jurisdiction of the court for grant of an order of restrain against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order."

25. Applying the law to the facts of the case at hand. The suit was filed on 31.05.2013 and thereafter it was adjourned at the behest of the plaintiff/petitioner for 04.07.2013 and again on the said date adjourned was sought and 09.07.2013 was the next date fixed and it is on that date an ex parte temporary injunction was granted i.e. after a lapse of forty days from the institution of suit.

26. The lower appellate court, by the impugned order dated 16.12.2013, set aside the ex parte injunction order and the present writ petition was filed on 29.04.2014 i.e. after a lapse of four months. The trial court while granting ex parte temporary injunction, has ordered that 'title prima facie proved, the matter is of immediate nature, in view of the facts and circumstances the parties to maintain status quo on the spot till the next date' (translated from hindi). There is no discussion in the entire order as to how the conclusion has been arrived at by the trial court that the ex parte injunction be granted without notice to the defendants. The suit admittedly was filed on 31.05.2013 and injunction was granted on 09.07.2014 after a lapse of 40 days, this time period was sufficient for putting the defendants to notice, rule 3 of Order XXXIX C.P.C. requires that only in case where it appears to the Court that object of granting injunction would be defeated by the delay, it has power to grant ex parte injunction. In such circumstances also, the court has to record reasons for its opinion that the object of granting injunction would be defeated by delay.

27. The contention of learned counsel for the petitioner that the affidavit in support of the injunction application made out a case for grant of ex parte injunction order which was sufficient for the court for forming its opinion to grant ex parte injunction order, cannot be accepted for the simple reason that where law requires recording of reasons for doing a particular act, the mere presence of material or assertions made in the

affidavit is not sufficient, it must also be shown that the court has applied its mind to the material/assertions and reasons for existence of grave urgency must find place in the order of the court. Ex parte injunction order was passed after forty days from institution of the suit and the writ petition challenging the lower appellate courts order was filed after 130 days, this clearly demonstrates that there was no grave urgency in granting ex parte injunction order.

28. It is of utmost importance to note that an ex parte order of injunction is an exception, the general rule is that injunction order be passed only after notice to the defendant. It is only in rare cases where the court finds that the object of granting injunction would be defeated by delay, the court can grant injunction ex parte but that too only after recording reasons having regard to the mandatory provisions of rule 3 of Order 39, ex parte injunction is not routine matter and it must be borne in mind by the courts below.

29. In the facts and circumstances of the present case and for the reasons and law stated herein above, the lower appellate court did not commit any illegality or jurisdictional error in vacating the ex parte injunction order; this court declines to interfere with the impugned order under Article 226/227 of the Constitution of India.

30. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.

THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 30017 of 2014

Raj Kumar Verma ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri R.S. Kushwaha

Counsel for the Respondents:
C.S.C., Sri Shiv Nath Singh

U.P. Secondary Education Services Selection Board Act, 1982-Section 10(i)-Providing no reservation on post of head of institution-whether ultra virus being contrary to U.P. Public Services (Reservation for SC/ST & and Other Backward classes) Act 1994?-held-'No'-controversy involved in present case squarely covered by decision of Apex Court in Chakradhan Paswan case-petition dismissed.

Held: Para-7
Hence, the exclusion of reservation from the post of the Head of the Institution in Section 10 of the Act of 1982 is in conformity with the provisions of the Constitution and is, in fact, intended to ensure that there is no violation of Articles 14 and 16 of the Constitution. As a matter of fact, Rule 12 (6) of the U.P. Secondary Education Services Selection Board Rules, 1998 makes a clear distinction between recruitment of teachers in the lecturer and trained graduate scale on the one hand and the recruitment of the Principals/Headmasters on the other hand. In the case of the latter, there is no provision for reservation consistent with the provisions of Section 10 of the Act of 1982.

Case Law discussed:
(2008) 12 SC 1; (1988) 2 SCC 214; (2011) 4 SCC 120

(Delivered by Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, C.J.)

1. The Uttar Pradesh Secondary Education Services Selection Board ('Board') issued an advertisement for direct recruitment to the post of Head of Government aided private Inter Colleges and High Schools. The petitioner applied for the post of Principal for Gorakhpur Region. It has been averred that no date for interview has been fixed thus far.

2. The grievance of the petitioner is that in consequence of the provisions of Section 10 (1) of the U.P. Secondary Education Services Selection Board Act, 1982, no reservation has been provided in respect of the post of the Head of the Institution to candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes in accordance with the provisions of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994. The petitioner challenges the provisions of Section 10 (1) of the Act of 1982 as unconstitutional. In consequence, the petitioner seeks to challenge the advertisement of 2013 as well as an earlier advertisement of 2011 issued by the Board and seeks a mandamus for issuance of a fresh advertisement after providing for reservation.

3. Section 10 of the Act of 1982 reads as follows:

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

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

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

4. Section 10 of the Act of 1982 specifically excludes the post of Head of the Institution from the purview of reservation. The issue, which is sought to be raised before the Court, is not res integra.

5. In Balbir Kaur v. U.P. Secondary Education Services Selection Board1, the Supreme Court specifically dealt with the issue as to whether the post of the Head of the Institution was liable to be reserved when direct recruitment is carried out in pursuance of an advertisement issued under the Act of 1982. The issue was considered in the judgment of the Supreme Court from two perspectives. Firstly, the matter was considered having due regard to the provisions of Section 10 noted above, which specifically and expressly excludes the post of Principal from the purview of the Act of 1994. But

this decision is sought to be distinguished by the learned counsel appearing on behalf of the petitioner by submitting that in that case there was no challenge to the constitutional validity of Section 10 of the Act of 1982. Now it is true that in Balbir Kaur (supra) there was no challenge to the constitutional validity of Section 10 of the Act of 1982. This aspect had been specifically noted in the judgment of the Supreme Court. However, the point, which we note, is that the decision in Balbir Kaur (supra) did not only rest on the provisions of Section 10 of the Act of 1982, which excludes the post of the Head of the Institution from the purview of reservation. Apart from this rationale, the Supreme Court also held, following the decision of the Constitution Bench in Chakradhar Paswan (Dr.) v. State of Bihar and Ors.2, that the existence of a plurality of posts is a sine qua non for a valid reservation in a single post cadre. Moreover, it was also held that neither in the Act of 1982 nor in the Rules made thereunder or in the Act of 1994 is there any provision for clubbing of all educational institutions in the State for the purpose of reservation. The observations of the Supreme Court in that regard read as follows:-

"Moreover, the post of the Principal in an educational institution being in a single post cadre, in the light of the clear dictum laid down by this Court, such a post cannot be subjected to reservation. It will result in 100 per cent reservation, which is not permissible in terms of Articles 15 and 16 of the Constitution of India. In PGI Chandigarh's case (supra) a Constitution Bench of this Court, while holding that plurality of posts in a cadre is a sine qua non for a valid reservation, affirmed the view taken in Chakradhar Paswan v. State of Bihar and Ors. In that case, it was held that there cannot be any reservation in a single post cadre and the decisions to the contrary, upholding reservation in single post cadre either directly or by device of rotation of roster were not approved. Besides, as noted above, neither the Principal Act, nor the rules made thereunder or the 1994 Act provide for clubbing of all educational institutions in the State of U.P. for the purpose of reservation and, therefore, there is no question of clubbing the post of the Principles in all the educational institutions for the purpose of applying the principle of reservation under the 1994 Act. We are, therefore, in agreement with the High Court that the advertisements impugned in the writ petition were not vitiated for want of provision for reservation. It is also pertinent to note that none of the respondents belong to the reserved category of Scheduled Castes or Scheduled Tribes or other Backward Classes."

6. The judgement of Balbir Kaur (supra) was subsequently followed by the Supreme Court in State of Uttar Pradesh & Ors. v. Bharat Singh & Ors.3. In Bharat Singh (supra), the Supreme Court referred to the decision of the Constitution Bench in Chakradhar Paswan (supra) and the subsequent decisions and held that separate posts in different institutions cannot be clubbed together for the purpose of reservation. Any reservation where there is only a single post in the cadre would amount to 100% reservation, which would violate Articles 14 (1) and 16 (4) of the Constitution. In that context, the Supreme Court held as follows:-

"71. In Chakradhar Paswan (Dr.) case this Court relying upon the decision in Arati Ray Choudhury v. Union of

India, M.R. Balaji v. State of Mysore and T. Devadasan v. Union of India held that separate posts in different institutions cannot be clubbed together for the purpose of reservation and that reservation may be made only where there are more than one posts. Reservation of only a single post in the cadre would amount to 100% reservation and thereby violate Articles 14 (1) and 16 (4) of the Constitution. In Bhide Girls Education Society v. Education Officer this Court held that a single post of Headmistress of an institution could not be reserved as the same would amount to making a 100% reservation.

72. The controversy was authoritatively set at rest by the Constitution Bench decision of this Court in Postgraduate Institute of Medical Education & Research v. Faculty Assn. case where this Court overruled the decisions of this Court in Union of India v. Madhav, Union of India v. Brij Lal Thakur and State of Bihar v. Bageshwari Prasad and observed: (Faculty Assn. case, SCC p. 23, paras 34-35).

"34. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35.Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

73. In the light of the above decision, we have no hesitation in holding that the post of Principals in each one of the aided/affiliated institution being a single post in the cadre is not amenable to any reservation. Question (ii) is accordingly answered in the affirmative."

7. In our view, the submission that there was no challenge to the constitutional validity of Section 10 of the Act of 1982 in Balbir Kaur (supra) and that the subsequent decisions would not be precedents must fail. The foundation of the decision in Balbir Kaur (supra) is two fold. Firstly, the decision rests on the express provisions of Section 10 of the Act of 1982, which excludes reservation on a single post cadre. But the second and more fundamental point is that the decision follows the long line of precedent of the Supreme Court in which the consistent view is that where there is a single post cadre, any reservation would amount to cent per cent reservation and

would hence offend Articles 14 and 16 of the Constitution. Hence, the exclusion of reservation from the post of the Head of the Institution in Section 10 of the Act of 1982 is in conformity with the provisions of the Constitution and is, in fact, intended to ensure that there is no violation of Articles 14 and 16 of the Constitution. As a matter of fact, Rule 12 (6) of the U.P. Secondary Education Services Selection Board Rules, 1998 makes a clear distinction between recruitment of teachers in the lecturer and trained graduate scale on the one hand and the recruitment of the Principals/Headmasters on the other hand. In the case of the latter, there is no provision for reservation consistent with the provisions of Section 10 of the Act of 1982.

8. In this view of the matter, we are unable to accept the challenge to the constitutional validity of the provisions of Section 10 of the Act of 1982 insofar as it excludes the post of Head of the Institution from the ambit of reservation. As a matter of fact, the constitutional validity of Section 10 of the Act of 1982 is squarely covered by the decision of the Supreme Court in Chakradhar Paswan (supra) and the subsequent line of judgments, which have been noted in the judgments of Balbir Kaur (supra) and Bharat Singh (supra). The decisions in Balbir Kaur (supra) and Bharat Singh (supra) emanated from the State of Uttar Pradesh. As a matter of fact, Balbir Kaur (supra) considered both the Act of 1994 and the Act of 1982. Since we are governed by binding precedent and the law laid down by the Supreme Court, there would be no occasion for this Court to exercise its jurisdiction under Article 226 of the Constitution in view of the clear proposition of law as interpreted in successive decisions of the Supreme Court. The Government Order dated 12 January 2011 (Anneuxre No.7), on which reliance has been placed by the petitioner, is similarly of no avail since the administrative decision must necessarily be read in the context of the provisions of the relevant Act and the law laid down by the Supreme Court.

9. For these reasons, we see no ground to entertain the petition. The petition is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 31251 of 2014

Yogesh Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anand Kumar Singh, Sriprakash Dwivedi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Permit to play mini bus-in to two adjoining Districts-authority refused to entertain such application-unless character certificate-from both district filed-held-arbitrary-requirement by provision of para 6 (ka) of resolution-shows total non application of mind-authorities shall not insist of certificate from both the districts-except in which petitioner permanently residing.

Held: Para-3
Merely because an applicant desires to carry on business, in this case operating a stage carriage which covers more than

one district, there is no logical reason to require a character certificate to be furnished from the District Magistrate of the adjoining district as well. The character of an applicant does not alter depending upon whether he has to ply his bus/vehicle in one or more than one district. In the circumstances, we are of the view that clause (Ka) shows a patent non-application of mind and has no reasonable justification. In fact, learned Standing Counsel has also not been able to point out any justification at all.

(Delivered by Hon'ble Dhananjaya Yeshwant Chandrachud, C.J.)

1. The petitioner is the owner of two mini buses and plies them on the basis of a stage carriage permit from Varanasi to Sarai Mamrej via Jansa, Kapsethi, Chauri Bhadohi. The permit which was issued by the Regional Transport Authority, Mirzapur in respect of one of the vehicles bearing registration No. UP66T-1255 is valid until 26 January 2017. The petitioner has applied for a permit on a route which falls within two districts. The petitioner has averred that the Regional Transport Authority, Mirzapur declined to entertain the application dated 26 February 2014 on the ground that clause 6(Ka) contained in the resolution dated 19 March 2013 states that where an applicant applies for a permit for another district in addition to his home district, he shall have to file a character certificate obtained from both the home district as well as the adjoining district. In other words, a character certificate is required to be obtained from the District Magistrate, both of the home district and the adjoining district in respect of which the stage carriage permit is sought. The petitioner is aggrieved by this condition which, it is urged, is arbitrary.

2. When the petition came up on 1 July 2014, we had directed the learned Standing Counsel to take instructions and, if necessary, to file a short counter affidavit explaining the rationale for imposing this condition. No counter has been filed. Learned Standing Counsel, however, states that instructions have now been furnished to him.

3. We see no reason or justification for the imposition of a condition requiring an applicant to furnish character certificates from both the districts, namely the home district as well as the adjoining district in respect of which a stage carriage permit is sought for plying the vehicle on a route which falls within the ambit of two districts. Character of an applicant has to be certified by the District Magistrate having jurisdiction over the place where the applicant is an ordinary resident. Merely because an applicant desires to carry on business, in this case operating a stage carriage which covers more than one district, there is no logical reason to require a character certificate to be furnished from the District Magistrate of the adjoining district as well. The character of an applicant does not alter depending upon whether he has to ply his bus/vehicle in one or more than one district. In the circumstances, we are of the view that clause (Ka) shows a patent non-application of mind and has no reasonable justification. In fact, learned Standing Counsel has also not been able to point out any justification at all.

4. In these circumstances, we read down the requirement of clause (Ka) of the resolution of the second respondent dated 19 March 2013 to mean that the applicant shall furnish a character certificate from the home district. The requirement of an additional character certificate from the adjoining district shall not be insisted upon.

5. The application of the petitioner shall now be considered in terms of the aforesaid directions.

6. The petition is, accordingly, disposed of. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 33525 of 2014

Rahul Shukla & Anr. ...Petitioners
Versus
Executive Officer, Nagar Palika Parishad, Ghaziabad ...Respondent

Counsel for the Petitioners:
Sri Bhuvneshwar Prasad

Counsel for the Respondent:

U.P. Act No. 13 of 1972-Section 30-petitioner are ghatwara-by putting Takhta and cottage therein-on payment of Rs. 5000/-annual fee-on refusal moved application-to make deposit under section 30-rejected by authorities below-in absence of relationship of Land lord and tenant-provisions of section 30-not attracted-held-proper petition dismissed.

Held: Para-14
In the absence of any evidence regarding existence of relationship of landlord and tenant, the conclusion is inevitable that petitioners are mere licencees, who have been permitted to put Takhat on Brij Ghat to carry their Jajmani business and not tenants. Therefore, the provisions of the Act do not get attracted and Section 30 of the Act does not come into play.

Case Law discussed:
1965 ALJ 722; 1981 Law Suit (Alld.) 563; 1987 (1) Alld. Rent Case 208.

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard Sri Bhuvneshwar Prasad, learned counsel for the petitioners.

2. The petitioners have preferred this petition against the order of Civil Judge (Junior Division) rejecting their application filed under Section 30 of U.P. Act No.13 of 1972 (hereinafter referred to as the Act) and the order of revisional court dismissing the revision arising therefrom.

3. The aforesaid orders are dated 30.9.2011 and 21.4.2014 respectively.

4. The petitioners applied for depositing rent in court under Section 30 of the Act contending that they are carrying 'Jajmani' work on the banks of Ganga at Brij Ghat. They are providing service of Tilak/Chandan to pilgrims and for the purpose pays Rs.500/- per annum to the Nagar Palika Parishad. They have lastly paid the aforesaid amount for the year 2005-06. Since the Nagar Palika Parishad thereafter has refused to accept it, they may be permitted to deposit the rent in court.

5. Section 30 of the Act contemplates deposit of rent in court in two contingencies namely where there is bona fide doubt or dispute as to the person to whom the rent is payable or where the landlord refuses to accept the rent of the building from the tenant.

6. A bare reading of Section 30 of the Act makes it clear that it is attracted where there is a doubt or dispute as to the person to whom the rent is payable or where the landlord refuses to accpet the rent of a building from the tenant.

7. In other words existence of relationship of landlord and tenant in relation to a building are the twin conditions necessary for applying Section 30 of the Act.

8. The petitioners contends that they have put a Takhat and a Chappar over the open space and the structure is within the purview of the definition of a building of which they are the tenants. In support they have relied upon certain decisions. The first is of second appeal in the case of Ram Dulare Vs. D.D. Jain and others 1965 ALJ 722 wherein the court has considered the meaning of the word 'accommodation' and has held that any building which provide shelter including a flimsy structure like a Jhopri which thatched roof would be covered in it.

9. The other decision is of Anwar Ahmad Vs. IVth Additional District Judge, Saharanpur 1981 Law Suit (Alld.) 563. This decision is based upon Ram Dulare (Supra) and holds that building means a roofed structure whether made of wood or otherwise.

10. Similarly in Abdul Hamid Vs. District Judge, Sitapur and others 1987 (1) Alld. Rent Cases 208 it was held that a wooden shop attached with a Pucca shop is a fixture to the main shop and would be a building within the meaning of Section 3(i) of the Act.

11. Notwithstanding the above decisions and the fact that a thatched Chappar with a Takhat may be construed to be a building the provisions of Section 30 of the Act would not be attracted unless the relationship of landlord between the parties is proved to establish the tenancy.

12. The Nagar Palika Parishad alleges that petitioners are mere licencees. This fact stands accepted by the petitioners by necessary implication which can be inferred from their own application which has been filed under Section 30 of the Act. The said application reveals that the petitioners intended to deposit Shulk (Fees) i.e. licence fee and not rent in respect of the above space/structure. It clearly proves that petitioners do not claim themselves to be tenants and there is no relationship of landlord and tenant between the two.

13. The petitioners have not brought on record any material to prove that they are tenants of the structure. The receipt of Rs.500/- filed by them also does not mention the petitioners to be tenant rather as Shulk realized from Chandan Ghatwalia.

14. In the absence of any evidence regarding existence of relationship of landlord and tenant, the conclusion is inevitable that petitioners are mere licencees, who have been permitted to put Takhat on Brij Ghat to carry their Jajmani business and not tenants. Therefore, the provisions of the Act do not get attracted and Section 30 of the Act does not come into play.

15. In view of the aforesaid facts and circumstances, the courts below have not erred in law in rejecting their application and in refusing to permit them to deposit any amount under Section 30 of the Act.

16. The writ petition has no merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2014

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 34091 of 2014

Shiv Shankar ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish, Sri Gajala Srivastava

Counsel for the Respondents:
C.S.C., Sri Mahesh Narain Singh

Constitution of India, Art.-226-Practice and Procedure-order obtained by concealment of dismissal of earlier suit-between same party-held-fraud vitiate every thing-even otherwise subsequent suit between same parties in respect of same subject matter-barred by principle of resjudicata-petition dismissed with cost of Rs. 25,000/-=.

Held: Para-9
It is settled law that fraud and justice cannot live together. If something has been obtained by playing fraud and the factum of fraud is not disputed, then that thing becomes non-est. Here, factum of filing of earlier suit for the same land has not been disputed by the petitioner's counsel

Case Law discussed:
(1994) 1 SCC 1; (2007) 4 SCC 221; SCC p. 231 para 22; (2008) 12 SCC 481; (2010) 8 SCC 383; 2011 (3) ACR 3544(SC); 2012 (6) ADJ 246.

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

1. Heard Sri Manish, learned counsel for the petitioner and learned Standing Counsel appearing for the State respondents.

2. This writ petition has been filed for issuing a writ of certiorari quashing the orders dated 28.3.2014 passed by the learned Member Board of Revenue in Revision No. 44 of 2013-14 (Shiv Shanker Vs. State of U.P. and others) and order dated 15.2.2014 passed by the Sub-Divisional Officer in Case No. 98/2004 (Gram Sabha Dhaulana and others Vs. Shiv Shanker.

3. Vide order dated 15.2.2014, restoration application filed by the Gaon Sabha seeking setting aside the judgment and decree dated 6.6.2005 has been allowed after condoning the delay and the case was restored to its original number. Whereas by the subsequent order dated 28.3.2014, the petitioner's revision filed against the order dated 15.2.2014 has been dismissed.

4. While assailing these orders, learned counsel for the petitioner contends that the petitioner has filed Suit No. 98 of 2004 (Shiv Shankar Vs. State of U.P. and others) under Section 229-B of U.P.Zamindari Abolition and Land Reforms Act, 1950 (in short ' the Act') impleading State of U.P. as well as Gaon Sabha as defendants and both have filed their written statement. The suit was decreed on 6.6.2005.

5. Aggrieved by the judgment and decree dated 6.6.2005, State of U.P. has filed an appeal, which was numbered as Appeal No. 64 of 2004-05. The appeal too had been dismissed by the Additional Commissioner (III) Meerut Division, Meerut vide judgment and order dated 4.2.2009.

6. It is after seven years, the Gaon Sabha has filed restoration application under Order IX, Rule 13 of Code of Civil Procedure seeking setting aside the

judgment and decree dated 6.6.2005 along with an application for condonation of delay. The delay has been condoned and the restoration application has been allowed. It is contended that once the judgment and decree dated 6.6.2005 has attained finality, by dismissal of the appeal, on 4.2.2009, filed by the State, it was not open for the Sub-Divisional Officer to set aside the judgment and decree dated 6.6.2005 and restoring the proceeding of the suit.

7. On the other hand, learned Standing Counsel has invited attention of the Court towards the observation made by the Sub-Divisional Officer while allowing the restoration application wherein it is recorded that with respect to the land in dispute i.e.Khasra No. 1345 measuring about 0.253 hectare, Khasra No. 2204 measuring about 0.089 hectare and Khasra No. 1401 measuring about 0.493 hectare, the petitioner had filed suit under Section 229-B of the Act, which was numbered as 14 of 1999 (Shiv Shankar Vs. State). This suit was dismissed on 26.1.2000. Aggrieved by the judgment and decree dated 26.1.2000, the petitioner had filed Appeal No. 8 of 2000 (Shiv Shankar Vs. State). The appeal was also dismissed on 14.11.2000. Concealing this fact, the petitioner has filed another suit in the year 2004 with respect to the same land, which was numbered as Suit No. 98 of 2004 (Shiv Shankar Vs. State), which was decreed on 6.6.2005. Against that, State filed Appeal No. 64 of 2004-05 (State Vs. Shiv Shankar) which was dismissed on 4.2.2009. Taking shelter of the observation made by the Sub-Divisional Officer, learned Standing Counsel contends that the petitioner has played fraud upon the courts and after dismissal of the earlier suit on 26.1.2000, no fresh suit for the same cause of action could be maintained.

8. From the perusal of the judgment dated 6.6.2005 passed in the suit filed in the year 2004, it transpires that in the plaint, the petitioner(plaintiff) has not disclosed the filing of the earlier suit and its dismissal for the same cause of action and obtained the decree by playing fraud upon the court. Therefore, even if the appeal filed by the State Government was dismissed, it will make no difference.

9. It is settled law that fraud and justice cannot live together. If something has been obtained by playing fraud and the factum of fraud is not disputed, then that thing becomes non-est. Here, factum of filing of earlier suit for the same land has not been disputed by the petitioner's counsel

10. In S.P. Chengal Varaya Naidu vs. Jagannath and others, (1994) 1 SCC 1, the Apex Court has observed as under:-

"5....The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

11. In A.V. Papayya Sastry v. Govt. of A.P., (2007) 4 SCC 221. Considering English and Indian cases, one of us (C.K. Thakker, J.) stated : (SCC p. 231, para 22) while dealing such matter, the Apex Court has observed as under:-

"22. It is thus settled proposition of law that a judgement, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of law. Such a judgement, decree or order--by the first court or by the final court--has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings."

