ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 26.11.1998.

1998

November, 26

BEFORE
THE HON'BLE S.R. SINGH, J.

CIVIL MISC. WRIT PETITION NO.17836 OF 1991

Pramod Kumar Yadav ... **Petitioner**

Versus

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

Counsel for the Petitioner : Sri Mahendra Pratap,
Sri R.P.Tiwari,
Sri M.D. Singh
Sri P.K.Yadav

Counsel for the Respondent : S.C.,
Sri S.N. Upadhayay.

Article 226 of the Constitution of India failure to issue advertisement in the news paper would not vitiate the appointment which were made by the appointing authority on the recommendation made by a duly constituted selection committee after notifying the vacancies to the Employment Exchange.

By the Court

1. These writ petitions are knit together in that common question of law and facts are involved and with the consent of the parties counsel they were heard together for convenient disposal by a common judgment. Writ petition No.17836, Pramod Kumar Yadav Vs. State of U.P. and others shall be the leading file.

2. Stated briefly the facts are that the petitioners Pramod Kumar Yadav, Gyanendra Kumar Shukla and Prashat Kumar were appointed Registration Clerk in the office of Sub Registrar, Jhansi in accordance with the provisions contained in the U.P. Registration Department (District Establishment) Ministerial Service Rules, 1978 as it stood prior to its amendment by Registration Department (District Establishment) Ministerial Service(First Amendment) Rules, 1991. Their services were terminated by identically worded separate orders dated June 15, 1991. These writ petitions were filed challenging the orders of termination. The petitions came to be dismissed along with a bunch of other writ petitions filed by

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adhoc/daily rated Registration Clerks in view of the order passed by the Division Bench in Civil Misc. Writ Petition No.582 of 1991, Hasnain Ahmad Vs. State of U.P. and Others which was taken to be the leading case among the bunch of the writ petitions filed by adhoc/daily rated Registration Clerks. The matter was taken upto the Supreme Court. The Supreme Court dismissed the Special Leave Petition but a Review Petition was filed and it was pointed out on behalf of the petitioners that they were appointed on regular basis and their case was not covered by the judgment rendered by the Division Bench in the case of Hasnain Ahmad(supra). The Supreme Court vide its judgment and order dated 26.9.97 allowed the appeal and set aside the order of the High Court dismissing the writ petition and remitted the matter back to this Court for consideration. That is how the matter has again came up for disposal.

3. I have heard Sri M.D. Singh, learned counsel appearing for the petitioners and Sri S.N. Upadhyay representing the respondents.

4. Learned counsel appearing for the petitioner submitted that the impugned order is vitiated, interalia, for the reasons; firstly, that it has been passed in breac of audialteram partem principles of natural justice; and secondly, that it is arbitrary and lacks reasons. In opposition the counsel appearing for the respondents urged that the State Government issued a telex dated 8.2.1991 restraining all the District Registrars from making any kind of appointments even then the District Registrar made the appointments of the petitioners and that too without following the procedure and hence there services were rightly terminated. In rejoinder it was urged for the petitioners that the I.G. Registration, it seems from the supplementary counter affidavit, erroneously assurned that the procedure prescribed by law was not followed in making the appointments.

5. I have given my anxious consideration to the submissions made across the bar. The telex dated 8.2.1991 referred to in para 8 of the supplementary counter affidavit dated 23rd day of August, 1994 filed after the conclusion of the arguments has not been brought on record. In the absence of the telex dated 8.2.1991 being brought on record, it came be said with any amount of certainty that the alleged ban was intended to cover appointments on the post in question, the process of selection to which posts had already commenced. The question whether the appointments were made in the teeth of the bar is a question of fact. Without giving an opportunity of showing cause, the services of the petitioners ought not to have been terminated on

the unilateral assumption that the appointments were made in the teeth of the ban order. Basudeo Tiwari Vs. Sido Kanhu University and others, JT 1998(6) 464 is an authority on the point In that case while reiterating the principle of natural justice as enunciated in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress, JT 1990(3) SC 725; Mohinder Singh Gill and another Vs. The Chief Election Commissioner and others, AIR 1978 SC 851; and S.L. Kapoor Vs. Jagmohan and others, AIR 1981 SC 136, the Apex Court held as under:-

> "In order to arrive at a conclusion that an appointment is contrary to the provisions of the Act, status, rules or regulations etc., a finding has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive at such a conclusion necessarily an enquiry will have to be made as to whether such appointment was contrary to the provsions of the Act etc. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry the person whose appointment is under enquiry will have to be issued to him. If notice is not given to him then it is like playing Hamlet without the price of Denmark, that is, if the employee concerned whose rights are affected, is not given notice of such a proceeding and a conclusion is drawn in his absence, such a conclusion would not be just, fair or reasonable as notice by this Court in D.T.C. Mazdoor Sabha's case. In such an event, we have to hold that in the provision there is an implied requirement of hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the Act, statue, rule orregulation etc. and it is only on such a conclusion being drawn, the services of the person could be terminated witout further notice."

6. Shrawan Kumar Jha and others Vs. State of Bihar and others, 1991 Supp. (1) S.C.C.330 was a case where appointments of certain Assistant Teachers made by the District Superintendent of Education, Dhanbad were cancelled vide order dated 28.5.1988. The order was upheld by the High Court. In Supreme Court it was argued for the respondents therein in support of the order of cancellation,

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that the appointments had been cancelled because the District Superintendent of Education had no authority to make the appointments therein support of the order of cancellation, that the appointments had been cancelled because the District Superintendent of Education had no authority to make the appointments. On behalf of the appellants therein it was contended that the order of cancellation passed in breach of natural justice was void. The Supreme Court held as under :

> "In the facts and circumstances of the case we are of the view that the appellant should have been given an opportunity of hearing before canceling their appointments. Admittedly, no such opportunity was afforded to them. It is well settled that no order to the detriment of the appellants could be passed without complying with the rules of natural justice."

7. In Shridhar Vs. Nagar Palika, Jaunpur and others, A.I.R. 1990 S.C. 307 the appointment of the appellant therein on the post of Tax Inspector in the Municipal Board, Jaunpur was cancelled by the Divisional Commissioner, Varanasi on the ground that the post ought to have been filled by promotion of one Hari Mohan, senior most Tax Collector working in the Municipal Board, Jaunpur. The High Court affirmed the order of the Commissioner on the finding that the appellant'' appointment was made in violation of the Government order dated 10.4.1950. The Supreme Court held as under:-

> "The High Court committed serious error in upholding the order of the Commissioner dated 13.2.80 in seting aside the appellant's appointment without giving any opportunity to him. It is an elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principles of natural justice is rendered void. There is no dispute that the Commissioner's Order had been passed without affording any opportunity of hearing to the appellant, therefore, the order was illegal and void. The High Court committed serious error in upholding the Commissioner's Order setting aside the appellant's

> appointment. In this view, Orders of the High Court and the Commissioner are not sustainable in law."

8. Upon consideration of the authorities, aforestated, I am of the considered view that the order impugned herein having been passed in breach of principles of natural justice cannot be sustained.

9. The second question is as to whether the appointments were made by following the procedure prescribed by law. In this connection it would be apt and proper to quote the submissions made on behalf of the parties before the Hon'ble Supreme Court and the observations/directions made in the judgment dated 27.9.1995 remitting the matter back to this Court as under:-

> "It has been urged on behalf of the appellant that his case differs from other cases dealt with by the High Court inasmuch as he had been selected for regular appointment by a duly constituted Selection Committee in accordance with the rules and the High Court has not considered this aspect of the matter. In the counter affidavit that has been filed on behalf of the respondents before this Court, it has not been disputed that the Selection Committee was duly constituted by the District Registrar, District Jhansi on February 24, 1991 but it is asserted that while doing so the District Registrar, District Jhansi, did not comply with the mandatory provisions of Rule 22 of the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975 which had been replaced by the Subordinate Offices Ministerial Staff(Direct Recruitment) Rules,1985 as amended upto date and thus there was defect in the procedure of the said selection and the selection was void. This questions has not been gone into by the High Court while dismissing the writ petition of the appellant. It is a question which should have been considered by the High Court before dismissing the writ petition of the appellant."

10. The decisions aforestated particularly Basudeo Tiwari squarely meet the argument advanced in justification of the impugned orders on the ground that the procedure laid down in Rule 22 of the relevant service Rules was not followed.

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11. On merits there is no substance in the submission that the procedure laid down in Rule 22 was not followed. In order to appreciate the submission it would be apt to quote rule 22 as under:

> "Rule 22:- That the appointing authority shall determine the number of vacancies to be filled during the course of the year as also the vacancies to be reserved under Rule 7. The vacancies shall be notified to employment exchange. The appointing authority may also invite application directly from persons who have their names registered in the employment exchange. For this purpose, appointing authority shall ensure and advertisement in a local daily newspaper besides pasting a notice on the Notice Board. All such applications shall be placed before selection Committee."

12. The District Registrar was admittedly the appointing authority prior to 20.3.1991 with effect from which date the rules were amended and IG Registration was made 'appointing authority'. From the averments made in the counter affidavit filed by Dewaki Nandan Dwivedi, the then Sub Registrar, Jhansi and the observations made by the Apex Court in its judgment dated 27.9.1995 it would be abundantly clear that the petitioners were selected for regular appointment by a duly constituted Selection Committee in accordance with the Rules. The only controversy that was to be decided by this Court as per direction given by the Apex Court in its judgment dated 27.9.1995 was whether the provisions under Rule 22 of the Rules aforesaid were followed. Sri M.D. Singh counsel for the petitioner submitted that after determining the vacancies the appointing authority notified them to the Employment Exchange as required by Rule 22 of the Rules as it then stood. This fact has not been disputed by Sri S.N. Upadhyay, learned counsel appearing for the respondent. Concededly the vacancies were notified to the Employment Exchange as visualized by the first part of rule 22 of the Rules. The second part of rule 22 in my opinion gives a discretion to the appointing authority to invite applications from the persons whose names are entered in the Employment Exchange by advertising the vacancies in newspapers. Failure to issue advertisement in the newspaper as required by the second part of rule 22, in the circumstances of the present case, would not vitiate the appointments which were made by the appointing authority on the

recommendation made by a duly constituted Selection Committee after notifying the vacancies to the Employment Exchange.

In view of the foregoing discussion the petitions succeed and are allowed. Impugned orders are quashed. Petitioners shall be entitled to full back salary and continuity in service. Respondents are directed to act accordingly.

Petitions Allowed.

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DATED ALLAHABAD, IST FEBRUARY ,1999.

BEFORE
THE HON'BLE O.P.GARG, J.

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February, 1

CIVIL MISC WRIT PETITION NO.21044 OF 1997

Committee of Management Janta Inter College Bagar Gosai Haraiya, Azamgarh & another ... Petitioner.
Versus
Regional Deputy Director of Education (Secondary), Azamgarh and others ... Respondents.

Counsel for the Petitioners : Sri Ashok Khare
Counsel for the Respondents : S.C. Sri Faujdar Rai
Sri R.G.Padia

Article 226 of the Constitution of India –the order passed by the D.I.O.S. attesting the signatures of the members is purely administrative decision which he has to take without entering into validity or other wise of the election of the new committee of management and its office bearers- the validity of the election cannot be determined before this Hon. Court in writ jurisdiction

By the Court

1. These are two identical connected writ petitions by which the order dated 19.06 .1997 passed by the District Inspector of Schools (for short DIOS) Azamgarh has been challenged. The difference in the two writ petitions is that over and above the relief claimed in civil Misc. Writ No. 21044 of 1997 an additional prayer for

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appointing the Authorised Controller to manage the affairs of the institution during the pendency of the writ petition has been made in the subsequent writ petition no. 260286 of 1997 . Since the controversy involved in the two writ petitions requires scrutiny of the validity or otherwise of the same order and the pleadings of the parties are almost identical, it is proposed to decide these two writ petitions together by this common judgement. Reference to various annexures is with regard to the documents filed in Civil Misc. Writ No. 21044 of 1997.

2. There is a registered society known as janta Shiksha Prishad under the aegis of which a recognised and aided educational institution, namely, Janta Inter College which is governed by the provisions of U.P. Intermediate Education Act, 1921 is run at Bagar Gosai,Haraiya, in district Azamgarh . Administration of the institution is run and managed by a committee of management which is constituted under the duly approved Schemee of Administration. It is an admitted fact that the last elections to constitute a new committee of management were held on 29.05.1994 in which Shiv Shankar Singh and Amresh Chandra Pandey petitioner no.2 were elected respectively as the president and Manager. The Committee of management of which Amresh Chandra Pandey was the manager, was duly recognised on 15.071974 on which date his signatures were attested. The term of the committee of management is three years.

The case of the petitioners is that till the elections are held to constitute the new committee of management in accordance with the Scheme of Administration, the outgoing committee is to continue and that the term of three years is to be reckoned with effect from 15.07.1994 on which date the erstwhile committee came into being. With a view to constitute a new committee of management, a meeting was called on 10.05.1997 in which it was resolved that the elections be held during the period 20th to 30th June, 1997 Subsequently, it was resolved that the elections be held on 22.06.1997 and on 25.05.1997, the DIOS was informed of the said fact by Annexure 6 to the writ petition. A list, Annexure 7 to the writ petition, of 79 members, who were entitled to vote was also sent to the DIOS. Sri Krishna Kumar Singh, Adovacate was appointed as E;lection officer and an agenda notice, Annexure 9 was circulated on 30.05.1997 which proved that nomination shall be filed on 20.06.1997 and that the date of polling after withdrawal of nominations by the specified date shall take place, if necessary, on 22.06.19997. A copy of the agenda item was also sent to the DIOS,

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on 29.05.1997 It was also published in 'Dainik Dev Bratta' a local daily, on 3105.1997. On the same day, a communication was sent to the DIOS, Annexure 12, to nominate an observer for the elections to be held on 22.06.1997. This letter was received in the office of the DIOS on on 02.06.1997. The regional Deputy Director of Education (for short RDDE) was also informed about the convention of the general body for the propose of election vide letter dated 31.05.1997 Annesure 13 to the writ petition. It appears that there was a move afoot to hold paralled elections by one Jagdish Dubey on the basis of the list of 215 members of the general body. The petitioners, apprehensive as they were informed the RDDE Azamgarh by addressing him letter dated 3.6.1997, and prayed that the DIOS be required to prevent the alleged elections which are to take place on 4th / 5th June, 1997. Smt. Sarita Yadav, RDDE Azamgarh brought the above facts to the notice of the DIOS by addressing him a later dated 4.6.1997, Annexure 15, and directoed him to ensure that the elections are held accouding to the amended Scheme of Administration by the members of the general body. On 9.6.1997 a letter, Annexure 16, was sent again making a request to the DIOS to nominate an observer. This letter was followed by reminders dated 13.6.1997 and 18.6.1997, Annexures 17 and 18. The DIOS did not nominate any observer. He, however sent a communication dated 12.6.1997. addressed to the petitioner no.2, Amresh Chandra Pandey, Jagdish Dubey and the Principal of the college to appear before him for hearing in connection with the managerial election of the institution. These persons were directed to produce the necessary documents in original, in support of their respective contentions. The details of the documents which they were required to produce, in original, are listed at sl. Nos. 1 to 7 in the letter aforesaid on the date fixed, i.e.19.61997, a meeting was held.It appears that the elections were held to constitute the new committee of management at the instance of the outgoing committee of management on 22.6.1997 a meeting was held . It appears that the elections were held to constitute the new committee of management at the instance of the outgoing committee of management on 22.6.1997 in which Shiv Shankar Singh and Bechu Prasad Gupta were respectively elected as Manager and President of the Committee. On 23.6.1997, the DIOS was informed of the result of the election with the prayer that the new committee of management of which Shiv Shankar singh had been elected as Manager, be recognised. According to the petitioners, they had received the letter, Annexure 22, purporting to be dated 19.6.1997 on 25.6.1997 whereby recognition to the committee of management, of which Indrasan Rai was alleged to

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have been elected as Manager, was recognised and his signatures had been attested. According to the petitioners, the letter, which was received on 25.6.1997 was ante-dated to 19.6.1997 by the DIOS deliberately to help the alleged newly elected committee of management of which Indrasad Rai is said to have been elected as Manager, It is alleged that Jagdish Dubey, who was present in the meeting dated 10.5.1997 and who had signed the proceedings book, had no authority or competence to hold the parallel elections, which are alleged to have taken place on 5.6.1997. The petitioners have went on to allege that the then DIOS HAS COLLUDED WITH Jagdish Dubey and others and it was at his behest that illegal elections had taken place on 5.6.1997 and which have come to be recognised by him. It is prayed that the impugned order dated 19.6.1997, annexure 22 to the writ petition, passed by the DIOS Azamgarh be quashed and that the respondents be commanded not to take and action in pursuance of the aforesaid order and should refrain from in terfering in the functioning of the petitioners to manage the affairs of the institution.

3. In the subsequent writ petition no. 26286 of 1997 on the above allegations, it has further been prayed that the respondents be directed to appoint Authorised Controller to manage the affairs of the institution during the pendency of the writ petition.

4. The contesting respondent, i.e. committee of management, of which Indrasan Rai is alleged to have been elected as manager, has filed counter affidavit. The stand taken by the respondent no.4 is that the election held on 5.6.1997 is legal and valid as it is cleraly in accordance with the provisions of the amended Scheme of Administration and the direction issued by the RDDE as well as DIOS, that since the election had already taken place on 5.6.1997 and the committee of management constituted in pursuance of the said elections has come to be recognised by a detailed order passed by the DIOS after hearing the petitioners also and the signatures of Indrasad Rai, the newly elected manager, have been attosted, the question of holding the elections on 22.6.1997 did not arise and, therefore, the petitioners have no locus standi to maintain the present writ petitions. Rejoinder and supplementary affidavits have also been filed.

5. Heard Sri Ashok Khare, learned counsel for the petitioners and Dr. R.G.Padia , learned Senior Advocate assisted by Sri Prakash

Padia on behalf of the respondent no.4 committee of Management of which Sri Indrasan Rai is the manager, at considerable length.

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6. To begin with it may be mentioned that there is no dispute about the fact that the last election to constitute committee of management was held on 29.5.1994. in which Shiv Shankar Singh and Amresh Chandra Pandey petitioner no.2 were elected respectively as the President and the Manager of the Committee of Management. It is also an admitted fact that the term of the Committee of Management was three years and after the expiry of the period of three years, a fresh election was to be held toconstitute a new committee. The dispute is with regard to the fact whether the outgoing committee of management has ceased to function of the expiry of the term of three years or it continued to function till such time it was substituted by newly elected committee of management. This aspect of the matter requires scrutiny of the scheme of administration, which was at the relevant time in force. According to the petitioners, there is a scheme of administration, which was duly approved by the Director of Education by order dated 1.6.1990 and that since then no amendments have been effected in the said scheme of administration. A copy of the scheme of administration as approved on 1.6.1968 is Annexure 1 to the writ petition. Clause 9 of the said scheme of administration deals with the term of the committee of management which provides that the term of the elected or nominated members of the committee of management shall be three years. There is no provision in the said scheme that after the expiry of the period of three years, the outgoing committee of management shall cease to exist. The stand taken by the petitioners on the point has been seriously challenged by the respondents. It is asserted that after the commencement of Act no.1 of 1981, the scheme of administration stands amended in view of the provisions of Section 16-cc and 16-ccc of the u.p. Intermediate education Act, 1921 (hereinafter referred to as the Act.) Under the aforesaid provisions the approved amended scheme of administration shall come into force and the elections were to be held in pursuance of the amended scheme of administration. A reference was made to the letter dated 20.101994, Annexure c. a.2 to the counter affidavit, issued by the DIOS Azamgarh to all the Managers and Principals of Higher Secondary/ Intermediate Schools in Azamgarh district which pertained to the subject of constitution of committees of management. It was directed that the committee of management shall be constituted in accordance with the amended scheme of administration. According to the amended provisions, the term of the committee of management is

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three years and the office be arers have further been allowed to continue for another period of one month and after the expiry of the period of three years and one month, the term of the committee of management shall ipso facto come to an end. In para 5, the procedure for election to constitute a new committee of management has been laid down. The legal position is that if the term of the Committee of Management of three years and one month has not expired, then the same committee of management has to hold the elections as has been held in 1994 Allahabad Civil Journal 420 Committee of Management Town Inter College, Mohamdabad Gohna, Mau vs. DIOS and others. In case where the outgoing committee of management fails to hold the elections, a procedure has been prescribed to overcome the empasse. Para 5 provides that in case out going President and the Manager do not call a meeting for election, in that event, one third of the members of the general body shall request the President and the Manager to convene a meeting of the general body. In the event of the failure of the outgoing President and the manager to call a meeting on the requisition by one third of the members, a meeting of the general body shall be convened after giving information and seeking approval of the DIOS . In that meeting the members of the general body shall nominate a President and chalk out a programme for holding the elections on a particular date. In sub para (2) para 5, further steps required to be taken to accomplish the task of election have been laid down. Now the question is whether the said amended scheme of administrtion was in vogue at the time when the new elections were to take place. It is true that no automatic amendment in the scheme of administration is visuallsed unless it falls within the clutches of section 16 cc of the Act. In (1994) 2 UPLBEC-1348- committee of Management Sahid Mangal Pandey Inter College Nagwa District Ballia and others it has been held that no automatic amendment is visualised except when it falls within clutches of Section 16-cc of the Act. If the Amendment suggested by Director in scheme of administration is not carried out by the committee of management, such amendment cannot be deemed to have been come into existence. The submission of the learned counsel for the petitioners that the DIOS, or for that matter, the RDDE had no authority to enforce the draft or amended scheme of administration without the concurrence of committee of management is otiose. With the supplementary counter affidavit filed by sri Indrasan Rai- respondent no.4, a copy of the letter dated 25.1.1985 sent by the RDDE to the petitioners institution has been filed as Annexure SC a-1, which indicates that the amended scheme of administration as circulated by

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the RDDE had been accepted and an asssurance was held out that in future the elections would be held according to the amended scheme of admiristration. In view of the u.p. Act. No.1 of 1981, letters of the RDDE and the DIOS as well as unequivocal and categorical acceptance by the then Manager Brija Rai, the amended scheme of administration came into force and in the light of the amended scheme, the committee of Management, which was admittedly elected on 29.5.1994 had ceased to exist after the expiry of the period of three years and if the outgoing committee failed to hold the elections well before the expiry of its term, it forfeited its right to hold the elections.

7. The allied controversy which would have a telling effect on the fate of the case is the date on which the term of the committee of management elected on 29.5.1994 shall commence. According to the petitioners, the committee was recognised by the DIOS on 15.7.1994 on which date, the signatures of the Manager Amresh Chandra Pandey- petitioner no.2 came to be attested. On behalf of the respondents, this contention has been repelled. It is asserted that the three years' term of the committee of management is to be reckoned right from the date on which the committee was elected, i.e., on 29.5.1994. In nutshell, according to the petitioners, the term of the committee of management was to continue upto15.7.1997 while according to the respondents, it came to an end on 29.5.1997. Sri Ashok Khare, learned counsel for the petitioners placed reliance on the decision of a Division Bench of this court reported in 1996 (3) ESC-152 (Alld) Girish Chandra vs. Rajendra Singh and others. I have carefully gone through the various observations made in the said decision and find that they are not applicable on all fours to the facts of the present case for one simple reason that in Girish Chandra's case (supra) there was a specific provision that a newly elected committee of management shall assume only after the DIOS has accorded its approval, on the basis of this explicit and specific provision, it was held that the term of the committee of management shall be reckoned from the date on which the committee was recognised by the DIOS. In the instant case, there is no such specific provision and, therefore, we have to fall back on the earlier decisions in which a distinct view contrary to Girish Chandra 's case (supra)has been taken. Undoubtedly, the term of the committee of management is to be govermed with reference to the provisions made in the scheme of administration. The amended scheme of administration, as it stands and applies to the petitioners institution, as it stands and applies to the petitioners institution, provides that the

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period of the committee of management and its office bearers shall be three years and that after the expiry of the period of three years, the office bearers shall continue to function for a further period of one month. In ase during the period of three years and one month, the newly constituted committee, according to the various provisions of the Scheme of a administration, does not take over the charge, the term of the existing committee shall automatically come to an end. The point is covered by the decision of this court in the case of Jungli Baba Intermediate College Garhawa District Ballia and another vs. Dy. Director of Education vth Region Varanasi and others (1991) 2 UPLBEC-1183 . a plea was raised in that case that the committee of management shall be deemed to have entered in office from the date the DIOS approved the scheme or the signatures of the manager were attested. The question, raised, therefore, was as to from which date the period of committee of management would start running i.e., either from the date of elections validly held where the period of earlier committee of management had already come toan end prior to this date and there being no dispute,or, from the date of the elected committee of management takes over the charge of the management. The purpose of prescribing the period of three years as being the term of committee of management is that it should function for the period prescribed in the scheme of administration. If for some reasons, even after elections, the newly elected committee of management is nto able to take charge from the earlier committee of management because of stay order or otherwise or from the Prabandh Sanchalak, the term of the committee of management would not commence. However, the day such elected committee of management takes over charge, and/or starts functioning as such, without any impediment, that the period of three years starts running. This period of three years in no case can be extended even if intermittent such committee of management is not able to discharge its function on account of in-fighting litigation between the parties or on account of stay orders passed by the court. It would be worthwhile to extract below, for ready reference, the oft quoted obser4vations made in Jangli Baba's case (supra) :-

> "……Attestation is only for the purpose of distribution of salary under the payment of Salary Act. It is true that the functioning of the committee of management is varied and is not confined merely for the purposes of distribution of salary and thus , the attestation of the signatures by the District Inspector of Schools could not be the starting point of the life of

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the Committee of Management. It may be in a given casefrom the date of the elections result are declared as urged by the respondents. However, in case the election took place earlier than the prescribed period of the earlier committee of management coming toan end. In such cases, it cannot be said that the period started from the date of election. Question, therefore, would be as to what would be the date which can be said that the period of the management committee starts. We find that there is nothing in the Act, Rules or under the scheme of administration. However, we feel after perusing the scheme of of administration, the various provisions of the Act and the Rules that its period would start running either from the date of election validly held where the period of earlier committee of management has already come to an end prior to this date and there being no dispute or form the date the elected committee of management takes over the charge of the management."

8. The above controversy came to be considered in the case of Committee of Management Brig. Hoshiyar Singh Memorial Uchchatar Madhyamik Vidyala Shamli District Muzaffarnagar and another vs. Dy. Director of Education Ist Region, Meerut and others 1995 1 UPLBEC-149. It was a case in which the old committee of management held elections of the new committee of management after the expiry of its term of three years and one month. It was held that according to the scheme of administration of the college as approved u/s 16-a of the act, the life of the committee of Management is three years and one month, after the expiry of which its term wil come to an end automatically even if the new committee of management has not been elected. It is settled law that life of the committee of management comes to an end after the expiry of three years and one month and it is not open it or its office bearers to hold election of the now committee of management there-after. The contention that the term of the committee of management commences from the date of the attestation of signatures of the Manager of the newly elected committee of management was negatived.

9. In the instant case, there was no impediment, whatsoever, in taking over the charge on the date of the election itself, i.e.on 29.5.1994, and, therefore, the term was to commence from the said

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date and not from 15.7.1994 on which date the signatures of the manager petitioner no.2 were attested by the DIOS.

10. Having thus cleared the decks from the cobwebs about the above controversies, now I proceed further to determine the question whether the respondent-committee of management alleged to have been elected on 5.6.1997. The petitioners obviously failed to initiate the election process to constitute the new committee management well within time as stipulated in the amended scheme of administration. The term of the outgoing committee of management expired on 29.5.1997 It was only a few days before exiry of the term that a meeting is alleged to have been held for finalising the programme for election. On the other hand, it is asserted by the respondent no.4 that when the President and the Manager failed to convene a meeting to chalk out a programme to hold the elections in spite of the letter dated 3.4.1997 sent to them, followed by reminder dated 26.4.1997, a notice was circulated toall the members of the general body on 27.4.1997 to convene a meeting of the general body on 4.5.1997. In the meeting held on 4.5.1997, Jagdish Dubey was nominated and authorised to hold the elections and Amarjeet Rai, Advocate was appointed as Election officer. On 20.5.1997 Jagdish Dubey sent a letter to the DIOS for nomination an observer to be present at the time of the elections which were to take place on … . 6.1997. The election programme was published in the local daily 'Dewal Dainik Samachar' and intimation to all the 215 members, the list of which was published on 28.10.1996 under the authority of Amresh Chandra Pandey, manager and Shiv Shankar Singh, President, was sent and with their participation, election had taken place on 5th June 1997 in which Jagdish Dubey was elected as President and Indrasan Rai as Manager. It appears that the present petitioners were making a demand for appointment of observer by DIOS so that he may remain present in the election meeting, which was convened for 22.6.1997. Obviously, the DIOS was in a fix for one simple reason that on behalf of Jagdish Dubey and Indrasan Rai, it was asserted that election had already taken place on 5.6.1997 and the new committee, which was elected, may be recognised whilethere was a demand on behalf of the petitioner to nominate an observer for the election, which were due to take place on 22.6.1997 . Faced with this situation, the DIOS in his wisdom sent a letter dated 12.6.1997 to Amresh Chandra Pandey, Jagdish Dubey and Principal of the College , a copy of which is Annexure 10, whereby he required them to be present before him on 10.6.1997 along with requisite documents. Admittedly the present petitioners, Jagdish

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Dubey or their representatives appeared before the DIOS on 19.6.1997 The rival parties were heard and ultimately by order dated 19.6.1997, a copy of which is Annexure 22 was passed by the DIOS recognising the committee of management which was elected on 5.6.1997. Signatures of Indrasan Rai were also attested in this manner, into existence and started managing the affairs of the institution.

11. Sri Ashok Khare, learned counsel for the petitioners pointed out that an unsavory feature of the case, which stares at our face, at intervals, is the fact of issuance of the letter, Annexure 22 by ante dating it to 19.6.1997 giving the impression that the meeting is to take place with view to decide the schedule of the elections to constitute a new committee of management. The submission made on behalf of the petitioners is not correct and is against the facts as obtaining on the record. On 3.6.1997 Ram Gati Singh, President of the society had addressed the letter, Annexure 14, to the RDDE mentioning therein that some fake elections are to take place on 4/5.6.1997 and that the unauthorised persons be prevented from holding elections and the DIOS be directed not to nominate an observer for the purpose. On the basis of this letter, the joint Director of Education of the region issued a letter on 4.6.1997, a copy of which is Annexure 15 to the writ petition. On the other hand, Indrasan Rai who had been elected on 5.6.1997 had sent papers to the DIOS for recognising the committee of management of which he was elected as Manager. An emphatic request was being made to the DIOS for attesting the signatures of Indrasan Rai. Finding himself in a quandary, the DIOS sent a letter dated 12.6.1997, Annexure 19 to Jagdish Dubey, President of the newly elected committee of management, and Amresh Chandra Pandey, as well as Principal of the college to ensure that the service of the letter takes place well in time on the aforesaid two persons. It is true that in this letter it has not been mentioned that an election had taken place on 5.6.1997 but tone and tenor of this letter clearly indicates that the dispute was with regard to the election which had already taken place. The fact that a number of documents were required to be produced by the rival parties which implied that some election had taken place. This conclusion is further fortified by the contents of the order dated 19.6.1997 passed by the DIOS, a copy of which is Annexure 22. He has jotted down the points raised before him by the petitioner no.2-Amresh Chandra Pandey on the one hand and that of Jagdish Dubey on the other. Jagdish Dubey has elicited the circumstances in which the election was held on 5.6.1997. All these submissions were made

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by the rival parties before the DIOS was whether the committee of management elected on 5.6.1997 is to be recognised or not and under what circumstances the elections had taken place on that date. The DIOS had come to the conclusion that since the outgoing committee of management has ceased to function on account of expiry of the term it could not hold fresh elections and the only course left with the members of the general body was to convene a meeting and to nominate a person of their choice to conduct an election in the light of the various provisions contained in the scheme of administration. The assertion of the petitioners that the letter dated 19.6.1997 was ante dated and that they did not have any knowledge of the election having been held on 5.6.1997 under the supervision of Jagdish Dubey is an after thought.

12. There is also dispute about the number of members of the general body. Accouding to the petitioners, there were only 79 members while according to the respondent no.4 the general body consisted of 215 members whose li9st was published in Dewal Dainik Samachar on 28.10.1996 under the authority of petitioner no.2 and shiv Sjhankar Singh, the then President of the committee of management. Now it is too late for these two persons to assert that the list was not published. Under their authority or signatures. In October, 1996 no other personhad any occasion to get the list of the members of the general bady published. The election was, therefore, tobe held on the basis of approved list of 215 members which was published on 28.10.1996 the list on which the petitioners have relied for purpose of election cannot be said to be authentic and valid list. It would not be out of place to mention that the petitioners had inducted one Bechu Prasad Gupta as member after the alleged process of election had commenced. According to the petitioner, bechu prasad Gupta was the person who was elected as President of the Committee of Management in the election alleged to have taken place on 22.6.1997 Since Bechu prasad Gupta could not have been made a member after the election process had commenced, his participation in the election was wholly illegal and unjustified. He could not be elected as president of the society.

13. Learned counsel for the petitioners pointed out that since there was a dispute about the validity of the elections of the two rival committees of management, the DIOS had no option in the matter but to refer the dispute to RDDE/Joint Director under the provisions of section 16-a(7) of the Act who alone has the power to determine the question as to which of the elected committee of management is

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in the effective control of the affairs of the institution. In support of his contention, he placed reliance on the decision in Committee of Management and another vs. DIOS and another (1989 ACJ-170) Committee of Management Sri Girdhari Lal Higher secondary School Chul hawari (Tundla) and anr. Vs. DIOS Firozabad and others (1994)l ESC-502: Urwa Bazar Educational Society urwa Bazar Gorakhpur and another vs. Assistant Registrar, Firms Soeieties and Units, Gorakhpur and others (1988) UPLBEC-515; Committee of management, Nehru Vidyapeeth Reotipur District Ghazipur vs. DIOS Ghazipur and others (1991) 1` UPLBEC-n187 and a series of decisions on the point, which is not necessary to recount as it would unnecessarily burden this judgement. There can be no quarrel about the proposition of law laid down in the aforesaid cases. It is well established that where there is a dispute about the elections between two rival committees of management, the DIOS is bound to refer the same for decision by the Dy. Director of Education, who is thenrequired to record the findings as to which one of the committees of management is in actual and effective control of the affairs of the institution. Various observations made in the aforesaid decisions do not apply to the facts of the present case for one simple reason that on the date i.e.19.6.1997 on which the DIOS had recognised the respondent no.4 as the validly constituted committee of management in the elections held on 5.6.1997 there was in existence no rival committee of mangement as admittedly, the rival committee of management which later on sought recognition is said to have been elected on 22.6.1998. A committee of management which is elected after the recognition of the committee which came into being much before, could not be recognised by the DIOS on 19.6.1997, there was only one elected committee of management , i.e., respondent no.4 and the committee of management elected on .22.6.1997 had not come into existence. At the time when the DIOS recgnised the duly elected committee of management there was no other rival committee of management and , there fore, the question of making a reference u/s 16-a (7) did not arise. Any reference u/s 19-a (7) if made by the DIOS in the backgroung of the facts and circumstances of the present case would have been otiose.

14. Much capital was sought to be made by challenging order dated 19.6.1997 passed by the DIOS by asserting that in the facts of the case, he had committed a grave illegality in recognising the respondent no.4 committee of management. It was urged that Jagdish Dubey, a stranger could not hold the elections and that the procedure adopted by him to elect a new body was also illegal and untenable. I

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am not convinced by this submission of the learned counsel for the petitioners. After the erstwhile committee of management had run out its term and has become defunct and when the outgoing President and Manager failed to convene a meeting in spite of the request, the only course left open was to convene a meeting of the general body on the authority of the one third of its members. The general body authorised and intimated Jagdish Dubey to hold the elections as the outgoing committee of management failed to do so. It was in this manner that Jagdish Dubey got an authority to hold the elections .

15. It is well established that the order passed by the DIOS attesting the signatures of the manager take as a matter of necessity. This aspect of the matter has been considered in a number of decisions of this court . To quote a few, reference may be made to committee of Management SAV Inter College V DIOS (civil Misc Weeit no. 12725 of 1975, decided on 24.11.1997 by a Division Bench of this court) Committee of Management and another vs. DIOS Meerut and another (1978) AWC-124) ; Committee of Management vaidic Higher Secondary School, Faizpur Ninana and another vs. DIOS Meerut and another (1993 2 UPLBEC- 934 and, Gauri Shankar Rai and others vs. Dr. Ram Lakhan Pandey, DIOS Ballia and others (1984 UPLBEC-166) In all these cases, it has been held that the DIOS is duty bound to recognise the committee of management and to attest the signatures of the Manager after making an administrative enquiry and without entering into the validity or other-wise of the election of the new committee of management and its office bearers. The DIOS has to collaborate with the various committees of management for administrative purposes in order to perform his various statutory duties ad adumbrated in the U.P. Intermediate Act. 1921 and U.P. High School and intermediate Colleges (Payment of salaries of Teachers and other Employees) Act, 1971. The power of the DIOS to recognise the committee of management and to attest the signatures of the manager, which is necessarily done for administrative purposes cannot be whittled down merely because a dispute has been raised about the validity of the election or otherwise by the rival committees of management. If the DIOS is permitted to show a apathy in the matter and his inaction in discharging the essential administrative function, it would lead to disastrous results. The DIOS was, therefore, justified in recognising the committee of management which was elected on 5.6.1997 and attesting the signatures of Indrasan Rai who was elected as its Manager.

16. It would not be out of place to mention that the validity of the election cannot be convassed or determined before this court in the writ jurisdiction. This aspect of the matter has to be decided by the civil courts. If the petitioners were really aggrieved on account of the recognition of a lady which according to them has been elected not in accordance with law, there was nothing to prevent them to file a civil suit before the competent court. The fact remains that the respondent no.4 committee has been recognised. It is functioning as such by managing the affairs of the institution . Any interference at this stage by this court would result in incalculable harm to the institution and its students. The supreme interest of the students and institution cannot be ignored merely because certain persons are fighting, in their litigative zeal to grab power. Any disturbance in the functioning of the respondent no.4 is likely to hamper the smooth running of the institution. The expediency demands that things should be allowed to go on.

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17. For the reasons stated above, I find that both the petitions are devoid of any merit and substance. .Interference by invoking the extra ordinary jurisdiction under Article 226 of the Constitution of India is wholly unwarranted. Both the writ petitions are accordingly dismissed without any order as to costs.

Petitions Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD: NOVEMBER 25, 1998.

BEFORE
THE HON'BLE D.P. MOHAPATRA, C.J.
THE HON'BLE R.R.K. TRIVEDI, J.

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November, 25

HABEAS CORPUS WRIT PETITION NO.20098 OF 1998.

Wali Mohammad ... Petitioner(In Jail)
Versus
Superintendent,DistrictJail,Bulandshahr & ors. ... Respondents.

Counsel for the Petitioner : Shri Daya Shankar Mishra
Counsel for the Respondent : A.G.A.

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Section 3(2) of National Security Act, 1980- the representation of the petitioner was submitted on 11.12.1997 which was received by the central govt. on 22-12-1997. The representation was decided on 7-2-1998, held that this inordinate and unexplained delay in deciding the representation has rendered the detention illegal.

By the Court

1. Petitioner Wali Mohammad of this habeas corpus petition has challenged his detention under Section 3(2) of the National Security Act, 1980 (thereinafter referred to as the Act) under the order dated 30.11.1997 (annexure-I to the petitioner), passed by respondent no. 2 and also his continued detention under the aforesaid order. He has also prayed that the respondents may be directed to release the petitioner from detention forthwith.

2. Along with the order of detention dated 30.11.1997 petitioner was also served the grounds on which basis respondent no. 2 formed his subjective satisfaction for passing the order of detention against the petitioner. The grounds have been filed as Annexure II to the writ petition. The facts stated in the grounds are that the petitioner is a criminal and daring person and in order to get illegal financial benefits, commits heinous crimes in a planned manner, armed with illegal weapons with his accomplices on account of which residents of Bulandshahr area live under fear and terror of the petitioner and do not dare to open their mouth against the petitioner and accomplices and are not able to muster courage to lodge any report. The people at large suffer from ill effects of the criminal activities of the petitioner and his accomplices which also affects prejudicially the maintenance of the public order. The petitioner and his accomplice Riyasat, on 11.9.1997, committed robbery in a daring manner and looted the amount of salary of Government employees in broad day light at pistol point by which an atmosphere of fear and terror prevailed in the locality, residents of which felf insecure and they ran helter skelter to save their life. There was a panic on the busiest road of the town. A short description of the criminal activities of the petitioner and his accomplice has also been mentioned therein as under:

3. That on 11.9.1997, at about 11.30 A.M., Shri Brij Bhushan Gupta, Junior Engineer (IV) and Shri Radha Kant Sharma, clerk of Anupshahr Branch of Ganga Canal Division, Bulandshahr, withdrew an amount of Rs.82,550/- from State Bank of India, Bulandshahr as

salary of the employees of the department and were coming back to their office. When they reached near the Kothi of Dr. S.P.K. Sharma, situate on Delhi Road, two criminals suddenly came from their front side; on of them was armed with a country-mae pistol, he fired at the aforesaid employees and another criminal entered into a scuffle with them. Both the employees felt nervous due to this sudden attack; the two criminals snatched the bag and ran away towards the Central School. On account of this activity in which the Government money was looted in broad day light on the main road of the town, a panic was created, the shop keepers and passers by were stunned and were seen running for their security; some persons closed their doods, fear and commotion prevailed. At that time the Inspector in-charge Police Station Kotwali with police force on a geep appeared at the place of occurrence. Brij Bhushan Gupta gave them information about the occurrence. Brij Bhushan Gupta gave them information about the occurrence. The Inspector in-charge immediately give signal to send more police force and he also entered into chase and search of the criminals. Report of this occurrence was lodged at Police Station Kotwali, Bulandshahr and was registered as case crime no.679 of 1997, under Section 394 I.P.C.

4. Both the aforesaid Government employees and the Inspector in-charge and the Police force accompanying him, proceeded towards the side in which the criminals had run away. Additional police force also reached. Police made an elaborate arrangement for arresting the culprits and chased them from all the sides. When the police force reached All Saint public School, some persons informed that two criminals with a bag have crossed the railway line and have run towards agricultural fields. The Inspector in-charge and the police force when reached hear the grove of Ram Pal Singh, they located the two culprits; the Police cautioned, chased and surrounded them. The culprits fire at the police party but the police force kept their courage and arrested the culprits at 1.15 P.M. near a Juar field where the two culprits had suddenly fallen down near the place where bricks were lying. Out of the two persons arrested, one was the petitioner Wali Mohammad and another was Riyasat. Brij Bhushan Gupta and Radha Kant identified them in presence of the Inspector in-charge and informed him that these two persons snatched the money kept in the bag. The bag was recovered from Riyasat with the entire money of Rs.82550/-. An ilegal knife was also recovered from him. From the possession of the petitioner a country made pistol of .315 bore with empty cartriages in its barrel and two live cartridges were recovered. The recovery memos were prepared separately in

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respect of the money recovered and the illegal fire-arms on which basis cases were registered as Case Crime No. 680 of 1997, under Section 307 I.P.C., Case Crime No. 681 of 1997, under Section 25 of the Arms Act against Wali Mohd. And case Crime No.682 of 1997, under Section 4/25 of the Arms Act was registered against Riyasat. After investigation charge sheets were submitted in and are under consideration of the Court. On account of the recovery of the amount in case Crime No.679 of 1997, under Section 394 I.P.C., Section 411 I.P.C. was also added. In this case also after investigation charge sheet has been submitted in Court which is under consideration.

5. On account of the criminal activities of the petitioner and his companion during the police encounter, the persons who were working in fields and passers by were under rear and terror which affected the public order badly and there was serous breach of law and order.

6. On 2.9.1997, at about 9.15 A.M., an amount of Rs.8500/- was forcibly snatched from Mukesh, son of Suresh Chand, resident of Mohalla Fatehganj, district Bulandshahr while he was proceeding on cycle to his shop in New Grain Mandi near Anup Shahr Adda, by three criminals who came in a blue scooter. As the criminals possessed fire-arms, the victim couldnot face them and they escaped successfully but the victim and the witness recognized the culprits. A report of this occurrence was lodged as case Crime No. 105/299/97, under section 356 I.P.C.

7. After the arrest of the petitioner on 11.9.1997, Mukesh complainant identified the petitioner and Riyasat and also informed the police of New Grain Mandi Police outpost. He also claimed that he can identify the accused as they committed the offence of loot. On this information a case Crime No.209/105/97, under Section 356 I.P.C. was registered against the petitioner. On interrogation the petitioner admitted his involvement in the aforesaid crime which has been recorded in General Diary No. 50 of 11.9.1997 at Police Station Kotwali, Bulandshahr. The case is still under investigation with the police. The petitioner is in judicial custody in connection with case crime no. 679 of 1997, under Section 394/411 I.P.C. and case crime no. 299/105 of 1997, under Section 356 I.P.C. and presently confined in district jail, Bulandshahr but the petitioner has filed bail applications and is trying to get himself released on bail. There is surong possibility that the petitioner shall be successful in his aforesaid object. If he is released on bail he shall again indulge in

similar activities affecting the public order. He shall also pressurise the witnesses and the victims of their criminal activities and shall try to destroy the evidence which shall further enhance the fear and terror in the locality and shall prejudicially affect the public order.

8. On the aforesaid facts, respondent no.2 felt satisfied that with a view to preventing the petitioner from acting in any manner prejudicial to the maintenance of the public order, it is necessary to pass an order directing the petitioner to be detained under Section 3(2) of the Act.

9. The petitioner was also informed that he has right to challenge his detention by making representations before the State Government, the Advisory Board and the Central Government. The representations may be submitted through Superintendent of Police immediately. The petitioner was also informed that his case shall be referred to the Advisory Board within three weeks and if his representation is not received within that period, it shall not be considered. The petitioner was also informed that if he desires a personal hearing before the Advisory Board, this fact may also be mentioned in the representation or by a separate representation which may be submitted through the Superintendent of Jail.

10. The aforesaid order dated 30.11.1997 was approved by the State Government on 10.12.1997, under Section 3(4) of the Act. The case of the petitioner was referred to the Advisory Board. A report about the detention of the petitioner was submitted to the Central Government on 11.12.1997 as required under Section 3(5) of the Act which was received by the Secretary, Ministry of Home Affairs, New Delhi, on 13.12.1997. The case of the petitioner was referred to the Advisory Board heard the petitioner personally on 7.1.1998. The Advisory Board found that there was sufficient cause to detain the petitioner. The report of the Advisory Board dated 13.1.1998 was received by the Stae Government on 14.1.1998. The State Government after consideration and examination of the entire matter, confirmed the detention of the petitioner for a period of 12 months by order dated 27.1.1998, under Section 12 of the Act.

11. The petitioner submitted his representation on 11.12.1997 which was forwarded by the respondent no.2 along with his comments to the State Government on 17.12.1997 which was received on 18.12.1997. The State Government examined the representation of the petitioner and rejected the same on 23.12.1997. The

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representation of the petitioner addressed to the Central Government on 11.12.1997 was sent by the State Government to the Central Government on 22.12.1997. The Central Government on 26.12.1997 called for some information from the State Government on 27.1.1998 and 29.1.1998 which was received by the Central Government on 2.2.1998. The representation was examined by different authorities and ultimately rejected by the Minister of State, Home Affairs on 7.2.1998.

12. In this petition counter affidavits have been filed by Rajesh Kumar Singh, Deputy Jailor, District Jail, Bulandshahr, on behald of respondent no.1, by Rajnish Gupta, the then District Magistrate, respondent no.2, by Shri R.S. Agarwal, Joint Secretary, Government of U.P., Home and Confidential Department, on behald of respondent no.3 and Bina Prasad, Under Secretary, Ministry of Home Affairs, Government of India, on behalf of respondent no.4.

13. We have heard Shri D.S.Mishra, learned counsel for the petitioner, Miss nahid munees, Additional Government Advocate, for respondents nos. 1 to 3 and Shri K.N.Pandey, holding brief of Shri S.N.Srivastava, Senior Standing Counsel, Government of India, for respondent no.4.

14. Learned counsel for the petitioner has challenged the impugned order of detention dated 30.11.1997 and the continued detention of the petitioner under the said order on the following grounds :-

1. The first submission is that in case Crime No. 299/105 of 1997, under Section 356 I.P.C. which is ground no.3 in the grounds of detention, petitioner was put to identification on 8.12.1997. However, the petitioner was not identified by the witnesses as culprit. Consequently, a final report was submitted by the police which has been accepted by the Court. Ground no.3 thus became non-existent.

2. So far as case Crime No.679 of 1997, under Sections 394/411 I.P.C. is concerned, the bail application moved by the petitioner and the bail order passed thereon were not placed before the detaining authority and he was not made aware of the correct facts. The subjective satisfaction of respondent no.2 for passing the impugned order thus vitiated.

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3. It has also been submitted that the petitioner was also detained under the Gangsters Act, in which neither bail application was pending nor was the bail granted. The petitioner could not be released from jail so as to indulge in the alleged criminal activities but this fact was also not placed before the detaining authority and he was not aware of the prevailing circumstances. The impugned order of detention thus stood vitiated.

4. Lastly, it has been submitted that the petitioner submitted his representation on 11.12.1997 which was received by the Central Government on 22.121997. The Central Government called for a report from the State Government on 26.12.1997. However, the State Government could send the required information on 27.1.1998 and 29.1.1998, i.e. after more than a month. Thereafter, the representation was rejected on 7.2.1998 by the Central Government, i.e. after 46 days' delay. The time taken between 26.12.1997 and 29.1.1998 has not been explained as to why the required information could not be sent by the State Government earlier. The continued detention of the petitioner thus has been rendered illedgal on account of the inordinate and unexplained delay in deciding the representation. The learned counsel has placed reliance on the cases of Ram Prasad Chaudhary versus State of U.P. (A.I.R. 1987 Allahabad 169) and State of U.P. Versus Kamal Kishore Saini (1988 S.C.C. (Cr.) p.107.

15. Miss Nahid Munees, learned Addl. Govt. Advocate, on the other hand, submitted that the petitioner was involved in case Crime No.679 of 1997, under Section 394/411 I.P.C. in which the public money was looted in a daring manner in broad day light from a busy road in full view of the general public. On chase, the petitioner and another accused Riyasat were arrested same day with the entire money. Such occurrence had sufficient potential and reach to disturb the public order. The validity of the order of detention is not affected in any manner on the ground that the bail application and the bail order were not placed before the detaining authority. The fact that the petitioner had applied for bail is not denied and the awareness of this fact was sufficient for the detaining authority to pass the order of detention. Learned counsel has further submitted that the delay has been duly explained in paragraph 15 of the counter affidavit filed by Shri R.S. Agarwal and reasons have been mentioned as to why the information could not be communicated to the Central Government earlier. It is submitted that in fact the report of the Advisory Board was received on 14.1.1998 and then only the complete information

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could be forwarded to the Central Government on 27th and 29th of January, 1998. The learned Addl. Govt. Advocate has placed reliance on the following cases in support of her contention.

Biramani versus State of Tamil Nadu (J.T. 1994 (1) S.C.350), Abdul Sattar Ibrahim Nayak versus Union of India (A.I.R. 1991 S.C. 2261), Jokhu Lal versus Superintendent, Central Jail, Naini and others (1994 Cr.L.J.3466) DB (Alld.), State of Tamil Nadu versus C. Subramani (1992 (Suppl.) A.C.C.p.35 (SC) and Smt. Kamla Bai versus Commissioner of Police, Nagpur and others (J.T.1993 (3) SC 666).

16. We have carefully considered the submissions made by the learned counsel for the parties. The first submission of the learned counsel for the petitioner that in identification held on 8.12.1997 as the petitioner was not identified by the witnesses, ground no. 3 became non-existent and the satisfaction arrived at by the detaining authority stands vitiated. It has also been submitted that in any case the continued detention of the petitioner became illegal as this fact was not considered by the appropriate government or by the Central Government. However, the submission of the learned counsel for the petitioner cannot be accepted. It is not disputed that on the date the impugned order was passed, the material on record was sufficient for having a satisfaction regarding involvement of the petitioner in the case. The detention order not be held to be illegal on the basis of the subsequent event about which the detaining authority could not be aware in any manner. Further, even assuming for the sake of argument that ground no. 3 bacame non-existent, the order of detention could not be affected in view of the provisions contained in Section 5A of the Act which provides that the order of detention shall be deemed to have been passed separately on each ground. In such circumstances even if ground no. 3 became non-existent, the validity of the order on other ground/grounds is not affected in any way. It can also not be disputed that the cases shown in ground no.3 and grounds nos.1 and 2 are separate and independent incidents. Thus the petitioner cannot claim any benefit on the basis of the case of Ram Prasad Chaudhary relied on by him.

17. So far as the second and third submissions that the petitioner's bail application and the order passed thereon were not placed before the detainine authority and the dtaining authority was not informed that the petitioner has been detained under the Gangsters. Act in which neither bail application was moved nor bail was granted, it is

claimed that the facts were not placed before the detaining authority, thus the impugned order vitiated as the prevailing facts and circumstances were not taken into account. We are not impressed by this submission of the learned counsel for the petitioner. The fact which was not placed before the detaining authority cannot be made a ground for attack. If detention of the petitioner under the Gangster Act was not part of the material placed before the respondent no.2, it has to be ignored. The Court has to examine whether the order of preventive detention could be legally passed on the basis of the material placed before the detaining authority. We have no doubt that the material which was made available to the detaining authority was sufficient for passing the order of Veeramai (supra), Hon'ble Supreme Court held in para. 6 as under:

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> " From the cat eha of decisions of this Court it is clear that even in the case of validly be passed if the authority passing the order is aware of the fact that he is actually in custody; if he has reason to believe on the basis of the reliable material released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities and if the authority passes an order after recording his satisfaction the same can not be struck down."

18. In the present case from perusal of the grounds, it is clear that there was material before the respondent no.2 for all the in gredtents which required to be satisfied before passing the order of detention against the person already in detention. In our opinion, the impugned order of detention does not suffer from any illegality.

19. The last submission is regarding the delay in deciding the representation of the petitioner. The learned cousel has submitted that the representation of the petitioner was submitted on 11.12.1997 which was received by the Central Government on 22.12.1997. However, the representation was decided on 7.2.1998. For this inordinate and unexplained delay, the continued detention of the petitioner has been rendered illegal. The learned counsel has submitted that there is virtually no explanation for the period 26.12.1997 to 29.1.1998 which was taken by the State Government in supplying the required information to the Central Government in supplying the required information to the Central Government. In this connection we have perused the counter affidavits of Bina Prasad, filed on behalf of respondent no. 4 and Shri R.S.Agarwal,

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filed on behalf of respondent no. 3. In para 5 of the Counter affidavit filed by Shri R.S.Agarwal, delay has been tried to be explained in the following words:

> "X X X X X X X X X X X X X It is further stated that the Ministry of Home Affairs, New Delhi vide their telex message dated 26.12.97 asked the opinion of Advisory Board. The report of Advisory Board received by the State Government on 14.1.98. Thereafter the State Govt. on 27.1.98 & 29.1.98 intimated to Secretary, Ministry of Home Affairs, New Delhi that the Advisory Board found suffcient cause for the detention of the petitioner……."

20. The counter affidavit filed by Bina Prasad on behalf of respondent no.4 on the other hand, does not say that the report or the Advisory Board was called for from the State Government. Para. 6 of the counter affidavit reads as under:

> " The allegation made in the para nos. 32 and 33 of the petition are denied being incorrect.it is stated that a representation dated 11.12.1997 from the detenu was received by the Central Government in the Ministry of Home Affair on 22.12.97 through State Government of Uttar Pradesh. This representation was immediately processed for consideration and it was found that certain vital information required for its further consideration was needed to be obtained from the State Government through a crash wireless message dated 26.12.97"

21. From the aforesaid averments it is clear that there is no material on record to show that the report of the Advisory board was at all required by the Central Government. No. material has been filed to establish this fact in absence of which it appears that the State Government dealt with the matter very casually and carelessly. This Court as well as the Apex Court repeatedly in number of judgments have expressed the view that the State Government and the Central Government must act swiftly and with reasonable desach while dealing with these matters which involve the question of liberty of a person. However, the State Government in the present case has utterly failed to act swiftly as required under the law. We have no hesitation in saying that on account of this delay of more than a

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month caused in sending information to the Central Government, the representation filed by the petitioner could not be decided within reasonable time which has rendered the continued detention of the petitioner illegal and he is liable to be released forthwith. Even if it is accepted that report of the Advisory Board was required from the State Government, the report was admittedly received on 14.1.1998, there is no explanation on record as to why it was kept for fifteen days and not sent to Central Government immediately. The Central Government could also not postpone the decision on the representation of the detenu for indefinite period. The Central Government was bound to discharge its legal obligation promptly on the basis of the material before it, and non- receipt of any paper from the State Government could not afford a valid excuse for the long delay. Thus, judged from any angle, conclusion is same that there was inordinate delay in deciding the representation.

22. For the reasons stated above, this petition is allowed. The continued detention of the petitioner is found illegal and the respondents are directed to release him forthwith if his detention is not required in any other case.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.1998

1998

December, 16

BEFORE
THE HON'BLE D.K.SETH,.J.

CIVIL MISC. WRIT PETITION NO. 5582 OF 1992

Channey Lal & Others ... Petitioner
Versus
Director, Malaria Reserch Centre & anothers... Respondents

Counsel for the Petitioner : Sri Dinesh Dwivedi
Sri Rakesh Dwivedi
Counsel for the Respondents : Shri K.R.Singh
S.C.

