ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD FEB. 1, 2000

BEFORE
THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE S.R. SINGH, J.

Civil Misc. Writ Petition No. 33929 of 1999

Manbodh Kumar Lal and others ...Petitioners
Versus
State of U.P. through the Chief Secretary, U.P. Shashan, Lucknow and others ...Respondents

Counsel for the Petitioner:
Shri Dinesh Dwivedi
Shri Rakesh Dwivedi

Counsel for Respondents:
S.C.

U.P. Panchyat Raj Act, 1947 as amended by U.P. Panchayat Raj (Amendment) Act, 1999, Ss. 25 and 25-A read with Constitution of India, Arts. 40, 243-G, 14,16 and 311.

Decision of State Govt. to transfer some governmental functions proposed to be transferred to panchayats is a policy decision hence not open to judicial review- Further under S.25(b) transferred employees would continue to be governed by same set of rules as were applicable to them on date of devolution of power and their service conditions not altered- impugned transfer held not violative of Arts. 14, 16 and 311.

Held-

In the present case, it would be evident from clause (b) of sub-section (1) of section 25 of the Act that the service condition of the existing Govt. employees of the Departments transferred to Gram Panchayats have not at all been altered as it is very clearly provided in clause (b) of sub-section (1) of section 25 that they would continue to be governed and the same set of rules as Government servants would, pro-tanto, apply to them as were applicable to them as were applicable to them on the date of devolution of power. In such view of the matter, we find no infirmity in the view taken by the learned Single Judge dismissing the writ petition nor do we find any substance in the writ petition filed by and on behalf of Gram Panchayat Adhikari challenging the validity of the amended sections 25 and 25-A of the U.P. Panchayat Raj Act, 1947 and the G.O. dated 1.7.1999. (Para 11)

Case Law discussed
(1993) 2 SCC 33.

By the Court

1. In the writ petition as also in the Special Appeals on hand, the challenge is to the validity of the Uttar Pradesh Panchaya Raj (Amendment) Act, 27 of 1999 and the G.O. dated July 1, 1999 pursuant to which the services of the village level employees of the State Government serving in the departments referred to in the G.O. aforestated were transferred to Gram Panchayats. The learned Single Judge dismissed the writ petition Nos.27939 of 1999 (U.P. Basic Health Workers and another V. State of U.P. & ors.) and 27937 of 1999 (Smt. Shobha Sharma V. State of U.P. & Ors.) by means of the judgment and order dated 13.7.99, the correctness of which has been canvassed in the instant Special Appeals. Writ petition No.3329 of 1999 has been instituted on behalf of the U.P. Gram Panchayat Adhikari Sangh whereas writ petition No.27939 of 1999 from which stemmed the Special Appeal No. 591 of 99 was instituted on behalf of the U.P. Basic Health Workers Association and Writ Petition No.27937 of 99 giving rise

to Special Appeal No.709 of 99 was instituted by appellant- Smt. Shobha Sharma, claiming herself to be the President of Mahila Karamchari Sangh, Uttar Pradesh- an Association of Auxiliary Nurses and Mid-wives. Since these cases are knit together by common questions of law, they are amenable to common disposal by a composite order.

2. Sri Dinesh Dwivedi, learned counsel appearing for the appellant began his submission assailing the transfer of the employees under the Gram Panchayats while Sri R.P. Goel, Advocate General appearing for the State articulated his submissions in vindication of the U.P. Panchayat Raj (Amendment) Act, 1999 and the consequent transfer of services of the village level employees of the concerned departments.

3. In order to get a hang of the controversy involved in the case, a brief sketch leading to enactment of the U.P. Panchayat Raj (Amendment) Act, 1999 is necessary. It is by seventy-third Amendment made in the year 1992 that Art. 243-G was inserted in the Constitution, which dwells upon powers, authority, and responsibility of Panchayats. It may be abstracted below as under;

"243G. Powers, authority and responsibilities of Panchayats- Subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein, with respect to-

(1) the preparation of plans for economic development and social justice;

(b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule."

4. A glance at Art. 243G would crystallise that the Legislature of a State has been ceded the power to endow the Panchayats, by law, with such powers and authority as may be necessary to enable them to function as Institutions of self-government and such law, it is further envisaged therein, may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level with respect to – (a) the preparation of plans for economic development and social justice; and (b) the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule; Health and sanitation, including hospitals, primary health centres and dispensaries; Family welfare; and Woman and Child development, are the matters enumerated respectively at Item Nos. 23,24, and 25 of the Eleventh Schedule of the Constitution. With intent to actualising the objectives engrafted in Art. 243G of the Constitution, the State Legislature enacted U.P. Panchaya Raj (Amendment) Act 27 of 1999 whereby the following sections came to be substituted in place of Sections 25 and 25A of the United Provinces Panchayat Raj Act, 1947:

"25. (1) Notwithstanding anything contained in any other provisions of this

Act, any Uttar Pradesh Act, Rules, Regulations, or Bye-laws or in any judgment, decree or order of any Court;

(a) The State Government may, by general or special order, transfer any employee or class of employees serving in connection with the affairs of the State to serve under Gram Panchayats with such designation as may be specified in the order and thereupon posting of such employee or employees in Gram Panchayats of a district shall be made by such authority in such manner as may be notified by the State Government.

(b) the employee or employees on being so transferred and posted in as Gram Panchayat, shall serve under the supervision and control of the Gram Panchayat on the same terms and conditions and with the same rights and privileges as to retirement benefits and other matters including promotion as would have been applicable to him immediately before such transfer and shall perform such duties as may be specified from time to time by the State Government.

(2) Subject to the provisions of sub-section (I), a Gram Panchayat may, after prior aproval of the prescribed authority , appoint from time to time such employee as may be considered necessary for efficient discharge of its functions under this Act in accordance with such procedure as may be prescribed:

Provided that the Gram Panchayat shall not create any post except with the previous approval of the Prescribed authority.

(3) The Gram Panchayat shall have power to impose punishment of any description upon the employees appointed under sub-section (2) subject to such conditions and restrictions and in accordance with such procedure as may be prescribed.

(4) The Gram Panchayat may delegate to the Pradhan or to any of its Committee, subject to such conditions and restrictions as may be prescribed, the power to impose any minor punishment upon the employees appointed under sub section (2).

(5) An appeal from an order imposing any punishment on an employee under sub-section (3) shall lie to such officer or Committee as may be specified by the State Government by notification.

(6) The prescribed authority may, subject to such conditions as may be prescribed, transfer any employee referred to in clause (b) of sub-section (I) from one Gram Panchyat to any other Gram Panchayat within the same district and the state Government or such other officer as may be empowered in this behalf by the state Government may similarly transfer any such employee from on district to another.

(7) A Nayay Panchayat may, with the previous approval of the prescribed authority, appoint any person on its staff in the manner prescribed. The person so appointed shall be under the administrative control of the prescribed authority who shall have power to transfer, punish suspend, discharge or dismiss him.

(8) Appeal shall lie from an order of the Prescribed authority punishing, suspending, discharging or dismissing a

person under sub-section (7) to an authority appointed in this behalf by the State Government.

25-A. The State Government, or such officer or authority as may be empowered by it in this behalf shall appoint a Secretary from amongst the employees referred in clause (b) of Sub section (1) or sub-section (2) of section 25, who shall act as secretary of such Gram Panchayat or Gram Panchayats, the Gram Panchayats within whose territorial limits such Gram Panchayats are situated and perform such other duties as may be prescribed by the State Government or such officer or authority as may be empowered in this behalf by the State Government."

5. Antecedent to Act 27 of 1999, an Ordinance captioned as Uttar Pradesh Panchayat Raj (Amendment) Ordinance, 1999 was promulgated on June 27, 1999 for the self-same purpose. This ordinance stood repealed by aforesaid U.P. Act, 27 of 1999. The focus of challenge herein is to the validity of clauses (a) and (b) of Sub-section (1) of Sec. 25 of the U.P. Panchayat Raj Act, 1947 as it stood substituted by U.P. Panchayat Raj (Amendment) Act, 1999 and that of the G.O. No.3467/33-1-99-222/99 Panchayati Raj Anubhjag-1 Lucknow dated July1,1999 issued in exercise of power under sub-section (1) of Sec. 25 of the U.P. Panchayat Raj Act, 1947 whereby certain State functions hitherto being performed by Govt. Departments have been delegated to Gram Panchayats. In other words, the functions of various government departments referred to in the G.O. dated 1.7.99, came to be transferred to Gram Panchayats.

6. The Uttar Pradesh Panchyat Raj (Amendment) Ordinance, 1999 that subsequently exalted itself to become U.P. Act 27 of 1999 does not detract from legislative competence and in fact, the submission of Sri Dinesh Dwivedi does not weave round the question that the State Legislature was not competent to make the enactment in question. Entry No. 5 of List 2 empowers the State Legislature to make law in respect of Local Government i.e. the Constitution and powers of Municipal Corporation, Improvement Trust, District Boards, Mining Settlement Authorities and other Local authorities for the purposes of local self government or village administration and Entry no. 6 empowers the State Legislature to make law in respect of public health, sanitation, hospital and dispensary. Organisation of village Panchayats with such powers and authority as may be necessary to enable them to function, as unit of self-government has been one of the directive principles of state policy as enshrined in Art. 40 of the Constitution. Art. 243G inserted by Constitution (Seventy-third Amendment) Act, 1992 enjoins upon a State Legislature to endow the Panchayats with such powers and authority as may be necessary to enable them to function as institution of self-government by means of appropriate legislation which may contain the provisions for devotion of powers and responsibilities upon the Panchayat at the appropriate level subject to such restriction as may be specified therein with respect to the preparation of plans for economic development and social justice; implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule. The

impugned enactment namely the U.P. Panchayat Raj (Amendment) Act, 1999 is well within the legislative competence of State Legislature. Section 25 and 25A and are intended to achieve the objective enshrined in Articles 40 and 243 G of the Constitution. Transfer of Government Department to the Gram Panchayat vide G. O. dated July 1, 1999, cannot be demurred to.

7. It is a matter of policy decision of the State Government as to what kinds of governmental functions are to be transferred to Pachayats. The decision taken by the Government under Clause (a) of Section 25(I) would not be open to judicial review by this court so long as it is in consonance with clause (b) of Sub-section (1) of Sec. 25 of the Act and Art. 243G of the Constitution.

8. The question remains whether clauses (a) and (b) of sub-section (1) of Sec. 25 of the U.P. Panchayat Raj Act, 1947 as substituted by U.P. Act 27 of 1999, infringe upon Articles 14, 16 and 311 of the Constitution of India. The bottomline argument advanced by Sri Dinesh Dwivedi is that the transfer of a Government employee to serve under Gram Panchayat with full supervision and control of the Gram Panchayat is fraught with the consequence of a transfer from one service to another service and such transfer, proceeds the submission, is discountenanced as impermissible.

9. It brooks no dispute that such employees on being so transferred and posted in as Gram Panchayat shall serve under the supervision and control of the Gram Panchayat subject to the same terms and conditions and same rights and privileges as to retirement benefits and other matters relating to promotion as would have been available and accrued to them immediately before such transfers and shall perform such duties as may be specified from time to time by the State Government.

10. The Submission made by the learned counsel that the transfer visualised under clause (a) of sub-section (1) of Section 25 is violative of Articles 14, 16 and 311 of the Constitution, cannot be countenanced in approval inasmuch as it has been very clearly provided in section 25(1) (b) of the Act that the service conditions of the Transferee employees of the concerned department will continue to be the same and they will continue to be the Government employees and governed by the same service conditions which were applicable to them prior to transfer of the departments to the Gram Panchayats.

11. The decision in **State of Gujarat V. Ramanlal Keshavlal Soni**[1], reliance on which was placed by Sri Dinesh Dwivedi cannot be taken aid of as the ratio decidendi of that case flows from different perspective. In that case, Gujarat Panchayat Third Amendment Act 1978 was declared unconstitutional as it offended Articles 311 and 14 of the Constitution inasmuch as a result of the Amendments, certain Government servants therein, ceased to be the Government servants with retrospective effect and their allocation to the Panchayat Service was cancelled and they were made servants of Gram and Nagar Panchayats with retrospective effect and they were treated differently from those working Taluka and district Panchayats

[1] (1993) 2 SCC 33

and under the amended provisions, their service conditions were to be prescribed by Panchayats by resolution whereas the condition of service of others were to be prescribed by the Government. Their promotional prospects were completely wiped out and all advantages which they could derive as a result of judgment of the Court in their favour were taken away and it was under these circumstances, that the Supreme Court held that their status as a Government servant would not be extinguished so long as the posts were not abolished and their services were not terminated in accordance with the provisions of Art. 311 of the Constitution nor was it permissible to single them out for differential treatment in violation of Art. 14 of the Consti. In the present case, it would be evident from clause (b) of sub-section (1) of section 25 of the Act that the service condition of the existing Govt. employees of the Departments transferred to Gram Panchayats have not at all been altered as it is very clearly provided in clause (b) of Sub-section (1) of Sec. 25 that they would continue to be governed and the same set of rules as Government servants would, pro tanto, apply to them as were applicable to them on the date of devolution of power. In such view of the matter, we find no infirmity in the view taken by the learned Single Judge dismissing the writ petition nor do we find any substance in the writ petition filed by and on behalf of Gram Panchayat Adhikari challenging the validity of the amended sections 25 and 25 A of the U.P. Panchayat Raj Act, 1947 and the G.O. dated 1.7.99.

Accordingly, the appeals and the writ petition aforestated fail and are dismissed. We make no order as to costs.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEB. 9,2000

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

Civil Misc. Writ No. 401 of 2000

M/S Kamla Motors & Engineering works Birdghat, Gorakhpur ...Petitioner
Versus
IBP Co. Limited a Government of India Enterprise through its Divisional Manager, Divisional Office, 17-A, Hastings Road, Ashok Nagar, Allahabad ...Respondent

Counsel for the Petitioner:
Shri Tarun Agarwala
Shri Bharat Ji Agarwal

Counsel for the Respondent:
Shri Vineet Saran
Shri Krishna Murari
Shri K.L. Grover

Article 226 of the Constitution of India- if there is breach of any one of the conditions, necessary action against the dealer may be taken under clause 9 (s) of the agreement. Since MS sample failed to withstand the test of scrutiny with regard to RON specification, supply and sale of HSD covered by the same agreement were also suspended.

Held-

That the agreement in question is composite one. The right to receive supply and sale of MS and HSD emanates from the same agreement and in the agreement, it has been mentioned that is there is breach of any one of the conditions, necessary action against the dealer may be taken under clause 9(s) of the agreement. Since MS sample failed to withstand the test of scrutiny with regard to RON specification, supply and

sale of HSC covered by the same agreement were also suspended. (Para 17)

By the Court

1. The petitioner, M/s Kamla Motors and Engineering Works, which is a partnership firm, is engaged in the business of sale of Motor Sprit (for short 'MS'), High Speed Diesel (for short 'HSD') and lubricants. The firm entered into an agreement dated 21.12.1972 as a licensee of Indo-Burma Petroleum Company Ltd., which was subsequently taken over by the Government of India through Acquisition Act and is now called as IBP Co. Ltd., for sale of the aforesaid products. The petitioner has a petrol pump at Bridh Ghat, Gorakhpur. A copy of the agreement dated 21.12.1972 containing the terms and conditions, on which both the parties have placed reliance, Annexure 2 to the writ petition. Clause 9(e) of the agreement requires the petitioner:

"to take every reasonable precaution against contamination of the products supplied by the Company by water, dirt or other hinges injurious to their quality and not in any way directly or indirectly alter the company's standard quality of products as delivered. The company shall have the right to exercise at their discretion quality control measures for products marketed by the Company."

2. By virtue of the provision made in clause 9(s) of the agreement, the respondent-company is at liberty to stop all supplies to the licensee for such period as the company may think fit, if there is a breach of any of the terms and conditions of the agreement by the licensee.

3. It appears that sample of MS was drawn from the retail outlet of the petitioner on 29.11.1999 by a Joint Inspection Team. The sample was sent for test report. The MS sample taken from the retail outlet of the petitioner did not meet the specification in respect of Research Octane Number (popularly known as 'RON'). It was noticed that the petitioner committed breach of terms and conditions contained in clause 9(e) of the dealership agreement as well as violated rules and the guidelines, and accordingly the impugned order dated 19.12.1999. Annexure 1 to the writ petition was passed whereby the petitioner was required to explain the reasons for failure of the sample. Sales and supplies of MS at the retail outlet of the petitioner were also suspended w.e.f. 16.12.1999. It is this order which has been challenged in the present petition on a variety of grounds. In substance, the case of the petitioner is that the MS sample, which was taken on 29.11.1999 from its retail outlet, was the same as was supplied by the respondent-company and that the petitioner has taken all reasonable precautions against the contamination of the products as supplied by the company and if the sample has failed in meeting the specifications in respect RON, it was not on account of any adulteration on the part of the petitioner. It is averred that the MS sample has withstood the test of scrutiny in all other respects, except that it allegedly failed to meet RON test for which the respondent-company has no facility. The petitioner asserts that it has not committed breach of any of the terms and conditions contained in the agreement, or violated the relevant Control Orders and guidelines issued by the Central Government and other authorities.

4. During the pendency of this petition, the respondent also suspended the supply and sale of HSD w.e.f. 5.1.2000. A copy of the said order, which is also the subject matter of challenge in the present writ petition, has been brought on record as Annexure S.A. 1 with the supplementary affidavit filed in support of the amendment application. As the things stand, the petitioner has now come to challenge two separate orders dated 16.12.1999 and 5.1.2000 by which the supply and sale of MS and HSD have been suspended.

5. On behalf of the respondents, a counter affidavit has been filed by Sri Abhimanyu Gupta, Divisional Manager, IBP Company Ltd., Allahabad. Repelling the averments made in the writ petition, it is stated that the various Government orders and guidelines relied upon by the petitioner stand superseded by the subsequently enacted Motor Speed and High Speed Diesels (Regulation of Supply and Distribution and Prevention of Malpractice) Order, 1998, (hereinafter referred to as 'the Control Order, 1998') which came into force w.e.f. 28.12.1998 and that under the said Control Order the Octane Number of MS is also required to be checked to ascertain purity by RON test. It is maintained that since the sample taken from the retail outlet of the petitioner was adulterated as it did not conform to the RON specifications, the respondent- Company was justified in initiating action against the petitioner in terms of clause 9(s) of the agreement and to suspend the supply and sale of both MS as well as HSD. In reply to the counter affidavit, a rejoinder affidavit has also been filed by the petitioner.

6. Heard Sri Bharatji Agarwal, Senior Advocate, assisted by Sri Tarun Agrawal, Advocate, for [etotopmer and S/Sri Vineet Saran and Krishna Murari appearing on behalf of the respondents at considerable length. Since the entire material is available on record, this writ petition is being disposed of finally at this stage with the consent of the learned counsel for the parties.

7. At the threshold of the hearing, a preliminary objection was raised by Sri Vineet Saran, learned counsel for the respondent – company that the present petition under Article 226 of the Constitution of India, which involves interpretation of the various clauses contained in the agreement/contract entered into between the petitioner and the respondent-company is not maintainable and the proper remedy of the petitioner for the relief of breach of contract, if any, is to file a suit for damages. It is an indubitable fact that the respondent-company is an organ or an instrumentality of the State as contemplated under Article 12 of the Constitution of India and consequently Sri Bharatji Agarwal urged that the writ petition for the relief claimed is undoubtedly maintainable. It was urged that any authority covered under Article 12 cannot act arbitrarily even in contractual matters and must act only to further public interest. The point was further developed by making submission that the respondent-company being a public body even in respect of its dealing with its customers/dealers, it must act in public interest and any infraction of their duty is amenable to examination either in civil suit or in writ jurisdiction. It is true that if a Government policy or action, even in contractual matters fails to satisfy

the test of reasonableness, it would be unconstitutional. In this connection, a reference may be made to the celebrated decisions of the apex court in *M/S. Radha Krishna Agarwal V. State of Bihar* A.I.R. 1977 SC—1496; K.D. Shetty V. International Airport Authority of India (1979) 3 SCC – 489; Kasturi Lal Laxmi Reddy Vs. State of J & K (1980) 4 SCC-1; Life Insurance Corporation of India V. Escorts Ltd. –(1986)1 SCC-264 M/s Dwarkadas Marfatia and Sons. V. Board of Trustees of the Port of Bombay –(1989)3 SCC –293; Mahabir Auto Stores V. Indian Oil Corporation –A.I.R. 1990 SC –1031. The point was succinctly made out by the Supreme Court in the case of Som Prakash Rekhi V. Union of India –(1981) 1 SCC-449 reiterated in M.C. Mehta V. Union of India –(1987) 1 SCC-395, wherein it was observed that :

"It is dangerous to exonerate corporations from the need to have constitutional conscience : and so, that interpretation, language, permitting, which makes a governmental agencies, whatever their mien, amenable to constitutional limitations, must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio."

8. As regards the power of judicial review, the apex court in E.P. Royappa V. State of Tamil Nadu- (1974) 4 SCC –3; Maneka Gandhi V. Union of India-(1978) 1 SCC –248 and Ajay Hasia V. Khalik Mujib Sehravardi (1981) 1 SCC-722 laid down that where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. Judicial review is permissible only on the established grounds of mala fide, arbitrariness, or unreasonableness of the Wednesbury variety as has been laid down in Delhi Science Forum V. Union of India (1996) SCC-260; New Horisons Ltd V. Union of India –(1995) 1 SCC-478; Asia Foundation and Constructions Ltd. Vs. Trafalgar House Construction (I) Ltd. (1997) 1 SCC –738; Tata Cellular V. Union of India-(1994) 6 SCC –651; Fertilizer corporation Kosigar Union (Regd.) Vs. Union of India, (1981) 1 SCC –568 and Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and others (1999) 1 SCC –492.

9. Sri Vineet Saran pointed out that he is not challenging the application of Article 14 of the Constitution if the action of the State or its instrumentality is arbitrary and discriminatory at the stage of granting or entering into a contract. He clarified that what he submits is that after a contract has been validly entered into, the breach of the various terms and conditions of the contract, if any, cannot be made the subject matter of writ jurisdiction. Emphatic reliance was placed by both the parties on the observations made by the apex court in the case of M/S Mahabir Auto Stores (supra). In that case, it has been laid down with all specificity that the State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties, Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of the State organ under Article 14 can be checked. But, Article 14 of the Constitution cannot and has not been construed as a charter for judicial review

of state action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. A close reading of the aforesaid decision would make it clear that the operation of Article 14 comes into place only at the stage of entering or not entering in contracts with individual parties and once the contract has been entered into, the rights of the parties shall be governed by the terms and conditions to which they are subject under the agreement.

10. On the strength of the aforesaid permise Sri Vineet Saran assiduously argued that the present petition under Article 226 in not maintainable for the breach, if any, of the terms of the agreement as the proper remedy of the petitioner, if at all, available is to file a civil suit for damages. This aspect of the matter may appropriately be dealt with raised in this petition.

11. The petitioner undoubtedly is receiving supplies for selling MS and HSD under an agreement dated 26.12.1972 (Annexure 2). An unfettered discretion has been conferred upon the respondent-company to suspend the sale and supply of the aforesaid items under clause 9(s) if there is breach of the agreement. The impugned orders dated 19.12.1999 (Annexure 1) and 5.1.2000, (Annexure S.A.-1) have been passed for the stoppage of supply and sale at the retail outlet of the petitioner primarily on the ground that the MS sample taken on 29.11.1999 did not conform to the RON test, meaning thereby the MS which was being sold at the retail outlet of the petitioner was adulterated. There is no dispute about the fact that the parties are governed by the terms of the agreement as well as the Control Order, 1998 made in exercise of power conferred under Section 3 of the Essential Commodities Act. The expression 'adulteration' as defined in the Control Order, 1998 means the introduction of any foreign substance into motor spirit/high speed diesel illegally/ unauthorisedly with the result that the product does not conform to the requirement indicated in Schedule 1. The expression 'malpractice' includes 'adulteration'. If the MS sample was found to be adulterated it would be a case of 'mal practice' on the part of the petitioner and in that event the respondent-company is entitled to take action under clause 9(s) for breach of the terms of agreement.

12. A factual aspect of the controversy has been raised in this writ petition that the MS sample of the petitioner has withstood the density test and since the respondent – company does not have the equipment to check RON the petitioner cannot be blamed if there is any variation of RON in the MS sample. It has been scientifically proved on chemical analysis that the density level of diesel is higher than that of Kerosene and density of kerosene is higher than that of petrol and, therefore, if kerosene is mixed with diesel the density of such adulterated product would be less than the density of pure diesel. However, by mixing some other article it is possible to again raise the density of this adulterated product to the level of diesel. Therefore, by mixing more than on item to diesel its density can be brought back to the prescribed standard. Similarly density of petrol will become higher by mixing kerosene but it can be brought back to the prescribed standard by mixing another item having

lower density. In Krishna Kumar V. Senior Superintendent of Police Bulandshahr –1998 (36) ACC-630, a Division Bench of this Court examined the matter and observed that it can never be the intention of legislature that even though two or more foreign substances have been mixed with diesel but if the product so made conforms to the density standard it should not be treated as a malpractice or that it does not amount to violation of the provisions of the Control Order. The observations of the Division Bench in this regard may profitably be quoted as follows:

"…..To our mind the correct and logical way to interpret Clause 2(a) will be to divide it into two parts. The introduction of any foreign substance in petrol or diesel illegally/unauthosedly simplicitor would amount to adulteration even though the product may conform to density standard as mentioned in Scheduled 1 of the Control Order. If the product does not conform to the density requirement indicated in Schedule 1 it will also amount to adulteration. In order to find out whether any foreign substance has been mixed with petrol or diesel it is absolutely necessary perform other tests like determination of flash point, recovery at different temperatures, viscosity and flow etc. …."

13. The contention raised on behalf of the petitioner that it is not responsible for the failure of the sample to meet the RON specifications cannot be accepted on the mere ground that the RON facilities are not available to the respondent-company and that the sample was taken from the MS, as supplied by the respondent-company. This submission is wide off the mark. Besides the density test RON test, of late, has come to be specified in Schedule 1 of the Control Order, 1998. RON test is almost anthicated modern test to gauge the purity of the product. It is one of the tests specified in Schedule 1 to ascertain the quality of the petroleum products. In paragraph of the counter affidavit of the respondent-company it has been specifically mentioned that though the IOC at Allahabad has no facility to under take RON test, samples collected from the retail outlet of the petitioner were sent to Delhi Terminal Laboratory, New Delhi of the Indian Oil Corporation which has the facility to undertake the RON test. As per Schedule 1 of the Control Order, 1998, RON should be 87 whereas the samples drawn from the retail outlet of the petitioner, as tested with the RON specification, was found to be 85 as would be apparent from the letter of Dy. Manager (Lab), Indian Oil Corporation Ltd., (Marketing Division), dated 14.12.1999, Annexure C.A. 1. As many as 7 samples of different dealers were sent for RON test. Out of seven samples, the sample number L-3594 concerning the petitioner-establishment did not meet the requirement of RON as it was 85.0. From this fact, it was concluded that the sample of the MS taken at the retail outlet of the petitioner was adulterated. The submission on behalf of the petitioner that it is not guilty of malpractice as the sample was taken from the supplies made by the respondent-company is otiose. The Government Corporations, such as the respondent, are not expected and will not supply sub-standard or adulterated material and it can be presumed that the product supplied by them would by pure and would conform to the standards laid down. If the supplies made by the respondent-company were deficient in RON specification, they should have been in respect of all the seven dealers and not

only in case of the petitioner. Under clause 9(e) of the agreement, it is for the dealer to take all reasonable precautions against the contamination or adulteration of the products supplied by the company. The report of the Laboratory to the effect that the MS sample is adulterated is sufficient to hold that the petitioner has indulged in malpractice, an expression, which has been defined in the Control Order, 1998. In Krishna Kumar's case (supra, it has been held that the report of the analyst is conclusive and admissible without any proof.

14. A faint suggestion was made on behalf of the petitioner that the MS sample taken from the outlet of the petitioner is in conformity with the executive orders, issued by the State Government, and the circular letters/guidelines issued by the respondent-company and, therefore, the petitioner cannot be branded of having committed any malpractice. The various Government orders and the guidelines which have been brought on record and have been relied upon by the learned counsel for the petitioner came into being prior to the commencement of Control Order, 1998. Since the RON test has been specified and has come into force w.e.f. 28.12.1998, the earlier orders and guidelines are of no consequence and have to be ignored. A statutory rule is also a delegated legislation and its position came to be explained in a Constitution Bench decision of the apex court in State of U.P. V. Babu Ram Upadhyay –A.I.R. 1961 SC –751 in which it was observed that the rule made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation. Similar view was taken in the case of State of Tamil Nadu V. M/S Hind Stores –A.I.R. 1981 SC –711. The provisions of the Control Order 1998 shall, therefore, have the overriding effect and prevail over the earlier Government order, circulars and guidelines.

15. This court cannot act as an appellate authority and examine the details of terms of contract. The primary concern of this court is to see whether there is any infirmity in the decision making process. The above observations are fortified from the decision of the apex court in Sterling Computers V. M.N. Publications Ltd. and others—A.I.R. 1996 SC—51. M/S Mahabir Auto Stores (supra) was a case where there was an abrupt stoppage of supply of lubricants to the dealer by the Indian Oil Corporation. No notice or intimation was given to the dealer and it was in these circumstances that the action of the company was held to be arbitrary. In the instant case, the action of the respondent-company cannot be faulted on any ground as the supply and sale of MS and HSD have been suspended for a specified period of 45 days. The impugned order, which is short-lived in nature, has been passed as a corrective measure with a view to act as a deterrent for others. If the malpractices of the dealers are ignored, in that event, they would feel emboldened and resort to further malpractices including adulteration, to the serious detriment of the public interest. Where the decision has been taken bona fide and a choice has been exercised on legitimate consideration, and not arbitrarily, there does not appear to be any reason why the court should entertain a petition under

Article 226 of the Constitution of India. Any other inference in the cases like the present one would be seriously jeopardise the public interest.

16. We would be doing well in not pronouncing upon any on the several contentions raised in the writ petition by both the parties and would feel satisfied by merely stating that since the MS sample did not conform to the RON specification, the respondent-company was well within its rights to suspend the supply and sale under clause 9(s) of the agreement. As a matter of fact, a complete answer to the various submissions made on behalf of the petitioner is to be found in a decision of the apex court in State of U.P. and others V. Brij and Roof India Co. Ltd. –1996 (6) SCC –22 in which the controversy was dealt with in the light of the different set of facts but nevertheless, the observations made by the apex court are applicable on all fours to the facts of the present case. In that case, the controversy raised was with regard to a private contract. It was observed that the remedy of writ petition under Article 226 of the Constitution adopted by the respondent of that case was misconceived. He was not entitled to any relief in the writ jurisdiction, firstly for the reason, the contract between the parties is a contract in the realm of private law, it is not a statutory contract. It is governed by the provisions of the Contract Act, or, may be also by certain provisions of Sales of Goods Act. Any dispute relating to interpretation of the terms and conditions of such contract cannot be agitated and could not have been agitated in a writ petition. Secondly, where there has been a breach of the terms of the contract, it not a matter to be agitated in the writ petition. That is again a matter relating to the interpretation of a term of contract and should be agitated before Arbitrator or the civil court, as the case may be.

17. A short and swift reference may also be made to the submission of the learned counsel for the petitioner that there was hardly any justification for suspending the supply and sale of HSD as no sample of this oil was taken or was found to be adulterated. This submission does not hold good for one simple reason that the agreement in question is composite one. The right to receive supply and sale of MS and HSD emanates from the same agreement and in the agreement, it has been mentioned that if there is breach of any one of the conditions, necessary action against the dealer may be taken under clause 9(s) of the agreement. Since MS sample failed to withstand the test of scrutiny with regard to RON specification, supply and sale of HSD covered by the same agreement were also suspended. The two articles of supply and sale cannot be aggregated as the rights of the petitioner flow in respect of both the commodities under one and the same agreement.

18. In view of the various observations made in the aforesaid case, the present writ petition for the relief's claimed is not maintainable. The proper remedy of the petitioner is to approach the civil court to challenge the alleged illegal action of the respondent-company and claim damages, if it is so advised.

19. In the conspectus of the above facts, the writ petition turns out to be devoid of any merits and substance and is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.3.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 10542 of 1983

Sri Nanhey Khan ...Petitioner.
Versus
The Ist Additional District Judge, Farrukhabad & Others ...Opp. Parties

Counsel for the Petitioner:
Shri Haider Husain
Shri G.N.Verma

Counsel for the Respondents:
Shri M.D. Singh
S.C.

