ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Testamentary Case 17 of 2012

Mohammad Bu Ali: In The Matter of Good of Late I.Husain..... Petitioner

Counsel for the Petitioner:
Sri J. Nagar, Sri Shubham Agarwal
Sri Sharad Malviya

Counsel for the Respondents:

Indian Succession Act, 1925-Section 263- Application for revokation of letters of administration grant-on ground petitioner being illiterate could not know about publication of notice-execution of will not denied-nothing whisper about allegations of forged will-non issue of citation-not fetal-certificate can not be revoked.

Held: Para-12
In the present case, the court while granting the Letters of Administration with the Will annexed on the basis of the evidence of one of the marginal witnesses has found the Will to be duly proved. The applicant in the application is not contending that no such Will was ever executed by the deceased or that if such a Will exists it is a forged, fictitious or a fraudulent document rather the contents of the application would reveal that the execution of the Will is admitted. There is not even denial to the attestation of the Will by the marginal witnesses who has proved the same.

Case Law discussed:
AIR 955 SC 566 (1); AIR 1970 Calcutta 433.

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

1. Heard Sri J. Nagar Advocate, assisted by Sri Shubham Agarwal, learned counsel for the applicant Qaisarul Islam.

2. The applicant has applied under Section 263 of the Indian Succession Act, 1925 for the revocation of the Letters of Administration granted by this court on 27.5.2013 in favour of one Mohd. Bu Ali in respect of the estate of the deceased Imamat Husain with the Will annexed.

3. The applicant is claiming rights on the properties of the late Imamat Husain on the basis of an oral gift of 1972 and as his sister's son (Bhanja).

4. The submission of leaned counsel for the applicant is that as the applicant has interest in the property of the deceased, he should have been named in the proceedings and issued a citation before granting the Letters of Administration. Secondly, the applicant is an illiterate person. The citation published in the news papers had escaped the notice of the applicant and as such he could not appear and file caveat so as to contest the grant.

5. In support of his contentions, Sri Nagar has placed reliance upon two decisions one reported in AIR 955 SC 566 (1) Anil Behari Ghosh Vs. Smt. Latika Bala Dassi and others and AIR 1970 Calcutta 433 Smt. Annapurna Kumar Vs. Subodh Chandra.

6. The Calcutta authority is only to the effect that where a person has slightest interest in the property, he is entitle to be issued a citation of the petition but the absence would not necessarily result in revocation of the grant.

7. Thus, in view of above, the applicant claiming himself to be the Bhanja may be having a right of citation but the issue is whether the non issuance of the said citation to him would render the grant as invalid.

8. The grant was made after the citation was published in the news papers twice. The publication was made in a widely circulated news papers in the area where the applicant resides. The publication of the citation in the news paper of the area is not disputed. Therefore, citation to the public in newspaper would be a citation to the applicant as well.

9. In view of above, in the normal case, once citation is published through news papers in the area, every person would be deemed to have knowledge of the proceedings unless contrary is shown. The applicant has not established by any material that he had not come across such a citation or that he actually had no knowledge even of the publication of the citation. The avernments to this effect are completely missing from the affidavit filed in support of the application. The only submission in this regard is that the applicant is an illiterate person.

10. In this view of the matter, I am of the view that the court had rightly proceeded with the matter after the citation was published in the news papers and the applicant had failed to participate in the proceedings.

11. The Supreme Court in the case of Anil Behari Ghosh (Supra) has ruled that where the proceedings are defective in substance, it would be a case for revocation of the grant of probate. The Supreme Court further explaining the phrase 'defective in substance' held that it means that the defect be of such a character as to substantially affect the correctness of the proceedings. The judicial power vested in the court to revoke the grant is not absolute. The power to revoke is exercised where the court prima facie belives that it is necessary to have the Will proved afresh. On the other hand, the court may refuse to grant annulment in cases where there is no likelihood of proof being offered that the Will admitted to probate or Letters of Administration was either not genuine or had not been validly executed.

12. In the present case, the court while granting the Letters of Administration with the Will annexed on the basis of the evidence of one of the marginal witnesses has found the Will to be duly proved. The applicant in the application is not contending that no such Will was ever executed by the deceased or that if such a Will exists it is a forged, fictitious or a fraudulent document rather the contents of the application would reveal that the execution of the Will is admitted. There is not even denial to the attestation of the Will by the marginal witnesses who has proved the same.

13. In such circumstances, when the execution of the Will has not been doubted by the applicant by making any averment to this effect and the application merely for the reason that he was not named in the proceedings and was not served with a citation individually, I do not consider it to be a fit case where the grant should be revoked.

14. In view of above, the petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2014

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

THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Special Appeal (D) No. 97 of 2014

Vinod Kumar Sharma..... Appellant
Versus
The State of U.P. and Ors. Respondents

Counsel for the Petitioner:
Sri Krishna Kumar Singh

Counsel for the Respondents:
C.S.C.

U.P. Temporary Govt. Servant(Termination of Services)Rules 1975-Rule3(i)-Petition Appellant working as orderly-after serving charge sheet-holding disciplinary-authority by excercising power under Rule 1975-passed termination order-order being punitive in nature-held service could not be dispense with invoking provisions of Rule 1975-order impugned termination as well as judgment quashed-with 50% back wages.

Held: Para-16-
In these circumstances and for the reasons which we have indicated above, we are of the view that the termination of services of the appellant could not have been effected by invoking the provisions of the 1975 Rules. This was not a termination simplicitor but a termination for misconduct, preceded by a full fledged departmental inquiry based on a charge of misconduct which was found to be established in the departmental inquiry. In the circumstances, the impugned order dated 3 April 2002 which was challenged before the learned Single Judge was unsustainable. The learned Single Judge has, in our view, completely failed to take cognizance of the governing position of law as laid down in the judgements of the Supreme Court which indicate that though the appellant was a temporary government servant and it was open to the competent authority to dispense with the services of the appellant simplicitor under Rule 3 (1) of the 1975 Rules, the termination order dated 3 April 2002 is on a charge of misconduct and the invocation of the 1975 Rules was clearly unlawful. The order of termination dated 3 April 2002 is punitive in nature.

Case Law discussed:
(1974)2 SCC 831; (1991) 1 SCC 691; 1999 SCC (L&S) 439; (2002) 1 SCC 520.

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

1. This special appeal is directed against the judgement of a learned Single Judge dated 10 April 2013 by which a petition under Article 226 of the Constitution filed by the appellant to challenge an order of termination from service has been dismissed.

2. The appellant was appointed by the second respondent in the Directorate of Prosecution as an Orderly on a temporary basis by a letter dated 24 February 1987. A charge sheet was issued to the appellant on 29 January 2002 stating that on 18 December 2001, he was assigned duties to the Camp Office of the Director General. It was alleged that the appellant had willfully not complied with the administrative direction as a result of which he had displayed gross indiscipline and breach of directions. A memo setting out inter alia the direction dated 18 December 2001, the finding contained in the preliminary inquiry dated 24 December 2001 and a list of witnesses by which the charge was to be established was furnished together with the charge sheet. A regular departmental inquiry was convened. On 20 March 2002, the Inquiry Officer submitted his report to the Director General. The inquiry report contained a detailed analysis of the evidence which was produced during the course of inquiry. The Inquiry Officer concluded that the appellant had willfully not remained present when he was directed to report to the

residence-cum-camp office of the Director General on 20 December 2001. The appellant was held to be guilty of misconduct. Thereafter, upon the receipt of the inquiry report, the second respondent passed an order dated 3 April 2002 purportedly in exercise of the powers conferred by The Uttar Pradesh Temporary Government Servants (Termination of Services) Rules, 1975, terminating the services of the appellant on the ground that in view of his indiscipline and the breach of administrative directions, the services of the appellant were no longer required.

3. The appellant filed a writ petition under Article 226 of the Constitution. Before the learned Single Judge, the specific contention which was raised by the appellant was that the termination was penal in nature on the ground of indiscipline and hence an order passed under Rule 3 (1) of the 1975 Rules was unlawful. The appellant submitted that the Supreme Court, while considering the provisions of Article 311 of the Constitution has held that the safeguards available to permanent government servants thereunder are equally available to temporary government servants.

4. The learned Single Judge dismissed the petition holding that the order which was passed by the competent authority was not cryptic but stated that the services of the appellant were being terminated on the ground of indiscipline and non compliance of the order of the higher authorities. The learned Single Judge held as follows:

"In the present case, the order is not cryptic. The order has stated that his services are being terminated on the ground of indiscipline and non-compliance of the orders of higher authorities. It need not be reminded that petitioner's services were not regularized. His services were dispensed with under Uttar Pradesh Temporary Government Servants (Termination of Services) Rules, 1975. Still an inquiry was conducted and a show cause notice in the form of charge-sheet along with allegations was issued to him in which charges were specifically mentioned. Even the evidence which was to be used against him has been annexed as a separate charge sheet. The officials whose evidence is to be used against him have also been enumerated. Petitioner has submitted his reply. Along with reply he has also given the names of the persons whom he wanted to use as his witness. The inquiry has been completed thoroughly. In such a situation it can not be said that the petitioner could not know as to on what grounds his services have been terminated. The order is a formal communication but prior to it a detailed inquiry was held and the petitioner has fully participated in the inquiry, hence the judgements relied upon by the petitioner are not applicable in this case."

5. The learned counsel appearing on behalf of the appellant submits that in the present, the order of termination is penal and stigmatic since it was preceded by a full fledged disciplinary inquiry. A charge sheet was issued, an inquiry was convened, evidence was adduced in the inquiry and a finding of misconduct was arrived at by the Inquiry Officer in his report, yet the competent authority has purported to exercise powers under the 1975 Rules under which the services of a temporary employee can be dispensed with by a notice simplicitor. In the present case, it is urged that the termination is clearly unlawful because the foundation of the order is an allegation of misconduct and hence, the order was of penal consequences.

6. On the other hand, learned counsel appearing on behalf of the

respondents has supported the order of the learned Single Judge.

7. Rule 3 (1) of The Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 provides as follows:

"3(1). Notwithstanding anything to the contrary in any existing rules or orders on the subject, the services of a Government servant in temporary service shall be liable to terminate at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant."

8. Rule 3(1) contemplates that the services of a temporary government servant can be terminated at any time by a notice in writing. The period of notice under sub-rule (2) of Rule 3 is to be one month.

9. The law on the subject has now been settled by a series of judgements of the Supreme Court. In Samsher Singh vs. State of Punjab and Anr1, a Bench of seven learned Judges of the Supreme Court held, while dealing with the case of a probationer that the authority may, in certain cases, be of the view that the conduct of the probationer would be such as to result in a dismissal on an inquiry but the authority may not hold an inquiry and simply discharge the probationer in order to enable him to pursue his vocation elsewhere. However, if on the other hand the probationer is faced with an inquiry on a charge of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) of the Constitution, the probationer can claim protection. The mere fact that an inquiry was held is not always conclusive. What is decisive is whether the order is really by way of punishment. For instance, an inquiry to assess the suitability of a probationer for being confirmed in service can be held and if the authority comes to the conclusion that the probationer is not suitable for being confirmed, an order of termination would not be regarded as punitive in nature. These principles were applied by the Supreme Court in the context of a termination of an ad hoc or a temporary government servant in State of Uttar Pradesh and Anr. vs. Kaushal Kishore Shukla2. The Supreme Court held as follows.

"A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the

Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order..."

10. In a decision in Radhey Shyam Gupta vs. U.P. State Agro Industries Corporation Ltd. and Anr3, the Supreme Court held that the termination of the services of a temporary servant on the basis of an assessment that his work is not satisfactory will not be punitive since the assessment that the work is merely the motive and not the foundation of the order. The situation would be different where the termination is preceded by an inquiry and where evidence is led and a finding of misconduct of a definitive nature is arrived at behind the back. The Supreme Court held as follows:

"But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee - even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases."

11. Consequently, where an inquiry has been held not for the purposes of establishing a misconduct but for the purposes of assessing the suitability of a temporary government servant, an order of termination simplicitor would not be contrary to law. In many cases, the employer may hold a preliminary inquiry and thereafter terminate the services of a temporary government servant. The object of a preliminary inquiry is not to establish misconduct and the termination would not be regarded as punitive in nature.

12. These principles were revisited in Pavanendra Narayan Verma vs. Sanjay Gandhi PGI of Medical Sciences4. The Supreme Court formulated the test to determine whether an order of termination is punitive as follows:

"One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one

of the three factors is missing, the termination has been upheld."

13. The Supreme Court reiterated that an employer is entitled to satisfy itself of the competence of a probationer to be confirmed in service and for this purpose satisfy itself fairly as to the truth of the allegations that may have been made about the employee. In that case, it was held that charge sheet merely details the allegations to enable the employer to deal with them effectively and the report of the inquiry had found nothing than the inability to meet the requirements of the post. Hence, none of the three factors for holding the termination in sum and substance to be punitive were found to be present.

14. In the present case, the facts are not in dispute. A regular departmental inquiry was held against the appellant. A charge sheet dated 29 January 2002 was issued. This was not a preliminary inquiry since admittedly a preliminary inquiry had already been held in this case on 24 December 2001. A Specific charge of misconduct was leveled against the appellant. The charge sheet contained inter alia a list of witnesses. The inquiry was thereafter pursued in the course of which evidence was received. The Inquiry Officer submitted his report dated 20 March 2002 to the Director General holding that the charge of misconduct had been established. There is a specific finding of misconduct in the report of the Inquiry Officer. An order of termination dated 3 April 2002 has been passed invoking the provisions of the 1975 Rules. This was clearly not a termination simplicitor within the meaning of rule 3 (1) of the 1975 Rules.

15. As a matter of fact, it must be mentioned here that even the impugned order of the learned Single Judge proceeds on the basis that an inquiry was conducted, preceded by a charge sheet, evidence was received and a finding of misconduct was arrived at.

16. In these circumstances and for the reasons which we have indicated above, we are of the view that the termination of services of the appellant could not have been effected by invoking the provisions of the 1975 Rules. This was not a termination simplicitor but a termination for misconduct, preceded by a full fledged departmental inquiry based on a charge of misconduct which was found to be established in the departmental inquiry. In the circumstances, the impugned order dated 3 April 2002 which was challenged before the learned Single Judge was unsustainable. The learned Single Judge has, in our view, completely failed to take cognizance of the governing position of law as laid down in the judgements of the Supreme Court which indicate that though the appellant was a temporary government servant and it was open to the competent authority to dispense with the services of the appellant simplicitor under Rule 3 (1) of the 1975 Rules, the termination order dated 3 April 2002 is on a charge of misconduct and the invocation of the 1975 Rules was clearly unlawful. The order of termination dated 3 April 2002 is punitive in nature.

17. We are, accordingly, of the view that the order of the learned Single Judge is unsustainable and the dismissal of the appellant was improper. The petition would have to be, accordingly, allowed by setting aside the order of termination dated 3 April 2002.

18. On the question of back wages, it is now well settled that there is an element of discretion which vests in the

Court in regard to the quantum of back wages that must follow the setting aside of an order of termination.

19. Having due regard to the facts and circumstances of the case, we order while setting aside the order of the learned Single Judge dated 10 April 2013 and the order of termination dated 3 April 2002 that the appellant would be entitled to his back wages which are quantified at 50%.

20. The special appeal is, accordingly, allowed in these terms. There shall be no order as to costs.

C.M. Application No. 18727 of 2014

Case :- SPECIAL APPEAL DEFECTIVE No. - 97 of 2014

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Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice

Hon'ble Dr. Devendra Kumar Arora,J.

This application seeks condonation of delay in filing the special appeal.

Since sufficient cause has been shown in the affidavit filed in support of the delay condonation application, the delay in filing the appeal is condoned.

The application stands, accordingly, disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2014

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.

Crl. Misc. Bail Cancellation Application No. 336 of 2014

Ram Pratap Singh..... Petitioner
Versus
State of U.P. and Anr..... Respondents

Counsel for the Petitioner:
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Counsel for the Respondents:
A.G.A., Sri Ashish Kumar Nagvanshi

Criminal Law-Cancellation of bail-scope and circumstances-explained-where bail order passed deviated from settled principle of law-tempering evidences and terrorizing witness-in absence of material-no cancellation order to be passed-applicant may approach before Session Judge make out case within four corner of contingencies given by Apex Court in Sanjay Gandhi Case-application rejected.

Held: Para-12

The above being the position of law, which holds good till date, in my considered view, the petitioner ought to have approached the trial court by filing an appropriate petition before it and to have followed the procedure set down by the Supreme Court in the case of Sanjay Gandhi. The present is not the forum for considering the bail cancellation application as I have already noted that no fact or finding has been brought into my notice, which could be making out a case of deviation from settled principles of law and thereby causing a prejudice to the prosecution due to granting bail that this Court should recall or cancel the order which is impugned herein. The allegation of tampering evidence and terrorizing the witnesses will require the other side to be heard appropriately by the court below and the court below may also require the evidence to be adduced before it in the light of Sanjay Gandhi. In that view, this petition appears of no merit as also not maintainable before this Court.

Case Law discussed:
AIR Supreme Court 961.

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. I have heard learned counsel on behalf of the petitioner, who seeks cancellation of Court's order dated 10.1.2013 passed in Criminal Misc. Bail Application No. 32206 of 2011 by which the opposite party Sujeet Kumar Singh was directed to be released on bail on furnishing bond to the satisfaction of the court concerned.

2. Some of the facts necessary to be noticed for disposal of the present petition are as follows:-

3. Undisputedly, the opposite party no. 2 was married to Archana, the deceased, on 25.11.2007 as per Hindu rites and rituals and it is also not disputed that on the day of occurrence, i.e., on 16.4.2011, the deceased was residing in her matrimonial house where she was killed. The fact that she was killed does not appear disputed as is recorded in the very order by the learned Judge, who passed the impugned order. In addition to what has been recorded, as may appear from the post mortem examination report, there were as many as 16 injuries and it appears from the perusal of those injuries that before the deceased had been finally killed by being strangulated to death with the help of ligature, she was brutally assaulted as there were numerous abrasions and contusions on the dead body.

4. The basic allegations were that since after being married, the deceased was being harassed and ill-treated by her in-laws because they were demanding Rs.2 lakhs in cash, a refrigerator, a washing machine and were asking the lady to convey the demand and ensure giving of the money and articles to them by her parents. The father of the deceased was not inclined to meet the demands of the accused persons and he appears to have intervened on social level by convening a panchayat. But, the accused persons were not ready to give up their demands and, ultimately, the deceased was killed.

5. While granting bail to the opposite party no. 2, the ground which found favour with the learned Judge was that undisputedly the opposite party no. 2-Sujeet Kumar Singh was working in merchant navy and, on the relevant day, he was away from India. To a submission that there was a tacit consent and connivance of opposite party no. 2 with other persons in killing the deceased, the learned Judge was taking a view that it was never the case of the prosecution and the police had also not found any conspiratorial angle after investigating the case and further, the ingredients of Section 304B I.P.C. that the death under circumstances not natural occurred "soon before" the death of the deceased also did not appear from the records and, in that view, the learned Judge directed the release of the opposite party no. 2 on bail as indicated above.

6. While addressing the Court, the learned counsel submitted that there was no denial in the F.I.R. that the opposite party no. 2 was away from India on the relevant date and he might have not been present in his house to participate directly in the commission of the offence but the tacit consent of the petitioner and his approval of the acts of his family members could no less be the evidence as regards having conspired with his family members in commission of murder of his wife. Submission also was that, after having been enlarged on bail, the opposite party no. 2 had committed as many as five overt acts towards tampering with the evidence and one such instance could be the lodging of the report by him by self-

inflicting an injury by firearm and implicating the informant and others, which report was found palpably false after investigation by the police. Submission was that it was a class example of terrorizing the witnesses so that they could not turn up into the witness-box to support the charges. The copy of the report obtained by the petitioner under the Right to Information Act has been placed during the course of the present hearing. As regards the other cases, the details thereof appears stated in paragraph 13 of the present petition and it was contended that intimidatory tactics were employed and adopted by opposite party no. 2 only to ensure that justice is not meted out to the victim of the ofence and her family members.

7. Some principles on cancellation of an order of bail may be recapitulated. It is well settled that the consideration for cancelling an order of bail are the same which are at the time of granting bail, i.e., (1) nature of offence and its impact on the society; (2) the nature of evidence collected against the accused; (3) the chances of the accused being available to justice during trial; (4) the further chances of the accused not tampering with the evidence; (5) the chances or any instance of commission of the offence by the accused; and, lastly, his own security after being enlarged on bail. If the court is satisfied on all these aspects of a prayer for bail, then a court generally admits an accused to bail. The other factor which is important as regards granting bail to an accused is that it could never be by way of a punishment that the accused should be refused being admitted to bail so that he is detained in custody. If the court is satisfied generally regarding the chances of an accused remaining available to justice during trial and that he would not tamper with the evidence or threaten the witnesses or he himself is not a threat to the society, then ordinarily the courts admit accused persons to bail.

8. Some of the provisions, which have been specifically incorporated in certain penal law, like, the Narcotic Drugs and Psychotropic Substances Act (N.D.P.S. Act for short) by Section 37, have virtually restricted the powers of a court including the High Court to grant bail by laying down that before granting bail, the Public Prosecutor must have the opportunity of opposing the prayer and in case of the Public Prosecutor having opposed the prayer, the Court should record its satisfaction that there were reasonable grounds for believing that the accused had not committed the offence and further that he is not likely to commit any offence while on bail. But, in that case also there are certain provisions, like, those under Section 21 of the N.D.P.S. Act in which that rigor, which is put down by Section 37 of the N.D.P.S. Act, is not applicable as there could be certain class of ceases which may entitle an accused to bail after considering the quantum of sentence, which may be inflicted upon an accused in cases of the N.D.P.S. Act as may be in cases of minimum quantity of the drug or subastance.

9. However, while cancelling an order of bail, the court has to be very circumspect and has to consider very compelling and weighty materials placed before it as granting bail is a rule and cancellation of an order granting bail is a exception to that rule. As regards the powers of the High Court to cancel an order of bail, I want to point out that High Court may cancel its own order but, in that case, it has to be shown that the High Court had deviated from some settled principles of law while granting bail which has caused prejudice to the

prosecution (please see (2004) 2 SCC 362, Mahboob Dawood Shaikh Vs. State of Maharashtra), and that pleading has to be very weighty and supported by very clinching materials otherwise under the judicial hierarchy an order of bail passed by the High Court is treated almost as not reversible and final in nature. There may be a question as to what is a weighty ground for cancelling an order of bail granted by the High Court. To elucidate, an order of bail passed in favour of assailant of deceased or a person, whose participation in a case of rape or docaity with murder is shown reasonably from some acceptable materials that in such cases the High Court may also cancel its order or its order may be cancelled by the Supreme Court. In some class of cases if the High Court finds itself to be misled on account of some suppression of facts or not being appropriately apprised of appropriate facts during the course of hearing then, in my considered view, it may not hesitate in cancelling its own order of bail.

10. In the present case, there was not such suppression of fact nor any deviation from the settled course of law was pleaded before me. The only contention was that after being enlarged on bail, the petitioner has indulged into further acts of threatening the witnesses or pressurizing them by filing false criminal charges against them and, thus, had attempted to tamper with the evidence of the case. In such a situation, the High Court could not arrogate to itself the powers of the court which could be approached in such circumstances with an appropriate application seeking the cancellation of an order of bail.

11. In the case of the State through the Delhi Administration Vs. Sanjay Gandhi reported in AIR 1978 Supreme Court 961, the Supreme Court was considering a similar prayer for cancelling an order of bail on the ground of tampering with the evidence by threatening or intimidating the witnesses or by pressurizing the witnesses so much so that they should not turn up in the witness-box. It was held that the application seeking cancellation of order of bail has to be heard by taking evidence and it was in that connection pointed out that taking of evidence may be by tendering the same on affidavit by stating thereon the facts and also by annexing documents showing as to how the accused had threatened the witnesses or attempted to tamper with the evidence. As regards the proving of allegations regarding the tampering of evidence or threatening the witnesses, it was observed that it has to be done as is done in a civil trial that the evidence has to be considered on the preponderance of probabilities and not as is the consideration in a criminal trial, that is to say, proved beyond reasonable doubt. No order of bail should be adjudged on the yardstick of proof beyond reasonable doubt rather if the application seeking the cancellation of bail appears supported by evidence which on probability showing reasonable apprehension that the witnesses were likely to be tampered or indicating the probability that they had indeed been won over then such evidence may require the order of bail to be cancelled.

12. The above being the position of law, which holds good till date, in my considered view, the petitioner ought to have approached the trial court by filing an appropriate petition before it and to have followed the procedure set down by the Supreme Court in the case of Sanjay Gandhi. The present is not the forum for considering the bail cancellation application as I have already noted that no fact or finding has been brought into my notice, which could be making out a case of deviation from settled principles of law

and thereby causing a prejudice to the prosecution due to granting bail that this Court should recall or cancel the order which is impugned herein. The allegation of tampering evidence and terrorizing the witnesses will require the other side to be heard appropriately by the court below and the court below may also require the evidence to be adduced before it in the light of Sanjay Gandhi. In that view, this petition appears of no merit as also not maintainable before this Court.

13. In the result, the petition is dismissed with the above direction.

14. It is supposed that if the petitioner files a petition before the trial court as per the law laid down in Sanjay Gandhi, the trial court shall entertain it and shall hear it after giving notice to the accused whose liberty is required to be put under jeopardy and after following the procedure pointed out by Sanjay Gandhi, the court shall dispose it of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE VIKRAM NATH, J.

Spcial Appeal No. 356 of 2012
alongwith Spl. Appl. No. 371 of 2012 and 379 of 2012.

Shiv Kumar Dubey..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri R.P. Mishra, Sri U.C. Chaturvedi

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U.P. Recruitment of dependents of Government Servant Dying in Harness Rules 1974-Rule-5(Provisio I)-guide lines governing of compassionate appointment-issued-view taken by Division Bench in Vivek Yadav case-requiring-proviso to Rule-5-normally must be exercised-for dealing case in just and equitable manner-would not reflect correct position of law-subsequent decision in Salabh Yadav case-holding the government can not dismiss application blind folded-but to apply its mind on such application moved beyond 5 years-held-government in appropriate case being satisfied with material of undue hardship-can exercise power to condone the delay.

Held: Para-29&30

29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;
(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;
(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the

immediate financial crisis caused by the death of the bread-earner;
(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;
(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;
(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;
(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;
(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family.

30. As regards the judgment of the Division Bench in Vivek Yadav (supra), the first part of the judgment of the Division Bench in Vivek Yadav's case holds in paragraph 4 that since Rule 5 contemplates an application by a competent person, in a case where the applicant is a minor, it will not be possible for a minor to make an application during the period of his minority. Therefore, considering the object of the Rules, it was held that the proviso to Rule 5 must normally be exercised in such cases. This observation, with respect, requiring that the proviso to Rule 5 must normally be exercised for the purpose of dealing with a case in a just and equitable manner would not be reflective of the correct position in law. The subsequent decision in Subhash Yadav (supra) only holds that the Government cannot dismiss an application which has been moved after five years blindfolded but has to apply its mind rationally to all the facts and circumstances of the case. In this regard, we clarify that the second proviso to Rule 5 requires an applicant, who invokes the power of dispensation or relaxation under the first proviso of the time limit of five years, to make out a case of undue hardship by elucidating, in writing, with necessary documentary evidence and proof, the reasons and justification for the delay. The Government may, in an appropriate case, when it is satisfied on the basis of the material that a case of undue hardship is made out, exercise the power which is conferred upon it under the first proviso to Rule 5 of the Rules but this power has to be exercised where a demonstrated case of undue hardship is made out to the satisfaction of the State Government. We answer the reference accordingly in the aforesaid terms.

Case Law discussed:
(2011)1 UPLBEC 494; 2010(7)ADJ 1; 2000(2)UPLBEC 1694; (1994)4 SCC 138; (1998) 5 SCC 192; (2004)7 SCC 271; 2004 AIR SCW 4602; AIR 2005 SC 106; (2005) 7 SCC 206; (1989) 4 SCC 468; (1991) Supp.(2) SCC 689; (1995) 6 SCC 476; (2006) 5 SCC 766; (2008) 13 SCC 730; (2009) 6 SCC 481; AIR 2011 SC 1880; (2012) 7 SCC 248; (2012) 11 SCC 307; 2013(5) AWC 5062(SC); [(2013) 1 UPLBEC 357]; AIR 2013 SC 3365; (1997) 8 SCC 85; JT 1995(9) SC 131; (1996)8 SCC 23; (2000) 7 SCC 192; C.M.W.P. No. 13102 Of 2010.

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

1. Compassionate appointment to dependents of employees of the State who die in harness has been the subject matter of a considerable body of law. A Division Bench has referred the correctness of two decisions rendered by this Court on the interpretation of the provisions of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 for consideration by the Full Bench. The principles which emerge from the judgments of the Supreme Court provide a binding framework within which the issue of interpretation which arises in this proceeding would have to be resolved. The question of law for decision of the Full Bench is:

(1) Whether the judgments in Subhash Yadav Vs. State of U.P.1 and Vivek Yadav Vs. State of U.P. & Ors.2 on the interpretation of the provisions of Rule 5(iii) and the proviso thereto read with Rule 8 of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, lay down the correct position of law?"

2. The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 ("the Rules") came into force on 21 December 1973. Rule 3 provides that the Rules shall apply to the recruitment of dependents of deceased government servants to public services and posts in connection with the affairs of the State of Uttar Pradesh, except those which are within the purview of the Uttar Pradesh Public Service Commission. The expression 'government servant' is defined in Rule 2(a) to mean a government servant employed in connection with the affairs of the State, who (i) was permanent in such employment; or (ii) though temporary had been regularly appointed in such employment; and (iii) though not regularly appointed, had put in three years' continuous service in a regular vacancy in such employment. The expression 'regularly appointed' is defined by the Explanation to Rule 2(a) to mean "appointed in accordance with the procedure laid down for recruitment to the post or service, as the case may be". The expression 'deceased government servant' is defined by Clause (b) of Rule 2 to mean a government servant who dies while in service. Rule 2(c) of the Rules defines 'family'. Rule 5 of the Rules provides as follows:

"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)fulfills 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.

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay take the appropriate decision.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

Rule 6 of the Rules provides for the contents of an application for employment in the following terms:

"6. Contents of application for employment. -An application for appointment under these rules shall be addressed to the appointing authority in respect of the post for which appointment is sought but it shall be sent to the Head of Office where the deceased Government servant was serving prior to his death. The application shall, inter alia, contain the following information:

(a) the date of the death of the deceased Government servant; the department in which he was working and the post which he was holding prior to his death;

(b) names, age and other details pertaining to all the members of the family of the deceased, particularly about their marriage, employment and income;

(c)details of the financial condition of the family; and

(d) the educational and other qualifications, if any, of the applicant."

Rule 8 is in the following terms:

"8. Relaxation from age and other requirements.- (1) The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.

(2)The procedural requirements for selection, such as written test or interview by a selection committee or any other authority shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards of work and efficiency expected on the post.

(3)An appointment under these rules shall be made against an existing vacancy only."

3. Before we elucidate the principles which emerge from the body of precedent on the subject, it would, at the outset, be necessary to emphasise certain basic precepts and interpret the provisions of the Rules as they stand. Appointments to public offices have to comply with the requirements of Article 14 and Article 16 of the Constitution. Article 16 provides for equality of opportunity in matters of public employment. Compassionate appointment is in the nature of an exception to the ordinary norm of allowing equality of opportunity to every eligible person to compete for public employment. The reason for the exception as envisaged in the Rules is that the immediacy of the financial hardship that is sustained by a bereaved family by the death of its earning member is sought to be alleviated in a situation in which the government servant died while in service. Rule 5 of the Rules applies where a government servant has died in harness after the commencement of the Rules.

4. The first requirement under Rule 5 is that the spouse of the deceased should not be already employed by the Central or State Governments or by a Corporation owned or controlled by them. Where this condition is met, one member of the family can be given suitable employment in government service in relaxation of the normal recruitment rules, provided three conditions are fulfilled. The first is that the applicant must fulfill the educational qualifications prescribed for the post; the second is that the applicant must be otherwise qualified for government service; and the third is that the application for employment must be made within five years from the date of death of the government servant. The first proviso to Rule 5 empowers the State Government to dispense with or relax the time limit for making an application for employment, for dealing with the case in a just and equitable manner, where government is satisfied that the time limit of five years for making an application for employment causes undue hardship in any particular case. Under the second proviso, a burden is cast on the applicant to establish a case of undue hardship by explaining the reasons and furnishing a proper justification, in writing, regarding the delay caused in making the application for employment after the expiry of the time limit of five years. This explanation has to be accompanied by necessary documents and proof in support of the reasons for the delay. The Government has to take an appropriate decision after taking into consideration all the facts leading to such delay.

5. Rule 6 of the Rules, which deals with the contents of an application for employment, amplifies the basic purpose and object of providing compassionate appointment. Besides stating the date of death of the deceased government servant,

the post and the department in which he was working, the application has to mention the names, ages and other details pertaining to all the members of the family of the deceased, particularly about their marriage, employment and income and the details of the financial condition of the family together with the educational and other qualifications of the applicant.

6. The Rules have been framed by the State Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution. The Rules make it abundantly clear that the purpose and object underlying the provision for compassionate appointment is not to reserve a post for a member of the family of a deceased government servant who has died while in service. The basic object and purpose is to provide a means to alleviate the financial distress of a family caused by the death of its member who was in government service. This is the underlying theme or thread which cuts across almost every provision of the Rules. Firstly, the spouse of the deceased government servant must not already be employed in the Central or State Governments or their Corporations. If the spouse is so employed, then obviously, there would be no warrant to grant compassionate appointment since the spouse would be expected to provide to the members of the family a nucleus for sustaining their livelihood. Secondly, the applicant himself should not be employed with the Central or State Governments or their Corporations. Thirdly, an application for appointment has to be made within five years from the date of death of the government servant. The rationale for imposing a limit of five years beyond which an application cannot be entertained is that the purpose of compassionate appointment is to bridge the immediacy of the loss of an earning member and the financial distress that is sustained in consequence. A lapse of time is regarded by the Rules as leading to a dilution of the immediacy of the requirement. The first proviso to Rule 5, however, confers upon the State Government a discretion to dispense with or relax the requirement of submitting an application in five years. This power is not unguided and is not left to the arbitrary discretion of the decision-making authority. Every discretionary power in public law has to be structured on objective principles. The first proviso requires the Government to be satisfied that the strict application of the norm of five years for submitting an application would cause undue hardship. The dispensation or relaxation is in order to deal with a case in a just and equitable manner. Under the second proviso, the burden has been cast on the applicant to furnish reasons and produce a justification together with evidence in the form of documents and proof in support of the cause for the delay in making an application within the stipulated period. Finally, on this aspect of interpretation, it must be emphasized that an applicant for employment under the Rules has to disclose in a full, true and candid manner, details of the financial condition of the family as well as all relevant details pertaining to the members of the family of the deceased including their names, age and status in regard to their marriage, employment and income. All these aspects have a bearing on the financial need of the family which has to be assessed before a decision is taken to grant compassionate appointment. The discretionary power to relax the time limit

of five years is in the nature of an exception. It is a power which is vested in the State Government, a circumstance which is indicative of the fact that the subordinate legislation expects it to be exercised with scrupulous care. Ordinarily, the time limit of five years governs. The State Government may relax the norm on a careful evaluation of the circumstances mandated by the second proviso. It is but a matter of first principle that a discretionary power to relax the ordinary requirement should not swallow the main or substantive provision and render the basic purpose and object nugatory. The Rules indicate, in consequence, that an application for compassionate appointment, which is in relaxation of the normal recruitment Rules, must be made within a period of five years of the date of death of the government servant. But the State Government is conferred with a discretionary power to relax the requirement of five years in order to alleviate a situation of undue hardship so as to deal with a case in a just and equitable manner. The satisfaction of the State Government before it exercises the power of relaxation is not a subjective satisfaction but must be based on objective considerations founded on the disclosures made by the applicant for compassionate appointment. Those disclosures, in writing, must necessarily have a bearing on the reasons for the delay and on whether undue hardship within the meaning of the first proviso to Rule 5 of the Rules would be caused by the application of the time limit of five years. The expression 'undue hardship' has not been defined in the Rules. Undue hardship would necessarily postulate a consideration of relevant facts and circumstances including the income of the family, its financial condition and the extent of dependency.

7. Now, it is in this background that it is necessary to dwell on the two judgments of the Division Bench to which a reference has been made in the order of referral.

8. In Vivek Yadav (supra), the father of the appellant, who was working as an Assistant Agriculture Inspector, died on 26 May 1986. The mother of the appellant was illiterate and did not claim compassionate appointment. The appellant was born on 2 February 1984 and on completing the age of eighteen, filed a representation on 4 August 2001 seeking compassionate appointment on the ground that the financial and social problems occasioned by the death of his father continued. The family consisted of the appellant, his mother, three sisters and another brother. The representation was rejected on the ground that it was barred by time. While interpreting the provisions of Rule 5, the Division Bench held as follows:

"... Reading of this rule would demonstrate that the application must be by a competent person, who is competent to make it. A minor, therefore, could not have made application. The time-limit for an application contemplated by the rule, therefore, could only be read to mean 'by a competent person', in other words, who has attained the age of majority. In a case, where the applicant is minor, it would not be possible for the minor to make an application for various reasons including that he is minor and as such he cannot be appointed to a post in the Government. Rule 5, therefore, will have to be read in such manner that it gives effect to the policy of the Government,

which is to provide employment to a member of the family of a Government employee, who dies in harness, so as to mitigate the hardship. The issue whether the family of the deceased over long passage of time continues to face the hardship, would be examined on the merits of the claim. ..."

Read in isolation, these observations would seem to indicate that if the dependent of a deceased employee was a minor at the time of death and, therefore, unable to apply for appointment, an application filed after attainment of majority would be valid irrespective of the length of time. That would not be reflective of the correct position in law. However, a later part of the same judgment, as we shall notice, explains the position.