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Article 226 of the Constitution – A daily-wage labour cannot be regularised when there is no vacancy Nor the court can give any direction for creation for any post –concept of retrenchment cannot be extended to a daily wage employee.

By the Court

1. The Petitioner allege to have been employed on daily wage basis in a project under the Indian Council of Medical research, an organized body of the Union of India at Shankergarh.

2. Mr. Ali Murtaza, holding brief of Mr. Rakesh Dwivedi submits that the project is still continuing yet the petitioners have been asked not to report on duty from 13.12.1991 orally, on 12th December, 1991. He contends that since the petitioners had been working for more than three years, they have acquired a right to be considered for being regularized. He, secondly, contends that the petitioners are still continuing without any break and have completed 24 days in a year. Their services could not be terminated. He also contends that since the petitioners were holding temporary posts, therefore, article 311 is very much attracted and as such, the termination of service of the petitioners cannot be sustained. He relied on the decision in the case of P. I. Dhingra. Vs. Union of India (AIR 1953 SC 36) in support of his contention that Article 311 is also attracted in respect of temporary posts since it does not make any distinction between a person holding permanent or temporary posts.

3. In support of his contention that the petitioners are eligible for being considered for regularization, he had relied on a decision in the case of State of Haryana. Vs. Piara Singh (AIR 1992 SC 2130). He particularly relied on the ratio decided in paragragh 17 of the said decision. On these grounds, he claims that the writ petition should be allowed and the petitioners should be reinstated.

4. Mr. K. R. Singh, learned Standing Councel on the other hand contends that the petitioners being daily wage labours do not have any right to any post and as such neither Article 3ll of the Constitution of India is Attracted nor they have acquired any right to be considered for regularization nor the could claim any right against the order of termination. He also relies on a decision in the case of Himansu Kumar Vidyarthi. Vs state of Bihar (1997(76) FLR 237) in support of his contention that the daily wage employee has nor right to the post and concept of retrenchment cannot be extended to

such/daily wage employee and his disengagement cannot be said to be arbitrary. Relying on the decision in the case of Pushpa Agarwal , Vs. Regional Inspectress of Girls School, Meerut (1995 (70) FLR 20), he contends that the principal of retrenchment as provided under the Central Industrial Disputes Act and the Rules framed thereunder, is also attracted in respect of a workman governed under the U.P. Industrial Disputes Act and the rules framed there under.

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5. I have heard both the learned counsel at length, and gone through the writ petition and have also confronted Mr.Murtaza about the pleading as to whether it has been pleaded that the petitioners are working for three years or more. The counsel had drawn my attention to paragraphs 4,6 and ll of the writ petition in order to make out a pleeding. On a plain reading of the said three paragraph, it does not show that such a case has been made put. Except the said three Paragraph, there are no other paragraph from which he could decipher any statement to the extent that the petitioners have been working continuously for a period over three years in order to appreciate the factual aspect, it may be useful to refer to the said three paragraphs, which are quoted below

6. That the above project was sanctioned in the year 1986-87, and started operating in the year 1987 with about 30.32 employees. All the appointments that were made, were purely temporary appointments. At the time when the petitioners were appointed, were already approximately 16-17 persons working in the project and taking the appointment of the petitioner also into account, the strength went upto 31. Thereafter. All the persons continued to function on the posts on which they were appointed. The petitioners are appointed as Surveillance/Intervention workers. The petitioners are , therefore, the employees of malaria Research Center which is a body sponsered by the Health Ministry of the Union of India and the Indian Council of Medical research.

7. That all the petitioners were continuously functioning on their posts without any break. It was only for the first time, this was done by the respondent no.2 who is the new Officer –in-Charge, who had come in the month of June, 1991.

8. That the fact that approximately 30 persons have been continuing in the Research Centre for nearly last three years or more, Indicate that such number of workman are required by the centre permanently. Therefore, putting the break of or terminating the

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services of the petitioners not on the ground of work or conduct, amounts to unfair treatment and harassment taking advantage of precarious nature of the petitioners service. It is well settled that if the work is there and if the petitioners are suitable, then it is absolutely unfair to terminate the services of the petitioners for the purposes of appointing other persons".

9. On a plain reading of the said three paragraphs, it shows that the petitioners have not made out any such case. On the other hand in paragraph 4 it is contended that the project was sanctioned in the year 1986-87 and there were 30-32 employees in 1987 and when the petitioners were appointed, there were already 16-17 persons working. But it is not mentioned as to on which date or at least in which year the petitioners were appointed, Though in paragraph 6, it was said that they were continuing without any break form the date of their appointment but nowhere the date of appointment having been disclosed, the said statement cannot help the petitioners in absence of mentioned of any year or duration: In paragraph ll, though it has been said that approximately 30 persons had been continuing for nearly last three years or more, but nowhere it is contended that the petitioners have been continuing for three years or more. Thus there appears to be wholly absence of material particulars in the pleadings so as to make out a case on the basis whereof the entire argument was advanced by Mr. Murtaza, could be substantiated.

10. The Principal which was advanced by Mr. Murtaza though are beyond all doubts being settled principal of law but those principals are attracted only on the basis of the facts as would be apparent from the pleadings. Though Mr. Murtaza had made certain statement at the bar but such statements do not form part of the pleadings. The High Court of record, It cannot rely on the statements made at the Bar unless it forms part of the pleadings borne on record.

11. The principal of Article 3ll as contended by Mr. Murtaza does not apply in the present facts and circumstances of the case since, admittedly, the petitioners have not been able to make out a case that they were holding any civil post. Admittedly they are not members of any civil services, There is nor pleading that the petitioners had been holding any civil post under the state. A workman employed on a daily wage basis in a project does not hold a civil post, there is no question of distinction of temporary or permanent. Therefore, the decision in the case of P.L. Dhingra,(Supra), relied on by

Mr.Murtaza does not help him in the facts and attracted on the basis of the pleadings that has been made out as observed above.

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12. The question of regularisation as has been sought to be advanced by Mr.Murtaza relying in the case of Piara Singh, Supra also appears to be wholly misconceived. In asmuch as, in paragraph 17 of the said decision, it was held as follows:-

> " Now coming to the direction that all those adhoc/temporary employees who have continued employees who have continued for more than an year should be regularised, we find it difficult to substain it. The direction has been given without reference to the existence of a vacancy. The direction in effect means that every adhoc/temporary employee who has been continued for one year should be regularised even though(a) no vacancy is available for him which means creation of a vacancy(b) he was not sponsored by the Employment Exchange nor was he appointed in pursuance of a notification calling for application which means he had entered by a back-door(c) he was not eligible and/or qualified for the post at the time of his appointment(d) his record of service since his appointment is not satisfactory. These are in addition to some of the problems indicated by us in para 12 which would arise from giving of such blanket orders. None of the decisions relied upon by the High Court justify such wholesale, Unconditional orders. Moreover, from mere continuation of an adhoc employee for one year, it cannot be presumed that there is need for a regular post. Such a presumption may be justified only when such continuance extends to several years. Further, there can be no "rule of thumb" in such matters. Conditions and circumstances of one unit may not be same as of the other. Just because in one case, a direction was given to regularise employee who have put in one year's service as far as possible and subject to fulfilling the qualifications, it cannot be held that in each and every case such a direction must follow irrespective of and without taking into account there other relevant circumstances and considerations. The relief must be moulded in each case having regard to all the relevant

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facts and circumstances of that case. It cannot be a mechanical act but a judicious one. Judged from this standpoint, the impugned directions must be held to be totally untenable and unsustainable ."

13. A plain reading the said paragraph shows that in the said case, it was never contended that a daily wage labour could be regularised even when there is no vacancy on the other hand , the court cannot give direction for creation of any post. However. In the fact and circumstances of the said case, the court had given certain directions for formulating scheme for regularization. In the present case, no interim order has been granted. Admittedly, the petitioners were out of employment since 13th december,1991. Then again there is no pleading in order to bring facts suitable for the purpose of issuing direction for formulating a scheme. At the same time, in the case of Himanshu kumar Vidyarthi,(Supra) it was held by the apex court that a daily wage employee has no right to the post. Therfore, the concept of retrenchment cannot be extended to a daily wage employee. The disengagement of a daily wage labour, who is engaged for a day is not a termination of service. Since a daily wage labour is engaged only on the basis of a contract lasting for a day only and each engagement is a fresh engagement, non-engagement or dis-engagement , therfore, is held not to be arbitrary.

14. In the case of Smt.Pushmpa Agarwal,(Supra), it was held that the principal of retrenchment as enunciated in the Central Industrial Disputes Act is also attracted in the case Governed by the U.P. Industrial Disputes Act. By reason thereof, the principal enunciated in the case of Himanshu Kumar Vidyarti (Supra) can very well be attracted in the cases where an employee is engaged on a daily wage basis governed by the U.P.Industrial Disputes Act, as in the present case. In the circumstances, it appears that no case of interfernce has been made out in writ jurisdiction.

15. Therefore, the writ fails and is accordingly dismissed. No cost.

16. At this stage Mr.Murtaza submitts that the court may be pleased to issue a direction for consideration of the representation that might be made by the petitioners having regard to continuation of their services.

The Pleading, as observed earlier, does not show that there were sufficient materials in order to issue such a direction for consideration of the representation, particularly when the petitioners

were no more in employment since 13th December, 1991 namely for over long seven years. In the fitness of the things, this Court feels that it is not a case fit for giving liberty to the petitioners to make representations for being considered by the respondents.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 30.11.98

BEFORE
THE HON'BLE D.S.SINHA, J.
THE HON'BLE B.K.SHARMA, J.

1998

November, 30

CIVIL MISC. WRIT PETITION NO. 27055 OF 1993

Doodh Nath Pandey ... Petitioner
Versus
Vice Chancellor of the Sampurnanad Sanskrit Vishwa Vidyalaya, Varanasi and Others ... Respondent

Counsel for the Petitioner : Shri A. N.Singh
Counsel for the Respondents : Shri Anil Tiwari
Shri R.P Mishra
S.C.

Article 226 of the Constitution- Statute No. 12.22 of the Ist Statute of Sampurnanand Sanskrit Vishwavidyalaya itself provides that the officiating principal will not be entitled to pay of the post of principal during such period – held – that the claim of the petitioner being senior most teacher for the salary of the post of principal is not sustainable.

By the Court

1. Heard shri A.N.Singh, learned counsel appearing for the petitioner and Shri Anil Tiwari, learned counsel representing the Vice-Chancellor of the Sampurnanad Sanskrit Vishwavidyalaya, Varanasi.

2. Indisputably, the Petitioner is a senior most teacher of Shri Kuber Nath Sanskrit Mahavidyalaya, Kuber Nath Deoria, and in that capacity he is officiating and acting as principal of the college as

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provided in the Statute No. 12.22 of the First Statute of the Sampurnanad Sanskrit Vishwavidyalaya, Varanasi which is applicable in the case of the petitioner.

3. The Statute 12.22 provides that in "case of office of the principal of an affiliated college falls vacant the senior most teacher of the college shall act as principal until a duly selected assumes office provided that such teacher shall draw the pay he is entitled to get on the post of the teacher and will not get the pay of the post of principal during such period."

4. In View of the provisions contained in the Statute No.12.22 the claim of the Petitioner for the salary of the post of the principal of the college is not sustainable. Thus, Instant petition has no force.

5. Consequently, the petition is dismissed summarily.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD THE NOVEMBER 12, 1998

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November, 12

BEFORE
THE HON'BLE D.P.MOHAPATRA, CJ.
THE HON'BLE R.R.K.TRIVEDI, J.

HABEAS CARPUS WRIT PETITION NO. 6925 OF 1998

Raju Bhatia ... Petitioner
Versus
State of Uttar Pradesh & Others ... Respondents

Counsel for the Petitioner : - Sri Guresh Singh
Counsel for the Respondents:- A.G.A.

Section 3(3) of National Security Act – validity of the order of detention has to be judged in every individual case on its own fact the court is only required to see as to whether on such allegation if accepted true the subjective satisfaction for passing an order of preventive detention under the Act, could be justified.

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By the Court

1. This habeas corpus writ petition under Article 226 of the Constitution of India has been filed by petitioner Rajeev Bhatia challenging the order of detention dated .4.12.1997 annexure 7 to the writ petition, passed by respondent no.2. district Magistrate Kanpur Nagar Under Section 3(2) of the National Security Act, 1980 (Herinafter referred to as the Act) and order dated 20.1.1998, under Section 12(1) of the Act, both passed by respondent no. 1. The petitioner has also prayed for a direction to the respondents to set him at liberty forthwith.

2. The impugned order dated 4.12.1997 was served on the petitioner in district jail, Kanpur Nagar on 5.12.1997. Along with the order of detention, petitioner was also served with the grounds for passing the said order by respondent no.2. In the grounds, inter alia, it has been stated that on 6.11.1997, at 2.00 P.M. Mohit Kumar Balmiki, Pappu and Vijai Dhobi came on a scooter to the tempo stand office, Sarsaiya Ghat, Kanpur Nagar, and were talking to Prakash Narain Kureel. After five minutes, petitioner along with his companions Shankar Balmiki and Sumit Tripathi came in a green Maruti van bearing registration no., UP-78 J-6795. All of them alighted from the Maruti van and fired from country-made pistols and in order to kill Vijai Dhobi, hurled two bombs which exploded near room of Prakash Narain. Pappu received fire-arm injury in his hand. Pappu, Mohit and Vijai Dhobi alongwith Prakash Narain Kureel went inside the room, petitioner and his companions fired indiscriminately and threw bombs on account of which panic prevailed in Mohalla Sarsaiya Ghat. People ran helter-skelter. Those who were on road turned back their vehicles and started running away, tempo drivers and rickshaw-pullers left their vehicles and started running, commotion and fear prevailed all around. At this point of time a police jeep arrived seeing which all the five persons including the petitioner left the place on the Maruti van and went towards Phoolbagh.

3. Prakash Narain Kureel lodged report of this occurrence in Police Station Kotwali which was registered as case Crime No. 343 of 1997, under Sections 147/148/307 I.P.C.

4. On 6.11.1997, at 5.15 P.M., Dinesh Kumar Sisodia, Inspector in-charge, Fazalganj Police Station, lodged report at Police Station Pheelkhana to the effect that on 6.11.1997 when he along with other

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police officials was deputed for V.I.P. duty and was proceeding from Police lines to Sarsaiya Ghat crossing, they heard explosions of bombs and sound of fire – arms. Passers – by and children told that a little away from that place bombs are being thrown. On this information they chased they chased the Maruti van of Petitioner and reached the taxi stand via Phoolbagh where a big crowd of persons from all walks of life had already assembled. The petitioner and his companions who were boarding the maruti Van, started firing at the police. The Inspector in-charge P.S. fazalganj, and other persons in the Police party narrowly escaped and without ring for their life, they proceeded towards the Maruti Van. The culprits left the Maruti van and taking advantage of the crowl assembled there, successfully escaped. When they were chased, the petitioner and his companions fired at the police party again in which constable Kanhaiya lal excaped narrowly. Sumit Tripathi, one of the companions of the petitioner, threw his, 315 bore gun which was lying at the spoot. However, the petitioner and his one companion Sushil Kumar were arrested at the spot with their illegal fire-arms, cartridges and bombs.

5. In respect of this occurrence, reports were lodged as case crime no. 238 of 1997, under Sections 143/148/149/307 I.P.C., case crime no. 239 of 1997, under Section 25 of the Arms Act and case No. 242 of 1997, under Section 4/5 of Explosive Substances Act. In respect of this occurrence a report was also lodged by Inspector In-Charge Kotwali Sri R.S.Garbyal, in General Diary report No. 63, dated 6.11.1997 at about 11.10 P.M. he also narrated how the public order was disturbed on account of the aforesaid activities of the petitioner and his companions. High officers visited the spot which fact was also mentioned in the report.

6. Aforesaid activities were committed by the petitioner and his companions in public place and broad day light at the busiest cross-road of Sarsaiya Ghat; 150 vards away from this place there is a place of pilgrimage and Temple, tempo stand, civil court, Collectorate, Treasury, Office of Collectorate, Kanpur Dehat, Offices and residence of Commissioner , Kanpur Division, and Deputy Inspector General of Police of the region and there is a V.I.P. road. From the aforesaid criminal activities of the petitioner and his companions, panic prevailed among persons visiting the temple and school going children and people present there. On account of the firing on Vijai Dhobi, fear and commotion prevailed all around and even tempo of life of the community was disturbed.

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7. The Investigating Officer prepared a sketch map of the place of occurrence. The Occurrence was also widely covered by the Press people and News was published in Hindi daily "Dainik Jagran " and "Aaj" of 7.11.1997. High ranking officers visited the spot and in their inspection reports all of them hed mentioned about the fear, commotion and terror prevailing in the Locality. It has also been stated that the petitioner has turned criminal as he is close associate of dreaded criminals Sumit Tripathi and Uma Shanker alias lala. They have five persons in there gang and quite often they indulge in committing offences of dacoity, murder and robbery. The other persons of this gang are Jitendra alias babu and Sushil Kumar. The criminal record of summit Tripathi and Uma Shanker alias lala has also been mentioned. The Dy. S.P. Kanpur nagar informed the senior Superintendent of police that confidential report has been received that the petitioner and his companions are again planning to kill Vijay Dhobi in Public place by similar attacks by bombs and bullets and if police comes in way, it shall also be tackled with better and if police in way, it shall also be tackled with better preparation it is clear from the confidential report received that the petitioner and his companions have already made preparations to disturb the public order in large scale and to meet such an eventuality administration has to take effective steps and should keep adequate vigilance.

8. The Investigating Officer of the aforesaid occurrence has recorded statement of the witness under section 161 Cr.P.C. who have all mentioned in there statement in detail that on account of the aforesaid criminal activities of the petitioner and his companions, the atmosphere had vitiated, the even tempo of life of the community was disturbed and people ran helterskelter to save their lives fear and terror prevailed all around, people closed their doors and windows, vehicles passing through that place turned their direction and ran away from the place. It is manifest that from the aforesaid activities of the petitioner and his companions public order had been disturbed. It has also been mentioned that presently the petitioner is in judicial custody and confined in District jail, Kanpur Nagar, he has already been granted bail on 18.11.1997 by the Court in case Crime No. 238 of 1997, under Sections 147/148/307 I.P.C. and the petitioner has also moved bail application in case crime no. 343 of 1997 and 5.12.1997 was fixed for hearing and there was every likelihood that the petitioner will be granted bail. In case the petitioner was released on bail, there was strong possibility that he

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shall again indulge in similar criminal activities prejudicial to the maintenance of the public order.

9. On the aforesaid grounds, respondents no. 2 felt satisfied that with a view to prevent the petitioner from acting in any manner prejudicial to the maintenance of the petitioner be detained.

10. In the grounds the petitioner was also informed that against the order of detention, he has right to make a representation to the state Government, Advisory Board and the central Government. Such representation may be submitted through the Superintendent of Jail. If he desires a personal hearing before the Advisory Board, this fact should also be mentioned in the representation.

11. The impugned order of detention services on the petitioner on 05.11.1997 was approved by the state Government under Section 3(4) of the Act on 12.12.1997. The fact of approval was communicated to the petitioner on 15.12.1997. same day, the central Government was also informed about the petitioner under Section 3(5) of the Act. The case of the Petitioner was referred to the Advisory Board on 15.11.1997, under Section 10 of the Act with all the papers. The advisory Board examined the representation of the petitioner and also heard him personally on 8.1.1998. The report of the advisory Board was received on 14.1.1998 indicating that there was sufficient cause of detain the petitioner under the provisions of the Act. The State Government after examining all the papers and the report of the Advisory Board confirmed the order for keeping the petitioner under detention for 12 months by order dated 20.1.1998.

12. The Petitioner submitted his representations addressed to the State Government and the Central Government on 18.12.1997 which was received by the state government on 22.12.1997. Petitioner's representation was examined and rejected by the State Government on 9.1.1998. Representation dated 18.12.1997 addressed to the Central government was received on 29.12.1997. On this representation on certain vital information was called for from the State Government Through cash wireless message on 31.12.1997. The requisite information was received by the Central Government the Ministry of Home affairs on 21.1.1998. On receiving the said informed on the representation was considered by the officers and it was put before the Ministry of state for Home Affairs on 28.1.1998. the Ministry after consideration rejected the representation on 3.2.1998.

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13. In this petition counter affidavits have been filed by Shri R.S.Agarwal on behalf of respondent no.1, Shri Prabhat Kumar, the then District Magistrate, Respondent no.2 has filed his own counter affidavit, Shri Nagesh Singh, Dy. Jailor, District Jail, kanpur Nagar, has filed counter affidavit on behalf of respondent no.4. Union of India.

14. We have heard Shri O.P.Singh, Learned counsel appearing for the petitioner, learned Additional Government Advocate Shri M.P.Singh for respondents nos. 1 to 3 and Shri Tej Prakash Mishra, Additional standing counsel, for Union of India.

15. Learned counsel for the petitioner challenging the impugned order of detention, made the following submissions :-

1. The first submission was that the impugned order of detention was passed respondent no.2 on the basis of a single incident which was not more than a scuffle between two groups and could only be termed a problem relating to law and order. On the basis of such a single incident public order could not be disturbed.

2. It was further contended that the relevant papers mentioned in the grounds on which basis the order of detention was passed were not supplied to the petitioner. Thus he could not make effective representation and the impugned order vitiated for non-compliance of section 8 of the Act.

3. Lastly, it has been submitted that there was inordinate and unexplained delay by the Central Government in deciding the representation of the petitioner which has rendered the continued detention of the petitioner illegal.

16. Learned Additional Government advocate, on the other hand, submitted that from the narration of the two incidents of 6.11.1997 mentioned in the grounds and also in the first information reports lodged in respect of the incidents and from other material on record, it is clear that on account of the criminal activities of the petitioner and his companions public order and even tempo of life of the community was badly disturbed. The facts was fully corroborated by the witnesses of the incidents examined under section 61 Cr.P.C. by the Investigating Officer. The confidential report of the Local Intelligence unit also proved that as petitioner and his colleagues

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failed in there attempt to kill Vijai Dhobi, they were engaged in serious planning for a second attempt with better preparations. Learned counsel also submitted that there is no bar that an order of preventive detention cannot be passed on the basis of a single incident. Passing of the order depends on the nature of the incident and its reach and effect of the people residing in that locality. Learned counsel has also submitted that the contention raised on behalf of the petitioner that he was not supplied the document mentioned in the ground is not correct. In fact, the signed acknowledging the receipt of the each and every paper served on hem along with the order of detention on 5.12.1997. Learned counsel has further submitted that there is no delay in deciding the representation of the petitioner and the short delay involved has been fully explained in the counter affidavit filed by Bina Prasad on behalf of respondent no. 4

17. Learned counsel for the parties also relied on certain authorities which shall be dealt with at the appropriate place.

18. The first submission of the learned counsel for the petitioner was that the impugned order of detention could not be alleged passed on the basis of the single incident which at the most related to law and order and it could not be said that it could effect the public order in any way. For the aforesaid submission, learned counsel for the petitioner has placed reliance on the cases : Anil Dey Vs. State of West Bengal 6 A.I.R. 1974 S.C> 832), Anant Sakharam Raut Vs. State of Maharashtra and another (A.I.R. 1987 S.C.137) state of U.P. Versus Hari Shanker Tiwari (A.I.R 1987 S.C.998), Smt. Shahshi Agarwal Versus State of U.P. and others (A.I.R 1988 S.C.596), Ahmed Husain Shaikh Husain Vs. Commissioner of police (1989) 4 S.S.C 751), and Abhai Shridhar Ambulkar vs. S.B.Bhave, Commissioner of police (A.I.R 1991 S.C. 397) (-1991 (1) crimes 290.

19. We have considered the submissions of the learned counsel for the petitioner and in our considered opinion none of the aforesaid cases help the petitioner in the facts and circumstances of the present case. In case of Smt. Shashi Agarwal (Supra), Hon'ble Supreme Court in Para .9 held as under.

> "Section 3 of National Security Act does not preclude the Authority from making an order of detention against a person while he is in custody or in a jail but the relevants facts in connection with the making of

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the order would make all the difference in every case. The validity of the order of detention has to be judged in every individual case on its own facts. There must be a material apparent disclosed to the detaining authority in each case that the person against whom an order of preventive detention is being made, is already under custody and yet for compelling reasons his preventive detention is necessary."

20. Hon'ble Supreme Court in the above case was considering the validity of the order of detention passed while the detenue was in jail. In the present case no such question was argued before us. As seen above, validity of the order of detention has to be judged in every individual case on its own facts. Therefore, this Court has to see the facts of the present case as to whether the detaining authority could reasonably have a subjective satisfaction for passing the order of detention. The major determining factors are the place and time of incident, the nature of the incident and its effect and reach on the residents of the locality. From the narration of the incident mentioned in the earlier part if this judgement it is clear that the incident took place in the busiest cross-road of town Kanpur nagar known as Sarsaiya Ghat crossing. The occurrence took place at 2.00 P.M. While the activities of the people of the town could he at the peak. As alleged in the grounds the detenue and his companions continued hurling bombs at such a busy place until a policy only thereafter. The effect and reach of such an incident on the people of the locality can be well imagined. Again, same day in the evening the petition and his companions indulged in similar activities and fired at the police party but they were chased and arrested. The incidents were of such a serious nature that high officers visited the place. Their reports and statements of the witnesses under section 161 Cr.P.C. made it apparent that even tempo of life of the community and the public order was badly disturbed. It is well established that we are not required to go into the correctness of the allegation made. The court is only required to see as to whether on such allegations, if accepted true, the subjective satisfaction for passing an order of preventive detention under the Act could be justified. We have no doubt that the order of detention in the facts and circumstances of the case is perfectly justified. The confidential report of the local Intelligence Unit that the petitioner and his companions are planing to report similar activity with better preparations was very relevant. On record there is ample material to justify the ordr of detention against the petitioner. The cases relied

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on behalf of the petitioner are distinguishable on facts and do not help the petitioner in any way.

21. The Second submission of the learned counsel for the petitioner was that relevant papers relied on un there grounds were not paras.25 and 26 of the writ petition and para.14 of the representation addressed to the Central Government and the State Government. Learned Addl. Government Advocate filled supplementary counter affidavit on 28.10.1998. Along with the supplementary counter affidavit filed by Shri O.P.Singh, Deputy Jailor in District Jail, Kanpur Nagar, copies of all the documents have been filed which were signed by the petitioner on 5.12.1997, acknowledging receipt of the copies. In the writ petition as well as in the representation petitioner did not say a word about the signatures on these papers. Though by filling a supplementary rejoinder affidavit an attempt has been made to explain but, in our opinion; the petitioner was not correct in saying that the documents were not supplied to him. The petitioner in his representation dated 17.12.1997 has mentioned his version of the case with reference to the annexures supplied to him. The manner in which the evermtns have been made in the reply leaves no doubt's that the petitioner was in possession of the of the appears at the times of preparing his representation. In para.14 of the representation in a vague manner it has been said that in respect of cases crime no.278 of 1987 no. papers, site plan and statements under Section 161 Cr.P.C. were annexed along with the order of detention which renders the alleged incident doubtful. Thus from the facts and circumstances and the material available on record, the submission of the learned counsel for the petitioner that the documents were not supplied cannot be accepted.

22. The Last submission of the learned counsel for the petitioner was about delay in deciding the representation of the petitioner by the Central Government. We have carefully examined this aspect of the case also. The representation dated 18.12.1997 addressed to the central Government was received in the Ministry of Home Affairs on 29.12.1997 through the District Magistrate, kanpur Nagar. The representation was proceed for consideration and it was found that certain vital information was requited from the State Government for which a crash wireless messages was sent on 31.12.1997. the requisite information was received on 21.1.1998. On receiving the said information the case was put up before the under Secretary, Ministry of Home affairs, on 27.1.1998 who same day after examination placed the matter before the Joint Secretary, Ministry of

Home affairs. The Joint Secretary placed the representation with his comments before the Ministry considered the representation of the petitioner and rejected the same on 3.2.1998. Thus the representation was decided within 13 days receipt of the information from the state Government. During this period of 13 days, 24th,25th,26th, 30th and 31st of January, 1998 and 1st of February, 1998 were holidays. Thus, if these six days are excluded, the representation was promptly decide within reasonable time. The Time taken in deciding the representation has been fully explained in paras .6, 7 and 8 of the counter affidavit of Bina prasad. In our opinion, this submission of the learned circumstances for the petitioner has also no force.

23. For the reasons stated above, we do not find any merit in this petition. The writ petition is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 17.12.1998

BEFORE
THE HON'BLE BRIJESH KUMAR, A.C.J.
THE HON'BE R.R.K.TRIVEDI, J.

1998

December, 17

HABEAS CORPUS WRIT PETITION NO.21277 OF 1998

Pappu alias Ausan Singh ... Petitioner(In jail)
Versus
Superintendent,district Jail,Mainpuri.&others ... Respondents.

Counsel for the Petitioner : Sri Daya Shankar Misra
Counsel for the Respondent : Sri S.N.Srivastava, S.C.

Section 3(3) of National Security Act – The disposal of the representation of the detenue cannot be delayed or postponed awaiting the decision or the report of the advisory board. This delay in deciding the representation of the petitioner renders the order of detention to be illegal—the representation is to be considered and disposed of with all promptness particularly when it involves liberty of the citizen as contained in Articles 226 of the Constitution.

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By the Court

1. The above noted two writ petitions are directed against the orders of detention of the petitioners passed under section 3(3) of the National Security Act by the District Magistrate, Mainpuri. The orders of detention in respect of both the petitioners in the above noted writ petitions have been passed on 20.12.1997. Since the grounds of detention of the two petitioners are same as well as other facts including the points involved, both the petitions have been heard together. However, the only difference between the facts of the two cases is that the representation of the petitioner Pappu alias Ausan Singh in Writ Petition No. 21277 of 1998 was rejected by the Central Government by order dated 24.2.1998; whereas the representation of Rajeev, the petitioner in Writ Petition No. 21293 of 1998 was rejected by order dated 2.3.1998. Both the parties agree that in all other respects the petitions raise similar questions of fact and law. Therefore, both these petitions are being disposed of by this common judgement.

2. Learned counsel for the petitioners has challenged the orders of detention and the continued detention of the petitioners on the ground that the petitioners had been in jail at the time when the orders of detention were passed and served upon them and had moved any application for bail. It was legally not permissible to pass an order of detention in the above circumstances. The next contention is that the representations of the petitioners were sent to the Advisory Board by the State Government after the hearing before the Advisory Board had already taken place; hence their representations were not considered by the Advisory Board. Yet another contention is that the representations of the petitioners have not been promptly decided by the Central Government and the delay is also not explained; hence the continued detention of the petitions is illegal.

3. The contentions raised on behalf of the petitioners have been countered on behalf of the State. It is submitted that the petitioners had not moved any application for bail was in the knowledge of the authority passing the order of detention, which fact was taken into account, but there was material to infer likelihood of the petitioners' being released on bail; hence the orders of detention are not bad. So far as the concerned, it is not denied that it was sent to the Advisory Board after the date of hearing but the Advisory Board had considered the same. The learned State Counsel also contended that

there was no inordinate and unexplained delay on the part of the Central Government in disposing of the representations of the petitions; hence continued detention of the petitioners would not be invalid.

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4. We propose first to take up the contention raised in behalf of the petitioners that there was delay in disposing of the representations preferred by the petitioners by the Central Government. For considering this point it would not be necessary to detail other facts which may not be relevant to settle the controversy. The relevant facts and dates, which admit of no dispute, are that the orders of detention were passed not served upon the petitioners in jail on 20.12.1997. The papers were forwarded to the State Government by the District Magistrate. The State Government approved the orders of detention on 29.12.1997. The State Government referred the matter to the Advisory Board on 30.12.1998. The relevant papers and information were also sent to the Central Government on the same day.

5. The petitioners preferred representations to the State Government through the District Magistrate on 7.1.1998. The District Magistrate prepares his comments and forwarded the representations to the State Government along with comments on 12.1.1998. Copies of representations along with comments were also sent to the Advisory Board on 12.1.1998. The hearing was fixed before the Advisory Board two days earlier, that is , on 10.1.1998. The State Government sent the representation of the petitioners to the Central Government sent the representations of the petitioner to the Central Government with comments on 15.1.1998 which were received by the Central Government on 19.1.1998. The Central Government, the next day, on consideration of the representations sought some information from the State Government on 20.1.1998. The required information was furnished by the State Government by wire less message, which was received by the Central Government on 11.2.1998. On receipt of this information the Central Government started considering the matter and ultimately rejected the representation on 24.2.1998 in the case of Pappu alias Ausan Singh and in 2.3.1998 in the case of Rajeev.

6. It would also be pertinent to mention here that though the hearing before the Advisory Board took place on 10.1.1998, the report of the Advisory Board was received by the State Government on 5.2.1998. The State Government confirmed the order of detention on 1.2.1998.

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The State Government sent the report of the Advisory Board to the Central Government, which was received there on 11.2.1998.

7. According to the petitioners the State Government delayed the sending of the information to the Central Government, that is to say, it took about 21 days in furnishing the information sought by the Central Government. The time taken in furnishing the required information is not explained. The Central Government also, after receiving information on 11.2.1998, took another 13 days in disposing of the representation of the petitioner Pappu alias Ausan Singh and about 20 days in the case of Rajeev. The time taken is also not explained. While appreciating the above argument we may advert to averments made in paragraph 6 of the counter-affidavit filed on behalf of the Union by Bina Prasad, Under Secretary, Ministry of Home Affairs. The relevant part of paragraph 6 reads as under:

> "……It is stated that a representation dated 7.1.1998 from the detenu was received by the Central Government in the Ministry of Home Affairs on 19.1.98 through Government of Uttar Pradesh. This representation was immediately processed for consideration and it was found that certain vital information(i.e. opinion of the Advisory Board) required for its further considered was needed to be obtained from the State Government through a crash wireless message dated 20.1.1998.:"

8. It is then averred in paragraph 8 that the required information became effectively available to the Central Government only on 11.2.1998 and the decision was taken by the Central Government on the representation within 10 days excluding February 14,15,21 and 2,which were holidays. On the above averment it is submitted on the petitioners have been considered promptly without delay.

9. Learned State Counsel, appearing for the respondents, submitted that there was no delay on the part of the State Government in furnishing the information called for by the Central Government. According to him the report of the Advisory Board was also to be furnished to the Central Government. The report was made available to the State Government only on 5.2.1998, the therefore, the required information could not be prior to 5.2.1998. Immediately on receipt of

the report of the Advisory Board the State Government sent it to the Central Government on 11.2.1998 without delay. From what has been averred in the counter affidavit filed on behalf of the Central Government and has been submitted before us, it appears that the reason for sending the required information to the Central Government was delayed because of non-availability of the report of the advisory Board. The question which thus falls for consideration is whether it was necessary for the Central Government to have called for the report of the Advisory Board and to postpone the consideration and disposal of the representations in want of the report of the Advisory Board. It has been submitted on behalf of the Advisory Board. It has been submitted on behalf of the petitioners, and rightly, that the disposal of the representation cannot be delayed or postponed awaiting the decision or the report of the Advisory Board. In the present case we find that the Advisory Board had heard the matter on 10.1.1998. The report was forwarded by the Registrar of the Advisory Board to the State Government with the letter dated 4.2.1998 which was received in the State Government on 5.2.1998. The State Government delayed the sending of the reports of the Advisory Board by six days. It thought it appropriate to consider the matter itself after receipt of the report of the Advisory Board. The State Government thus confirmed the orders of detention of the petitioners for a period of twelve months on 11.2.1998 and on that day sent the report of the Advisory Board to the Central Government. It is evident that the Central Government sought for the information and the report of the Advisory Board on 20.1.1998. Thereafter it did nothing till the report of the Advisory Board was received on 11.2.1998. it was undoubtedly futile wait for the report of the Advisory Board. In case the Advisory Board does not hear the matter and forwards its reports to the Government to even though representation is ripe for consideration this would not be a just reason for postponement of consideration of the representation of the detenu. The government without waiting for the report of the Advisory Board has to consider the representation and dispose it of at the earliest. In this connection learned counsel for the petitioners has relied upon decision in the case of Navalshankar Ishwarlal Dave V.State of Gujrat reported in 1993 S.C.C.(Cri) 1126 holding that the report of the Advisory Board is not to be awaited for disposal of the representation.

10. Learned counsel for the State has referred to certain decisions of this Court 7.11.1998 rendered in Habeas Corpus Writ Petition No. 13655 of 1998 – Tarik Mashkur Vs. State of U.P. and others and a

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decision dated 12.11.1998rendered in Habeas Corpus Writ Petition No. 6925 of 1998 – Raju Bhatia Vs. State of Uttar Pradesh and others to submit that delay of longer period was held not to be inordinate so as to render the continued detention of the detenu illegal or invalid. We would, however like to observe that it depends upon the facts and circumstances of each case. A given amount of delay may not be held to be sufficiently explained in one case, but it may be held to be otherwise in the set of facts of another case. As in the present case we are definitely of the view that the Central Government or the State Government has to decide the representation of the detenu irrespective of the fact as to whether the Advisory Board has already heard and decided the matter and has submitted its report or not. The authority concerned, namely, the State Government or the Central Government has not to wait for the result of the hearing before the Advisory Board. It must consider the representation on its own merits without waiting for Advisory Board to decide the matter and wait for its reports. The Central Government wrongly waited for the reports of the Authority Board to be furnished to it by the State Government. Thus the reason which has been put forward to explain the delay is neither valid nor cogent. The representation is undoubtedly to be decided at the earliest. Had the Central Government not asked for and waited for the report of the Advisory Board, there seems to be no reason that it would have certainly decided the representations earlier. Postponing the consideration of the representations for a reason not legally admissible will in no way explain the delay. The Central Government got the report of the Advisory Board after about three weeks of receipt of the representations of the detenu. Waiting of this period could be avoided. The State Government also cannot be said to have acted with all promptness as on receipt of the report of the Advisory Board it forwarded the same to the Central Government, which was received there only on 11.2.1998. We are, therefore, of the view that the representations of the petitioners have not been considered and decided by the Central Government with the speed and promptness which is required for disposal of such representations. After receiving the representations on 19.1.1998 the Central Government called for the report of the Advisory Board which was not necessary and took no steps in the matter until the report was furnished to the Central Government. Even after receipt of the report of the Advisory Board it took about 13 days to dispose of the representation in the case of Pappu alias Ausan Singh and about 20 days in the case of Rajeev.

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11. We are not impressed by the submission made on behalf of the respondents that the right to make representation to the Central Government is neither a fundamental right to the Central Government nor a constitutional right, hence delay in disposing of the representation by the Central Government would not result in invalidating the continued detention. Relying upon A.I.R. 1984 S.C. 1095 State of U.P.Vs. Javed Zaman Khan, it has been submitted that right to make a representation to the Central Government under section 14 of the Nation Security Act is only a statutory right. A perusal of the above noted decision shows that it was decided in a different context. A second representation was made by the detenu addressed to the Prime Minister. His representation to the State Government and first representation to the Central Government, both had already been decided. Matter related to COFEPOSA. It was also observed that representation through any source and addressed to whomsoever will not amount to representation.

12. The learned counsel for the petitioners has placed reliance on two decisions of Hon'ble Supreme Court reported in J.T.1998 (3) S.C. 41 Smt. Premlata Sharma Vs. District Magistrate Mathura and others to show that right to make representation is relatable to Article 22(5) of the constitution. The other case is reported in J.T. 1996 (2) S.C 532 Kundan Bhai Dulabhai Shaikh vs. District Magistrate, Ahmedabad and others holding that right to make representation is a constitutional right and the representation under the Act is only an extension of constitutional guarantee enshrined under Article 22(5) of the Constitution. It was also observed that Article 22(5) does not specify the authority to whom representation can be made. It is submitted by the state Counsel that the decision in the case of Javed Zaman Khan (supra), is a decision of a Bench of three Judges. It will, however, not be necessary to further go into this question in view of the Full Bench decision in the case of Raj Bhadur Yadav vs.State of U.P. and others (1997 (35)A.C.C.33) holding that even though right of representation may be statutory right yet the representation is to be considered and disposed of with all promptitude more particularly since it involves liberty of the citizen as enshrined in Article 21 of the Constitution.

13. Since we have arrived at a conclusion that there has been unexplained delay on the part of the Central Government in considering and disposing of the representations of the petitioners, in our view, it will not be necessary to deal with other contentions raised on behalf of the petitioners.

14. In view of the above discussion, it is held that the continued detention of the petitioners is invalid and illegal. We allow the writ petitions. The petitioners shall be released forthwith in case their detention in jail is not required in any other case.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 9.12.1998

1998

December, 9

BEFORE
THE HON'BLE M.KATJU, J
THE HON'BLE S.L.SARAF, J

CIVIL MISC.WRIT PETITION NO.24148 OF 1998.

M/S Hiltex Industries Fabrics Pvt.Ltd. ... Petitioner
Versus
Additional Director General of Factories, Ordinance Equipment Factory & Others ... Respondent

Counsel for the Petitioner : Ajit Kumar
Counsel for the Respondents : S.C.

Article 226 of the Constitution- it is settled principle of Administrative law that the authority must act fairly –in the instant case, the authority acted openly and fairly by again inviting offers from all the parties including the petitioner.

By the Court

1. Heard Sri S.U.Khan for petitioner,Shri Yatindra Singh learned Advocate General for respondentNo.s 1,2 and 4, Shri S.N.Srivastava for respondent no.3 Sri S.P.Gupta and Sri C.B.Yadav for respondent no.5 and Shri R.N.Singh for respondent no.6

2. We have perused the writ petition, counter affidavit and rejoinder affidavit.

3. The petitioner has prayed for a mandamus directing the respondent no.1 to enter into contract with the petitioner pertaining to 375 gms. W P for canvas cloth quantity 3,18,300 meters or

3,48,400 meters in pursuance to the tender dated 30.4.98 in accordance with its opening and result of the opening made on 15.5.98 and not otherwise.

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4. It is alleged in para 4 of the writ petition that the respondent no.1 acting as a functionary of respondent no.3 invited open tenders on 30.4.98 for supply of the aforesaid quantity of the canvas cloth. The petitioner also submitted its tender which was said to be lowest amount Rs.77.40 per meter whereas respondent no.5's offer was Rs.82.50 per meter and respondent no.6 offered Rs.83.00 meter with certain discount. However, the contracts were granted to respondent nos.5 and 6.

5. In the counter affidavit it is alleged in para 4 © that the petitioner was not an established supplier, and its performance was not satisfactory on earlier occasions. In para 4(e) of the counter affidavit it is alleged that the petitioner is an earlier tender had offered the rate of Rs.75.40. hence the Tender Purchase Committee by fax message dated 3.6.98 (vide Annexure CA-3 decided to make a counter offer at Rs.75.50 per meter. All parties, including the petitioner sent replies to the counter offer vide Annexure CA-4 to CA-7. The petitioner refused to lower its offer vide Annexure CA-5, whereas the other parties lowered their earlier offer in para 4(g) of the counter affidavit it is alleged that the Tender Purchase Committee in its meeting on 25.6.98 noted that a siser concern of the Ordnance Equipment Factories had received offer at Rs.69 per meter, and hence it was decided to further negotiate the price from all the participating firms. The respondent no.1 sent fax letters to all parties including the petitioner on 14.7.98(vide Annexures CA-9 to CA-12.CA-12 is the tender of the petitioner by which it again quoted its lowest rate at Rs.77.40 per meter (i.e.it again refused to lower its initial ofer) whereas other parties lowered their offers. Ultimately on 4.8.98 the offers of respondent nos.5 and 6 were accepted and contracts were executed in their favour. Thus in our opinion there is no illegality was committed by the respondents.

6. It is settled basic principle in administrative law that an authority must act fairly vide Tata Celleur vs. Union of India 1994 (6) SCC 651. In our opinion the authority acted fairly in this case. Learned counsel for petitioner submitted that the authority should have accepted the offer of the petitioner at Rs.77.40 per meter because that was the lowest offer in the tender which had been opened earlier. He further submitted that it was not open to the authority to enter into

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private negotiation. we are not in agreement with the submission of the learned counsel for the petitioner. This is not a case of private negotiation at all, rather the authorities have acted openly and in the knowledge of all the parties. It would have been another mater if the authorities had entered into secret negotiation with respondent nos.5 and 6 after the initial tender,but there was no such secret negotiation in this case. In this case the authority acted fairly and not arbitrarily. The petitioner was granted time again and again to lower its tender but it refused to do so. The authority acted openly and fairly by again inviting offers from all the parties including the petitioner to lower their tender rate and after opening the tenders the authority did not accept the petitioner's offer as it did not lower its tender. Thus, the authority has acted in a fair manner and there is no merit in this petition. Petition is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
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DATED :ALLABAD :10.12.1998

1998

December, 10

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE S.L.SARAF, J.

CIVIL MISC. WRIT PETITION NO. 679 OF 1992

Vam Organic Chemicals Limited & another : Petitioners
Versus
State of U.P. & others : Respondents

Counsel for the Petitioners : Shri Rajesh Kumar Agarwal
Counsel for the Respondents : Addl. Advocate General

Article 226 of the constitution – the Principle of unjust enrichment is not applicable to a case where Goods have not been sold as such and are instead captivily for manufacturing some other goods and what is sold is the new product.

BY THE COURT

1. Heard learned counsel for the parties.

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.---
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S.L.Saraf,J.

2. This is an application praying for refund of a certain amount being the amount of purchase tax deposited by the petitioner under protest for the period 1986-87 to 1992-93. This petition had earlier been heard and decided by a Division Bench of this court consisting of Hon'ble Om Prakash J.and Hon'ble S.L.Saraf ,JJ, Since then Hon'ble Om Prakash J. has been transferred as Chief Justice if Kerala, hence this application has been transferred to this court on nomination by Hon'ble Chief Justice.

3. The decision of the Division Bench is reported in 1997 U.P.T.C. 624 Vam Organic Chemicals Ltd. & another vs.State of U.P. & others . the controversy is regarding paragraph 18 of the aforesaid judgement which reads:

"So far as the refund of the amount of Rs.1,02,34,845.52 paise is concerned the petitioner company may make a proper application for the refund thereof to respondent No.2 who will consider the same in the light of the observations made hereinabove."

4. The petitioner made an application for refund in the light of the above observation of the Division Bench and the said application has been rejected by order dated 5.3.1998,hence this application.
The short question in this case is whether the principle of unjust enrichment laid down by the Supreme Court in Mafatlal Industries ltd. Etc. Etc. vs. Union of India Etc. Etc. (1996 (11) Judgement Today (S.C.)283, can be commodity but a different commodity for which the original commodity is used as raw materials. In the present case the petitioner has alleged, and it is not disputed, that the petitioner captively consumed the industrial alcohol for manufacturing certain chemicals and hence what was sold by the petitioner was not alcohol but chemicals, which is a totally different commodity. The question , therefore, is whether the petitioner is entitled to refund?

5. Learned Additional Advocate – General has relied upon a Division Bench decision of the Court in the case of Somaiya Organics (India) Ltd. And another vs. The State of U.P. & another (Writ Petition No.487 of 1997 decided on 24th August , 1990).

6. He has laid emphasis on the following observation:

"Be that as it may, even if we assume, for the sake of argument that the said distillery is owned by the Somaiya Organics and that

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,therefore, no sale can be envisaged between two factories owned by the same legal person, even so we are not inclined to direct refund of the purchase tax collected from the petitioner in exercise of our discretionary jurisdiction under Article 226 of the Constitution, in as much as we presume that the burden of the tax has been passed by the petitioner to the consumers. No statement is made petitioner to the petitioner that the amount of purchase tax was not included in the sale price of the product of the petitioner or that it was not collected from purchasers/consumers."

7. This observation does go to support the contention of the learned Additional Advocate General that the applicant must make a categorical assertion that the amount of purchase tax is not included in the price of goods sold by the petitioner.

8. Learned Additional Advocate –General also relied on an the observation of the Supreme Court in the case of Mafatlala Industries Ltd. (Supra) in paragraph 110 (iii).

9. However, learned counsel for the applicant has relied on paragraph 9 of the decision of the Supreme Court in the case of Bhadrachalam Paperboards Ltd. & another vs. The Government of Andhra Pradesh & others Judgement Today 1998(5) S.C.314. in that decision the Supreme Court observed:

"We find that the High Court was not right in so presuming in the light of the case put forward by the Government pleader as Extracted above. The appellants have reimbursed as tax liability which was on the Forest Department and the appellants have consumed the goods for manufacturing paperboards, etc. Therefore, the question fo appellants passing on the liability to the consumer on the facts of this case would not arise. Consequently, the appellants are entitled for refund of the tax collected from them, not for the entire period but for the period commencing three years prior to the date of filing of the writ petitions."

10. In our opinion, in view of the clear observation of the Supreme Court in paragraph 9 of thedicision of Bhadrachalam Paperboards Ltd. And another (Supra) we are of the opinion that the observation to the contrary in the decision of the Allahabad High Court in Somaiya Organics (India) & another is not a good law.

11. In our opinion, paragraph 9 of the decision of the Supreme Court (quoted above) really clinches the case. The whole controversy is

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whether it what is sold is not the original goods but some other goods which was manufactured from the original goods, then whether the principle of unjust enrichment is applicable. In other words whether the principal of unjust enrichment can be extended to a case where what is sold is not the original goods but some other goods manufatured is from the original goods. Learned Additional Advocate – General conteended that paragraph 9 is to be read with paragraph 5 and hence the contention of the learned counself of the applicant is not correct. We are not in agreement with the contention of the learned Additional Advocate-General. In bhadrasholam case (sapra) the original goods were bamboo and hardwood, which were consumed by the appellant for manufacturing paperboards. In the context the Supreme Court observed that there is no question of appellant passing on the tax liability to the consumer. This gos to indicate that the Supreme Court was of the view that the principle of unjust enrichment is not applicable to a case where the goods have not been sold as such and are instead captively consumed for manufacturing some other goods, and what is sold is the new products. This is precisely the intiation here and hence the decisions in Bhadra Chalam's case (Supra) squarely applies to the present case.

12. In the circumstances this application is allowed. The refund as prayed for shall be granted and the respondents are directed to refund the amount to the applicant within three months from the date of production of a cerfified copy of this order before the authority concerned.

13. Learned Addl. Advocate General has prayed for leave to approach the Supreme court. In our opinion this is not a fit case where leave should be granted because the point has already been decided by the supreme Court in the case of Bhadrachalam paperboards. (supra). The prayer for leave is therefore rejected.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 10.12.1998

1998

December, 10

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE B.K. SHARMA, J.

CIVIL MISC. WRIT PETITION NO. 13250 OF 1990

M/s Satya Oil Traders ... Petitioner.

Versus

The State of U.P. and others ... Respondents.

Counsel for the Petitioner : Shri Shyamji Gaur
Shri J.S. Kashyap
Shri P.N.Tripathi
Counsel for the Respondents : S.C.

U.P. Kerosine Control Order 1962 – No order of suspension can be passed unless the licensee has been given resonable opportunity of submitting his explanation – no opportunity was given to the petitioner before suspending the licence and as such the suspension of licence is contrary to law and cannot be upheld.

BY THE COURT

1. Heard Sri P.N. Tripathi, Learned counsel appearing for the petitioner and Sri Vinay Malviya, learned Standing Counsel representing the respondents.

2. The petitioner is a licensee under the provisions of U.P. Kerosena Control Order, 1962. By the order dated 26th April , 1990, a copy whereof is Annexure-I to the petition, the licence of the petitioner has been suspended on the order of the District Magistrate dated 24th April, 1990.

3. In paragraph 3 of the petition it is asserted that the order of the District Magistrate dated 24th April, 1990 was never served on the petitioner despite repeated requests made to the authorities concerned. In paragraph 8 of the petition it is asserted that neither any charge-sheet nor any show cause notice was served on the petitioner before passing the order of suspension.

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D.S.Sinha,J.
B.K.Sharma,J.

4. On 30th May, 1990 the Court granted a months time to the respondents to file counter affidavit, but the respondents failed to file the counter affidavit. Therefore, 17th July, 1990 the Court admitted the petition and granted interim order directing the District Supply officer and District Magistrate, the respondents no.2 and 3, not to give effect to the impugned order of suspension dated 26th April, 1990.

5. We are now in the year 1998, which is also about to come to an end, No counter affidavit has been filed even after the lapse of more than 8 years counted from the date of admission, i.e. 17th July, 1990. Under the circumstances the Court has no choice but to accept the averments made in the petition that the order of the District Magistrate dated 24th April 1990 on the basis of which the impugned order of suspension dated 26th April 1990 was passed was never served on the petitioner; and that the suspension order was passed without serving on the petitioner any charge sheet or show cause notice . Under paragraph 11 of U.P. kerosene Control order, 1962, no order of suspension can be passed unless the licensee has been given reasonable opportunity of submitting his explanation. Admittedly, no opportunity has been given to the petitioner before suspending the licence, therefore, the suspension of the licence of the petitioner is contrary to law and cannot be upheld.

6. In the result the petition succeeds and is allowed. The impugned order of suspension dated 26th April 1999, Annexure-I to the petition is quashed.

Petition Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD, 12 JANUARY, 1999

1999

January, 12

BEFORE
THE HON'BLE O.P.JAIN, J.

CRIMINAL REVISION NO. 1729 OF 1998.

M/s Premier Vinyl Flooring Ltd. & others ... Revisionists.
Vs.
State of U.P. & another ... Respondents.

Counsel for the Revisionist : Shri Samit Gopal
Counsel for the Respondents : A.G.A.

Section 397/401 Cr.P.C.- the accused are not entitled to file any additional evidence in the Hon'ble High court – Nor the accused can place material in support of his contention in every case at the stage of summoning order –the question of facts are to be decided by court of comptent jurisdiction during course of trial.

By the Court

1..This is a revision against order dated 7th October , 1998 (Annexure –1) passed by IIIrd Addl. Chief judicial magistrate, Ghaziabad , who has rejected an application filed by the accused for recall of summoning order.

2. The brief facts of the case are that respondent no. 2 M/s Tara Chand and Company filed a complaint against accused persons under Section 138 of Negotiable Instruments Act alleging that the accused issued a cheque on 30th May, 1997 for a sum of rupees two lacs which was drawn on Punjab National Bank. Respondent no. 2 presented the cheque on 30th august, 1997 to his Bank, Union of India , but it was dishonoured by the Punjab National Bank on 1st of September 1997. The complainant was informed of the dishonour of the cheque on 3rd September , 1997 \. On 10th September . 1997 respondent no.2 issued to notices to revisionist no. 1 M/s Premier Vinyl Flooring ltd. And its officers, who are revisionists no. 2 to 5. In spite of notice dated 10th September ,1997 the payment was not received by respondent no. 2 within 15 days of the notice and therefore, a complaint was filed by respondent no.2 against the revisionists on 6.11.1997. The complaint is Annexure-II.

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O.P.Jain,J.

3. On this complaint being filed the learned Magistrate summoned the accused on 9th December ,1997. The accused appeared before the court and filed objection Annexure-IV and it was prayed that the complaint dated 6th November, 1997 was barred by limitation. According to accused persons. The notices were served on them on 13th September , 1997 and the period of 15 days fixed for the payment expired on 29th September,1997. The complaint was required to be filed on or before 29th October ,1997 but it has been filed on 6th November, 1997 and therefore, it is barred by limitation.

4. The learned Magistrate has rejected the objection filed by the accused by impugned order dated 7th October , 1998 on the ground that the date of receipt of notice is a question of fact which can be decided only after recording evidence. It has been observed by the learned Magistrate that in the complaint the date of receipt of notice by the accused is not mentioned and acknowledgement receipt is also not on record. Therefore, it cannot be said at this stage that the notice was received by the accused on 13th September,1997 as alleged by them in their objection . Being aggrieved against the order of the learned Magistrate the present revision has been filed.

5. have heared Srdi G.S.Chaturvedi, learned Senior Advocate and Sri Pankaj naqvi, learned counsel appearing for respondent no.2. Learned A.G.A. has been heard on behalf o the State .

6. It is argued on behalf of the revisionists that they filed an affidavit before the lower court in which it was clearly alleged that the notice was received by them on 12th September ,1997. A copy of the affidavit is Annexure-V to the revision. It is contended that this material was sufficient for the lower court to come to the conclusion that the notice was actually served on 12.9.1997. particularly when it was not specifically controverted by the by the complaint in his reply Annexure-VI. It is further contended that it was obligatory for the complainant to have mentioned the date of service of notice in complaint Annexure-II and in the absence of this averment in the complaint. The summoning order should not have been passed.

7. On behalf of respondent no. 2 it is argued that the complainant was not aware of the date on which the notice was actually served . He could give only the date on date on which the notice was sent by him. As the postal acknowledgement receipt was not received from the post-office nor the registered envelope was received undelivered, the complainant could not have given the date

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of actual service of notice. According to learned counsel for respondent no.2 this is purely a question of fact which has to be decided on the basis of evidence led by the parties during the trial and therefore. The learned Magistrate has rightly come to the conclusion that this point will be decided after the evidence is recorded.

8. It may be mentioned at this stage, that on behalf of the accused- revisionists Annexure-III has been filed in this Court which is a letter purporting to be issued by post and telegraph department in which it is stated that the registered letters in question were delivered to accused persons on 12.9.1997 It is rightly pointed out on behalf of the respondent no.2 that this letter was letter was never produced before the trial court and the accused are not entitled to file any additional evidence in this court. Therefore, for the purposes of deciding the present revision Annexure-III letter is being ignored.

