ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.5.2000

BEFORE
THE HON'BLE SHITLA PD. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 6561 of 1983

Gopal Shukla ...Petitioner
Versus
The V Additional District Judge, Deoria and others ...Respondents

Counsel for the Petitioner:
Shri Shashi Nandan

Counsel for the Respondents:
S.C.
Sri P.K. Ganguly
Sri K.K. Singh

Section 21 of U.P. Act No. XIII of 1972- For the date of construction, the Court must consider the evidence as provided under section 2 of the Explanation. (Held in para 13).

From a perusal of the judgements of the court below, it is apparent that none of the courts have considered the document, which have been mentioned in the Act rather they have considered the agreement written by the petitioner which was vague with regard to the date of construction. Since the date of construction has not been properly determined. I am of the view that the point of the applicability of the U.P. Act No. XIII of 1972 cannot be determined, therefore, the judgements of the courts below are vitiated in law.

By the Court

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner. Who is tenant of the disputed shop, for quashing the orders passed by the Vth Additional District Judge Deoria and Judge Small Causes Court (Civil Judge) Deoria, respondent nos. 1 and 2 respectively.

2. The brief facts, as stated in the writ petition, are that the petitioner was the tenant of the premises in question, which are two in number. The rent of the first was Rs.90/- per month and for the second, it was Rs. 20/- per month. A suit was filed by the respondent nos. 3 and 4, who are the husband and wife for the ejectment of the petitioner from the said premises on the ground that the petitioner had not paid the rent since 1979.

3. The petitioner contested the suit and filed his written statement and alleged that there was no rent due against him rather he had deposited the rent which was more-than the amount claimed in the court. The further plea of the petitioner was that the building was constructed in the year 1969, as such, the provisions of U.P. Act No. XIII of 1972 (hereinafter referred to as the Act) are applicable. The petitioner has also claimed that the protection of the provisions of Section 20(4) of the Act as he had deposited the entire rent along with interest and counsel fee in the court.

4. The trial court framed a number of issues. One of the issues which was relevant was issue no. 1. It was to the effect that as to whether the provisions of Section 20(4) of the Act are applicable and petitioner is entitled to the benefits of the aforesaid provisions? The other issues were with regard to the default after legal notice and mis-joinder of the necessary parties etc. While disposing of the issue no. 1, the trial court observed that from the paper no.46-C, it is apparent that the defendant had deposited a sum of Rs.41401.25P. Whereas the amount was due Rs. 3904.36 P. On the point of Section 20(4) of the Act, the trial court considered the date of construction of the house in question. The trial court observed that the parties have produced their evidence regarding the date of the construction. The plaintiff claimed was that it was constructed in the year 1973 whereas the defendant (petitioner) alleged that it was constructed in the year 1969. From the

judgment it is clear that neither sanction map was filed nor any documentary evidence was produced to this effect. The court considered the document paper no. 42 Ka of 1.9.74; it was a rent note in which the petitioner admitted that it was constructed in the recent past. The court also considered oral evidence of Bandu Ram. The landlord and ultimately came to the conclusion that the shops were constructed before letting it out to the petitioner, therefore, in view of the provisions of Section 2(2) of the Act, the provisions of the Act are not applicable and the petitioner is not entitled for the protection of the provisions of Section 20(4) of the Act. While deciding the issue of default, the trial court held that the petitioner is defaulter and he has not paid the rent since 1969. On the point of other issues, the finding was given against the petitioner and the suit was decreed for the ejectment and arrears of the rent.

5. Aggrieved by the judgment passed by the trial court, a revision under Section 25 of the Judge Small Causes Court was filed by the petitioner. The revisional authority came to the conclusion, as mentioned in para 5 of the judgment that before the revisional court, one of the legal point was alleged that the burden of proof lies with the landlord, therefore, this burden has not been discharged by the landlord. The revisional court agreed that in view of the provisions of Section 2 of the Act, it is to be seen that when the house was used for the first time. But as there is no document then the rent note, which has been executed by the tenant, is to be seen for assessing the date of construction and since it has been done by the trial court, therefore, the finding recorded by the trial court is correct finding. The revisional court also held that as the provisions of the U.P. Act No. XIII of 1972 was not applicable, the tenant was not entitled to the benefits of Sections 20(4) of the Act and the findings recorded by the trial court have been affirmed.

6. The petitioner has challenged these two judgements under Article 226 of the Constitution of India before this Court. Counter and rejoinder affidavits have been exchanged. Learned counsel for the parties were heard at length.

7. Sri Shashi Nandan, learned counsel for the petitioner, has urged that both the courts have not appreciated the legal points involved in the present case, therefore, they have arrived at a wrong conclusion. His submission is that one of the issues framed in the present case was regarding the applicability of the provisions of U.P. Act No. XIII of 1972 whereas the petitioner was entitled to get the benefits of Section 20(4) of the Act. His further submission is that to decide the applicability of the aforesaid Act, it was necessary for the trial court to record the finding of fact regarding the date of construction of the premises in question. His submission is that it is true that the rent note was executed by the petitioner in which it was mentioned that the premises was constructed in the recent past but there was no date of construction or first assessment mentioned in the aforesaid document and since there was no assessment register filed by the plaintiff nor any map was filed, there was no evidence before the court to come to the conclusion regarding the actual date of construction or the first assessment of the premises in question. His submission is that if any such dispute arises, the burden of proof lies on the landlord regarding the date of construction. He has placed reliance on a decision reported in 1980 Allahabad Rent Cases 466 (**Ram Saroop Rai v. Smt. Lilawati)**

8. His submission is that as the finding which has been given by the trial court has been affirmed by the revisional court is based on assumption, therefore, there is no finding of the date of construction as such, the finding recorded by the trail court is vitiated in law.

9. Sri P.K. Ganguly learned counsel for the respondent-landlord has submitted that the question with regard to the construction as to whether the building is new or old is the question of fact. His further submission is that as the U.P. Act no. XIII of 1972 is not applicable, therefore, the petitioner is not entitled for any benefit or protection under Section 20(4) of the Act. His submission is that there is no error apparent on the face of record in these the judgements of the court below, therefore, the writ petition should be dismissed.

10. Sri Shashi Nandan, learned counsel for the petitioner urged that the burden lies on the plaintiff (landlord) to prove the date of construction of the building and the findings of the fact based on irrelevant document is no finding of fact and his submission is that Section 2 of the Act deals with the exemption from the operation of the Act of the particular building. He has placed reliance on the explanation (1) of Section 2 of the Act. His submission is that the date of construction should also be determined as provided under Section 2(1) of the Explanation and no other proof is admissible in the eye of law.

11. After hearing the learned counsel for the parties at length, I am of the view that before discussing the real controversy involved in the present case, it is necessary to see the relevant Section under the U.P. Act No. XIII of 1972 and also consider whether the provisions of the aforesaid Act are applicable or not and thirdly, as to whether the courts below have decided this issue properly ? The relevant Section 2 of the U.P. Act No. XIII of 1972 is quoted below::-

"**2 Exemption form operation of Act.-** (1) Nothing in this Act shall apply to the following, namely:-

(a) any building of which the Government or a local authority or a public sector corporation [or a Cantonment Board] is the landlord; or

(b) any building belonging to or vested in a recognised educational institution,

(bb) any building belonging to or vested in a public charitable or public religious institution;

(bbb) any building belonging to or vested in a waqf including waqf-alalaulad;

(c) any building used or intended to be used as a factory within the meaning of the Factories Act. 1948 (Act No. LXIII of 1948) [where the plant of such factory is leased out along with the building]; or

(d) any building used or intended to be used for any other industrial purpose of any goods) or as a cinema or theatre; where the plant and apparatus in salled for such purpose in the building is leased out along with the building:

Provided that nothing in this clause shall apply in relation to any shop or other building, situated within the precincts of the cinema or theatre, the tenancy in respect of which has been created separately from the tenancy in respect of the cinema or theatre; or;

(e) any building used or intended to be used as a place of public entertainment or amusement (including any sports stadium, but not including a cinema or theatre), or any; building appurtenant thereto; or

(f) any building built held a society registered under the Societies Registration Act, 1860 (Act No. XXI of 1860) or by a co-operative society, company or firm, and intended solely for the own occupation or for the occupation of any its officers or servants, whether on rent or free of rent, or as a guest house, by whatever name called, for the occupation of person having dealing with it in the ordinary course of business;

(g) any building, whose monthly rent exceeds two thousand rupees;

(h) any building of which a Mission of a foreign country or any international agency is the tenant.

Except as provided in sub-section (5) of Section 12, sub-section (1-A) of Section 21, sub-section (2) of Section 24, Sections 24-A,24-B,24-C or sub-section (3) of Section 29, nothing in this Act shall apply to a building during a period of ten years form the date on which its construction is completed:

Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or the Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evam Vikas Parishad, and the period of repayment of such loan or advance exceeds the aforesaid period of ten years then the reference in this sub-section to the period of ten years shall be deemed to be a reference to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest)., whichever is shorter:

Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub-section to the period of ten years shall be deemed to be a reference of forty years from the date on which its construction is completed.

Explanation I – Fort he purpose of this section –

(a) the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction, and in the case of building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said dates, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction merely for the purpose of supervising the construction or guarding the building under construction) for the first time:

Provided that there may be different dates of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different landlords;

(b) "construction" includes any new construction in place of an existing building which has been wholly or substantially demolished;

(c) where such substantial addition is made to an existing building that the existing building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition.

Explanation II – The expression "bank" means-

(i) a banking company, as defined in the Banking Regulation Act, 1949;
(ii) the State Bank of India constituted under the State Bank of India Act, 1959;

(iii) a subsidiary bank, as defined in the State Bank of India (Subsidiary Banks) Act,1959;

(iv) a corresponding new bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings)n Act, 1970;

(v) a financing bank or Central Bank (as defined in the Uttar Pradesh Co-operative Societies Act, 1965), not being a Land Development Bank; and

(vi) any other financial institution notified by the State Government in the Gazette as a Bank for the purpose of this Act;

Explanation III – A building shall be deemed to be constructed substantially out of funds obtained from sources mentioned in the proviso, if the funds obtained form one or more of such sources account for morel than one-half of the cost of construction."

A perusal of the this Section would show that the finding has to be recorded by the court below regarding the date of construction of the house and if such finding is given, then only the provisions of Section 20(4) of the Act can be considered. Section 20(4) of the Act is quoted below:-

"20 (4) In any suit for eviction on the ground mentioned in clause (a) of sub- section (2) if at the first hearing of the suit the tenant unconditionally pays or (tenders to the landlord to deposit in Court) the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine percent per annum and the landlord's costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub section (1) of Section 30, the Court may, in lieu of passing a decree for eviction on the ground pass an order relieving the tenant against his liability for eviction on that ground:

Provided that nothing in this sub-section, shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area town area.

Explanation – For the purpose of this sub-section-
(a) the expression "first hearing" means the first date for any steps or proceeding mentioned in the summons served on the defendant;
(b) the expression "cost of the suit" includes one-half of the amount of counsel's fee taxable for a contested suit."

13. From a perusal of the aforesaid two Sections it is crystal clear that for the date of construction, the court must consider the evidence as provided under Section 2 of the Explanation. From a perusal of the judgements of the court below, it is apparent that none of the courts have considered the document, which have been mentioned in the Act rather they have considered the agreement written by the petitioner which was vague with regard to the date of construction. Since the date of construction has not been properly determined. I am of the view that the point of the applicability of the U.P. Act No. XIII of 1972 cannot be determined, therefore, the judgments of the courts below are vitiated in law.

14. I accordingly, allow the writ petition and set aside the judgment and order passed by the prescribed authority as well as revisional authority. The matter is being remanded to the prescribed authority to give opportunity to the parties to lead evidence on the point of construction of the house, as provided under the law and decide the matter afresh in accordance with law.

15. There is no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:THE ALLAHABAD 21.1.2000

BEFORE
THE HON'BLE SHITLA PD. SRIVASTAVA,J.

Civil Misc. Writ Petition No. 16578 of 1995

Shri Peer Mohammad ...Petitioner
Versus
Disitrict Judge, Jalaun, at Orai and others ...Opp.Parties

Counsel for the Petitioner:

Shri M.A. Qadeer

Counsel for the Respondents:
S.C.
Shri Namwar Singh

U.P. Urban Building (Regulation of letting Act 1972- Section 21(1) (b)- Release Application – on the ground as the construction is very dilapidated condition finding about the condition of building recorded by the authorities as existed on the date of moving the application Held proper. Held- (Para 15)

It is settled law that the law as stands is to be seen on the date when the cause of action accrues. Admittedly, when the building was in existence on the date of application, the findings recorded by the prescribed authority that no building has fallen down, therefore, the application was not maintainable, is not correct.

Case law discussed;-
1997 AWE---191.
1997 (1) AWE—94(SC)

By the Court

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner for quashing the order dated 23.5.1995 (Annexure12 to the writ petition) passed by the respondent no.1 and further for issuance of a writ commanding the respondents not to implement the impugned order and not to evict the petitioner from property in dispute in pursuance there of.

2. Brief facts, as stated in the writ petition, are that the contesting respondent nos. 2 to 26 claiming themselves to be the landlord of the premises in question filed an application under Section 21 (1) (a) (b) and 2 of the U.P. Act. No. XIII of 19 2(herein after referred to as the Act.) It was alleged in; the application for release that the heirs of About Gafoor had let out one room and open land measuring 10 feet to the petitioner but the petitioner has wrongly claimed in his tenancy 60 feet X 85 feet land along with one room and Chhapar. It was further pleaded that there was a family settlement between the landlords and they set up a claim of bona fide need and sought relief under Section 21 (1) (a) (b) of the Act. The application of the landlord was contested by the petitioner on the ground that the application nor their need is genuine nor the building in dispute is in dilapidated condition. The opposite parties had filed affidavit of Abdul Hameed son of Abdul Shakoor dated 14.12.1987, affidavits of Mohammad Saleem, D.C. Dueby, Junior Engineer, Abdul Rashid, Khursheed Ahmad, Mohammad Alim. On the other hand, the petitioner also filed affidavit of himself, Mohammad Naim and Abdul Hameed.

3. The prescribed authority also appointed Advocate Commissioner who had submitted his report 67-C and map. The prescribed authority considered the evidence available on record and rejected the release application on 21.07.1994. with the finding that the landlord has failed to establish the bona fide need and building in dispute has fallen down therefore, the application in dispute is not maintainable.

4. Aggrieved by the aforesaid judgment and order of the prescribed authority, the contesting respondents preferred an appeal being Rent Appeal No. 17 of 1994, which was allowed on 23.05.1995. The petitioner has challenged this order.

5. Sri M.A. Qadeer, learned counsel for the petitioner has urged that. The appellate court has wrongly observed that the appellate court has wrongly observed that the landlords have been evicted on 4.10.1980 in Execution Cased No.11 of 1980, arising out of J.C.C. Suit No. 48 of 1972. His submissions are that there was no documentary evidence to the effect that there was any family settlement between the Co-landlords on 01.01.1979. Learned counsel for the petitioner has further urged that the respondent no.1 has wrongly observed that the petitioner has purchased property in the year 1972 whereas the

property was sold in the year 1982. His submission is that so far as the property purchased by the petitioner in the name of his wife on 21.2.1983 is concerned the same is not in the possession of the petitioner but is in the possession of his sons, namely, Nafis, Anwar and Azad. It is further submitted that the landlords did not lead any evidence that they have complied with the mandatory provisions of Rule-17 framed under the Act and the opposite parties had neither submitted any sanctioned map nor estimate of expenditure to be incurred in the demolition and construction nor lead any evidence to the effect that they had possessed of sufficient means to spend in demolition and fresh construction. Sri Qadeer further contended that the appellate court completely ignored the Inspection report and map prepared by the Commissioner appointed by the prescribed authority therefore, the findings recorded by him suffer from error apparent on the face of record.

6. A counter affidavit was filed by the contesting respondents. In paragraph 11 of the counter affidavit it is stated that the landlord respondents were evicted in execution case no.11 of 1980 from the house in question on 04.10.1980. It is also stated that Dakhalnama was also filed and the document of family settlement was also submitted which were considered by the appellate court. A finding of fact has been recorded, therefore, the finding of fact cannot be interfered in the writ jurisdiction. It is further stated in the counter affidavit that the property purchased by the petitioner in the name of his wife who sold the same during her illness was not proved by the petitioner and which was rightly disbelieved by the appellate court. It is further submitted in the counter affidavit that the landlord respondents have fully complied with the Rule-17 framed under the Act as they have filed sanctioned map and estimate of expenditure and their evidence about the financial capacity and means to raise the constructions which was fully considered by the appellate court. It is further submitted that the petitioner had an alternative accommodation and also owner of a truck and has sufficient source of income.

7. A supplementary counter affidavit has also been filed. Along with the supplementary Counter affidavit the judgment of the prescribed authority has been filed. A rejoinder affidavit has been filed by the petitioner. In para 11 of the rejoinder affidavit, it is denied that the landlords were evicted from their rented house in Execution Case No.11 of 1980. It is also denied that petitioner has got alternative accommodation.

8. A Supplementary Counter Affidavit was filed by the respondents annexing there with a certified copy of the release application and affidavits a certified copy of the release application and affidavits of Abdul Rashid and Mohammad Salim. In reply to the said Supplementary Counter Affidavit, a Supplementary Rejoinder Affidavit has also been filed.