The Court defined "fraud" as an act of deliberate deception with the design of securing something by taking unfair advantage of another. In fraud one gains at the loss and cost of another. Even the most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam."

12. This view has been reiterated by the Apex Court in the case of K.D. Sharma vs. Steel Authority of India Limited, (2008) 12 SCC 481.

13. In Meghmala and others vs. G. Narasimha Reddy and others (2010) 8 SCC 383, the Supreme Court in paragraphs 33 and 34 has observed as under:-

"33. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. [Vide Vimla (Dr.) v. Delhi Admn. AIR 1963 SC 1572, Indian Bank v. Satyam Fibres (India) (P) Ltd. (1996) 5 SCC 550, State of A.P. v. T. Suryachandra Rao (2005) 6 SCC 149, K.D. Sharma v. SAIL (2008) 12 SCC 481 and Central Bank of India v. Madhulika Guruprasad Dahir (2008) 13 SCC 170]

34. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide Gowrishankar v. Joshi Amba Shankar Family Trust (1996) 3 SCC 310, Ram Chandra Singh v. Savitri Devi (2003) 8 SCC 319, Roshan Deen v. Preeti Lal (2002) 1 SCC 100, Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education (2003) 8 SCC 311 and Ashok Leyland Ltd. v. State of T.N. (2004) 3 SCC 1)."

14. The Apex Court has reiterated the same view in Inderjit Singh Grewal Vs. State of Punjab and another 2011 (3) ACR 3544 (SC).

15. This Court has also taken the same view in Smt. Vibha Shukla And

Another Vs. Director Of Education (Basic) U.P., Allahabad And Others, 2012 (6) ADJ 246.

16. Otherwise also, the subsequent proceeding was barred by principle of resjudicata. In view of foregoing discussions, no relief can be granted to the petitioner. The writ petition is misconceived and it is hereby dismissed. Since the petitioner has abused the process of the court for the last ten years and also committed fraud upon the Court, a cost of Rs. 25,000/- is imposed upon the petitioner, which is recoverable as arrears of land revenue. The petitioner is directed to deposit the aforesaid amount before the Collector Hapur within a period of six months from today. In case, cost is not deposited within the aforesaid period of six months, the Collector shall realize the same as arrears of land revenue. Learned Standing Counsel is directed to send certified copy of this judgment to the Collector Hapur forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2014

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 34216 of 2014

Salik Ram & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Piyush Kan Vishwakarma

Counsel for the Respondents:
C.S.C., Sri Ram Asrey Yadav, Sri Rajesh Kushwaha, Sri M.K. Yadav.

Constitution of India-Art.-226-Appeal against judgment passed under 229-B-with delay condonation application filed-unless delay condoned-in eye of law no appeal pending-commissioner not only misinterpreted the judgment but acted against settled principle of law-moreover when final relief can not be granted-no question of interim order-order continuing interim order till disposal of appeal-set-a-side.

Held: Para-13
Therefore, in my considered opinion, the learned Additional Commissioner has not only mis-interpreted the judgment of this Court but also ignored the settled principle of law that unless delay is condoned there can be no appeal or revision, therefore no interim order could be passed in view of the provisions contained in Order 41, Rule 3A(3) of the Code of Civil Procedure, which provides that the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal.

Case Law discussed:
2008 14 SCC 445; (2012(8) ADJ 210).

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

1. Learned counsel for the petitioners is directed to implead the concerned Gaon Sabha during the course of the day and serve a copy of the writ petition upon the learned counsel appearing for the Gaon Sabha.

2. Heard Sri P.K.Vishwakarma, learned counsel for the petitioner, Sri C.S.Singh, learned Additional Chief Standing Counsel appearing for the State-respondents, Sri R.A.Yadav, learned counsel appearing for the caveator, Sri Rajesh Kushwaha, learned counsel for the respondent no.3 and Sri M.K.Yadav, learned counsel for the Gaon Sabha.

3. Through this writ petition the petitioner has prayed for issuing a writ of

certiorari quashing the order dated 20.3.2014 passed by respondent no.2 in Appeal No. 21 of 2013 (Sanjay and others vs. Salik Ram and others) by which the delay in filing the appeal has been condoned and the earlier interim order dated 22.8.2013 for maintaining status quo has been made operative till the pendency of the appeal.

4. The facts giving rise to the present case are that respondent nos. 3 and 4, Sanjay and Rajmani have filed Suit No. 98/127 (Rajmani and others vs. Muniraj and others) under section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (for short the Act) before the Sub Divisional Officer Jaunpur. The aforesaid suit was dismissed vide judgment and order dated 20.6.2011 holding it to be not maintainable being barred by section 49 of the U.P. Consolidation of Holdings Act, 1953. Against the aforesaid judgment a review application was filed which was allowed on 27.4.2012. Challenging this order a revision was filed which was numbered as Revision No. 111 of 2012 (Smt. Patti Devi and others vs. Rajmani and others). The revision was allowed on 27.8.2013. Thereafter the respondents have filed an appeal under section 331 of the Act against the judgment and decree dated 20.6.2011. The appeal was barred by time, therefore, the respondents have filed an application for condonation of delay. It appears in the appeal without condoning the delay an order for maintaining status quo was passed by the Additional Commissioner on 22.8.2013. Challenging the aforesaid order a writ petition was filed by the petitioner before this Court which was numbered as Writ C No. 67250 of 2013 (Salik Ram and others vs. State of U.P. and others). The writ petition was disposed of with the following observation:

"Even otherwise the suit itself is barred under Section 49 and therefore there would be no question of grant of any final relief much less an interim relief. (emphasis supplied)

The petitioner will raise all these objections by way of an affidavit before the learned Additional Commissioner himself within 15 days from today and the learned Additional Commissioner shall consider these objections and proceed to pass orders by the next date fixed positively without fail.

The writ petition is disposed of with the said observation."

5. Pursuant to the order of this Court dated 10.12.2013 the petitioner has filed objection before the court concerned and the court concerned after condoning the delay has passed the impugned order in the writ petition.

6. When the writ petition was presented, this Court on 7.7.2014 has passed the following order:

"It appears, against the order dated 22.8.2013 passed in appeal no. 21 of 2013 (Sanjai and Others Vs. Salik Ram and Others), directing the parties to maintain status quo, the petitioner approached this Court through Writ C No. 67250 of 2013 (Salik Ram and Others Vs. State of U.P. and Others) and on 10.12.2013, this Court has passed the following order:

"Even otherwise the suit itself is barred under Section 49 and therefore there would be no question of grant of any final relief much less an interim relief.

The petitioner will raise all these objections by way of an affidavit before

the learned Additional Commissioner himself within 15 days from today and the learned Additional Commissioner shall consider these objections and proceed to pass orders by the next date fixed positively without fail. "

In turn, the petitioners approached the Additional Commissioner and filed their objections. Now, by the impugned order, the Additional Commissioner has confirmed the earlier order passed by him on 22.8.2013.

I am surprised to note that when on previous occasion, the Court in the writ petition had taken note of this fact that in case the suit was barred by section 49 of the Consolidation of Holdings Act, 1953, there was no occasion to pass any interim relief, how the Additional Commissioner could confirm the earlier order maintaining status quo.

The Additional Commissioner is directed to file his personal affidavit explaining the situation under which the earlier interim order has been made absolute till the disposal of the appeal.

As prayed, put up this case on 21.7.2014 as fresh.

On that date, learned Additional Commissioner (Judicial) 1st, Varanasi Division, Varanasi shall remain present before this Court along with the record to assist the learned standing counsel."

8. Pursuant thereto necessary affidavit has been filed. I have gone through the affidavit filed by the respondents.

9. Sri C.S.Singh, learned Additional Chief Standing counsel contends that in the judgment dated 10.12.2013 passed by this Court, the sentence beginning with, "Even otherwise the suit itself is barred under Section 49 and therefore there would be no question of grant of any final relief much less an interim relief", was not an observation of the court but it was the submission of the learned counsel for the petitioner made before the court and taking note of that this Court has directed the petitioner to file objection which was also directed to be considered. I am not satisfied with the stand taken by the learned standing counsel for the simple reason that the suit itself was dismissed as barred by section 49 of the U.P. Consolidation of Holdings Act and the appeal was also barred by time and the same was not competent.

10. The learned Additional Commissioner on the earlier occasion has granted an interim order for maintaining status quo without condoning the delay whereas the appeal was admittedly barred by time and in that eventuality this Court was approached through Writ C No. 67250 of 2013 and this Court taking note of the fact has observed that without there being any notice to the other side and without condonation of delay no interim order could be passed and in this regard the petitioner was required to file objection before the appellate Court. It was further observed that since the suit itself was barred under Section 49 of the Consolidation of Holdings Act, 1953 there could be no occasion to grant any final relief much less an interim relief.

11. Now after the above order the learned Additional Commissioner has condoned the delay and maintained the earlier interim order. So far as condonation of delay is concerned I do

not find any ground to interfere with the view taken by the learned Additional Commissioner as it was positive exercise of discretion in view of the law down by the Apex Court in State of Bihar and others Vs. Kameshwar Singh and others reported in JT 2000(5) 389 wherein the Apex Court has observed as under :-

"..... Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

12. However, I am of the considered opinion that the learned Additional Commissioner has committed manifest error of law in continuing the earlier interim order which could not be granted as unless delay was condoned there could be no appeal in view of the law laid down by the Apex Court in Noharlal Verms vs. District Coopeative Central Bank Ltd. Jagdalpur, 2008 14 SCC 445 wherein the Apex Court has held as under:

" 32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation a court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

13. Following the above judgment, this Court has also taken the similar view in Nagar Palika Parishad vs. Raghuraj Singh Public Inter College and others (2012 (8) ADJ 210). Otherwise also, even if it is assumed that it is a fresh interim order that could also not be passed in view of the earlier judgment of this Court rendered in Writ C No. 67250 of 2013. Therefore, in my considered opinion, the learned Additional Commissioner has not only mis-interpreted the judgment of this Court but also ignored the settled principle of law that unless delay is condoned there can be no appeal or revision, therefore no interim order could be passed in view of the provisions contained in Order 41, Rule 3A(3) of the Code of Civil Procedure, which provides that the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal.

14. Therefore, no interim order could be passed as here the appeal was not heard under Rule 11, Order 41 of the Code of Civil Procedure.

15. In the result the writ petition succeeds and is allowed in part. The impugned order dated 20.3.2014 passed by respondent no.2 in Appeal No. 21 of 2013 (Sanjay and others vs. Salik Ram and others) is quashed to the extent to which it has directed the continuance of the earlier interim order till the disposal of the appeal.

16. Since the delay has already been condoned, the learned Additional Commissioner is directed to decide the appeal expeditiously after hearing both the parties without granting any

unnecessary adjournment to the learned counsel for the parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 37999 of 2014

Vinod Kumar Gupta ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Singh

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Yadav, Sri S.C. Shukla

Constitution of India, Art.-226- cancellation of fair prices shop license-appeal pending-but stay application rejected-contention of petitioner that in view of two Division Bench direction-authorities restrained to create third party interest-hence stay ought to have granted-held-earlier judgment without specific issue regarding creation of third party interest-not binding effect while by subsequent Division Bench taking view of fresh allotment of fair price shop-being interlocutory measure subject to decision of appeal-in so long appeal allowed and license restored-petitioner no right to run the shop-rejection of stay application held-proper.

Held: Para-8
The exposition of law laid down in aforesaid Division Bench judgment, where the issue has been raised, argued and decided, constitute a binding precedent on this Court, with which I find myself bound.

Case Law discussed:
W.P. No. 19080 of 2008.

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

1. Heard Sri Birendra Singh, learned counsel for the petitioner and perused the record.

2. The only argument advanced in the writ petition is that during pendency of appeal of petitioner the fair price shop cannot be allotted to a third party.

3. It is not in dispute that petitioner had entered into a contract with respondents for running fair price shop sometimes in 1990 in Gram Panchayat Murara, Block Muftiganj, Tehsil Kerakat, District Jaunpur so as to distribute essential commodities to card holders within that area. On the ground of illegalities and irregularities in distribution of essential commodities petitioner's fair price shop agreement was suspended by Deputy Collector vide order dated 27.12.2013, which was passed in exercise of powers conferred under U.P. Scheduled Commodities (Distribution) Order, 2004 (hereinafter referred to as the "Order, 2004").

4. The petitioner preferred Appeal No. 32 of 2014 against aforesaid order of suspension and appeal was pending. In the meantime, Deputy Collector completed his inquiry and after considering petitioner's reply to show cause notice dated 27.12.2013 passed a final order dated 04.04.2014 cancelling fair price shop agreement of petitioner. Thereagainst petitioner preferred Appeal No. 52 of 2014, which is also pending. In this appeal petitioner filed an application requesting Appellate Authority that during pendency of appeal, petitioner's fair price shop should not be allotted to any third person but the application has been rejected by Appellate Authority by impugned order dated 04.07.2014, hence this writ petition.

5. Learned counsel for petitioner drew my attention to an interim order dated 16.09.2011 passed by a Division Bench of this Court in Lucknow in Misc. Bench No. 11977 of 2010, Vinod Kumar Mishra Vs. State of U.P. and others, providing that during pendency of appeal third party rights should not be created by appointing another shop dealer. He also drew my attention to another order dated 19.10.2011 passed in Misc. Bench No. 10373 of 2011, Jagannath Upadhyay Vs. State of U.P. and others, disposing of that writ petition in terms of interim order dated 16.09.2011.

6. It is contended that aforesaid decisions compel the Appellate Authority not to allow third party rights during pendency of appeal and, therefore, the impugned order is liable to be set aside.

7. It is no doubt true that a Division Bench decision is binding on this Court when I am sitting single. However, what is binding is a precedent laid down in the judgment and not the ultimate order passed as such. A binding precedent is arrived at by the Court when an issue is raised, argued and decided. In the two orders placed before this Court, I do not find that "third party right cannot be created", was an issue raised, argued and decided. There is no discussion in the judgment and only an operative part of the order which was an interim order initially, relied and followed subsequently in subsequent writ petition which was only disposed of in terms of that interim order.

7. It appears that the Hon'ble Court was not apprised of earlier Division Bench judgment on the subject wherein this issue has been considered and decided long back. I may refer hereat the Division Bench judgment in Writ Petition No. 19080 of 2008, Naubat Singh Vs. State of U.P. and others, decided on 11.04.2008, wherein this very issue was raised but was negatived by giving reasons. The Court said:

"Learned counsel for the petitioner contended that since the appeal is already pending it is not open to respondents to appoint another person as fair price shop dealer in respect to the area where the petitioner was working as fair price shop dealer.

However, we do not find any force in the submission. The petitioner's agreement for distribution of essential commodities having been cancelled admittedly, presently he has no right in the matter of distribution of essential commodities of fair price to the public at large. Since there appears to be no person available for distribution of essential commodities of fair price, the public at large cannot be made to suffer and, therefore, the respondents decided to appoint another person as a fair price shop dealer pursuant whereto the impugned order dated 02.04.2008 has been passed. The aforesaid order obviously is for appointing an intermittent dealer and subject to the result of the petitioner's appeal, inasmuch as, in case the said appeal is allowed and the petitioner's agreement is restored, any person who has been appointed in place of petitioner would have no right to continue thereafter, but till the time, appeal of petitioner is decided, in our view, the petitioner has no right, legal or otherwise, to restrain the respondents from making arrangement of distribution of essential commodities appointing another person as

dealer in the area where the petitioner was operating as fair price shop dealer.

Learned counsel for the petitioner seeks to place reliance on order dated 23.11.2007 passed by Hon'ble Single Judge of this Court in Writ Petition No. 57682 of 2007 wherein an order was passed restraining the authorities from doing any fresh allotment of the fair price shop till the appeal is decided.

In our view, the aforesaid order would have no application in the present case. Firstly, in the earlier writ petition filed by the petitioner which has been disposed of this Court on 07.03.2008 directing the appellate authority to decide his appeal within three months, no such order has been passed restraining the respondents from allotting shop in question to any one and for the said purpose only no fresh petition would lie. Secondly, we are of the view that so long as the licence of a person continued to be cancelled he has no right either in law or otherwise to create any obstruction in the way of respondent-authorities in making arrangement for distribution of essential commodities to the public at large in such manner as they found expedient and in the interest of public at large. If the authorities found it appropriate that the people would be better serve if the fair price shop is allotted to a third person, we do not find any illegality or irregularity in such exercise of power unless it can be shown that it is mala fide or without jurisdiction or is inconsistent to any provision or executive order having force of law. No such provision has been placed before us." (emphasis added)

8. The exposition of law laid down in aforesaid Division Bench judgment, where the issue has been raised, argued and decided, constitute a binding precedent on this Court, with which I find myself bound.

9. In view thereof, the writ petition lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2014

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Civil Misc. Writ Petition No. 42027 of 2005 alongwith W.P. No. 42028 of 2005.

Moti Lal Nehru Inter College, Bareily
...Petitioner
Versus
Peethaseen Adhikari Labour Court & Anr.
...Respondents

Counsel for the Petitioner:
Sri Dinesh Chandra Mishra, Sri M.C. Mishra

Counsel for the Respondents:
Sri S.S. Nigam, S.C., Sri Shivendra Kumar Gupta, Sri T.S. Dabas, Sri Abhay Raj Singh, Sri Harish Chandra Dwivedi

Constitution of India, Art.-226-Service Law-dismissal from service-on conviction in criminal case-honorably acquittal-entitled for reinstatement without back wages.

Held: Para-21
This apart, it is trite law that once the order of conviction passed by the trial court is set aside by the higher court , there does not exist any conviction in the eye of law at all. Punitive action taken against the respondents-employees was based solely on the order of conviction and the removal of the order of conviction has the result of removing the entire basis of the order of termination.

Case Law discussed:
1961 (2) FLR 241; (2006) 5 SCC 446; (2009) 6 SCC 791; 2010 (2) SCC 252.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. The writ petition no. 42027 of 2005 has been filed challenging the award of the Labour Court, Bareilly dated 4.11.2004 in adjudication case no. 31 of 1999. The dispute referred vide Government Order dated 26.2.1999 was as to whether the termination of services of the respondent no.2 namely Bheem Sen son of Hori Lal, class IV employee with effect from 23.1.1980 was legal or not.

2. In the connected writ petition no. 42028 of 2005, the award dated 2.11.2004 passed by the Labour Court, Bareilly is under challenge. In the said case also the dispute referred vide Government Order dated 26.2.1999 was as to whether the termination of services of respondent no.2 Sita Ram son of Shri Ram Dayal from the post of peon with effect from 23.1.1980 was legal or not.

3. Both the employees, namely, Bheem Sen and Sita Ram respondent no.2 in the connected writ petitions were class IV employees in the petitioner institution. They were terminated by a common order dated 29.1.1980 on the ground that they were convicted and sentenced for life imprisonment in Sessions trial no. 143 of 1979 for the offence under Sections 302 and 304 I.P.C. by judgment and order dated 22.1.1980 passed by the IV Additional District and Sessions Judge, Bareilly. Both the respondent no.2,namely, Bheem Sen and Sita Ram filed criminal appeal no. 316 of 1980(Bheem Sen and another Vs. State of U.P.) before this Court challenging the order of conviction dated 22.1.1980 passed by the Sessions Court. The appeal was allowed by the judgement and order dated 15.7.1998 and they were honourably acquitted by the appellate court. After acquittal they had approached the petitioner for their reinstatement. They were denied the same and as such they had raised industrial dispute which was referred by two separate referral order of the same date i.e. 26.2.1999.

4. The Labour Court, Bareilly passed two separate awards in favour of both the employees which are under challenge, in the two connected writ petition.

5. As the controversy involved in both the writ petitions, in substance, is same and hence both the writ petitions are being decided by this common judgement.

6. In so far as the writ petition no. 42027 of 2005 is concerned, the respondent no. 2 was appointed as class IV employee on the post of Daftari in the year 1963-64 in the petitioner institution. The petitioner institution was recognized up to High School at the time of appointment of the respondent no.2.

7. In so far as the respondent no.2 in writ petition no. 42028 of 2005 is concerned, he was appointed as class IV employee as Chaukidar in the year 1976-77.

8. It may be mentioned that as in the connected writ petitions both Bheem Sen and Sita Ram are arrayed as the respondent no.2 and hence they will jointly be referred as respondents hereinafter.

9. The facts in brief relevant for deciding the controversy are that against respondents Bheem Sen and Sita Ram, a First Information Report was lodged

under Sections 302 and 364 I.P.C. and registered as case crime no. 9 of 1979 in the police station Deorania, District Bareilly. They were implicated in the charges of kidnapping and murder. They were arrested in the aforesaid crime and therefore they were suspended by the Principal by two separate orders of the same date i.e. 27.1.1979.

10. The respondents Bheem Sen and Sita Ram were convicted for life imprisonment in the Sessions Trial No. 143 of 1979 by judgment and order dated 22.1.1980 passed by the IV Additional District and Sessions Judge, Bareilly. On account of said conviction, the Principal of the college by a common order dated 29.1.1980 terminated the services of respondents Bheem Sen and Sita Ram with effect from 23.1.1980. The termination order is on record as "Annexure-6" to the writ petition.

11. A perusal of the termination order indicates that the services of the two employees were terminated only on the ground of their conviction for life imprisonment in Sessions Trial No. 143 of 1979 by judgement and order dated 22.1.1980.

12. In the writ petition, it has been brought on record that after the termination of the services of respondents namely Bheem Sen and Sita Ram; two class IV employees were appointed on the vacant post namely, Harish Babu and Mehar Singh after seeking approval of the District Inspector of Schools. Harish Babu was appointed on 16.3.1980 and Mehar Singh was appointed on 26.3.1979. The permission for appointment of the incumbents as class IV employee was sought by letter dated 12.2.1979 sent to the District Inspector of Schools, who had granted approval for temporary arrangement to be made on account of suspension of the respondents Bheem Sen and Sita Ram. The record further indicates that Harish Babu was appointed on the vacant post of Daftari with effect from 17.3.1980 on temporary basis whereas Mehar Singh was appointed on temporary basis with effect from 25.3.1979 on the post of Chaukidar. The information regarding appointment of Harish Babu and Mehar Singh was sent to the District Inspector of Schools by the Principal vide letters dated 16.3.1980 and 26.3.1979; respectively. The District Inspector of Schools vide letter addressed to the Principal dated 1.5.1980 had acknowledged the documents sent for appointment of Harish Babu as Daftari.

13. For their reinstatement on the post of Daftari and peon, both the respondents namely Beem Sen and Sita Ram filed C.P. Case No. 61(B) of 1998 and 62(B) 1998; respectively, and matter was referred to the Labour Court by the State Government by two separate referral orders of the same date i.e. 26.2.1999 as indicated above. It was stated in the written statements filed by both the respondents-employees that after their acquittal they had submitted representations to the management of the college but no reply was received by them. Copy of the judgement of acquittal in criminal appeal no. 316 of 1980 was also sent to the institution. As no reply was received till 22.9.1988, they were constrained to raise the present dispute.

14. The Principal of the institution in reply to the written statement filed by the respondents-employees before the Labour Court took the stand that after removal of

the respondent-employees from service, two people have already been engaged in the college as against the vacant post and now there was no vacancy in the college. Though respondents-employees have been discharged of the offence and acquitted yet a considerable time had been elapsed between the period of their removal and acquittal and further rights of two other incumbents who were appointed on the said post had accrued. As those two incumbents were appointed in the institution from the year 1979-80, as such, there was no question of reinstatement of the respondents-employees. It was also contended that when the respondents-employees were removed from service they never made representation for their reinstatement nor filed any appeal before the higher authority against their termination order. Thus, they did not challenge the order of their removal from service. In view thereof, their claim had suffered from a considerable delay and no relief could be granted to them. The Labour Court after consideration of respective submissions of both the parties and perusal of the record, recorded a finding in both the Adjudication case No. 30 of 1999 (in the case of Sita Ram) and No. 31 of 1999 (in the case of Bheem Sen) that admittedly no disciplinary inquiry was conducted against these employees. Their services were terminated only on the ground that they were convicted by the Sessions Court for the offence under Sections 302 and 364 I.P.C. However, conviction was set aside by the appellate court and they were honourably acquitted.