9. The learned Magistrate has observed has observed that the accused is not entitled to produce any evidence at this stage and no order can be passed on the basis of the date of receipt of notice disclosed by the accused in his objection or in his affidavit.

10. Learned counsel for the revisionists has relied on Suresh Kukmar Bhikamchand Jain Vs. Pandey Ajay Bhushan and others (1998) 1 Supreme Court cases 205 in support of the contention that the accused is not required to wait till framing of the charges or cross –examination of prosecution witness. He is not debarred from producing relevant documentary material which can be legally looked into without any formal proof .

10-A. A close reading of the above authority shows that these observations were made particularly in the context of sanction under Section 197 Cr.P.C. In paragraph 22 of the above authority the following observations have been made :

> " After giving our careful consideration to the facts and circumstances of the case and the respective submissions of the learned counsel for the parties it appears to us that the question of requirement of sanction under Section 197 Criminal Procedure and the stage at which an accused against whom the cognizance of offence has been taken by the learned Magistrate can lead evidence in support of his defence."

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11. In paragraph 24 of the same ruling the Court has observed as under :

> "On the other hand it would be logical to hold that the matter being one dealing with the jurisdiction of the court to take cognizance, the accused would be entitled to produced the relevant and material documents which can be admitted into evidence with out formal proof , for the limited consideration of the court whether the necessary ingredients to attract Section 197of the Code have been established or not."

12. It is, therefore, apparent that the observations were made particularly in the context of sanction under Section 197 Cr.P.C. and it has been laid down that in every case the accused can place material in support of his contention at the stage of summoning order. Even in the context of sanction under Section 197 Cr.P.C. the accused was permitted to produced documentary material which can be legally looked into without any formal proof. In the instant case the accused- revisionists have not produced any document which can be looked in without any formal proof. The affidavit of the accused cannot be accepted as evidence during the trial. Even Annexure –III which is said to be a letter issued by the Postal Department is not a document which is admissible in evidence without formal proof. The contents of Annexure-III will will have to be proved by examining the Post –man who delivered the registered letters to the accused or by the evidence of jthe person who received the same.

13. A similar question arose before a Division Bench of this Court in the case of V.D.Agarwal and others and others Vs. Ist Addl. Munsif Magistrate, Lucknow and others,Writ Petition No. 148 (m/s) of 1993 , decided by Lucknow Bench , reported in 1993 Lucknow Civil Decision 1108 and it was observed in paragraph 19 that it is for the petitioner to show that he did not receive any notice and it is for the petitioner to prove at the time of trial the notice was not served on him at all or that 15 days time did not expire on the which the complaint was filed. These questions of fact are to be decided by court of competent jurisdiction and as such giving any finding at this stage on that point one way or the other may prejudice either party in the course of trial.

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14. It was argued by the learned counsel for the revisionists that the date of service of notice issued by the complaint have been mentioned in the complaint and in the absence of such particulars in the complaint, the complaint it self is not maintainable. Learned counsel has argued that in jthe case of a plaint, it is necessary to mention the date on which the cause of action arose and similarly the date on which the cause of action arose to the complainant in the instant case should have been mentioned .

15. This Court is unable to agree with the a above contention. In the Code of Civil Procedure there is a whole chapter devoted to the drafting of the plaint . The rule application are to be found in Order VIII of C.P.C In the Code of Criminal Procedure there is no such provision . On the contrary according to the definition of "complaint " given in Section 2 Sub-clause (d) a complaint can also be oral. Therefore, the giving of the date of cause of action in jthe complaint can not be made mandatory.

16. In view of the above discussion, this Court comes to the conclusion that the learned Magistrate was right in saying that the date of service of notice is a questionof fact which will be decided after recording evidence. The revision therefore has no force and is hereby dismissed.

Petition Dismissed.

APPELLATE JURISDICTION
CIVILSIDE
DATED : ALLAHABAD 19.2.1999

1999

February, 19

BEFORE

THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE D.K. SETH, J.

SPECIAL APPEAL NO. 843 OF 1998

Muslim Educational Society , Shahjahanpur , through its president , AzizurRahmanKhan, District Shahjahanpur and others ... Appellants- Petitioner

Vs.

District Inspector of schools shahjahanpur and others ... Respondent

1999

Muslim Educational Society & ors.
Vs.
D.I.O.S., Shahjahanpur & others.

N.K.Mitra,CJ.
D.K. Seth,J.

Counsel for the Appellants : Shri A.P. Sahi
Shri G.K. Singh
Shri R.N.Singh
Counsel for the Respondents : Shri R. Asthana
Shri Pipersenia

Article 226 of the Constitution of India-the principle of natural justice would be violated if in the matter of granting recognition of the newly elected committee and attesting the signature of the Manager ,no opportunity of hearing is given to the erstwhile committee of management.

By the Court

1. Respondent no.2 is alleged to have held an election of the committee of jmanagement, pursuant to which one Haji Jameel Uddin Khan is alleged to have been elected as Manger of the committee of managemant of the Institution , which is a miority one. The D.I.O.S.had attested the signature of jthe said Manager despite the fact that erswhile committee of management which was admittedly running the Institution, had intimated the D.I.O.S.that they should be given an opportunity before accepting the claim of anyone else for constituting the committee of management .

2. We have Mr. R.N. Singh assisted by Mr. A.P. Shahi for the appellants, Mr. R.Asthana for respondent no. 2 to 5 and Mr. Pipersenia , learned Standing Counsel for respondent no. 1.

3. Mr. R.N. Singh , learned counsel for the appellants submit that the appellants committee is still surviving and therefore there cannot be any constitution of the committee of management during the lifetime of the said committee.

4. It is an admitted position that signature of respondent no. 2-Haji jameel uddin khan was attested without giving opportunity of the appellants.

5. The facts being disputed we do not propose to enter into the same, and the appeal is being decided on a short question as whether any opportunity is to be given to the existing committee of management before attesting signatures of allged newly constituted committee of management . When it is disputed that erstwhile committee of management is continuing , in the interest of justice, it

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is necessary that before attesting signatures of the manager pr before granting recognition to the newly elected committee, the D.I.O.S. has to ascertain the fact as to whether prima facie there is something to show that an election had been held and that the claimant had been elected as manager . Thus , before granting recognition or attesting signatures of THE Manager of newly elected committee of management, the D.I.O.S. has to saisfy himself that there are sufficient materials to arrive at a conclusion that election had taken place and a new committee had been constituted. In the present case, since it was intimated to the D.I.O.S. by the appellants that they apprehend constitution of a committee of management during the lifetime of erstwhile committee it was incumbent upon the D.I.O.S. to ascertain the said fact .Thus, in our view, there was violation of the principle of natural justice in matter of granting recognition to the newly elected committee and attesting signatures of the manager without giving opportunity to the erstwhile committee of management . O this short point , we are unable to agree with the view taken by learned Single Judge to the extent that for the purpose of granting recognition or attestation of signatures, there is no scope for natural justice for giving opportunity to the erstwhile committee of management.

6. The appeal, therefore succeeds and is allowed to the extent that the question should be decided by D.I.O.S. afresh after giving opportunity to both the parties , as early as possible preferably within a period of six weeks from date. Both the parties will be at liberty to support their contention by filing adequate documents before the D.I.O.S., if it is so necessary . Since we have entered in to the merits of the case, we have kept all the question open to dthe D.I.O.S. to make alternative arrangement, if the circumstances so require and till then status quo be maintained. The order dated 13.7.1998 shall be subject to jthe result of decision that might to taken by the D.I.O.S. afresh.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 23.3.99

1999

March, 23

BEFORE
THE HON'BLE B.K. ROY, J.
THE HON'BLE M.C. JAIN, J.

CIVIL MISC. WRIT PRTITION NO. 1386 OF 1991

Dr.Bhumitradeo Vice–chancellor, Gorakhpur university ,gorakhpur and others ... Petitioners
Vs.
IInd Additional Civil Judge ,Gorakhpur & ors. ... Respondents

Counsel for the Petitioners : Shri Dilip Gupta
Counsel for the respondents : Shri P.K. Mishra S.C.

Section 69 of the state Universities Act- no suit can be instituted in respect of anything done or purported or intended to be done pursuant to the Act or the rules or the statutes or the ordinance made thereunder.

By the Court

1. The prayer of the petitioners is to quash the orders dated 7.1.91 and 8.1.91 passed by the Munsif City , Gorakhpur (respondent no.2) as contained in Annexure 20 and 21 in misc. case no. 421 of 1990 arising out of Original Suit No. 2728 of 1989.

2. It appears that respondent No. 3, herein , filed the suit in question for grant of a decree of permanent injunction on his favour and against the defendants and for directing defendant No. 2 to 4 pay Dearness Allowance to him as well as to other part –time Iecturers of LawDepartment of Gorakhpur University by Implementing Resolution no. 2 dated April 26, 1987 passed by the Executive committee of defendant no.2.

3. Mr. Dilip Gupta , the learned counsel appearing on behalf of the petitioners, contended that in view of the provisions of Section 69 of the State Universities act no such suit could be maintainable and any order passed therein shall be wholly without jurisdiction and thus this writ petition be allowed.

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Dr. Bhumitra Deo,V.C., Gorakhpur University & others
Vs.
Iind A.D.J. Gorakhpur & others

B.K. Roy, J.
M.C. Jain,J.

4. Section 69 of the Act aforementioned reads thus:-

> "Bar of suit – no. suit or other legal proceedings shall lie against the State Government or the Director of education (Higher Education) or the Deputy Director (as defined in Section 60-A) or the authorisedController or the university or any officer ,authority or body there of in respect of any thing of anything done or purported or intended to be done in pursuance of the act or the rules or the statutes or the Ordinance made thereunder."

From a bare perusal of the aforementioned Section 69 of the Universities Act it is crystal clear that no suit can be instituted in respect of anything done or purported or intended to be done pursuant to the to the Act or the rules or the Statutes or the Ordinance made thereunder. Resolution No.2 in question was apparently passed under the aforementioned statutory provision.

5. Consequently the suit filed for implementation of Resolution NO.2 was not maintainable and impugned orders passed are without jurisdiction.

6. In the results the impugned orders are quashed and this writ petition is allowed but since Respondent No. 3 has not appeared before us to contest it we make no order as to cost.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED AHAHABAD THE : MARCH 16, 1999.

1999

March, 16

BEFORE
HON'BLE S.R. SINGH, J.

CIVIL MISC. WRIT PETITION NO. 872 OF 1999.

Rajendra Kumar ... **Petitioners**

Vs.

State of u.p ... **Respondents**

Counsel for the Petitioners : Mr. B.K. Shukla, and Dr. R.S. Dwivedi
Counsel for the Respondents : S.C.

1999

Rajendra Kumar
Vs.
State of U.P.

S.R. Singh,J.

U.P. Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974—The grand son of the deceased- Government servant dying in harness, shall be treated as member of "family" as defined in Rule 2-C but only in those cases where his father pre-deceased the grand father who died in harness.

By the Court

1. The question that surfaces for determination in this petition is whether the petitioner , who happens to be the grandson of a Government servant, who died in harness, can stake claim for appointment on compassionate ground under the provisions of the Uttar Pradesh Recruitment of dependants of government servants dying in Hamess rules, 1974.

2. It is beyond the pale of controversy that petitioner 's father , namely, Sri Lallu Ram predeceased PRAHALAD , the grand father of the petitioner, Prahalad admittedly was working as Godown Chaukidar in the office of 4th respondent i.e. the senior marketing Inspector Maudaha Distt. Hamirpur and he was the only member eking out a living for the family . It would appear that th e aforesaid PRAHALAD was spirited away by death while in hamness on 10.6.1997. It would further appear that Lallu Ram , the father of the petitioner was the son of Prahalad who as aforesaid , predeceased Prahalad 10 years back. The petitioners claimed, he was dependent of his grand-father namely ,Prahalad and it is the context of the above circumstances that the petitioner staked his claim for compassionate appointment backed by the provisions of the aforestated.

3. I have heard Dr. R. Dwivedi learned Senior Advocate appearing for the petitioner and Sri Inder sen singh , Standing Counsel representing the opp. Parties.

4. Dr. R. Dwivedi, began his submission canvassing that since the father of the petitioner had breathed his last during the life time of his father Prahalad , the petitioner fell back upon his grand- father for dependence and therefore , he would be treated to be a member of the "family" of the deceased Government Servant for the purposes of the aforesaid Rules. The learned Standing Counsel on the other hand,counter-acted the submission stating that the grandson is not included in the definition of the term "family" as defined in Rule 2 © of the Uttar Pradesh Recruitment of Dependents of Government

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S.R. Singh,J.

Servant Dying in Hamess Rules, (to be abbreviated as the 'rules') which apply to recruitment of Depandants of kljthe deceased Government Servants to Public Services and post in connection with the affairs of the Uttar Pradesh except the services and posts which are within the purview of the Uttar Pradesh Public Service commission and have , later-on , been placed within the purview of the Uttar pradesh Subordinate service Selection Commission . According to rule 4, these rules and any order issued thereunder , shall have effect not with standing any thing to the contrary contained in any rules, regulations or orders in forced at the commencement of these rules . Rule 5 of the Rules provides for compassionate appointment of a member of the "family" of a deceased . The rule being germane to the cotroversy involved in ljthe petition is excerpted below.

> " 5 recruitment of a member of the family of the deceased In case a Government servant dies in hamess after the commencement of these rules 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 shall on making an application for the purpose be given a suitable employment in Government service which is not within the purview of the State Public Service Commission in relaxation of the normal recruitment rules provided such member fulfils the educational qualifications prescribed for the post and is also otherwise qualified for Government service Such employment should be given without delay and as far as possible in the same department in which the deceased Government servant was employed prior to his death "

5. The word 'family ' , according to rule 2 ©0 of the Rules includes the following relations of the deceased Government servant:
(i) wife or husband:
(ii) sons:
(iii) Unmarried and widowed daughters :

6. The question remains whether the grandson of a Government servant dying in Harness can , in the given situation , be treated to be a member of the family as defined in rule 2 © of the rules . It bears no repudiation that the legislature has power to define the word even

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S.R. Singh,J.

artificially and so the definition of a word in the definition clause of a statute may either be restrictive of its ordinary meaning or it may be extensive of the same . Normally , when a word is defined to "mean"such and such , the definition is prima facie restrictive and extensive whereas, where the word defined is declared to "include"such and such the definition is prima facie extensive. Justice G.P.Singh in his Book "Principles of Statutory Interpretation , 6th Edn , has succinctly expounded the proposition as under:

> " The word includes is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occuring in the body of the statute . When it is so used these words and phrases must be construed as comprehending not only such thing as they signify according to their nature and import but also those things which the interpretation clause declares the they shall include .

7. The petitioner, in the instant case , was dependant to the hilt on the gradfather – Prahalad inasmuch as the father of the petitioner had died during the lifetimeof prahalad , regard being had to the inclusive definition of the term 'family' as defined in ,and object sought served by the rules ,I am pursuaded to the view that in the fact-situation of the present case , the petitioner ought to be treated as a member of the "family" of the deceased Government Servant who died in hamness and therefore , the petitioner should be held to be entitled to claim compassionate under the aforesaid rules The Contrary contention brought to by the bear by the Standing Counsel that since the grandson is not specially included in the term "family" as defined in rule 2 © , the petitioner is not entitled to claim compassionate to claim compassionate appointment , does not commend itself to be countenanced . The court would have been least inclined to view with favour the position , had the father of the petitioner been alive.

8. As a result of the foregoing discussion, the petition succeeds and is allowed . the respondents are directed to give suitable appointment to the petitioner under the provision of the rules aforestated within a span of two months from the date of production of a certified copy of this order before the 4th respondent or any other appropriate authority as the case may be.

Petition Allowed.

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February, 4

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 4.2.1999 .

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

CIVIL MISC. WRIT PETITION NO. 45968 OF 1996

Commander K.K. Gulati , V.S.M. Indian Navy (Retd.) & others ... Petitioners

Versus

Shalini Memorial Society and School, 5, Nehru Road Dehradun & others ... Respondents

Counsel for the Petitioners : Shri K.C. Sinha
Counsel for the Respondents : S.C.

Section 21 (1)(A) & 21 (1)(a)(8) of U.P. Urban Building (Regulation of Letting) Rent and Evidtion Act 1972 – the emphasis is on the word "let out to a recognised educational institution." It must relate to the date of letting and not to the date of filing the application by the land lord under section 21 (1)(a) of the Act.

By the Court

1. These two writ petitioners arise out of proceedings taken by the landlords under section 21(1) (a) and 21(8) of U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the act). The reference as to the parties in this judgment shall relate to write petition No. 45968 of 1993.

2. Briefly stated the facts arising out of these writ petitions are that the petitioners are landlords of House No. 5, Arjun Road (Nehru Road), Dehra Dun. The disputed house was allotted to the shalini Menorial society and school, Dehra Dun, Respondents no. 1 on 25.1.1973. The landlords filed an application for release of the building in question in the year 1982 under Section 21 (1) (a) of the Act on the ground that they require it bona fide for their personal need.

3. The application was contested by the tenant-respondent no. 1 on the ground that the need of the landlords was not bona fide. It was further objected that the building was let out to an educational

society and in view of the provisions of Section 2(b) and 2(q) of the Act, the provisions of the Act are not applicable. The prescribed Authority recorded a finding that the need of the landlords was bona fide and they will suffer a greater hardship in case their application is rejected but rejected the application on 20.5.1983 on the ground that the provisions of the Act are not applicable as the building vests in respondent no.1 as it was an educational institution.

4. The petitioners, in view of the judgment of the Prescribed Authority, filed suit No. 55 of 1983 for ejectment against the tenant-respondents on the ground that the Act was not applicable. Respondent no. 1 filed a revision alleging that the provisions of the Act ware applicable to the revision on 10.8.1987 taking the view that if a property is taken on rent by a society or an ducational society such building does not vest in such society or institution as contemplated under Section 2(b) of the Act. The suit was accordingly dismissed on 10.8.1987.

5. The petitioners filed application for release registered as P.A. Case No. 109 of 1985 alleging that petitioner no. 1 was in service of Navy but he retired from service. The Prescribed Authority without going into the merits of the case rejected the application on the ground that respondent no. 1 is running an educational institution and against such institution the application under Section 21(1) (a) of the Act is not applicable in view of Section 21(8) of the Act. The petitioners preferred an appeal against the said order before the District Judge. Respondent no. 4 dismissed the appeal on 3.11.1993 affirming the view taken by the Prescribed Authority. The petitioners have preferred Writ Petition No 45968 of 1993 against these orders.

6. The petitioners also filed an application under Section 21(8) of the Act for enhancement of rent on 21.7.1995 as the Appellate Authority in its order dated 3.11.1993 had taken the view that the application filed by the landlords for release of the disputed accommodation is not maintainable in view of Section 21(8) of the Act and they are entitled only for enhancement of the rent on the basis of market value as contemplated under the said provision. The tenant-respondents no. 1 and 2 have filed writ petition no. 12228 of 1996 seeking prohibition restraining the prescribed Authority to proceed with the case on the ground that the provision of Section 21(8) of the Act is ultra vires to article 14 of the constitution.

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7. One of the basic question is as to whether the provision of the Act is applicable in respect of disputed building on its allotment to Shalini Memorial society and school, respondent no. 1. Section 2 of the Act exempts certain building from operation of the Act. Section 2(1) (b) provides that any building belonging to or vested in a recognised education institution, the whole of the income from which is utilised for the purposes of such institution the Act shall not apply. The words "belonging to or vested" was considered by the supreme Court in Bhatia Co-operative Housing Society Vs. D.C.Patel, AIR 1953 SC 16, wherein it was held that the property if let out and is rever back to the owner, it shall not vest in the tenant. It relied upon the observation of Lord Macnaghten.

> "The words 'property' and 'belonging to' are not technical words in the law of scotlant. They are to be understood, I think. In their ordinary signification. They are in fact convertible terms; you can hardly explain the one except by using the other. A man's property is that which is his own, that which belongs to him, what belongs to him is his property."

8. The right of a tenant in a demised premises is limited one. Section 105 of the Transfer of property Act provides that a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time. express or implied. It does not create any right in the property itself. In Ganesh Inter College, Etah va. Smt. Surekha Jain, 1985 ARC 24, the Court interpreting Section 2(1) (b) held that if the property is taken on rent by a society or an educational institution, it does not vest in it or belongs to it . The building under the tenant of such tenant shall not be treated as exempted under the said provision.

9. The next question is whether the application filed by the landlords under Section 21(1) (a) of the Act was barred under Section 21(8) of the Act which reads as under :-

> " (8) Nothing in clause (a) of sub-Section (1) shall apply to a building let out to the state Government or to a local authority or to a public sector corporation or to a recognised educational institution unless the Prescribed Authority is satisfied that the landlord is a person to who, clause (ii) or clause (iv) of the Explanation to sub-section (1) is applicable :

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> Provided that in the case of such a building the District Magistrate may, on the application of the landlord, enhance the monthly rent payable therefor to a sum equivalent to one-twelfth of ten per cent of the market value of the building under tenancy, and rent so enhanced shall be payable from the commencement of the month of tenancy following the date of the application.
>
> Provided further that a similar application for further enhancement may be made after the expiration of a period of five years from the date of the last order of enhancement."

10. The tenant-respondent had taken the plea that as the building was let out to a plea that as the building was let out to a recognised educational institution, the application under Section 21(1) (a) filed by the landlords was not applicable. It was for the petitioner to establish that it was not applicable. It was for the petitioner to establish that it was a recognised educational institution and the building was let out to such institution. The petitioners have annnexed the copy of the allotment order as Annexure-1 to the writ petition. It is a direction to the landlords to let out the accommodation to " Shalini Memorial society and School, Dehradun." The version of the respondents is that Shalini Memorial Society is society registered under the provisions of societies Registration Act, 1960.

11. A society is registered under section 3 of the societies Registration Act, 1860. The property vests in the society under section 5 and the suits by or against the society are to be filed as provided under the said section. Section 21(8) of U.P. Act No.XIII of 1972 does not contemplate a letting to a society but to a 'recognised educational institution'. There is a difference between a society and a recognised educational institution. A society may have many institutions spreading over various parts of India but each institution is to be recognised in accordance wit the provisions of the Act applicable in that state. The recognised educational institution has been defined under section 3(q) of the Act which reads as under :-

> "(q)" recongnised educational institution" means any University established by law in India, or any

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> institution recognised under the Intermediate Education Act,1921 or the Uttar Pradesh Basic Education Act, 1972 or recognised or affiliated under the Uttar Pradesh state Universities Act. 1973."

12. The tenant was to establish that the institution was recognised either under the provisions of Intermediate Education Act, 1921 or the Uttar Pradesh Basic Education Act, 1972 or recognised or affiliated under the Uttar Pradesh Universities Act, 1973. A society may run an unrecognised institution at one place and a recongnised institution on other place or on the same place two different institutions, one recognised and another unrecognised. The tenant must prove that the letting was to a recognised educational institution. The difference between an educational institution and a society was considered in Avadh Beharin Lal Saxena Vs. Jankin Prasead Anglo Sanskrit Education Association, Khurja and others, 1982 ARC 538, wherein an educational society was owner of the property. It had let out certain premises situate in a recognised institution and claimed exemption under clause (b) of sub-section (1) submission on the following observation :-

> "It is, therefore, apparent that the recognised educational institution can only be one which is recognised under the Intermediate Education Act or U.P. Basic Education Act or U.P. state Universities Act. It is not disputed by the learned counsel for the respondent that Janki Prasad Anglo Sanskrit Education Association, Khurja is not recognised under any of the aforesaid enactments. The institutions that are being run by it may be so recongnised but they are neither the plaintiffs nor the owners of the building. Under the circumstances, I am not prepared to hold that the plaintiff was a recognised educational institution under the U.P. Act No. xiii of 1972."

13. Similar view was taken in Atar Singh Vs. IIIrd Additional District Judge, aligarh and others, 1982 ARC 624, and it was observed the societies themselves cannot be treated to be recognised educational institutions. It should be seen that the recognition or affiliation in the case of a degree college is granted to the college as such and not to the society running the college.

14. The letting was admittedly not in favour of the recognised educational institution and therefore the provision of section 21 (8) of the Act is not applicable.

15. There is yet another aspect. The averment of the tenant-respondent is that it was running a school in the name of 'Silver Oak School' at the time of allotment but it was not recognised. It is, however, running primary school of shalini Memorial Schools.

16. It was recognised by the U.P. Basic Education officer after the year 1982. A copy of the letter of the Basic Education officer dated 25.10.1989 has been annexed in the supplementary affidavit filed in writ petition no. 12228 of 1996 which states that District Recognition Committee in its meeting dated 25.101989 decided to grant recognition for the classes I to V (primary section). The contention of the petitioners is that temporary recognition was granted in the year 1982 but permanent recognition was granted in the year 1989. It is, however, clear that at the time of allotment the society was not running any recognised educational institution. Sub-section (8) of section 21 of the Act contemplates. There cannot be letting to a recognised educational institution unless the recognition has been granted prior to the date of allotment.

17. Sri Rajesh Tandon, learned counsel for the respondent, vehemently urged that the Prescribed Authority will examine the applicability of the provisions of sub-section (8) of section 21 of the Act while deciding an application filed by the landlord under section 21 (1) (a) of the Act on the date of its presentation and if by that date the institution is recognised the application filed by the landlord will be barred under section 21 (8) of the Act. He has placed reliance upon the decision Matin and Harris Ltd. Vs. Vi Additional District Judge and others, 1998 (1) ARC 109, wherein the supreme court interpreting the first proviso to section 21 (1) of the Act held that even if the landlord had filed application prior to the expiry of three years of the purchase of the building, his application cannot be "entertained" by the authority before expiry of that period, meaning thereby, the landlord can file an application even before the expiry of three years from the date of purchase of then property but it shall not be treated as entertained by the prescribed authority unless decided before the period.

18. This decision was in respect of interpretation of first proviso to Section 21(1) of the Act interpreting the meaning of the word

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"entertain". There is no such provision under sub-section (8) of Section 21 of the Act. On the other hand the emphasis is on the word "let out to a recognised educational institution". It must relate to the date of letting and not to the date of filing the application by the landlord under section 21(1) (a) of the Act. It the interpretation as suggested by the learned counsel for the respondent is accepted, any building which was let out to a society, such society can get any institution recognised later on and thereby deprive the landlord of filing application under section 21(1) (a) of the Act. This cannot be the intention of the legislature.

19. Learned counsel for the respondents raised another argument that the prescribed Authority having earlier rejected the application filed by the landlords under section 21(1) (a) of the Act on 20.5.1983, the subsequent application filed by them in the year 1985 was barred on the principle of resjudicata. It is admitted to the respondents that the petitioners after the said decision filed suit for ejectment on the ground that the building is exempted under section 2(1) (b) of the Act but there the respondents took a countrary stand that the Act was applicable and ultimately it was found by the revisional authority that the Act was applicable and the view which was taken by the prescribad Authority for rejecting the application that the Act was not applicable was held erroneous. It is the subsequent decision that operates as resjudicata as held in Raghunath Vs. Ram Khelawan. AIR 1970 Alld. 26.

20. Learned counsel for the petitioners has taken one additional ground in support of this contention that the application filed by the landlord on the ground of bona fide need is to be released under section 21(1-A) of the Act which provides that not with standing anything contained in Section 2, the prescribed authority shall, on the application of a landlord in that behalf, order the eviction of a tenant from any building under tenancy, if it is satisfied that the landlord of such building was in occupation of a public building for residential purposes which he had to vacate on account of the cessation of his employment. An application filded under Section 21 (1-A) is not barred under sub-section (8) of Section 21 of the Act as that section prohibits the filing of application under section 21(1) (a) of the Act. The version of the petitioners is that petitioner no. 1 was in the service of Navy. He was occupying a Government accommodation, c-2/18, Moti Bagh, New Delhi, from which he was evicted by notice under sub-section (2) of section 4 of the Public Eviction of Unauthorised Occupants Act, 1971. It appears this plea was not

raised before the prescribed authority and it requires a finding on question of fact.

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21. The tenant-respondents filed writ petition No. 12228 of 1996 challenging the vires of sub-section (8) of section 21 of the Act on the ground that it is violative of article 14 of the Constitution. It is contended that there is no legal justification to enhance the rent on the basic of market value when in respect of similarly situated houses the rent cannot be enhanced. On the other hand the landlords contend that there is no justification to insert this provision depriving the landlord to use his own property in case he needs it and it is in violation of Articles 19 and 21 of the Constitution when he wants to use his own property for personal need. It is, however, not necessary to decide this controversy as I have held above that the application filed by the landlords was not barred by the provisions of sub-section (8) of Section 21 of the Act.

22. In view of the above the Writ Petition No 45968 of 1993 is allowed. The order dated 27.3.1990 passed by the prescribed authority and the order dated 3.11.1993 passed by the appellate authority are quashed. The prescribed authority shall decide the application afresh keeping in view the observation made above and in accordance with law. As the matter is very old and the first application was filed by the petitioners in the year 1982, the prescribed authority is directed to decide the application of the landlords within a period of three mounts from the date of production of a certified copy of this order.

23. The Writ Petition No. 12228 of 1996 is dismissed as infructuous in view of the decision in the above mentioned writ petition.

24. Considering the facts and circumstances of the case the parties shall bear their own costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 24.2.1999

1999

February, 24

BEFORE
THE HON'BLE M.KATJU J.
THE HON'BLE KAMAL KISHORE, J.

CIVIL MISC. WRIT PETITION NO. 40429 OF 1994...

Dr. Hari Prasad Adhikari ... Petitioner.
Versus
Chancellor sampurnanand Sanskrit University
And others ... Respondents.

Counsel for the Petitioner : Shri S.k. Pandey.
Counsel for the Respondents : Shri Anil Tiwari.

Section 31 of U.P. State Universities Act- there is no provision in the U.P State Universities Act which provides that only Indian can be appointed in Universities. Universities are centres of high learning and best intellectuals should be made available for teaching.

BY THE COURT

1. Heard Learned counsel for the parties.

2. The petitioner has prayed for quashing of the resolution of the executive council of Sampurnanand Sanskrit University dated 27.11.94 and for a mandamus directing the respondents not to terminate the services of the petitioner as Lecturer in Tulnatmaka Dharma Darshan in Sampurna and Sanskrit University, Varanasi.

3. The petitioner is a citizen of Bhutan. A vacancy on the post of lecturer in Tulnatmaka Dharma Darshan arose and was advertised vide Annexure 1 to the petition and the petitioner applied against the same. The petitioner was selected on 27.1091 and joined on 2.11.91.

4. Learned counsel for petitioner has relied on Section 31(2)(a) of U.P. State University Act which states that the appointment of a teacher in the first instance, shall be on probation for one year which may be extended for a period not exceeding one year. In our opinion this provision means that the maximum period of probation can be two years, and hence we agree with the submission of learned

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counsel for the petitioner that the petitioner became confirmed on 2.11.93 i.e on completion of two years since his joining. However it appears that subsequently the executive council of the University passed the impugned resolution 27.11.94 Annexure 15 to the petition by which it was resolved to terminate the services of the petitioner in pursuance of the letter of Ministry of Human Resources Central Government dated 19.5.94 a copy of the aforesaid letter dated 19.5.94 is Annexure 4 to the Counter affidavit of the University. A perusal of the aforesaid letter dated 19.594 shows that the Ministry of Human Affairs was of the view that as a matter of general policy foreigners should not ordinarily be appointed in Indian Universities and this should be done only in exceptional cases when Indians are not available. In our opinion the aforesaid circular of the Ministry of Human Affairs is wholly arbitrary and deserves to be quashed. It must be understood that Universities are centres of higher learning and they are not schools or colleges. Hence for the country to progress the best intellectuals should be made available in Universities and other centres of higher learning so that academic standard in the country go up. If the approach of the Human Resources Ministry is accepted the result will that inferior level or mediocre Indians may be appointed as teachers in Universities although much more brilliant foreigners are available. In our opinion such a view cannot be accepted. If our nation is to progress it must insist on very high academic standards and academic rigor.

5. A University is not an employment exchange for providing employment to people. It is a center of higher learning, where the top intellectuals should be appointed of pursuing higher studies, research and imparting higher education. In our opinion there can be no discrimination between Indians and non-Indians in Universities and other centres of higher learning.

6. In this connection it maybe noted that in ancient India there were great universities like Nalanda and Taxila where foreigners form China Tibet, etc. were not only students but also teachers. In our opinion foreigners should not be denied teaching post in the centres of higher learning if the are meritorious. In our opinion appointments of teachers in a university is not a question of giving a job to a person, it is much more a question of maintaining high academic standards.

7. If the stand of the Ministry of Human Recourses as contained in the letter dated 19.5.94, is accepted then other countries can deny

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teaching jobs to Indian nationals. At present a large number of Indians are teaching in American British and other foreign Universities, and we should emulate the example of these foreign countries which appoint the most meritorious persons whenever available in the world.

8. In the Rigveda it is said let noble thoughts come to us from every side. In our opinion we should adopt this non-parochial approach in academic matters also, particularly in centres of higher learning.

9. In our opinion the circular of the Ministry of Human Resources dated 19.5.94 is arbitrary and it si hereby quashed.

10. There is no provision in the U.P. State Universities Act which states that only Indians can be appointed in the Universities, Section 31 of the Act does not state that only Indians can be appointed as teachers. Ofcourse it can be verified whether the foreigner is a security risk or not or is otherwise unfit, but if there if nothing against him we see no reason why he should not be appointed in our centres of higher learning if meritorious.

11. In the circumstances we quash the resolution of the Executive Council dated 27.11.94 and also quash the order of the Ministry of Human Resources dated 19.5.94. Petition is allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 28.1.1999

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January, 28

BEFORE
THE HON'BLE ALOKE CHAKRABARTI, J.

CIVIL MISC. WRIT PETITION NO. 8786 OF 1994...

G.M., Moradabad Dugdh Utpadan Sahkari Sangh Ltd. ... Petitioner.

Vs.

Presiding Officer, Labour Court, U.P., Rampur & Others ... Respondents.

Counsel for the Petitioner : G.D.Mishra
Counsel for the Respondents : S.C.
K.K.Arora

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Regulation 103 of U.P. Cooperative Socities Employees Service Regulation 1975-Cooperative Society is an Industry within the meaning of Industrial law and for an employee of cooperative Society, the forum provided by labour law is to be availed of and not the forum provided by regulation.

By the Court

1. This writ petition was heard along with civil Misc. Writ Petition Nos. 15485 of 1994 and 26104 of 1994.

2. Award dated 12.51993 (Annexure-1 to the writ petition) has been challenged by the General Manager, Moradebad Dugdh Utpadak Sangh Ltd. Dalpatpur, Mordabad. The respondent no.4 got a reference made by the State Government to respondent no. 1 Labour Court in respect of his claim of reinstatement and back wages on an allegation that the said respondent no.1 4 had been in employment as junior electrician under the present writ-petitioner who was made opposite party no.3 before the Labour Court. The respondent no.2, the present petitioner and respondent no.3 were made respondents before the said Labour Court and they filed separate written statements. After a contested hearing ultimately the Labour Court passed the impugned award directing reinstatement of the respondent no 4 and back wages for the period between June, 1991 and the date of reinstatement.

3. Learned counsel for the petitioner argued four points in support of the writ petition challenging the said award. The first contention of the petitioner is that the respondent no. 4 workman approached the state Government after a long delay and on the said ground the impugned award could not stand and in support of such contention reference was made to the case of U.P. State Electricity Board and others V. P.O Labour Court, Kanpur and others, reported in 1998 (78) F.L.R. 511. The second point argued by the learned counsel for the petitioner is that the workman concerned did not raise the dispute before the employer at any stage and, therefore, the reference itself was bad and the award is liable to be set aside.

4. With regard to the aforesaid two contentions, learned counsel for the respondents workman contended that both the said questions are on facts and the said objections had not been ever raised before the Labour Court. It is further contended that had those points been

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raised before the Labour Court the petitioner would have been getting opportunity to dislodge the said objections proving necessary facts.

5. Considering the aforesaid two contentions. I find that the learned counsel for the petitioner could not show from records that such objection had been raised at any earlier stage. Therefore, I am of the argument of the respondents with regard to the said contentions of the petitioner, has force and those being based on facts cannot be permitted to be raised for the first time in writ Court.

6. Learned counsel for the petitioner made his third contention that the workman himself is a daily-wager and, therefore, cannot complain of his retrenchment and in this connection law decided in the case of Himanshu Kumar Vidyarthi and others v. State of Bihar and others, reported in 1997 (76) F.L.R.237 has been relied on. Learned counsel for the respondent workman contended that the said judgment is per incurrium as it did not take notice of settled law in respect of the said aspect and the provisions of section 2(g) and section 25-B of the Industrial Disputes Act.

7. A perusal of the judgment in the case of Himanshu Kumar Vidyarthi (supra) Shows that in the said case appointments of the employees there were admitted to have not been to the posts in accordance with Rules and they were engaged on the basis of need of the work and in the said admitted factual background their disengagement from service was held not to be construed as retrenchment under the Industrial Disputes Act.

8. In the present case in the impugned award finding is that the workman was employed on the post of junior electrician and on facts it was found that he completed 240 days' service within a span of twelve months. Therefore, the judgment in the case of Himanshu Kumar Vidyarthi (supra) does not apply in the facts of the present case.

9. Learned counsel for the petitioner made his fourth contention that the workman concerned here an employee of a cooperative society could not avail of the remedy provided by the Industrial Dsiputes Act as the said Act itself does not apply in the case of an employee of a cooperative society. In support of this contention law has been referred as decided in the case of Vikramaditya Pandey v. Industrial Tribunal (2) Lucknow and another reported in 1997 (75)F.L.R.844

and arvind Kumar Agarwal V. State of U.P. and another reported in 1998 (78)F.L.R 440 as also District Co-operative Federation Ltd. V. The Presiding Officer, Labour Court, Agra and another reported in 1998(78)F.L.R.444.With regard to this contention learned counsel for the respondent workman contended that the said question was also not urged before the Labour Court in any manner by the employer and, therefore, such question cannot be raised for the first time in writ petition.

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10. Although in the oral argument only the aforesaid four points were raised by the employer-petitioner but in the written argument filed by the petitioner an additional question was raised as to under which employer the workman is to get his relief. A perusal of the records indicates that there is no necessity for any clarification as reference related to dispute on termination on 30.11.1986 and admittedly workman was in employment of Infant Milk Food Factory, Dalpatpur, Moradabad on the date of termination.

11. With regard to contention relating to back wages I find that nothing has been shown on behalf of the employer that such contention was raise with sufficient disclosure of facts before the Labour Court and, therefor, this question also cannot be raised in a writ proceeding.

12. With regard to the post claimed by the workman a contention has been raised by the employers as to whether he was holding the post of plant-operator of junior electrician. At the time of hearing nothing has been shown clearly relating to the said dispute and, therefore, I do not find any ground for interference on the said ground.

13. With regard to contention that forum under the Industrial Dispute Act is not available for an employee of a co-operative society, I find that for settlement of dispute forum has been provided in the U.P. Co-operative Societies Act, 1965. But, in the said provision though a non-obstante clause has been provided but the dispute which can be referred for arbitration under the said provision specially excludes a dispute regarding disciplinary action taken against a paid servant of a society.

14. On behalf of employer it has been contended that though notification had not been made in view of section 135 of the Act but

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the intention of the Legislature is clear from the said section which is as follows :

> "135. Certain Act not to apply to co-operative societies. The provisions contained in the Industrial Disputes Act, 1947 (Act XIV of 1947), and the U.P Industrial Disputes Act (U.P. Act XVIII of 1947), shall not apply to Co-operative societies."

15. Decision has been arrived by learned single Judge in the case of Vikramaditya Pandey Vs. Industrial Tribunal reported in 1997(75) FLR 844 holding that in view of provision of section 135 (although not notified making it enforced) and of Regulation 103 of U.P. Co-operative Societies Employees Service Regulations,1975 the said labour laws are not applicable to co-operative employees. The law so decided has been followed in the case of Arvind Kumar Agarwal vs. State of Uttar Pradesh reported in the case of 1998(78)FLR 440.

16. The Aforesaid Regulation 103 of the Regulation of 1975 is as follows:

> "103.The provisions of these regulations to the extent of their inconsistency with any of the provisions of the Industrial Disputes Act, 1947,U.P. Dookan Aur Vanmijya Adhishthan Adhiniyam, 1962, Workmen Compensation Act, 1923 and other labour laws for the time being in force, if applicable to any co-operative society of class of co-operative societies, shall be deemed to be inoperative."

17. The above Regulation has been interpreted in the case of Vikramaditya Pandey (supra) holding that if there is any inconsistency between the regulation and the Industrial Disputes Act,1947 or any other labour law for the time being in force, the present Regulation shall be applicable and the other laws shall be deemed to be inoperative."

18. But the same Regulation 103 was considered earlier in the case of Jai Kishun Vs. U.P. Co-operative Bank Limited reported in 1989(2)UP;BEC 144 wherein Division Bench of this court held that the said Regulation provides that provision of these Regulations to the extent of their inconsistency with any other provision of aforesaid labour law shall be deemed to be inoperative. The Division Bench also took into consideration that though U.P. Industrial Disputes Act has not been specifically mentioned in the said

Regulation 103 but as the said statute is undoubtedly a lobour law for the time being in force, the Regulation will not be applicable. In respect of statute relating to co-operative society prevailing in the State concerned, applicability of provision of Industrial Disputes Act was considered in the case of Gujarat State co- operative Land Development Bank Ltd Vs. P.R. Mankad reported in AIR 1979 SC 1203 and the case of R.C.Tiwari Vs. M.P. State Co-operative Marketing Federation reported in AIR 1997 SC 2652 which indicate that in the facts of the present case, the labour law becomes applicable and not the forum provided under the Co-operative Societies law.

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19. With regard to section 135 of U.P. Co-operative Societies Act it is an admitted position that the said section has not been yet enforced by a notification and effect thereof has been considered in various cases decided by this court. Such findings holding that the said section having not been enforced, there is no exclusion of jurisdiction of the forum provided by the U.P. Industrial Disputes Act, had been arrived at in the case of Mauranipur Kisan Sahakari Sewa Samiti Vs. State of U.P. reported in 1993 UPLBEC 555 and the case of Sadhan Sanjari Samiti Vs. Presiding Officer reported in 1993(67)FLR 87.

20. In this connection it may also be noticed that the co-operative society had been held to be industry within the meaning of industrial law by the seven member constitution Bench of apex court in the case of Bangalore Water Supply Vs. R. Rajappa reported in A.I.R.1978 SC 548.

21. In view of aforesaid position in law and in particular a decision of Division Bench of this court interpreting Regulation 103 also and being fully in respectful agreement with the said finding, I am of the opinion that the judgements in support of the contentions of the employer can not be applied and law which is required to be followed is that decided by the Division Bench in the case of jai Kishun (supra) holding that for an employee of a Co-operative society not the forum provided by Regulation but the forum provided by labour law prevailing is to be availed of.

22. In view of aforesaid findings, no interference can be made on the present writ petition and the same is hereby dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 28.1.1999

1999

January, 28

BEFORE

THE HON'BLE ALOKE CHAKRABARTI, J.

CIVIL MISC. WRIT PETITION NO. 6477 OF 1991

Sahkari Ganna Vikas Samiti Ltd.
Modinagar, district Ghaziabad
Through its Secretary **... Petitioner.**

Versus

State of U.P. & others **... Respondent.**

Counsel for the Petitioner : Mr. Rakesh Tiwari
: Mr. J.N. Tiwari
Counsel for the Respondents : S.C.
: Mr. Shyam Narain

Article 226 of the Constitution of India - the order passed by the District Inspector of School attesting the signatures of the members is purely and administrative decision which he has to take without entering in to validity or otherwise of the election of the new committee of management and its office bearers – the validity of the election cannot be determined before this court in writ jurisdiction.

By the Court

1. For quashing the award dated 22.9.1990 passedd by the Labour Court, Ghaziabad, this writ petition was filed by the employer.

2. Heard Mr. Rakesh Tiwari, learned counsel for the petitioner and Mr. Shyam Narain, learned counsel for the respondent workman..

3. Learned counsel for the petitioner raised two contentions over and above raising an objection that the respondent no.3 employee herein being employed by a Co-operative Society, no proceeding was maintainable under the Industrial Disputes Act and therefore reference itself was bad. The other two contentions raised on behalf of the employer petiotioner were that the proceeding before labour court was barred by the principle of resjudicata and that after

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acquittal of employee concerned in the criminal proceeding, the disciplinary proceeding could be very well held in respect of his conduct and the findings of the labour court in that respect is not tenable.

4. Learned counsel for the respondent workman contended that there is no bar in raising an industrial dispute and principle of resjudicata can not be aapplied in a proceeding under the Industrial Disputes Act on the Basis of decision in statutory appeal. It has been further contended in this regard that no plea of resjudicata having been raised in the writ petition itself, such a question can not be raised at the time of hearing as the respondent was deprived of making out his case in the counter affidavit.

5. With regard to other points raised by the petitioner, learned counsel for the respondent contended that the scope of criminal proceeding and a disciplinary may be different but a categorical finding in criminal proceeding on facts will remain binding and no disciplinary proceeding can be held in respect of the same. As regards availability of forum under the Industrial Disputes Act an employee of co-operative society, it is contended that in respect of such disputes, the forum under Industrial Disputes Act is very much available in view of provision of law as contained in relevant Regulation and the bar intended to be enforced by section 135 of the U.P. Co-operative Societies Act is non existent as the said section admittedly has not been enforced.

6. After considering the aforesaid contentions as also the facts available on record and the law referred to by the respective parties, I find that the relief provided by appeal in the concerned Regulation does not exclude the relief available under the labour law. It appears that reference under the Industrial Disputes Act can be made as, admittedly, a dispute was existing with regard to termination of service of workmen concerned and no law was shown either in the statute or settled by any court of law which debars a workman in such circumstances from seeking relief under the Industrial Disputes Act.

7. With regard to criminal proceeding, I find that in the impugned award it has been recorded that the representative of the employer admitted that the charges in the criminal proceeding and those in the disciplinary proceedings are the same and therefore a finding was recorded that in such circumstances, the disciplinary proceedings

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should not have been held in respect of same charges. It is true that the scope of disciplinary proceeding is ordinarily different from the scope of criminal proceeding. But, when the charges are identical and a finding has been arrived as regards facts involved nad on that basis the workman concerned had been honourably acquitted, there is no reason for continuing the disciplinary proceeding on the same charges when misconduct can be proved only on contrary findings of facts. On behalf of the employer nothing has been shown here that there is any difference in the nature of charges involved in two proceedings. Therefore the findings of labour court in respect of workman concerned on this issue can not be interfered with.

8. Law has been referred to in respect of effect of decision of criminal proceeding. In the case of State of Rajasthan Vs. V.K. Meena reported in (1996) 6 SCC417 the law was considered generally. No finding has been recorded therein showing that a finding of criminal court on facts to be totally remaining out of consideration while considering a disciplinary proceeding on the same charges. In the case of State of Karnataka Vs. T. Venkataramanappa reported in (1996) 6 SCC 455 also the apex court considered the difference in standard of proof in criminal proceeding and a departmental proceeding. The same also does not help in deciding the present question involved . The facts considered therein was with regard to acquittal in a criminal proceeding for bigamy and it has been held that such acquittal is not a bar to a departmental proceeding for contracting second marriage without permission of Government.

9.. Reference has been made to the case of Depot Manager A.P. State Road Transport Corporation Vs. Mohd. Yousuf Miya reported in A.I.R. 1997 S.C. 2232 wherein law has been considered for deciding simultaneous continuation of a criminal proceeding and a departmental enquiry and in what circumstances such departmental proceeding is to be stayed. The said question not being involved herein, the said law does not help either of the parties. In the case of State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi reported in 1991 (2) SCC 716 consideration was of standard of proof in a departmental proceeding and therefore it does not help in either way in the present case . With regard to the case of Nelson Motis Vs. Union of India reported in AIR 1992 SC 1981 the observations are general in nature . An earlier three member Bench in the case of Corporation of Bagpur City Vs. Ramchandra reported in 1981(2) SCC 714 considered the particular aspect and held that

"normally where the accused is acquitted honourably and completely exonerated of the charges it would not be expedient to continue a departmental enquiry on the very same charges"

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10. With regard to contention that forum under the Industrial dispute Act is not available for an employee of a co-operative society, I find that for settlement of dispute forum has been provided in the U.P. Co-operative Societies Act, 1965. But, in the said provision though a non-obstante clause has been provided but the dispute which can be referred for arbitration under the said provision specially excludes a dispute regarding disciplinary action taken against a paid servant of a society.

11. On behalf of employer it has been contended that though notification had not been made in view of section 135 of the Act but the intention of the Legislature is clear from the said section which is as follows.

> "135. Certain Acts not to apply to co-operative societies. The provisions contained in the Industrial Disputes Act, 1947 (Act XIV of 1947), and the U.P. Industrial Disputes Act (U.P.Act XVIII of 1947), shall not apply to Co-operative societies."

12. Decision has been arrived by learned single Judge in the case of Vikramaditya Pandey Vs. Industrial Tribunal reported in 1997(75) FLR 844 holding that in view of provision of section 135 (although not notified making it enforced) and of Regulation 103 of U.P. Co-operative Societies Employees Service Regulations, 1975 the said labour laws are not applicable to co-operative employees. The law so decided has been followed in the case of Arvind Kumar Agarwal Vs. State of Utter Pradesh reported in the case of 1998(78) FLR 440.

13. The aforesaid Regulation 103 of the Regulation of 1975 is as follows.

> "103. The provisions of these regulations to the extent of their inconsistency with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmwn Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any co-

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operative society or class of co-operative societies, shall be deemed to be inoperative."

14. The above Regulation has been iterpreted in the case of Vikramaditya Pandey(supra) holding that "if there is any inconsistency between the regulation and the Industrial Disputes Act, 1947 or any other labour law for the time being in force, the present Regulation shall be applicable and the other laws shall be deemed to be inoperative"

15. But the same Regulation 103 was considered earlier in the case of Jai Kishun Vs. U.P.D Co-operative Bank Limited reported in 1989(2) UPLBEC 144 wherein Division Bench of this court held that the said Regulation provides that provision of these Regulations to the extent of their inconsistency with any other provision of aforesaid labour law shall be deemed to be inoperative.

16. But the same Regulation 103 was considered earlier in the case of Jai Kishun Vs. U.P.Co-operative Bank Kimited reported in 1989(2) UPLBEC 144 wherein Division Bench of this court held that the said Regulation provides that provision of these Regulations to the extent of their inconsistency with any other provision of aforesaid labour law shall be deemed to bi inoperative. The Division Bench also took into consideration that tough U.P.Industrial Disputes Act has not been specifically mentioned in the said Regulation 103 but as the said staute is undoubtedly a labour law for the time being in force, the Regulation will not be applicable. In respect of statute relating to co-operative society prevailing in the concerned, applicability of provision of Industrial Disputes Act was considered in the case of Gujarat State Co-operative Land Development Bank Ltd. Vs. P.R. Mankad reported in AIR 1979 SC 1203 and the case of R.C.Tiwari Vs.M.P. State Co-operative Marketing Federation reported in AIR 1997 SC 2652 which indicate that in the facts of the present case, the labour law becomes applicable and not the forum provided under the Co-operative Societies law.

17. With regard to section 135 of U.P. Co-operative Societies Act it is an admitted position that the said section has not been yet enforced by a notification and effect thereof has been considered in various case decided by this court. Such findings holding that the said section having not been enforced, there is no exclusion of jurisdiction of the forum provided by the U.P.Industrial Disputes Act, had been arrived at in the case of Mauranipur Kisan Sahakari

Sewa Samiti Vs. State of U.P. reported in 1988 UPLBEC 555 and the case of Sadhan Sahkari Samiti Vs. Presiding Officer reported in 1993(67) FLR 87.

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18. In this connection it may also be noticed that the co-operative society had been held to be Industry within the meaning of industrial law by the seven member Constitution Bench of apex court it case of Bangalore Water Supply Vs. R.Rajappa reported in A.I.R. 1978 SC 548.

19. In view of aforesaid position in law and in particular decision of Division Bench of this court interpreting Regulation 103 also and being fully in respectful agreement with the said finding, I am of the opinion that the judgements in support of the contentions of the employer can not be applied and law which is required to be followed is that decided by the Division Bench in the case of Jai Kishun (supra) holding that for an employee of a Co-operative society not the forum provided by Regulation but the forum provided by Regulation but the forum provided by labour law prevailing is to be availed of.

20. In view of aforesaid findings, no interference can be made with impugned award and the writ petition is hereby dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD : 8.4.1999

BEFORE
THE HON'BLE SHITLA PRASAD SRIVASTAVA, J.

1999

April, 8

CIVIL MISC. WRIT PETITION NO.11202 OF 1982

Ram Swarup & another ... Petitioner.
Versus
The Board of Revenue, Uttar Pradesh, Allahabad & others. ... Respondents.

Counsel for the Petitioners : Mr. Satya Prakash
Counsel for the Respondents :

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Shitla Prasad Srivastava,J.

Article 226 of the Constitution of India-the order passed by D.D.C. remanding the case before the Consolidation officer was without jurisdiction as after notification under section 52 of Act he has no jurisdiction to entertain the review application and remand the case – right was acquired on the basis of the sale-deed dated 26-8-1969, the order of Consolidation Authority on the compromise cannot be said to bea bar under section 49 of Consolidation of Holdings Act.

By the Court.

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioners for quashing of the order dated 31.8.1981 (Annexure-2 to the petition) passed by the Additional Commissioner, Bareilly Division, Bareilly and order dated 9.7.1982 (annexure-3 to the petition) passed by the Board of Revenue and further for relief of writ of mandamus commanding the opposite parties not to interfere in the possession of the petitioners over the land in dispute on the basis of the impugned orders of opposite party now. 1 and 2 or on any other basis.

2. Brief facts giving rise to the present Writ Petition as stated by the petitioners are that plot no. 198 measuring 3.25 acres of village Naugawan, Pargana Pooranpur, District Pillibhit was recorded in the basic year khatauni at the time of consolidation in the name of Raghoubir Sahai. One Smt. Ram Dulari filed an objection under Section 9-A of U.P. Consolidation of Holdings Act (hereinafter referred to as the Act) claiming 1/3rd share in the said plot on the basis of the family pedigree. The Consolidation Officer Rejected the objection of Smt. Ram Dulari. She preferred an appeal before the Settlement Officer Consolidation, which was dismissed on 1.3.1968, thereafter, the revision filed by her was also dismissed by the Deputy Director of Consolidation on 26.4.1968 and notification under Section 52 of the Act was made on 16.8.1969. Raghubir transferred the holding in suit on 26.8.1969 in favour of Data Ram, father of respondent nos. 3 to 7. Then she filed a review application before the Deputy Director of Consolidation which was allowed by the Deputy Director of Consolidation on 4.12.1969 and the case was remanded to the Consolidation Officer for deciding it afresh on merit.

3. It is stated that when the matter reached to the consolidation Officer, Data Ram, father of respondent nos. 3 to 7 filed application for impleadment, claiming that Raghubir Sahai had sold the land in dispute to him on 26.8.1969, therefore he should be impleaded.

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Petitioner's contention is that the parties entered into compromise before the Consolidation Officer for deciding the case in terms of the compromise and before the Consolidation Officer, Data Ram, father of the respondent nos. 3 to 7 made a statement that as there has been a compromise in the case between smt. Ram Dulari and Raghubir Sahai, therefore, he does not want to say anything and his application for impleadment may be rejected. Accordingly, on the basis of the compromise dated 11.5.1970, Smt. Ram Dulari executed a sale deed in favour of the petitioners on 25.6.1971 and since then, the petitioners are in continuous possession. It is further stated that as Data Ram had threatened the petitioners to take possession of the land in dispute, therefore, the proceedings under Section 145 Cr.P.C. were started and was decided in favour of the petitioners.

4. The petitioners have alleged that Data Ram, father of the respondent nos. 3 to 7 filed a suit under Section 229-B of U.P. Zamindari Abolition and L and Reforms Act (hereinafter referred to as the U.P.Z.A & L.R. Act) but it was dismissed as withdrawn on 4.5.74, then Data Ram again filed a Suit No.21/1978-79 under Section 229-B/209 of U.P.Z.A. & L.R. Act, which was dismissed on 18.101979 by the trial court. An appeal was filed by Data Ram against the judgment passed by the trial court and during the pendency of the appeal, he died and his heirs, respondent nos. 3 to 7 were substituted. The appeal was allowed by the Additional Commissioner on 31.8.1981. The petitioners filed a Second Appeal against the judgment of the Additiional Commissioner, which was dismissed on 9.7.1982. The petitioners have challenged these two judgments by way of the present writ petition.