9. I have heard the learned counsel for the parties and have also perused the records. The prescribed authority held that now the disputed property is in the shape of land and Section 21 of the Act will apply only after reconstruction of a building, the application for release was not maintainable, the application was rejected. The appellate Court observed that the prescribed authority did not record any finding about the comparative hardship or the bona fide requirement and the appellate court held that the landlord have been evicted from the house in Execution Case No.11 of 1980 in which they were living and only property they have is the property in dispute. The appellate Court also observed that only point is whether the building requires demolition or not. Considering the Amin's report dated 26.4.88 wherein it is mentioned that the bamboos and beams of the room and khaprial were in dilapidated

condition, he has also observed that on 27.9.1990 and application was moved by the applicants that the room under the tenancy in question had fallen down on 26.9.90 due to rains in the morning. He had also considered the Advocate- Commissioner's report who had submitted the report to the effect that the room Aa, Ba, Sa, Da was found fallen at the time of inspection and that its material was lying hither and thither which has been shown by him in the map, the appellate court observed that now the building has fallen down. The appellate court ultimately held that the findings of the prescribed authority that the Act does not apply is mis – conceived as on the date of application the building was indilapi dated condition. He further held that the building is bona fide required by the landlords for the purpose of profession as well as for the purpose of residence, it required demolition and new construction and it can be released with surplus land. He accordingly allowed the appeal and set aside the judgment of the prescribed authority and the application of the landlords for the release of the building under Section 21 (1) (a) and 21 (1) (b) and 21(2) of the U.P. Act. No. XIII of 1972 was allowed and the tenancy of the tenant was terminated and held that it shall stand determined on expiry of 30 days from the date of his order as provided under law.

10. Sri Namwar Singh, learned counsel appearing for the respondents urged that the prescribed authority has held that there is no building but that finding has been reversed, therefore, the application filed by the landlord who is respondent in the case was maintainable for the release under Section 21 of the Act. He further submitted that the need of the landlord under Section 21 (a) (1) can be considered even if the building is in dilapidated condition and requires demolition and for that purpose he has placed reliance demolition and for that purpose he has placed reliance on a decision report in 1997 AWC 191 (Guru Prasad Versus I Addl. District Judge, Kanpur) Wherein the court has observed in paragraph 5 of the said judgment that " When the composite application under clauses (a) and (b) of Section 21 (1) is made by the landlord it is open to him to press his case under any of the two clauses. He may claim eviction of the tenant under clause (a) if proves bona fide requirement of the building for his personal occupation and also satisfies the other requirements laid down by the relevant rules. In such a case even if the building is in dilapidated condition which requires demolition and reconstruction the case will be covered by clause (a) he can still press the application for release of the building under clause (a)." He has also placed reliance on 1997 (I) AWC 94 (S.C.) Ashok Kapil Versus Sana Ullah and others, in which it has been held that even after losing roof, building can continue to be building in its general meaning.

11. After hearing the learned counsel for the parties and going through the record, I am of the view that the sole point for consideration was as to whether the application under Section 21(1) and (b) of the Act was maintainable or not as there was no building on the spot. The word Building has been defined under Section 3(1) of the Act, Which is reproduced below:-

> " building", means a residential or non – residential roof structure and includes-
>
> (i) any land (including any garden), garages and out houses appurtenant to such building;
> (ii) any furniture supplied by the landlord for use in such building;
> (iii) any fitting and fixtures affixed to such building for the more beneficial enjoyment thereof."

The prescribed authority held that now disputed property is in the shape of a land, therefore, after reconstruction the provisions of Section 21 of the Act shall apply, the application under Section 21(I) (a) and (b) of

the Act was not maintainable. The appellate authority held that the building was in a dilapidated condition and the landlord required it for demolition and re-construction, therefore, the application under Section 21 of the Act was maintainable, as there was bona fide need of the landlord.

12. The point which was to be determined in the present case was as to whether on the date of application, the building as defined under Section3 of the Act, Which is quoted, above was in existence or not. It was urged by Sri Namwar Singh that if the roofed structure can be a building, then the definition of the building as defined under Section 3 of the Act. Can be interpreted as a structure without roof can also be a building, the building had the roof on the date of the application but subsequently, it was dismantled.

13. In the instant case, the finding of the prescribed authority is that at least on the date of the decision there was no building. He has placed reliance on the Commissioner's report. The appellate authority held otherwise. From the Judgement of the prescribed authority it is apparent that he has not considered the existence of building on the date of application rather he held that after reconstruction Section 21 will apply. In absence of any such finding, even if the judgment of the Supreme Court cited above is applied in the present case, a finding has to be given as whether on the date of application there was a building or not. The prescribed authority has held that at least on 27. 9. 90 subject matter was not there. There is no clear cut finding as to what was the application. The prescribed authority held that the accommodation was in dilapidated condition on the dated when the application was made, therefore the application under Section 21 of the Act can be filed and it can be allowed on merit under Section 21 (a) (b) of the Act, which deals with the application for release. The relevant Section is quoted below:--

Section—21. Proceedings for release of building under occupation of tenant.—(1) The prescribed authority may, on an application of the landlord in that behalf, order the eviction of tenant from the building under tenancy or any specified part there of if it is satisfied that any of the following grounds exists, namely;--

> (a) that the building is bona fide required either in its existing from or after demolition and new construction by the landlords for occupation by himself of any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord in the trustee of a public charitable trust for the objects of the trust.
>
> (b) that the building is in a dilapidated condition and is required for purposes of demolition and new construction.

14. From a perusal of the aforesaid Section, it is clear that the application can only be filed in respect of the building, The definition of building has already been quoted in the preceding paragraph of this judgment.

15. The question for determination is as to whether the prescribed authority was right in rejecting the application on the ground that building fell down during the pendency of the application or not. A perusal of Section 21 of the Act would who that the cause of action to the application will accrue on the date earlier to the filing of the application in respect of the building. The application was filed in the case by the landlord treating the building in question in dilapidated condition and the petitioner who was tenant contested the case that the building was not in dilapidated condition, therefore, the application was rightly maintainable on the date when it was filed. Now the question, which emerges, is as

to whether the application was maintainable or not when the building fell down during the pendency of the application before the prescribed authority. It is settled law that the law as stands is to be seen on the date when the cause of action accrue. Admittedly, When the building was in existence on the date of application, the findings recorded by the prescribed authority that now building has fallen down, therefore, the application was not maintainable, is not correct. The appellate authority has held that the application for release was maintainable as the building was in existence on the date of application and tenant said that it is not in dilapidated condition. I therefore, agree with the finding recorded by the appellate authority that the application was rightly maintainable. The question of bona fide need etc. and the question of partition are question of fact which are not to be seen by this Court in exercise of jurisdiction under Article 226 of the Constitution of India. I am therefore of the view that the view taken by the appellate authority is correct and the application of the land lord was not maintainable. I therefore dismiss the Writ petition. There will be no orders as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 5.1.2000

BEFORE
THE HON'BLE B. DIKSHIT, J.

Civil Misc. Writ Petition No. 11490 of 1975

Mannan Rai ...Petitioner
Versus
The Deputy Director of Consolidation, Ballia and others ...Respondents

Counsel for the Petitioner:
Shri Gyan Chanore Dwivedi
Shri M.D. Mishra
Shri Indra Sen Singh
Counsel for the Respondent:
S.C.

Hindu Adoption and Maintenance Act, 1956, S.16 read with U.P. consolidation of Holdings, Article 59- Adoption deed though registered but not signed by natural father or mother- Adoption deed, held to be void - hence no presumption under s.16 can be drawn that adoption is in compliance with the provision of the Act.
Held (para 6)
It is not in dispute that the adoption has not been signed by natural guardian. One of the necessary ingredient under section 16 is that the adoption deed should be signed by the person giving in adoption. As the adoption deed has not been signed by the person giving in adoption, section 16 is not attracted for presuming that the adoption of petitioner has been made in compliance with provision of the Act. As the petitioner has failed to prove adoption and relied on presumption under section 16 of the Act, which is not attracted.
Cases referred.
AIR 1973 SC 2451

By the Court

1. Petitioner Mannan Rai is an objector under section 9(2) of U.P. Consolidation of Holdings Act in respect of khata no.71 and 77 on which. in the basic years, names of Jagarnath , Shivji and Ramlal opposite parties were recorded . Admittedly the disputed land belonged to Ratan. Petitioner claimed that he is adopted son of Ratan and, therefore, entitled to succeed. The petitioner in support of his case filed a registered adoption deed dated 7.5.57 executed by Ratan . He examined Jeera as Witness in support of his case, who is attesting witness of the deed. He also filed a school leaving certificate showing Ratan to be his adoptive father and a first information report dated 28.6.57 wherein Ratan has stated that petitioner is his adopted son. The objections filed by petitioner were rejected by Addition. Consolidation Officer Sikanerpur, Ballia by dated 6.11.73. The petitioner preferred two appeals as there were two objections in respect of two sets of plots. The

Sattlement Officer Consolidation by order dated 18.12.74 dismissed the objection in which , according to him, Ratan transferred during his life time the plots in favour of opposite parties Shivaji and Jagarnath but allowed the objection in respect of other plots of Khata No. 71 to the extent of 1/3 in repeat of which no gift was made by Ratan . The petitioner felt aggrieved in respect of land which was held to be transferred to opposite parties Shivaji and Jaganath by Ratan by gift and filed an appeal. While the appeal in respect of other set of plots which were held to be that of petitioner .on the basis of finding that petitioner was adopted son of Ratan, was filed by opposite parties. The deputy director of consolidation after hearing the parties allowed the revision of opposite party Shivaji Rai and Jagarnath and dismissed the revision of Mannan Aggrieved by the order passed by deputy director of consolidation allowing the revision by order dated 3.10.75 the petitioner has preferred this petition.

2. The learned counsel for petitioner argued that the deputy director of consolidation could not have gone into the question of fact and reversed the findings recorded by settlement officer consolidation that the petitioner is not adopted son of Ratan. He further argued that the adoption deed filed by petitioner was a registered document and there was a presumption under section 16 of Hindu adoption and maintenance act(in short 'act ') that the adoption has been made in compliance with the provisions of said act. As the adoption deed (which has not been filed but has been produced before the court) did not contain the signature of natural father and mother of petitioner. Therefore he submitted that as the adoption deed was a registered document and it was also proved by a attesting witness Jeera the presumption under section 16 of the Hindu adoption and maintenance act was also attracted even if the adoption deed was not signed by natural father and mother of petitioner. Therefore , the learned counsel for petitioner submitted that the onus to disprove the adoption was of opposite parties . He further argued that only civil court could go in to the validity of the deed and as the adoption deed was not void - ab - initio, therefore, its validity could not be examined by consolidation authorities. He also relied upon the first information report wherein Ratan stated that petitioner was his adopted son. The arguments advanced has been opposed by learned counsel for opposite parties.

3. The question which arise for consideration before this court is: " whether presumption under section 16 of Hindu adoption and maintenance act is to be drawn that adoption has been in compliance with the provision of the said act despite the fact the adoption deed though registered, has not been signed by the person giving the child in adoption?

4. Section 5 of the act lays down that no adoption shall be made after the commencement of the act by or to a Hindu expect in accordance with the provisions contained in chapter 11 of the act and any adoption made in contravention of said provision shall be void. Section 6 of the down conditions for an adoption to be valid. One of the necessary requisite for a valid adoption is the person giving in adoption must have capacity to do so. The next section. which requires reference for the purpose of determining controversy is section 9, which is about the person who are capable to give in adoption .It provides that no person except the father or mother or the guardian of a child shall have capacity in adoption . Where an adoption is under challenge. Which deviates normal rule of succession and deprives natural heirs to succeed, the burden of proof is on the person who claims that he has been. It is he who has to establish all the necessary requisites laid down in section 6 of the act has been complied.

Section 16 of the act is as follows:

"Presumption as to registered documents relating to adoption - Whenever any document registered under any law for the time beginning in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption , the court shall presume that the adoption had been made in compliance with the provisions of this act unless and until it is disproved.

5. It is a rule of evidence where under the condition laid down therein, the onus of proof does not remain on the person claiming to be adopted. It stands shifted on person who challenges the adoption. As the normal rule of onus of proof stands deviated under the conditions laid down under section 16, it is to be strictly constructed.

6. It is not in dispute that the adoption has not been signed by natural guardian. One of the necessary ingredient under section 16 is that the adoption deed should be signed by the person giving in adoption. As the adoption deed has not been signed by the person giving in adoption, Section 16 is not attracted for presuming that the adoption of petitioner has been made in compliance with provisions of the act. As the petitioner has failed to prove adoption and relied on presumption under section 16 of the act, which is not attracted.

7. The learned counsel for petitioner has dispute the jurisdiction of consolidation authority by contending that the adoption deed could he declared void only by contending that the adoption deed could be declared void only by a civil court. The contention has no force. It is well within scope of power of consolidation authority to determine rights of parties in a case where document is void (See Gorakh Nath vs. H.N. Singh A.I.R. 1973 SC 2451). As the adoption deed is void document, as held above, the consolidation authorities did have the power to determine the rights of parties.

8. So far scope of scope of power of revisional authority is concerned, as the finding in favour of petitioner was recorded taking into consideration the adoption deed also, which is void, as held above, the deputy director of consolidation was well within the scope of his power in examining the correctness of finding after excluding the adoption deed in question.

9. For aforesaid reasons, the write petition fails and is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: JANUARY 13,2000

BEFORE
THE HON'BLE M.C. AGARWAL,J.
THE HON'BLE S.RAFAT ALAM,J.

W.P. 15 of 1997

M/s Bharat Heavy Electricals Limited, Shaktinagar, Sonbhadra, through Sri P.K. Bajpai , Deputy General Manager (Finance). ...Applicants
Versus
State of U.P. and another ...Respondents.

Counsel for the Petitioner:
Rajesh Kumar

Counsel for the Respondents:
S.C.

Trade Tax Act, s.29 (2) - refund of excess amount within period prescribed - Non compliance of - petitioner, held entitled to interest @ 18% from the date of the order of refund.
Held-(para 7)
Admittedly the refunds have not been made within three months from the date of the order of refund passed by assessing authority or within three months from the date of the receipt of the appellate / revisional order. Therefore, in terms of sub - section (2) of section 29, the petitioner was entitled to interest on the delayed refund. While refunding the amounts, it was the duty of the assessing officer to pay alongwith the

principal amount, the interest also that was payable in terms of section 29 (2) of the act.
Case law referred.
(1992) 194 ITR Bom. 148

By the Court

By this petition, petitioner claims the following relief:-

"(i) to issue a writ , order or direction, directing the respondent no. 2 to refund the amount which is in excess of tax due after giving the benefit of the T.D.S. certificates forthwith .

(ii) to issue a writ , order or direction which this Hon'ble court may deem fit and proper in the circumstances of the case ."

1. The petitioner is M/s Bharat Heavy Electricals Ltd., a Government of India Undertaking and that it had to come to this court to seek refunds from the Trade Tax Department, Government of U.P. reflects on the efficiency and sincerity of the officers in dealing with tax payers.

2. The petitioner's case briefly stated is that it executed contracts for the supply of power plant equipment and also engaged itself in the erection, commissioning and fabrication of power plants. Under the provision of section 8d of the U.P. Trade Tax Act, the contractees made deductions on account of trade tax from the amounts payable to the petitioner and on assessments being made for the years 1987-88,1988-89,1990-91,1991-92 and 1992-93, the tax from the amounts payable to the petitioner and on assessments being made for the years 1987-88,1988-89,1989-90,1990-91,1991-92 and 1992-93,the tax deducted at sources was found to be refunded to the petitioner. The petitioner applied for refunds for assessment years 1987-88,1988-89,on 19.9.94.The application for assessment years 1991-92 was made on 05.02.1996,for 1991-92 on 23.7.96 and for 1992-93 on 10.9.96 but the amounts were not refunded the total refund was of the order of Rs.55,20,904.00 since the refunds were not being granted, the petitioner came to this court for the aforesaid relief.

3. In the grounds it was inter ale stated that the petitioner is entitled to interest on the delayed refunds @ 18% per annum.

4. A counter affidavit sworn by Sri G.R. Arya, Asstt. Commissioner (assessment) Trade Tax, Noida has been filed on behalf of the respondents .The affidavit does not disclose why an officer posted at Noida is filing the counter affidavit when the matter relates to the jurisdiction of Trade Tax officer. Robertsganj, distt. Sonbhadra. It is admitted in the counter affidavit that the deductions were made under section 8-d by the contractees from the amounts payable to the petitioner and in paragraph 5 of the counter affidavit it is specially admitted that the contractees had deposited the amount with their respective assessing authorities. It is also admitted in paragraph 6 that on the assessment order having been passed in the case of the petitioner, it was entitled to refund then the counter affidavit goes on to state as under :

"8. That in this regard the deponent states that for the assessment year1987-88 the tax imposed on the 9petitioner was Rs.86,491/- as well as the tax deposited by the contractee department which was deducted from the payment of the petitioner wasRs.53,44,499/- hence the excess amount deposited which was refundable to the petitioner was of Rs. 52,58,008/- out of which a refund voucher of Rs.43,37,834/- was handed over to the petitioner on 27.3.1997 and Rs.4,10,365/- was refunded to the 8 petitioner on 17.12.1997. Similarly the remaining amount of Rs. 5,09,809/- was refunded to petitioner on 24.7.1999. Therefore in the assessment year 1987-88 there is no refund due against the petitioner.