9. Noting that the mother was illiterate, the appellant himself was a minor and there were elder sisters, the Division Bench in Vivek Yadav held that in such cases the proviso to Rule 5 must, normally, be exercised for the purpose of dealing with the cases in a just and equitable manner. The Division Bench referred to a judgment of a learned Single Judge in Manoj Kumar Saxena Vs. District Magistrate, Bareilly & Ors.3, which had considered various judgments holding that when an application is moved for appointment on a compassionate basis of a member of the family on attaining majority who was a minor at the time of death of his father, it could not be said that there was delay in moving the application. The Division Bench specifically did not accept this to be a correct interpretation of Rule 5, for its consequence would be to suspend the operation of the Rule until the applicant had attained the age of majority. In that context, the Division Bench held as follows:-

"In our opinion, that really may not be a correct reading of the rule as that would contemplate that the rule would stand suspended till such time a minor attains majority and thereafter the minor within 5 years on attaining majority could make application. No provision whether it be primary or subordinate legislation must be read even if it be a beneficial piece of legislation which has the effect of adding words against the expression of language of the provision. The proviso, in our opinion, which confers power to relax the delay in making an application within five years, also must be read to include consideration of an application even after expiry of 5 years if the applicant was a minor at the time of death of the deceased employee and makes an application within reasonable time of attaining majority."

The Division Bench observed that the test to be applied is whether the family of the deceased continues to suffer financial distress and hardship occasioned by the death of the breadwinner so as to relax the period within which the application could be made. These, it was held, are matters of fact which the competent authority would have to consider. Since the application was rejected merely because it was beyond the time prescribed, the order of the authority was set aside and a direction was issued to take a fresh decision within a stipulated period.

10. The subsequent judgment of the Division Bench in Subhash Yadav (supra) deals with a situation where the father of the appellant had died in harness on 8 August 1994 when the appellant was six years of age. The appellant attained the age of majority on 5 December 2005 and made an application for compassionate appointment. The State Government declined to accord relaxation of the period

of five years and the writ petition filed by the appellant was dismissed by a learned Single Judge who held that since the appellant had been able to survive for sixteen years, that was indicative of a lack of immediacy. The Division Bench held that the Government erred in rejecting the application on the ground that there was an inordinate delay and such a blanket reason without considering anything else would not be in conformity with the power which has been conferred on the State, to relax the time period, which has to be exercised reasonably. Hence, the Division Bench held that the authorities cannot reject an application "blindfold" if it had been moved after five years and were required to apply their mind rationally, exercising the discretion in view of other factors relating to the case.

11. Now, it is in this background that it is necessary for the Court to consider the principles of law which emerge from the judgments of the Supreme Court on the subject.

12. In Umesh Kumar Nagpal Vs. State of Haryana & Ors.4, the Supreme Court explained the basic purpose of providing compassionate appointment to the dependent of a deceased employee who has died in harness:

"The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. ... For these very reasons, the compassionate employment cannot be granted after a lapse of reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

13. In Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors.5, the Supreme Court held that compassionate appointment is an exception to the general provision and, being an exception, it should not interfere unduly with the rights of other persons. The Supreme Court held thus:

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure.

Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment of seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee."

14. The decision in Umesh Kumar Nagpal (supra) was followed by the Supreme Court in General Manager (D&PB) & Ors. Vs. Kunti Tiwary & Anr.6. The Supreme Court noted that under the Scheme which had been adopted by the Indian Banks Association, the terminal benefits received by the family of the deceased employee had to be considered together with the income of the family, employment of other members, the size of the family and liabilities, if any. The Supreme Court in that case held that the family of the deceased employee had not been left in penury or without any means of livelihood and its income was not such as to lead to the conclusion that the family was living hand to mouth.

The same view was followed in Punjab National Bank & Ors. Vs. Ashwini Kumar Taneja7.

15. In National Hydroelectric Power Corporation & Anr. Vs. Nanak Chand & Anr.8, the principle was formulated as follows:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises."

16. In Commissioner of Public Instructions & Ors. Vs. K.R. Vishwanath9, the following principles were laid down by the Supreme Court:

"...the claim of person concerned for appointment on compassionate ground is based on the premises that he was dependent on the deceased employee. Strictly this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. ...High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments."

Specifically dealing with a situation where a dependent was a minor at the date of death of the employee, the Supreme Court referred to the decision in Sushma Gosain & Ors. Vs. Union of India & Ors.10 and observed thus:

"The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread-earner in the family. Such appointments should, therefore, be provided immediately to redeem the family in distress. The fact that the ward was a minor at the time of death of his father is no ground, unless the scheme itself envisages specifically otherwise, to state that as and when such minor becomes a major he can be appointed without any time consciousness or limit. The above view was reiterated in Phoolwati (Smt.) v. Union of India and Ors.11 and Union of India and Ors. v. Bhagwan Singh12. In Director of Education (Secondary) and Anr. v. Pushpendra Kumar and Ors, (1998) 5 SCC 192, it was observed that in matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for grant of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased-employee. As it is in the nature of exception to the general provisions it cannot substitute the provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision."

17. In State of J&K & Ors. Vs. Sajad Ahmed Mir13, the principle was followed as follows:

"Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed from except where compelling circumstances demand, such as, death of the sole breadwinner and likelihood of the family suffering because of the set back. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to the normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution."

18. The principles of law which emerge from the decided cases were summarized in a judgment of the Supreme Court in V. Shivamurthy Vs. State of Andhra Pradesh & Ors.14, Hon'ble Mr. Justice R.V. Raveendran speaking for a Bench of two learned Judges formulated those principles thus:

"(a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no

other mode of appointment is permissible, appointments on compassionate grounds are a well recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies.

(b) Two well recognized contingencies which are carved out as exceptions to the general rule are:

(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the bread-winner while in service.

(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the bread winner.

Another contingency, though less recognized, is where land holders lose their entire land for a public project, the scheme provides for compassionate appointment to members of the families of project affected persons. (Particularly where the law under which the acquisition is made does provide for market value and solatium, as compensation).

(c) Compassionate appointment can neither be claimed, nor be granted, unless the rules governing the service permit such appointments. Such appointments shall be strictly in accordance with the scheme governing such appointments and against existing vacancies.

(d)Compassionate appointments are permissible only in the case of a dependant member of the family of the employee concerned, that is, spouse, son or daughter and not other relatives. Such appointments should be only to posts in the lower category, that is, Classes III and IV posts and the crises cannot be permitted to be converted into a boon by seeking employment in Class I or II posts."

19. The provisions of Rule 5 of the Rules in the State of Uttar Pradesh specifically came up for consideration before the Supreme Court in Santosh Kumar Dubey Vs. State of Uttar Pradesh & Ors.15, In that case, the father of the appellant was untraced from 1981. The Supreme Court held that without going into the issue as to whether compassionate appointment could be sought in a case of deemed death under Section 108 of the Indian Evidence Act, such a right could have been exercised in 1988 itself and the period of five years under Rule 5 would not enable the appellant to compute the period until 1993. In that context, the Supreme Court observed as follows:

"11. The very concept of giving a compassionate appointment is to tide over the financial difficulties that are faced by the families of the deceased due to the death of the earning member of the family. There is immediate loss of earning for which the family suffers financial hardship. The benefit is given so that the family can tide over such financial constraints.

12. The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the family of the deceased who has died in harness. But this, however, cannot be

another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in Government service.

13. In the present case, the father of the appellant became untraceable in the year 1981 and for about 18 years, the family could survive and successfully faced and overcame the financial difficulties that they faced on missing of the earning member. That being the position, in our considered opinion, this is not a fit case for exercise of our jurisdiction. This is also not a case where any direction could be issued for giving the appellant a compassionate appointment as the prevalent rules governing the subject do not permit us for issuing any such directions."

20. In Local Administration Department & Anr. Vs. M. Selvanayagam @ Kumaravelu16, the principle has been set out in the following observations of the Supreme Court:

"It has been said a number of times earlier but it needs to be recalled here that under the scheme of compassionate appointment, in case of an employee dying in harness one of his eligible dependents is given a job with the sole objective to provide immediate succour to the family which may suddenly find itself in dire straits as a result of the death of the bread winner. An appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased employee would be directly in conflict with Articles 14 & 16 of the Constitution and hence, quite bad and illegal. In dealing with cases of compassionate appointment, it is imperative to keep this vital aspect in mind."

In Shreejith L. Vs. Deputy Director (Education) Kerala & Ors.17, these principles have been reiterated.

21. In Union of India & Anr. Vs. Shashank Goswami & Anr.18, the Supreme Court held thus:

"9. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate grounds is based on the premise that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right.

10. As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, the applicant cannot claim appointment in a particular

class/group of post. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased."

These principles have been reiterated in a more recent judgment of the Supreme Court in State of U.P. & Ors. Vs. Pankaj Kumar Vishnoi19, specifically in the context of Rule 5 of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974.

22. In Chief Commissioner, Central Excise and Customs, Lucknow & Ors. Vs. Prabhat Singh20, the Supreme Court has addressed words of caution in the following observations:

"We are constrained to record that even compassionate appointments are regulated by norms. Where such norms have been laid down, the same have to be strictly followed...The very object of making provision for appointment on compassionate ground, is to provide succor to a family dependent on a government employee, who has unfortunately died in harness. On such death, the family suddenly finds itself in dire straits, on account of the absence of its sole bread winner. Delay in seeking such a claim, is an anti thesis, for the purpose for which compassionate appointment was conceived. Delay in raising such a claim, is contradictory to the object sought to be achieved... Courts and Tribunals should not fall prey to any sympathy syndrome, so as to issue directions for compassionate appointments, without reference to the prescribed norms. Courts are not supposed to carry Santa Claus's big bag on Christmas eve, to disburse the gift of compassionate appointment, to all those who seek a court's intervention. Courts and Tribunals must understand, that every such act of sympathy, compassion and discretion, wherein directions are issued for appointment on compassionate ground, could deprive a really needy family requiring financial support, and thereby, push into penury a truly indigent, destitute and impoverished family. Discretion is therefore ruled out. So are, misplaced sympathy and compassion."

23. Once again, in MGB Gramin Bank Vs. Chakrawarti Singh21, the Supreme Court has observed as follows:

" Every appointment to public office must be made by strictly adhering to the mandatory requirements of Articles 14 and 16 of the Constitution. An exception by providing employment on compassionate grounds has been carved out in order to remove the financial constraints on the bereaved family, which has lost its bread-earner. Mere death of a Government employee in harness does not entitle the family to claim compassionate employment. The Competent Authority has to examine the financial condition of the family of the deceased employee and it is only if it is satisfied that without providing employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family. More so, the person claiming such appointment must possess required eligibility for the post. The consistent view that has been taken by the Court is that compassionate employment cannot be claimed as a matter of right, as it is not a vested right.

The Court should not stretch the provision by liberal interpretation beyond permissible limits on humanitarian grounds.

Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years."

24. In several decisions, the Supreme Court has dealt with cases of minors seeking compassionate appointment. In Haryana State Electricity Board & Anr. Vs. Hakim Singh22, the Supreme Court dealt with a case of a widow who had applied after a period of 18 years for appointing her son who was four years old when his father died in harness, contending that she could make the application only when her son attained majority. The High Court had allowed the writ petition. While allowing the appeal, the Supreme Court observed as follows:

"We are of the view that the High Court has erred in over stretching the scope of the compassionate relief provided by the Board in the circulars as above. It appears that High Court would have treated the provision as a lien created by the Board for a dependent of the deceased employee. If the family members of the deceased employee can manage for fourteen years after his death one of his legal heirs cannot put forward a claim as though it is a line of succession by virtue of a right of inheritance. The object of the provisions should not be forgotten that it is to give succor to the family to tide over the sudden financial crisis be-fallen the dependents on account of the untimely demise of its sole earning member."

25. Similarly, in Jagdish Prasad Vs. The State of Bihar & Anr.23, the Supreme Court rejected the case of a minor who had claimed compassionate appointment after he had attained majority while observing as follows:-

"It is contended for the appellant that when his father died in harness, the appellant was minor; the compassionate circumstances continue to subsist even till date and that, therefore, the Court is required to examine whether the appointment should be made on compassionate grounds. We are afraid, we cannot accede to the contention. The very object of appointment of a dependent of the deceased employees who die in harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family. Since the death occurred way back in 1971, in which year the appellant was four years old, it cannot be said that he is entitled to be appointed after he attained majority long thereafter. In other words, if that contention is accepted, it amounts to another mode of recruitment of the dependent of a deceased Government servant which cannot be encouraged, dehors the recruitment rules."

26. In Haryana State Electricity Board Vs. Naresh Tanwar & Anr.24, the widow of a deceased employee had made an application after twelve years claiming compassionate appointment for her son who had since attained majority. The High Court allowed the writ petition holding that compassionate appointment could not be restricted to a period of three years and if assistance to the members of the family of a deceased employee is required to be given, the member of the family must necessarily attain majority before becoming eligible to apply for appointment. While setting aside the judgment of the High Court, the Supreme Court observed as follows:

"It has been indicated in the decision of Umesh Kumar Nagpal (Supra) that compassionate appointment cannot be granted after a long lapse of reasonable period and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment, is intended to meet the immediate financial problem being suffered by the members of the family of the deceased employee. In the other decision of this Court in Jagdish Prasad's case, it has been also indicated that the very object of appointment of dependent of deceased-employee who died in harness is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for years.

It appears to us that the principle of compassionate appointment as indicated in the aforesaid decisions of this Court, is not only reasonable but consistent with the principle of employment in government and public sector. The impugned decisions of the High Court therefore cannot be sustained."

27. In Sanjay Kumar Vs. The State of Bihar & Ors.25, the Supreme Court again dealt with a case of compassionate appointment of a minor who had made an application upon attaining majority. The Supreme Court observed as follows:

"This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread-earner who had left the family in penury and without any means of livelihood. ...on the date when the first application was made by the petitioner on 2.6.88, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time, as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

28. In a Judgment of a Division Bench of this Court consisting of Hon'ble Mr. Justice Sunil Ambwani and Hon'ble Mr. Justice Amreshwar Pratap Sahi delivered on 7 May 2010 in Union of India & Ors. Vs. Smt. Asha Mishra & Anr.26, the same principle was formulated in the following observation:

"The principles of consideration for compassionate appointment have been firmly settled and have been reiterated from time to time. Compassionate appointment is not a vested right or an alternate mode of employment. It has to be considered and granted under the relevant rules. The object of compassionate appointment is to tide over an immediate financial crisis. It is not a heritable right to be considered after an unreasonable period, for the vacancies cannot be held up for long and that appointment should not ordinarily await the attainment of majority. Where the family has survived for long, its circumstances must be seen before the competent authority may consider such appointment. It is not to be ordinarily granted, where a person died close to his retirement."

29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the

principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family.

30. As regards the judgment of the Division Bench in Vivek Yadav (supra), the first part of the judgment of the Division Bench in Vivek Yadav's case holds in paragraph 4 that since Rule 5 contemplates an application by a competent person, in a case where the applicant is a minor, it will not be possible for a minor to make an application during the period of his minority. Therefore, considering the object of the Rules, it was held that the proviso to Rule 5

must normally be exercised in such cases. This observation, with respect, requiring that the proviso to Rule 5 must normally be exercised for the purpose of dealing with a case in a just and equitable manner would not be reflective of the correct position in law. The subsequent decision in Subhash Yadav (supra) only holds that the Government cannot dismiss an application which has been moved after five years blindfolded but has to apply its mind rationally to all the facts and circumstances of the case. In this regard, we clarify that the second proviso to Rule 5 requires an applicant, who invokes the power of dispensation or relaxation under the first proviso of the time limit of five years, to make out a case of undue hardship by elucidating, in writing, with necessary documentary evidence and proof, the reasons and justification for the delay. The Government may, in an appropriate case, when it is satisfied on the basis of the material that a case of undue hardship is made out, exercise the power which is conferred upon it under the first proviso to Rule 5 of the Rules but this power has to be exercised where a demonstrated case of undue hardship is made out to the satisfaction of the State Government. We answer the reference accordingly in the aforesaid terms.

31. These special appeals along with other connected appeals shall now be placed before the appropriate Bench in accordance with the roster of work.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.03.2014

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Revision No. 619 of 2014

Smt. Meena..... Revisionist
Versus
State of U.P. & Ors..... Opp. Parties

Counsel for the Petitioner:
Sri Shailendra Kumar Bharti, Sri Kalyan Sundaram Srivastava

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section-497/401-Criminal Revision-Against order by Magistrate-refusing to record the statement of applicant under section-164 Cr.P.C.-on ground the I.O. be hands in gloves with accused pressuring to withdraw her case-offence under section 420, 464, 376, 498-A IPC-held-generally without notice to opposite party-revision can not be heard, but considering peculiar facts of the case-revisionist not a stranger-delay itself defeat the justice-prayer confined to get her statement recorded u/s 164 Cr.P.C.- held-considering amended provision of section 164(5-A)(a) Cr.P.C. effective from 03.02.2013-right of revisionist to place her version on record-if so prejudice shall caused to any one-order impugned quashed-necessary direction given to the Magistrate.

Held: Para-9&10

9. Ordinarily before finally adjudicating upon the revision this court issues notice to the opp. party. But in the peculiar facts and circumstances of the case this court has not adopted the same course because in that situation it could have defeated the ends of justice. There is hardly any chance for this revision to be heard on merits in a measurable distance of time due to staggering pendency of cases in this court. Apart from this the prayer of the revisionist is confined simply to get her statement recorded. Such a prayer is not likely to prejudice any one. It is the right of the victim to bring her version on record.

10. It is further directed that Magistrate concerned on presentation of this order shall after duly intimating the police

procure from the same an application of request in this regard and shall thereafter proceed to record the statement of the alleged victim girl.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This revision has been filed assailing the validity of the order dated 23.1.2014 passed by C.J.M. District Mathura whereby he refused to record the statement of the revisionist Smt. Meena u/s 164 Cr.P.C. in pursuance of case Crime No. 489 of 2013, u/s 420, 494,376, 498-A IPC P.S. Kotwali District Mathura.

2. Heard learned counsel for the revisionist and learned AGA for the State. Record as well as impugned order has been perused.

3. The contention of the counsel is that the investigation of the case has not proceeded on the right lines and even the statement u/s 161 Cr.P.C. has not been recorded by the Investigating Officer. The submission is that the revisionist is under the threat of dire consequences and even the investigating officer seems to be hands in gloves with the accused and is exercising coercive pressure on her to withdraw the case. The contention is that the revisionist had lodged an FIR against opp. party nos.3 and 4 u/s 420,494, 376 and 498A IPC. but because of the unfair attitude of the investigating officer she has no chance to get justice. The only prayer made before this court is that the Magistrate should be directed to record her statement u/s 164 Cr.P.C. so that the true version may come on record and the investigating officer will not get the chance to bring on record something which she never stated or to record a doctored statement suited to the interests of accused.

4. I have gone through the impugned order which reveals that a report from the police station was sought by the Magistrate and as the investigating officer did not feel the need of getting her statement recorded u/s 164 Cr.P.C. the Magistrate also did not deem it fit to record the same.

5. Ordinarily the Magistrate is not bound to record the statement of a stranger or the statement of witnesses who have not been sponsored by the investigating officer. But in the present case, the situation is somewhat different in the perspective of the offences which have been alleged by the revisionist accused. In fact the Magistrate concerned seems to be oblivious to Section 164(5-A)(a) which was inserted by Act 13 of 2013 coming into effect from 3.2.2013. It shall be relevant and useful to extract the same herein below:

[(5A)(a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub section(1) or sub-section(2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code(45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section(5), as soon as the commission of the offence is brought to the notice of the police:

6. The perusal of the aforesaid provision newly inserted in criminal procedure Code would make it clear that as soon as the commission of the offence was brought to the notice of the police, it was incumbent upon the police to get the statement of the victim against whom the offence was said to have been committed recorded.

7. Apart from this, it is also apparent that the revisionist is not a stranger to the case, she is not any tom dick and harry unconnected with the criminal transaction which took place, nor can be said to be any one sponsored on behalf of the accused to prop up his defence. The judicial policy which discouraged the recording of the statement u/s 164 Cr.P.C. by the Magistrate unless the request came from the investigating officer was with the view to discourage strangers to meddle with investigation. It was also with the view to discourage and avoid the situation where the accused himself may send up his own man to the Magistrate and create defence evidence in his favour. Such a judicial policy was also with a view to avoid the court of the Magistrates being crowed by such requests and create an anarchic situation which could have become unmanageable. In the present matter the victim herself has the grievance that her statement was not recorded by the investigating officer. Her statement is the most relevant statement in the facts and circumstances of the case and if the Magistrate records her statement u/s 164 Cr.P.C. it shall not be recording the statement of any irrelevant person or a person sponsored at the behest of some motivated vested interest.

8. In view of the peculiar facts and circumstances of the case and also the amended position of law in criminal procedure code this court finds it fit to set aside the impugned order. It is further directed that the matter is remanded back with the direction that the application moved by the revisionist with the prayer to record her statement u/s 164 Cr.p.C. shall be decided in accordance with law and in the light of the observations made by this Court. It is clarified that none of the observations made by this court in this order shall be construed to have any reflection on the merit of the case nor shall be interpreted to the prejudice of the accused side or any other person concerned.

9. Ordinarily before finally adjudicating upon the revision this court issues notice to the opp. party. But in the peculiar facts and circumstances of the case this court has not adopted the same course because in that situation it could have defeated the ends of justice. There is hardly any chance for this revision to be heard on merits in a measurable distance of time due to staggering pendency of cases in this court. Apart from this the prayer of the revisionist is confined simply to get her statement recorded. Such a prayer is not likely to prejudice any one. It is the right of the victim to bring her version on record.

10. It is further directed that Magistrate concerned on presentation of this order shall after duly intimating the police procure from the same an application of request in this regard and shall thereafter proceed to record the statement of the alleged victim girl.

11. The revision is allowed and the impugned order dated 23.1.2014 passed by Chief Judicial Magistrate, Mathura is set aside.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.02.2014

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE VIPIN SINHA, J.

Criminal Appeal No. 896 of 1983

Laddan alias Ishaq..... Appellant
Versus
State..... Respondent

Counsel for the Petitioner:
Sri P.N. Misra, Sri Rahul Misra

Counsel for the Respondent:
A.G.A., Sri Anand Tiwari

Indian Evidence Act, 1872-Section 134- conviction under section 302 IPC-based upon solitary witness-fully reliable, can not be interfered-because no identification pared conducted-in absence of no other corroboration-held-for substantial justice no requirement of quantity but quality of witness is material-however same observation in evidence-does not get wiped out-clear cogent and trustworthy oral evidence-nor the finding shall vitiate the prosecution case merely on account of non holding identification parade.

Held: Para-14
There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). But, if there are doubts about the testimony the courts will insist for corroboration. It is for the Court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time honoured principle is that evidence has to be weighted and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

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

1. The present appeal is against the order of Sri B.B.L. Hajelay, Sessions Judge, Rampur dated 21st March 1983 in Sessions Trial No. 169 of 1982; State of U.P. Vs. Laddan @ Ishaq convicting the accused u/section 302 I.P.C. and sentencing him with imprisonment for life.

2. Heard the learned counsels for the parties. Sri Rahul Misra, holding brief of Sri P.N. Misra, learned Sernior counsel for the appellant and Sri Anand Tiwari, learned counsel appearing for the state.

3. A perusal of the record shows that the prosecution story as set up in the F.I.R. is to the effect that Santram, Jhajhan (deceased) and Karan Singh were the real brother who were doing the business of selling of Poolas of Maize (as fodder). As per the prosecution, a day before the incident i.e. 7th July 1982 an altercation took place with regard to the sale and purchase of fodder between Laddan @ Ishaq, the present accused appellant and the deceased. It has further come up that regarding the said altercation which occurred a day before the incident, Prashadi Lal, PW-2 and Jhau Ram, PW-2 were the eye witnesses and it is said that on the said date i.e. 7th July 1982 the accused applicant after altercation had left the place saying that he would be seeking his revenge; that the very next day at about 05.15 p.m. in the evening Laddan reached the place of occurrence and while the deceased Jhajhan was sitting on the Thela, Laddan in the presence of the first informant i.e. Sant Ram told his brother Jhajhan "आज तुमहें ठिकाने लगा देंगे" and saying this, he took out his tamancha from his Penth and fired upon his brother Jhajhan who as a result of injury fell down and died, with regard to which occurrence the FIR had been lodged.

4. In the report it was also given that Jhau Ram, PW-5 and Hari Om PW-6 were the witnesses and in whose presence the occurrence had taken place. The F.I.R. was lodged at Police Station Civil Lines, Rampur on 18th July 1982 at 05.45 p.m. describing the place of occurrence to be Rahe Murtuza, opposite Shanker Press, at a distance of 4 furlong from Police Station Civil Lines, Rampur and the time of occurrence was mentioned as 05.15 p.m.

5. The accused appellant was charged as "that you on 08.07.1982 at about 5.15 p.m. at Rahe Murtuza, near Shanker Printing Press, near Police Station Civil Lines, Rampur committed murder of Jhajhan by causing him pistol shot injury which resulted in his death, soon after while being taking to him the District Hospital and you, therefore, committed an offence punishable u/section 302 I.P.C. and thus cognizance within the Court of Sessions."

6. The first informant Sant Ram was examined as PW-1, however, subsequently he was declared hostile in view of the fact that there were several contradictions in his testimony inasmuch as at one place he says that he was not present at the spot of occurrence where the incident took place whereas at another place he says that he had reached the place of occurrence and was present when Laddan had arrived and had seen Laddan causing the fatal injury. In his statement Sant Ram, the first informant submitted that he reached with fodder at the spot 15 minutes before the shooting and had seen the entire incident. It may be emphasized that even when being crossed examined by the state counsel, Sant Ram has intimated that he was not present when the shooting took place but he subsequently confirmed the written report Exb. Ka-1 and then further stated that the true position was that he was present at the place of occurrence at the time of shooting and his explanation for earlier denying his presence at the place of occurrence was on account of his apprehension of danger to his life but subsequently on cross examination by the defence counsel, he again gave the same statement which are in conflict with his written report and it was in these circumstances that he was treated as hostile. The other eye witness is Hari Om, PW-6, who also was treated hostile by the prosecution but the fact remains that both the aforesaid witnesses i.e. Sant Ram and Hari Om, who were treated as hostile have supported the case of the prosecution to the extent that the occurrence took place on 8th July 1982 at about 05.15 p.m. and also as to the place of occurrence. Hari Om in his statement, recorded u/section 161 Cr.P.C. had clearly stated ''राहे मुर्तजा पर Collectorate से आने वाली सड़क के तिराहे पर पहुँचा तो तिराहे उत्तर पश्चिम ओर खड़े सतं राम ने शोर मचाया कि बचाओ बचाओ तो मैने उस ओर देखा तो पाया कि तिराहे के कोने पर हथठेला पर बैठे झाझन लाल को अफजुलपुर के लड्डन उर्फ हस्हाक ने तमंचे से जो वह लिये था गोली मार दी गोली बहुत नजदीक से बांये गर्दन पर मारी गई जिससे झाझन लाल को चोट आई। झाउ लाल भी शाट पर आ गये थे और आदर्श कालोनी के मंदिर के पुजारी जी प्रभा कान्त वहॉ आ गये थे जिन्होने पूरा वाक्या देखा था।'' However the said Hari Om later on resiled from his aforesaid statement and was treated hostile. But the law remains that such part of the evidence as corroborates the occurrence of the incidence can be read in the evidence.

7. It is further to be seen that Prasadi Lal, who is the real cousin of Sant Ram and who was examined as PW-2 has clearly stated in his statement that Jhajhan, the deceased was engaged in the business of selling of "pulaas" of Maize as fodder. Prasadi Lal, needless to say, is an eye witness to the occurrence with regard to the motive, which took place on 7th July 1982 i.e. a day prior to the incidence. In his cross examination Prasadi Lal has clearly stated that he knew Laddan since a very long time as Laddan used to purchase fodder for cattle with regard to which purchase, he visited every day and that he used to purchase fodder from different persons. Prasadi Lal who is the first cousin of Sant Ram has also stated that Laddan is also known as Ishaq. There are no contradictions in the statement of Prasadi Lal.

8. The most important witness is Jhau Ram who was examined as PW-5, who is also in the business of selling of fodder (Maize Pulaas), who in his statement has clearly mentioned that the appellant accused is known as Laddan (Ishaq), Jhau Ram in his evidence has clearly reiterated that the occurrence which took place on 7th July 1982 with regard to sale and purchase of pulaas as well as the incident of 8th July 1982. Jhau Ram has also stated that on the date of occurrence at about 05.15 p.m. He was present at the place of occurrence and busy with his own work of selling of "Pulaas" of maize and that he saw Jhajhan sitting on the Thela after selling off his "pulaas"; that he heard Sant Ram shouting and then he saw that Laddan, the accused, after pulling a Tamancha from his "Penth" had shot Jhajhan in the neck on the left side, as a result of which Jhajhan fell down and then Laddan sped away on a cycle. In his cross examination Jhau Ram has clearly insisted that he was present at the time when the quarrel of "Pulas" took place and was also present on the date of occurrence. Jhau Ram has further stated that he knew the accused Laddan since much before as he used to come to purchase fodder frequently, almost every day. He being a frequent visitor, was well known to Jhau Ram.

9. Dr. Harish Chand Narula, PW-8 was examined and as per the report the following anti mortem injury was found on the person of the deceased:

"fire wound entry oval shaped of 4 cm x 3 cm inside chest cavity deep at the left side of neck, laterally 10 cm below the left ear lobule. Margin were lacerated. Scorching and tattooing present. No external mark of injury present all over the body."

10. Sri R.K. Sharma, the Investigating Officer, was also examined and in his statement he submitted that in the site plan, he has not shown Shanker Printing Press as it was at a big distance. He stated that it is wrong to say that when Jhajhan was brought to the police station, he was already dead, that he does not remember that on what conveyance Jhajhan was brought to the Police Station. The Thela on which he found blood stains was found by him at the place of occurrence and not at the police station. He asserted that it is wrong to say that the Thela was at the police station not at the place of occurrence.

11. The trial court looking to the evidence on record and looking to the contradiction made by Sant Ram in his evidence had declared him hostile along with Hari Om PW-6. However, the trial court has consistently and rightly relied upon the two other witnesses i.e. Prasadi Lal and Jhau Ram. Prasadi Lal is the real cousin of Sant Ram and thus there was no question of his being falsely dragged in the occurrence. He being witness of the incident to the motive of crime, which took place on 7th July, 1982 i.e. a day prior to the alleged incident is undisputed and unimpeachable. While Jhau Ram, PW-5 is a witness of both the incidents i.e. the incident which took place on 7th July, 1982 and also on 8th July, 1982 and has fully supported the case of the prosecution. The counsel for the accused-appellant has vehemently contended that there has been an improper investigation in the present case; that in fact there are no eye witness and that as no identification was made, hence the involvement of the accused-appellant is doubtful.

12. However, the fact remains that even if we ignore the evidence of Sant Ram and Hari Om but Jhau Ram and Prasadi Lal have categorically supported the case of the prosecution, neither their

presence has been doubted nor any suggestion have been made to them in the Examination-in-Chief or cross examination. There is not even a whisper from the defence side that there is any enmity between the accused appellant and the witnesses on account of which the appellant may have been falsely implicated. Even the presence of Jhau Ram at the place of occurrence has not been doubted. On the other hand the evidence of Jhau Ram is unimpeachable. Even if he is to be treated as a solitary witness. The Hon'ble Apex Court in his judgement of Sunil Kumar Vs. The State Government of NCT of Delhi; (2003) 11 SCC 367 while relying upon the case of Vadivelu Thevar V. The State of Madras; 1957 CriLJ 1000- this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly neither wholly reliable nor wholly unreliable. In the case of first two categories this Court said that they post little difficulty but in the case of third category of witness corroboration would be required.

13. The relevant portion is quoted as under:-

".....Hence, in our opinion, it is a sound and well- established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for, proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3)Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses.....

14. Vaiduvelu Thevar's case (supra) was referred to with approval in the case of Jagdish Prasad and Ors. Vs. State of M.P. 1994 CriLJ 1106. This Court held that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). But, if there are doubts about the testimony the courts will insist for corroboration. It is for the Court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time honoured principle is that evidence has to be weighted and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

15. The Apex Court has held that even assuming there is a contradiction and if the evidence appears to be clear, cogent and trustworthy and if nothing substantial have been brought on the record to disregard the testimony of other witnesses then merely because there are some aberration the evidence does not gets wiped out. In the present case the evidence of PW-5 alone was substantial to fix the guilt on the accused appellant.

16. Needless to say that there cannot be an exact and precise reproduction of evidence in any mathematical manner and what is to be seen is whether the version presented in the court was substantial and similar to what was stated during the investigation.

17. As far as the question of identification is concerned, almost all the witnesses have categorically stated that the accused was known to them from much prior to the date of occurrence. The Trial court has rightly concluded that "if at the stage of trial PW's testimony does not convince the court about the witnesses knowing the accused from before the occurrence and if the PW's evidence convinces that they knew the accused from before the occurrence, then the mere failure to hold the identification parade at the instance of the accused will not be fatal to the prosecution case. All the eye witnesses including the hostile witnesses said that they knew the accused from before the occurrence. Thus in view of the aforesaid material fact merely on account of non holding of the identification parade, will not vitiate the case of the prosecution.

18. The Apex Court in the case of Hari Nath And Ors. Vs. State of U.P.; AIR 1988 SC 345 has held that the evidence of identification merely corroborates and strengthen the oral testimony in Court which alone is the primary and substantial evidence as to identity. The Court has further held "it is no doubt true that offence of corroboration by test identification may not assume any materiality if either the witnesses had know the accused earlier." Thus the objection with regard to the identification as raised by the counsel for the appellant is misconceived.

19. It may further be appreciated that the place of occurrence has not been disputed in any serious manner by the appellant. No plea or defence has been taken with regard to any enmity with the witnesses, nothing exist on record which may say that the accused appellant has been falsely implicated either because of some previous enmity or inimical witness. It was a day light incident which took place in the presence of the eye witness who has supported the case of the prosecution persistently and thus this Court finds no good ground to interfere with the finding and conviction as recorded by the Trial Court.

20. In support of their contention that Jhau Ram is not a reliable witness, a plea has been taken inasmuch as to the effect that Jhau Ram has stated that the body was taken to the police station on the Thela, which Thela was found at the place of occurrence. However, the fact remains that the investigating officer in his statement has clearly stated that the Thela was found at the place of occurrence. The evidence of Jhau Ram is apparently unimpeachable and fully corroborates the case of the prosecution. The Apex Court has repeatedly taken the view that minor discrepancies or improvements which do not affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or

improvements. The purpose is to primarily and clearly to sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case such discrepancies should not be attached undue significance. (Kuriya and Ors. Vs. State of Raj.) (2012) 10 SCC 433.

21. Thus in view of the aforesaid factual position and evidence on record and circumstances this Court finds no good ground to interfere with the findings as recorded by the Sessions Judge, Rampur and accordingly the judgement dated 21st March, 1983 passed by the Sessions Judge, Rampur in Sessions Trial No. 169 of 1982 convicting the accused appellant under Section 302 I.P.C. and imposing sentence of life imprisonment is affirmed and the present appeal is accordingly dismissed.

22. A copy of this judgement be communicated to the court below.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2014

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Service Single No. 1147 of 2014

Ram Sajeevan Patel..... Petitioner
Versus
State of U.P..... Respondent

Counsel for the Petitioner:
Sri A.M. Tripathi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Appointment-claim based upon land-acquired for construction of Hospital-based upon government order-held-in view of Full Bench decision-provisions of G.O. providing preference in job-or preferential appointment-being contrary to provisions of land acquisition Act neither appointment nor preference can be given.

Held: Para-14
The Full Bench has given reasons for coming to the conclusion that any such Government Order, which provides benefit of employment is contrary to the scheme as provided under the Land Acquisition Act and hence, would be invalid. Even in case, any Government Order which provides that preference in employment shall be given to a person whose land has been acquired, would be inconsistant with the intention of the Parliament as contained in the Land Acquisition Act. As such, I am of the considered view that in view of the law laid down by the Full Bench of this Court in the case of Ravindra Kumar vs. Distirct Magistrate, Agra and others (supra) the petitioner is not entitled to get any benefit in government employment on the ground that his land has been acquired, even on the basis of Government Order dated 15.06.1985.

Case Law discussed:
2005(1) UPLBEC 118

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

1. Notice on behalf of opposite parties has been accepted by the learned Chief Standing Counsel.

2. Heard learned counsel for the petitioner and learned Standing Counsel for the opposite parties.

3. This writ petition has been filed seeking following reliefs:-

(i) to issue a writ, order or direction in the nature of mandamus thereby commanding/ directing the opposite parties

particularly the opposite parties no.1 and 2 to consider and provide suitable employment to the petitioner according to his qualification in terms of Government Order dated 15.06.1985, as contained in Annexure No.1 to the writ petition.

(ii)to issue, any appropriate writ, order or direction which this Hon'ble Court may deem, just and proper in the nature and cirucmstances of the case.

(iii)to award the cost of the writ petition in favour of the petitioner.

4. Learned counsel for the petitioner submits that land of the petitioner situated at village-Kailey i.e. Gata No.133(M) Rakba, measuring area 0-19-11 ½ has been acquired by the State Government for the purpose of construction of a Hospital known as OPEC Hospital consisting 500 beds in village Kailey, district Basti. The petitioner has applied to the opposite parties for providing suitable appointment in lieu of the land acquired by them. The petitioner is having qualification of High School, as such, he is elible for the post of Malaria Inspector. In this regard, the petitioner has preferred representation dated 15/16.06.2007, which is still pending.

5. Further submission of learned counsel for the petitioner is that as per government order dated 15.06.1985, the petitioner is entitled to get preference in the appointment.

6. Learned Standing Counsel on the other hand submits that the question as to whether a person whose land has been acquired can be offerred any government job, has been considered by full Bench of this Court in the case of Ravindra Kumar vs. District Magistrate, Agra and others reported in 2005 (1) UPLBEC 118, wherein the Court has come to the conclusion that since there is no provision in the Land Acquisition Act to grant any such benefit of giving employment, as such, the government order to the effect providing benefit of employment is invalid. It is submitted that even a preference in employment on the basis of land having been acquired cannot be granted.

7. I have considered the submissions made by learned counsel for the parties and gone through the record.

8. The Government Order dated 15.06.1985 provides that in case the land has been acquiured for the purpose of establishing the Industrial Uinit, the family members of the owner of land shall be given preference in the following manner:-

(1) The dependants whose land has been acquired
(2) Residents of concerning tehsil.
(3) Residents of concerning village.
(4) Residents of concerning State.