5. The grounds of attack against the impugned judgment by the petitioners are that the suit which was filed by Data Ram was barred by the provisions of Section 49 of the Act, therefore, the impugned judgment is illegal. It was contended that the findings of the courts below that the right of Raghubir Sahai were extinguished under Section 189 of the U.P.Z.A.& L.R. Act on executing the sale deed dated 27.8.1969 in favour of Data Ram is also incorrect. It is also contended that the findings of the court below that Ram Dulari filed a review application in collusion with Raghbir is also incorrect. It is further contended that Data Ram has filed application before the Consolidation Officer when the matter was remanded by the Deputy Director of Consolidation on the review application of Smt. Ram Dulari and a compromise was filed before the consolidation Officer in presence of Data Ram and Smt. Ram Dulari was given one-third

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share and Data Ram gave a statement that he does not want to press the application for impleadment, therefore, the principle of estoppel will apply against Data Ram and Data Ram was bound by the compromise filed before the Consolidation Officer and thereafter, when Raghubir Sahai executed sale deed in favour of the petitioners, Data Ram could not say that he is not bound by the compromise. It was further contended that the findings given by the Deputy Director of Consolidation before the notification under Section 52 of the Act was not final, therefore, the Deputy Director of Consolidation had jurisdiction to review the judgment and parties are bound by the judgment given by the consolidation Officer on the basis of the compromise

6. A counter affidavit was filed. In the counter affidavit, it is stated that the sale deed was executed, after denotification under Section 52 of the Act, in favour of Data Ram by Raghubir Sahai, therefore, the right, title, and interest in respect of Raghubir Sahai, the plot in dispute were extinguished in under Section 189 of U.P.Z.A..& L.R. Act. When proceedings under Section 9 of the Act were started, Smt. Ram Dulari claimed her share but she lost her case from the courts of Consolidation Officer. Settlement Officer Consolidation and finally from the Deputy Director of Consolidation and then, there was a notification under Section 52 of the Act. Data Ram purchased property from Raghubir Sahai subsequent to the judgment of the Deputy Director of Consolidation in revision after denotification, therefore, the Deputy Director Consolidation had no jurisdiction entertain the review application filed by Smt. Ram Dulari and remand the case to the Consolidation Officer to decide afresh. The order of remand is without jurisdiction and nullity. It is further contended that as Data Ram was not a party in the consolidation proceddings and he had only applied for being impleaded before the conslidation officer after remand and as the order of remand was itself without jurisdiction, therefore, even if Data Tam gave a statement thathis application for impleadment may be rejected he is not bound by the compromise arrived at between Raghubir Sahi and Smt. Ram Dulari as he was not party to the Consolidation proceedings and principle of estoppel will not apply against him. Further contention is that when Raghubir had already sold the property in favour of Daya Ram and on the basis of conclusive compromise that too in the proceedings which was illegal and without jurisdiction, no right of Raghubir Sahai could be curtailed and he has no right to make second transfer of property in favour of the petitioners of the basis of compromise and suit was not barred

under Section49 of the Act. It is further contended in the counter affidavit that even after dismissal of the application of Data Ram for impleadment and his statement, if any, cannot take away the right which was acquired by him on the basis of the sale deed dated 26.8.1969.

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7. Heard the learned counsel for the parties and have pursed the record. The trial court dismissed the suit of Data Ram with the finding that he was bound by his statement given before the Consolidation Officer after the case was remanded by the Deputy Director of Consolidation on the review application. It was also held by the trial court that if the revision which was filed by Smt. Ram Dulari was pending Deputy Director of Consolidation before the date of notification under Section 52 of the Act, then the review application was maintainable and order passed by the Deputy Director of Consolidation remainding the case to Consolidation Officer was not without jurisdiction and as the right of Smt. Ram dulari and Raghubir Sahai were decided on the basis of the compromise, the suit of the plaintiff was barred under Section 49 of the Act. Learned Commissioner on the appeal filed by the plaintiff Data Ram, who died during the pendency of the appeal held that when notification under Section52 was made and Data Ram purchased the property from Raghubir after denotification, then the Deputy Director of Consolidation had no authority or jurisdiction to entertain the review application filed by Smt. Ram Dulari. It has also been held by the first appellate court that on 26.8.69, the right, interest and title of Raghubir Sahai was extinguished under Section 189 of U.P.L.A. & L.R. Act, the appeal was accordingly allowed. In the Second Appeal filed by petitioners, the Board of Revenue has held that after the denotification under Section 52 of the Act, the Deputy Director of Consolidation had no jurisdiction to entertain the review application and remand the case before the Consolidation Officer, therefore, the order of remand being without jurisdiction is nullity.

8. Before disclosing the controversy, it is necessary to see the effect of Section 189 of U.P.Z.A. & L.R. Act. This provision of law deals with the extinction of the interest of a bhumidhar with transferable rights. Section 189 of U.P.Z.A. & L.R. Act is quoted below :-

> "189. Extinction of the interest of a bhumidhar with transferable rights:- The interest of a bhumidhar with transferable

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rights in his holding or any part thereof shall be extinguished—

(a) when he dies intestate leaving no; heir entitled to inherit in accordance with the provisions of this Act;

(aa) when the holding or part thereof has been transferred or let out in contravention of the provisions of this Act;

(b) when the land comprised in the holding has been acquired under nay law for the time being in force relating to the acquisition of land; or

(c) when he has been deprived of possession and his right to recover possession is barred by limitation."

9. A bare perusal of this provision would show that on 26.8.1969 when Raghubir Sahai who was recorded in the revenue record transferred his holding after the judgment was delivered by the Deputy Director of Consolidation in his favour and a notification was made under Section 52 of the Act then whatever right Raghubir Sahai had came to an end under Section 189 of U.P.Z.A. & L.R. Act. Learned counsel for the petitioners has urged that from the judgment of the Consolidation Officer, it is apparent that the order of the Deputy Director of Consolidation in revision was not final, therefore, the findings recorded by the Commissioner or the Board of Revenue is not correct and compromise is binding.

10. Learned counsel for the respondents has urged, in reply, that as there was no jurisdiction with the Deputy Director of Consolidation to entertain the review application, therefore, any proceeding after denotification under Section 52 of the Act was without jurisdiction and Data Ram who was not party to any proceedings, he is not bound by the compromise merely because he filed application and got it rejected. Learned counsel for the respondents has further urged that the Deputy Director of Consolidation while exercising power of revision vested in him under the Act exercises quasi judicial powers and in the absence of any provision in the Consolidation Act, which expressly or by necessary implication vests in him the power of

review, he cannot exercise such power. For that purpose he has placed a full Bench case reported in 1997 A.L.L.J.2363 (Smt. Dhivraji and others vs. Deputy Director of Consolidation, Allahabad and others).

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11. A bare perusal of this decision would show that full Bench in paragraph 24 of the judgment has held as under:-

> "On the authoritative pronouncements made by the Supreme Court in the aforementioned decisions, the legal position which is manifest is that the Deputy Director of Consolidation while exercising the power of revision vested in him under the Consolidation Act exercises quasi judicial powers and in the absence of nay provision in the Consolidation Act, which expressly or by necessary implication vests in him the power of review, he cannot exercise such power. It follows that the Deputy Director of Consolidation is not competent to revive a revision proceeding disposed of by final order on a review application filed by one of the parties.

12. Further on the point of jurisdiction, the finding was given by the Full Bench in paragraph 35, which is reproduced as under :-

> "Coming to the provisions of the U.P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy Director of Consolidation while deciding a revision petition exercises judicial or quasi-juridical power and, therefore his order is final subject to any power of appeal or revision vested in superior authorities under the Act. The Consolidation authorities particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot reopen any proceedings and cannot review or revise his earlier order. However, as judicial or quasi-judicial authority, he has the power to correct any clerical mistake/arithmetical error manifest error in his order in exercise of his inherent power as a tribunal."

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Shitla Prasad Srivastava,J.

13. After hearing the learned counsel for the parties, at length, I am of the view that this writ petition has no force. From a perusal of the documents available on record, and the judgments, it is clear that Data Ram had purchased the property on 26.8.1969 and revision by Smt. Ram Dulari before the Deputy Director of Consolidation was dismissed on 26.8.68 and the notification under Section 52 of the Act was made on 16.8.69, the review was allowed on 4.12.1969 and compromise was arrived at on 8.9.1970. The petitioners purchase the property from Raghubir Sahai on 25.6.71, therefore, the Data Ram father of opposite parties being the first purchasers in time acquired right, title and interest on the basis of the sale deed and right, title and interest of Raghubir Sahai came to an end in respect of the property in question on the date, therefore, he had no right to enter into compromise before the Consolidation Officer and to execution of the sale deed in favour of the petitioners.I am also of the view that the order passed by the Deputy Director Consolidation remanding the case before the Consolidation Officer was also without jurisdiction as after notification under Section 52 of the Act, he has no jurisdiction entertain the review application and remand the case. Since Data Ram has simply applied for the impleadment before the Consolidation Officer when he was not party, the judgments of the Consolidation authorities, if he got his application dismissed for any reason, it would not amount to admission of right, title and interest of Smt. Ram Dulari or will not operate as estoppel against him so far as right which he acquired on the basis of the sale deed dated 26.8.69, therefore, the order of the Consolidation authorities on the compromise cannot be said to be bar under Section 49 of the Consolidation of Holdings Act rather Smt. Ram Dulari and Raghubir Sahai wre bound by the order passed by the Deputy Director of Consolidation in revision which was decided on 26.4.1968 which was final.

14. The writ petition, therefore, has no force and is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD : 2.4.1999
BEFORE
HON'BLE D.K. SETH, J.

1999

April, 2

CIVIL MISC. WRIT PETITION NO. 12200 OF 1999 .

Arvind Kumar ... Petitioners.
Versus
The Director Rajya Krishi Utpadan Mandi Parishad U.P. & others ... Respondents.

Article226 of the Constitution of India - the petitioner cannot claim any legal right to be appointed even when he is appointed on a substantive vacancy if he has been appointed against the rules - he cannot claim to be governed by the regulation if he was not engaged pursuant to said regulation.

By the Court

1. The petitioner was appointed on 4th May, 1991 on daily wage basis for a period of 30 days. Subsequently, the Deputy Director of Administration directed the Secretary, Mandi Samity, Bareilly to appoint the petitioner as Typist on a consolidated pay of Rs. 1200/- p.m. and accorded sanction for payment of salary for the period July,1991 till November, 1991. Subsequently by an order dated 31st March, 1992, sanction for payment of salary of Rs.1200/- p.m. .was accorded for the post held by the petitioner. By an order dated 4th September,1992, the petitioner's service was terminated. This order was challenged by the petitioner in writ petition No. 4155 of 1993 since been dismissed by an order dated 3rd Feb., 1993 with the observation that if any vacancy arises, the petitioner shall be given preference in appointment when such appointment is made by the respondents, provided the petitioner fulfils the qualification. Pursuant to the said judgement, the petitioner had made an application on 6th April,1993 and continued to submit successive application on 10th June, 1994 2nd October, 1995 and 6th January, 1996 and thereafter, on 23rd November, 1996. By an order dated 1st January 1997, the Additional Director, Administration sent an communication to the Deputy Director, (Administration) Mandi Parishad, Bareilly to the effect that in the event the post of Accounts Clerk falls vacant, the petitioner's case may be considered for appointment in terms of the

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order passed by this Court being the order dated 3rd February, 1993. By his order dated 20th January, 1997, the Deputy Director (Administration) had issued an appointment letter to the petitioner seeking to appoint him on probation against a substantive vacancy. After the period of probation was over, on the recommendation of the Deputy Director (Administration) though, however, the petitioner has not been able to produce any order of confirmation. At this stage, the petitioner's service has been terminated by orders dated 12th March,1999 contained in Annexure I and II respectively to the writ petition. These two orders have since been challenged by Mr. Mahesh Gauram, learned counsel for the petitioner in this writ petition.

2. Mr. Gautam submits that since the petitioner has been appointed against a substantive vacancy on regular basis, his service could not be terminated under the U.P. Temporary Government Servants (Termination of Service) Rules, 1975 as has been sought to be done in terms of the order of termination contained in Annexure 1 since the said Rules don not apply in the case of the petitioner, who is not a Government servant. He then contends that the petitioner is governed by the U.P. Agriculture Produce Market Committee (Centralised Service) Regulation 1984 and is not a workman within the meaning of Industrial Disputes Act and as such, his service could not be retrenched in terms of Section 6 - H of the Industrial Disputes Act as has been sought to be done by virtue of Annexure II to the writ petition. He then contends that in fact the termination is a penalty in disguise, which can only be done in accordance with the regulations, which provided for holding of an inquiry and giving of an opportunity. In case the order of termination is a cancellation of the appointment even then the principles of natural justice and equity requires giving of an opportunity to the petitioner. He then contends that since the petitioner was governed by the 1984 Regulations, his service could have been terminated on under the provisions of the said Regulations and his service could not have been dispensed with otherwise. He had also contended that a person cannot be a government servant and a workman under the Industrial Disputes Act simultaneously. Therefore, there is an inherent contradiction in the two orders. Inasmuch by the first order the petitioners has been treated to be a government servant while applying 1975 Rules and at the same time by the second order, he is treated as a workman. He had also relied on a few decisions, of which a reference shall be made at appropriate state. Mr. Gautam had also relied on Regulation 22 of the 1984 Regulations to contend that after the probation period

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was over, the petitioner shall be deemed to have been confirmed, provided he had satisfactorily completed the probation period. Therefore, by virtue of Regulation 22, the petitioner has been deemed to be confirmed in his service On these grounds, Mr. Gautam submits that the impugned orders contained in Annexure 1 and 2 to the writ petition should be quashed.

3. Mr. B.D. Mandhyan, learned counsel for the respondents on the other hand contends that the petitioner was not regularly appointed according to the provisions contained in the Regulations, which requires publication of advertisement as well as seeking of names from the Employment Exchange. Since the petitioner was not engaged pursuant to the said Regulations, he cannot claim to be governed by the said Regulations. According to him, the petitioner having been appointed de hors the Rules, he cannot claim any legal right to the post even if he is given appointment on a substantive vacancy or a post. By virtue of the petitioner's appointment on probation on completion of satisfactory probation period, the petitioner cannot claim any right to the post since he was appointed de horse the Regulations. Unless the petitioner has a legal right to establish by invoking writ jurisdiction, he cannot get any benefit out of such termination or service. By virtue of orders dated 12th March, 1999, there cannot be said to be any infirmity. He tries to explain the said two orders that the second order is an order by which the petitioner's service was terminated and the first order is only a simple communication of the same order, which is being clarified by the second order. He further contends that the petitioner's service could be dispensed with without the said order because he cannot establish any right to the post by virtue of his alleged appointment. He further contends that the High Court had never directed in the order dated 3rdFeb.,1993 that the petitioners should be given appointment directly. Inasmuch it was only a preference to be given to the petitioner in case the recruitment is made against any vacancy , which imply that recruitment is to be made directly and the other thing being equal, the petitioner is entitled to a preference. He also relies on a number of decisions, where such questions have been gone into. Reference shall be made to those decisions at appropriate stage. Mr. Madhyan on these grounds contends that the writ petition should be dismissed.

4. I have heard both the learned counsel at length.

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5. The facts ad disclosed shows that the petitioners was not recruited through the procedure laid down in Regulations 14, 15 and 16of the 1984 Regulations. The recruitment could be made under the said Regulations as provided in Regulation 14 after the appointing authority determines the number of vacancies to be filled up in the course of the year as well as the vacancies to be filled up in the course of the year as well as the vacancies to be reserved under Regulation 11 for Schedule Casts and Schedule Tribes and others. One such vacancy is determined the posts are to be advertised in one or two leading newspapers of the State calling for applications from eligible candidates . The vacancies are also required to be notified to the Employment Exchange, According to Regulation and orders for the time being in force. According to Regulation 15, candidates taking part in the selection by direct recruitment shall be required to pay to the appointing authority such fees as may be prescribed from time to time by the Board. In terms of Regulation 16, applications received from the candidates in response of such advertisement and the name received through the Exchange should be forwarded to the Selection Committee after fixing a date of selection. The Selection Committee thereupon, shall scrutinize the applications and prepare a list of eligible candidates and having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes and Scheduled Tribes and other categories, call the eligible candidates for test or interview as disclosed by the marks obtained in the test or interview and in case two or more candidates obtain equal marks, the merit shall be determined on the basis of age. The number of selected candidates shall be larger but larger by more than 25 percent of the number of vacancies. The list shall thereupon be forwarded to the appointing authority mentioning the aggregate marks obtained at the selection by each candidate and as well as the name of the candidates of general and reserved categories.

6. Thus a specific procedure having been prescribed by the Regulation, the recruitments are to be made according to the said procedure. The made case out in the writ petition does not show that the petitioner has undergone this selection procedure and had competed with other eligible candidates. The order dated 3rd February, 1993 passed in writ petition no. 41255 of 1993 had never directed that the petitioner should be given appointment. On the other hand, while dismissing the writ petitioners, it had merely observed that the petitioner may be given preference in appointment if any such appointment is made by the respondents in case any vacancy arises. Such preference could be given to the petitioner

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provided other things are equal after the petitioner has undergone through the selection process. It would have given preference only if the petitioner had obtained the same marks in the selection with any on up to the last candidate and thereby, claim a position higher than such candidates securing idential marks. The said order did not confer any other right to the petitioner no did it issue any mandate on the respondents to give appointment to the petitioner de hors the Rules. The appointment purported to have been given to the petitioner alleging to be in pursuance of the order dated 3rd February .,1993 is wholly a ployed conceal the nature of the appointment given to the petitioner through back door de hors the Rules. By reason of such appointment, the petitioner cannot claim to have acquired any right to be governed under the said Regulation, 1984 and thereby claim the benefit of Regulation 22 for claiming confirmation on the expiry of the probation period even if the appointment letter has been attempted to be dressed with such a provision. Unless the petitioner is appointed following the Regulation 1984, he cannot claim any legal right to the post since he was, apparently, as the case has been made out in the writ petition, was appointed de hors the Rules.

7. In the case of State of Himanchal Pradesh Vs. Suresh Kumar Sharma (1996 (2) SLR 321), the apex court had held that the judicial process cannot be utilized to supporta mode of recruitment dehors the Rules.

8. In the case of State of Haryana Vs. Piara Singh (AIR`1992 SC 2130), the apex court had depricated entering into service through back door.

9. Unless a person establishes his right to post, he cannot claim any legal right . Unless the appointment confers legal right on the candidate, he cannot enforce the same by invoking writ jurisdiction.

10. Mr. Madhyan had pointed out that innumberable candidates have been appointed through back door creating a heavy burden on the Mandi Parishad flouting the Regulations. It seems that there are some substance in the Submission of Mr. Madhyan, who had also mentioned in the Short counter affidavit and the factum where of as in some cases already been taken note of, which Mr. Mandhyan had stated in this case. In fact, in the other decisions cited by Mr. Madhyan, this fact has been taken note of. It appears that

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appointments which are not being made according to Regulations has since been sought to be dispensed with.

11. Mr. Gautam had taken objection to the extent that a particular date has been selected instead of dispensing with the service of all others. That question cannot be agitated in this writ petition by the petitioner, claiming equity or equality in terms of Article 14 since at the time of his initial entry, he him self had come in without any regard been had to the Articles 14 and 16. Inasmuch as selection without following the procedure laid down in the Regulation of eligible candidates were eligible and has a right to be considered, were ignored and the petitioner has over-stepped the equity consideration or equality in the eye of law as contemplated in Articles 14 and 16 of the Constitution of India. Then again, there cannot be any equality in illegality. It is a decision on the policy of the organization on the basis whereof such a cut off date has been introduced. Whether the cut of date that has been introduced is valid or illegal, cannot be gone into within the scope and ambit of this writ petition since this question has not been raised as it appears from the prayers made in the writ petition. Unless such a question is raised, only on the basis of the statement made at the Bar, this Court cannot go into such question in absence of the pleadings and the prayers. The rules of pleadings are meant for giving opportunity to the other side, and that was the reason why the Court is supposed to confine within the pleadings. Unless rules of pleadings are followed, advancement of such argument will spring surprise on the other side.

12. Be that as it may, in view of the observations made above, I also do not find any substance in the submission of Mr. Gautam with regard to the cut off date particularly in absence of any material to show that the cut off date was arbitrary or otherwise. Except such argument, no material has been shown to the Court as to how introduction of such cut off date was arbitrary.

13. In case such appointment are allowed to continue, in that event it would have the affect the obliterating the principles emunicated in Articles 14 and 16 the Constitution which requires that there should be an equality and equal treatment in the eye of law as well as equal opportunity of employment. In case individuals are given appointment through back door, not only the petitioner who has been so given, in that event all other eligible candidates who had a right as has been observed herein before .

14. The question as to whether 1975 Rules relating to termination of temporary Government servant apply or not, is not required to be gone into view of the observations made herein before.

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15. Mr. Gautam had relied on a decision in the case of Smt. Mahendra Kaur Vs. Hafiz Khalil & others (1983 AWC 837) rendered by the Full Bench in support of his contention that where specific rules have been provided, the same are to be followed. But he said decision does not help Mr. Gautam on two grounds. First that the said decision was with regard to certain procedure relating to the Code of Civil procedure for substitution and addition of parties, which has nothing to do with service jurisprudence. Secondly, the petitioner has not been able to establish that he is governed by the 1984 Regulation in order to claim that his service could be terminated only in terms of the provision contained in the said Regulation. Therefore, he cannot derive any benefit out of the ratio decided in the said decision.

16. Mr. Gautam had also relied on a decision in the case of R.C. Tiwari Vs. M.P. StateCooperative Marketing Federation Limited. (JT. 1997 (5) SC 95), which was a decision on the question of reference under Section 10 of the Industrial Disputes Act, 1947. I have gone through the said judgement. The said decision has no manner of application in the facts and circumstances of the present case since the said decision proceeds on the basis of altogether a different and distinct facts and circumstances, which by no stretch of imagination could be attracted in the present case.

17. Mr. Gautam had also relied on a decision in the case of Syed Aiaz Vs. Mohammad Rafiq & others (AIR 1974 ALL 178 F.B.). Relying on paragraph 8 of the said decision, he had contended that in absence of the expression statutory provision an authority cannot pass an order as has been done in the present case while passing an order of termination, which is de hors 1984 Regulation. For the reasons given herein before, the ratio decided in the said Full Bench decision also cannot be attracted in the present case. That apart, the said decision was related to the exercise of jurisdiction by the Tribunal, where the reference was as to whether the Government cancelling the order of allotment and directing release of the accommodation in favour of the landlord passed the revision filed under section 7 of the Rent Control and Eviction Act. Is order passed under sub section (2) of Section 7 of the Rent Control and Eviction

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Act within the meaning of Section 7-A of the Act. Therefore the said decision was passed altogether on a foundation, the principle whereof could hardly be held to support the contention of Mr. Gautam in the facts and circumstances of the present case.

18. Mr. Gautam had relied on a decision in the case of Mohinder Singh Vs. The Chief Election Commissioner, New Delhi & others (AIR 1978 SC 851). He confined his argument on paragraph 8 of the said judgement to contend that unless it is indicated in the order it self, no other ground can be imported to support such order by means of counter affidavit. Inasmuch as in the order, it has not been contended that he petitioner's appointment was de hors the Rules. On the other hand, it has been sought to be terminated by the First order as one under the 1975 Rules for temporary Government servants and the second one under Section 6-H of the Industrial Disputes Act to uphold the expression used in paragraph 8 of the said decision. There is no doubt that Mr. Gautam's submission has some substance because orders are not like old wine becoming better as they grow older. "This proposition is settled principle of law. But the question is whatever might be the motive, the order has to be tested as is coined. In the present case, there being two orders, one may supplement the other. Even if the First order is an order of termination simpliciter, the Second order shows that it is an order of retrenchment giving one of month's notice. In case the petitioner is not governed by the 1984 Regulation, in that event, he cannot claim that the order is bad when he has been given one months' notice, particularly when there is nothing to show that the petitioner was confirmed after having been appointed following the 1984 Regulation. Unless he is governed by the Regulations he cannot claim any benefit out of the 1984 Regulations. Whereas, if he is not governed by 1984 Regulations, he can at best be considered workman within the meaning of Industrial Disputes Act. Therefore, the decision in the case of Mohindra Singh Gill (Supra) also does not come to the rescue of the petitioner.

19. So far as the submission that a person cannot be Government servant and a workman under the Industrial Disputes Act simultaneously is concerned, the above does not appeal to me for the simple reason that nowhere the petitioners has been treated to be a Government servant by the respondents. Nor I have held that the petitioner was a Government servant. Even without 1975 Rules, the service of a person can be terminated with one month's notice in some circumstances.

20. In the present case, the petitioner has not been able to show a right to the post and, therefore, he cannot place his case on a decision as claimed by Mr. Gautam, Whether, he is a Government employee or a workman is not as question to be gone into in this case in view of the observations made earlier. This Court has note exercised its discretion to invoke writ jurisdiction Simply on the ground that the petitioner has not been able to establish his legal right to hold the post or continue in the post. In order to secure the same by this Court to support the appointment de hors the Rules or mode of recruitment de horse the Rules, which this Court refused to lend support.

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21. Identical question had cropped up before this court in various cases, which have be decided by this Court and reference may be made there to in the passage following.

22. In respect of several other cases identical question was posed to this Court which were decided on diverse dates. In the decision decided on 20.11.1997 in writ petition no. 35830 of 1997 Employee Union of Asstt. Vs. Director, U.P. Krishi Utpadan Mandi Parishad & others, in similar circumstance, it was held that the petitioners therin do not have any right to the post by virtue of their employments which were all time bound. In Special Appeal No. 3 of 1998 the order passed in writ petition no. 35830 of 1997 dated 20.11.1997 has since been confirmed by the appellate court. Yet in another decision dated 2.1.1998 in the writ petition no. 2879 of 1998 Raghuvendra Nath Misra Vs. Krishi Utpadan Mandi Parishad & others, the same view was taken by another learned Single Judge. Identical view was taken by another learned Single Judge in his order dated 6.8.1998 passed in writ petition no. 25272 of 1998 between Mohan Pandey Vs. The Director / Additional Director of Rajya Krishi Utpadan Mandi Parishad & Others. In the writ petition no. 7612 of 1998, decided on 6.3.1998between Hrendra Kumar Vs. Secretary, Rajya Krishi Utpadan Samiti and others. I had taken a view that unless a person claims a right to the post, he cannot claim any legal right to establish through writ jurisdiction and that the recruitment de hors the rule does not confer any right to continue. In the decision dated 19.3.1999 passed in writ petition no. 10204 of 1999 between Awadh Narain & another. Vs. State of U.P. & others, I had held in order to invoke writ jurisdiction, one must establish that he has legal right which he could enforce through writ jurisdiction. Right to work is a right to livelihood but that does not mean that in every case the said

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principle would apply even when appointment is made orally on daily wage basis to serve a temporary need through stop gap arrangement. One has to show that he has acquired a right to the position order to claim a right to livelihood. Unless right to post is established, one cannot claim infringement of the right of livelihood. One cannot expect such right to be established de hors the rule. Such decision was arrived at relying on the decision in the case of Himanshu Kumar Vidyarthi Vs. State of Bihar (1997(76) FIR 237) of the apex court, and some other decisions mentioned in the said judgement.

23. For the foregoing reasons, the petitioner having been unable to establish any legal right as observed herein before, this writ petition fails and, is , accordingly, dismissed. There, will ,however no order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATE ALLAHABAD : 26.2.1999

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Februar, 26

BEFORE
THE HON'BLE M. KATJU,J. .
THE HON'BLE B.K. SHARMA,J.

CIVIL MISC. WRIT PETITION NO. 25333 OF 1998 .

Hindustan Lever Ltd. & another ... Petitioners.
Versus
State of U.P. & others ... Respondents.

Counsel for the Petitioners : Shri Tarun Agarwal
Counsel for the Respondent : S.C.
: B.D. Mandhyan

Constitution of India Article 226—rearaith Mandi Adhiniyam / section 32 of the Mandi Adhiniyam-Existence of an alternative remedy not absolute bar is a matter of discretion - no sale within the market area of Etah but only on companies Depott which were all out-side the market area of Etah Mandi Samiti held restrained from levying or collecting any market fees.

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By the Court

1. This writ petition has been filed praying for a writ of certiorari quashing the impugned order dated 22.7.98 passed by the Mandi Samiti …. Copy of which is Annexre - 2 to the petition and for a writ of madamus restraining the respondent from recovering the amount including interest under the aforesaid order and for restraining the respondents 3 to 5 from with holding issuing of Gate Passes or taking any coercive action against the petitioners in future. There was also a prayer in the petition for declaring the explanation to section 17 (iii) of the U.P. Krishi Utpadan Mandi Adhiniyam, 1964 (hereinafter referred to as Mandi adhiniyam) as ultra vires, but this prayers has not been pressed by the learned counsel for the petitioner.

2. We have heard Sri Shanti Bhusan learned counsel and Sri. Tarun Agarwal, learned counsel for the petitioners, and Sri B.D. Mandhyan learned counsel for the Krishi Utpadan Mandi Samiti,Etah

3. The facts of the case are that the petitioner is a Come in corporated under the Indian Companies Act having its registered office at Mumbai. Earlier the business was being run by M/s Lipton India Ltd. Which was amalgamated with M/s Brook Band India Ltd. With effect from 7.3.1994, and this company in turn was amalgamated with the petitioner Company M/s Hindustan Lever Ltd. With effect from 21.3.1997 .

4. The petitioner Company is engaged in the manufacture, distribution/sale of serveral consumer products in its various factories located in different parts of India. The present relates to the petitioners factory at Etah in which it produce ghee.

5. In paragraph 9 of the writ petition it has been mention that the sales and distribution system followed by the petition Company over the last about 40 years is uniform throughout India.. The consumer products which are manufactured at the petitioned factory are not sold at the factory gates but there is a stock transfer from the factory to the Company depots which are own leased / managed by the petitioner Company at its own costs and expenses through Agents called " Clearing & Forwarding Agents" (hereinafter called C.& F Agents). It is alleged that after the goods are manufactured at the factories, the petitioner Company makes a 'stock transfer' of these goods to the Company Depots through trucks. At the Depots the

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goods are unloaded stored by C & F Agents for and on account of the petitioner company as per the terms of the Contractual Agency signed and executed between the petitioner company and the C&F Agents. A sample copy on one such contract dated 21.3.1997 between the petitioner Company and one of the C.& F Agents located at agreement is Annexure - 4 to the petition.

6. In paragraph 9 of the writ petition it is also alleged that at all times the property in the finished goods stored the depots always and exclusively vest with the petitioner Company and never with the C & F Agents. The C & F Agents are only hired for providing certain services viz. Unloading of goods from the trucks, storage of the goods at the depots of petitioner, despatch of goods by trucks to the Re-distributor stockists as per the sale orders, raising first sale invoice behalf of the petitioner company in the name of the Re-distribution stockists, and collecting the payments of sale invoices cheques/demand drafts from the Re-distribution stockists draw as payable to the credit of the petitioner company. It is fully alleged that the first sale of the company products is made at the factory gate but always at the depot gate, which is and managed by the petitioner company through its C & F Agent This sale is made at the depot gate to the Re-distribution stockists, and the sale consideration for each and every invoce is directly received by the petitioner company from the Re-distribution stockists in its own Bank account maintained at the respective C & F Agents locations. It is further alleged that the sale consideration is never received by the C & F Agents in their own names or to the credit of their own Bank accounts. If any complaints or claims for damages, short delivery, defects, are received from the Re-Distribution stockists after delivery of the company products to them they are entertained and settled by the petitioner company at its own costs, without any exposure or liability being attached to or suffered by the C & F Agents. It has been further alleged that the petitioner manufactures Ghee only at one location i.e. at its Etah factory in U.P. and this Ghee is sold by the petitioner company under brand 'Anik Ghee'. It is alleged that the entire production of ghee is stock transferred by trucks from time to time from the Etah factory about 20 of the company Depots, 5 of which are within U.P., and the C & F Agents functions are limited to operated as petitioners Delivery Agents without any further processing of the said products which are received by them for sale to the Re-distribution stockist in a sealed condition.

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7. In paragraph 9 the petitioner has also quoted certain relevant provisions of the Agreements between the petitioner and the C & F Agents, copy of which is Annexure-4 to the petition, Thus, Clause 2 (a) of the said Agreements states " The Company shall consign from time to time its goods to the C & F Agents by air, road or rail which the C & F Agents shall receive, stock and hold on behalf of the company." Clause 2 (d) of the said Agreement states "The C & F Agent has requested the company to provide goodown space to store the goods received by the C & F Agent from the company which the company has provided on the terms and conditions more particularly mentioned in this Agreement and in the Agreement supplemental to this Agreement Provided Always that the C & F Agent shall store in the said godown the goods belonging only to the comp any and /or its associate/ subsidiary companies." Clause 2 (e0 of the said Agreement states ":The godown shall display a sign board indicating that the goods belong to and are the property of the company and/ or its associate/subsidiary companies as the case may be." Clause 2 (f) the said Agreement states "The goods entrusted to the C& F Agent for the purpose of this Agreement remain the property of the company and it shall always be open to the officers of the company duly authorised in writing by the Authorised Signatory of the comp any for the said premises with or without notice to inspect the stocks and accounts and for the purpose, the said officers of the Company shall, if so warranted, be entitled to enter the godown, inspect the condition of the goods, without let or hindrance from the c & p Agent and for this purpose C& F Agent shall be bound to hand over possession of the go down together with the goods and said officers will be entitled to put lock at all exits of the go down ……. Clause 2 (g) of the said agreement states " The C & F Agent shall at no time have any lien of the goods or the godown premises for its charges, remuneration or dues of what so ever nature. " Clause 2 (h) of the said Agreement states " The C & F Agent shall be responsible for the safety of the goods entrusted by the Company from the time of receipt of the goods till such goods are issued out of the godown as per instructions of the Company. The C & F Agent shall be liable to make good any loss caused to the Company as a result of pilferage, the ft, robbery or damage or destruction of the goods excluding acts of God." Clause 2 (j) of the said Agreement states "The C &F Agent shall promptly comply with invoicing delivery/despatch instructions of the Company and shall cause to be delivery/despatch instructions of the Company and shall cause to be delivered to the authorised transport Contractors of the Company and/or the Rail heads the required quantity of the goods for

movement to the Company's stockists, dealers or other godowns. " Clause 2 (1) of the Agreement states " The C & F Agent shall submit to the Company statements in Forms prescribed by the company containing details of stock received, held and distributed. These statements shall be submitted at such time and at such intervals as may be instructed by the Company." Clause 2 (m) of the said Agreement states " The C& F Agent shall raise invoice on the Company's stockist for the value of the goods despatched to them as per instructions of the Company and bank the cheques of the RS and submit to the Company in the format prescribed together with all necessary returns as are indential thereto. " Clause 3 of the said Agreement states " For the service rendered by the C & F Agent the Company agrees to pay service charges as mutually agreed between the parties and communicated in writing to the C & F Agent accordingly and which may be revised from time to time. But for the aforesaid the C & F Agent will not be entitled to any other charges, remunerations or reimbursements."

8. In paragraph 10 of the writ petition it is alleged that the petitioner Company does not conduct sale of Ghee through any commission agents in U.P. or outside U.P. as the entire sales made from its own Depots at 20 different locations through C & F Agent.

9. In paragraph 11 of the writ petition it is alleged that the petitioner Company appoints its Re-distribution stockists by entering into a formal agreement called Redistribution stockists Agreements. A sample copy of one such agreement dated 11.12.97 has been annexed as annexure-5 to the petition paragn 13 of this agreement between the petitioner company and Re-distribution stockists is as follows:-

"It is clearly agreed between the RS and the Company that the despatch/delivery of goods by the Company to the RS shall always be on payment by cash/DD/Cheque against supply as may be required by the Company from time to time. Such payment against despatch shall always be the essence of supply order which Company may accept to execute partly or wholly on receipt of a supply order from the RS. Such orders may be placed by him on the company through telephonic orders, or orders though company's representative/C & F A (orally or in writing) depending upon the expediency of the business and mutual convenience of the parties hereto. In such circumstances, and in order to enable the company to execute smoothly the order so placed by the RS without loss of time, the RS hereby agrees to entrust and keep in deposit, and the company

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agrees to accept such deposit, the pre-signed crossed cheques of the RS drawn in favour of the company with standing instructions and authorisation to the company filling up the sale price of the goods despatched as per company's sale invoice. The company shall have the right to complete the cheques so deposited with the price as per its sale invoice as soon as the goods ordered for the despatched. In addition the RS also hereby authorises the company to use such pre-signed desposited cheques for payment and discharge of any amount out standing the RS in the company's books of accounts. The signed Cheque shall constitute a representation and assurance on the part of the Redistribution Stockist to the company that the Redistribution Stockist has sufficient funds with his banker to cover the amount of the Cheque. without prejudice to the foregoing provisions the company shall have the right to make a demand for payment by any other mode of payment like cash, demand draft, etc. and the RS shall make all payments to the company in the manner so prescribed by the company."

10. In paragraph 12 of the petition it is alleged that the petitioner company puts its goods in the streem of trade by on selling it to the redistribution stockist.

11. Thus the case of the petitioner is that it does not making sale at the factory get at Etah, and instead there is a stock transfer from the Etah factory to the petitioners Depots, and it is the C & F A gents at the Depots who make the sale at depots who make the sale at the Depot to the Redistribution Stockists. Hence the petitioner has contended that the Mandi Samiti, Etah has no right to levy Mandi fee since there is no sale within the market area of Etah.

12. It appears that by letter dated 8.3.91 the Mandi Samiti Etah for the first time demanded a sum of Rs 55,97,495.77 as man fee on the alleged sale of Anik Ghee produced in the Etah facto The petitioner challenged this demand before the High Court but the High Court dismissed the petition on the ground that the petitioner should approach the Board under section 32 of the Mandi Adhiniyam. Thereafter the petitioner went up in appeal before the Supreme Court the Supreme Court in Civil Appeal Nos. 1769 - 1773 of 2998 decided on 25.3.98, copy of which has been annexed as Annexure-1 to the petition, set aside the judgement of the High Court and observed that the demands raised against the traders shall be taken to have been made in provisinal assessment but the traders can file an objection within two months which should be decided within two

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months thereafter. Consequently the petitioner filed an objection before the Mandi Samiti which has been rejected by the impugned order dated 22.7.98 vide Annexure-2 to the petition. The total amount levied by the impugned order is Rs.4,93,86,932.66 out of which the petitioner has deposited under protest Rs.42,88,802.81 and it was directed to deposit the balance of Rs.4,50,98,179.85. Aggrieved this writ petition has been filed in this Court.

13. Counter affidavit has been filed on behalf of the Mandi Samiti Etaha. In the counter affidavit a preliminary objection has been raised that the petitioner has an alternative remedy under section 32 of the Mandi Adhiniyam and it is alleged that certain disputed questions of facts are involved because of which the petition should be dismissed on the ground of an alternative remedy. Another preliminary objection was taken in the Supplementary Counter Affidavit filed on 6.1.99 before this Court in which it was contended that the petition is not maintainable as no objection has been filed by M/s lipton India Ltd. Or M/s brook Bond India Ltd.

14. In paragraph 5 to 11 of the counter affidavit it is disputed that there is any stock transfer from the Etah factory to the Depots.

15. In paragraph 19 of the counter affidavit it is stated to the sale of Ghee takes place in Etah and it is denied that there is any stock transfer by the petitioner.

16. In paragraph 29 of the counter affidavit it is alleged that the petitioner did not care to produce in-trinsic evidence to show that there was a stock transfer.

17. Before considering the rivals submissions of the parties we may deal with the preliminary objections of the respondents. Regarding the first preliminary objection that the petitioner has an alternative remedy under section 32 of the Mandi Adhiniyam we are of the opinion that this is not a fit case for relegation the petitioner to his alternative remedy. It is settled law that existence of and alternative remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution of India, but it is a matter of discretion. In the present case there are two aspects because of which we are not inclined to dismiss this petition on the ground of an alternative remedy. Firstly, this matter has been pending since 1991 when for the first time demand notice was sent to the petitioner by the Mandi Samiti, Etah and the matter came up to this Court and then

went up to the Supreme Court and thereafter the inpugned order dated 22.7.98 has been passed in pursuance on the direction of the Supreme Court. The matter has been pending for long and has gone up even to the Supreme Court and it will be in the interest of justice that the matter should be decided by this Court finally now. There is a latin maxim " Interest Republic and sit finis lititum" which menas "it is in the interest of the republic that there should be an end to litigation." The controversy in this case has been dragging on for many year and it is high time that it should be finally decided by this Court, instead of relegating the matter to the Board. Secondly this court had earlier dismissed the petition on the ground of alternative remedy under section 32 but the judgement of this Court was set aside by the Supreme Court, which means that even the Supreme Court was not impressed by the existence of an alternative remedy under section 32. Hence we are not inclined to dismiss the petition on the ground of an alternative remedy.

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18. As regard the second preliminary objection of the respondents we are of the opinion that it is a hyper-technical one. It has already been mentioned that M/s Lipton India Ltd. Amalga mated into M/s brook Bond India Ltd. In 1994 and that Company was in turn amalgamated with the petitioner M/s Hindustan Lever ltd. in 1997. Thus both M/s Lipton India Ltd. And M/s Brook bond India Ltd. were not in existence after 1997. Hence the only Company which could have filed an objection in pursuance the judgement of the Supreme Court dated 25.3.98 was M/s Hindustan Lever Ltd. and this Company filed the objection .

19. The two Schemes of amalgamation of 1994 and 1997 indicate that the liabilities of M/s Lipton India Ltd. as well as of M/s Brook Bond India Ltd. have been taken over by the petitioner Company. Hence the petitioner is certainly entitled to challenge the imposition of market fee of M/s Lipton India Ltd. and M/s Brook Bond India Ltd. Hence we find no substance in this second preliminary objection also.

20. We may now proceed to consider the case on merits. The main contention of Sri Shanti Bhushan, Learned counsel for the petitioner is that there were only stock transfers from the Etah factory and not any sale at the factory gate. No doubt the explanation to section 17 to the Mandi Adhiniyam states that when any specified agricultural produce is taken out of the market area by a licensed trader there is

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presumption that the goods were sold in such area. This explanation reads as follow.

21. For the purpose of clause (iii), unless the countrary proved, any specified agricultural produce taken out or propose to be taken out of a market area by or on behalf of a licensed trader shall be presumed to have been sold within such are an in such case, the price of such produce presumed to be sold shall be deemed to be such reasonable price as may be ascertain in the manner prescribed'

22. Sri Shanti Bhusan contended that this explanation to section 17 only raises a rebuttable presumption and it is not conclusive proof. We are in agreement to submission. In our opinion if no material is produced by a trader to rebut the presumption then it will be presumed that the goods are sold within the market area, but if material is produced by the trader to the contrary then the presumption can be rebutted. In this case we find that the petitioner has produced overwhelming evidence before the Mandi Samiti to rebut the presumption.

"It may be noted that Section 17 (iii) (b) states that the Mandi Samiti has the power to levy market fee, "which shall be payable on transaction of sale of specified agricultural product in the market area."

23. A perusal of Section 17 shows that market fee is payable on sales within the market area. In our opinion two things are noteworthy regarding this provision. Firstly, the market is payable on sales and not on contracts. There is a clear distinction in law between a contract and a sale. Even if the is a contract to sell certain goods yet there may be a breach of that contract resulting in no sale, for which a suit damages may be maintainable or a suit for specific performance. Learned counsel for the respondents has tried to draw a distinction between the work "Sale' and the expression " Transaction Sale" we are of the opinion that there is no such distinction In our opinion the expression "Transaction of Sale" has the meaning as the work "Sale'.

24. The second point to be notied the above provision is that market fee is payable on sales within the market area, and not sales outside the said area. Thus in our opinion the situs of sale as of paramount importance to determine whether Mandi fee is payable or not. If no

sale has taken place within the market area obviously no Mandi fee is payable.

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25. Section 2 ® of the Mandi Adhiniyam states "sale includ barter or deposit of goods by way of pledge or as security for the amount received as advance"

26. This definition of sale in the Mandi Adhiniyam does no really define a sale as is only an inclusive definition . In other words it only states that certain transactions which was otherwise not be sale would also be treated as a sale e.g.. or deposit of goods by way of pledge or security. The present case does not relate to barter or deposit of goods by way of pledge or security. Hence Section 2® of the Mandi Adhiniyam does not at all help us in understanding the meaning of the word's. Hence we have to go back to the general law in the sale of Goods Act to understand the meaning of the word 'sale'. In an analogues legislation of the State of Andra Pradesh the Supreme Court in agricultural Market Committee V. Shalimar Chemical Works (AIR 1997 SC 2502) has applied the provisions of the sale of Goods Act for deciding when and where a transaction of sale place.

27. Section 4(1) of the Sale of Goods Act stated "A contra sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price". Section 4(3) of the said Act states " Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at future time or subject to some condition thereafter to be ful filled, the contract is called an agreement to sell."

28. A perusal of section 4(3) clearly indicates that for to take place there must be a transfer of property. As to the transfer of property takes, we have to go to Chapter I of the sale of Goods Act. Section 18, which is contained in Chapter III, states "Where there is a contract for the sale of unascertained goods, no property in the goods is transfer to the buyer unless and until the goods are ascertained". Section 19 of the Sale of Goods Act states" (1) where there a contract for the sale of specific or ascertained goods the Property in them is transferred to the buyer at such time as parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the Parties and the circumstances of the case.

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(3) Unless a different intention appears, the rules contained in sections 20 to 24 as rules for ascertaining the intention of the parties as to the at which the property in goods is to pass to the buyer". Section 20 of the Sale of Goods Act states "Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of pay of the price or the time of delivery of goods, or both, is postponed." Section 23 of the sale of Goods Act states "(1) there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliver state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passed to the buyer. Such assent may be express or implied, may be given either before or after the appropriation is made (2) Where, in pursuance of the contract, the seller delivers goods to the buyer or to a carrier or other bail (Whether by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deer to have unconditionally appropriated the goods to the contract.

29. The expression specific goods has been defined in Section 2(14) of sale of Goods Act to means "goods identified and ag upon at the time a contract of sale is made."

30. The facts of the present case reveal that what is transferred from the factory to the Company Depots (where the C & F Agents are located) are unascertained goods and not ascertain goods. The goods becomes ascertained only after out of the stock lying with the C & F Agent at the depot certain specifications out of the stock are separated for being sold. To give illustration, suppose there are 10,000 tins of ghee lying at the depot with the C & F Agents. If an order of 100 tins of ghee are received then it is only when out of this stock of 10,000 tins ghee (which are unascertained goods) 100 spec tins are taken out of the stock. Under section 23 (1 of the Sale of Goods Act it is only when these specific 100 tins are appropriated to the contract that the sale takes place. Under Section 23(2) it is when the C & F Agents delivers these 100 specific tins to the carrier (which may be a truck or otherwise) goods can be said to be unconditionally appropriated to the contract. These provisions clearly show, that the exacy poi time when the sale takes place is when the C & F Agents delay certain specific tins of ghee to the carrier (truck or other which is meant for carrying the goods to the

purchaser. Thus sales take place at the depot of the C & F Agents because it is at the moment of handing over the goods to the carrier of transportation to the buyer that the appropriation of the go to the contract (i.e. the sale) takes place. It may be not that Section 18 to the Sale of Goods Act makes it clear that is no question of transfer of unascertained goods. In the present case the goods which are transported from the factory are unascertained goods because out of the total stock being carried in the transfer from the factory it is not clear which particular tins are sold to which particular buyer. The facts of the present case clearly show that in fact unascertained goods are carried from the factory to the depots, and it is only at the depot that out of the stock certain specific tins are separated on receiving order from the redistribution stockist for sale of those specific tins.

31. In P.S.N.S. Ambalavana Chettiar and Co-Ltd. And another Express Newspapers Ltd. Bombay (AIR 1968 SC 741 the Supreme Court held that in view of Section 18 of the Sale of Goods Ac is a condition precedent to the passing of property under a ract of sale that the goods are ascertained. Unless and until a specified portion of the total stock is identified and appreciated to the contract no property passed to the buyer.

32. Section 19 of the Sale of Goods Act provides that "whether there is a contract for the sale of specific or ascertained of the property in them is transferred to the buyer at such time the parties to the contract intend it to be transferred". Clause 3 of the Section 19 makes it clear that "unless a different intention appears, the rules contained in Sections 20 to 24 and rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

33. In the present case there is nothing to show that any different intention existed, and hence the rules mentioned in Section 20 to 24 of the Sale of Goods Act will determine the intention of the parties. As already observed above, Section 23 is the specific provision which is applicable to the present case. In our opinion the situs of the sale is at the depot C & F Agent is located, because it is at the depot where the goods are appropriated to the contract, and the sale takes place at the exact moment when the ascertained goods are handed over to the carrier at the depot. Hence in our opinion no sale takes place within the market are of Mandi Samiti Etah. In this connection reference may also be made to the decision of the Supreme Court in

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34. Learned counsel for the respondent has relied on the judgment of the Supreme Court in M/s Vijay Traders Vs. M/s Bajaj Auto Vehicles Ltd. JT 1995 (7) SC 608. In our opinion this decision us distinguishable. In the case of M/s Vijay Traders the Supreme Court found that the distributor were buying the vehicles from M/s Bajaj Auto Vehicles Ltd.

35. In the present case there is overwhelming evidence to show that there was no sale by the petitioner to the C & F Agents but the sale was by C & F Agents on behalf of the petitioner to the Redistribution stockist. This evidence include the agreements the petitioner and the C & F Agents (Annexure-4 to the writ petition), the agreements between the petitioner and the Redistribution stockists (Annexure-5 to the writ petition), the stock Transfer Notes (Annexure-sa-8), application for issue of gate pass (Annexure-Sa-11), Form F Declaration under the Central Sales Tax Rules (Annexure-Sa-3) Form a submitted by the petitioner to the Mandi Samiti (Annexure-2) to the rejoinder affidavit), Sales Invoice issued by the Depot to the Redistribution Stockist (Annexure-RA-9) cheque issued by the latter in favour of the petitioner (Annexure-RA-9), the depot account of the petitioner (Annexure-RA-7), Sales Tax assessment (Annexure-RA-5) etc.

36. The situs of the sale, in our opinion, was clearly at the depot and not at the factory gate and hence we are of the opinion that no transaction of sale took place within the market area of the Mandi Samiti, Etah. In fact market fee is paid at the depots to the other Mandi Samitis concerned vide Annexure-RA-11 and RA-12.

37. In the impugned order dated 22.7.98 (Annexure-2 to the writ petition) reference has been made to Article 366 (29A). We do not see what relevance has Article 366 (29 A) to this case. That provision relates to Tax on the Sale or purchase of Goods, and has extended the definition of sale for the purpose of sales tax was made in view of the decision of the Supreme Court in State of Madras V. Gannon Dunkerly AIR 1958 560 by which the Supreme Court invalidated the definition of sale in the Madras Sales Tax Act which had included works Contract. In out opinion there is a distinction between fee and a tax. Mandi fee is a fee and not a tax, and we are unable to see that what relevance Article 366(29) has to this case.

38. In paragraph 8 of the impugned order it has been observed that the petitioner has not adduced any evidence of declaration of declaration in respect of Excise. In this connection it has been pointed out by Sri Shanti Bhusan, learned counsel for the petitioner that ghee was not an excisable item at the relevant time. It became an excisable item in June 1988 for a short period, and thereafter again it became non-excisable.

39. In paragraph 10 of the impugned order it has been observed that the sale takes place at the Etah factory, but this observation is wholly without any basis. No reference has been made to the provisions of the Sale of Goods Act which have been referred to above. The observation that there is some secret stipulation between the redistribution stockist, the C & F Agent and the petitioner is wholly without any basis. Thus in our opinion the impugned order proceeds on conjectures and surmises and cannot be sustained. The petitioner pays Mandi fee on sales made at the dopots to which the stock transfer has taken place from the Etah factory.

40. On the facts and circumstances of the case we set aside the impugned order dated 22.7.98 and hold that thee is no sale within the market area of Etah and the sale only takes place at the company's depots which are all outside the market area of Etah.

41. The Mandi Samiti, Etah is hence, restrained from levying or collecting any market fee from the petitioner. We allowed this writ petition and quash the impugned order dated 22.7.1998 passed by the Mandi Samiti.

42. By an interim order dated 17.8.98 passed by this court in this case the petitioner had been directed to deposit half of the Principal amount with the Mandi Samiti, Etah which was to be put in a Fixed Deposit by the Samiti at once and the remaining half had to be deposited by the petitioners as Bank guarantee to the credit of the Mandi Samiti, and subject to the above conditions the impugned order was stayed.

43. Since we have allowed this petition we direct that any amount deposited by the petitioner in pursuance of the aforesaid interim order shall be refunded to the petitioner with interest @ 12% per annum from the date of deposit within two months the date of this

judgment and the Bank Guarantee furnished by the petitioner shall stand discharged.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:- ALLAHABAD 16.3.1999

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March, 16

BEFORE
THE HON'BLE D.K.SETH,J.

CIVIL MISC. WRIT PETITION NO. 8138 OF 1999

Brij Behari and others ... Petitioners
Vs
Nagar Palika Parishad Mathura through its Chairman and others ... Respondents

Counsel for the Petitioners : Shri Janardan Sahai
Counsel for the Respondents : Shri S.V.Goswami

U.P. Municipals Act S.4 and 74 Read With .U.P. Municipal Servants Appeal Rules 1967- Rule 3 an appeal under the rule 3 is provided only against the order of punishment and not against the simple order of removal . The termination order passed against the petitioner after settlement was arrived at on condition of non vicitimisation was held to be not a termination order simpliciter.

By the Court

Shri S.V.Goswsami, learned counsel for respondents had taken a Preliminary objection as to the maintainability of the writ petition on the ground that an appeal is provided under rule 3 of the U.P. Municipal Servants Appeal Rules 1967. He had also contested the case on merit on the ground that the order of termination impugned in this writ petition is of termination Simplicitor without casting any stigma and the decision not to retain the Petitioners is followed by a motive that the petitions were not fit to be retained in service. The reason for non-retention of the petitioners in service was not a foundation for removal of the petitioner as such it was not a

Punishment. The word used in the termination being a simple removal, on the ground that there was no necessity of their services, no prejudice was meant to The petitioners since it did not cast any stigma from securing any future Employment. Therefore, the petitioners cannot maintain the writ petition onMerit.

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Mr. Janaradan sahai, learned counsel for the petitioners, on the other hand, Contents that Rule 3 of the said Rule provides an appeal only against an order of punishment. Since the order impugned is a simple order of removal not being an order of punishment, no appeal is maintainable, even through the Order of removal has been passed in exercise of power conferred under section 74 of the U.P. Municipalities Act. The representation that was filed, though it was described as an appeal, was wholly incompetent. He next contends that the reasons for termination is not motive, as has been sought to be advanced by Mr. Goswami but is a foundation to the extent that the petitioners did not express their regret not had given any undertaking to work sincerely after the strike was over for which the petitioners had participated by reason of the fact that strike was declared illegal. He relies on the statement made in paragraph 13 of the counter affidavit where some of the participants of the strike were taken back in service on expressing regret and giving undertaking for working with sincerely. The petitioners did not express regret or gave any undertaking, and therefore, despite the promise contained in Annexure-11 to the writ petition to take back all the participants of the strike on the condition that they would not be victimised, the petitioners have not been taken in, and such non retention which was effected before the promise was entered into is in effect a case of victimisation. Therefore, according to him though dressed in a simple form, the order of termination is a penalty in disguise, which cannot be inflicted except after holding an enquiry.

I have heard learned counsel for the parties at length.

Rule 3 of the U.P. Municipal Servants Appeals rules, 1967 provides as under:-

3. Appeals.- Subject to the provisions of the Act, appeal against an order of punishment be lie-

(i) to the President in a case in which the order of punishment is passed by a punishing authority other than the President under Section 76;

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(ii) to the Commissioner of the Division in a case in which the order of punishment is passed by the punishing authority under Section 74 or by the President under Section 76."

Thus it appears that the appeal is provided against an order of punishment. Clause (I) of rule 3 prescribes the forums of appeal as President in case where an order of punishment is passed by an officer other than the President under section 76. Whereas Clause (ii) of Rule 3 prescribes the forum of appeal to the commissioner of the Division in case where an order of punishment is passed by the punishing authority under section 74 or by the President under section 76. Clause (I)and (ii) therefore makes it clear that the appeal lies only against order of punishment passed either section 74 or under section 76.

Section 74 and 76 provides as follows:

"74. Appointment and dismissal of permanent superior staff0Subject to the provisions of Sections of Section 57 to 73, servants on posts in the noncentralised services, carrying scale of pay equal to or higher than the lowest scale of pay admissible to the clerical staff, shall be appointed and may be dismissed, removed or otherwise punished, or the services of a probationer may be terminated, by the President, subject to the right of appeal, except in the case of the termination of the service of probationer, to such authority, within such time and in such manner as may be prescribed:

Provided that appointments on the posts of tax Superintendent, Assistant Tax Superintendents, Inspectors, Head clerks, Sectional Head clerks, sectional Accountants Doctors, Vaids, Hakim and Municipal Fire Station Officers shall be subject to the approval of the Board."

"76. Punishment and dismissal of permanent inferior staff.- Execpt as otherwise provided, the executive Officer, and where is no Executive Officer, the President may dismiss, remove or otherwise punish servants of the board, or terminate the services of probationers, referred to in Section 75 subject to their right of appeal, except in the case of the termination of the service of a probationer, to such authority within such time and in such manner as may be prescribed."

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The reading of section 74 shows that the President may appointed, remove or otherwise punish a servants on posts in the non-centralised services carrying scale of payment equal to or higher that the lowest scale of pay admissible to the clerical staff. Section 76 empowers the Executive Officer or the President to dismiss, remove or otherwise punish the servants of the board. Thus both these sections empower the President of the Executive Officer, as the case may be to dismiss, remove or otherwise punish a different categories of persons as mentioned in Section 74 and Section 76 respectively. In both cases, the order of punishment is subject to the right of appeal as indicated in these two sections. Now the right of appeal conferred under the Rule 3 of U.P. Municipal Servant's Appeal Rules confines the appeal only against order of punishment. If an order of dismissal or removal is passed under section 74 or 76 other than by way of punishment the same cannot be subjected to an appeal by reason of the specific provisions provided in rule 3.