15. In view of the said scenario, the termination of the services of the respondents-employees would fall within the meaning of retrenchment and as the provisions of Section 6-N of U.P. Industrial Dispute Act have not been complied with, the termination order dated 23.1.1980 was clearly illegal. The respondents-employees were directed to be reinstated with effect from the date of termination i.e. 23.1.1980 along with backwages, continuity of service and all other consequential benefits.

16. Learned counsel for the petitioner assailing the award submits that the finding of the Labour Court for reinstatement of respondent no.2 is illegal as it was beyond the scope of Labour Court. He further submits that the labour court had no jurisdiction to entertain the dispute with regard to the educational institution. Moreover, difficulty in reinstatement of the employees concerned was clearly narrated before the Labour Court, but it did not consider the same. He further submits that the two incumbents who joined after termination of the services of the respondents-employees were neither party before the Labour Court nor in the present writ petition.In case the termination of respondents-employees were held illegal, the two incumbents Harish Babu and Mehar Singh had to go who had a right to the posts in question on account of their working in the institution for a long time.

17. Learned counsel for the respondent no.2 Shri Shivendra Kumar Gupta submits that admittedly the dismissal of the two respondents-employees was in consequence to the order of conviction passed by the Sessions Court. There is no dispute that no independent departmental inquiry was ever held against these delinquent employees. Once the order of conviction was set aside by the higher court in

appeal, the natural consequence would be that the respondent-employees ought to have been reinstated in service, immediately. Once the order of conviction failed, the very foundation on which the order of dismissal was based disappeared. Consequently, the order of dismissal must fall with the acquittal of the respondents-appellants.

18. Having heard the rival submissions of the learned counsel for the parties and perused the record, this court finds that the only controversy in the present writ petition is as to whether after the acquittal of respondents -employees by the appellate court they were entitled for reinstatement in the service or not.

19. Admittedly these two employees were permanent employees in the petitioner institution. They were suspended and terminated only on account of their implication and conviction (later on) in the criminal case. Both the respondents were honourably acquitted by the judgement and order of this court dated 15.7.1998. As no independent departmental inquiry was conducted against them, the natural corollary would be that the request of the employees was required to be redressed by the petitioner. Since this was not done, they had to approach the labour court for redressal of their grievances.

20. A very important aspect of the matter which is apparent from the record is that the two incumbents namely Harish Babu and Mehar Singh were appointed on temporary basis on the approval granted by the District Inspector of Schools in order to meet the exigencies shown by the then Principal of the institution. Mehar Singh was appointed in place of Sita Ram on 25.3.1979 by the order of the Principal of the institution dated 26.3.1979 and the same was approved by the District Inspector of Schools on 13.4.1979. The letter of the Principal addressed to the District Inspector of Schools dated 26.3.1979 is on record "as annexure-9" to the writ petition. Thus it is apparent that Mehar Singh was appointed during the period of suspension of Sita Ram meaning thereby prior to his termination with effect from 23.1.1980. There is nothing on record to indicate that the interim arrangement made during the termination of the respondents- employees by temporary appointment of Harish Babu and Mehar Singh was ever converted into permanent arrangement.

21. This apart, it is trite law that once the order of conviction passed by the trial court is set aside by the higher court , there does not exist any conviction in the eye of law at all. Punitive action taken against the respondents-employees was based solely on the order of conviction and the removal of the order of conviction has the result of removing the entire basis of the order of termination.

22. This Court in 1961(2)FLR, 241 Divisional Superintendent N. Rly. Allahabad Vs. Ram Saran Das has observed that with the setting aside of the order of conviction, the very foundation on which the order of dismissal,removal or reduction in the rank must fall. In the case of G.M. Tank Vs. State of Gujarat and others reported in (2006) 5 SCC 446 the Apex Court has considered the sustainability of the departmental proceedings based on the identical and similar set of facts as in the criminal case and it was held that as there was no evidence against the employee to hold

him guilty and he had been honourably acquitted in criminal trial during the pendency of the proceedings,challenging his dismissal, the same required to be taken note of and the appeal deserves to be allowed. However, payment of backwages was denied. In (2009)6 SCC 791 Basanti Prasad Vs. Chairman, Bihar School Examination Board and others, it was held that the punishment was imposed on the basis of an order of conviction having been set aside and no independent departmental inquiry was held against the delinquent employee, grievances raised by the employee's wife for monetary and service benefits payable to her late husband (who died during the pendency of litigation) could not have been rejected, resorting to a hypertechnical approach by the the high court. However, placing reliance on G.M. Tank (Supra) it was held that the appellant was not entitled to backwages. In the case of State of Uttar Pradesh and another Vs. Mahindra Nath Tiwari reported in 2010 (2) SCC 252 it was held that only question remains of back-wages as employee dismissed from the service on conviction was not reinstated on acquittal in appeal. There was delay of 22 years in filing the writ petition against the order of termination of the services of the employee. The appeal was disposed of by the Apex Court with the clarification that the employee respondent would not be entitled to back-wages.

23. In view of the law laid down by the Apex Court now the question remains to be decided by this court is as to what relief can be granted to the respondents-employees at this stage.

24. In so far as the employee Bheem Sen in writ petition no. 42027 of 2005 is concerned, it has been brought on record by way of supplementary counter affidavit filed by him that he was superannuated from the service on 31.3.2005 and he was never reinstated.

25. The interim order passed in writ petition no. 42027 of 2005 is that execution of the award shall remain stayed till the next date of listing. The order sheet indicates that the interim order was extended from time to time. As the respondent-employee could not be reinstated in service after termination order passed in the year 1980, this court is of the view that he is not entitled to back-wages. However it is apparent from the record that the respondent employee namely Bheem Sen son of Hori Lal had suffered on account of illegal approach of the petitioner institution.Though he was entitled for reinstatement as early as in the year 1978 when he was acquitted,yet the benefit was illegally denied to him. In view thereof in order to meet the ends of justice the court directs that in (writ petition no. 42027 of 2005) Bheem Sen son of Hori Lal be awarded a lump sum compensation of Rs. 50,000/- for the hardships and sufferance on account of illegal act of the petitioner institution.

26. it is,therefore, directed that, in case, the respondent no.2 Bheem Sen is entitled for any other benefit for the period of services rendered by him in the institution, the same shall also be calculated and paid to him within a period of two months from the date of production of certified copy of this order.

27. In so far as the case of Sita Ram (in writ petition no. 42028 of 2005) is concerned , it may be noted that in the said case the interim order dated

24.5.2005 passed by this court is as follows:-

"In the meantime, if the petitioner reinstates the respondent-workman within one month from today and ensures payment of wages regularly, the operation of the award impugned in the present writ petition dated 2nd November, 2004 shall remain stayed.

In case of default, the petitioner shall not be entitled to the benefits of this order."

28. It has been brought on record that pursuant to the interim order dated 24.5.2005 passed by this court, the petitioner institution allowed him to join the duties under compelled circumstances. An application dated 7.3.2011 bringing on record the said fact has been filed before this court.

29. Shri Dinesh Chandra Mishra, learned counsel for the petitioner also stated at bar that in pursuance of the order dated 19.4.2010 passed by the District Inspector of Schools, Mehar Singh was adjusted against the vacant post of another class IV employee with effect from 1.2.2010. The respondent Sita Ram had already joined the services on 21.6.2005 under the interim order passed by this court.

30. In view of the facts discussed above, this court directs that the salary of Sita Ram be paid with effect from the date of his reinstatement ie. 21.6.2005 pursuant to the interim order, if not already paid, as he has been held entitled to reinstatement after acquittal in criminal case in the year 1998. However he shall not be entitled to back-wages. It is further directed that the arrears of salary of Sita Ram along with all other consequential benefits, if any, shall be calculated and paid to him within a period of four months from the date of production of certified copy of this order, in the petitioner institution.

31. Consequently, both the writ petitions are allowed with the observations made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2014

BEFORE
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 44673 of 2008

Smt. Saroj Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.P. Verma

Counsel for the Respondents:
C.S.C., Sri Rajeev Ojha

Limitation Act, Section-5-condonation of delay 118 days-reason disclosed after death of claimant-under depression could not file within time-held-proper-can not be rejected.

Held: Para-16
So far as the other reason given by the learned Tribunal for rejecting the applications, i.e. the delay/ limitation in filing the same is concerned, this court is of the view that in view of averments made in the application for condonation of delay, there was sufficient cause for condoning such delay and the Tribunal erred in taking a very narrow and strict view of the matter whereas in fact it should have taken a liberal view. Reference may be made in this regard to the Supreme Court judgment reported in Collector, Land Acquisition, Anantnag Vs. Katiji, AIR 1987 SC 1353. The

reason given in the application for condonation of delay was that after the death of late Radhey Shyam Sharma, the legal heir/ wife was in a state of depression and anxiety on account of which she could not file application for substitution within a reasonable period and it is only after being able to come out of the mental anxiety and trauma of his death, she filed the application, which, according to the Tribunal, was delayed by 118 days. In the facts and circumstances, there was sufficient explanation for the delay as such the said order of the learned Tribunal is not sustainable even on this count.

Abatement of claim petition-death of sole claimant-accident claim on personal body injury-during pendancy of claim petition-in another accident-died-Tribunal dismissed claim petition as opted-held-right to sue of heirs still service-petition can not be dismissed as abted.

Held: Para-11
In the instant case, the claimant had filed the claim petition during his life time. After his death, though the claim for compensation based on the personal injuries sustained in the accident dated 09.02.2005 stood abated and the right to sue did not survive any further but the said right survives in favour of the petitioner herein, who is legal heir of the claimant in so far as the loss to the estate of the deceased is concerned, keeping in mind the above mentioned full bench decision of the Madhya Pradesh High Court and Sections 1 & 2 of the Legal Representatives Suits Act, 1855.

Case Law discussed:
2006(1) ACC 378; 2006(3) ACC 462; 1996 ACJ 440; AIR 2007 MP 38; 1995 ACJ 706. AIR 1987 SC 1353.

(Delivered by Hon'ble Rajan Roy, J.)

1. By means of this writ petition, a challenge has been made to the order dated 30.08.2007 passed by the Motor Accident Claims Tribunal in M.A.C.P. No.195 of 2005, Radhey Shyam Sharma Vs. Mohd. Kasim and others, whereby the application for substitution filed by the petitioner herein along with the application for condonation of delay have been rejected on the ground that the claim petition having been filed by the claimant on the basis of a personal injury, the same stood abated on his death and the right to sue did not survive in favour of legal heirs/ representatives.

2. The facts of the case in brief are as under:

3. On 09.02.2005, an accident took place in which late Radhey Shyam Sharma sustained injuries. Based on these injuries, Sri Sharma filed the above mentioned claim petition seeking compensation to the tune of Rs.16,50,000/- under various heads plus 18% interest per annum thereon. Sri Sharma subsequently met with another accident and consequent thereto died on 09.06.2005. It is not in dispute that the death of Sri Sharma was not on account of the injuries sustained by him in the first accident, which took place on 09.02.2005. In the above mentioned claim petition, a written statement was filed by the Insurance Company on 24.11.2005, inter allia, stating that the claimant had already died and the petition had abated. Subsequently on 12.01.2006, an application for substitution was filed by the petitioners as the legal heirs of Sri Sharma along with an application for condonation of delay in filing the same. Objections to the aforesaid application were filed on 28.08.2006, inter allia, stating that the claim had abated and the right to sue did not survive.

4. On 30.08.2007, the aforesaid applications were rejected by the learned Tribunal on two grounds, firstly, the claim had abated after the death of the claimant in view of full bench decision of the Karnatka High Court in the case of Uttam Kumar Vs. Madhav and others reported in 2006 (1) ACC 378 Karnatka and other judgments viz. Virendra Singh Vs. Ashok Kumar and others, 2006 (3) ACC 462 and the decision of the Supreme Court allegedly in the case of M.S. Ajuta Hasan Vs. T.G. Nayyar, 1996 ACJ 440. Secondly, the application for substitution had been filed with a delay of 118 days and the cause shown in the application for condonation of delay was not sufficient nor satisfactory.

5. Heard learned counsel for the petitioner and perused the records.

6. Notices were issued to the respondent No.3 but nobody has put in appearance on his behalf. The counsel for the respondent No.2 also did not appear.

7. The learned counsel for the petitioner contends that the petitioner being legal heir/ wife of late Radhey Shyam Sharma and the claim petition having been filed by Sri Sharma during his lifetime, she was entitled to be substituted at his place as the right to sue survived in her favour. The learned Tribunal erred on facts and in law in rejecting the application for substitution as having been abated and also as being barred by limitation.

8. A perusal of the impugned order reveals that the learned Tribunal has rejected the applications as abated mainly relying upon the judgments referred to above. So far as the legal position that in cases of personal injury, the claim dies with the claimant and the right to sue does not survive is concerned, there cannot be much doubt and the decisions referred in the impugned order on this issue to the aforesaid extent cannot be disputed.

9. However having said so, this court would like to refer to another full bench decision of the Madhya Pradesh High Court in the case of Smt. Bhagwati Bai Vs. Bablu and others, AIR 2007 MP 38, wherein after considering the provisions of Section 306 of the Indian Succession Act and the provisions of the Legal Representatives Suits Act, 1855, it is held that though the claim based on personal injury would abate on the death of the claimant but the right to sue will survive so far as the loss to the estate of the deceased is concerned and to this extent, the proceedings can be pursued by the legal heirs/ representatives of the deceased. The relevant extracts of the aforesaid full bench decision are being quoted below:

"9. A reading of Sub-section (1)(a) of Section 166 of the Motor Vehicles Act, 1988, would show that only a person who has sustained the injury, can file an application for compensation. Further a reading of Sub-section (1)(d) of Section 166 would show that any agent duly authorised by the person injured can also file such application for compensation for injury suffered by such person. Sub-section (1)(c) of Section 166 provides that where death has resulted from the accident, all or any of the legal representatives of the deceased can file an application for compensation and Sub-section (1)(d) of Section 166 provides that a legal representative of the deceased can also file claim where death has resulted

from the accident. Thus, in a case of personal injury not resulting in death the legal representative of such person who was injured and who dies subsequently not on account of accident but for some other reason cannot maintain an application for compensation for personal injury sustained in an accident under Sub-section (1) of Section 166 of the Motor Vehicles Act, 1988. Hence, the contention of Mr. Choubey, learned Counsel appearing for the appellants, that under Section 166(1) of the Motor Vehicles Act, 1988, an application for compensation for personal injury can be filed also by the legal representatives of the deceased whose death was not as a result of accident but for some other reason is not correct.

10. Section 306 of the Indian Succession Act, 1925, on which reliance has been placed by Mr. Bansal, learned Counsel appearing for the respondent No. 3/Insurance Company, is quoted herein below:

"Section 306. Demands and rights of action of or against deceased survive to and against executor or administrator.--

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his deceased, survive to and against his executors or administrators; except cause of action for defamation, assault as defined in the Indian Penal Code, 1860 (45 of 1860) or other personal injuries not causing the death of the party; and except also cases where, after the death of the parly, the relief sought could not be enjoyed or granting it would be nugatory."

The aforesaid section inter alia provides that all rights to prosecute any action or special proceeding existing in favour of a person at the time of his death, survive to his executors or administrators except causes of action for personal injuries not causing the death of the party. Thus, under Section 306 of the Indian Succession Act, 1925, the executors or administrators of a deceased will have a right to prosecute or continue any action or special proceeding existing in favour of the deceased at the time of his death, except causes of action for personal injury not causing death of the party. Therefore, where the accident does not cause death of a party but only causes personal injury to him, his executors or administrators will not have a right to prosecute or continue to prosecute an application for compensation for personal injury suffered by the party in a motor accident.

11. In Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair (1986 ACJ 440 : AIR 1986 SC 411), the Supreme Court observed that the principle contained in Section 306 of the Indian Succession Act, 1925, will apply not only to executors or administrators but also to other legal representatives. Paragraph 8 of the judgment of the Supreme Court in Melepurath Sankunni Ezhuthassan v. Thekittil Geopalankutty Nair (supra), as reported in the AIR, is quoted hereinbelow:

"Section 306 further speaks only of executors and administrators but on principle the same position must necessarily prevail in the case of other legal representatives, tor such legal representatives cannot in law be in better or worse position than executors and administrators and what applies to

executors and administrators will apply to other legal representatives also."

Hence by virtue of the principle in Section 306 of the Indian Succession Act, 1925, the legal representatives of a deceased, who suffers personal injury in a motor accident and who dies subsequently for some other reason, cannot prosecute or continue to prosecute an application for compensation under Sub-section (1) of Section 166 of the Motor Vehicles Act, 1988.

12. Section 1 of the Legal Representatives Suits Act, 1855, confers rights on the executors, administrators or representatives of any person deceased to maintain an action for any wrong committed in the lifetime of a deceased person. The said Section 1 of the Legal Representatives Suits Act, 1855, is quoted herein below:

'S. 1..... Executors may sue and be sued in certain cases for wrongs committed in lifetime of deceased.-- An action may be maintained by the executors, administrators or representatives of any person deceased, for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death and the damages when recovered shall be part of the personal estate of such person;

and further, an action may be maintained against the executors or administrators or heirs or representatives of any person deceased for any wrong committed by him in his lifetime for which he would have been subject to an action, so as such wrong shall have been committed within one year before such person's death and the damages to be recovered in such action shall, if recovered against an executor or administrator bound to administer according to the English Law, be payable in like order of administrator as the simple contract debts of such person."

13. It will be clear from Section 1 of the Legal Representatives Suits Act, 1855, quoted above that the legal representatives of any deceased person can maintain an action for any wrong committed in the lifetime of such deceased person, which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by such person, so as such wrong shall have been committed within one year before his death and the damages when recovered shall be part of the personal estate of such person. It is by virtue of this provision in Section 1 of the Legal Representatives Suits Act, 1855 that the legal representatives of the deceased person can also maintain or continue to maintain an application for compensation for personal injury suffered in the lifetime of such person in a motor accident which has occasioned pecuniary loss to the estate for which such person might have filed an application for compensation under Section 166(1) of the Motor Vehicles Act, 1988. But where a personal injury suffered by a person during lifetime in a motor accident has not occasioned pecuniary loss to the estate of the such person, the legal representatives of the deceased person cannot maintain or continue to maintain an application for compensation under Sub-section (1) of Section 166 of the Motor Vehicles Act, 1988.

14. Further, under Section 1 of the Legal Representatives Suits Act, 1855, an application for personal injury suffered by a person during lifetime in a motor accident can be maintained and continued by the representatives of the deceased person for the pecuniary loss occasioned to the estate of the deceased person so long as the accident has been caused within one year before his death. Moreover, the accident may have occasioned pecuniary loss to the estate of a person in many ways and it is for the Tribunal or the Court to decide the loss which has been occasioned to the estate of the person who had suffered personal injury in a motor accident depending on the pleadings and proof before the Court in each case. In Paragraph 21 of the judgment of the Division Bench of this Court in Umedchand Golcha v. Dayaram and Ors. (supra), the Division Bench of this Court has held :-

"Further, the question is which items can form loss to the estate of the deceased. Of course, exhaustive list of these items cannot be given, since it would depend upon pleadings and proof brought before the Court by the claimant/legal representatives. But it can be held that loss of accretion to the estate through savings or otherwise caused on account of accident permanently or temporarily can be worked out on giving facts or assessing the loss to the estate. Further, the existing state of estate may suffer loss by application towards medical expenses, expenditure on diet, expenditure on travelling, expenditure on attendant, expenditure on diet, expenditure on Doctor's fee, reasonable monthly/annual accretion to the estate for certain period etc. The claimant does not keep separate amount for such unforeseen expenditures during his life-lime. His income is at the most divided in three parts, namely, expenditure on himself, expenditure on family and the savings to the estate. Therefore, he has to meet such expenditure from out of his estate. There may be circumstance where it is born by his legal representatives. Therefore, it is held that the legal representatives can ask for loss to the estate of these items by production of satisfactory evidence unless Court is able to draw lifetime conclusion about such expenditures from out of the estate, from the facts and circumstances and on the basis of experience."

15. In the result, we are of the considered opinion that a claim for personal injury filed under Section 166 of the Motor Vehicles Act, 1988 would abate on the death of the claimant and would not survive to his legal representatives except as regards the claim for pecuniary loss to the estate of the claimant. The matter will now be placed before the Division Bench for assessment of the pecuniary loss caused to the estate of the deceased Pancham Singh on account of the motor accident suffered by him on the basis of pleadings and proof before the Tribunal/Court. "

11. In the instant case, the claimant had filed the claim petition during his life time. After his death, though the claim for compensation based on the personal injuries sustained in the accident dated 09.02.2005 stood abated and the right to sue did not survive any further but the said right survives in favour of the petitioner herein, who is legal heir of the claimant in so far as the loss to the estate of the deceased is concerned, keeping in mind the above mentioned full bench decision of the Madhya Pradesh High Court and Sections 1 & 2 of the Legal Representatives Suits Act, 1855.

12. So far as the full bench judgment of the Karnatka High Court in Uttam Kumar's case is concerned, there can be no quarrel with regard to the proposition of law laid down therein with regard to the claim based on personal injury in view of Section 306 of Indian Succession Act, 1925 is concerned, however the said decision does not consider the other aspect relating to the loss caused to the estate of the deceased in the light of the provisions of the Act of 1855, which have been considered by the full bench of the Madhya Pradesh High Court in Smt. Bhagwati Bai's case (supra).

13. The learned Tribunal herein has not considered the judgment of the full bench of the Madhya Pradesh High Court nor the aforesaid aspect while rejecting the applications in question. So far as the judgment of the learned single Judge of the Madhya Pradesh High Court in the case of Shantabai Dube and another Vs. Kanhaiyalal and another, 1995 ACJ 706 is concerned, the same cannot be treated as good law in view of subsequent full bench decision of the same High Court in Smt. Bhagwati Bai's case (supra).

14. In view of the above, the irresistible conclusion is that the learned Tribunal erred in rejecting the applications in question on the ground of abatement of the claim petition without considering the issue of loss to the estate of the deceased. The learned Tribunal failed to appreciate that for considering this aspect of the matter not only the right to sue survived but the substitution of the petitioner herein was essential.

15. The learned Tribunal appears to have been misled by the fact that the applications before it did not disclose the cause of the death of Radhey Shyam Sharma and which, according to this court, was wholly irrelevant. The application for substitution clearly mentioned that the date of death of Sri Sharma was 19.06.2005 and the same was on account of an accident and it nowhere stated that the death was on account of injuries sustained in the first accident.

16. So far as the other reason given by the learned Tribunal for rejecting the applications, i.e. the delay/ limitation in filing the same is concerned, this court is of the view that in view of averments made in the application for condonation of delay, there was sufficient cause for condoning such delay and the Tribunal erred in taking a very narrow and strict view of the matter whereas in fact it should have taken a liberal view. Reference may be made in this regard to the Supreme Court judgment reported in Collector, Land Acquisition, Anantnag Vs. Katiji, AIR 1987 SC 1353. The reason given in the application for condonation of delay was that after the death of late Radhey Shyam Sharma, the legal heir/ wife was in a state of depression and anxiety on account of which she could not file application for substitution within a reasonable period and it is only after being able to come out of the mental anxiety and trauma of his death, she filed the application, which, according to the Tribunal, was delayed by 118 days. In the facts and circumstances, there was sufficient explanation for the delay as such the said order of the learned Tribunal is not sustainable even on this count.

17. In view of the above discussion, the impugned order dated 30.08.2007 is quashed. The applications for substitution and condonation of delay are allowed.

The substitution of the petitioner herein as party in the M.A.C.P. No.195 of 2005 shall be allowed to be carried out within a period of one month from the date of submission of a certified copy of this order and the learned Tribunal shall proceed thereafter in accordance with law in the light of the observations made hereinabove for ascertaining the loss, if any, caused to the estate of the deceased late Radhey Shyam Sharma on account of the accident suffered by him on 09.02.2005 on the basis of the pleadings and proof adduced before it.

18. The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.05.2014

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE MRS. RANJANA PANDYA, J.

Civil Misc. Writ Petition No. 55384 of 2009

Mohd. Sagir ...Petitioner
Versus
Dakshinanchal Vidyut Vitran Nigam Ltd. Agra & Ors. ...Respondents

Counsel for the Petitioner:
Sri B.C. Rai

Counsel for the Respondents:
Sri Rajesh Tripathi, Sri H.P. Dube, Sri Rajendra Kumar Mishra

Constitution of India, Art.-226-Alternative Remedy-writ petition-held no absolute bar-where principle of Natural Justice violated-and petition pending since long-assessment on opening meter-behind the back of petitioner-opportunity to file objection-held must in view of section 126(3) of Act 2003-objection to avail remedy of appeal under Section 127-held no bar.