9. That for the assessment year1988-89 the total tax imposed on the petitioner was Rs.4,21,74,104/- Subsequently, the total tax payable by the petitioner was determined at Rs.22,000/- , therefore, the excess amount deposited by the 8petitioner was Rs.9,53,048/- out of which Rs. 3,18,399/- has been refunded to the petitioner on 27.3.1997, again Rs. 1,11,411/- has been refunded to the 9 petitioner on 27.3.1999 again by another voucher the remaining amount Rs. 5,23,238/- has been refunded to the petitioner on23.7.1998. Therefore, for the assessment year 1988-89 now there is no refund due against the petitioner.

10. That for the assessment year 1989-90 the refund due to the petitioner was Rs. 25,44,160/- out of which Rs. 1,87,310/- has been refunded to the petitioner on 30.4.1997 and RS. 23,56,850/- has been refunded to the petitioner on 24.7.1999 hence now there is no amount refundable to the petitioner for the assessment year 1989-90.

11. That similarly, for the assessment year 1990-91refund due in favour of the petitioner was of Rs.28,99,861/- and the same has been refunded to the petitioner in the following manner.

Dated	Amount
27.3.97	13,98,927/-
17.12.97/24.2.98	1,16,491/-
23.7.99	13,84,443/-

	28,99,861/-

In this way, for the assessment year 1990-90 also now there is no amount refundable to the petitioner.

12. That similarly, for the assessment year 1991-92 the refund due in favour of the petitioner was Rs.9,59,227.60 and the same has been refunded to the petitioner in following manner.;

Dated	Amount
30.4.97	58,642/-
5.12.97	3,89,394/-
5.12.97	57,031/-
17.12.97	24,030/-
23.7.99	4,30,130/-

	9,59,227/-

Therefore, in the assessment year 1991-92 there is no refund due in favour of the petitioner from the department.

13. That similarly for the assessment year 1992-93 refund due in favour of the petitioner was Rs. 2,88,549/- and the said amount has been refunded to the petitioner in the following manner:

Dated	Amount
27.3.97	1,61,900/-
17.12.97	96,735/-
23.7.99	29,914/-

	2,88,549/-

Therefore, now there is no amount refundable to the petitioner from the department for the year 1992-93.

14. That from the facts stated above, it is absolutely clear that from the assessment year 1987-88 to 1992-93 there is no amount refundable in favour of the petitioner from the department and the entire amount as it has been mentioned above, has been refunded to the petitioner and the same has been received by the petitioner."

5. In the rejoinder affidavit it has been admitted that the amounts mentioned in counter affidavit have been refunded but without interest and that the petitioner is entitled to heavy cost and interest

6. Section29 of the U.P. trade tax act deals with refund and subsection (20 provides for

payment of interest on delayed refund . It reads as under:-

"(2) If the amount to be refund in accordance with sub-section (1) is not refunded as aforesaid within three months from the date of order or refund passed by the Assessing authority , or as the case may be , from the date of receipt by him of the order of refund , if such order is passed by any other competent authority or court, the dealer shall be entitled to simple interest on such amount at the rate of eighteen percent per annum from the date of such order or, as the case may be, the date of receipt of such order of refund by the Assessing authority to the date of the refund :

Provided that for calculation of interest in respect of any period after the 26th day of may ,1975, this sub-section shall have effect as if for the words 'six months the words 'three months were substituted and for the words 'six percent ' the words twelve percent ' were substituted ."

7. (admittedly the refund have not been within three months from the date of the order of refund passed by the assessing authority of within three months from the date of the receipt of the appellate/ rivisional order. Therefore, in terms of sub-section (2) of section 29, the petitioner was entitled to interest on the delayed refund . while refunding the amount ,it was the duty of the assessing officer to pay alongwith the principal amount , the interest also that was payable in terms of section 29(2) of the act .) 'Refund ' does not mean only return of the excess amount paid to department by the assess but the interest payable on such amount is included in the refund.(see Suresh B.Jain vs. P.K.B. Nayar (1992) 194 ITR Bom. 148), but the calculating of interest has to be made from the relevant dates mention in section 29(2) and the counter affidavit shows that the amounts becoming due refund have been paid in instalments .Though the petitioner prays for the grant of interest by an order of this court in the present writ petition , it is not possible for this court to undertake that mathematical exercise particularly because the date of the commencement of the interest is not specified. In the rejoinder affidavit that has been filed, the petitioner has not undertaken that exercise to tell the court what are the actual amount of interest claimed and how they have been calculated. Therefore so far as the claim before the assessing officer who shall pass speaking orders thereon giving all the details that are required for calculation of interest under section 29(2) of the Act.

8. This writ petition is, therefore, finally disposed of with a direction that the petitioner may make its claims for interest before the assessing officer and the assessing officer respondent no. or his successor in office shall dispose of the claims within three months from the date of their receipt by a speaking order specifying the relevant dates and amounts found payable on account of interest will be paid within a month of the making of the order by the assessing officer failing which such amounts will carry further interest @ 18% from the date of the order till the date the refund order is actually handed over to the petitioner 's representative.

9. The petitioner will get its costs of this writ petition which we assess at Rs. 10,000/- (ten thousand).

Petition Disposed of.

ORIGINAL SIDE
CIVIL SIDE
DATED: ALLAHABAD 8.2.2000

BEFORE
THE HON'BLE BINOD KUMAR ROY,J.
THE HON'BLE LAKSHMI BIHARI,J.

Civil Misc. Writ Petition No. 6002 of 1988

Lalit Mohan **...Petitioner**
Versus
State of Uttar Pradesh and others **...Respondents**

Counsel for the Petitioners:
Shri Jitendra Pande
Dr. R.G Padia

Counsel for the Respondents:
Shri H.P. Misra
S.C.

Public Accounts 'default Act 1850, S.3- whether the word 'Moneys 'or' Securities for money' under the section, under which action against petitioner- Sales point Supervisor in Agriculture department was taken by respondents, includes seed and fertilisers .
Held, No. (Held – Paras 5.2 and 8)

In this backdrop, we hold that the articles which were in custody of the petitioner undoubtedly was property, but it cannot be held that they were money as envisaged under Section 3 of the Act aforementioned. In the result, we quash the impugned citation and restrain the Respondents from realising the amount in question from the Petitioner under the provisions of the act aforementioned clarifying that it would be open to the Respondents to take resort to any legal action which may authorise them do so.'

Cases Referred.
(56) FLR 383
(1987)4 SCC 601

By the Court

1. The Petitioner, who at the relevant time was appointed on adhoc basis as Sales Point Supervisor in the Agriculture Department and posted in Babaganj Block and given charge of Fatuhabad Seed Store, has come up with two fold prayers:- (1) to quash the citation dated 22.12.1987 issued by the Assistant Collector and Tehsildar, Tehsil Phulpur, district Allahabad as contained in Annexure –4 (wrongly mentioned in the prayer portion as the order dated 22.12.1987) asking him to pay a sum of a Rs. 5226.81 plus interest plus collection charges allegedly and (ii) to command the Respondent not to adopt any coercive measure compelling him to pay the amount in question.

2. Having regard to the submissions made at the Bar by Dr. R.G. Padia, learned Senior Counsel appearing on behalf of the Petitioner and Sri H.R Mishra, Learned Standing Counsel appearing on behalf of the Respondents, The only moot l question which arises and require our answer is as to whether the word 'money ' or securities for money mentioned in section 3 o the Public Accountants' Default Act 1850 under which action has been taken by the Respondents according to Sri Mishra will include seed and fertilisers which were put in the custody of the petitioner?

3. According to Dr. Padia this question stands answered in favour of the petitioner by a Division Bench of our court in State of U.P. Versus Girja Dayal Srivastava 1988 (56) Factory Law Report 383. The relevant part of the judgement relied upon by Dr. Padia reads thus:-
"The Section speaks of an official assignee, trustee or sarbarakhar and any person who by reason of any office held by him in the service of the Central government or the government of State, is entrusted with receipt, custody or control of any moneys or securities for money or the management of any lands belonging to such Government. The petitioner did not belong to the first three classes, the question is does he belong to the fourth class? In order to place him in that class it shall have to be found that he is a person who by reason of the office held by him, was entrusted with the receipt, custody or control or control of any moneys or securities for money or the management of any lands belonging to such Government. The nature of the functions of the petitioner, by virtue of his office, would appear from the charges framed against him in the disciplinary enquiry proceedings and the post which he held. It would appear from the judgement of the public services Tribunal that the petitioner was an assistant Agriculture Inspector in Grade III and had been charged on Five counts: (1) credit sale against rules, (2) shortage of stock (3) misappropriation of

government stock, (40 flouting of departmental instructions, and (5) dereliction of duty. There is nothing on the record to show that as an Assistant Agriculture Inspector, Grade III, he was entrusted with receipt, custody or control of any moneys or securities for money; of course he was not concerned with the management of any lands belonging to state Government. None of the five heads of charges against the petitioner relates to "any moneys or securities for money" within the meaning of section 3 of the act. Credit sales, prima facia, could not imply receipt of money, no money could have passed in a credit sale. Shortage and misappropriation of Government Stocks is not the same thing as shortage or misappropriation of money or securities for money. Learned counsel for the parties have not invited our attention to nay ruling on the subject. A decision of Punjab and Haryana High Court in the case of Kundan Lal v The Collector Gurudaspur (5). has come to our notice. The petitioner there was a wasil baki Nawis and it had been conceded by the State Government that the duties of the office of the petitioner did not include the duty of receiving or handling any money. A contention was raised before the court that if , nevertheless, the petitioner had, contrary to the requirement of duties of his office, actually received money and embezzled it, he should be deemed to have been a public accountant within the meaning of section 3 of the Act. The court repelled the contention and it was observed that that the scheme of the 'Act showed that its provisions were intended to apply to only government servants who were expected to come into possession or control of money by reason of their office. It is clear to us from the material on record that the petitioner could not be said to have been entrusted with the receipt, custody or control of any moneys or securities for money within the meaning of section 3 of the Public Accountants Default Act, 1850. We therefore hold that the amount could not be realised from the petitioner as the arrears of land revenue.

The ordinary procedure for imposition of pecuniary liabilities and for recovery thereof is the process of civil court; the process of recovery as arrears of land revenue is an exception to the ordinary process. The right of recovery as arrears of land revenue must be shown to be permitted by a statutory provision including statutory rules. In respect of government servants, the loss caused to the government may be recovered from their salary under Rule 49 of the Civil Services (Classification, Control & Appeal) Rules, 1930 as applicable in U.P. , it may also be recovered from their pension under Rule 351-A or 470 of the Civil Service (Classification , Control and Appeal)Rules , 1930 as applicable in U.P. Learned Counsel for the State has not been able to show that there is any other Act, Rule or statutory Provision under which the amount in question would be recovered as arrears of land revenue. Writ Petition no.2620 of 1985, therefore, should also succeed."

4. Sri H.R. Mishra, learned Standing counsel, on the other hand, contended as follows:- The word trustee' appears to have been misinterpreted by the Division Bench. He placed reliance on a decision of the Hon'ble supreme Court in P.K. Chinnasamy versus Government of Tamil Nadu and others (1987) 4 S.C.C. 601. According to Sri Mishra the word 'money', in the facts of circumstances of a case like the instant one should not be given a restrictive meaning . In any view of the matter the facts are such that we should not exercise our discretionary jurisdiction.

5. The Black's Law dictionary Fifth Edition defines the word 'money thus: "In usual and ordinary acceptation it means coins and paper currency used as circulating medium of exchange, and does not embrace notes, bonds evidences of debt, or other

personal or real estate. Lane V Railey, 280Ky.319 133 S.W. 2d 74,79,81 See also currency, currency money; flat money; Legal Tender; Near money; Scrip; Wampum. A medium of exchange authorised or adopted by a domestic or foreign government as a part of its currency U.C.C $ 1-201 (240)."

5.1 STROUD'S Judicial dictionary, fifth Edition defines it as follows: "Money" as currency and not as medals, seems to me to have been well defined by Mr. Walker in Money Trade and Industry as :'That passes freely from hand to hand throughout the community, in final discharge of debts and full payment for commodities; being accepted equally without reference to the person who receives it to consume it or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities" (per Darling, J.' Moss V Hancock [1899] 2Q.B111) Cp. CASH.

xx xx xx

But the word 'money in our language answers to the Barbarian's Latin word 'moneta,' and is a genus that comprehends two species, viz Ready money and money due i.e. the money in testator's own hands, or his money in the hands of any body else "(per Gilbert C.B., Re Shelmer, Gil.eq.Rep 202)."

5.2 In this backdrop, we hold that the articles which were in custody of the petitioner undoubtedly was property but it cannot be held that they were money as envisaged under Section 3 of the Act aforementioned.

6. True it is that in Chinnasamy the Apex Court has held as follows:-

"Every public officer is a trustee and in respect of the office he holds and the salary and other benefits which he draws, he is obliged to render appropriate service to the State. The scheme postulates that every public officer has to be given some posting commensurate to his status and circumstances should be so created that he would be functioning so as to render commensurate service in lieu of the benefits received by him from the state. If an officer does not behave as required of him under the law he is certainly liable to be punished in accordance with law.

7. Thus, we hold that the damages caused by the petitioner in relation to the seeds and fertilisers could not be recovered under the provisions of the Act aforementioned.

8.(i) Since the action of the respondents by resorting to the provisions of the Act is not permissible, we shall not refuse to exercise our discretion.

8.(ii) In the result, we quash the impugned citation and restrains the respondents from realising the amount in question from the petitioner under the provisions of the Act aforementioned clarifying that it would be open to the Respondents to take resort to any legal action which may authorise them to do so.

9. This writ is dismissed to the extent indicated but with cost.

10. The office is directed to hand over a copy of this judgment to Mr. Mishra within two weeks.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.2.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 9743 of 1999

Radha Kishan ...Petitioner
Versus
VIIIth Additional District Judge, Kanpur Nagar and others ...Respondents

Counsel for the Petitioners:
Shri B.D Mandhayan

Shri S.C Mandhyan

Counsel for the Respondents:
Shri Shakti Dhar Dubey
S.C.

Code of Civil Procedure, 1908, OXV R.5 read with U.P. Urban Building (Regulation letting, rent and Eviction) Act, 1972 Ss. 20 (4) and 7. Provision Suit for arrears of rent together with house and water tax -Entire rent alleged paid – Question about first date of hearing which means when court first applies its mind-suit dismissed in default on 19.9.1991 on ground of delayed payment of monthly rent-Subsequently restored on 22.1.1993 and not date for filing w.s. tenant on monthly rent of Rs. 25/- a.m., denied liability to pay house and water tax under S. 7 Proviso-Courts below found that petitioner had not deposited monthly rent within time prescribed under 0.15 r. 5- Petitioner submitted explanation-Held, that court was to consider whether in such circumstances discretion should be exercised to strike of the defence. But court failed to examine this aspect of the matter. (Held-Para9) The provision of order 15, Rule 5 of the Code of Civil procedure has not been engrafted to penalise the defendant but it is in order to ensure that the tenant deposits monthly rent and not unnecessarily prolong the hearing of the suit. If there is any reasonable explanation offered by the tenant, the Court can accept such explanation and condone the delay in depositing such rent. The tenant had deposited monthly rent but there was some delay in depositing the rent. It was his case that it was due to his financial difficulty and secondly, he did not receive any advice from the counsel that the amount has to be paid in the specified time . The Court was to consider whether in such circumstances the discretion should be exercised to strike off the defence. The Court did not examine this aspect of the matter.

Case law discussed :
1982 (I) ARC 665
1983 (2) ARC 422
1993 (2) ARC 451
1984 (I) ARC 410
1995 (I) ARC 563
1999 (2) ARC 668
1988 (I) ARC 545
1999 (I) ARC 301
1999 (2) ARC 465

By the Court

1. This writ petition is directed against the order of Judge, Small Causes Court, respondent no.2 dated 20.1.1998, whereby he struck off the defence of the petitioner and the order of respondent no.1 dated 17.2.1999, dismissing the revision against the said order.

2. The petitioner is a tenant of the disputed premises. Smt. Vidya Devi, the erstwhile owner, gave a notice dated 31.08.1990 to the petitioner demanding arrears of rent Rs. 575/- for the period 19.9.1988 to 18.8.1990 at the rate of Rs. 25/- per month and Rs. 106/- towards house tax and water tax. The petitioner sent money order for Rs. 600/- which was accepted by her. She filed suit no.150 of 1999 for recovery of arrears of rent, ejectment and damages with the allegations that the petitioner had not paid the entire amount which included the house tax and water tax after service of the notice. He was defaulter and was liable for eviction. The summons was issued to the petitioner wherein 5.8.1991 was the date fixed for filing written statement. The suit was dismissed in default of plaintiff on 19.9.1991. He filed an application for restoration of the suit. The Court restored the suit on 22.1.1993. The plaintiff sold the property to respondents3, 4 and 5 on 17..1993 they filed application for their impleadment as plaintiffs. The Court allowed their impleadment application on 9.12.1993 on 17.3.1994 the petitioner filed written statement. It was alleged that he had remitted the rent by money order and had not committed any default in payment of arrears of rent.

3. The plaintiffs filed an application strike of the defence on the ground that the petitioner had not deposited the entire arrears of rent as claimed by the plaintiff on the date fixed for filing written statement i.e. on., 050891. It was further alleged that the petitioner failed to establish that he had paid the rent to the previous landlady for the period

prior till 17th march, 1994 and the explanation submitted by him for deposit of delayed monthly rent was not acceptable . the revision filed by the petitioner against this order was dismissed by respondent no.1 on 17.2.1999.