In the present case, the petitioners appear to have been dismissed which according to the stand taken by the Municipality is a termination simpliciter since they have been removed without any stigma. Mr. Goswami, in his submission has clarified that stand taken by the Municipality to the extent that the order of termination was not by way of punishment but termination simpliciter which could be passed without holding any enquiry. However, through he had tried to justify the contention raised by him about the maintainability of the writ petition of the fact that the petitioner had filed an appeal and the same is pending and that the petitioners had accepted the said order as punishment which is indicated in the pleadings made out in the writ petition.

But such question is dependent on the view taken the authority issuing the order. How it is accepted by the recipient is not the governing factor. When municipality takes a stand that it was not a punishment, even if the petitioners considered it to be a punishment, the Municipal may dismiss the appeal on the ground that it is not maintainable since it was not passed by way of punishment. What stand would be taken at that is a matter of guess. Now the stand taken by the learned counsel for respondent Shri Goswami is that it is not by way of punishment though the petitioners might have accepted the same as by way of punishment. The Municipal Authority may decide to take advantage of both end. In such circumstances, it is not wise to leave the matter at the hand of the

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Municipal Authority to take a stand, which might suit them best. Thus it appears that in view of the specific provision contained in Rule 3 of 1966 Rule the petitioners were ill advised to prefer the appeal since the appeal in such a case is incompetent, as rightly contended by Mr. Sahai and I do not find any reason to disagree with the contention raised by him. Respectfully, I am unable to persuade myself to agree with the contention of Mr. Goswami with regard to non-maintainability of the writ petition on the ground that an appeal lies and the petitioners had preferred such an appeal in view of the observation made above.

It is not disputed that the petitioners were participants of the strike in which some other scavenger had participated. The petitioners services were terminated by the impugned order dated 23.121998, contained in Annexures 1 and 2. It is an admitted position that the petitioners who are scavengers were on strike since before 23.12.1998 this position has not been disputed in his usual fairness by Mr. Goswami. Therefore, the order of termination or removal, as the case may be has to be considered in the background of the facts and circumstances in which the said order was brought into being. From Annexure –11 to the writ petition it appears that the settlement was arrived at between the striking scavengers and the Municipality. It is mentioned in the said settlement that on 4.1.1999 there was a settlement between the leaders of the scavengers and the Municipality and it was decided that the striking scavengers arrived at between the parties, on the terms and conditions mentioned in the said settlement, which are five in number. The first condition was that the scavengers would join their service on 5.1.1999 and shall withdraw the strike. There were other conditions, which are not necessary for our present purpose. The fifth condition was that none of the workers would be victimised.

Since admittedly the petitioners were also participant in the strike, as soon the settlement was arrived at there could not be any reason to resist the petitioners from joining their duty after the strike is withdrawn. In paragraph 13 of the counter affidavit it is admitted that some of striking employees were taken back on their expression of regret and giving of an undertaking for sincere work. At the bar it was contended by Goswami that the conduct of the petitioners were so bad they not even express regret nor they had given any undertaking for participating in the illegal strike. Admittedly the strike was declared illegal and the petitioners had participated in the illegal strike. Thus according to the stand taken by the Municipality

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the petitioners were not retained because they did not express their regret and execute an undertaking. Therefore the non-withdrawal of the termination of the service is in effect a consequence of non-expression of regret and non-execution of undertaking by the petitioner. Thus on account of such conduct the petitioners were not taken back and the order of termination was sought to be maintained, on the basis of the settlement arrived at between the parties which indicates that it was in effect a punishment or penalty inflicted on the petitioners. Admittedly the petitioners are scavengers and had participated in the strike.

In the settlement it is not mentioned that particular persons viz. Petitioners would not be taken back as one of the condition of settlement with the group of workers and with whom the settlement was arrived at. Therefore the settlement had been equally applicable in the case of the petitioners as well. After having arrived at a settlement on 4.1.1999 allowing all the workers to join on 5.1.1999 the attempt to maintain the order of termination appears to be a penalty in disguise on account of the petitioners' participation in the strike. If the respondents want to penalise the petitioners it was open for them to take steps for inflicting punishment in accordance with the relevant rules on account of participation in the illegal strike. If it is proposed to pass punishment, then the respondents are required to undergo the entire process of disciplinary punishing the person participating in an illegal strike.

In the facts and circumstances as discussed above the order of termination does not appear to be a termination simpliciter as has been sought to be argued by Sri Goswami. It is in effect a penalty in disguise. In exercise of writ jurisdiction this court has to look into the substance and pierce the curtain in appropriate cases and find out the character of the order to do justice to the persons who are at the receiving end on account of their position which is incompatible with the permeable power of the employer. It is for the court to lift the veil and find out as to whether the mightier employer has inflicted a punishment or a weaker worker is victimised though dressed in a simple form so as to avoid the whole procedure of holding enquiry to inflict punishment.

In the present case as it appears from the discussion above, it is a case of victimisation by maintaining the order of termination even after the settlement was arrived at on condition of non-victimisation and not a termination simpliciter.

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Vs.
Nagar Palika Parishad and others.

D.K. Seth, J.

In that view of the matter the writ petition succeeds and the impugned order shall be treated as nonest in view of the settlement arrived at between the parties as contained in Annexure-11 and is hereby declared as such. In case the other employees had expressed regret and had given undertaking as stated in paragraph 13 of the counter affidavit the petitioners shall also express their regret and give undertaking in writing before their joining. If such an expression of regret is expressed and an undertaking is given in that event the petitioners shall be allowed to join and be given all such benefits as has been given to other employees. However, the expression and undertaking given by the petitioners shall not be used for the purpose of victimising the petitioners by entering the same in the service record of the petitioners.

With this observation this writ petition stands allowed to the extent as indicated above.

The other contention raised by Sri Sahai is that the petitioner being confirmed employees their services could not have been terminated without assigning any reasons in the manner as has been sought to be done. This contention is disputed by Shri Goswami. However, in view of the discussion made above, it is not necessary to go into the said question for the purpose of the present writ petition.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD : APRIL 6, 1999.

1999

April, 6

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE ONKARESHWAR BHATT, J.

CIVIL MISC. WRIT PETITION NO. 18664 OF 1991.

Smt. Shobha Chaturvedi ... Petitioner.
Vs
Union of India Through the District Manager, Telephone and others ... .Respondents.

Counsel for the Petitioner : Pankaj misra
Viresh misra
Counsel for the Respondents : Parekh
Ashok Mohiley
S.C.

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Binod Kumar Roy, J.
Onkareshwar Bhatt, J.

India Telegraph Rules – r-443 default in payment of Telephone bills –the telephone cannot be disconnected on account of non payment of the bills companies Telephone the petitioner is not a member there is no presumption that the property of a wife to be the property of the husband.

By the Court

1. Whether for the non-payment of the Bill of a closed connection telephone of a Public Limited Company the telephone of the wife of the Managing Director of that Company, which is under liquidation, can be disconnected by the Telecom Authority by invoking Rule 433 of the Indian Telephone Rules?, is the short question for our adjudication in this writ petition.

2. Firstly the prayer of the petitioner. Her prayer is to quash the order dated 26.12.1990 and the direction as contained in the Letter dated Agra 1.6.1991 addressed to the petitioner of the Account Officer (T.R.) Agra Telephones, Agra (Respondent No.2) as contained in Annexure Nos. 5 and 11 respectively.

2A. The relevant part of the order, as contained in Annexure-5, reads thus:-

> "Sub:- Disconnection of Phone No. 61743
> Kindly disconnect phone no. 61743 in lieu of O/- dues of Closed connection No. 73579."

2B. The substance of the communication made vide the letter as contained as contained in Annexure-11 is that she is requested to deposit the due amount of Rs.3455/- in regard to Telephone No. 73579, failing which the connection of her telephone No. 61743 can be disconnected and that it is expected that she will not give such an opportunity to the Department.

3. The petitioner's case is as follows:- Agra Construction Company Ltd. Agra was a Public Limited Company having its Branch Office at Sanjay Place, Agra. Telephone No. 73579 belongs to the said

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Company. The telephone bills of the aforementioned telephone of the company were regularly paid except the bill of March, 1989. To the tune of Rs.3455/-. On account of non-payment the aforesaid Bill that telephone was disconnected on 8.6.1989. The company went into liquidation. A Receiver was appointed over its properties by the Delhi High Court. The husband of the petitioner was Managing Director of the Company. The petitioner is living at 36, Baghfarzana, Agra having her independent telephone bearing No. 61743 at her aforementioned residence in her own name. She has been regularly paying bills of her telephone but for non payment of the dues of the Company's Telephone No. 73579 the order communication as contained in Annexure 5 and 11 have been made even through she has nothing to do with the company. Therefore no coercive action should have been taken against her by the telephone authorities. Their action is against the very concept of law relating to Private Limited companies and accordingly the impugned order and communication are liable to be quashed.

4. On 25.7.1991 the following order was passed by the Bench:-

> "A notice of the petition has been served on the learned Senior Standing Counsel List this petition for admission on the expiry of a month by which the respondent may file counter affidavit.
>
> Meanwhile the first respondent is directed to restore the telephone standing in the name of the petitioner, namely, telephone no. 61743 within a week of the date on which a certified copy of this order is submitted before the respondent nos. 1 and 2 provided that there are no dues outstanding against the petitioner with respect to this telephone.
>
> Sd/-A.N.Verma,J.
> Sd/-R.K.Gulati,J.

5. A counter affidavit was filed on 27.1.1999 by the Respondents alongwith an application for its acceptance after condoning the delay. It has been sworn by the Assistant Account Officer, the Telecom District Mahanagar , Agra and following facts have been stated:-

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Onkareshwar Bhatt, J.

Telephone No. 73579 was disconnected on 8.6.1989 for default in payment of the bills. Notices recovery were sent to the husband of the petitioner Sri Satish Chandra Chaturvedi, who was the Managing Director of the Company, who vide his letters dated 3.5.1990 and 12.5.1990 requested to adjust the outstanding dues against the OYT deposit of Rs.8000/- made by the Company. Accordingly a sum of Rs.6000/- was adjusted but a sum of Rs.3445/- still remained to be recovered. Sri R.N.Bhatia, aretired officer of the petitioner Corporation was appointed Receiver at the instance of the company. It is admitted that telephone no. 61743 was provided in the name of the petitioner at 36, Bagh Farzana, Agra. Telephone no. 61743 was disconnected on 26.12.1990 and not earlier. Under the Rules the Respondents are well within their legal powers to disconnect the telephone of the petitioner since she is wife if Sri S.C.Chaturvedi who has been enjoying that telephone. The telephone of wife can be legally disconnected against the dues of her husband under the Rules. It has been held to that effect as per the recent judgement dated 25.11.1986 in Zarina Begum Vs. General Manager, Madras, of a learned Single Judge of the Madras High Court, The writ petition is, thus devoid of merit and is liable to be dismissed .

The Submissions:-

6. Sri Pankaj Mishra, the learned counsel appearing on behalf of the petitioner, contended that the stand by the Respondents in the counter affidavit is thoroughly misconceived. The petitioner is the owner/subscriber of her telephone who cannot be compelled to pay the dues of that Telephone which admittedly belonged to the company and her telephone cannot be disconnected by the Department. Significantly, no specific Rule has been referred to in the counter affidavit to support the basis of the plea of the Respondents and accordingly the reliefs claimed for by the petitioner are fit to be allowed with costs.

7. Sri Parekh, learned Standing Counsel for the Union appearing on behalf of the Respondents, on the other contended as follows:- As per Rule 443 the Telecom authorities are entitled to disconnect the telephone of the petitioner and they have not committed any wrong in passing their order and communication. He relied upon a Division Bench judgement of this Court in M/s Ajay Iron and Steel Works and Another V. Union of India & others 1999 ALR 91. He also submitted that the writ petition is fit to be dismissed.

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Binod Kumar Roy, J.
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Our Findings:-

8. Rule 443 of the Indian Telephone Rules framed under the Indian Telegraph Act, relied upon by Mr. Parekh reads thus:-

> "443. Default of payment.-If, on or before the due date, the rent or other charges in respect of the telephone service provided are not paid by the subscriber in accordance with these rules, or bills for charges in respect of calls (local and trunk) or phonograms or other dues from the subscriber are not duly paid him, any telephone or telephones or any telex service rented by him may be disconnected without notice. The telephone or telephones or the telex so disconnected may, if the Telegraph Authority thinks fit, be restored, if the defaulting subscriber pays the outstanding dues and the reconnection fee together with the rental for such portion of the intervening period (during which the telephone or telex remains disconnected) as may be prescribed by the Telephone Authority from time to time. The subscriber shall pay all the above chages within such period as may be prescribed by the Telephone Authority from time to time.

9. Rule 2(pp) defines a "subscriber" as follows:-

> "Subscriber" means a person to whom a telephone service has been provided by means of an installation under these rules or under an agreement."

10. On a conjoint reading of the aforementioned Rules, it is clear that if a subscriber commits default in payment of the bills of his telephone then his telephone can be disconnected. At best it can be applicable if the subscriber owns more than one telephone. This rule cannot be invoked by the Department if the subscribers are different.

11. On the case set-forth by the Respondents in the counter affidavit Telephone No. 74579 belonged to the Agra Construction Company Ltd. Agra i.e. to say the company was its subscriber. It is indeed strange then how the petitioner, who is owner/subscriber of her

Telephone No. 61743, can be compelled to clear the bills of Telephone No. 73579 or else to face disconnection of her telephone.

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12. In Salomon V. Salomon & Company 1897 Appeal Cases 22 it was held to the effect that a Corporation in law is equal to a natural person and has a legal entity of its own which is entirely separate from that of its shareholders; it bears its own name and has a seal of its own, its assets are separate and distinct from those of its members, it can sue sued exclusively for its own purpose; its creditors can not obtain satisfaction from the assets of its members; and the liability of the members or shareholders is limited to the capital invested by them. This legal position has been approved by the Supreme Court in Tata Engineering and Locomotive Company V. State of Bihar AIR 1965 SC 40.

13. In Kailash Prasad Modi V. Chief General Manager AIR 1994 Orissa 98 a Division Bench of the Orissa High Court after considering Rules 2(pp) and 433 has held that disconnection of a personal telephone of son of an erstwhile Director of a Company on the ground of non-payment of dues of the Telephone of that Company can not be disconnected applying Rule 433 on the ground that the company is a juristic person and which it is the subscriber, its liability is not transferred to its director and that in a Private Limited Company the liabilities of the directors are limited and as such they are not subscribers of the company's telephone. We are in full agreement with the view expressed by the Orissa High Court.

14. There is no presumption in law that the property of a wife will be presumed to be the property of the husband. It is also a settled law that use by the husband of his wife's Stridhan property cannot change the character of that property. (See Pratibha Rani Vs. Suraj Kumar AIR 1985 SC 628) Thus, use of petitioner's telephone by her husband is of no consequence.

15. Now we come to the Division Bench decision of our own High Court, strongly relied upon by Sri Parekh. The relevant part of this judgement is as follows:-

> "3. It appears that petitioner no.2 Vijay Kumar Gupta was a partner in the firm Lala Sukhdev Ram Rolling Mills and there was a telephone connection No. 348597 in the name of that firm. Obviously, since the petitioner No.2 was a partner in the said firm, he is

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liable to pay the telephone bills of the firm since under Section 25 of the Partnership Act each partner is individually and severally liable.

4.Learned counsel for the petitioner urged that the other telephone connections bearing Nos. 370077,342619,340440 and 371440 are in the name of petitioner and hence they could not have been disconnected for the dues against the firm Lala Sukhdev Ram Rolling Mills. We are not in agreement with this submission."

X X X

"5. The language of Rule 443 is very clear. If a person is in default in payment of telephone dues of on telephone, and if he has any other telephone connection (s) also, the order telephone connections can also be disconnected in view of Rule 443. Since the petitioner was liable to pay the dues in respect of telephone no. 348597, hence, the other four telephone connections could also be disconnected. If however, the petitioner pays the telephone bill in respect of telephone no. 348597, the other telephone connections will be reconnected forthwith, provided he has paid the bills for those telephone connections also."

16. In Bacha F.Guzadar Vs. Commissioner of Income Tax AIR 1955 SC. 74 the Supreme Court held that "Partnership is merely an association of persons for carrying on business of partnership and in law the firm name is a compendious method of describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from shareholders." Apparently the facts of M/s Ajay Iron and Steel Works are entirely different from the instant case. Thus, this decision is of no help to the Respondents.

17. The judgement rendered by the learned Single Judge of the Madras High Court, referred to in the counter affidavit, has not been shown to us and thus no comment of ours is required in this regard, besides it is not binding on us

18. As admitted in the counter affidavit a Receiver has been appointed in regard to the assets of the company. We fail to

appreciate as to how then the petitioner can be coerced to pay the outstanding bills of the company's telephone which is in 'custodia legis of the Delhi High Court.

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19. In our considered view the stand of the Respondents that they can disconnect the telephone of the petitioner on account of non-payment of the bills of the Company's telephone, is thoroughly misconceived and unjustified and thus rejected. It is indeed pity that such a course has been taken by the Respondents.

20. For the reasons aforementioned, we are of the view that the petitioner is entitled to the reliefs prayed for.

21. .In the result, we allow this writ petition and quash the impugned order and direction as contained in Annexure No. 5 and 11 by grant of a writ of certiorari. The Respondents are commanded not to disconnect the telephone of the petitioner provided the petitioner has not defaulted or does not default in regard to payment of bills of her aforementioned telephone number.

22. Since the petitioner has been unnecessarily and illegally coerced by Respondent No. 2, she is entitled to costs, which we assess to the tune of Rs.2,000/- only to be paid by Respondent No.2 to her.

23. The office is directed to hand-over a copy of this order within one week to Sri Parekh, learned Standing Counsel for the Union, for its intimation to and follow up action by the Respondents.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED; ALLAHABAD 9TH APRIL, 1999

1999

April, 9

BEFORE
THE HON'BLE O.P.JAIN ,J
THE HON'BLE S.K.AGARWAL .J

HABEAS CORPUS WRIT PETITION NO.42594 OF 1998

Ali Akhtar ... **Petitioner**

Vs.

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

1999

Ali Akhtar
Vs.
State of U.P.
and others

O.P.Jain, J.
S.K.Agarwal,J.

Counsel for the Petitioner : Shri Sarvesh
Shri B.K.Tripathi
Counsel for the Respondents : Sri A.K.Tripathi AGA
Sri Chandra Prakash
Union of India

constitution of India-Article 226-Hebeas Corpus petition-unexplained delay in disposal of representation- the test is the not the durationj or range of delay but how it is explained by the authority concerned. The delay of 14 days in the disposal of rep;resentation remained unexplained the order of dentention set aside whereas in many cases even longer delays have been well explained and the detention order has been held to be justified.

By the Court

1. Petitioner Ali Akhtar has filed this Habeas Corpus Petition against the order of detention)Annexure 1) dated 21st July, 1998 passed by District Magistrate, Azamgarh under section 3 (2) of National Security Act of 1980 (hereinafter called the Act). The grounds of detention supplied to the petitioner are given in Annexure 1A. A perusal of the grounds shows that on 9th May, 1998 one Raj kumar Singh alongwith his friend Ram Badan Singh alias Ramai was going on Rajdoot Motor Cycle No. URX 7747 from Bilariaganj to his village Bagahi Dand. At about 3-00 PM when the motor cycle reached village Khalitpur Bazar, petitioner Ali Akhtar alongwith his companions Ashfaq Master, Salam Jafar pradhan and Sarfuddin armed with unlicensed pistols stopped the motor cycle and fired at Raj Kumar Singh, who died. Ali Akhtar and his companions made a murderous assault on Ram Badan Singh alias Ramai and indiscriminately fired their pistols. Due to the daring broad day ;light murder and the firing of guns shots there was a commotion at Khalitpur amd the pedestrians and person going on vehicle fled away. The shop keepers started closing their shops and an atmosphere of fear and terror was created in the localaity . The public was agitated and the relations between the two communities were affected. People belonging to Hindu comunity resorted to "Chakka jam and the public order was adversely affected.

2. A First Information Report was lodged by Kishun Dev Singh at P.S. Bilariaganj and a case under Sections 147 148 149 307 302 IPC was registered by the police. The accused was arrested and a charge sheet against them was filed on 25th June 1998.

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and others

O.P.Jain, J.
S.K.Agarwal,J.

3. We have heard Sri Sarvesh, learned counsel for the petitioner, Sri A.K.Tripathi, learned A.G.A. on behalf of the state and Sri Chandra Prakash for Union of India and have gone through the record.

4. The first information report lodged by Kishun Dev Singh is Annexure-2 and its perusal shows that in the Holi festival preceding the day of the incident there was some communal disturbance between the Hindus and Muslims of the locality because 'Abeer' was ap;plied to a person who objected to it. In this communal incident who ;persons belonging to Muslim community and one person belonging to Hindu community lost their lives . A report of the communal; violence was lodged by Raj Kumar Singh who is the victim of the incident dated 9th May, 1998. It is stated in the F.I.R. that after the incident on the Holi festival the petitioner and his companions were in the lookout of a chance to kill Raj Kumar Singh.

5. Learned counsel for the ;petitioner has argued that the detention order is based on a solitary incident which may affect the law and order but does not affect public order. It was also argued that present petitioner Ali Akhtar had nothing to do with the earlier incident at the time of Holi festival.

6. In our opinion, this argument is not available to the petitioner because in respect of the same incident dated 9th May, 1998 and on the basis of the same F.I.R. a detention order was passed against one Ashfaq Master, who is named in the present F.I.R. The detention of Ashfaq Master was challenged in Habeas Corpus Petition No. 28574 of 1998, Ashfaq Master Vs. State of U.P. and others decided by this Court on 13th January, 1999. Sri Sarvesh, learned counsel for the petitioner has very fairly made a photo copy of the judgement dated 13.1.99 available to us. A perusal of the judgement shows that the above contention was re;pelled with the following observations.

> "We, however, feel in difficult to accede to the contention advanced on ;behalf of the petitioner. It is because that the incident indicated in the ground of detention is not to be considered in isolated manner, the background of the incident is also important. It is then only that the impact of present incident on the members of two communities namely Hindus and Muslims, can be appreciated. It also appears from perusal of the First Information

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O.P.Jain, J.
S.K.Agarwal,J.

Report that originally the dispute started with the applying of 'Abeer' (dry color) on a member of community which followed the dispute and resulted in death of three persons two on the side of Muslims and one on the side of Hindus. In this background, it need not be emphasised that after the incident occurred in the area in which members of two communities were involved and one person belonging to Hindus was injured, later on who died, needless to say that it would disturb the communal harmony. The result is that it will be matter relating to public order. We do not find any substance in the submission made by the learned counsel for the petitioner.'

7. The next contention of Sri Sarvesh is that there has been undue delay on the part of the Central Government in disposing of the representation filed on behalf of the ;petitioner Ali Akhtar. Sri Sarvesh admits that there has not been any delay on the part of the State Government. But so far as the Central Government is concerned, there is unexplained delay according to learned counsel. The representation submitted on behalf of Ali Akhtar was received by the Central Government on 31st August, 1998. And it was ;processed by the Director in the Ministry of Home Affairs on 4th September, 1998. The Joint Secretary dealt with the file on 7th September, 1998 and on the same day he submitted it to the Home Minister, Government of India. The Home Minister rejected the representation on nineteen days in disposing of the representation by the Home Minister and no explanation has been given of this delay which is described as inordinate delay by the learned council. It is further argued that in the case of Ashfaq Master (Habeas Corpus Petition No. 28574 of 1998) the detention was set aside on the ground of unexplained delay in disposing of the representation of the detenue. We , however, find that in the case of Ashfaq Master the delay was about one month. The papers relating to Ashfaq Master were placed before the Home Minister on 29th August, 1998 and the representation was rejected on 25th September, 1998. Thus , there was a delay of about 26 days.

8. In the instant case the delay is of 19 days and in the counter affidavit filed on behalf of the Central Government by Bina Prasad, Under Secretary it is mentioned that there were Gazetted holidays on 5,6,12,13,19 and 20th September, 1998. In view of the fact that the papers were placed before the Home Minister on 7th September,

1998, the holidays falling on 5th September and 6th September 1998 may be excluded. Even so, there were four holidays and the Central Government is required to explain the delay of about 15 days only.

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and others

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S.K.Agarwal,J.

9. It may also be mentioned in this connection that even before the receipt of representation the matter was considered by the Central Government on 10th August, 1998 and it came to the conclusion that there was no necessity to interfere with the order of detention approved by the Government of Uttar Pradesh. This order was passed on the basis of the report received from the State Government. When the representation of the petitioner was received the matter was again considered and thereafter some more information was collected by sending crash wireless message dated 14.8.1998. The information was received on 31st August 1998 and then it was considered by the Director, Ministry of Home Affairs and thereafter by Joint Secretary and Home Minister.

10. Learned A.G.A. has cited Smt. Kamlabai Vs. Commissioner of Police, Nagpur and ors. JT 1993 (3) SC 666 which was also a case; under National Security Act. In that case the Government of India sent a wireless message on 19..5..92 asking for certain information and again wireless message was given on 13.7.92 and the matter was decided by 'the Government of India on 15.7.92. It was argued before the apex court that no explanation has been given regarding the delay between 18.6.92 to 13.7.92. This contention was not accepted and the Court made the following observations:

> " The delay by itself is not a ground which proves to be fatal, if there is an explanation. However, the short delay can not be given undue importance having regard to the administrative actions. We do not think that the delay in this case is so inordinate as to warrant interference."

11. However, we find that a more strict view has been taken in some latest cases. In the case of Rajammal Vs. State of T.N. and another 1999 SCC(Criminal) 93 it has been observed that it is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay ,but how it is explained by the authority concerned. In the case of Rajammal the file was submitted before the Minister who received it while he was on tour. The file was submitted to the Minister on 9,.2.98 and he passed the order 14.2.98. It was observed by the

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Court that there is no explanation whatsoever of far as the delay which occurred between 9,.2.98 and 14.2.98. It was further observed that merely stating that the Minister was on tour and hence he could pass orders only on 14.2.98j is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay, since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.

12. In the case of Parvez Vs. State of UP 1999 (1) JTC 469 (All) there was delay of fourteen days in the disposal of the representation. The delay remained unexplained and it was held that intermittent holidays are not to be counted in explaining the delay . It was found that the matter was placed before the Home Minister on 11.9.98 and there was no explanation as to in what circumstances for fourteen days the representation, which was ripe for disposal , remained pending . The further detention of the detenue was held to be invalid.

13. In the case before us there is unexplained delay of about fifteen days . In the counter affidavit filed one behalf of the Central Government there is not a word about the reasons which caused the delay and, therefore, in our opinion the order of detention has to be set aside.

14. In view of the above discussion, we hold that there has ;been unexplained delay in considering and disposing of the representation by the Central Government. The writ petition is thus, allowed and continued detention of the petitioner is held to be invalid. The petitioner shall be set at liberty forthwith unless wanted in any other case.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINALA SIDE
DATED; 5TH APRIL, 1999

1999

April, 5

BEFORE
THE HON'BLE O,P. JAIN, J
THE HON'BLE S.K. AGARWAL, J

HABEAS CORPUS PETITION NO. 36969 OF 1998

Rafeeq alias Mantex ... Petitioner

VS.

Union of India and others ... Respondents

Counsel for the Petitioner : Sri N.I.Jafri
Sri M. Islam
Counsel for the Respondents : Sri Mahendra Pratap AGA
Sri S.Banerjee
Sri S.N.Srivastava
Sri M.B.Singh

Constitution of India- Article 226- Habeas Corpus the incident did give rise to law and order problem for the police and special force had to be deployed in the locality some time for not a case in which public order was effected a great extent- in cases of detention, it is subjective satisfaction of the District Magistrate and this Court does not sit as a court of appeal to appreciate the correctness of the facts or sufficiency of ;the material but accepting the facts stated in the grounds of detention as correct, the court can form an opinion whether the detention under National Security Act was justified or not ?

By the Court

1. Habeas Corpus Petition No. 36969 of 1998 has been filed by Rafeeq alias Mantex and Habeas Corpus petition no. 35426 of 1998 has been filed by Rashid alias Kalwa. Both the detenues have been detained by order passed under section 3 (3)j of the National Security Act of 1980 (hereinafter called the Act). The order of detention has been passed by District Magistrate, Jyotiba Phule Nagar who is respondent no. 3 As the grounds of detention and the grounds on which the detention has been challenged are similar in; both the cases, they are being disposed of by a common judgement.

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O.P. Jain, J.
S.K. Agarwal,J.

2. We have heard Sri N.I. Jafri and Sri M. Islam on behalf of the petitioners and Sri Mahendra Pratap AGA for the respondents and have gone through the record.

3. The ground of detention furnished to the detenues is Annexure 3 from which it appears that on 11th June, 1998 the Nikah of Km. Salma was to take place at about 4 P/.M. with one Haneef. Co-accused Infaq alias Kaddi had proposed to marry Km. Salma refused to marry Infaq. On 10th June, 1998 at about 6 P..M. Infaq and his friends tried to pressurise Km.Salma but she again refused and, therefore, Infaq and ;his companion went away after holding out threats to Km. Salma.

4. On 11th June , 1998 at about 7 in the morning Km.Salma, her sister Km. Nazma and other family ,members were sitting in the court-yard of the house when Infaq alias Kaddi, Asif, Rashid alias Kalwa and Rafeeq armed with knives entered the house and assaulted Km. Salma with knives. When the family members tried to save her the accused persons threatened them and killed Km. Salma on the spot. After killing Km. Salma the accused left the scene of occurrence brandishing their knives and creating terror in the locality. Due to the terror created by accused persons the neighbours hid in their houses. When the information was received by the police and the police reached the spot, they found that the doors of the houses in the vicinity are closed and there was silence in the locality. The police found some slippers (Chappals) scattered in the lane and the dead –body of Km. Salma was found in the court yard. The family members were crying.

5. It is further mentioned in the grounds of detention (Annexure 3) that the neighbours were so much terrified that even after the accused had left the spot, no one came to help the family members of the deceased. It is a further mentioned that Rashid himself had proposed to marry Km. Nazma , sister of deceased Km. Salma, one year back, but Nazma had refused to marry Rashid, and, therefore , Rashid was also inimical to the family. Rashid , Iknfaq and Aasif are close friends and are related to Rashid . Therefore, all the four killed Km. Salma on the day on which she was to be married to Haneef.

6. Annexure 3 further recites that due to this barbaric ,murder of Km. Salma , the residents of Mohalla Lal Bagh and Hasan;pur and nearby villages were terrified and they were very much agitated. The residents of the locality obstructed the traffic on Gajraula-

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Hasanpur by-pass road and various political parties , threatened to obstruct the traffic if the accused are not arrested. In connection with this incident various entries were made in; the General diary of the Police Station from 11th June, 1998 to 24th August, 1998. The accused surrendered in court on 18,.6.1998 and tried to obtain bail. On the date on which the detention order was passed, the bail application filed by the accused was pending. It is further mentioned in Annexure 3 that the detenues and their friends and family members are constantly threatening the family members of Km. Salma and it is likely that they will repeat the crime.

7. On this ground accused Rafeeq and Rashid were detained. They filed a representation before the detaining authority and ;their case was referred to the Advisory Board. The detention was confirmed and the representation filed by the detenues was rejected. Therefore, they have filed the present Habeas Corpus Petitions.

8. The first contention on behalf of the detenues is that they were already in jail on 30th August , 1998 in connection with offence under section 302 I.P.C. registered on account of death of Km. Salma and, therefore, there was no justification to pass an order of detention. The law on the point is settled. If the detaining authority has reason to believe that the detenues who are in jail are likely to be released on bail, the order of detention can be passed notwithstanding that the detenues are already in jail. It is mentioned in the grounds of detention that the detenues are trying to obtain bail and ;an application for bail has already been filed. In paragraph 11 of both the petitions it is mentioned that the copy of bail application dated 27.8.1998 produced by the sponsoring authority before the detaining authority was fabricated by the SHO concerned and in fact no bail application had been filed on behalf of Rafeeq or Rashid.

9. We have carefully examined the record and in our opinion this allegation is totally baseless. A copy of bail application dated 27.8.1998 has not been enclosed with ;the petitions. The SHO who is said to have forged the bail application has not been impleaded by name. Had the allegation been true, the petitioners would have produced a copy of the bail application and could have filed the affidavit of the Advocate concerned who may have said that no such bail application was filed by him. In the absence of such material, the allegation made on behalf of the detenues; has to be rejected.

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10. The second contention is that there is total non-application of mind on the part of the District Magistrate . In support of this contention it is pointed out that in the grounds of detention (Annexure 3), it is mentioned in the order relating to Rashid that he had proposed to marry Km. Salma 's sister Km. Nazma one year back, but Km. Nazma turned down his proposal . It is argued that a similar averment has been made in the grounds (Annexure 3) supplied to Rafeeq . It is argued that it is not possible that both Rafeeq as well as Rashid may have proposed to marry Km. Nazma at the same time.

11. This contention is found to be factually incorrect. In Annexure 3 relating to Rashid it is no doubt stated that he proposed to marry Km. Nazma and she refused, but in Annexure 3 relating to Rafeeq it is clearly mentioned that Rafeeq's brother-in-law Rashid proposed to marry Km. Nazma and she refused. Therefore, it is wrong to suggest that similar allegations have been made in both the petitions and that there is non-application of mind.

12. The next contention on behalf of the detenues is that they have been detained on the basis of a single incident and there may have been a breach of law and order, but it is not a case in which there was breach of public order or public tranquillity. It is also argued that four persons are said to have taken part in killing Km. Salma, but only two of them have been detained and no reason has been given in the grounds of detention as to how the case of Rashid and Rafeeq is distinguishable from the case of Infaq and Asif.

13. First of all we will consider whether an order of detention can be passed on the basis of a single incident or not. We find that this ,matter has been considered by this Court in various cases. We will refer only 2-3 cases decided by this court . In the case of Vijai Pal alias Pappu Vs. Union of India and others, 1996 ACC 741, it has been held that an order of detention can be based on one solitary act. Whether a single act is sufficient or not to sustain an order of detention depends upon the gravity and nature of the act having regard to the fact whether the act is organised act or a manifestation of organised activities . In the cited case a reference has been made to Attorney General for India and other Vs. Amrat Lal Prejvandas and others, 1994 SCC (Criminal) 1325, in which it was observed that "though ordinarily one act may not be held sufficient to sustain an order of detention, if the act is of such a nature as to indicate that it is an organised act or a manifestation of organised activity . The

gravity and nature of the act is also relevant. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activity …If , however, in any given case a single act is found to be not sufficient to sustain the order of detention ;that may well be quashed but it cannot be stated as a principle that one single act cannot constitute the ;basis for detention. On the contrary, it does. In other words, it is not necessary that there should be multiplicity of grounds for making or sustaining an order of detention."

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14. This point was considered by this Court in; the case of Farhat Khan Vs.. State of UP and others, 1997 J.I.C. 1118 and various cases of the apex Court have been discussed in paragraphs no. 34 to 37. The court came to the conclusion that even a solitary incident can justify ;the detention if it is serious enough and if it had resulted in breach of public order as distinguished from law and order.

15. The same question was again considered in the case of Vinod Vs. Secretary Ministry of Home Affairs, Government of India , New Delhi & others. 1997 JIC 1185 9(All). After considering various cases from paragraphs 19 to 31, ;the Court came to the conclusion that even on the basis of a single incident a person can be detained under National Security Act provided such single act has the effect of disturbing public order and even tempo of the life of the community or the society or the locality.

16. Now we proceed to examine the facts of the present case in the light of the observations made in the cases cited earlier. A perusal of various cases in which order of detention was passed on ;the basis of a single incident shows that the incidents were of a grave nature in which attack was made on; the police party or it was a case ;of bank robbery or it was a case of high- way robbery particularly in broad day light. In order to justify detention on basis of a solitary incident ordinarily it should be shown that the offence was pre-planned. In some cases detention on the basis of a single incident has been justified because it involved communal disharmony. For example in the case of Vjnod Vs. Secretary (Supra) the incident was found capable of giving rise to the clash between scheduled caste and upper caste residents of the locality . So far as the case in hand is concerned, the incident is very unfortunate and of a daring nature, but the motive for the commission of the offence was entirely personal and it is not likely that the detenues will repeat the offence . Where offence is committed for gain as in the case of robbery or

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dacoity, a repetition is bound to take place because there is no limit of greed. But in a case like the present where the detenues killed Km. Salma because she failed to accept the marriage proposal on behalf of co-accused Infaq, it is highly unlikely that the detenues ;will commit a similar offence again. It is mentioned in the grounds of detention that the incident has taken place in a crowded Muslim ;locality . But the victim as well as the detenues; both belonged to the same community tension. The grounds of detention (Annexure – 3) recites that the people of the locality were terrified and the shops were closed and traffic was obstructed. This kind of reaction is likely in most of the cases of murder in broad day light . That , however, does not mean that in every case of broad day light murder the accused have to be detained under National Security Act.

17. After carefully considering the grounds of detention we are of the opinion that the incident did give rise to law and order problem for the police and special force had to be deployed in the locality for some; time, but we are not satisfied that it is a case in which public order was affected to a great extent. We are conscious of the fact that in cases of detention, it is the subjective satisfaction of the District Magistrate and this Court does not sit as a court of appeal to appreciate the correctness of the facts or sufficiency of the material. But accepting the facts narrated in the grounds of detention as correct, we are of the opinion that the detention of the detenues under National Security Act was not justified.

18. As we have already come to the conclusion that the detention of petitioners Rafeeq and Rashid was not justified , it is unnecessary to consider the further argument that the order of detention is discriminatory. It was argued that four persons, namely Rafeeq, Rashid, Asif and Infaq took part in the incident and yet only Rafeeq and Rashid have been detained. It was also argued that it was Infaq who proposed to marriage Km. Salma and he should have been the first person to be detained. In our opinion this contention cannot be upheld because recently a Full Bench of this Court has held in Habeas Corpus Petition No. 10215 of 1998, Chandresh Paswan Vs. State of U.P. and others, decided on 26th February, 1999 that the principle of parity is not applicable in the case of detention under National Security Act.

19. In view of the above discussion, both the Habeas Corpus Petitions are allowed and the detention order dated 30th August 1998 (Annexure 2) passed by District Magistrate, Jyotiba Phule Nagar,

respondent no. 3, in both the cases is hereby quashed. Petitioners Rafeeq alias Mantex and Rashid alias Kalwa are ordered to be released from custody unless they are wanted in any other case.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 31.03.1999

BEFORE
HON'BLE V.M.SAHAI, J.

1999

March, 31

CIVIL MISC. WRIT PETITION NO. 12636 OF 1999.

Shri Ram ... Petitioner
Vs.
The Board of Revenue U.P., Lucknow & ors ... Respondents

Counsel for the Petitioner : Mr. Anupam Kulshreshtha
Counsel for the Respondents : S.C.

Section 219 of land Revenue Act- In view of this translatory provision only reference which were pending before the board of Revenue were saved and revisions pending before the Commissioner or the Additional Commissioner were not saved, and as such the Commissioner or the Additional Commissioner ought to have decided the revisions pending before them on 18.8.1997 under section 219 of the Act.

By the Court

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

The impugned order dated 11.1.1999 has been passed by the Board of Revenue which has been filed as Annexure 2 to this writ petition without giving any opportunity of hearing to the petitioner. The U.P. Land Laws (Amendment) Act, 1997 (U.P. Act No. 20 of 1997) came into force on 18.8.1997 and Section 218 was omitted from the Land Revenue Act and section 219 was substituted in the

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Act which gave power to the Board of Revenue or the Commissioner or the Additional Commissioner or the Collector etc. to decide the revisions . The effect of this amendment was that w.e.f. 18.8.1997 the Commissioner or the Additional Commissioner had power to decide the revision. The revision was decided by Additional Commissioner had power to decide the revision. The revision was decided by Additional Commissioner by his order dated 16.11.1998 under the amendment Section 219 which came into force on 18.8.1997. The Board of Revenue has remanded the matter to the Additional Commissioner for deciding it afresh as revisions was filed before the Additional Commissioner before coming into force of U.P. Act No. 20 of 1997 were to be decided under the old Section 218 of the Land Revenue Act. This view of the Board of Revenue does not appear to be correct as in the amending Act itself a translatory provisions has been given u/s. 10 which is being quoted below.

> "Notwithstanding anything contained in this Act all cases referred to the Board under section 218 of the U.P. Land Revenue Act, 1901, are under Section 333-A of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 as they stood immediately before the commencement of the Act and pending before the Board on the date of such commencement shall continue to be heard and decided by the Board as if this Act has not been enacted".

In view of this translatory provision only references which were pending before the Board of Revenue were saved and revisions pending before the commissioner or the Additional Commissioner were not saved, and as such e Commissioner or the Additional Commissioner ought to have decided the revisions pending before them on 18.8.1997 under Section 219 of the Act. Under the circumstances the judgement passed by the Board of Revenue on 11.1.1999 cannot be sustained.

The writ petition succeeds and is allowed. The order dated 11.1.1999 passed by the Board of Revenue (Annexure-2 to the writ petition) is set aside. The petitioner is directed to move an application before the Board of Revenue about maintainability of the revision which shall be decided expeditiously, in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABD THE 11TH MARCH, 1999.

BEFORE
HON'BLE RAVI S. DHAVAN, J.
HON'BLE A.K.YOG, J.

1999

March, 11

CIVIL MISC. WRIT PETITION NO. 9088 OF 1999

M/s Modi Tyre Factory, Modinagar, Ghaziabad ... Petitioner.

Vs.

Chief Judicial Magistrate, and others ...Respondents.

Counsel for the Petitioner : Sri V.B. Singh
Counsel for the Respondents : S.C., Sri Pankaj Mittal

U.P. Municipalities Act 1960- Section 160 and 161- an appeal is provided against the assessment order on property taxes, The amount of tax which has been determined or assessed must be deposited before the appeal can be considered.

By the Court

This writ petition has been filed by messers Modi Tyre Factory, Modinagar, The orders sought to be impugned are dated 19 July, 1997, Annexure-8 to the petition, warrant of demand, issued under section 168 of the U.P. Municipalities Act, 1916, Annexure-10 to the writ petition and the citation, dated 25 January 1999, for recovering the amount of Rs.14 lacs from the petitioner, annexure-10 to the writ petition.

The Court has heard learned counsel for the petitioner and perused the record of the writ petition.

An assessment of the premises occupied by the petitioner had been made. This related to assessment for the year 1996 to 2001. This is the quinquennial assessment under section 143(1) of the Act. In so far as the warrant of demand and the citation is concerned, this has been issued as the petitioner has not satisfied the ratable taxes as were assessed. The petitioner has filed an appeal under section 160 of the Act. But , the condition precedent, the filing of the appeal had not been met by the petitioner under section 161 of the Act. The amount of the tax which has been so assessed

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C.J.M. and others.

Ravi S. Dhavan, J.
A.K. Yog, J.

must be deposited before the appeal can be considered. The petitioner filed the appeal, but did not follow the mandatory provision by accompanying the deposit of tax with the appeal. In the circumstances, an ad interim order was denied by the appellate authority and the appeal is not being heard.

This means that this writ petition has been filed only for the purpose of obtaining an ad interim order. There can be no short cuts to the authority of law nor can the Court make any compromise with the conditions of Section 161 of the Act. The law is very clear on this aspect, section 160 of the act provides for an appeal. To an owner or occupier of property who is aggrieved by an assessment on property taxes. Section 161 mentions in no uncertain terms that the amount of tax which has been determined or assessed must be deposited before the appeal can be considered. In reference to the present assessment of rateable taxes, the petitioner did not deposit the tax. The only indulgence the Court can grant is that should the petitioner make deposit of the amount which has been assessed, which assessment aggrieves the petitioner, the appellate authority, then, may consider the appeal and render a decision on it within two months of the deposit of the tax.

With the aforesaid observations, the petition is consigned as dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABD 19.8.1998.

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August, 19

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

CIVIL MISC. WRIT PETITION NO. 26212 OF 1998

Mithlesh Kumari & others ... Petitioner.
Vs.
Gaon Sabha, shahjahanpur & others ... Respondents.

Counsel for the Petitioner : Sri Y.S. Saxena
Counsel for the Respondents : S.C.,

Code of Civil Procedure Order XIV Rule 2(2)- this rule leaves discretion on the court to try an issue as preliminary issue it is not obligatory on the court, to decide issue relating to the jurisdiction or legal bar to the suit as a preliminary issue.

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Mithlesh Kumari & ors.
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Sudhir Narain, J.

By the Court

The petitioners seek a writ of certiorari quashing the orders passed by Respondent Nos. 2,4 and 5 whereby the prayer of the petitioners to decide certain issues as preliminary issues before deciding the suit was rejected.

The Collector, Shahjahanpur filed a Suit under section 229-B/209 of U.P. Zamindari Abolition and Land Reforms Act on behalf of the Gaon Sabha alleging that the land belonged to the Gaon Sabha and the petitioners have no right over the land in dispute and if they are found in possession, they may be evicted.

The petitioners filed written-statement and claimed that they have a right over the land in dispute. It was further alleged that during consolidation proceedings the plaintiff could raise an objection in regard to the title and right over the land in dispute and such objection having not raised, the claim of the plaintiff-respondent was barred under Section 49 of U.P. Consolidation of Holdings Act (hereinafter referred to as the Act). It was further pleaded that the Collector had no power to institute the suit on behalf of the Gaon Sabha.

The trial court framed various issues. Issue No. 3 was whether the suit was barred by Section 49 of the Act, Issue No. 6 related to the question as to whether the Collector has power to file the Suit on behalf of the Gaon Sabha and the State Government and Issue No. 8 was whether the court fee paid was sufficient.

The petitioners filed an application that these issues may be decided as preliminary issues. The trial court rejected this application on 22.11.1984 taking the view that these issues can be decided along with other issues as they involve questions of facts as well as law. The petitioners filed a Revision against the said order before the Additional Commissioner which was dismissed on 5.6.1985. The Board of Revenue dismissed the Revision against this order on 18.2.1998.

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Sri Y.S. Saxena, learned counsel for the petitioners contended that Section 49 of the Act bars the jurisdiction of the Court to adjudicate upon any matter which has either been decided by the consolidation authorities or which could or ought to have been taken under the provisions of the Act. He has placed reliance upon a decision rendered in Jaswant Kumar Vs. State of U.P. and others, 1979 A.L.J. 276 wherein it was held that the finding recorded by the consolidation authorities is binding on the ceiling authorities and the same cannot be challenged in any civil or revenue court as Section 49 of the Act is based on the rule of res-judicata so far as the question relating to the declaration and adjudication of the rights of the tenure holders in respect of the holdings are concerned.

The question is whether these issues ought to have been decided as preliminary issues by the courts below. Order XIV Rule 2(2) C.P.C. provides that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the court, or
(b) a bar to the suit created by any law for the time being in force, and for that purpose may if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision of that issue.

Sub-rule (2) leaves discretion upon the court.

It is not mandatory on the Court to decide the question of the jurisdiction or other issues relating to the maintainability of the suit. Sub-rule (1) of Rule 2 mandates a Court that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of s ub-rule (2), pronounce judgment on all issues.

The intention of the Legislatre is that instead of prologing the suit by first deciding a preliminary issue and thereafter deciding other issues, be avoided as far as possible. If all the issues are decided that may avoid unnecessary multiplicity of the proceedings in relation to deciding the preliminary issue. It is open for the Court, however, in some circumstances if it is apparently

clear that the suit is not maintainable or barred by jurisdiction, to dispose of such issues, may decide such issues as preliminary issues.

The orders of the courts below, in considering that the preliminary issues are to be decided after taking evidence along with other issues, do not suffer from any manifest illegality. There is no merit in the writ petition and, it is, accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.3.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

1999

March, 10

CIVIL MISC. WRIT PETITION N. 8499 OF 1999

Ayub Hussain ... Petitioner
Versus
The Cantonment Board, & another ... Respondent

Counsel for the Petitioner : Sri Rajesh Tandon
Counsel for the respondents : Sri Rakesh Tiwari

Cantonment Act 1924 Section 282(13) – It provides that the Board may make bye –laws in respect of various matters mentioned therein – the Board cannot exercise the powers arbitrarily by fixing lessor period in one case and larger period in other case. It has to apply one and the same policy for everyone.

By the Court

The petitioner claims that he should be granted a permanent lease in respect of an area measuring 2.60x.50 sq.m situated at Sy. No 202 Pauri Garhwal.

The petitioner is a vegetable /fruit vendor. He was granted permit to use and occupy the land mentioned above for one year for the period from 5.2.1998 to 4.3.1999. The petitioner before the expiry of the said period moved application on 27.11.1998 and again on 2.11.1998 for grant of permanent lease in respect of the area on which he was permitted to occupy for one year. THIS Application

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Sudhir Naraom. J.

was disposed of by Respondent No.2 holding that the petitioner cannot be granted a lease but he can be granted license only for a period of one year only.

I have heard Sri Rajesh Tandon, learned counsel for the petitioner and Sri Rakesh Tiwari, learned counsel for the respondent.
The contention of learned counsel for the petitioner is that the petitioner should be granted a lease of the land and not a license. He has referred to section 111 of the Cantonment Act,1924 (In Short the Act). Section 111 of the Act confers power on the central Government to make rules in regard to the fund and property of the Cantonment Board. It reads to the fund and property of the Cantonment . It reads as under:-

"lll. Power to make rules regarding cantonment fund and property:- The(Central Government) may make rules consistent with this Act to provide for or any of the following matters, namely :-

(a) The Conditions on which property may be acquired by (Boards) or on which property vested in a (Board) may be transferred by sale, mortgage, Lease, exchange or otherwise and
(b) Any other matter relating to the cantonment fund or cantonment property in respect of which no provision or insufficient provision is in the opinion on of the (Central Government), necessary ."

Learned counsel for the petitioner has not placed before me any rule framed by the Central Government indicating the conditions under which the lease of the property acquired or vested in the Board can be given on lease. Secondly, there is no provision compelling an authority to grant the lease . The petitioner, in these circumstances cannot claim that land in question be leased in his favour either by the Central Government or the Board.

Section 210 provides that no person of the classes mentioned therein can occupy the land unless license is granted. Clause (g) of Sub – section (1) of section 210 relates to the vendors of fruit or vegetable. The petitioner is a vendor of fruits and vegetables. He was also granted license for one year for the period 5.2.1998 to 4.3.1999 in pursuance of an agreement executed between the petitioner and respondent no.2.

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The second submission of learned counsel for the petitioner is that respondent no.2. wrongly observed that the period of license is to be confined only for one year as provided under Section 282(13) of the Act which reads as follows:-

"282. Power to make bye-laws.-

……..

……

(13) the permission, regulation or prohibition of the use or occupation of any street or place itinerant vendors or the exercise of any calling or the setting up of any booth or stall, and the fees chargeable for such use or occupation."

This rules does not limit the period for which the license can be granted. Clause (13) of section 282 only provides that the Board may make bye-laws in respect of various matters mentioned therein. It has not been shown that the board has made any bye-law limiting the period of license in respect of the occupation for the vendors. In case there is any bye law fixing the period of license, It can lay down its own policy for granting the license, to, the persons for the purposes enumerated the clause (13) of Section 282 of the Act. The period of license may exceed one Year or it may be less than one year but it cannot exercise the power arbitrarily by fixing lesser period in one case and larger period in other case. It has to frame a policy in this regard for example if it is to grant license to fruit/Vegetable vendors, it has to apply one and the same policy for each one. The observation of respondent no.2. in his order that clause (3) of section 282 provides for one year period for granting of license is not correct.

Respondent no.2. in his order made it clear that the petitioner can apply for fresh license. The petitioner has been given a chance to apply for renewal of the license and in case the petitioner submits application that will be considered keeping in view the observation made above and in accordance with law.

The writ petition is accordingly disposed of finally.

Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 3RD FEB., 1999
BEFORE
THE HON'BLE S.R. SINGH, J.

1999

February, 3

CIVIL MISC. WRIT PETITION NO. 23548 OF 1998

Rajendra Deva ... Petitioner
Versus
Addl. Labour Commissioner (Account)
Kanpur–cum-Appellate Authority & another ... Respondents

Counsel for the Petitioner : Rajendra Deva
Counsel for the Respondents : S.C.
Shri Piyush Bhargava
Shri Piyush Verma
Shri V.R.Agarwal

Payment of gratuity Act S.7(3-A)1972- The employer is liable to pay simple interest at the prescribed rate from the date on which the gratuity becomes payable to the date on which it is paid. The deposit of the amount with the appellate authority would not absorve the employer liability to pay interest. Once it is established that the employer from failed to discharge the obligation cast upon it by sub section (2) and (3) of section 7 of the Act.

By the Court

The petitioner, Rajendra Deva was employer as a Chemist in M/s Hari fertilizers which was an a unit of M/s Orissa Cement Limited, Sahupuri, Varanasi, U.P. The service of the petitioner came to be terminated w.e.f. 16.5.1989 on account of closure of the said unit. The gratuity payable to the petitioner was not paid by the employer and therefore he stated his claim for gratuity under Section 7 of the payment of gratuity Act, 1972 (hereinafter referred to as the act). In his application the petitioner submitted that he had completed more than 20 years of service on 16.5.1989 and his last pay was Rs.1440/- per month. The amount of gratuity claimed by the petitioner was Rs.16,615.38 paise with interest. The application was contested inter alia on the ground that the last wages drawn by the petitioner was Rs.1400/- only beside Rs.38/- per month as H.R.A which was not to be included in the wages for the purpose of calculating the amount of gratuity. The petitioner thereafter filed

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S.R.Singh, J.

replication stating therein that according to the pay structure prevalent I the establishment he had earned an increment @Rs.40/- per month w.e.f.. 1.4.1989 and therefore, his wages as on 16.5.1989 would be Rs.1440/-. The controlling Authority on consideration of the fact and circumstances of the case allowed the petitioner's application and held that he was entitled to payment of Rs.16,615.38 paise as gratuity and interest @10% under Section 7(3-A) of the Act. Aggrieved against the said order the respondent employer filed an appeal which was initially dismissed for want of prosecution vide order dated 22.12.1993 but the matter came to be remitted by this court to the appellate authority for decision on merit. The appellate authority thereafter allowed the appeal in apart and held that calculation of the amount of gratuity on the basis of imaginary increment of Rs.40/- in the monthly salary of Rs.1400/- was unjustified and the order passed by the controlling authority was modified accordingly. The instant petition has been filed praying for issuance of writ order or direction for the payment of modified gratuity amount with interest and compensation of Rs. 40,000/- for necessary delay and harassment in payment of gratuity.

I have heard the petitioner who appeared in person and Sri Piyush Bhargav, learned counsel appearing for the respondent no.2.

Although the prayer clause of the writ petition is not happily worded but the petitioner in the course of his submission urged that the appellate authority was not justified in modifying the order passed by the Controlling authority inasmuch as the increment earned by the petitioner was rightly added in the monthly salary last drawn by him. Wages according to Section 2(s) of the act of 1972 means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are "payable " to him in cash and includes dearness allowance but does not include any bonus commission, house rent allowance overtime wages and any other allowance. The Controlling Authority in its order dated 10.12.1993 has clearly held that accordance to the pay scale prevalent in the establishment the petitioner had earned the increment of Rs.40/- as on 1.4.1989 and for the purpose of calculating the gratuity the increment so earned was to added in the salary actually paid to the petitioner inasmuch as was no order withholding payment of increment was brought on record. In the absence of any order withholding the annual increment, the Controlling Authority was, in my opinion justified calculating the amount of gratuity on Rs.1440/- as the wages last drawn by the

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petitioner, even the appellate in its order dated 30.12.1995 has held that the increment ought to have been given to the petitioner but since it was in fact not given and therefore, the appellate authority held that the Controlling Authority was not justified in calculating the amount of gratuity after adding the imaginary of Rs.40/- in the monthly salary. In my opinion the order passed by the appellate authority is unsustainable.

It was also submitted by the petitioner that the failure of the employer to discharge the obligation cast upon it by sub Section (2) rendered itself liable to pay interest on the amount of gratuity till the date on which the amount of gratuity was actually paid Sri Piyush Bhargava submitted that a sum of Rs.16,615/- was deposited by the petitioner with the appellate authority on 17.3.1993 and , therefore the employer was not liable to pay interest after 17.3.1993. The Submission made by the learned counsel cannot be countenanced. Sub Section (2) of section 7 of the act of 1972 provides that as soon as gratuity becomes payable the employer shall, whether an application referred to in sub-section (1) has been made or not "determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined". Sub Section (3)of section 7 of the Act of 1972 provides that the employer shall arrange to pay the amount of gratuity within thirty days from the date id becomes payable to the person to whom the gratuity is payable. Sub section (3-A) of section 7 of the Act is reproduced hereunder.

"(3-A)- If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3) the employer shall pay from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central government from time to time for repayment of long term deposits, as that Government may, by notification specify:

It is evident from sub- section (3-A) of section 7 of the Act, extracted above that the employer is liable to pay simple interest at the prescribed rate from the date on which the gratuity becomes payable to the date on which it is paid. The deposit of the amount with the appellate authority would not absolve the employer of its liability to pay interest once it is established that the employer has failed to discharge the obligation cast upon it sub section (2) and (3) of

section 7 of the Act. In the instant case the employer failed to determine the amount of gratuity and give notice in writing to the petitioner and also to the controlling authority specifying the amount of gratuity so determined, as visualised by sub-section (2) of section 7 of the Act. It further failed to arrange the payment of gratuity with in thirty days from the date it become payable to the petitioner. The deposit of the amount with the appellate authority after the order passed by the Controlling Authority would not absolve the employer of its liability to pay interest as visualised by sub-section (3-A) of section 7 of the Act. The petitioner is therefore entitled to get interest till the date of actual payment of gratuity to him. He is also entitled to cost quantified at R.2,000/-

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In the result, therefore the petitioner succeeds and is allowed with cost quantified at Rs.2,000/-. The appellate order dated 30.12.1995 is quashed. The petition is held entitled to interest at the prescribed rate till the date of actual payment.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 11.12.1998
BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE S.L.SARAF, J.