Held: Para-29
Learned counsel for the petitioner has also raised some other submissions regarding the assessment made by the respondents on 30/9/2009 including the submissions that the assessment made for 365 days was unjustified since the respondents have already conducted the inspection on 28/4/2009 and no period prior to the said date can be taken for assessment. However, we having taken the view that the petitioner was entitled for opportunity to file an objection against the provisional assessment notice dated 05/9/2009, we leave it open to the petitioner to raise such objection as permissible regarding the provisional assessment, and do not feel it necessary to decide the said submissions in this writ petition.

Case Law discussed:
2009(1) ADJ 430; 1998 (8) SCC 1.

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

1. We have heard Shri B.C. Rai, learned counsel for the petitioner and Shri Rajenda Kumar Mishra, learned counsel appearing for the respondents.

2. Counter and rejoinder affidavits having been exchanged between the parties, with the consent of the learned counsel for the parties, we proceed to decide the writ petition finally.

3. By this writ petition, the petitioner, proprietor of M/s Monex Glass Private Limited has challenged the order dated 30/9/2009, by which the Executive Engineer finalized the theft assessment on the basis of checking dated 16/8/2009. Petitioner has also prayed for appropriate writ, order or direction declaring the meter testing report dated 03/9/2009 as illegal and arbitrary.

4. Brief facts of the case which emerge from the pleadings of the parties are:That the petitioner, had a contracted load of 498 KVA from the Dakshinanchal Vidyut Vitran Nigam Limited (hereinafter called the "Corporation"). Two meters have been installed by the Corporation i.e. main meter in the meter room and one out door meter installed outside the factory premises at the same line. On 20/8/2008, the Officers of the Corporation inspected the main meter and outdoor meter and no irregularity was found. Inspection report dated 20/8/2008, was prepared accordingly. On 28/4/2009, inspection was again carried out by the Officers of the Corporation along with authorized representatives of the manufacturing company namely: M/s Secure Meters (Pvt.) Limited, but nothing incriminating was found either with the main meter or with the outdoor meter. Meter Sealing Certificate dated 28/4/2009 was prepared by the inspection team. An Office Memorandum dated 19/6/2009, was issued by the Corporation forming a Committee for testing of meters. On 16/8/2009, Officers of the Corporation inspected the factory premises of the petitioner. Inspecting team also obtained MRI report. New meters were installed at the factory premises of the petitioner and both the old meters were taken out and were given to the Assistant Engineer (Raid) for further investigation. On the same date i.e. 16/8/2009, Meter Sealing Certificate No.103 was prepared. On 19/8/2009, the checking team required the petitioner to return the Meter Sealing Certificate No.103 dated 16/8/2009 and thereafter the checking team prepared another Sealing Certificate No.105 dated 16/8/2009. On 18/8/2009, the Superintending Engineer, issued a letter directing the Executive Engineer to obtain an acknowledgement from the petitioner to appear on 27/8/2009 in the office of the Corporation at Agra. The said letter was served on the petitioner's Manager working in the factory, who on the said letter endorsed that for some work, petitioner has gone out of India and he shall return on 10/9/2008, he prayed for a date to be fixed. Another letter dated 25/8/2009 was issued by the Superintending Engineer addressed to the Executive Engineer in which it was mentioned that according to the Electricity Supply Code, 2005 (hereinafter called the "Code 2005") consumer has to be informed within seven days. It was stated in the letter that 03/9/2009 is the date fixed for opening of the meter and owner of the firm, Manager or any other representative be asked to ensure his presence on 03/9/2009 in the office of the Managing Director of the Corporation at Agra. On 25/8/2009, the Manager of the factory again wrote a letter that the firm owner is out of India and a date be fixed after 10/9/2009. He further stated that he being the Manager of the factory, cannot go out of the factory. He prayed for next date. On 03/9/2009, the meter was opened before a Committee constituted by office order dated 19/6/2009. The inspection report dated 03/9/2009 found meters body, seal, lead seal, and ultra-sonic welding steps were in order. However, it observed that foreign wires were found connected and remote control and sensing device was found inside the meter. An F.I.R. was also lodged against the petitioner on 04/9/2009 under Sections 135 and 150 of the Electricity Act, 2003 (hereinafter called the "Act, 2003"). A provisional assessment notice dated 05/9/2009 for an amount of Rs.21588487/-was sent to the petitioner. On 11/9/2009, petitioner

submitted an objection against the testing of the meter carried on 03/9/2009.The objection was made against the testing of the meter done on 03/9/2009 and was not made against the provisional assessment notice dated 05/9/2009. Petitioner had also filed Writ Petition No.49991/2009 on 15/9/2009 challenging the testing of the meter made on 03/9/2009. Petitioner's representative on 22/9/2009 prayed for time to file objection. It was prayed that the matter be adjourned after 05/10/2009. By letter dated 23/9/2009, petitioner's request was not acceded and 29/9/2009 was the date fixed for filing the objection. On 29/9/2009, petitioner appeared before the Executive Engineer and prayed that his objection dated 11/9/2009, be first decided and he also prayed that his writ petition in the High Court is pending which is fixed for 05/10/2009, hence he be given 15 days time to file objection. Petitioner's prayer for filing the objection was not acceded and the assessment was finalised by order dated 30/9/2009, against which order this writ petition has been filed. A Division Bench of this Court passed an interim order on 28/10/2009, restraining the respondents from enforcing the recovery proceedings in pursuance of the final assessment made by the respondents on 30/9/2009 and further directed the respondents for restoration of the power supply. The Corporation thereafter filed Special Leave to Appeal (Civil) No(s).35966/2009, challenging the interim order dated 28/10/2009. The said Special Leave Petition was disposed of by the Apex Court on 26/3/2010 permitting the Corporation to file an application for vacating the interim order within seven days which was to be disposed of within next three weeks after giving opportunity of hearing to both the parties.

5. Counter affidavit along with application for vacating the interim order has been filed by the Corporation on 03/4/2010 in this Court.

6. A perusal of the Order Sheet indicates that although the matter was listed before different benches from time to time, but due to adjournment sought on behalf of the petitioner or respondents the stay vacation application could not be disposed of. The case was directed to be listed peremptorily on 03/4/2014. The writ petition came up before this bench on 18/4/2014 when a direction was issued to list on 21/4/2014. The matter was heard on 22/4/2014 on which date both the parties agreed that the writ petition itself be decided finally. Hearing was concluded on 22/4/2014 and the judgment was reserved.

7. Shri B.C. Rai, learned counsel appearing for the petitioner in support of the writ petition raised various submissions. He submits that the assessment order dated 30/9/2009 has been passed without giving reasonable opportunity to the petitioner. Petitioner's request made on 29/9/2009 to give 15 days time to file objection was not accepted and without there being any objection by the petitioner to the provisional assessment notice dated 05/9/2009, final assessment order dated 30/9/2009 has been passed. It is submitted that the request of the petitioner's representative to fix a date after 10/9/2009 for opening the meter was also not acceded whereas it was informed that the owner of the firm (petitioner) has gone out of India. The respondents completed the entire proceedings hastily in utter violation of the principles of natural justice. It is further submitted by the

learned counsel for the petitioner that the testing of the meter done on 03/9/2009 was made by the Corporation in violation of the provisions of Clause 5.6 (c) (iii) of the Electricity Supply Code, 2005 (hereinafter called the "Code 2005"). It is submitted that the petitioner was never given any option to indicate as to whether he wants the meter to be tested at the licensees lab, or independent lab or by electrical inspector. The petitioner never gave his consent for getting the meter tested at the Corporations Office. The testing of the meter having been done in violation of the aforesaid provision, the entire assessment is illegal. He submits that the testing of the meter has been done by the Corporation contrary to the law as laid down by the Division Bench of this Court in Smt. Amrawati Devi Vs. Purvanchal Vidyut Vitran Nigam Ltd & Anr, 2009 (1) ADJ 430. He further submits that the assessment made is not in accordance with the provisions of the Act, 2003 as well as the Code, 2005. He submits that the assessment has been made for a period of 365 days whereas on 28/4/2009, the petitioner's meter was inspected by the Corporation's team and nothing wrong was found at the petitioner premises and the assessment could not have been made of any date prior to 28/4/2009.

8. Learned counsel for the petitioner has also challenged the office order dated 19/6/2009, being ultra-vires to the provisions of the Code, 2005. He submits that no executive order can be passed contrary to the statutory scheme as delineated in the Code, 2005.

9. Shri Rajenda Kumar Mishra, learned counsel appearing for the Corporation refuting the submissions of the learned counsel for the petitioner contended that against the assessment order dated 30/9/2009, the petitioner has a statutory remedy of filing an appeal under Section 127 of the Act, 2003, hence the writ petition be not entertained to enable the petitioner to avail the remedy of appeal. It is submitted that Clause 5.6 (c) (iii) of the Code, 2005 is not attracted in the present case. It is submitted that the said clause is attracted only with regard to the defective meters and is not applicable in the cases of theft of electricity within the meaning of Section 135 of the Act, 2003. He further submits that the Division Bench judgment of this Court in Smt. Amrawati Devi's case (supra) is not applicable in the facts of the present case. It is further submitted that the ratio of the Division Bench judgment in Smt. Amwarawati Devi's case (supra) failed to notice sub-clause (iii) of Clause 5.6 (c) of the Code, 2005. He submits that the option once exercised by the consumer shall not be changed. He submits that the testing of the meter conducted on 03/9/2009 has became final. It is submitted that the prayer made in the objection dated 11/9/2009 by the petitioner that the meters be re-checked by the licensee in some other independent lab is neither practically possible, nor legally permissible.

10. Learned counsel for the parties have placed reliance on various judgments of this Court as well of the Apex Court which shall be referred to while considering their submissions in detail.

11. At first, we need to consider the submissions of the learned counsel for the respondents that there being remedy of appeal provided, the writ petition be not

entertained and the petitioner be relegated to avail the remedy of appeal provided under Section 127 of the Act, 2003. There cannot be any dispute that against the final assessment made under Section 126 of the Act, 2003, an appeal is provided under Section 127 of the Act, 2003. There are two reasons due to which we do not find this is a fit case to be dismissed on the ground of alternate statutory remedy. Firstly, sub-section (3) of Section 126 of the Act, 2003 contemplates giving an reasonable opportunity of hearing to a consumer before passing a final order of assessment. The submission of the petitioner in the writ petition is that he was not afforded reasonable opportunity of hearing and the assessment order has been passed in violation of the principles of natural justice. From the assessment order dated 30/9/2009, it is clear that there was no objection by the petitioner to the provisional assessment notice dated 05/9/2009. Petitioner had also appeared on 29/9/2009 and prayed for 15 days time to file an objection which was not considered. Even the one months period contemplated under Section 126 (3) of the Act, 2003 had not expired. There being allegation by the petitioner that the assessment order dated 30/9/2009 has been passed in violation of the principles of natural justice, we think it proper to consider the above submissions on merit. It is well settled that when an order is passed in violation of the principles of natural justice, the alternative remedy is not a bar in entertaining the writ petition. The above proposition has been laid down by the Apex Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & Ors, 1998 (8) SCC 1, in which case the Apex Court laid down following in paragraphs 15,16,17,18,19,20 and 21.

"15.Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative reme3dy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely or some old decisions of the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmad vs. Municipal Board, Kairana, AIR 1950 SC 163, laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid & Son Vs. The Income Tax Investigation Commission AIR 1954 SC 207 which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that Writ Petition under Article

226 could still be entertained in exceptional circumstances.

17. A specific and clear rule was laid down in State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86, as under :

"But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

18. This proposition was considered by a Constitution Bench of this Court in A.V.Venkateswaran, Collector of Customs vs Ramchand Sobhraj Wadhwani, AIR 1961 SC 1506 and was affirmed and followed in the following words:

"The passages in the judgments of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus per-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court".

19.Another Constitution Bench decision in Calcutta Discount Co.Ltd. vs Income Tax Officer Companies Distt. I AIR 1961 SC 372 laid down :

"Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Court will issue appropriate orders or directions to prevent such consequences. Writ of certiorari and prohibition can issue against Income Tax Officer acting without jurisdiction under Section 34, Income Tax Act".

20.Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a Writ Petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21.That being so, the High Court was not justified in dismissing the Writ Petition at the initial stage without

examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal"."

12. Secondly, the writ petition has been entertained by this Court on 28/10/2009, on which date the interim order was also passed by this Court staying the recovery proceedings in pursuance of the final assessment dated 30/9/2009 and the writ petition has been pending in this Court for about five years. This is another reason due to which we propose to decide the writ petition on merits instead of dismissing the writ petition on the ground of alternative remedy.

13. The submission which needs to be next considered is the submission raised by the learned counsel for the petitioner that the assessment order dated 30/9/2009 has been passed in violation of the principles of natural justice since he has not been afforded a reasonable opportunity of hearing before making the final assessment. Sub-section (3) of Section 126 of the Act, 2003 provides as follows:

"126. Assessment.-
(1).....
(2).....
(3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person."

14. Whether reasonable opportunity of hearing has been given to a consumer before making a final assessment is the question which has to be determined on the facts of each case.

15. From the facts of the case as noted above, 16/8/2009, was the date when the checking was made on the petitioner's premises. After the checking dated 16/8/2009, letter dated 18/8/2009 was served on the petitioner in which 27/8/2009 was the date fixed for testing of the meter. The Manager of the petitioner's factory made an endorsement that the owner of the factory (petitioner) has gone out of India and he shall return on 10/9/2009, hence the date of testing of the meter be fixed thereafter. The said request was not acceded by the Executive Engineer and by another letter dated 25/8/2009, 03/9/2009 was the date fixed for testing of the meter on which letter again the same endorsement was made by the Manager which was made on 25/8/2009 that a date be fixed after 10/9/2009. It was stated that the Manager is unable to come out of the factory premises in view of the absence of the owner. Despite the aforesaid two protests, the respondents proceeded with the testing of the meter on 03/9/2009 and a provisional assessment notice dated 05/9/2009 was served on the petitioner fixing 23/9/2009 in the matter. On 11/9/2009, petitioner had filed a detailed objection against the testing of the meter conducted on 03/9/2009. Petitioner referring to Clause 5.6 (c) (iii) of the Code, 2005 stated that the testing of the meter was done without the consent of the petitioner. Following prayer was made in

paragraph 24 of the said application which is to the following effect:

"24-It is, therefore, requested that power supply of the factory may be restored and information regarding approved independent and competent test laboratory may be provided so that Applicant may opt for testing of meter and further provisional assessment notice may be withdrawn."

16. By letter dated 23/9/2009, the Executive Engineer fixed 29/9/2009 as the date for filing objection. Petitioner appeared on the said date and filed an application praying that his objection dated 11/9/2009 be first disposed of. It was further stated that his writ petition in the High Court is pending in which 05/10/2009 is the date fixed and he requested for 15 days time for filing objection. The said prayer of the petitioner was refused and the Corporation proceeded to pass the final assessment order dated 30/9/2009.

17. From the facts as narrated above, it is clear that the request of the petitioner for fixing a date after 10/9/2009 for testing of the meter was not acceded to and the meter was tested in the office of the Corporation on 03/9/2009, although one of his representative was present. The provisional assessment notice dated 05/9/2009 was served on the petitioner fixing 23/9/2009 as the date fixed for filing objection. Another date fixed was 29/9/2009, on which date the petitioner appeared and made a request for granting 15 days time. Before that a detailed objection dated 11/9/2009 was filed by the petitioner against the testing of the meter conducted on 03/9/2009. Petitioner in his objection dated 11/9/2009 has requested for information in respect of providing independent and competent test lab so that the applicant may opt for testing of the meter. The said objection remained pending and on 29/9/2009 when the petitioner appeared, he again prayed that the said objection be decided and 15 days time be given. The Corporation did not decide his objection dated 11/9/2009. Further more, on 29/9/2009, when for the first time the petitioner appeared he stated that he had gone out of India at the time of checking and testing of the meter and requested for time to file objection which ought to have been acceded even though the respondents may not have granted 15 days time, at least a breathing time be allowed to file objection. Further, the period of one month from serving the provisional assessment notice dated 05/9/2009 was also not expiring and there was no such urgency on the part of the Corporation to finalise the assessment, even two or three days time for filing the objection would have been given in consonance of the principles of natural justice. When the Corporation did not accede to the petitioner's request and finally proceeded to pass the assessment order dated 30/9/2009 which in our considered opinion has violated the principles of natural justice in the facts and circumstances of the present case, hence the assessment order dated 30/9/2009 deserves to be set-aside on this ground alone.

18. Much argument has been raised by the learned counsel for both the parties on Clause 5.6 (c) (iii) of the Code, 2005 in reference of the testing of the meter which was conducted on 03/9/2009. The submission of the petitioner's counsel is that before the testing of the meter it was removed from the premises of the

petitioner on 16/8/2009, petitioner was required to give an option for getting the meter tested either by a licensees laboratory or independent lab or with the electrical inspector. It is submitted that the petitioner was neither informed about the option, nor he ever exercised his option. The testing of the meter done on 16/8/2009, is contrary to the statutory scheme. It is relevant to note the statutory scheme of Code, 2005 in the above context.

19. Chapter V of the Code, 2005 relates to metering. Clause 5.4 of the Code, 2005 deals with ownership and use of meter. Clause 5.4 (a) which is relevant is quoted below:

"5.4 Ownership and Use of meters: (a) [At the time of seeking a new connection the consumer shall indicate option in the application form to either purchase the meter, MCB/CB and associated equipment himself from the authorized vendor(s)/make or manufacturers of meter approved by the licensee, or require that such approved meter, MCB/CB and associated equipment be supplied by the Licensee.

Provided that it shall be the responsibility of the licensee to ensure that meters of national repute only are used as specified in clause 5.2, and under Sec 55 of the Act by CEA. The licensee shall not restrict the consumer choice to 2-3 make/manufacturer only, but shall offer a wide ranging choice from amongst the list of approved make/manufacturers. The Licensee shall put the list of approved vendor(s)/make or manufacturers of meter, on their website/ display on the notice board/and if requested, supply the consumer with the list of approved vendor(s) / make or manufacturer.

Provided also that the licensee shall get the meter lots inspected by test labs having accreditation from National Accreditation Board for testing and Calibrating laboratories, and also adhere to test procedure specified in clause 5.5. The Licensee shall put the list of such approved test labs, on their website / display on the notice board/and if requested, supply the consumer with the list of approved labs. The licensee shall also set up appropriate number of testing labs and get the accreditations from NABL, if not already done.]"

20. Clause 5.6 of the Code, 2005 deals with Defective Meters. Clause 5.6 (a), (b),(c) and (d) which are relevant in the present case are quoted below:

"5.6 Defective Meters.-(a) The Licensee shall have the right to test any meter and related apparatus if there is a reasonable doubt about the accuracy of the meter and the consumer shall provide the Licensee necessary assistance in conduct of test. However, the consumer shall be allowed to be present during the testing.

[(b) A consumer may request the Licensee to test the meter installed on his premises if he doubts its accuracy of meter readings not commensurate with his consumption of electricity, stoppage of meter, damage to seal, by applying to the Licensee in prescribed format (Annexure 5.1) along with the requisite testing fee. The Licensee shall test the meter:

(i) Within 15 days of the receipt of the application, at consumer's premises, or

(ii) Within 30 days at licensee's lab, or Independent lab, or

(iii) By installing a tested check meter in series with the existing meter within 7 days of filing of application.]

(c) In case of testing of meter at consumer's premises, the testing of meter shall be done for a minimum consumption of 1 kWh. The meter testing team of the licensee shall carry heating load of sufficient capacity to carry out the testing. Optical Scanner may be used for counting the pulses/revolutions or meter shall be tested as per the procedure described in IS/IER 1956 or through aqua-check for LT meters and through RSS for others. The aqua Check and RSS shall be calibrated in laboratory of national repute once in a year.

(i) In case the meter is found O.K., no further action shall be taken.

(ii) In case the meter is found fast / slow by the licensee, and the consumer agrees to the report, the meter shall be replaced by a new meter within 15 days, and bills of previous three months prior to the month in which the dispute has arisen shall be adjusted in the subsequent bill as per the test results. In case meter is found to be slow, at the request of the consumer, these charges may be recovered in installments not exceeding three.

[(iii) If the consumer disputes the results of testing, or testing at consumer's premises is difficult, the defective meter shall be replaced by a new tested meter by the Licensee, and, the defective meter after sealing in presence of consumer, shall be tested at licensee's lab / Independent lab / Electrical Inspector, as agreed by consumer. The option once exercised by consumer shall not be changed. The decision on the basis of reports of the test lab shall be final on the Licensee as well as the consumer.]

(d) In cases of testing of a meter in the licensee's/ Independent test laboratory,

(i). Consumer shall be informed of the proposed date of testing at least 7 days in advance so that he may be present at the time of testing, personally or through an authorized representative.

ii. The signature of the consumer or his authorized representative, if any present, shall be obtained on the Test Result Sheet.

iii. The results of testing, billing, and in case the consumer disputes the results of testing, shall be same as provided in clause 5.6(c) above."

Clause 5.9 of the Code, 2005 deals with cost of Replacement of Defective/Burnt Meters. Clause 5.9 (b) (ii) which is relevant is quoted below:

"5.9 Cost of Replacement of Defective/Burnt Meters.

(a) .....

(b) [xxx]

(i) .....

(ii) If it is established, as a result of testing, that the meter was rendered defective due to tampering or any other deliberate act by the consumer to interfere with the meter, the cost of the meter shall be borne by the consumer as above. The consumer shall be assessed under Section 126 of the Electricity Act 2003, and shall be punishable under Section 138 of the Electricity Act 2003. In addition, action as permissible under law shall be taken against the consumer for pilferage and tampering."

22. In the order impugned dated 30/9/2009, the Executive Engineer referring to Clause 5.6 (c) of the Code, 2005, has stated that Clause 5.6 (c) is

applicable for defective meters only, and is not applicable for the tampered meters. In the counter affidavit filed on behalf of the respondents also a categorical stand has been taken by the respondents that clause 5.6 (c) of the Code, 2005 as well as the Division Bench judgment of this Court in Smt. Amrawati Devi's case (supra) relates to defective meter and does not apply to tampered meter. Following was stated in para 29 of the counter affidavit which is to the following effect:

"29. That, the contents of paragraph Nos.24,25 and 26 of the writ petition are incorrect and as such denied. It is most respectfully submitted that whatever the objection has been raised by the petitioner the same were duly considered and decided by the assessing officer by means of the assessment order dated 30.09.2009. The allegation being made by the petitioner contrary to this are incorrect and unfounded and as such denied. It is most respectfully submitted that decision of this Court in the case of Smt. Amrawati Devi (2009 (1) A.D.J.430) would not apply in the present case inasmuch as the ratio laid down by this Hon'ble Court in the case of Smt. Amrawati Devi is related to the defective meters and here in the instant case the meter of petitioner were found to be tampered. It is submitted that there is clear distinction between 'tampered meter' and 'defective meter' under the scheme of the Act, 2003 and Supply Code, 2005 and therefore, the decision of this Hon'ble Court in the case of Smt. Amrawati Devi as affirmed by Hon'ble Supreme Court will have no application in the present case. It is further to point out here that the meters of the petitioner were tested by the committee of expert engineers and remote controlling and sensing device was found fitted inside the meters and as such the defect could be and has been detected by naked eyes and therefore, the same was not required to be tested in any lab as the same cannot be termed as defect in meter and it comes within the definition of tampering in meter and therefore, the meters were found to be tampered and thus, the provisions pertaining to the defective meters would not apply in the instant case."

23. There is no dispute in the present case that the meter was taken out from the petitioner's premises on 16/8/2009, after it being sealed was sent to be tested on licensees lab/independent lab/electrical inspector as agreed by the consumer. Relevant part of Clause 5.6 (c) (iii) of the Code, 2005 is "..... shall be tested at licensee's lab/Independent lab/Electrical Inspector, as agreed by consumer."

24. The agreement of the consumer as contemplated above in Clause 5.6 (c) (iii) of the Code, 2005, is an agreement for testing of the meter at any of the places mentioned therein i.e. (i) Licensees lab (ii) Independent lab (iii) Electrical Inspector. The aforesaid clause further stated that the option once exercised by the consumer shall not be changed. Thus, the consumer has to opt any of the three places for testing of the meter. The word "agree" has been defined in P. Ramanatha Aiyar's The Law Lexicon 3rd Edition 2012 in following words:

"Agree. To concur, to come to a mutual assent; to come into harmony, to promise; to contract;to assent; to unite in mental action; to acquiesce in. In Thorton v.Kelley, II R.I 498,499, it is said that the word "agree" is sometimes used to signify an offer merely, but properly speaking it

embraces concurrence or assent. (Ame.Cyc.)