Provincial Small Cause Courts Act read with Evidence Act, S. 114 and General Clauses Act, S. 27- Default in payment of arrears of rent. Presumption-when to be drawn-Both the Courts held that there was no refusal to accept the money order alleged to have been sent by petitioner-M.O. reaching land lord after period prescribed.

Held-

Admittedly the petitioner had remitted the money order for a sum of Rs. 1000/- , the demand made by the plaintiff-respondent, within one month from the date of service of notice, he cannot be held to be defaulter.

Once the tenant has remitted the money and there is nothing to show that the remitter colluded with the postman who got the money order returned to him or there is any other circumstance indicating that the money order if returned for other reasons than the remarks made by the postman, the presumption will be that the money order was tendered to the addressee. The petitioner had sent the money order within time in pursuance of the demand notice. There may not be any intention, unless there is any evidence to the contrary that he wanted that the amount remitted by the money order should not be received by the addressee.

The petitioner had filed the coupon. There are three parts of the money order form. One is returned to the remitter but the other part which is sent to the addressee was not on the record. The postal remark was that it was refused. If the address was incomplete it could be returned to the remitter with the endorsement that the address was incomplete. The courts below without considering this aspect held that the address was incomplete.

Case Law discussed:
1974AWR294; AIR 1992 SC639; 1963 AWR 472;1965 ALJ. 839; AIR 1966 AII 519; 1978 UPRCC 498; 1983 (1) ARC 849; 1985 (1)ARC13; 1986 (2) ARC 121; 1989 (1) ARC 413; AIR 1970 AII 446; AIR 1990 SC 1215; AIR 1980 AII 280, AIR 1976 Del..111.

By the Court

1. The petitioner is aggrieved against the decree for recovery of arrears of rent, ejectment and damages passed against him by the courts below.

2. The plaintiff-respondents no.3 and 4 filed S.S.C. Suit No. 115 of 1990 against the petitioner for recovery of arrears of rent, ejectment and damages with the allegations that the petitioner was tenant at monthly rent of Rs.100/- and Rs. 30/- per month as electric charges. He had not paid rent for the period 1.9.1979 to 30.6.1980 amounting to Rs. 1000/- and electric charges amounting to Rs. 300/-. He sent a notice dated.9.7.1980 demanding this amount which was served on him on 11.7.1980 but inspite of service of notice he did not pay the amount. The

petitioner denied the averments made in the plaint. His case was that the rent was Rs. 100/- per month inclusive of electric charges. He had sent a money order on 14.7.1980 for a sum of Rs. 1000/- but it was refused by the plaintiff, Prem Chandra. The trial court decreed the suit on 17.12.1981 on the finding that the landlords had not refused to accept the money order alleged to have been sent by the petitioner. This judgment has been affirmed in revision by the respondent no. 1 on 6.8.1983. These order have been challenged in the present writ petition.

3. The core question is whether the petitioner has committed default in payment of arrears of rent. Admittedly the petitioner had sent money order on 14.7.1980 for a sum of Rs. 1000/-. This amount covered the period for which the notice was sent. The money order, however, is alleged to have been delivered to Prem Chandra, the plaintiff, after the period of one month. In Full Bench decision of this Court in Bhikha Lal & others V. Munna Lal, 1974 AWR 294, the question referred was whether the tenant could be said to have committed default under Section 3(1)(a) of U.P. (Temporary Control of Rent and Eviction) Act, 1947 in respect of payment of rent which he had sent to a landlord by money order well within time but had reached the landlord after expiry of 30 days. The Court answering the said question held that if the landlord has demanded the arrears through the registered notice, the amount sent by money order there, will be implied authority to the tenant to send the amount through the postal agency and if the tenant sends the amount within the time prescribed in law to the landlord, unless he withdraws it, the tender will be valid tender to the landlord within time even if the money order does not reach him within the prescribed time under law. It was observed as Under:-

" Thus, assuming that by reason of sec. 44(1) of the Post Office Act, the post office is the statutory agent of the tenant, it can still be held to be the agent of the creditor also provided the circumstances of the case justify that inference. We are thus free to consider the question before us unhampered by Sec. 44(1) of the Post Office Act."

"Thus, it appears to me that the Court in this case inferred an implied authority to the debtor to send the cheque by post merely because a demand had been made by post. This principle to my mind is based on sound logic. If a trader sends me a reminder of an outstanding bill through a messenger, in the absence of any intention expressed to the contrary. I believe I would be justified in assuming that the trader, by implication has authorised me to send the amount outstanding through that messenger. Extending this principle, if a creditor who resides in a different town, makes a demand from his debtor by means of a letter dispatched through the post he impliedly invites the debtor to meet his obligations through the post. In this connection it may be borne in mind that "Government exercises a governmental power for the public benefit in the establishment and operation of the postal money order system and is not engaged in commercial transactions, notwithstanding it may have some aspects of commercial banking."

4. In Smt. Priya Bala Ghosh and others v. Bajranglal Singhania and

another, AIR 1992 SC639, where the tenant had remitted the money order within time but reached to the landlord after the outer limit of time fixed by the law, the tenant was not held defaulter. The Supreme Court held that he law envisages that remittance of money order must be made before the last day runs out prescribed by the statute. The delay in reaching the money order to the landlord may be for various reasons which may not be under the control of the tenant and in those circumstances he cannot be held to be defaulter in paying rent within time prescribed by the statute.

5. Admittedly the petitioner had remitted the money order for a sum of Rs.1000/- the demand made by the plaintiff-respondent, within one month from the date of service of notice, he cannot be held to be defaulter.

6. Another question is whether the money order was tendered to the plaintiffs by the postman concerned. The petitioner has filed money order coupons,Ext.A-36 and Ext A-37. It was addressed to Prem Chandra, one of the plaintiffs. The coupon contained endorsement of refusal by the addressee. Prem Chandra appeared as witness and denied that he refused to accept the money order and the endorsement of the postman was wrong. None of the parties had examined the postman. One view is that the mere denial by a party that he never refused to accept the money order or any letter rebuts the presumption contemplated under Section 114(1) of the Evidence Act because the person cannot lead negative evidence except to say that he did not receive the letter or money order alleged to have tendered to him. The other view is that mere denial is not sufficient to rebut the presumption because the man is interested to deny a fact which is against him. A large number of decisions have been cited in support of rival contention.

7. In Wasu Ram v. R.L. Sethi and another, 1963 AWR 472,where the landlord was alleged to have refused money order and deposed that he never received the money order, the Court held that the presumption was not rebutted. In Salik Ram Sahu and others v Bindeshwari Ram Rauniyar, 1965 ALJ 839, it was held that a bare denial by the addressee who stood to profit by his denial and therefore had all the motive in the world to deny will not necessarily weaken the presumption created by the endorsement "refused", and that if the addressee states on oath that he never received the communication, the Court must decide after considering all the surrounding circumstances, whether he should be believed. Similar view was taken in Asa Ram v Ravi Prakash AIR 1966 All 519.

8. In Jamal Khan and others v. Haji Yusuf Ali and others, 1978 U.P.R.C.C.498, it was held that the presumption stood rebutted on the denial by the addressee on oath but veracity of the statement must be considered by the Court on the light of evidence on record and the conduct of the party concerned. Similar view has been expressed in Smt. Bachchi Devi and another v. Ist Addl. District Judge and others 1983(1)ARC 849; Ramesh Chandra v. Gyan Chandra and another's, 1985 (1) ARC 13; Dharam Pal Tyagi v. Anil Kumar, 1986 (2)AR 121; and Mahabir Prasad Agarwal v. Brij Nath Gigras, 1989 (1) ARC 413

9. The Full Bench in Ganga Ram v. Smt. Phulwati, AIR 1970 Alld. 446,has

held that it is not necessary to produce and examine the postman to prove the endorsement of refusal. The controversy in regard to presumption has been considered by the Apex Court in Anil Kumar v Nanak Chandra Verma AIR 1990 SC 1215,and taking into account both the views held that bare statement of tenant on oath denying tender and refusal to accept delivery is not sufficient to rebut presumption. The contrary view expressed in Shiv Dutt Singh v Ram Dass, AIR 1980Alld 280 and Jagat Ram Khullar and another v Battu Mal, AIR 1976 Delhi III that bare statement of tenant was sufficient to rebut the presumption of service was not accepted. The Supreme Court observed:-

"In our opinion there could be no hard and fast rule on that aspect. Unchallenged testimony of a tenant in certain cases maybe sufficient to rebut the presumption but if the testimony of the tenant itself is inherently unreliable, the position may be different. It is always a question of fact in each case whether there was sufficient evidence from the tenant to discharge the initial burde."

10. Once the tenant has remitted the money and there is nothing to show that the remitter colluded with the postman who got the money order returned to him or there is any other circumstance indicating that the money order is returned for other reasons that the remarks made by the postman, the presumption will be that the money order was tendered to the addressee. The petitioner had sent the money order within time in pursuance of the demand notice. There may not be any intention, unless there is any evidence to the contrary that he wanted that the amount remitted by the money order should not be received by the addressee.

11. The nest submission of the learned counsel for the petitioner is that the presumption under Section 114 of the Evidence Act and Section 27 of the General Clauses Act can be raised only when it is proved that it was properly addressed to the person and placed reliance upon the decision Dharam Pal Tyagi v. Anil Kumar, 1986 (2) ARC 121, wherein it was held that before any presumption could be raised, it has to be proved that it was properly addressed to the addressee. There is no controversy on this legal position. (The petitioner had filed the coupon. There are three parts of the money order form. One is returned to the remitter but the other part which is sent to the addressee was not on the record. The postal remark was that it was refused. If the address was incomplete it could be returned to the remitter with the endorsement that the address was incomplete. The courts below without considering this aspect held that the address was incomplete.)

12. In view of the above the writ petition is allowed. The order dated 6.8.1993 is quashed. Respondent no. 1 shall decide the revision afresh keeping in view the observation made above and in accordance with law. In the facts and circumstances of the case the parties shall bear their own costs.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26TH JULY, 2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE A.K.YOG, J.

Special Appeal No. 475 of 1998

Smt. Shashi Saxena W/o Dr.Dushyant Kumar Saxena, Resident of 71 Shanti Sarowar, Ramghat Road, Aligarh
...Appellant
Versus
Deputy Director of Education, Region – II, Agra/Regional Inspectress of Girls Schools, Agra Region, Agra & others
...Respondents.

Counsel of the Appellant:
Shri B.B.Paul

Counsel of Respondents:
S.C.
Shri V. Singh
Shri K.D. Misra

U.P. Secondary Education Service Commission Act, 1982-Section 33B-Right of Regulaisation-appointment on short terms vacancy in C.T. grade-petitioner was not working on the specified date when the short term vacancy converted into substantive vacancy-cannot claim for regularisation.

Held-

Hence, it cannot be said that the services of Smt. Shahsi Saxena came to an end automatically on the post of Assistant Teacher in L.T. Grade being converted into substantive vacancy on the retirement of Smt. Ram Disit. There being no adverse circumstance or material against the working of Smt. Shashi Saxena as such, we find no justification in depriving said Smt. Shashi Saxena the relief claimed in writ petition No. 20349 of 1996.Writ Petition No.2-349 of 1996 is allowed. (Para 17)

Case Law discussed:
1999 (3) Education and Service Cases, 1950 and (1997) 2 UPLBEC 1329

By the Court

1. Above mentioned five Special Appeals arise from Writ Petitions under Article 226, Constitution of India, which were filed in this Court due to dispute between Smt. Shashi Saxena (present appellant) and one Smt. Kusum Singh both Assistant Teachers in Shree Teeka Ram Girls Inter College, (Called the College) a 'recognised' girls intermediate college receiving 'grant-in aid' as contemplated under U.P. Intermediate Education Act, 1921 (as amended up-to date). Admittedly, The U.P. High School and Intermediate College (Payment of Salaries of Teachers and Other Employees) Act, 1971,U.P.Act No. 24 of 1971 and U.P. Secondary Service Commission Act, 1982 U.P. Act No.5 of 1982 (as amended up to date) are applicable to the College

Dates in chronological order are given hereunder to appreciate the controversy between the parties:-

24.09.85 One Shashi Kant Sharma – Assistant Teacher – C.T. Grade-Promoted adhoc-as Assistant Teacher –(L.T. Grade) regularized w.e.f. 07.08.1995 vide order dated 29.01.96. Writ Annexure9P 49. Cancelled on 12.02.96 Writ Annexure 10P.52.

03-10-85 Kusum Singh (R-6) appointed directly on adhoc basis- against short-term vacancy on the aforesaid post of Assistant Teacher –C.T. Grade (Caused

by adhoc promotion of Shashi Kant Sharma from C.T. to L.T. Grade
District Inspector of Schools accorded approval and Kusum Singh paid salary as Assistant Teacher (C.T. Grade).

30-06-87 Term of Kusum Singh, as adhoc, extended up to 30.06.87 or till a regularly selected candidate by U.P. Secondary Education Service Commission was available.

24-03-90 Resolution of Committee of Management-One Rama Dixit (L.T. Grade Assistant Teacher)promoted adhoc –as Lecturer (Hindi) Short-term vacancy on L.T. Post held by Rama Dixit.

07-12-91 Resolution of Committee of Management Committee proposing to make direct selection instead of promoting Kusum Singh.

22-05-93 Proposal rejected by Regional Insapectress of Girls Schools.

02-07-93 (Impugned)
Application/letter in favour of Shashi Saxena by Committee of Management making short term direct ad hoc appointment. Writ Annexure-2/P18.

16-07-93 Committee of Management's resolution.

22-07-93 Papers sent to Regional Inspectress of Girls Schools. Writ Annexure-3/P.20

07-08-93 Shashi Kant Sharma regularized retrospectively vide order dated 23.01.1996
28-08-93
(Impugned) Regional Inspectress of Girls Schools approval to Committee of Management resolution dated 16.07.93. Annexure-3/20.

01-10-93 Application by Kusum Singh –seeking promotion against .T. post of Smt. Rama Dixit.

16-10-93 (Impugned) Regional Inspectress of Girls Schools orders) giving approval to Shashi Saxena and asking Manager to explain 8 excess posts of Assistant Teacher –L.T. Grade Annexure—13.
writ petition No. 3054 of 94 (Kusum Singh v Regional Inspectress of Girls Schools) challenging Annexures 2 and 3, claimed promotion on LT post held by Shashi Saxena (falling vacancy on promotion of Smt. Rama Dixit with effect from July 1993.

21-01-94 Interim order to pay Salary to Shashi Saxena, after D.D.E. satisfied regarding validity of appointment of Shashi Saxena.

14-09-94 (Impugned) Order of Deputy Director of Education to pay salary to Shashi Saxena (26-9-94- stayed by High Court till validity of appointment of Shashi Saxena decided) Writ Annexure 14.
10-01-95 (Impugned) Order of Deputy Director of Education to pay salary to Shashi Saxena Writ Annexure 15.

29-01-95 Order of Deputy Director of Education in favour of Kusum Singh

22-11-95 Order of District Inspector of Schools, Annexure C.A.-1

29-01-96 Kusum Singh regularized with retrospective effect from 06.04.1991

as Assistant Teacher C.T. Grade vide order dated 25/29-1-96 Annexure 9/P49

12-02-96 Order of regularisation dated 29.01.1996 cancelled Writ Annexure 10/PP52.

The Five Special Appeals, arising from a common judgment and order dated 29th may 1998 passed by a learned single judge of this Court are dealt hereunder:-

I- SPECIAL APPEAL No. 475 of 1998 (Leading Case – arising from Writ Petition No. 3054 of 1994 – Kusum Singh versus Regional Inspectress of Girls School, Agra & others).

2. Relevant facts and figures, which are necessary for the purpose of deciding controversy between the parties, are not in dispute and the same are given below for ready reference;

3. One Shashi Kant Sharma, Assistant Teacher in C.T. Grade, working in college was promoted on ad hoc basis as Assistant Teacher in L.T. Grade with effect from 24th September 1985 and consequently causing 'short-term' vacancy on the post of Assistant Teacher-C.T. Grade (held by the said Shashi Kant Sharma) with effect from 24th September 1985.

4. Smt. Kusum Singh was given ad-hoc appointment on direct basis against aforementioned 'short-term' vacancy on 03rd October 1985, which was approved by the District Inspector of Schools/Regional Inspectress of Girls Schools and consequently she was paid salary also. Since appointment of Smt. Kusum Singh was against short-term vacancy, on becoming substantive, was to continue till a regular appointment was being made as is evident from the perusal of the Manager's letter dated 30th June 1987 (Annexure-1 to the Rejoinder Affidavit in Writ Petition No. 3054 of 1994).

5. Smt. Kusum Singh, admittedly, since 1987 held a post of Assistant Teacher C.T. Grade, purely on ad-hoc basis against short-term vacancy and continued as such when one Smt. Rama Dixit, Assistant Teacher L.T. Grade, was given ad-hoc promotion against short-term vacancy on the post of Lecturer (Hindi) in pursuance to the management's resolution dated 24th March 1990.

6. Since Smt. Rama Dixit was given ad-hoc promotion against short-term vacancy on the post of Lecturer, a contingency arose to fill up the post of Assistant teacher, L.T. Grade (so for held by said Smt. Rama Dixit)by making ad-hoc short-term appointment.

7. On 07th December 1991 Committee of Management decided to fill up "short-term' vacancy of Assistant Teacher, L.T. Grade (caused by ad-hoc promotion so Smt. Rama Dixit) by making direct selection. Smt. Kusum Singh, since working on ad-hoc basis in C.T. Grade, was, therefore, not eligible for second 'ad-hoc' promotion on the post in L.T. Grade. The then Regional Inspectress of Girls Schools, however, initially rejected the proposal of the management vide order dated 20th May 1993. The Committee of Management, however, passed another resolution dated 16th July 1993 recommending the name of Smt. Shashi Saxena (present appellant) to be appointed by direct selection on ad-hoc basis against aforementioned short term vacancy in L.T. Grade(earlier held by

Smt. Rama Dixit). Papers were sent to the Regional Inspectress of Girls Schools and the then Regional Inspectress of Girls Schools accorded approval to the said proposal of ad-hoc appointment of Smt. Shashi Saxena vide letter dated 28th August 1993.

8. It appears that Smt. Kusum Singh made representation dated 01st October 1993 raising grievance that she should have been promoted against the post of Assistant Teacher , L.T. Grade (vacated by Smt. Rama Dixit). Having found no positive action in her favour, Smt. Kusum Singh filed Writ Petition No 3054 of 1994 (subsequently amended and prayed for issuing writ of certiorari to quash orders dated 02nd July 1993. Annexure-11 to the Writ Petition dated 28th August 1993. Annexure 12 to the Writ Petition, dated 16th October 1993 Annexure-13 to the Writ Petition, passed by the management and the Regional Inspectress of Girls Schools, dated 14th September 1994. Annexure 1-4 to the Writ Petition and date 10th January 1995. Annexure-15 to the Writ Petition passed by Regional Inspectress of Girls Schools, in favour of Smt. Shashi Saxena. Perusal of the impugned order dated 10th January 1995passed by the Deputy Director of Education (Annexure-5 to the Writ Petition) shows that the claim of Smt. Kusum Singh was rejected on the ground that she was working on ad-hoc basis against the short-term vacancy in C.T. Grade and hence she could not be considered for second ad-hoc appointment by promotion in L.T. Grade.

9. Smt. Kusum Singh in aforementioned petition also claimed writ of mandamus directing the Respondents to promote her on the post of Assistant Teacher, L.T. Grade, on short term vacancy caused by promotion of Smt. Rama Dixit on the post of Lecturer (Hindi) and also for payment of salary to her as Assistant Teacher in L.T. Grade with effect from July 1993. Smt. Kusum Singh also filed application for interim order, which was rejected vide order dated 30th July 1997.

10. Smt. Shashi Saxena field Counter Affidavit and contested the claim of Smt. Kusum Singh. Smt. Shashi Saxena in Para 3 to 9 of the Supplementary Counter Affidavit sworn on 23rd March 1996 stated that the then Deputy Director of Education, Ram Naresh Suman had objected on payment of salary after 30th June 1986 to Smt. Kusum Singh as her appointment was approved up to 19th May 1986 and initially refused to regularise the services of Smt. Kusum Singh vide letters dated 13th October 1995 and 22nd December 1995. Aforementioned orders were changed without assigning reasons by the same authority illegally, arbitrarily and apparently due to extraneous considerations. There were general complaints against said Ram Naresh Suman for acting arbitrarily and illegally on the eve of his retirement (which was due on 31st January 1996). Director of Education was pleased to stay such orders vide order dated 25th January 1996 (copy filed along with Supplementary Counter Affidavit). Smt. Kusum Singh, therefore, get no benefit or valid base for her claim on the basis of these illegal orders.

11. Undisputedly, Shashi Kant Sharma (whose post of C.T. Grade Assistant Teacher was held by Smt. Kusum Singh) was regularised by the Deputy Director of Education vide order

dated 23rd January 1996 as Assistant Teacher in LT. Grade under Section 33-B, U.P. Secondary Education Service Commission Act, 1932 (Annexure-8 to the affidavit in the leading case). In the said order, it was mentioned that Smt. Kusum Singh was not regularised because of position of vacancy with respect to the post held by her not being clear. It has also come on record that Smt. Kusum Singh was subsequently regularised by the order of Deputy Director of Education dated 29th January 1996. Annexure-9 to the affidavit in leading Appeal where under Smt. Kusum Singh was regularised in C. T. Grade with effect from 07th August 1993. Aforesaid orders of the Deputy Director of Education dated 23rd January 1996 and 29th January 1996 (Annexure 8 and 9 referred to above) go to show that while Smt. Shashi Saxena was regularised as Assistant Teacher with effect from 07th August 1993 in L.T. Grade, Smt. Kusum Singh was Regularised as Assistant Teacher with effect from 07th August 1993 in C.T. Grade.

12. It is clear and beyond doubt that Smt. Kusum Singh was working on ad-hoc basis against short-term vacancy in C.T. Grade when Smt. Shashi Saxena was appointed on regular basis as Assistant Teacher in L.T. Grade vide order of approval dated 28th August 1993 passed by Regional Inspectress of Girls Schools in favour of Smt. Shashi Saxena. This goes to show that Smt. Kusum Singh has no right whatsoever to claim appointment on the post of L.T. Grade which was vacated by Smt. Rama Dixit in the year 1990. To this extent we find no as irregularity or illegality in the order of Deputy Director of Education date 10th January 1995 (Annexure-15 to Writ Petition).

In view of the above, the relief's claimed by Smt. Kusum Singh in Writ Petition No.3054 of 1994 cannot be granted. Writ Petition deserves to be dismissed.

13. Consequently, Writ Petition No.3054 of 1994 is dismissed Special Appeal No.475 of 1998 allowed with costs.

II- Special Appeal No. 478 of 1998 (Smt. Shashi Saxena Vs Deputy Director of Education & others) arising out of Writ Petition No.20849 of 1996 (Smt. Shashi Saxena Vs Deputy Director of Education & others.)

Smt. Shashi Saxena through this Petition claimed writ of mandamus against the Respondents to allow her to continue on the post Assistant Teacher in L.T. Grade in the College Though she was appointed initially against short-term vacancy and notwithstanding that Smt. Rama Dixit, permanent incumbent had attained age of superannuation and retired with effect from 30th June 1996, and , consequently, substantive vacancy had occurred with effect from 01st July 1996.

14. Smt. Shashi Sacena continued to work as such irrespective of the above order of Deputy Director of Education dated 29th January 1996 in favour of Smt. Kusum Singh apparently due to the order of Director of Education dated 25th January 1996 (copy on record).

In this petition learned single Judge at the admission stage vide order dated

04th July 1996 directed status quo as on date to be maintained.

15. Division Bench decision of this Court in the case of Raj Kumar Verma Versus District Inspector of Schools, Saharanpur and others-1999 (3) Education and Service Case 1950 – Pr. 10 – (referring to the Full Bench case of Pramila Mishra versus Deputy Director of Education, Jhansi Division, Jhansi and others reported in (1997) 2 UPLBEC 1329), observed that the question' whether an ad-hoc appointee working against short terms vacancy shall cease automatically on considered in the said Full Bench. Above referred Para 10 of the said Division Bench Judgment reads:-

"10. The question herein is not whether a teacher appointed in a short-term vacancy is entitled to continue as of right even after the vacancy is converted into a substantive vacancy, The Question involved in the instant case is whether the appellants are entitled to be considered for being given substantive appointment. The right to be so considered for being given substantive appointment under Section 33-B accrues only upon conversion of the short term vacancy into substantive vacancy as provided in sub-section (1) of Section 33-B. A teacher appointed in short term vacancy on or before the dates specified in sub-clause (a) (i) of sub-section (1) of Section 33-B if not found' suitable' and 'eligible' to get substantive appointment would cease to hold the post on such date as the State Government may by order specify. That is how the provisions contained in Section 33-B of U.P. Act. No. 5 of 11982 "interact" with those of the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981 in respect of teachers appointed prior to the date specified in the Section. The Question as to how do the two provisions "Interact" has not been specifically answered by the Full Bench in Parmila Mishra's case (supra). In our opinion the right of a teacher appointed in a short term vacancy on or before the date specified in Section 33-B (1) accrues only upon the short term vacancy being converted into a substantive vacancy and a teacher, appointed in short term vacancy on or before the specified dates, who is not found 'suitable' and 'eligible' or substantive appointment shall cease to hold the appointment on such date as the State Government may be order specify and not on the date short term vacancy came to be converted into substantive vacancy. The question in our considered opinion, needs to be examined by the duly constituted Selection Committed comprehended by sub-section (3) of Section 33-B as the appellants were concededly appointed in Certificate of Teaching Grade before the specified date namely, May 13, 1989. whether they fulfill other conditions of being given substantive appointment is a question which is to be decided by the Selection Committee. In our opinion, therefore, the judgment of the learned single Judge needs to be modified accordingly for nothing in Parmila Mishra's case inhibits substantive appointment being given to a teacher appointment against a short term vacancy prior to the dates specified in Section 33-B of U.P. Act No.5 of 1982 if the conditions stipulated therein are satisfied and such teacher is found by the Selection Committee 'suitable' and eligible' for being given substantive appointment. As a matter of fact the question as to the "interaction" of Section 33-b of U.P. Act No.5 of 1982 with the

provisions contained in the U>P. Secondary Education Service Commission (Removal of Difficulties) (Second) order, 1981 though posed by Full Bench in Parmila Misra has not been answer, perhaps due to inadvertence, if we may say so with almost respect and humility. The contention of Sri Sabhajeet Yadav, Standing Counsel is, therefore, unacceptable to us"

16. The Deputy Director of Education, U.P. in the letter dated 17th August 1996 (Annexure-2 to the Supplementary Affidavit along with Miscellaneous Application No. 13364 of 2000) had taken the same view as has been upheld by the Division Bench of this Court in the case of Raj Kumar Verma (supra). The Regional Joint Director of Education, Agra, after hearing concerned parties including Smt. Kusum Singh, vide order dated 10th February 1999, found that said Smt. Kusum Singh was working on ad-hoc basis by direct appointment against short-term vacancy on the post of Assistant Teacher (C.T. Grade); a vacancy caused by ad-hoc short term promotion of Smt. Shashi Kant Sharma as Assistant Teacher from C.T. Grade to the post of Assistant Teacher L.T. Grade and that Smt. Kusum Singh has been rightly regularised as Assistant Teacher in C.T. Grade under Section 33-A with effect from 07th August 1993. (Annexure SA-1 to the Supplementary Affidavit annexed with Miscellaneous Application No. 13364 of 2000).

17. Hence, it cannot be said that the services of Smt. Shashi Saxena came to an end automatically on the post of Assistant Teacher in L.T. Grade being converted into substantive vacancy on the retirement of Smt. Ram Dixit. There being no adverse circumstance or material against the working of Smt. Shashi Saxena as such, we find no justification in depriving said Smt. Shashi Saxena the relief claimed in Writ Petition No. 20349 of 1996. Writ Petition No. 20349 of 1996 is allowed.

Consequently, Special Appeal No. 478 of 1998 is allowed with costs.

18. A writ of mandamus is issued against the Respondents to allow the Petitioner-Smt. Shashi Saxena to continue on the post of L.T. Grade Teacher in College even after short-term vacancy on the post held by her got converted into substantive vacancy with effect from 30th June 1996 to pay arrears of salary and to continue to pay in future such salary/emoluments, etc, as may become due in accordance with law until she is finally regularised and /or a duly selected candidate by the U.P. Secondary Education Selection Board Joins the post, as the case may be.

III- Special Appeal NO. 477 of 1998 (Smt. Shashi Saxena versus Deputy Director of Education & others) arising out of Writ Petition No.33235 of 1996 (Smt. Shashi Saxena versus Deputy Director of Education & others).

19. This Writ Petition was filed by Smt. Shashi Saxena claiming writ of mandamus commanding concerned Respondent Nos. 2,3 and 4 to pay her salary regularly of the post of L.T. Grade teacher in the College with effect from July 1996 and punish Subhash Chand Jaiswal, the then Accounts officer in the Office of District Inspector of Schools for willfully disobeying the order of this Court dated 04th June 1996 (Annexure-5 to the Writ Petition) and that of his

superiors dated 15th July 1996, 07th August 1996, 17th August 1996 and 19th August 1996 (Annexures-6 to 9 to the Writ Petition) and further writ of mandamus commanding the Respondents to decide her several representation (copies filed as (Annexures-10,11,12,13 and 15 to the Writ Petition) as well as for direction to the concerned authorities to regularly pay salary to the petitioner on the post of Assistant Teacher in L.T. Grade.

Relief claiming writ of mandamus for deciding representation has lost its efficacy in view of the fact that Writ Petition No. 3054 of 1994 has been allowed.

20. The other relief's (regarding continuance of the Petitioner as Assistant Teacher in L.T. Grade in the College with effect from July 1996 and to allow the Petitioner to continue as Assistant Teacher in L.T. Grade, if she has not been regularised as yet and be paid salary till a regularly selected candidate by the U.P. Secondary Education Board joins the post in question) have already been granted and the same are affirmed.

IV- Special Appeal No. 476 of 1998 (Smt. Shashi Saxena versus Deputy Director of Education & others) arising out of Writ Petition No. 37288 of 1998 – Smt. Shashi Saxena versus Deputy Director of Education & others.

21. Smt. Shashi Saxena again filed Writ Petition No. 37288 of 1998 seeking a writ of certiorari to quash the impugned order dated 29th January 1996 passed by Deputy Director of Education informing the manager of the College that he had regularised the services of Smt. Kusum Singh. In view of the facts stated above, we find that this petition is misconceived inasmuch as regularisation of Smt. Kusum Singh as Assistant Teacher in C.T. Grade under the impugned order does not affect or in any manner prejudice any right of Smt. Shashi Saxena.

Writ Petition is, accordingly dismissed with the observation that regularisation of Smt. Kusum Singh as Assistant Teacher in C.T. Grade; does not affect service of Smt. Shashi Saxena, in any manner.

Special Appeal is also dismissed.

No order as to costs .

22. **V- Special Appeal No. 479 of 1998 (Smt. Shashi Saxena versus Deputy Director of Education & others) arising out of Writ Petition No. 5585 of 1998 (Smt. Kusum Singh versus District Inspector of Schools & others).**

This Writ Petition filed by Smt. Kusum Singh for claiming writ of certiorari to quash order dated 19th January 1998 passed by District Inspector of Schools (Annexure-8 to the Writ Petition) cannot be entertained and nor she is entitled to the relief's claimed, - in view of our decision in Writ Petition No 3054 of 1994, This Petition is, accordingly, dismissed.

Special Appeal No. 479 of 1998 is allowed.

No other point has been raised.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 30, 2000

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

Civil Misc. Writ Petition No. 28884 of 2000

Smt. Shashi Kala Singh ...Petitioner
Versus
District Inspector of Schools, Maharajganj and others ...Respondents

Counsel for the Petitioner :
Shri Ashok Khare

Counsel for the Respondents:
Shri V.K. Shukla
Shri R.C. Dwivedi, S.C.

U.P. High School and Intermediate College (Payment of salaries of Teacher and other Employees) Act, 1971-Section 7-AA-Termination of part time Teacher – prior approval from DIOS not obtained order held bad part_ time teacher are paid the honorarium instead of pay scale As the petitioner was given the pay scale-Matter remitted back to the DIOS for fresh consideration in the eight of observation.