9. The questions which were referred before the Full Bench of this Court in the case of Ravindra Kumar vs. District Magistrate, Agra and others (supra), read as under:-

"1. Whether Government Orders/ Circulars providing employment to one member of a family whose land has been acquired (over and above the compensation awarded under law) is valid or not?

2. Whether the qcquiring bodies for whose benefit the land is acquired are

bound by these Government Orders/ Circulars.

3. Whether a writ can be issued directing the acquiring body to consider the claim in accordance with the Government Orders/ Circulars."

10. The Full Bench in paras-9,10 and 11 has observed that the Land Acquisition Act takes care of the difficulties of a person whose land has been acquired by granting 30% solatium under Section 23 (2) in addition to the market value of the land which has been acquired. The grant of solatium in addition to the full market value of the land has obviously been made to cater to the difficulties of the person whose land has been acquired. There is no provision in the Land Acquisition Act to grant a job in addition to the amounts specified in Section 23. Hence, any Government Order for providing a job in addition to that is an our opinon violative of the provisions of the Land Acquisition Act and as such Government Order will amount to amendment of Section 23, which will be illegal.

Paras-9, 10 and 11 of the judgment on reproduction read as under:-

"9. It is not denied that the petitioner has received full compensation as provided under Section 23 of the Land Acquisition Act which means an amount equal to full market value of the land with interest as well as solatium under Section 23(2) which is equal to 30% of the market value. That being so we cannot understand under which law a person can get a job in addition to this compensation.

10. The Land Acquisition Act takes care of the difficulties of a person whose land has been acquired by granting 30% solatium under Section 23(2) in addition to the market value of the land which has been acquired. Thus, if the market value of the land acquired is Rs. 1 Lac, the owner will get not only Rs. 1 Lac but an additional Rs. 30,000/- i.e. he will get Rs. 1.30 Lac with interest at 12% from the date of the notification under Section 4 to the date of the award or the date of taking possession whichever is earlier, vide Section 23(1 -A).

11. This grant of solatium in addition to the full market value of the land has obviously been made to cater to the difficulties of the person whose land has been acquired. There is no provision in the Land Acquisition Act to grant a job in addition to the amounts specified in Section 23. Hence any Government Order for providing a job in addition to that is in our opinion violative of the provisions of the Land Acquisition Act, for such a Government Order will amount to amendment of Section 23, which will be illegal."

11. The Full Bench has further held that any Government Order providing for any further benefit not mentioned in the Land Acquisition Act would be inconsistent with the intention of Parliament as contained in the Land Acquisition Act. As such, any such Government Order would be violative of the Land Acquisition Act and would hence be invalid. Para-22 of the judgment is reproduced as under:-

"22. There is no provision under the Land Acquisition Act under which the Circular dated 28.12.1974 could be issued. Whatever compensation has to be given for acquisition of the land is provided under the Land Acquisition Act itself which is a self-contained Code. Any G.O. providing for any further benefit not mentioned in the Land

Acquisition Act would be inconsistent with the intention of Parliament as contained in the Land Acquisition Act. Hence any such GO. would be violative of the Land Acquisition Act and would hence be invalid. Such a G.O. will also violate Article 16 of the Constitution as already mentioned above."

12. The Full Bench has answered the questions referred in the following manner:-

"1. The Government Orders/Circulars providing employment to one member of a family of a person whose land has been acquired (over and above the compensation awarded under the law) are invalid.

2. The acquiring body for whose benefit the land is acquired are not bound by such Government Order/Circular.

3.No writ can be issued directing the acquiring body to consider the claim in accordance with the aforesaid Order/Government Circular."

13. Learned counsel for the petitioner tried to submit that Government Order dated 15.06.1985 was not before the Court in the case of Ravindra Kumar vs. District Magistrate, Agra and others (supra). It is also submitted that in the Government Order dated 15.06.1985 only a preference is to be given and it is not necessary that the appointment is to be given to the person whose land has been acquired.

14. The Full Bench has given reasons for coming to the conclusion that any such Government Order, which provides benefit of employment is contrary to the scheme as provided under the Land Acquisition Act and hence, would be invalid. Even in case, any Government Order which provides that preference in employment shall be given to a person whose land has been acquired, would be inconsistant with the intention of the Parliament as contained in the Land Acquisition Act. As such, I am of the considered view that in view of the law laid down by the Full Bench of this Court in the case of Ravindra Kumar vs. Distirct Magistrate, Agra and others (supra) the petitioner is not entitled to get any benefit in government employment on the ground that his land has been acquired, even on the basis of Government Order dated 15.06.1985.

15. The writ petition being devoid of merit is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI,J.

Civil Misc. Writ Petition No. 1715 of 2000

Vijay Prakash Pandey..... Petitioner
Versus
Inspector General of Police H.Q. Alld. & Ors. Respondents

Counsel for the Petitioner:
Sri P.K. Dwivedi, Sri P.K. Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India-Art.-226-family pension-claimed by petitioner being adopted son-adoption took place on 11.10.97-adoptive father died on 12.12.97-adoption deed registered on 16.01.98 by adoptive mother-who also died on 16.12.2002-till her death she got family pension-when adoptive father died-petitioner was only six year old-at the time

of death of adoptive mother-petitioner was 11 years old boy-once adoption found valid-family pension can not be denied-till achieving age of majority- order impugned quashed-direction issued to give family pension within 3 months.

Held: Para-15

It is also relevant to mention that Smt. Damyanti Devi, wife of deceased employee had also died on 16.12.2002 and she got family pension since 12.12.1997 to 16.12.2002. It had also been brought on record that petitioner no.2- Vijary Prakash Pandey (adopted son) was hardly six years old at the time when his father Sri Brij Bihar Pandey died on 12.12.1997 and when his mother Smt. Damyanti Devi died on 16.12.2002, the petitioner no.2 was hardly 11 years old. This is most unfortunate that in these circumstances once the adoption was correct in the eyes of law, then there was no occasion to deny the benefit of family pension to petitioner no.2 (adopted son) since his attainment of the majority.

Case Law discussed:

AIR 1983 SC 114; 1995 Law Suit (SC) 1102

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. The present writ petition has been filed in the nature of certiorari calling for the records and to quash the orders dated 14.10.1999 and 11.06.1999.

2. The counter affidavit and rejoinder affidavit have been exchanged between the parties.

3. The case of the petitioner no.2 is that he is adopted son of late Brij Bihari Pandey, who was working as Constable in Civil Police and died on 12.12.1997.

4. This petition is being filed by late Smt. Devanti Devi alias Damyanti Pandey, wife of Sri Brij Bihari Pandey alongwith petitioner no.2- Sri Vijay Prakash Pandey (adopted son of deceased employee). Sri Brij Bihari Pandey in his life time has desired to adopt a son and in this regard he talked and convinced Sri Shashi Kant Pandey for adoption of his elder son Vijay Prakash Pandey (petitioner no.2) and in this regard adoption ceremony was solemnized in the presence of Pandit and other members of the village which is known as "Datta Homam". For a valid adoption, the physical act of giving and taking is an essential requisite ceremony, imperative in all adoptions. And this requisite is satisfied in its essence on expression of consent or an executed deed of adoption.

5. The said documents regarding adoption has been brought on the record as annexure no.1 to the present writ petition.

6. The said documents were prepared on 11.10.1997 and immediately thereafter Sri Brij Bihari Pandey, the father of petitioner no.2 died on 12.12.1997. An application dated 13.01.1998 had been moved by Smt. Damyanti Pandey for registration of the said documents and the same was registered on 16.01.1998. She had also moved an application before the Civil Judge (Senior Division), Mau for succession certificate in favour of the petitioner no.2 (her adopted son) and finally name of the petitioner nos. 1 and 2 had been mutated in family register. After due verification and enquiry the District Magistrate, Mau has also issued succession certificate in favour of the petitioners.

7. In this background, petitioner no.1 had moved an application to the U.P. Police Head Quarter, Allahabad to consider the case of the petitioner for family pension and in response the Finance Controller had also informed to the Senior Superintendent of

Police, Ballia for incorporation of her adopted son's name for family pension. In this regard a legal opinion had also been sought by the Senior Superintendent of Police, Ballia vide his letter dated 06.11.1998 from the Senior Prosecution Officer and finally through a letter dated 15.11.1998, the Senior Superintendent of Police, Ballia had informed to the U.P. Police Head Quarter, Allahabad that as per the legal opinion submitted in the present matter, Sri Vijay Prakash Pandey (adopted son of Brij Bihari Pandey) would be entitled for family pension up to his attainment of majority and the family pension benefit may be conferred in his favour. Certain other correspondence took place between the department but finally the Finance Controller, U.P. Police Head Quarter, Allahabad, vide order dated 14.10.1999 had declined for giving family pension to the adopted son, specially on the ground that his adoption deed had not been executed in his life time and the same had been executed after the demise of an employee (Sri Brij Bihari Pandey) and therefore, he is not entitled for any benefit.

8. He further states that under the Hindu Law an adopted son continues the line of the adoptive father for secular and spiritual purposes and when a widow adopts a son to her husband, the doctrine of relation back makes sonship retroactive from the moment of the death of the late husband. The adopted son is deemed to have been born on the death of the adoptive father

9. Learned counsel for the petitioner has further argued that in the present matter, no doubt that an employee who had died on 12.12.1997, but in fact in his life time, the adoption had been decided between husband and wife and the documents had been executed in the presence of the witnesses on 11.10.1997 and finally the succession certificate has also been issued in favour of petitioner no.2 (Vijay Prakash Pandey).

10. Learned counsel for the petitioners has apprised to the Court regarding Section 12 of The Hindu Adoptions and Maintenance Act, 1956, for ready reference, same is quoted below:-

"12. Effects of adoption.- An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoptive family:

Provided that--

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c)the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

11. By bare perusal of the said Section, it is apparent that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoptive family.

12. Hindu Adoptions and Maintenance Act clearly provides that an adopted child shall be deemed to be the child of his adoptive father or mother for all purposes with effect from the date of the adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. As a consequence, when a widow adopts a child, the child not merely acquires an adoptive mother but also acquires other relationships in the adoptive family, unless there is anything to the contrary in the Hindu Adoptions and Maintenance Act.

13. In the present matter, deed had been prepared on 11.10.1997 before the demise of Sri Brij Bihari Pandey. It has also brought on record, the succession certificate issued by the District Magistrate, Mau and also decision taken by the Civil Judge (Senior Division), Mau dated 19.03.1998 in Original Suit No.30 of 1998 (Damyanti Pandey alias Davanti Pandey & others) (Annexure No.4 to the writ petition). The complete record which has been brought before this Court demonstrated that the adoption was not fake and it is true that the same had taken place and finally the same has also been approved by the competent authority.

14. The Hon'ble Apex Court in Madhusudan Das Vs. Smt. Narayani Bai & Ors., AIR 1983 SC 114) has held as follows:-

"It is well settled that a person who seeks to displace the natural' succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. It is also true that the evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion for doubting its truth. Nonetheless the fact of adoption must be proved in the same way as any other fact."

15. It is also relevant to mention that Smt. Damyanti Devi, wife of deceased employee had also died on 16.12.2002 and she got family pension since 12.12.1997 to 16.12.2002. It had also been brought on record that petitioner no.2- Vijary Prakash Pandey (adopted son) was hardly six years old at the time when his father Sri Brij Bihar Pandey died on 12.12.1997 and when his mother Smt. Damyanti Devi died on 16.12.2002, the petitioner no.2 was hardly 11 years old. This is most unfortunate that in these circumstances once the adoption was correct in the eyes of law, then there was no occasion to deny the benefit of family pension to petitioner no.2 (adopted son) since his attainment of the majority.

16. Learned Standing Counsel has relied the Government Order dated 24.08.1966 which talks about the family pension and he has indicated the following provisions:-

"उपर्युक्त योजना 1 अप्रैल, 1965 से प्रवृत्त होगी और पैरा 5, 6, 10 और 13 के उपबन्धों के अधीन रहते हुए पेन्शन योग्य अधिष्ठानों के ऐसे समस्त सरकारी अधिकारियों–स्थायी या अस्थायी–पर लागू होगी जो 1 अप्रैल, 1965 को सेवा में थे या उसके बाद भर्ती किये जायं।"

17. Bare perusal of the said Government Order, it is apparent that the same is applicable for giving pensionary benefits and he has also indicated the "टिप्पणी 1–उपर्युक्त 2 और 3 में सेवा नियुक्ति से पहले वैध रूप से गोद ली गई सन्तान भी सम्मिलित होगी।"

18. The adoption has taken place prior to the retirement of an employee. It

does not talks about the situation where a person dying in harness and adoption has already taken place either in his life time or after the demise of an employee.

19. In true sense, under the present facts and circumstances of the case the Government Order dated 24.08.1966 would not be applicable in the present facts and circumstances of the case.

20. Learned counsel for the petitioners has also drawn the attention of the Court regarding decision in Chandan Bilasini Vs. Aftabuddin Khan, reported in 1995 Law Suit (SC) 1102. It is useful to quote the relevant paragraphs, which are as below:-

"4. The first appellate court on the basis of the oral evidence as well as the two supporting documents held that there was a valid adoption of the respondent Amaresh Sarkar by the original plaintiff No.1. The Division Bench of the High Court in appeal, however, held that there was no valid adoption. It appears to have drawn an adverse inference on the basis of the fact that the adoptive mother who was alive at the time when the evidence was recorded by the trial court, had not examined herself. It is accepted by both sides that at the time when the evidence was recorded the adoptive mother was a very old lady 86 years of age and she was too old to be produced in court for giving evidence. The Division Bench failed to take into account the fact that there were three other witnesses who were present at the time of the adoption ceremony who were examined -one of them being the priest and the other one being a person who was also present at the time when the deed of admission of adoption was executed by the first plaintiff adoptive mother and was an attesting witness to the deed. The mere fact that some other persons who were also present at the adoption ceremony were not examined, cannot be considered as making the adoption doubtful. There is clear testimony relating to the ceremony of taking and giving the respondent Amaresh Sarkar in adoption as between the natural parents and the adoptive mother. The registered document regarding this adoption which was executed within a month of the adoption by the adoptive mother should also be given its due weight as evidence of adoption. There is also a second document executed by the natural father after a lapse of two years. Since the natural father would be interested in executed such a document which would give an advantage to his natural son the same probative value may not be attached to the second document. But the earlier document which is executed by adoptive mother must be given its due weight. It has been properly proved and is a registered document.

5. Looking to the entire evidence which is on record which goes to establish that adoption took place by the ceremony of giving and taking, we hold that there was a valid adoption of the respondent Amaresh Sarkar by the original first-plaintiff Chandan Bilasini Dasi. After the coming into force of the Hindu Adoptions and Maintenance Act of 1956, this adoption was made in accordance with the provisions of Hindu Adoptions and Maintenance Act.

6. On adoption of the respondent Amaresh Sarkar by the widow of the deceased Kalikrishna Sarkar, the adopted son Amaresh Sarkar severed his ties with his natural family and became a part of the adoptive family. As such, Chandan Bilasini Dasi became his mother and Kalikrishan became his deceased father. Section 12 of the Hindu Adoptions and Maintenance Act clearly provides that an adopted child shall be deemed to be the child of his adoptive

father or mother for all purposes with effect from the date of the adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. As a consequence, when a widow adopts a child, the child not merely acquires an adoptive mother but also acquires other relationships in the adoptive family, unless there is anything to the contrary in the Hindu Adoptions and Maintenance Act.

7. This position is reinforced by Section 14(4) which sets out that where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child. In other words, the family relationship gets crystalised as at the date of adoption. The child will be deemed to be the child of the parent who adopts the child and the existing or deceased spouse of that parent (as the case may be), if any, will be considered the child's father or mother. A spouse subsequently acquired by the adoptive parent becomes the step-parent of the adopted child. The adopted child, however, cannot divest any person of any property already vested in that person (Section 12[c])."

21. Looking to the entire evidence which has been brought on record in the present writ petition clearly establish that the adoption took place by the ceremony of giving and taking even in his life time of the deceased employee, the department can not take a plea that in formal and in true sense the execution of the deeds had not been taken place in his life time and the same had been carried out after the demise of an employee.

22. Bare perusal of the annexure no.1 to the writ petition, it is apparent that the ceremony of giving and taking had taken place on 11.10.1997 and Sri Brij Bihar Pandey, deceased employee died on 12.12.1997.

23. Therefore, as per the view taken by the Hon'ble Apex Court, this Court is of the view that the denial of the right of the petitioner no.2 (adopted son) was not justified and is not in accordance with law.

24. Therefore, the orders dated 14.10.1999 and 11.06.1999 (annexure nos. 12 and 15 of the writ petition) are hereby quashed. Mandamus is issued to the respondent no.1 to pay family pension to the petitioner no.2 (adopted son) since 16.12.2002, when his mother Damyanti Devi has died till the attainment of his majority. It is expected that same may be carried out within three months from the date of presentation of certified copy of this order, before the respondent no.1.

25. The writ petition is, accordingly, allowed.

26. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2014

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

Criminal Appeal No. 1728 of 2007

Parvez..... Appellant
Versus
The State of U.P..... Respondent

Counsel for the Petitioner:
Sri Shudhanshu Srivastava, Sri Rajul Bhargava, Sri Sharfuddin Ahmad, Smt. Nayan Shree, Sri S.M.N. Abaas Abbadi, Sri Shakil Ahmad, Sri Sumit Goyal

Counsel for the Respondents:
A.G.A.

Criminal Appeal-against conviction-offence under section 302 and 307 IPC-challenged on ground of anti-timed- FIR-discrepancy in statement of prosecution witness-non mention of crime number in letter of doctor-can not be inferred that FIR is anti-timed-minor discrepancies in evidence-not to be given undue importance-considering inescapable conclusion about guilt of appellant-appeal dismissed.

Held: Para-32
There are consistent statements of the informant and other injured witnesses and the Investigating Officer that the injured first went to the police station, lodged the First Information Report and then were sent for medical examination in the District hospital. Merely because crime number was not mentioned in the letter sent to the doctor along with the injured witnesses for medical examination in the District hospital, it cannot be inferred that the First Information Report is ante-timed.

Case Law discussed:
(1999)3 SCC 507; 1988(Supp.) SCC 241; 1972Crl. L.J. 1302; (2002)4 SCC 426; (2006) 2 SCC 450; (2011) 6 SCC 288; (2005)9 SCC 788; (2012) 11 SCC 205; 1995 Supp(1)SCC; (2005) 10 SCC 374; (2006)13 SCC 65; (2011)9 SCC 698; (2012)10 SCC 476; (2013)4 SCC 360.

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

1. Heard Shri S.M.N. Abaas Abbadi, learned counsel for the appellant and learned A.G.A.

2. Two persons namely appellant Parvej and his brother Riyasat were committed to trial in the court of Additional District and Sessions Judge (F.T.C.) Court no.1 Saharanpur under Sections 302 and 307 I.P.C. Riysast was acquitted by giving him benefit of doubt of having committed the offences under Sections 302 and 307 I.P.C..

3. The appellant Parvez was found guilty and was convicted under Section 302 I.P.C. and punished for life imprisonment along with fine of Rs. 3,000/-. Under Section 307 I.P.C., he was punished for seven years R.I. and fine of Rs. 2000/-. In default, the appellant has to undergo six months additional imprisonment. All the sentences were to run concurrently.

4. The prosecution case is that the informant Asgari wife of Abdul Hamid resident of Peer Bazeshah Wali Gali no. 3, Thana Jankpuri submitted a written application dated 2.9.1997 in the police station Janakpuri. It was stated in the First Information Report that Parvej the appellant was the husband of her daughter Sanoo. However prior to the incident they had separated and divorced. Three children born out of the marriage were living with Parvej. Only one ,daughter, namely Rubi was with Sanoo at her Maika. After divorce, Sanoo was living with the informant. There is some whisper of a dispute going on between the parties in the court as Parvej had eloped with Sanoo six years prior to the incident and married her.

5. Parvej was pressuring Sanoo to handover their daughter Rubi to him for a long time and was angry as she had refused, to give her only daughter living with her.

6. On the fateful day i.e. 2.9.1997 at around 8 A.M., Parvej along with his brother Riysat came to the house of Asgari and some altercation occurred between him and Sanoo over the custody of Rubi(their daughter). Thereafter he along with his brother Riyasat started stabbing Sanoo with "Ustura'(Knife). The informant Asgari and her younger daughter Sabbo aged about fourteen years tried to save Sanoo and they were also

assaulted with "Ustura' by the appellant and his brother. Sabbo the younger daughter of the informant Asgari received fatal injuries on her person. She ran out of the house crying in an injured condition and fell down on the Kharanja outside the house. She died on the spot on account of the fatal injury received on her neck. During the incident the neighbours came on the spot hearing the cries of the deceased and the injured. One Rasihda wife of Jamaludeen along with other neighbours also witnessed the incident.

7. On the said information, a case under Sections 302 and 307 I.P.C. was registered against the appellant and his brother Riyasat on 2.9.1997 at 9.05 A.M. After lodging the First Information Report, Asgari and Sanoo were sent to the District hospital by the police for their medical examination. Dr. T.R. Sharma, who entered in the witness box examined both the injured, namely, Asgari and Sanoo and also conducted postmortem of the deceased Sabbo.

8. The informant Asgari was medically examined at 9.30. A.M. and as per the injury report the informant was having two injuries of incised wounds on the left and lower side of her neck and middle chin. Apart from these two injuries, contusions and abrasions were also found on her person. The nature of the injuries have been described as simple and caused by some sharp edged object. Similar injuries were also found on the person of Sanoo who was examined at 9.45 A.M. The injuries reported are three incised wounds on the left back and front side of the neck and outer edge of left eyebrow. The remark is that the injuries were caused by some sharp edged object. Both the injury reports are dated 2.9.1997 itself .

9. The injuries of the deceased are incised wound on the right and front side of the neck which was bone deep and carried from right ear to half portion of the neck diagonally cutting trachea and artery of right side of the neck from the middle. Cause of death was due to shock and haemorrhage on account of antemortem injuries.

10. The appellant Parvej was arrested on 8.9.1997 and on the disclosure statement made by him "Ustura' the murder weapon was recovered near four electric poles near the over-bridge, covered under the grass. As per the recovery memo dated 8.9.1997 blood was found on the "Ustura' at the butt and front sharp portion. As per the serologist report the blood found on the murder weapon "Ustura' was disintegrated.

11. P.W. 1 Smt. Raseeda, the neighbour of the informant was declared hostile and was cross examined by the prosecution. Smt. Raseeda P.W.1 though she turned hostile however admitted that she had reached on the spot and saw the dead body of Shabbo lying on the road and injured Asgari and Sanno but she denied the presence of Parvej and Riyasat. In her cross examination she tried to suggest that the residents of Mohalla gave an application against Asgari and Sanoo making allegations of prostitution.

12. P.W 2 the injured witness and informant Smt. Asgari had reiterated her version in the First Information Report.

13. The injured witness Sanoo P.W.6 stated that the report was lodged by her mother at the police station and thereafter their medical examination was done at the District hospital. She and her mother were admitted in the hospital.

While narrating the incident she stated that the appellant Parvej along with his brother Riyasat came to their house and attacked her with "Ustura' after snatching Rubi her daughter from her lap. No injury was inflicted on Rubi. The appellant first attacked her and then her mother Asgari. In the meantime her younger sister Shabbo came to save her, she was also attacked and received fatal injuries. The incident occurred at the Sahan of the house. The appellant along with co-accused ran away from the door of the room which opened in the "Gali" (lane).

14. P.W.3 Dr. T.R Sharma, who had examined the injured Asgari and Sanoo and also conducted postmortem on Shabbo stated on oath that all the injuries received by Asgari and Sanoo were fresh and he proved the postmortem and injury reports given by him.

15. P.W.4 constable Vijendra Singh and P.W.7 constable Rajendra Singh were witnesses of the inquest.

16. P.W. 5 constable Harendra Singh was witness of recovery of murder weapon ("Ustura'). He affirmed that the weapon was recovered on 8.9.97 after arrest of the accused Parvej at his pointing out.

17. P.W.8 S.I. K.P. Singh was the investigating officer.

18. P.W.8 S.I. K.P. Singh, the Investigating Officer in his examination in chief stated that the site plan was prepared by him and inspection was made in the presence of the informant Asgari. He further described that blood was found scattered from the house of the informant to the place where the dead body of Sabbo was lying. He affirmed the recovery of the bloodstained earth and plain earth from the site of the incident and the recovery of Ustura at the pointing out of the accused from the place concealed under the grass and rags near four electricity poles near the over bridge. Inquest was prepared by him in the presence of the Panch witnesses as also P.W.4 and P.W.7 i.e constables Vijendra Singh and Rajendra Singh whose signatures have been obtained on the inquest report. Murder weapon was sent to the forensic laboratory for chemical examination. He also stated that at the time of recovery of the murder weapon he found blood on it.

19. The statement of the accused under Section 313 Cr.P.C. was recorded and all the incriminating circumstances were put to him which he denied.

20. The submission of the learned counsel for the appellant is that there is inconsistency in the statement of injured witness i.e. informant P.W.2 Asgari, and P.W. 6 Sanoo regarding the place of occurrence of the incident. The P.W. 2 informant said that Sabbo was attacked by the appellant inside the room when she came to save her and Sanoo. She ran out of the room crying and died at the road outside the house of the informant whereas P.W. 6 in her statement said that the entire incident occurred in the Sahan adjacent to the room which opens in the "Gali" outside the house of the informant. He further stated that the time of the incident as narrated is incorrect in view of the statement of P.W.2. The incident is said to have occurred at around 8 A.M. whereas Dr. T.R. Sharma, who had conducted postmortem stated that rigor mortis was present over the upper portion of the hands of the deceased, therefore, there is possibility of the incident having occurred six hours prior to the time mentioned in the First Information Report and thus between 3 to 4 A.M.

21. The further submission is that the First Information Report is ante-timed as the crime number has not been mentioned in the letter (Chitthi Majroobi) written for medical examination of the injured Asgari and Sanno. The statement of the witnesses is that the injured witnesses went to the police station and after the report was lodged they were sent along with letter for medical examination. The fact that the crime number has not been mentioned in the letter addressed to the doctor for medical examination clearly shows that the First Information Report is ante-timed and it was lodged after inquest was prepared and postmortem was conducted. He further submits that the inquest was alleged to have been prepared by the Investigating Officer, S.I. K.P. Singh, however he did not put his signature on the inquest, rather the signatures of two other constables Vijendra Singh and Rajendra Singh were taken on the inquest .

22. Moreover S.I. K.P. Singh Investigating Officer in his statement said that the site plan was prepared in the presence of informant Smt. Asgari whereas Asgari had deposed that she remained hospitalized after lodging the First Information Report when she was sent along with Sanno for medical examination. The inquest of the deceased was prepared in her presence and at the time of preparation of site plan neither she nor her daughter, injured witness went to the spot. The site plan was prepared in the presence of neighbours , she gave the key of her house.

23. Much stress has been laid by the learned counsel for the appellant on the said inconsistency in the statement of the informant Asgari and the Investigating Officer and on that basis it was submitted that the site plan was not prepared on the spot.

24. He lastly submits that the alleged murder weapon i.e. "Ustura" was found from an open place and it was implanted on the appellant. The said fact further established from the statement of P.W.5 that on the cloth in which the alleged murder weapon was kept and sealed was carrying the name of Liyakat Police station Nakor, Saharanpur. Though it contains the slip of F.S.L where it was sent for chemical examination. The alleged weapon cannot be connected with the present crime and it was some other weapon which was sent for chemical examination. On account of these discrepancies,the entire prosecution story falls as the inconsistencies/discrepancies found are fatal to the prosecution case.

25. Learned A.G.A. per contra submits that discrepancies as pointed out by the learned counsel of the appellant are minor discrepancies. It is the case of circumstantial evidence and each instance of incriminating circumstance, by way of reliable and clinching evidence, has been established by the prosecution. The chain of events is complete on the basis of which, no conclusion other than one of the guilt of the accused-appellant can be reached.

26. There was motive to commit the crime. It is an undisputed fact that the appellant and Sannoo P.W. 6 the injured witness were husband and wife and on account of their strained relationship they had divorced two years prior to the incident. However a dispute remained on account of one daughter being born out of their wedlock after divorce in the house of the parents of Sannoo. The appellant wanted to get his daughter in his custody and earlier also an altercation had taken place over the custody of the child. On the date of incident the appellant came to the house of the informant, again altercation took place between the

appellant and Sannoo over custody of their daughter Rubi. After some altercation, the appellant inflicted injuries on the neck of his ex-wife Sannoo and the informant Asgari. When he was attacking them with Ustura, the younger daughter of Asgari came to their rescue and the appellant also inflicted fatal injures on her neck, which sliced the trachea and artery of her neck from the middle. The deceased Sabbo ran out crying on account of the injuries on her person and succumbed to the injuries on the road in front of the house. P.W.1 one of the neighbours who was stated to be the witness of the incident though she denied the presence of the accused appellant at the place of occurrence and also the time of incident being around 8 A.M., however, she admitted in her examination in chief that she saw the two injured persons with blood oozing out of their wounds,namely, Asgari and Sannoo and the deceased Sabbo lying on the road outside the house.

27. We have considered the submissions of the learned counsel for the parties and perused the record.

28. In so far as the submission of the learned counsel for the appellant regarding the discrepancies about the place of occurrence of the incident is concerned it will be seen that there is no inconsistency. In fact, the site plan prepared by the Investigating Officer signed by him shows that the body of the deceased Sabbo was found at the place marked as "S" which is a road/"Gali" outside the house of the informant. "X" is the place inside the house where blood was found. It has also been mentioned in the site plan that blood was found scattered from place "X" i.e. place of occurrence and the place "S" where the body of the deceased was lying . The distance from "X" to "S" was mentioned as 24 steps.

29. Further the informant also stated on oath that the incident occurred in the house and the deceased ran after getting injury on her person and died outside the house on the road. The mere one line in the statement of P.W.6 that the entire incident occurred in the "Sahan" whereas she also said that after they were attacked by the appellant and blood fell on the ground in the room is not sufficient to accept the contention of the learned counsel for the appellant. The Investigating Officer took a sample of bloodstained earth and plain earth from the place of occurrence. In the serologist report human blood was found in the bloodstained earth sent for chemical examination.

30. A reference may be made to the judgment of the Apex Court in State of Rajasthan Vs. Teja Ram and others (1999) 3 SCC 507 wherein discrepancy in the evidence as between two sets of witnesses was considered. The Apex Court in paragraph 18 of the judgment held that there was little justification of the High Court for blowing up such a mote discrepancy to the size of a mountain and then to reject the whole evidence by depicting it as a material discrepancy. In the said case, the discrepancy in the evidence of two sets was that two witnesses said that assailants were seen going out from the western gate of the house while other two witnesses said that assailants went out through the eastern gate. It was held that in the circumstances of the case, no adverse inference can be drawn against such witnesses.

31. In the case of Appabhai and another Vs. State of Gujarat, 1988 (Supp.) SCC, 241, the Apex Court in paragraphs 13 and 14 of the judgement has held that minor discrepancies to the testimony should not be given undue importance.

The injured victim, the victim assaulted must be considered as the best eye-witness. Paragraphs no. 13 and 14 of the judgement are quoted as under :-

"13.On the second contention, the learned Counsel highlighted many of the contradictions in the evidence of Devji (PW-4) as against his previous statement ; one recorded by the Executive Magistrate (Exh. 66) and another by the police during the investigation. We have, however, also examined the relevant evidence. It is true that there are many contradictions in the evidence of Devji. He has not attributed overt acts to individual accused in his statement before the police whereas he has attributed such overt acts in his evidence before the court. But that is no ground to reject his entire testimony. It must not be forgotten that he was a victim of the assault. Fortunately he has survived. He must, therefore, be considered as the best eye witness. The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. Jagamohan Reddy, J., speaking for this Court in Sohrab and Anr. v. the State of Madhya Pradesh 1972 Crl. L.J. 1302 at 1396 observed :

This Court has held that falsus in no falsus in omnibus is not a found rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered.

"14. In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat , M.P. Thakkar, J. observed :

A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

32. The contention of the learned counsel for the appellant is that the First

Information Report is ante-timed cannot be accepted for the reason that the time of the incident mentioned in the First Information Report is around 8 A.M. The chik F.I.R was prepared at 9.05 A.M. After lodging of the First Information Report, the injured witnesses were sent to the District hospital and were examined at 9.30 A.M. and 9.45 A.M. The statement of the injured witnesses is that they first went to the police station, lodged the First Information Report and then were sent by the police to the District hospital along with a letter of medical examination. Time of chik F.I.R. mentioned in the inquest was 9.05 A.M. Time of commencement of the inquest was mentioned as 10.15 A.M. and completion was 11.15 P.M. and postmortem was conducted on the same day at 5 P.M.. Thus, there is no missing link in the sequence of events and the time mentioned in the First Information Report does not suggest that the First Information report is ante-timed. There are consistent statements of the informant and other injured witnesses and the Investigating Officer that the injured first went to the police station, lodged the First Information Report and then were sent for medical examination in the District hospital. Merely because crime number was not mentioned in the letter sent to the doctor along with the injured witnesses for medical examination in the District hospital, it cannot be inferred that the First Information Report is ante-timed.

33. The Apex Court in (2002) 4 SCC, 426 Rajesh alias Raju Chandulal Gandhi and another Vs. State of Gujarat; (2006) 2 SCC, 450, Radha Mohan Singh alias Lal Saheb and others Vs. State of U.P. and (2011) 6 Supreme Court Cases, 288, Brahm Swaroop and another Vs. State of Uttar Pradesh has discussed the discrepancies and omissions in the inquest report and held that such discrepancies or omissions are not sufficient to put the prosecution out of the court and such omission would not necessarily led to an inference that the First Information Report is ante-timed.

34. In the case of Jaishree Yadav Vs. State of U.P. (2005) 9 Supreme Court Cases, 788. In paragraph 16 it was held that merely because the requisition sent by the investigating officer to the doctor, to conduct the postmortem, did not accompany all the particulars found in the inquest report and the complaint like the particulars of the case, the contention of the learned counsel for the accused that when the dead body was sent for postmortem the investigating agency did not know the full particulars of the case. It was held that :-

"..... We do not think that these omissions, if any, would lead to the conclusion that the FIR is anti-timed. It is a settled principle in law that though it is necessary to give the gist of the information collected during the course of inquest proceedings and from the material available in the FIR to the doctor conducting the post mortem, it is not necessary to give all the particulars as contained in either of the above said documents. This is clear from the judgment of this Court in the case of Mahendra Rai vs. Mithilesh Rai & Ors."

35. This apart the fact that inquest has not been signed by the Investigating Officer is not fatal to the prosecution case for the reason that there are other two witnesses of the inquest P.W. 4 and P.W.7 who stated on oath that they were present and signed the inquest which was prepared by the Investigating Officer. Moreover the purpose of the inquest is to ascertain the condition of the body of the deceased at the time of inspection. The signatures of the Panch

witnesses and two constables namely P.W. 4 and P.W.7 are on the inquest.

36. The recovery of murder weapon "Ustura" was at the pointing out of the appellant. The recovery cannot be said to be from an open place as the "Ustura" was found hidden beneath grass and rags from a place which was disclosed by the appellant though it was described an open place being under the over bridge between four electricity poles. As the appellant guided the Investigating Officer to the specific place mentioned in his disclosure statement and the bloodstained "Ustura" was recovered which was concealed by him under the grass and rags, it cannot be described as a recovery from an open place. The seizure memo was prepared and marked as exhibit Ka 5. A perusal of the same indicates the facts discovered from the statement of the accused-appellant and the recovery of Ustura a weapon was concealed by him. While dealing with the recovery on the basis of disclosure statement made by the accused the Apex court in Teja Ram (supra) wherein the axes hidden beneath the rags were recovered with the help of the information elicited from the accused, the Apex Court has held that normally the above circumstance should have been given weighty consideration in the evaluation of the circumstantial evidence.

37. Further in the serological report on account of the blood having been found disintegrated that does not mean that the blood stuck on the axe would not have been human blood at all.

38. The Apex court in the case of Sunil Clifford Daniel Vs. State of Punjab reported in (2012) 11 SCC 205 has considered the fact that blood found to have disintegrated on the recovered article in detail. After consideration of various judgments the Apex Court had observed in paragraph 46 which is quoted below-:

"In view of the above, the Court finds it impossible to accept the submission that, in the absence of the report regarding the origin of the blood, the accused cannot be convicted, upon an observation that it is only because of lapse of time that the classification of the blood cannot be determined. Therefore, no advantage can be conferred upon the accused, to enable him to claim any benefit, and the report of dis-integration of blood etc. cannot be termed as a missing link, on the basis of which, the chain of circumstances may be presumed to be broken."

39. While coming to the said conclusion Teja Ram (supra) was also considered wherein it was held that merely due to disintegration of the serum and absence of specific report regarding presence of human blood on the weapon,it cannot be imagined that the blood would be of some other origin.

40. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.

41. The court finds, in the present case, that there was strong motive for commission of the crime. Though the appellant had divorced Sannoo, his ex-wife two years prior to the incident and they were living separately, however, he was insisting for the custody of their daughter born after the divorce at the house of the informant. Admittedly three children born out of their wedlock were living with the appellant. Thus there is little possibility of doubt regarding existence of motive. Thus an inference may

be drawn that the appellant in fact wanted to get back his daughter at any cost.

42. His wife Sannoo was strongly resisting and not prepared to give custody of the female child Ruby. On account of it, some altercation had taken place between them prior to the incident.

43. The Apex Court in Sunil Cliffored Daniel(supra) considered the case of Suresh Chandra Bahri vs. State of Bihar reported in 1995 Supp (1) SCC page 80 to come to the conclusion that the entire evidence on record suggest that the appellant has sufficient/necessary motive to commit the crime.