4. The first question is as to what is the date of first hearing in the facts and circumstances of the present case. The courts below have held that 5.8.1991, the date fixed for filing written statement, was the date of first hearing. The meaning of the words "date of first hearing" has been considered in various decisions of the Supreme Court and this Court. In Jagannath and another vs. Ram Chandra Srivastava and others 1982 (1) A.R.C. 665, the Division Bench of this court, considering explanation (1) added to Order 15, Rule of the code of Civil Procedure by U.P. Act No. 57 of 1976, held that the date of first hearing would be the date or dates specifically mentioned in the summons namely, if the summons mentions the date for filing written statement, it shall be the date for hearing and if in the summons a date is fixed for filing written statement and another date for hearing of the matter, it is the last of the dates mentioned. The full Bench decision in Siya Ram Vs. District judge, Khetri and others, 1984 (1) A.R.C. 410 affirmed this decision while interpreting the expressions "first hearing " as given under explanation to section 20 (4) of U.P. Urban Buildings (Regulation off Letting, Rent and Eviction) Act 1972. In Shri Nath Agarwal vs. Shri Nath, 1983 (2) A.R.C. 422 the same meaning was given as in the decision of Jagannath's case (supra). This question came up for consideration before the Apex Court in Suraj Ahmad Siddiqui Vs. Prem Nath Kapoor, 1993 (2) A.R.C. 451, the Supreme Court interpreting the expression "first hearing" as given in explanation to section 20 (40 of U.P.. Act No. 13 of 1972, held that the date of first hearing cannot be taken to be the date for filing written statement though the date for that purpose may be mentioned in the summons. The date on which the Court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary will be the date of first hearing. The Court observed as follows:-

"Does the determine of the expression "first hearing" for the purposes of Section 20(4) mean something different? The "step or proceedings mentioned in the summons" referred to in the definition should, we think, be constructed to be a step or proceedings to be taken by the Court for it is, after all, a "hearing" that is the subject mater of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression" first date for any step or proceeding to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the Court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the Court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issue, if necessary"

5. Again this decision was considered in Adwaitanand vs. Judge, Small Cases Court, Meerut and others, 1995 (1) A.R.C. 563. It was held that though the date for filing written statement by the defendant may be mentioned in the summons but the expression used is "first hearing of the suit' which means the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary. Th view taken by the full Bench decision of this Court in Siya Ram vs.

District Judge, Kheri, 1984 (1) A.R.C 410 was not approved. This view has been again reiterated by the Supreme Court in Sudarshan Devi and others vs. Sushila Devi and others, 1999(2) A.R.C 668. The emphasis is on the words "hearing " and it is for the Court to consider as to what was the date fixed for hearing when the Court proposes to apply its mind for hearing the matter.

6. In the context of the above decisions the view of the courts below that 5.8.1991, the date for filing written statement, was the date of first hearing, cannot be upheld. On 5.8.1991 the petitioner filed an application that he had not received the copy of the plaint. The application was, however, rejected on the ground that on the back of the summons there was a note made by the process server that a copy of the plaint was also attached. The case was adjourned by the Court permitting the petitioner to file written statement. The suit in the meantime was dismissed for default on 19.9.1991 and it was restored on 22.1.1993.

7. The petitioner in his objection had stated that he had paid the rent to the erstwhile owner. The court considered the evidence on merits and took the view that the petitioner had failed to prove that he had paid the rent to the previous landlady for the period prior to 17.3.1994 as she had already sold the property to the respondents 3 to 5 on 17.8.1993. The version of the petitioner was that he had not received any notice from the previous landlady regarding sale o the property. It is not necessary to go into the controversy as the matter was not to be decided on merits. The petitioner was to deposit the rent admitted buy him to be due.

8. The real controversy in the suit is as to whether there was an agreement between the parties to pay house tax and water tax in addition to rent as part of rent. The plaintiff had sent notice on 31.8.1990 demanding arrears of rent Rs. 575/- at the rate of Rs. 25/- per month for the period 190\.9.1988 to 18.8.1990 and also Rs. 106/- towards house tax and water tax. The petitioner is alleged to have remitted Rs. 600/- by money order. This was in excess of the rent demanded by the landlady. The contention of the petitioner is that he was not liable to pay water tax in addition to the rent under Section 7 of U.P. Act No. 13 of 1972 as under the proviso to said section a tenant is not liable to pay water tax as rent did not exceed Rs. 25/- per month. It was for the plaintiff to plead and prove by adducing evidence that there was a separate agreement between the parties to pay tax in addition to rent as part of the rent.

9. The courts below have further found that the petitioner had not deposited monthly rent within the time as prescribed under Order 15, Rule 5 C.P.C. the petitioner had submitted explanation firstly, that he was under financial difficulty due to expenses being incurred by him on the treatment of his daughter – in Law and secondly, the counsel had not advised him to deposit the amount within certain specified time. The Court took the view that there was no ample evidence to prove this fact. The court has to consider the explanation in totality of all the circumstances. The Provision of Order 15 Rule 5 of the Code of Civil Procedure has not been engrafted to penalise the defendant but it is in order to ensure that the tenant deposits monthly rent and not unnecessarily prolong the hearing of the suit. If there is any reasonable explanation offered by the tenant the Court can accept such explanation and condone the delay in depositing such rent. The tenant had deposited monthly rent but there was some delay in depositing the rent. It was his case that it was due to his financial difficulty and secondly, he did not receive any advice from the counsel that the amount has to be paid in the specified time. The Court was to consider whether in such circumstances the discretion should be exercised to strike off the defence. The Court did not examine this aspect of the matter. It is settled principal that the Court is not bound to strike off the defence and the discretion is to

be exercised to strike off the defence. The Court did not examine this aspects of the matter. It is settled principal that the Court is not bound to strike of the defence and the discretion is to be exercised considering the various aspects of the matter vide Sudhir Kumar Gupta vs. Dr. S.K. Rajan and others, 1988 (1) A.R.C 545, Prem Nath vs Dr. Chandra Prakash Saxena, 1999 (1) A.R.C 301 Ashok Kumar Baranwal and another vs. Ist A.D.J. Gorakhpur and others, 1999 (2) A.R.C. 465.

10. In view of the above the writ petition is allowed. The impugned orders are hereby quashed. The trial court shall decide the suit taking into consideration the defence of the petitioner. As the suit was filed in the year 1991, the hearing of the suit shall be expedited and the same may be decided possibly within six months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.1.2000

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

Second Appeal No. 132 of 2000

Second Appeal against the judgement and order dated 1.10.1999 passed by Shri Narendra Kumar Jain, IXth Addl. District Judge, Kanpur Nagar in Civil Appeal No. 96 of 1997.

Hari Shanker ...**Applicant /Defendant**
Versus
Smt. Jag Deyee ...**Respondent/Plaintiff**

Counsel for the Appellant :
Shri S.L. Singh

Counsel for the Respondents:

Code of civil procedure, 1908, Ss 96 and 100 read with O.21 r. 6-A – Right to appeal – Only negative point in trial Court decree was imposition of cost against defendant, which was set aside by appellate court-no declaration of title – thus though a finding may be adverse, it will not operate as re judicate against defendant as he has no right or occasion to prefer an appeal. (Held – para 10)

It appears that an appeal is preferred against a decree. There is no right of appeal unless there is decree against a party. The suit was dismissed and no right was declared either of the plaintiff or of the defendant. Neither in the decree it was declared that the defendant has no right. The only negative point in the decree was imposition of cost against the defendants which the appeal court had set aside. Thus in appeal court's decree, there was nothing adverse to the defendant. The appeal court has not modified the decree of the learned trial court with regard to the other aspects excepting reversing that part of the decree by which cost was imposed on the defendant on account of giving a false evidence. Thus either in the decree of the appeal court or of the decree of the learned trial court, there is nothing against the defendant. So there is no scope for the defendant to be aggrieved by any part of the decree after the appeal court had reversed imposition of cost as against the defendant. Therefore, there is no right of appeal available to the defendant after the appeal court's decree. So far the finding is concerned, that is with regard to arriving at a decision in the suit itself, which has not culminated in any declaration of title. Therefore, the finding though may be adverse, it will not operate as res judicate as against the defendant since he has neither any right to appeal nor occasion to prefer any appeal. Thus there cannot be any question of preferring an appeal against a finding in respect whereof plea of res judicate is not applicable.

Case law discussed:
AIR 1961 SC 832
ILR 6 CAL 319 FB
ILR 6 CAL 206
6I LR 7 BOM 464
AIR 1974 SC 1126
AIR 1925 MAD 264
AIR 1973 PAT 586
AIR 1973 PAT 22
ILR 62 CAL 70 39 CWN 567
9 CWN 548
AIR 1951 PUN 444
AIR 1968 KARN 154

AIR 1974 PAT 1(FB)
AIR 1977 PAT 206
AIR 1977 PAT 206
AIR 1922 PC 241
AIR 1968 All 284
AIR 1971 CAL 225
AIR 1961 BOM 97
AIR 1967 All 243
AIR 1961 CAL 39 (FB)
AIR 1949 PAT 197

By the Court

1. In a suit claiming right over a property by the plaintiff on the basis of the Will, the defendant had claimed that he happens to be owner of the property. Accordance an issue was framed being issue no.4 as to whether the defendant was the successor of one Baldeo and was the owner of the property. The learned trial court had found that the Will produced by the plaintiff was forged one and the plaintiff and his witness Mool Chandra were guilty of giving false evidence producing forged documents for which a cost of Rs.2,000/- was imposed on the plaintiff along with the direction for initiation of the proceedings under Section 195, read with Section 340 of the Code of Criminal Procedure; while Mool Chandra was directed to be proceeded against under Section 420/467/468/471 IPC; while a cost of Rs. 1,000/- was also imposed on the defendant on account of giving false evidence.

2. The defendant preferred an appeal challenging the said imposition of cost as well as the finding with regard to issues no.4 and 8 respectively. The learned trial court reversed the imposition of cost on the defendant on account of giving false evidence while it had also rejected the appeal with regard to the finding on issue no.4 and 8. The learned counsel for the appellant contends that there having been a declaration of right of the defendant to the extent that he was not the successor of Baldeo Prasad and not the owner of the property, he can maintain the Second Appeal even though the decree with regard to imposition of cost as against the defendant was set aside.

3. Sections 96 and 1200 of the Code provides for appeal from decree passed by a court of original jurisdiction and on appeal by a court subordinate to the High Court respectively. Neither of these Sections permit appeal against judgment. However, where decree is not drawn within 15 days of the judgement and decree, Order 20, Rule 6A permits filing of appeal with a copy of the last paragraph of the judgment, which by fiction is treated as decree. Therefore, the appeal lies from the decree and not from the judgment although the word "decision" is used in sub-section (1) of Section 96 of the Code.

4. The above view finds support in the case of Jaga Dhish Vs. Jawahar Lal Bhargava (AIR 1961 SC 832). There can be no appeal against findings embodied in the judgment but not in the decree. In Niamat Vs. Phadu (ILR 6, Cal. 319 (FB); Koylash Vs. Ram (.ILR 6 Cal. 206); Anusuyabai vs. Sakharam (6 ILR7 Bom 464); the above view was expressed. The apex court in Ganga Bai Ns. Vijay kumar (AIR 1974 SC 1126) had held that no appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. In M. Latchayya. Vs. S. Kotamma (AIR 1925 Mad 264) Tausukh Bai Vs. Gopal mahto (AIR 1929 Pat 586); Jugal Kishore Vs. Sheonandan Singh (AIR 1973 pat 22) it has been laid down that mere adverse finding against a party does not give a right of appeal.

5. However, a different view was taken in the case of Harachandra Das. Vs. Bholanath Das (ILR 62 Cal.70) :; 39 CWN 567); Krishna Chandra Goldar Vs. Mahesh Chandra Saha (9CWN 584); Ali Ahmad vs. Amarnath (AIR 1951 Punjab 444); P.N Kesavan Vs. Lakshmy (AIR 1968 Karnataka 154); Arjun Singh Vs Tara Das Ghosh (AIR 1974 Pat 1 (FB). In those cases it was held that though under the strict letters of the provision in the

Code relating to right of appeal lies a party in whose favour a decree has been passed against a finding contained in the judgement, he has a right to appeal against a finding adverse to him provided that it would operates as res judicata in a subsequent suit or proceedings However, whether this proposition is based on grounds of Justice, as has been taken in Arjun Vs. Taradas (Supra),- is correct or not – was not determined finally in Ganga bai Vs. Vijay Kumar (Supra) by the apex court.

6. But The principal of res judicate can not be applied in respect of adverse finding out incorporated in the decree against a person in whose favour the decree is passed because he has no right or occasion to go in appeal..

7. In Banarasi Sah. Vs Bhagwanlal Sah (AIR 1977 Pat 206), it was held that where a decree is absolutely in favour of a party but some issues are found against him, he has no right of appeal against the decree and plea of res judicata cannot be founded on adverse decision against him because he had no occasion to go in appeal.

8. In Midnopore Zamindari Company Ltd. Vs. Naresh ranjan Roy (AIR 1922 PC 241); Sri pal Vs. Swami Nath (AIR 1968 Alld.282); Smt. Tarabai Mohata Vs. Union of India (AIR 1971 Cal 225); Mathura bai vs. Ram Krishna Bhaskar Barve (AIR 1961 Bom 97); Sukhani Vs. Sukhbasi (AIR 1967 Alld. 423), it was reiterated that when a party succeeds in a suit or appeal an adverse finding against him cannot be the basis of a plea of res judicata, for having succeeded he had no occasion to prefer an appeal. In The Commissioner for the port of Calcutta Vs. Bhairadinram Durga Prasad (AIR 1961 Cal 39 (FB) it was held that such a party has no right of appeal when a suit is dismissed on a finding that the plaintiff had no right to sue , an adverse finding against the defendant is not res judicata as was held in Markanda Mahapatra Vs. Varada Kameshwar Rao Naidu (AIR 1949 Pat 197).

9. This principal will equally apply when the appeal courts decree result into the dismissal of the suit and there is nothing adverse to the defendant in the decree though some of the findings in the decision of judgement be may be adverse to the defendant.

10. It appears that an appeal is preferred against a decree. There is no night of appeal unless there is a decree against a party. The suit was night of appeal unless there is a decree against a party. The suit was dismissed and no right was declared either of the plaintiff or of the defendant Neither in the decree it was declared that the defendant has no right. The only negative point in the decree was Imposition of cost against the defendant which the appeal court had set aside. Thus in appeal court's decree there was nothing adverse to the defendant. The appeal court has not modified the decree of the learned trial court with regard to the other aspects excepting reversing that part of the decree by which cost was imposed on the defendant on account of giving a false evidence. Thus either in the decree of the appeal court or of the decree of the learned trial court, there is nothing against the defendant. So there is no scope for the defendant. So there is no scope for the defendant to be aggrieved by any part of the decree after the appeal court had reversed imposition of cost as against the defendant. Therefore, there is no right of appeal available to the defendant after the appeal court's decree. So far the finding is concerned that is with regard to arriving at decision in the suit itself, which has not culminated in any declaration of title. Therefore, the finding though may be adverse, it will not operate as res judicata as against the defendant since he has neither any right to appeal nor occasion to prefer any appeal. Thus there cannot be any question of preferring an appeal against a finding in respect whereof plea of res judicata is not applicable.

11. Therefore, after hearing Mr. S.L. Singh learned counsel for the appellant and perusing the order impugned, I do not find that this appeal raises substantial question of law for being admitted.

12. The appeal has no merit. It is accordingly dismissed. No cost.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ADDLAHBAD 01.01.2000.

BEFORE
THE HON'BLE ALOK CHAKRABARTI,J.

Civil Misc. Writ Petition No. 47786 of 1999

Param Hans Singh ...Petitioner.
Versus
State of Uttar Pradesh, through Secretary, ...Respondents.

Counsel for the petitioner:
Shri Ashok Khare
Shri O.P. Singh

Counsel for the Respondents:
S.C.

Article 226 of the Constitution of India- the Measurements of Height and Chest were taken by the selection committee- appointments were given-termination of appointment could not be directed on measurements after appointment particularly when there is no findings that the measurements by the members of the selection committee before appointment were not acceptable. (Held – para 26) That as regards height and chest of the petitioners selection committee gave a certificate and thereupon appointments were given. After the appointment, petitioners were called and those measurements were again taken and this time finding a deficiency termination was directed. This measurement was admittedly taken few months after the appointment. In such facts, I am of the opinion that termination could not be directed on measurement after appointment particularly when there is no finding that measurement by the members of the selection committee before appointment was not acceptable or was non-existent.

<u>Case referred</u>-
1961(1)U.P.L.B.E.C P. 347
AIR 1990 SC P. 371
ARI 1986 SC P 691
1973(3) BSC P 1455
1990(3) UPLBEC P 2032
1999(1) UPLBEC P 54

<u>By the Court</u>

1. This writ petition was heard along with Civil Misc. Writ Petition Nos. 47781. 47785,47793,48529,48844,49015,49241, and 49242 of 1999.

2. Facts relevant for disposal of this writ petition and other connected matters are that an advertisement was published in daily newspaper dated 8.4.1997 notifying a selection for the posts of Excise Constables in the Excise Department of the State of Uttar Pradesh. A selection committee consisted of four officers of the Excise Department considered the cases of the applicants including the petitioner taking their height measurement as also measurement of chest before and after expansion. Petitioner along with several other candidates were found fit and eligible and names of such selected candidates were notified by order dated 28.8.1997. upon due compliance of further requirements including medical certificate by the Chief Medical Officer, appointment letters were issued to the selected candidates including the petitioner and thereupon the petitioner joined on the post of excise constable on 30.8.1997 and was continuously working thereafter.