Held-

Before parting with the case, I would like to observe that the question whether the post of Principal will also come under the provisions of Sec.7AA of the Act is left open to be decided by the Distt Inspector of Schools and the parties are given liberty to have their say on the point before the Distt Inspector of Schools who will examine the question keeping in mind clause 5 of the recognition order dated 16.01.1997. Appointment in the instant case was made not on a fixed honorarium but in a given scale of pay i.e. Rs.2000-3500. In case, it is found that the post of Principal would be deemed to have been created in view of clause 5 of the recognition order, whole complexion of appointment would be changed the post of principal in that even will go out of the purview of sec. 7AA of the Act and will have to be filled in accordance with the provision of the U.P. Secondary Education Service Selection Boards Act, 1982. (Para 7)

By the Court

1. **Premala Singhania Kanya Inter College** Siswa Bazar Maharajganj is a recognised intermediate College, the affairs of which are husbanded by the Committee of Management constituted under and in accordance with the provisions of the U.P. Intermediate Education Act 1921 (In short the Act). Though recognised under the Act, the college has bot yet been brought within the preview of the U.P. High School and Intermediate (Payment of Salary to teachers and other Employees) Act, 1971 and recognition accorded to the Institution is sans financial aid (Vityavihin) The posts of teachers including Principal have bot yet been sanctioned and the management has to fend on its own resources for payment of salary to teachers who, it would appear, have been appointed under section 7 AA of the Act. One of the conditions for recognition as contained in the order dated 16.01.1997 is "**Niyamanusar Ek Yogya Pradhancharya Kee Niyukta Kee Jaye**". This condition in the recognition order being Annexure 1 to the supplementary affidavit, may lead to an inference that the post of Principal should be deemed to have been created by order dated 16.01.1997 itself but in the absence specific pleading and arguments in this regard it would be but proper to forbear from expressing any opinion on this point.

2. The Petitioner herein was appointed vide letter dated 29.6.1995, the Principal of the college to which the Distt. Inspector of Schools accorded approval vide letter dated 21.6.1997 in the scale of Rs. 2000-3500 with effect from 1.7.1995 and attested the signatures of the petitioner as Principal of the Institution. It would transpire that a dispute surfaced in which the two rival committees locked horns, each claiming to be the validly elected Committee of the Management. The matter escalated to the level of the Regional Joint Director of Education who by his order dated 19.1.2000 tilted the scale in favour of the Committee of Management of which Dr. Amar Chand Kedla was elected Manager. As a sequel to the said order that signatyure of Dr. Amar Chand Kedlya, as Manager of the Institution, came to be attested by the Distt Inspector of Schools on 20.1.2000 and on 21.1.2000, the petitioner was placed under suspension. The petitioner canvassed the validity of the order dated 21.1.2000 by means of writ petition no.10660 of 2000.The said writ petition, it is alleged, was taken up on 8.3.2000 but the same was deferred to 9.3.2000 owing to the strike by lawyers of the High Court. It would appear that the petitioner preferred another writ petition being writ no. 9268 of 2000 for appropriate direction interdicting the respondents therein from interfering with the working of the petitioner as principal of the Institution. The writ petition came to be filed on the premises that the suspension of the petitioner having not been approved within 60 days, the order of suspension lapsed automatically in view of sec. 16 G(7) of the Act. The writ petition was finally disposed of by judgment and order dated 27.4.2000 (Annexure 8 to the petition).A question arose in the said writ petition as to **"Whether the petitioner's suspension would be approved or not"?** The Court, interlay, held **"It is also desirable that the Distt. Inspector of Schools should pass an order one way or the other on his own discretion without being influenced by any observation made in this order after31.5.2000 in order to enable the petitioner to conduct the examination as Centre superintendent so hat the examination may not be disturbed."** It was made clear by the Court that **"In case no order is passed by the Distt. Inspector of Schools within one month from 31st may, 2000 despite a certified copy of the judgment is produced before him within three weeks from date in that event it will be deemed that the suspension has not been approved by the District Inspector of Schools and deemed to have expired on the expiry of 21st March 2000."** Before any order could be passed by the Distt Inspector of Schools pursuant to above direction of this Court, the services of the petitioner came to be terminated vide order dated 29.6.2000 pursuant to decision allegedly taken by the sequel to the direction contained in the judgment dated 27.4.2000 of this Court, the District Inspector of Schools took up the matter and passed the order impugned herein holding that in financially unaided (vityavihin) college, appointment of teachers and employees are although not required to be approved ,m the appointment benign of part time nature, yet the services of the part time teachers are not liable to be terminated by the Management in arbitrary manner and in breach of the canons of natural justice. The Management was held to be entitled to terminate the services o part time teacher employs but in accordance with

the procedure establish by law. The Distt Inspector of Schools by order impugned herein rejected the representation of the petitioner without testing the validity of the order terminating the services of the petitioner on the anvil of principles aforestated.

3. I have heard Sri Ashok Khare for the petitioner, Standing Counsel for the respondent no. 1 and Sri V.K. Shukla and Sri R.C. Dwivedi for the respondents 2 and 4. The respondents counsel did not propose to file any counter affidavit in the case and the writ petition is being disposed of finally at the motion hearing stage itself.

4. It has been urged by Sri Ashok Khare that the Distt Inspector of Schools having held that the services of part-time teachers appointed under section 7 AA of the act, Cannot be terminated by the Management tin an arbitrary manner without following the principles of natural justice, ought to have examined whether the petitioner services were terminated in violation of the principles of natural justice as embodied in regulations 36 and 37 of chapter III of the Regulations; the impugned order passed by the Distt Inspector of Schools is impaired by error of law inasmuch as the Distt Inspector of Schools failed to advert himself to the question as to whether the services of the petitioners were terminated in accordance with the procedure established by law and in consonance with the rules of natural justice; and section 16 G (3) (a) which inhibits termination of services **"Except with prior approval in writing of the Inspector"** has to be imported for its application on all ours in relation to part-time teachers as well. On behalf of the respondents, it has been submitted that Sec. 16-G of the Act and regulation 36 and 37 of chapter III of the Regulations have no application to part-time teachers whose services are governed by Sec.7AA of the Act read with the G.O. No. 6522/15-8-3065/85 Shiksha (8) Anubhag, Lucknow dated Oct. 15, 1986, a copy of which has been annexed as Annexure 3 to the Supplementary affidavit.

5. I have devoted my anxious consideration to the submissions made across the bar. Sec. 7 A B excludes applicability of provisions of the U.P. High School and Intermediate College (Payment of Salaries of Teachers & other Employees) Act, 1971 and those of the U.P. Secondary Education Selection Board Act, 1982 but does not exclude the applicability of Sec. 16 G of the Act. Sub-section (1) of Sec. 16 G explicitly envisages that every person employed in a recognised Institution would be governed by such condition of service as may be prescribed by Regulations and any agreement between the Management and such employees in so far as it is incongruous with the provisions of the Act or with the Regulations and any agreement between the Management and such employees in so far as it is incongruous with the provisions of the Act or with the Regulations shall operate In vacuum. Sub section (3) prohibits dismissal, removal, discharge from service or reduction in rank of diminution in emoluments and service of notice of termination except with the prior approval in writing of the District Inspector of Schools, Sub section (4) of Sec. 7AA of the Act provides that no part-time teacher shall be employed unless he possesses such minimum qualifications as may be prescribed. Appendix A to regulation 1 of Chapter II of the Regulating prescribes the qualifications for appointment of the Head of an institution and other teachers.

The same qualification are prescribed for part-time teachers too. Part-time teachers are, however, paid "Such honorarium as may be fixed by the state Government by general or special order in this behalf." This is clear from Section 7 AA of the Act which read as under:

"7-AA Employment of part time teachers or part-time instructors (1) Notwithstanding anything contained in this Act, the management of an institution may, from its own resources, employ"

(i) as an interim measure part-time teachers for imparting instructions in any subject or group of subjects or for a higher class for which recognition is given or in any section of an existing class for which permission is granted under Section 8-A.;

(ii) Part-time instructors to impart instructions in moral education or any trade or craft under socially useful productive work or vocational course

(2) No recognition shall be given and no permission shall be granted under section 7-a unless the Committee of Management furnishers such security in cash or by way of Bank guarantee to the Inspector as may be specified by the State Government from time to time.

(3) No part-time teacher shall be employed in an institution unless such conditions may be specified by the State Government by order in this behalf are complied with.

(4) No part-time teacher or part-time instructor shall be employed unless he possesses such minimum qualifications as may be prescribed.

(5) A part-time teacher or a part-time instructor shall be paid such honorarium as maybe fixed by the State Government by general or special order in this behalf.

(6) Nothing in this Act shall preclude a personal already serving as a teacher in an institution from begin employed as a part –time teacher or a part-time instructor under section 7-AA

6. Appointment of a part-time teacher under section 7 AA in an institution, which has been given vitavihin recognition's not required to be made in the manner prescribed by Sec. 16 F of the Act and the regulations made thereunder. But that by itself does not lend support to the interpretation that the part-time teachers appointed under section 7 AA of the Act could be given tertiary treatment and dealt with in arbitrary fashions by the Management. An element of public interest is involved both in the appointment and termination of services of such teachers in that the duties and functions of such teachers have the complexion of public nature. No person having requisite qualification prescribed in Appendix A to regulation of chapter II of the Act can be appointed a part-time teacher under section 7 AA of the Act and once a teacher is appointed under section 7 AA, he acquires a right to be dealt with reasonably by the management. The principle contained in Sec. 16 G (3) (a) of chapter III of the Regulations made under the Act, being of regulatory nature, would be attracted even in relation to a part-time teacher appointed under section 7 AA of the Act and by this reckoning, obligation is cast upon the Distt Inspector of Schools to ensure that such teachers are not dealt with by the Management in antagonism of the principles of natural justice. It would be contrary to public policy and public interest to clothe the Management of an "Institution " with unfettered power to terminate the services of part-time teachers who perform as much public function as regularly appointed teachers. Even the Distt Inspector of Schools was of the view that the Management could

not terminate the services of part-time teachers arbitrarily and in breach of the canons of natural justice but he failed to examine whether in the present case, the Management acted arbitrarily and in violation of the rules of natural justice which are embodied in regulations 36 and 37 of chapter III of the Regulations made under the Act. The non-obstinate clause notwithstanding in section 7 AA overrides the provisions of the Act in so far as method of appointment of part-time teachers and instructors is concerned. In my opinion, it does not exclude the applicability of Sec. 16 G of the Act and related provisions of the Regulations, Section 16-E (10) of the Act will also be attracted in appropriate case e.g. where the appointee does not possess the requisite qualification, the appointment will be liable to be cancelled by competent authority. Though there is no need for creation of posts of part-time teachers, employment of part-time teachers too is 'Niyamit' (regular) subject to certain conditions as visualised by condition no 4 of the G.O. dated 15.10.1986 since prior approval of the Distt Inspector of Schools as Visuallsed by Sec. 16 G(3) of the Act has not been examined on the anvil of canons of justice and fair play, the order impugned herein cannot be sustained.

7. Before parting with the case, I would like to observe that the question whether the post of Principal will also come under the provisions of Sec. 7AA of the Act is left open to be decided by the Distt Inspector of Schools and the parties are given liberty to have their say on the point before the Distt Inspector of Schools who will examine the question keeping in mind clause 5 of the recognition order dated 16.1.1997 Appointment in the instant case was made not on a fixed honoralum but in a given scale of pay i.e. Rs.2000-3500. In case, it is found that the post of Principal would be deemed to have been created in view of Clause 5 of the recognition order, whole complexion of appointment would be changed the post of Principal in that event will go out of the purview of Sec. 7AA of the Act and will have to be filled in accordance with the provision of he U.P. Secondary Education Service Selection Boards Act, 1982.

As a result of foregoing discussion, the petition succeeds and is succeeds and is allowed, the impugned order I squashed. The Distt. Inspector of Schools is directed to take appropriate decision in the matter afresh in accordance with law and in the light of the observations made in the judgement.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 11, 2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE ONKARESHWAR BHATT, J.

Civil Misc. Writ Petition No. 485 of 2000

Ram Singh (Truck Driver) of Truck No. M.P. 09KA/2467 C/o Mahendra Singh Resident of Village and Post Udi, District Etawah & Others ...Petitioners
Versus
The State of U.P. through Station House Officer, Police Station Kaunch, District Jalaun & another ...Respondents

Counsel for the Petitioners :
Shri Ashok Kumar
Shri Kunwar Saksena

Counsel for the Respondents:
Sri Pradeep Kumar Gupta
Shri R.D. Gupta
S.C.

(A) U.P. Trade Tax Rule- Rule 13, 13-A-84 (I)-Power of Caesur Trade Tax Authority has no power to cease the vehicle, except to stop and detain the stationary for Inspection with in the required period. Vehicle detained for 5 month without any authority –Sale Tax Commissioner is directed to look and asses the quantum of compensation.
Held-
Rule-84 (1) does not permit the Trade Tax Authorities to stop or detain the vehicles for a period longer than what is required for inspection of the goods or unloading of the goods. This , in our opinion, is a correct and reasonable interpretation of Rule 84 (1) . In the present case the vehicles were detained for more than 5 months which was clearly illegal as held by various decisions of this Court, referred to above, Earlier this Court in such cases for wrong and illegalities committed by public servants relegated the petitioners to the remedy of filing a civil suit for damages, but in exceptions 1 cases the Courts have granted damages also in writ jurisdiction. (Para 10)

(B) Constitution of India Art. 226-Alternative remedy- No absolute bar- We were inclined to grant compensation to the petitioners in these cases instead of relegating the petitioner to file Civil Suits as we want to stop the illegal practice of detaining and seizing of the vehicles by the U.P. Trade Tax Authorities. Everyone knows that a civil suit often takes 10 years or more to decide, and hence we are not relegating the petitioner to that remedy. However, Sri Pradeep Kumar gupta, learned Additional Chief Standing Counsel requested that he will himself speak to the Commissioner, Trade Tax U.P. and convey the displeasure of this Court, and the Commissioner will ensure that these illegalities do not occur in future. We accordingly direct the Commissioner, Trade Tax to charge-sheet the official who had committed these illegalities and proceed Departmentally against them. (Para 12)
Case Law Discussed
1992 U.P.T.C 18
1992 U.P.T.C. 273
1992 U.PT.C 604
AIR 1994 SC 787

By the Court

1. Heard Sri Ashok Kumar and Sri Kunwar Saksena learned counsel for the petitioners. Sri Pradeep Kumar Gupta, Additional Chief Standing Counsel and Sri R.D. Gupta learned Standing Counsel.

2. Writ petition No. 485 of 2000 had been filed initially for a mandamus directing the respondents to release the truck Nos. M.P. 09KA/2467, M.P. 06/8045 and M.P 09/1589 which were laying in the custody of respondents since 3rd and 5th January, 2000 respectively.

3. In this petition we had passed an order on 24.05.2000 for releasing of the aforesaid trucks on the petitioners furnishing security other than cash and bank guarantee to the satisfaction of respondent no. 2 We are informed by the learned counsel for the petitioners that in pursuance of the interim order the aforesaid trucks have been released in favor of the petitioners.

4. Learned counsel for the petitioners has submitted that in fact the respondents had no jurisdiction to seize the trucks and he has claimed damages. The submission of the learned counsel for the petitioners is correct. It has been repeatedly held by several Division Benches of this Court that trucks cannot

be seized under the U.P. Trade Act e.g. in the case of **M/s D.B. Timber Merchant, Ballia Vs. Commissioner OF Sales Tax and another**. 1992 U.P.T.C.18 **M/s M.S. Freight Carriers and another Vs. SALES Tax Officer, check Post, Ghaziabad,** 1992 U.P.T.C. 273, **M/s Freight Carriers of India ,Calcutta vs. Deputy Commissioner (Executive ,Sales Tax, Ghaziabad and others,** 1992 U.P.T.C. 604 etc.

It has been held consistently by this Court that there is no power in the U.P. Sales Tax Act to seize the trucks, and the authorities can only seize the goods, not the truck.

In **Lucknow Development Authority Vs. M.K. Gupta, A.I.R. 1994 S.C.787**(Para 8) the supreme Court has observed as under:

" The administrative law of accountability of public authorities for their arbitrary and even ultra virus actions has taken many strides. It is now accepted both by this Court and English Court that the state is liable to compensate for loss or injury suffered by a citizen due to arbitrary actions of its employees. In state of Gujarat V. Memon Mahomed Haji Hasam, AIR 1967 SC 1885, the order of the High court directing payment of compensation for disposal of seized vehicles without waiting for the outcome of decision in appeal was upheld both on principle of bailee's legal obligation to preserve the properly intact and also the obligation to take reasonable care of it to return it in same condition in which it was seized and also because the Government was, bound to return the said property by reason of its statutory obligation or to pay its value if it had disabled itself from returning it either by its own act or by act of its agents and servants .it was extended further even to bonafid action of the authorities if it was country to law in Lala Bishambar Nath Vs. Agra Nagar Mahapalika. Agra AIR 1973 SC 1289. It was held that where the authorities could not have taken any action against the dealer and their order was invalid It is immaterial that the respondents had acted bonafide and in the interest of preservation of public health. Their motive may be good but their orders are illegal. They would accordingly be liable for any loss caused to the appellants by their action.' The theoretical concept that King can do no wrong has been abandoned in England itself and the State is now held responsible for tortuous act of its servants. The first Laws commission constituted after coming into force of the Constitution on liability of the State in Tort. Observed that the old distinction between sovereign and non-soaring functions should no longer be invoked to determine liability of the State Friedmann observed'

"It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown and to substitute for it the principle of legal liability where the State either directly or through incorporated public authorities, engages in activities of a commercial, industrial or managerial character the proper test is not an impracticable distinction between governmental and non-governmental function, but the nature and form of the activity in question"

Evon M/s Kasturi Lal Ralia Ram Jain v. State of Uttar Pradesh. A.I.R.1965 SC 1039 did not provide any immunity for

tortuous acts of public servants committee in discharge of statutory function if it was not referable to sovereign power. Since house construction or for that matter any service hired by a consumer or facility availed by him is not a soverign function of the state the ratio of Kasturi Lal (supra) could not stand in way of the Commission awarding compensation. We respectfully agree with Mathew. J. in Shyam Sunder v. State of Rajasthan, (1974) SCC 690 (AIR 1974SC 890) that it is not necessary, to consider whether there is any rational dividing line between the so-called sovereign and proprietary and commercial functions for determining the liability of the State In any case the law has always maintained that the public authorities who are entrusted with statutory function cannot act negligently . As far back as 1878 the law was succinctly explained in geddis v. Proprietors of Bann reservoir, (1878)3 App cas.430 thus.

"I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone but an action does lie for doing what the Legislature has authorised, if it be done negligently.'

5. In the same decision the Supreme Court in para 11observed as under:-

"Today the issue thus is not only of award of compensation but who should bear the brunt, the concept of authority and power exercised by public functionaries has many dimension. It has undergone tremendous change with passage of time and change in socio-economic outlook .The authority empowered to function under a Statute while exercising power discharges public duty. It has to act to sub serve general welfare and common good. In discharging this duty honestly and bona fide loss may accrue to any person. And he may claim compensation, which may in circumstances be payable. But where the duty is performed capriciously or the exercise of power results in harassment and agony then the responsibility today the loss determined should be whose? In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary, It is unfortunate that matters which require immediate attention linger on and the man in the (street is) made to run from one end to other with no result. the culture of window clearance appears to be totally dead. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated and it erodes the credibility in the system. Public administration, no doubt involves a vast amount of administrative discretion which shields the action of administrative authority. But where it is found that exercise of discretion was malafide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When a citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same? It was never more necessary than today when even social obligations are regulated by grant of statutory powers. The test of permissive form of grant are over .It is now imperative and implicit in the exercise of

power that it should be for the sake of society. When the Court directs payments of damages or compensation against the State the ultimate sufferer is the common man. It is the tax payers money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law. It is therefore, necessary that the Commission when it is satisfied that a complaint is entitled to compensation for harassment or mental agony or oppression, which finding of course should be recorded carefully on material and convincing circumstances and not lightly, then it should further direct the department concerned to pay the amount to the complainant from the public fund immediately but to recover the same from those who are found responsible for such unpardonable behavior by dividing it proportionately where there are more than one functionaries."

6. On the strength of the above decisions the learned counsel for the petitioners has urged that damages should be awarded to the petitioners since their vehicles were detained for about 5 months from January 3 ,2000 to the end of May 2000 and in fact they were released only after the interim order dated 24.5.2000

7. When the law is settled that the authorities can not detain and seize the vehicles we fail to understand how the petitioners vehicles have been detained for 5 months without any sanction of law. The action of the respondent is clearly malafide in law. Several cases are coming up before us where we find that vehicles have been seized for long periods by the Trade Tax authorities although the law has been settled long time back that there is no power in the Trade Tax authorities to do so.

8. The learned Standing Counsel has relied on Rule 84(1) of the U.P. Trade Tax Rules, which states that the officer empowered under Section 13 or 13-A or under Rule 3-A or 4 may stop the vehicle and keep it stationary as long as required by such officer. In our opinion Rule 84 must be read as a whole and it connote be read in part. The purpose of Rule 84 is to see that there is no evasion of Trade Tax and hence it permits inspection of goods and detention of goods where the officer concerned is prima-facie of the opinion hat tax is being evaded and the law is being infringed.

9. So far as the stopping of the vehicle is concerned in our opinion this can only be for the purposes of either inspection of goods or unloading the goods from the vehicle. This act should not take a coupe of hours or so.

10. In our opinion Rule 84(1) does not permit the Trade Tax authorities to stop or detain the vehicles for a period longer than what is required for inspection of the goods or unloading of the goods. This in our opinion, is a correct and reasonable interpretation of Rule 84(a). In the present case the vehicles were detained for more than 5 months which was clearly illegal as held by various decisions of this Court , referred to above. Earlier this Court in such cases for wrong and illegalities committed by public servants relegated the petitioners to the remedy of filing a Civil Suit for damages but in exceptional cases the Courts have granted damages also in writ jurisdiction e.g. in **Hindustan Petroleum**

Corporation Ltd. And another Vs. Dolly Dass, JT 1999(3)SC 61.

11. In our opinion the time has come when these illegalities by the authorities of detaining and seizing the vehicles must be strongly checked otherwise the law will continue to be violated by such authorities.

In connected similar writ petition No. 355 of 2000, **Hindustan Transport Agency Vs. State of U.P. and another,** Sri Kunwar Saksena, learned counsel for the petitioner invited our attention to Annexure 2 to the writ petition. Where the Sales Tax Authorities, who seized the vehicles on 4.4.2000 directed on the same day that the petitioner's vehicle is not only detained but the petitioner has to arrange for security of the goods and vehicle, vide Annexure 2.The petitioner made representation vide annexures 5 and 6 praying that the vehicle be released and submitted that the petitioner was suffering daily loss of Rs.4000/- due to detention of the vehicle. However, the vehicle was only released in pursuance of the interim order dated 21.4.2000 on 25.4.2000

12. We were inclined to grant compensation to the petitioners in these cases instead of relegating the petitioner to file Civil Suites as we want to stop the illegal practice of detaining and seizing of the vehicles by the U.P. Trade Tax authorities. Everyone knows that a Civil Suit often takes 10 years or more to decide. And hence we are not relegating the petitioner to that remedy. However, Sri Pradeep Kumar Gupta, learned Additional Chief Standing Counsel requested that he will himself speak to the Commissioner, TRADE TAX.U.P. and convey the displeasure of this Court , and the Commissioner will ensure that these illegalities do not occur in future. WE accordingly direct the Commissioner, Trade Tax to charge sheet the officials who had committed these illegalities and proceed Departmentally against them. The Commissioner shall also grant proper compensation to the petitioners in both these cases commensatra to the loss they have suffered preferably within two months from the date of production of a certified copy of this order in accordance with law. The Commissioner shall also issue insurer to all trade tax authorities for the with that such illegalities must stop immediately.

13. Both the petitioners are disposed of with the aforesaid observations. The Registrar General of this Court shall send a copy of the this judgment to the Principal Secretary, Institutional Finance (Trade Tax), U.P. Lucknow who in turn will forward it to all the concerned Trade Tax authorities including the check post Officers to ensure strict compliance of this judgment.

Certified copy of this order will also be given to the learned counsel of the parties on payment of usual charges within two days.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 16, 2000

BEFORE
THE HON'BLE R.K. AGARWAL, J.

Sales Tax Revision No. 257 of 1991

The Commissioner, Sales Tax, U.P., Lucknow ...Applicant

Versus

M/s. Mohkampur Tea Garden, Mohkampur, Dehradun ...Opp. Party

Counsel for the Applicant:
Sri B.K. Pandey
Standing Counsel

Counsel for the Respondent:
S.C.

U.P. Trade Tax Act-Section 2 © read with Central Sales Tax Act-$-8 (2A) 'Dealer-Assessee graining Tea on his own land can be exempted under U.P. Trade Tax Act interstate sale the Assegee is liable to pay the Tax under Central Act.

Held-

I find that the assessee opposite party in the present case may not be treated as a dealer under the provision of U.P. Trade Tax Act in respect of tea grown on his own landor any in the land in which he has an interest and sold by him but certainly he is a dealer under the provisions of central Sales Tax in he effects interstate sales. The exemption under the provisions of U.P. Trade Tax to such a person is a qua the person alone and not in respect of the goods generally. Thus the goods are not generally emempt under the provisions of U.P. Trade TAX Act, and therefore the interstate sales of tea effected by the assessee opposite party is not liable to tax at nil rate under section 8(2-A) of the Central Sales Tax Act. (Para-7)

Case Law Discussed
1995 v8 96-STC 355
AIR 1996SC-1519
(2000)VA 119 S.T.C.-18
(1967)20 S.T.C. 520

By the Court

1. Both these revisions have been filed by the commissioner of Sales Tax ,U.P., Lucknow against the order dated 23.11.1990 passed by the Sales Tax Tribunal, Division Bench, Dehradun in Second Appeal , Division Bench, Dehradun in Second Appeal Nos. 269/90 (1981-82……Central) and 139/88 (1982-1983……Central) Under Section 11(1) Of the U.P. Sales Tax Act (now known as U.P. Trade Tax Act) hereinafter referred to as the Act.

2. The facts of the case in brief are that the assessee opposite party is engaged in growing tea in his own tea garden and after necessary processing had sold the same out side in U.P. During the assessment years 1981-82 and 1982-83 the assessee opposite party had effected sale of tea valued at Rs. 1,63,875.31 paise and Rs. 2,17,584.75 paise respectively out side the Sate of U.P. The Sales Tax Officer, Dehradun vide order dated 31.3.1986 and 30.03.1987 passed for the assessment years 1981-82 and 1982-83 respectively imposed Central Sales Tax on the turn over of tea by refusing to grant exemption to the assessee.

3. Feeling aggrieved by the said order the assessee filed an appeal under section 9 of the Act before the Assistant Commissioner Judicial which were allowed by separate orders dated 17.02.1987 for the assessment years 1981-82 and 01.01.1988 for the assessment years 1982-83. The Commissioner of Sales Tax feeling aggrieved by the aforesaid order filled two second appeals under section 10 of the before the Sales Tax Tribunal Dehradun. The Sales Tax Tribunal Dehradun by the impugned order dated 23.11.1990 had dismissed both the appeals filed by the Commissioner of Sales Tax.

4. I have heard Sri B. K. Pandey, learned Standing Counsel on behalf of the appellant. In spite of affidavit of

service having been filled by the Commissioner of Sales Tax U.P. Lucknow no one has put in appearance on behalf of assessee opposite party. Vide order dated 3.8.2000 passed on the order sheet in these cases the court had held the service to be sufficient.

5. Learned Counsel for the applicant submitted that the Tribunal has Committed manifest error of law in granting exemption to the interstate sales of tea effected by the assessee opposite party in each of the two assessment orders in question. The submitted that tea is not generally exempted under the provisions of U.P. Trade Tax Act and therefore, it would not be exempted under section 8 (2-A) of the Central Sales Tax Act 1956. According to the learned Standing Counsel under the U.P. Trade Tax Act a person who sells agricultural or horticulture produce grown by himself or grown any other land in which he has an interest, whether as owner, us ufractury mortage, tenant or otherwise or who sells poultry or dairy products from fowls or animals kept by him shall not, in respect of such goods, be treated as a dealer. The proviso to section 2 (C) or the U.P. Trade Tax Act excludes the aforementioned person from being treated as a dealer and therefore a person who grows tea on his own land or on any land in which he has an interest and sells such tea is not treated as a dealer under the provisions of U.P. Trade Tax Act. But under the Central Sales Tax Act the definition of thew word dealer as given in section 2 (B) of the said Act does not exclude such a person from being considered as a dealer. Thus a person who grows tea on his won land or any other land in which he has an interest and sells it in the course or interstate trade and commerce is a dealer within the provision of the Central Sales Tax Act. He further submitted section 8 (2-A) of the Central Act only provides for the rates of tax and in respect of the sale of any goods the sale or as the case may be purchased by which is under the Sales Tax Law of the appropriate stage exempt from tax generally shall be nil under the Central Act. According to the learned Standing Counsel, tea is liable to tax at the bonds of manufacture or importer and only such tea which is grown by the person himself is excluded being not a dealer. In support of aforesaid plea learned Standing Counsel relied upon the decision of the Hon'ble Supreme Court in the case of Commissioner of Sales Tax, Jammu reported in (1995) Vol.96 Sales Tax Cases 355 where in the Hon'ble Supreme Court had held that Sub Sec. (2-A) of the Central Sales Tax Act speaks of sales and purchase of goods being exempted generally under the Sate Sales Tax enactment and it does not speak of exemption qua the dealer much less qua unit manufacturing such goods.

6. The Hon'ble Supreme Court while considering the provisions of 8 (2-A) of the Central Sales Tax Act has held as follows:-

" The idea behind sub-section (2-A) of section 8 of the Central Sales Tax Act, which we have analysed here in before, is to exempt the sale/ purchase of goods from the Central Sales Tax where the sale or purchase of such goods is exempt generally under the State Sates Tax Law. We must give due regard and attach due meaning to the expression "generally" which occurs in the sub-section and which expression has been detained in the Explanation. If the said

expression had not been there, it could probably have been possible to argue that inasmuch as the goods sold by a particular manufacturer- dealer are exempt from the State Tax in his hand, they must equally be exempt under the Central Act. But sub- section (2-A) requires specifically that such exemption must be a general exemption and not an exemption operative in specified circumstances or under specified conditions. Can it be said that the goods sold by the dealers in this case are exempt from tax generally under the State Sales Tax enactment . The answer can only be in the negative such goods are exempt from tax only when they are manufactured in a large or medium scale industrial unit within five years of its commencement of production and sold within the said period, i.e. in certain specified circumstances alone. The exemption is not a general one but a conditional one. The exemption under the Government Order No.159 is not with reference to goods or a class or category of goods but with reference to the industrial unit producing them and their manufacture and sale within a particular period. For the purposes of the Government order, the nature class or category of goods is irrelevant; it may be may goods. It is concerned only with the industrial unit producing them and the period within which they are manufactured and sold. Can it be said in such a case it is an instance where the sale is of goods, the sale or purchase of which is under sales tax law of the appropriate state , exempt from tax generally. Certainly not, Exemption provided by Government Order No. 159, to repeat, is not with reference to goods but with reference to the industrial unit .So long as it is (i) a large or medium scale industry and (ii) it manufactures and sells goods within the five years of its going into production , the sale of such goods is exempt irrespective of the nature or classification of goods. Similar goods may be manufactured by another unit but if it does not satisfy the above two requirements, the goods manufactured and sold by it would not be entitled to exemption from tax. Indeed, the goods manufactured by that very unit would not be eligible for exemption if they are manufactured after the expiry of five years from the date it goes into production and/or sells them beyond the said period. The period of exemption may also vary from unit to unit depending on the date of commencement of production in each unit. For the above reasons, We are of the opinion that the exemption granted under the aforesaid Government orders not satisfy the requirements of section 8(2-A).

7. The principal laid down by the Hon'ble Supreme Court in the case Pine Chemicals Ltd. and others (Supra) was reiterated by the Hon'ble Supreme Court in the case of Sate of Uttar Pradesh and another's Vs Hindustan Safety Glass Works (P) Ltd. reported in A.I.R. 1996 S.C. 1519 and Union of India and another Vs Rapidur (India) Pvt. Ltd. reported in (2000) Vol.119 Sales Tax Case Page 18.