To enter into an agreement [S.58(b),T.P. Act (4 of 1882)]; to concur [S.23,Indian Evidence Act (1 of 1872)]."

25. Now the submission and the stand taken by the learned counsel for the respondents in the impugned order as well as in the counter affidavit is that Clause 5.6 of the Code, 2005 is not applicable when there is an allegation that the meter has been tampered. Clause 5.6 (a) of the Code, 2005 provides " The Licensee shall have the right to test any meter and related apparatus". Although the heading of the word is "defective meters", but the said heading cannot control the substantive provision when the provision is clear and categorical. The right of a licensee to test the meter where licensee has a reasonable doubt that the meter is tampered cannot be taken away and in event the right is only confined to defective meters as alleged by the respondents, the said interpretation shall not advance the object of the Act, 2003.

26. Clause 5.9 of the Code, 2005 deals with cost of Replacement of Defective/Burnt Meters. Sub-clause (a) (ii) of the Code, 2005 uses the words "as a result of testing, that the meter was rendered defective due to tampering or any other deliberate act by the consumer to interfere with the meter". Thus, when the sub-clauses 5.6 and 5.9 are read together, it is clear that the meter is to be treated as a defective meter consequent to tampering or any other deliberate act by the consumer. Thus, in the cases where the allegations are that the consumer has tampered the meter the said meter is fully covered by the definition of defective meters as given in Cause 5.6 of the Code, 2005 and the case of the respondents that Clause 5.6 is not attracted is incorrect.

27. A Division Bench judgment of this Court in Smt. Amrawati Devi's case (supra) had considered the same Clause 5.6 (c) (iii) of the Code 2005. Paragraphs 6,7,8,9,10 and 11 of the said judgments are quoted below:

"6. From reading of Clause 5.6 (c) (iii) it is clear that this clause in unequivocal terms declares that the defective meter after sealing in presence of consumer, shall be tested, at licensee's lab/independent lab/Electrical Inspector, as agreed by the consumer. Therefore, the agreement by the consumer is essential for testing of the meter either at the laboratory of the Nigam or at the laboratory of some other independent agency. It further provides that option exercised by consumer once cannot be changed. The clause, therefore, empowers the authorities to seal the meter and get it tested with consumer's agreement. Since the clause operates harshly against the consumer it has to be construed strictly. The consumer has a right to get the meter tested with independent agency. The authorities, therefore, have a corresponding duty to apprise the consumer of the right. Failure to discharge this duty, which flows from sub-clause (c) (iii) by the authorities while exercising their right to send the meter for testing, renders the entire proceedings for sealing the meter irregular and illegal. Annexure-3 dated 26.11.2008 does not comply with this requirement. The relevant portion is extracted below:

"1. मीटर ऐक्यू चेक से चेक किया गया मीटर 12.61 धीमा पाया गया। बीसत्र.12ण्61ः

2. मीटर संख्या यू0पी0ई0 को उतार कर सील किया गया। मीटर का परीक्षण 4.12.2008 को मीटर लैब में होगा। उपभोक्ता को सूचित किया जाता है कि दिनांक 4.12.2008 को 12.00 बजे मीटर के परीक्षण हेतु उपस्थित हो।"

7. It only informs the consumer that the meter shall be tested at licensee's laboratory and she should be present on 4.12.2008. In absence of intimation that she has a right to get it tested at independent laboratory, the notice was contrary to law.

8. It has been argued by the respondents that the Code, 2005 being the law, the petitioner cannot claim that she was not aware of it. On the other hand the counsel for the petitioner argued that 'ignorance of law is no excuse' does not apply universally. We do not consider it necessary to enter into this wider issue as we have found the notice dated 26.11.2008 Annexure-3 to be contrary to Clause 5.6 (c) (ii).

9. For the same reason the argument of the respondents that once the petitioner did not object, she waived her right to get the defective meter tested by independent laboratory cannot be accepted, unless she knew or had knowledge about the provisions of Clause 5.6 (c) (iii) of the Code, 2005. In such situation the doctrine of waiver cannot be pressed into service. The Apex Court in M/s.Moti Lal Padampat Sugar Mills Ltd. v. State of U. P. and others, AIR 1979 SC 621, had held in paragraph 6 as below:

"Secondly, it is difficult to see how, on the facts, the plea of waiver could be said to have been made out by the State Government. Waiver means abandonment of a right and it may be either express or implied form of conduct, but its basic requirement is that it must be "an intentional act with knowledge". Per Lord Chelmsford, L.C. in Earl of Darnley v. London, Chatham and Dover Rly. Co., (1867) LR 2 HL 43 at 57. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out in Halsbury's Laws of England (4th Edn.) Volume 16 in paragraph 1472 at page 994 that for a "waiver to be effectual it is essential that the person granting it should be fully informed as to his rights" and Isaacs, J., delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd., (1920) 28 CLR 305 (Aus), has also emphasised that waiver "must be with knowledge, an essential supported by many authorities."...Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement: there is no such maxim known to the law. Over a hundred and thirty years ago, Maule, J., pointed out in Martindale v. Falkner, (1846) 2 CB 706, "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so." Scrutton, L.J., also once said: "It is impossible to know all the statutory law, and not very possible to know all the common law." But it was Lord Arkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam, (1937) AC 473"....the fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse,

a maxim of very different scope and application. It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the Appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated June 25, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government.

10. In our opinion, in absence of intimation of Clause 5.6 (c) (iii) of the Code, 2005, the petitioner could not be deemed to have waived her right to exercise her option to get her meter tested at independent laboratory. To be fair to the Nigam as well as consumer, a notice is required to be given by the Nigam to the consumer as to whether the consumer wants to get the defective meter tested at the laboratory of the Nigam or by Electrical Inspector or by an independent agency. The answer of the notice has to be given by the consumer. After the option is exercised by the consumer and he agrees to get the meter tested at the laboratory of the Nigam or Electrical Inspector, then the Nigam may fix the date for testing the meter. If the consumer exercises his option to get the meter tested from outside agency, the list of the names of the outside agency approved by the Nigam should be intimated to the consumer so that he may choose any one of the outside agency and according to the option of the consumer. The outside agency may test the meter and its finding about testing of meter would be final. It is after following this procedure that the option exercised by consumer cannot be changed. The decision on the basis of option exercised by the consumer, and the report of the test laboratory shall be final and binding on the licensee as well as on the consumer. But the Nigam did not inform the petitioner to exercise her option on 26.11.2008 when the meter of the petitioner was sealed and she was informed to appear on 4.12.2008 for testing of the meter.

11. We are of the considered opinion that after sealing the meter the Nigam must serve a notice, on which it should be printed in bold capital letters, intimating the consumer or his representative to exercise his option either to get the meter tested by the Electrical Inspector or at the laboratory of the Nigam or the consumer may exercise his option to get his meter tested from one of the outside agencies approved by the Nigam mentioned in the notice. Once the consumer exercises his option then immediately a date has to be fixed for testing of the meter in the presence of the consumer."

28. The law laid down in the aforesaid case fully supports the submission of the learned counsel for the petitioner. It is relevant to note that against the aforesaid Division Bench judgment dated 15/1/2009, Purvanchan Vidyut Vitran Nigam Limited filed Special Leave to Appeal which was dismissed by the Apex Court on 03/8/2009. The respondents having taken the stand that Clause 5.6 (c) of the Code, 2005 is not applicable with regard to the testing of the meter conducted on 03/9/2009, and we having come to the conclusion that Clause 5.6 (c) of the Code, 2005 is applicable, the final assessment order dated 30/9/2009 falls on the said ground also and deserves to be set-aside.

29. Learned counsel for the petitioner has also raised some other submissions regarding the assessment made by the respondents on 30/9/2009 including the submissions that the assessment made for 365 days was unjustified since the respondents have already conducted the

inspection on 28/4/2009 and no period prior to the said date can be taken for assessment. However, we having taken the view that the petitioner was entitled for opportunity to file an objection against the provisional assessment notice dated 05/9/2009, we leave it open to the petitioner to raise such objection as permissible regarding the provisional assessment, and do not feel it necessary to decide the said submissions in this writ petition.

30. We having held that the assessment order dated 30/9/2009 deserves to be set-aside on the grounds as indicated above, and fresh assessment be made, the submission of the petitioner challenging the Office Order dated 19/6/2009 needs no consideration in this writ petition. The above submission is left open to be considered in an appropriate case.

31. In the result the assessment order dated 30/9/2009, is set-aside. The writ petition is disposed of. The petitioner is allowed 15 days time to file objection to the provisional assessment notice dated 05/9/2009 before the Executive Engineer and the Executive Engineer thereafter shall proceed to finalise the assessment keeping in view the observations made by us in this judgment.

32. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2014

BEFORE
THE HON'BLE RAM SURAT RAM (MAURYA), J.

Civil Misc. Writ Petition No. 57457 of 2012

Ramesh Chandra Shukla & Anr. Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.D. Mishra, Sri R.K. Shukla

Counsel for the Respondents:
C.S.C., Sri D.D. Chauhan, Sri D.P. Mishra
Sri O.P. Mishra, Sri Diwakar Singh

High Court Rules Chapter, XXII Rule-2-
Practice and procedure-pending disposal of Writ Petition on-issuance notice-whether deemed petition admitted? held-'No'-under writ jurisdiction considering speedy disposal-nature-before admission notices issued to finally decide the petition after hearing both parties-objection of counsel overruled-case be listed for admission.

Held: Para-8
Thus it is now well settled that High Court is competent to issue notice to the respondents before admission and can decide the writ petition finally at the stage of admission. Present writ petition arises out of proceedings under Section 33/39 of U.P. Land Revenue Act, 1901. The various proceedings provided under U.P. Land Revenue Act, 1901 are summary proceeding and require to be decided expeditiously. Therefore writ petitions arising out of the orders passed in the proceedings U.P. Land Revenue Act, 1901 also require for speedy disposal. With the object of speedy disposal, notices has been issued to the respondents, pending admission so that the writ petition can be decided at the admission stage.

Case Law discussed:
AIR 1987 All 360(DB); 2000 Cr.L.J. 569 (F.B.); AIR 2003 SC 2588; AIR 1996 SC 1092; (2005) 6 SCC 344.

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

1. Heard Sri M.D. Mishra, for the petitioners.

2. This writ petition was listed for "admission" in the cause list on 05.05.2014. The counsel for the petitioners submitted that writ petition was heard for admission on 06.11.2012. The Court, after hearing the arguments, recorded prima facie satisfaction that writ petition raised substantial issue for consideration and issued notice to the respondents. Chapter XXII Rule 2 of the High Court Rules, provides that if the Court does not find sufficient reasons to admit the application it may reject it. Where the application is not so rejected, notice thereof shall be served on such opposite parties named in the application and on such other persons, if any, as the Court may direct. After issue of the notice, the writ petition is liable to be listed for "hearing" on its turn. Chapter VIII Rule 33 confers exclusive jurisdiction to Chief Justice to expedite the hearing of the case. Hearing of the writ petition on merit can only be done when writ petition is listed for "hearing" either on its turn or expedited by Chief Justice. The writ petition is wrongly listed for admission and should be listed for hearing on its turn.

3. I have considered the arguments of the counsel for the petitioner. In exercise of powers under Article 225 of Constitution of India, Allahabad High Court Rules, 1952 has been framed. Chapter XXII provides procedure for the writ under Article 226 of the Constitution, other than a writ in the nature of Habeas Corpus. Rule 1 provides for filing/receiving of the writ petition by Division Bench or Single Judge of the natures as specified in it. Rule 2 provides for notice which reads as "if the Court does not find sufficient reasons to admit the application it may reject it. Where the application is not so rejected, notice thereof shall be served on such opposite parties". According to the counsel for the petitioner as the notice has been issued 06.11.2012 as such the writ petition be treated to be admitted. The order dated 06.11.2012 directing the writ petition to be listed for admission is not according to the provisions of Rule 2 and has no meaning and it shall be deemed to be admitted.

4. The word "admit" means "to accept for the purpose of consideration" as given in Law Lexicon. The Bench hearing the writ petition under Chapter XXII Rule 1 of the High Court Rules has been given power to admit or reject it. Admission under Chapter XXII Rule 1 is not automatic. When Bench hearing the writ petition under Chapter XXII Rule 1 itself directed the writ petition to be listed for admission, then merely notice has been issued to the respondents it can not be deemed to be admitted. There is no bar to hear the respondents at the admission stage. Chapter XXII Rule 5 provides for lodging caveat. If a respondent files caveat then the petitioner is required to give him notice of the writ petition and he is usually heard at the time of admission. Thus it is clear that the Court can hear the respondents at the time of admission and for that purpose it has discretion to issue notice to the respondent before admission. The controversy as to whether the respondents have right to be heard at the stage of admission came for consideration before Division Bench of this Court in Chandrajit Vs. Ganeshiya, AIR 1987 All 360 (DB), in the matter arising out of caveat under Section 148-A C.P.C. and Division Bench held that the caveator has right to oppose admission and can be heard. In view of Division Bench

judgment, Chapter XXII Rule 5 has been amended by Notification No. 276/VIII-C-2 dated 04.07.1989, providing Rule for lodging caveat in the writ petition. A Full Bench of this Court in Satya Pal and others Vs. State of U.P. and others, 2000 Cr.L.J. 569 (F.B.) upheld the practice of this Court to issue notice to the respondent pending admission and deciding the writ petition finally at the admission stage. Thus there is no substance in the arguments that on the notice being issued, the writ petition shall be deemed to be admitted and order directing the writ petition to be listed for "admission" is contrary to Chapter XXII Rule 2.

5. It has been consistently held by Courts in the world that Rules/ procedure are framed to achieve the object of speedy justice. The Constitution Bench of Supreme Court in Sardar Amarjit Singh Kalra v. Pramod Gupta, AIR 2003 SC 2588, held that Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.

6. Supreme Court in Puran Singh v. State of Punjab, AIR 1996 SC 1092 held that the object of Article 226 is to provide a quick and inexpensive remedy to aggrieved parties. Power has consequently been vested in the High Courts to issue to any person or authority, including in appropriate cases any government, within the jurisdiction of the High Court, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Sole object of writ jurisdiction to provide quick and inexpensive remedy to the person who invokes such jurisdiction is likely to be defeated. When the High Court exercises extraordinary jurisdiction under Article 226 of the Constitution, it aims at securing a very speedy and efficacious remedy to a person, whose legal or constitutional right has been infringed. If all the elaborate and technical rules laid down in the Code are to be applied to writ proceedings the very object and purpose is likely to be defeated.

7. While dealing with the Case Management, Supreme Court in Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344, provides as follows:

1. Writ petitions: The High Court shall, at the stage of admission or issuing notice before admission categorise the writ petitions other than the writ of habeas corpus, into three categories depending on the urgency with which the matter should be dealt with: the fast track, the normal track and the slow track. The petitions in the fast track shall invariably be disposed of within a period not exceeding six months while the petitions in the normal track should not take longer than a year. The petitions in the slow track, subject to the pendency of other cases in the court, should ordinarily be disposed of within a period of two years.

8. Thus it is now well settled that High Court is competent to issue notice to the respondents before admission and can decide the writ petition finally at the stage of admission. Present writ petition arises out of proceedings under Section 33/39 of

U.P. Land Revenue Act, 1901. The various proceedings provided under U.P. Land Revenue Act, 1901 are summary proceeding and require to be decided expeditiously. Therefore writ petitions arising out of the orders passed in the proceedings U.P. Land Revenue Act, 1901 also require for speedy disposal. With the object of speedy disposal, notices has been issued to the respondents, pending admission so that the writ petition can be decided at the admission stage.

9. The objection raised by the counsel for the petitioner is overruled. List for admission in next cause list. On that day writ petition be heard finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 57786 of 2012

Anoop Srivastava & Ors. ...Petitioners
Versus
Registrar General High Court, Allahabad & Ors. ...Respondents

Counsel for the Petitioners:
Sri H.R. Mishra, Sri S.K. Mishra

Counsel for the Respondents:
Sri Yashwant Varma, Sri Ashish Mishra

Allahabad High Court Bench Secretaries(condition of service) Rules 2005-as amended 2012-Rule-6(i)-Appointment on post of Bench Secretaries Grade I-eligibility for appearing in examination-petitioner working as Consol operator-seeking direction to participate in written examination-held-except R.O. And A.R.O. under rules framed by Hon'ble Chief Justice-providing condition of appointment-includes criteria for appointment-plea of Art. 14 of constitution not available-channel of promotion of Consol operator-to that post of computer operator grade-C-than programmer grade- 2 onwards-can not be allowed to change their promotion zone-petition dismissed.

Held: Para-18 & 19

18. So far as the submission of the petitioners that they are possessed of better qualification vis-a-vis Review Officer/Assistant Review Officer is concerned, we are of the opinion that the submission of the petitioners has no relevance having regard to the statutory rules, which define the zone of consideration.

19. In the totality of the circumstances on record, we find no good ground to interfere either with the amended rules or with the process of selection which has been initiated for appointment as Bench Secretary Grade-I.

Case Law discussed:
(2011) 6 SCC 725.

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

1. Heard Sri H.R. Mishra, learned Senior Advocate assisted by Sri S.K. Mishra, learned counsel for the petitioners and Sri Ashish Mishra, learned counsel for the respondent-High Court.

2. Petitioners, before this Court, seek quashing of the notification dated 17th August, 2012, whereby Clause 6(i) of the Allahabad High Court Bench Secretaries (Condition of Service) Rules, 2005 (hereinafter referred to as the "Rules, 2005") has been amended. They also pray for a writ of mandamus directing the respondent-High Court to permit the petitioners to appear in the

competitive examination to be held for promotion to the post of Bench Secretary Grade-I in the establishment of the High Court, Allahabad.

3. Petitioners, who are 9 in number, were all recruited and appointed as Console Operators-cum-Data Entry Assistants in the year 2001 in the establishment of High Court. They have been confirmed on the said post under the order of the Joint Registrar (Establishment) dated 1st June, 2009 with effect from the dates mentioned in the order against their names.

4. Sri H. R. Mishra, learned counsel for the petitioners submits that the post of Bench Secretary Grade-I, the appointment whereof is regulated by the Allahabad High Court Officers and Staff (Condition of Service and Conduct) Rules, 1976 (hereinafter referred to as the "Rules, 1976"), was earlier filled after holding selection through competitive examination to be conducted by the appointing authority from the Assistants having not less than 10 years of continuous service in Class-III posts. Preference was to be given to candidates possessing a Law Degree. He submits that under the Rules, 1976, all Class-III employees including the persons, who were holding the post of Console Operators-cum-Data Entry Assistants, like the petitioners were permitted to appear in the competitive examinations to be held for appointment on the post of Bench Secretary Grade-I. Reference is made to paragraph-16 to the present writ petition.

5. It is the case of the petitioners that by notification dated 17th August, 2012, zone of eligibility of the candidates eligible to sit in the competitive examination, has been curtailed by providing that only Review Officer (for short "RO"/Assistant Review Officer (for short "ARO") having not less then 10 years of continuous service would be entitled to participate in the competitive examination, by making an amendment in Rule-6 (i) of Rules, 2005. The eligibility zone for appearing in the competitive examination for appointment on the post of Bench Secretary Grade-I has been confined to RO/ARO only and as a result whereof persons, like the petitioners stand excluded from being eligible to participate in the competitive examination. This amendment in rule 6(i) of Rules, 2005 is arbitrary.

6. It is also stated that the petitioners are working on Class III posts in the establishment of the High Court and they have 10 years of experience. If larger number of persons participate in the competitive examinations, it would always result in best possible candidates being available for appointment on the post of Bench Secretary Grade-I and therefore, also the amendments in Rules, 2005 vide impugned notification dated 17th August, 2012, known as "The Allahabad High Court Bench Secretaries (Conditions of Service) (Amendment) Rules, 2012 (hereinafter referred to as the "Rules, 2012"), virtually defeats the very purpose of competitive examinations.

7. He further submits that there is little or no reasonable classification for not treating the petitioners, who are holding Class III Posts in the establishment of the High Court, to be eligible to appear in the competitive examinations specifically with reference to the objects sought to be achieved and therefore, their exclusion is hit by Article 14 of the Constitution of India.

8. It is further case of the petitioners that they possess better qualifications vis-a-vis Assistant Review Officer/Review officer, therefore, they may be permitted to participate in the competitive examination.

9. Lastly, it is contended that some of the vacancies, which have been advertised in respect of posts of Bench Secretary Grade-I, are of the year prior to 2012 and therefore, Rules, 2012 will not apply. The practice, which was being followed by the High Court prior to the amendments in Rules, 2005, should be directed to be followed in respect of vacancies of the earlier years.

10. Sri Ashish Mishra, learned counsel for the respondent-High Court on the contrary submits that petitioners were never members of the cadre covered by Rules, 1976. Their appointment was made against the posts, which were created outside the Rules, 1976. It is further stated that in the year 2010, a separate cadre for the employees like the petitioners, who were working in the Computer Section of the Allahabad High Court, has been created by the Hon'ble The Chief Justice in exercise of powers under Article 229 (2) of the Constitution of India, known as "The Allahabad High Court Computer Section Service Rules, 2010" (hereinafter referred to as the "Rules, 2010") and that the petitioners have been merged against the cadre posts of Computer Operators Grade-B. For the persons working in the computer cadre, channel of promotion has been provided as Computer Operator Grade-C and thereafter as Programmer Grade-2 onwards. Reference is made to Rules 3 and 12 read with Schedule-I and Schedule-II of Rules, 2010. He therefore, submits that under the Rules, 2005, even prior to its amendment in 2012, only Assistants having ten years of continuous service on Class III posts, were entitled to participate in the competitive examinations to be held for the post of Bench Secretary Grade-I. Petitioners do not answer the description of Assistants. Even if such Console Operators-cum-Data Entry Assistants were earlier permitted to appear in the competition, the same was only a mistake, which need not be repeated. Even otherwise, since now different cadre has been provided for Console Operator-cum-Data Entry Assistants like the petitioners, they can have no grievance in the matter of appointment to be made on the post of Bench Secretary Grade-I nor their exclusion can be said to be arbitrary and violative to Article 14 of the Constitution of India.

11. Learned counsel for the High Court points out that the year of vacancy is wholly irrelevant, so far as the recruitment on the post of Bench Secretary Grade-I under Rules, 2005 is concerned, inasmuch as the Rules do not contemplate advertisement of vacancy year-wise. The vacancies which have now been advertised in the year 2013 have necessarily to be filled in accordance with amended Rules, 2012. Reference is made to the judgement of the Apex Court in the case of Deepak Agarwal & Another vs. State of Uttar Pradesh & Others, reported in (2011) 6 SCC 725, wherein it has been held that there is no rule of universal or absolute application that vacancies are to be filled invariably by law existing on the date when the vacancy arises. He further submits that plea that in case, the petitioners are permitted to participate in the process of selections, large number of candidates would become available for

being considered and therefore, may result in the best selection for the post of Bench Secretary Grade-I is only an argument of desperation. Petitioners do not belong to the feeding cadre and therefore, they have no right to participate in the process of selection. He submits that it is within the discretion of rule framing authority to lay-down the zone of consideration and once such prescription has been made, the rule can only be challenged on three grounds (a) rule is contrary to the Parent Act, (b) rule framed is not within the authority of the person framing the rule, and (c) it violates any fundamental right of the aggrieved persons. First two grounds have not been pressed. Plea of discrimination, as has been canvassed by the learned counsel for the petitioner, is neither here nor there, in view of the fact that a separate cadre and a separate channel of promotion has been provided for the persons working under Rules, 2010 like the petitioners.

12. We have considered the submissions made by the learned counsel for the parties and have examined the records of the present writ petition.

13. It is not in dispute that so far as the appointment on Class III posts in the establishment of the High Court, Allahabad is concerned, the same is regulated by Rules, 1976. These Rules, 1976 provide for the cadre of Class III posts and their method of recruitment. Admittedly there exists no post of Console Operator-cum-Data Entry Assistant under Rules, 1976. It is the employees, who were working as Assistants referable to Rules, 1976 were the feeding cadre for appointment as Bench Secretary Grade-I under Rules, 2005.