3. On 15.1.1998 the Deputy Excise Commissioner, Kanpur Division, Kanpur Nagar issued a communication that the petitioner and several other Excise Constable were required to be present at the office of the Excise commissioner, U.P. for physical examination on 20.1.1998. Petitioner duly

appeared accordingly and was subjected to a fresh physical verification. After the lapse of almost one and a half years the Deputy Excise Commissioner, Kanpur Division issued a notice on 7.10.1999 to show cause as to why his services be not terminated. The notice had a recital that in the physical examination conducted on 20.1.1998 the chest measurement of the petitioner was found to be 79.5 cm and upon expansion was found to be 84.5 cm which was less than the required measurement of 81.3 cm and 86.4 cm as specified in Rule 13 of the U.P. Excise Constables, Drivers and Tari Supervisors Services Rules, 1983. Petitioner submitted a detailed reply on 5.11.1999. Final order was passed on 6.11.1999 by the Deputy Excise Commissioner, Kanpur Division, Kanpur Nagar terminating the services of the petitioner. Challenging the said order the present writ petition was filed.

4. Respondents filed counter-affidavit.

5. Heard Mr. Ashok Khare, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

6. The first contention of the learned counsel for the petitioner is that the provisions mentioning height and chest measurement have no nexus with the job to be performed by the petitioner and, therefore, Rule 13 of the said Rules is liable to be quashed. In support of such contention reliance was placed on the judgment in Civil Misc. Writ Petition No.36264 of 1995- Krishna Kumar Sharma v. State of U.P. and others decided on 28.5.1997 a copy whereof has been annexed at Annexure-10 to the Writ petition. In the said judgment a similar provision contained in Rule 13 of U.P. Subordinate Excise Service Rules, 1992 to the extent it prescribed height and chest measurement was held to be violative of Article 14 of the Constitution.

7. The second contention of the petitioner is that the petitioner was appointed after due selection and verification of height and chest measurement as required and found fit there. Therefore, after appointment, the respondents could not get the chest measurement verified again and on a minor difference found, appointment of the petitioner could not be terminated. It has been stated on behalf of the petitioner that in measurement of height and chest no expertise get the said measurement done and found to be satisfactory. There was no occasion to verify the measurement and to take action on minor discrepancy noted. It is stated that any of the provisions of Rule 13 of the said Rules of 1983 does not indicate of height and chest measurement by a qualified medical practitioner nor ordinary common sense requires a certificate from the trained person to certify height and chest measurement.

8. The third contention on behalf of the petitioner is that Rule 13 (as contained in the copy of the aforesaid rules of 1983 at Annexure-9 to the Writ petition) does not provide for any chest measurement without expansion and therefore, if there is any discrepancy in the measurement of chest without expansion, the same could not be treated as violative of Rule 13 of the said Rules of 1983.

9. Further to the above contention, one more argument was advanced that in any event difference in the two measurements, one before and one after appointment, is very small and that can occur on two different dates and this will not automatically indicate that the petitioner was not having the requisite chest measurement at the time of appointment.

10. In respect of Writ Petition Nos. 48529 of 1999 (Firoz Anwar V. State of U.P. and others) and 48912 of 1999 (Rajendra Kumar Sen and others v State of U.P. and others). The final orders passed have been challenged on a further contention that petitioners there were not given proper opportunities as against

the show cause notice when the petitioners submitted their reply in English, the same was not considered and before their reply was again submitted in Hindi, the final order was passed and this violates principles of natural justice.

11. Mr. H.N. Tripathi learned counsel for the petitioner in Civil Misc. Writ Petition No. 48844 of contended that even if there was a difference between the reading of measurement taken before and after appointment, the same could not be a ground for termination as respondents have also acquiesced by granting appointment on the basis of the physical conditions available.

12. In support of such contention law as been referred to as decided in the case of Smt. Pushplata Saxena v. Chancellor, Agra University reported in 1996(1) UPLBEC 347 band Bhagwati Prasad v. Delhi State Mineral Corporation reported in AIR 1990 SC 371.

13. Mr. P.K. Mishra, learned counsel for petitioner in Civil Misc. Writ Petition No. 49242 of 1999 contended that in his case the petitioner filed a medical certificate mentioning the measurement and such medical certificates were produced before selection as appears from documents at Annexures 2 and 5 to the Writ Petition. It is , therefore, stated that facts are apparent that the petitioner was having requisite height and chest measurement duly certified by duly qualified person and, therefore, petitioner's appointment could not be terminated on an allegation that measurements were not done by person having no expertise. This aspect is also similar to the case of the petitioners in Civil Misc. Writ Petition Nos. 47781.48529.48912 and 49241 of 1999.

14. On behalf of the respondents it has been contended that the judgment in the case of Krishna Kumar Sharma (supra) does not help the present petitioners as the rule under consideration there was a different one than the rule under consideration here. It is further stated that the post involved in the aforesaid case was a post of Excise Inspector and, therefore, reasons recorded in the said judgment do not apply in the present case of Excise Constables. It is further stated that rule 13 of the Rules of 1983 clearly mentions a requirement of certificate regarding medical aspect by a duly qualified Medical Officer and therefore, measurements of height and chest by members of selection committee, admittedly not having medical qualifications, cannot prevail to show that due compliance of the rules was made.

15. It is contended on behalf of the respondents that discrepancy in measurement and finding thereof showing a reading below the prescription, disentitles the petitioner from employment as it violates the provisions of statutory rules and there is no question to consider whether the discrepancy is minor or major. With regard to the provision relating to measurement of chest before expansion it is stated that the copy of the rules annexed to the writ petition does not contain the correct position and reference was made to U.P. Excise Manual where the aforesaid Rule 13 is available as quoted below:

13. Physical fitness- No. candidate shall be appointed to a post in the service unless he be in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties. Before a candidate is finally approved for appointment to the service, he shall be required to produce a medical certificate of fitness in accordance with the rules framed under Fundamental Rule 10 and contained in Chapter III of the Financial Hand-book, Volume II, Part III:

Provided that a medical certificate of fitness shall not be required from a candidate recruited by promotion:

Provided further that in the case of Candidates from the posts of Excise Constable, their chest measurements should bot be less than 81.3 cm unexpanded and 86.6 cm after expansion and height should not be less than 167.6 cm (162.6 cm. In the case of candidates belong to Kumanon Division and the districts of Pauri Garhwal, Tehri Garhwal, Uttar Kashi, and Chamoli).

16. The said provision indicates clearly that the chest measurements were prescribed before and after expansion.

17. In further support to the aforesaid contention a copy of the Gazette Notification in respect of the said Rules of 1983 has also been produced which contains the provision as available in the Excise Manual with only difference in chest measurement on expansion as 86.4 cm.

18. Learned Standing Counsel contends that the present posts of Excise Constables require certain physical aspects of the candidates as the job involved herein is of a different nature than the job required to be rendered by Excise Inspector, whose cases were considered in the aforesaid judgment of Krishna Kumar Sharma (supra).

19. With regard to the contention that the reply filed in English was not considered, on behalf of the respondents it has been contended that those replies were duly considered and in support of such contention reference was made to the statement made in counter-affidavit which has not been effectively denied by the petitioner. It is contended that there was no violation of principles of natural justice.

20. As regards law it has been contended that in some of the writ petitions show cause notices have been challenged and the same are premature as held in the case of Executive Engineer v. Ramesh Kumar Singh reported in AIR 1986 SC 691. It has been stated that if the candidate concerned was not having qualification at the time of appointment, his appointment has to be cancelled as held in the case of District Collector V. M. Tripura Sundari Devi reported in (1990) 3 UPLBEC 2032.

21. Interim orders passed in some of the writ petitions have also been challenged referring the law decided in the cases of State of Rajasthan V. Hintndera Kumar Bhatt reported in 1997(3) E.S.C. 1455. On the maintainability of the writ petition on the ground of existence of alternative remedy, it has been contended by the learned Standing Counsel that law justifies dismissal of the writ petition on the aforesaid ground in view of the law decided in the case of Km. Mamta Jahoori v. State of U.P. reported in 1999(1) UPLBEC 54.

22. After considering the aforesaid contentions of respective parties I find that the Rule 13 as contained in the copy annexed to the writ petition is not correct and the actual provision as contained in the official gazette, is the correct provision and the same includes the measurement of chest, both before and after expansion. Therefore, the contention of the petitioner on the aforesaid provision is not acceptable.

23. With regard to the judgment in the case of Krishna Kumar Sharma (supra) it is apparent that the petitioner therein was holding the post of clerk and was seeking appointment as Excise Inspector. The judgment was delivered taking specifically into consideration the duties of Excise Inspector and upon a finding that their duties do not require such measurement as regards physical aspects and only brain and character. In the present case the posts concerned are of Excise Constables in the Excise Department and in paragraph 21 of the counter-affidavit categorical statements have been made regarding requirement for the posts of Excise Constables as different from those of Excise

Inspectors. Nature of duties of excise Constables has also been described therein. No effective denial of the said contentions have been made by the petitioner nor any material has been produced for making the Court to disbelieve the aforesaid statements regarding nature of job and its requirements for the posts of Excise Constables. Therefore, the reasons given in the case of Krishna Kumar Sharma (supra) do not apply in the present cases of Excise Constables. Nothing has been shown on behalf of the petitioner leading the Court to reach a conclusion that such requirements regarding physical aspects of Excise Constables are without any nexus with the requirement for the post. Therefore, the provision of Rule 13 in the aforesaid Rules of 1983 do not appear to be violative of Article 14 of the Constitution of India.

24. With regard to the present cases it appears that admittedly at the time of selection and appointments petitioners were found to be fit and satisfying requisite qualifications and such finding was by the Selection Committee. There is no material to reach the conclusion that the findings of the Selection Committee as regards measurement of height and chest were wrong. The impugned order also does not record such a finding. The allegation that the members of the selection committee did not have expertise to measure height and chest is also devoid of any merit as ordinarily it cannot be accepted that in such measurement any expertise is required. on behalf of the respondents also the above was not substantiated in any manner at the time of hearing. Therefore, findings against the petitioners in the impugned order on the aforesaid ground, cannot stand.

25. In Writ petition nos. 49242, 49241, 48529 and 47781 of 1999 the finding of want of expertise of the persons measuring and termination of services on that ground, is further contrary to correct facts as documents disclosed in the writ petitions are not disputed by the respondents so far medical certificates were filed showing height and chest measurement of the candidates concerned before appointment. Therefore, termination on the aforesaid ground in those writ petition is bad.

26. In the facts of the present cases it is apparent that as regards height and chest of the selection committee gave a certificate and thereupon appointments were after the appointment petitioners were called and those measurements were again taken and this time finding a deficiency termination was directed. This measurement was admittedly taken few months after the appointment. In such facts, I am of the opinion that termination could not be directed on measurement after appointment particularly when there is no finding that measurement by the members of the selection committee before appointment was not acceptable or was non-existent.

27. With regard to allegation as regard non-consideration of reply in English, I find this has been disputed by respondents and there is no material available on which the same can be decided here.

28. As affidavits have been exchanged and the writ petitions are being finally decided, I am not refusing exercise of jurisdiction on technical grounds raised by the respondents.

29. In view of the aforesaid findings, the impugned order of termination cannot stand. The writ petition is, therefore, allowed and the impugned order dated 6.11.1999 at Annexure08 to the Writ petition is hereby quashed.

Writ Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.3.2000

BEFORE
THE HON'BLE M. KATJU,J.
THE HON'BLE D.R. CHAUDHARY,J.

Civil Misc. writ Petition No. 4247 (s/s) of 1998

Vijai Kumar Jain ...Petitioner
Versus
State of U.P. through the Secretary, ...Respondents

Counsel for the petitioners:
Shri Amarendra Kumar Bajpai
Shri Kapil Deo

Counsel for the Respondents:
S.C.

Constitution of India, article 226- Punishment stoppage of one increment alongwith recovery of Rs. 74,994/- without considering the reply given by the higher authorities to the Audit objection- order of punishment is held arbitrary, without application of mind.
Held-(para 8)

It is evident that the petitioner made purchases only from the U.P. Small Industries Corporation Limited at the rate fixed by the Corporation itself and that too after taking approval from the Chief Engineer. Moreover the Chief Engineer had himself informed the Accountant General by his letter dated 23.2.1987 through the Joint Secretary about these purchases. Copies of the letters of the Chief Engineer as well as the Joint Secretary to the government are Annexure 1 and 2 to the writ petition. Hence we fail to understand how the petitioner can be at any fault. It appears that the entire action against the petitioner was misconceived and arbitrary.

By the Court

1. This writ petition has been filed for quashing the impugned order of punishment dated 8.2.1994 Annexure 4-a to the writ petition (as amended) and for a mandamus directing the respondents to consider the petitioner for promotion as Superintending Engineer.

2. The petitioner was appointed as Assistant Engineer in the Rural Engineering Service of U.P. Government in adhoc capacity on 18.1031972 and he was approved by the U.P. Public Service Commission on 11.5.1979. On 23.1.1980 the petitioner was promoted as Executive Engineer on adhoc basis and was regularised in April 1980 and in between he was confirmed as Assistant Engineer on 2.7.1982.

3. In Paragraph 9 of the writ petition it is stated that in the year 1985-86 a routine audit of the public accounts maintained by the department was conducted and the audit team raised an objection under the head 'extra expenditure' for the year 1985-86. A purchase from the U.P. Small Industries Corporation at their rate list was termed by the audit cell as superfluous and extra expenditure to a tune of Rs. 74,944/- was indicated in the total purchase of the material worth Rs. 1,15,200/-. In paragraph 10 of the writ petition it is stated that the Chief Engineer when informed about the same immediately reacted and replied to the objection raised by the audit team through his letter dated 23.1.1987 through the Joint Secretary of the department. The joint Secretary after satisfying himself with the reply of the respondent no. 2 forwarded the detailed reply of the Chief Engineer with his sanction in favour of the same to the Accountant General, Allahabad on 23.2.1987. True copy of the letter dated 23.2.1987 is annexure 3 to the writ petition. Despite this reply the petitioner was served with a charge sheet vide covering letter dated 3.11.1989. True copy of the covering letter containing the letter of the Joint Secretary dated 7.9.1988 and the charge sheet is Annexure 4 to the writ petition. The petitioner filed his reply to the charge sheet dated 15.12.1989. Thereafter the petitioner was served with the order of punishment dated 8.2.1994 by the State

Government by which recovery of Rs. 74,994/- was ordered from the salary of the petitioner besides permanently withholding of one increment and a reprimand entry. True copy of the order is Annexure 4-a to the writ petition.

4. In paragraph 14-B of the petition it is stated that the aforesaid order was arbitrary as it was contrary to the letters copies of which are Annexures 2 and 3 to the writ petition. The entire controversy related to the alleged misuse of public money by extra expenditure said to have been incurred by the petitioner when the material alleged to have been bought was through the public agency, U.P. Small Industries Corporation, a public sector undertaking regarding which there existed guide lines recommending purchase of material from the Corporation alone of the goods available with the Corporation. Moreover the entire purchase made from the Corporation by the petitioner was with the prior approval of the Chief Engineer.

5. In paragraph 14-C of the writ petition is alleged that the State Government did not even care to look to its own recommendation made to the Accountant General justifying need of the purchase, which had been approved by the Chief Engineer. As a result of this the petitioner was not promoted while eight of his colleagues were promoted as Superintending Engineer.

6. A counter affidavit has been file by the respondent. In paragraph 3 of the same it is alleged that the petitioner while posted as Executive Engineer in 1982-83 made certain purchases in which he committed irregularities and had paid higher rates than the scheduled rates. The same allegation has been made in paragraph 7 and 9 of the counter affidavit.

7. A rejoinder affidavit has been filed. In paragraph 5 of the same it is stated the purchases were made after getting approval/sanction of the Chief Engineer on 9.7.1982 vide Annexure 1 to the writ petition and these purchases were made only from U.P. Small Industries Corporation Limited, a public sector undertaking as per mandatory provision of G.O. dated 30.11.1981 copy of which is Annexure 2 to the writ petition and hence there was no question of any irregularity of paying at a higher rate. The same allegation has been made in paragraph 9 of the rejoinder affidavit and it is stated that no irregularity was committed. In paragraph 11 is stated that the G.O. dated 30.11.1981 specifically provides that the required materials must be purchased only from U.P. Small Industries Corporation Limited and only the rates of the Corporation be defrayed. Hence no question arose for departmental approval of the rates. Moreover sanction from the Chief Engineer was also taken by the petitioner.

8. On the facts of the case we are clearly of the opinion that the impugned order is arbitrary and illegal. It is evident that the petitioner made purchases only from the U.P. Small Industries Corporation Limited at the rate fixed by the Corporation itself and that too after taking approval from the Chief Engineer. Moreover the Chief Engineer had himself informed the Accountant General by his letter dated 23.2.1987 through the Joint Secretary about these purchases. Copies of the letters of the Chief Engineer as well as the Joint Secretary of the Government Annexure 1 and 2 to the Writ petition. True copy of the sanction of the Chief Engineer is Annexure 3 to the Writ petition. The G.O. Dated 30.11.1981 state that the purchase can be made from the U.P. Small Industries Corporation only at the rate notified by it. Hence we fail to understand how the petitioner can be at any fault. It appears that the entire action against the petitioner was misconceived and arbitrary.

9. In the circumstances the writ petition is allowed. The impugned order of punishment

dated 8.2.1994 is quashed and a mandamus is issued to the respondents to consider the petitioner of promotion as superintending Engineer preferably within two months of production of a certified copy of this order before the authority concerned in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 21.02.2000

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE RATNAKAR DAS,J.