8. Having heard learned counsel for the appellant I find that under the provisions of U.P. Trade Tax Act tea is liable to tax generally. It does not attract tax only when a person growing tea on his own land or on the land in which he has an interest sells the same directly as in that event such a person is not treated as a dealer in view of the proviso to

section 2 (C) of the U.P. Trade Tax Act. There is no such corresponding provisions under the Central Tax Act excluding such a person from being treated as a dealer. The proviso of Section 8 (2-A) of the Central Sales Tax would be applicable only where the goods are exempt from tax generally and not under some specified condition. Applying the principles laid down by the Hon'ble Supreme Court in the case of pine Chemicals Ltd.(Supra) I find that the assessee opposite party in the present case may not be treated as dealer under the provisions own land or any in the land in which he was and interest and sold by him but certainly he is a dealer under the provisions of Central Sales Tax if he effects interstate sales . The exemption under the provisions of U.P. Trade Tax to such a person is a qua the person alone and not introspect of the goods generally. Thus the goods are not generally exempt under the provisions of U.P, Trade Tax Act , and therefore the interstate sales of tea effected by the assessee opposite party is not liable to tax at nil rate under section 8 (2-A) of the Central Sales Tax Act.

9. The decision of the Hon'ble Supreme Court in the case of Deputy Commissioner of Agricultural Income Tax and Sales Tax, Quilon Vs. Travancore Rubber and Tea Co. reported in (1967) 20 Sales Tax Cases page 520 will not be of any help to the assessee opposite party as the Hon'ble Supreme Court has held in the aforesaid case that the onus which lay upon the department that assessee is a dealer in the Central Sales Tax Act, has been discharged. It found that no efforts has been made to find out the intention with which the assessee was formed the selling organisation it has set up and other relevant facts. Before the Hon'ble Supreme Court the applicability of Section B (2-A) of the Central Sales Tax was not at all raised.

10. The decisions of the Hon'ble Supreme Court in the case of D.S. Bist and sons reported in 1979 U.P. Tax case page 511 only lays down that tea even after processing remains agricultural product the same view was taken by this Court in the case of Dehradun Tea Company reported in 1980 U.P. Tax cases page 459. The aforesaid two cases arose under the provisions of U.P. Trade Tax Act and the question as to whether the interstate sales or tea is exempt under the Central Sales Tax Act or not was not involved. The reliance placed by the Tribunal on the aforementioned decisions for holding that the interstate sales is also exempt is misplaced.

11. In view of the foregoing discussions the order of the Tribunal cannot be sustained and is here by set aside and it is held that the interetate sales of tea effected by the assessee opposite party in each of the two assessment years in question was not exempt from payment of tax under section 8(2-A) of the Central Sales Tax. Both the revisions succeed and are allowed. However there shall be no order as to costs.

Revision Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 18, 200

BEFORE
THE HON'BLE R.H. ZAIDI, J.

Civil Misc. Writ Petition No. 3014 of 1998

Punjab & Sind Bank, Branch Khurja, District Bulandshahar through its Branch Manager ...Petitioner
Versus
The Additional district Judge VII, Bulandshahar and others ...Respondents

Counsel for the Petitioner:
Shri R.N. Kesari

Counsel for the Respondents:
S.C.
Shri Vinod Sinha

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, S.21(8) read with Constitution of India, Article 226-Enhancement of rent-Application for valuers of both the parties filing reports- Petitioners values not including land's value in determining. The market value of the building-Further this report not supported by affidavit-Court below, held, rightly did not place any reliance on the same-Hence no error of law committed.

Held-

The report filed by the valuer of the petitioner was not supported by an affidavit, therefore, the authorities below did not commit any error of law in not placing the reliance upon the said report, as the same was not proved in accordance with law. It may also be noted that if the value of the land is included in the value of the building as determined by the valuer of the petitioner, there would remain not much difference in the two reports filed before the authorities below. Thus, the determination of the market value and enhancement of rent by the Appellate Authority does not warrant interference by this court under Article 226 of the Constitution of India, as the same cannot be said to be bad in law.

U.P. Urban Buildings (Regulation of letting, rent and Eviction) Act, 1972, Ss. 22 and 10(2) readwith Code of Civil Procedure, 1908, O.41 R. 27- Jurisdiction of appellate authority to admit additional evidence- Application for admitting additional evidence in appeal not supported by affidavit-Held, rightly rejected. (Para 7)

Held-

From the above noted decisions, it is apparent that the Appellate Authority acting under Section 22 of the Act has got jurisdiction to admit additional evidence at the appellate state but the requirements of Order 41 Rule 27, C.P.C., are to be followed by the said authority while admitting the additional evidence. In the present case, the Appellate Authority has fully followed the aforesaid decisions and rightly refused to admit the additional evidence as the requirements of Order 41 Rule 27 were not fulfilled. I do not find any illegality in the order passed by the Appellate Authority. The application filed by the petitioner for permission to file additional evidence was rightly rejected by the Appellate Authority. (Para 16)

Case Law discussed
1989(1) ARC 340(SC), 1992(2) ARC 571(SC), 1992(1) ARC 265, 1987(2) ARC 359, 1976 AWC 73, 1977 U.P.R.C.C. 58, 1978 ARC 294, 1980 ARC 590, 1982 ARC 76, 1983 ARC 723, 1983 ARC 789, 1983(2) ARC 264, 1984 ARC 52, 1985(1) ARC 445, 1987(1) ARC 103, 1996(2) ARC 498, 1997 (1) ARC 31

By the Court

1. By Means of this petition filed under Article 226 of the Constitution of

India, petitioner prays for issuance of writ, order of direction in the nature of certiorari quashing the order dated 09.091994 passed by the respondent no. 2 enhancing the rate of rent of the building in question from Rs. 2100/- per month to Rs. 9000/- per month, order dated 24.10.1997 rejecting the application of the petitioner for filing additional evidence and order dated 24.11.1997 passed by respondent no. 1, allowing the appeal of respondent nos. 2 to 11 and enhancing the rate of rent of the building in question from Rs. 9000/- to Rs.12,000/- per month and dismissing the Appeal No. 28 of 1994 filed by the petitioner.

2. Relevant facts of the case giving rise tot he present petition, in brief, are that respondent nos. 3 to 11, for short, "the contesting respondents" filed an application under sub-section)8) of Section 21 of the U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, for short, 'the Act' for enhancing the rate of rent from Rs.2,100/- per month to Rs. 12,258/- per month of the building in question which was in the tenancy of the petitioner bank. Application filed by the contesting respondents was opposed by the petitioner denying the facts pleaded by the contesting respondents. Both parties produced evidence in support of their cases. The documentary evidence also included the reports of the valuers. The contesting respondents filed the report of M/s Agarwal Associates Engineers, which was supported by an affidavit. The said valuer valued the building at Rs. 14,71,000/-. On the basis of the said report, the contesting respondents claimed an amount of Rs. 12,258/- plus amount of house and water as rent. Petitioner also filed the report of its valuer, namely, M/s Ajit Singh Associates who valued the building at Rs. 4,89,983/- per month. after going through the material on the record, the Rent Control & Eviction Officer enhanced the amount of rent from Rs. 2,100/- to Rs. 9,000/- per month puls amount of house and water tax by its judgment and order dated 09.09.1994. Challenging the validity of the said judgment, both parties, petitioner and the contesting respondents, filed appeals before the Appellate Authority. Petitioner's appeal was registered as Appeal No. 28 of 1994 while that of contesting respondents as Appeal No. 29 of 1994. During the pendency of the above noted appeals, the petitioner filed an application under Section 10(2) of the Act read with Order 41 Rule 27, C.P.C. as the petitioner wanted to produce additional evidence, particularly, an affidavit of the Engineer in support of the report which was not filed before the Rent Control & Eviction Officer on account of bona fide mistake of its counsel. The application filed by the petitioner for filing additional evidence was objected to and opposed by the contesting respondents. The appellate Court upheld the objection filed by the contesting respondents and dismissed the application for filing the additional evidence holding that by means of the said application, petitioner wanted to fill up the lacuna in its case which was legally not permissible, by judgment and order dated 24.10.1997. The Appellate Authority, after going through the evidence on the record, allowed the appeal filed by the contesting respondents and enhanced the amount of rent from Rs. 2,100/- per month plus amount of house tax and water tax by its order dated 24.11.1997, hence the present petition.

3. Learned counsel for the petitioner vehemently urged that the Appellate Authority acted illegally in rejecting the application filed by the petitioner for admission of additional evidence and has also erred in dismissing the appeal of the petitioner and in allowing the appeal of the contesting respondents. It was urged that it was on account of mistake of the counsel that affidavit could not be filed before the Rent Control & Eviction Officer. The application filed by the petitioner for admission of additional evidence was, therefore, liable to be allowed as the petitioner should not suffer for a bona fide mistake committed by his counsel.

4. On the other hand, learned counsel appearing for the contesting respondents vehemently urged that at the appellate stage, the parties to the appeal are not at liberty to file additional evidence. Additional evidence at appellate stage can be filed it the applicant fulfils the requirements provided under Order 41 Rule 27. The petitioner has failed to fulfil the conditions for filing additional evidence, therefore, the application for filing the additional evidence was rightly rejected by the Appellate Authority. It was also urged that the valuer of the petitioner acted illegally in not including the value of the land on which the building is situated when it is will settled in law that while determining the value of the building, the value of land is also to be included. It was also urged that the Appellate Authority has rightly enhanced the rent of the building in question and the Writ Petition was, therefore, liable to be dismissed.

5. I have considered the submissions made by the learned counsel for the parties and also carefully perused the record.

6. The questions which arise for determination in this petition are whether in the market value of the building, the value of the land on which the building is situated, is also to be included in the market value of the building, whether the application filed by the petitioner for admitting additional evidence at the appellate stage was rightly rejected by the Appellate Authority and as to whether the Appellate Authority has rightly enhanced the rate of rent of the building in question from Rs. 9,000/- to Rs. 12,000/- per month.

7. Application for enhancement of the rent was filed under subsection (8) of Section 21 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 whom clause (ii) or clause (iv) of the Explanation to sub section (1) is applicable:

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 percent of the market value of the building under tenancy, and the 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"

From the aforesaid statutory provision, it is apparent that on the application made by the landlord, the District Magistrate may enhance monthly rent payable in respect of a building let out to the State Government or to a local authority or to public sector corporation or to a recognised educational institution to a sum equivalent to one-twelfth of the ten percent of the market value of the building under the tenancy and the rent so enhanced shall be payable from the commencement of the month of tenancy following the date of application. Such enhancement would be permissible on expiration of five years from the date of the last order of enhancement of the rent. Petitioner bank which is a company within the meaning of Section 3 of the companies Act, 1956 and comes within the definition of "public sector corporation" as defined under clause (p) of Section 3 of the Act. For the purposes of enhancement of the rent, the market value of the building in question has to be determined. Parties have produced evidence in support of their cases oral (in the form of affidavits) and documentary including the valuers' reports. As stated above, the contesting respondents filed the report of M/s. Agrawal Associates Engineers, which was supported by an affidavit in which the value of the building and land on which the building was situated, was included and the same was valued at Rs. 17,71,000/-. On the other hand, the petitioner filed the report of its valuer, namely, M/s. Ajit Singh Associates who assessed the market value of the property in dispute at Rs. 12,51,990/- (i.e., Rs. 6,75,000/- value of the land and Rs. 5,75,990/- value of the building). However, petitioner's valuer deducted the value of the land from the value of the building, which was illegal and contrary to law. It is well settled in law that the value of the land on which the building is situated, is to be included in the market value of the building while determining the market value under the aforesaid proviso. A reference in this regard may be made to the decisions in Central Bank of India and others v. II Additional District Judge, Jhansi and others, 1989 (1) ARC 340 (SC); State of Uttar Pradesh and others v. VII Additional District Judge, Saharanpur and others, 1992 (2) ARC 571 (SC); State of Uttar Pradesh and others v. VII Additional District Judge, Saharanpur and others, 1992 (1) ARC 265 and State of Uttar Pradesh v. Roop Kishore Tandon others, 1987 (2) ARC 359. The report filed by the valuer of the petitioner was not supported by an affidavit, therefore, the authorities below did not commit any error of law in not placing the reliance upon the said report, as the same was not proved in accordance with law. It may also be noted that if the value of the land is included in the value of the building as determined by the valuer of the petitioner, there would remain not much difference in the two reports filed before the authorities below. Thus, the determination of the market value and enhancement of rent by the Appellate Authority does not warrant interference by this Court under Article 226 of the Constitution of India, as the same cannot be said to be bad in law.

8. So far as the second question regarding admission of additional evidence at appellate stage is concerned, it may be noted that aggrieved by the judgment and order passed by the

Prescribed Authority, appeal was filed by the petitioner under Section 22 of the Act. Section 22 of the Act reads as follows:-

"22. Appeal – Any person aggrieved by an order under Section 21 or Section 24 may within thirty days from the date of the order prefer an appeal against it to the District Judge, and in other respects, the provisions of Section 10 shall mutatis matandis apply in relation to such appeal."

9. Section 22 of the Act specifically provided that the provisions of Section 10 of the Act shall mutatis mutandis (i.e. with such changes as may be necessary) apply in relation to such appeal. Sub-section (2) of Section 10 of the Act reads as under:-

Appeal against order under Sections 8,9 and 9-A.

(1) ……..

(2) The appellate authority may confirm, vary or rescind the order, or remand the case to the District Magistrte for rehearing, and may also take any additional evidence, and pending its decision, stay the operation of the order under appeal on such terms, if any, as it thinks fit."

(underlined to supply emphasis)

From a plain reading of the aforesaid statutory provisions, it is apparent that the Appellate Authority, while dealing with and deciding an appeal under Section 22 of the Act, has got the jurisdiction to admit additional evidence. In the present case, the case was decided by the Prescribed Authority by its judgment and order dated 09.09.1994 whereby the rate of rent was enhanced from Rs. 2,100/- per month to Rs. 9,000/-. Challenging the validity of the said order, two appeals were filed before the Appellate Authority, one by the petitioner and the other by the contesting respondents. It wa during the pendency of the said appeals that an application was filed by the petitioner for permission to produce the additional evidence, a copy of which is contained as Annexure-8 to the writ petition. The said application was not supported by any affidavit. In the said application, only it was stated that inadvertently some documents could not be produced before the Prescribed Authority, the same were being produced alongwith a list of papers, therefore, permission to file said documents be granted. Said application was objected to and opposed by the contesting respondents pleading that by means of the said application, the petitioner wanted to fill up the lacuna in its case as the petitioner, besides other papers, wanted to file an affidavit of the valuer so that the valuer's report may become admissible in evidence, which was legally not permissible. The application, according to the contesting respondents, therefore, was liable to be rejected. The Appellate Authority upheld the objection and dismissed the application by its judgment and order dated 24.10.1997 holding that no case for filing additional evidence was at all made out and that the additional evidence was sought to be filed to fill up the lacuna in the case which was legally not permissible.

10. The question as to whether the Appellate Authority had the jurisdiction to admit additional evidence and as to whether it could reject the same, arose in several cases and stands already decided.

11. In Haji Abdul Samad Vs. Jalal Uddin, 1976 A.W.C. 73, it was held that

the Appellate Authority has got the jurisdiction to admit additional evidence in the appeal. Appellate Authority has to exercise the power with circumspection although Section 10 (2) of the Act does not place any restriction on the power of the Appellate Authority but such a restriction is implied inasmuch as the appellate Court could not be treated like the original Court. A distinction has got to be maintained between the powers of an original court and the appellate Court. The power given to the Appellate Authority is discretionary and High Court will not be justified in interfering with the refusal to admit additional evidence.

12. In M/s. Gur Narain Jagat Narain & Company Vs. M/s. Motor and General Sales Private Limited and others, 1977 U.P.R.C.C. 58, it war ruled by this Court that though Section 10 (2) of the Act does not lay down expressly any condition as mentioned in Order 41 Rule 27, C.P.C., the principle contained in the latter, afford proper guidelines to the Appellate Authority in dealing with appeals under the Act and the principles of Rule 27 of Order 41, C.P.C., are applicable to the cases in which additional evidence is sought to be filed at appellate stage. Section 10 (2), Section 34 and section 38 read with Rule 22 of the rules framed under the Act have to be read together to ascertain the intention of the legislature and have to be harmoniously interpreted.

13. In Krishna Kumar Agarwal Vs. I Additional District and Sessions Judges, Saharanpur, 1978 A.R.C. 294, while considering the provisions of Section 10(2) of the Act, it was ruled that the Appellate Authority has got the discretionary power to admit the evidence and that unless conditions mentioned in Order 47 Rule 27, C.P.C., are fulfilled, additional evidence cannot be admitted at appellate stage.

14. In Radhey Shyam Vs. II A.D.J. and others, 1980 A.R.C. 590, this Court held that Section 10(2) of the Act confers the powers to admit additional evidence upon the Appellate Authority. Rule 22 also supplement the said power and although Order 41 Rule 27, C.P.C. in terms does not apply to the proceedings under the Act, however it principles should be resorted for admitting additional evidence for fulfilling the requirements of Rule 17.

15. In Nanak Prasad Vs. Sahdev Prasad Srivastava and another, 1982 A.R.C. 76, it was held that Section 10(2) of the Act gives ample power to the Appellate Authority to admit additional evidence at appellate stage. In the appeals filed under Section 22 of the Act, provisions of Section 10 apply mutatis mutandis. Similar view was taken by this Court in Narendra Kumar Vs. IV A.D.J. Meerut, 1983 A.R.C. 723, wherein it was held that Section 10(2) of the Act Applic mutatis mutandis to Section 22 under which the appeal is filed against the orders passed by the Prescribed Authority. Thus, the Appellate Authoirty has got the power to take additional eivdence by the requirements of Order 41 Rule 27, C.P.C., are to be fulfilled before any evidence is taken at the appellate stage.

Same view has been taken by this Court in the following cases:-

1. Wasi Ahmad alias Wasi Mohd. Vs. V A.D.J. Agra and another, 1983, ARC. 789.
2. Kanhaiya Lal Vs. Ii A.D.J. and others 1983(2) A.R.C. 264.

3. Om Prakash Jaiswal Vs. Prescribed Authority, Allahabad, 1984, A.R.C. 52.

4. Bhola Nath Vs. A.D.J., Gonda and others, 1985(1), A.R.C. 445.

5. Bhola Nath Vs. Mohd. Ibrahim and another, 1987(1) A.R.C. 103.

6. Sardar Harbhajan Singh Vs. Hari Babu and another, 1996(2), A.R.C. 498.
7. Shanta Ram Vs. VII A.D.J. Kanpur and another, 1997(1) A.R.C. 31.

16. From the above noted decisions, it is apparent that the Appellate Authority acting under Section 22 of the Act has got jurisdiction to admit additional evidence at the appellate stage but the requirements of Order 41 Rule 27, C.P.C., are to be followed by the said authority while admitting the additional evidence. In the present case, the Appellate Authority has fully followed the aforesaid decision and rightly refused to admit the additional evidence as the requirements or Order 41 Rule 27 were not fulfilled. I do not find any illegality in the order passed by the Appellate Authority. The application filed by the petitioner for permission to file additional evidence was rightly rejected by the Appellate Authority.

17. From the material on the record, particularly from the report of the valuer, namely M/S. Agrawal Associates Engineers which was supported by an affidavit that market value of the building was assessed at Rs. 14,71,000/-, therefore, the Prescribed Authority rightly enhanced the rate of rent to Rs. 12,000/- per month which was equivalent to $1/12^{th}$ of 10 percent of the market value. The report which was filed by the petitioner to contradict the report filed by the contesting respondents, for the reasons stated above, was inadmissible in evidence and the same was rightly discarded by the Appellate Authority.

18. In view of the aforesaid discussion, No. case for interference under Article 226 of the Constitution of India is made out.

19. The writ petition fails and is hereby dismissed with cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.8.2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE G.P. MATHUR, J.

Civil Misc. Writ Petition No. 29629 of 2000

Shambhu Singh ...Petitioner
Versus
State Election Commission U.P. Through its Secretary and others...Respondents.

Counsel for the Petitioner:
Shri A.P. Sahi
Shri Ashok Singh

Counsel for the Respondents:
Shri S.K. Misra
Shri B.D. Mandhyan
S.C.

U.P. Panchayat Raj (Election of members, Pradhan and U.P. Pradhan) Rules 1944 rules 55 read with Constitution of India, Article 243-0-Jurisdiction bar-Village Pradhan Election –result declared-information send to the District Magistrate who ordered for re-counting found illegal High Court can interfere under Article 226-

Held-

In our view, on proper interpretation of the Statute after the election process has come to an end, the state election Commissioner, District Magistrate and the Election Tribunal. As a corollary it follows that the State Election Commissioner, district Magistrate and Election officer can neither cancel the pool/declaration of the result nor can direct for a fresh poll and recounting after the candidate has been declared elected, but such a declaration has to be in accordance with law. (Para 8 and 9)

Case law discussed

AIR 1952 SC64

By the Court

1. In the instant writ petition the petitioner has challenged the declaration of the result of the election held for the office of the Pradhan of village Sheopur Bujurg, tehsil Padrauna, district Kushinagar declaring respondent no.4 as the elected candidate. The contention of the petitioner is that he was originally declared elected. The counting of votes took place on 28th June, 2000 and after completion of counting of votes result was declared which is Annexure-2 to the writ petition. When called upon by the Court the petitioner has also produced certificate issued by the Returning Officer declaring the petitioner as elected candidate in respect of village Sheopur Bujurg, tehsil Padrauna, district Kushinagar. The contention of the petitioner is that subsequent to the declaration of result and issuance of the certificate on the same date, i.e. 28th June, 2000, a complaint was lodged by respondent no. 4 to the District Magistrate, which is stated to be of 30th June, Annexure-1 to the counter affidavit. On the basis of the said complaint the District Magistrate passed an order dated 3rd July, 2000, whereby the cancelled the declaration of result made on 28th June, 2000 in respect of the petitioner and directed the Returning Officer to declare respondent no. 4, as duly elected. Pursuant to the direction of the District Magistrate, another declaration was made by the Returning Officer whereby the declared respondent no. 4 as duly elected on 6th July, 2000.

2. The question that arises for consideration in the instant writ petition is whether after the declaration of result and issuance of certificate the District Magistrate has any authority to reopen the election process and direct the Returning Officer for afresh declaration of the result. It is also required to be considered in this connection that the Returning Officer, who is for the purpose of holding election, can cancel his declaration one made declaring the duly elected candidate and again declare the result pursuant to the direction of the District Magistrate.

3. The contention of the learned Advocate for respondent no. 4 is that there appeared serious discrepancy in the counting process and the chart, which was relied upon for the counting, was made on the basis of the forged documents. He referred to Section 12-BC of the U.P. Panchayat Raj Act, 1947 and submitted that the District Magistrate has supervisory power over the election and, as such, the district Magistrate was quite within his powers to cancel the election of the petitioner and direct the Returning Officer to declare the election result again.

4. We have considered the submission of the learned Advocates

forties. In our view, Section 12-BC refers to other provisions relating to holding of elections. It is no doubt true that the District Magistrate has supervisory power over the conduct of elections of Pradhans Up-Pradhans and the member of Gram Panchayats in the district, but one the election result is declared and certificate issued, election process is complete and Section 12-C immediately comes into play.

5. Section 12-C of the U.P. Panchayat Raj Act, 1947 provides for application to be made for questioning the elections. If there was any forged document relied in the process of counting process of counting that really amounts to irregularity in the counting process, the proper remedy for the respondent no. 4 is to challenge the same by way of filing an election petition.

6. We have heard learned standing counsel, who has also submitted that the supervisory power of the District Magistrate has not ended in the instant case in view of the fact that the election process has not ended by mere declaration of election result on 28th June, 2000 and the Returning Officer has not become functus officio thereby. According to the learned standing counsel the election process is only completed when the report is sent to the District Magistrate and thereafter to the State Election Commission. In this connection he has referred to Rule 55 of the U.P. Panchayat Raj (Elections of Members, Pradhans and U.P. Pradhans) Rules, 1994 which is set out below:

"55.Report of result: As soon as may be after the result of an election has been declared, the Nirvachan Adhikari shall report the result to the District Magistrate and shall also inform the Secretary of the Gram Panchayat. The District Magistrate shall report the result to the State Election Commission."

7. It is clear from Rule 55 that the only duty given to the District Magistrate is that after he received the report of the Nirvachan Adhikari of the declaration of the result, he shall also inform the Secretary of the Gram Panchayat, and shall report the result to the State Election Commission. It is clear that after the result is declared and it becomes final, the intimation and the report of the same is required to be given to the District Magistrate for the purpose of giving report of the result to the State Election Commission. There is no power conferred upon the District Magistrate directing the Returning Officer to declare the election result again when it has once been declared. We are, therefore, unable to agree with the submissions of the learned standing counsel. In our view the only remedy upon to the respondent no. 4 is to file an election petition in pursuance of Section 12-C of the U.P. Panchayat Raj Act. In our view there is no necessity to the petitioner to file an election petition since he has been declared elected on 28th June, 2000. It is the District Magistrate who exceeded his jurisdiction and interfered with the declaration of the result by directing the Returning Officer to reopen the election process. This is not permissible in law.

8. The meaning of word "Election" and when does he election process comes to an end has been considered by the Supreme Court while deciding the cases under Representation of People Act. In this connection the judgement and

decision in the case of *P.N. Ponnuswami vs. Returning Officer* (A.I.R. 1952 SC 64) may be taken note of. In the aforesaid decision the Supreme Court has given a wide meaning to the word "Election" so as to connote 'the entire process culminating in a candidate being declared elected'. The election, therefore, really includes "the entire procedure to be gone through to return a candidate to the Legislature". The same principle has been enunciated in the Judgement and decision in the case of Mohinder Singh Gill vs. Chief Election Commissioner (A.I.R. 1978 S.C. 851) wherein it was laid down that the election "commences from the initial election notification and culminates in the declaration of the return of a candidate". Election process, thus, comes to an end on "the final declaration of returned candidates." More or less the same procedure as in the Representation of People Act has been provided in the Statute with which we are concerned. In the present case the same definition of election has to be applied to the election held under the U.P. Panchayat Raj Act and the Rules. In our view, on proper interpretation of the Statute after the election process has come to an end, the State Election Commissioner, District Magistrate and the Election Officer cease to have any jurisdiction and the only authority which can deal with and decide any complaint regarding the election is the Election Tribunal. As a corollary it follows that the State Election Commissioner, District Magistrate and Election Officer can neither nor can direct for a fresh poll and recounting after the candidate has been declared elected, but such a declaration has to be in accordance with law.

9. Article 242-O of the Constitution bars the jurisdiction of the court in the matter of election of Panchayats. In the instant case after the election process has come to an end what is challenged by means of writ petition is not the election but the order of the State Election Commissioner, District Magistrate or the Election Officer, cancelling the poll/declaration of the result and directing for repoll or recounting after a candidate has been duly declared elected and as such, writ petition cannot be barred. In such a case, Article 243-O of the Constitution is not attracted. In this connection the judgement and decision in the case of Mohinder Singh Gill vs. Chief Election Commissioner (supra) may again be taken note of. It was held by the Supreme Court in the said decision that the bar created by Article 329(b) of the Constitution was confined to litigative challenges of electroal steps taken by the Election Commission and its Officer for carrying forward the process of election to its culmination in the formal declaration of the result. Similarly Article 243-0 of the Constitution bars the jurisdiction of this Court so far as the election and the steps taken in connection therewith are concerned, but after the election is over, if any order is passed by the Election Commissioner or any other officer affecting the election, which has already been completed, writ petition against such an order under Article 226 of the Constitution can be entertained. In such a case no election is called in question. This Court in the case of Smt. Ram Kanti vs. District Magistrate and other (1995 A.W.C. 1465), following the aforesaid Supreme Court decisions, has also taken the same view. There is no reason not to follow the said settled principle as enunciated in the aforesaid decision.

The writ petition, accordingly, succeeds and is allowed. The order of the District Magistrate dated 3rd July, 2000 is quashed.

10. It is, however, made clear that we have not made any adjudication on the merit of the election and it will be open to respondent no. 4 to pursue the remedy by filing an election petition, if he is so advised.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 25, 2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE G.P. MATHUR..J.

Civil Misc. Writ Petition No. 52720 of 1999

M/s. Maheshwari Brothers ...Petitioner
Versus
The Chairman and Managing Director, U.P. State Textile Corporation Ltd. Vastra Bhawan, Sharda Nagar, Kanpur and others ...Respondents.

Counsel for the Petitioner:
Shri S.N. Srivastava

Counsel for the Respondents:
S.C.
Shri D. Awasthi

U.P. Public Money's (Recovery of Dues) Act 1972, section 3 (I) (d)-Recovery as Arrears of land Revenue-Petitioner being authorised dealer of the Firm was supplied some goods-liability of payment of those price-Corporation send demand Notice-Recovery Certificate issued held valid-any amount due to the corporation can be recovered as arrears of land revenue.
Held –

It also appears from Section 3 (I) (d) of the Act if any money is due and payable to the State Government or the Corporation, the same shall be recoverable as arrears of land revenue. On proper interpretation of Section 3 (I) of the said Act it appears that since the money is recoverable on the basis of the goods sold to the writ petitioner, the U.P. State Textile Corporation can claim as creditor to enforce the said agreement and may take steps for issuance of certificate in terms of Section 3(I) of the act. The said Act has been enacted for the purpose of speedy recovery of debts and as such we are of view that the Corporation is right in issuing the certificate for recovery of the dues in the manner as it has done in the instant case. Our view also finds support from the decision of a Division Bench of this Court in the case of M/s Jaishree Poukry Feed Industries, versus State of U.P. and others (Allahabad Civil Journal 1991. Page 47). (Para 7)

Case law discussed
A.C.J. 1991 47

By the Court

1. In the instant writ petition the petitioner has prayed for quashing of the impugned certificate dated 15.10.1998 (Annexure No. 6) issued by respondent no. 1 against the petitioner and forwarding letter dated 24.10.1998 (Annexure No. 6-A) issued by respondent no. 2 and recovery notice dated 5.6.1999 (Annexures No. 5 &5-A issued by respondent no. 3 to the petitioner in relation to recovery of the amount of Rs. 3,14,642 plus Rs. 2.00 with its all consequential effects throughout whatsover with immediate effect.

2. The petitioner has also prayed for issuing mandamus commanding the respondents (I) not to recover the alleged amount of Rs. 3,14,642.39 contained in the recovery certificate as well as

recovery notice from the petitioner either in case or by way of making attachment of his movable and immovable property and selling the same in the auction proceedings, (ii) to decide his representation dated 9.8.99 contained in Annexures no. 7 & 7-A to the Writ petition, and (iii) to refund the amount of TDR/Fixed Deposit Amount of Rs. 50,000/- with the interest at the present bank rate accrued thereupon for last several years and further to pay the commission and loss suffered by the petitioner to the tune of Rs. 2 lacs due to non-performance of the contract no. 12 dated 16.11.1991 (Annexure no. 7-A) by respondent no. 1.

3. The petitioner has further prayed for withdrawal of the recovery certificate dated 15.10.1998 and recovery notice dated 5.6.1999 with its all consequential effects.

4. The fact interalia relating to the writ petition are that in the year 1984 the petitioner was appointed as an authorised dealer by respondent no. 1 and an agreement was executed containing the terms and conditions of the business agreed to be carried on between the petitioner and respondent no. 1. On 22.9.1995 respondent no. 1 issued a demand notice and on 16.10.1995 a legal notice was issued to the petitioner whereby a sum of Rs. 1,19,619.05 and Rs.1,95,021.34 total Rs. 3,14,640-39 were shown due against the petitioner. On 23.11.1995 petitioner submitted his reply to the demand notice and the legal notice through his lawyer. A recovery certificate was issued on 15.10.1998 by respondent no. 1 to the Collector/Dy. Commissioner, District Mumbai through the Collector Kanpur Nagar which was forwarded by respondent no. 3 through its letter dated 24.10.1998. On 5.6.1999 respondent no. 3 issued recovery notice to the petitioner claiming a sum of Rs. 3,14,642.39 plus Rs.2.00 in pursuance to the recovery certificate dated 15.10.1998. The petitioner on 19.8.1999 filed his representation before the Manager Marketing to the department of respondent no. 1 annexing therewith a copy of contract no. 12.

5. It appears from the record that the matter arises out of a contract of dealership by which the petitioner was appointed as an authorised dealer and an agreement had been entered into between U.P. State Textile Corporation Limited and M/s Maheshwari Brother. The relevant clauses of the agreement arrest out hereinbelow:

"3. That the Corporation shall supply the goods to the Dealer at their ex-mill price exclusive of excise duty and any other taxes imposed from time to time. But endeavour shall be made to affect supplies in time but the Corporations shall not accept any liability for unforced delay in dispatch of goods or inability to supply the goods ordered by the dealer for reasons beyond its means.