14. We may record that the word "Assistant" has not been defined under Rules, 1976, even otherwise whatever may have been the position with regard to the employees working as Console Operator-cum-Data Entry Assistant being treated to be the Assistant working in Class III, in the establishment of the High Court or not prior to Rules, 2010, the issue has crystallized with the framing of the Rules, 2010, wherein all Console Operator-cum-Data Entry Assistants have been designated as Computer Operators Grade-B. Reference Rule-3, Rule-12 read with Schedules-I and II of Rules, 2010. Under Rule-12 of Rules, 2010 a different channel of promotion/appointment on higher posts in the said cadre has been provided. So far as the persons like the petitioners are concerned, the next channel of promotion is to that of the post of Computer Operator Grade-C and thereafter to the post of Programmer Grade-2 onwards. The Rule framing authorities has further laid at rest the doubts if any with regard to the persons eligible to participate in the competitive examinations to be held for the post of Bench Secretary Grade-I by making necessary amendments in Rules, 2006 known as Rules, 2012. The amendments which have been made in the existing Rule-6 (i) of the Allahabad High Court Bench Secretaries (Condition of Service) Rules, 2005 reads as under---

Rule -6

Particulars –Source of appointment to various promotional posts. Appointment to the various categories of promotional posts in the service shall be made from the following sources, namely (i) Bench Secretary Grade-1

Existing Rule- By selection through competitive Examination to be conducted by the appointing authority open to the Assistants having not less

than ten years continuous service in Class III posts. Preference shall however, be given to candidates possessing a Law Degree

Rule as hereby amended:

By selection through competitive Examination to be conducted by the appointing authority open to the Review Officer/Assistant Review Officer having not less than ten years continuous service. Preference shall however, be given to candidates possessing a Law Degree

15. It is, therefore, clear that Rules, 2005 as amended in the year 2012 provide for zone of eligibility for appearing in competitive examination for the post of Bench Secretary Grade-I as those working as Review Officer/Assistant Review Officer. The competence of the Hon'ble The Chief Justice to frame rules under Article 229 of the Constitution of India is not challenge. The power to lay down service conditions shall necessarily include the mode and manner of recruitment to the post. The plea of violation of Article 14 of the Constitution of India has only been stated to be rejected. A

16. As noticed above, under Rules, 2010, a different channel of promotion has been provided for the petitioners and therefore, they cannot insist that merely because they are drawing salary, which is equivalent to the employees working as Review Officer/Assistant Review Officer, which is a Class III post, they should also be held eligible to participate in the competitive examination for the post of Bench Secretary Grade-I against in respect of vacancies which occurred prior to 2012.

17. The Apex Court in the case of Deepak Agarwal (Supra) has held that there is no rule of universal or absolute application that vacancies are to be filled invariably by law existing on the date when the vacancy arises. The law so laid down applies with full force in the facts of the case, inasmuch as the Rules, 2005 do not contemplate advertisement of the vacancy year-wise nor any other rule in that regard has been brought to our notice by the learned counsel for the petitioner.

18. So far as the submission of the petitioners that they are possessed of better qualification vis-a-vis Review Officer/Assistant Review Officer is concerned, we are of the opinion that the submission of the petitioners has no relevance having regard to the statutory rules, which define the zone of consideration.

19. In the totality of the circumstances on record, we find no good ground to interfere either with the amended rules or with the process of selection which has been initiated for appointment as Bench Secretary Grade-I.

20. The present writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 61020 of 2012

Sri Krishan Bhadauriya Office, Assistant-III ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Brij Raj Singh, Sri S.R. Singh
Sri Devendra Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Sandeep Kumar Srivastava

Sri Ayank Mishra, Sri Baleshwar Chaturvedi

U.P. Government Servant(Discipline and appeal) Rules 1999-Rule-7-Dismissal-without holding disciplinary proceeding in accordance with rule-without charge-sheet-held-without following mandatory provisions under rule-order not sustainable-quashed-reinstatement with consequential benefit with cost of Rs. 11000/-.

Held: Para-16
Applying the law, stated herein above, on the facts of the case at hand, it is admitted by the respondents that the petitioner was terminated directly without following the procedure as provided under rule 7 of the Rules. Enquiry against the petitioner was never contemplated nor charges was framed, major penalty of termination was imposed on the investigation report that is not permissible under the Rules.

Case Law discussed:
(2006) 9 SCC 167; [2012(1) ESC 279 (All) (DB)]; [2012(1) ESC 229 (All) (LB)]; [2010 (1) ESC 18 (All) (DB)]; [)2014) 2 UPLBEC 1060]; AIR 1991 SC 2010; 2013(4) SCC 161; 2013 (5) SCC 111; 1993(3) SCC 196; 1974 A.L.J. 862; (2007) 1 SCC (L&S) 292; [2012(1) ESC 279(All)(DB)].

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

1. Heard Sri Devendra Kumar Singh, learned counsel for the petitioner and Sri Ayank Mishra as well as Sri Baleshwar Chaturvedi, learned counsel for the respondents.

2. The petitioner was posted as Office Assistant-III in the office of Executive Engineer, Computer Billing Service Centre, Agra w.e.f. April 2006 to March 2007 and when the petitioner was posted at Chitrakoot after six years from the date of posting at Agra, he was issued show cause notice dated 30.04.2012 alleging that while the petitioner was posted in the office of Executive Engineer, Computer Billing Service Centre, Agra, the petitioner had committed illegalities inasmuch as irregularities pertaining to electricity bill and money collected from the customers was not deposited, forged receipts were prepared which resulted in the alleged loss of Rs. 17,05,305/-.

3. It was further alleged that bungling was done in the output data and in other documents. An investigation was carried out by Sri Ram Bhajan Singh, Inspector (Economic Offences Wings U.P. Lucknow), and the report was examined by the Dakshinanchal Vidyut Vitaran Nigam Ltd., Agra and it was decided to terminate the services of the petitioner. The petitioner replied to the show cause notice stating that after lapse of six years show cause notice was issued and the details of the allegations have not been furnished and further the investigation report is not enclosed with the show cause notice. After receiving the reply, petitioner's services was terminated by respondent no. 4 by order dated 18.05.2012. Aggrieved by the said order, petitioner preferred an appeal which has also been dismissed by a five line cryptic order.

4. Aggrieved by the orders dated 18.05.2012 passed by respondent no. 4, Superintendent Engineer, Vidyut Vitaran Mandal, Banda and order dated 11.10.2012 passed by respondent no. 3, Chief Engineer, Dakshinanchal Vidyut Vitran Nigam Ltd, Banda Region Banda, petitioner has approached the court.

5. Sri Devendra Kumar Singh, learned counsel for the petitioner,

contends that neither any show cause notice nor enquiry report nor any charge sheet was ever served upon the petitioner and no enquiry officer was appointed, the procedure prescribed under U.P. Government Servants (Discipline and Appeal) Rules 1999 was not followed and the authority has illegally exercised his powers under Rule 3 (iv)(v) which wholly is ex parte and illegal. The termination order is merely eye wash in order to protect the other officers of the Corporation.

6. Sri Devendra Kumar Singh, in support of his submission, has relied upon (i) Hari Ram Maurya Versus Union of India and others; (2006) 9 SCC 167, (ii) Dr. Subhash Chandra Gupta Versus Versus State of U.P. and others; [2012(1) ESC 279 (All) (DB)], (iii) Man Mohan Singh Jaggi Versus Food Corporation of India and others; [2012(1) ESC 229 (All)(LB)] and (iv) G.R. Agnihotri and another Versus Dakshinanchal Vidyut Vitran Nigam Ltd and others; [2010(1) ESC 18 (All)(DB)].

7. In rebuttal, Sri Baleshwar Chaturvedi appearing for the respondents, submits that on the employees of U.P. State Electricity Board (now U.P. Power Corporation Ltd.), the Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999 is applicable, Sri Chaturvedi admits that the authority has exercised its power terminating the services of the petitioner without issuing charge sheet and appointing enquiry officer solely on the basis of the investigation report submitted by the Investigating Officer.

8. Rival submissions fall for consideration.

9. The Division Bench of this Court in Smt. Parmi Maurya vs. State of U.P. and others [(2014) 2 UPLBEC 1060] held that the provisions of Rule 7 of the U.P. Government Servant (Discipline and Appeal) Rules 1999 is mandatory and it is obligatory for the employer to frame charge/conduct disciplinary enquiry by applying the principles of natural justice and prove the allegations, without adopting such procedure order passed terminating the delinquent employee is illegal. Paragraph 7 is as follows:-

"7. On these facts, the learned Single Judge, in our view, was clearly in error in arrogating to the Court the task of determining whether the certificate and mark sheets submitted by the appellant were genuine or otherwise. This, with respect, was no part of the jurisdiction of the writ Court under Article 226 of the Constitution. When a substantive charge of misconduct is levied against an employee of the State, the misconduct has to be proved in the course of a disciplinary inquiry. This is not one of those cases where a departmental inquiry was dispensed with or that the ground for dispensing with such an inquiry was made out. The U.P. Government Servants (Discipline and Appeal) Rules, 1999 lays down a detailed procedure in Rule 7 for imposing a major penalty. Admittedly, no procedure of that kind was followed since no disciplinary inquiry was convened or held."

10. Rule 2(d) defines departmental enquiry and means "departmental inquiry" under Rule 7 of the rules. Rule 7 provides the procedure for imposing major penalty which states that before imposing major penalty an enquiry shall be held in the manner provided in the rule. Sub-rule (ii)

provides the fact constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges. Sub-rule (ii) is as follows:-

"(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority."

11. Sub-rule (v) provides that the documentary evidence and list of witnesses and the statements shall be served upon the delinquent official alongwith charge-sheet and sub-rule (vii) provides that in case of denial of the charges by the delinquent official the enquiry officer shall proceed to call witnesses proposed in the charge sheet and record their oral evidence in the presence of the charged delinquent official who shall be given an opportunity to cross examine such witnesses; Sub-rule (viii) provides for submission of enquiry report to the disciplinary authority along with the record of the enquiry and sub-rule (ix) provides that disciplinary authority having regard to the findings of all or any of the charges is of the opinion any penalty specified in rule 3 should be imposed on the charged government servant which shall give a copy of the enquiry report and his findings recorded to the charged Government servant and require him to submit representation, if he so desires and thereafter pass reasoned order imposing one or more penalty mentioned in rule 3.

12. The Supreme Court in Union of India vs. K.V. Jankiraman (AIR 1991 SC 2010), Union of India V. Anil Kumar Sarkar, 2013 (4) SCC 161 and State of Andhra Pradesh v. C.H. Gandhi, 2013 (5) SCC 111, held that the enquiry commences from the date of issue of charge-sheet. Framing of the charge-sheet is the first step taken for holding enquiry into the allegations on the decision taken to initiate disciplinary proceedings. Service of charge-sheet on the Government servant follows decision to initiate disciplinary proceedings and it does not precede and coincide with that decision. (Vide Delhi Development Authority v. H.C. Khurana 1993 (3) SCC 196).

13. The Full Bench judgment in case of State of U.P. v. Jai Singh Dixit and others, 1974 A.L.J. 862, the words 'inquiry' and 'contemplated' was considered.

"34. A formal departmental inquiry is invariably preceded by an informal preliminary inquiry which itself can be in two phases. There can be a summary investigation to find out if the allegations made against the Government servant have any substance. Such investigation or inquiry is followed by a detailed preliminary or fact finding inquiry whereafter final decision is taken whether to initiate disciplinary proceeding. The first preliminary inquiry may be in the shape of secret inquiry and the other, of an open inquiry. In the alternative, when complaints containing serious allegations against a Government servant are received, the authority may peruse the records to satisfy itself if a more detailed preliminary inquiry be made.

37. Departmental inquiry is contemplated when on objective consideration of the material the

appointing authority considers the case as one which would lead to a departmental, inquiry, irrespective of whether any preliminary inquiry, summary or detailed, has or has not been made or if made, is not complete. There can, therefore, be suspension pending inquiry even before a final decision is taken to initiate the disciplinary proceeding i.e., even before the framing of the charge and the communication thereof to the Government servant."

14. The Supreme Court in Mathura Prasad v. Union of India and others, (2007) 1 SCC (L&S) 292), held that when an employee is sought to be deprived of his livelihood for alleged misconduct, the procedure laid down under the rules are required to be strictly complied with:

"When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedure laid down under the sub-rules are required to be strictly followed: It is now well settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in the manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact, for sufficient reasons may attract the principles of judicial review."

15. The Division Bench of this Court in Dr. Subhash Chandra Gupta v. State of U.P. and others, [2012(1) ESC 279 (All)(DB)] while dealing with the provision of rule 7 and 9 of the Rules, held that the procedure for imposition of major penalty is mandatory and where the statute provides to do a thing in a particular manner that thing has to be done in that manner. Paras 15 and 16 is as follows:-

"15. It is well settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgment of the Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541.

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667 (All)(DB), held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceedings including the order of punishment has observed as under:

"10.....Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000(1) UPLBEC 541, considering the question as to

whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P. Cooperative Spinning Mills and others, 2001(2) UPLBEC 1475 and Laturi Singh v. U.P. Public Service Trinunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

16. Applying the law, stated herein above, on the facts of the case at hand, it is admitted by the respondents that the petitioner was terminated directly without following the procedure as provided under rule 7 of the Rules. Enquiry against the petitioner was never contemplated nor charges was framed, major penalty of termination was imposed on the investigation report that is not permissible under the Rules.

17. The impugned order dated 18.05.2012 passed by respondent no. 4, Superintendent Engineer, Vidyut Vitaran Mandal, Banda and order dated 11.10.2012 passed by respondent no. 3, Chief Engineer, Dakshinanchal Vidyut Vitran Nigam Ltd, Banda Region Banda, are quashed. The petitioner shall be reinstated in service with all consequential benefits.

18. In the facts and circumstances of the case and for the reasons stated herein above, the writ petition is allowed. Counsel fee assessed at Rs. 11,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2014

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 64875 of 2011

Man Mohan Rai ...Petitioner
Versus
U.P. Financial Corporation Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.K. Malviya, Sri N.L. Pandey

Counsel for the Respondents:
C.S.C., Sri A.A. Khan

Constitution of India, Art.-226-Recovery of loan-advanced by financial corporation amount exceeding Rs. 10 lacs-can be recovered under state financial corporation act-recovery proceeding under Act no. 1972-held-without jurisdicition.

Held: Para-16
From the discussions aforesaid, it is clear that the recovery in the present case since is for an amount exceeding Rs.10 lacs, therefore, it could be resorted to only under the provisions of the Act 1993 or the enactment protected by virtue of section 34(2) therein, which includes the 1951 Act, but omits the 1972 Act. The impugned recovery certificate issued under the 1972 Act, therefore, is contrary to law and cannot be sustained. Consequently, the writ petition succeeds and is allowed. The impugned recovery proceedings pursuant to recovery citation dated 14.10.2010 initiated under the 1972 Act are set aside. However, it will be open for the respondent- corporation to proceed in accordance with law under the Act 1993 or State Financial Corporation Act, 1951, which may be available to it.

Case Law discussed:
(2003) 2 SCC 455; 2005 AIR (All) 320; W.P. No. 33035 of 2004; (2010) 5 SCC 761.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. The present writ petition has been filed challenging the recovery certificate

dated 14.10.2010 issued by the Assistant Collector II- Grade Jagadhri under the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972.

2. The crux of the submission is that the recovery since is of more than Rs.10 lacs, therefore, in view of the law laid down by the Apex Court in Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and others reported in (2003) 2 SCC 455, the recovery initiated under the U.P. Public Moneys (Recovery of Dues) Act, 1972 (hereinafter referred to as 1972 Act) is without jurisdiction and the dues could only be recovered by resorting to provisions of the State Financial Corporations Act, 1951 (hereinafter referred to as 1951 Act) or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 1993 Act).

3. The petitioner was a partner in a firm, which availed of a term loan of Rs.9 lacs from the U.P. Financial Corporation on 9.10.1996. It is claimed that petitioner along with his family met with a serious accident, in which some of his family members died and petitioner also remain hospitalized for long periods, as a result whereof the petitioner could not pay the dues of the Corporation. The recovery proceedings were initiated and various litigations ensued at the instance of the firm and its partners, which need not be enumerated in detail. Suffice it to say that the factory premises of the firm was sold for a sum of Rs.5,40,000/- for the dues of the Corporation. The petitioner also claims to have deposited a sum of Rs.1,90,065/-. Petitioner's residential house was also auctioned for the dues of the Corporation for a sum of Rs.32.50 lacs and the same was adjusted for the dues of the Corporation. The recovery in question under the Act of 1972 has now been issued on 14.10.2010 for a sum of Rs.2,00,24,720/-. The recovery impugned under the 1972 Act has been challenged by the petitioner on the ground that the same is wholly unauthorized in view of law laid down in Unique Butyle Tube Industries (P) Ltd. (supra) and the only course available to proceed for any dues is by resorting to the 1951 Act or 1993 Act.

4. We have heard Sri N.L. Pandey, learned counsel for the petitioner, Sri Atiq Ahmad Khan, learned counsel for the U.P. Financial Corporation and learned Standing Counsel for the respondent-state.

5. Learned counsel for the petitioner has placed reliance upon the judgment in Unique Butyle Tube Industries (P) Ltd. (supra) and also upon a Full Bench judgment of this court in Suresh Chandra Gupta vs. Collector, Kanpur Nagar reported in 2005 AIR (All) 320 to contend that the impugned recovery proceedings are wholly without jurisdiction.

6. Per contra, Sri Khan, learned counsel for the Corporation has placed reliance upon a Division Bench judgment of this court dated 18.8.2004 in Writ Petition No.33035 of 2004 'Ajit Kumar vs. State of U.P. and others' and another judgment dated 22.8.2008 delivered in Writ Petition No.36803 of 2007 'M/s Mak Plastic (P) Ltd. and others vs. U.P. Financial Corporation and others'. Sri Khan has also relied upon an order of the Apex Court dated 21.9.2005 in Paliwal Glass Works and others vs. State of U.P. and others, referring the matter to a larger bench for reconsideration of the decision

rendered in Unique Butyle Tube Industries (P) Ltd. (supra).

7. The Apex Court in Unique Butyle Tube Industries (P) Ltd. (supra) took note of the relevant provisions of the 1951 Act, 1972 Act and 1993 Act. Para 7 of the said judgment, which refers to the relevant provisions, is reproduced herein below:-

"7. In order to appreciate the rival submissions a few provisions throwing light on the controversy need to be noted.

Act

"34. Act to have overriding effect.- (1) Save as provided under sub- section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2). The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989)."

Financial Act

"32-G. Recovery of amounts due to the Financial Corporation as an arrear of land revenue.- Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorized by it in writing in this behalf, may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue."

U.P. Public Moneys (Recovery of Dues) Act, 1972

"3. Recovery of certain dues as arrears of land revenue. - (1) Where any person is party-

(a)-(b) ---------

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government or the Corporation shall be recoverable as arrears of land revenue; and such person-

(i) makes any default in repayment of the loan or advance or any installments thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant of portion or any installment thereof; or

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(2) The Collector on receiving the certificate shall proceed to recover the

amount stated therein as an arrear or land revenue.

(3) No suit for the recovery of any sum due as aforesaid shall lie in the civil court against any person referred to in sub-section (1).

(4) In the case of any agreement referred to in sub-section (1) between any person referred to in that sub-section and the State Government or the Corporation, no arbitration proceedings shall lie at the instance of either party for recovery of any sum claimed to be due under the said sub-section or for disputing the correctness of such claim:

Provided that whenever proceedings are taken against any person for the recovery of any such sum he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment the proceedings shall be stayed and the person against whom such proceedings were taken may make a reference under or otherwise enforce an arbitration agreement in respect of the amount so paid, and the provisions of Section 183 of the Uttar Pradesh Land Revenue Act, 1901, or Section 287-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as the case may be, shall mutatis mutandis apply in relation to such reference or endorsement as they apply in relation to any suit in the civil court."

8. After noticing the provisions aforesaid, the Apex Court held that recovery of money under the 1972 Act was not a mode protected under sub-section (2) of section 34 of the 1993 Act and relying upon the principles of casus omissus and reading of the statute as a whole, came to the conclusion that once the 1993 Act had come into being, realization of debt covered therein had to be regulated by the provisions of 1993 Act, or under the enactments which have been specifically protected therein, including State Financial Corporation Act, 1951. It was, therefore, held that since the provisions of the Act of 1972 were not protected as such the recovery initiated under the 1972 Act was without jurisdiction.

9. The Apex Court, however, in a subsequent order dated 21.9.2005 passed in Civil Appeal No.5933 of 2005: Paliwal Glass Works vs. State of U.P. and others, referred the matter to a larger Bench on the ground that while deciding the issue in Unique Butyle Tube Industries (P) Ltd. (supra), the implication of section 32G of the Act 1951 and its impact on section 34(2) of the Act 1993 had not been considered. The operative portion of the referring order dated 21.9.2005 in Paliwal Glass Works and others (supra) is reproduced herein below:-

" We are of the view that the submissions made on behalf of the parties need to be considered. The respondents are correct that the scope of section 32G of the State Financial Corporation Act, 1951 and its impact on Section 34(2) of the 1993 Act has not been considered by the decision in Unique Butyle (supra). We are therefore of the view that the question of the scope of Section 34 of the 1993 Act as determined in Unique Butyle requires reconsideration. Let the matters be placed before the Hon'ble the Chief Justice of India for passing such appreciate orders as the Hon'ble the Chief Justice may thinks fit."

10. We have been informed at the bar that Civil Appeal No.5933 of 2005,

wherein referring order had been passed has been finally decided on 26.9.2013. It transpires that appeal was decided by the larger Bench of the Apex Court on the facts noticed in the judgment dated 26.9.2013. It seems that larger Bench did not consider, in view of the facts and circumstances noticed in the judgment dated 26.9.2013, to answer the reference, and instead proceeded to decide the matter on merits. The judgment in Unique Butyle Tube Industries (P) Ltd. (supra), therefore, continues to hold the field.

11. In a subsequent judgment of the Apex Court in A.P.T. Ispat (P) Ltd. vs. U.P. Small Industries Corporation Ltd. reported in (2010) 5 SCC 761, another Division Bench reiterated the view expressed in Unique Butyle (supra). Para 22 of the said judgment is reproduced:-

"22. There is another point and though it was not raised before the High Court, we think it proper to mention it since it is crucial to the proceedings under Section 3 of the U.P. Public Moneys (Recovery of Dues) Act, 1972. In a decision by this Court in Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corpn. it was held that after the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, recourse cannot be taken for recovery of dues to the provisions of the U.P. Public Moneys (Recovery of Dues) Act, 1972 because the U.P. Act does not find mention in Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993."

12. We have otherwise considered the submission of Sri Khan that the provisions of section 32G incorporated under the 1951 Act permits the recovery to be resorted under the 1972 Act. Section 32G of the 1951 Act permits the Financial Corporation or any person authorized by it, in writing in this behalf, without prejudice to any other mode of recovery, to make an application to State Government for the recovery of the amount due to it, and if the State Government or its authority, specified by the State in this behalf, is satisfied, after following such procedure as may be prescribed regarding the amount due, it may issue a certificate for that amount to the Collector, who may then recover it as arrears of land revenue. From the materials brought on record, we do not find that any course contemplated under section 32G had been resorted to by the Corporation in the present case, inasmuch as no application appears to have been addressed to the State Government for recovery of the amount due to the Corporation nor any certificate thereunder has been issued to the Collector. Requirement of following the procedure, as may be prescribed, to ascertain the dues does not appear to have taken place. In such circumstances, necessary ingredients attracting provisions of Section 32G of the 1951 Act are completely missing and the Corporation cannot rely upon Section 32G, to justify the recovery resorted herein under the 1972 Act. Section 32G permits recovery by Corporation in addition to any other mode of recovery which may be available to the Corporation in accordance with law, and as it has not been invoked by the Corporation in the present case, reference of it has no relevance in the facts of the present case. Even otherwise, the authoritative pronouncement in Unique Butyle Tube Industries (P) Ltd. (supra) continues to hold the field and the recovery under the Act 1972 cannot be proceeded with.

13. Placing of reliance by Sri Khan, on the unreported judgment of the

Division Bench in Ajit Kumar (supra) also has no applicability on the facts of the present case, inasmuch as the Division Bench of this court in Ajit Kumar (supra) after noticing the judgment in Unique Butyle Tube Industries (P) Ltd. (supra) refused to interfere in the matter, noticing the conduct of the petitioner, who had refused to pay even a part or fraction of the dues and was only insisting upon plea that recovery was not permissible, and as such this Court refused to exercise discretionary jurisdiction under Article 226 of the Constitution. The judgment delivered in Writ Petition No.33035 of 2004 'Ajit Kumar vs. State of U.P. and others' was delivered on the specific facts and circumstances of the case concerned, which cannot be treated to be a authority for a proposition contrary to Unique Butyle (supra), particularly in view of the facts of the present case which are quite different.