1998

December, 11

CIVIL MISC. WRIT PETITION NO. 34064 OF 1998.

Johri Mal **... Petitioner**
Versus
State of U.P. & anothers **... Respondent**

Counsel for the Petitioner : Sri W.H. Khan
Counsel for the Respondents : S.C.

Constitution of India-Act 226- guide-lines is sued for appointments of the D.G.C Addl. D.G.C. and penal lawyers –the District Judge recommended in favour of the petitioner but no reason was assigned for rejecting the recommendation of the District Judge- the petitioner's term as D.G.C. criminal was directed to be renewed forthwith.

Case Law discussed-

AIR 1991 SC-53

By the Court

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& another

M. Katju, J.
S.L. Saraf, J.

Heard learned counsel for the petitioner and learned standing counsel. The petitioner has prayed for quashing of the impugned order dated 18.9.98 (Annexure-8 the writ petition) and for the renewal of his term as DGC(Criminal) in district Meerut.

In this case on 26.10.98 learned standing counsel was granted one month's time to file a counter affidavit, but no counter affidavit has been filed so far . Hence we are treating the allegation in this petition to be correct.

The petitioner has stated that he was selected and placed in the panel of Panel Lawyer (Criminal) on 6.12.78 and remained in the panel for 5 years and thereafter by order dated 7.1.83 the respondent no.1 the State of U.P. appointed the petitioner as Additional DGC (Criminal) for one year. A true copy of the order dated 7.1.83 has been annexed as Annexure-1 to the petition. The petitioner's term was regularly renewed from time . Subsequently on superannuation of one Kripal Singh DGC (Criminal) Meerut on 1.7.1995 by order of respondent no.2 dated 30.6.95 the petitioner was handed over the charge of DGC (Criminal) through letter dated 3.7.95 and the petitioner started functioning as DGC(Criminal) a true copy of the order dated 3.7.95 has been annexed as Annexure-2 to the petition. Thereafter the post of DGC (Criminal) Meerut was duly notified and advertised and the applications were invited A true copy of the notification dated 8.7.96 has been annexed as Annexure-3 to the petition After following the procedure prescribed in the L.R. manual and after obtaining the no.1 selected and appointed the petitioner as DGC (Criminal) vide order dated 17.9.97 true copy of which has been annexed as annexure-4 to the petition.

The petitioner has since been functioning as DGC (Criminal) He prayed for renewal for his term which was expiring on 14.9.1998 A true copy of the letter dated 14.9.1998 is annexed as Annexure-6 to the petition. However, his term has not been extended although the District Judge, Meerut and the District Magistrate Meerut both made favourable reports and recommended the petitioner's appointment as DGC (Criminal) In paragraph 13 of the petition it has been alleged that the petitioner has been working satisfactorily and with unblemished record as District government Counsel and hence his term should be renewed.

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S.L. Saraf, J.

Since this matter is of some importance we are dealing with it at some length. There was a time when irrespective of political affiliations appointments of Government counsels were made in the High Court and District Courts purely on merit. In this Court itself appointment as a Government Counsel was usually regarded as a stepping stone to high offices. Almost all the persons who were appointed about 20 or 30 yeas ago as Government Counsel in the High Court were elevated as Judge of this Court or occupied other high posts like Advocate General, Law Minister etc. This was because such appointments were made on the basis of competence and not caste creed religion or political affiliation. Subsequently, however, the post of government Counsel has steadily been politicalised and the result has been that very often the Court is not assisted properly and very often-incompetent persons are appointed as Government Counsel because of their political affiliation, caste or other extraneous consideration. This Court and the District court requires proper assistance from the Government Counsels. The interest of the State also suffers by appointing incompetent persons.

Since Government have been changing very frequently in recent years in U.P. what has been happening is that whenever a new government comes many of the Government Counsels appointed by the previous government are sacked and in their places new persons are appointed not on merit but on the basis of caste, creed or political affiliations, which is subversive of the administration of justice. The Court requires highly meritorious Government Counsel to dispense justice properly.

In our opinion the time has now come when the post of Government Counsel should be given purely on merit irrespective of political affiliation, caste,Creed or religion. The post of Government Counsel is a responsible post, and it cannot be distributed as leaves of office on extraneous considerations .

In the present case the recommendation has been made in the petitioner's favour by the District Judge and it has also been recommended by the District Magistrate. We see no reason why the recommendation of the District Judge should be refused. In our opinion for the appointment of the post of DGC, Addl. DGC or Panel Lawyers, ordinarily the recommendation of the District Judge must be accepted by the Government because the District Judge is the senior most Judicial Officer in the district and he is expected to know about the lawyers in the court. No doubt the District Magistrate has

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also to be consulted but ordinarily the District Judges recommendation must carry the greatest weight. If the Government is not agreeable to the recommendation of the District Judge then strong, cogent reasons must be assigned by the Government in writing irrespective of political affiliation, caste creed or religion or on any other extraneous consideration.

In the present case the District Judge has recommended in favour of the petitioner and no good or cogent reason has been assigned for rejecting the recommendation of the District Judge. Hence we direct the petitioner's term as OGC (Criminal) to be renewed forthwith by the State Government.

The Supreme Court has observed in Special Reference No.1 of 1998 that the Chief Justice of India means not the Chief Justice of India alone but in consultation with his four senior most colleagues. No doubt this judgement was given in the context of appointments of Judges in the Supreme Court and High Courts, but in our opinion he spirit of the judgement is applicable to present case also since the intention was to keep the administration of justice away from political considerations. Hence in our opinion the District Judge should not make the recommendation alone but in consultation with the two senior most Judicial Officers in the District Court and also the CJM in the case of recommendations for appointments in the criminal side, and the senior most Civil Judge for appointments of the civil side and also the District Magistrate . In other words the recommendation shall be by a collegiunm headed by the District Judge and consisting of the above mentioned five members (consisting of four judicial officers and the District Magistrate). If two members disapprove the name no recommendation will be made. No name will be recommended if the District Judge disapproves . This is our opinion, will be in accordance with the norms laid down in the L.R.Mannual . Such a recommendation will ordinarily be treated as binding on the Government unless for some strong, cogent reasons to be recorded in writing if the Government disagrees. We again make it clear that the recommendation must be made purely on merit and competence ignoring caste, creed, religion or political affiliation.

In Shrilekha Vidyarthi vs. State of U.P. A.I.R. 1991 S.C.537 the Supreme Court held that Article 14 of the Constitution applies to appointment of Government Counsels in district courts. In our

opinion the direction issued above will ensure non- arbitrariness in such appointments.

In view of the above, the impugned order dated 18.9.98 is quashed. The petition is allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE.
DATED:ALLAHABAD 6.1.1999.

BEFORE
THE HON'BLE D.K. SETH, J.

1999

January, 6

WRIT PETITION NO. 40530 OF 1998

Priyanka Singh ... Petitioner.

Versus

State of U.P. & another ... Respondents.

Counsel for the Petitoner : Shri Ashok Kumar Singh.
Counsel for the Respondent : S.C.

Constitution of India Article 226- Appointment-a person does not acquire any right to be appointed on account of acquisition of the requisite qualification. It does not confer any legal right to be enforced through writ petition to get an appointment only on the basis of acquisition of eligibility or qualification.

By the Court

The petitioner by means of this writ petition prays for a mandamus directing the respondents to give appointment to the petitioner because the petitioner is eligible and qualified for being appointed as an Assistant Teacher in the Primary School, on account of her acquisition of B.T.C. Degree.

Mr. Ashok Kumar Singh, learned counsel for the petitioner contends that since the petitioner had acquired requisite qualification, therefore, she is eligible for being appointed as Assistant Teacher and had accordingly made an application before the appropriate

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authority on the basis whereof, she should be appointed Assistant Teacher in any of the Primary Schools.

Mr. I.S. Singh, learned Standing Counsel on the other hand contends that for the purpose of appointment, a person has to acquired the requisite qualification, he cannot claim as of right to be appointed on the post of Assistant Teacher. By reason of such eligibility, she may have acquired a right to be considered when the recruitment process is undergone.

After having heard Mr. Ashok Kumar Singh and Mr. I.S. Singh, learned counsel appearing for the respective parties, I do not find any merit in this writ petition.

The writ petition, therefore, fails and is dismissed accordingly in view of the fact that a person does not acquire any right to be appointed on account of acquisition of the requisite qualification. By acquiring requisite qualification, a person acquires only a right to be considered if applied for in the process of recruitment. It does not confer any legal right to be enforced through writ jurisdiction to get an appointment only on the basis of acquisition of an eligibility qualification. It is open to the petitioner to apply when recruitment process is undergone and if so applied, she has a right to be considered for being recruited in the selection process in accordance with law. The petitioner has not alleged that her application has not been entertained or she had been denied or deprived of this right of being considered in any recruitment process.

This order, however, will not prevent the petitioner from applying when the recruitment process is undergone and being considered in accordance with law, in such post at appropriate time.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL CIDE
DATED: ALLAHABAD 22.2.1999

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE KAMAL KISHORE, J.

1999

February, 22

CIVIL MISC. WRIT PETITION NO. 24295 OF 1992

Dr. Ravindra Nath Pandey ... Petitioner
Versus
State of U.P. & others ... Respondents

Counsel for the Petitioner : Shri U. N. Sharma
Counsel for the Respondents : S.C.

Statute 11.01 of the Gorakhpur University – A candidate having 50% marks in each of two examination- B.A. and Intermediate is said to have consistently good academic record and the petitioner having obtained 52% and 57% marks in B.A. and Intermediate respectively, has been held to have a consistently good academic carrier – order holding otherwise quashed.

By the Court

Heard Sri U.N. Sharma, learned counsel for the petitioner and learned counsel for the respondents.

In this case although the petition was admitted on 9.7.1992, no counter affidavit has been filed as yet.

The petitioner is challenging the impugned order dated 20.6.1992 annexure 6 to this petition by which his prayer for regularisation as lecturer in Economics in National Degree College, Barahalganj, Gorakhpur has been rejected.

The post of lecturer fell vacant and therefore a requisition was sent to the District Inspector of Schools, Gorakhpur on 15.2.1989 annexure 1 to this writ petition. Thereafter the committee of Management of the Institution obtained a letter of permission for making appointment from the Regional Higher Education officer Gorakhpur and the same was given by letter dated 19.4.1989 annexure 2 to this writ petition, since the commission failed to

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State of U.P. & others

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Kamal Kishore, J.

appoint, an advertisement was made in the daily newspaper 'Dainik Jagran' on 31.3.1989, inviting applications from the eligible candidates for the appointment to the post of lecturer . The petitioner applied and an interview took place and ultimately the petitioner was appointed by the committee and a letter of approval was also obtained from the University. Initially the letter of appointment was from 4.12.1989 but later on this order/letter was modified to the effect that the approval is granted w.e.f. the date on which the petitioner had taken charge. The photo copy of letters dated 4.12.1989 and 16.1.1990 are annexures no. 3 and 4 this writ petition.

The petitioner started teaching in the institution w.e.f. 1.8.1989 in pursuance of the letter of the Committee of Management date 30.7.1989. The true copy of the appointment letter is annexed to this writ petition as annexure 2-A.

In para 6 of the petition it has been stated that the approval from the University was given to the petitioner from time to time and ultimately the State Government promulgated an ordinance on 22.11.1991 known as the U.P. Higher Education Service Commission (Amendment) ordinance which later on became an Act. This ordinance introduced Section 31-C in the Act. This provision provides for regularisation.

By the impugned order dated 20.6.1992 the petitioner has been held ineligible as he does not possess continuous high academic record. The learned counsel for the petitioner submitted that that the view of the respondent is arbitrary and he has invited our attention to statute 11.01 of Gorakhpur University which has been quoted in para 10 to this writ petition. Sub clause 7 (d) of the Act states that a candidate having 50% of marks in each of the two examination B.A. and Intermediate separately is said to have consistently good academic record. As pointed out in para 7 to this writ petition, the petitioner had obtained 52.24% marks in B.A. examination, and 57% in Intermediate. Hence in view of statute 11.01 (7)(d) it has to be held that he had a consistently good academic record.

In view of the above we hold that the order dated 20.6.1992 is arbitrary and it is hereby quashed. We direct that the service of the petitioner shall be regularised from the date of the impugned order with all benefits and all arrears to be given within three months from the date of the production of the copy of this order.

With the observation made above, this writ petition is allowed.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD:18.02.1999

BEFORE
THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE D.K. SETH, J.

1999

February, 18

SPECIAL APPEAL NO. 142 OF 1999.

Ram Kripal Singh ... Applicant/Appellant.
Versus
U.P. State Road Transport Corporation through it Managing Director, Tedhi Kothi,Lucknow & ors. ... Respondents.

Counsel for the appellant : Shri Bhoopendra Nath Singh.
Counsel for the respondent : S.C.

High Court Rules Chapter VIII Rule 5– A special appeal is not maintainable against the order of single Judge passed in exercise of jurisdiction conferred by Article 226 of the Constitution of India against award passed by the Tribunal- a relief seeking implementation of the award also comes within the prohibited zone as provided in chapter 8 Rule 5 of the High Court, Rules.
Case law discussed-

By the Court

The prelimnary objection taken by Mr. Vivek Saran, learned counsel for the respondents 1,2, & 3 is that the appeal is not maintainable under Chapter-VIII Rule 5 of the Allahabad High Court Rules. He pointed out that in the writ petition the relief sought for, was in respect of an award passed by the labour court. Therefore, in view of the provisions provided in Chapter-VIII Rule 5 of the Allahabad High Court Rules such appeal is not maintainable against an order of a Single Judge passed in exercise of jurisdiction

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conferred by article 226 of the Constitution of India in respect of an award passed by the tribunal.

Mr. B.N. Singh, learned counsel for the appellant, however, pointed out that it was not an award which was challenged in the writ petition. He pointed out that it was the duty of the State Government to lodge appropriate complaint for non-implementation of an award by the respondent who is bound by the award. According to him, as contemplated in Section 14-A of the U.P. Industrial Disputes Act, 1947, cognizance can only be taken in terms of Section 16 of the said Act only on a report of the District Magistrate or by any officer other than a District Magistrate with the previous sanction in writing of the District Magistrate. Thus cognizance can be taken only on the basis of a complaint loaged by the District Magistrate. The petitioner/appellant seeks mandamus on the authorities to discharge their statutory duty cast upon them under Section 14-A read with Section 16 of the said Act. Therefore, it had no relation with the award. The award is not a subject matter in the writ petition or the appeal. It was a subject matter of the proceeding before the labour court but not in these proceedings.

We have heard both the learned counsel at length.

It appears that Mr. B.N. Singh has advanced a very attractive arguments which almost impelled us to take a different view. But a proper reading of the prayers made show that whatever relief was asked for was in respect of an award viz :

> "1. Issue a writ, order, direction in the nature of mandamus commanding the respondents to pay Rs200/= per day for breach of award as provided under Section 14-A of the U.P. Industrial Disputes Act, 1947 from 15-02-1997 till the date of payment.
>
> "2. Issue a further writ, order, direction in the nature of mandamus commanding the respondent Nos. 1 and 2 to pay entire back wages, leave encashment/ex-gratia alongwith 18% interest."

In other words in the said writ petition the implementation of the award passed by the Industrial Tribunal through Section 14-A of the U.P. Industrial Disputes Act, 1947, is the principal relief that has been sought for. An award passed by the Labour Court or the

Industrial Tribunal is capable of being executed. U.P. Industrial Disputes Act in Section 14-A provides that in case of non-implementation of the award by the employer, the employee may seek compensation while providing for penal action in addition. Such penal action however can be taken against an employer in the mode provided in Section 16 of the said Act.

Thus the relief sought for under Section 14-A of the said Act is in effect a relief relating to the implementation of the award. An order passed in a writ petition under Article 226 of the Constitution seeking implementation of an award is an order passed " in the exercise of jurisdiction conferred by Article 226 ……. Of the Constitution in respect of" an …award (a) of a tribunal ……. Made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or Central Act……"

Rule 5 of the Allahabad High Court Rules lays down "that an appeal lies to the Court from a judgement …….In respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made …. In the exercise of jurisdiction conferrea by article 226 or 227 of the Constitution in respect of any judgement , order or award – (a) of a tribunal … made …. In the exercise …. Of jurisdiction under any Uttar Pradesh Act or under any Central Act, ….. of one Judge." Thus in order to be appellable, the order shall not be an order in respect of an award made by a tribunal under any Uttar Pradesh Act or any Central Act.

In the present case the subject matter is in respect of the implementation of an award. The expression " in respect of … award" does not mean that the award is to be challenged. The phrase "in respect of" means in relation to or relating to or arising out of or connected with or concerning or pursuant to or on the basis of. It is wide enough to include doing of something pursuant to or on the basis of or taking any steps relating to or concerning the award. Implementation of award includes exercising jurisdiction under Section 14-A read with Section 16 of the Act. Thus the steps to be taken under Section 14-A read with Section 16 is in respect of the award, the implementation of which is sought for. Anything to be done or any order to be passed in relation to the implementation of an award is in effect an order in respect of an award of a tribunal.

The word Tribunal has not been defined in the Rules, but now it is a principle of law that a Tribunal is a body or an authority

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invested with judicial power to adjudicate on question of law or fact effecting the rights of the parties in a judicial manner. It is so held in the case Sudershan Singh Bedi Vs. Additional District Magistrate (1993(1) A.W.C. P.916(DB). A Tribunal or a Labour Court constituted under the U.P. Industrial Disputes Act is an authority invested with judicial power to determine the rights of the parties before it judicially on question of law or fact and thus satisfies the test.

A right of appeal is a creature of Statute. A litigant does not have any inherent right to prefer an appeal against an order unless such a right is conferred on the litigant by law. This proposition is well settled in law and since been re-iterated by the Apex Court in Shah Babulal Khimji Vs. Jayaben D Kania, 1981 (4) SCC 8.

Whether the right of an appeal is available to a litigant is question dependant on the Statute creating the right to appeal. In order to be appellable the order must be an order made appellable by the Statute. It has to satisfy the test with regard to the charactiristics of the order that is made appellable by the Statute.

As observed above, in the present case the order does not fall within the category of orders that are made appellable under Rule 5 Chapter-VIII of the High Court Rules. On the other hand it is an order falling within one of the exempted or prohibited category. It is an order which is expressly excluded from being appellable under Rule 5 Chapter-VIII of the High Court Rules.

Therefore, we find sufficient force in the submission of Mr. Vivek Saran that this appeal having sought the relief of implementation of an award, the same comes within the prohibited zone as provided in Chapter-VIII Rule 5 of the Allahabad High Court Rules. Therefore, the appeal is not maintainable.

We, therefore, hold that the appeal is not maintainable and is accordingly dismissed.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 12.1.99.

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE RAM KISHORE SINGH, J.

1999

January, 12.

CIVIL MISC. WRIT PETITION NO.13572 OF 1989

M/s Anita Tyre Retreading works ... Petitioner.
Versus
The City Magistrate, Muzaffarnagar & others ... Respondents.

Counsel for the Petitioner : Sri Ravi Kant.
Counsel for the Respondent : S.C.

Air (Prevention and Control of Pollution) Act 1981 S.43- It deals with taking of the cognizance of the offences mentioned in the aforementioned Act. It has no bearing in regard to a Public Nuisance created under Section 133 Cr.P.C.

By the Court

The petitioner assails an order passed by the City Magistrate, Muzaffarnagar in Case No. 1/11 of 1988, under section 133 I.P.C., P.S. Nai Mandi, District Muzaffarnagar (as contained in Annexure-12) overruling its objection that he has no jurisdiction to decide the proceedings. In doing so the learned magistrate has placed reliance on a judgment/order dated 2.3.1987 of the Andhra Pradesh High Court in Criminal Misc. Petition No. 3028 of 1986 Messers Nagar Juna Paper MillsLimited Vs.Sub Divisional Magistrate and others.

2. Sri Arvind Srivastava, learned counsel appearing on behalf of the petitioner, contended that Sri Shyam Singh Yadav, City Magistrate, Muzaffarnagar who has passed the impugned order lacked jurisdiction to pass it inasmuch as he was not vested with any powers under section 43 of the Air(Prevention and Control of Pollution) Act, 1981 and that at any rate the powers having been conferred on a Judicial Magistrate under section 133 Cr.P.C. he lack authority to decide the proceeding.

3. Sri Sudhir Jaiswal, learned Standing Counsel resutted the submissions on behalf of the respondents.

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4. In our view both submissions of Mr. Srivastava are thoroughly misconceived.

4.1. Section 43 of the Air (Prevention and Control of Pollution) Act, 1981 deals with the cognizance of the offences mentioned in the aforementioned Act. It has no bearing in regard to a Public Nuisance created under Section 133 Cr.P.C
.

4.2. On a bare perusal of Section 133 Cr.P.C. it appears that the District Magistrate, Sub Divisional Magistrate or any Executive Magistrate who has been specially empowered by the State, and not a Judicial Magistrate, can pass a conditional order for removal of Public Nuisance.

4.3. It is not the case of the petitioner either in its pleading or through its learned counsel Sri Srivastava that Sri Yadav, City Magistrate, Muzaffarnagar was not conferred power by the State Government to decide such a proceeding.

4.4. The petitioner has failed to rebut the statutory presumption of correctness of the official acts attacked with the order of the Magistrate.

4.5. The impugned order further shows that the proceeding was initiated on 3.2.1998 on the Inspection Report of the U.P. Pollution Control Board, Regional Office and Laboratory, Dehradun.

5. For the aforementioned reasons this writ petition is dismissed.

6. The office is directed to hand over a copy of this order to Sri Sudhir Jaiswal, learned Standing Counsel, within a week for its communication to the authority concerned.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 13.1.1999.

BEFORE
THE HON'BLE D.K. SETH, J.

1999

January, 13

CIVIL MISC. WRIT PETITION NO. 42928 OF 1998.

Ram Bilas Tewari ... Petitioner.

Versus

State of U.P. and Others ... Respondents.

Counsel for the Petitioner : Shri Ram Mohan
Counsel for the Respondent : S.C.

High Court Rules Chapter XXII Rule 7- under this rule second writ petition cannot be maintained on the same facts involving the same cause of action- if the petitioner omitted necessary and proper party in the earlier writ petition, he cannot maintain second writ petition on the ground that he had not impleaded the necessary party in the earlier case.

By the Court

Pursuant to a Government Order dated 22.11.1993 the petitioner was absorbed in the service of the Government protecting his salary to the extent of last pay which he was receiving while employed in the Gorakhpur Mandal Vikas Nigam Limited which alleged to have been wound up. The petitioner had moved a writ petition no.6483 of 1998 along with three other persons claiming the relief of fixation of salary on the basis of last pay drawn by him in the Nigam. The said writ petition was disposed of by an order dated 27.2.1998 which is Annexure-8 to the writ petition. It appears from the said order that an additional grievance was also raised in the writ petition to the extent that the arrears withheld by the Nigam is a liability of the State Government where the petitioner has been absorbed for which the petitioner has made a representation which was directed to be considered by the said order without recording any observation regard to with the entitlement of the petitioner.

Shri Ram Mohan, learned counsel for the petitioner submits that since Nigam was not a party in the said writ petition, therefore,

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the representation has not been considered by the Managing Director, Gorakhpur Mandal Vikas Nigam Ltd. Who has been made party in the present writ petition seeking the relief to consider the petitioner's representation in terms of the Order dated 27.2.1998 by the Managing Director of the Nigam.

Whatever may be the reason, the cause of action involved in writ petition no.6483 of 1998 is one and the same which is being espoused in the present writ petition. It was open to the petitioner to pray the Managing Director of the Nigam or the Nigam itself as party in the said writ petition. It appears that the State of U.P. and Commissioner, Basti Division who are respondent nos. 1 and 3 respectively in the present writ petition were parties in the said writ petition. If the petitioner omits to add necessary or proper party in the writ petition and does not take any stept, he can not maintain the second writ petition simply because he had omitted to make one necessary or proper party in the writ petition itself. In any event, the petitioner has not produced the said Government Order dated 22.11.1993 to show that the said Government Order did not make any provision for recovery of the dues of the employee. He has also not pointed out the terms of absorption in the Government service from which it can be deciphered as to what is the extent of legal right of the petitioner. In such circumstances, the present writ petition is based on same cause of action which was involved in the earlier writ petition seeking to recover the arrears withheld by the Nigam. Initially it was sought to be recovered from the State Government. Now it is being sought to be recovered from the Nigam which could have been made in the said proceeding.

In such circumstances this writ petition is not maintainable in view of Rule 7 Chapter XXII of the Allahabad High Court Rules being second writ petition can not be maintained fact involving identical cause of action. Therefore this writ petition is dismissed.

However, till order of dismissal of this writ petition will not prevent the petitioner to recover the arrears if he is otherwise entitled through any procedure in the common law or any forum or manner that might have mentioned in the Government Order dated 22.11.1993 as the case may be.

However, there will be no order as to cost.

Let a certified copy of this order be supplied to the learned counsel for the petitioner on payment of usual charges at the earliest.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 21.1.1999.

BEFORE
THE HON'BLE B.DIKSHIT, J.
THE HON'BLE ALOKE CHAKRABARTI, J.

1999

January, 21

CIVIL MISC. WRIT PETITION NO.36746 OF 1998

Udai Nariain Pandey ... Petitioner.
Versus
Director of Education (Higher Education), U.P. Allahabad and others ... Respondent.

Counsel for the Petitioner : Dr. .R. G. Padia & Sri P. Padia
Counsel for the Respondent : Mr. R.N. Singh S.C.

Gorakhpur University Statute 16.24 of the Ist statute-grant of sesson benefit is available not only to a teacher but also to head of department or Prinicipal.

By the Court

The order dated 13.10.1998 (Annexure-7 to the writ petition issued by the Director of Education (Higher Education) allowing the respondent no.5 to continue as Principal of Shiva Pati Degree College, Soharatgarh, Siddharth Nagar till 30.6.1999 granting him the session benefit in terms of statute 16.24 of First Statutes of the University of Gorakhpur.

The contention of the petitioner is that the respondent no.5 could not be allowed to continue as Principal in terms of the said statute 16.24 as such benefit is only available as a teacher and one can not be continued as Head of the Department or Principal applying the said provision of statute 16.24. On such contention the present petitioner claming himself to be the senior most teacher of

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the institution is entitled to_work as officiating Principal of the institution in question on retirement of the respondent no.5 on 30.9.1998.

The respondent no.5 has filed counter affidavit and has contended that he was selected by the U P.Higher Education Service Commission and thereupon was appointed on substantive post of Principal in the institution concerned and, therefore, applying the provision of statute 16.24 the respondent no.5 has to be re-employed for the continuing session and, therefore, the impugned order is valid and proper and should not be interfered with.

Heard DR. R.G. Padia, learned counsel for the petitioner and Mr. R.N. Singh learned counsel for the respondent no.5 as also Mr. Dileep Gupta, learned counsel for Gorakhpur University as question of interpretation of the provisions of First Statutes of the University of Gorakhpur came up for consideration.

As regards applicability of the provisions of law there is no dispute that the First Statutes of the University of Gorakhpur are applicable. On the applicability of particular provision the learned counsel for the petitioner contended that the provision applicable in respect of the session benefit of a Principal is statute 17.13 which runs as follows :

> "17.13. The provisions of statutes 16.23 to 16.26. relating to the superannuation of the teachers of the University shall mutatis mutandis apply to the teachers of an affiliated college."

It has been admitted by all the parties that by virtue of the said statute 17.13 the provision applicable in the present case is as contained in statute 16.24 which is as follows:

> "16.24(1) Subject to the provisions of Statutes 16.25 and 16.26 the age of superannuation of a teacher of the University governed by the new scale of pay shall be sixty years.
>
> (2) The age of superannuation of a teacher of the University not governed by the new scale of pay shall, subject to Statute 16.25, be sixty years.

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(3) No extension in service beyond the age of superannuation shall be granted to any teacher after the date of commencement of these Statutes:

Provided that a teacher whose date of superannuation does not fall on June 30 shall continue in service till the end of the academic session that is, June 30 following, and will be treated as on re-employment from the date immediately following his superannuation till June 30, following.

Provided further that such physically and mentally fit teachers shall be re-appointed for a further period of one year, after June 30, following the date of their superannuation, as were imprisoned for taking part in freedom struggle of 1942 and are getting freedom fighters pension.

Provided also that the teachers who were re-appointed in accordance with the second proviso as it existed prior to the commencement of the Gorakhpur University (Twenty-ninth the expiry of the period of their re-employment may be considered for re-appointment, for a further period of one year."

The learned counsel for the petitioner contended that the first proviso to clause (3) of Statute 16.24 refers to a teacher and for the purpose of session benefit the said expression 'teacher' means only persons actually teaching and it does not include Principal. In support of such contention reliance has been placed on the judgment in the cases of Dr. Rajpati Chauhan v. V.C. Sampurnanand Sanskrit University Varanasi and others, reported in 1998 (2) Education and Service Cases 1190 and Paras Nath Pandey v District Inspector of Schools Basti and others, reported in 1995 (1) UPLBEC 667 (photostat copies of the said two judgements have been annexed in the writ petition along with the documents at Annexure-3 thereof).

For the purpose of said contention reference was also made to the definitions of the expressions 'teacher' and 'teacher of the University' as contained in sub-section (18) and (19) respectively of section 2 of the U.P. State Universities Act, 1973. The said provisions are as follows.

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"2.(18) "teacher" means a person employed for imparting instruction or guiding or conducting research in the University or in an Institute or in a constituent, affiliated or associated college and includes a Principal or a Director,

(19) "teacher of the University" means a teacher employed by the University for imparting instruction and guiding or conduction research either in the University or in an Institute or in a constituent college maintained by the University."

The aforesaid definitions made it clear that the expression 'teacher' includes a Principal. Therefore, while considering the first proviso in statute 16.24, re-employment of a principal has also to be granted as in the said proviso only expression used is 'teacher' for the purpose of such re-employment.

Law has been referred to by both parties for the purpose of interpreting an expression used in various parts of one particular provision of law but this aspect need not be decided here as expression 'teacher' has been only used in sub-clause (3) of statute 16.24 and the three provisos thereafter. Sub-clauses (1) (2) of statute 16.24 used the expression teacher of the University' and not teacher. Therefore, we find the question of grant of re-employment and continuation in service has been given only in respect of teachers which admittedly includes principal as the expression has been defined in the said statute.

Strong reliance has been placed by the petitioner on the law decided in the case of Dr. Raj Pati Chauhan v. V.C. Sampurnanand Sanskrit University Varanasi (supra) ad Paras Nath Pandey v. District Inspector of Schools, Basti (supra) Relying on the said judgment it has been contended that principal is not entitled to continuation in service in the present facts as only teachers are to get such benefit under the first proviso as aforesaid. On behalf of the respondent it has been contended that the present respondent no.5 having been employed as principal or regular basis he is entitled to continue in serice on re-employment as principal only.

The facts involved in the case of Dr. Raj Pati Chauhan (supra0 it appears that the petitioner therein was Reader in the Department of Education in Sampurnanand Sanskrit University and the respondent no.3 to continue as Head of the Department concerned. Applying the provisions of statute 16.24 in the aforesaid factual background it was held that under the said statute 16.24 a teacher was to be re-

employed as a teacher only and would not enjoy other offices like Head of the Department or principal ship of academic council . In coming to such a finding reliance was placed on the findings in the case of Paras Nath Pandey (supra)

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The judgment in the case of Paras Nath Pandey (supra) also shows that the petitioner therein admittedly was appointed as Assistant Teacher in the college concerned and ultimately was promoted as Head of the Department of vyakaran. Thereaftr he was working as officiating Principal of the college. While other proceeding initiated by the said petitioner claiming his right to continue as officiating principal and for other reliefs was pending he attained the age of superannuation and claiming session benefit he claimed to be entitled to continue as officiating principal till the end of the concerned academic year. In the aforesaid factual background the law was considered and we find that only because of the said special fact that he was working as officiating principal, his re-employment was held as a teacher and not as principal. The difference of facts with the case of Prof. R.N. Tewari vs. Allahabad University and others reported in (1991) 1 UPLBEC 563 was not obly considered but was also approved. The relevant finding in the case of Paras Nath Pandey is as follows.

> "18. The facts involved in Prof. R.N. Tiwar's case (supra), which has been relied upon by the learned counsel for the petitioner are altogether different . There the petitioner was Professor. Immediately after the date of his super annuation he got re-employed on the post of Professor and performed the same functions which he was performing on the date of his superannuation and under the peculiar circumstances of the particular case a Division Bench of this Court had held that by no stretch of imagination it could be said that he was not a teacher of the University as defined under the State Universities Act. Therefore, there can possibly be no quarrel with the proposition of law laid down therein. But the ratio of that case cannot be grafted on the facts and circumstances of the case in hand. Herein the petitioner on the date of his superannuation was a teacher and in addition thereto he was looking after the work of Principal as officiating Principal. Therefore, immediately, after the date of his superannuation he was re-employed as a teacher under the provisions of clause 3 of statute 16.24 of the Statute and not as Principal. He

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could not, therefore, forestal the appointment of a regular Principal."

Therefore, it is apparent that statute 16.24 provides for re-employment on the post the concerned person was employed on the date of superannuation. In the case of Prof. R.N. Tewari (supra0 the petitioner therein was a professor on the date of his superannuation and, therefore, he was to continue as Professor on re-employment under first proviso of Statute 16.24. In the case of Paras Nath Pandey (supra) the petitioner was a teacher on the date of his superannuation and in addition thereto he was looking after the work of Principal as officiating Principal and, therefore, on superannuation he was re-employed as a teacher only and not as Principal. Same was the finding with regard to a teacher having charge as Head of Department or a member of council Substantive appointment in all those cases being in the post of teacher on re-employment concerned teacher was to continue only as a teacher and he is not to enjoy the additional administrative charges after superannuation.

In the present facts the respondent no.5 admittedly was appointed on substantive post of Principal in the institution concerned and while holding the said post, date of superannuation came. Admittedly, apart from the said appointment as Principal, the respondent no.5 never held any post of teacher in the said institution. Therefore, applying the law as aforesaid, after the date of superannuation the respondent no.5 was to continue in service on re-employment as Principal.

In view of the aforesaid findings, the claim of the present petitioner cannot be allowed and the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 18.1.1999

BEFORE
THE HON'BLE R.H. ZAIDI, J.

1999

January, 18

CIVIL MISC. WRIT PETITION NO. 1556 OF 1999.

Committee of Management, Junior High School Rosangpur, Auraiyathrough it's Manager ... Petitioner
Versus.
Basic Shiksha Adhikar, Etawah/Auraiya.
And others ... Respondent.

Counsel for the Petitioner : Shri Yogesh Kumar Saxena
Counel for the Respondents : Shri Y.K. Saxena, Advocate.

U.P. Regulartised Basic School Rules 1971Rule-10 -the order passed by the Basic Shiksha Adhikari disapproving the resolution passed by the committee of management to terminate the service of an Asstt. Teacher challanged, - District Basic Education officer if he was not satisfied with resolution could atmost return the paper to the committee of management. He had no authority to reject the resolution outrightly.

By the Court

By means of this petition , petitioner prays for issuance of a writ, order or direction in the nature of certiorari quashing the impugned order dated 27.11.1998, whereby the respondent no.1, the Basic Shiksha Adhikari, Etawah/Auraiya, dis-approved the resolution passed by the petitioner –Committee of Management of Junior High School, Rosangpur, Auraiya, to terminate the services of respondent no.2 Shri Brijesh Kumar Dwivedi as Assistant Teacher in the said school.

It appears that Sshri Brijesh Kumar Dwivedi, the respondent no.2 was appointed as Assistant Teacher in the aforesaid Junior High School on 14.8.1992. His appointment was also approved by the Basic Shiksha Adhikari. Subsequently Shri Ram Naresh Pandey and Jagdish Narain Shukla, who were also candidates for appointment on the aforesaid post, made complaints against respondent no.2 on the basis of which after making preliminary inquiry, the respondent no.2 was placed under suspension vide order dated 25.6.1997 by the

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petitioner. The respondent no.1 revoked the order of suspension vide his order dated 8.9.1997, Civil Misc. Writ Petition No. 32259 of 1997 was filed in this Court by the petitioner which was finally disposed of by judgement and order dated 26.9.1997. It was directed by this Court that the petitioner shall conclude the inquiry within 2 months and in case the inquiry is not concluded within the said time, it would be open to respondent no.2 to submit representation before the petitioner to revoke the order of suspension, Even if the suspension order is revoked, it will be open to the petitioner to continue with the disciplinary proceedings. Thereafter, chargesheet was framed and suplied to the petitioner. The disciplinary proceedings were conducted on the basis of which the petitioner-Committee of Management on 23.01.1998 resolved to terminate the services of respondent no.2 A copy of the resolution alongwith the record of the case were thereafter submitted to the respondent no.1 for his approval. The respondent no.1 on receipt of the papers regarding termination of the services of respondent no. 2formulated as many as 4 questions for determination in the case which were answered in a negative and in favour of respondent no.2 by him and the respondent no.1 thereafter disapproved the resolution passed by the petitioner on 23.1.1998. The respondent no.1 has also revoked the suspension of respondent no.2 and directed for his re-instatement and payment of salary with effect from the date he was placed under Suspension. The petitioner was directed to submit the salary bills for the period the respondent no.2 remained under suspension by his order dated 27.11.98 which is under challenge in this petition.

Learned counsel for the petitioner vehemently urged that the order passed by respondent no.1 dated 27.11.1998 is wholly illegal and without jurisdiction. He has referred to and relied upon the provisions of Rule 10 of U.P. Recognized Basic Schools Rule, 1978. It was urged that the respondent no.1 could at the best, if he was not satisfied dis-agreed with the resolution passed and the recommendation made by the Committee of Management with the direction that the matter shall be re-considered by the Selection Committee. He had no authority to reject the recommendation out-rightly.

After perusing the provisions of Rule 10 of the aforesaid rules Mr. Y.K. Saxena, who has filed caveat on behalf of respondent no.2 as well as learned standing counsel have fairly conceded that the order passed by the respondent no.1 is not in consonence with the provisions of sub-rule (5) of Rule 10 of the said rules. The same is

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illegal and without jurisdiction inasmuch as the respondent no.1 had no jurisdiction to out-right reject the recommendation made by the Committee of Management. He could at the best return the papers to the Committee of Management with the aforesaid direction.

In view of the aforesaid facts, it is not necessary in the present case to ask the respondents to file counter-affidavit.

I have considered the submissions made by the learned counsel for the petitioner and also perused the record.

Sub-rule (5) of Rule 10 of the aforesaid Rules provides as under:-

"10. (5) (I) If the District Basic Education Officer is satisfied that—

a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

b) the procedure laid down in these rules for the selection of Head-master or assistant teacher as the case may be, has been followed, he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District basic Education officer is not satisfied as aforesaid, he shall return the papers to the management with the direction that the matter shall be reconsidered by the selection committee.

(iii) If the District basic Education officer does not communicate his decision within one month from the date of receipt of the papers under clause (4) shall be deemed to have accorded selection committee."

Under sub-clause (ii) of Clause-(b) of Sub-rule (5) of Rule 10 of U.P. Recognized Basic Schools Rules 1978, the District Basic Education officer if he was not satisfied by the cecommendation made by the Selection Committee, could at the best to return the papers to the Management with the directio9n that the matter should be reconsidered by the Selection Committee. He had no authority to reject the recommendation. Thus, the respondent no.1 exceeded his jurisdiction in passing the order dated 27.11.1998 and rejecting the recommendation. The learned counsel appearing for respondent no.2 as well as learned Standing counsel have conceded that the aforesaid

impugned order is wholly illegal and without jurisdiction as stated above. Therefore, the impugned order dated 27.11.1998 is liable to be quashed and the writ petition deserves to be allowed.

In view of the aforesaid facts, the present petition succeeds and is allowed. The order dated 27.11.1998 is hereby quashed. The respondent no.1 is directed to proceed in accordance with the provisions of the aforesaid Rules and in the light of the observations made above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 1.2.1999

1999

February, 1

BEFORE
THE HON'BLE D.K. SETH, J.

CIVIL MISC. WRIT PETITION NO. 1151 OF 1999

Tilak Ram Singh and others. ... Petitioners
Versus
Cane Commissioner ,U.P. Lucknow and others... Respondents

Counsel for the Petitioners : Shri N.L. Pandey
Counsel for the Respondents : Mr. P.M.N. Singh
Addl. Advocate General

11. Regulation 27 of U.P. Cane Cooperative Service Regulation 1975- This regulation provides for automatic dropping of the proceedings on the end of crushing season. If the disciplinary proceedings could not be concluded within the same crushing period. Even any order passed thereafter would be void and wholly without any jurisdiction.

By the Court

On the ground of certain lapses committed by the petitioner in the season 1995-96 when he was appointed as seasonal clerk, he was subjected to a disciplinary proceeding initiated on 9.7.1997. The disciplinary proceeding was concluded on 9.10.1998. Learned counsel for the petitioner Mr. N.L.Pandey relying on Regulation 27 of the U.P Cane Co-operative Service Regulation 1975, contends that

disciplinary proceeding in respect of a lapse committed during a particular season, is to be initiated and concluded before the end of the crushing season or within the time stipulated therein, whichever is latter, and in default such disciplinary proceeding shall be deemed to have been automatically dropped. Therefore, according to him, the lapse committed by the petitioner in crushing season 1995-96, cannot be gone into after the end of the said crushing season namely on 9.7.1997. He alternately argues that even if it can be so initiated, it has to be concluded within the time frame stipulated in Regulation 27 and in default the same shall be deemed to have been automatically dropped, after expiry of the crushing season. Therefore, according to the learned counsel, there cannot be any jurisdiction to pass an order against the petitioner on 9.10.98 namely in the next season. Learned counsel further submits that the impugned order being wholly without jurisdiction and a nullity, the petitioner should not be thrown to the process of appeal as provided in regulation 31. On these grounds he prays for quashing of the impugned order.

Mr. P.M.N. Singh, Learned Addl. Advocate General, On the other hand contends that regulation 31 provides for an appeal which is adequate alternative remedy, and in view of existence of such adequate remedy, this court sitting in writ jurisdiction should not enter into the questions which also requires investigation on merits. According to him, such a question have arisen in the case of Devendra Singh and others Vs. Chairman, District Cane Service Authority, Bijnor and others (Writ Petition No. 42588 of 1998, disposed of on 11.1.1999) Zerox copy of the certified copy of the said judgment has been produced by him in court. Relying on this decision, Mr. P.M.N. Singh contends that the writ petition is liable to be dismissed on the ground of alternative remedy .He next contends that since the question is a question of fact, sitting in writ jurisdiction, this Court cannot enter into the question, therefore, the petitioner cannot obtain any relief by invoking writ jurisdiction in the facts and circumstances of the case.

Mr. N.L. Pandey, however, has not addressed the Court on the merits of the case. He has confined his submission to the said question and contends that in view of patent absence of jurisdiction, it is not necessary that the petitioner should be thrown to the process of appeal when on the face of it, it is apparent that the order has been passed without any jurisdiction in consequence of the provisions of regulation 27 .

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I have heard both Mr. Pandey and Mr. P.M.N. Singh at length.

There is no dispute that the petitioner's service is governed by U.P. Co-operative Service Regulation 1975 and the petitioner is subject to the provisions thereof. Admittedly, the petitioner is a seasonal clerk. He was subjected to a disciplinary proceeding initiated on 9.7.1997 in respect of the lapse committed by him in the season 1995-96 and the said proceeding was concluded on 9.10.1998 when the impugned order was passed in respect of the said proceeding. In his usual fairness, Mr. P.M.N. Singh has not disputed these facts. It appears from annexure-12 & 13 to the writ petition, that the proceedings against the petitioners were initiated in July 1997 and the impugned order was passed in October, 1998, in respect of the lapse committed in the season 1995-96. Admittedly, the crushing season begins on 1st October and continues till the end of July following. Thus, the season which might have begun in October, 1997, had come to an end in July 1998 and a different season has started in October, 1998 and thus order passed on 9.10.1998 falls in subsequent season. In this background, let us test the provisions of regulation 27 which provides as follows:

> " 27. Disciplinary proceedings:
>
> In the event of a complaint against any member of the seasonal staff, the Secretary of the Union shall made a preliminary enquiry and if he is satisfied that a prima facie case is established against the person concerned, he shall intimate the same to him in the form of charges and call for his explanation to be submitted within a specified time. The Secretary of the alongwith definite recommendations to the District or Zonal Authority, as the case may be, for passing final order in the case. In case the explanation is not received within the specified time the Secretary shall submit his final report to the District or Zonal Authority as the case may be, on the basis of material already on the file. These proceedings shall be of a summary nature and the Secretary should not take more than a month to complete the same. The District or Zonal Authority as the case may be, should also arrange to dispose of the same within one month of the receipt of the final report form the Secretary . In case of default on the part of Secretary of cane union or the District or Zonal Authority as the case may be, in not completing the disciplinary

proceedings against a seasonal staff by the end of crushing season, the same shall be deemed to have been automatically dropped.

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Regulation 27 specifies that in respect of any lapse an explanation is to be called in the form of charges and the Secretary is required to examine records and submit his final report with definite recommendations to the District or Zonal authority for passing final order. In case no explanation is received, then final report may be submitted by the Secretary to the District or zonal authority on the basis of records already on the file. The proceedings is a summary proceedings which is to be completed within one month by the Secretary, and the district and zonal authority is also required to dispose of the matter within one month form the date of receipt of final report from the Secretary. It is further provided that in case of default either on the part of the Secretary of the Cane Union or on the part of the District or Zonal Authority in not completing the disciplinary proceedings against a seasonal staff by the end of the crushing season, the same shall be deemed to have been automatically dropped.

The expression used in Regulation 27 is clear and unambiguous and has specified specific time and has also provided for the consequence in respect of non compliance of the time frame stipulated therein. If there is a provision for automatic dropping of the proceedings at the end of the crushing season, in cases where the proceeding could not be completed, there cannot be any different consequence conceived out of such provision. Therefore, after the end of the season, if the proceeding is not concluded, the same is deemed to have been automatically dropped. Thus, once time frame expires, non-completion of the proceedings within the stipulated period, results into dropping of the proceedings which cannot be revived since the same is automatic. Once it is dropped, in the absence of specific provision, it cannot be revived. The provision of regulation 27 does not provide any exception that in certain contingencies such proceedings could be revived. If the disciplinary proceedings could not be concluded within the stipulated time frame, any order passed thereafter would be void any a nullity and wholly without any jurisdiction. The jurisdiction to continue the proceedings would cease at the end of the crushing season if time frame is not adhered to. In such circumstances, the impugned order which was passed in October, 1998 in the proceedings initiated on 9.7.97 , thereafter the succeeding crushing season having ended in July 1998,

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the provisions of regulation 27 with regard to default clause is attracted. As soon it is attracted, the disciplinary proceedings having lapsed the orders passed are wholly without jurisdiction and non est and has no existence in the eye of law.

Though rightly contended by Mr. P.M.N. Singh, this Court should not enter into such question when there is alternative remedy in existence, but in cases where the order on the face of it is without jurisdiction and void and when the Court is not required to go into disputed questions of fact and on the basis of the records it can be ascertained that there are absence of jurisdiction and the orders passed are nullity and has not existence in the eye of law, in such circumstances, existence of alternative remedy cannot stant in the way of invoking writ jurisdiction which is discretionary one. Alternative remedy is not an ab-solute bar. It is at the discretion of the Court either to exercise the writ jurisdiction or not to do it. The question is dependent on the facts and circumstances of each case and it is for the Court to decide that where such discretion should be exercised judicially. In this case it is apparent on the face of the record that the impugned order is without jurisdiction and void ab initio, therefore, it is a case fit for exercising such discretion. If the order itself is without jurisdiction and void ab initio, in that event, there cannot be any question of prefering appeal when on the face of it, the order has no existence.

The decision in the case of Devendra Singh (supra) has not dealt with this particular point or question since not raised therrin. Therefore, the said deecision is distinguishable on the question raised by Mr. Pandey in the present case.

For the foregoing reasons, this writ petition is allowed. The orders impugned contained in annexure-13 to 20 are hereby quashed. Let a writ of certiorari do accordingly issue .

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD, 25.2.1999

1999

February, 25

BEFORE
THE HON'BLE O.P. GARG, J.

CIVIL MISC. WRIT PETITION NO. 6925 OF 1999

Har Pal Singh ... Petitioner
Versus
Additional Session Judge/Special Judge, Ram pur and another ... Respondent

Counsel for the Petitioner : Sri A.N. Srivastava
Sri P.K.Srivastava
Sri N.K. Srivastava
Counsel for the Respondents : S.C.

Hindu Marriage Act Section 24- the finding of the fact recorded by the criminal court in proceedings under section 125 Cr.P.C. are irrelevant for the parposes of the petition under section 24 of the ACT. Finding in a cirminal case does not operate as res-judicate in a civil suit- The mere fact that the respondents deny the factur of marriage, is no bar to the power of the court to make an order u/s 24 of the ACT in order to claim maintenace for children as contemplated under section 26, no appliation is required to be made and an order may be passed in favour of the children on the application of the wife moved under section 24 of the ACT.

By the Court

Heard Sri Amar Nath Srivastava learned counsel for the petitioner. Respondent no.2 Smt. Nanhi had filed a petition No. 33 of 19996 u/s 3 of the Hindu Marriage Act (hereinafter referred to as the Act') for dissolution of marriage against the present petitioner. During the pendency of the said Matrimonial petition, respondent no.2 moved an application u/s 24 of the Act claiming pendente lite alimony and litigation expenses. This application was registered as Misc.Case no. 36 of 1997 Learned trial court by the impugned order dated 13.1.1999, has awarded a sum of Rs. 2000-as litigation expenses and Rs. 600/- in total as pendente lite limony (Rs. 400 for the maintenance of Smt. Nanhi- wife-and Rs.200 for the maintenance of the daughter) This order has been challenged by the petitioner primarily on the ground that his marriage was never solemnized with the respondent no.2 and, therefore, question of payment of any

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pendente lite and litigation expenses to an woman, who is strangerto him, does not arise. Sri A.N. Srivastava, learned counsel for the petitioner pointed out that in proceedings under Section125 Cr.P.C. initiated by respondent no.2 it has been held that she is not legally wedded wife of the petitioner and that the daughter for whom pendente lite was claimed was not born out of the wed-lock in between the petitioner and the respondent no.2 It was urged that the finding recorded in proceedings under Section 125 Cr.P.C. would operate as ---- judicata in the application u/s 24 of the Act and, therefore, the trial court was not justified in awarding the amount of litigation expenses and pendente lite.

So far as the question of findings of fact recorded by the criminal court in proceedings u/s 125 Cr.P.C. is concerned, they are irrelevant for the purpose of the petition u/s 24 of the Act. Whatever has been said in a criminal case about the relationship of the petitioner and the respondent no.2 is of no consequence A finding if at all, given in a criminal case, does not opeate as resjudicata in a civil suit/petition Even otherwise, it would appear that there is no concrete finding recorded by the criminal court in proceeding u/s 125 Cr.P.C. that the respondent no.2 is not wife of the petitioner. By order dated 11.1.1994 Judicial Magisgrate concerned has awarded a sum of Rs. 250/- and Rs. 1250/- respectively as maintenance for the wife and the daughter under the provision of Section 125 Cr. P.C. Thepresent petitioner filed a revision appliation no. 11 of 1994 which was allowed on 8.11.1996 and the case was remanded for recording of fresh evidence on the consession made by the parties and their counsel. As it is, therefore, no concluded finding has been recorded by the criminal court that the respondent no.2 was not married to the petitioner.

The mere fact that the respondent in a matrimonial petition denies the factum of marriage is not bar to the power of the court to make an order under Section 24 of course, a good prima facie case about the marriage would have to be made out by the petitioner before any such order could be made by the court in case of any such contention being raised by the respondent. In this connection a reference may be made to Jain Vs. jain (68) A.C.-405

On the basis of the material available on record, the trial court has recorded a finding that the petitioner has married respondent no.2 and out of their wedlock a daughter, who is living with respondent no.2 was given birth. There is an entry in the family reegistered in which Smt. Nanhi Devi-respondent no.2 and her daughter Sunita

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have been shown as wife and daughter of the present petitioner. The trial court has, therefore, rightly come to the conclusion that prima facie there subsists a relationship of man and wife between the petitioner and the respondent no.2 and Km.Sunita as their daughter. The order for the grant of Rs. 2000 as maintenance and Rs. 400 as pendente lite alimony passed by the trial court is quite justified, apt and equitable taking into consideration the means of the present petitioner .

Another point raised by learned counsel for the petitioner Sri A.N. Srivastava is that under Section 24 of the Act, grant of pendente lite alimony can be made only to the wife and not to the children. In support of his contention, he placed reliance on the decision of the apex court reported in 1978 SCC (CRI) –508-Capt.Ramesh Chand Kaushal Vs. Mrs. Veena Kaushal and others . I have thoroughly studied the said ruling and find that the point which learned counsel for the petitioner wants to make out does not find support from the decision aforesaid.

Under Section 26 of the Act , interim order for custody and maintenance of children may be passed in proceedings under the Act. The petition for dissolution of marriage u/s 13 is a proceeding under the Act. There is some difference of judicial opinion on the question as to whether in an application for interim maintenance by the wife, the court has power to grant maintenance not only for the wife but also for the children although there may be no separate application under Section 26 of the Act. In this connection, a reference may be made to the decisions reported in Baboo lal vs Prem Lata (AIR 1974 Raj-93) Usha Vs. Sudhir Kumar –I.L.R. (1973) P & H –248; Balbir Kaur Vs. Raghubvir Singh (74) A.P.&H-255; Contra Akasam Chinna V. Parbati (A.I.R. 1967 Orissa – 163) Chandrakant V. Shardabai (1977) 2 Karnatak L.J.-29 and Bankim Chandra V. Anjali (A.I.R 1972 Patna 80) In Mulla;s Hindu Lal, Fifteenth Edition by S.T.D. Desai at page 874, it is stated that where there is no possibility of any injustice being done to the husband the court may make such an order for the benefit of the wife as well as the children of the marriage living with her without insisting on a separate application. I am also of the view that in order to claim maintenance for children as contemplated u/s 26, no separate application is required to be made and on the application of the wife moved u/s 24 in the proceeding for dissolution of marriage u/s.13 of the Act, interim mandamus may be granted for the children also. This view has the merit of doing away with the multiplicity of the

applications required to be moved under sections 24 and 26 separately.

In the conspectus of the above factual and legal position, it is not a fit case for interference in writ jurisdiction under Article 226 of the Constitution The writ petition is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 11.11.1998.

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November, 11

BEFORE
THE HON'BLE D.K.SETH,J.

CIVIL MISC. WRIT PETITION NO. 18126 OF 1995.

Sarvesh Chandra Shukla ... Petitioner.
Versus
U.P.Higher Secondary Education Services Commission, Allahabad & others ... Respondents.

Counsel for the Petitioner : Shri Rakesh Pande
Counsel for the Respondents : S.C.,Shri Haider Zaidi, Shri M.C.Singh

Intermediate Education Act 1921-Chapter III- Regulation 36 — readwith section 16 (G (3) (a) Punishment inflicted without giving the copy of enquiry report-approved by the commission-held-commission overlooked the grave and patant error in the proceeding itself-order cannot be sustained. (Para 10,11)

Case law discussed.
1991(1) SCC. 588

By the Court

1. A punishment was inflicted upon the petitioner pursuant to the resolution dated 12th of October, 1991, which was approved by the

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Commission by its order dated 8th of June, 1995, which was communicated by communication dated 13th of June, 1995 being Annexure-11 to the writ petition. The petitioner has challenged the said order in this writ petition.

2. Mr. Rakesh Pandey, learned counsel for the petitioner contents that no enquiry report was ever shown to the petitioner neither any copy of the enquiry report was given to him. Therefore, relying on the decision in the case of "Union of India and others Vs. Mohammad Ramjan Khan, 1991(1) S.C.C.588, he contended that the order of punishment cannot be sustained. He further contended that after the reply was submitted by the petitioner on 14th of September, 1991 a report was forwarded to the Committee of Management by the Inquiry Committee on 20th of September, 1991 and the petitioner was asked to appear in the enquiry on 12th of October, 1991 on which date punishment was inflicted. By the resolution inflicting the punishment was forwarded to the Commission for its approval under Section 21 of the U.P. Secondary Education Services Commission Selection Board Act, 1982. Thus, the case is made in paragraphs 29, 30 and 31 of the writ petition, appears to be a case of no enquiry no opportunity. Therefore, according to him the approval granted by the Commission cannot be sustained

3. Mr. Vijai Kumar Singh, learned counsel for the respondents, on the other hand, contends that the case of Mohammad Ramjan Khan (supra) was prospective in nature and cannot be attracted in the present case, where the resolution was taken according to decision in Mohd. Ramjan Khan. He also contends that the petitioner had refused to receive the chargesheet and that despite giving opportunity he did not participate in the enquiry. Therefore, the petitioner cannot challenge the said order. The writ petition, therefore, be dismised.