4. That the goods will be supplied on the terms and conditions of the sales contract from time to time, read with the conditions contained herein provided that in case of inconsistency between the two, the provisions of this contract shall prevail.

5.That the Corporation's dealings with the dealer shall be on principal to principal basis and the Corporation shall not in any way be responsible for the dealers dealings with the third parties.

6. That the Corporation will supply goods to the dealers against payment in cash by bank draft or by documents drawn through or bankers at respective mills as the case may be, depositing upon the policy in force from time to time. That in case the documents are drawn on D.D. limit, any bank commission, interest or other charges that may be charged by the bankers would be borne by the dealer.

7. That in case documents are drawn on bill collection basis or sent to M.O. direct for collection, interest on bill amount @ 20% per annum shall be payable by the dealer from the day following the date of the bill upto the date of actual payment.

8. That in case the documents are received back unpaid from the bankers or the documents sent to Head Office direct for collection, are not paid within 15 days of the intimation to the dealer, an interest or bill amount @ 24% p.a. shall be payable by the dealer from the day following the date of the bill upto the date of actual payment.

9. If the documents are not retired by the buyers in time or buyers do not take delivery or goods offered to them after making payment, the company reserves the right to cancel the contract without further reference to the buyers. If any loss is occurred tot he Company, the same shall be recoverable from the buyers but the buyers will not be entitled to any difference in price on such cancellation.

10. That on satisfactory performance, the Corporation shall allow incentive bonus at the rates decided by the Sales Committee from time to time.

13. That the Corporation shall have the right to sell directly or indirectly sized yard on beams and/or any other yarn from time to time or use the same themselves in processing as weaving etc., without any reference to the said dealer, who shall not be entitled to any incentive whatsover on such transactions.

17. That in the event of breach of any terms mentioned in this agreement, the Corporation shall be entitled to claim damages from the loss suffered apart from forfeiting the security. If the loss suffered is less than the amount of security deposit then only security deposit shall stand forfeited.

24. That all questions and disputes relating to or arising out of the contract, whether during the continuance of the contract or after its completion or abandonment shall be referred to Chairman, U.P. State Textile Corporation Ltd. or his nominee as sole Arbitrator and his decision upon such dispute or difference shall be final and binding on the parties."

6. Learned Advocate for the petitioner has referred to Section 3 of the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 (hereinafter referred to as 'the act') and has submitted that the said recovery proceedings as arrears of land revenue can be initiated only under the said section which is not applicable in the instant case. The contention of the writ petitioner is that there was no direct loan transaction between respondent no.1 and the writ petitioner. The writ petitioner was appointed, according to the agreement on the basis of which loan was advanced, to act as authorized dealer and as such, the dealer-writ petitioner, is

supplying goods to different parties. The provision contained in section (3) (1)(a) pertains to agreement relating to hire purchase of goods sold to the dealer by the State Government or the Corporation, by way of financial assistance. The writ petitioner is neither carrying on business on hire purchase nor the goods have been sold to the petitioner by the Corporation by way of financial assistance. Sub-section (1)(b) of section 3 is also not applicable, according to the writ petitioner, since the agreement in the instant case, is not relating to a loan, advance or grant or relating to credit in respect of, or relating to hire purchase of goods sold to the petitioner by a banking company or a Government company, as the case may be, under the State sponsored scheme, Sub-section (1) of the said Act is set out herein below:

'3(1) Where any person is party –

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire purchase of, goods sold to him by the State Government or the Corporation, by way of financial assistance, or

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State sponsored scheme, or

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern, or

(d) to any agreement providing that any money payable thereunder to the State Government (or the Corporation) shall be recoverable as arrears of land revenue, and such person-

(i) makes any default in repayment of the loan or advance or instalment thereof, or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any instalment thereof, or

(iii) otherwise fails to comply with the terms of the agreement.

then in the case of the State Government, ;such officer as may be authorized in that behalf by the State Government by notification in the official Gazette, and in the case of the Corporation or a Government company the Managing Director(or where there is no Managing Director then the Chairman of the Corporation, by whatever name called) thereof, and in the case of a banking company, the local agent thereof, by whatever name called, may send a certificate, to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrears of land revenue."

7. In our view there is no dispute that the writ petitioner has taken the goods from the State Textile Corporation Ltd. and is liable to pay the amount due and payable for the same. The corporation in the instant case is in the position of a creditor and the writ petition is in the position of debtor in respect of the textile goods received by the writ petitioner from the Corporation and the writ petitioner is under an obligation to make payment for the same. It cannot be disputed that the goods have been sold to the writ petitioner and the writ petitioner has not paid the amount, which has become due and payable in respect of the said goods. It appears that there is an agreement,

which relates to goods sold to the writ petitioner on principal to principal basis and for the amount due in respect of these goods, the Corporation can enforce the same as creditor pursuant to the agreement mentioned herein before. It also appears from Section 3(1)(d) of the Act if any money is due and payable to the State Government or the Corporation, the same shall be recoverable as arrears of land revenue. On proper interpretation of Section 3(1) of the said Act it appears that since the money is recoverable on the basis of the goods sold to the writ petitioner, the U.P. State Textile Corporation can claim as creditor in terms of Section 3(1) of the act. The said Act has been enacted for the purpose of speedy recovery of debts and as such we are of view that the Corporation is right in issuing the certificate for recovery of the dues in the manner as it has done in the instant case. Our view also finds support from the decision of a Division Bench of this Court in the case of **M/s Jaishree Poultry Feed Industries versus State of U.P. and others** (Allahabad Civil Journal 1991, Page 47).

8. Considering all aspects of the matter, we are in view that there is no scope for quashing the certificate as prayed for by the writ petitioner. There appears no merit in the writ petition and the petition is liable to be dismissed.

In the result the writ petition fails and is hereby dismissed. There shall be no order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD AUGUST 22, 2000

BEFORE
THE HON'BLE M.C. JAIN, J.

Application A- 80 (On behalf of Vishnu Prasad)

And

Application A- 96 (On behalf of Aditya Pratap Narain Singh and another)

In

Testamentary Suit No. 4 of 1985

In the matter of estate of late Smt. Rani Reoti Devi

Jai Bharat Mani Acharya Dixit ...Plaintiff
Versus
Kunwar Anirudh Pratap Narain Singh and others ...Defendants/ Respondents

Counsel for the Applicants :
Shri S.N. Singh .
Shri A.K. Singh

Counsel for the Respondent :
Shri J. Nagar (Administrator General)

A, Indian Succession Act, Sec. 231 read with Administrator General Act, 1963, S.9- Testamentary suit on basis of will renunciation by executor with prayer to appoint Administrator General in his place – No one applied for substitution after executor's death.

Held –

The point of the matter is that as per Section 9 of the Administrator General Act, in case no application for grant of Letters of Administration is made within one month after the death of the person concerned, the Administrator General may apply for grant of Letters of Administration for the estate of the deceased. It is not disputed that the

executor who renounced the executor ship by means of application A-25 later on died. It is a fact that after his death, no person came forward before this court for substitution to continue the present proceedings. The Administrator General, therefore, had a right under Section 9 of the Administrator General Act to move this Court for continuing the proceedings. (Para 7)

B. Code of Civil Procedure, 1908 – Appointment of Receiver in partition suit in 1946- Receiver objecting to appointment of Administrator General as custodian of property at Allahabad- Held, Court is custodian legis of property, not the receiver- Hence receiver's objection untenable.

Held – Para 16

As a mater of fact, the receiver appointed is Suit No 55 of 1945 by the court of civil Judge, Deoria has no business to object to the appointment of Administrator General as the custodian of the property at Allahabad as an interim measure. He can have no independent right in the matter to assert. The law is well settled that when a court puts the receiver in possession of the property, it (property) comes under court's custody, the receiver being merely an officer or agent of the court. It is the court which becomes custodia legis of the property in respect of which the receiver. The contention raised by the Receiver is wholly untenable that a direction should be made that the property of the deceased situate at Allahabad shall be managed by him.

Cases referred :

1983 ALJ (NOC) 12

By the Court

1. I have heard Sri S.N. Singh learned counsel for the applicant/defendants on application A-96 and Sri A.K Singh learned counsel for applicant of application A-80 and Sri J. Nagar learned counsel for the Administrator General.

2. A-96 is an application by Aditya Pratap Narain Singh and Anil Pratap Narain Singh, Two of the defendants in Testamentary Suit no. 4 of 1985 for recalling the order dated 8.7.1993 passed by the Court and to dismiss the present Testamentary Suit no. 4 of 1985 in question. The dispute relates to the estate of the deceased Rani Reoti Devi widow of Ravi Pratap Narain Singh. Originally, Testamentary Case No. 10 of 1984 was filed by Jai Bharat Mani Acharya Dixit for grant of Letters of administration in respect of the estate of the said deceased lady on the basis of a will allegedly executed by her on 14.4.1984 in which he was the executor. As caveat had been filed opposing the grant of Letters of administration, Testamentary Case No. 10 of 1984 was converted into present Testamentary Suit No. 4 of 1985. Application A-25 was made by Jai Bharat Mani Acharya Dixit that he be relieved of the executorship on account of his ill health and paucity of funds. His prayer was that his renunciation from executor ship be accepted in favour of Administrator General U.P. or any other person the Court might find fit. The said Jai Bharat Mani Acharya Dixit died after making of such application. Another application A-35 was made by the Administrator General, U.P. that he be substituted in place of deceased executor Jai Bharat Mani Acharya Dixit. By the impugned order dated 8.7.1993 this Court accepted the renunciation of Jai Bharat Mani Acharya Dixit from executor ship and directed the Administrator General, U.P. to continue the proceedings of the Testamentary Suit.

3. The present two Applicants/ defendants Aditya Pratap Narain Singh and Anil Pratap Narain Singh pray for setting aside the said order on the ground that a civil suit for partition had already been filed by Rani Reoti Devi against her father-in-law late Raja Brij Narain and other co-sharers of the entire co-parcenery property of his family, being Original Suit No. 55 of 1945 which is still pending in the court of Civil Judge, Deoria. It has yet to be decided in the partition suit as to whether Rani Reoti Devi actually had any share in the property. In case it is found that she had no share, then the present Testamentary Suit No. 4 of 1985 has to be dismissed. The alleged will is a forged document. It having not yet any right on the basis of the alleged will and the question of renunciation from executorship in favour of Administrator General, U.P. could not arise at all. The deceased Rani Reoti Devi has left a number of successors who have wrongly been mentioned as near relatives and after her death, if she had any share, the same would devolve on her successors. Under Section 9 of the Administrator General Act, 1963, the Administrator General can be permitted to administer the estate of the deceased if there is apprehension of misappropriation, deterioration or waste of such assets. Nothing of the kind had been shown in the question of substitution of Administrator General in place of Jai Bharat Mani Acharya Dixit. It has also been submitted that the applicant-defendant no.4 did not get any opportunity to contest the matter before the passing of the order dated 8.7.1993.

4. The prayer made in the application A-96 has been vehemently opposed by the Administrator General by filing a counter affidavit A-98. It is submitted that this court has only to decide the genuineness otherwise of the will and not the title of the parties; under Section 231 of the Indian Succession Act, the executor could renounce the executorship the will dated 14.4.1984is a genuine document and under Section 9 of the Administrator General Act, he could apply for grant of Letters of administration for the estate of the deceased on the renunciation of executorship by Jai Bharat Mani Acharya Dixit. It is relevant to state that in the present Testamentary Suit the title or rights of the parties are not to be determined. This court has only to determine the limited question as to whether the will in question dated 14.4.1984 had actually been executed by Rani Reoti Devi. Right and title of the parties may have to be decided in the partition suit but not in the present testamentary proceedings. The parties are at issue on this pertinent aspect of the matter in the said suit which has not yet reached the ripened state of decision after the evidence of the parties. The apparent state of things is that Jai Bharat Mani Acharya Dixit has been named as executor by the testator Rani Reoti Devi in the will aforesaid.

5. It is significant to take note of the provision contained in Section 231 of the Indian Succession Act which reads as under;

" 231. Procedure where executor renounces or fails to accept within time limited- If an executor renounces, or fails to accept an executorship within time limited for the acceptance or refusal thereof the will may be praved and letters of administration with a copy of the will annexed, may be granted to the person

who would be entitled to administration in case of intestacy."

6. The above provision contained in Section 231 of the Indian Succession Act leaves not the slightest doubt that the executor Jai Bharat Mani Acharya Dixit could renounce the executor ship which he did by making application A-25. I do not think that the substitution of the Administrator General in place of executor Jai Bharat Mani Acharya Dixit suffers from any defect of any nature whatsoever. It is of no consequence that in application A-25 the executor Jai Bharat Mani Acharya Dixit had stated that his renunciation was in favour of Administrator General, U.P. or any other person as this court may find fit. What is material is that he renounced his executor ship which he could have very well done.

7. The point of the matter is that is as per Section 9 of the Administrator General Act, in case no application for grant of Letters of administration is made within one month after the death of the person concerned, the Administrator General may apply for grant of Letters of administration for the estate of the deceased. It is not disputed that the executor who renounced the executor ship by means of application A-25 later on died. It is a fact that after his death, no person came forward before this court for substitution to continue the present proceedings. The Administrator General, therefore, had a right under Section 9 of the Administrator General Act to move this Court for continuing the proceedings.

8. The matter may be considered yet from another angle. Rule 39 of Chapter XXX of the Rules of the Court states that after the proceedings are converted into a suit, procedure in such suit shall, as nearly as may be, be according to the provisions of the court (C.P.C.). Order XXII Rule 4A(1) of the Code of Civil Procedure says that if, in any suit, it appears to the court that any party who had died during the pendency of the suit had no legal representative, the court may on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator General, or an officer of the court or such other person for the purpose of the suit. Therefore, the Administrator General could very well be substituted in place of the deceased executor Jai Bharat Mani Acharya Dixit who had renounced the executor ship by making the application A-25.

9. The contention of the applicant of A-96 that Rani Reoti Devi left a number of successors cannot be taken note of at this stage to oust the Administrator General from prosecuting the suit. Really speaking, the applicants of application A-96 being defendants in the case have challenged the genuineness of the will in question and it has to be tested as to whether the same is a genuine document or otherwise. Non- suiting the Administrator would tantamount to the acceptance of the case of the applicants/defendants offering challenge to the will without any contest. After all, it has to be determined on the anvil of reliability after weighing the evidence of the two sides as to whether the will in question is a genuine document or a forged one.

10. It is not case of the applicant of application A-96 that they were not parties in the suit before the passing of the

order dated 8.7. 1993. They have not at all been prejudiced by the substitution of the Administrator General in place of Jai Bharat Mani Acharya Dixit, executor, who renounced the executor ship by application A-25 where after he died. It makes no difference to them as to whether the proceedings were carried on by Jai Bharat Mani Acharya Dixit or the same are now being carried on by the Administrator General.

11. It may be observed that the proceedings before the testamentary court are the proceedings in rem.

12. As held by this Court in the case of **Subhash chandra Pandey vs. Administrator General, U.P. 1983 ALJ, NOC 12**, the right of Administrator General to make an application for the grant of Letters of administration and obtain the same is governed by Sections 7 and 9 of the Administrators General Act 1963. The whole object of conferring powers on him and casting an obligation on him to apply for Letters of administration is that the assets of the deceased may be saved from the danger of misappropriation, deterioration or waste etc. There is no inherent bar to the Administrator General applying for probate or Letters of administration for the benefit of a third party. This is clearly indicated by Section 2(2) of the Act which defines "letters of administration ". The term includes any Letters of administration "whether general or with a copy of the will annexed or limited in time or otherwise". So, the Administrator General comes in his own rights under Section 9 read with Section 2 of the Act. The purpose of making such application is that after administering the estate, he would give the remaining assets to the legatee.

13. In view of the above discussion, I do not find any merit in application A-96 whereby the prayer has been made to recall the order dated 8.7.1993. This application is bound to be rejected.

14. Application A-80 has been moved o behalf of one Vishnu Prasad, attorney of the Receiver appointed in O.S. No. 55 of 1945 of the court of Civil Judge, Deoria with the prayer that it be directed that the properties of the deceased situate at Allahabad shall be managed by the said Receiver appointed by the order of the Civil Judge, Deoria in Suit No. 55 of 1945 during the pendency of the present Testamentary Suit. The application is supported by an affidavit. It may be stated that by order dated 13.3.1989, this court permitted the Administrator General and the Official Trustee to take charge, as an interim measure, of the property at no.2 N.K. Mukerji Road, Allahabad (which also forms the subject matter of the will dated 14.4.1984 executed by Rani Reoti Devi). One Yadvendra Dutt Dubey is putting up claim in respect of the said property and he is also a party before this court.

15. The argument of the learned counsel for the applicant of application A-80 is that the Administrator General has no right to be replaced as executor in place of Jai Bharat Mani Acharya Dixit and to prosecute the above Testamentary Suit. It is urged that Jai Bharat Mani Acharya Dixit left behind one son and five daughters and there could be no justification for execution of renunciation by him. The genuineness of the will in question has also been challenged. It has

been argued that Jai Bharat Mani Acharya Dixit had died before making of the purported application A-25 (which was made on 19.7.1988). The sheet anchor of the application A-80 is that Rani Reoti Devi claimed half share in the entire property of Padrauna Raj by filing suit no 88 of 1945 in the court of Civil Judge, Deoria and the property is custodia legis since 2.1.1946 under the management of Receiver appointed from time to time by the order of the court of Civil Judge, Deoria and presently, Sri Ram Autar Kesriwal is the Receiver. He alone and none else has the right to manage the property of Rani Reoti Devi also which is included in the properties of Padrauna Raj.

16. Prayer made in application A-80 too has been opposed by the Administrator General. I have held above while deciding Application A-96 that the Administrator General could be substituted in place of Jai Bharat Mani Acharya Dixit who had renounced the executor ship by making application A-25 on 19.7.1988. It is not disputed that Jai Bharat Mani Acharya Dixit had actually died. There is no evidence from the side of the applicant of application A-80 to back the contention that he died even before making the application A-25. As a matter of fact, the receiver appointed in Suit No. 55 of 1945 by the court of Civil Judge, Deoria has no business to object to the appointment of Administrator General as the custodian of the property at Allahabad as an interim measure. He can have no independent right in the matter to assert. The law is well settled that when a court puts the receiver in possession of the property, it (property) comes under court's custody, the receiver being merely an officer or agent of the court. It is the court which becomes custodia legis of the property in respect of which the receiver is appointed. Such de jure possession of the court is through receiver. The contention raised by the Receiver is wholly untenable that a direction should be made that the property of the deceased situate at Allahabad shall be managed by him. This application, therefore, also does not have any merit and is to be rejected.

17. In view of the above discussion, the application A-96 and A-80 are hereby rejected.

18. The office is directed to list application A-97 for orders/hearing.

Application Rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.9.2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE P.K. JAIN, J.

Special Appeal No. 113 of 1998

High Court of Judicature at Allahabad, through its Registrar and others
...Applicants.
Versus
Manglesh Singh ...Respondent.

Counsel for the Appellants:
Shri S.M.A. Kazmi
Shri Sudhir Agarwal

Counsel for the Respondent:
Shri Ranjeet Saxena
Shri Satish Chaturvedi

U.P. Subordinate Court's staff (Punishment and Appeal Rules, 1976- section 4 (i) (f) readwith Constitution of India, Article 311 (2) – Reversion-

Petitioner working as Accounts Clerk on Ad-hoc basis on fixed terms- extended time to time- permitted to work even after expiry of the terms- reversion to its original post by putting stigma- without affording any opportunity- reversion order found illegal.

Held-

The impugned order dated 1.9.1992 clearly shows that the Respondents was reverted t the post of Copyist at a lower salary from the post which he was continuing to hold on the ground that his work was not satisfactory. Thus clearly a stigma was attached. The order of Respondent No. 3 was thus in teeth of ratio laid down in S.P. Vasudeva cited by Sri Saxena. In this backdrop alone we are constrained to hold that as stigma was attached while passing the impugned order dated 1.9.1992 thereby an opportunity to have his say to the Respondent was must before its passing. (Para 14)

Case law discussed:
1987 (55) F.LR. 304
AIR 1987 SC- 1627
1992 (4) Sec –33
AIR 1975 SC-2292
J.T. 1993 (3) SC- 740
1986 (2) 4 JSC 235
AIR 1986 SC 1626

By the Court

1. The appellants who were Respondent Nos. 2,1 and 3 respectively in Civil Misc. Writ Petition No. 13299 of 1997 assail validity of the Judgment dated 21.5.1997 quashing the order dated 1.9.1992 passed by Appellant No.3 the Judge, Family Court, Allahabad and the order dated 12.3.1997, passed by Appellant No.2 the then Hon'ble Inspecting Judge, Allahabad.

2. Vide order dated 1.9.1992 the writ Petitioner who was appointed o Ad-hoc basis as an Account Clerk in the scale of Rs.1200-1560-EB-40-2040 was reverted in public interest and for smooth running of the office work as Copyist in the scale of Rs.950-30-1150-EB-25-1500 as during that period his work was not found to be satisfactory and his writing was also very poor.

Vide Order dated 12.3.1997, the then Hon'ble Inspecting Judge, Allahabad held that that the Appointing Authority has powers to revert an employee from higher scale to lower scale if his work and conduct is not satisfactory.

3. The impugned judgement reads thus:

"This writ petition has been filed against the impugned order dated 1.9.1992 passed by the Family Court and the impugned order of the Inspecting Judge dated 12.3.1997 Annexure-3 to the writ petition.

The petitioner was appointed as an ad-hoc class II employee in the scale of 1200-2040 vide Annexure-2 to the writ petition. By the impugned order dated 1.9.1992 true copy of which is Annexure-3 to the writ petition he was reverted as Copyist in the pay scale of 950-1500. He filed an appeal on the administrative side before the Inspecting Judge but that was rejected hence this petition.

It was held by the Supreme Court in Hussain Sasansaheb Kaladgi Vs. State of Maharashtra 1987 (55) F.I.R. 304 that a direct recruit cannot be reverted to a lower post. On the same principle I am of the opinion that a person appointed on higher pay scale directly cannot be reverted to a lower pay scale. In view of

the above this petition is allowed. The impugned order dated 1.9.1992 and 12.3.1997 are quashed. Nod order as to costs.

M. Katju J"

The Original Pleadings:-

4. The case of the Respondent, who was the Writ Petitioner, in short was to this effect:-

He was appointed by the Judge, Family Court, Allahabad with effect from 16th July till 30th September,1991 on purely ad-hoc basis as Class III employee whose service was liable to be terminated at anytime without any notice; he was allowed to work from 16.7.1991 itself on the substantive vacant post of Account Clerk and even after 30th September,1991 he has been continuously working in the office of the Judge, Family Court at Allahabad; even though his service record has always been good and he was never communicated of any adverse entry against him, yet to his utter surprise the impugned order dated 1.9.1992 was passed casting stigma without giving him an opportunity of hearing and thereby there has been a gross violation of the principles of natural justice and fair play; he went up in appeal under Clause 6 of Para 7 of Allahabad High Court Rules, 1956 on the administrative side of the Court but it was dismissed vide order dated 12.3.1992; to the best of his knowledge under Rule 4(1)(f) of the U.P. Subordinate Courts Staff (Punishment And Appeals) Rules, 1976 punishment of reduction to lower post, time scale or grade, or to a lower stage in a time scale or graded scale can be imposed but it falls under the category of major punishment and that under Rule 5 thereof no order of reduction in rank can be passed unless a person is informed in writing of the ground on which is proposed to take such action and had been afforded an adequate opportunity of defending himself; that sub-rules (2)(3) and (4) of Rule 5 aforementioned lays down the procedure which is required to be followed in case of major punishment, which were not at all followed and thus the order dated 1.9.1992 is void-ab-initio and liable to be set aside.

5. In the counter affidavit filed by Appellant nos. 1 and 2, which was sworn by O.S.D. (Litigation) of the Court, it has been stated, interalia, that as per the character roll entries recorded for the years 1992-93 and 1993-94 his work was not found satisfactory, his hand writing was also not good; as he was appointed purely on ad-hoc basis hence as per the rule, there was no need to give him show cause notice or opportunity of hearing before passing the impugned order; under Section 6 of the Family Courts Act, the Judge, Family Court is the appointing authority who has powers to revert an employee from higher scale to lower post, if his work and conduct is not found satisfactory, after obtaining report from the Judge, Family Court and the District Judge, Allahabad and thereafter the representation of the petitioner was rejected on 12.3.1997 which was also communicated his reversion not a punishment but an order simplicitor; he was simply deputed to work on a higher scale and was reverted when his work and conduct was not found satisfactory; the U.P. Subordinate Courts Staff (Punishment And Appeal) Rules,1976 does not apply to his case and it would be just and expedient in the interest of justice to dismiss his writ petition.

6. In the counter affidavit filed on behalf of Appellant no.3, it has been asserted, interalia, that the establishment of the Family Court, Allahabad itself is a temporary establishment, which is being extended year to year, as is evident from the G.O. appended as Annexure C.A-1; vide Notification dated 4th April 1995, punished in the Official Gazette, the State Government has framed rules known as "Utter Pradesh Family Court Rules, 1995"; the writ petitioner had wrongly approached Appellant no.1 for redressal of his grievances, as proper authority was the State Government, since the dispute had arisen prior to the aforesaid Rules; the writ petition is liable to be dismissed as the person alleged to have been promoted in his place has also not been made party to the writ petition as even assuming though not admitting that such a person has been promoted in his place; his appointment was made without completing legal formalities on temporary and ad-hoc basis, though he worked till 1992 without any further extension during which period his work was not found satisfactory and was reverted to the post of Copyist; there was a break I his service on 1.7.1992 and at his own request he was assigned the same work but till 30th August,1992 he did not improve himself; prior to passing of impugned order due to unsatisfactory performance and work and even thereafter he failed to improve his work therefore his services were again given break on 13.71993 he was warned several times to improve his work but he did not improve it is wrong to say that he was neither given any warning nor was communicated of any adverse entry and the writ petition being devoid of any merit is liable to be dismissed with costs.

7. The Respondent filed a Rejoinder affidavit to the aforesaid Counter Affidavit stating, interalia that the services of none of the similarly placed employee has not been terminated on the ground of the temporary character of the Family Court, since the placement was purely temporary, therefore, he was advised not to implead other person as party to this writ petition but in case it is desired that they be impleaded then he be permitted to implead them as party so that justice be done; the very act of promoting the persons itself proves that the manner of appointment made will be deemed to have been made on permanent basis as all of them.are continuously working since the date of their appointment; even after coming into force of the Rules one Sri Abdul Rahman Zafri was appointed on 17.5.1995 in the scale of Rs.1200-2040 on a Class III post in similar fashion as that of the petitioner and other employees by calling applications only and not I accordance with the rules; the entries of the year 1993-94 pertains to the year subsequent to the year of his reversion about which he was never communicated and ,thus, no reliance can be placed on the same; it is denied that there was break in his service on 1.7.1992 due to his unsatisfactory performance and work it is also denied that since he failed to improve his work his services were again given a break on 13th July, 1993; the order of break in service has been passed not only in his case but in cases of another employees; he was never issued any warning to improve his work; his hand writing is important at the place where he has been reverted and not as Account Clerk.

8. In his Rejoinder affidavit to the counter affidavit of Appellant nos. 1 and 2, similar facts have been asserted.

The Submissions:-

9. Sri S.M.A. Kazmi and following him Sri Sudhir Agarwal, learned counsel appearing in support of this Special Appeal, had contended as follows:-

(i) The Judgement is cryptic and has not even stated what was the precise case of the appellants and issues raised by them.

(ii) Since undisputedly, the Respondent was not appointed even on ad-hoc basis, after 30.9.1991 and on 1.9.1992, on Class III post even on ad-hoc basis, therefore, he had no right to hold the post Class III and this significant aspect of the matter was completely lost sight of by the learned single Judge, who had proceeded t presume that the petitioner's appointment as an ad-hoc employee had continued till 1.9.1992 when he was reverted back as Copyist and, thus, the impugned judgement is vitiated.

(iii) The learned Single Judge has committed as apparent error in applying the ratio laid down by the Apex Court in Hussain Sasansaheb Kaladgi V. State of Maharashtra, 1987(55) F.L.R. 30= (A.I.R.1987 SC 1627) which was case of a temporary employee and not of an ad-hoc employee for a fixed term period.

(iv) The Respondent was deemed to discharge functions of a Class IV employee though as Class III employee in the scale of Rs. 950-1500 and the order impugned had changed his assignment and not reduced his rank.

In support of his submissions on merit, Sri Agarwal placed reliance on following decisions:-

(i) Director, Institute of Management and Development, U.P. V. Smt. Pushpa Srivastava 1992 (4) S.C.C.,33;

(ii) S.P. Vasudeva V. State of Haryana & others A.I.R.1975 S.C. 2292, and

(iii) State of Haryana V. Shri S.M. Sharma and others J.T. (SC) 1993 (3) 740 = A.I.R., 193 SC 2273

10. Sri Ranjit Saxena followed by Sri Satish Chaturvedi, learned counsel appearing on behalf of the Respondent, on the other hand, had contended as follows:-

(i) As pointed out by the Supreme Court in Jarnail Singh & Ors. Vs State of Punjab & Ors. 1986(2) U.J.(S.C.)235 (=A.I.R. 1986 SC 1626) the provisions prescribed under Article 311 of the Constitution are squarely applicable to ad-hoc employees also, the writ petitioner who was an ad-hoc employee and even though his services were not renewed after 30th September, 1991, but having regard to the fact that his appointing authority had proceeded to take work from him continuously and on the same salary and thus he was an ad-hoc employees and impugned order had cast a stigma against him by stating that his work has not been found to be satisfactory and writing is also very poor and thus he is being reverted and posted as Copyist at lower salary, it was illegally passed and was rightly quashed by the learned Single Judge. The use of the word

'reversion' in the order impugned cannot be dubbed as mere placement of the Respondent as suggested to by Sri Agarwal.

(ii) Bad handwriting was not relevant for holding the post of accounts Clerk but may be relevant for the post of a Copyist, which shows that the order has been passed on an irrelevant ground.

(iii) The Respondent was never communicated of any adverse entry at all and the entries relied upon in the Counter Affidavit are of a subsequent period.

(iv) The decisions relied upon by Sri Agarwal do not apply to facts of the instant case.

Our Findings:-

11. The moot question for our adjudication is:-

Whether a fixed term ad-hoc employee, who was continued to discharge his functions even after expiry of his term, can be reverted to a post with a lesser salary with a stigma in regard to non satisfaction of his work without giving any opportunity to have his say?

12. What should contain a Judgement is well known to every one of us. Unfortunately the judgement of the learned Judge does not disclose what was the precise case of both parties and what were the submissions made before him. As an appeal lay against the judgement it is expected that the judgement should contain even briefly the respective case of the parties, the issues raised and pressed by them which requires adjudication.

However, in the peculiar facts and circumstances of the instant case we do not wish to set a side the judgement on this ground and remand the case. We have ourselves taken pain to peruse the case of the respective parties and proceeded to state them earlier and heard the learned counsel for the parties at length.

13. Now we are proceed to consider the cases cited at the Bar.

In S.P. Vasudeva V. State of Harayana and others, supra, the Apex Court held as follows:-

"…..It may not be a correct use of the phrase 'ad-hoc' because he was not appointed for any special or particular purpose, so that it could be said that till that purpose was over he could not be discharged. The phrase seems to have been used in the sense of 'temporary'.

X X X X

We may in this connection point out that where an order of reversion as in the present case, of person who had no right to the post, does not show ex facie that he was being reverted as a measure of punishment or does not cast any stigma on him, the Courts will not normally go behind that order to see if there were any motivating factors behind that order……."

In Director, Institute of Management & Development, U.P. V. Smt. Pushpa Srivastava, supra when the post itself was ultimately sought to be abolished, the Apex Court held that the appointment being contractual and ad-hoc which came to an end by efflux of time, the employee had no right to continue on the post and claim regularisation in service in absence of any rule.

In State of Haryana V. S.M. Sharma, supra, what the Apex Court held was that entrustment or withdrawal of current duties charge in one's own pay scale did not amount to either promotion or reversion.

The Apex Court in Jarnail Singh & Ors. V. State of Punjab & Ors. Supra had laid down that the provisions as contained in Article 311 of the Constitution are applicable even in case of an ad-hoc employee and that it is open for such an employee to show that while terminating his services on the ground that he was no longer required, it was open for such an employee to show that persons who are junior to him have been retained and thus Articles 14 and 16 of the Constitution will come into play.