14. The other judgment of the Division Bench of this Court dated 22.8.2008, relied upon by Sri Khan in Writ Petition No.36803 of 2007 goes to show that the case was decided, while the reconsideration of Unique Butyle (supra) was pending before Hon'ble Supreme Court. The Division Bench in Writ Petition No.36803 of 2007 while noticing the judgment in Unique Butyle (supra) observed as under:-

"So far as this case i.e. Unique Butyle (supra) is concerned, the Division Bench of the Supreme court has categorically held that a Bank or a financial institution has the option or choice to proceed either under the State Act i.e. U.P. Act 1972 or under the modes of recovery permissible under the Corporation Act, 1951."

The observations made by the Division Bench of this court noted above, appears to be contrary to law laid down in para 16 of the Unique Butyle (supra), wherein the proceedings of recovery under the 1972 Act had been specifically quashed. The judgment in Writ Petition No.36803 of 2007 permitting the recovery proceedings under the 1972 Act to continue essentially proceeded on the premise that the matter is still subjudice before the Apex Court, pursuant to the referring order passed in M/s Paliwal Glass Works (supra) and thus, will have no relevance now, as the issue of reconsideration of Unique Butyle (supra) is no longer pending. The argument of Sri Khan based upon the judgment delivered in Writ Petition No.36803 of 2007, therefore, also cannot be accepted.

15.The judgment in Unique Butyle (supra) has also been a subject matter of consideration by the Full Bench of this court in Suresh Chandra Gupta (supra), the conclusions wherein have been laid down in para 23 and 24 of the said judgment, which are reproduced:-

"23. Our conclusions are as follows:

(a) In case of repugnancy or inconsistency between the Central Act under list-1 and the State Act under list-II-the Central Act shall prevail.

(b) The UP Public Moneys (Recovery of Dues) Act, 1972 is neither contrary to Section 32-G of the State Financial Corporation Act, 1951 nor is there any repugnancy between the two. It is not void.

(c) The guarantors are covered under the Recovery of Debt Due to Bank and

Financial Institution Act, 1993 and recovery proceedings against them can be taken under this Act.

(d) Recovery proceedings can neither be initiated against the principal borrower nor against the guarantor under the UP Public Moneys (Recovery of Dues) Act, 1972 if the debt is more than 10 lakhs; recovery proceedings can only be initiated under the 1993 Act.

24. In view of our conclusion the writ petition is allowed. The recovery proceedings against the petitioner under UP Public Moneys (Recovery of Dues) Act, 1972 are quashed. It would be open to the respondents to initiate recovery proceedings in accordance with law. Petition allowed."

16. From the discussions aforesaid, it is clear that the recovery in the present case since is for an amount exceeding Rs.10 lacs, therefore, it could be resorted to only under the provisions of the Act 1993 or the enactment protected by virtue of section 34(2) therein, which includes the 1951 Act, but omits the 1972 Act. The impugned recovery certificate issued under the 1972 Act, therefore, is contrary to law and cannot be sustained. Consequently, the writ petition succeeds and is allowed. The impugned recovery proceedings pursuant to recovery citation dated 14.10.2010 initiated under the 1972 Act are set aside. However, it will be open for the respondent- corporation to proceed in accordance with law under the Act 1993 or State Financial Corporation Act, 1951, which may be available to it.

17. Subject to the aforesaid observations made, the writ petition is allowed. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2014

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

Civil Misc. Writ Petition No. 64991 of 2013

Priti Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ganesh Shankar Srivastava
Sri R.D. Kishore

Counsel for the Respondents:
C.S.C., Sri Vivek Varma

Constitution of India, Art.-226-Education-petitioner through out meritorious student-right from High School to B.A. Part-I and II-in Part III in Sanskrit-I and II paper secured 65% marks but in III paper only 34 marks-on request of scrutiny-Writ Court directed to get copy under R.T.I.-and after fight in contempt-proceeding-university came with case answer sheet weeded out-direction to award average marks issued.

Held: Para-17
In peculiar facts and circumstances of this case, in my view, the end of justice would be met if a direction is issued to the University to award average marks to the petitioner in IIIrd Paper of Sanskrit in which she has been awarded only 34 marks. Accordingly a direction is issued upon the University to award average marks to the petitioner in the IIIrd Paper of Sanskrit within two months from the date of communication of this order.

Case Law discussed:
(2011) 8 SCC 497); (2009) 1 SCC 599.

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

1. The petitioner is a brilliant student. She passed her High School and Intermediate with first division marks, and in B.A. Part-I & II also she secured first division marks. She has preferred this writ petition for issuance of a writ of certiorari for quashing the order dated 03.07.2013 passed by respondent no. 3, Examination Controller, Mahatma Gandhi Kashi Vidyapith, Varanasi, whereby in response to her application under Right to Information Act, 2005 she was informed that her answer script of Sanskrit-III paper has been weeded out.

2. The essential facts are; the petitioner was a student of B.A. in Swami Ramnarayanacharya Mahila Mahavidyalaya, Belthara Road, Ballia (for short, "the College"). The said College is affiliated with Mahatma Gandhi Kashi Vidyapith, Varanasi (for short, "the University"). The University is governed under the provisions of U.P. State Universities Act, 1973 and it has its First Statutes and Ordinance, which regulate the affairs of the University and its affiliated Colleges.

3. It is stated that the petitioner has a brilliant academic record. She passed her High School with 68% marks and Intermediate with 74% marks. She appeared in B.A. Part-I as a regular student in the year 2010 and secured 64.50% marks. In B.A. Part-II also she secured 62.16% marks. In B.A. Final year, she selected two subjects; Home Science & Sanskrit; and there were three papers in Sanskrit. The petitioner appeared in B.A. Final year examinations in 2012 and in IIIrd Paper of Sanskrit she had taken extra two additional answer scripts and solved all the questions. However, when the result was declared, to the utter surprise of the petitioner, she had been shown only 34 marks awarded in the third paper of Sanskrit. In first and second paper she had secured more than 60% marks and only in third paper she had got 34 marks.

4. Dissatisfied with her marks in Sanskrit (IIIrd Paper), the petitioner made a request to the Principal of the Institution on 09 August, 2012 for re-evaluation of her answer book of Sanskrit (IIIrd Paper). A copy of the said application has been appended to the writ petition as annexure-5. When her grievance was not attended she preferred a Writ Petition bearing no. 55700 of 2012 (Priti Sharma v. State of U.P. & Others) in this Court. On 19 October 2012 the said writ petition was disposed of with the liberty to the petitioner to approach the University under Right to Information Act, 2005 and the University was directed to consider the petitioner's request in the light of law laid down by the Supreme Court in CBSE v. Aditya Bandopadhyay, (2011)8) SCC 497.

5. It is stated that in compliance of the order of this Court, the petitioner submitted her representation on 01 November 2012. The said application failed to elicit any response from the University.

6. The petitioner, thereafter, filed a contempt application being Contempt Application (Civil) No. 2571 of 2013 (Priti Sharma v. Sahab Lal Maurya, Examination Controller, M.G. Kashi Vidya). On 21 May, 2013 this Court disposed of the contempt application giving last opportunity to the University to comply the order of this Court dated 19 October, 2012 passed in Writ Petition No.

55700 of 2012 within a period of six weeks.

7. In compliance of the order passed in the contempt application, the respondent University has passed the impugned order dated 03 July, 2013 and has rejected petitioner's application on the ground that in pursuance of the decision of the Examination Committee the application for the xerox copy of the answer script becomes time barred (90 days from the date of declaration of the result). The petitioner's application was rejected being time barred, and consequently the University refused to provide copy of the answer script of the petitioner. Aggrieved by the order of the University the petitioner has preferred this writ petition.

8. On 05 December, 2013 the Court has asked the learned Counsel for the University to seek instruction whether petitioner's answer script of Sanskrit, IIIrd Paper, B.A. (Regular) has been weeded out or not. On 18 December, 2013 learned Counsel for the University informed the Court that petitioner's answer-script has been weeded out. The Court directed the University to file an affidavit of a responsible officer of the University. In compliance thereof the University has filed a counter affidavit sworn by the Deputy Registrar, wherein it is stated that petitioner's answer script of Sanskrit (IIIrd Paper) has been weeded out.

9. I have heard Sri Ganesh Shankar Srivastava, learned Counsel for the petitioner and Sri Vivek Varma, learned Counsel for the University.

10. Learned Counsel for the petitioner submits that it is a practice of the various Universities to award general marks in such a situation. His submission that average marks can be awarded may have merit acceptance.

11. Learned Counsel for the petitioner submits that the petitioner had moved an application to the Principal of the College within 90 days. The petitioner is a girl student and is living in a rural area of District Ballia, there was no negligence or latches on her part. She had made a representation to the University and thereafter she has preferred writ petition earlier as well as a Contempt Application. Learned Counsel for the petitioner further submits that the University has failed to point out any provision under its Statutes or Ordinance, wherein it is provided that the copy of answer script would not be provided to a candidate after 90 days. If such resolution has been passed by the Examination Committee, it has not been brought on the record. Lastly he urged that the petitioner has secured 69 marks in Sanskrit (First Paper) and 64 marks in Second Paper, her answer script of third paper has not been properly evaluated as only 34 marks have been awarded to her.

12. Sri Vivek Varma, learned Counsel for the University submits that the Examination Committee of the University has taken a resolution that the answer-scripts of the candidates are weeded out after 90 days. Therefore, it is not possible to re-evaluate the answer script of the petitoner. He has also relied on a judgment of this Court in Jagdish Kumar v. State of U.P. & Others passed in Writ-C No. 29207 of 2013. Against the said order, the Special Appeal has been rejected.

13. I have heard learned Counsel for the parties and considered their respective submissions.

14. Ordinarily this Court does not interfere in the matter of result of the candidates where there is no provision of re-evaluation in the Statutes or the Rules but the Supreme Court in Sahiti and others v. Chancellor, Dr. N.T.R. University of Health Science and others, (2009) 1 SCC 599, has held that even in the case where there is no rule of re-evaluation, the High Court can issue a direction for re-evaluation of the answer scripts. The Supreme Court has further held that if there is no provision for re-evaluation, there is more responsibility on the examiners to evaluate the answer scripts with responsibility and with due care. Paragraph Nos. 32 & 37 of the said judgment read as under;

"32. The plea that there is absence of specific provision enabling the Vice-Chancellor to order re-evaluation of the answer scripts and, therefore, the judgment impugned should not be interfered with, cannot be accepted. Re-evaluation of answer scripts in the absence of specific provision is perfectly legal and permissible. In such cases, what the court should consider is whether the decision of the educational authority is arbitrary, unreasonable, mala fide and whether the decision contravenes any statutory or binding rule or ordinance and in doing so, the court should show due regard to the opinion expressed by the authority.

37. Award of marks by an examiner has to be fair and considering the fact that re-evaluation is not permissible under the Statutes at the instance of the candidate, the examiner has to be careful, cautious and has the duty to ensure that the answers are properly evaluated. Therefore, where the authorities find that award of marks by an examiner is not fair or that the examiner was not careful in evaluating the answer scripts, re-evaluation may be found necessary."

15. In the present case the petitioner has passed her High School and Intermediate Examinations with first division marks and she has also passed her B.A. Part-I and II with the same University with first division marks. In the Ist and IInd Papers of Sanskrit also the petitioner has secured more than 60% marks but only in the third paper she has got 34 marks.

16. The grievance of the petitioner is genuine, she has approached this Court for a direction upon the University to produce her answer script. The University is taking shelter of its resolution of the Examination Committee that after 90 days it weeds out the answer script of the candidates. In the present case the result was declared on 30 June 2012 and the petitioner moved an application on 09 August, 2012 within 90 days. She had also approached this Court on 17 October, 2012 that is the reasonable time when her grievance was not attended.

17. In peculiar facts and circumstances of this case, in my view, the end of justice would be met if a direction is issued to the University to award average marks to the petitioner in IIIrd Paper of Sanskrit in which she has been awarded only 34 marks. Accordingly a direction is issued upon the University to award average marks to the petitioner in the IIIrd Paper of Sanskrit within two months from the date of communication of this order.

18. The writ petition is, accordingly, disposed of.

19. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.01.2014

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

Civil Misc. Writ Petition No. 65532 of 2011

Ram Veer Singh & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha, Sri Abhitab Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri N.L. Pandey, Sri Anil Kumar

Constitution of India, Art.-226-Election of committee of Management in the year 2011-Respondent-4 permitted those 101 member alleged to be enrolled 2004-05-Asst. Registrar allowed only 42 validly elected members to participate in the year 2008-Respondent -4 never raised objection before Asst. Registrar-rather the petition filed by Respondent-4 questioning election 08 also dismissed with liberty to filed civil suit-as per scheme of administration election scheduled to be held in the year 2011-Respondent-4 allowed those 101 members to participate-which questioned by the petition-held bonafide dispute was there-DIOS has no power to adjudicate the validity of member-except the regional committee-order impugned by DIOS set a side-with followup direction.

Held: Para-17
Relevant it would be to mention that the State Government has issued a Government Order dated 19th December, 2000, which has been modified on 20th October, 2008 (annexure-14 to the writ petition), which provides that if the District Inspector of Schools has any difficulty, the matter shall be referred to the Regional Level Committee. From a perusal of the Government Order dated 20th October, 2008 it brings out that the District Inspector of Schools can attest the signature within a week of the election of the Committee of Management where there is no dispute in respect of the election or the electoral college, but if there is any dispute, then the District Inspector of Schools should refer the matter to the Regional Level Committee. The District Inspector of Schools, in my view, has no jurisdiction to decide the electoral college or the validity of the election, if any objection is filed before him raising a bona fide dispute. In the present case, the electoral college was determined by the Assistant Registrar in compliance with the order of this Court dated 05th August, 2005 passed in the special appeals, as referred above. Therefore, there was a bona fide dispute with regard to validity of participation of 101 members, who were admittedly enrolled in the year 2004-05 i.e. before the order was passed by the Assistant Registrar. It was also admitted fact that the newly enrolled 101 members were not allowed to participate in the election of 2008. Thus, in view of the aforesaid facts, it was crystal clear that there was a bona fide and genuine dispute raised by the life members which ought to have been decided by the Regional Level Committee and not by the District Inspector of Schools. From a perusal of the impugned order of the District Inspector of Schools it is established that he has travelled beyond his jurisdiction as he has gone into the validity of enrollment of 101 members.

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

1. This writ petition has been preferred by 5 life members of a society, namely, Shiksha Prasar Samiti, Kapsarh, Sardhana District Meerut, for quashing of the order dated 31st October, 2011 passed

by the District Inspector of Schools, Meerut, the respondent no. 3, whereby he has recognised the election of office-bearers of the respondent no. 4, Committee of Management of Janta Adarsh Inter College, Kapsarh, Meerut.

2. Shorn off unnecessary details, the brief facts are that Shiksha Prasar Samiti, Kapsarh, Sardhana, District Meerut (for short, the "Society") is a society registered under the Societies Registration Act, 1860, as applicable in Uttar Pradesh. It has established an Intermediate College, namely, Janta Adarsh Inter College, Kapsarh, Meerut (for short, the "Institution"), which is a recognised institution and is governed by the provisions of the Uttar Pradesh Intermediate Education Act, 1921 and the Regulations framed thereunder.

3. The Institution has its approved Scheme of Administration, which regulates its affairs in respect of constitution and election of the Committee of Management, various categories of Members, duties and responsibilities of the office-bearers, election process, etc.. The Society, which has established the Institution, has its bye-laws, which governs the affairs of the Society. It is stated that the General Body of the Society and the Institution is the same and one. From the records, it transpires that a dispute arose in respect of membership of the Society which resulted in filing of two writ petitions, being Civil Misc. Writ Petition Nos. 27970 of 2003 (Malwa Singh v. Deputy Registrar, Firms, Societies and Chits, Meerut and others) and 37082 of 2003 (Committee of Management, Janta Adarsh Inter College and another v. State of U.P. and others) before this Court. Writ Petition No. 27970 of 2003 was decided by this Court vide order dated 17th December, 2004, whereby Regional Level Committee was directed to record specific findings as to three points regarding the election held on 11th July, 2003. The second writ petition i.e. Writ Petition No. 37082 of 2003 came to be decided by this Court vide judgement dated 15th April, 2005, whereby a direction was issued for fresh adjudication by the Deputy Registrar, Firms, Societies and Chits for finalisation of the voters' list with reference to the approved Scheme of Administration. Against the aforesaid two orders dated 17th December, 2004 and 15th April, 2005 passed in the above-mentioned two writ petitions, two special appeals, being Special Appeal No. 577 of 2005 (Shiv Kumar v. Mr. Malwa Singh and others) and Special Appeal No. 201 of 2005 (Committee of Management and another v. State of U.P. and others) respectively, were filed. Both the special appeals were disposed of by a common judgement and order dated 05th August, 2005 and further a direction was also given that the Deputy Registrar shall give due weigh to the admission stated to be made by Sri Malwa Singh in regard to the eligibility of 38 members in Shiv Kumar's group and it was left open to the Deputy Registrar to proceed on the basis of the admission and give it due value.

4. In compliance with the order passed in special appeals, the Assistant Registrar, Firms, Societies and Chits, Meerut by an order dated 18th February, 2008 accepted the list of 42 validly enrolled members. A copy of the said order dated 18th February, 2008 is on the record as annexure-4 to the writ petition. This order was challenged by some of the members including Sri Malwa Singh by

means of Civil Misc. Writ Petition No. 24421 of 2008 (Malwa Singh and others v. Assistant Registrar, Firms, Society and Chits, Meerut and others), which was dismissed by this Court vide order dated 15th May, 2008 leaving it open to the parties to file a civil suit. A copy of the order of this Court dated 15th May, 2008 is on the record as annexure-16 to the counter affidavit filed by the respondent no. 4. In pursuance of the order of the Assistant Registrar dated 18th February, 2008, fresh election was held on 21st September, 2008, wherein one Sri Shiv Kumar was elected as Manager and Sri Bhupendra Singh was elected as President. As the term of the Committee of Management is 3 years, therefore, before expiring the term viz. 20th September, 2011, the Committee of Management proposed to hold the fresh election on 21st August, 2011.

5. The grievance of the petitioners is that the respondent no. 4 conducted the said election in 2011, in which he permitted to participate 101 more members in addition to 42 members, who were found by the Assistant Registrar as valid members. Against the inclusion of 101 new members, who were stated to be enrolled sometimes in 2004, the petitioners submitted their objections before the District Inspector of Schools on 06th August, 2011 and 11th August, 2011. They have stated to have filed a similar objection before the Election Officer also on 12th August, 2011. Said objections are on record as annexures-5 and 6 to the writ petition.

6. It is averred by the petitioners that their objection was rejected by the Election Officer and the election was held on 21st August, 2011, wherein 142 members including 101 new members were allowed to participate. The District Inspector of Schools, ignoring the objections filed before him, recognised the election of the respondent no. 4 by the impugned order dated 31st October, 2011.

7. A counter affidavit has been filed by the respondent no. 4. The stand taken in the counter affidavit is that 101 members were enrolled in 2004-05, therefore, their participation in the election of 2011 is legal and justified.

8. I have heard Sri R.K. Ojha, learned Senior Advocate, assisted by Sri Abhitab Kumar Tiwari, learned Counsel for the petitioners, learned Standing Counsel for the educational authorities i.e. respondent nos. 1 to 3, and Sri N.L. Pandey, learned Counsel for the respondent no. 4.

9. Sri R.K. Ojha, learned Senior Advocate, submits that in compliance with the order of this Court dated 05th August, 2005 passed in the special appeals, the Assistant Registrar had determined the electoral college of the Society i.e. General Body of the Society as well as the institution. Said decision was made in the year 2008 and if 101 members were enrolled in 2004-05, their case shall be deemed to have been rejected by the Assistant Registrar as the fact with regard to their enrollment was not brought to the notice of the Assistant Registrar. He further submits that since aforesaid 101 members were not legally enrolled, this fact was not brought before the Assistant Registrar. Lastly, he urged that the last undisputed election of 2008 was held on the basis of electoral college determined by the Assistant Registrar vide its order dated 18th February, 2008,

therefore, in the next election, which was held in the year 2011, there was no justification to permit 101 new members, who were alleged to be enrolled in the year 2004-05. Hence, on account of participation of 101 new members, the election stood vitiated, therefore, a direction may be issued to hold the fresh election on the basis of electoral college determined by the Assistant Registrar, which comprises of only 42 members.

10. Sri N.L. Pandey, learned Counsel for the respondent no. 4, submits that 101 members were enrolled in the year 2004-05 and they have right to participate in the election as they were enrolled strictly in terms of the procedure provided in the bye-laws of the Society. He has drawn the attention of the Court to paragraph-47 of the counter affidavit to show that the petitioner no. 3 Sri Sugan Pal was the proposer of Sri Jai Pal Singh Rana, who contested the election for the office of Treasurer. A copy of the said document has been brought on record as annexure-24 to the counter affidavit.

11. Learned Standing Counsel has tried to justify the reasons assigned by the District Inspector of Schools in the impugned order. However, he has fairly submitted that in such cases of disputed question, only the Regional Level Committee has the authority to deal with the matter.

12. I have considered the respective submissions advanced by the learned Counsel for the parties and perused the record.

13. The Institution has been established by the Society. It is a common ground that the General Body of the Society and the Institution is the same. While deciding the special appeals, this Court has taken note of the said fact and has directed that till the electoral college is determined by the Assistant Registrar, the proceedings before the Regional Level Committee shall be in abeyance to wait the decision of the Assistant Registrar. In compliance with the said direction, the electoral college was determined by the Assistant Registrar vide its order dated 18th February, 2008. Said order was passed after affording opportunity to all the concerned parties. From a perusal of the order of Assistant Registrar it is evident that the issue with regard to enrollment of 101 members was not raised before him by either of the parties. Therefore, the Assistant Registrar confined his findings with regard to the validity of only 42 members. He rejected the claim of 63 members. The Assistant Registrar in his final analysis has found that there are 42 valid members of the General Body. This decision was challenged before this Court in Civil Misc. Writ Petition No. 24421 of 2008, which was dismissed on the ground of disputed question of fact and it was left open to the aggrieved party to file a civil suit. There is nothing on record to indicate that in pursuance of the order of this Court any civil suit was preferred by any aggrieved party, therefore, the order of the Assistant Registrar attained finality.

14. Regard being had to the fact that the fresh election of 2008 was held by the electoral college comprising 42 members, for the reasons best known to the parties, the cause of 101 members was not espoused before the Assistant Registrar either by them or by the members concerned, therefore, validity of 101 members was not scrutinised by the

Assistant Registrar in its order dated 18th February, 2008.

15. After the term of office-bearers of the Committee of Management, who were elected in 2008, came to expire, the Committee of Management decided to permit 101 new members, stated to be enrolled in 2004, and despite the objections raised in this regard, the election was held.

16. After the election was over, the papers were sent to the office of the District Inspector of Schools, where the petitioners and others had also raised same dispute by filing their objections but the District Inspector of Schools proceeded to decide the dispute with regard to enrollment of 101 members himself without referring the matter to the Regional Level Committee.

17. Relevant it would be to mention that the State Government has issued a Government Order dated 19th December, 2000, which has been modified on 20th October, 2008 (annexure-14 to the writ petition), which provides that if the District Inspector of Schools has any difficulty, the matter shall be referred to the Regional Level Committee. From a perusal of the Government Order dated 20th October, 2008 it brings out that the District Inspector of Schools can attest the signature within a week of the election of the Committee of Management where there is no dispute in respect of the election or the electoral college, but if there is any dispute, then the District Inspector of Schools should refer the matter to the Regional Level Committee. The District Inspector of Schools, in my view, has no jurisdiction to decide the electoral college or the validity of the election, if any objection is filed before him raising a bona fide dispute. In the present case, the electoral college was determined by the Assistant Registrar in compliance with the order of this Court dated 05th August, 2005 passed in the special appeals, as referred above. Therefore, there was a bona fide dispute with regard to validity of participation of 101 members, who were admittedly enrolled in the year 2004-05 i.e. before the order was passed by the Assistant Registrar. It was also admitted fact that the newly enrolled 101 members were not allowed to participate in the election of 2008. Thus, in view of the aforesaid facts, it was crystal clear that there was a bona fide and genuine dispute raised by the life members which ought to have been decided by the Regional Level Committee and not by the District Inspector of Schools. From a perusal of the impugned order of the District Inspector of Schools it is established that he has travelled beyond his jurisdiction as he has gone into the validity of enrollment of 101 members.