Civil Misc. Writ Petition No. 5658 of 1989

Ramesh Kumar Shukla ...Petitioner.
Versus
Allahabad Development Authority, Allahabad and others ...Respondents.

Counsel for the Petitioner:
S/Shri G.N.Chandra
Triveni Shanker
Ram Pratap Singh
K.P. Upadhayay
Murlidhar.

Counsel for the Respondents:
S.C.
Sri Ashok Moheley,
Sri Vineet Saran

Constitution of India, Article 226-Jurisdiction-Interim order obtained by suppression of material facts-extra ordinary jurisdiction under Article 226, held, not to be exercised. Held – (Paras 15, 18 & 19)

The petitioner is clearly guilty of suppression of material facts and getting the interim order dated 19th March, 1989 by suppression of material facts. He has forfeited claim for any relief from this Court in exercise of its special and extraordinary jurisdiction under Article 226 of the Constitution of India. Indeed, he has incurred the liability of having his petition dismissed in limine. Thus, in terms of the stipulation contained in the allotment order, the allotment in favour of the petitioner was liable to be cancelled. The Development Authority therefore did not act illegally in passing the impugned order of cancellation of allotment in favour of the petitioner. The Court is further of the opinion that the Development Authority did not commit any illegality in passing a fresh order of allotment in favour of the respondent no. 3 The allotment of the disputed plot in favour of the respondent no. 3 having been legally made more than 11 years back is, in the absence of any fault on his part, not liable to be interfered with by the Court in exercise of its special, extraordinary discretionary and equitable jurisdiction under Article 226 of the Constitution of India.

It is not necessary to adjudicate whether the petitioner made the application for allotment of the plot on 21st December, 1987 or 4th January, 1988. In any event, he had applied after the last date fixed for submission of the application, which was the 20th December, 1987. This being the position, it is rightly contended by the counsel of the respondent no. 3 that the petitioner could not be an applicant for allotment of the plot lawfully, and was clearly not entitled for participating in the process of allotment by lottery. Also viewing the matter from this angle, the Court is of the opinion that the petitioner does not deserve to be granted any relief.

By the Court

1. Heard Sri Murlidhar, the learned Senior Advocate appearing for the petitioner, Sri Ashok Mohiley, the learned Standing Counsel of the respondents No. 1 and 2 and Sri M.P. Sarraf, holding brief of Sri Vineet Saran, the learned counsel representing the respondent No. 3, permitted to be impleaded by the order of the Court dated 22nd November, 1994, at length and in detail.

2. The acts and events constituting the facts of the case, as they emerge from the pleadings before the Court, are these.

3. The Allahabad Development Authority, Allahabad, the respondent No. 1. Hereinafter called the 'Development Authority' issued a

Notification in the Newspaper 'Northern India Patrika' dated 20th November' 1987 inviting applications for allotment of plots in Ashok Nagar Extension Scheme of the applications for allotment opened on 21st November, 1987 and the last date appointed for registration was 20th December, 1987. The procedure for allotment of the plots, adopted under the Rules, was by drawing lottery.

4. The Secretary of the Development Authority addressed the petitioner a communication dated 28th September, 1988, a copy whereof is Annexure '1' to the petition, notifying that the petitioner had been allotted a plot bearing No. B-38 measuring 162 Sq. Meter at the rate of Rs. 510/- per sq. meter. The communication further informed the petitioner that out of total estimated price of the plot amounting to Rs. 82,620/- the sum of Rs. 15,000/- deposited by him as registration fees had been adjusted towards the price of the plot and called upon him to pay the balance amounting to Rs. 67,620/- in four equal quarterly instalments of Rs. 16,605/-. The first installment was payable upto 31st January, 1989, the third installment was payable upto 30th April 1989 and the fourth instalment was payable upto 31st July, 1989.

5. The communication dated 28th September, 1988 warned the petitioner that in the event of default in payment of the instalment by the appointed date, the allotment shall be cancelled. It also informed the petitioner that if the payment of the instalment was allowed to be made after due date, it would be accepted with 15 percent interest per annum. Besides this warning, the communication contained many other stipulations which are not relevant for determination of the controversy raised in the petition.

6. The petitioner deposited the first instalment in time. In respect of second instalment which was payable upto 31st January, 1989 he issued a Cheque dated 31st January, 1989 for Rs. 16,905/- drawn on the State Bank of India, Daraganj Branch, Allahabad in favour of the Development Authority. The Development Authority sent the Cheque to its Bankers for collection. On 8th February, 1989, the Chief Accounts Officer of the Development Authority learnt that the cheque of the petitioner was dishonoured. Thereupon the dealing clerk put up before the Joint Secretary of the Development Authority a note Dated 14th February, 1989 apprising him about the factum of dishonouring of the cheque. On the same date, the Joint Secretary directed that the allotment in favour of the petitioner be cancelled and requisite information be sent to him as is evident from Annexure C.a. '2' appended to the Counter-affidavit of Sri K.P. Srivastava filed on behalf of the Development Authority. Accordingly, the petitioner was informed vide letter dated 15th February, 1989, a copy whereof is Annexure '4' to the petition.

7. On 22nd February, 1989 the petitioner submitted a hand written application enclosing therewith another cheque dated 22nd February, 1989.

8. In the meantime the plot in dispute was allotted to Sri Shashi Kant Duggal, the respondent no. 3, who had duly applied for allotment of the plot on 19th December, 1987 and was in the waiting list at serial no. 1. The requisite allotment letter No. 4583 dated 15th February, 1989 was sent to Sri Duggal and he was required to deposit the costs of the plot amounting to Rs. 82,620/- minus Rs. 15,000/- already deposited by him by way of registration fee, in four equal quarterly instalments.

9. The respondent no. 3 chose to and deposited the entire amount of Rs. 67,620/- in lump sum, and he was delivered possession of the plot in question on 24th February, 1989.

10. By means of instant petition under Article 226 of the Constitution of India the petitioner seeks to challenge the order dated 15th February, 1989 cancelling the allotment of the plot in dispute in his favour. He has prayed for other relief's also, which are incidental and consequential to the relief of quashing of the cancellation order.

11. The writ petition wa filed on 16th March, 1989. It received consideration of the Court on 19th March, 1989. Parties were directed to exchange affidavits. Further, the Court restrained the respondents No. 1 and 2 from executing any lease deed in respect of the plot in question in favour of any person other than the petitioner.

12. On the day when the petition was filed and the interim order was passed the disputed plot had already been allotted in favour of the respondent No. 3, on 15th February, 1989, and he had also been delivered possession on 24th February, 1989, completing the transaction regarding the allotment and lease of the disputed plot in favour of the respondent No. 3, and creating a legally cognizable right in his favour. Significantly, the petitioner did not implied him as respondent. He also did not disclose all these facts in the petition. These facts were brought to the notice of the Court by the Development Authority in its counter-affidavit filed on 9th April, 1990, alongwith the stay vacation application, after serving upon the counsel of the petitioner a copy thereof.

13. On 10th July, 1990, Sri Shashi Kant Duggal movedm an application praying that he may be impleaded to the petition as respondent no. 3. Alongwith the application he filed Counter-affidavit also disclosing therein the relevant facts and circumstances of the case.

14. After the lapse of more than five years from the date of filing of the writ petition, and more than four years from the date of service of the counter-affidavit of the Development Authority bringing on record the factum of the allotment of the plot in favour of Sri Shashi Kant Duggal and delivery of possession thereof to him, the petitioner woke up and moved the application dated 3rd October, 1994, praying for impleadment of Sri Shashi Kant Duggal as respondent No. 3. On this application, the Court directed impledment of Sri Shashi Kant Duggal as respondent No. 3.

15. Had the petitioner disclosed in his writ petition the facts noticed above, the Court is of the opinion, he would not have succeeded in getting the interim order dated 19th March, 1989. The petitioner is clearly guilty of suppression of the material facts and getting the interim order dated 19th March, 1989 by suppression of the material facts. He did not approach the Court with clean hands. Thus, he has forfeited claim for any relief from this Court in exercise of its special and extraordinary jurisdiction under Article 226 of the Constitution of India. Indeed, he has incurred the liability of having his petition dismissed in limine.

16. Otherwise also, on merits, the Court is afraid, the petitioner is not entitled to the relief's prayed for by him. It is not disputed that one of the conditions of allotment of the plot in dispute in favour of the petitioner was that in the event of default in payment of the instalments of the price of the plot by the stipulated date, the allotment would be cancelled. It is not in dispute that the petitioner had committed default in paying the second instalment of the price which was payable by 31st January, 1989.

17. At this juncture, it is relevant to notice that on 31st January, 1989. When he had issued the cheque in favour of the Development Authority for paying the second instalment, the petitioner did not have the requisite balance in his account in the Bank to cover the amount of the cheque. The petitioner was fully aware of the fact that he

did not have requisite balance at his credit to cover the amount of the cheque issued in favour of the Development Authority in respect of the second instalment. The inevitable happened. The cheque was bounced.

18. Thus, in terms of the stipulation contained in the allotment order, the allotment in favour of the petitioner was liable to be cancelled. The Development Authority, therefore, did not act illegally in passing the impugned order of cancellation of allotment in favour of the petitioner. The Court is further of the opinion that the Development Authority did not commit any illegality in passing a fresh order of allotment in favour of the respondent No. 3. The allotment of the disputed plot in favour of the respondent No. 3 having been legally made more than 11 years back is , in the absence of any fault on his part, not liable to be interfered with by the Court in exercise of its special, extraordinary, discretionary and equitable jurisdiction under Article 226 of the Constitution of India.

19. There is yet another important aspect worthy of notice. The last date for making application for allotment of the plot, in terms of the notification issued by the Development Authority, was 20th December, 1987. But , the petitioner had applied for allotment of the plot after expiry of the said date. According to the respondents, the petitioner had applied on 4th January, 1988 and according to the petitioner, he had applied on 21st December, 1987. It is not necessary to adjudicate whether the petitioner made the application for allotment of the plot on 21st December, 1987 of 4th January, 1988. In any even, he had applied after the last date fixed for submission of the application, which was the 20th December, 1987. This being the position, it is rightly contended by the counsel of the respondent No. 3. That the petitioner could not be an applicant for allotment of the plot lawfully, and was clearly not entitled for participating in the process of allotment by lottery. Also \viewing the matter from this angle the Court is of the opinion that the petitioner does not deserve to be granted any relief.

20. All told, the petition lacks merit and is dismissed summarily. The interim order dated 19.3.1989 shall stand vacated. On the facts and circumstances of the case, there is no order as to costs.

21. Sri Triveni Shanker, the learned counsel appearing for the petitioner, makes an oral application to determine the question whether a certificate in the nature referred to in clause (I) of Article 132 or clause (I) of article 133 may be given in respect of instant case.

22. After giving anxious consideration to the prayer made by the learned counsel of the petitioner and taking into account the facts and circumstances of the case, the Court is of the opinion that instant case does not involve any substantial question of law either as to the interpretation of the Constitution or of law of general importance which needs to be decided by the Hon'ble Supreme Court. Thus, the prayer is rejected.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 16.03.2000
BEFORE
THE HON'BLE SUDHIR NARAIN

Civil Misc. writ Petition No. 26394 of 1991

Sheel Kumar Mishra **...Petitioner**
Versus
Smt. Usha Rani Mishra **...Respondent**

Counsel for the Petitioners:
Shri Anil Kumar Sharma

Counsel for the Respondent:
S.C.

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, SS. 16 (1) (b),

18 and S.14 as amended by Amendment Act, 1976-Deemed vacancy-Tenant left accommodation allowing his brother to occupy the same in 1965-Land-lord accepting rent from such occupant though receipt issued in name of original tenant for long period-Acquisition of right of tenancy by occupant in law-Implied consent-Applicability of S.14 as amended in 1976.
Held-
It is true that mere knowledge of the land lord of occupation of the building by a person other than the tenant to whom it was let out, in itself is not sufficient to show that he had given consent to him to continue to occupy it as tenant, as according to him, his occupation may be as a relative, guest or employee of the tenant. He may not have any objection to the occupation of such person in the building in that capacity. The position will however, be different when the tenant has vacated the accommodation long ago and the land-lord accepts rent from such occupant, though in the name of tenant, who no longer is occupying the building. The Court can draw in inference of implied consent as a tenant of the accommodation in question. (Para 9)
Case Law discussed:
1979 ARC 222
1986 (1) ARC 132
1984 (2) ARC 61
1982 (1) ARC 201
1988 (2) ARC 501
1985 (1) ARC 1
1984 ALJ-99

By the Court

1. The core question in the petition is as to whether the disputed accommodation is vacant or not.

2. Briefly stated, the facts are that one Ram Chandra Mishra was the tenant of a portion of the disputed house no. 3A, 274, Azad Nagar, Kanpur. He was selected for the post of store and purchase officer in the National Dairy Research Institute, Karnal, in the year 1964. He shifted to Karnal with his entire family from the disputed house. After him, it was occupied by his elder brother, R.A. Mishra. In the year 1965 Sri R.A.Mishra died and after his death the petitioner, his son, continued to occupy the same along with his younger brother, Sunil Kumar Mishra

3. The landlords of the house in question sold it on 10.8.1990 by executing three separate sale-deeds, one in favour of Smt. Usha Rani Mishra, the wife of the husband of his younger brother, Sunil Kumar Mishra, the second to Rajiv Prakash, respondent no.2 and the third to Mrs. Neeta Awasthi. The dispute in the present case relates to the portion which was sold to respondent no. 2. After execution of the sale-deed by the previous landlord, one Sri P.S. Chauhan filed application for allotment on 26.9.1990 before the Rent Control and Eviction Officer, alleging that the house in question was likely to fall vacant. The Rent Control Inspector submitted report on 7.1.1991 that the petitioner and his brother Sunil Kumar Mishra were found in possession. It was reported that the petitioner and the family of his brother were residing in the disputed house for the last 25 years and there was no vacancy. The petitioner filed written statement before the Rent Control and Eviction Officer on 7th May, 1991, alleging that he was residing in the disputed house as a tenant with the consent of the landlord since the year 1964-65. Rajiv Prakash, the owner of the house, filed objection that the accommodation in question be declared as vacant as the petitioner has no right to continue to occupy the disputed house. The Rent Control and Eviction Officer by his order dated 24.7.1991 declared the disputed accommodation as vacant and, on 6.8.1991, he passed order releasing the disputed accommodation in favour of respondent no. 2 on an application filed for release under Section 16(1)(b) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, (in short the 'Act').

4. On 21.8.1991, the petitioner filed application to recall the order dated 24.7.1991 whereby the vacancy was declared and an order dated 6.8.1991 releasing the disputed accommodation in favour of respondent no. 2

was passed. He also filed a revision against these orders under Section 18 of the Act. The revision of the petitioner was dismissed on 24.8.1991 on the ground that the revision does not lay against the order declaring vacancy. The petitioner then filed application under Section 16(5) of the Act on 17.1.1992. This application was rejected on 19.2.1992. The petitioner filed a revision against this order. The revision has been dismissed on 25.2.1992. The petitioner has filed Civil Miscellaneous Writ Petition No. 7180 of 1992 against the order dated 19.2.1992 and 25.2.1992.

5. The core question is whether the petitioner has acquired any right of tenancy under the law. Admittedly, his uncle Ram Chandra Mishra was the tenant of the disputed accommodation. He was selected for a job at Karnal and he shifted there in the year 1964 and, thereafter, the father of the petitioner and his family including the petitioner continued to live in this house. The landlords of the house never objected that the petitioners were in unauthorised possession after Ram Chandra Mishra left to Karnal on transfer. The dispute arose only after the previous landlords executed the sale-deed on 10.8.1990. The Rent Control and Eviction Officer held that as father of the petitioner, Shri R.A. Misra, was brother of Ram Chandra Mishra, the tenant, he could not be held as member of the family of the outgoing tenant and the accommodation in question shall be treated as vacant under the law. The contention of the petitioner that he was entitled to the benefit of Section 14 of the Act was not occupied. Section 14 provides that the tenant in occupation of the building with the consent of the landlord immediately before the commencement of the U.P. Urban buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976, not being a person against whom any suit or proceedings for eviction is pending before any court or authority on the date of such commencement, shall be deemed to be authorised licencee or tenant of such building. This provision contemplates that, firstly, the occupant should be accepted as licencee or a tenant by the landlord; secondly, he is residing with his consent and, thirdly, his occupation is prior to commencement of the aforesaid Amending Act of 1976, i.e. 5th July, 1976. The petitioner was admittedly residing prior to the year 1976.

6. The next question is whether he had the consent of the landlord to continue to occupy the premises as a tenant or licencee. The consent may be express or implied. It was not necessary that the consent must be in writing. The petitioner had produced ration-card, electric bill, voters list from 1967 to 1990, letters written by Sri Ram Chandra Mishra and the payment of rent made to the previous landlord in support of his version.