14. Now the facts of the instant case. The impugned order dated 1.9.1992 clearly shows that the Respondent was reverted to the post of Copyist at a lower salary from the post which he was continuing to hold on the ground that his work was not satisfactory. Thus clearly stigma was attached. The order of Respondent No.3 was thus in teeth of the ratio laid down in S.P. Vasudeva cited by Sri Agrawal himself and Jarnail Singh cited by Sri Saxena. In this backdrop alone we are constrained to hold that as stigma was attached while passing the impugned order dated 1.9.1992 thereby an opportunity to have his say to the Respondent was must before its passing.

15. The other decisions relied upon by Sri Agarwal do not apply the facts and circumstances of the instant case, who also failed to show us any rule of the relevant time vesting such powers in Appellant No.3 as stated in the order of then Hon'ble Inspecting Judge.

The Result:-

16. For the reasons aforementioned. We hold that this appeal is without any merit, It is dismissed accordingly, but without there being any order as to cost.

17. The office is directed to hand-over a copy of this Judgement within two weeks to Sri Sudhir Agarwal the Special Counsel of the Court.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 04.09.2000

BEFORE
THE HON'BLE A.K. YOG, J.

Civil Misc. Writ petition No. 42463 of 1993

Smt. Kamala Sharma ...Petitioner
Versus
Dy. Director of Education, Agra Division, Agra and others ...Opp. Parties

Counsel for the Petitioner:
Shri S. Chaturvedi
Smt.S.V. Mishra. Sri C. Mishra
Shri Ashok Bhushan,

Counsel for the Respondents:
Shri B.B. Paul
S.C.

U.P. Intermediate Education Act, 1921 read with Indian Evidence Act, 1872 – Estoppel –Seniority – Challenge, after several years in absence of any fraud or misrepresentation – not permissible – further committee of Management not impleaded, though a necessary party.
Held –

It is not the case of the Petitioner that Respondent No. 3 did not possess requisite minimum academic qualification for being appointed as lecturer in the year 1970. Respondent No.3 having been allowed without any objection to work and / or there being no charge of misrepresentation or fraud being practiced by the said Respondent No. 3, one cannot be permitted and justify challenge to the initial appointment at a belated stage after about 18 years. Besides what has been argued at the bar and referred to above, this Court would like to note that Petitioner did not impleaded committee of Management of the College. Instead she had impleaded the Authorised Controller. Chiranji lal Balika Inter College,. Aligarh/ City Magistrate. Aligarh. Assuming that there was a validity elected Committee of Management , constituted as contemplated under the Scheme of Administration under the U.P. Intermediate Education Act, 1921, the aggrieved party, in case the Petitioner is granted relief, shall be Committee of Management. The Authorised Controller is appointed under the Act only to represent the Committee of Management for time being for day to day function. The Authorised Controller is, in fact, not the Committee of Management as such. Committee of management ought to have been impleaded in the petition and sought to be served through Authorised Controller instead of manager. In the absence of committee of Management , which is not only relevant but also necessary party in the instant case, the Petitioner cannot be granted relief claimed in the writ Petition .(Para 7 & 16)

Case Law discussed

AIR 1986 SC 1859
(1993) 2 UPLBEC 922
(19910 2 U.P.LBEC 1202
AIR 1975 SC 1269
AIR 1981 SC 1473
AIR 1983 SC 194
AIR 1987 SC2111 (Pr.12)

By the Court

1. The petition under Article 226, Constitution of India has been filed by one Smt. Kamla Sharma seeking to challenge the impugned order dated November 1/2 1993 passed by Respondent No.3 (SMT Usha Varshaney, both working as lecturers in a recognized intermediate Girls institution called Chiranji Lal Girls inter College, Aligarh (called the 'college), which is admittedly governed by the provisions of U.P. Intermediate Education Act, 1921 (as amended up to date) and Regulations framed there under Copy of impugned order has been filed as (Annexure –1 to the Writ petition)

2. For appreciating the controversy raised by the parties, following undisputed dates are being given:-

Sl No	Dates	Events
01	08-07-66	Smt. Kamla Sharma the petitioner was appointed as a lecturer (English) at Agrasen balika Inter College, Mathura (Where the Petitioner worked up to 13th july 1970.
02	08-07-69	Smt. Usha Varshney, Repondent No.3 was appointed as C.T. Grade Teacher at Chiranji Lal Balika Higher Secondary School, Aligarh
03	01-09-69	Respondent No.3 was given promotion as Lecturer (Sanskrit).
04	10-10-69	Chirangi Lal Balika

		Higher Secondary School was upgraded as Inter college
05	10-02-70	Regional Inspectress of Girls Schools approved appointment of Respondent No.3 as C.T Grade Teacher on One – year probation.
06	16-06-1970	Regional Inspectress of Girls Schools approved respondent No.3 Lecturer (Sanskrit)
07	14-07-70	Petitioner was appointed and she joined as Lecturer in Chiranji Lal Balika Inter College Aligarh.
08	24-11-70	Regional Inspectress of Girls Schools approved the Petitioner's appointment as Lecturer in Chiranji Lal Balika Inter College, Aligarh.
09	14-08-83	Resolution was passed by Committee of Management for adding service of Petitioner from 08-07-1963 to 13-07-1970 at Agrasen Inter College, Mathura into service at the institution from 14-07-1970 recommending grant of selection grade to the Petitioner.
10	02-04-89	Petitioner submitted representation to the Committee of Management for correct determination of seniority and to place her next to principal as senior most Lecturer.
11	19-04-93	Authorised Controller
12	02-11-93	Deputy Director of Education on appeal filed by Respondent No.3 against order dated 19-04-1993 declared Respondent No.3 senior to the Petitioner

3. Heard learned counsel for the petitioner Shri Ashok Bhushan, the learned Standing Counsel appearing on behalf of Respondent Nos. 1 and 2 (who had accepted notice for Respondent No. 2 also) and Shri B.B. Paul, Advocate appearing on behalf of Respondents No. 3.

4. There is no dispute that Smt. Kamla Sharma (Petitioner) did not challenge the seniority of Smt. Usha Varshney (Respondent No.3), who was ever – since the appointment of the Petitioner in the college till 1989 was treated senior to the Petitioner. The Petitioner. Counsel, however, referred to para 2 of Annexure RA-3 (filed along with the Rejoinder Affidavit) to show that the Petitioner had made representations dated 29th December 1973. 22nd April 1974, 25th April 1978 and 25th July 1983.n It is further alleged that the Petitioner had made representations dated 02nd April 1989 and 01st June 1989 also before Authorised Controller but no action was taken. The fact that Petitioner did not pursue her representations and aforementioned dates clearly show that there is gap of about four years between 1974 and 1978 as well as gap of five years between 1978 and 1983. In case,

committee of management was not circulating seniority, as required under relevant regulations. The Petitioner ought to have raised the issue before higher authorities or proper Court. She approached this Court for a writ of mandamus to command the Respondents to treat the Petitioner senior to Respondent No.3 by allowing long time of more than a decade to run and she contended by filing representations with no decision on them. Long since and passive approach of her disentitle her to reopen long settled old issue.

5. In reply filed by Respondent No.3 before the Appellate Authority (Annexure CA- 16 to the Counter Affidavit) Respondent No.3 categorically pleaded that her senior position above the Petitioner was never disputed by the Petitioner during 1970-1989 (PP 60,63, and 66 of the Counter Affidavit). Respondent No. 3 categorically pleaded that her seniority after 18 years should not be allowed to be disturbed by permitting Petitioner to challenge her initial appointment as lecturer which was direct appointment and not by promotion. Respondent No. 3 categorically contended that she could not be promoted from C.T. grade to Lecturer Graduate to intervening cadre of Assistant Teacher L.T. Grade of Assistant Teachers. Respondents No.3 claimed that she was duly appointed as Lecturer when college was upgraded to Intermediate level in 1970 and the recommendation in favour of the Petitioner by committee of Management was approved by the then Regional Inspectress of Girls Schools vide order dated 16th June 1970 (Annexure 13 to the Supplementary Affidavit). This order of approval has not been challenged by one and so long as this order of approval in favour of respondent No.3 as lecturer in the College stands the Petitioner cannot be permitted to challenge the appointment of Respondent No.3 at this stage while claiming seniority after time as it will amount to collateral challenge.

6. In this facts of the present case. It has to be accepted that Respondent No.3 was validly appointed with the approval of Regional Inspectree of Girls Schools under order dated 16th June 1970. The argument of the Petitioner, now after several years that Respondent No.3 could not be promoted from C.T. grade to Lecturer Grade in the College when the Petitioner has been treated junior to respondent no.3 ever since 1970 to 1989, cannot be permitted.

7. It is not the case of the Petitioner that Respondent No.3 did not possess requisite minimum academic qualification for being appointed as lecturer in the year 1970. Respondent No.3 having been allowed without any objection to work and or there being no charge of misrepresentation or fraud being practiced by the said Respondent No.3 one cannot be permitted and justify challenge to the initial appointment at a belated stage after about 18 years. There is no averment that Petitioner's had made above referred representations within the knowledge of respondent No.3 In absence of any knowledge to respondents No.3 about challenge to her initial appointment nor it was earlier challenging by the Petitioner or any one else it is not expedite to allow the Petitioner to challenge the same after several years.

8. The learned counsel for the petitioner referred to the case of Shitla Prasad versus State of U.P. – AIR SC

1859. The above mentioned case of Shitla Prasad is clearly distinguishable. on facts inasmuch as in the aforementioned case Petitioner did not possess requisite academic qualification. In the instant case, there is no dispute that Respondent No.3 possessed all the requisite minimum academic qualification prescribed under the relevant Act and the Regulations framed the render at the time of appointment.

9. The argument on which Petitioner seeks to assail appointment of Respondent No.3 is whether respondent No. 3 could be validly appointed by way of promotion from C.T. to the post in Lecturer Grade without first being promoted to L.T. Grade and completing five years in L.T. Grade.

10. Petitioner in support of above submission refer to the use of word 'promotion' Mere use of expression 'Promotion ' in appointment letter or otherwise under misconception of facts and / or language' cannot change the real nature of appointment nor can it be permitted to be used as a pretext to establish illegality/ irregularity in the process – particularly when there is no fault or participation of the Respondent No.3 and also that about decades have passed. Obviously Respondent No.3 could not be appointed by way of promotion but by direct selection only subject to her possessing prescribed minimum academic qualification at the relevant time.

11. As the record stands, it cannot be ruled out that Respondent No.3 was not appointed through regular selection by direct mode. The then regional Inspectress for Girls Schools to the appointment of Respondent No.3 accorded approval and it will be deemed. In absence of to the allegation contrary, that she had after scrutinizing the papers did not find lacuna in this appointment of Respondent No.3 and consequently accorded approval to the appointment of Respondent No.3 It cannot be now permitted to be assailed on technical grounds like the above.

12. The learned counsel for the petition then referred to the case of Smt. Prem Balika Rai versus Regional Inspectress of Girls Schools, Varanasi and others connected with the case of Malit Singh versus Regional Inspectress of Girls Schools (1993)2 UPLBEC 922. As already mentioned above. Fact of the instant case are different to the extent that in the present case Respondent No.3 is claiming her appointment by direct selection. The controversy raised in the fact of Prem Balika Rai (Supra) was entirely different.

13. On the other hand, learned counsel for the Respondent referred to the decision of Dr. Asha Saxena versus S.K. Chaturvedi (1991) 2 UPLBEC 1202 wherein a Full Bench of this Court observed that law is to the fact that law is well settled that Court will not interfere with the seniority which has prevailed and remained final for long time.

14. Apex Court in the case of Malcon versus Union of India – AIR 1975 SC 1269, has taken a similar view while it observed that before one can seek remedy, one must show having acted with due diligence and promptitude.

15. It will be noted that Courts do not permit collateral challenge by allowing one to assail initial appoint to disturb 'Seniority' particularly when there

is no allegation of fraud or misrepresentation. The above view finds support from the decisions of the apex Court in:

1. AIR 1981 SC 1473
2. AIR 1983 SC 194
3. AIR 1987 SC 2111 (Pr.12)

16. Besides what has been argued at the Bar and referred to above, this Court would like to note that Petitioner did not implead Committee of Management of the College. Instead she had impleaded the Authorised Controller. Chiranji Lal Balika Inter College, Aligarh/City Magistrate, Aligarh. Assuming that there was a validly elected Committee of Management, constituted as contemplated under the scheme of Administration under the U.P. Intermediate Education Act, 1921", the aggrieved party, in case the petitioner is granted relief, shall be Committee of Management. The Authorised Controller is appointed under the Act only to represent the Committee of Management for time being for day to day function. The Authorised Controller is in fact, not the committee of Management as such Committee of Management ought to have been impleaded in the petition and sought to be served through Authorised Controller instead of Manager. In the absence of committee of Management, which is not only relevant but also necessary party in the instant case the Petitioner cannot be granted relief claimed in the Writ Petition.

17. It may be noted that the whole dispute of seniority between Petitioner and Respondent No.3 assumed importance and became significant inasmuch as under U.P. Secondary Service Commission Act senior most teacher is required to take over on ad hoc basis if regular incumbent is not available.

18. In view of the above, I find no error apparent on the face of record. The writ Petition looks merit. It is, accordingly, dismissed.

Petition Dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 13.9.2000

BEFORE
THE HON'BLE A.K. YOG, J.

Civil Misc. writ Petition No. 513 of 1998

Constable Firoz Khan (terminated)
...Petitioner
Versus
Inspector General of Police, Bareilly Zone Bareilly and others ...Respondents

Counsel for the Petitioner:
Shri Raj Kumar Khanna

Counsel for the Respondents :
S.C.

Constitution of India, Article 311 (2) – Termination of Petitioner service as constable upon his conviction by Criminal Court without any decision by appellate Court in violation of principles of natural Justice – Order of Termination set aside – case remanded.

Held – Para 9

Assuming the Government order dated October12, 1979 permits dismissal termination of a Government employee without waiting for final decision of appeal (if Government employee is convicted by a trial Court), the impugned order does not disclose that such a termination can be passed without complying with the requirement of procedure like giving notice and

opportunity under Article 311 92) Constitution of India or as contained in relevant service rules.

Case law discussed

1984 (2) LCD 294 (Pr. 3 and 4)
1980 ACJ. 270 (DB) (Pr.9)

By the Court

1. All the respondents are represented by the standing counsel and writ petition can be disposed of finally as the time likely for final hearing of the case will be the same as for deciding ' stay application' I propose to decide the writ petition finally as contemplated under Chapter XXIII of the Rules of Court.

2. No counter affidavit has been filed by the respondents in spite of several opportunities being given by the Court.

3. On perusing the petition and the documents annexed therewith, it is apparent that the facts stated in the petition are matter of record.

4. Heard learned counsel for the petitioner and the learned standing counsel.

5. Petitioner was employed as constable in the department of police, U.P. Government. At the relevant time, he was serving as constable (No. 88) ever since, he was appointed in the year 1968. He completed 28 years of his service with unblemished record as stated in (paras 4 and 5 of the writ petition)

6. According to the petitioner, there was some dispute to the petitioner, there was some dispute with his landlord about residential accommodation in his tenancy and a crime case No. 346 of 1989 under sections 323, 452, 504, 506 I.P.C. was registered against him on the basis of the first information report lodged at the police station, Civil Lines, District Moradabad on 9.3.1989. petitioner alleges that the said first information report was lodged by the landlord to implicate him falsely out of enmity.

7. In the aforesaid of time case the 4th Additional Chief Judicial Magistrate, Moradabad found him guilty of committing offences under section 323 I.P.C. an imposed fine of Rs.250/- and in case of failure to deposit the same within the stipulated period he had to serve one week's rigorous imprisonment. He was found not guilty of other offences. In appeal, the Ist Additional District & Sessions Judge, dismissed the appeal vide judgment of the Addl. Chief Judicial Magistrate. Petitioner preferred criminal revision No.1330 of 1995 before this Court which has been admitted on October 20, 1995 and pending (para 8 of the writ petition).

8. It is contended that the impugned order of termination (Annexure –1 to the writ petition) suffers from manifest illegality an as the same has been passed without notice and without affording opportunity of hearing (para 9 of the writ petition)

9. Perusal of the impugned order dated 3.6.1996 passed by the Superintendent of police, Rampur indicates that the said authority had imposed punishment of termination of service on the basis of Government order in question, permits termination in case of a Government employee being found guilty of criminal offences by a criminal Court, without waiting for final decision

in appeal. No other reason or circumstances has been disclosed therein. Assuming the Government order dated October 12, 1979 permits dismissal termination of a Government employee without waiting for final decision of appeal (if Government employee is convicted by a trial Court), the impugned order does not disclose that such a termination can be passed without complying with the requirement of procedure like giving notice and opportunity under Article 311 (2) constitution of India an or as contained in relevant service rules. Against aforesaid impugned order dated 3.6.1996 Appeal preferred by the petitioner was dismissed vide impugned order dated 28.4.1997 (Annexure-3 to the writ petition) passed by the Deputy Inspector General of Police, Moradabad Zone Moradabad.,

10. The appellate authority also failed to refer to the specific pleas faised by the petitioner in his defence in the memorandum of appeal, Review petition has also been dismissed vide his order dated 28.11.1997 (Annexure – 4 to the writ petition). The said order is far from being satisfactory as it does not disclose the details of the ruling cited before it.

11. Learned counsel for the petitioner has pleased reliance on the decisions in the following cases: -

(i) State of Uttar Pradesh through director N.O.C. V. Sri Sadanand Misra and another (1984 (2) Lucknow Civil Decision (LCD) page 294 (Paragraph 3 and 4). In the said case learned single Judge while dealing with requirement of Article 311 of the Constitution of India in which case a Government employee being terminated from service having been punished by a criminal Court, held that an enquiry under clause (a) of Article 311 (2) may not be held when order of removal from service is passed on the ground of conduct which has led to conviction on a criminal charge, but the enquiry is not dispensed with where the order is based merely on the conviction recorded by the criminal Court. The Court observed that when removal from service on the ground of conduct which has led to his conviction on a criminal charge but on the ground of conviction itself. In my opinion, therefore the enquiry which the principles of natural justice require to be held could not be dispensed with.

(ii) Dost Mohammad v Union of India – (1980 Allahabad Civil Journal) page 270 (DB) para (9). In the aforesaid case a Division Bench of this Court observed "a perusal of the impugned order clearly shows that the disciplinary authority did not apply his mind objectively to the question as to whether the conduct which led to the petitioner's conviction was sufficient to impose the penalty against him and if at all what penalty should be imposed on him. It appears that the disciplinary authority mechanically exercised its power under Rule 19 to remove the petitioner from service merely because the petitioner had been convicted of a criminal offences under section 323 I.P.C. In our opinion the disciplinary authority noted in violation of the principles of natural justice as well as in excess of his jurisdiction. The appellate authority also acted in the same manner and it failed to apply its mind to the question raised by the petitioner in appeal.

12. In view of the above, the impugned order dated 28.11.1997 is set

aside and the matter is remanded back to the appellate authority (respondent no.1) to decide the appeal afresh in the light of the observations made above within three months of the receipt of a certified copy of this judgment provided it is filed within two months from today. It is made clear that the appellate authority shall decide the appeal without being prejudiced or influenced by any of the observations made in this judgment particularly and in accordance with material before him and in accordance with law.

13. Writ petition is allowed and the case is remanded back to respondent no. 1 appellate authority for decision Appeal in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 11.9.2000

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

Civil Misc. Writ Petition No. 39687 of 2000

Sunil Kumar ...Petitioner
Versus
Director, Rajya Shaikshik Anusandhan Aur Prashikshan Parishad, Uttar Pradesh, Lucknow and others ...Respondents

Counsel for the Petitioner:
Shri Ashok Bhushan
Shri Anil Bhushan

Counsel for the Respondents:
Shri S.C. Verma
S.C.

Constitution of India, Article 226 – Petitioner a candidate for S.B.T.C course had secured more than quality point marks mentioned in the news item- But his name did not appear in second list – In earlier petition the Court by interim order permitted petitioner provisionally to join the course – He successfully completed Training – But not allowed to appear in exams by Director in pursuance of general order by High Court – As per direction to Court petitioner submitted fresh representation before respondent no. 1 – Representation rejected by Director – Hence present petition.

Held – para 9

The Petitioner was eligible as he was B. Ed. But he was not selected as his quality point could not be ascertained. Once this deficiency was removed on governments own asking he could not be ignored. The failure to attach mark sheet did not make him ineligible. It was a defect which could be rectified at any time. Since the Government itself permitted the candidates to make representation, If they have been overlooked for any reason, the respondent no. 1 acted illegally in insisting that the mark sheet could not be filed later, as the petitioner's application due to this defect was incomplete and he was ineligible.

By the Court

1. The petitioner a candidate for Special Basic Training Certificate Course (in brief SBTC) has approached this Court by way of second writ petition for redressal of his grievance. The basic facts cannot be disputed, as they are clear from the documents filed by the petitioner before the respondents at one or the other stage. They are also mentioned in the impugned order passed by the Director. Therefore, this petition is being disposed of at the admission stage, without calling for any counter affidavit, but after hearing the learned standing counsel.

2. An advertisement was issued on 8.3.1998 by the respondents inviting applications from eligible candidates for SBTC as large number of vacancies were existing. Last date of receipt of application was 30.3.1998. Petitioner belonged to general category. He was eligible, therefore, he applied on 16.31998. Along with his application he claims to have submitted marks sheets of the examination passed by him, from high school to B. Ed. but his name did not find place in the first list. In first week of May 1999 a news-item was published permitting candidates of all categories to make representations with complete details, if they, had secured more than quality point marks mentioned in the news- item but their names did not appear for any reason, for inclusion in second list. Since the petitioner had secured 55.22 quality point marks which was much more than 52.99 the quality point marks determined for general candidate, he made representation along with documents including the marks sheets but it was not accepted as his name did not find place in the district list as is clear from Annexure –2 to the writ petition. Being aggrieved by the order he filed Civil Misc. Writ Petition No. 23660 of 1999 and prayed that he may be permitted during pendency of the writ petition to undergo SBTC training. Interim order was passed in the petition on 1.6.1999 permitting him provisionally to join the course. He completed his training with effect from 8.6.1999 to 30.6.1999. He was also issued a certificate on successful completion of training. By letter dated 12.7.1999 he was sent for practical training but before its completion he was relieved from training by the Basic Education Officer. He was not permitted to appear in the examination of SBTC training as the Director had issued a general order on 11.8.1999 in furtherance of an order dated 28.7.1999 passed by this Court in civil Misc. Writ Petition No. 27948 of 1999 Ghanshyam and others v. State of U.P. and others vacating interim order in not only the writ petition, but all other petitions. The petitioner's writ petition was finally disposed of long with 248 other writ petitions. The learned judge categorised the petition in three groups one, where the candidates had obtained their degrees from outside the state, second where the candidates had obtained degrees by correspondence course or from parallel institutions and the remainder were placed in the third category. The writ petitions of the first two category were not decided. The third category was further divided in four groups on the nature of controversy involved. The leading decision was delivered in Civil Misc. Writ Petition no. 19715 of 1999 Smt.Manju Devi v Director, Rajya Shaikshik Anusandhan Aur Prashikshan Parishad, Uttar Pradesh and others decided on 9.12.1999. The petition were disposed off with a direction that petitioners shall make a fresh representation by 21.1.2000, which shall be decided by the Director by a speaking order. The Learned judge further framed a detailed scheme contain. Who should make it and how it should be decided. The petitioner in pursuance of the directions given in the decision made a fresh representation before respondent no. 1 on 11.1.2000 along with copies of 14 documents including marks sheets from high school to B.E.D examination and other relevant documents. This representation has been rejected by the Director by order dated 31.3.2000. A copy of the order has been filed as

Annexure –4 to this petition. It has been challenged in this writ petition.

3. I have heard at length Sri Ashok Bhushan, the learned counsel for the petitioner and Sri S.C Verma, the learned standing counsel appearing for the respondents.

4. The main question, and in my opinion a very important question, that arises for consideration in this petition is whether the respondent no.1 who is the Director, Rajya Shaikshik Anusandhan Aur Prashikshan Parishad, U.P. Lucknow, was justified either in law or in property in rejecting the representation of petitioner without adverting to the documents filed by him in complete disregard of the directions issued by this Court. For this it is necessary to extract paragraph 8 and 9 of the order dated 9.12.1999 :-

" Fresh Representations May Be Filed

8. All writ petitions, which are being decided are of the year 1999 In many of these writ petitions the candidate claim that they were entitled for quality point marks on the basis of degrees, sports activity, NCC or extra curricular activity etc. and reservation and had filed necessary certificates; yet necessary quality marks were not awarded. The respondents claim that no certificates were submitted. In some of the petitions, there is bonafide mistakes also.

9. The respondents themselves had published a news – item for filing representations. In most of the writ petitions, the claim of the petitioners have been decided or if decided it is by a non speaking order. In view of this it would be proper that petitioners may file their representation again and the Director or any officer nominated by him may dispose off the representations by a speaking order".

5. I have extracted these paragraphs as in my opinion they are very necessary for deciding this petition. Paragraph 8 makes clear the stand of the department in those petition and paragraph 9 the purpose for directing the petitioners to make fresh representations. The department contested those petitions and their specific claim was that since petitioners had not filed certificates to enable the department to calculate their quality point marks they were not entitled to any relief. But this Court did not agree with this submission as the state itself published news- item permitting petitioners to make representation. The Court constructed the news-item as permitting the applicants to produce certificates etc to enable the department to determine their quality point marks. For instance, if someone had not filed the marks sheet ever though certificate was filed or someone did not produce the certificate that he was entitled to be selected under reserve category or under sports quote even though he had claimed to be selected on this basis then he could produce it by way of representation in furtherance of the news-item. The Court was obviously persuaded by its concern for justice and its anxiety to avoid any hardship to any petitioner for technical reasons, specifically when it was admitted to the respondents that there were still 4,000 vacancies, therefore it permitted the petitioners not only to make representation but widened its scope by permitting them to furnish such information and file such documents as

they considered relevant for decision of there representations.

6. I would now examine whether the respondent no.1 in deciding the representation filed by the petitioner followed the directions issued by this Court either in letter or spirit. In the representation filed by the petitioner in January, 2000 which is extracted in the order of respondent no.1, it was stated that the petitioner was a general category candidate whose quality point mark was 55.2 but his name was not included in the list for SBTC training and no attention was paid even though he brought it to the notice of the respondents. In support of his claim he filed the documents as directed by this Court. One of such document was mark sheet of B. Ed. The respondent no. 1 noticed this fact in his order. He did not dispute its correctness. But he rejected the representation, as according to him, the petitioner was not eligible. It was held that the petitioner's application, that is the one filed in 1998, was incomplete as even though he had filed the B. Ed. certificate he had not filed the mark sheet to enable the respondents to determine quality point mark, therefore his candidature could not be accepted and he was ineligible. The respondent no.1 did not calculate the quality point on the mark sheet submitted by the petitioner as it was filed after 30.3.1998 the last date for receipt of application. In support of his view, he referred to two decision of this Court in paragraph 7 and 8 of the order, one in Civil Misc. Writ Petition No.29107 of 1999 Alok Kumar Pandey v State of U.P. and others decided on 19.7.1999 in which the notification issued by the state Government on 9.1.1998 was upheld, on the basis of which advertisement was issued on 8.3.1998. And the other in Civil Misc. Writ Petition No. 20159 of 1999 Babu Ram Bhartiya and others v State .of U.P. and others decided on 18.5.1999 in which this Court held that in absence of any provision, no papers could be accepted after the last date for receipt of SBTC forms. In paragraph 9 it was mentioned that a list of 27,000 candidates had been prepared. The last date for any candidate of the list to file any document was 30.3.1998

7. It is thus obvious that the only defect in the application form filed within time was that the petitioner had not attached the mark sheet of B. Ed. Even though petitioner denies it but assuming it to be so, once this Court permitted petitioner to file it the respondents should have calculated the quality point mark taking into account the marks of B. Ed. But the respondent no.1 rejected the paragraph 8 of his order no document or paper could be accepted after the last date. He was also of the view that calculation of quality point mark on the basis of mark sheet or any certificate filed after 30.3.1998 could not be done. In other words, no mark sheet or certificate could be accepted after 0.3.1998. In taking this view he committed manifest error of law. I do not propose to discuss how far the ratio in Babu Ram Bhartiya (Supra) referred in paragraph 8 was applicable and how it has been misapplied as I am firmly of the view that the respondent no. 1 did not comply with the directions issued by this Court. The order dated 9.12.1999 was passed after considering the objection, raised on behalf of the respondents, that the petitioners had not filed necessary papers to enable the respondents to determine quality point marks, yet the Court permitted, the petitioner in paragraph 11 of its order, not only to file representation and the

documents filed along with the application but, "any other information or document which the petitioner considers relevant for decision of his representation " and directed respondent no. 1 to decide the representation by a speaking order. The directions were clear and explicit. It did not leave any option to the respondent no. 1 except to consider documents filed by petitioner and decide whether he had requisite quality point marks. The respondent no. 1 could not go behind the direction. He was bound to accept the document filed by petitioner. Once he did not dispute its authenticity he should have calculated the quality point mark. The respondent no. 1 in observing that no document could be accepted after 30.3.1998 acted in complete disregard of the order passed by this Court. He did not appreciate that it was direction issued by this Court in writ jurisdiction. It had become final. The order was neither challenged in appeal before this Court nor before any higher Court, The department was bound by it unless it was recalled or set aside. The respondent no. 1 was not exercising review jurisdiction over the order passed by this Court nor he could sit in judgment over it. He was bound to pass order in accordance with the directions issued by this Court.

8. It is necessary to clarify in this connection the purpose of direction to pass a speaking order. The Court issues such direction and permits a petitioner to file representation because many a times the grievances raised involves determination of facts. A speaking order as the expression indicates means an order, which must gives reasons in support of it to enable the Court to judge its correctness in the facts and circumstances of the case. The order must be passed after application of mind. Where the Court directs an order to be passed in the light of observation made by it the exercise of jurisdiction is limited. For instance, this Court while passing the order on 9.12.1999 had directed the respondent no.1 to decide the representation on information and documents filed by the petitioner. The respondent no. 1 did not advert to the document filed by the petitioner and rejected the representation on irrelevant considerations in complete disregard of the directions issued by this Court. Mere writing few paragraphs did not make it a speaking order on the representation of the petitioner. The authorities when required to pass a speaking order are obliged to pass an order which must not be a formality but an order which can be upheld in law. The respondent no. 1 rejected the representation on the ground that the petitioner was ineligible. But this was not correct. Because even if it is assumed that the mark sheet of B. Ed. was not filed it did not render the petitioner ineligible. His application was defective at the most and that is why his quality point marks were not calculated. The difference between eligibility and defect is that the former could not be cured after expiry of time for filing the application but latter could be removed at any time. When this Court did not agree with the respondents in earlier petition that the petitioner could not be selected due to absence of mark sheet, it was of the opinion that non-filing of mark sheet was defect, only, which could be removed even subsequently. The spirit of the order was that the candidates should not be deprived of the opportunity to undergo SBTC for some technical omission The order of the respondent was, therefore, contrary to the order passed by this Court.

9. There is yet another reason for quashing the order of respondent no. 1 He has taken the view that since petitioner did not file his mark sheet of B. Ed. prior to 30.31998 he was ineligible and could not file it subsequently. But the mistake committed by his was that he did not appreciate the purpose and effect of the new-item. The petitioner has applied within time. He has filed his certificates. He claims to have filed the mark sheet. But the absence of mark sheet for B. Ed. prevented the department from calculating his quality point marks. That is why, even with high percentage his name did not find place in the list. But when the Government itself invited applicants to make representation if the quality point marks was more than the prescribed nom and the petitioner produced the mark sheet then there was no justification to ignore it. The application was complete. The petitioner was eligible as he was B. Ed. But he was not selected as his quality point could not be ascertained. Once this deficiency was removed on governments own asking he could not be ignored. The failure to attach mark sheet did not make his ineligible. It was a defect which could be rectified at any time. Since the Government itself permitted the candidates to make representation, if they have been overlooked for any reason, the respondent no. 1 acted illegally in insisting that the mark sheet could not be filed later, as the petitioner's application due to this defect was incomplete and he was ineligible.

10. In the result this petition succeeds and is allowed The order dated 31.3.2000 passed by respondent no. 1 Annexure-4 to the writ petition is quashed. Since the mark sheet of B. Ed. filed by petitioner was not disputed, the respondent no. 1 is directed to calculate his quality point mark and grant him admission to Special BTC Training Course. The petitioner has completed his training. He shall be permitted to complete practical training and appear in the examination as directed by this Court on 9.12.1999 paragraph 13 (ii) of the order in Civil Misc. Writ Petition No. 19715 of 1999 Smt. Manju Devi v. Director, Rajya Shaikshik Anusandhan Aur Prashikshan Parishad, Uttar Pradesh and others. The aforesaid directions shall be complied by respondent no. 1 within one month from the date a certified copy of this order is produced before him.

11. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEPTEMBER 5, 2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE O. BHATT, J.

Civil Misc. Writ Petition No. 480 of 1984

Brooke Bond India Limited ...Petitioner
Versus
State of Uttar Pradesh and another ...Respondents

Counsel for the Petitioner:
Shri Bharat Ji Agarwal

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act Rules, Rule-41(I) Advance Return submitted by the Assesee during the month itself- the required amount was not within the

meaning of tax as contemplated u/s 8 (I) -hence not liable to pay the interest

Held-Para 8

In our opinion the contention of the learned counsel for the petitioner is correct. Interest is payable under section 8(I). On the tax which is admittedly payable as defined in the explanation to section 8(I). The deposit of tax by the petitioner at 1/12th of the estimated advance tax could not be regarded as tax admittedly payable. Since the tax admittedly payable is calculated on the turn over as disclosed monthly deposits merely represents 1/12th of the deposit on advance tax on the basis of the previous year's liability. It is not the tax calculated on the turn over as per account books or the returns. In fact no return is required to be filed in the first two months. Hence in the relevant years no interest could be charged. There is no doubt about the fact that the entire tax had been deposited alogwith the quarterly returns.

Case law discussed

1997 U.P.T.C. 843

By the Court

1. Heard Sri Bharatji Agarwal, learned counsel for the petitioner, and learned Standing Counsel.

This writ petition has been filed for a writ of certiorari to quash the impugned recovery proceeding including recovery certificates which are Annexures 5,6 and 7 to the petition for the assessment years 1976-77 , 1977-78, and 1978-79 under Section 8 of the U.P. Sales Tax Act. It has also been prayed that a refund be granted to the petitioner for these assessment years in respect of which it deposited the amounts on 3.8.1984. The further prayer is that the respondent should not realise interest for the subsequent assessment years in respect of advance estimated tax deposited by the petitioner in subsequent months.

2. The petitioner is a public limited company which carries on the business of tea, coffee, etc. Under Rule 41 (1) of the U.P. Sales Tax Rules the petitioner is required to furnish monthly returns. Rule 41 prescribed the period and manner in which returns are to be filed. The second proviso of Rule 41 which is relevant in this case reads as follows:

" Provided further that the dealer may instead of submitting a return as aforesaid estimate his turnover for the year on the basis of the turnover admitted by him in his return, or disclosed in his account books, whichever is greater, for the immediately preceding year, Calculated the amount of tax payable thereon and deposit a sum equal to one-twelfth thereon during each of the first two months of every quarter, and deposit the balance of tax due on the turnover admitted by him in his return for the relevant quarter, quarter, which shall be prepared and submitted in the manner laid down in his rule."

By virtue of said proviso, instead of filing the return every month, a dealer can opt to file the return quarterly, but for this concession, he has to pay tax in the first two months of the quarter at the average of the tax on the turnover admitted by him in his return or as disclosed in his account books, whichever is greater, for the immediately preceding year and he has to deposit the tax during the month itself and cannot postpone till the end of the succeeding month.

3. The petitioner opted for the procedure prescribed in the second proviso and instead of filing return month to month basis it filed quarterly return in

which entire tax was deposited. For the first two months of each quarter the petitioner had paid tax at 1/12th of the tax of the immediately preceding year. For the month of April 1/12 of the tax was to be paid in the month of May and for the month of May it was to be paid in the month of June. However, the petitioner deposited the entire tax for the first quarter ending June along with the balance amount of tax with the quarterly return itself.

4. It has been stated in paragraph 7 of the writ petition that no objection was ever raised by the department at any time and not only the petitioner but various dealers had been depositing the advance tax for the month of April in the month of May and similarly estimated advance tax for the month of May was being deposited in June every year In paragraph 8 of the petition it is stated that similar practice was followed by all the dealers of the State in U.P. and estimated advance tax in the first two months of every quarter was deposited in the next succeeding month and the department has always been accepting the same without any objection. However, the respondent no. 2 issued notice dated 30.3.1984 for the assessment years in question under the U.P. Sales Tax for imposing of interest. True copies of these notices are Annexures 1, 2 and 3 to the petition. The petitioner submitted a reply contending that it has no liability of tax in respect of advance estimated tax deposited by the petitioner.. The petitioner also referred to the regular practice of the department in this connection.

5. It is contended by the petitioner that interest is payable under Section 8 on the tax which is admittedly payable as defined under the explanation of Section 8(1). The deposit of tax at 1/12th of the estimated advance tax does not fall under the category "tax admittedly payable" as defined in the explanation and hence no interest was payable by the petitioner. True copy of the petitioner's reply is Annexure 4 to the petition. Thereafter the impugned recovery certificates were issued vide Annexures 5,6 and 7 of the writ petition.

6. In paragraph 18 of the petition it is stated that the Commissioner of Sales Tax issued a circular dated 1.4.1982 in which it is stated that the tax for the month of April should be deposited in the month of April itself and similarly 1/12th of the amount of tax for the month of May should be deposited in the month of May itself. True copy of the circular is Annexure 8 to the petition. Accordingly the petitioner made deposits but the petitioner wrote to respondent no. 2 to withdraw the recovery certificate as the petitioner was not liable to pay any interest. The petitioner has contended that it was not liable to pay the interest and hence the amount deposited should be refunded with interest.

7. A counter affidavit has been filed and we have perused the same. In paragraph 5 of the same it is alleged that under Rule 41(1) the tax of April should be deposited in April itself and hence the contention of the petitioner is not correct similarly in paragraph 8 it is stated that the interest becomes payable when the tax is deposited late. In paragraph 9 it is stated that since the petitioner did not comply with Rule 41(1) hence interest has to be charged.

8. In our opinion the contention of the learned counsel for the petitioner is

correct. Interest is payable under Section 8(1) on the tax which is admittedly payable as defined in the explanation to Section 8(1). The deposit of tax by the petitioner at 1/12th of the estimated advance tax could not be regarded as tax admittedly payable. Since the tax admittedly payable is calculated on the turn over as disclosed monthly deposits merely represents 1/12th of the deposit on advance tax on the basis of the previous year's liability. It is not the tax calculated on the turn over as per account books or the returns in fact no return is required to be filed in the first two months. Hence in the relevant years no interest could be charged. There is no doubt about the fact that the entire tax had been deposited along with the quarterly returns.

9. Learned counsel for the petitioner has relied on the decision of this Court in *M/s Agarwal Automobiles Vs CST 1997 UPTC 843* and we fully agree with the view taken in the aforesaid decision.

Learned Standing Counsel submitted that against the impugned order the petitioner has right of appeal and hence the petition should be dismissed on the ground of alternative remedy. We are not inclined to accept this argument because the writ petition was filed in the year 1984 and hence it would not be proper to dismiss the petition on the ground of alternative remedy after a lapse of 16 years. It is settled law that alternative remedy is not an absolute bar.

10. Learned Standing Counsel has submitted that in paragraph 6 of the judgment of this Court in Agarwal Automobiles Case (Supra) which has been relied upon by the learned counsel for the petitioner it has been stated that the assessee has to deposit the tax during the month itself and cannot postpone it till the end of the succeeding month. Learned counsel for the petitioner does not dispute this proposition but it is not the admitted tax as contemplated under Section 8(1) of U.P. Trade Tax Act as no return are required to be filed for the first two months of the quarter when a dealer resorts to the second proviso of Rule 41. Hence the tax payable by him according to monthly average of the preceding year cannot be treated as the tax admittedly payable by the dealer.

11. In fact for this reason the contention of the learned Standing Counsel in Agarwal Automobiles case (supra) has been rejected in paragraph 11 of that decision.

12. For the reasons mentioned above the writ petition is allowed and the amount of interest deposited by the petitioner is directed to be refunded for the assessment years 1976-77, 1977-78 and 1978-79 with interest at Rs. 12% from the date of deposit till the date of refund within 3 months of production of copy of this order before the assessing authority.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.9.2000

BEFORE
THE HON'BLE R.K.DASH, J.

Civil Misc. Writ Petition No. 40098 of 1998

Hansh Raj Singh ...Petitioner
Versus
The Managing Director and others ...Respondents

Counsel for the Petitioner:
Shri K.S. Rathor

Counsel for the Respondents:
Shri Rakesh Tiwari

Reserve Bank of India (staff) Regulation 1948--Reg. 46 (2) (b) Salary during suspension period-involvement in criminal case--Fair acquittal after reinstatement salary during suspension period denied in view of ' No work No Pay' specific provision about full pay and allowance after acquittal-direction issued to pay the entire amount within two months.

Held-Para 7

The case in hand, however, stands on a different footing. Besides, there is specific provision in the Regulation referred to earlier which provides that full pay and allowances would be admissible if the employee is acquitted of all the blame.

Case law discussed
1997 (1) E.C.C. 565

By the Court

1. Heard Sri K.S. Rathore, learned counsel for the petitioner and Sri Rakesh Tiwari, learned counsel for the respondent no. 1 to 3.

On the consent of counsel for the parties the writ petition is taken up for final disposal at the stage of admission. The petitioner while serving as cashier/clerk in the ate Bank of Patiala, Chowk Area, Allahabad was placed under suspension by order dated June 17, 1995 (Annexure-1) since he was involved in a criminal case and remained in jail being arrested by the police. The Criminal case and remained in jail being arrested by the police. The Criminal case ended in acquittal by a judgment and order dated 16.9.1995 (Annexure-2) and thereupon the order of suspension was revoked and the petitioner joined his service on 20.2.1995. The total period of suspension was 145 days. The petitioner then made a representation to treat the whole period of suspension as duty, .on receiving which the Managing Director of the State Bank of Patiala informed the petitioner to apply for leave for the aforesaid period. The aforesaid factual position stands admitted by the counsel appearing for both the patties.

2. Learned counsel for the petitioner referring to Regulation 46 (2) (b) of the Reserve Bank of India (Staff) Regulation, 1948, as set out in the rejoinder affidavit submits that in view of the acquittal of the petitioner, The whole period of suspension should be treated as duty and full pay and allowances should be paid to the petitioner since he was acquitted of the charge.

3. Learned counsel appearing for the respondents, on the other hand contends that the petitioner committed a misconduct, inasmuch as, without prior permission he left for his native place and got involved in a murder case and though ultimately he was acquitted by the Court, he is not entitled to full pay and allowances for the period of suspension on principle of "no work no Pay"

4. Undisputedly, the petitioner was found not guilty of the charge of murder and was accordingly acquitted. In such a fact situation question arises whether the petitioner would be entitled to full pay and allowances for the whole period of suspension. The relevant part of Regulation 46 of the Reserve Bank of India (Staff) Regulation, 1946 of which

reference has been made in the rejoinder affidavit is extracted hereunder:

"46 (2) (b) Any payment made to an employee under sub- Regulation:
(ii) shall be subject to adjustment of his pay and allowances which shall be made according to the circumstances of the case and in the light of the decision as to whether such period is to be accounted for as a period on duty or leave.

Provided that full pay and allowances will be admissible only if the employee---

(a)……
(b) is acquitted of all blame or satisfies the Competent Authority, in the case of release from detention or of his detention being set aside by a Competent court that he had not been guilty of improper conduct resulting in his detention."

5. A reading of the said Regulation would show that full pay and allowance will be admissible to an employee if he satisfies the authority that he has been found not guilty and acquitted of the charge. The case of the respondents is that the petitioner is not entitled to salary for the whole period of suspension, in view of clause 13.1 to 13.6 (wrongly typed as 3.36) of the Bipartite settlement, 1966. The copy of the Bipartite settlement has been produced before me. A reading of the aforesaid clauses does not show that an employee is not entitled to full salary and allowance for the suspension period for his being involved in a criminal charge. The submission of the learned counsel for respondents that the petitioner had committed misconduct, inasmuch as, he absented himself from duty and got involved in a criminal case and, therefore, he is not entitled to salary for the period of suspension merits no consideration in view of the fact that admittedly no disciplinary proceedings has been initiated against him for his alleged absence form the Headquarters without prior permission.

6. In the course of argument, learned counsel for the respondents referred to a decision of the Apex Court in the case of **Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujrat Electricity Board, Gujrat & another** 1997 (1) E.S.C. 565, and submitted that in view of the law laid down in the said case the petitioner is not entitled to full pay and allowances for the period of suspension. The aforesaid reported case has no application to the facts and circumstances of the present case. The petitioner in that case was charged with an offence under section 302/34 I.P.C. and upon trial was found guilty and sentenced for life. In view of the conviction and sentence action was taken against him and he was dismissed from service. Challenging the said order of dismissal he approached the High Court under Article 226 of the Constitution of India. While the writ petition was pending he was acquitted of the offence by the High Court. In view of such acquittal, the court disposed of the writ petition and directed to reinstate him in service but denied back wages. He moved a letters patent appeal and was unsuccessful. Then he moved the Apex Court by filing special leave petition. In such fact situation, their Lordships held that since the petitioner had involved himself in a criminal case, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail.

7. The case in hand, however, stands on a different footing. Besides there is specific provision in the Regulation referred to earlier which provides that full pay and allowances would be admissible if the employee is acquitted of all the blame.

8. In view of the discussions made above, I am inclined to allow the present writ petition. Resultantly, the writ petition is allowed. The respondents are directed to treat the whole period of suspension of the petitioner as duty and pay him salary and other allowances for the said period within two months hence. In the circumstances, there will be no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD THE: 12.9.2000

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

Civil Misc. Writ No. 40351 of 2000

Shashi Bhushan Kumar ...Petitioner
Versus
U.P. Higher Education Services Commission through its Secretary, and another ...Respondents.

Counsel for the Petitioner:
Sri W.H. Khan

Counsel for the Respondents:
Sri B.K.Bist, Sri Pshpendra Singh
S.C.

Constitution of India, Article 226-Application sent through speed post on 31.7.2000 reached to its destination on 14.8.2000 -Last date for receipt of form fixed 5.8.2000-whether the Higher Education Commission can reject such application? held-'No' direction issued to entertain and place the same before the secretary.

Held-Para 9

So far the decision of the Division Bench in Ram Autar (supra) is concerned it was no doubt held therein that the application sent by registered post if received after expiry of the last date would be liable to be rejected. But the relevant portion of the advertisement as quoted by Division Bench in its judgement do not expressly or by necessary implication establish an agreement inviting applications through post office and as such the Division Bench decision of facts is not applicable.

By the Court

1. Heard Sri W.H. Khan for the petitioner and Sri B.K. Bist for the U.P. Higher Education Services Commission and the learned Standing Counsel representing the State.

2. Pursuant to the advertisement no. 27,28,29 issued by U.P. Higher Education Services Commission, Allahabad in National Daily including 'Times of India' dated 5.7.2000 the petitioner applied for the post of Lecturer in Political Science. The application was sent through Speed Post on 31.7.2000 from Lohiya Nagar Post Office, Patna. According to the advertisement aforestated the last date for receipt of application was 5.8.2000 as would be evident from Clause III of the advertisement which reads as under:-

"निर्धारित आवेदन पत्र पूर्ण रूपेण स्वहस्तलिपि में पारित कर सचिव उ0प्र0 उच्चतर शिक्षा सेवा आयोग 18-ए, न्याय मार्ग, इलाहाबाद-211001 को निर्धारित अंतिम तिथि 05-08-2000 तक पंजीकृत पार्सल / स्पीड पोस्ट से अनिवार्यतः

प्राप्त हो जाना चाहिए । अन्य किसी माध्यम से आवेदन पत्र स्वीकार नहीं होगा । निर्धारित आवेदन पत्र से इतर अथवा अपूर्ण अथवा अंतिम तिथि के उपरान्त प्राप्त आवेदन पत्र स्वीकार्य नहीं होंगे ।"

3. The application it appears reached its destination on 14.8.2000 i.e. after expiry of the last date. The Commission refused to accept the application on the ground that it was tendered in the Office of the Commission after 5.8.2000.

4. The question that arises for consideration is whether the Post Office was the agent of the respondent-Commission. It has been submitted by Sri W.H. Khan, counsel appearing for the petitioner that in view of the language used in para 3 of the advertisement, the Post Office became the agent of the Commission.

5. Sri B.K. Bist representing the Commission submits, on the basis of a Division Bench decision of this Court in **Ram Autar Vs,. Public Service Commission and others,** 1987 U.P.L.B.E.C. 316 that the Commission was justified in not accepting the application which was tendered after expiry of the last date.

6. We have given our anxious consideration to the submission of the learned counsel. In **Commissioner of Income Tax, Bombay South, Bombay Vs. M/s Ogale Glass Works Ltd.** A.I.R. 1954 S.C. 429 (Vol.41, C.N.104) a question arose as to whether the Post Office would be the agent of the addressee in a case where the cheque was sent by post on the request of the creditor. The Supreme Court held as under:-

"There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee."

And further:-

"After such request the addressee cannot be heard to say that the post office was not his agent……..Of course, if there be no such request, express or implied, then the delivery of the letter or the cheque to the Post Office is delivery to the agent of the sender himself."

7. The decision aforestated has been referred and followed by Supreme Court in **The Indore Malwa United Mills Ltd. Vs. THE Commissioner of Income Tax (Central) Bombay** A.I.R. 1966 S.C. 1466 (V 53 C 288) wherein it has been reiterated that:-

"If by an agreement, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him."

8. Relying upon the aforesaid decision of the Supreme Court, a Full Bench of this Court in **B. Lal and others Vs. M. Lal.** 1970 A.L.J. 470 has held as under:-

"From an analysis of these decisions two principles emerge; The first is that if the creditor and the debtor reside at two different places served by postal system, form the very fact that the creditor makes a demand through the post, an authority to

the debtor to meet his obligation through the post is implied."

9. So far the decision of the Division Bench in Ram Autar (supra) is concerned it was no doubt held therein that the application sent by registered post if received after expiry of the last date would be liable to be rejected. But the relevant portion of the advertisement as quoted by Division Bench in its judgment do not expressly or by necessary implication establish an agreement inviting applications through post office and as such the Division Bench decision on facts is not applicable.

10. In the result the petition succeeds and is allowed. The respondent-U.P. Higher Education Services Commission is directed to entertain the application if the same is presented personally before the Secretary within 10 days from today who shall acknowledge the receipt of the application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEPT. 8, 2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE G.P.MATHUR, J.

Civil-1 Misc. Writ Petition No. 23954 of 2000

Nitya Nand Pandey ...Petitioner
Versus
Additional Chief Judicial Magistrate V/ Civil Judge (Senior Division), Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Shri A.P. Tewari
Shri S.S.Tripathi

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Extra ordinary jurisdiction-Exercise of, for ordering quick disposal of civil suit pending for long time- Held, Power under Article 226 cannot be exercised. Held-Para 4

We are afraid that we are unable to grant any relief in the instant case, since in our view, it will not be proper to exercise such power in writ jurisdiction under Article 226 of the Constitution of India in respect of a civil suit pending before the district court. The Civil Procedure Code itself provides remedy in such circumstances. In this connection Section 24 of the Code of Civil Procedure may be taken note of.

Case Law discussed
1998 A.C.J. 154
AIR 1991 All. 114
1990 AWC 308

By the Court

1. In the instant writ petition the petitioner has prayed for issuance of a writ of mandamus commanding the Additional Chief Judicial Magistrate V/ Civil Judge (Senior Division), Gorakhpur to adjudicate and decide Original Suit No. 1990 of 1988, Nitya Nand Pande Vs. Sharda Prasad Pande and others within a specified time.

2. The facts alleged by the writ petitioner is that the petitioner filed a suit for permanent injunction restraining the respondents from cutting down the trees standing over the suit land as well as from raising any construction over the same. A relief for mandatory injunction for removal of boundary wall and door raised over the suit land has also been claimed. The aforesaid suit filed on 9.8.1988 was

registered as O.S. No. 1990 of 1988, Nitya Nand Pandey .V. Sharda Prasad Pandey and others in the court of Munsif, Gorakhpur, now pending in the Court of Additional Chief Judicial Magistrate V / Civil Judge (Senior Division), Gorakhpur.

3. In the said suit written statement was filed and necessary issues were settled. The parties also led their evidence in support of their respective claims. It has been alleged by the writ petitioner that the defendants, who are respondents no. 2 to 5 in the instant writ petition, are adopting dilatory tactics by taking adjournments and are trying to prolong the litigation by filing one application or the other very often. The suit was fixed for final hearing on 8.12.1999. In the mean time on 30.11.1999 the respondents made an application for making formal order and on 8.12.1999 the respondents sought for adjournment, which was allowed by the trial court subject to payment of Rs. 20/- as costs, fixing 23.12.1999. Thereafter several dates were fixed by the trial court but the respondents did not allow the trial court to proceed with the suit and on one pretext or the other god adjournments. In the circumstances the writ petitioner has prayed that a writ of mandamus be issued directing the District Judge to expeditiously dispose of the trial.

4. We are afraid that we are unable to grant any relief in the instant case, since in our view, it will not be proper to exercise such power in writ jurisdiction under Article 226 of the Constitution of India in respect of a civil suit pending before the district court. The Civil Procedure Code itself provides remedy in such circumstances In this connection Section 24 of the Code of Civil Procedure may be taken note of.

"24. General power of transfer and withdrawal.-(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the district Court may at any stage-

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it, and competent to try or dispose of the same, or

(b) Withdraw any suit, appeal or other proceeding pending an any Court subordinate to it and.

(i) Try or dispose of the same; or

(ii) Transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) Retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2)……."

If the petitioner is really aggrieved, he should have applied under the provisions of Section 24 of the Code of Civil Procedure. It is also open to the petitioner to place an application before the District Judge for transfer of the suit. It may also be noted that the Allahabad High Court Rules also provides relief in appropriate circumstances for transfer of a proceeding.

5. Under Chapter VII Rule 4 of the Allahabad High Court Rules the High Court has power under extraordinary original civil jurisdiction to remove any suit being or falling within the jurisdiction of any Court subject to its superintendence when it shall think proper to do so either on the agreement of the parties to that effect or for the purposes of justice. The said Chapter is set out as follows :

'**Extraordinary original civil jurisdiction of the Court -** The Court may remove and try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence when it shall think proper to do so either on the agreement of the parties to that effect or for the purposes of justice, the reasons for so doing being recorded on the proceedings of the Court.'

6. In this connection we may observe that the decision of the Division Bench of this Court in the case of **Sidhartha Kumar and others versus. Upper Civil Judge, Senior Division, Ghazipur and others** reported in A.C.J. 1998 Page 154 has not considered the aforesaid provisions of the Code of Civil Procedure or of the Rules of our High Court probably because the learned counsel has not referred the said provisions to the learned Judges. When the Code of Civil Procedure and Rules provide for the remedy, there is no reason for interference in the writ petition. The said decision of the aforesaid Division Bench in our view appears to be per incurium.

7. In this connection we may also take note of the Full Bench decision of this Court in the case of Ganga Saran .V. Civil Judge, Hapur, Ghaziabad and others (A.I.R. 1991 Allahabad 114. In the aforesaid decision it was held interalia:
"….Where an aggrieved party approaches High Court under Article 226 of the3 Constitution against an order passed in civil suit refusing to issue injunction to a private individual who is not under statutory duty to perform public duty or vacating an order of injunction, the main relief is for issue of a writ of mandamus to a private individual and such a writ petition under Article 226 of the Constitution would not maintainable…"

8. All aspects have not been considered by the Division Bench of this Court in the case of Sidhartha Kumar (supra). Being perturbed with the delay in rendering justice to the litigants the Division Bench in the aforesaid decision laid stress on speedy justice and held that unnecessary adjournment should not be granted. The said Division Bench also did not consider any of the decisions of the Supreme Court referred to in the Full Bench case of Gang Saran (supra). In the case of **Qamaruddin Vs. Rasul Baksh** reported in 1990 All. W.C. 308, it has been clearly laid down that ordinarily an interlocutory order passed in a civil suit is not amenable to extraordinary jurisdiction of the High Court under Article 226 of the Constitution.

9. In our view, the Division Bench judgment in the case of Sidhartha Kumar and others (supra) is per incurium since all the aforesaid decisions and the points considered therein have not been considered, probably because the learned counsel did not refer the same. It is unfortunate that the suit of 1980 is kept pending. There is nothing. However, on

record to show that the appropriate remedy against the adjournment orders passed by the trial court was pursued by the plaintiff. Considering all the aspect of the matter, we are inclined to dismiss the writ petition.

10. We, however, observe that in the event an application is moved for early disposal of the suit before the appropriate forum, appropriate steps should be taken by the court below and the suit should be disposed of as early as possible without further loss of time.

11. The writ petition stands dismissed, with the observations noted above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD SEPT. 8, 2000

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

Civil Misc. Writ Petition No. 18535 of 1998.

Avinash Kumar Yadav ...Petitioner.
Versus
The Executive Director, Indian Telephone Industries ltd. Naini, Unit Allahabad and another ...Respondents.

Counsel for the Petitioner :
Shri Yashwant Singh
Shri Ganga Prasad

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

Voluntary Retirement Scheme- Petitioner opting voluntary retirement- Also accepting terminal benefits in the shape of retirement compensation and leave encashment-However, before voluntary retirement could take effect from a future date under the scheme, petitioner made an application seeking withdrawal of his offer of voluntary retirement.

Held-Para 6

In my opinion, the question raised herein is squarely covered by the decision aforestated and the mere fact that the petitioner had accepted the terminal benefits in the shape of retirement compensation and leave encashment would not foreclose him from asserting his right. The order refusing to accede to the request of the petitioner withdrawing his option for voluntary retirement contains no reasons and is, there fore unsustainable.

Case Law discussed:
1987 (supp) sec 228
AIR 1979 SC 694.
1998. (9) SCC 559.
Jt. 1997 (4) SC 300.
(1992) U.P.L.B.E.C. 664
JT. 2000 (6) SC 359.

By the Court

1. Petitioner, who was employed on the post of Machinist under the respondents, responded to the Voluntary Retirement Scheme floated by the respondents by making application dated 29.11.1997. In which the voluntary retirement was sought to be made effective with prospective date i.e. 31.12.1997 in terms of the date prescribed under the Scheme. However, before the voluntary retirement could take effect, the petitioner, it would transpire, made an application on 9.12.1997 seeking to withdraw his offer of voluntary retirement . This request of the petitioner was turned down by the respondents vide letter dated 29.12.1997 and by order impugned herein and in which is embodied the letter dated 30.12.1997 the petitioner was intimated that this application under voluntary

Retirement Scheme has received the seal of approval for his voluntary retirement with effect from 31.12.1997 and accordingly, he was relived of his duties in the company with effect from the aforesaid date.

2. I have heard **Sri Ganga Prasad**, appearing for the petitioner and **Sri P.K. Mukherji** for the respondents. The main brunt of the contention canvassed by **Sri Ganga Prasad** is that since the petitioner had withdrawn the application seeking voluntary retirement before the effective date, the respondents were not justified in accepting the application, which has already been withdrawn by the petitioner **Sri P.K. Mukherji** appearing for the respondents in opposition, urged that the petitioner had no right to withdraw his application as per para (11) of the I.T.I. Circular No. 1017/97 dated 3.11.97 and that apart the petitioner, urged the learned counsel accepted the terminal benefits and thereby acquiesced to the order dated 29.12.1997 by which his request made vide application dated 9.12.1997 embodying request for cancellation of his option for voluntary retirement, was 'regretfully' not acceded to by the Management and hence, proceeds the submission of **Sri Mukherji**, the petitioner is estopped from canvassing the correctness of the impugned order for the petitioner , it has been submitted that the terminal benefits flowing from voluntary retirement Scheme i.e. compensation amount to the tune of Rs. 1,8,237/- besides Rs. 2873.00 towards encashment of un-availed leave given vide cheques dated 11.3.1998. and 22.3.1998. respectively were accept by the petitioner in direct financial straits stemming from the reasons that his services having come to an end with effect from 31.12.1997 he had no wherewithal to fall back upon to support himself and his family.

3. In **Balram Gupta v. Union of India & Ors**[1]. It has been held by the Apex Court that notice of the voluntary retirement, has to be ranked in parity with a letter of resignation and it can be withdrawn at any time before retirement takes effect not with standing any rule providing for obtaining specific approval of the concerned authority as a condition precedent for withdrawal of notice. The Apex Court has held that a certain amount of flexibility is required and if such flexibility does not jeopardise government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow withdrawal of the letter seeking voluntary retirement in the facts and circumstances of the case.

4. In **Union of India v. Gopal Chandra Misra**[2], which was a case of a High Court Judge withdrawing his resignation before the effective date, the Supreme Court held that resignation can be withdrawn at anytime before it takes effect i.e. before it effects the termination of the tenure of the office/post or employment. The principle aforestated received its echo in **Balram Gupta's** case and was held to be applicable to a case of voluntary retirement under a Scheme providing for voluntary retirement. In **J.N. Srivastava v. Union of India and Anr.,**[3] the principle laid down in **Balram Gupta's** case received reinforcement and was followed holding that withdrawal of voluntary retirement before the intended

[1] 1987 (supp.) SCC 228
[2] AIR 1079 SC 604
[3] 1998 (9) SCC 559

date of retirement is permissible. In that case also, the voluntary retirement notice dated 3.10.1989 was to come into effect from 31.1.1990 Though the authorities accepted the proposal on 2.11.1989 but before the effective date i.e. 31.1.1990 could reach , the appellant therein wrote a letter to withdraw his voluntary retirement proposal . The said request for withdrawal of voluntary retirement proposal was not accepted by the employer vide communication dated 26.12.1989 and, therefore, the employee had to give up the charge of the post as per his memo relinquishing the charge. The employee, however, went to the Tribunal but the Tribunal gave no relief to him holding that voluntary retirement had come into force on 31.1.1990 and the appellant therein had given up the charge of the post as per his memo relinquishing the charge and consequently, he has estopped from withdrawing his voluntary retirement notice, the Supreme Court held as under:

" It is now well settled that even if the voluntary retirement notice is moved by an employee and gets accepted by the authority within the time fixed before the date of retirement is reached the employee has locus paenitentia to withdraw the proposal for voluntary retirement…… It is to be noted that once the request for cancellation of voluntary retirement was rejected by the authority concerned on 26.12.1989 and when the retirement came into effect on 31.1.1990 the appellant had no choice but to give up the charge of the post to avoid unnecessary complications."

The Supreme Court held that the reasoning of the Tribunal could not be 'sustained' and accordingly, the order of the Tribunal was set aside and the authorities were directed to treat the petitioner to have validly withdrawn his proposal for voluntary retirement with effect from 31.1.1990. The appellant therein was held entitled to arrears of salary and other emoluments including increments and to get pensionary benefits refixed accordingly " Subject to the adjustment of any pension amount and other retirement benefits already paid to the appellant in the meantime upto the date of his actual superannuation"

5. In **Power Finance Corporation Ltd. V. Pramod Kumar Bhatt[4],** it was held that " jural relationship of employer and employee does not come to an end till employee is actually relieved." In **Pukhraj Mantri v. U.P. Co. operative Spinning Mills. Federation Ltd.[5]**, the employee had given resignation to be effective from a prospective event but before such event could happen, he withdrew resignation. Relying upon the decision of the Supreme Court in **Union of India v. Gopal Chandra Misra (supra); M/S.J.K. Cottons & Co. Ltd. V. State of U.P. AIR 1990 SC 1808; and Punjab National Bank v. P.K. Mittal AIR 1989 SC 1083,** it was held by this court that resignation tendered by the petitioner therein could not become legally effective before expiry of the notice of three month as visualised in bye-law no 6 of the U.P. Textile co-operation General Service Condition Bye-laws and since the resignation was withdrawn before it could become effective both according to the bye-law and the letter seeking resignation and therefore, the petitioner therein was held to be deemed tin service of the respondents In

[4] JT 1997 (4) SC 300
[5] (1992) UPLBEC 664

Shambhnu Murari Sinha v. Project and Development India and Anr.[6], Option of voluntary retirement was exercised by the appellant therein vide letter dated 18.10.1995 and though it was accepted by the management vide their letter dated 30.7.1997 the appellant was not relived form service and he was father allowed to continue in service till 26.9.1997, which for all practical purposes was held to be **"effective date"** as it was on this date that he was relived from service and since in the meantime, the appellant therein had already withdrawn the offer of voluntary retirement vide letter dated 7.8.1997 the Apex Court held that the question was squarely covered by the decision in **Balram Gupta; J.N. Srivastava; and Power Finance Corporation (Supra)** and accordingly, the appeal of the employee was allowed by the Apex Court and he was held entitled to continue in service with all consequential benefits.