44. The suggestion of the defence is that the informant was a person of loose character and a complaint was made by the neighbours that she had indulged in prostitution along with her two daughters, therefore, there is strong possibility of the crime being committed by any of the customers of the three females in the house. The said suggestion is a remote possibility and there is no basis for making the said statement. Even otherwise from the evidence on record it is clear that the incident occurred around 8 A.M. as stated by the informant. The neighbours rushed to the spot after hearing the cries of the deceased and injured, however, no one has come forward to give such a statement. One neighbour P.W.1 though she stated in her examination that she saw the deceased lying in a pool of blood on the road having an injury on the neck when she rushed to the spot. She however turned hostile and stated that she did not see the appellant and his brother at the place of occurrence. The incident happened in the dwelling house of the informant and the most natural witnesses would be the inmates of the house. Only for the reason that some independent witnesses turned hostile and did not support the prosecution case, the court cannot castigate the prosecution as it was not possible to examine any independent witness who had witnessed the events. Normally the neighbours and other independent witnesses do not come forward in such matters. Experience reminds us that the people are generally insensitive when a crime is committed even in their presence. They keep themselves away from the court unless it is inevitable. But the prosecution case cannot be thrown out or doubted on that ground alone. See Appabhai and another Vs. State of Gujarat (supra).

45. So far as the contention of the learned counsel for the appellant that the incident occurred in the odd hours of night and not in the morning of 2.9.1997 is concerned, it may be noted that the basis of the said contention is the statement of P.W.3 Dr. T.R. Sharma, who conducted the postmortem. The doctor in his cross examination submitted that as rigor mortis was present over the upper portion of the hands of the deceased, therefore, there was a possibility of the incident having occurred six hours prior to the time mentioned in the First Information Report. Dealing with the submission of learned counsel for the appellant we may refer to the relevant portion from the Modi's Medical Jurisprudence and Toxicology, 23rd Edition which is quoted as under :-

"In the voluntary muscles, rigor mortis follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities, and lastly extends downwards to the muscles of the abdomen and lower extremities."

46. In Mangu Khan Vs. State of Rajasthan (2005) 10 SCC 374 the Apex court observed in paragraph-8 that :-

"The contention urged by reference to textbooks on Forensic Medicine to show the time within which rigor mortis develops all over the body also has no factual basis. It depends on various factors such as constitution of the deceased, season of the year, the temperature in the region and the conditions under which the body has been preserved. The record indicates that the body was taken from the mortuary. We notice that there is no cross examination, whatsoever, of the doctor so as to elicit any of the material facts on which a possible argument could have been based. If these are the circumstances, then the presence of rigor mortis all over the body by itself cannot warrant the argument of the learned counsel that the death must have occurred during the previous night. Acceptable ocular evidence cannot be dislodged on such hypothetical basis for which no proper grounds were laid."

47. Moreover it is settled legal proposition that the ocular evidence would have primacy unless the oral evidence available is totally irreconcilable with the medical evidence. More so ocular testimony of a witness will have greater evidentiary value vis-a-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence . It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved.

48. So far as the opinion of the doctor is concerned that incident might have occurred six hours prior to the time mentioned in the First Information Report i.e. 8 A.M. and the suggestion of the appellant that it occurred in the night does not mean that Dr. T.R. Sharma P.W.3 was able to fix the exact time of death.

49 Issue raised by the learned counsel for the appellant has been considered and decided in umpteen number of judgements of the Apex Court. Reference may be taken to (2006) 13 SCC, 65 Baso Prasad Vs. State of Bihar (2011) 9 SCC 698 Rakesh and another Vs. State of Madhya Pradesh; (2012) 10 SCC 476, Darbara Singh Vs. State of Punjab; and (2013) 4 SCC 360 Umesh Singh Vs. State of Bihar.

50. In the present case the doctor on the basis of postmortem conducted by him only gave a suggestion that the time of occurrence might be prior to 8 A.M.

51. In view of the above, it is evident that the incident occurred at about 8. AM. The injured Asgari and Sannoo went to the police station, lodged the First Information Report and were taken to the hospital where they were examined by the doctor. The motive was also disclosed in the First Information Report itself. It is,therefore, improbable that the appellant has been falsely implicated as promptness in lodging of the First Information Report shows that there was no time for manipulation.

52. Further it does not appeal to reason as to why injured witnesses would falsely implicate the appellant when he had already divorced Sannoo and they were living separately for almost two years prior to the occurrence of the incident and spare the real culprits to go scot free.

53. There is no discrepancy in the statement of two injured witnesses and

even if there are minor discrepancies between the narrations of the witnesses when they speak on details, unless contradictions are of material dimensions, the same should not be used to discard the evidence in its entirety.

54. Other circumstances, particularly the nature of the injuries inflicted on the person of the injured witnesses and the deceased, arrest of the accused, recovery of weapon, his disclosure statement prove the prosecution case. There is no reason not to believe the statements of the injured eye witnesses.

55. In a feeble attempt learned counsel for the appellant submits that this is a case where the offence, if any, said to be committed by the appellant would not go beyond Section 304 I.P.C. as it was a case of sudden provocation and appellant did not intend to commit the crime.

56. The said confession does not stand to reason as it is evident that the appellant was carrying a 'Ustura" with him when he went to meet Sannoo and moreover he did not attack Sannoo only but two other persons also who came to save her. He ran away only after causing serious injuries to Sabboo who died on the spot. The fact of carrying weapon with him, clearly shows that the appellant had intention to settle the dispute for ever at any cost.

57. In view of the above we reach an inescapable conclusion that the appellant is guilty of the commission of the offence for which he has been charged. We do not find any force in the present appeal. The appeal lacks merit and is dismissed accordingly.

58. The judgment and order dated 15.2.2007 convicting and sentencing the accused-appellant with rigorous imprisonment for life is affirmed. The accused-appellant Parvej is in jail. He shall be kept there to serve out the sentence awarded by the trial court and affirmed by us.

59. The certified copy of the judgment be sent to the lower court within a week. The record of the case be also transmitted to the court below immediately. The compliance shall be reported by the Chief Judicial Magistrate Saharanpur within four weeks from date of receiving the copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2014

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Civil Misc. Writ Petition No. 2029 of 2014

Ishwar Prasad..... Petitioner
Versus
Union of India & Ors..... Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Singh

Counsel for the Respondents:
Sri R.B. Singhal(A.S.G.I.), Sri Sanjay Kr. Yadav, Sri Satish Chaturvedi, Sri S.K. Rai

Constitution of India, Art.-226-alternative remedy-petitioner ex-army personal-claiming post retiral benefit-preliminary objection to approach before Army Tribunal-in view of Arm Force Tribunal Act 2007-contention that where the question involve interpretation of Constitutional provisions-held-in view of L.Chandra Kumar-Tribunal itself can decide this question-petition not maintainable-on ground of alternative remedy.

Held: Para-9

In view of the above, I am of the opinion that the petitioner has the remedy of approaching the Armed Forces Tribunal, in the first instance. Therefore, the writ petition is dismissed, leaving it open to the petitioner to avail the said remedy.

Case Law discussed:
(1997)3 SCC 261; (1998)8 SCC 1; 1985 SC 130; 2013 Lawsuit (SC) 819; AIR 2002 SC 1295.

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The petitioner who is an ex-army personnel has filed this writ petition claiming retiral benefits.

2. Sri R.B. Singhal, senior advocate / Assistant Solicitor General of India, assisted by Sri S.K. Rai advocate has raised a preliminary objection regarding maintainability of the writ petition. It is contended that in view of the provisions of the Armed Forces Tribunal Act, 2007, hereinafter referred to as 'Act', the petitioner has efficacious remedy of approaching the Tribunal, as laid down by the Apex court in the case of L. Chandra Kumar vs. Union of India, (1997)3SCC261. He has also placed reliance on the judgement of learned single judge of this court dated 26.11.2013 passed in writ petition no. 64424 of 2013. Sri Jitendra Kumar Pandey advocate who has appeared on behalf of respondent no. 4, has supported the contention of Shri Singhal.

3. Counsel for the petitioner, placing reliance on the judgement of the Apex court in the case of Whirlpool Corporation vs. Registrar of Trade Marks(1998)8SCC1, submitted that where there is violation of fundamental rights, the availability of alternative remedy is not an absolute bar for exercise of jurisdiction by this court. He has also placed reliance on the judgement of the Apex court reported in AIR 1985 SC 130 D.S. Nakara and other vs. Union of India wherein, it was held that the pension is not a bounty but a right conferred on a retired employee for the valuable services rendered by him in the hey-day of his service time. He has also placed reliance on another judgement reported in 2013Lawsuit (SC)819 State of Jharkhand vs. Jitendra Kumar Srivastava.

4. Armed Forces Tribunal, Act 2007 has been enacted in exercise of power under Art.323-A of the Constitution. Section 3(o) of the Armed Forces Tribunal Act, 2007 (hereinafter referred as the Act), defines 'the service matters' and clause (1) thereof, includes remuneration (including allowances), pension and other retirement benefits. Section 14 of the Act confers jurisdiction to the Armed Forces Tribunal in relation to all service matters. Therefore, the dispute relating to payment of retiral dues comes within the purview of service matters as defined under section 3(o) of the Act.

5. While interpreting the scheme of Administrative Tribunal Act,1985 the constitutional bench of the Apex Court in L. Chandra Kumar vs. Union of India, (supra) held that in matters coming under the jurisdiction of the Tribunal, it will not be open for the litigant, to directly approach the High Courts. It was observed that :-

"The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under

Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunal will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

(emphasis supplied)

6. Similar view was taken by the supreme court in the case of Kendriya Vidyalaya Sangathan and others vs. Dr. R.D. Vishwakarma and others (AIR 2002 SC 1295). It was observed as under :-

"At the same time, as laid down in Chandra Kumar, the High Court ought not to permit the aggrieved person to bypass the remedy of moving the Administrative Tribunal in the first instance."

7. I am of the opinion that in cases of Armed Forces Tribunal constituted under the Act, the same analogy will apply.

8. The question which now arises is whether writ should be entertained because the petitioner alleges violation of constitutional rights. Controversy in this regard is also no more res-integra, in view of the authortative pronouncement of the apex court in the same case of L. Chandra Kumar vs. Union of India (supra), wherein, it was held that the tribunal also has the power to go into issues regarding infraction of constitutional rights. It was held as under:-

....."It has been contended before us that the Tribunal should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted."

(emphasis supplied)

9. In view of the above, I am of the opinion that the petitioner has the remedy of approaching the Armed Forces Tribunal, in the first instance. Therefore, the writ petition is dismissed, leaving it open to the petitioner to avail the said remedy.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.03.2014

BEFORE

THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Revision No. 2152 of 2007

Devendra Kumar Jain..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
Sri Satya Narayan Gupta

Counsel for the Respondents:
A.G.A., Sri A.N. Mishra, Sri Neeraj Mishra

Cr.P.C. Section-401-Criminal Revision-against acquittal-offence under section 395/397/307/149/198 IPC-if two views possible-which goes in favor of accused should be preferred-no material available on record by which approach of lower court can be either cursory or resulting miscarriage of justice-order impugned does not suffer from any infirmity-warrant interference by this court-revision dismissed on merit as well as on ground of maintainability.

Held: Para-16
The impugned order of the trial court does not seem to suffer from any such infirmity and impropriety or illegality or with any of those judicially recognized vices referred to above, which may persuade the Court to interfere and set aside the judgment.

Case Law discussed:
AIR 1934 PC 227; AIR 2010 (SCW) 6704; 2012 (9) JT 252

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. The list has been revised, but none appears to press the revision on behalf of revisionist.

2. This is an old revision of 2007. The dockets of pending cases are already huge and the matter cannot be allowed to linger on for indefinite period of time.

3. Shri A. N. Mishra, counsel for the opposite parties is present in the Court. In the aforesaid circumstances, this Court, therefore, proposed to proceed with the hearing of the case with the assistance of learned A.G.A. and also on the basis of the record of the case.

4. This is a criminal revision filed against judgment and order dated 28.6.2007, passed by Additional Sessions Judge/Special Judge(D.A.A. Act), Lalitpur, in Special Session Trial No.20 of 2005, State Vs. Mulu & others, whereby the three accused respondents have been acquitted under various charges of Sections 395/397, 307/149, 148 I.P.C., for which they were arraigned.

5. Shorn of unnecessary details the prosecution story may be described in brief to the effect that on 21.5.2010, while the complainant, Devendra Kumar Jain was going on his Jeep along with Kailash, Karan and Surendra Kumar at about 8:00 p.m., when he reached at the place of occurrence, two motorcycles overtook the Jeep and intercepted them. Thereafter, accused Mulu, Prabhu, Feran along with two unknown assailants alighted from the motorcycles and after hurling threats, made criminal assault on the complainant's side. Accused Feran fired from the country made pistol and then the complainant was dragged out from the Jeep and was badly beaten. Accused Prabhu also fired from the country made pistol which he was wielding at the time of incident. It is admitted that the fires made at complainant missed the target and he had a skin escape and remained uninjured, as a result to the fires made at him. It was also alleged that Rs.2,000/- were also snatched away from the complainant which he was carrying in his

pocket. After committing the aforesaid incident, the accused took to their heels and made their escape good. According to the complainant's version he tried to get the F.I.R. registered against the accused, but his effort did not succeed and he had ultimately to bring the present complaint in question in the court against the accused. The accused were summoned under the aforesaid charges and after the observance of the regular procedure of the trial the prosecution evidence was adduced. There were chiefly four witnesses produced by the complainant. P.W.1 was Devendra Kumar Jain, the complainant himself, P.W.2 was Kailash, P.W.3 was Karan, while P.W.4 was doctor, who is said to have examined the complainant. The version of the incident which has been referred above was substantially the same which was given by witnesses, but P.W.2, Kailash turned hostile and contradicted the version on very factual aspect of the case. P.W.4, who medically examined the complainant, found some minor and simple injuries on his person.

6. During the course of argument raised on behalf of the respondent-accused, a preliminary objection was raised at the very outset of the hearing about the maintainability of the revision. According to the counsel, as the prosecution emanated on the basis of a complaint, and, therefore, the legally provided remedy for the complainant was to file an appeal under Section 378(4) of the Code of Criminal Procedure, and that too after obtaining special leave to appeal from the order of acquittal. The counsel has also drawn the attention of the Court to Section 378(5) of Cr.P.C., which provides for a limitation of sixty days, within which the special leave to appeal has to be sought. According to the counsel, if an appeal is provided to be filed by a particular party against the particular order any other remedy in the form of filing revision shall be simply not maintainable in the law. The contention is that on this very ground the revision should be dismissed summarily and simply may not be entertained.

7. I find force to the submission made on behalf of the respondents. It may be relevant and apt to extract the relevant provision of the Code which are as follows :-

"378. Appeal in case of acquittal.-(1) .....

(2) .....

(3) .....

(4) If such an order of acquittal is passed in any case instituted upon complainant and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

8. Even, if we cast a fleeting glance on the aforesaid provision it leaves no doubt to see that the impermissible course has been adopted by the complainant, and

this Court cannot either ignore or override the statutory law prevalent. In fact, the provision under Section 401(4) of Cr.P.C. is also relevant in this regard to be kept in mind and the same reads as follows :-

"401. High Court's powers of revision.-(1) .....

(2) .....

(3) .....

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

9. This is true that if the High Court is satisfied that the revision has been brought under the erroneous belief that no appeal lies thereto and the call of substantive justice requires to still look into the same and entertain it, this Court, in its wisdom, may treat the application of revision as a petition of appeal and deal with the same as such, accordingly. There is absolutely nothing on record to indicate any such erroneous belief. No material, whatsoever, either, in the form of affidavit or by any other way has been brought on record to indicate any such circumstance, which may persuade the Court to take a liberal view of the matter. But, still, as this Court has proceeded to decide this revision in the absence of revisionist's counsel, this Court proposes to apply all the standards and settled principles which are conventionally applied to the appreciation of evidence while the Court sits to exercise its jurisdiction in appeal. Such a course is being adopted to avert the faintest chance of any miscarriage of justice.

10. First of all, it may be apt to recall the broader principles. In the hearing of appeal against the order of acquittal, the law is trite and too well settled. There is a marked difference between the approach to be adopted while sitting to hear the appeal against conviction and the approach which is adopted while the Court sits to hear an appeal against acquittal. There is a general golden rule of criminal jurisprudence which runs as a thread underlining the criminal law that accused is to be presumed innocent unless he is proved guilty. This presumption of innocence does not forsake the accused after he obtains the verdict of acquittal in his favour. In fact, the presumption gets fortified. It may be apt to quote the famous words of the Privy Council used in the case of Sheo Swaroop Vs. King Emperor, AIR 1934 PC 227, which run as under :-

"The High Court should and will aways give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainty not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

11. This view of law adopted by the Privy Council has formed the chief plank on the basis of which most of law in the following decades was laid down. The Supreme Court decisions on this point regarding the scope of interference in the verdicts of acquittals, have further supplemented the aforesaid view of the Privy Council.

12. In the case of Brahm Swaroop Vs. State, AIR 2010 (SCW) 6704 also, the same view was reiterated. The substance

of what was held in the case may be summarized as follows :-

"It is well established in law that the appellate court should not ordinarily set aside a judgement of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law. Similarly, the incorrect placing of the burden of proof may also be a subject matter of scrutiny by the appellate court. The court of appeal may not interfere where two views are possible for the reason that in such a case it can be held that prosecution failed to prove the case beyond reasonable doubt and accused is entitled for benefit of doubt."

13. In yet another case of Pudhu Raja & Anr. Vs. State, 2012 (9) JT 252, the Apex Court observed as further :-

"7. The law on the issue of interference with an order of acquittal is to the effect that only in exceptional cases where there are compelling circumstances and the judgement in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

14. Thus, the presumption of innocence is by no means weakened by the verdict of acquittal given in favour of the accused. Unless in higher Court's scrutiny it is found that the judgment of acquittal suffers either from a perversity of approach or the findings arrived at by the trial court are against the weight of evidence on record. It has also to be seen whether there has been left out any important admissible piece of evidence from consideration or whether some inadmissible piece of evidence has wrongly been considered by the court below. Failure to consider the some important admissible piece of evidence as well as the error of having considered an inadmissible piece of evidence, both may adversely affect the correctness of the judgment arrived at by the trial court. There may be some other circumstances also where the higher Court may find after weighting the evidence on record that an approach of the Court has been either cursory or was so lackadaisical that it has resulted in the miscarriage of justice. In all the aforesaid circumstances this Court does not desist to interfere or to upset the judgment, but otherwise, this Court is always slow to replace the judgment of the lower court, even in the event where it feels inclined to take a different view of the matter. Sometimes it may so happen that the higher Court may feel that another view was also possible and the accused instead of having been acquitted, could also have been convicted. But, this finding does not rule out the view that has been taken by the trial court in the case that an accused could also have been acquitted. In other words, it may be said that if two views, one in favour of accused and another against him, are possible, then too, the one which favours the accused ought to be adopted, because in the presence of this

possibility that the accused could also have been judiciously evaluated as innocent, it cannot be said that the guilt of the accused has been proved beyond all possible reasonable doubts. This is the hub and substance of the law that has evolved during the course of several decades and it does not admit of any controversy.

15. When this Court appreciated and evaluated the evidence as has been discussed in the impugned order and is also present before this Court in the form of original record, it can be said that the impugned order does not suffer from any of such infirmities which may constitute a valid ground to interfere in the matter. The Court has validly taken into account the improbability of the allegation that even on the repeated fires having been made on the complainant, he was still escaping in a magical manner repeatedly and remained uninjured, by the shots fired at him all throughout. It has also been taken into account as to how the complainant's side has completely failed to give any details or any kind of discription about the motorcycles used in the alleged crime. The fact that the witnesses produced by the complainant have a history of loyalty to him and that they have been used as witnesses even in other cases by the complainant, has also been considered by the trial court. The discrepancy in the version inter se between the testimonies produced before the court has also been adversely viewed by the Court. In fact the entire prosecution version given out by the complainant has been found to be palpably improbable and also reflecting the unnatural conduct of the witnesses. The enormity of the assault made on the complainant has also been found to be not in consonance with the scars and nominal injuries found on the person of the complainant.

16. The impugned order of the trial court does not seem to suffer from any such infirmity and impropriety or illegality or with any of those judicially recognized vices referred to above, which may persuade the Court to interfere and set aside the judgment.

17. In the aforesaid view of the matter, the revision stands, dismissed, both on the ground of its maintainability as well as on its merits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Service Single No. 2233 of 1991

A.K. Misra..... Petitioner
Versus
State of U.P..... Respondent

Counsel for the Petitioner:
Sri S.D. Singh, Sri Alam Singh, Sri S.K. Shukla

Counsel for the Respondents:
C.S.C.

U.P.Temporary Government Servant(termination of service)Rules 1975-readwith U.P. Police Regulation-Regulation-541-Termination of constable-on involvement in criminal case-under section 392, 323, 506, 342 IPC-S.P. passed termination order considering conducts of petitioner under Rule 1975-argument that termination can be only under Regulation 541 and the provisions of Rule 75 not available-held misconceived-in absence of appointment letter-can not be treated probationer-before passing impugned order authority taken care of his conduct-acquittal base upon compromise is immaterial-warrants no interference.

Held: Para-8

I have perused the aforementioned judgments and facts of each case and the judgments are distinguishable from the facts of the present case. In Ram Sagar Pandey's case (Supra) as well as in Murli Shanker case (Supra) the finding is that the constables were permanent constables in the police force and they had completed their probation and the Court was of the opinion that their services could not have been terminated under 1975 Rules by giving one month's notice. The Division Bench in Ram Lakhan Tiwari's case (Supra) has referred to a Full Bench judgment of the Supreme Court in Nanak Chandra vs. State of U.P. in writ petition no. 2808 of 1970 decided on 21.5.1971, which considered the question, as to whether Police Act and the Police Regulations contemplates any temporary employment of police officers, and came to the conclusion that temporary post can be created in the police force and the Full Bench was of the view that the Section 2 of Police Act is wide enough to the wordings that such post can be created and the decision of the Full Bench was affirmed by the Supreme Court and was of the view that petitioners, who were recruited on temporary basis and through out their services they remained as temporary employee and their services were liable to be terminated on one month's notice.

Case Law discussed:

(2011)3 UPLBEC 2588; (2000) 5 SCC 152.

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

1. Heard learned counsel for the petitioner as well as learned Standing Counsel.

2. The case of the petitioner is that the petitioner was appointed as temporary constable and a criminal case was lodged against the petitioner registered as Crime Case No. 288 of 1991 under Sections 392, 323, 506 and 342 I.P.C. lodged at Police Station G.R.P., Lucknow. It appears that thereafter the impugned order dated 21st March, 1991 was passed by the Superintendent of Police Railway terminating the services of the petitioner treating him to be temporary Government employee under U.P. Temporary Government Servants (Termination of Services) Rules, 1975.

3. Aggrieved by the said impugned order, the petitioner has preferred this writ petition. The submission of the learned counsel for the petitioner is that the order impugned is punitive in nature as it casts a stigma upon the petitioner and further the U.P. Temporary Government Servants (Termination of Service) Rules, 1975 are not applicable on the petitioner. The sole basis for termination of the petitioner is the lodging of the first information report and the petitioner was subsequently acquitted in the trial and the final argument of the learned counsel for the petitioner is that the procedure as prescribed under Regulation 541 of the Police Regulations has not been complied with.

4. In rebuttal, the learned Standing Counsel states that the petitioner has not filed his appointment letter nor he has stated in the pleadings, as to when, the petitioner was appointed and as to whether his services was under probation, as contemplated under Regulation 541.

5. The Police Force being a disciplined force and in case, of criminal offences being lodged against a temporary constable is sufficient to terminate his services. The order does not cast any stigma, as it does not state that the order has been passed on any misconduct rather on unsuitability of the petitioner.

6. The pleadings are silent, as to the nature of the appointment of the petitioner

and it is nowhere stated that the petitioner was appointed against a clear vacancy as contemplated under Regulation 541. Sub-clause (1) of Regulation 541 states that the person will be on probation from the date he begins to officiate in clear vacancy. The entire petition is silent, as to whether the petitioner after completing his training was appointed against a clear vacancy rather the submission of the learned counsel for the petitioner is that the petitioner was recruited as a temporary constable and no appointment letter was issued to the petitioner. There is no denial of the fact that immediately after the petitioner got recruited he got involved in a criminal offence of serious nature. The impugned order states that the petitioner was temporary constable bearing no. 2526 and his services are no longer required and hence is being terminated in lieu of a month's notice. The order impugned has been passed under the 1975 Rules.

7. The learned counsel for the petitioner has relied upon judgments passed in Writ Petition No. 1055 of 1993 (Ram Sagar Pandey vs. State of U.P. and others), Writ Petition No. 551 (SS) of 1993 (Murli Shanker vs. State of U.P. and another), Division Bench judgement in Ram Lakhan Tiwari vs. Senior Superintendent of Police, Kanpur reported in (2011) 3 UPLBEC 2335, State of U.P. vs. Sunil Kumar Sharma reported in (2011) 3 UPLBEC 2588 and the Supreme Court judgment reported in (2000) 5 SCC 152 Chandra Prakash Shahi vs. State of U.P. and others.

8. I have perused the aforementioned judgments and facts of each case and the judgments are distinguishable from the facts of the present case. In Ram Sagar Pandey's case (Supra) as well as in Murli Shanker case (Supra) the finding is that the constables were permanent constables in the police force and they had completed their probation and the Court was of the opinion that their services could not have been terminated under 1975 Rules by giving one month's notice. The Division Bench in Ram Lakhan Tiwari's case (Supra) has referred to a Full Bench judgment of the Supreme Court in Nanak Chandra vs. State of U.P. in writ petition no. 2808 of 1970 decided on 21.5.1971, which considered the question, as to whether Police Act and the Police Regulations contemplates any temporary employment of police officers, and came to the conclusion that temporary post can be created in the police force and the Full Bench was of the view that the Section 2 of Police Act is wide enough to the wordings that such post can be created and the decision of the Full Bench was affirmed by the Supreme Court and was of the view that petitioners, who were recruited on temporary basis and through out their services they remained as temporary employee and their services were liable to be terminated on one month's notice. Paragraphs 6 & 11 of the Ram Lakhan Tiwari's case (Supra) are reproduced:-

"The State of U.P. filed Civil Appeal No. 8279 of 1996. By judgment dated 13.4.2007, the Supreme Court set aside the judgment of the learned Single Judge of the Court, with findings that Full Bench of the High Court in Nanak Chand Vs. State of U.P., in writ petition No. 2808 of 1970 decided on 21.5.1971, considered the question as to whether the Police Act and the Police Regulations contemplates any temporary employment of police officers, and came to the conclusion that temporary post can be created in the police force. The Full Bench was of the view that Section 2 of the Police Act is wide enough to permit such posts to be created. The Supreme Court held as follows:-

"The Full Bench was also of the view that it is a general rule in the State for all new recruits to be employed first in a temporary capacity. Accordingly, the full Bench held in Nanak Chand (Supra) that all the petitioners were recruited on temporary basis and throughout their service they remained temporary employees whose services were liable to be terminated on one month's notice. Undisguisedly, the decision of the full Bench was not brought to the notice of the learned Single Judge. In view thereof, counsel on both sides submit that the order of the Single Judge impugned in this appeal may be set aside and the matter may be remitted to the Single Judge of the High Court of Allahabad to consider afresh after considering the judgment in Nanak Chand (supra) rendered by the full Bench of the High Court"

11. The Supreme Court referred to the Full bench decision of this Court in Nanak Chand (Supra) that temporary employment is also given in the police force. There is no general rule that all the police constables are permanent employees. The petitioner was recruited in the year 1973. There was nothing to show that he was placed under probation. The petitioner had to be treated as a temporary employee on the date when his services were terminated by the Senior Superintendent of Police, Kanpur."

9. In Chandra Prakash Shahi's case (Supra), the Supreme Court after considering earlier judgments on the subject made a distinction between termination simlicitor and a punitive termination and the Supreme Court was of the view that termination motivated by employees general unsuitability is valid. Paras 28 and 29 are relevant:-

"28.) The important principles which are deducible on the concept of "motive" and "foundation", concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an enquiry is held and it is on the basis of that enquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an enquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that enquiry, the order would be punitive in nature as the enquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the order would be founded on misconduct and it will not be a mere matter of "motive".

29.)"Motive" is the moving power which impels action for a definite result, or to put it differently, "motive" is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action. If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary enquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary enquiry."

10. The facts of Chandra Prakash Shahi's case (supra) is distinguishable from the facts of the case in hand. The constable had completed training and also two years of probationary period, the Apex Court opined that the services of the probationer if proposed to be terminated, the procedure prescribed by Regulation for the purpose needs to be complied. Paras 31, 32 and 33 are relevant:-

"31.) There is another aspect of the matter.

327.) Para 541 of the U.P. Police Regulations provides as under :

"541. (1) Recruits will be on probation for a period of two years, except that --

(a) those recruited directly in the Criminal Investigation Department or District Intelligence Staff will be on probation for three years, and

(b) those transferred to the Mounted Police will be governed by the directions contained in paragraph 84 of the Police Regulations.

If during the period of probation their conduct and work have been satisfactory and they are approved by the Deputy Inspector General of Police at the end of the period of probation for service in the force the Superintendent of Police will confirm them in their appointment.

(2) In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police officer he may dispense with his services. Before, however, this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge.

(3) Every order passed by a Superintendent under sub-paragraph (2) above shall, subject to the control of the Deputy Inspector General, be final."

33.) Where, therefore, the services of a probationer are proposed to be terminated and a particular procedure is prescribed by the Regulations for that purpose, then the termination has to be brought about in that manner. The probationer-constable has to be informed of the grounds on which his services are proposed to be terminated and he is required to explain his position. The reply is to be considered by the Superintendent of Police so that if the reply is found to be convincing, he may not be deprived of his services."

11. The learned counsel for the petitioner has failed to bring on record any material to show that the services of the petitioner was terminated on the basis of misconduct. The only submission is that a first information report was lodged and, therefore, the petitioner's service has been dispensed with. The impugned order is innocuous order and does not say that the foundation for passing the order is lodging of F.I.R. rather the order has been passed on general unsuitability, it is not punitive or stigmatic in nature. This Court vide order dated 7.9.2000 had directed the competent authority to decide the representation of the petitioner, as the petitioner was acquitted in criminal case. Vide order dated 12.12.2000 the Superintendent of Police rejected the representation stating therein that the petitioner was charged for serious offence and has been acquitted under Section 392 I.P.C. on the basis of compromise and not on merits. The impugned order dated 21.3.1991 was passed after assessing the suitability of

the petitioner and it was found that the petitioner was not suitable for the post of constable. The order dated 7.9.2000 has also been challenged by way of amendment.

12. The petitioner's appointment was purely temporary and he was not on probation, Regulation 541 is not applicable and his services could be terminated under the Rules of 1975.

13. For the reasons stated herein above, the writ petition is devoid of merits and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2014

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

Crl. Writ-Public Interest Litigation No. 2357 of 1997

Bachchey Lal..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
From Jail

Counsel for the Respondents:
A.G.A., Sri Patanjali Mishra

Constitution of India, Art.-226-Public Interest Litigation-direction for premature release of convicts-in jail for more than 14 years-guide lines issued-to sort out problems providing private health care for women prisoners-the District Judge and jail superintendent, Director General Medical and Health to provide specialist government women doctors for female inmates and their children-further directions for smooth and proper implementation of guide lines issued.

Held: Para-18 & 19

18. The Registrar General, High Court and the Member Secretary, U.P. Legal Services Authority are directed to communicate and ensure compliance of the aforesaid directions and to submit a report on the next listing. We also direct the Member Secretary and Secretary, UPSLSA, not merely to forward the responses received by the Authority to this Court, but to pro-actively issue directions to the DLSAs and to take other necessary steps as these matters relate to prisoners confined in jails and their need for legal aid.

19. Copies of this order be provided to Member Secretary, UPSLSA, all District Judges for communicating to members of DLSAs, CJMs and other concerned judicial officers, District legal aid counsel, ADG (Prisons), U.P. for communication to all Jail superintendents, Law Secretary and LR, Home Secretary, U.P., Director General (Medical and Health), U.P., learned Government Advocate, learned AGA Sri Vimlendu Tripathi, Special counsel for High Court, Sri Sudhir Mehrotra, learned Amicus Curiae, Sri Patanjali Mishra, and also to place the same before the R.G. High Court for compliance and submission of feedback on next listing. We hope that the said authorities or at least the high level representatives on their behalf who are capable of taking decisions in 13 the matters and answering the queries that may be raised by the Court, shall attend the hearing on the next listing.

Case Law discussed:
(1978) 4 SCC 47; (1980) 1 SCC, 81.

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

1. We have heard Sri Sudhir Mehrotra, learned special counsel for the High Court, learned Government Advocate Sri Akhilesh Singh, Sri Vimlendu Tripathi, learned A.G.A and Sri Patanjali Mishra, learned Amicus Curiae appointed by this Court.

2. Learned A.G.A. has filed affidavits on behalf of (a) Home Department, (b) I.G.

(Prison), Principal Secretary Medical and Health and (c) ADG/ IG (Prisons). He has also filed 5 charts mentioning tabular details as sought for by this Court. Reports by the District Judges, forwarded by the registry and UP SLSA (U.P. State Legal Services Authority, Lucknow) have also been filed.

Directions for convicts in jail for more than 14 years whose cases were to be considered for premature release.

3. In our order dated 27.11.2013 we have found the figure of 1223 such convicts to be unacceptably high and had directed that there should be a significant reduction in the number of such convicts by the next listing. Regretfully, the chart No. 1 relating to such convicts prisoners, who have undergone 14 years and more actual sentence without remission shows that the figure is still 1157. There seems to be no significant reduction from the earlier figure. The number of convicts who have been actually freed after the previous orders is not clear from the said chart. It is also not clear from the chart as to whether the nominal roles or the Form A disposals are being held up at the D.M.'s, or at the Jail, or at headquarters or at the Government (Advisory Board's) levels, but the major hurdle appears to be at the District Magistrates level. We would like better information on the next listing about the level at which delays are taking place and issuance of directions to the District Magistrates or other functionaries, where the disposals may have got struck for expediting the process. Explanations should also be sought from these authorities for the reasons for the delays, and why the G.O. dated 6.9.04 fixing the time schedule for consideration of the matters at different stages is not being strictly followed.

4. We are shocked to note that in some cases, even though the prisoners have been in jail for periods of 14 years and much more mentioned at serial Nos. 2, 18, 19, 23, 92, 93, 96, 97, 100, 110, 152, 156, 167, 270, 276, 277, 288, 297, 302, 304, 307, 310, 314, 316, 319, 320, 321, 323, 326, 330, 331, 342, 345, 396, 666, 674, 676, 677, 681, 695, 696, 697, 706, 929, 986, 1006, 1007, 1008, 1009, 1019, 1020, 1022, 1057, 1149, 1150 of Chart I, where the considerations of Forms A or nominal roles have been held up at the Court level, because the judgments are not available. One of the glaring example is at S.N. 396 relating to Pappu @ Chandrapal, who is detained in Central Jail Agra since last 29 years and his case has not even been considered at the jail level because of non availability of copy of judgment. We would like an explanation why even the judgements in the aforesaid serial numbers and other similar cases are not available, stalling consideration of applications in Forms A or nominal roles, even though the prisoners have been in jail for 14 or more years. We direct that immediate steps must be taken for making the judgements available at the jail level.

5. Likewise, another disturbing reason for non-consideration of applications in Form A for release on Probation appears that guardian is not available. A prisoner who has crossed 75 or more years of age may have lost his wife or most of other relatives who are accepted as guardians. Probation officers often refuse to be guardians. The result is that the applications in Form A of such prisoners are not considered beyond the jail level. Immediate directions must be issued that absence of private guardians will be no reason for non-consideration of Form A, and that probation officers or other suitable funcionary shall be given the charge of his guardian on the release of the convict onprobation or license.

6. A cursory perusal of Chart 1 shows that prisoner Ambika Prasad at serial no. 474 aged 71 years is detained in Central Jail, Varanasi for 47 years and only a letter has been sent by the prisoner to the D.M. on 24.04.2011. Likewise prisoners at Serial Nos. 28, 396, 397, 398, 399, 400, 461, 602, 614, 616, 618, 619, 848 and 849 have done 28 or more years, but their Form A applications, nominal roles are pending at different stages, including before the jail authorities and the D.M. On the next date of listing, we would like to have complete records of all the prisoners, who have undergone actual periods of more than 28 years in prison from all the jails and how their remissions have been dealt with, and what are the special reasons for not releasing these 14 or 15 prisoners who have undergone such inordinately long periods in prisons, and whether there is any proposal to expedite their applications for facilitating their release. It should also be indicated whether fresh applications have been moved each year after the rejections of the Forms A or nominal roles as per the relevant G.O.

7. We also find from a perusal of Chart I that there are about 153 convicts above the age of 70 years who have served out more than 14 years actual period in prison and whose cases have either not been considered for want of judgments or proper guardians, or are pending at the jail, D.M., headquarters or government levels, or have been rejected by the government by one line orders, that they are unfit for release. Prima facie, under normal circumstances there appears no good reason for further detaining such old prisoners (some of whom have crossed 75, 80 or even 90 years, and some are incapable of walking without support or are suffering from other ailments), whose continued detention is a burden on the jail and the State after they have served out 14 or more years, whose cases cease to be covered by the 14 year minimum period in jail restriction under s. 433 A Cr.P.C and who would normally be expected to have lost any potentiality to further commit a crime. We direct that the applications in Form A, nominal roles or mercy petitions of these approximately 153 prisoners who are over 70 years old and have undgergone more than 14 years be considered and decided within 3 months, and in the cases of rejection, written orders be passed mentioning reasons why further detention of this old prisoner is necessary and the concrete information on which this inference is based, for perusal by this Court. Where judgements are not available, they must be obtained within two weeks. The Registrar General and the District Judges of the districts must ensure that the copies of the judgments when requested for by the jail or other authorities are provided within ten days of the demand. Background information and other required formalities be completed and joint meetings of the jail superintendents, D.M.s, and S.S.Ps/ S.P.s be held preferably in the jail or other suitable premises, where the convict is available within 6 weeks for immediate consideration of the applications in Form A or nominal roles, at the initial stage for forwarding to the next level. No case should remain pending for consideration at the jail or other level for absence of guardian, and in case the old prisoner is unable to provide a guardian, the State must issue an order directing probation officers or other suitable functionaries to act as guardians. The immediate progress in compliance of this direction be informed to this Court on the next listing.

Preparation of circulars for prisoners having served more than 14 years.