7. In Ram Chandra Gupta Vs. II ADJ, Allahabad and others, 1979 ARC 222 wherein the daughter was allotted the premises but after her marriage, she left the house and father continued to reside therein, it was held that the father shall be deemed to continue with the consent of landlord and the accommodation could not be treated as vacant under the law. The fact that the rent receipts were issued in the name of his daughter would not show that the occupant was not living in the house with the consent of the landlord. She was allotted the premises at the time when in she was unmarried and after her marriage, she left the house but the same was occupied by her parents. In Meera Paul and others Vs. II ADJ, Faizabad and others, 1986 (1) ARC 132, the facts were that after the tenant was transferred, it was occupied by tenant's married sister. The objection taken was that she could not be treated as a family member and the accommodation should be deemed vacant. The court repelled the contention and held that she was residing in the premises within the knowledge of the landlady and as she never objected to her occupation, she was entitled to the benefit of Section 14 of the Act. The view of the Rent

Control and Eviction officer that as there was neither written consent nor any receipt in the name of the petitioner, the petitioner was not entitled to the benefit of Section 14 of the Act was held erroneous. Section 14 of the Act does not require that the consent of the landlord must be in writing before regularization of the tenancy can be done under the said provision. The consent of the landlord may be expressed or implied.

8. The learned counsel for the respondent contended that the mere knowledge of the landlord of the possession of a person in occupation of the disputed building itself cannot be taken as his consent to occupy the premises as a tenant. He has placed reliance upon the decision in Ram Singh Vs. Banwari Lal and others, 1982 (1) ARC 201, where the court on examining facts held that there was no evidence on record showing that the occupant was treated as a tenant or that his possession was with the consent of the landlord and in absence of such evidence, he was not entitled to the benefit of Section 14 of the Act. In Girja Shanker and another Vs. Hriday Ranjan Chakraborty, 1988 (2) ARC 501, an Aushdhalaya was the tenant. One Hriday Ranjan Chakraborty claimed that he was paying rent to the landlord and he should be treated as the tenant. It was found that he was an employee of the tenant and, therefore, was not entitled to the benefit of Section 14 of the Act. The Supreme Court made the following observation:

"The tenant of the premises in question has long left. An employee without the consent though, perhaps, with knowledge of the landlord was occupying the premises, but in such circumstances it cannot be held as the High Court has done that there was no deemed vacancy."

In the facts and circumstances of the aforesaid case it was held that even though the occupant was living within the knowledge of the landlord, he was not entitled to the benefit of Section 14 of the Act. In Jaspal Singh Vs. Addl. District Judge, Varanasi and others, 1985 (1) ARC 1, it was held that if a person was occupying the premises prior to the U.P. Act No. 28 of 1976, he cannot claim the benefit of Section 14 of the Act if he was not residing with the consent of the landlord and the proceedings against such occupant was pending against him on the date of the enforcement of the Act.

9. It is true that mere knowledge of the landlord of occupation of the building by a person other than the tenant to whom it was let out, in itself is not sufficient to show that he had given consent to him to continue to occupy it as tenant, as according to him, his occupation may be as a relative, guest or employee of the tenant. He may not have any objection to the occupation of such person in the building in that capacity. The position will be, however, different when the tenant has vacated the accommodation long ago and the landlord accepts rent from such occupant, though in the name of tenant, who no longer is occupying the building. The Court can draw an inference of implied consent as a tenant of the accommodation in question. In Rajendra Kumar and others Vs. District Judge, Varanasi and another, 1984 ALJ 99, where the tenant had sold his ginning and flour machine and thereafter transferred possession of shop as well to another person and the landlord continued to accept the rent from such person, though the receipt was issued in the name of the original tenant, it was held that there will be an implied consent of the landlord to continue as a tenant. Such person was held to be entitled to the benefit of section 14 of the Act. It was observed that:

"Petitioner has been found to be in possession since 1965 to the knowledge of opposite party. Length of possession and passage of time are circumstances which strongly (sic) in favour of petitioner. Added to this is the finding that opposite party had knowledge of

it. Therefore she should be deemed to have consented (sic) in possession of petitioner."

10. Landlord respondent no. 2 had filed objection and it was admitted to him that Ram Chandra Misra, the tenant had shifted to Karnal on the transfer and permitted the family of Ram Asrey Misra to live as a relative along with the family in the year 1965. Paragraph 3 of his objection dated 16.3.1991 reads as under:

"That Sri Ram Chandra Misra became the tenant of the disputed portion on or about 1947 or 1948 on account of relationship. Sri Ram Chandra Misra allowed Sri Ram Assrey Misra to live as a relation along with his family in the year 1965. As the services of Sri Ram Chandra Misra were transferred to Karnal, although he joined his duties at Karnal as store Purchasing officer but his family continued to occupy the disputed portion."

11. It is not the case of the respondent that R14am Chandra Misra lived in the disputed house while he continued in service and his children were receiving education at Kanpur. This matter is to be examined by the Rent Control and Eviction Officer.

12. The learned counsel for the respondent further contended that there were six landlords who have sold the property to respondent no. 2 on the 10th August, 1990, and the consent of all the co-landlords were required before any benefit under Section 14 of the Act can be given. The petitioner had filed the objection. It was not his case that some of the co-landlords had not given the consent. It depends upon the fact of each case as to whether any of the landlords had an objection in regard to the occupation of the occupant of the premises in question.

13. The contention of the petitioner is that the consent of the landlord shall be apparent as while executing the sale-deed on 10.8.1990 Usha Rani, wife of Sunil Kumar Mishra, brother of the petitioner, was referred as the tenant in the sale-deed. It was nowhere the case of any of the parties that she was inducted as a tenant in the year 1978 when she was married to Sunil Kumar Mishra or there was any allotment in her favour. The statement in the sale-deed shows that she was treated as a tenant being a family member of R.A. Mishra, father of the petitioner.

14. The learned counsel for the petitioner urged that the petitioner had not challenged the order of vacancy by filing a writ petition. He had filed revision against the said order and that revision having been dismissed, he has no right to challenge the said order in this writ petition. This contention cannot be accepted. The petitioner has filed a revision against the order of release on the ground that the disputed accommodation should not be treated as deemed vacant. The revision was, however, dismissed on the ground that it was not maintainable against the order of vacancy. He now cannot be deprived from taking the plea that the disputed accommodation should not be treated as vacant.

15. In view of the above, the writ petition is allowed. The order dated 24.7.1991 declaring the vacancy is hereby quashed. The Rent Control and Eviction Officer shall consider the matter afresh keeping in view the observation made above and in accordance with law.

16. The Rent Control and Eviction Officer had passed the order of release after the accommodation was treated as vacant. It case it is finally held that there was no vacancy, the order of release passed on 6.8.1991 shall be treated as quashed, but if it is held that there was vacancy, the release order passed in favour of respondent no. 2 shall remain operative.

17. In view of the facts and circumstances of the case the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 18, 2000

BEFORE
THE HON'BLE M.C.AGARWAL,J.
THE HON'BLE S.RAFAT ALAM,J.

Civil Misc. Writ Petition No. 895 of 1981

Indira Rani Devi ...Petitioner
Versus
Nagar Palika, Puranpur and another ...Respondents

Counsel for the Petitioner:
Shri Ambrish Kumar Sharma
Shri V.B. Upadhya

Counsel for the Respondents:
Sri K.D. Tripathi
S.C.

U.P. Municipalities Act Section 135(3) -A notification of the imposition of a tax under sub section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of the Act. Therefore, any minor lapse in the procedure would stand cured by the issue of the notification.
Held-
That in respect of cinema houses of the second class whose annual value is less than Rs.10,000/-, the show tax should not be less than 10 rupees per show. The order goes on to state that in respect of cinema houses for which the show tax has been enhanced as above, there shall be an exemption from octroi and advertisement tax. The exemption granted by this order is, thus, not absolute. It is available if in respect of a cinema of first class, the show tax is Rs. 20/- or more per show and in respect of a cinema of a second class, the show tax is Rs. 10/- or more per show. The petition does not state in which of the two categories the petitioners cinema house falls.(para11)
Case Law Referred:-
1999 (2) U.P.L.B.E.C. P. 956

By the Court

1. By this petition under Article 226 of the Constitution of India, the petitioner challenges a notification dated 12.4.1980 issued by the Government of U.P. whereby the rules regarding the levy of show tax on cinema houses situate within the territorial limits of Nagar Palika, Puranpur have been published. A copy of the notification has been annexed to the writ petition as annexure 4. The petitioner further prays that the Nagar Palika be restrained from realising show tax and octcri duty on the import of films form the petitioner.

2. We have heard Sri V. B. Upadhya, learned counsel for the petitioner and Sri K.D. Tripathi, learned counsel for the respondent no. 1 ie.the State of U.P.

3. The petitioner's case is that she owns a cinema house situate at Puranpur which was a town area governed by the provisions of the U.P. Town Areas Act, 1940. On 22.4.1977 the Governor in exercise of powers under Section 36(1) of the said Act superseded the town area committee on grounds of persistent default and abuse of power and appointed the District Magistrate, Pilibhit as administrator under Section37 of the Act. Then on the 10th of July, 1978 the State Government in exercise of powers under Section 3(1)(a) of U.P. Municipalities Act issued a notification declaring the area to be a fourth class municipality w.e.f. 16th of July, 1978. On 10.12.1978 an advertisement was issued in weekly news paper published from Pilibhit by the officer Incharge, Municipal Board, Puranpur publishing proposal for imposing show tax within the limits of the Municipal Board, Puranpur. Subsequently by notification dated 12th of April, 1980 rules relating to the show tax were published in the official gazette. It is averred that prior to the said notification issued under Section 3(1) of the U.P. Municipalities Act, no show tax was imposed by the Town Area, Puranpur. It is claimed that the effect of the supersession of the Town Area, Puranpur and creation of Municipal board in place of the Town Area is that the District Magistrate, Pilibhit who is the

Administrator is alone competent to act as the Board and the action of the officer Incharge in imposing the show tax is wholly illegal and not in conformity with the provisions of the U.P. Municipalities Act. It is also claimed that even on the creation of the Municipality in place of the town area, the Municipal Board had no power to impose a new tax and the only power available to the new Board under Section 333a is that it shall continue to impose and realise the taxes already imposed by the Town Area Committee and that no new taxes could be imposed. It is claimed that the impugned tax has been imposed by the officer Incharge of the Board who is not the Administrator and who has not been appointed as Prescribed Authority by the State Government and as such the officer Incharge of the Board cannot be deemed or treated as Board under the provisions of the Act. According to the petitioner there is no resolution of the Board nor any proposal was ever made by the Board for the imposition of show tax and the Board never authorised the officer Incharge either to impose the tax or to take any steps for imposition of the tax.

4. Regarding the octroi duty in respect of import of films by the cinema houses, it is claimed that through a Government Order dated 19th of September, 1978, the Governor exempted from payment of octroi duty from the cinema houses that were paying show tax and, despite exemption, the respondent is still realising octroi duty from the petitioner on the import of films. It is on the aforesaid allegations that the petitioner claims the aforesaid relief's.

5. A counter affidavit was filed on behalf of the respondent Nagar Palika in which it is claimed that the show tax has been levied in accordance with the provision of the U.P. Municipalities Act. It is claimed that by virtue of the provisions of S.333 of the Municipalities Act read with the proviso to Section 10AA (c) an Administrator is empowered subject to any general or special order made by the State Government to delegate all or any of his powers to any officer subordinate to him. The State Government is also said to have issued an order empowering the District Magistrate to delegate their powers, functions and duties under the said Act to any Sub Divisional Magistrate under him. In exercise of those powers, the District Magistrate, Pilibhit delegated his powers, functions and duties to Sri R.C.Sharma, the Sub Divisional Magistrate, Puranpur who initiated the proposal to levy the show tax and was competent to do so. Regarding octroi, it is claimed that the aforesaid Government Order does not apply to the petitioner because the show tax levied is less than the limit prescribed therein.

6. No rejoinder affidavit was filed.

7. As is evident after the supersession of the Town Committee, a municipality was created in its place by an order dated 10th of July, 1978. Sub-section (2) of Section 36 of the Town Areas Act provides the consequences of the suppression of a Committee and amongst them one of the consequences is that all members of the Committee shall as from the date of the order vacate their offices as such members. The other consequence is that all powers and duties of the Committee may during the period of supersession be exercised and performed by the Prescribed Authority or if none is appointed by the District Magistrate. It was in pursuance of these provisions that the District Magistrate stood substituted in place of the members of the Committee and could function as the Town Area Committee. Then during the period of supersession itself, the area was constituted into a municipality. Section 333 of the U.P. Municipalities Act makes provision for the interregnum between the creation of a municipality and the constitution of a Board by the election of its member. Section 333 reads as under:-

"333 Exercise by District Magistrate of Board's power pending establishment of Board-When a new municipality is created under this Act, the District Magistrate, or other officer, or committee, or authority appointed by him in this behalf, may until a Board is established, exercise the powers and perform the duties and functions of the Board, and, he or it shall, for the purposes, aforesaid, be deemed to be the Board:

Provided always that the District Magistrate or such other officer or committee, or authority shall, as early as possible, make preliminary arrangements for the holdings of first elections and generally or expediting the assumption by the Board of its duties when constituted"

On behalf of the petitioner, reliance was heavily placed on the provisions of Section 333-A which provides for consequences of establishment of a municipality in place of town area or notified area. The said section stands as under:-

"333-A. Consequences of establishment of a municipality in place of town area or notified area-Where a municipality is created in place of a town area or notified area, the following consequences shall, notwithstanding anything contained in section 34 of the Town Areas Act, 1914 (U.P.Act 11 of 1914), or Section 339 of this Act, follow as from the date of the creation of the municipality:

(i) All taxes, fees, licences fines or penalties imposed, prescribed or levied, on the date immediately preceding the said date, by the Town Area Committee or the Notified Area Committee, as the case may be, be deemed to have been imposed, prescribed or levied by the Board under or in accordance with the provisions of this Act shall, until modified or changed , continue to be so realizable:

(ii) Any expenditure, incurred by the Town Area Committee, or the Notified Area Committee, on or before the date immediately preceding the said date from its funds shall continue to be so incurred by the Board as if it was an expenditure authorised by or under the said Act;

(iii) All property including the rights or benefits subsisting under any deed, contract, bond, security or chooses in auction vested in the town area or notified area, as the case may be, on the date immediately proceeding the said date, shall be transferred to and vested in and ensure for the benefit of the Board;

(iv) All liabilities, whether arising out of contract or otherwise which have accrued against the Town Area Committee or the Notified Area Committee and are outstanding on the date immediately proceeding the said date, shall thereafter be the liabilities of the Board;

(v) The fund of the town area or the notified area and all the proceeds of any unexpended taxes, tolls fees or fines, levied or realised, as the case may be, by Town Area Committee or the Notified Area Committee shall be transferred to and from part of the Municipal fund of the municipality;

(vi) All legal proceedings commenced by or against the Town Area Committee or the Notified Area Committee and pending on the date immediately preceding the said date, shall be continued by or against the Board;

(vii) Any officer or servant, who on the date immediately preceding the said date, was employed by the Town Area Committee or the Notified Area Committee in full time employment shall be transferred to and become an officer or servant of the Board as if he had been appointed by it under the provisions of this Act; and

(viii) Anything done or any action taken, including any appointment or delegation made, notification, or direction issued, rule,

regulation, from, bye-law or scheme framed permit or licence granted or registration effected under the provisions of the United Provinces Town Areas Act, 1914(U.P. Act II of 1914), or the provisions of this Act as applied to the notified area shall be deemed to have been done or taken under the corresponding provisions of this Act and shall continue in force accordingly unless and until superseded by anything done or any action taken under this Act."

8. Section 333-A merely provides that the existing rights and liabilities of the Town Area Committee shall continue to be effective and it does not restrict the rights and obligations which arise from the establishment of a municipality. The contention raised on behalf of the petitioner that the newly created municipality had no right to levy show tax because no such tax was levied by the erst-while Town Area Committee, has no substance.

9. As pointed out above, Section 333 makes provision for the transitional period and appoints the District Magistrate or other officer or committee or authority appointed by him in this behalf to exercise the powers and perform the duties and functions of the Board and he or it shall, for the purpose aforesaid, be deemed to be the Board. Therefore, if the District Magistrate appoints any officer to exercise the powers and perform the duties and functions of the Board, such officer can act as the Board for all purposes of the U.P. Municipalities Act till an elected Board takes over for which Section 333 provides that the District Magistrate shall take steps, as early as possible for holding the election and of expediting the assumption by the Board of its duties when constituted. In the counter affidavit, it has been asserted that the District Magistrate appointed Sri R.C. Sharma to exercise the powers, functions and duties under the U.P. Municipalities Act as the officer Incharge, Nagar Palika, Puranpur and it was in exercise of those powers that Sri R.C. Sharma made the proposal for levy of show tax which were ultimately approved by the Government by the issue of the impugned notification. The contention that the District Magistrate could not delegate his powers to another officer ignores the specific provisions of Section 333 of the U.P. Municipalities Act which specifically confers power on the District Magistrate to appoint another officer or committee or authority to exercise powers and perform the duties and functions of the Board.

10. The learned counsel for the petitioner placed reliance on a recent judgment of this Court in Behram Ji Vs. State of U.P. 1999 (2) UPLBEC 956 in which a Division Bench of this court held that the Administrator of a superseded Town Area had no power to impose fresh taxes or revise the existing taxes and that a superseded local body should be restored, as soon as possible. The judgment deals on the general concept of democracy and does not refer to any of the statutory provisions and must therefore, be restricted in its application to an identical case only. The present case is not an identical case. The reason is that here a new municipality was constituted in July, 1978 and there was no undue delay in initiating the proposals for levy of show tax. The record shows that Sri R.C. Sharma, who was appointed by the District Magistrate to discharge the functions of the Board, initiated the proposals in December 1978, as mentioned in paragraph 5 of the writ petition. No one has ever raised an eye brow to the initiation of the levy of the tax by the said officer. In our view this being the case of a newly created municipality, that was in need of funds and the proposal having been initiated without undue delay, the aforesaid judgment cannot be applied in aid of the petitioner. Further Section 135 (3) of the U.P. Municipalities Act provides that a notification of the imposition of a tax under sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of the Act. Therefore, any minor

lapse in the procedure would stand cured by the issue of the notification. We, therefore, hold that there is no illegality in the imposition of show tax by the Nagar Palika, Puranpur, respondent no. 1.