4. I have heard both the learned counsel at length.

Whether the question of non-service of enquiry report is material in the present case need not be gone into, if it is found that there was no enquiry before the enquiry report was prepared or in case it appears that no opportunity was ever given to the petitioner to defend the charges. Be that as it may, the decision in the case of Mohammad Ramjan Khan was given on 2nd of November, 1990. It was anterior on the point of time when the resolution was taken. Therefore, Mr. Vijai Kumar Singh learned counsel in his usual fairness has conceded that the ratio decided in the case of Mohammad Ramjan Khan would be attracted in the present case. But he contends that the enquiry report was shown to the petitioner, which is, in fact, sufficient compliance of the requirement of the said decision. The

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petitioner had ever asked for a copy of the enquiry report nor he had never objected to the said report. Therefore, whatever right, he had , was waved the same and therefore, now it cannot take resort of the ratio decided in the said case.

5. A statement was made in paragraph 31 of the writ petition, which was replied to in paragraph 28 of the counter affidavit, where it has been stated that the enquiry report was shown to the petitioner on 12th of October, 1991. This fact remains that the enquiry report was not shown before the order of punishment was inflicted. Inasmuch as it was alleged to have been shown to petitioner on 12th of October, 1991 in the meeting and the resolution to inflict the punishment was taken on 12th of October, 1991 in the said meeting. Therefore, such showing cannot be taken to be a sufficient opportunity to take any objection to the said report. That apart, it was not asserted that the copy of the report was served on the petitioner. On the other hand, it was stated that it was only shown to him. Showing of the report of enquiry does not amount to service of the report. Therefore, the same does not satisfy the condition as enunciated in the case of Mohammad Ramjan Khan (Supra).

6. At the same time it is contended in paragraphs 29 and 30 of the writ petition that within six days after submission of the reply by the petitioner, Inquiry Committee had submitted its report on 20th of September, 1991 and the Committee of Management had asked the petitioner to appear on 12th of October, 1991 in the meeting on which date the Management Committee had proposed to inflict the punishment for stopage of two increments. This fact has been dealt with in paragraph 27 of the counter affidavit, where the said fact has not been denied. Mr. Singh has drawn my attention to the order of approval dated 8th of June, 1995 passed by the Commission,. A perusal of the said order shows that on the basis of the allegations made against the petitioner by resolution dated 22nd of July, 1991 it was found that the charges were serious and therefore, a three members Inquiry Committee was constituted. The Inquiry Committee had prepared the chargesheet and sent it under registered post on 12th of August, 1991, which having been refused by the petitioner, the same was published in the "Dainik Jagran" on 9th of August, 1991. Subsequently, the petitioner had received the chargesheet on 11th of September, 1991 and had submitted his reply on 14th of September, 1991. In the reply he denied all the charges. On 20th of September,1991 the Enquiry Committee submitted its report and had forwarded the same to the management finding the petitioner guilty of all the charges and recommended termination of

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service. The Committee of Management thereafter issued a notice to the petitioner by which he was asked to appear on 12th of October, 1991. The said notice is Annexure-CA-4 to the counter affidavit. It appears from the said notice that the Inquiry Committee had considered his reply and had prepared the enquiry report on which final decision would be taken on 12th of october, 1991 at 11.00 A.M. in a meeting to be held in the school premises. If the petitioner wants to adduce any evidence or if he wants to submit any objection in respect of the chargesheet, then he may do so in the said meeting. The text of the above notice clearly indicates that the meeting was fixed for final decision on the enquiry report. Once the enquiry report was prepared and it was set down in for final decision by the Committee of Management, in that event the meeting cannot be said to be a meeting for holding enquiry particularly in view of the fact that the meeting was not convened by the Inquiry Committee . It was convened by the Committee of Management for purpose of holding an enquiry. Admittedly the Inquiry Committee was constituted which had submitted its report. No where the respondents had asserted that the Inquiry Committee had ever called the petitioner to appear in any enquiry to defend the charges. Since the Committee of Management was holding the meeting to take final decision on the report of the Inquiry Committee, there was no scope for giving any evidence or submitting any objection to the enquiry report particularly, when no copy of the enquiry report was given to the petitioner. It was only shown to the petitioner in the meeting dated 12th of October, 1991 after which he did not have any opportunity to meet the said report. Thus from the material on record it does not appear that any enquiry was ever held against the petitioner.

Sub-section (3) (a) of Section 16-G of the U.P. Intermediate Education Act, 1921 provides that no teacher can be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments or served with notice of termination of service except with the prior approval in writing of the Inspector. Section 21 of the U.P. Secondary Education Services and Selection Board Act, 1982 provides that prior approval of the District Inspector of Schools would be necessary to reduce emoluments of the teacher or to withhold his increment for any period. Regulations 31 to 45 of Chapter-III of U.P. Intermediate Education Act deals with the question of punishment, enquiry and suspension of the teacher which provides that the punishment can be inflicted only after the enquiry is held and the procedure for holding enquiry is laid down in Regulation 36 which reads as follows:

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36.(1) The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the employee charged and which shall be so clear and precise as to give sufficient indication to the charged employee of the facts and circumstances against him. He shall be required within three weeks of the receipt of the chargesheet to put in a written statement of his defence and to state whether he desired to be heard in person. If he or the inquiring authority so desires an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that enquiry such oral evidence will be heard as that inquiring authority considers necessary. The person charged shall be entitled to cross examine the witnesses, to given evidence in person, and to have such witnesses called as he may wish: provided that the enquiring authority conducting the enquiry may for sufficient reasons to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof. The inquiring authority conducting the enquiry may also separately from these proceedings, make his own recommendation regarding the punishment to be imposed on the employee.

(2) Clause (1) shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him.

(3) All or any of the provisions of clause (1) may for sufficient reasons to be recorded in writing be waived where there is difficulty in observing exactly the requirements thereof and those requirement can in the opinion of the inquiring authority be waived without injustice to the person charged."

7. The said regulation provides that the proposed ground, on which action is taken shall be reduced in the form of a definite charge or charges which shall be communicated to the employee charged. The charge should be clear and precise. He should be required to submit his reply within three weeks from the receipt of the chargesheet and expression as to whether he desired to be heard. If the charges are not admitted, in that event oral enquiry shall be held. At the enquiry such oral evidence will be as that if the Inquiry Authority shall consider it necessary that the charged employee if he so wants to he may cross examine the witness or may give evidence in person or may call his witness. The Inquiry Authority, for reason to be recorded in writing, may refuse to call the witness. The Inquiry Authority is required to make its recommendation separately, recording its findings and recommendation of punishment. Such

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requirement is to be followed in a manner which may not inflict injustice to the person charged nor except in cases where it is not possible to follow the procedure exactly. The same can be waived without causing any injustice to the charged employee.

8. Thus it appears that in the present case, as observed earlier, the procedure laid down in Regulation 36 has not been followed in its spirit. In fact the procedure has been waived to the prejudice of the petitioner inflicing injustice to him.

9. It is apparent from the record in the present case that three weeks' time after receipt of the charge sheet was not given to the petitioner to put in his written statement of defence. Instead he was given only 3 days' time. Be that as it may, the petitioner had submitted his reply within 3 days. Therefore, such giving of lesser time may not be an infraction of the procedure contained in Regulation 36, Chapter III of the Regulation.

10. In the present case, the charges have been denied by the petitioner. Therefore, an enquiry was a necessity. Admittedly, no enquiry was held . No evidence was adduced in the enquiry in the present case of the petitioner.. No witness was examined in his presence. Therefore, he had neither opportunity to inspect the materials used against him for preparing the enquiry report and defend his cause nor he had the liberty to adduce any evidence either by way of production of documents or by examining any witness. There is nothing to show that the proceedings contained any record of evidence. The statement of the finding and the grounds alleged in the enquiry report and the recommendation of punishment does not show that it was based on the record of the evidence as is necessary under sub-Regulation I of Regulation 36, chapter III of the said Regulation. It is not a case where the petitioner had absconded in order to attract sub-Regulation. 2 Even if the procedure is waived, in that event the enquiring authority has to record reasons in writing for waiving the requirements of sub-Regulation I of Regulation 36 above. Such waiver of requirement under sub-regulation I is permissible when there are difficulties in observing exactly the requirements. There is nothing to indicate that there was any difficulty in observing the requirements exactly. Then again the waiver would be in respect of one or other part. But it cannot be a case of waiver of whole of the requirement. The waiver may be in respect of a particular part and that too without inflicting injustice on

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the person charged. The waiver should be to such an extent which will not work injustice to the person charged.

11. In the present case, the whole requirement of holding an enquiry after the receipt of the reply to the charge sheet has been waived depriving the petitioner either to inspect the documents used against him or to adduce his own evidence either by production of documents or by examining his own witnesses. Thus, it is apparently a case of no enquiry no opportunity. It is clearly in violation of the requirement of sub-Regulation I of Regulation 36. Therefore, no reliance can, at all be placed on the enquiry report, which is based on an assumed enquiry patently on the face of which it is apparently a case of no enquiry no opportunity. While granting approval, the Commission was oblivion of this situation. The commission had overlooked the grave and patent error apparent in the proceedings itself. The absence of non-fulfilment of the requirement of Regulation 36, Chapter III is so obvious and loud that the action of the Commission in granting approval cannot be supported. It was the duty of the Commission while granting approval, to examine the decision making process. In the present case, the decision making process, patently suffers from no observance of the requirement of Regulation 36. This aspect having been thoroughly overlooked and omitted, it appears that the Commission had failed to apply its mind or in other words, it is a clear case of non-application of mind.

12. In the facts and circumstances of the case, the grant of approval contained in Annexure 11 and the resolution dated 12th of october,1991 cannot be sustained and, are, liable to be quashed.

13. Let a writ of certiorari do accordingly, issue quashing the order dated 8th June,1995 passed by the Commission communicated on 13th of June,1995, contained in Annexure 11 and the resolution dated 12th of october,1991 inflicting the punishment to the petitioner.

14. The application is, thus, allowed. However, it will be open to the respondents, if they are advised, to conduct a fresh enquiry in accordance with law.

APPLELATE JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD : 3.12.1998.

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December, 3

BEFORE
THE HON'BLE PALOK BASU, J.
THE HON'BLE P.K.JAIN, J.

FIRST APPEAL FROM ORDER NO. 353 OF 1991.

New India Assurance Company Ltd. ... Defendant/Appellant
Versus
Smt. Sita Sharma and others ... Respondents.

Counsel for the Appellant : Sri A.K.Saxena
Counsel for the Respondents : Km. N.A. Moonis.

Motor Vehicle Act 1988 – Section 157 (2) Insurance policy of Moter vehicle – earstwhile owner transferred the vehicle to third person – whether such subsequent purchasher is entitled to claim benefit of the Policy ? Held – 'Yes'. (Para 11)

Case Law discussed
AIR 1996 SC 586

By the Court

1. A question of some importance has arisen in this case, i.e. whether an insurance policy covering a motor vehicle would continue to fasten liability under that policy even if the policy-holder has transferred the vehicle during the terms of the policy.

2. It is not in dispute that a truck bearing registration no. URU 4605 crushed one Ved Prakash Sharma at about 7 P.M. on 6.1.1990 in village Dhamaura district Rampur. Ved Prakash Sharma lost his life instantaneously, but the truck driver tried to run away. Some police personnel and also relatives of Ved Prasad Sharma (deceased) chased the truck, stopped it at some distance and arrested the driver whereafter first information report was lodged and the driver was also taken into custody. The said truck was insured with New India Assurance Company. After due interval a claim petition was filed by Smt. Sita Sharma, widow of the deceased, Smt. Javitra, mother of the deceased, Santosh Kumar Sharma and Anil Kumar Sharma, minor

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and major sons of the deceased respectively. The Insurance Company took up the plea that original owner of the aforesaid vehicle no. URU 4605 had transferred the said vehicle in the name of another person, namely, Jameel Ahmad and, therefore, no liability could be fastened on the Insurance Company. Other pleas were also raised.

3. After discussing the entire evidence on record the Tribunal concerned allowed the said claim in part and directed that:
(i) A sum of Rs. 1,44,000/- was payable as lump sum compensation with interest with effect from the date of application at the rate of 12% per annum;
(ii) From out of the said compensation amount of Rs. 59,000/- shall be paid to the widow of the deceased, Rs. 25,000/- shall be paid to the minor son and Rs. 25,000/- will be paid to each major son and the mother of the deceased. The further rider was that the amount allocated for Santosh Kumar, minor son, shall be kept in a nationalised bank in the shape of F.D.R. till he attains the majority.

4. Aggrieved by the said order of the Tribunal dated 30.1.1991 the Assurance Company has filed the instant Appeal.

5. Sri A.K.Saxena, learned counsel for the appellant has been heard at sufficient length, who has taken the Court through the entire record. Km. N.A.Moonis, Advocate, appeared for the respondents-claimants, and she has also been heard sufficiently.

6. In so far as the taking place of accident, manner of collision, chasing of the vehicle and catching hold of the driver are concerned, the matter is concluded by dead findings of fact and even though Sri Saxena wanted to argue the matter on these points also, but the evidence on record does not permit any deviation from the findings already recorded by the Tribunal. It is, therefore, in the fitness of evidence to uphold the findings of the Tribunal that the aforesaid accident took place in the manner alleged by the claimants and further that the vehicle was insured under the policy issued by the appellant, New India Assurance Company Ltd. Sri Saxena, however, insisted that the Tribunal has wrongly relied upon some decisions in order to make award against the appellant and has wrongly ignored the fact that the earst-while owner who was the policy holder did not

send any intimation to the Insurance Company regarding the aforesaid transfer by erstwhile owner to Jameel Ahmad, who has been impleaded as respondent in this appeal and, therefore, this Court should allow the appeal and set aside the award of compensation. Reliance was placed on the provisions contained in sub section (2) of Section 157 of The Motor Vehicles Act.

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7. Km. N.A.Moonis, Advocate, on the other hand, argued with equal vehemence that the Tribunal was perfectly justified in awarding compensation in as much as the validity of the policy could not cease only because of the transfer of the policy during the period of its continuance to Jameel Ahmad arrayed as respondent in this appeal. She also placed reliance on some decisions of the High Court and that of the Supreme Court.

8. Before discussing this point it may be relevant to note what the provisions under section 157 are and, therefore, it is quoted here:

"157. Transfer of certificate of insurance:-

(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

Explanation:- For the removal of doubts it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.

(2) The transfer shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

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9. The aforesaid section 157 has its own legislative history. It appears that transfer of certificate of insurance was causing considerable litigative agony in as much as genuine claimants were being denied the legitimate compensation on technical ground of vehicle's transfer and the claims being successfully resisted by the insurance companies on the ground that the contract of insurance survived only with the insurer and the policy holder and nothing beyond. In The Motor Vehicles Act, 1939 certificate of insurance matters were dealt with in chapter VIII and the relevant sections were 103 to 106 thereof. Those sections were not taking note of the liability under the policy even if the vehicle was transferred by the policy holder during the continuance of the insurance policy where after the State through the Parliament intervened. Section 103-A was, therefore, enacted by the Parliament by Act no. 56 of 1969 which became effective from 1.10.1970. The aforesaid newly added section 103-A, however, provided that where a person in whose favour the certificate of insurance has been issued proposes to transfer to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, he may apply in the prescribed form to the insurer for the transfer of the certificate of insurance and the policy described in the certificate in favour of the person to whom the motor vehicle is proposed to be transferred and if within fifteen days of the receipt of such application by the insurer, the insurer has not intimated the insured and such other person, his refusal to transfer the certificate and the policy to the other person, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. Sub sections (2) and (3) of Section 103-A extend the choice to the insurer to refuse to transfer the certificate of insurance to transferee of the vehicle. It appears that these provisions again left enough lacuna and litigation, as appeared from the decided cases, took a turn and again the claimants were at the receiving end.

10. Consequently, when new Motor Vehicles Act was enacted in the year 1988 the aforesaid section 157 was incorporated. Sub Section (1) of Section 157 carries the intention of the Parliament, i.e. the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of

its transfer. The language is in positive terms, nothing further is required to be done with regard to transfer of policy. The responsibility of the transferee to make an application within fourteen days from the date of transfer to insurer for making necessary changes in the certificate of insurance relating to the said transfer can at the best be taken to be a clerical job so as to make the insurance company aware and of the subsequent transferee for any future exigencies, such as renewal of the insurance of the vehicle etc. Surviving period of the policy fixes and continues liability in that policy, as it was with previous owner inspite of transfer of the vehicle to new owner. There can not be any other meaning attached to sub-section(2) of section 157 and, therefore, the argument of the appellant's counsel that in the instant case because there is absence of the evidence of any such step as intimation of transfer by the transferee to the insurer shall enable the insurer to deny the liability, is hereby rejected.

11. Enough support can be had from the decision of the Hon'ble Supreme Court in the case M/S Complete Insulations (P) Ltd. Vs. New India Assurance Company Ltd. reported in AIR 1996 Supreme Court page 586. In para 10 the provisions of new section 157 have been noted and it has been held that the aforesaid section provides that the certificate of insurance together with the policy of insurance described therein shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred. If the policy of insurance covers other risks as well, e.g. damage caused to the vehicle of the insured himself, that would be a matter falling outside Chapter XI of the New Act and in the realm of contract for which there must be an agreement between the insurer and the transferee, the former undertaking to cover the risk or damage to the vehicle. In the cited case since there was no such agreement and since insurer had not transferred the policy of insurance in relation thereto to the transferee, the insurer was not liable to make good the damage to the vehicle. In other words by implication it stands delineated by Hon'ble Supreme Court that in other case, such as the instant one, transfer of vehicle alongwith the transfer of the certificate of insurance will retain the liability of the insurer.

12. In view of the aforesaid decision of Hon'ble Supreme Court reference of Sri Saxena to 1994 A.C.J. pages 368, 878 and 1019 and 1995 A.C.J. page 288 is unjustified.

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13. During the course of arguments Km. N.A.Moonies, learned counsel for the respondents, drew attention of the Court to application and affidavit filed by her on behalf of the respondents-claimants alleging that even when the respondents have initiated execution proceedings the Assurance Company did not pay the entire liability under compensation award. Therefore, their argument that a time bound direction to make the payment, or for that matter the payments, should be made. The request is genuine.

14. In view of the aforesaid discussions, the appeal fails and is hereby dismissed with costs, which are assessed at Rs. 1150/- (Rupees one thousand one hundred fifty only). The Assurance Company is hereby directed to deposit entire compensation amount within three months from today, if not already done, whereafter the executing court may proceed with the execution application, which apparently has already been filed by the respondents-claimants. If the amount of compensation has been deposited or in the event of deposit within the period allowed or after realisation in execution case, it shall be disbursed in terms of the award.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD: 21.12.1998

1998

December, 21

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE M.C.AGARWAL, J.

CIVIL MISC. WRIT PETITION NO. 41002 OF 1998

S.K.Garg, Advocate ... Petitioner

Versus

The State of U.P. through its Secretary & others.. Respondents.

Counsel for the Petitioner : Shri S.K.Garg
Counsel for the Respondents : S.C.

Constitution of India, Article 21 reeadwith Article 47-Right to life-includes right to health – Government hospital can not denoy any person to provide medical assistance on the ground of poverty.

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Vs.
State of U.P. & others

M. Katju, J.
M.C.Agarwal,J.

Case law discussed.
1995(3) SCC. 42
1997 (2) SCC. 83

By the Court

This petition relates to the appalling conditions prevailing in the Government Hospitals in district Allahabad.

The petitioner is an Advocate practising in this Court and this petition has been filed as a Public Interest Litigation. He has referred to the conditions prevailing in Swaroop Rani Hospital, Allahabad. Dufferin Hospital, Allahabad, Colvin Hospital; T.B. Hospital (Beli Hospital) etc. which he claims to have visited.

In paragraph 7 and 8 of the petition it has been alleged that needy and poor patients have been refused necessary medicines and proper medical treatment. In paragraph 9 of the petition it is alleged that the operation theatres are in unhygienic conditions. In paragraph 12 of the petition it is alleged that pitiable conditions are prevailing in these hospitals particularly for T.B. patients, maternity cases, and patients with other diseases. In paragraph 13 of the petition it is alleged that the Swaroop Rani Hospital which is affiliated to the Moti Lal Nehru Medical College is in worse condition than other Government Hospitals. In paragraph 14 it is alleged that in Swaroop Rani Hospital there is shortage of day today medicines and blood in the blood bank, and there is an unsatisfactory x-ray department because of which emergency cases cannot be properly attended to. It is alleged that there is a lot of garbage and filth in these hospitals. In paragraph 16 of the petition it is alleged that the toilets are dirty and in the wards there is an unhealthy and unhygienic atmosphere. In paragraph 17 it is alleged that the road conditions near the Hospitals and inside them are very bad and there is storage of dirty water with mosquitoes, etc. it is also alleged that electric supply is not properly maintained for these hospitals.

The petitioner has referred to Article 47 of the Constitution which provides that it is a duty of the State of raise the level of nutrition and the standard of living of the people and to improve public health.

1998

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& others

M. Katju, J.
M.C.Agarwal,J.

In our opinion the allegations in the petition are serious. The Supreme Court in Consumer Education & Research Centre and others V. Union of India and others 1995(3) SCC 42 and in State of Punjab and others V. Mohinder Sfingh Chawla and others 1997(2) SCC 83 held that the right to health is a part of the right to life guaranteed by Article 21 of the Constitution. It is indeed true that most of the Government Hospitals in Allahabad are in a very bad shape and need drastic improvement so that the Public is given proper medical treatment. Anyone who goes to the Government Hospitals in Allahabad will find distressing sanitary and hygienic conditions. The poor people, particularly, are not properly looked after and not given proper medical treatment. Consequently most people who can afford it go to private nursing homes or private clinics. There are many complaints that the staff of the Government Hospitals are often in collusion with the Doctors who run private nursing homes, and deliberately do not look after the patients who come to Government Hospitals so that they may be driven to go to private nursing homes,and they often advise patients to go to a particular nursing home. All this needs to be thoroughly investigated. This is a welfare State, and the people have a right to get proper medical treatment. In this connection it may be mentioned that in U.S.A. and Canada there is a law that no hospital can refuse medical treatment of a person on the ground of his poverty or inability to pay. In our opinion Article 21 of the Constitution, as interpreted in a series of judgments of the Supreme Court, has the same legal effect.

On the facts and circumstances of the case we direct that a Committee be set up immediately for investigating the affairs of the government Hospitals at Allahabad. The Chairman of the Committee will be Sri Vibhav Bhushan Upadhya, Sr. Advocate of this Court and former Advocate General of U.P. and the members of the Committee will be the Addl. Director, Medical Health, Allahabad, the Chief Medical officer, Allahabad, the District Chairman of the Committee. This will make a thorough investigation into these affairs of the Government Hospitals at Allahabad and submit a detailed report by the next date fixed in this case.

List on 11.4.99.

Copy of this order will be given to Sri V.B.Upadhya learned counsel and to learned counsel for the petitioner free of cost. The petitioner will give a photocopy of this order to the Addl. Director, Medical Health, Allahabad, C.M.O. Allahabad and D.M.,Allahabad

who will file their personal counter affidavits by thedate fixed in this case. Learned Standing Counsel will also inform these officers that they have to file their personal counter affidavits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD : 16.12.1998.

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.L. SARAF, J.

1998

December, 16

CIVIL MISC. WRIT PETITION NO. 12586 OF 1992.

Son. Ldr. H.S. Kulshrestha ... Petitioner
Versus
Union of India through Secretary ... Respondents

Counsel for the petitioner : In person
Counsel for the respondents :.S.C.

Constitution of India – Article 226- Article 14-facility of free Railway Pass to Ex . M.Ps. –held, ex-M.Ps. are not a privileged. Group – hence free Pass facility declared illegal.

By the Court

This is public interest litigation filed by a former Air Force Officer in which he has prayed for a mandamus to the respondents not to issue free rail passes to Ex. Member of Parliament. It has been alleged in this petition that the respondent is giving free railway passes to former Members of Parliament. In our Opinion this is wholly illegal and in violation of Article 14 of the Constitution . In a poor country like ours such passes cannot be given in this manner. Former M. Ps. are not a privileged group.

Shri Govind Saran , learned counsel for the railway submitted that the ex. M. Ps. have not been impleaded in this petition . In our opinion this is a policy matter and hence there is no need to implead the ex. M.Ps. He has then alleged that the petitioner is not an aggrieved person . In our opinion this is a public interest litigation and can be filed by anyone. In fact we appreciate the good

spirit of the petitioner who as responsible citizen of the Republic is fully entitled to file this petition.

Hence the rail passes issued by the railways in favour of ex.-M.Ps. are declared illegal and are hereby cancelled from today and the authorities are directed not to issue any free passes to any Ex. Member of Parliament in future. The petition is allowed.

APPELATE JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD AUGUST 18, 1999

1999

August, 18

BEFORE
THE HON'BLE VIRENDRA SARAN, J.
THE HON'BLE M.C. JAIN, J.

CRIMINAL APPEAL NO . 2281 OF 1984

Jai Veer Singh ... **Appellant (In Jail)**

Versus

State of U.P. ... **Opposite party**

Counsel for the Appellant : Shri A.B.L. Gaur
Shri Samit Gopal
Counsel for the Opposite party : A.G.A.

7. Section 374 of Cr. P.C.- the uncorroborated testimony of child witnesses suffers from inherent improbabilities and weaknesses. The possibility cannot be ruled out that the two child witnesses delivered tutored evidence. The accused appellant could not be convicted on their such testimony-Appeal Allowed.

By the Court

The appellant Jai veer Singh was convicted by Sri Umeshwar Pandey . the then IV Additional Sessions judge, Ghaziabad under Section 302 I.P.C. by judgement and order dated 21.8.1984 passed in S.T. No. 298 of 1983. He was sentenced to life imprisonment. Aggrieved, he has preferred this appeal.

The incident took place in between the night of 16th and 17th July, 1983 sometime after about midnight in village Nangla

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Virendra Saran,J.
M.C. Jain, J.

Moosa, P.S. Modinagar, District- Ghaziabad. The victim of the felony was Smt. Gajendra wife of Kamal Singh, P.W.4 resident of the same village. The prosecution case as per the F.I.R. and the evidence was that in between the fateful night Smt. Gajendra alone with her three children was sleeping in her courtyard .Her husband Kamal Singh P.W.4 had gone to village Rajpura to see his ailing brother-in-law . On one cot Smt. Gajendra was sleeping with her youngest child whereas her daughter Km. Yashoda, P.W.1. and son Umang alias Billu . P.W.2 were sleeping on two different cots nearby, After about midnight Km.Yashoda , P.W.1 heard the voice of her mother and awoke .She saw the accused Jai Veer Singh assaulting her mother with some weapon which she could not recognise. Her brother umang alias Billu , P.W.2also awoke at the same time and saw the occurrence.On alarm being raised by them their uncle Rajveer Singh P.W.5. and grandmother arrived at the spot. On receiving the blows of assault the victim could not get up from the cot and became unconscious. She was taken to Modinagar on a cart belonging to Ved Pal to the residence of her husband's elder brother Harpal Singh, P.W.3.Km. Yashoda, P.W.1 along with her uncle Harpal Singh. P.W.3.then went to the Police Station Modinagar . She dictated the F.I.R. to her uncle Harpal and signed the same . On the basis of the F.I.R. Ex. Ka-1,a case under Section 308 I.P.C. was registered at the Police Station on 17.7.1983 at 2 A.M. the victim had also been taken to the Police Station. She was to Govindpuri primary Health Centre for medical examination. Her condition being serious she was referred from Primary Health Centre Govindpuri to District Hospital, Ghaziabad. ON being taken to M.M.G. Hospital, Ghaziabad her injuries were examined by Dr. M.L. Parekh at 3.20 A.M. who found as many as four incised wounds and three lacerated wounds on her person. All the Injuries were fresh. Soon thereafter she died. The case was converted from Section 308 to Section 304 I.P.C.

On information being sent from the hospital to the Police Station Kotwali Ghaziabad, S.I. Mani Raj Singh, P.W.9. was sent to the hospital to prepare inquest report and other relevant papers. After doing the needful he handed over the dead body to constable anant Ram, P.W.7 and Rajendra Singh to carry it for post – mortem. The post-mortem was conducted by Dr. S.K. Bhagwat, P.W.6 on 17.7.1983 at 4.30 P.M. He found the following ante-mortem injuries on her person:-

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1. Incised wound with tapering end and skin deep at lower end 7cm. X I cm (middle) bone deep in the centre over left temporal region extending from eye brow to ear.
2. Incised wound 8. Cm. X 2cm.x bone deep entry left mendibular bone & lower jaw, Bone and teeth coming out from the wound on the upper cheek extending from below lower lip.
3. Incised wound 12cmx 2cm x muscle deep from right half of chin to the lateral side of neck just below injury no.2.
4. Incised wound 11 cm x 3 cm x muscle deep just below injury no. 3 cutting neck muscle. Larynx and left regular vein on neck vein.
5. Stab wound 3 cm.x 1cm x oval at one end x 2 cm deep over left part deltoid muscle .
6. Lacerated wound 9 cmx 3cm x skin deep on upper and left arm .
7. Lacerated wound 15 cm.x 4cm.x muscle deep over 2/3 part of left arm . Extending from elbow joint.

The deceased was aged about 35 years and about ½ day had passed since she died. The death had occurred due to shock and haemorrhage caused by ante-mortem injuries. The case was further converted from Section 304 to 302 I.P.C. . The investigation followed as usual where after a charge-sheet was submitted against the accused- appellant under Section 302 I.P.C. .After committal he was tried for the offence punishable under Section 302 I.P.C. At the trial the prosecution examined ten witnesses , out of whom Km. Yashoda, P.W. 1 and Umang alias Billu, P.W.2 were the eye witnesses of the occurrence. Rajveer Singh, P.W.5 was examined as the person who had seen the accused –appellant running from the spot. Harpal Singh, P.W..3. is the elder brother of the husband of the deceased who had scribed the F.I.R. Kamal Singh, P.W.4 is the husband of the deceased. DrS.K. Bhagwat, P.W.6. had conducted the post-mortem over the dead body of the deceased. S.I Amar Singh P.W.10 was the Investigating Officer and rest were examined as formal witnesses . No. witness was examined by the accused – appellant in defence.

Learned Additional Sessions judge , believed the testimony of two child witness namely, Km. Yashoda P.W.1. AND Umang alias Billu, P.W.2. He, however, discarded the testimony of rajveer Singh , P.W.5. and in our opinion rightly, for the reason that he was examined by the Investigating Officer after sufficient delay

on 5.8.1983 and his name was also not there in the F.I.R. It may also be recalled that he was not an eyewitness of the actual occurrence. Any way, placing reliance on the testimony of two child witnesses the learned Additional Sessions Judge found the guilt of the accused-appellant to be proved. He, accordingly, convicted and sentenced him as stated in the opening paragraph of the judgement.

The accused –appellant pleaded not guilty and his case as per his statement under section 313 Cr.P.C. was that the husband of the deceased was the manager of Yuvak Mangal Dal of the village and he had committed misappropriation of some money belonging to the village school which was objected to by him and for this reason he came to be falsely implicated.

We have heard Sri Samit Gopal learned counsel for the appellant and learned A.G.A from the side of the State. We have also carefully gone through the evidence on record. We are of the opinion that the prosecution case suffers from inherent weaknesses and element of doubt persists as to the guilt of the accused – appellant. We intend to state the reason for our this conviction in the succeeding discussion.

In the first instance, it is worthy of notice that there could hardly be any motive on the part of accused –appellant to commit the murder of the lady in question. He had no enmity with her whatsoever. There was no previous background either involving the two in any manner. No doubt Kamal Singh , P.W.4.-husband of the lady and the accused-appellant have come up with the case of enmity between them. The reason assigned by the accused- appellant in his statement under Section 313 Cr.P.C. was that kamal Singh, P.W.4 had misappropriated certain funds of the village school and he had objected to it . According to him, it was the reason of Kamal Singh, P.W.4. harbouring grudge against him. On the other hand, the cause of enmity spoken by Kamal Singh, P.W.4. is that he was the Manager of the school, that Sher Mohd. And Sakhawat had fought election for the office of Pradhan, that he had backed Sher Mohammad whereas the accused was on the side of Shekhawat and both of them were fast friends,that kharanja had been laid in his village but the front of his house had been left out and the slope of the drain had also been diverted towards his house for which he had exchanged hot words with Pradhan and the accused Jai Veer Singh, that Jai Veer Singh had held out threats to him.

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There is nothing to indicate that any litigation had taken place between Kamal Singh, P.W.4. and the accused-appellant on any score. Nor is there anything to show that Kamal Singh , P.W.4. had been prosecuted for some misappropriation of the funds of the village school. What we wish to emphasise is that the enmity, if any, between Kamal Singh P.W.4. and accused –appellant was not of such nature which could have actuated the appellant Jai Veer Singh to commit the murder of the wife of Kamal Singh. What had been spoken about by Kamal Singh, P.W.4. and the accused-appellant in his statement under Section 313 Cr.P.C, could at the best be termed as minor skirmishes as are usually there in village life. So, the point of the matter is that there was no apparent motive on the part of the accused-appellant to indulge in this crime.

Secondly the whole case is based on the testimony of two child witnesses, namely , Km. Yashoda P.W.1. and Umang alias Billu, P.W.2. who are children of the deceased. The evidence of Km.Yashoda, P.W.1.was recorded on 16.2.1984 when she gave her age as 13 years .The evidence of Umang alias Billu, P.W.2 was also recorded on 16.2.1984 and his age at that time was about 9-10 years. It is a fact that there is no corroboration of their testimonial assertions by independent sources. So far as the value, which can be attached to the testimony of child witness is concerned, no fixed rule can be prescribed. At times, evidence of children is notoriously dangerous unless immediately available and unless received before any possibility of coaching is eliminated. Children have good memories and no conscience. They are easily taught stories and live in the world of make –believe., so that they are often convinced that they have really seen the imaginary incident which they have been taught to relate . As corroboration of the evidence of Km. Yashoda P.W.1. and Umang alias Billu, P.W.2 by independent sources is not available , we have to test their reliability keeping in view the attending circumstances including the medical evidence.

On application of this process we discover basic improbabilities in the evidence of these two child witnesses. It has to be pointed out that both of them claim to have seen the occurrence in the light of a lantern. The incident took place after about midnight .Both the witnesses have stated that they could not make out as to by what weapon the accused had assaulted their mother. It does not stand to logic that at about midnight or thereafter, which was the time of sound-sleep, the lantern would have been glowing brightly . rather its flame would have ordinarily been dimmed to facilitate conformable sleep. Even if it is taken for a moment that the lantern

was glowing brightly at the time of the incident after about midnight, then there could hardly be any reason for these two child witnesses not being able to see as to with what weapon she had been assaulted by the accused. It renders the testimony of both these child witnesses doubtful.

Another sterling reason casting cloud on the testimony of the two child witnesses is that in the F.I.R. lodged by Km. Yashoda, P.W.1 which is the earliest prosecution version, it is stated that when she awoke, she saw that the accused struck some weapon on the face of her mother. It is indicative of the fact that only one blow had been struck by the accused-appellant on the victim . On medical examination and subsequent post-mortem, as many as seven injuries were found on the person of the deceased out of which five were of sharp edged weapon and two of blunt weapon. The justifiable inference is that several blows had been struck on the victim and probably two weapons had been used to assault her, one sharp edged and the other blunt.

Yet another reason is that though the F.I.R. is shown to have been lodged at the Police Station on 17.7.1983 at. 2.A.M. and the victim was sent to Primary Health Centre Govindpuri for medical examination immediately thereafter but the crime number is not found mentioned in the Chitthi Majrubi on the back of which the medical examination report is recorded. Head constable Sahi Ram Sharma, P.W.8. could not assign any reason in this behalf. It gives the impression as if the F.I.R. was not ready by that time Kamal Singh P.W.4.- husband of the victim had received the information of the incident in village Rajpura the following day wherefrom he came to Ghaziabad and then reached Mohan Nagar. The possibility cannot be ruled out that the F.I.R. was ante-timed and was actually lodged the next day after Kamal Singh, P.W.4. returned from rajpura. This suspicion gets strengthened in the light of the mention made by Km. Yashoda, P.W.1. in the F.I.R. that the accused was inimical towards her father. Ordinarily a child of about 12-13 year of age. As Km. Yashoda P.W.1. was could hardly be aware about the enmity between her father and the accused and in any case , she could hardly be expected to mention this fact in the F.I.R. It may be stated at the risk of repetition that no litigation, civil that no litigation , civil or criminal , had taken place between her father and the accused earlier to the incident. Nor has there been any noticeable incident of physical assault etc. between the two.

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For the reasons discussed above, we come to the conclusion that the uncorroborated testimony of child witnesses namely Km. Yashoda P.W. 1 and Umang alias Billu, P.W. 2 suffers from inherent improbabilities and weaknesses. The possibility cannot be ruled out that the two child witnesses delivered tutored evidence. The accused-appellant could not be convicted on their such testimony,It is wholly doubtful that the accused –appellant was the assailant of the deceased victim.

In the result and for the reasons discussed hereinabove, we allow this appeal and set aside the conviction under Section 302 I.P.C. and sentence of life imprisonment passed against the accused appellant by the learned Additional Sessions Judge . The accused-appellant is on bail. He need not surrender. His personal bond and bail bonds are hereby cancelled and sureties discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD : 24.8.1999.

1999

August, 24

BEFORE
HON'BLE A.K. YOG, J.

CIVIL MISC. WRIT PETITON NO. 36092 OF 1999.

Committee of Management of Misri lal Inter College Mawanyan, Mirzapur ... Petitioner.
Vs
Joint Director of Education ,Bindhyachal Mandal, District Mirzapur & others ... Respondents

Counsel for the Petitioner : S.K. Chaubey
Counsel for the Respondent :S.C.

Section 16-A (7) of U.P Intermediate Education act- the provisions of section 16-A (7) has been misused both by the private litigant as well as by educational authorities- the concerned authority did not decide the matter of dispute expeditiously –failed to achieve the object for which legislature incorporated section 16-A (7) of the Act- the authority must lend explanation for not complying with the direction of the Hon'ble High Court – the District Magistrate was directed to take over the charge of the management of the institution and to convene a meeting of the general body in order to get the election held in accordance with the scheme of administration.

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C/M, M.L. Inter College, Mirzapur
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J.D.E., Mirzapur

A.K. Yog, J.

By the Court

Through this petition, committee of Management said to be represented by one Raj dhar Dubey, Petitioner alleges that there is an institution called Misri lal Inter college. Mawanyan, Mirzapur, which is being governed by the provisions of U.P. Intermediate Education Act, regulation framed thereunder, (for short called the Act) and duly approved scheme of Administration. Copy of Scheme of Administration has been filed as Annexure no. 1 to the petition.

Petitioner alleged that an election for constituting Committee of Management of the institution took place on 25.8.1996 but Respondent no. 3, (one Ram singh) raised dispute and matter was referred to the Deputy Director of Education as contemplated under Section 16(A) 7 of the Act. It is further stated that some dates were fixed by the said authority but matter was not decided.

Ultimately petitioner filed a representation before concerned authority to decide representation. The concerned authority pointed out that Respondent no. 3 through out absented and did not appear on any fixed date in spite of notice. And in that view, petitioner requested the authority should decide the matter on merit without waiting for his appearance.

It is alleged in the petition that petitioner was forced to file writ petition no. 21773 of 1999 and learned Single Judge of this Court vide judgement and order dated 25.5.1999 directed the concerned authority (respondent no. 1) to decide the matter within six months from the date of production of a certified copy of this order (Annexure 6 to the petition).

Respondent No.1 has decided the dispute under Section 16 (A)7 of the Act vide order dated August 10,1999.

At the out set I would like to mention that authority has not tendered explanation whatsoever for not passing order within time granted by this Court vide judgement and order dated 25.5.1999. there is nothing on record for perusal of this Court at this stage as to why the authority did not comply with the order of this High Court . It is expected that an authority while deciding the matter shall also tender explanation for consideration of the court or of higher authority showing a justifiable cause for not complying with the direction of the High Court . This is the least that an authority is

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expected to do. As otherwise , 'concerned authority ' should approach High Court for seeking extension of time by giving facts justifying extension of time.

With out going into the merit of the case, Iam of the opinion that the concerned authority did not decide the matter of dispute expeditiously and completely failed to achieve the object for which legislature incorporated Section 16A (7) of the Act. Even if parties succeed after expiry of term under law, the college suffers in silence .The dispute remains at an its own place. Existence of dispute pertaining to the management of educational institution, precipitating continuous flow of writ petitions compels this Court to take judicial notice of the same. ProvisionOf Section 16 A(7) has been misused both by the private litigant as well as educational authorities.It is high time, State Government should give a serious thought. As otherwise the pitiable condition of education in the State is bound to be reduced to a brazen dismal.

Coming to the present case, I find that authorities failed to decide the dispute and by inaction has rendered itself unfit by passively abusing its official position.

In the totality of the circumstances, I direct the petitioner and learned Standing Counsel to submit a certified copy of this judgement before District Magistrate, who shall immediately take over charge of the Management of the institution himself or through an official appointed by him, who shall immediately convene a meeting of the General Body, which shall elect itself an adhoc Committee not exceeding three members and District Magistrate shall command the said Committee to get the election held in accordance with the Scheme of Administration as expeditiously as possible but in no case exceeding three months from the date of receipt of certified copy of this judgment. Entire proceedings shall be subject to supervision and control of the District Magistrate. List of life membership shall be finalised in general body meeting-convened after due notice under law and also after its being published in Daily News papers having wide circulation in the locality.

No party shall be allowed to raise objection before elections are held, and charge is taken over by new Committee of Management. If any party has any grievance, he may file an application in this Court .

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLHABAD AUGUST 19, 1999

1999

August, 19

BEFORE
THE HON'BLE R.R.K. TRIVEDI, J.
THE HON'BLE M.C. JAIN, J.

CRIMINAL APPEAL NO. 421 OF 1982

Raja Ram & another ... Appellants

Versus

State of U.P ... Respondent

Counsel for the Appellants : Shri R.N. Rai
Shri Shashank Shekhar
Shri A.D. Giri
Counsel for the Opposite party: Dy. G.A.
Sri P.N. Misra

Section 374 of Cr. P.C. – the circumstances do not form a continuous chain excluding every possibility excepting the hypothesis that it were the appellants or any of them who committe the murder- there are several dark spots which shake the prosecution story- Appeal Allowed.

By the Court

The two appellants Raja Ram and Ram Jas have preferred this appeal against the judgment and order dated 12.2.1982 passed by Sri D.S. Ram the then IIIrd Addl. Sessions Judge, Ghazipur in Sessions Trial No. 352 of 1980 whereby each of them has been convicted under Section 302 I.P.C. read with Section 34 I.P.C. and sentenced to life imprisonment.

One Parvez Khan son of Shahzada Khan, aged about 19 years was murdered in this incident which took place on 27th November, 1978 at about 6.45 P.M. at the house of the complainant Abul Hasan, P.S. Gahmar, District Ghazipur. The deceased was the son of the elder brother of the complainant and had come to the village from Calcutta about 2 or 2-1/2 months before the incident, as he was to go to Aligarh for further education. Due to riots in Aligarh he was staying in the village. He was about to leave for Aligarh next day of the incident. The F.I.R. was lodged by Abul Hasan, P.W. 1 at the

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R.R.K. Trivedi,J.
M.C.Jain, J.

concerned Police Station on 27.11.1978 at 8.30 P.M. The complainant Abul Hasan P.W. 1 had gone to ease himself in the jungle after leaving the victim Parvez in the Baithaka of his house. The victim was studying in the said Baithaka in the light of a lantern and was sitting on a Gadda placed on the Pual (Paddy Straw). The glowing lantern had been kept in the window of the Baithaka. The complainant's servant Suraj Nath had also left the Baithaka to go to his house to take his food. After a while, the victim's grandmother Asharfi Bibi called the victim to take food. Her call went unanswered. She came out of the main door of the residential house and saw a man wearing Lungi coming out of the Baithaka. As her eyesight was weak, she could not recognise him. She enquired as to who he was but did not get any reply. Thereafter she went inside the Baithaka and found the victim Parvez lying murdered. She wailed and wept. A number of villagers assembled. The complainant Abul Hasan also returned after easing himself and went to lodge the F.I.R. The police investigated. Inquest report and related papers were prepared and the dead body was sent for post-mortem which was conducted on 29.11.1978 at 7 P.M. by Dr. S.C. Mishra, P.W. 8. The follwering ante-mortem injuries were found on his person:

(1) Incised wound 20 cm x 9 cm on right side of neck 5 cm.below, the lower pose of right ear, start from back of neck 8 cm below the occipital tuberance passes in front of neck to left side of neck upto 10 cm below the lower pose of left ear.

(i) Neck vessels or right side-cut.
(ii) Thyroid cartilege-cut
(iii) Pharynx- cut
(iv) Larynx –cut

(2) Incised wound 3 cm x 1 cm x cavity deep on right side of chest 8 cm below from the right nipple.
(3) Incised wound 5 cm x1cm x skin deep on left side of neck. Just below the lower pale of left ear.
(4) Incised wound 2 cm x 5 cm x skin deep on left side of neck 3 cm below injury no. 3
(5) Incised wound 1.4 cm x 5 cm x skin deep on left side of shoulder (Ant.aspect.)
(6) Incised wound 2x 1 cm x skin deep on right arm (Ant. Aspect) 20 cm below the shoulder joint.

(7) Incised would would 4 cm x 5 cm x skin deep on right forearm ant.asepct 12 cm. Below the injury no. 6

Pasteable food was found in the stomach. The death had occurred due to shock and haemorrhage due to ante-mortem injuries no. 1 and 2.

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The accused-appellants figured during the course of investigation on the basis of circumstantial evidence and they came to be booked by the police. They pleaded false implication.

At the trial, the prosecution examined eleven witnesses out of whom Abul Hasan, P.W.1 was the complainant. Suraj Nath, P.W.2 (servant of the complainant), Irshad, P.W.3. and Sohrab Khan P.W.6 were examined as the witnesses of the circumstance indicating the complicity of the present appellants. Asharfi Bibi, P.W.5 is the grand-mother of the deceased who had first of all seen the dead body of the deceased in the Baithaka where she had gone to call him for food. Saghir Ahmad, P.W. 4 was examined as witness of extra judicial concession allegedly made by the accused appellants to him. S.I.Ram Janam Singh, P.W. 7 and S.I. jamuna Prasad Pandey, P.W. 11 were the Investigating Officers of the case. Dr. S.C. Mishra, P.W.8 had conducted the post-mortem over the dead body of the deceased. The rest were formal witnesses. The accused appellants did not tender any evidence in defence. We have heard Sri A.D. Giri, learned counsel for the appellants and learned A.G.A. assisted by Sri Apul Mishra learned counsel for the complainant.

Learned counsel for the appellants had argued that the case is of circumstantial nature. The accused-appellants are neither named in the F.I.R. nor is there any eye witness account about the commission of the murder by them. It has been urged that it is an extablished legal position that in a case of circumstantial nature, the circumstances should be of conclusive nature and tendency so as to exclude every hypothesis excepting the guilt of the accused. It has been submitted in the first instance that the motive assigned by the prosecution against the appellants for the commission of this crime is wholly infirm. The other argument from the side of the appellants is that the incident took place sometime late in the night and the F.I.R. was ante-timed. This submission is sought to be supported by the post-mortem report also. Another argument of learned counsel for the appellants is that the circumstances relied upon by the prosecution in support of its case do not form a continuous chain to

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exclude every possibility excepting that of the guilt of the accused-appellants.

We propose to examine the worth of the arguments advanced by the learned counsel for the appellants having regard to the evidence on record and the counter contention of the learned A.G.A. that the guilt of the appellants stood fully proved.

True it is that no reason or motive has been mentioned in the F.I.R. for the murder of the victim. There is not even a whisper of suspicion against the accused appellants. The motive has come to be indicated against the appellants in the evidene that the deceased had friendship with the accused Raja Ram who had a young wife and had not given birth to any child after several years of marriage. The victim had covetous eye on her and was attempting libidinous advances towards her which had come to the notice of the accused Raja Ram. He and the other accused Ram Jas were also friends and they joined hands and murdered the victim.

The testimony of Suraj Nath, PW2 (servant of the informant Abul Hasan, P.W.1) and Sohrab Khan P.W. 6 is that earlier to the present incident, there had been a quarrel between the deceased on the one hand and Raja Ram and Ram Jas on the other as the cycle of the former had collided with that of the latter. In this connection the deceased and these two witnesses had gone to complain to Bhimal-father of Raja Ram. The collision had not taken place in the presence of these two witnesses but the deceased had informed them. There evidence is to this effect that at that time when Raja Ram's father had rebuked him (Raja Ram), Raja Ram had held out that there was a mystery which he and the deceased Parvez knew and that he would settle the scores with him. However, it is significant to note that Sohrab Khan, P.W.6 had accompained Abul Hasan, P.W. 1 to the Police Station at the time of the lodging of the F.I.R. but it goes unexplained as to why there was no mention of any such threat in the F.I.R. Nor did Sohrab Khan, P.W. 6 say anything in this regard in his statement under Section 161 Cr. C.P. to the investigation Officer.

So far as the alleged attempt of the deceased Parvez to develop nearness or illicit relation with Raja Ram's wife is concerned, it also does not stand to logic. Parvez was not to stay in the village. Rather he was to go to Aligarh for further studies the very next day. Moreover, the version of Suraj Nath, P.W. 2 is that the deceased used to visit the Baithaka of Raja Ram and this witness also used to

be occasionally present there. In the presence of Raja Ram also Parvez used to cut some jokes with his wife by asking Raja Ram to call his wife as he wanted to see his sister-in-law (Bhabhi-Raja Ram's wife). If such was the standard of relations between Raja Ram and Parvez deceased, it is not believable that Raja Ram would have thought of murdering Parvez. It has also come in the testimony of Suraj Nath, P.W. 2 that Nurul's house was under construction in front of the house of Raja Ram and Parvez used to visit that spot as well as the Baithaka of Raja Ram whenever he was free. 14-15 days back, Parvez was in the Baithaka of Raja Ram when Raja Ram's wife threw a clod of earth from the window over Parvez. Parvez stood up and started looking up towards the window on the side of the courtyard wherefrom the clod of earth had been thrown. Raja Ram appeared there and asked Parvez as to what was he seeing. Parvez replied that he was seeing his sister-in-law (Bhabhi) and Raja Ram then put his hand on the neck of Parvez and pushed him aside. This incident is also indicative of the fact that Parvez was on terms of cuting jokes with the wife of Raja Ram and still they were on visiting terms. Nothing had happened to render their relations strained to the extent that Raja Ram with the help of another friend Ram Jas could think of cutting short the life of Parvez. So , we are of the considered opinion that the motive developed by the prosecution against the appellants at the stage of evidence is tenuous, very weak and wholly insufficient.

On scrutiny of the evidence on record we also find substantial force in this contention of learned counsel for the appellants that greater possibility is that the incident took place late in the night and that the F.I.R. was ante-timed. The case of the prosecution is that Asharfi Bibi P.W. 5 (grandmother of the deceased Parvez) had called him to take his dinner but her call had not be responded to by him. That means to say, the deceased had not taken his dinner by the time the incident occurred. However, as per the post-mortem report pasteable food was found present in the stomach of the deceased. Such could be the position of the stomach after about two hours of taking food by the deceased. It can justitiably be inferred from the stomach contents of the deceased that the incident did not take place at about 6.45 P.M. Rather it took place late in the night after the deceased had taken his meals. There is another important reason which deserves notice. The house of the informant is just adjacent to the Baithaka in which the incident is said to have taken place. The victim was allegedly studying in the light of a lantern at the time the incident took place. The post-mortem report shows that as many as

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seven incised wounds had been inflicted on him. Having regard to the nearness of the house of the informant to that of the Baithaka of the Darkhol in which the incident took place, shrieks or cries of the victim must have necessarily been heard by his grandmother or other inmates inside the house. But nothing of the kind happened. We also note that the deceased did not receive any injury on her palms. Had he been attacked at the time when he was reading in the light of the lantern, as a natural instinct he would have raised his hands to save himself and would have received some injuries there. It appears as if there was no resistance. It leads to the justifiable inference that actually he had been assaulted and killed late in night when he was asleep.

There is yet another ground which is suggestive of the incident having taken place late in night. Suraj Nath, P.W.2 stated that on the day of the incident Abul Hasan, P.W.1 informant had gone to village Udai and had returned in the night at 10 P.M. if it were so, it spills beyond comprehension as to how could the incident take place at about 6.45 P.M. and as to how could the report be lodged at 8.30 P.M. in the night. It appears that the incident took place late in night and the F.I.R. could not be lodged at 8.30 P.M. when Abul Hasan, P.W. 1 was not even available for lodging the same after going to the Police Station. We are, therefore, inclined to hold that prosecution case received a serious setback when the medical and ocular evidence is judged in the right perspective in the light of above speaking circumstance.

Another circumstance relied upon by the prosecution is that Suraj Nath, P.W.2 had seen the appellants Raja Ram and Ram Jas going towards the western side when himself was going to the eastern side to his house to take food. He allegedly met them in the northern side of the house of Ram Janam. It cannot be a circumstance indicating of the guilt of the accused for two reasons. First he does not say that both or any of them had any arm. Second both of them were the residents of the same village with their houses nearby and there could be nothing unusual if they were so spotted by Suraj Nath, P.W. 2. The alleged circumstance does not advance the prosecution case any farther.

Yet another circumstance relied upon by the prosectuion is that the same night Irshad, P.W. 3 was going to Bara Kalan Halt Station to board Buxar Shuttle Train to reach Buxar for ultimately going to Assam. When he was passing by the pond known as

jagdewa Talab at about 7.30 P.M. He saw the present appellants washing blood from their hands and clothes. Admittedly, it was darkness at that time but he claims that he had flashed his torch. He had even asked them as to what they were doing and they had replied that they were washing the dirt. It is somewhat improbable that after committing the crime, the appellants would go to wash blood stains from their hands and clothes at a pond on a public way. It is also not acceptable that while passing by that way , this witness could ascertain from some distance that what the appellants were washing was blood. The statement of this witness was also recorded by the investigating officer after the lapse of about two months. His statement is that he returned to his village on 23.1.1979 and then learnt about the murder of Parvez. He then recollected the above incident of the alleged washing of blood by the appellants and went to the Daroga to make statement. All it appears to be a cock and bull story not worthy of belief.

Lastly comes the alleged extra judicial confession of the appellants to Saghir Ahmad, P.W. 4. What he says is that after about 16-17 days of this murder, at about 9.30 P.M. he was watching the paddy crop of his field when the two appellants came from the side of the station and stopped under a mahua tree. According to him, they were saying that the police might have come to the village and it would be better for them to go to the village after the villagers fell asleep. He also allegedly heard them saying that they had committed a blunder. According to him he had flashed his torch and had asked them as to what blunder they had committed, but they had not replied and had proceeded towards the village hurriedly. Even on accepting it as such, it cannot amount to an extra judicial confession. The witness has further stated that after about two months when the appellants were bailed out, they came to his pumping set and then he inquired from them as to what blunder they were talking about that night. Raja Ram and Ram Jas then allegedly made confession to him. The relevant portion of the statement of the witness is extracted below:

> "Tab Raja Ram Ne Kaha Ki Kisi ke izzat par koi haath dale to iske alawa aur kya ho sakata hai---------- hamne bar-bar parvez se kaha ki hamari aurat se talluk tor de lekin wah nahin mana. Is par mazboor hokar ham logon ne uska katla kar diya. Ram jas ne kaha ki uska katla na karte to aur kya karte. Apni bahan betiyon ko randi ka pesha karne ko kya chhor dete."

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The witness insists that thereafter he informed of this onfession to the villagers.

It is not possible to accept the statement of this witness that any such extra judicial confession was made to him by the appellants. It is pertinent to observe in this behalf that he did not make disclosure about the alleged extra judicial confession even to the Investigation Officer as admitted by him in his cross-examination. Moreover, natural human conduct is that one tries to conceal his guilt. It does not stand to reason that the appellants would go to this witness and would make a clean confession of their guilt to him particularly when there was no such compulsion for them. This witness was neither any authority nor could exert any moral pressure on the appellants and it is wholly illogical that the appellants at their own accord would have made any such extra judicial confession to this witness.

On testing the circumstantial evidence of the prosecution on the anvil of reliability, our conclusion is that the circumstances do not form a continuous chain excluding every possibility excepting the hypothesis that it were the appellants or any of them who committed the murder of Parvez. Only an attempt has been made by the prosecution to do the patchwork. There are several dark spots which shake the prosecution story. It is really unfortunate that the victim who was a young boy aged about 19 years, met a tragic death with the application of violence to him, but it is not at all established that assailants were the accused-appellants or any of them.

For the discussion made hereinabove, the conviction and sentence passed against the accused-appellants by the Court below cannot be sustained. We accordingly allow the appeal. The judgment and order dated 12.2.82 passed in S.T.No.352 of 1980 are hereby set aside. The appellants are on bail. They need not surrender. Their personal bonds and bail bonds are cancelled and sureties discharged.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED ALLHABAD 13.08.1999.

1999

August, 13

BEFORE
HON'BLE K.D. SHAHI, J.

CRIMINAL REVISION NO. 1456 OF 1982

Siraj Uddin ... Applicant (In jail)

Versus

State of U.P ... Opposite party.

Counsel for the Applicant : Sri D.N. Wali
Counsel for the Respondent : A.G.A.

S. 397/401 of Cr. P.C.- Revisionist was sentenced to undergo six months R.I. & to pay a fine of Rs. 1000/- -the revisionists has suffered the agony of protracted prosecution and harassment for a long period of 19 years and in this peculier circumstances of the case the sentence is reduced for the period already undergone.