8. In the affidavit of compliance filed by the Home Department, Government of U.P., it has been mentioned that an order has been passed by another Division Bench in Criminal Appeal No. 209 of 1993 Mewa Lal Vs. State of U.P., wherein the said Court has held that a prisoner, whose appeal is pending, even if he has completed an actual period of more than 14 years cannot be released under the U.P. Prisoner's Release on Probation Act, 1938 or on consideration of his nominal role. This is contrary to view taken by this Court in Criminal Misc. Writ Petition No. 2357 of 1997 by the order dated 27.11.2013 and also the Government Order issued by the Government dated 14.7.2004. However, we are informed that a Special Leave Petition challenging the order of the D.B. in Criminal Appeal No. 209 of 1993, has been filed before the Apex Court. Be that as it may, we fail to understand why the other part of our directions relating to preparation of a draft circular for prisoners having served out more than 14 years on the line of Maharashtra Government circular dated 11.4.2008, which was shown to us by the State in the interactive previous hearing in chambers, which makes a detailed categorisation of different categories of crimes as mentioned in pages 4, 5, 6 and 7 of our previous order dated 27.11.2013, has not been issued. We hope that by the next listing at least a draft circular will be produced before this Court for its perusal, so that a proper Government Order can be issued at the appropriate time, and the problem of non-disposal of applications in Form A or nominal roles which has resulted in a very large number of convicts (including very old or ailing convicts) remaining in jail even after periods where their further detention appears futile.

Make the jailbandi.com website or other website operational.

9. We regret to note that in spite of our previous order jailbandi.com website which was to detail the stages and progress of consideration of their applications under Form-A and nominal roles has not been made operative, which could have enabled the UP SLSA or other authorities or persons to verify in a transparent manner that the matters are being dealt with in a proper manner and the time schedule is being adhered to. Learned A.G.A. informs that a new website upprison.nic.in has been set up, but he was not in a position to say whether the data has been fed in the said website or whether it is operational. We would like proper details on these matters on the next listing. The UPSLSA which is required to keep a watch to ensure whether the disposals of Forms A, and nominal roles are taking place in a scheduled time period should oversee whether the web site is functioning and monitor disposal of matters and report compliance on each date of listing.

Sentence remission benefits for prisoners serving fixed term sentences not covered by section 433 A Cr. P. C. restriction

10. In this connection, Chart 2 has been furnished by the Jail Authorities, which mentions that there are 1965 such prisoners, who have undergone 1/3rd of their sentence and would be eligible for

their Form A being considered. We regret to note that neither prisoners have been identified, nor does it appear that any action has been taken for releasing the prisoners, which would help reduce the prison population, which is creating major law and order and human rights problems. We have not been informed about the progress of utilizing the sentence remission benefits for limited term prisoners, whose cases were not covered by the restriction under section 433 A Cr.P. C. from the District Judges, Subordinate Judicial Officers, Jail visitors lawyers or from the jail authorities and U.P. SLSA. We would like a better details in this regard on the next listing.

Report in Connected Criminal Appeal No. 2773 of 2005 Gobardhan Singh and another Vs. State of U.P., regarding old ailing or long confined prisoners.

11. Chart 5 has been furnished, which mentions that between the ages of 70 to 75 years there are 931 such prisoners. Above the age of 75 years there are 620 prisoners. Most of these prisoners have been in jail for more than 10 years, and in most cases their appeals are pending in the High Court. There are 33 under trial or convicted women prisoners, who are in jail for more than 10 years. In cases other than 304 B I.P.C. there are 599 under trial or convicted male prisoners, who are in jail for more than 12 years. Even in cases other than 304 B I.P.C., there are 24 under trial or convicted women prisoners, who are in jail for more than 7 years. These figures are unacceptably high. We are of the view that no adequate or concrete steps have been taken for reducing the numbers of such prisoners. It shows the complete inefficacy of the legal aid system that the vast majority of these prisoners who are old or have spent long periods in jail are not seeking legal aid. In most of the cases the response recorded to the query about whether the prisoner desired legal aid was N.A. or No. We fail to understand how an old and ailing prisoner who may even have engaged a lawyer, but whose lawyer is either not arguing his first bail application or the prisoner is not able to afford fees for moving a second bail application being moved would not be interested in getting bail. We are indeed disturbed to note that even though, such a large number of prisoners are in jail for such long periods of time, as per information collected from the jail authorities and papers forwarded to this Court from the district courts, as pointed out by the High Court counsel Sri Sudhir Mehrotra, only about 42 prisoners have asked for legal aid. We have reasons to doubt the correctness of this figure and it appears that no sincere effort has been made by the DSLSA's or other judicial officers or jail visitor lawyers to cross-check the information furnished by the jail authorities as directed by the previous order, or to actually elicit information by interviewing prisoners as to whether they would like legal aid at the district Court or High Court levels. This is another illustration for showing that the legal aid system is virtually nonfunctional and inspires no confidence amongst the prisoners or for general public. Forty two cases relate to jail appeals pending in the High Court. As a beginning these limited number of prisoners identified by the High Court counsel may be provided with legal aid. There is further need to contact the old, ailing and long confined prisoners described above and to make them an offer of effective legal aid at the district or High Court levels. The DLSAs after convincing such prisoners that effective legal aid would be provided to them, must forward requests to the High Court. The High Court also needs to streamline procedures for providing legal aid for such prisoners.

Directions to CJMs to take steps for release of prisoners, who are in jail for period over 2 months after bail order.

12. We are disturbed to note that in October, 2013, as per the tabular chart supplied in October, 2013 pursuant to the order dated 25.9.2013, there were 155 such prisoners, who are in jail after being granted bail by the lower Court and High Court. Now the numbers as per the chart furnished on 26.3.2014 reveals that there are 168 such prisoners. Therefore, their numbers have even increased by 13 from 155 as per the earlier figures. As per the said chart, it is only in Gorakhpur range, there has been decline of 33 to 22 such prisoners. In other ranges of Allahabad, Meerut, Lucknow, Agra, Bareilly, there has been no change, or even an increase. This is in blatant violation of our order dated 25.9.2013 in Criminal Appeal No. 2773 of 2005 Gobardhan Singh and others vs. State of U.P. where at page 4, we have referred to Moti Ram and others Vs. State of M.P., (1978) 4 SCC 47 and Hussainara Khatoon (1) vs. State of Bihar, (1980) 1 SCC, 81. In these cases the Apex Court has reprimanded the subordinate Courts for considering the obligation to pay a sum of money on forfeiture of the bonds or sureties for nonappearance to be the only means for enforcing the attendance of the accused to face trial or to receive sentence, and for fixing bail amounts only in terms of the nature of the crime, which approach favours the wealthy and discriminates against the impecunious litigant, and eschews other criteria, such as roots of an accused in the community, his financial standing, or other features, such as the incapacity of an accused to abscond on account of his young or old age, or being a woman, or physically infirm or ailing. Similarly, in our previous order in Criminal Public Interest Litigation No. 2357 of 1997, Bachchey Lal Vs.State of U.P., dated 27.11.13 we had called for an explanation from the District Judges, and other jail visiting judicial officers as to why these prisoners (which include prisoners who are in jail for 9, 10 or 11 years after bail orders as pointed out in pages 14 and 15 of our order dated 27.11.13) continue to languish in jail for want of adequate sureties. We had suggested that such prisoners be released by the appropriate lower Court Judges by accepting any other alternative security, or on personal bonds, with or without conditions, such as periodical reporting before police stations or courts concerned, or alternatively prisoners can be released from jail on personal bonds and given time to arrange for sureties, after fulfilling which requirement the periodical reporting before the Court or the police station could be done away with. The bonds could even be reduced in appropriate cases, and even the requirement for providing sureties may be given the go-by in onerous cases, where the prisoner lacks means to obtain adequate sureties for his release, forcing him to illegally and unconstitutionally remain in jail for long periods of time. We would like an explanation from the District Judges concerned for the inaction especially regarding the prisoners, which are mentioned in Proforma 6 of Chart 5 furnished to us on 26.3.2014. Proforma 6 of the said chart may be forwarded to the District Judges by the Registry and U.P. State Legal Services Authority immediately. It is ridiculous to note that one case, in which the accused is in jail, is pending since long at the final stage of hearing arguments, only due to non-availability of sureties under section 437-A.

Information sought about prisoners confined in jail for more than 5 years desiring legal aid.

13. We think that no genuine effort has been made by the jail or judicial authorities in regard to this direction in our order dated 27.11.2013. We direct the jail and the DLSAs to sincerely comply with this direction and to send proper feed back on the next listing.

Prisoners suffering from mental ailments

14. Chart II has been furnished which points out that there are a total of 247 prisoners in jails in the 6 ranges of Agra, Allahabad, Bareilly, Lucknow, Meerut and Gorakhpur. However we find that only a limited number of these prisoners are being kept in the Mental hospitals (mainly at Varanasi, and a few in Agra), and the rest are confined in the normal jails. There appears to be no proper protocol for treating or caring for these prisoners in the jails. We would like better information on this point from the ADG (Prisons) and Director General (Medical and Health) U.P. on the next listing.

Problems of women prisoners.

15. It has been mentioned in the affidavit on behalf of the Director General (Medical and Health) that directions have been issued for providing private health care for women prisoners in Kanpur and Allahabad jails, and that an order has been issued on 21.2.14 by the Director General (Medical and Health) to the CMOs to assign duties of specialist government women doctors for female inmates and for their minor children in jails. On the next listing we would like a feedback from the Jail Superintendents and District Judges regarding the extent to which this direction is being carried out, and doctors have been provided who are visiting jails and addressing problems of women prisoners and their minor children.

16. Better details be also furnished regarding the other remaining points in the order dated 27.11.2013 in Criminal Public Interest Litigation No. 2357 of 1997 (Bacchey Lal v. State) and the order dated 25.9.2013 in Criminal Appeal No. 2773 of 2005 (Govardhan v. State) on the next listing.

17. As we are passing orders on several prison reform related matters in these connected petitions and appeal, and often different sets of responses are forwarded to the UPSLSA and to this Court from the lower Courts and administrative authorities, we direct the Registrar General to appoint an appropriate Judicial Officer to vet files and to present responses systematically and to be available during the periodical hearings in these connected matters.

18. The Registrar General, High Court and the Member Secretary, U.P. Legal Services Authority are directed to communicate and ensure compliance of the aforesaid directions and to submit a report on the next listing. We also direct the Member Secretary and Secretary, UPSLSA, not merely to forward the responses received by the Authority to this Court, but to pro-actively issue directions to the DLSAs and to take other necessary steps as these matters relate to prisoners confined in jails and their need for legal aid.

19. Copies of this order be provided to Member Secretary, UPSLSA, all District

Judges for communicating to members of DLSAs, CJMs and other concerned judicial officers, District legal aid counsel, ADG (Prisons), U.P. for communication to all Jail superintendents, Law Secretary and LR, Home Secretary, U.P., Director General (Medical and Health), U.P., learned Government Advocate, learned AGA Sri Vimlendu Tripathi, Special counsel for High Court, Sri Sudhir Mehrotra, learned Amicus Curiae, Sri Patanjali Mishra, and also to place the same before the R.G. High Court for compliance and submission of feedback on next listing. We hope that the said authorities or at least the high level representatives on their behalf who are capable of taking decisions in 13 the matters and answering the queries that may be raised by the Court, shall attend the hearing on the next listing.

20. List on 21.4.2014

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 2870 of 2014

Bhagwan Singh.... Defendant/Petitioner
Versus
Sri Nahar Singh & Ors.
..... Plaintiffs/Respondents

Counsel for the Petitioner:
Sri S.C. Pandey

Counsel for the Respondents:
Sri M.K. Srivastava

C.P.C.- Order VII Rule-11- Application to reject plaint-on ground of limitation-rejected by Trail Court-as after exchange of pleading-after framing issues-this question can be decided more appropriately-no interference called for-petition dismissed.

Held: Para-10 & 11

10. The non rejection of the plaint under Order 7 Rule 11 CPC would only entail participation and contest of the suit by the defendant who thereupon can always raise an issue of the suit being barred by limitation. On such a plea being raised an issue regarding suit being barred by time can be framed by the court and decided more appropriately on the basis of the evidence adduced by the parties irrespective of rejection of the plaint under Order 7 Rule 11 CPC.

11. Thus, the order impugned does not in any manner results in miscarriage of justice causing irreparable loss and injury to the petitioner which may warrant interference by this Court in exercise of extra-ordinary writ jurisdiction.

Case Law discussed:
(2006) 5 SCC 658; (2005) 7 SCC 510; (2005) 5 SCC 548.

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

1. The plaintiff respondents no. 1 and 2 on 29.5.2008 have filed a suit for specific performance of an agreement to sell dated 15.6.1983.

2. Petitioner filed an application under Order 7 Rule 11 CPC alleging that the suit is patently barred by law of limitation.. The application has been rejected by the courts below.

3. The submission of the learned counsel for the petitioner is that the question of limitation is dependent upon the legal proposition and no factual aspects are involved therein and therefore the courts below are not justified in rejecting the application.

4. Learned counsel for respondents no. 1 and 2 relies upon a decision of the Supreme Court in (2006) 5 SCC 658

Balasaria Construction (P) Limited Vs. Hanuman Seva Trust and others and contends that a plaint is not liable to be rejected under Order 7 Rule 11 CPC on the ground of being barred by law of limitation.

5. In the above-referred case the provisions of Order 7 Rule 11(d) CPC were not held applicable as the court was of the opinion that the aforesaid question can not be decided without proper pleadings framing an issue of limitation and taking of evidence.

6. This was preciously laid down by the Supreme Court in Popat and Kutecha Property Vs. State Bank of India Staff Association (2005)7 SCC 510 that where a question of limitation has to be decided on the basis of the fact, the plaint is not liable to be rejected under Order 7 Rule 11(d) CPC.

7. The settled position otherwise is that the plaint of a suit could be rejected, if the suit on the face of the pleadings in the plaint itself appears to be barred by law of limitation.

8. In this regard, a reference may be had to the judgment of the Supreme Court in the case of N.V. Srinivasa Murthy and others Vs. Mariyamma and others (2005) 5 SCC 548.

9. Thus, in sum and substance where the question of suit being barred by limitation is a mixed question of fact and law and is dependent upon the evidence to be adduced by the parties, it is not proper to resort to Order 7 Rule 11 CPC so as to reject the plaint summarily.

10. The non rejection of the plaint under Order 7 Rule 11 CPC would only entail participation and contest of the suit by the defendant who thereupon can always raise an issue of the suit being barred by limitation. On such a plea being raised an issue regarding suit being barred by time can be framed by the court and decided more appropriately on the basis of the evidence adduced by the parties irrespective of rejection of the plaint under Order 7 Rule 11 CPC.

11. Thus, the order impugned does not in any manner results in miscarriage of justice causing irreparable loss and injury to the petitioner which may warrant interference by this Court in exercise of extra-ordinary writ jurisdiction.

12. In view of the aforesaid facts and circumstances, the petition is disposed of with the direction to the court below to formulate an issue regarding the suit being barred by limitation and to decide the same after allowing the parties to adduce evidence on the said issue.

13. The writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2014

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 3041 of 2013

Arvind Kumar-II Petitioner
Versus
High Court of Judicature at Allahabad & Anr. ..... Respondents

Counsel for the Petitioner:
Sri Shashi Nandan, Sri Udayan Nandan, Sri Rupak Chaubey
Counsel for the Respondents:
C.S.C., Sri Manish Goyal

Constitution of India, Art.-227-Expunging adverse remark-petitioner while discharging judicial duty-passed certain order on release application-Distt. Judge

while hearing revision-passed certain adverse remark behind the back of petitioner-time and again Supreme Court depreciated practice of making unnecessary remark against subordinate judicial officer-sitting in appellate revisional jurisdiction-after going through order passed by petitioner nothing objectionable material-requiring the appellate/revisional court to pass adverse remark-against principle of Natural Justice-offending para of adverse remark set-a-side.

Held: Para-33

This apart, it has been well settled that such remarks ought not to be made on the judicial side unless the officer is present before the court or is given an opportunity to explain his conduct. The petitioner who is a judicial officer and a man of dignity and integrity was entitle to a minimal courtesy of furnishing his explanation before being condemned. This was none done. He came to know of it on 7.9.2013 when an annual confidential remark to the above effect was made in his service book for the year 2012-2013.

Case Law discussed:

AIR 1972 Alld. 193; AIR 1964 SC 1; AIR 1964 SC 704; (1986) 2 SCC 577; (2001) 3 SCC 54; AIR 1963 SC 1728; (1986) 2 SCC 569; (1990) 2 SCC 533; (1994)1 SCC 450; (1997)4 SCC 65; (2012) 6 SCC 491; (2011) 3 SC 496; AIR 1996 SC 3240.

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

1. The Court was addressed by Shri Shashi Nandan, Senior counsel assisted by Sri Udayan Nandan, learned counsel for the petitioner and Shri Manish Goyal, learned counsel for respondents in a most precise and a concise manner with all fairness without any competitiveness of winning and loosing. The assistance and the ability with which it has been provided is worth appreciation.

2. Petitioner Arvind Kumar-II a member of the subordinate judiciary of the State of U.P. visualizing that his career is in ruins preferred this petition under Article 226 of the Constitution of India for expunging the remarks made against him by the District Judge in paragraph 32 of the judgment and order dated 20.3.2013 passed in Rent Appeal No. 42 of 2012 (Asfar Husain Vs. Smt. Shamin Bano).

3. The petition was first presented to a Division Bench and on a query made by the Court as to whether the petitioner has preferred any representation against the adverse remark contained in the above paragraph, the petitioner instead of submitting specific reply informed that such a remark made on judicial side can be addressed by the court in exercise of its inherent power of superintendence contending thereby that the making of representation is of no avail. Accordingly, the Court vide order dated 13.12.2013 directed this petition to be treated as one under Article 227 of the Constitution of India. It is in pursuance of the said order that the registry has placed and listed this petition before me as I am dealing with petitions under Article 227 of the Constitution of India arising from suits.

4. Justice Sulaiman of the Allahabad High Court in Panchanan Banerji Vs. Upendra Nath Bhattacharji AIR 1927 Alld. 193 ruled that the High Court has power to expunge remarks on the character of a person before the court. He observed "The High Court, as the supreme court of the revision must be deemed to have power to see that courts below do not unjustly and without any lawful excuse take away the character of a party or of a counsel before it."

5. A three judges bench of the Supreme Court in Dr. Raghubir Saran Vs.

State of Bihar AIR 1964 SC 1 in relation to a criminal case held that the High Court has inherent power to expunge remarks in judgment or order of subordinate court made against a stranger. It observed "Every High Court as the highest court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of serving the ends of justice. This power extends to expunction or ordering expunction of irrelevant remarks made against a person who is neither a party nor a witness to the proceedings."

6. In the State of Uttar Pradesh Vs. Mohammad Naim, AIR 1964 SC 704 the Court in a criminal case had made adverse remarks against police force of the State and the government had applied for deletion of those remarks. The special bench of four judges of the Supreme Court held that the High Court in exercise of its inherent jurisdiction can expunge remarks made by it or by a lower court, if it is necessary to do so to prevent abuse of the process of the Court or otherwise to secure the ends of justice but the said jurisdiction is of exceptional nature to be utilised exceptionally.

7. The Supreme Court in Advocate General of Bihar Vs. High Court Judicature at Patna (1986)2 SCC 577 ordered for the expunction of strictures made by the learned single judge of the High Court against the Advocate General of the State terming the incident between the bench and the bar to be unfortunate which could have been avoided with little tact and understanding without making an inquiry as to who was at fault.

8. It is in this legal background that the Supreme Court in the matter of 'K' A Judicial Officer (2001) 3 SCC 54 finally laid down that a sub-ordinate judge faced with disparaging and undeserving remarks made by a court of superior jurisdiction is not without any remedy. He can invoke the inherent jurisdiction of the High Court for expunging the objectionable remarks as the High Court is a Court of record and is vested with powers of superintendence over the courts below as also with inherent jurisdiction but the aforesaid extra-ordinary inherent power vested in the High Court to expunge remarks recorded by the court of superior jurisdiction can be utilized subject to satisfying the following tests:-

i) The passage or the remark complained of is wholly irrelevant and unjustifiable;

ii) Its retention on the record will cause serious harm to the person/persons to whom it refers;

iii) Its expunction will not affect the reasons in the judgment and order; and

iv) Whether the party whose conduct is in question was before the court to defend himself.

9. In Ishwari Prasad Mishra Vs. Mohd Isha AIR 1963 SC 1728 a three Judges Bench of the Supreme Court has emphasised the need to adopt utmost judicial restrain against using strong language and imputation of motive against the lower judiciary, as in such matters the judge concern has no remedy in law to vindicate his position.

10. Their Lordships of the Supreme Court in Nirajan Patnaik Vs. Shashi Bhushan Kar and another (1986) 2 SCC 569 advised that harsh and disparaging remarks are not to be made against persons and authorities whose conduct come into consideration before Courts of law unless it is really necessary for the decision of the case. They also reminded

that higher the forum, greater are the powers and the greater is the need for restrain and mellowed approach.

11. In A.M. Mathur Vs. Pramood Kumar Gupta (1990) 2 SCC 533 the Supreme Court has sounded a note of caution that as a general principle for the proper administration of justice "derogatory remarks ought not to be made against the persons or the authorities whose conduct come into consideration unless it is absolutely necessary for the decision of the case".

12. Again in K.P. Twari Vs. State of Madhya Pradesh (1994) 1 SCC 450 it was reiterated that using intemperate language and castigating strictures on the officers of the lower judiciary diminishes the image of the judiciary as a whole in the eyes of public and therefore the higher courts should exercise restrain from using disparaging remarks against the lower judiciary.

13. In Brij Kishore Thakur Vs. Union of India (1997) 4 SCC65 the Apex Court disapproved the practice of passing strictures against sub-ordinate officers and observed that no greater damage can be caused to the administration of justice then by publicly expressing lack of faith in the sub-ordinate judiciary by the higher courts.

14. The above legal position apart, a superior court is loco-parentis vis-a-vis the subordinate courts. Loco-parentis is a person who is in the situation of a lawful father of a child. Therefore, the relationship of a superior court with that of subordinate court is like a father to a child. It acts as its parent. The superior court as such not only acts as a controlling or supervising authority of the subordinate court but as a friend, philosopher and guide. Therefore, the superior court has to keep in mind the concept of loco-parentis while sitting in appeal over the judgments and orders of the subordinate court to keep at bay any uncalled for and unwarranted remarks.

15. A judge functioning at any level discharges his functions independently and judicially. He has his own dignity and credibility. The same has to be maintained and preserved by all specially the superior court that acts as loco-parentis by avoiding unwarranted comments on the reputation of the officer as it creates a dent in the image of the entire judicial system. Instead, if necessary the Court should adopt a reformative method on administrative side.

16. Thus, in the case of Amar Pal Singh Vs. State of U.P. and others (2012) 6SCC491 it has been eloquently said that a judicial officer projects the face of the judicial system and the independence of judiciary. This should be paramount in the mind of the judge of the superior court while sitting in appeal. He is therefore, required to maintain sobriety, calmness and poised restrain being loco-parentis howsoever strongly he may feel about the fallacy in the judgment and the order passed by an officer.

17. In the matter of 'K' a judicial officer (Supra) it has been pointed out that any criticism and observation by a superior court in a judicial pronouncement touching on the character of a judicial officer have its own mischievous infirmities. In the first place, it condemns the officer unheard with no opportunity to shield himself. Secondly, it is a criticism in public. Thirdly, it gives the litigating party not only the sense of victory over his opponent but also over the judge. Lastly, it demoralises the officer and places him in the category of a litigant for seeking expunction of the remarks. Therefore, whenever the conduct of a judicial officer,

unworthy of him, comes to the notice of the higher court on the judicial side, the better and safer course admissible is to dispose of the lis on merits thereof avoiding criticism of the officer and to draw proceedings separately on the administrative side, if necessary.

18. One should also not loose sight of a well recognised legal maxim that 'the honesty and integrity of a judge can not be questioned, but his decision may be impugned for error either of law or fact'. It is in view of the above principle that it has been settled that errors in the judgment and order may be corrected by appellate tribunals in cases where the law allows for an appeal but not the honesty and the character.

19. A superior court is only an appellate or revisional authority of the judgment and order of the court below to test its correctness and soundness but is not expected to sit in judgment over the conduct of the judicial or quasi judicial authority whose decisions are in issue before it and to indulge in criticising the conduct of that sub-ordinate functionary. The superior court does not act as a disciplinary authority while dealing with the judgment or order of the lower authority in appeal or revision.

20. Thus, a court sitting in appeal has no authority of law to castigate or stigmatise an officer through a judgment as it would be plainly condemning him in flagrant violation of the principles of natural justice without holding an inquiry.

21. The beauty of the Indian judicial system lies in its hierarchical system which provides for the correction of the judgments and orders of the subordinate courts by the superior courts but without any malice towards any one who went wrong in passing the same. The Sub-ordinate courts accepts the wisdom of superior courts unmindful of their decisions going wrong with the zeal to perform better and to act more wisely in future. But if judges of the superior courts starts rebuking the officers of the sub-ordinate judiciary for taking a particular view which may not find approval of higher echelons it would create ripples in the judiciary destroying the very fabric of its independence and fearless approach to decision making process.

22. In Mona Panwar Vs. High Court of Judicature at Allahabad and others (2011) 3 SC 496 while expunging the remark made by the High Court on judicial side against a subordinate judicial officer observed that to 'err is human' and the dictum applies even to judges at all levels as it is often said that judge is yet to be born who has not committed any error. Therefore, there is a need to adopt utmost judicial restrain and not to make any disparaging remarks against the members of lower judiciary while sitting in appeal over their judgments and orders.

23. In Kashi Nath Roy Vs. State of Bihar AIR 1996 SC 3240 it has been observed that in the judicial hierarchical system it is expected that in some measure the lower courts may go wrong in decision making on facts and law both but such errors are meant to be corrected by the appellate forum without frowning upon the court below in unnecessary measure.

24. In view of the above legal position, two things are clear enough. In the first place superior courts should avoid

making harsh and castigating remarks against the lower judiciary or its officers or any other person or authority whose conduct falls before it for consideration unless it is absolutely necessary for the decision of the suit/matter. Secondly, such adverse remarks, if made can be expunged by the High Court in exercise of its inherent supervisory jurisdiction as a court of record subject to satisfying the tests laid down in that respect.

25. Additionally, it is not ordinarily permissible and proper to expose a judicial officer to punishment by way of strictures of superior courts that too in exercise of appellate power in gross breach of principles of natural justice.

26. In the light of the above legal discussion, I turn to the facts of the instant case.

27. The petitioner holding the post of Civil Judge (Senior Division) acting as a prescribed authority on the evaluation of the evidence on record had allowed the release application of the landlady under Section 21 (1) of the U.P. Act No. 13 of 1972 vide judgment and order dated 20.3.2013 holding the need of the land-lady to be genuine and bona-fide.

28. The tenant had then preferred the rent appeal whereupon the District Judge not only set aside the order of release passed by the prescribed authority but has frowned upon the petitioner observing that he has failed to take into account the subsequent events that have taken place during pendency of the release application which were on record and this was done by him wilfully and deliberately and his conduct reflects negligence and ulterior motive in discharge of judicial function.

29. Paragraph 32 of the judgement containing an adversarial remark against the petitioner is reproduced herein below:-

"उभय पक्ष के द्वारा उपरोक्त तथ्य कथित किए गए और उनके संबंध में साक्ष्य प्रस्तुत की गयी, का पूर्ण विवरण विद्वान नियत प्राधिकारी (नियत प्राधिकारी श्री अरविन्द कुमार सिविल जज सी0 डि0 के पद पर कार्यरत हैं और वह न्यायिक सेवा के अनुभवी व वरिष्ठ अधिकारियों में से एक हैं) के द्वारा अपने आलोच्य निर्णण में उल्लिखित किया गया है, उसके उपरान्त भी उपरोक्त तथ्यों के संबंध में कोई संवीक्षा उनके द्वारा नहीं की गयी और न ही उनके द्वारा भवन अवमुक्ति के प्रार्थना–पत्र के विचारण के अन्तराल में घटित तथ्यों के संबंध में प्रस्तुत किए गए कथन व साक्ष्य को उनके द्वारा जानबूक्षकर स्वेच्छापूर्वक अनदेखा किया गया, जो कि उनके न्यायिक कार्य के सम्पादन में घोर लापरवाही व दुर्भावना को परिलक्षित करता है।"

30. The remarks made by the District Judge in the judgment are certainly stigmatic in nature. The said remarks, if permitted to stand would definitely affect the career of the petitioner and cause serious harm to him later.

31. The reading of two judgment and orders; one passed by the prescribed authority and the other by the District Judge and the perusal of the record of the court below which had been summoned by this Court, in no way indicates that the petitioner had acted with any negligence or with ulterior motive in deciding the release application. At least there is no material to impute any motive in this regard. The comment to this effect is unfounded and without any basis. It may be another thing that the judgment and order passed by him may stand vitiated for non consideration of some material on record but hardly any motive for ignoring the same can be imputed for it. Therefore, the remark contained in the passage in question is wholly unjustifiable. It would have been sufficient for the appellate authority to have stated that the order

impugned is unsustainable for non consideration of the evidence on record.

32. I have read the whole of the judgment and if it is read omitting the impugned paragraph 32 it would not affect the reasoning contained in the judgment so as to weaken it on merits. In short, the merits of the judgment would not be affected by the deletion of the above paragraph. The reasoning or even the conclusion arrived at by the District Judge in passing the said judgment would remain unaffected by its deletion.

33. This apart, it has been well settled that such remarks ought not to be made on the judicial side unless the officer is present before the court or is given an opportunity to explain his conduct. The petitioner who is a judicial officer and a man of dignity and integrity was entitle to a minimal courtesy of furnishing his explanation before being condemned. This was none done. He came to know of it on 7.9.2013 when an annual confidential remark to the above effect was made in his service book for the year 2012-2013.

34. The aforesaid objectionable remark made by the District Judge is therefore clearly in violation of the principles of natural justice and is not sustainable in law.

35. In view of the above, the petitioner qualifies all the tests laid-down in 'K' a judicial officer (Supra) for expunging the remarks made against him by the District Judge on the judicial forum.

36. Accordingly, for all that has been said, I direct for expunction of the entire paragraph 32 of the judgment and order dated 20.3.2013 passed by the District Judge in rent appeal no. 42 of 2012.

37. The petition is allowed but with no costs. The lower court record is directed to be returned forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2014

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 3689 of 2014

Mustaq Ullah..... Petitioner
Versus
State of U.P. and Ors..... Respondents

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

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service Law-termination of service-during verification of educational record-certificates of petitioner found forged-termination order questioned in absence of disciplinary proceeding-held-once the declaration in application form found incorrect-no use of disciplinary proceeding-termination held-proper.

Held: Para-20
Applying the principles laid down in the aforementioned judgments of Hon'ble Supreme Court on the facts of the present case, this Court finds that since the petitioner procured the appointment on the basis of forged mark sheet and certificate, it amounted to misrepresentation and fraud on the employer. In the circumstances, there would be no equity in favour of the petitioner or any estoppel against the employer while restoring to termination without holding any enquiry. The petitioner suppressed material information and gave false information and, therefore, he cannot claim any right to continue in service. The respondent employer has rightly exercised

the discretion to terminate the services of the petitioner.

Case Law discussed:
2000(3)SC 151; 2004(6) SCC 325; 2003(8) SCC 319; AIR 1994 SC 853; 2012 (8) SCC 748; JT 2005 (11) SC 439; JT 2005(6) SC 391; JT 2007(4) SC 186; JT 2009(9)SC 365; JT 2008(3)SC 452; JT 2009(5) SC 278; JT 2008(8) SC 57.

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

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and Ms. Suman Sirohi, learned Standing Counsel for respondents.

2. On 14.2.2014 Sri Khare was heard at length and was directed to file a supplementary affidavit of the petitioner annexing therewith copy of the receipt of deposit of fees for appearance in the examination, admit card and other documents to demonstrate that he appeared as a private candidate in Adhikari Pariksha of 1997, alleged to have been held by Gurukul Vishwavidyalay, Vrindavan, Mathura.

3. Again on 20.2.2014 writ petition was heard at length and the following order was passed :

"Heard Sri Siddharth Khare, learned counsel for the petitioner and Ms. Suman Sirohi, learned Standing Counsel appearing for the respondents.

Pursuant to the order of this Court dated 14.2.2014, learned Standing Counsel has produced the original records. From perusal of the record, it is found that the mark sheet as well as certificate of Adhikari Pariksha as submitted by the petitioner before the concerned authorities of the year 1997 was sent for verification. On the basis of this certificate of Adhikari Pariksha, 1997 shown to be issued by Gurukul Vishwa Vidyalaya, Brindavan, Mathura, the petitioner has shown himself to possess minimum educational qualification as mentioned in the advertisement and on that basis obtained the service. A letter for verification of the aforesaid certificate and the mark sheet was sent by the respondent department to the Gurukul Vishwa Vidyalaya, Brindavan, Mathura. In response to it, the Vice Chancellor of Gurukul Vishwa Vidyalaya, Brindavan, Mathura sent the letter dated 22.5.2013 followed by another letter dated 23.10.2013 clearly stating therein that the mark sheet and Adhikari Pariksha Certificate of 1997 as submitted by the petitioner is not correct and totally forged papers. The original records were also shown to Sri Siddharth Khare, learned counsel for the petitioner and thereafter it has been returned to the learned Standing Counsel. Ms. Suman Sirohi further submits that in the impugned order the year of certificate was inadvertently typed as 2007 in place of 1997 and consequently, a correction order dated 8.1.2014 was passed by the Deputy Commissioner, Mirzapur and thus the typing mistake in the impugned order dated 26.12.2013 has been corrected.

Sri Siddharth Khare has filed today a supplementary affidavit of the petitioner in which in paragraph 3 and 4, it is stated that the petitioner is not in a position to file any fee slip and admit card with regard to his Adhikari Pariksha passed from Gurukul Vishwa Vidyalaya, Brindavan, Mathura because it has been misplaced. In pargraph 5 of the affidavit, it is stated that the petitioner has the original mark sheet and certificate of Adhikari Pariksha of the year 1997 passed by him from Gurukul Vishwa

Vidyalaya, Brindavan, Mathura, which shall be placed before this Court at the time of argument. In view of the specific averment in paragraph 5 of the aforesaid supplementary affidavit, Sri Siddharth Khare produced the alleged original mark sheet of the petitioner of Adhikari Pariksha, 1997 bearing Roll No. 19861 and Serial No. 15419 and the date of issue as 18.6.1997. He also produced the alleged original certificate of the petitioner of Adhikari Pariksha, 1997 bearing entry "certificate no. 1288 dated 30.7.1997". On the back side of this certificate, there is a hand written certification that entire entries of this certificate are correct and according to college records. This certification has been done on 25.7.1997. Prima facie, this certificate itself appears to be forged inasmuch as, in the certificate, the entry dated 30.7.1997, could not have been certified on 25.7.1997 coupled with the fact that the certificate as submitted by the petitioner to obtain the employment was communicated to be forged by the Vice Chancellor of the concerned Vishwa Vidyalaya i.e. Gurukul Vishwa Vidyalaya, Brindavan, Mathura.

Sri Siddharth Khare seeks time to file a supplementary affidavit so as to challenge the correction order dated 8.1.2014, the copy of which has been given by learned Standing Counsel to him in Court during the course of argument.

As prayed, two days' time is granted to the petitioner to file supplementary affidavit. In the supplementary affidavit, the petitioner shall explain the entries of the certificate as noted above. He shall also annex with the supplementary affidavit the copy of the mark sheet as well as the front and back page of his certificate Adhikari Pariksha, 1997. The original certificate and the mark sheet is being returned to Sri Khare with direction that the same shall be produced on the next date.

As prayed, put up on 24.2.2014 in the additional cause list to enable the petitioner to file a supplementary affidavit containing the details as observed above.
"

4. Today Sri Siddharth Khare has filed second supplementary affidavit dated 24.2.2014 of the petitioner, which is taken on record. It is stated in paragraph 8 of this supplementary affidavit as under :

"8. That only because of the aforesaid typographical mistake/inadvertent error at the part of the issuing authority negative opinion with regard to the genuinity of the High school certificate may not be formed."

5. Sri Siddharth Khare submits as under :

(i) The petitioner is a regularly selected candidate and was appointed in accordance with law and was appointed as Excise Constable vide order No. 2259 dated 25.1.2011 issued by the Deputy Excise Commissioner, Mirzapur.

(ii) The petitioner has been removed from service without observing the procedure established by law.

(iii) The mark sheet and the certificate of Adhikari Pariksha of 1997 of Gurukul Vishwavidyalaya, Brindavan, Mathura possessed by the petitioner are wholly valid. The verification report received from the Vice Chancellor of Gurukul Vishwavidyalaya, Brindavan, Mathura does not establish that the mark sheet and the certificate of the petitioner are forged. In fact, the said Vice Chancellor does not have the records and,

therefore, in the absence of records, he could not have stated that the mark sheet and the certificate possessed by the petitioner are forged.

(iv) On similar set of facts in Writ (A) No. 45819 of 2013 and Writ (A) No. 54821 of 2013 were dismissed by two separate orders dated 3.10.2013. Against these two orders, Special Appeal No. 1632 of 2013 and Special Appeal No. 1634 of 2013 respectively were preferred by the petitioners of those writ petitions in which the Division Bench of this Court passed an interim order dated 30.10.2013 as under :

"Argument is that the issue is squarely covered by the recent Full Bench Judgment of this Court in the case of Dhanpal and Others Vs. State of U.P. and Others, [2013 (8) ADJ 723 (FB)].

It is submitted that right from 2010, the appellant is working and it is a case of cancellation of appointment and that too without a proper and reasonable enquiry/opportunity.

It is further submitted that it is not a case of any concealment or filing of the incorrect documents which mislead the respondents in appointing the appellant.

In view of the aforesaid matter, there should be a response from the respondents.

List the matter after six weeks.

On the facts, this Court directs that till the next date of listing, operation of the order impugned dated 16.09.2013 in the writ petition shall remain stayed. "

6. Sri Khare, therefore, submits that in view of the interim order passed in Special Appeal No. 1632 of 2013, the petitioner being a similarly situated person is entitled for similar interim relief.