18. After careful consideration of the matter, I am of the view that the matter ought to have been considered by the Regional Level Committee and not by the District Inspector of Schools. Therefore, the order of the District Inspector of Schools dated 31st October, 2011, as is impugned in this writ petition, needs to be set aside and accordingly, it is set aside. The Joint Director of Education, Meerut Region, Meerut is directed to place the matter before the Regional Level Committee in terms of the Government Order dated 19th December, 2000 and 20th October, 2008. The Regional Level Committee shall consider the matter after giving opportunity to the

concerned parties and pass appropriate order expeditiously preferably within a period of three months from the date of communication of this order. Till the decision is taken by the Regional Level Committee, the status quo as on today shall be maintained by the parties.

19. Needless to say that the Regional Level Committee shall consider the matter independently in accordance with law. Any observation made in this judgement shall not cause any prejudice to the contentions and interest of either of the parties.

20. Accordingly, the writ petition is disposed of.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 66820 of 2010 along with W.P. No. 68908 of 2010

Chief Account Officer & Anr. ...Petitioners
Versus
Mohd. Idrish ...Respondent

Counsel for the Petitioners:
Sri Subodh Kumar, Sri Udit Chandra

Counsel for the Respondent:
S.C., Sri A.K. Srivastava, Sri S. Srivastava

Constitution of India, Art.-226-Service law-recovery of excess amount-after six year retirement-when received excess amount knowingly not disclosed this fact-contention that not instrumental in getting excess amount can not be recovered-held-Public money neither belongs to payer or receiver-it can be recovered at any time-direction to pay entire amount within 3 month with three installments-without any excess demand-petition allowed.

Held: Para-6
So far as the payment in excess is concerned, we are of the opinion that it is not in dispute. The amount which has been paid in excess was not legally due to the respondent, it was a public money and cannot be retained illegally.

Case Law discussed:
2012(4) ESC 509 (SC).

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

1. The Writ Petition No.66820 of 2010 has been filed by the Chief Account Officer (GPF), Controller of Communication Accounts and Union of India, and the Writ Petition No.68908 of 2010 has been filed by the Chief General Manager U.P. East Telecom Circle, Telecom District Manager, B.S.N.L. Jaunpur and Accounts Officer (Cash), O/o T.D.M. B.S.N.L. Jaunpur.

2. In both the writ petitions the petitioners are challenging the order of the Central Administrative Tribunal, Allahabad Bench, Allahabad dated 11.08.2010 in Original Application No.1392 of 2009.

3. The brief facts of the case are that the respondent was the employee in the Department of Telecommunication since 21.03.1969 and retired on 29.5.2003. After six years from the date of retirement a recovery notice dated 17.08.2009 has been issued by the petitioners asking the respondent to pay the sum of Rs.1,12,525/-. According to the notice, the respondent has been paid the amount

in excess in the financial year 1996-97. The respondent filed his reply vide letter dated 15.09.2009 contesting the notice on the ground that the recovery after the retirement of six years is illegally, arbitrarily and without jurisdiction. When no response has been received from the petitioners, the respondent filed a Writ Petition No.53004 of 2009, which has been dismissed on the ground of alternative remedy. In pursuance thereof the respondent filed Original Application No.1392 of 2009 before the Tribunal. The Tribunal vide order dated 11.08.2010 allowed the Original Application. The Tribunal held as follows:-

"I have heard both the counsel and perused the record on file. It is clear that the mistake in the opening balance was made by the employer and was not due to any concealment of fact or fraud committed by the employer. It is also normal practice for financial statements to be accepted as correct. The applicant retired and mistake was not detected at that time hence all retiral benefits were given to him. It is only after a lapse of 6 years that mistake was detected and now he is being asked to make good the payment made to him. I am of the opinion that mistake in the opening balance was made by the office staff dealing with the matter and there was no concealment or fraud committed by the applicant in the matter. Therefore, placing reliance on two judgments of Hon'ble High Court (referred to above), no case seems to be made out for recovery from the applicant at this stage."

4. Learned counsel for the petitioners submitted that it is not disputed that sum of Rs.1,12,525/- has been paid in excess to the respondent and the said payment was due to one Sri Mohd. Illyas, but instead of crediting the said amount in the account of Sri Mohd. Illyas it has been inadvertently credited to the account of the respondent in the financial year 1996-97. When the respondent was not entitled for the said amount he ought to have been objected at that time. However, when such mistake has been deducted in the year 2009 a notice has been issued. It is submitted that the excess amount, which has been paid to the respondent, was a public money, the respondent had no legal right to retain the said amount. Whether there was no concealment of fact or misrepresentation on the part of respondent, is wholly irrelevant. The reliance is placed on the decision of the Apex Court in the case of 'Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others' reported in 2012 (4) ESC 509 (SC).

5. Learned counsel for the respondent submitted that there was no concealment of fact or misrepresentation on the part of the respondent. The excess payment was made by the employer, maybe inadvertently, but the same cannot be recovered after 6 years from the date of retirement. He further submitted that in fact, the excess amount which has been credited is Rs.52,083/-.

6. We have considered the rival submissions and perused the records. So far as the contention of the respondent that only a sum of Rs.52,083/- has been paid in excess is concerned, we do not find any substance, for the reasons that such plea has not been raised before the Tribunal. Even such plea has not been taken in the reply dated 15.09.2009 which is Annexure-3 to the writ petition. In the letter dated 17.08.2009 it is specifically

mentioned that the excess amount of Rs.1,12,525/- has been made in the name of Mohd. Idrish in the financial year 1996-97, therefore, the plea of the respondent that only a sum of Rs.52,083/- has been paid cannot be accepted at this stage. So far as the payment in excess is concerned, we are of the opinion that it is not in dispute. The amount which has been paid in excess was not legally due to the respondent, it was a public money and cannot be retained illegally. The Apex Court in the case of 'Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others' reported in 2012 (4) ESC 509 (SC) (Supra) on a consideration of several decisions of the Apex Court has held as follows:-

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

7. We are of the opinion that the issue involved is squarely covered by the decision of the Apex Court referred herein above. In view of the aforesaid, the impugned order dated 11.08.2010 passed in Original Application No.1392 of 2009 'Mohd. Idrish Vs. Union of India and others' is set aside. The respondent is directed to make the payment of Rs.1,12,525/- within a period of three months which may be accepted by the petitioners in three installments. It is made clear that apart from the aforesaid amount the respondent may not be liable to pay any other amount.

8. Both the writ petitions stand allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2014

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 66995 of 2008

Ram Nagina Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.P. Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Pension and gratuity-with-held on ground of pendency of criminal case-admittedly no departmental enquiry pending-held-no ground for withholding pension-any amount excess liable to be adjusted-with

direction to pay full pension-with liberty to initiate departmental proceeding after decision of criminal case.

Held: Para-6 & 7

6. Admittedly, no disciplinary action is pending against the petitioner and it is merely on the basis of the pendency of the criminal proceedings the petitioner is being paid interim pension.

7. in my opinion, the aforesaid judgement is fully applicable to the present case and the petitioner is entitled for full pension. However, since the recovery of Rs. 6841/- is being made on the basis of the direction of the Accountant General, (Lekha and Hakdari)-I, U.P., Allahabad, respondent no. 2, I find that no reason worth taking into consideration either from the report or on the basis of the argument advanced by the petitioner to interfere in the recovery being made in pursuant to the letter dated 18.10.2008. The aforesaid amount is liable to be adjusted from the payment made henceforth to the petitioner.

Case Law discussed:
AIR 1971 SC 1409; (1983) 1 SCC 305.

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri H.P. Mishra, learned counsel for the petitioner and learned Standing Counsel for the State authority.

2. The present petition has been filed for challenging the order impugned dated 18.10.1988 whereby the recovery of Rs. 6841/- allegedly paid in excess to the petitioner, was directed by the respondent no. 2, Accountant General, (Lekha and Hakdari)-I, U.P., Allahabad. A further prayer to release entire difference of arrears of pension, gratuity etc. including various allowances has also been made by the petitioner. .

3. During the course of argument and on perusal of record, it transpires that there was a criminal case pending against the petitioner being Criminal Case No. 398 of 1995 wherein the petitioner was also detained in jail from 31.10.1995 to 31.11.1995 and on this ground provisional pension is being paid to the petitioner.

4. A counter affidavit has been filed on behalf of the respondents no. 3 to 5 wherein the grant of such provisional pension during the pendency of the criminal appeal was sought to be supported. It was also stated in paragraph 4 of the counter affidavit that 90% gratuity, GPF has already been paid to the petitioner and for remaining 10% GPF amount, a letter has already been written to the respondent no. 2. Insofar as the amount of Rs. 6841/- allegedly paid in excess to the petitioner, it was submitted that from the order under challenge, passed by respondent no. 2, the amount is clearly liable to be recovered from the petitioner. It was further stated that the altogether allowances like washing, food, bonus etc. have already been paid to the petitioner.

5. Learned counsel for the petitioner has relied upon the judgement of this Court in the case of Narendra Kumar Singh vs. State of U.P. decided on 5.10.2013. In the aforesaid judgement also the interim pension was being paid on the ground that the criminal case is pending against the petitioner. The Division Bench of this Court relied upon various decisions of the Apex Court held that pendency of criminal case is no ground for withholding the pension of the employee and a direction to pay full pension was made by the Court. It would

be appropriate to abstract paragraph 7, 8, 9, 14 and 15, which is quoted below:

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

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.

8. 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....."

9. 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.

14. 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.

15. 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."

6. Admittedly, no disciplinary action is pending against the petitioner and it is

merely on the basis of the pendency of the criminal proceedings the petitioner is being paid interim pension.

7. In my opinion, the aforesaid judgement is fully applicable to the present case and the petitioner is entitled for full pension. However, since the recovery of Rs. 6841/- is being made on the basis of the direction of the Accountant General, (Lekha and Hakdari)-I, U.P., Allahabad, respondent no. 2, I find that no reason worth taking into consideration either from the report or on the basis of the argument advanced by the petitioner to interfere in the recovery being made in pursuant to the letter dated 18.10.2008. The aforesaid amount is liable to be adjusted from the payment made henceforth to the petitioner.

8. It is made clear that as left open by the Division Bench of this Court in Narendra Kumar Singh vs. State of U.P.(supra), it will be open to department to proceed afresh after decision in a criminal case in case the department after initiating the proceedings is satisfied that the petitioner is liable for loss caused to the department or for any misconduct if proved in such proceedings.

9. It is expected that the respondent will proceed with the matter, as expeditiously as possible strictly in accordance with law, preferably within a period of six months.

10. With the aforesaid observations, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2014

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Civil Misc. Writ Petition No. 69034 of 2009

Pankaj Kumar Dubey ...Petitioner
Versus
Punjab National Bank & Ors. Respondents

Counsel for the Petitioner:
Sri Umakant, Sri Narendra Pratap Singh
Sri Rishu Mishra

Counsel for the Respondents:
Sri Dharmendra Vaish, Sri S.S. Yadav, S.C.

Constitution of India, Art.-14-Cancellation of appointment-petitioner finally got selected-on post of peon-cancellation on ground of over-qualification-whether justified-held-'No'.

Held: Para-20
I am not inclined to accept the argument of learned counsel for the bank that the petitioner had concealed material facts. Further, this Court having already held that condition regarding disqualification for possessing higher education, is violative of constitutional rights of the petitioner under Article 14 and 16 cannot be denied relief on any such technical ground.

Case Law discussed:
AIR 2000 SC 919; 2011(1) 115 (P & H)(FB); AIR 2002 SC 1503; 1996 Law Suit (SC) 1321.

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. Higher education is considered to be a golden wand to ameliorate poverty; eradicate social backwardness by opening new horizons for employment with enhanced skill, social acceptability and intellectual well being. But it is not always so, like in the instant case, where higher education has become a curse, a malediction, a stumbling block, in snatching from the petitioner the source of livelihood.

2. Shorn of details, the petitioner, after completing VIII standard in the year 1996, got himself registered with the local employment exchange. However, as luck would have it, the petitioner could not get any employment and therefore, pursued further studies and succeeded in passing standard X and XII. He remained unemployed till the year 2008, when the magic wand conjured upon him a public employment as peon in Punjab National Bank vide appointment letter dated 29/3/2008. However, the happiness was short lived. By letter dated 17/4/2008, he was informed that on perusal of testimonials produced by him, it transpired that he did not possess the prescribed qualifications and thus, his offer of employment has been cancelled.

3. This followed the fight for survival. Representations made by petitioner to the higher authorities fell on deaf ears. Recourse to law was the only way out; this is how the petitioner has landed before this Court.

4. The respondent bank in its response put forth a shocking defence. The petitioner is over-qualified for the post of peon and hence, the dispensation of his service. His intermediate pass certificate is responsible for his doom. It is a disqualification for the coveted post of peon, as according to the HRD circular dated 14/10/2004, the minimum qualification for the post is pass in English standard with the rider that the candidate should not have passed 10 + 2 exam or its equivalent. It is contended that the petitioner had concealed his actual qualification but when the correct facts came to the knowledge of the authorities, the impugned order dated 17/4/2008 was passed, cancelling his appointment.

5. Per contra, the petitioner claimed that he has not concealed any fact. His candidature was sponsored by the local Employment Exchange. He passed standard VIII in the year 1996 and the same year, he got himself registered with the Employment Exchange. The petitioner could not get employment and therefore, pursued further studies. Since his candidature was sponsored by the Employment Exchange on basis of registration done in the year 1996, as such, it forwarded the details available with in at the time of registration. The vacancy was not advertised in any newspaper nor minimum qualification was notified to the petitioner. He fairly and truthfully produced all his testimonials before the authorities both at the time of interview and again when he reported for joining. He had thus, not concealed any fact. The stipulation in HRD circular dated 14/10/2004 making higher educational a disqualification for the job is irrational, arbitrary, violative of Article 14 and is liable to be struck down.

6. Now, the principal consideration is whether higher education can be a disqualification for the post of peon. What is the rationale behind it? Does it withstand the test of rationality imbibed in Article 14 of the Constitution.

7. Courts have repeatedly said that Article 14 is edifice of our constitution, which eschew arbitrariness, irrationality and discrimination. It prohibits class legislation but permits classification based on intelligible differentia, having nexus to the object sought to be achieved. The classification cannot be based on ipse dixit of the authorities. Not every mark of distinction, however, irrational to the object of the provision, would justify the classification.

8. This principle of law has time and again been reiterated by the Apex Court, and does not require any further exposition. The question posed is to be tested on the anvil of article 14 and 16 of the Constitution of India. The respondent by providing higher education of Intermediate a disqualification for the post of peon, have carved out a class of individuals who are more qualified in comparison to those with lesser qualification, having passed VIII standard but have not passed intermediate. The question immediately arises is whether such a classification is permissible in law and what is the rationale behind it.

9. It is noticeable that the stipulation in this regard has been challenged as arbitrary and unreasonable restriction on the right of the petitioner to such employment by filing a supplementary affidavit dated 26/4/2010 and again by seeking quashing of the said clause by means of amendment application dated 9/1/2014. In reply to it, the bank has also filed supplementary counter affidavit, but therein, no rationale or logic has been disclosed for making such classification. However, Sri D. Vaish, learned counsel for the Bank at the time of argument submitted that such classification for entry into service is necessary as it had been the experience that more qualified persons are not serious in performance of their duties as a class IV employee. They feel distressed and let down doing such menial jobs and there is a lot of discontent amongst such persons. It is contended that because of this reason, such stipulation has been incorporated.

10. A very similar situation arose before the Apex Court in the case of Mohd. Riazul Usman Gani and others vs. District & Sessions Judge, Nagpur & others AIR 2000 SC 919, while it was called upon to adjudicate upon the validity of the recruitment rules for the post of peon in the judgeship of Nagpur. The provision was to the following effect :-

5.(d) Applications of those candidates possessing minimum educational qualification of passing IVth Vernacular standard and/or educated upto passing of VIIth Standard only should be considered for the interview to the posts of peons and those who have studied above Vllth vernacular standard may not take proper interest in the work of peons and, therefore, should not be called for interview.

It was observed as under : -

20. If an employee does not perform the duties attached to the post disciplinary proceedings can certainly be taken against him. An employer cannot throw up his hands in despair and devise a method denying appointment to a person who otherwise meets the requisite qualifications on the ground that if appointed, he would not perform his duties. Qualification prescribed is minimum. Higher qualification cannot become a disadvantage to the candidate.

21. A criterion which has the effect of denying a candidate his right to be considered for the post on the principle that he is having higher qualification, than prescribed cannot be rational. We have not been able to appreciate as to why those candidates who possessed qualifications equivalent to SSC examination could also not be considered. We are saying this on the facts of the case

in hand and should not be understood as laying down a rule of universal application.

22. We do not think, therefore, that the criterion four as laid by the Advisory Committee constituted under the Rules and upheld by the High Court is in any way reasonable or rational. By adopting such a course High Court has put its stamp of approval to another type of reservation for recruitment to the service which is not permissible, A poor person can certainly acquire qualification equivalent to SSC Examination and not that he cannot go beyond Standard VII. Perhaps by restricting appointment to candidate having studied only up to Standard VII High Court may not be encouraging dropouts.

11. Similar question came up for consideration before the Punjab and Haryana High Court in case of Manjit Singh vs. State of Punjab & others reported in 2011 (1) 115 (P&H) (FB) where the qualification prescribed for the post of Physical Training Instructor was Certificate in Physical Education. The aspirants were Bachelors in Physical Education, which was a higher qualification as compared to Certificate in Physical Education, and were thus, denied the appointment. The Full Bench of Punjab and Haryana High Court held that higher education cannot be treated to be a disqualification, as otherwise, it would be violative of Article 14 and 16. It was observed as under :-

26. The distinction sought to be created to deny eligibility is arbitrary and illusory. It goes without saying that the higher qualification provides better knowledge, better sense and in sight and equip the person with better understanding of the issues and problems. It cannot be a "bane" but has to be a "boon". The Hon'ble Supreme Court in the case of Mohd. Riazul Usman Gani and others vs. District & Sessions Judge, Nagpur, (2000) 2 Supreme Court Cases 606 had the occasion to consider whether the higher qualification than 8th standard prescribed for the post of Peon renders a candidate ineligible. Examining the issue, it is observed as under:-

"21. A criterion which has the effect of denying a candidate his right to be considered for the post on the principle that he is having higher qualification than prescribed cannot be rational. We have not been able to appreciate as to why those candidates who possessed qualifications equivalent to SSC Examination could also not be considered. We are saying this on the facts of the case in hand and should not be understood as laying down a rule of universal application."

27. From the facts on record and dictum of above noticed judgments, it emerges that the candidate possessing higher qualification in the same line cannot be excluded from consideration for selection. It is a different matter that he/ she may not be entitled to any additional weightage for higher qualification, but cannot be denied consideration at par with a candidate possessing minimum prescribed qualification. Denying consideration to a candidate having better and higher qualification in the same line and discipline would definitely result in breach of Articles 14 and 16 of the Constitution of India.

12. The logic put forth by the respondent bank that the more qualified

person will not be doing the job properly is not based on any objective statistical data or research, but merely on certain notions which are relics of the imperial past. The Apex Court had in the case of Mohd. Riazul Usman Gani (Supra) turned down such logic as irrational and illogical. If a person does not work, it can be a ground for taking disciplinary action against such person, but it cannot be made basis for denying appointment to him. Thus, classification made on such ground is based on whims and imagination, with no empirical data in support thereof. Further, such classification encourages educational backwardness, which is against our constitutional ethos. Efforts should be made to create a climate conducive to an individual, even with limited resources, to aspire for higher goals in the field of education, instead of encouraging an increase in school drop-outs under the lure of getting public employment.

13. The Apex Court noted that such stipulation is a kind of reservation in favour of a class not recognised by the Constitution. Our constitution provides reservation to educationally backward classes of citizens and not to citizens who lag behind in education. Thus, stipulation in this regard is against the constitutional philosophy.

14. In view of above discussion, I am of the considered opinion that the impugned restriction for selection to the post of peon, is illegal, arbitrary and violative of Article 14 and 16 of the Constitution.

15. Sri D. Vaish, learned counsel for the respondent bank has placed reliance on the judgement of the Apex Court in the case of Bibhudatta Mohanty vs. Union of India AIR 2002 SC 1503. That was a case where a person with higher qualification than what was prescribed, claimed preference over others. It was held that the clause pertaining to the eligibility providing for giving preference to a more qualified person, only means that all the qualifications being equal, a person possessing higher qualification, will be given preference. It however, cannot be the sole criteria in selection and appointment.

16. The other judgement relied upon by learned counsel for the respondent is in the case of Security Health Department of Health and others vs Anita Puri 1996 LawSuit (SC) 1321, wherein, it is held that when suitability of candidate for a specified post is considered by an expert body, after due consideration of relevant factors, courts should not ordinarily interfere with such selection and evaluation.

17. However, these judgements are of no help to the petitioner as they are not attracted to the controversy at hand.

18. Sri D. Vaish, learned counsel for the respondents submitted that the petitioner has concealed correct facts regarding his qualification and thus, there is no illegality in cancelling his appointment. On the other hand, counsel for the petitioner contended that there is no concealment of any relevant fact by the petitioner. The petitioner had got himself registered with the local Employment Exchange in the year 1996 and at the relevant time he was VIII passed. The petitioner had not submitted any application for appointment pursuant to any advertisement. His name was

forwarded by the Employment Exchange and on the date of interview, he produced all the original testimonials. The respondents after verifying the same, offered employment to him vide letter dated 29/3/2008. The petitioner reported for joining and again produced the original testimonials, whereupon, the impugned order was passed, even without any show cause notice or opportunity of hearing to him.

19. Order sheet dated 21/2/2012 is to the following effect :-

"Sri Uma Kant learned counsel appearing for the petitioner submitted that the vacancy was not advertised in the newspaper and the names were called only through employment exchange and it was never brought in the notice of the petitioner that what should be the qualification for appointment on the post of peon. Taking note of that learned counsel appearing for the Bank is directed to file supplementary counter affidavit brining on record the relevant rules governing the selection of peon in Punjab National Bank and the copy of the advertisement in which the vacancies were advertised if any. Learned counsel for the petitioner is also at liberty to file supplementary rejoinder affidavit to the supplementary counter affidavit filed by the respondent.

List this case on 26th March, 2012."

20. In pursuance of the said direction, no affidavit was filed by the respondent bank. A perusal of the record reveals that a supplementary counter affidavit was filed on 19/1/2014, in which also the required information has not been given. As such, there appears to be considerable force in the submission of the petitioner that his name was considered for selection to the post, as it was sponsored by the Employment Exchange, without his having made any separate application in this regard. The application filed by the petitioner at the time of interview only discloses his name, date of birth, his address and that he has duly passed standard VIII, which is the minimum qualification prescribed for the post. The declaration filed alongwith the application is to the effect that the petitioner is not involved in any criminal case. Indisputably, the petitioner had himself produced all his testimonials at the time of joining and wherefrom, the respondents concluded that his appointment for the post is illegal and cancelled the same. Had there been any intention on part of the petitioner to procure appointment by misleading the authorities, nothing prevented him from withholding his intermediate certificate at the time of reporting. Thus, I am not inclined to accept the argument of learned counsel for the bank that the petitioner had concealed material facts. Further, this Court having already held that condition regarding disqualification for possessing higher education, is violative of constitutional rights of the petitioner under Article 14 and 16 cannot be denied relief on any such technical ground.

21. Before parting, it is noteworthy to mention that now the respondents themselves have prescribed standard XII as the minimum qualification for the post of peon, as is evident from letter by the Bank dated 6/7/2011 (Annexure 1 to the amendment application). The respondents have filed their counter affidavit in reply to the amendment application but have not denied the said fact. Sri D. Vaish

admits that now the minimum qualification for the post of peon is intermediate. This is clear recognition by the Bank that higher education of intermediate is infact a necessity for due performance of duties attached to the post of peon, in a bank.

22. Thus, higher education if not a magic wand, but surely a jewel on one's crown; if not a hero but can never be a villain. A fortiori, the denial of appointment to the petitioner cannot be sustained. Impugned order dated 17/4/2008 is quashed. Respondents are directed to forthwith permit the petitioner to join his duties in pursuance to the offer of appointment dated 29/3/2008 and he shall be paid his regular salary, in accordance with law.

23. Writ petition is allowed with costs.