By the Court

This revision has been filed by revisionist/applicant, Siraj Uddin against the judgement and order dated 29.07.1982 passed by Sri G.S.N. Tripathi, the then 1st Addl. District and sessions judge, Bijnor in Criminal Appeal No. 134 of 1982, whereby the learned Sessions Judge dismissed the appeal and confirmed the conviction of the revisionist under Section 7/16 of Prevention of Food Adulteration Act and sentenced him to undergo six months R.I. and to pay a fine of Rs. 1000/- (repees one thousand) and in default of payment of fine, further three months' R.I. in case No. 440 of 1982 (State versus Sirajuddin) under Section 7/16 of Prevention of Food Adulteration Act, police station Dhampur, District Bijnor.

It is alleged that on 12.01.1981 at 8.15 a.m., revisionist Siraj Uddin was selling mixed milk near Seohara Road, Chauraha within the limits of Nagar Palika Kshetra. A sample was taken from him by the Food Inspector, namely, G.D. Kandpal (:P.W.I.) and the same was sent for chemical examination, after examination it was found adulterated.

The revisionist was charged on 22.11.1981 and after recording the statements of G.D. Kandpal. Food Inspector (P.W.I.) and Kallan

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his Asstt. Jamadar (P.W.2) an independent witness and also of the accused Siraj Uddin, the learned Magistrate found the charge proved against the accused. The learned Session Judge confirmed the conviction and sentence passed by the learned Magistrate against which order the present revision has been preferred.

I have heard Sri D.N. Wali learned counsel appearing for the revisionist and the learned A.G.A. Sri Wali did not challenge the conviction of the revisionist on merits. He only argued that looking the facts and the circumstances of the case, a lenient view may be taken in the matter and the revisionist may be released on probation of good conduct or any other minimum sentence, which may be passed against the revisionist.

I have considered this aspect of the case. The case started in early 1981 and it is 1991, the age of the revisionist was 50 years on the date of the alleged offence and now he is about 69 years and it was argued that in this old age when the revisionist has already suffered agony of protracted litigation, he can not sustain the pains of imprisonment. It was further argued that the revisionist has remained in custody for about two days at the time of trial, for about seven days after dismissal of the appeal and when the revision was fixed for hearing , the revisionist could not appear. Due to non appearance of the revisionist, a non bailable warrant was issued against him and he was taken into custody on 24.09.1997 and thereafter he was released on 27.10.1997, hence he has already remained in custody for about 42 days. Learned counsel appearing for the revisionist referred a judgment of this Court passed in Criminal Revision no. 1466 of 1983 by Hon'ble R.K. Singh J. on 19.03.1996 reported in 1996 JIC page 676 in the case of Bhageloo versus State of U.P. and another. In this case it has been decided by this court that twenty years have passed and the revisionist has now grown too old to face the rigour of jail custody. In this case, the revisionist has remained in custody for about two weeks. The revisionist had to be burdened with heavy family burden and if remanded jail, it will result in starvation of the dependants. Looking these facts, this Court reduced the sentence awarded to the revisionist under Section 7/16 of Prevention of Food Adulteration Act for the period already undergone.

Learned counsel for the revisionist referred another ruling of Punjab and Haryana High Court reported in 1996 Crl. L.J. page 2720- Des Raj Versus State of

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Haryana. It was also a ruling under Section 7/16 of Prevention of Food Adulteration Act, in which the accused was 26 years of age who was not a previous convit. He had faced agony of prosecution and sufferd mental harassment for a period of eight years, the sentence was reduced for the period already undergone. In this ruling, a ruling of the apex court in the case of Brahma Dass Versus State of Himanchal Pradesh reported in 1981 (2) FAC 13 was referred, in which it was held:

"Coming to the question of sentence, we find that the appellant had been acquitted by the trial Court and High Court while reversing the judgment of acquittal made by the appellate Judge has not made clear reference to clause (f). The occurrence took place about more than 8 years back. Records show that the appellant has already suffered a part of the imprisonment. We do not find any useful purpose would be served in sending the appellant to jail at this point of "time for undergoing the remaining period of the sentence, though ordinarily in an antisocial offence punishable under the Prevention of Food Adulteration Act the Court should take strict view of such matter."

In view of this ruling of Punbaj and Haryana High Court and also the ruling of apex Court and on the above mentioned grounds, the sentence of the revisionist was reduced for the period already undergone. The facts of that case are similar to the facts of the present revision referred above, the revisionist has suffered the agony of protracted prosecution and harassment for a long period of 19 years and in this peculiar circumstance of the case his sentence is reduced for the period already undergone. The sentence order passed by the learned Magistrate and its confirmation by the learned Sessions judge is, accordingly, modified to the period already undergone. The conviction is however maintained, along with the default clause.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLHABAD AUGUST 19, 1999

1999

August, 19

BEFORE
THE HON'BLE A.K. YOG, J.

CIVIL MISC. WRIT PETITION NO. 35304 OF 1999.

Committee of Management, Midil School Samittee Madiyapur & another ... Petitioners.
Versus
Director of Social Welfare Officer U.P.& ors. ... Respondents.

Counsel for the Petitioner : Sri S.D. Pandey
Counsel for the Respondent : S.C.

Article 226 of the Constitution of India- Grant-in-aid is not as of right and it is much less under law- petitioner can at best ask for being considered for receiving grant-in-aid.

By the Court

Grant –in-aid is not as of right and it is much less under law. Petitioner, who alleges to be Committee of Management of an educational institution can at best ask for being considered for receiving grant-in-aid provided it has applied for the same and satisfies that the condition contained in relevant Govt. Orders issued from time to time are satisfied by it.

Even otherwise, this Court, exercising extra-ordinary jurisdiction under Article 226, Constitution of India, cannot direct the respondents to extend grant-in-aid to the petitioner. This Court can, at best, direct concerned authorities to consider the case of the petitioner.

Representation of the petitioner dated 18th June 1999 (Annexure-6 to the Writ Petition) is said to be still pending. If so, the concerned authorities shall consider the same and take decision thereon within three months. Question whether institution is entitled to or not for the grant-in-aid may be decided by giving reasons on merits by the concerned authorities within the time stipulated above within three months from the date of production of a certified copy of this order and communicate its decision to the petitioner by

Registered A.D. post within a week of passsing of the order deciding said representation.

The writ Petition stands allowed subject to the observation made above.

It is, however, made clear that this judgment shall not be taken or treated deciding the matter on merits in any respect in favour of the petitioner and authorities concerned may take decision independently in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD : 25.8.1999.

1999

August, 25

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE D.R. CHAUDHARY, J.

CIVIL MISC. WRIT PETITION NO. 22697 OF 1997.

Ravindra Nath Banerjee ... Petitioner.

Versus

State of U.P. & others ... Respondents.

Counsel for the Petitioner : Mr. Ashok Bhushan
Mr. Rajesh Kumar,
Mr. T.P. Singh
Counsel for the Respondents : S.C.

Article 226 of the Constitution of India – the order reducing the petitioner's pension to 50% and withholding the entire gratuity amount was passed on the ground that he made irregular appointments of Sanskrit and Urdu teachers- held the petitioner cannot be blaimed for the same as these appoinments were lateron cancelled and the teachers got the salary in pursuance of the interim orders passed by the Hon'ble High Court. In such circumstances it cannot be said that the petitioner has caused any financial loss to the govt.- order quashed.

By the Court

This writ petition has been filed against the impugned order dated 06.03.97 (Annexure-3 to the petition) and for a mandamus

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directing the respondents ro release the gratuity with interest and full pension of the petitioner.

I have heard Sri T.P. Singh and Sri Ashok Bhushan learned counsel for the petitioner and learned standing counsel . for the respondents.

The petitioner retired on 31.07.91 as Associate District Inspector of School, Fatehpur. From 27.08.1985 to 30.5.87 the petitioner worked as Basic Shiksha Adhikari, Allahabad and thereafter he was transferred out of Allahabad. A charge sheet dated 26.08.87 was issued to him regarding certain allegations during his tenure as Basic Shiksha Adhikari, Allahabad. True copy of the charge sheet is Annexure-1 to the petition. The petitioner submitted a reply to the charge sheet on 12.05.88. it is alleged that thereafter the petitioner was not given opportunity to produce his evidence nor cross-examine the witnesses against him. After his retirement he was not paid his gratuity but was paid only provisional pension. The petitioner filed writ petition no. 24969 of 1994 in this court in which an order was passed directing the enquiry to be completed within three weeks. Thereafter notice dated 05.05.94 was issued to the petitioner alongwith the enquiry report. True copy of the letter dated 05.05.94 has been annexed as Annesure-2 to the petition. Thereafter the impugned order dated 06.03.97 was passed reducing the petitioner's pension to 50% and withholding the entire gratuity amount. Aggrieved, this petition has been filed in this Court.

The order dated 06.03.1997 is based on the allegations against the petitioner on charges no. 5,6, and 11. As regard the other charges it has been stated in the enquiry report dated 14.10.1992 that no financial loss was caused to the State Govt. on these charges. Charge no. 5 related to appointment of some Sanskrit teacher made by the petitioner on 24.01.86 in certain Basic School in urban areas whereas it is alleged that the post had been allotted for the rural areas in view of the order of the Director of Education (Basic) passed on 27.01.86. These appointments were ordered to be cancelled by the Regional Asstt. Director of Education (Basic), Alld. Vide order dated 04.08.86. Writ petitions were filed by the Sanskrit teachers who were appointed by the petitioner and interim orders were passed by the High Court on the strength of which these teachers are still continuing in service and are being paid salary by the State Govt. Thus it is evident that the said teachers are being paid salary on account of interim orders of the High Court and hence it cannot be

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said that financial loss was caused to the Govt. by the petitioner . Moreover there is no allegation in the impugned order that the petitioner obtained any benefit in making such appointments or that they were made malafide. In fact the order of the Director of Educaiton (Basic) to the effect that appointment will be made in rural areas was passed after the petitioner had made the appointments, and hence the petitioner cannot be blamed for this.

As regard charge no. 6 which related to appointment of Urdu teachers such appointments were cancelled subsequently, but against the cancellation order the teachers filed writ petition no. 11730 of 1986 Kishwar Sultan and others v. Basic Shiksha Adhikari. and an interim order was passed as follows:

> "Till further order of the Court, operation of the order dated 26.06.86 passed by Basic Sshiksha Adhikari. shall remain stayed. Petitioner shall be entitled of their salary."

This interim order is still continuing and the teachers are getting salary pursuant to the above order. Here also it has to be said that the salaries are being paid to the Urdu teachers in pursuance of the interim order of this court and hence obviously the petitioner cannot be blamed for the same. Moreover salaries are being paid for the work done by the teachers.

As regard charge no.11 the allegation is that the petitioner paid City Compensatory Allowance to the employees of the Basic Shiksha Parishad which was not admissible to them. In this connection it is mentioned in paragraph 22 of the writ petition that the quesiton regarding payment of CCA is pending before the High Court in writ Petition no. 1430 of 1984 . In fact the CCA was being paid to those employees since before joining of the petitioner as Basic Shiksha Adikari. Hence it is not the petitioner who has for the first time started paying CCA to the members. The amount paid to such employees in Rs.6607/= only. If the employees are not entitled to the said allowance the same can be adjusted from their salary or other dues.

In paragraph 25 of the petition it is alleged that some letter dated 13.05.92 was written to the Enquiry Officer Sri Hari Prasad Pandey to submit further report with regard to the alleged financial loss. It is alleged in paragraph 25 of the petition that no opportunity

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was given to the petitioner with regard to the details required by letter dated 13.05.92 and neither the State Govt. nor the Enquiry Officer gave an opportunity of hearing to the petitioner before submitting the additional report dated 14.10.92. The petitioner has alleged that no notice under Regulation 351-A of Civil Service Regulation was issued to the petitioner nor any enquiry report was submitted after due participation of the petitioner in the enquiry. It is alleged in paragraph 28 of the petition that the report dated 14.10.92 was exparte and without notice to the petitioner. In paragraph 29 of the petition it is alleged that the finding in the impugned order that the petitioner caused financial loss of Rs. 562982/= to the State Govt. is incorrect and unfounded.

In paragraph 32 of the writ petition it is alleged that as regards charge no. 1 the only allegation is that the petitioner filled up the post of Assistant. Teachers in Primary institution without approval of the District. Selection Committee, and the petitioner has not fulfilled the quota reserved for the reserve candidates. The petitioners reply was that he made appointment after approval from the selection committee and the quota of the reserved category was carried forward. As regard charge no. 2 the petitioner has stated that he made appointments on the basis of the addresses given by the candidated to the department in their application, and the petitioner did not made appointment to any person outside the district. As regards charge no. 3 the petitioner has alleged in para 34 that the Selection Committee itself included the names in the selection list and petitioner had only followed the recommendation of the selection committee. As regard charge no 4 it is alleged in para 35 that actions done by the petitioner in posting of the employees and teachers was in accordance with exigencies of administration. Similarly the petitioner has given reply to other charges in paragraph 36 to 41 of the writ petition.

It is alleged in paragraph 44 of the writ petition that the petitioner is now more than 64 years of age. In paragraph 45 of the petition it is stated that the petitioner has an unemployed son to support. Due to the impugned order the petitioner cannot make two ends meet.

A counter affidavit has been filed. In paragraph 5 of the counter affidavit it is stated that the Enquiry Officer gave full opportunity of hearing to the petitioner and thereafter submitted his enquiry report on 16.12.92. In paragraph 6 of the counter affidavit it

is stated that while working as Distt. Basic Education officer Addl. the petitioner committed grave financial irregularities and hence an enquiry was instituted. In paragraph 13 of the counter affidavit it is stated that the petitioner has caused grave financial loss to the State Govt. and the charge have been found to be proved in the enquiry . In paragraph 14 of the same it is stated that the petitioner made several irregular appointments of Sanskrit Teachers. In paragraph 15 of the same it is stated that petitioner made 20 illegal and irregular appointment of Urdu Teachers and most of them were not have requisite minimum qualification.

A rejoinder affidavit has also been filed and we have perused the same.

In our opinion the impugned order is wholly arbitrary and illegal. The main charges against the petitioner are regarding making irregular appointments of Sanskrit and Urdu Teachers. As already mentioned above these appointments were later on cancelled but the High Court granted interim orders in writ petitions and payments of such teachers are being made in pursuance of the interim orders of this Court. Hence it cannot be said that the petitioner has caused financial loss to the Govt. As regards the allegation that the Sanskrit teachers should have been appointed in rural areas the petitioner has pointed out that the order for posting these person in rural areas was issued after the petitioner had made appointments. Hence the petitioner can hardly be blamed for the same.

On the fact and circumstances of the case we are of the opinion that the impugned order dated 06.03.97 depriving the petitioner of his gratuity and half of his pension is arbitrary and illegal.

ORIGINSL JURISDICTION
CIVIL SIDE
DATE ALLAHABAD : 25.8.99

1999

August, 25

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE KRISHNA KUMAR, J.

CIVIL MISC. WRIT PETITION NO. 27396 OF 1997

Dr. Dinesh Jha, ... Petitioner.

Versus

The Chancellor, University of Allahabad, Raj Bhawan, Lucknow and others ... Respondents.

Counsels for the Petitioner : Shri Shailendra
Shri R.K. Singh
Shri V.K. Chandel.

Counsels for the Respondents : Mr. R.K. Agarwal
Mr. S.N. Upadhyay
Mr. Ashok Bhushan.

Article 226 of the Constitution of India-Validity of section 3 of the U.P. State Universities Amendment Act No. 9 of 1998 challenged on the ground that only Moti Lal Nehru Regional Engineering College, Allahabad has been mentioned therein and this law has been made applicable only to that college-It is open to the legislature to pick out any particular matter which is required by the legislature to be treated specially there is no principle that legislation without making a similar legislation for other bodies makes the legislation unconstitutional- A classification can be reasonable even though a single object is treated as a class by itself.

By the Court

Heard learned counsel for the parties.

The petitioner has prayed for a mandamus directing the respondents not to make any selection in pursuance of the advertisement dated 12.2.1996. He has also challenged the constitutional validity of Section 3 of the U.P. State Universities (Amendment) Act 1998.

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Dr. Dinesh Jha Vs. Chancellor, University of Alld.,Lucknow & others.

M. Katju,J. Krishna Kumar, J.

The dispute in this case is regarding the post of Principal of Motilal Nehru Regional Engineering College, Allahabad. It is this post on which the selection of respondent no. 5 was made on contract basis. The petitioner is working as Professor in the Engineering College and he has challenged the selection of respondent no. 5 for the post of Principal of the college.

It appears that the U.P. legislature has amended thelaw regarding the appointment of Principal of the Motilal Nehru Engineering College, Allahabad Section 3 of the U.P. Amendment Act no. 9 of 1998 states as follows:

> "31-B(1) Notwithstanding anything to the contrary contained in any other provision of this Act or in the Uttar Pradesh Higher Education Services Commission Act, 1980, appointment to the post of Principal or teacher of the Motilal Nehru Regional Engineering College, Allahabad shall be made in accordance with the rules and bye laws of the Motilal Nehru Regional College Society, Allahabad.
>
> (2) All appointments made before the commencement of the Uttar Pradesh State Universities (Amendment) Act 1998 in accordance with the provisions of sub-section (1) shall be deemed to have been made under the said sub-section as if the provisions of the said sub section were in force at all material times."

A perusal of the above amendment shows that appointment to the post of Principal of Motilal Nehru Regional Engineering College shall be made in accordance with the Rules and Bye-laws of the Motilal Nehru Regional Society, Allahabad. Sub-section (2) of Section 31 states that any appointment made before the amending Act in accordance with the provisions of sub-section (1) shall be deemed to have been made under the said sub-section as if the provisions of the said sub-section were in force at all material times.

Admittedly the petitioner's appointment has been made under the bye laws of the Motilal Nehru Regional Engineering College Society. The relevant part of Bye law 4 of the bye laws of the Society states as follows:

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"4.SELECTION COMMITTEE:

Selection Committee for filling the various teaching posts of Professor, Reader and lecturer including the Principal, other than those on which appointments are made on contract basis shall be constituted in the manner laid down below namely:

(i) Selection Committee for the post of Principal (on which appointments are made on contract basis):

1. Chairman of Board of Governors/ Chief Secretary of the State Govt.	Chairman
2. Educational Advisor (T), Ministry of Human Resource Development Government of India, New Delhi.	Member
3. Secretary, Technical Education Government of U.P. Lucknow	Member

Two of three Experts to be nominated by the Chairman of the Board such as

Director of IIT
Vice Chancellor,
University of Roorkee, Roorkee."

There is no denial that the petitioner was appointed on contract basis after the selection by the selection committee mentioned in Rule 4. Hence in our opinion the selection and appointment of respondent no. 5 was valid as it was in accordance with U.P. Amendment Act No 9 of 1998.

Learned counsel for the petitioner alleged that the appointment of the Principal cannot be made on contract basis. This argument cannot be accepted in view of bye law 4 which has been quoted above. Such bye-law specifically mentions that the appointment of Principal can be made on contract basis.

Learned counsel for the petitioner has challenged the constitutional validity of U.P. Amendment Act no. 9 of 1998 on the ground that only Moti Lal Nehru Regional Engineering college,

Allahabad has been mentioned therein and this law has been made applicable only to that college. We see no unconstitutionality in the above amendment. It is open to the legislature to pick out any particular matter which is required by the legislature to be treated specially and there is no principle that legislation without making a similar legislation for other bodes makes the legislation unconstitutional. A classificaton can be reasonable ever though a single object is treated as a class by itself vide Ramkrishna Dalmia vs Tendolkar (1955 SCR 279, State of J. & K. Vs Golam Mohd. AIR 1967 SC 122, Mittal vs Union of India AIR 1983 SC 1, Lachman vs State of Punjab AIR 1963 SC 222 etc.

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In paragraph 6 of the counter affidavit filed on behalf of the Engineering college it has been stated that the selection on the post of Principal of Motilal Nehru Engineering College is made in accordance with the provisions of Memorandum of Association and the Rules and Bye laws of the society. In paragraph 8 of the counter affidavit it has been stated that the bye laws has been approved by the Central and State Governments vide Annexures 1 and 2 to the counter affidavit. In paragraph 9 ot the counter affidavit it is stated that the petitioner also applied for being considered for appointment of the post of Principal but as a result of short listing of applications the petitioner was not called for interview. He filed writ petition no. 17471 of 1996, which was dismissed by a Division Bench of this Court on 21.5.1996. In paragraph 11 it is stated that it is false to say that Sri S.K. Agarwal functioned as Chairman of the Board of Governors. The Chief Secretary of the State was Chairman of the Board of Governors and this post is now held by the Minister of Technical Education, U.P. In paragraph 13 it is stated that the selection committee for the appointment on the post of Principal was constituted strictly in accordance with the Memorandum of Association and the bye laws of the Rules of the Society. In paragraph 14 it is stated that the writ petition filed by the teaching and administrative staff association to its Vice President was dismissed on 8.4.1997. In paragraph 19 it is stated that the record of the case was placed before the Division Bench of this Court which after being satisfied that the same was just and proper was pleased to dismiss the writ petition. Hence the same controversy cannot be raised again. In paragraph 25 of the counter affidavit it is stated that the criteria for short listing and screening of the applications was placed before the Division Bench of this Court which after being satisfied about the bonafide action of the respondent was pleased to

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dismiss the writ petition. In paragraph 27 it is denied that there was any collusion between S.K. Agarwal and respondent no. 5

In paragraph 30 of the counter affidavit it is stated that in all other Engineering Colleges which are maintained by the State Government selection and appointment on the post of Principal is made according to their own Memorandum of Association and bye laws of the Society. Hence by making amendment of the law in the case of Motilal Nehru Engineering college, the process of selection and appointment has been made uniform.

In our opinion there is no merit in this petition. As already stated above the petitioner was appointed as Principal after a valid selection by the selection committee under bye law 4 of Society's, Bye Laws. We see no unconstitutionality in U.P. Amendment Act 9 of 1998, and in particular the said amendment does not violate Article 14 of the Constitution.

Thus there is no force in this petition and it is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.8.1999

1999

August, 25

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE D.R. CHAUDHARY, J.

CIVIL MISC. WRIT PETITION NO. 36373 OF 1999

The Chief Post Master ... Petitioner
Versus
Shri Mohammad Salim and another ... Respondents

Counsel for the Petitioner : Shri Satish Chaturvedi
Addl. Standing Counsel
Government of India
Counsel for Respondents : S.C.

Article 226 of the Constitution of India-the recovery of house rent cannot be made from the pension but can be made by other

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means-the tendency of the govt. servant or employees of public sector undertaking of continuing to occupy the official accomodation even after retirement or transfer has become wide spread and must be stopped.

By the Court

This writ petition has been filed against the impugned order of the Central Administrative Tribunal dated 6.5.1999 copy of which is Annexure 4 to the petition.

The respondent no. 1 retired as postman on 19.5.1995 but he continued occupying the official accommodation in his possession and hence the rent of Rs. 900/- was ordered to be recovered from his pension for the house rent with interest. The respondent no. 1 filed a petition before the Central Administrative Tribunal which allowed this petition by the impugned order and held that the recovery of house rent cannot be made from the respondent's pension but it can be made by other means.

On the facts and circumstances of the case we are not inclined to exercise our discretion under Article 226 of the Constitution by interfering with the impugned order. However, we are informed that the respondent no. 1 is still occupying the official accommodation even four and a half years after his retirement. This is indeed shocking. We are of the opinion that the respondent no. 1 must vacate the official accommodation in his possession immediately. This tendency of government servants or employees of public sector under taking of continuing to occupy the official accommodation even after retirement or transfer has become wide spread and must now be stopped. It has to be realised when a person retires or is transferred he should vacate the official accommodation in his possession within a reasonable period otherwise his successor will have no place to live in. There are cases coming up before this court where a government employee continued to retain the official accommodation even several years after his retirement or transfer. This practice has to be deprecated and must be stopped now.

Hence on the facts and circumstances of the case while we do not exercise our discretion under Article 226 of the Constitution against the impugned order, we direct the respondent no. 1 to vacate the official accommodation in his possession forthwith. We further issue a general mandamus directing the employees of the Central and

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State Government to vacate the official accommodation in their possession on their transfer or retirement within the period prescribed by the Rules or if there are no such Rules then within three months of the date of retirement or transfer, failing which they will be evicted by police force.

With these observations the petition is disposed of finally.

Let the Registrar of this Court send a copy of this judgment to the Central and State government through the Secretary of the Department concerned so that this judgment is strictly complied with in future and this practice of retaining official accommodation even after transfer/retirement is stopped.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 25.8.99

BEFORE
THE HON'BLE M. KATJU, J.

1999

August, 25

Civil Misc. Writ Petition No.28101 of 1999

Committee of Management and others ... Petitioners
Versus
District Inspector of Schools and others ... Respodents

Counsel for the Petitioners : Shri Prakash Padia
Counsel for the Respondents : S.C.
Shri A.K. Pandey
Shri J.P. Singh

Article 226 of the Constitution of India—the order of suspension passed against the head of institution is subject to the supervision by D.I.O.S.- the petitioner may avail the remedy before the D.I.O.S.

By the Court

This writ petition has been filed for a writ of certiorari for quashing the impugned order dated 9.7.1999 Annexure 20 to the writ petition and for a mandamus restraining the respondents from interfering in the affairs of the institution in question and directing the respondent no. 1 to pass a speaking order regarding its approval

in respect of the suspension order of respondent no.2 dated 15.2.1999.

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C/M and others
Vs.
D.I.O.S. and others

M. Katju, J.

I have heard learned counsel for the parties.

The dispute relates to Janta Inter College, Bazar Gosai, Harraiyya, Azamgarh which is a recognised Intermediate college receiving grant-in-aid. In paragraph 3 of the petition it is alleged that the last election was held in June 1997 and the petitioner no.2 was elected as Manager and his signature was attested by the District Inspector of Schools. Against that two writ petitions were filed in this court by Sheo Shankar Singh claiming to be lawfully elected by the Manager in the institution in question. The petition were dismissed by a learned Single Judge (vide Annexure 3 to the petition) and the committee of management of the petitioner was recognised by the learned Single Judge and the signature of the petitioner no.2 was attested by the District Inspector of Schools. Against that judgement a special appeal no.153 of 1999 was filed by Shiv Shankar Singh which was admitted and an interim order was passed that no policy decision would be taken by the Manager without the concurrence of the District Inspector of Schools. True copy of the order dated 25.2.1999 is Annexure 4 to the petition. Another special appeal no.265 of 1999 was filed which is also pending in this Court. In paragraph 6 of the petition it is alleged that in view of the G.O. dated 3.2.1997 the committee of management passed a resolution on 3.8.1997 in which meeting the respondent no.2 participated and it was resolved that the account by way of development fund would not be operated by the Principal alone but jointly alongwith the manager. In paragraph 8 it is alleged that despite this resolution the respondent no.2 operated the development fund account singly and a huge amount of the same fund has been embezzled. In this connection various letters were sent to various authorities concerned copies of which are Annexure 5, 6 and 7 to the writ petition. True Copy of the Audit report dated 27.2.99 is Annexure 8 to the writ petition. In paragraph 10 of the petition it is alleged that the Joint Director of Education wrote to the District Inspector of Schools vide letter 23.4.1999 directing that the amount of development fund withdrawn by the respondent no.2 should be directed to be deposited back with the Government fund. True copy of the said letter is Annexure9. The District Inspector of Schools also passed an order directing the petitioner to recover the amount illegally withdrawn by the respondent no.2 from the development fund. True copy of the said letter is Annexure 10 to the writ petition.

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In paragraph 12 of the petition it is alleged that the petitioner no.2 immediately wrote a letter dated 2.5.1999 to the respondent no.2 asking him to return the amount illegally withdrawn from the development fund which is more than rupees one lac. True copy of the said letter is Annexure 11 to the petition. However, no amount was returned back by respondent no.2. Thereafter the D.I.O.S. by the order dated 19.5.1999 gave permission to take disciplinary proceeding against the respondent no.2 for the amount illegally withdrawn and embezzled. True copy of the said letter is Annexure 12. The committee of management then passed a resolution dated 23.5.1999 suspending the respondent no.2 vide Annexure 13 to the writ petition. The petitioner passed an order dated 23.5.1999 in pursuance of the resolution of the committee of management suspending the respondent no.2. True copy of the suspension order dated 23.5.1999 is Annexure 12 to the writ petition.

In paragraph 16 of the petition it is alleged that the papers were sent to the District Inspector of Schools for approval of the suspension order but no orders have been passed by the District Inspector of Schools. Subsequently, a charge sheet has been issued to the respondent no. 2 vide Annexure 15 to the writ petition. True copy of the letter to the committee of management and District Inspector of Schools dated 16.6.1999 alleging collusion between the Banking authority and respondent no. 2 and forgery is Annexure 16 to the petition.

In paragraph 20 of the petition it is alleged that against the order dated 23.5.1999 respondent no. 2 filed writ petition no. 22636 of 1999 but no interim order has been granted and the petition is pending. In paragraph 21 it is alleged that the orders were passed by the respondent no. 1 District Inspector of Schools dated 19.5.1999 by which the petitioner was given permission to act against the respondent no. 2 for not depositing the amount illegally withdrawn from the development fund. True copy of the said letter is Annexure 17 to the writ petition. Against the order writ petition no. 24991 of 1999 was filed and an exparte interim order dated 16.6.1999 has been passed by this court. True copy of the said roder is Annexure 18 of the writ petition. In pursuance of this court order dated 16.6.1999 the District Inspector of Schools passed an order dated 1.7.1999 vide Annexure 19. Subsequently the impugned order dated 9.7.1999 was passed by which it was directed that the respondent no. 2 will work as Principal in view of the interim order

dated 16.6.1999. True copy of the said order is Annexure 20 to the writ petition.

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In paragraph 26 it is stated that the District Inspector of Schools has not yet taken any decision in the matter and it is alleged that this was deliberate so that after sixty days of suspension the Principal may claim reinstatement as per the U.P. Intermediate Education Act and Regulations. In paragraph 29 it is alleged that no opportunity of hearing was given to the petitioner before passing the impugned order. In paragraph 32 it is alleged that very serious allegation of embezzlement of development of fund has been made against the respondent no.2.

A counter affidavit has been filed by the respondent no.2. In paragraph 3 it is alleged that the petitioner was a rank trespasser and not a member of the General Body. In paragraph 5 of the counter affidavit it is alleged that the G.O. dated 3.2.1997 is against the regulations. In paragraph 7 it is alleged that there is no illegality and irregularity in the operation of the account. The details of the same have been given in the said paragraph. In paragraph 7 of the counter affidavit it stated that the answering respondent is not aware about any audit inspection. In paragraph 8 it is stated that the petitioner has misinterpreted the order of the Joint Director. The Joint Director only directed the District Inspector of Schools to look into the matter and make an enquiry and if it was found that the respondent no.2 has illegally withdrawn any amount he be directed to deposit the same. It is alleged that the District Inspector of Schools has not made any enquiry. In paragraph 9 it is stated that the order dated 1.5.1999 was passed without enquiry or notice to respondent no.2. In paragraph 10 it is alleged that there was no illegal withdrawal and mis-utilisation of the account. The amount withdrawn has been utilised in the construction of the building and other development activity. Photostat copy of the cash-book in this connection is Annexure C.A.3. In paragraph 11 it is stated that the order dated 19.5.1999 passed by the District Inspector of Schools is illegal as no opportunity of hearing was given to the respondent no.2 before passing the said order. In paragraph 12 it is alleged that the respondent no.2 has been suspended without any basis. In paragraph 23 it is stated that the respondent no.2 is working as ad hoc Principal since 1994 and has claimed regularisation. In paragraph 30 it is alleged that the charges levelled against the respondent no.2 are baseless and false.

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M. Katju, J.

In the rejoinder affidavit the allegations in the counter affidavit are denied and those in the writ petition are reiterated. In paragraph 9 of the rejoinder affidavit it is alleged that the respondent no.2 was not empowered or authorised to utilise the development fund. It is stated that the alleged payment is farzi and incorrect.

In Govind Swarup Pandey Vs. The Authorised Controller 1981 UPLBEC 17 a Division Bench of this Court has held that the order of suspension passed against the Head of the Institution is subject to supervision by the District Inspector Schools and in that petition it was held that the petitioner was directed to avail of the alternative remedy before the District Inspector of Schools.

In the facts and circumstances of the case I am of the opinion that the petitioner should approach the District Inspector of Schools who will himself hold an enquiry against the respondent no. 2 regarding alleged illegal withdrawal and misutilisation of the development fund and the District Inspector of Schools after hearing the Committee of Management and others concerned as well as the respondent no. 2 shall pass appropriate orders in relation to the same preferably within six weeks of production of a certified copy of this order in accordance with law. If the petitioner files a certified copy of this order before the District Inspector of Schools within two weeks from the date of this judgment the status quo on the post of Principal shall be maintained till the completion of enquiry by the District Inspector of Schools.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD:6TH-April, 1999

1999

April, 6

BEFORE
HON'BLE M. KATJU, J.
HON'BLE R.K. SINGH, J.

CIVIL MISC WRIT PETITION NO. 14168 OF 1999

Chhidda Khan ... **Petitioner.**

Versus

State Of U.P. And Others ... **Respondents.**

Counsel for the Petitioner : Amar Nath Bhargava
Counsel for the Respondent : S.C.

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M. Katju, J.
R.K. Singh,J.

Constitution of India, Article 25, read with 226- Public Interest litigation scope of- humble appeal to the public to refrain from utilizing Loudspeakers either for Akhand Ramayan, or in Azan, Kirtan and Quauwali or in public programme-causing a great deal of inconvenience and harassment to the general public particularly to those who are suffering from heart problems-scope of general appeal –its bining effect-discussed.

By the Court

The case of the petitioner is covered by the Division Bench decision of this Court in Civil Misc. Writ Petition No. 42403 of 1998 Mohd v Sharif Saifi Vs State of U.P. and others. We issue the same direction in this case also.

However we wish to issue a humble appeal to the general public to refrain from utilizing loudspeakers, whether it is for Akhand Ramayan, Azan, Kirtan, Quawwali or public programmes, functions, marriages, or for any such purposes because this is causing a great deal of inconvenience And harassment to the general public, particularly to persons who may be having heart problems and want to get sound rest, students who wish to study, and others who do not wish to be disturbed.

In our opinion no doubt everyone has a fundamental right under Article 25 of the Constitution to practice his religion freely, but this right should not be exercised in a manner which causes harassment or inconvenience to others. Hence we are issuing this humble appeal to people of all religions. We make it clear that this is only a humble appeal and not a binding order on the petitioner or on anyone. In religious matters coercion should be avoided as that makes people bigoted or fanatic. Hence the method to be used is gentle persuasion, and not coercion. We are therefore only issuing a humble appeal not to use loudspeakers, and are not passing any order in this connection. We have confidence in the good sense of the people of this country that they will abide by reasonable and good suggestions of this court. We made it clear that since this is only an appeal the authorities will not seek to enforce it, and we are confident the people of all religions will voluntarily accept it if they find it fair and reasonable .

With the aforesaid directions and suggestions the writ petition is finally disposed off.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.8.1999

BEFORE
THE HON'BLE YATINDRA SINGH, J.

1999

August, 13

CIVIL MISC. WRIT PETITION NO. 6622 OF 1985

Brij Basti Udyog, Delhi, Agra, Bye-pass Road, Mathura : **Petitioner**

Versus

The State of U.P. and others : **Respondents**

Counsel for the Petitioner : Shri D.P.S. Chauhan
Shri Bharat Ji Agarwal
Shri Tarun Agarwal

Counsel for the Respondents : S.C.
Shri A.S. Diwakar

U.P. Industrial Dispute Act 1947 Section 6-2 A- Back wages- award consisting reinstatment with back wages – the labour court should be conscious as to whether the plea of 'not gainfully employed any where else' has been taken and proved. – in absence of such discussion reinstatement with back wages cannot be awarded – matter remitted back to give specific finding on this point alone. (Para 15)

Case law discussed.
AIR 1978 SC 1410
AIR 1978 SC – 481
AIR 1999 SC – 1160
AIR 1965 Cal. 166
1970 Lab.I.C.629:1970 FLR 70
AIR 1967 SC- 420
(1966) 1 LLJ 730 (S.C.)
1980 (2) SCC. 593-(1980) 1 LLJ- 137
1981 LLJ 369 (SC)
1983 Lab- I.C. 670 (S.C.)
1996 (2) LLJ- 720
AIR 1984 SC- 286
1982 (3) SCC.- 386

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State of U.P. & others

Yatindra Singh, J.

By the Court

1.M/S Brij Basi Udyog (the Petitioner) is a firm registered with Registrar of Firms, Bombay. It manufactures Fire-fighting equipments at Mathura. There was another firm named M/s Brij Basi Engineers (the other firm for short), which was registered with Registrar of Firms U.P. Lucknow. The other firm functioned as a contractor for supply of the unfinished fabricated components for the petitioner. It had no other business except to act as a contractor for the petitioner. It was dissolved due to non-availability of work from the petitioner due to which its workmen were retrenched on 13.12.1981 Thirty – one workmen raised an industrial dispute about termination of their services, which was referred to the Labour Court by the State Government. The Labour court by its award dated 22.12.1984 has held that:

the petitioner and other firm are one and the same – the other firm being a camouflage for the petitioner;

One workman namely Gopi Nath was not employed by the other firm but was employed by the petitioner. He was rightly retrenched on 9.12.1981 (there is no dispute about him in this writ petition);

The remaining 30 workmen were not rightly retrenched and were entitled to be reinstated with full back wages;
Two workmen who had received retrenchment compensation were also entitled to be reinstated. The retrenchment amount that they had received was to be deducted from the amount towards their backwages.

It is against this award that the present writ petition has been filed.

POINTS FOR DETERMINATION

I have heard Sri Tarun Agrawal, counsel for petitioner and Sri A.S. Diwakar , counsel for the contesting respondents. The following points arise for determination in this case:

(i) Was the petitioner the real employer? Was the other firm a camouflage for the petitioner?

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Yatindra Singh, J.

(ii) Are some of the contesting respondents, who have received retrenchment compensation, estopped from raising an industrial dispute? Have they waived their rights to raise it?
(iii) Was retrenchment of the contesting respondents valid?
(iv) What are the principles for awarding back wages? Should the contesting respondents be awarded full back wages?

Ist POINT: WAS PETITIONER THE REAL EMPLOYER?

3. when can one be held to be an employer of persons employed by others? This has been discussed by the Supreme Court in Husaini Bhai vs. Alath Factory Tezhilali Union (Husaini Bhai's case). The Supreme Court has held that the true test (is) where a worker or group of workers labours to produce goods or services and these goods or services are for the business of another that other is, in fact, the employer. He has economic control over the workers subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contract is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor,. The labour court has applied these principles to the facts of the case and has held that even though the petitioner and the other firm were different firms, had different partners, and began their business at two different places; Yet the petitioner was a real employer of the contesting respondents. This was in view of the facts that the other firm:

- was producing goods only for the petitioner;
- had shifted its production unit to the premises of the petitioner;
- had identity card of its workmen on the letter head of the petitioner (the labour court disbelieved the explanation given by the petitioner);
- had no separate workshop;
- had office at the same place as the petitioner from where wages etc. were distributed to their workmen.

If the principles of the Hussaini Bhais case apply, as they are, then there is no fault in the award on this score.

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B.B. Udyog, Mathura
Vs.
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Yatindra Singh, J.

4. Sri Tarun Agarwal, learned counsel for the petitioner has argued that Hussaini Bhai's case may be read with another decision reported in Punjab National Bank vs. Ghulam Dastgir (Dasgir's Case)(AIR 1978 SC 481). Here the bank had given a car alongwith allowances for petrol, driver etc. to the manager yet the manager instead of the bank was held to be the real employer of the driver. According to Sri Agarwal this was because the real control and direction over the driver was not with the Bank but with the manager. He argues that this is the case here: the petitioner had no real control or direction over the contesting respondents; it was with the other firm; the petitioner cannot be held to be the employer.

5. The Dastagir's case is distinguishable. The Court in paragraph 3 of Dastgir's case had held that there is nothing on record to indicate that the control and direction of the driver vested in the bank. The driver was not manufacturing or producing any goods for the bank as the case here. Apart from it the court in paragraph 2 says that the question (who is the real employer) in each case turns on its own circumstances and decisions in other cases are rather illustrative than determinative. TheDastagir's case turns upon its own facts where there was paucity of evidence. But here, there is some evidence. In any case, it is a two judge decision whereas Husain Bhai's case is a three Judge decision (though of the same Judge). Husain Bhai's case has also been cited with approval in a latter decision reported in Secretary, Haryana State Electricity Board, vs. Suresh.

6. The Husaini Bhai's case is applicable to the facts of the present case as the group of workers working in the other firm used to produce goods for the business of the petitioner only. The petitioner (in view of Husain Bhai's case) had the economic control over the workers' subsistence, skill and continued employment. The finding recorded by the Labour Court is neither perverse nor so unreasonable that no reasonable person could have reached it on the basis of the evidence on record. It cannot be set aside in the wirt Jurisdiction.

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Yatindra Singh, J.

2nd POINT; ACCEPTENCE OF THE RETRENCHMENT COMPENSATION- WAIVER

7. The petitioners in their written statement had pleaded that seven workers had accepted the retrenchment compensation and are estopped from raising the industrial dispute. Before the Labour court, the petitioner filed documents in respect of three of them only. The Labour court has held that: one of them had not received retrenchment compensation as the person who had received the retrenchment compensation was named Balbir and in the reference there is no Balbir but one Brijbir; two of them, namely Devi Ram and Punna Lal , had accepted retrenchment compensation but they are to be reinstated the retrenchment compensation be deducted from the amount of back wages. The labour court has not discussed if they have waived their rights or are estopped from raising the dispute.

8. Have these two waived their rights to raise the industrial dispute? Are they estopped? Should they be denied the relief of reinstatement on this ground? The Calcutta High Court and the Patna High Court have taken the view that such workmen who have received ratrenchment compensation, can not be estopped from questioning their retrenchment or claiming benefits under the Act. The Madras High Court has sounded a different chord, the workers were estopped from claiming subsequently the benefits conferred by the Act as they had deliberately contracted themselves out of the statute.

9. The Supreme Court in Workmen of subong Tea Estate, vs Outgoing Management of Subong Tea estate, has observed that such objections are technical pleas and should not be entertained in an industrial adjudication. This is clear from the words 'apart from the fact that such technical pleas are not generally entertained.' Twenty-eight out of thirty have not received retrenchment compensation. The Labour Court has exercised its discretion in not permitting the petitioner to raise this plea. There is no reason why petitioner should be permitted to do so. I don't think that I would be justified in permitting the petitioner to raise it.

3rd POINT: WAS RETRENCHMENT VALID?

10. The Labour Court has held that the retrenchment was illegal on the ground that the notice has been given by the other firm and

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there was no such occasion for closure as the petitioner and the other firm are one and the same. This approach of the Labour Court is not correct. The notice for the retrenchment was given by the other firm as it had employed the contesting respondents. Once the labour court came to the conclusion that the other firm and the petitioner were one and the same, the notice given by the other firm should have been treated to be the notice on behalf of the petitioner and the validity of the retrenchment ought to have been judged on this basis – the petitioner may not be manufacturing unfinished fabricated component (THE MATERIAL Manufactured by the other firm) and may be purchasing it from some where else. The finding in this regard is therefore illegal.

4th POINT: PRINCIPLES – BACK WAGES

11. The Labour Court has reinstated the contesting respondents with full back wages. Before I comment upon it, Let's discuss the general principles regarding back wages.

12. Section 11-A and sub-section (2-A) in Section 6 have been inserted in 1971 and 1978 in the Industrial Dispute Act (The Central Act) and the U.P. Industrial Dispute Act (the State Act) respectively. They are substantially same and give discretion to the Labour Court to impose terms and conditions in case discharge/dismissal/removal of a workman is being set aside. Back wages is a term, a condition, which is at the discretion of the Labour Court . Even prior to it the law was the same – back wages were in the discretion of the labour court. But the discretion has to be exercised judicially.

13. The general rule in labour jurisprudence is that the back wages are awarded from the date of the termination order and not from the date of the order holding termination of service to be illegal. And certainly the normal rule on reinstatement, is full back wages since the order of termination is nonest. Even so, the industrial court may well slice off a part. To what extent wages for the long interreghum should be paid is, therefore, a variable dependent on a complex of circumstances. The Courts in different cases have explained these complex circumstances Here are some relevant factors, which should be considered while making deductions in back wages. The full back wages may not be awarded if:

(i) the Industry may close down or might be in severe financial doldrums or the relief of back wages may place an impossible burden

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on the employer. Or the unit has started making profits but has still not cleared its accumulated loss.

(ii) The conduct of the workman is such - he may not be wholly blameless; or strike may be unjustified.

(iii) The nature of the work is such – the workman may be a casual, a seasonal or a daily wager. He may not get work every day. The court may find out for how long he could have got the work and one of the methods may be to take the average of last three years and direct payment of back wages on that basis.

(iv) There was delay in raising the dispute, though the delay after raising the dispute is not relevant. The dispute should be raised at the earliest.

(v) The activity conducted by the industry is such. Many activities have been held to be an industry though they are not profit making. Charitable, research oriented educational, welfare activities of the State or similar activities even if they are Industry within the meaning of the State or the Central Act, yet have to be differentiated with profit making activities so far as back wages on reinstatement are concerned.

(vi) The workman was gainfully employed somewhere else. He can not take double advantage.

(vii) No efforts were made by the workman to seek employment. It is also relevant. The workman should minimise the loss.

There may be other reasons. This list is by no means exhaustive.

14. The relevant factors for not awarding full back wages if are not apparent from the record have to be pleaded and proved. As far as the first three factors namely: an impossible burden and its effect on the management: the conduct of the workman; and the nature of work, are concerned, it is for the employer to plead and prove it. The fourth and the fifth factor namely delay and the nature of activity may be obvious from the record itself and the court can consider it. But if it is not so then the employer has to plead and prove it. But so far as the last two factors namely gainfully employed somewhere else and the effort made by the employee are concerned – it is a difficult question. If this question is raised then as the facts about the employment or non employment during the period of enforced idleness or the efforts made by workman to get a job are within special knowledge of the workman. It is fair that he should state first if he was gainfully employed or not or if any efforts were made by him for securing alternative employment. It is in this sense that

initial burden may be on the employee. It is in this sense that initial burden may be on the employee. But once he has discharged it, then it is for the employer to prove that he (workman) was gainfully employed.

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15. In this case the only relevant consideration was, if the contesting respondents were gainfully employed or not. There is no discussion in the award in this regard. One doesn't know if it was raised and if there is any evidence on the part of the contesting respondents that they were not gainfully employed. The petitioner has filed a supplementary affidavit indicating that the contesting respondents are gainfully employed at other places. The names of the firms are also mentioned. There is no specific denial of this. This has also been mentioned in the rejoinder affidavit. As the case is being sent back , this question may be decided after affording reasonable opportunity to the parties to adduce evidence.

CONCLUSION

16 In view of the finding given above the award dated 22.12.1984 is quashed so far as the finding on question nos.3 and 4 namely: the legality of the retrenchment; and back wages are concerned. The findings on the other question namely: that the petitioner was the real employer; some of the contesting respondent can not be estopped from raising the industrial dispute for having have received retrenchment compensation; and Gopi Nath was rightly retrenched, are upheld. These findings will not be reopened. The Labour Court will re-decide the question number 3 and 4 in accordance with law after affording reasonable opportunity to the parties to adduce evidence in that regard. The case should be decided expeditiously. In view of partial success, cost will be on parties.

With these directions the writ petition is allowed. The parties will appear before the Labour Court on 20th September 1999.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, 27.7.1999

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July, 27

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

CIVIL MISC. WRIT PETITION NO. 32132 OF 1994

Sita Ram ... **Petitioner**

Versus

Executive Engineer, Irrigation , Block (Ist.) Deoria & others ... **Opp. Parties**

Counsel for the Petitioner : Sri Rajiv Gupta
Sri H.K. Misra
Counsel for the Respondents : Sri Gautam Chaudhary
S.C.

U.P. Temporary Government Servants- (Termination of Services) Rules 1975 readwith Constitution of India, Article 226 – Termination order- Temporary Government Servants- continuously worked for 25 years – performance of the employee never questioned during long period- all of sudden without opportunity of hearing without any deciplinary proceding- termination order cannot be passed by putting stigma of –`unsatisfactory work' – such approch is totally inhuman.

Case Law discussed.
AIR 1992 SC – 2130
1990 (2) SCC. 396 _ AIR 1990 SCC- 883
1990 Suppl. (I) Sec. 562 – 2228
AIR 1991 SC 295

By the Court

The petitioner was appointed as Beldar on 1.10.1969 He continued to work without any break in service on fixed salary of Rs. 1675/- P.M. He worked continuously till 30.6.94. The Executive Engineer, Irrigation . Division (Ist) Deoria, by order dated 29.6.1994 terminated the services of the petitioner treating him to be a temporary employee under the U.P. Temporary Government Servants (Termination of Services) Rules 1975 (in brief rules) The

petitioner challenged the order dated 29.6.1994 by means of the present writ petition.

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The respondents have filed counter affidavit wherein it was stated that the petitioner was appointed on temporary basis. The work of the petitioner was unsatisfactory which has been marked in his character role. The petitioner was work charge Beldar and there is no requirement for continuing the petitioner as the work is over. The services of the petitioner was rightly terminated under the rules.

I have heard Shri H.K. Misra learned counsel for the petitioner and Shri Gautam Chaudhary learned Standing counsel for the respondents.

Counsel for the petitioner argued that the petitioner has worked for about 25 years as Beldar and the petitioner's services have been terminated by the respondents without giving any opportunity of hearing to him. The termination of the petitioner's services under the rules is an abuse of the rules. The post on which the petitioner was working is still existing and it has not been abolished. He further argued that the termination order is liable to be set aside on humanitarian grounds. The learned Standing Counsel argued that since the petitioner was a temporary employee, his services could be terminated under the rules by giving one month's notice and there is no illegality in the termination order dated 29.6.1994.

The argument of the respondents that there is no work or post available for the petitioner cannot be accepted The main concern of the court in such matters is to ensure the Rule of Law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor it should seek to take advantage of their helplessness. The State must be a model employer.

The apex court in State of Haryana and others versus Piara Singh A.I.R. 1992 S.C. 2130 observed as under:

> "Where a temporary or adhoc appointment is continued for long the court presumes that there is need and warrant for a regular post and accordingly directs regularisation The principles relevant in this

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behalf are stated by this Court in several decisions. Of which it would be sufficient to mention two decisions having a bearing upon the issue involved here . They are Dharwad District P.W.D. Literature Daily Wage Employees Association vs State of Karnataka, (1990) 2 SCC 396 (AIR 1990 SC 883) and Jacob vs Kerala Water Authority, 1990 Suppl (1) SCR 562 (AIR 1990 SC 2228). In the first case, it was alleged that about 50,000 persons were being employed on daily-rated or on monthly – rates basis over a period of 15 to 20 years, without regularising them. It was contended that the very fact that they are continued over such a long period is itself proof of the fact that there is regular need for such employment. In that view of the matter following directions were given, after reviewing the earlier decisions of this court eleborately (at PP.890-91 of AIR)".

The apex court in Dharwad District P.W.D. Literature Daily Wage Employees Association versus State of Karnataka AIR 1990 SC 883) issued direction for regularising the services of those employees who had completed ten years of service. In Jacob versus Kerala Water Authority AIR 1990 SC 2228 direction for regularisation was issued with immediate effect without waiting for the State Government approval.

In State of Haryana (supra) the apex court further laid down:

"So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any prescribed for the post and subject also to availability of work if a casual labourer is continued for a fairly long spell- say two or three years- a presumption may arise that there is regular need for his services. In such a situation , it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this Court, security of tenure is necessary for an employee to give his best to the job

It is not disputed by the respondents that the petitioner has been continuously working for 25 years as Beldar. If an employee continues for such a long period in a service then the presumption is that the work is available on which he had been working. In the counter affidavit it was alleged that the work of the petitioner was unsatisfactory which was marked in his character role. This bald statement made in the counter affidavit without being supported by documentary evidence cannot be accepted. Nothing has been brought on the record to indicate as to how the work of the petitioner was unsatisfactory. In paragraph 12 of the writ petition the petitioner has clearly stated that the post is lying vacant and has not been abolished and the work is still existing. This has not been denied by the respondents in paragraph 10 of the counter affidavit. There is no reason for terminating the services of the petitioner after he has put in about 25 years of service under the rules.

If the services of a temporary employee is terminated after 25 years then it gives rise to various human problems . The apex court in H.C. Puttuswamy vs Hon'ble Chief Justice of Karnataka, Bangalore and others A.I.R. 1991 SC 295 has held as under:

> "The human problem stands at the outset in these cases and it is that problem that motivated us in a allowing the review petitions. It may be recalled that the appellants are in service for the past 10 years. They are either graduates or double graduates or post graduates as against the minimum qualification of S.S.L.C. required for Second Division Clerks in which cadre they were originally recruited. Some of them seem to have earned higher qualification by hard work during their service. Some of them in the normal course have been promoted to higher cadre. They are now overaged for entry into any other service. It seems that most of them cannot get the benefit of age relaxation under Rule 6 of the Karnataka Civil Services (General Recruitment) Rules 1977. One could only imagine their untold miseries and of their family if they are left at the midstream. Indeed, it would be an act of cruelty at this stage to ask them to appear for written test and viva voce to be conducted by the Public Service Commission for fresh selection".

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V.M.Sahai, J.

The effect of the termination order is that the petitioner has been uprooted. He has put in 25 years of service and he has become overage for any other service . He cannot seek employment anywhere else. He must be having family to support. The employers were satisfied with his work for 25 years. After a employee puts in service of 25 years his services cannot be terminated. Therefore, the law laid down by the apex court in H.C. Puttuswamy (supra) applies to the fact of the present case.

The impugned termination order dated 29.6.1994 cannot be upheld for the aforesaid reasons.

In the result, the writ petition succeeds and is allowed. The impugned order of termination dated 29.6.1994 passed by respondent no. 1 Annexure-1 to the writ petition is quashed. The respondents are directed to reinstate the petitioner on Class IV post and shall pay arrears of salary to the petitioner from 29.6.1994 till the date of this judgement at the rate of Rs. 1675/- per month. The respondents are directed to consider the claim of regularisation of the petitioner on a Class IV post in the light of the observations made in this judgement and shall pass appropriate orders. The aforesaid directions shall be complied with by the respondents within a period of two months from the date of production of a certified copy of this judgement before respondent no. 1

The petitioner shall be entitled to his costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD: 7.4.1999

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April, 7

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE R.K. SINGH, J.

CIVIL MISC. WRIT PETITIONS NO. 14469 OF 1999

Sant Kumar & others ... Petitioners.
Versus
The Collector, Saharanpur & others ... Respondents.

Counsel for the petitioners : Mr.Dhan Prakash

Counsel for the Respondents : S.C.

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M. Katju, J.
R.K.Singh,J.

Constitution of India, Article 21, 25- Civil sense-use of laudspeaker by constructing new masjid causing great harassment- once right of religion is fundamental right at the same time right to privacy is also fundamental right-both must be read harmoniously. One must learn civic sense and to avoid causing harassment to other. (Para 5 and 6)

Case law discussed.
1998 (8) – SCC- 296

By the Court

1. Heard learned counsel for the petitioner and learned standing counsel. The petitioners and respondent no. 2 to 6 are residents of village Asadpur, district Saharanpur.

2. The petitioners have prayed for a direction to respondent no. 1 to stop any construction of a new Masjid in place of the room in question and also to stop use of loudspeaker.

3. We have already held in Civil Misc. Writ Petition No. 43403 of 1998 (Mohd Sharif Saifi vs State of U.P. & others) decided on 28.1.1999 that it is a fundamental right of every citizen under Article 25 of the Constitution of India to construct any house of worship whether it is mosque,church, temple etc. on his own land or any one else's land with the consent of that person. Hence there can be no objection regarding construction of the Mosque and we direct that no one will interfere in the construction of the mosque.

4. We have also issued a humble appeal in Civil Misc. Writ Petition No. 14169 of 1999 (Chhidda Khan Vs State of U.P. and others) decided on 6.4.1999 by which we have appealed to the general public to refrain from utilizing loudspeakers, whether it is for Akhand Ramayan, Azan, Kirtan, Quawwali or public programmes, functions, marriages, or for any such purposes because this is causing a great deal of inconvenience and harassment to the general public, particularly to persons who may be having heart problems and want to get sound rest, students who wish to study, and others who do not wish to be disturbed.

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5. We may further mention that while the right to practice one's religion freely is a fundamental right under Article 25 of the Constitution, the right to privacy is also a fundamental right under Article 21 of the Constitution as held by the Supreme Court in R.Rajagopal vs. State of Tamilnadu AIR 1995 SC 264 and Mr. X versus Hospital Z AIR 1998 (8) SCC 296. Hence both these rights must be read harmoniously.

6. In our opinion use of loudspeakers invades- the right to privacy of the citizens. Hence we are of the opinion that the right to religion under Article 25 and the right under Article 21 must be read together. No body has the right to practice religion in a way so as to invade the privacy of others . Hence we again repeat our humble appeal to the citizens to refrain from utilizingloudspeakers, whether it is for Akhand Ramayan, Azan, Kirtan, Quawwali or public programmes, functions, marriages, or for any such purposes etc. as the same causes a great deal of inconvenience and harassment to the general public.

We may mention that in England, U.S.A., Canada, etc. people do not even ordinarily blow the horns of their cars, as this is regarded as bad manners since it causes inconvenience to others. We too must learn civic sense in our country, and avoid causing harassment to others.

With these observations and directions the writ petition is finally disposed off.