7. Learned Standing Counsel has again produced today the original records and this Court perused the same. Referring to the application form of the petitioner, she submits that a declaration was made by the petitioner in the application form that if any information given in the application form is found to be wrong or untrue, he be dismissed from service even after selection. In the said application form, the petitioner has given details of his educational qualification and annexed the high school mark sheet and certificate, which have been found to be forged on verification from the Vice Chancellor of Gurukul Vishwavidyalaya, Brindavan, Mathura. She further submits that once the very basis of obtaining the employment has been found to be forged, the dismissal of the petitioner from service is wholly justified. She submits that the original certificate produced by the petitioner before this Court has also been found to be forged as noted in the above quoted order dated 20.2.2014. She submits that the interim orders are not precedents and, therefore, this Court is not bound to follow the interim order passed in Special Appeal No. 1632 of 2013. She submits that it appears that the facts of the csae in the aforesaid special appeal appears to be different inasmuch as, the interim order was granted in the said special appeal in view of the law laid down by the Full Bench of this Court in the case of Dhanpal and others Vs. State of U.P. reported in 2013 (8) ADJ 723 (FB) in which it has been held that Adhikari Pariksha up to the year, 2008 is equivalent to high school. She submits that in the case of Dhanpal (supra), the Full Bench of this Court has not held that

even the forged certificate of Adhikari Pariksha up to the year 2008 shall be treated to be valid.

Findings

8. I have carefully considered the submissions of learned counsel for the parties. In the order dated 20.2.2014 as reproduced above, this Court has prima facie found the certificate of the petitioner to be forged and, therefore, granted him time to explain. In paragraph 8 of the second supplementary affidavit filed today, the petitioner has stated that the aforesaid lacuna is a typographical and inadvertent error on the part of the issuing authority. This paragraph has been sworn on personal knowledge. It has not been explained that how the petitioner has personal knowledge of alleged typographical mistake said to have been committed by the alleged officers of the University. Thus the averments of para 8 of the second supplementary affidavit is incorrect.

9. Sri Siddharth Khare has invited the attention of the Court to the contents of paragraph 9 of the second supplementary affidavit filed today, in which it is stated that the certificate of the petitioner is genuine as it has been certified by the Ex-Registrar of the Gurukul Vishwavidyalaya, Brindavan, Mathura vide letter dated 22.2.2014. This letter filed as Annexure No.4 to the second supplementary affidavit is reproduced below

गुरूकुल विश्वविद्वद्यालय, वृन्दावन

आर्य प्रतिनिधि सभा उ0 प्र0 लखनऊ द्वारा संचालित

GURUKUL VISHWAVIDYALAYA VRINDABAN-281121 (INDIA)

क्रमांक– ळण्टण्टण्ध्718 दिनांक– 22ण्2ण्2014

प्रेषक,

पूर्व कुलसचिव गुरूकुल विश्वविद्यालय वृन्दावन, मथुरा।

सेवा में,

मुश्ताक उल्ला पुत्र श्री अजमत उल्ला छिपटहरी बांदा।

विषय : अंक पत्रों के सत्यापन के सम्बन्ध में :–

प्रमाणित किया जाता है कि मुश्ताक उल्ला पुत्र श्री अजमल उल्ला ने अधिकारी परीक्षा वर्ष 1997 अनुक्रमांक 19861 ने गुरूकुल विश्वविद्यालय वृन्दावन से प्रथम श्रेणी में उत्तीर्ण किया है। कार्यालय अभिलेखों से मिलान करने पर सही पाया गया।

भवदीय"

10. Perusal of the aforesaid letter shows that it bears dispatch no. GVV/718 dated 22.2.2014 and has been issued by some one as Ex-Registrar . The name of the person who issued the certificate neither appears in the certificate nor has been disclosed in the supplementary affidavit. Even if it is assumed for a moment that this certificate has been issued by some Ex-Registrar yet it is surprising that how and under what authority an Ex-Registrar can issue such a certificate. Apart from this on the left hand side at the top of this letter, monogram of the University is printed while below the signature a stamp bearing seal of the State Government containing name of the University has been affixed. These circumstances are clear indications of the fraudulent conduct of the petitioner and also of the ingenuineness of this paper. The Vice Chancellor of the Gurukul Vishwavidyalay, Vrindavan, Mathura, on being asked by the respondent authorities to verify the mark sheet and the certificate of the petitioner, communicated vide letter dated 22.5.2013 followed by letter dated 23.10.2013 that the said mark sheet and certificate of adhikari Pariksha 1997 produced by the petitioner are forged. Thus, the mark sheet and certificate of Adhikari Pariksha

submitted by the petitioner to obtain employment have been correctly held by the respondents to be forged and fabricated.

11. So far as the contention of Sri Siddharth Khare that the petitioner could have been removed from service, only after initiating the disciplinary proceeding is concerned, this Court is of the view that once the appointment has been obtained on the basis of forged certificates, the impugned order cannot be held to be illegal.

12. The jurisdiction under Article 226 of the Constitution of India is an extraordinary and discretionary jurisdiction, which cannot be exercised in the facts and circumstances of the case.

13. In the case of United India Insurance Company Ltd. V. B.Rajendra Singh and others, JT 2000(3)SC.151, considering the fact of fraud, Hon'ble Supreme Court held in paragraph 3 as under :

"*Fraud and justice never dwell together". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that "no judegment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything"(Lazarus Estate Ltd. V. Beasley 1956(1)QB 702).*

(Emphasis supplied by me)

14. In the case of Vice Chairman, Kendriya Vidyalaya Sangathan and Another Vs. Girdhari Lal Yadav, 2004 (6) SCC 325, Hon'ble Supreme Court considered the applicability of principles of natural justice in cases involving fraud and held in paragraphs 12 and 13 as under :

"12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram chandra Singh v. Savitri devi this Court has noticed : (SCC p. 327 paras 15-19)

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."

19. In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false

representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit.

13. In view of our findings aforementioned that the respondent was guilty of an act of fraud, in our opinion, the Central Administrative tribunal as also the High court committed a manifest error in setting aside the order of the appointing authority as also the Appellate Authority."

(Emphasis supplied by me)

15. In the case of Ram Chandra Singh Vs. Savitri Devi and others, 2003(8) SCC 319, Hon'ble Supreme Court held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

25. 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.

37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."

(Emphasis supplied by me)

16. In the case of S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others, AIR 1994 SC 853, the Hon'ble Supreme Court held in para 7 as under :

"*7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". 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."

(Emphasis supplied by me)

17. In the case of Jainendra Singh Vs. State of U.P., 2012 (8) SCC 748, Hon'ble Supreme Court considered the fact of appointment obtained by fraud and held in para 29.1 to 29.10 as under :

"29.1 Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

29.2 Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3 When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.

29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.

29.5 Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6 The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7 The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8 An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make

a person undesirable or unsuitable for the post.

29.9 An employee in the uniformed service pre-supposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."

(Emphasis supplied by me)

18. In the case of Ram Chandra Singh Vs. Savitri Devi and others, JT 2005 (11) SC 439, Hon'ble Supreme Court has elaborately considered the meaning of the word fraud and its effects and held in para 15 to 34 as under :

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

19. In Derry v. Peek, (1889) 14 AC 337, if was held:

In an 'action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit.

20. In Kerr on Fraud and Mistake at page 23, it is stated:

"The true and only sound principle to be derived from the cases represented by Slim v. Croucher is this that a representation is fraudulent not only when the person making it knows it to be false, but also when, as Jessel, M.R., pointed out, he ought to have known, or must be taken to have known, that it was false. This is a sound and intelligible principle, and is, moreover, not inconsistent with Derry v. Peek, A false statement which a person ought to have known was false, and which he must therefore be taken to have known was false, cannot be said to be honestly believed in. "A consideration of the grounds of belief", said Lord Herschell, "is no doubt an important aid in

ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so."

21. In Bigelow on Fraudulent Conveyances at page 1, it is stated :

"If on the facts the average man would have intended wrong, that is enough."

22. It was further opined:

"This conception of fraud (and since it is not the writer's, he may speak of it without diffidence), steadily kept in view, will render the administration of the law less difficult, or rather will make its administration more effective. Further, not to enlarge upon the last matter, it will do away with much of he prevalent confusion in regard to 'moral' fraud, a confusion which, in addition to other things, often causes lawyers to take refuge behind such convenient and indeed useful but often obscure language as 'fraud upon the law'. What is fraud upon the law? Fraud can be committed only against a being capable of rights, and 'fraud, upon the law' darkens counsel. What is really aimed at in most cases by this obscure contrast between moral fraud and fraud upon the law, is a contrast between fraud in the individual's intention to commit the wrong and fraud as seen in the obvious tendency of the act in question."

23. Recently this Court by an order dated 3^rd September, 2003 in Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education and Ors. reported in JT 2003 (Supp. 1) SC 25 held:

"Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud. (See Derry v. Peek (1889) 14 AC 337).In Lazarus Estate v. Berly [(1956) 1 All ER 341] the Court of Appeal stated the law thus:

"I cannot accede to this argument for a moment "no Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything". The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever."

In S.P. Chengalyaraya Naidu v. Jagannath [(1994) 1 SCC 1] this Court stated that fraud avoids all judicial acts, ecclesiastical or temporal."

24. 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.

25. In Arlidge & Parry on Fraud, it is stated at page 21:

"Indeed, the word sometimes appears to be virtually synonymous with "deception", as in the offence (now repealed.) of obtaining credit by fraud. It is true that in this context "fraud" included certain kinds of conduct which did not amount to false pretences, since the definition referred to an obtaining of credit "under false pretences, or by means of any other fraud". In Jones, for example, a man who ordered a meal without pointing out that he had no money was held to be guilty of obtaining credit

by fraud but not of obtaining the meal by false pretences: his conduct, though fraudulent, did not amount to a false pretence. Similarly it has been suggested that a charge of conspiracy to defraud may be used where a "false front" has been presented to the public (e.g. a business appears to be reputable and creditworthy when in fact it is neither) but there has been nothing so concrete as a false pretence. However, the concept of deception (as defined in the Theft Act 1968) is broader than that of a false pretence in that (inter alia) it includes a misrepresentation as to the defendant's intentions; both Jones and the "false front" could now be treated as cases of obtaining property by deception."

26. 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.

27. In Smt. Shrisht Dhawan v. Shaw Brothers , it has been held that:

"Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct,"

28. In S.P. Chengalvaraya Naidu v. Jagannath [(1994) 1 SCC 1] this Court in no uncertain terms observed:

"...The principle of "finality of litigation" cannot be passed 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 whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation... A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage... A litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

29. In Indian Bank v. Satyam Fibres (India) Pvt. Ltd. , this Court after referring to Lazarus Estates (supra) and other cases observed that 'since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court it also amounts to an abuse of the process of the Court, that the Courts have inherent power to set aside an order obtained, by practising fraud upon the Court, and that where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order".

30. It was further held:

"The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud" on Court, In the case of fraud on a party to the suit or proceedings, the Court may direct the affected party to file a separate suit for setting aside the decree obtained

by fraud. Inherent powers are powers, which are resident in all Courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or Courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behavior. This power is necessary for the orderly administration of the Court's business."

31. In Chittaranjan Das v. Durgapore Project Limited and Ors. , It has been held:

"Suppression of a material document which affects the condition of service of the petitioner, would amount to fraud in such matters. Even the principles of natural justice are not required to be complied within such a situation.

It is now well known that a fraud vitiates all solemn acts. Thus, even if the date of birth of the petitioner had been recorded in the service returns on the basis of the certificate produced by the petitioner, the same is not sacrosanct nor the respondent company would be bound thereby."

32. Keeping in view the aforementioned principles, the questions raised in these appeals are required to be considered. The High Court observed that the application of intervention filed by the appellant purported to be under Order XXVI, Rules 13 and 14(2) and Order XX, Rule 18 was not maintainable as they do not confer any power to court for setting aside a preliminary decree on the ground that it was obtained by practising fraud. But once the principles aforementioned are to be given effect to, indisputably the court must be held to have inherent jurisdiction in relation thereto.

33. In Manohar Lal Chopra v. Raj Bahadur Rao Raja Seth Hiralal , the law is stated in the following terms:

"The Code of Civil Procedure is undoubtedly not exhaustive: it does not lay down rules for guidance in respect of all situations nor does it seek to provide rules for decision of all conceivable cases which may arise. The civil courts are authorized" to pass such orders as may be necessary for the ends of justice, or to prevent abuse of the process of court, but where an express provision is made to meet a particular situation the Code must be observed, and departure therefrom is not permissible."

34.In Sharda v. Dharmpal , a three-Judge Bench, of which both of us are parties, held that directing a person to undergo a medical test by a matrimonial court is implicit stating:"

(Emphasis supplied by me)

19. Similar principles with regard to fraud have been laid down by Hon'ble Supreme Court in the case of JT 2005(6) SC 391, para 7 to 15, JT 2007(4) SC 186, para 19 to 39, JT 2009(9) SC 365, para 22 and 23, JT 2008 (3) SC 452, para 12.3 to 15, JT 2009(5) SC 278, para 13 to 18 and 28 and JT 2008(8) SC 57.

20. Applying the principles laid down in the aforementioned judgments of Hon'ble Supreme Court on the facts of the present case, this Court finds that since the petitioner procured the appointment on the basis of forged mark sheet and certificate, it amounted to misrepresentation and fraud on the employer. In the circumstances, there would be no equity in favour of the petitioner or any estoppel against the employer while restoring to termination without holding any enquiry. The

petitioner suppressed material information and gave false information and, therefore, he cannot claim any right to continue in service. The respondent employer has rightly exercised the discretion to terminate the services of the petitioner.

21. In view of the above, I find no merit in the writ petition. The writ petition fails and is hereby dismissed with cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2014

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Application No. 4542 of 2014

Vinod Kumar Sahu..... Applicant
Versus
State of U.P..... Respondent

Counsel for the Petitioner:
Sri Rakesh Dubey

Counsel for the Respondents:
A.G.A.

Cr.P.C.-482-Application against rejection of application under section 153(3) Cr.P.C.-on ground if amount of bribery given by father of applicant-who only could maintain application-held-misconceived-if allegation found true-can either way would be very serious impact-if bribery demanded by judicial officer or by an advocate for his own benefit-order quashed-being nonest direction to pass fresh order in light of observation made above.

Held: Para-7
Ordinarily this court does not entertain the application u/s 482 Cr.P.C. which assails the validity of refusal done by the Magistrate with regard to the applications seeking registration of the FIR. But it is a case where this court feels impelled to interfere as the order does not stand the scrutiny in the eyes of law. The order is completely without jurisdiction for the reason of court's complete failure to exercise the jurisdiction vested in him and that too on absolutely illegal grounds. If the judicial officer refuses to exercise his jurisdiction it is just as objectionable and untenable where he wrongly exercises the jurisdiction though he had none under law. Who can file a complaint or lodge an FIR is a question of law. If the same has been brought by a person who lacks the sanction of law or who is prohibited by some provision of law, then the prosecution as a result of such filing might be illegal. On the other hand if a person entitled to lodge an FIR and bring the complaint is dis-entitled to do so under some wrong conception of law, this is also a pure illegality and this court must interfere to set the mistake right in order to meet the ends of justice.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application u/s 482 Cr.P.C. has been moved assailing the validity of the order dated 24.12.2013 passed by Special C.J.M., Kanpur Nagar in Misc.Case no. 520 of 2013 u/s 156(3) Cr.P.C. P.S. Kotwali District Kanpur Nagar whereby the application u/s 156(3) Cr.P.C. has been rejected.

2. It appears that an application under 156 Cr.P.C. was moved in the court of Special Chief Judicial Magistrate with the allegation that during the period when the applicant was in jail, his father was duped by one Devendra Verma, Advocate who misled him to believe that the Presiding Officer in whose court applicant's case or matter was pending, was a corrupt officer and there is no possibility to procure bail from that court without greasing his palm. Further allegation was that under the coercive pressure of this fabricated version Rs.15,000/- were demanded from applicant's

father and out of which Rs.12,000/- were also coughed up to the aforesaid Advocate. The application also contained the allegations that after his release on bail the balance amount of Rs.3000/- was further demanded from his father. When the applicant came to know about all these facts he resisted the demand and refused to succumb to the pressure. It was further alleged that on being refused the aforesaid Advocate Devendra Verma threatened him with life. It was also alleged that when the applicant approached the police station and tried to lodge the F.I.R the police refused to register the case against him as the aforesaid Advocate being the General Secretary of Bar Association wields a lot of clout. Aggrieved by the refusal of police to register the F.I.R with regard to the commission of aforesaid offences, the court was approached u/s 156(3) Cr.P.C. with the prayer to direct the investigation into the case after registering the F.I.R.

3. Heard learned counsel for the applicant and learned AGA. Record has been perused.

4. The perusal of the impugned order reveals that the primary ground which dissuaded the learned Magistrate from ordering the registration of the FIR was that as the amount of Rs.12000/- was allegedly taken from the father of the applicant fraudulently, only the father would be the aggrieved person, and therefore, an application u/s 156(3) Cr.P.C. ought to have been moved by father and not by the applicant who was his son.

5. This court is the view that the reasoning given by the lower court is patently misconceived and is wholly untenable. In fact the allegations contained in the application are of very serious nature in which not only the amount of Rs.12000/- has been cheated fraudulently from the father but the ostensible purpose for which the cheating was done scandalizes the judicial institution itself. In fact if the allegations are true then in that event even the father of the applicant who took steps in the direction of giving bribe may also have to suffer the consequence of his obnoxious conduct. The nature of allegation is such that it could only have been brought to a logical end through a proper investigation alone. According to the applicant's version he was in jail when some lawyer in order to get him out of the prison deceitfully cheated his father in the name of giving bribe to the judicial Officer. The matter ought to have been investigated regardless to the fact whether the charge is false or true. Both situations may have serious consequences. It is not a case in which filing of a complaint case can ever bring the culprits to book. The Magistrate has abstained from exercising the jurisdiction vested in him on the basis of a reasoning which is wholly against law. The misconception of law is palpable. The Magistrate has acted under the impression as if it was only the father alone from whom the money was taken who could have brought the complaint or the FIR. It is not so. Of course there are certain offence where only the first aggrieved person has the right to bring the complaint. But here in this case the offences alleged do not come in that category or class provided in Criminal Procedure Code.

6. The impugned order stands quashed and the lower court is directed to pass an appropriate order in accordance with law.

7. Ordinarily this court does not entertain the application u/s 482 Cr.P.C. which assails the validity of refusal done by the Magistrate with regard to the applications seeking

registration of the FIR. But it is a case where this court feels impelled to interfere as the order does not stand the scrutiny in the eyes of law. The order is completely without jurisdiction for the reason of court's complete failure to exercise the jurisdiction vested in him and that too on absolutely illegal grounds. If the judicial officer refuses to exercise his jurisdiction it is just as objectionable and untenable where he wrongly exercises the jurisdiction though he had none under law. Who can file a complaint or lodge an FIR is a question of law. If the same has been brought by a person who lacks the sanction of law or who is prohibited by some provision of law, then the prosecution as a result of such filing might be illegal. On the other hand if a person entitled to lodge an FIR and bring the complaint is dis-entitled to do so under some wrong conception of law, this is also a pure illegality and this court must interfere to set the mistake right in order to meet the ends of justice.

8. In the present case a person entitled to lodge the FIR or bring a complaint failed to exercise his legal right because the judicial doors were not kept ajar under a wrong conception of law which the Magistrate had in his mind and which prompted him to pass the impugned order whereby he refused to direct the registration of FIR.

9. Being non-est in the eyes of law the impugned order stands quashed.

10. The court below is directed to pass fresh order in the light of the observations made by the court in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2014

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ANIL KUMAR AGARWAL, J.

Civil Misc. Writ Petition No. 4606 of 2014

Chandra Prakash Gupta..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
Sri Anurag Singh

Counsel for the Respondents:
C.S.C., Dr. S.K. Yadav.

Electric Supply Code-2005-chapter IV clause-4(1) Provisio II-fresh electric connection-for domestic use-old premises owned by subsequent purchaser-new connection can be given only on production of no dues certificate-judgment relied by petitioner-having no application-petition disposed of.

Held: Para-3
Having perused the same we are of the opinion that since in the instant case there is already a clear statutory provision to that effect as such a fresh electricity connection can only be granted if No Dues Certificate is given by the person, who is seeking to have fresh electricity connection. Consequently, the ratio of the aforesaid decision cannot come to the aid of the petitioner in view of the aforesaid statutory provision in the Electricity Supply Code, 2005 that has been promulgated much after 2004. Consequently, if the petitioner applies for a fresh electricity connection complying with the aforesaid condition, it shall be open to the respondents to consider the same in accordance with law.

Case Law discussed:
AIR 2004 SC 2171

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

1. Heard learned counsel for the petitioner, who has prayed for a mandamus

directing the respondents to give a domestic electricity connection, which is a new connection in respect of the premises, which the petitioner states to have purchased in an auction from the State Bank of India under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The contention of the petitioner is that since he is an auction purchaser he is not liable to clear any erstwhile dues in respect of the same premises and that too even in a different name, in as much as, it is the liability of the previous owner and not of the petitioner. The petitioner has relied upon the judgment of three Judges in the case of Ahmedabad Electricity Co. Ltd. Vs. Gujarat Inns Pvt. Ltd. and others reported in AIR 2004 SC 2171 wherein, in the absence of any statutory provision, it was held that if an auction purchaser applies for a fresh connection then no liability with regard to the previous dues of the erstwhile owner can be fixed upon him and therefore, a fresh connection cannot be denied.

2. We have perused the ratio of the said decision and we find that in the Electricity Supply Code, 2005, a statutory provision has now been introduced under Clause 4.1 of Chapter 4 of the Code, which is quoted below:

"4.1 Licensee's Obligation to Supply.- The Licensee shall on an application by the owner or occupier of any premises, located in his area of supply, give supply of electricity to such premises within the one month after receipt of completed application showing payments of necessary charges and other compliances.

Provided where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution Licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as specified by the Commission in clause 4.8;

Provided also in case of application for supply from a village or hamlet or area wherein no provision for supply of electricity exists, the Commission shall extend the time period for provision of supply appropriately on a case-to-case basis;

Provided further that in case of arrears of electricity dues in respect of old consumers/ premises where ownership has changed, the new connection shall be released to the new owners only after submission of No-Dues Certificate as provided in clause 4.3(f);

And provided that if there are arrears of electricity dues on a premises, a new connection shall not be released to a new applicant/ or the old consumer on the same premises. The connection shall also not be released if-

(i) The applicant (being an individual) is an associate or relative (as defined in Section 2 and 6 respectively of the Companies Act, 1956) of the defaulting consumer,

(ii) Or where the applicant being a company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, is controlled, or having controlling interest in the defaulting consumer, provided, the Licensee shall not refuse electric connection on this ground, unless an opportunity to represent

his case is provided to the applicant and a reasoned order is passed by an officer as designated by the licensee."

3. Having perused the same we are of the opinion that since in the instant case there is already a clear statutory provision to that effect as such a fresh electricity connection can only be granted if No Dues Certificate is given by the person, who is seeking to have fresh electricity connection. Consequently, the ratio of the aforesaid decision cannot come to the aid of the petitioner in view of the aforesaid statutory provision in the Electricity Supply Code, 2005 that has been promulgated much after 2004. Consequently, if the petitioner applies for a fresh electricity connection complying with the aforesaid condition, it shall be open to the respondents to consider the same in accordance with law.

4. With the aforesaid direction the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.02.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Service Single No. 5318 of 1987
along with Service Single No. 1172 of 1996 and Service Single No. 6221 of 1987

Km. Suman Srivastava..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
Sri A.K. Shukla, Sri Akhilesh Kalra, Sri I.H. Farooqui, In person, Shyam Mohan.

Counsel for the Respondents:
Sri K.K. Tewari, Sri Arshad Rizvi, C.S.C., K.D. Nag, Sri Ved Prakash.

U.P. Secondary Education Service Selection Board Act 1982-Appointment of Asst. Teacher in C.T. grade-advertised 05.12.1986-appointment on short term vacancy-management issued appointment letter on 31.12.1986-without approval of DIOS-on 02.02.1987 manager sent the selection list for approval-28.02.1987 RIGS accorded approval-on 25.08.1987 appointment letter issued to Smt. Rastogi-who joined on 28.08.1987-subsequently on misconception by manager-approval granted earlier canceled-which resulted termination of her services-held-without hearing to Mrs. Rastogi termination can not be passed-refusal of joining prior to approval of selection-meaningless-appointment of last candidate of merit-wholly illegal-petition by Rastogi allowed-and the petition of Km. Suman Srivastava dismissed-follow up direction given.

Held: Para-26
It is evident from the facts that on 25.08.1987 the case of Km. Suman Srivastava has been rejected by the RIGS and on the same date appointment letter is issued to Km. Abha Rastogi and she joined on the following date. The approval was granted by R.I.G.S. on 28.02.1987. The Manager of the College in connivance with Suman Srivastava tried to mislead the RIGS by creating an impression that Km. Abha Rastogi has refused to join vide letter dated 12.02.1987. The RIGS in the impugned order dated 25.08.1987 takes notice of the fact that Km. Abha Rastogi vide letter dated 25.04.1987 had complained to the RIGS that the Management is not cooperating and not issuing the appointment letter and taking notice of the fact that the Management had allowed Km. Abha Rastogi last opportunity to join by 10.02.1987 and vide letter dated 12.02.1987 Abha Rastogi refused the offer of appointment, the impugned order has been passed without issuing notice to

Smt. Abha Rastogi. The approval is granted in February, 1987 and the Management issues appointment letter in August 1987 and in the intervening six months the Management in collusion with Km. Suman Srivastava tried to non-suit Smt. Abha Rastogi on fact which was otherwise false and fabricated. The R.I.G.S. Should have issued notice to Km. Abha Rastogi before passing the order dated 25.08.1987 for the reason that Km. Abha Rastogi had already complained to the R.I.G.S. that the Manager was not issuing appointment letter. The withdrawal of approval and consequential order of termination without opportunity was bad and unsustainable and is liable to be set aside on that ground alone.

Case Law discussed:
1998 U.P.L.B.E.C 640; 1996(1) U.P.L.B.E.C 271; 1991 ACJ 125; 1983 U.P.L.B.E.C 768; (2001) 3 SCC 328; (2007) 1 UPLBEC 120; (1994) All. C.J. 781; (1998) 3 ESC 2006; [(2013)4 UPLBEC 2769]; (2001) 1 UPLBEC 481; (1975) 2 SCC 702-11; AIR 2005 AP 45, 49; (1998)8 SCC 194; [1982 UPLBEC 213].

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

1. Writ Petition No. 5318 of 1987, Km. Suman Srivastava Versus State of U.P. and others and connected petitions Writ Petition No. 1172 of 1996, Smt. Abha Rastogi Versus State of U.P. and others and Writ Petition No. 6221 of 1987, Smt. Abha Rastogi Versus R.I.G.S. Lucknow and others, the facts are common pertaining a single selection, and as such, these writ petitions are being decided together, on the consent of the parties, at the admission stage as per rules of the Court.

2. Heard the petitioner, Km. Suman Srivastava appearing in person in Writ Petition No. 5318 of 1987, Sri K.D. Nag, learned counsel for the petitioner in the other connected petitions and Sri Somesh Tripathi for Committee of Management as well as learned Standing Counsel for the State-respondents.

3. The facts of the case is that Hanuman Pd. Rastogi Girls' Inter College, Subhash Marg, Lucknow is an institution recognized under the U.P. Intermediate Education Act, 1921 and Regulation framed thereunder and the provisions of U.P. Secondary Education Services Selection Board Act 1982 is applicable. The institution is grant-in-aid. One post of Assistant Teacher Science in C.T. Grade was advertised on 05.12.1986. The post was for short term vacancy to be filled up in accordance to Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981. Several candidates applied for the said post and the Selection Committee recommended the name of Abha Rastogi and other candidates were Basanti Rastogi, Kumari Swatantra Bala Rastogi and Kumari Suman Srivastava in the order of merit.

4. The Manager sent appointment letter on 31.12.1986 to Smt. Abha Rastogi who was placed at Serial No. 1 of the select list without sending papers of selection for prior approval of the RIGS as required under Order 1981. It is alleged by Suman Srivastava that Smt. Abha Rastogi refused the offer of appointment vide letter dated 12.02.1987, this fact is denied by Smt. Abha Rastogi. It is for the first time on 02.02.1987 the manager sent the name of the selected candidate namely Smt. Abha Rastogi along with the records of selection for approval under the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and the Regional Inspector of Girls School (RIGS)

accorded approval in respect of the selection of Abha Rastogi vide letter dated 28.02.1987 which was received by the institution on 03.03.1987. The Management of the institution issued appointment letter dated 25.08.1987 in favour of Smt. Abha Rastogi and she accordingly joined on 26.08.1987. In the intervening period i.e. on the date on which approval of the RIGS was received i.e. 03.03.1987, the Manager sent a letter seeking approval in respect of Suman Srivastava without informing that the incumbent had joined attempting to dislodge rightful claim of Smt. Abha Rastogi. On account of misrepresentation and misconception by the Manager the approval granted in favour of Smt. Abha Rastogi was cancelled by RGIS vide order dated 25.08.1987 and in pursuance thereof the management vide order dated 31.08.1987 terminated the services of Abha Rastogi. Both the letter dated 25.08.1987 issued by the R.I.G.S. Cancelling the approval and the consequential termination order dated 31.08.1987 are impugned in the Writ Petition No. 6221 of 1987 by Abha Rastogi. Suman Srivastava approached this court seeking writ of mandamus to treat her appointed as Assistant Teacher under the deeming clause of 1981 Order. There was interim orders in respect of the respective parties, but only Smt. Abha Rastogi was allowed to continue and was paid her salary whereas Suman Srivastava was not allowed to work for want of approval and appointment letter.

5. It is submitted by Km. Suman Srivastava that once Smt. Abha Rastogi vide letter dated 12.02.1987 refused the appointment, she does not have any legal right to claim appointment on the said post and since the other two candidates have refused appointment, therefore, Km. Suman Srivastava being the fourth candidate became eligible for the appointment. RIGS never approved the appointment of Suman Srivastava but it is contended by her that since seven days had lapsed from the date of receipt of particulars pertaining to her selection it will be deemed that approval was granted by RIGS. The proposal sent by the Manager for approval of the name of Suman Srivastava was wrongly rejected by RIGS by order dated 25.08.1987.

6. Km. Suman Srivastava has relied upon following judgments in support of her contentions:-

1998 U.P.L.B.E.C. 640, Chhatrapal vs. D.I.O.S. & others, 1996 (1) U.P.L.B.E.C 271, Nagar Palika Inter College v. Havildar Singh, 1991 ACJ 125, Sukhanandan v. D.I.O.S. And 1983 U.P.L.B.E.C 768, Rajendra Prasad v. Kayastha Pathsala.

7. There was interim order in favour of Suman Srivastava, however, it was never given effect to finally interim order was vacated on 09.03.1990 after exchange of affidavits. Interim order dated 09.03.1990 is reproduced herein below:

"Application for Stay

Lucknow DATED 9.3.1990.

Hon'ble D.K. Trivedi, J.

Writ Petition No. 5318 of 1987, was filed by Kumari Suman Srivastava, whereas writ petition No. 6221 of 1987 was filed by Km. Abha Rastogi.

There is no dispute that there is one vacancy of Assistant Teacher in C.T. Grade in the College. Admittedly, for this

ad hoc appointment a selection took place and in the said selection Km. Abha Rastogi, was placed at serial no. 1. It is further alleged that name of Km. Suman Srivastava finds place at serial No. 4. The R.I.G.S. by letter dated 28.02.1987, granted an approval in favour of Km. Abha Rastogi. The said letter was received in the office of College on 3.3.87. The above mentioned facts are not disputed by the counsel for the parties. Counsel for Km. Suman Srivastava states, on the basis of some letter of the Management that Km. Abha Rastogi has refused to join the post by letter dated 12.2.87. R.I.G.S. canceled the order of approval granted in favour of Km. Abha Rastogi. Km. Abha Rastogi, has denied this fact and counsel for the Abha Rastogi, pointed out that admittedly the approval was granted by R.I.G.S. On 28.2.87. Therefore, there is no question for refusal of joining the post on 12.2.87 as alleged by the other side. There is no letter of 12.2.87 on record. It is also not disputed between the parties that if there is no refusal of Km. Abha Rastogi, then, Km. Suman Srivastava, has no right to continue in service as there is only one post on which Km. Abha Rastogi has better claim. She is admittedly selected by the Selection Committee and placed at serial number 1.

From the perusal of the file it appears that whole controversy has been created by the management of the college. As there is no letter of refusal of Km. Abha Rastogi on record and further in view of the fact that Km. Abha Rastogi as well as R.I.G.S. including the Manager of College, are now denying this fact of refusal, therefore, in my opinion, there is no justification in continuance of the stay order, passed in favour of Suman Srivastava of Writ petition No. 5318 of 1987. Stay order dated 21.8.87 is therefore, vacated.

sd/D.K. Trivedi,
9.3.1990."

8. It is alleged on behalf of Committee of Management that Km. Suman Srivastava was working in the institution prior to the issuance of the advertisement. She was engaged on honorarium of Rs. 200 and further she was an applicant to the post advertised for temporary vacancy but in the order of merit she finds place at Serial No. 4 and at no point of time she was issued appointment letter nor her name was ever approved by RIGS nor she has been paid salary from the State Exchequer. On the other hand, Committee of Management contends that Smt. Abha Rastogi was issued appointment letter and in pursuance thereof she joined. The Manager admits that there was no refusal on the part of Smt. Abha Rastogi as alleged by the Km. Suman Srivastava.

9. During the pendency of the writ petition, Smt. Abha Rastogi was brought into L.T. grade on regular basis by order dated 13.02.2006 w.e.f. 05.04.1995 and since then she has been working in the L.T. Grade and on account of pendency of writ petition her regularization is not being considered and on the strength of her 26 years service she claims regularization under Section 33B of 1982 Act for which Smt. Abha Rastogi preferred Writ Petition No. 1172 of 1996.

10. In rebuttal, Sri K.D. Nag, Advocate appearing for Smt. Abha Rastogi contends that the appointment letter dated 31.12.1986 was an invalid appointment letter as it was issued prior to

the approval of the RIGS. Under the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, the selection process has to be approved by the RIGS and it is only after the approval the appointment letter could have been issued. According to Sri K.D. Nag, appointment letter was issued on 25.08.1987 and Smt. Abha Rastogi had duly accepted and joined. She had approached the RIGS on several occasions vide complaint dated 14.04.1987, 05.05.1987 and again on 25.05.1987 for issuance of appointment letter, but the Management was conniving with Km. Suman Srivastava and in turn misleading the RIGS. It is further contended that Km. Suman Srivastava has no locus to challenge the appointment of Smt. Abha Rastogi as Smt. Abha Rastogi had accepted the offer of appointment and the select list stood exhausted. It is on account of misrepresentation on the part of Committee of Management that the RIGS had passed the impugned order dated 25.08.1987 by which approval was rejected and in pursuance thereof the Committee of Management had terminated the services of Smt. Abha Rastogi vide order dated 31.08.1987.

11. Sri K.D. Nag, Advocate appearing for Smt. Abha Rastogi has relied upon following judgments.

(2001) 3 SCC 328, Buddhi Nath Chaturvedi & others versus Abahi Kumar & others, (2007) 1 UPLBEC 120, Sadhna Kumari (Smt.) vs. State of U.P. and (1994) All C.J. 781, Rajendra Prasad Srivastava versus DIOS Gorakhpur. Civil Misc. Writ Petition No. 13572 of 2003, Chandra Mohan Pandey Versus District Inspector of Schools, Deoria and others, decided on 23.08.2005. The judgment was affirmed in Special Appeal No. 977 of 2006, District Inspector of Schools, Deoria and another Versus Chandra Mohan Pandey and another decided on 08.12.2006.

12. Learned Standing Counsel has not disputed the factual matrix and has contended that as per the provisions of the Act and the Regulations framed there under and Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, a valid appointment letter can be issued after the approval has been granted by the RIGS. Any appointment letter sent prior to the date is nullity within the meaning of law and in case appointment letter is issued prior to the date of approval then it would only become valid from the date on which the approval was granted by the RIGS. The legal right to salary accrues only from the date of approval, the Order 1981 requires prior approval. In respect of Km. Suman Srivastava no approval was granted nor payment of salary was made at any point of time, she has no claim as the candidate at serial no. 1 i.e. Abha Rastogi had joined the post of Assistant Teacher.

13. Rival submissions fall for consideration.

14. In Ashika Prasad Shukla vs. District Inspector of Schools, Allahabad and another, (1998)3 ESC 2006, a Division Bench of this Court held:

"15. The next question that falls for consideration is whether the appointment of the petitioner-appellant could still stand invalidated on the ground that it was make without prior approval of the

District Inspector of Schools, Sri Yatindra Singh placed reliance on a Division Bench decision of this Court in A.K.Pathshala vs. Smt. M.D.Agnihotri, 1971 Alld.L.J. 983, wherein it was held, on construction of Section 16-F(1) of the U.P. Intermeditate Education Act, 1921, that appointment without prior approval by the Competent Authority would, in the eye of law, be no appointment. The ratio of the said decision as held by a subsequent Division Bench in Lalit Mohan Misra vs. District Inspector of Schools, 1979 All.L.J. 1025, is that a "person gets the status of a teacher when requisite formality is completed." The relevant observation are as under:-

"Without approval the person does not get the status of a teacher even though the approval is to be followed by formal letter but in the absence of formal letter the person gets the status of a teacher after approval to the appointment is given by the District Inspector of Schools. The appointment of a person as a teacher becomes effective only from the date approval is given and even if a person is allowed to work before that the same has no recognition under the U.P. Intermediate Education Act."

16.Paragraph 2(3)(iv) of the Second Removal of Difficulties Order is not phrased in a prohibitory language as was the language used in Section 16-F(1) of the U.P. Intermediate Education Act, 1921. The words 'prior approval' have been used in sub-clause(ii) of paragraph 2(3) of the Second Removal of Difficulties Order and a conjoint reading of sub-clauses (ii),(iii) and (iv) of clause (3) of paragraph 2, no doubt, leads to an inescapable conclusion that the appointment would be issued under the signature of the Manager only on the approval having been communicated by the District Inspector of Schools within seven days of the receipt of the papers or where the approval is deemed to have been accorded as visualized by sub-clause (iii) of clause (3) of paragraph 2 of the Second Removal of Difficulties Order. However, appointment if made prior to approval or deemed approval, would become effective from the date of approval of deemed approval as held by the Division Bench of this Court in Lalit Mohan Misra."