6. In my opinion, the question raised herein is squarely covered by the decision aforestated and the mere fact that the petitioner had accepted the terminal benefits in the shape of retirement compensation and leave encashment would not foreclose him from asserting his right. The order refusing to accede to the request of the petitioner withdrawing his option for voluntary retirement contains no reasons and is , therefore, unsustainable.

7. As a result of foregoing discussion, the petition succeeds and is allowed. The impugned orders are quashed. The respondents are directed to re-situate the petitioner in his job attended with all consequential benefits subject, of course, to the condition that the amount already received by the petitioner as terminal benefits i.e. retirement compensation and leave encashment will be credited to the arrears which may be admissible to the petitioner and if it still falls short, the same shall be liable to be sub-ducted from the future salary of the petitioner.

[6] JT 2000 (6) SC 359

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 7.4.200

BEFORE
THE HON'BLE S.K. AGARWAL, J.

Criminal Revision No. 1310 of 1997

Madan Mohan Upreti ...Revisionist.
Versus
Smt. Khashti Devi and another
...Opposite parties.

Counsel for the Revisionist:
Shri C.D. Bahuguna

Counsel for the Respondents/ Opp. Parties:
A.G.A.

Code of Criminal Procedure, 1973, S. 125- Revisionist alleging change in circumstances since the grant of maintenance of Rs. 400/- per month to wife- Allegation that now she is earning Rs. 750/- per month – No. proof in support of the allegation- Hence no alteration or cancellation of maintenance can be granted by High Court in Revision- Hence C.J.M. concerned directed to go into this aspect after perusing oral and documentary evidence led by parties.

Held- Para 4

The charge alleged before me requires proof. The applicant has to prove this like a fact or circumstance by adducing evidence. This evidence may be oral or documentary or both. This change in the circumstances of the wife is to be considered by the court concerned if an application for either alteration or cancellation of the maintenance is moved before it by the applicant. This court cannot go into this contention of the learned counsel for the revisionist in this application. When this order was modified by the learned revisional court till that period there was no evidence before the court that the wife is able to maintain herself or regarding occurrence of any material change in her status.

By the Court

1. Heard learned counsel for the revisionist. List has been revised yet learned counsel for the opposite party is not present in court.

2. The main contention of the learned counsel for the revisionist is that the circumstances have changed. In so far as it relates to the wife. According to him she is now earning a sum of Rs. 725/- per month as salary from Kasturba Mahila Uththaan Mandal, Kumaun, Kausani. District Almorah. This is a total change in the status of the wife who had been allowed maintenance by the Judicial Magistrate at the rate of Rs. 250/- per month on the ground that she is unable to maintain herself. It was increased to a sum of Rs. 400/- per month by the revisional court on her revision.

3. In section 125 Cr. P.C. it is very clearly indicated that any person i.e. wife, children or parent's are entitled to maintenance allowance if any one of them is neglected or refused to be maintained if they are unable to maintain themselves. According to Sub Clause (a) of Sub Section (1) of Section 125 Cr.P.C. a wife who is unable to maintain herself is entitled to get maintenance.

4. The change alleged before me requires proof. The applicant has to prove this like a fact or circumstance by adducing evidence. This evidence may be oral or documentary or both. This change in the circumstances of the wife is to be considered by the court concerned if an application for either alteration or cancellation of the maintenance is moved before it by the applicant. This court cannot go into this contention of the learned counsel for the revisionist in this application. When this order was modified by the learned revisional court, till that period there was no evidence before the court that the wife is able to maintain herself or regarding occurrence any material change in her status.

5. In the circumstance, it is directed that the Judicial Magistrate concerned shall go into this aspect a fresh as adverted to earlier. The revisionist shall furnish oral as well as documentary evidence in respect of changes occurred in the status of his wife, opposite party no. 1 The wife shall also be afforded by the Magistrate an opportunity of rebuttal.

6. With this direction, this revision stands disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD JULY 7, 2000.

BEFORE
THE HON'BLE S.K. AGARWAL, J.

Criminal Appeal No. 2176 of 1995

Babu Yadav ...Appellant (In Jail)
Versus
State of U.P. ...Opp. Party.

Counsel for the Appellant:
Shri V.B. Rao

Counsel for the Amicus Curice:
Sri Manish Tewari

Counsel for the Respondent:
Sri Ratan Singh
A.G.A.

Indian penal code 1860,s. 376 as amended- offence under – Appellant a grownup raped girl aged 10/11 years – Enmity between the two Criminal families is an admitted fact, which impelled appellant to undermine and damage honour of poor innocent girl and the family- appellant's lust coupled with enmity makes this assault a well thought out design- Hence no leniency on sentence, can be extended to appellant.

Held- para 13

There is, thus, no scope for any reduction of the sentence. There exist no extenuating circumstances to do so in his case. The ravished girl was only 10 or 11 years old at the time of incident and the appellant himself was a fully grown up young man. Enmity between the families was an admitted fact and may have impelled him to undermine and damage the honour of the poor girl and the family. The lust for sex had made him a maniac. His lust coupled with enmity makes this assault a well thought out design. This girl was visiting his house to play with his adolescent niece unmindful of that enmity and its consequences that ultimately visited her. Her innocent mind could not even notice the threads of lust present in the eyes of this appellant. It was beyond her age. In the light of the above no lenience on sentence can be extended to the appellant. The trial court had already erred on the side of leniency. Since the appellant is in jail all along from the very inception, I do not find it reasonable to issue him any notice for enhancement.

By the Court

1. Present appeal has been preferred by the appellant against judgment and order dated 14.12.1995 passed by Sri S.C. Agarwal I Additional Sessions Judge, Banda and convicting and sentencing him to eight years, R.I. under Section 376, I.P.C. in S.T. No. 200 of 1994.

2. The brief facts of the case are that the minor daughter of the informant Girja Devi, viz. Km. Kalli, had gone to the house of the appellant to play with his younger niece, aged about ¾ years. It is alleged that the appellant had sent his niece out of the house and detained Kalli inside. He thereafter, attempted to commit rape on her (Kalli). When the appellant was in the midst of the process the poor child started crying due to extreme pain, which attracted her mother to the spot. Seeing her mother approaching his house, the appellant ran away leaving the injured, hapless victim, inside his house. On enquiry by her mother, Kalli communicated to her that the appellant had committed sexual intercourse with her and due to pain she had cried out and wept, Several neighboring persons, as alleged in the F.I.R. also witnessed the

incident. Girja Devi, wife of Jabra Yadav, resident of Village Hardauli, lodged a report of the incident at P.S. Kotwali Baberu, District Banda, at about 8.30 P.M. on 31.5.1994. The distance of the police station from the spot of incident is only 2 Kms.

3. The prosecution, in support of its case, has examined P.W. 1 Girja Devi and Km. Kalli. Out of them Km. Kalli is the solitary eyewitness, being the victim. So far as P.W. 1 Girja Devi is concerned she had seen the appellant coming out and running away. P.W. 3 Dr. Shiva Bharadwaj initially examined the victim P.W. 4 Arvind Kumar Dubey is the Head Moharir. He had registered the F.I,R. and prepared relevant papers pertaining to it P.W. 5 Dr. M.C. Mittal is Radiologist. He had x-rayed the elbow and knee joints of the victim for ascertainment of her age P.W. 6 Raj Bali Singh is the Investigating Officer in the case. This is the entire evidence.

4. I have heard Sri Manish Tewari, learned counsel, amicus curiac, on behalf of the appellant and Sri Ratan Singh learned A.G.A.

5. Learned counsel for the appellant has come up with the submission that this is wholly a false case foisted by the informant, Girja Devi, upon the appellant on account of pre-existing enmity. He has taken recourse to prove this fact to the statement of the victim, Km. Kalli, wherein she has admitted the presence of some bad blood between the families. She had further stated the their houses adjoin. The next contention raised by the learned counsel for the appellant is that taking into consideration the normal process, there may be a difference of 2 years in her age either way. The victim cannot be treated to be less than 12 years of age. He also urged that initially the case was that an attempt was only made upon the victim, but no rape, as such, was committed.

6. In order to deal with the submissions made by the learned counsel for the appellant, I have to examine the evidences of P.W. 1 and P.W. 2 closely because in this case the prosecution to support its case , examined no other independent witness. So far as P.W. 1 is concerned, admittedly, she was not a witness to the incident. She had only seen the appellant emerging out and running away from the house as soon as she reached there on hearing the alarm raised by her daughter, and therefore, at best, she is a witness under Section 6 of the Evidence Act of the circumstance that her daughter had gone inside the house of the appellant to play with his niece; and that she had heard and alarm, which attracted her to the spot. On arriving at the spot she had noticed the appellant's emergence and thereafter his running away and found her daughter crying with pain. Apart from this she had also noticed the clothes of her daughter heavily stained with blood. These circumstances. When taken cumulatively into consideration, prove that her daughter was ravished inside the house by the appellant. What is to be examined by the Court is whether the appellant was alone inside the house or as admitted by P.W. 2 there were other family members, including male members. On this point, so far evidence of the mother, P.W. 1 is concerned, she is unequivocal in her statement that the appellant was all alone inside the house and none else were there. But when the testimony of P.W. 2 is looked into, it is

found that she had stated that normally the sister-in-law (elder brother's wife) her children and the mother of the appellant used to live in that house. The defence has not further probed this witness whether his brother also resides in the house and he or others was present there or not. In these circumstances, I do not find any merit in the contention of the learned counsel that other family members were also present inside the house. At least presence of any male member other than the appellant is not borne out. I also do not find any valid reason to discard the testimony of the mother and the daughter that there was none in the house except the appellant.

7. It has also come in evidence of the two witnesses (P.Ws. 1 & 2) that the blood stained clothes were not handed over to the police. The Head Constable (P.W.4) has admitted this fact that the underwear and other blood stained garments, belonging to the victim, were not given to him at the time of registration of the F.I.R. The I.O. (P.W.6) admits that they were not given to him also and he was informed that the under garment was thrown. It could not be found out in search. Therefore, it is true that in the present case an important piece of evidence is not available on record. The under garment would have provided us a clinching evidence against the appellant, but, however, absence of the same cannot be taken as sufficient to discard the testimony of these two witnesses. It is common knowledge that in the villages clothes used during menstruation by the village ladies are generally being thrown of when it became stained with blood and the animals loitering on the road, including dogs, remove them away beyond their recovery. Similarly her undergarment too must had been lost once thrown away.

8. The victim P.W. 2 had clearly stated that the appellant penetrated his male organ into her vagina and blood oozed out and she suffered severe pain, which made her cry out She, no doubt, had admitted that immediately after the arrival of her mother, Girja Devi, Ram Ashrey and a neighbor, had also reached there. But she had very clearly stated that these persons had reached the spot after arrival of her mother, which means that by that time the appellant must have taken to his heels beyond their vision. It has been brought out in the evidence of P.W.2 that during the day she had fallen on her flour mill, which was fixed in her own house, but she had not been probed further whether she had sustained any injury in that fall. In the result, no credence can be granted to this admission against the prosecution case.

9. It is beyond my comprehension that a mother, like the informant, will play with the honour of her own daughter just to fasten the guilt upon the head of a person falsely like the appellant , due to enmity. Village polity has not degenerated to this extent in our country. Any such presumption will not only be preposterous but also come as a slur to simpleton looking village life.

10. The last submission of the learned counsel for the appellant deserves some consideration that it is a case of attempt and not commission of rape. A perusal of the injury report and the evidence of the Doctor (P.W. 3) indicate clearly that the hymen of the victim was affected partially by the so-called attempt of the appellant. There was tenderness in

the outer surface of the vagina. Hymen was torn at 6 O'clock and 9 o'clock position. There was also a small tear of 1 cm. On the perennial region at 6 o'clock position. On touch blood came out. The vagina smear examination report is not available on record. However, in the present case, in the facts and circumstances available on record, it does not affect the outcome of this appeal. The X- Ray examination report and the statement of P.W.5 indicates that Epiphyses around right elbow joint had not fused to their respective metaphyses. Epiphyses around right wrist joint had also not fused to their respective metaphyses. The X-Ray technician had found that all carpal bones had appeared. This does not help the appellant because carpal bones generally appear amongst the girls or females at the age of ¾ at the most. In order to determine the age, the court can take recourse to the normal means, which include the presence of number of teeth, height and weight, apart from ossification of bones. A perusal of two medical reports of this girl shows that she had 13/14 teeth. Her height was 1.25 meter and was 30 Kgs. in weight. But no secondary sex character had appeared as yet. Her vagina had admitted little ginger with difficulty , which indicates that penetration had not taken place in deep. Tear of hymen cannot take place unless the limb had gone inside. Sometimes in young girls. Specially belonging to villages, hymen is found torn because of hard work and labour . There is no confirmed medical opinion with regard to this tear in the hymen. No doubt the Medical Officer (P.W.5) was not subjected to any cross-examination on this point, but nonetheless the court is not precluded from taking into consideration the circumstances, which are available to it from the evidence as well as from the circumstances. P.W. 3 Dr. Shiva Bharadwaj had given the opinion that this injury could have been the result of penetration of the male organ at about 12.00 noon on 31.5.1994 Unfortunately, she had been left wholly untouched on the point. She had given out in her examination-in-chief itself for the question put to her by the prosecutor with regard to her opinion about age that she is not authorised to give any such opinion, but she had further stated that according to her report her age could be less that 12 years P.W. 5 Dr. M.C. Mittal was a little bit more assertive in his approach on this issue. He stated in the examination-in-chief that on the date of examination she was 10 years of age. This opinion was formed from the result of the X-Ray examination. The X-Ray examination does not show any fusion process of the epiphyses having commenced as yet . This report clearly negatives the setting in of this process in her. In the circumstances I find it very difficult to form an opinion that this girl was more that 12 years of age. The learned counsel has argued on the basis of Apex Court judgment. Which says " medical opinion can vary by two years either way in estimation" But when the opinion of the Radiologist (P.W.5) is taken into consideration. It is found that at the most the age of this victim could be below 12 years but in no case above 12 years even if I accept this argument. However, having given my anxious consideration to this issue. I am of the opinion that the age of this girl. At the time of commission of offence, was not beyond 10 or 11 years. As opined by P.W. 5.

11. Learned Additional Sessions Judge had awarded the appellant a

sentence of 8 years R.I. only. While doing so, he had completely ignored the amendment introduced in Section 376 I.P.C. Section 376 (1) I.P.C. reads as under:

"376.Punishment for rape- (1) Whoever except in the cases provided for by sub-section (2) commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be far life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less that seven years."

Thus so far as sub-section (1) of Section 376. I.P.C. is concerned, no doubt a minimum sentence of seven years or, in cases of heinous nature life imprisonment or a sentence upto 10 years is permissible. Lesser sentence is also permissible for adequate and special reasons to be mentioned in the judgment.

12. Coming up to sub-section (2) of Section 376 I.P.C. clause (f) provides that whoever " commits rape on a woman when she is under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be far life and shall also be liable to fine. " Thus according to this amendment, whoever commits rape on a woman when she is under twelve years of age, must be visited in the least with R.I. for a term not less than 10 years. The sentence must also be visited with fine. The learned Additional Sessions Judge has completely ignored this part of Session 376, I.P.C. from his consideration. Such a lapse on the part of Sessions Judges or Additional Sessions Judges is beyond imagination. They are supposed to be conversant with the provisions of law. Specially the special provisions and they must go through the sections first before imposing any sentence after conviction of an accused. I refrained myself from taking a serious view against the then learned Additional Sessions Judge, Sri S.C. Agarwal, in the present case, for the lapse on his pat at this juncture. However, as an act of rectification, a copy of this judgment must be sent to him, if he is still in service.

13. There is, thus, no scope for any reduction of the sentence. There exist no extenuating circumstances to do so in his case. The ravished girl was only 10 or 11 years old at the time of incident and the appellant himself was a fully grown up young man. Enmity between the families was an admitted fact and may have impelled him to undermine and damage the honour of the poor girl and family. The lust for sex had made him a maniac. His lust coupled with enmity makes this assault a well thought out design. This girl was visiting his house to play with his adolescent niece unmindful of that enmity and its consequences that ultimately visited her. Her innocent mind could not even notice the threads of lust present in the eyes of this appellant. It was beyond her age. In the light of the above no leniency on sentence can be extended to

the appellant. The trial court had already erred on the side of leniency. Since the appellant is in Jail all along from the very inception, I do not find it reasonable to issue him any notice for enhancement.

14. In the result this appeal fails and is accordingly dismissed. His conviction and sentence are confirmed. The appellant is in jail. He shall serve out his sentence. Whatever remissions are available to him under the law that shall be taken into consideration by the jail authorities in constituting and computing his sentence.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEP. 14, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE S.K. JAIN, J.

Civil Misc. Writ Petition No. 19411 of 1995

Pramod Kumar Pathak ...Petitioner
Versus
The District Supply Officer, Shahjahanpur & another ...Respondents-

Counsel for the Petitioner:
Shri Ramendra Athana

Counsel for the Respondents :
S.C.
Shri H.R. Mishra

Constitution of India, Article 19(1) (g) read with Indian Limitation Act, Article 137 and Essential Commodities Act, 1955- Control order – Applicability of Article 137 Limitation Act to Control over under E.C. Act.

Held para 4

Thus, there is no question of applicability of three years rule of limitation to the provisions under control order enacted under the provision of the Essential Commodities Act, 1955. Prescribing a period of sixty days only for filing an application for renewal of a licence, in our view, by no stretch of imagination is unreasonable and/or arbitrary and, accordingly, the petitioner's assertion that his fundamental right as guaranteed under Article 19 (1) (g) of the Constitution of India stands breached, has got no force at all.

By the Court

The petitioner has come up with a prayer to declare last portion of the proviso to Clause 4 (c) of the Control Order as ultra vires to Article 19 (1) (g) of the Constitution of India which reads thus:-

" No application for renewal of a licence shall be entertained after sixty days of the date of expiry of the licence under any circumstances.'

2. Sri Ramendra Asthana, learned counsel appearing on behalf of the petitioner contended that as Article 137 of the India Limitation Act prescribes a period of three years limitation, thus the curtailment of three years period to a period of sixty days only has infringed the petitioner's rights to trade and profession as guaranteed under Article 19 (1) (g) of the Constitution of India.

3. To a question put by us as to whether the provisions of the Indian Limitation Act, 1967 are applicable to the authorities under the Control Order? Mr. Asthana very fairly takes up a stand that they are not applicable.

4. Thus there is no question of applicability of three years rule of limitation to the provisions under Control Order enacted under the provision of the Essential commodities Act, 1955, Prescribing a period of sixty days only for filing an application for renewal of a licence, in our view, by no stretch of imagination is unreasonable and/or arbitrary and, accordingly, the petitioner's assertion that his fundamental right as guaranteed under Article 19 (1) (g) of the Constitution of India stands breached, has got no force at all.

5. This writ petition is consequently dismissed, but without cost.

6. The office is directed to hand over a copy of this order to Sri H.R. Mishra learned Standing Counsel, within one week for its intimation to the authority concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.8.2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE ONKARESHWAR BHATT, J.

Civil Misc. Writ Petition No. 1120 of 1995.

Deepak Fertilisers and Petrochemicals Corporation Limited. ...Petitioner.
Versus
State of U.P., through Secretary Institutional Finance, Govt. of U.P., Secretariat Building, Lucknow and others ...Respondents.

Counsel for the Petitioner:
Sri Rajesh Kumar Agarwal
Sri Bharat Ji Agarwal

Counsel for the Respondents :
S.C.
Sri R.D. Gupta

U.P. Trade Tax Act, S.4 (a) read with Constitution of India, Article 14- Petitioner manufacturer which was exempted by notification date 31.3.1995- But in notification dated 15.5.1995 there was no mention of Fertilisers sold by Petitioners- Petitioner challenges impugned notifications on ground of discrimination and prays for mandamus directing respondents not to discriminate N.P.K. 23:23:0 and to include the same in exemption of notification.

Held – Para II

We, there fore, hold tht merely because of different compositions of N.P.K. 23:23:0 sold by the petitioner. Hence, we allow the petition and direct that the respondents shall not realize tax on the sale of N.P.K. 23:23:0 from the petitioner from 10.4.1995 to 31.3.1996

Cases referred :
CMW 1152 of 1995 decided on 6.7.2000
(1989) 2 Sec 285
AIR 1990 SC 913 (Pr. 27)

By the Court

1. Heard Sri Bharat Ji Agarwal, learned counsel for the petitioner, and Sri R.D. Gupta, learned Standing Counsel, for the respondents.

2. The petitioner is a company registered under the Indian Companies Act which is engaged in the business of manufacture and sale of Phosphatic Fertilisers and allied chemicals, and it is registered under the U.P. Trade Tax and Central Sales Tax Act. The petitioner is Sellking Phosphatic Fertilizers within the State of U.P. and composition of the same I N.P.K. 23:23:0 (the letters N.P.K.

Standing of nitrogen, Phosphorous and Potassium, respectively).

3. A notification dated 2.11.1994, Annexure no.4 to the Writ Petition, was issued by the State Government under Section 4 (a) of the U.P. Trade Tax Act exempting Potassic and Phosphatic Fertilizers till 31.3.1995. However, subsequently a notification dated 10.4.1995, vide Annexure 5 to the writ petition, was issued superseding the earlier notification dated 2.11.1994 and stating that only certain category of fertilisers (mentioned therein) will be exempted and not all kinds of fertilizers. This was followed by another notification dated 15.5.1995 specifying seven varieties of fertilizers to be exempted under Section 4 (a) vide Annexure 6. In the notifications dated 10.4.1995 and 15.5.1995 there is no mention of the fertilizers sold by the petitioner viz N.P.K. 23:23:0. Hence the petitioner wrote a letter dated 23.11.1995 of the Commissioners, Trade Tax pointing out the discrimination meted out to the petitioner by non-inclusion of N.P.K. 23;23;0 in the exemption notification dated 15.5.1995. A true copy of the said letter is Annexure 7.

4. However the Trade Tax Officer issued a notice dated 16.11.1995 to the petitioner to show cause why tax be not imposed on the petitioner's sale of fertilizer N.P.K. 23:23:0, vide Annexure 8. Thereupon on 29.11.1995 the petitioner's representative and counsel appeared before the Trade tax Officer and prayed for adjournment since the matter relating to exemption for N.P.K. 23:23:0 was pending before the State Government. However, the side authority issued notice dated 29.11.1995 to the petitioner, vide Annexure 9. He also stopped issuing From 31 to the petitioner.

5. The petitioner challenges the validity of impugned notifications dated 10.4.1995 and 15.5.1995, Annexures No. 5 and 6 respectively to the writ petition. The petitioner has also prayed for mandamus directing the respondents not to discriminate N.P.K. 23:23:0 and to include the same in the exemption notification. Exemption has been granted to N.P.K. 20:20:0 and some other N.P.Ks. vide Annexure 6 to the writ petition.

6. The first grievance of the learned counsel of the petitioner is tht this notice dated 0.4.1995 could not have been issued with retrospective effect. In view of the decision of this Court rendered in **Civil Misc. Writ petition No. 1152 of 1995' (M/S Ganesh International and another Vs. Assistant Commissioner and Others)** decided on 6.7.2000 this point has to be decided in favour of the petitioner, Hence we hold that notification dated 10.4.1995 will only apply prospectively and not retrospectively.

7. Shri Agarwal's second submission is that the notification dated 15.5.1995 is discriminatory. The notification dated 15.5.1995 vid Annexure 6 to the writ petition, was issued by which the fertilizers except N.P.K. 23:23:0 were exempted till 1.4.1996. Subsequently, on 1.4.1996 again all kinds of Phosphatic Fertilizers of N.P.K. combination have been exempted.

8. In paras 20 and 21 of the writ petition it has been alleged that there is discrimination against N.P.K. 23:23:0 in the notification dated 15.5.1995. All the fertilizers mentioned in the notification

dated 10.4.1995 and 15.5.1995 are phosphatic and potassic fertilizers. All the fertilizers of N.P.K. of various combinations are treated as phosphatic fertilizers not only by the Government of India but also by the State Government's Agriculture Department, the farmers, the trade, and in common parlance. Hence, it is submitted that there is no rational basis of discriminating against N.P.K. 23:23:0

9. The learned counsel of the petitioner has relied upon a decision of the Supreme Court rendered in the case **'Ayurved Pharmacy and another Vs. State of Tamil Nadu' 1989 (2) Supreme Court Cases page 285,** and has submitted that two items of the same category cannot be discriminated. Relying upon his decision he has submitted that merely because of the composition of N.P.K. discrimination could not have been made against the petitioner.

10. On the other hand, the learned Standing Counsel appearing for the respondents has relied upon a decision of the Supreme Court in '**Kerala Hotel and Restaurant Association and other Vs. state of Kerala and others' AIR 1990 Supreme Court page 913 (para 27)** wherein it has been held that the State enjoys the widest latitude where measures of economic and fiscal regulation are concerned.

11. In our opinion, the decision of the Supreme Court in Ayurveda Pharmacy and Another Vs. State of Tamil Nadu (Supra) squarely applies to the facts of the present case. In that decision it was held by the Supreme Court that while it is open to the legislature or State Government of select different rats of tax for different categories, where the commodities belong to the same class or category there must be a rational basis for discriminating between on the commodity and another for the purpose of imposing tax (vide para 6) (We, therefore, hold that merely because of different compositions of N.P.K. discrimination could not have been made against N.P.K. 23:23:0 sold by the petitioner. Hence, we allow the petition and direct that the respondents shall not realize tax on the sale of N.I.K. 23:23:0 from the petitioner from 10.4.1995 to 31.3.1996.)

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2000

BEFORE

THE HON'BLE U.S. TRIPATHI, J.

Criminal Revision No. 2059 of 2000

Tajuddin **...Revisionist**
(In Jail)
Versus
State of U.P. **...Opp. Party**

Counsel for the Revisiomist :
Shri I.M. Khan

Counsel for the Respondent:
A.G.A.

Juvenile Justice Act, 1986, Ss, 18 and 19- Bail- Refusal to grant – when justified.

Held – Para 12 and 13)

It is true that in the instant case there is no mention of the criminal or criminals in whose association or contact the applicant may come if he is released on bail, but the Juvenile Court as well as the Appellate Court had also held that the release of applicant on bail would expose him to moral danger and would also

defeat the ends of justice Juvenile Court has also mentioned the case, which are 10 in number, in which he is involved. List of above cases shows that the applicant was involved in cases under Section 3 of Goonda Act, 307 I.P.C., 323 ,353, I.P.C., 110 Cr. P.C. and 294 I.P.C. The Criminal antecedents of the applicant clearly indicate that his release would expose him to moral danger. It also shows that he is hardened criminal and if released on bail would again indulge in various nature of cases and therefore, the ends of justice would be defeated. Therefore, in this case, conditions no. 2 and 3 exist and therefore, the case law relied on by the learned counsel for the applicant is distinguishable.

Thus, it is clear that the applicant has criminal history and his tendency is to indulge in crime and if released on bail would expose him to moral danger and would defeat the ends of justice. Therefore, his bail was rightly refused.

Case Law discussed

1991 (28) ACC 484

By the Court

1. This revision has been filed against the order dated 31.8.2000 passed by Session Judge, Agra in Juvenile Appeal No. 114/2000 dismissing the appals arising out of order dated 25.8.2000 passed by Juvenile Judge, Agra in crime no. 274/2000 under Section 18/20 N.D.P.S. Act, rejecting the bail applicant

2. The applicant was apprehended by Police of P.S. Mantola, District Agra under Section 18/20 N.D.P.S. Act. He was produced before Special Judge, N.D.P.S. Act, who found him juvenile and transferred the case before Juvenile Judge. The applicant moved application for releasing him on bail on the ground that he was juvenile and under Section 18 of Juvenile Justice Act. 1986 he ought to be released on bail.

3. The learned Juvenile Judge held that the applicant in juvenile. On the point of bail he held that the applicant was wanted in as many as 10 cases under various Section of I.P.C., Goonda Act. and 110 Cr. P.C. and therefore he was likely to bring into association with any known criminals and the ends of justice would be defeated. With these observations he rejected the bail application.

4. Aggrieved with the said order, the applicant filed appeals before the Sessions Judge, Agra under Section 37 of juvenile Justice Act. The Appellate Court found that during last three years the applicant had been challenged in as many as 10 criminal cases including those under Section 294, 307 I.P.C. and 3 Goonds Act. Now he was been arrested under Section 18 of N.D.P.S. Act. This fact by itself goes to show that applicant is of hardened criminal nature and his release would expose to moral danger and would expose to time to other hardened criminals. Thus, the end of justice would be defeated, if he is released on bail with these observations, he dismissed the appeal.

5. Aggrieved by above order, the applicant filed this revision under Section 38 Juvenil Justice Act.

6. Heard the learned counsel for the applicant and perused the orders of the Juvenile Justice as well as Appellate Court.

7. The learned counsel for the applicant on bail was rejected on the ground that it was likely to bring him into as ciation with any known criminals but the criminals were not known an therefore, bail was wrongly refused. He has also placed reliance on a Single Judge decision of this Court Rais vs State of U.P., 1991 (28) ACC 484. On the other hand, learned A.G.A. contended that the applicant is a hardened criminal and there is finding that his release would expose him to moral danger and would also defeat the ends of justice and therefore, his bail was rightly refused.

8. Section 18 of the juvenile act reads as under:-

Bail and custody of juveniles. (1) When any person accused of a bailable or non-bailable offence and apparently a juvenile is arrested or detained or appears or is brought before a Juvenile Court, such person shall, notwithstanding anything contained in the Code of Criminal procedure,1973(2 of 1974), or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral danger or that his release would defeat the ends of Justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer-in charge of the police station, such officer shall cause him to be kept in an observation home or a place of safety in the prescribed manner (but not in a police station or jail, until he can be brought before a Juvenile Court.

applicant contended that the release of

(3) When such person is not released on bail under sub-section (1) by the Juvenile Court it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order.

9. It has not been disputed that the applicant is a juvenile as defined in the Juvenile Justice Act. The restrictions imposed on release of applicant on bail are as under:-

(1) If there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal; or

(2) expose him to moral danger, or

(3) that his release would defeat the ends of justice.

10. In the case of Rais Vs. State of U.P. (supra) the release of petitioner on bail was refused only on the ground that he may come into the contact with association of any known criminals. The lower Courts have not brought the case of petitioner within clauses 2 and 3 mentioned above. It was held that there was no proper evidence before the two Courts be low. Registration of case under Section 399, 402 I.P.C. on the same date of recovery against the petitioner was not sufficient for coming to the conclusion that the petitioner was likely to come into contact with association of any known criminals. The word " know" has not used by the parliament in the section without purpose. By use of word " known" the parliament requires that the Court must

know full particulars of the criminals with which the delinquent is likely to come into association. There is no such evidence or finding. It appears that the procedure under Section 19 of the act was also not allowed . The parent or guardian or Probation Officer was not informed about the juvenile's arrest. Considering the circumstances of the case it was found that Appellate Court as well as, Juvenile Magistrate had erred in not releasing the juvenile on bail.

11. In the said case, the refusal of a juvenile on bail was only on the ground that if he would be released, it would likely to bring him into association with any known criminals. There was evidence to show as to who was the criminal or criminals in whose association Juvenile may come after release. The three conditions laid down in Section 18 are independent and according to wordings of Section 18 the bail may be refused if any of the conditions referred to above exist.

12. It is true that in the instant case there is no mention of the criminal or criminals in whose association or contact the applicant may come if he is released on bail, but the Juvenile Court as well as the Appellate Court had also held that the release of applicant on bail would expose him to moral danger and would also defeat the ends of justice. Juvenile Court has also mentioned the cases, which are 10 ins number, in which he is involved. List of above shows that the applicant was involved in cases under Section 3 of Goonda Act, 307 I.P.C., 323, 353 I.P.C. Cr.P.C. and 294 I.P.C. The criminal antecedents of the applicant clearly indicate that his release would expose him to moral danger. It also shows that he is hardened criminal and if released on bail would again indulge in various nature of cases and therefore, the ends of justice would be defeated. Therefore, in this case, conditions no.2 and 3 exist and therefore, the case law relied on by the learned counsel for the applicant is distinguishable.

13. Thus it is clear that the applicant has criminal history and his tendency is to indulge in crime and released on bail would expose him to moral danger and would defeat the ends of justice. Therefore, he was rightly refused bail. The revision has no force and is, accordingly, dismissed and the Juvenile Court is directed to follow the procedure given in Sub Section (3) of Section 18 of Juvenile Justice Act.1986.