Similar view was again held by a Division Bench of this Court in Special Appeal No.319 of 2005 in Smt. Shobha Rastogi vs. The Committee of Management and others, decided on 22.3.2005. From the aforesaid judgments, the conclusion arrived is that the appointment could be issued by the Manager only on the approval communicated by the District Inspector of Schools within seven days of the receipt of the papers or where the approval was deemed to have been accorded as visualized by sub clause (iii) of clause (3) of Paragraph 2 of the Second Removal of Difficulties Order. Further, any appointment made prior to the approval or deemed approval would become effective only from the date of approval or deemed approval and that the appointment made prior to the approval or deemed approval would not be held to be illegal. In view of the aforesaid, the authority was not justified in rejecting the case of the petitioner on this ground....."

15. This Court in Lal Bahadur v. State of U.P. and others, [(2013) 4 UPLBEC 2769] had interpreted "prior approval" and "permission" as contained in Regulation 101 in case of appointment of class IV post and relied upon Amit

Kumar v. District Inspector of Schools, Jaunpurand others, (2001) 1 UPLBEC 481, wherein it has been held that Regulation 101 clearly expresses that prior approval of D.I.O.S. is a condition precedent for making any appointment on a non-teaching post. Relevant extract of the aforesaid judgment is quoted below:-

"From the aforesaid meaning of the word "except" it is clear that the expression "except" has been used in Regulation 101 to mean "only". Therefore, the appointing authority before making appointment on a non-teaching post could make any appointment only after obtaining prior approval of DIOS. In my opinion use of these two words 'shall' and "except" have been used in imperative terms. And clearly express that prior approval of DIOS is a condition precedent for making any appointment on a non-teaching post. Use of word "except" with the prior approval of DIOS does not leave any discretion to the appointing authority to make any appointment without obtaining his prior approval. If Regulation 101 is treated to be directory then the appointing authority could make appointment on non-teaching post even without prior approval of the DIOS. It would result in giving power to the appointing authority to make appointment first and thereafter obtain financial approval. This was not the intention of legislature or the Rule making authority. And it clearly intended that before making any appointment the appointing authority must obtain prior approval of the DIOS. The legislative intent has to be given effect to while interpreting regulatory provisions of Regulation 101. Regulations 103 to 106 to Regulations further make it clear that the Regulation 101 cannot be construed as permissive or directory. Further the procedural safeguard contained in Regulation 101, making it obligatory for the appointing authority in matters of making appointment on non-teaching posts, not to fill the vacancy except with the prior approval of the DIOS, has an element of public interest. Regulation 103 providing for appointments under the Dying in Harness Rules makes it obligatory on the DIOS to provide appointment to dependents not only in the institution where the deceased was working but any other institution, therefore, the only reasonable interpretation which can be given to the two words "shall" and "except" used in Regulation 101 is that these expressions are imperative and the regulatory provision contained in Regulation 101 is mandatory and cannot be treated to be directory. The requirement of obtaining prior approval of DIOS is not an empty formality. It is in public interest. The appointment of petitioner being contrary to Regulation 101 did not vest any right in him either to claim his appointment as regular or any salary."

13. Regulation 101 was again interpreted by a Division Bench of this Court in the case of Jagdish Singh Vs. State of U.P. and others, reported in [2006(24) LCD 1712], wherein after discussing entire provisions on the subject, the Division Bench of this Court has clearly held that prior approval contemplated in Regulation 101 is the prior approval of the District Inspector of Schools after completion of the process of selection and before issuance of appointment letter to the selected candidates. This Court in the aforesaid judgment of Jagdish Singh Vs. State of U.P. And others (supra) has clearly discussed the difference between iwokZuqeksnu and vuqefr i.e. 'prior

approval' and 'permission'. After discussing the issue, it has been held by this Court in the said case that what Regulation 101 requires is that District Inspector of Schools will accord his approval to the selection made by the appointing authority and it is only after approval of the District Inspector of Schools to the selection that appointing authority can issue appointment order to the selected candidate."

16. From the facts and law stated herein above, it is admitted case of the respondents viz Committee of Management and RIGS that no approval was accorded to the selection of Km. Suman Srivastava and no appointment letter was issued to her, where as approval was accorded to the selection of Smt. Abha Rastogi by RIGS and appointment letter was issued to her and she joined in pursuance thereof and is working on L.T. Grade after abolition/merger of C.T. Grade to L.T. Grade. In the opinion of the Court Km. Suman Srivastava has no locus to challenge the selection of Smt. Abha Rastogi nor is she an aggrieved persons.

17. The meaning of the expression 'person aggrieved' will have to be ascertained with reference to the purpose and the provisions of the statute. One of the meaning is that person will be held to be aggrieved by a decision if that decision is materially adverse to him. The restricted meaning of the expression requires denial or deprivation of legal rights. A more legal approach is required in the background of statues which do not deal with the property rights but deal with professional misconduct and morality. (Bar Council of Maharastra vs. M.V. Dabholkar, (1975) 2 SCC 702-11, paras 27 & 28).

18. Broadly, speaking a party or a person is aggrieved by a decision when, it only operates directly and injuriously upon his personal, pecuniary and proprietary rights (Corpus Juris Seundem. Edn. 1, Vol.IV., p. 356, as referred in Kalva Sudhakar Reddy vs. Mandala Sudhakar Reddy, AIR 2005 AP 45, 49 para 10)

19. The expression 'person aggrieved' means a person who has suffered a legal grievance i.e. a person against whom a decision has been pronounced which has lawfully deprived him of something or wrongfully refused him something.

20. Km. Suman Srivastava does not dispute that she was not the selected candidate and appointment letter was issued in favour of Smt. Abha Rastogi and her selection was also approved by the R.I.G.S. After issuance of appointment letter and in pursuance thereof Smt. Abha Rastogi joined the post, Other candidates in the list had no locus as the selections stood exhausted. The Committee of Management as well as the R.I.G.S. have not supported the case of Km. Suman Srivastava and the approval of Km. Suman Srivastava was rightly rejected by the R.I.G.S. Km. Suman Srivastava had no locus to challenge the selection of Smt. Abha Rastogi and neither she was an aggrieved person.

21. This Court while vacating the interim order passed in favour of Km. Suman Srivastava had noticed vide order dated 09.03.1990 that the Management by one letter gave an impression to the RIGS that Smt. Abha Rastogi had refused the offer of appointment and on the basis of the letter of the Management the RIGS

cancelled the approval in favour of Smt. Abha Rastogi and thereafter the Committee of Management terminated her service. No opportunity was given to Smt. Abha Rastogi before passing the impugned order.

22. In Basudeo Tiwari Vs. Sido Kanhu University & Others (1998) 8 SCC 194, Hon'ble Supreme Court held requirement of audi alteram partem flows from Article 14 in order to ensure State action to be just, fair and reasonable procedural requirement of natural justice has to be implied before dispensing with the services of a person. Paragraphs 9 and 10 are reproduced:-

9. The law is settled that non-arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14. It has come to be established, as a further corollary, that the audi alteram partem facet of natural justice is also a requirement of Article 14, for natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well settled that any action taken by the employer against an employee must be fair, just and reasonable which are the components of fair treatment. The conferment of absolute power to terminate the services of an employee is an antithesis to fair, just and reasonable treatment. This aspect was exhaustively considered by a constitution Bench of this Court in Delhi Transport Corpn. v. D.T.C. Mazdoor Congress.

10. In order to impose procedural safeguards, this Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing - it may be implied from the nature of the power - particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the Court merely supplies omission of the legislature. (vide Mohinder Singh Gill vs. Chief Election Commissioner) and except in case of direct legislative negation or implied exclusion. (vide S.L. Kapoor v. Jagmohan).

23. In Mohan Lal Sharma versus The District Inspector of Schools Muzaffar Nagar and others, [1982 UPLBEC 213], the Division Bench has held that the D.I.O.S. has no power to review once an approval has been granted and even assuming that the order of approval was granted by mistake even then D.I.O.S. has no jurisdiction to revoke the same unless opportunity of explanation of hearing was given. Paragraph 1 is reproduced:-

"There is no provision in the Intermediate Education Act or in the regulations framed thereunder conferring power on the District Inspector of Schools to review an order according approval under section 16-E of the Act. The District Inspector of Schools, like any other statutory authority, has, however, power to recall or revoke its order it it is obtained by mistake, misrepresentation or fraud. Even assuming that the order of approval was passed under some mistake, the Inspector had no jurisdiction to revoke the same unless some opportunity of explanation of hearing was given to the petitioner because once an approval is granted to the appointment of a teacher and if orders of his appointment are

issued, vested rights are created in his favour."

24. It is not in dispute between the parties that it was temporary vacancy and the procedure as prescribed under the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 is applicable. Sub-clause 3(i) provides that management shall intimate the vacancies to the District Inspector of Schools/RIGS and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the Manager of the institution along with the particulars given in Appendix "B" to this Order. Order (ii) of sub-clause 3 provides names and particular of the candidate and also of other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for this prior approval. Sub-clause (iv) provides on receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure, to communicate his decision within seven days of the receipt of papers by him from the Manager, the management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager. Order (i), (ii), (iii) and (iv) of sub-clause 3 are reproduced:

"(3) (i) The management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the Manager of the institution along with the particulars given in Appendix "B" to this Order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, issued with Notification No. Ma-1993/XV-7 (79)-1981, dated July 31, 1981, hereinafter to be referred to as the First Removal of Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the Head of institution.

(ii) The names and particulars of the candidate selected and also of other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of receipt of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or, as the case may be, on his failure, to communicate his decision within seven days of the receipt of papers by him from the Manager, the Management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the manager."

25. A bare perusal of Para 3 sub-clause (ii) and (iii), it is incumbent upon the Manager to issue an order of appointment after prior approval from the D.I.O.S. Or after a lapse of seven days from the date of receipt of particulars.

26. It is evident from the facts that on 25.08.1987 the case of Km. Suman Srivastava has been rejected by the RIGS

and on the same date appointment letter is issued to Km. Abha Rastogi and she joined on the following date. The approval was granted by R.I.G.S. on 28.02.1987. The Manager of the College in connivance with Suman Srivastava tried to mislead the RIGS by creating an impression that Km. Abha Rastogi has refused to join vide letter dated 12.02.1987. The RIGS in the impugned order dated 25.08.1987 takes notice of the fact that Km. Abha Rastogi vide letter dated 25.04.1987 had complained to the RIGS that the Management is not cooperating and not issuing the appointment letter and taking notice of the fact that the Management had allowed Km. Abha Rastogi last opportunity to join by 10.02.1987 and vide letter dated 12.02.1987 Abha Rastogi refused the offer of appointment, the impugned order has been passed without issuing notice to Smt. Abha Rastogi. The approval is granted in February, 1987 and the Management issues appointment letter in August 1987 and in the intervening six months the Management in collusion with Km. Suman Srivastava tried to non-suit Smt. Abha Rastogi on fact which was otherwise false and fabricated. The R.I.G.S. Should have issued notice to Km. Abha Rastogi before passing the order dated 25.08.1987 for the reason that Km. Abha Rastogi had already complained to the R.I.G.S. that the Manager was not issuing appointment letter. The withdrawal of approval and consequential order of termination without opportunity was bad and unsustainable and is liable to be set aside on that ground alone.

27. In due course of time, one Smt. Raksha Saxena Assistant Teacher working in L.T. Grade was confirmed by letter dated 09.05.1989. The post occupied by Km. Abha Rastogi became substantive vacancy. Section 33B was inserted on 06.04.1991 in U.P. Secondary Education Services Selection Board Act 1982 for regularization of ad hoc teachers including teachers appointed on short term vacancy. It is not in dispute that Km. Abha Rastogi fulfills all conditions for regularization under Section 33-B. C.T. Grade was declared dying cadre by the State of U.P. and as a matter of policy decision all C.T. Grade teachers were liable to be brought into next higher grade in the L.T. Grade. Km. Abha Rastogi was brought into L.T. Grade on regular basis w.e.f. 05.04.1995 vide letter dated 13.02.2006. The District Inspector of Schools rejected the claim of Km. Abha Rastogi for regularization in C.T. Grade vide order dated 23.03.1995 which is impugned in respect of Writ Petition No. 1172 of 1996 and was stayed by this Court vide order dated 27.02.1996. Thereafter, the District Inspector of Schools issued another letter on 13.121996 to the manager of the college to send papers of Km. Abha Rastogi for regularization. The matter is pending and has not been considered for regularization on account of the pendency of the writ petition.

28. For the reasons and law stated hereinabove, the writ petition No. 5318 of 1987, Km.Suman Srivastava Versus State of U.P. and others, is devoid of merit and is dismissed. Writ Petition No. 1172 of 1996, Smt. Abha Rastogi Versus State of U.P. and Writ Petition No. 6221 of 1987, Smt. Abha Rastogi Versus R.I.G.S.Lko, are allowed. The impugned orders dated 25.08.1987 and 31.08.1987 passed by the R.I.G.S. Lucknow and Manager respectively and order dated 23.03.1995 passed by the District Inspector of Schools, Lucknow, are quashed. It is directed that the case of Smt. Abha Rastogi shall be considered for regularization under

Section 33-B of the U.P. Secondary Education Selection Board Act, 1982 within three months from the date of service of certified copy of the order.

29. No order as to cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2014

BEFORE
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Criminal Misc. Application No. 5830 of 2014, (u/s 482 Cr.P.C.)

Mohd. Haroon & Ors. ..... Applicants
Versus
State of U.P. and Anr..... Opp. Parties

Counsel for the Petitioner:
Sri Ved Mani Sharma

Counsel for the Respondents:
A.G.A.

Cr.P.C. Section-482-application to quash criminal proceedings-on basis of compromise-offence under section 323, 324, 326, 504, 506 IPC-held-offence under Section 326 IPC found proved-offence being serious in nature having impact on society can not be quashed merely based upon compromise-claims rejected.

Held: Para-11
Offence under section 326 IPC was found proved against them, which is a serious offence punishable upto life imprisonment. Thus, the offence in question is definitely a serious nature of offence having its impact over the society. Hence, the same cannot be permitted to be quashed simply because the parties have entered into compromise.

Case Law discussed:
(2003) 4 SCC 675; (2008) 9 SCC 677; 2012(10) SCC; (2008)16 SCC 1.

(Delivered by Hon'ble Virendra Vikram Singh, J.)

1. Heard learned counsel for the applicants and learned Additional Government Advocate for the State.

2. The applicants have approached this Court by way of moving an application under section 482 Cr.P.C. and have prayed for quashing the proceedings of Criminal Case No. 1075 of 2011 (State vs Mohd Haroon and others) arising out of Case Crime No. 441 of 2009, under sections 324, 323, 326, 504 and 506 IPC, PS Nawabganj, district Bareilly pending before the Judicial Magistrate, Nawabganj, Bareilly.

3. The only ground on which the quashing of the criminal proceedings has been prayed is that the applicants have entered into compromise with Umakant, injured in the case. A joint affidavit showing the compromise between the parties has been filed as annexure-4 to the present application.

4. It has been argued that since the parties have entered into compromise, the proceedings of the case be quashed in view of the judgment of Hon'ble the Apex Court in the case of B.S. Joshi vs State of Haryana (2003) 4 SCC 675 and Nikhil Merchant vs Central Bureau of Investigation and Another (2008) 9 SCC 677.

5. The offence in question involves a serious offence like 326 IPC, which is punishable upto life imprisonment. The question at this juncture arises as to whether the Court is obliged or duty bound to quash the proceedings of a criminal case, in which the accused and the affected persons have entered into

compromise. In order to analyse the analogy of the decision of Hon'ble the Apex Court, as it has been relied upon needs be gone into.

6. In the case of B.S. Joshi vs State of Haryana referred to above, the dispute was between the husband and wife and the criminal proceedings were pending in respect of the matrimonial litigations, which was permitted to be quashed because of the compromise between the parties.

7. In the case of Nikhil Merchant vs Central Bureau of Investigation and Another, the dispute between the Company and the Bank were set at rest on the basis of the compromise arrived at by them whereunder the dues of the Bank have been cleared and the Bank does not bear any further claim agianst the Company. Under such a peculiar circumstances, the proceedings were quashed on the basis of the compromise between the parties.

8. The same matter again came before Hon'ble the Apex Court in the case of Gian Singh vs State of Punjab and another 2012 (10) SCC page 303, The case was referred to a larger Bench while two judges of Hon'ble the Apex Court raise suspicion about the legality of the law propounded in the case ofB.S. Joshi vs State of Haryana; Nikhil Merchant vs Central Bureau of Investigation and Another. The Hon'ble the Apex court in the case of Gian Singh vs State of Punjab though held that it cannot be said that the case of B.S. Joshi vs State of Haryana ,Nikhil Merchant vs Central Bureau of Investigation and Another and Manoj Sharma vs State and others (2008) 16 SCC 1 were not correctly decided, however, it was held that the heinous and serious offences of mental depravity or offence like murder, rape dacoity, etc or under special statues like Prohibition of Corruption Act or offence committed by Public Servant while working in their capacity as Public Servant, cannot be quashed even though, the victim or victim's family and offender have settled the dispute. Such offences are not private in nature and have a serious impact on a society. It was also held that in this judgment that before exercise of inherentpowers under section 482 Cr.P.C. High Court must have due regard to nature and gravity of the crime and its societal impact. Thus, from the judgment of Gian Singh vs State of Punjab (Supra) it is evident that even though the High Court in exercise of powers under section 482 Cr.P.C. is empowered to quash the proceedings of a criminal case, irrespective of the fact whether the offence is not mentioned in section 320 Part I and Part II Cr.P.C., but the court has not been given unfettered powers to quash the proceedings in every case where the parties to the offence entered into compromise. The charge sheet for certain offences especially mentioned in the judgment and for the remaining offences, it has been held that High Court must consider the nature and gravity of the crime and its impact over the society.

9. In view of the above proposition of Law, it lies incumbent in this Court toconsider the facts of the case as to whether in view of the compromise between the parties, the proceedings of the present case can be quashed.

10. It is the interest of the society and the society looks forward that any person, who has committed any offence should be put to trial and further be convicted, if sufficient evidence is available

against him. It is also necessary to deter the persons of shattered mentality, to have some fear for the law that they will have to face the consequences, if they involved in these criminal activities.

11. If the facts of the present case be looked into, it tells that all the applicants mercilessly assaulted Umakant on 9.6.2009 to the extent that he received grievous injuries. However, the injury report has not been filed by the applicants or they were shy of placing it before the court, but the fact remains that apart from the other offences, offence under section 326 IPC was found proved against them, which is a serious offence punishable upto life imprisonment. Thus, the offence in question is definitely a serious nature of offence having its impact over the society. Hence, the same cannot be permitted to be quashed simply because the parties have entered into compromise.

12. Accordingly, the present application with the prayer to quash the proceedings is hereby rejected.

13. The trial court is directed to proceed with the trial expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2014

BEFORE
THE HON'BLE A.P. SAHI, J.
THE HON'BLE M.C. TRIPATHI, J.

Civil Misc. Writ Petition No.5919 of 2014

Sursari Prasad..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
Sri R.S. Singh

Counsel for the Respondents:
C.S.C., Sri K.N. Mishra, Sri Abhishek Mishra

U.P. Cooperative Societies Act 1965-Constitution of India Art.-226-Alternative remedy-order passed under section 38 appealable under section 98(i)(d)-writ petition-challenging order passed by Joint Registrar on direction of Court-can not be entertained directly-petition dismissed on ground of alternative remedy.

Held: Para-7
The said provision makes it amply clear that an order such as that passed under Section 38 in the present case is appealable and, therefore, the preliminary objection raised by Sri Mishra is upheld.

(Delivered by Hon'ble A.P. Sahi, J.)

1. The petitioner is aggrieved by the order passed by the Joint Registrar dated 24.12.2013, Annexure-1 to the writ petition on the ground that the order is erroneous on various grounds and facts as well as in law.

2. Sri K.N. Mishra for the respondent - bank has raised a preliminary objection that the impugned order is appealable in terms of Section 98 (1) (d) of the U.P. Cooperative Societies Act, 1965, and, therefore, the petition should not be entertained.

3. We have perused the records and we find that the order of the Registrar is an outcome of a Division Bench judgment dated 11.1.2012 between the same parties in Writ Petition No.48177 of 2011, reported in (2012) 1 UPLBEC 798. The authority of the Registrar to hear the matter and dispose of the issue of disqualification was found to be within

the jurisdiction of the Registrar in terms of Section 38 of the 1965 Act.

4. In Section 2 (o), an Officer of the Cooperative Society has been defined which also includes a Member of Committee of Management. The provisions are extracted hereunder for ready reference:-

"(o) "Officer of a co-operative society" means the president, vice-president, chairman, vice-chairman, secretary, member of committee of management, treasurer, liquidator, administrator or any other persons employed by co-operative society whether with or without remuneration to carry on the business of the society or to supervise its affairs."

5. Consequently, the Division Bench upon an interpretation of Section 38 readwith Section 29 of the Act came to the conclusion that the Registrar has the authority to enter into such a question and accordingly, the Joint Registrar, who had issued the notices, was directed to dispose of the matter finally.

6. As a consequence of the aforesaid direction of the High Court, the impugned order has been passed. The same can be subjected to a challenge through an appeal as urged by Sri Misra. The provisions of Section 98 (1) (d) are extracted hereunder:-

"98 (1)(d). an order of the Registrar under sub-section (2) of Section 27 expelling or removing a member or under sub-section (2) of Section 38 removing or disqualifying any officer of a co-operative Society."

7. The said provision makes it amply clear that an order such as that passed under Section 38 in the present case is appealable and, therefore, the preliminary objection raised by Sri Mishra is upheld.

8. The writ petition is dismissed on the ground of availability of alternative remedy.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.03.2014

BEFORE
THE HON'BLE BALA KRISHNA NARAYAN, J.

U/s 482/378/407 No. 6319 of 2013

Lakhan Singh..... Applicant
Versus
State of U.P. & Anr..... Opp. Parties

Counsel for the Petitioner:
Sri Gopesh Tripathi

Counsel for the Respondents:
Govt. Advocate

Cr.P.C. Section 482-Quashing of order-rejecting application under section 156(3) Cr.P.C.-on objection by prospective-accused-held-no locustandi unless process issued on cognizance taken-order impugned quashed-direction for fresh consideration given.

Held: Para No. 32& Para 10-
In the light of the aforesaid discussions, it is abundantly clear that the prospective accused has no locus standi to challenge a direction for investigation of a cognizable case under Section 165(3) Cr.P.C. before cognizance or issuance of process against the accused. The first question is answered accordingly.

For the aforesaid reasons and the settled legal position on the issue, I have no hesitation in holding that the Chief Judicial Magistrate, Raebareli clearly exceeded his

jurisdiction in rejecting the application moved by the applicant before him after considering the objection filed before him by the proposed accused, opposite party no. 2.

Case Law discussed:
1997(34) ACC 163; 2009 Crl. Law Journal 1683; 2011(2) ALJ 217.

(Delivered by Hon'ble Bal Krishna Narayan, J.)

1. Counter affidavit filed on behalf of the State today is taken on record.

2. Heard learned counsel for the applicant and Smt. Madhulika Yadav, learned A.G.A. for the State. None has put his appearance on behalf of the opposite party no. 2, despite being served.

3. The short controversy involved in this application under section 482 Cr.P.C. is that whether the learned Magistrate was legally justified in rejecting the application moved by the applicant under section 156(3) Cr.P.C. before him on the basis of the objection filed by the proposed accused before him at the pre cognizance stage.

4. Learned counsel for the applicant submitted that the proposed accused has no right of hearing at the stage of making an order under section 156(3) Cr.P.C. or during the stage of investigation until court took cognizance and issued process. In support of his contention he has placed reliance on Karan Singh & others vs. State of U.P. & others 1997(34) ACC 163, Abdul Aziz & others vs. State of U.P. and others 2009 Crl. Law Journal 1683 and Father Thomas versus State of U.P. and another 2011(2) ALJ 217.

5. Smt. Madhulika Yadav, learned A.G.A. has made her submissions in support of the impugned judgment and order.

6. I have heard the learned counsel for the parties present and perused the impugned order dated 21.10.2013 passed by the Chief Judicial Magistrate, Raebareli, copy whereof has been filed as Annexure-9, as well as the other material brought on record.

7. The brief facts of the case are that the applicant filed an application under section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Raebareli alleging commission of offences under Sections, 420, 467, 468 and 218 I.P.C. by one Sri Pankaj, Circle Officer (city), Raebareli with a prayer for registering the first information report against him and investigating the same. Upon getting information of filing of the application under Section 156(3) Cr.P.C. against him by the applicant, the opposite party no. 2 appeared before the Chief Judicial Magistrate, Raebareli on 1.2.2013 and filed his objection before him on the same date, copy whereof has been filed as Annexure-8 to this application. The Chief Judicial Magistrate, Raebareli by the impugned order after considering the objection filed by the opposite party no. 2 rejected the application moved by the applicant before him under Section 156(3) Cr.P.C. As far as the legal position on the issue involved in this matter is concerned, the same is crystal clear. This Court has repeatedly held in a catina of decisions that the proposed accused has no locus or right to be heard at the pre cognizance stage. This Court in the case of Karan Singh (supra) while dealing with the same issue has held as hereunder :-

"Where an order is made under Section 156(3) Cr.P.C. directing the police to register FIR and investigate the same, the Code nowhere provides that the Magistrate shall hear the accused before issuing such a direction,nor any person

can be supposed to be having a right asking the Court of law for issuing a direction that an FIR should not be registered against him. Where a person has no right of hearing at the stage of making an order under section 156(3) or during the stage of investigation until court takes cognizance and issues process, he cannot be clothed also with a right to challenge the order of the Magistrate by preferring a revision under the Code. He cannot be termed as an "aggrieved person" for purpose of section 397 of the Code."

8. This Court again in paragraph 9 of the case of Abdul Aziz (supra) has reiterated as hereunder :-

"Thus at the stage of 156(3) Cr.P.C. any order made by the Magistrate does not adversely affect the right of any person, since he has got ample remedy to seek relief at the appropriate stage by raising his objections. It is incomprehensible that accused cannot challenge the registration of F.I.R. by the police directly. But can challenge the order made by the Magistrate for the registration of the same with the same consequences. The accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and that he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed prior to his summoning. Further, if the accused does not have a right to install the investigation, but for the limited grounds available to him under the law, it surpasses all suppositions to comprehend that he possesses a right to resist registration of F.I.R."

9. Full Bench of this Court in paragraphs 30, 31, 32 and 65A in Father Thomas (supra) has held as hereunder :-

30. We have also seen that during the stage of investigation the accused has no right of intervention as to the mode and manner of investigation and who should investigate.

31. Even after submission of a final report, either when the police decides to order further investigation under Section 173(8) Cr.P.C. or before accepting or rejecting the report, only the informant is required to be heard. The accused is not entitled to be heard even at this stage. In this view it would be unrealistic to confer a right of hearing when only an innocuous direction for investigation is passed by the Magistrate in a case disclosing a cognizable offence, especially when the allied order regarding the decision of a police officer to investigate in exercise of powers under section 156(1) is not vulnerable to challenge in the criminal revision. Also when objections to maintainability of a case are raised on the ground of limitation under Section 468 or under section 195 Cr.P.C., the appropriate stage for raising these objections is at the time of cognizance or at the time of framing of charges, and not when a Magistrate issues a direction for investigation under Section 156(3) Cr.P.C.

32. In the light of the aforesaid discussions, it is abundantly clear that the prospective accused has no locus standi to challenge a direction for investigation of a cognizable case under Section 165(3) Cr.P.C. before cognizance or issuance of process against the accused. The first question is answered accordingly.

65A. The order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C. directing the police to register and investigate is not open to revision at the instance of a person against

whom neither cognizance has been taken nor any process issued."

10. For the aforesaid reasons and the settled legal position on the issue, I have no hesitation in holding that the Chief Judicial Magistrate, Raebareli clearly exceeded his jurisdiction in rejecting the application moved by the applicant before him after considering the objection filed before him by the proposed accused, opposite party no. 2.

11. In view of the above, the impugned order dated 21.10.2013 passed by the Chief Judicial Magistrate, court no. 9, Raebareli is set aside. The matter is remitted back to the C.J.M., Court no. 9, Raebareli for passing a fresh order in the matter keeping in view the settled legal position on the issue.

12. Accordingly, this application is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.03.2014

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Service Single No. 6412 of 1999

U.P. Cooperative Union Ltd. Petitioner
Versus
Presiding Officer Labour Court. Respondent

Counsel for the Petitioner:
Sri Rakesh Kumar

Counsel for the Respondents:
C.S.C., Sri B.S. Yadav

Constitution of India-Art.-226-claim for arrears of salary-of higher post-workman being employee of co-operative societies Act 1961-provisions of Industrial Tribunal Act 1947-not applicable-order passed by Labor Court-held without jurisdiction-order quashed.

Held: Para-18
The impugned order dated 20.09.1999 cannot be sustained in the light of the law stated herein above. The labour court did not have jurisdiction to entertain the application as U.P. Co-operative Societies Act, 1965 being special Act and Chapter IX of the Act provides for settlement of dispute including claims for amounts due. The order impugned passed by the labour court is also without jurisdiction as the entire mechanism for redressal of dispute is provided under Chapter IX of the U.P. Co-operative Societies Act, 1965. The impugned order dated 20.09.1999 passed by the respondent no. 1, Presiding Officer, Labour Court, Lucknow cannot be sustained either on merit or on the ground of jurisdiction and is hereby quashed.

Case Law discussed:
(2008)7 SCC 22; 2007AIR SCW 956; 2006 AIR SCW 4901; (2005)8 SCC 58; (1997)5 SCC 59; (1995) 1 SCC 235; [2008(3) LBESR 363 (All)]; [2001(1)SCC 73]; [2005(8) SCC 58]; 2006 SC 1784:2006 LLR 494(SC); AIR 2008 SC 968.

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

1. Matter has been taken up in the revised list.

2. Heard Sri Rakesh Kumar, learned counsel appearing for the petitioner for U.P. Cooperative Union Limited.

3. This writ petition has been preferred against the order dated 20.09.1999 passed by the respondent no. 1, Presiding Officer, Labour Court, Lucknow in exercise of its power under Section 6(H) of the U.P. Industrial Disputes Act, 1947 which is pari materia to Section 33-C(2) of the Industrial Disputes Act, 1947. The respondent no. 2 i.e. Workman had approached Labour Court making an application under

Section 33-C(2) stating therein that though he was a clerk he was working on the post of Assistant Receptionist from 1989 to 1992 and thereafter he was transferred as clerk, therefore, he has claimed arrears of salary amounting to Rs. 65,572.45 paisa for the post of Assistant Receptionist.

4. The petitioner filed their objections to the claim stating therein that respondent no. 2 was clerk and at no point of time he was transferred or appointed as Assistant Receptionist. The claim is not maintainable under Section 33-C(2) as claim of the workman is disputed and the same has not been adjudicated upon.

5. Sri Rakesh Kumar further states that U.P. Co-operative Societies Act, 1965 is a special enactment and the remedies for redressal of dispute is provided in the Act itself and is a self contained code, U.P. Industrial Disputes Act is not applicable to the employees of Co-operative Societies.

6. In support of his contention, learned counsel for the petitioner has relied upon the following decisions:-

"D. Krishnan and another versus Special Officer, Vellore Cooperative Sugar Mill and another, (2008) 7 Supreme Court Cases 22, Ghaziabad Zila Sahkari Bank Ltd. Versus Addl. Labour Commissioner and others, 2007 AIR SCW 956, U.P. State Road Transport Corporation versus Shri Birendra Bhandari, 2006 AIR SCW 4901, State of U.P. and another versus Brijpal Singh, (2005) 8 SCC 58, Union of India versus Gurbachan Singh and another, (1997) 5 SCC 59, Municipal Corporation of Delhi versus Ganesh Razak and another, (1995) 1 SCC 235 and Sahkari Ganna Vikas Samiti Ltd., Bijnor versus Jitendra Mohan and another, [2008(3) LBESR 363 (All)]."

7. In D. Krishnan's case (supra), the Hon'ble Supreme Court held that proceedings under Section 33-C(2) are in the nature of execution proceedings. Such proceedings presupposes some adjudication leading to determination of a right, which has to be enforced.

8. In Ghaziabad Zila Sahkari Bank Limited's case (supra), the Supreme Court has held that the U.P. Co-operative Societies Act, 1965 will apply to persons in the employment of Co-operative Societies, to the exclusion of all other labour laws including U.P. Industrial Dispute Act, 1947. Paragraph 60 is reproduced:-

"*60. The general legal principle in interpretation of statutes is that 'the general Act should lead to the special Act'. Upon this general principle of law, the intention of the U.P legislature is clear, that the special enactment UP Co-operative Societies Act, 1965 alone should apply in the matter of employment of Co-operative Societies to the exclusion of all other Labour Laws. It is a complete code in itself as regards employment in co-operative societies and its machinery and provisions. The general Act the UPID Act, 1947 as a whole has and can have no applicability and stands excluded after the enforcement of the UPCS Act. This is also clear from necessary implication that the legislature could not have intended 'head-on-conflict and collision' between authorities under different Acts"*

9. The Hon'ble Supreme Court further stated that in case the ingredients of section 6(H) are not satisfied then also

there is no adjudicated claim but only a highly disputed claim of workman. The scope of section 6(H) was discussed in paragraph 64 which is reproduced:

"64. In the alternative if we are to presume that the ingredients of S.6H are not satisfied then also there is no adjudicated claim but only a highly disputed claim of the workman. In this connection, one can refer to the decision of this court in the case of Central Inland Water Transport Corporation vs. The Workmen and Another (supra) wherein this court opined that:

"11. The only question which arises for determination in this Court is whether the Labour Court has jurisdiction to adjudicate on the issues referred to it under Section 33(C)(2) of the Industrial Disputes Act. Sub-section (2), which is part of Section 33C dealing with "the recovery of money due from an employer" reads as follows:

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government.

12. It is now well-settled that a proceeding under Section 33(C)(2) is a proceeding, generally, in the nature of an execution proceeding wherein the Labour Court calculates the amount of money due to a workman from his employer, or if the workman is entitled to any benefit which is capable of being computed in terms of money, the Labour Court proceeds to compute the benefit in terms of money. This calculation or computation follows upon an existing right to the money or benefit, in view of its being previously adjudged, or, otherwise, duly provided for. In Chief Mining Engineer, East India Coal Co. Ltd. v. Rameswar and Ors. it was reiterated that proceedings under Section 33(C)(2) are analogous to execution proceedings and the Labour Court called Upon to compute in terms of money the benefit claimed by workmen is in such cases in the position of an executing court. It was also reiterated that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer.

13. In a suit, a claim for relief made by the plaintiff against the defendant involves an investigation directed to the determination of (i) the plaintiff's right to relief; (ii) the corresponding liability of the defendant, including, whether the defendant is, at all, liable or not; and (iii) the extent of the defendants liability, if any. The Working out of such liability with a view to give relief is generally regarded as the function of an execution proceeding. Determination No. (iii) referred to above, that is to say, the extent of the defendant's liability may sometimes be left over for determination in execution proceedings. But that is not the case with the determinations under heads (i) and (ii). They are normally regarded as the functions of a suit and not an execution proceeding. Since a proceeding under Section 33(C)(2) is in the nature of an execution proceeding it should follow that an investigation of the nature of determinations (i) and (ii) above is,

normally, outside its scope. It is true that in a proceeding under Section 33(C)(2), as in an execution proceeding, it may be necessary to determine the identity of the person by whom or against whom the claim is made if there is a challenge on that score. But that is merely 'Incidental'. To call determinations (i) and (ii) 'Incidental' to an execution proceeding would be a perversion, because execution proceedings in which the extent of liability is worked out are just consequential upon the determinations (i) and (ii) and represent the last stage in a process leading to final relief. Therefore, when a claim is made before the Labour Court under Section 33(C)(2) that court must clearly understand the limitations under which it is to function. It cannot arrogate to itself the functions--say of an Industrial Tribunal which alone is entitled to make adjudications in the nature of determinations (i) and (ii) referred to above, or proceed to compute the benefit by dubbing the former as 'Incidental' to its main business of computation. In such cases determinations (i) and (ii) are not 'Incidental' to the computation. The computation itself is consequential upon and subsidiary to determinations (i) and (ii) as the last stage in the process which commenced with a reference to the Industrial Tribunal. It was, therefore, held in State Bank of Bikaner and Jaipur v. R.L. Khandelwal, that a workman cannot put forward a claim in an application under Section 33(C)(2) in respect of a matter which is not based on an existing right and which can be appropriately the subject-matter of an industrial dispute which requires a reference under Section 10 of the Act.

14. The scope of Section 33(C)(2) was illustrated by this Court in The Central Bank of India Ltd. v. P.S. Rajagopalan etc.. Under the Shastri Award, Bank clerks operating the adding machine were declared to be entitled to a special allowance of Rs. 10/- per month. Four clerks made a claim for computation before the Labour Court. The Bank denied the claim that the clerks came within the category referred to in the award and further contended that the Labour Court under Section 33(C)(2) had no jurisdiction to determine whether the clerks came within that category or not. Rejecting the contention, this Court held that the enquiry as to whether the 4 clerks came within that category was purely 'incidental' and necessary to enable the Labour Court to give the relief asked for and, therefore, the Court had jurisdiction to enquire whether the clerks answered the description of the category mentioned in the Shastri Award, which not only declared the right but also the corresponding liability of the employer bank. This was purely a case of establishing the identity of the claimants as coming within a distinct category of clerks in default of which it would have been impossible to give relief to anybody falling in the category. When the Award mentioned the category it, as good as, named every one who was covered by the category and hence the enquiry, which was necessary, became limited only to the clerks' identity and did not extend either to a new investigation as to their rights or the Bank's liability to them. Both the latter had been declared and provided for in the Award and the Labour Court did not have to investigate the same. Essentially, therefore, the assay of the Labour Court was in the nature of a function of a court in execution proceedings and hence it was held that the Labour Court had jurisdiction to determine, by an incidental enquiry, whether the 4 clerks came in the

category which was entitled to the special allowance.

15. It is, however, interesting to note that in the same case the court at page 156 gave illustrations as to what kinds of claim of a workman would fall outside the scope of Section 33(C)(2). It was pointed out that a workman who is dismissed by his employer would not be entitled to seek relief under Section 32(C)(2) by merely alleging that, his dismissal being wrongful, benefit should be computed on the basis that he had continued in service. It was observed "His ... dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed ... him, a claim that the dismissal ... is unlawful and, therefore, the employee continues to be the Workman of the employer and is entitled to the benefits due to him under a preexisting contract, cannot be made under Section 33(C)(2)". By merely making a claim in a loaded form the workmen cannot give the Labour Court jurisdiction under Section 33(C)(2)."

10. In U.P. State Road Transport Corporation's case (supra), the Hon'ble Supreme Court relying upon the State Bank of India versus Ram Chandra Dubey and others, (2001(1) SCC 73) and a three-Judge Bench decision in State of U.P. and another versus Brijpal Singh, (2005 (8) SCC 58), discussed the scope of Section 33-C(2), holding, that the benefits to be enforced under section 33-C(2) of the Act must be a preexisting benefit or one flowing from preexisting right and there is a difference beween the preexisting right or benefit on one hand and the right or benefit which is considered just and fair on the other hand is vital. The former falls within jurisdiction of the Labour Court exercising powers under section 33-C(2) of the Act while the latter does not.

11. In Gurubachan Singh's case (supra), Hon'ble Supreme Court held that the power under Section 33-C(2) does not extend to adjudication of a fresh case treating a part of service rendered by workman as a re-employment after retirement.

12. Similarly, in Municipal Corporation of Delhi's case (supra), the Supreme Court held that the Labour Court's jurisdiction under Section 33-C(2) cannot be invoked to adjudicate dispute of entitlement of the workman, it can only interpret the award or settlement on which the claim is based. The jurisdiction is like that of the Executing Court.

13. In Union of India Vs. Kankuben AIR 2006 SC 1784: 2006 LLR 494 (SC) the Apex Court referring to earlier decisions observed that the benefit sought to be enforced under Section 33-C(2) is necessarily "a pre-existing benefit or one flowing from a pre existing-right". The difference between a pre-existing right and benefit on the one hand and right and benefit which is considered just and fair on the other hand is vital. The former comes within the ambit of Section 33-C(2) while latter does not.

14. Considering pari materia provision in Section 6-H of U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "U.P. Act, 1947") in Hamdard Laboratories Vs. Deputy Labour Commissioner AIR 2008 SC 968, the Court said that Section 6-H (1) of the U.P. Act, 1947 is in the nature of an execution proceedings. It can be invoked inter alia in the event any money is due to workman under an award but cannot be invoked in a

case where ordinarily an industrial dispute can be raised and can be referred to any adjudication by the appropriate Government to an industrial Court. The authorities under Section 6-H cannot determine any complicated question of law and also cannot determine in regard to existence of legal right. The Court went to observe that it cannot usurp the jurisdiction of the State Government under Section 11-B of the U.P. Act, 1947. The Court said in paras 38 and 39 that the jurisdiction of Labour Court under Section 33-C(2) is limited and if existence of right itself is disputed the provisions may not be held to have any application.

15. This Court in Sahkari Ganna Vikas Samiti's case (supra), set aside the order of labour court on the ground that it had no jurisdiction to adjudicate the dispute of the employees of co-operative societies.

16. In view of the exposition of law, stated herein above and considering the facts that by order dated 25.07.1989, respondent no. 2 was attached as Assistant Receptionist but was not paid the salary of the Assistant Receptionist nor over time charges was paid for the additional shifts and the workman/respondent no. 2 prayed for computing the amounts towards salary and over time charges. The petitioner-Cooperative Society disputed the claim of the respondent no. 2. It was categorically stated that the respondent no. 2 was never appointed as Assistant Receptionist nor any service was taken from the respondent no. 2 in shifts. The labour court by the impugned order partially allowed the application holding that the respondent did not work in shifts but since he was transferred as Assistant Receptionist, therefore, the workman was entitled to the salary of Assistant Receptionist. The order dated 25.07.1989 clearly states that the workman/respondent no. 2 was not posted as Assistant Receptionist, but he was attached with the receptionist and subsequently he was transferred as a clerk.

17. From the pleadings of the parties, it is evident that the claim of the respondent no. 2 is not based upon any adjudication, the post as well as the amount was itself disputed which needed adjudication. The labour court erred in adjudicating the dispute as it was beyond its scope under Section 33-C(2) of the Industrial Disputes Act.

18. The impugned order dated 20.09.1999 cannot be sustained in the light of the law stated herein above. The labour court did not have jurisdiction to entertain the application as U.P. Co-operative Societies Act, 1965 being special Act and Chapter IX of the Act provides for settlement of dispute including claims for amounts due. The order impugned passed by the labour court is also without jurisdiction as the entire mechanism for redressal of dispute is provided under Chapter IX of the U.P. Co-operative Societies Act, 1965. The impugned order dated 20.09.1999 passed by the respondent no. 1, Presiding Officer, Labour Court, Lucknow cannot be sustained either on merit or on the ground of jurisdiction and is hereby quashed.

19. The writ petition is allowed.

20. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.

THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 6603 of 2014

Jyoti Shankar Pandey & Ors.....Petitioners
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioners:
Sri Anil Tiwari

Counsel for the Respondents:
C.S.C., Sri Tarun Verma, Sri Vishwa Pratap Singh

Constitution of India, Art.-226-House grabbing-clear from advocate commission report-as well as from court affidavit filed by S.S.P.-incident of house grabbing proceed-sub-inspector also involved with them-such practice highly depreciated-it is duty of administration to maintain law and order-adequate security be provided to the petitioner-investigation including conduct of S.I. be completed within 6 weeks-if role affirmed disciplinary action be taken against S.I. concern.

Held: Para-14
In the light of the aforesaid, we find that apparently on the basis of the affidavits that has been filed before the Court, the petitioners are in possession and they cannot be dispossessed except in accordance with law. An attempt to grab the house forcefully was made. It is alleged that a Sub-Inspector and Chowki In-charge were also involved. The rule of law is required to be maintained. It is the duty of the administration, especially the police to maintain law and order and ensure that no such incident of house grabbing takes place. The practice of house grabbing is deprecated.

Case Law discussed:
1995(26) ALR 114; 2001(42) ALR 817.

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

1. The petitioners' have filed the present writ petition praying for a writ of mandamus commanding the respondents not to take any action against the petitioners with regard to their peaceful living and possession in their residential house being House No.581/1, Ramanand Nagar, Allahpur, Allahabad except in accordance with law. The petitioners have also prayed for a writ of mandamus commanding the respondents to provide police protection, especially against the Sub-Inspector and In-charge Police Chowki.

2. The facts leading to the filing of the writ petition is, that the petitioner no.1 purchased House No.581/1 measuring 252 sq. meters at Allahpur in the name of his daughter from Sangam Lal by means of a registered sale deed dated 13th December, 2013, pursuant to which, the petitioners were put in possession and are residing therein. It is alleged that on 26th January, 2014 two persons along with armed persons came to their house and threatened the occupants to vacate the premises. These two persons alleged themselves to be the true owners of the house in question. The petitioners lodged an FIR on the same date being Case Crime No.31 of 2014. In the night of 27th January, 2014 around 10.00 pm, the same persons along with armed persons again came at their residence and started throwing out the household articles from the house. The neighbours interfered and intimated the police. The incident was also reported to the Senior Superintendent of Police. On account of the intervention of the neighbours, these unknown persons made a retreat only to come again on the night of 28th January, 2014 and, this time, these persons were accompanied by Sri S.K. Sharma, Sub-Inspector. It is alleged that these persons dragged the ladies out of the house and also indulged in beating some of the occupants. It is alleged that the house was locked by the Sub-Inspector but upon intervention of

certain Advocates who are the friends of the petitioner no.1 and other officials of the administration, the possession was given back to the petitioner after midnight. It is alleged that for the incident, which occurred on 28th January, 2014, an application was filed before the police station but no first information report was lodged.

3. The petitioner, thereafter, filed the present writ petition, which came up for admission on 31st January, 2014. This Court appointed an Advocate Commissioner and directed him to visit the spot and submit a report. The Advocate Commissioner submitted a report indicating that the petitioners were occupying the premises and their household articles were found inside the house. The Court Commissioner also reported that an attempt was made to demolish the boundary wall at the rear portion of the house. In the light of the aforesaid report, notice was issued to respondent no.7 and to the state authorities to file a counter affidavit. The Court also directed the Senior Superintendent of Police and the Station House Officer to ensure that no unforeseen incident takes place at the premises in question and to provide adequate security to the petitioners in the event, the need arose.

4. A counter affidavit has been filed on behalf of the Senior Superintendent of Police. The respondent admits that a first information report was lodged on 26th January, 2014 and action was taken and that S.K. Sharma, Sub-Inspector was appointed as the Investigating Officer. The respondent also admits the incident, which took place on 27th January, 2014 and submitted that pursuant to receiving a telephonic call received at 100, the police reached the spot and interfered and tried to resolve the matter. The respondent further admits the incident of 28th January, 2014 and submitted that Chowki In-Charge was sent to resolve the matter. The respondents further admitted that the petitioner's application dated 28th January, 2014 was received and the Station House Officer was directed to maintain law and order. The respondents further submit that on 29th January, 2014 an order was passed taking away the investigation from S.K. Sharma, Sub-Inspector, who was transferred to police line.

5. Upon a direction from the Court, the learned Standing Counsel has submitted that the police is still investigating the matter.

6. Respondent no.7, the alleged person, who was involved in the incident, which occurred on 26, 27th and 28th January, 2014 was impleaded under the orders of the Court. The said respondent has filed a counter affidavit contending that he had purchased Araji No.39, 41, 50, 51 and 52 measuring 378 sq. meters by means of a registered sale deed dated 19th October, 2012, pursuant to which, respondent no.7 was given possession and his name was mutated in the municipal records. It is alleged that a portion of the house in question was also part of the sale deed of respondent no.7. Respondent no.7 however, contends that on 1st March, 2013 certain antisocial elements had taken illegal possession of his property. In this regard, he had filed an application before the Sub-Divisional Magistrate praying that possession be given back and had also filed another application for demarcation of the plot. Since nothing happened, respondent no.7 filed another application before the District Magistrate, who by an order dated 15th July, 2013 directed the Sub-Divisional Magistrate to look into the matter. It transpires that the Kanoongo submitted a report dated 26th July, 2013 indicating that since the plot was in an

abadi area, it was not possible to demarcate the plot and that no possession could be given to respondent no.7 and that he should be advised to file a civil suit. Inspite of the aforesaid report, it transpires that respondent no.7 filed a fresh application dated 8th October, 2013 before the Sub-Divisional Magistrate praying that possession of the plot should be given by police force. The respondent no.7 contended that at this stage Sangam Lal, who eventually sold the property to the petitioners started claiming himself that he was the owner and, subsequently, sold the house to the petitioners vide sale deed dated 13th December, 2013. Respondent no.7 filed a first information report against Sangam Lal on 11th January, 2014 indicating therein that he has been dispossessed by Sangam Lal and that possession should be given back to him. Respondent no.7 further contends that when he returned from his village on 29th January, 2014 he found that he had been dispossessed by the petitioner from the house in question. The respondents submitted that the petitioner has misused the process of the Court and have forcibly entered into the house through police force, which is owned by them.

7. The Sub-Inspector has also filed a counter affidavit. The said respondent admits his presence at the spot on the night of 28th January, 2014 and also admits that the investigation was taken away from him.

8. In the light of the rival stand of the parties, the Court has heard Sri Anil Tiwari, the learned counsel for the petitioners and Sri Tarun Verma, Advocate assisted by Sri Vishwa Pratap Singh, the learned counsel for respondent no.7 as well as the learned Standing Counsel for the State-respondents.

9. The learned counsel for the petitioners submitted that the sale deed of the petitioners is different and distinct from the sale deed of respondent no.7. The boundaries are different, the house number is different and the area is different. Further, the sale deed of respondent no.7 does not indicate that there exists any structure, namely, a house and only indicates that a small portion of open land from 5 plots have been purchased. The learned counsel contended that in the garb of the sale deed, the respondents was using police force and armed persons to grab the house of the petitioners illegally without any authority of law. It was also alleged that the brother of respondent no.7 is a sitting MLA of the ruling party.

10. Upon hearing the learned counsel for the parties, the Court finds that the incident of house grabbing, which occurred on 26th, 27th and 28th January, 2014 has been admitted by the police in their counter affidavit. On the other hand, the counter affidavit of respondent no.7 reveals a vague stand with regard to his possession of the property in question. Respondent no.7 contends in paragraph 9 of the counter affidavit that he was dispossessed on 1st March, 2013 by unknown antisocial elements. In paragraph 11 of the counter affidavit, respondent no.7 contends that he was again dispossessed in July, 2013. The Kanoongo in his report dated 26th July, 2013 categorically states that possession cannot be given to respondent no.7. In paragraph 13 of the counter affidavit, respondent no.7 contends that he moved an application in August, 2013 praying for delivery of possession. In paragraph 15 of the counter affidavit, respondent no.7 contends that he was dispossessed on 26th January, 2014. Finally, in paragragh 17, the respondent no.7 contends that when he came back from his village he found that the petitioners had taken possession of the house on 29th January, 2014.

11. The fact that the petitioners are in possession of the house in question is borne

out by the counter affidavit filed by the police as well as by the Advocate Commissioner's report. The possession of the petitioners is further fortified by the counter affidavit of respondent no.7 indicating that he was not in possession since March, 2013.

12. The Court further finds from a perusal of the sale deeds of the petitioners and respondent no.7 that the areas of the plot are different and the boundaries are different. Whereas the sale deed of the petitioners indicate the purchase of land and house, the sale deed of respondent no.7 does not indicate the existence of any structure such as house in question.

13. House grabbing is a serious matter. Taking illegal and forcible possession without any authority of law on the basis of an alleged sale deed is wholly illegal. The country is governed by a rule of law and no one could be allowed to break the law. This Court in Smt. Chetan Atma Govil Vs. Rent Control and Eviction Officer and others, 1995 (26) ALR 114 and Sanjay Singh Vs. State of U.P. and others, 2001 (42) ALR 817 has condemned the practice of house grabbing.

14. In the light of the aforesaid, we find that apparently on the basis of the affidavits that has been filed before the Court, the petitioners are in possession and they cannot be dispossessed except in accordance with law. An attempt to grab the house forcefully was made. It is alleged that a Sub-Inspector and Chowki In-charge were also involved. The rule of law is required to be maintained. It is the duty of the administration, especially the police to maintain law and order and ensure that no such incident of house grabbing takes place. The practice of house grabbing is deprecated.

15. We accordingly, dispose of the writ petition by issuing a writ of mandamus to respondent nos.2, 3, 4 and 5 to ensure that no unforeseen incident takes place at the premises in question, such as house grabbing and that adequate security is provided to the petitioners in the event, such a need arises. We also direct the police authorities to complete the investigation as early as possible preferably within six weeks from today. The investigation will also include the role of the Sub-Inspector and other police personnel and, in the event, their role is affirmed, disciplinary action would be initiated against them. It would be open to the parties to file a suit in a court of law to establish their title on the property in question.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE RAJAN ROY, J.

Civil Misc. Writ Petition No. 7120 of 2014

Mohd. Sultan & Ors..... Petitioners
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioners:
Sri Ananad Mohan Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-21-Right to life and liberty-petitioner seeking protection-from unnecessary harassment by local police-in add hours in mid night-only reason disclosed the petitioner to be hurdend criminal-merely filing charge sheet-can not be basis of presumption of criminal-knocking the doors by police without any authority of law-amounts to intrusion into fundamental

rights-mandamus issued-with cost of Rs. 10,000/-.

Held: Para-11
In the instant case, the respondents contend that petitioner no.1 is a notorious criminal. The mere fact that a chargesheet has been filed against him does not make him a notorious criminal. The respondents have not said anything about the antecedents of the other petitioners nor has stated anything about the antecedents of the respondents against whom a first information report had also been lodged. The State authorities have to take action which is reasonable and fair and just procedure established by law has to be followed. Even though the petitioners have been chargesheeted, they still have their right under the Constitution. The action of the respondents in making such nocturnal visits is wholly illegal and without any sufficient cause.

Case Law discussed:
(2012)5 SCC 1.

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

1. Heard the learned counsel for the parties.

2. The petitioners have filed the present petition praying for a writ of mandamus commanding the respondents not to interfere in the peaceful life and liberty of the petitioners and have further prayed that they should not be harassed and humiliated by the police at odd hours of the night without any just and cogent reason. The petitioners have also prayed that an enquiry be instituted in the matter relating to the nocturnal visits made by the police at the residence of the petitioners.

3. The petitioners contend that on account of some inter se dispute with respondents no.6 and 7 several first information reports had been lodged against the petitioners and cross first information reports have also been lodged by the petitioners against respondents no.6 and 7. Pursuant to the investigation, chargesheets against the petitioners as well as against respondents no.6 and 7 have been filed before the appropriate court of law.

4. The petitioners contend that in spite of the chargesheets being filed, the petitioners are being harassed by the police in collusion with respondents no.6 and 7. Various first information reports have been lodged in various police stations in the city of Allahabad and the petitioners have gone to all the police stations and have produced the relevant documents inspite of which the respondents continue to harass the petitioners by visiting their residence at odd hours of the night without any cogent reasons.

5. This Court called for a counter affidavit. Respondent no.3,Senior Superintendent of Police, Allahabad has filed a counter affidavit indicating that the petitioner no.1 is a notorious criminal and a land mafia. The police is not harassing nor humiliating the petitioners nor are they in collusion with private respondents no.6 and 7. Pursuant to the first information reports lodged by various parties, including the petitioners, fair investigation was made and without being influenced by any person or authority, chargesheets were filed which are pending in a court of law.

6. Having heard the learned counsel for the parties at some length and having perused the record, the Court finds that a categorical assertion was made by the petitioners in paragraph 12 of the writ petition, namely, that the police are harassing the petitioners by visiting them at odd hours and also lifting them at odd hours. This specific assertion has not been denied by the

Senior Superintendent of Police in paragraph 6 of his counter affidavit.

7. Personal liberty is a fundamental right of the petitioners, guaranteed under Article 21 of the Constitution of India. Such right which is given under the Constitution cannot be infringed by the police by carrying out investigation in such a nefarious manner. There is no allegation in the counter affidavit that the petitioners are not participating in the investigation or are absconding.

8. On the other hand, they admit the assertions made by the petitioners in the writ petition that all relevant documents have been produced by them to the police authorities. Consequently, the Court does not find any justification in the action of the police in visiting the residence of the petitioners at odd hours of the night in the absence of any cogent or sufficient reason.

9. In Ramlila Maidan Incident, In Re, (2012) 5 SCC 1, the Supreme Court held that right to sleep is a biological necessity and interfering with the person's sleep is prohibited by the Constitution. The Supreme Court held that the right to sleep is associated with sound health, which is an inseparable facet of Article 21 of the Constitution. The Supreme Court held that the knock at the door by the police without authority of law amounts to an incursion into privacy and violation of the fundamental rights of a citizen. The right to privacy has also been held to be a fundamental right being an integral part of the Constitution. The Supreme Court further held that the legitimate intrusion into the privacy of a person is not permissible as right to privacy is inclusive in the right to life and liberty guaranteed under the Constitution.

10. The primary task of the State is to provide security to all citizens without violating human dignity. Privacy and dignity of human life is a fundamental right of every human being and any action which offends or impairs human dignity tantamounts to deprivation of a right to live.

11. In the instant case, the respondents contend that petitioner no.1 is a notorious criminal. The mere fact that a chargesheet has been filed against him does not make him a notorious criminal. The respondents have not said anything about the antecedents of the other petitioners nor has stated anything about the antecedents of the respondents against whom a first information report had also been lodged. The State authorities have to take action which is reasonable and fair and just procedure established by law has to be followed. Even though the petitioners have been chargesheeted, they still have their right under the Constitution. The action of the respondents in making such nocturnal visits is wholly illegal and without any sufficient cause.

12. In the light of the aforesaid, a writ of mandamus is issued to the police authorities not to harass the petitioners by visiting them at odd hours in the night unless the police authority has sufficient and cogent reasons for making such visit which would be recorded prior to their visit.

13. Accordingly, the writ petition is allowed with cost of Rs.10,000/-, which shall be paid to the petitioners within three weeks from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.03.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ADITYA NATH MITTAL, J.

Service Bench No. 7928 of 1996

State of U.P. & Others..... Petitioners
Versus
I. Husain & Others... Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.14 and 21- petitioner after 9 years service-availing medical leave-restrained from joining-orally informed about termination of service-Tribunal recorded specific finding-warrant no interference-in democratic polity-such action not just and fair-hit by Art. 14 and 21 of Constitution-petition dismissed with modification of 25 % back wages with continuity in service and pension benefits.

Held: Para-14
We are also of the view that in democratic polity, it is not just and fair on the part of the State Government to discharge its obligation by oral instructions. The basic principle of rule of law is that citizens must know where they stand in their usual course of life vide AIR 1975 SC 2260; Smt. Indira Nehru Gandhi vs. Raj Narain (para 205).

Case Law discussed:
2000(3) SCC 239; AIR 2000 SC 3058; 1999(2) SCC 21; (2012) 3 SCC 178; 2008(26) LCD 1470; (2008) 3 UPLBEC 2500; AIR 1975 SC 2260.

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

1. The instant writ petition has been preferred under Article 226 of the Constitution of India by the State of U.P. against the judgment and order dated 21.09.1995 passed by U.P. Public Services Tribunal, Lucknow in Claim Petition No.312/F/IV/1987.

2. The claimant-respondent was appointed as Overseer in Irrigation Department in the year 1965 on temporary basis and continued in service, at different places. On account of sudden serious illness on 01.03.1974 because of Cardiac ailment, he rushed for treatment hence could not apply for leave. He underwent treatment for a long period and reported for duty on 09.11.1975 with leave application along with medical certificate. However, no order was passed with regard to his posting. After receipt of the joining report of the petitioner, the Assistant Engineer directed the Block Development Officer vide his letter dated 14.05.1976 that claimant-respondent's joining report should not be accepted and no work should be given to him. Failing to resume duty, the claimant-respondent submitted a representation which seems to have been rejected and informed by order dated 21.01.1987. Thereafter, the claimant-respondent approached the Tribunal.

3. Before the Tribunal, the claimant-respondent set up a case that under compelling circumstances, he could not submit the leave application and while reporting for duty, he had also furnished medical certificate with regard to prolong treatment with the request that he should not be prevented to resume duty. Further defence set up by the claimant-respondent is that in spite of the fact that he has discharged as temporary overseer for more than 9 years, he was not communicated in writing with regard to termination of services. Everything was done orally preventing the claimant-respondent to resume duty. It has further been pleaded by the respondent-claimant that the termination of service, that too when the claimant-respondent has served for about nine years by oral instructions shall be hit by Article 14, read with Article 21 of the Constitution of India. The State has got no right to dispense with

employees' services orally, as it shall be against the Constitutional mandate.

4. On the other hand, on behalf of the petitioner-State, the case set up before the Tribunal is that the services of the claimant-respondent were never satisfactory and he suffered with adverse entries for several years. The appointment order was on provisional basis and absence from duties was unauthorized and without sanction of leave. Hence, the claimant-respondent has rightly not been permitted to resume the duty. The temporary appointment was automatically came to an end.

5. After considering the pleadings on record and the arguments advanced by the learned counsel for the parties, the Tribunal recorded a finding that once the claimant-respondent has submitted a joining report along with fitness certificate and medical report, it was incumbent on the appointing authority to pass appropriate orders and services should not have come to automatic end. The Tribunal further noted that no notice was served on the claimant-respondent nor was he communicated in writing with regard to termination of services. Such action on the part of the State authorities is held to be arbitrary by the Tribunal. The Tribunal further held that till the order is passed in writing with regard to service condition, the employees shall be deemed to be in service and the relationship of the employer and employee shall not be broken.

We have considered the arguments, advanced by the learned counsel for the parties at length and perused the record.

6. A perusal of the appointment letter, filed with the writ petition reveals that the claimant-respondent was appointed on 28.03.1965 provisionally as Overseer in regular pay-scale along with dearness allowances and other allowances. The appointment was subject to approval by U.P. Public Service Commission to continue against regular temporary cadre of Overseers. The appointment letter further reveals that services could have been terminated after serving a month's notice. At the face of record, a perusal of the appointment letter, reveals that the claimant-respondent's appointment was against the temporary regular vacancy subject to approval by U.P. Public Service Commission to work against the regular temporary cadre of Overseers. Nothing has been brought on record as to why the petitioner-State has not forwarded the claimant-respondent's name for approval to U.P. Public Service Commission.

7. Now, it is well settled proposition of law that even temporary Government Employees' Services are protected by Article 311 of the Constitution of India and once the appointment was against the regular temporary cadre, subject to approval of U.P. Public Service Commissioner, that too in the regular pay scale, the services of claimant-respondent were protected by Article 311 read with Articles 14 and 21 of the Constitution of India, vide 2000 (3) SCC 239, V.P. Ahuja vs. State of Punjab; AIR 2000 SC 3058, Prabhu Dayal Birari vs. M.P. Rajya Nagrik Aapurti Nigam Limited; 1999 (2) SCC 21, Radhey Shyam Gupta vs. U.P. State Agro Industrial Corporation.

8. The services could not have been dispensed with without passing a written order. Action of the Petitioner-State seems to be arbitrary exercise of power, more so when the claimant-respondent has been deprived to resume duty and continued in service without any written order of termination.

9. In a case reported in (2012) 3 SCC 178 Krushnakant B. Parmar vs. Union of

India & Another, their lordships of Hon'ble Supreme Court held that for sustaining the allegations of wilful absence from duty, it must be proved that the absence was wilful. If absence is due to compelling circumstances under which it is not possible to report for or perform duty, such absence cannot be held to be willful and employee cannot be held guilty of misconduct. The relevant portion of the aforesaid judgment is reproduced as under:-

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

19. In the present case the inquiry officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.

20. The question relating to jurisdiction of the Court in judicial review in a departmental proceeding fell for consideration before this Court in M.V. Bijlani vs. Union of India, (2006) 5 SCC 88 wherein this Court held:

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

10. In the present case, though the claimant-respondent was working since more than 9 years, the State did not take care to discharge its Constitutional and statutory obligation by serving a notice or even terminating the services with due communication to the claimant-respondent in writing. Such action on the part of the State to dispense with the services orally is autocratic and against the Constitutional mandate where State is expected to discharge duty fairly and justly in terms of Article 14 of the Constitutional of India to protect the right to livelihood guaranteed by Article 21 of the Constitution of India.

11. A Division Bench of this Court in a case reported in 2008 (26) LCD 1470 Shri Kanhaiyalal vs. Uttar Pradesh Lok

Sevaadhikaran and others, of which one of us (Hon'ble Devi Prasad Singh, J.) was a Member held that even temporary Government Servants charged for misconduct, is entitled to face regular inquiry.

12. In the present case, the defence set up by the State, prima-facie, seems to co-relate to certain adverse entries or certain misconduct on the part of the claimant-respondent. In case, the defence set up by the petitioner-State is accepted then the action of the State Government in not permitting the claimant-respondent to resume duty or depriving him to continue in service without passing any written order, seems to be punitive in nature and shall not be sustainable being hit by Article 311 of the Constitution of India.

13. In an other case reported in (2008) 3 UPLBEC 2500 Tirth Raj Misra vs. State of U.P. and others, of which one of us (Hon'ble Devi Prasad Singh, J.) was a Member, the question cropped up before this Court was as to whether the State has got right to dispense with services of its employee orally. It has been held that oral instructions or order depriving the employees from service shall amount to arbitrary exercise of power and against the Constitutional mandate, being hit by Article 14 read with Article 21 of the Constitution of India. Relevant portion from the judgment of Tirth Raj Misra (supra) is reproduced as under:-

"A plea has been taken by the respondents in the counter-affidavit that since the petitioner was engaged as Daily Wager to meet out exigencies of services, the respondents were entitled to terminate his services even by oral order. The argument advanced by the learned Standing Counsel through plea taken in the counter-affidavit seems to be not sustainable. Whenever the service conditions of an incumbent are governed by some statutory provisions, rules or regulations then it shall always be incumbent upon the authorities to pass appropriate written order while dispensing the services. Passing of a oral order depriving a person from his/her source of livelihood, which is guaranteed under Article 21 of the Constitution of India, is an arbitrary exercise of power and shall be hit by Article 14 of the Constitution of India. Termination of service orally without complying the provisions of Industrial Disputes Act shall suffer from vice of arbitrariness and against the constitutional mandate. Accordingly, the writ petition deserves to be allowed."

14. We are also of the view that in democratic polity, it is not just and fair on the part of the State Government to discharge its obligation by oral instructions. The basic principle of rule of law is that citizens must know where they stand in their usual course of life vide AIR 1975 SC 2260; Smt. Indira Nehru Gandhi vs. Raj Narain (para 205).

Unless an order is passed in writing, the employee shall not be aware that what are the reasons and what are the grounds on the basis of which his services have been dispensed with. The decision taken by the State Government to dispense with the services of its employee orally, in any way, shall not be sustainable being hit by Article 14 of the Constitution of India. It is always expected in democratic polity that the State shall discharge its obligation justly, fairly and not in arbitrary highhanded manner.

15. In view of above, the impugned judgment and order dated 21.09.1995, passed by the U.P. State Public Services Tribunal does not seem to suffer from any impropriety or illegality which may call for interference by this Court under Article 226 of the Constitution of India. However, keeping in

view of the fact that the claimant-respondent, had not discharged duties, we confine the arrears of salary to 25% along with perks and other benefits. The claimant-respondent shall be deemed to be in service for all practical purposes including pensionary benefits by the petitioner-State.

The impugned order dated 21.09.1995 passed by the U.P. Public Services Tribunal is modified accordingly. Let a decision be taken by the State-petitioner with regard to payment of arrears of salary as well as pentionary benefits in terms of the present modified judgment with due communication to the claimant-respondent, expeditiously say within a period of three months from the date of receipt of certified copy of this judgment.

The standing counsel shall communicate the order forthwith.

Writ petition is disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2014

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 8283 of 2014.

Bashir and Ors..... Petitioners
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioners:
Sri P.S. Chauhan

Counsel for the Respondents:
C.S.C., Sri D.D. Chauhan, Sri Rajesh Yadav

Constitution of India, Art.-226-order against dead person-held-nullity-order against dead person passed November 2010 who already died in January 2010-held-not sustainable-quashed.

Held: Para-4
While assailing the impugned order, learned counsel for the petitioners contends that the order impugned has been passed against a dead person. In the submission of learned counsel for the petitioners, the petitioners' father, against whom proceeding was initiated, has already expired in January, 2010 and the order has been passed in November, 2010. It is settled that the order against the dead person is nullity and void abinitio. The view taken by me finds support from the following authorities on the point.

Case Law discussed:
AIR 1957 Page 521; A.I.R 2001 Supreme Court 2003; 2009(75) ALR 515; 2013(4) AWC 3770.

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

1. Heard Sri P.S.Chauhan, learned counsel for the petitioners, learned Standing Counsel and Sri Rajesh Yadav, learned counsel for the Gaon Sabha.

2. Learned counsel for the respondents state that under the facts and circumstances of this case, he does not propose to file counter affidavit and the writ petition may be decided on its own merit in accordance with law.

3. This writ petition has been filed for issuing a writ of certiorari quashing the order dated 27.11.2010 passed by the Sub-Divisional Officer, Rampur Maniharan District Saharanpur in Case No. 08/2010 (State Vs. Ajmer and others) in a proceeding under Section 176A of U.P. Zamindari Abolition and Land Reforms Act, 1950 by which the name of the petitioners' father has been expunged from the revenue record. Although, there is laches of more than three years but under the facts and circumstances of the case, that is liable to be ignored and the writ petition is being taken up for final disposal.

4. While assailing the impugned order, learned counsel for the petitioners contends that the order impugned has been passed against a dead person. In the submission of learned counsel for the petitioners, the petitioners' father, against whom proceeding was initiated, has already expired in January, 2010 and the order has been passed in November, 2010. It is settled that the order against the dead person is nullity and void abinitio. The view taken by me finds support from the following authorities on the point.

5. The Apex Court in the case of Leelawati Bai Vs. State of Bombay, A.I.R. 1957, Pae 521 has held that the order passed against the dead person is a complete nullity.

6. In A.I.R. 2001, Supreme Court, 2003, Amba Bai and others Vs. Gopal and others, the Apex Court has held as under:

"As the judgment in the Second Appeal was passed without the knowledge that the appellant had died, the same being a judgment passed against the dead person is a nullity."

7. In T.Gnanavel and T.S.Kanagaraj and another reported in 2009(75) ALR 515, the Apex Court has taken the same view by observing as under:-

"19. For the reasons aforesaid, we are of the opinion that the High Court had rightly intercepted the provision of Order XXII, Rule 4(4) of the C.P.C. and accordingly held that the decree passed by the Trial Court on20th of December, 2002, in O.S. No.3946 of 1999 was a nullity in the eye of law as the defendant had died during the pendency of the suit for specific performance of the contract for sale and no exemption was sought at the instance of the plaintiff/appellant to bring on record the heirs and legal representatives of the defendant before the judgment was pronounced."

8. This Court also in the case of Subhash Chandra and another Vs. Dy. Director of Consolidation, Jaunpur and others 2013 (4) AWC 3770, has held that order passed against the dead person is a nullity.

9. Taking note of the fact that the petitioners' father, against whom the proceeding was initiated, has already died, when the impugned order was passed. The impugned order dated 27.11.2010 is hereby quashed. The writ petition succeeds and is allowed. However this order will not preclude the respondents to pass fresh order in accordance with law.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 26.02.2014

BEFORE
THE HON'BLE MANOJ MISRA, J.

Criminal Misc. Application No. 13149 of 2013

(U/s 482 Cr.P.C.)

Govind Chandra Gupta.... .Applicants
Versus
State of U.P. & Anr..... Opp. Parties

Counsel for the Petitioner:
Sri Vijay Shankar Mishra

Counsel for the Respondents:
A.G.A., Sri Radhey Shyam, Sri Rajesh Kumar

Cr.P.C. Section-482-Summoning order-offence under Section 420 IPC-complainant works under contract-amount of Rs. 1,19,828/-found due-non payment thereof-on demand-the accused persons ousted the complainant from the office-held-dishonest intention on part of accused not existed-in absence of essential element of offence under section 420 IPC-summoning order amount to abuse process of Court-proceeding of complainant case including summoning order quashed.

Held: Para-6

It is necessary to show that at the time of making promise he has fraudulent or dishonest intention to deceive or to induce person so deceived to do something which he would otherwise not do. It was observed that such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently. In the instant case it is not established, even prima facie, that there existed dishonest intention on the part of the accused when the contract was entered into between the department and the complainant. Accordingly, the essential ingredient for commission of an offence punishable under Section 420 IPC is not disclosed.

Case Law discussed:

(2010)10 SCC 361

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

1. Heard Sri Rajesh Kumar, learned counsel for opposite party no. 2 and learned AGA for the State.

2. By the present application u/s 482 Cr.P.C., the applicant has sought for quashing of the proceedings of Complaint Case No. 726 of 2011 pending in the court of Judicial Magistrate, Qayamganj, District Farrukhabad, under Section 420 IPC relating P.S. Kotwali Qayamganj, District Farrukhabad. The applicant has also prayed for quashing of the summoning order dated 26.7.2012 passed by the aforesaid court.

3. According to the complaint case (annexure no. 1 to the application), the allegation in nut shell is that under a works contract with the Irrigation Department, whose officer is the accused (applicant), the complainant supplied goods (being machine, etc.) and completed various formalities, but his final bill payment of Rs. 1,19, 828/- was not being made on account of which he has suffered mental agony as also financial loss. In the statement recorded under Section 200 Cr.P.C. (annexure no. 2 to the application) it has been stated that when the complainant demanded for payment, the accused shouted at him and therefore, it appears that the accused has turned dishonest. In the statement, Rs. 1,05, 250/- has been shown to be due to the complainant. The court below, on the aforesaid allegations summoned the accused under Section 420 IPC.

4. The submission of learned counsel for the applicant is that no offence punishable under Section 420 IPC is made out inasmuch as there is no allegation in the complaint that there was any dishonest intention from the very beginning, which is an essential ingredient for an offence punishable under Section 420 IPC. It has been submitted that even assuming that money required to be paid under the agreement was not paid to the contractor (complainant), it cannot be said that there was dishonest intention on the part of the accused from the very beginning that is since the time of entering into works contract. It has thus been submitted that no offence punishable under Section 420 IPC is made out. It has further been submitted that in absence of any material showing misappropriation of fund, it cannot be said that the applicant committed any offence, particularly when the allegation is not that the applicant made any false promise at the time of entering into the alleged contract.

5. Per contra, learned counsel for the complainant submitted that from the complaint allegations it is clear that the complainant was entitled to a sum of Rs. 1,19,828/- from the department but despite all the formalities having been completed, the amount was not paid, therefore, there existed dishonest intention on the part of the applicant.

6. Having considered the submissions of learned counsel for the parties and on perusal of record, this Court is of the view that from a perusal of the complaint as also the statement recorded in support thereof, it is not established, even prima facie, that there existed dishonest intention on the part of the accused from the very beginning that is from the stage when the work contract was entered into between the department and the complainant. Mere failure to fulfill a promise cannot be a ground to draw proceedings for prosecution under Section 420 I.P.C. The essential ingredient for an offence punishable under Section 420 IPC is dishonest misrepresentation on the part of the accused at the time of making promise. In the case of V.P. Srivastava Vs. Indian Explosives Ltd. (2010) 10 SCC 361, the Apex Court held that mere failure to perform the promise, by itself is not enough to hold a person guilty of cheating. It is necessary to show that at the time of making promise he has fraudulent or dishonest intention to deceive or to induce person so deceived to do something which he would otherwise not do. It was observed that such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently. In the instant case it is not established, even prima facie, that there existed dishonest intention on the part of the accused when the contract was entered into between the department and the complainant. Accordingly, the essential ingredient for commission of an offence punishable under Section 420 IPC is not disclosed.

7. In view of the above, proceedings against the applicant amount to abuse of process of court and to secure the interest of justice, the same deserves to be quashed.

8. The application is allowed. The proceedings of complaint case no. 726 of 2011 pending in the court of Judicial Magistrate, Qayamganj, district Farrukhabad as also the summoning order dated 26.7.2012 summoning the applicant under Section 420 IPC are hereby quashed.