11. Now we come to the question of the petitioner's claim for exemption from octroi. A copy of the relevant Government Order dated 19th of September, 1978 has been placed as annexure 5 to the writ petition. This order says that in respect of cinema houses of first class i.e. whose annual value is Rs. 10,000/- or more, the show tax should not be less than Rs.20/- per show and in respect of cinema houses of the second class whose annual value is less than Rs.10,000/- the show tax should not be less than 10 rupees per show. The order goes on to state that in respect of cinema houses for which the show tax has been enhanced as above, there shall be an exemption from octroi and advertisement tax. The exemption granted by this order is, thus, not absolute. It is available if in respect of a cinema of first class, the show tax is Rs.20/- or more per show and in respect of a cinema of a second class, the show tax is Rs.10/- or more per show. The petition does not state in which of the two categories the petitioner's cinema house falls and the notification dated 12tth of April, 1980 by which the rules have been notified show that the show tax levied is only Rs.10/- per show. Therefore, if any exemption is available, the petitioner can approach the Municipal Board, Puranpur stating the facts of its case and the Municipal Board will decide the matter, according to law. So far as the present petition is concerned, the petitioner has failed to make out any case at this stage so as to enable this court to make an order in her favour particularly when it had been challenging the levy of show tax and no tax had actually been paid because of the interim order dated 22.12.1981 by which the respondent no. 1 was restrained from realising the show tax and the octroi duty.

12. In view of the above discussions, the writ petition is liable to be dismissed. The petitioner has withheld the payment of the taxes for an unduly long time because of the interim order dated 22.12.1981. We, therefore, deem it fit to direct the petitioner to clear the dues within six weeks of this judgment, failing which it shall be liable to pay interest on the arrears of the tax due till today @ 18% per annum compounded six monthly.

13. In the result, the writ petition is dismissed with costs to respondent no. 1 that we assess at Rs. 2500/- We further direct the petitioner to clear the dues in respect of show tax and octroi duty, the payment of which has been withheld by virtue of the interim order dated 22.12.1981 within six weeks from today. In case of default in clearing the dues, the petitioner will be liable to pay interest on the said dues due till today @ 18% per annum. The interest shall be compounded six monthly. The interim order dated 22.12.1981 stands discharged.

CRIMINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16 MARCH,2000

BEFORE
THE HON'BLE RATNAKAR DASH, J.

Criminal Misc. Application No. 2750 of 1997

Sri Ram Chandra Prasad Keshri and others ...Petitioners
Versus
The State of U.P. and another...Opp. Parties.

Counsel for the Applicant:
Shri Prem Chandra

Counsel for the Opp. Parties:
Shri R.K.Porwal
A.G.A.

Cr.P.C. Section 482 - A reading of the compliant as well as the statement of the witnesses including the complainant do not reveal that the accused persons had any

intention to deceive the complainant so as to bring the case within the ambit of section 420 I.P.C.- This being purely a civil dispute criminal proceeding was not maintainable.
Held –
Criminal law cannot be put into motion against them in absence of any material that they being patners of the firm had taken active part in inducing the complainant to supply the goods intending not to pay the price thereof. Therefore, the order of taking cognizance of the offence under section 406 I.P.C. a reading of the averments made in the complaint does not show that the accused persons were entrusted with any property which they dishonestly mis-appropriated or converted to their own use so as to make them liable for the said offence. In that view of the matter, cognizance of the said offence taken by the learned Magistrate being bad in law has to be set at naught.(para6)
Cases referred-
1998(V0l XVI) Crl. Rulings 625
1999 (3) S.C.C. 259
1999 S.C.C.686

By the Court

1. Heard learned counsel for the applicants and the learned Additional Government Advocate for the State. None appears for the opposite party no. 2.

2. In this proceeding under Section 482 Cr.P.C. the order dated July Ist, 1996 of the learned Judicial Magistrate-I, Etawah taking cognizance of the offence under sections 420, 406 I.P.C. is under challenge. The applicants (hereinafter referred to as the 'accused persons') are partners of the firm. M/s Keshari Traders, G.T. Road, Rajganj in the district of Hazari Bagh (Bihar) and they deal in consumer goods. Accused Ram Lakhan Prasad, one of the partners, it is alleged, approached the complainant, opposite party no. 2 herein on 1.8.1995 and requested to supply five truck-load of flour inducing him to believe that price would be paid on receipt thereof. Accordingly, the complainant sent flour on different dates, but received payment only in respect of the first consignment. He requested the accused persons to pay up the balance amount and the same having not been heeded to, led him to file the case which was registered as complaint case no. 175 of 1996. The learned Magistrate upon examination of the complainant and the witnesses was prima-facie satisfied that a case under sections 420 and 406 I.P.C. was made out and accordingly took cognizance of the said offences.

3. Learned counsel appearing for the accused persons contended that a reading of the complaint as well as the statement of the witnesses including the complainant do not reveal that the accused persons had any intention to deceive the complainant so as to bring the case within the ambit of section 420 I.P.C. So far as section 406 I.P.C. is concerned, he urged that even assuming the prosecution as true, it being not the case of the complainant that he had entrusted the goods to the accused persons which they dishonestly misappropriated or converted to their own use, no offence of criminal breach of trust can be said to have been made out against them. Lastly, he submitted that this being purely a civil dispute criminal proceeding was not maintainable and in support thereof he relied upon a decision of the Apex Court in the case of **Nageshwar Prasad Singh alias Sinha Vs. Narayan Singh and another**,1998 (Vol. XVI) Criminal Rulings 625.

4. With the assistance of the learned counsel for the accused persons as well as the counsel for the State I have gone through the complaint petition and the statement of the complainant recorded by the Magistrate. On facts, the question arises whether default of the accused persons to pay the balance price of the goods would make them criminally liable under section 420 I.P.C. No doubt, the facts narrated in the complaint reveal that it was a commercial transaction between the parties but in my opinion, that cannot be sole reason to hold that no offence of cheating has been made out. The complainant, it is alleged,

was deceived by accused, Ram Lakhan Prasad and was dishonestly induced to send five truck load of flour which he dispatched on different dates. But payment was made only in respect of one consignment. This, prima facie shows that accused Ram Lakhan Prasaed had dishonest intention from the very beginning not to make full payment of the price of the goods to the complainant. A similar case like the present one came up for consideration before the Apex Court in the case of **Rajesh Bajaj Vs. State of U.P. and others** (1999) 3 S.C.C. 259, as to whether non-payment of the balance amount in a commercial transaction would make one liable for cheating. In the said case, the grievance of the complainant was that he had supplied some garments to the accused the Managing Director of a foreign company. The garments were received and the payment was promised to be made within a fortnight but when no payment was made a report was lodged to the police on the basis of which a case under section 420 I.P.C. was registered. The accused approached the Delhi High Court seeking quashing of the criminal proceeding. The Court upon hearing found that there was nothing in the report to suggest that the accused had dishonest or fraudulent intention at the time of export of the goods and consequently quashed the proceedings. The complainant then moved the Apex Court and their Lordships in not agreeing with the view expressed by the Delhi High Court held that the commercial transaction or money transaction is hardly a reason for holding that the offence for cheating would allude from such a transaction and in fact many cheating were committed in the course of commercial and money transactions. The law laid down in **Rajesh Bajaj** (supra) has been reiterated in a latest decision in the case of **Trisuns Chemical Industry Vs. Rajesh Agarwal and others** (1999) S.C.C. 686.

5. The facts in Nageshwar Prasad Singh alias Sinha (supra) are some what different. In that case the accused was summoned to face a criminal charge under section 420 I.P.C. The allegation against him was that he entered into an agreement for sale with the complainants in respect of certain property and delivered possession thereof to them, but subsequently he backed out from the agreement and did not execute the sale deed. According to complainants, the said act of the accused amounted to 'cheating' punishable under section 420 I.P.C. It may be noted, simultaneously they also filed a suit for specific performance of contract. Taking all these facts into account, their Lordships held that the liability of the accused, if any arising out of breach of contract was civil in nature.

6. On a conspectus of the materials of the present case, I am of the opinion that a prima facie case under section 420 I.P.C. is made out against accused Ram Lakhan Prasad. So far others are concerned, they have been arrayed as accused being partners of the firm M/s Keshari Traders . Criminal law cannot be put into motion against them in absence of any material that they being partners of the firm had taken active part in inducing the complainant to supply the goods intending not to pay the price thereof. Therefore, the order of taking cognizance of the offence under section 420 I.P.C. against them is unsustainable. With regard to the offence under section 406 I.P.C. a reading of the averments made in the complaint does not show that the accused persons were entrusted with any property which they dishonestly mis-appropriated or converted to their own use so as to make them liable for the said offence. In that view of the matter, cognizance of the said offence taken by the learned Magistrate being bad in law has to be set at naught.

7. In the result, the criminal misc. case is allowed in part. The order of taking cognizance of the offence under section 420 I.P.C. against accused Ram Lakhan Prasad, petitioner no. 3 is maintained and the rest part of the impugned order is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 8.3.2000

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

Civil Misc. Writ Petition No. 52913 of 1999

Head Constable CP 28 Shiv Mohan Singh and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri C.B. Yadav

Counsel for the Respondents:
S.C.
Shri Sabha Jeet Yadav

U.P. Government Servant(Criterion for Recruitment by promotion) Rules 1994, Rule 4 - The Government order or office memorandum being executive in nature cannot supersede or be contrary to the Rule 1994 framed under Article 309 which is legislative in character. Held-

Once the government decided that 50 percent of sub-inspectors could be promoted from constable and head constable the criteria for promotion in absence of any other rule by government governing promotion to the post of sub-inspector could only beas provided by rule 4 of Rules 1994. The government orders issued after 1994 being contrary to the Rule 1994 cannot be given effect to. (para 10)
Case referred.
1999 (3) UPLBEC p. 1702

By the Court

1. The petitioners were initially appointed as constables under the U.P. Police Regulation read with Police Act, 1861. The petitioners have been promoted as Head Constables. The next promotion post of head constables is sub-inspector. The petitioners claim that a government order was issued on 6.8.1995 which provided that 50 percent vacancies be filled by direct recruitment and the remaining 50 percent were to be filled by promotion. Out of this 50 percent which was reserved for rankers 25 percent vacancies were to be filled in accordance with seniority subject to rejection of unfit and the remaining 25 percent vacancies were to be filled by departmental examination. The respondents issued an office memorandum dated 19.5.1998 which provided that 50 percent vacancies will be filled from the constables and head constables through departmental examination. It is the validity of this order which is under challenge in this petition.

2. I have heard Sri C.B. Yadav, learned counsel for the petitioners and Sri Sabha Jeet Yadav, learned standing counsel appearing for the respondents.

3. Learned counsel for the petitioners has urged that in view of rule 4 of U.P. Government Servants (Criterion for Recruitment by promotion) Rules, 1994 (in brief Rules 1994) the post of sub-inspector which is a promotional post of constables and head constables could only be filled in accordance with seniority subject to rejection of unfit. Learned counsel further urged that after these rules came into force in 1994 the respondents could not issue any government order or office memorandum providing for making promotion or selection to the post of sub-inspectors by any method other than provided by the aforesaid rule. Learned counsel for the petitioner has placed reliance on a division bench decision of this court in State of U.P. and others V. Shakuntala Shukla1999 (3) UPLBEC 1702.

4. On the other hand the learned standing counsel has vehemently argued that the post of sub-inspector is not the promotional post of constables or head constables. He has urged that the post of sub –inspector is a selection post and, therefore, Rules 1994 shall not be applicable, therefore, the respondents were well within their rights to make appointment and selection on the post of sub-inspector in

pursuance of office Memorandum dated 19.5.1998.

5. The short question that arises for consideration of this court is as to whether the post of sub-inspector is the promotional post of constable or head constable or is a selection post. The other question which arises for consideration is whether in view of the Rules 1994 the respondents could issue government order dated 6.8.1995 and office memorandum dated 19.5.1998 and proceed to make promotion on the post of sub-inspector.

6. There is no dispute that all the petitioners are head constables. There is also no dispute that 50 percent of the post of sub-inspectors in the state is to be filled by promotion. There further appears no dispute that the field of eligibility for such promotions are from the constables or head constables. In paragraph 3 (a) of the counter affidavit it is admitted that recruitment to the post of sub-inspector is not regulated by any statutory rules of recruitment framed under Police Act. It is claimed by the State that it is regulated by government order issued from time to time and by government order dated 19.5.1998 a policy decision was taken to fill 50 percent vacancies of sub-inspector by direct recruitment and remaining 50 percent by promotion of departmental candidates through competitive examinations. Since the government itself treats 50 percent post of sub-inspector as promotional the argument of learned standing counsel that it is selection post cannot be accepted.

7. In 1994 the state government framed U.P. Government Servants (Criterion for Recruitment by Promotion) Rules, 1994. Rule 4 of the rules lays down the criteria for promotion. It is extracted below:

> "Criterion for recruitment by promotion- Recruitment by promotion to the post of Head of Department, to a post just one rank below the Head of Department and to a post in any service carrying the pay scale, the maximum of which is Rs. 6700/- or above, shall be made on the basis of merit, and to rest of the posts in all services to be filled by promotion including a post where promotion is made from non-gazetted post or from one service to another service shall be made on the basis of seniority subject to rejection of unfit."

8. This rule came up for consideration before a division bench of this court in Shakuntala Shukla (supra) which after exhaustively dealing with its import in respect of promotion of sub –inspector to circle inspector where also there are no rules framed by the government and the promotion is governed by government orders issued from time to time held:

> "The rule apply to a recruitment by promotion to a post service for which no consultation with the Public Service Commission is required and " have effect notwithstanding anything to the contrary contained in any other service rules made by the Governor under the proviso to Article 309 of the Constitution, or Orders for the time being in force." Concededly, the post of Inspector is not in respect of which consultation with P.S.C. is required and it will brook no dispute that if at all the Rules are held to be applicable, the criterion therein for selection of Sub-Inspectors for promotion to the rank of Inspector would be 'seniority subject to rejection of unfit' and not 'merit' as contemplated in the Government order dated 5th Nov.1965. Therefore, the impugned selection which was made on the basis of the G.O. would be unsustainable being basically illegal."

9. This decision is also an authority for the proposition that Rules 1994 applies to police personals. In this view of the matter it appears unnecessary to deal with various decisions relied by learned standing counsel as they

have been dealt by the division bench and I respectfully agree with it.

10. I may now deal with the government orders issued from 1986 onwards. On 15.7.1986 an order was issued by the government that the posts of sub-inspectors shall be filled in the state by direct recruitment as well as by promotion in proportion of 50-50. Another order was issued on 6.8.1995 that out of 50 percent vacancies to be filled by promotion 25 percent would be filled by seniority subject to rejection of unfit and the remaining 25 percent were to be filled by departmental examination. Another order was issued on 19.5.1998 which provided that the 50 percent to be filled by promotion shall be by departmental examination. The effect of this order was that the promotion on seniority subject to rejection of unfit has been replaced by promotion by departmental examination. This criteria for promotion is contrary to Rule 4 which has been extracted above. The government order or office memorandum being executive in nature cannot supersede or be contrary to the Rule 1994 framed under Article 309 which is legislative in character. The government orders/office memorandum issued by the government regulating promotion of sub-inspectors to the extent that they attempt to fetter with legislative power cannot exist. In Shakuntala Shukla (supra) the argument that promotion on merits alone having been provided by the government order dated 5.11.1965 the field stood occupied and rule 4 of the rules mentioned above could not effect it was rejected as executive order could not stand once the field was occupied by rules framed under Article 309 of the constitution. Once the government decided that 50 percent of sub-inspectors could be promoted from constable; and head constable the criteria for promotion in absence of any other rule by government governing promotion to the post of sub-inspector could only be as provided by rule 4j of Rules 1994. The government orders issued after 1994 being contrary to the Rule 1994 cannot be given effect to.

11. In the result the writ petition succeeds and is allowed. The impugned selections made by the respondents for the post of sub-inspectors under the office memorandum dated 19.5.1998 stands quashed so far as it relates to 50 percent of promotional quota. The respondents are directed to hold selections afresh in accordance with U.P. Government Servant (Criterion for Recruitment and Promotion) Rules, 1994. The interim order is discharged.

12. The parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.4.2000

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

Civil Misc. Transfer Application No. 195 of 1998

Smt. Zohra Begum Widow and others ...Applicants
Versus
VIIth Additional District Judge, Bareilly and another ...Opposite parties

Counsel for the Applicants:
Sri Krishna Mohan

Counsel for the Respondents:
S.C.

Code of Civil Procedure Section 24- if there is sufficiently reasonable suspicion, however little it may be, in the mind of the litigants in such circumstances the same has to be taken into account and weighed with as a factor for the purpose of deciding an application under section 24 of the Code of Civil Procedure. But such suspicion must have some nexus or some objectivity.
Held-
In case the officer has already been transferred, then there could be no basis for

harboring any suspicion any further. Even if he is not transferred even then the allegation that has been made does not appeal to me to be sufficient to accept that the petitioner has a reasonable apprehension as against the officer. (para 18)

By the Court

1. Mr. Manu Saxena was permitted to address the court on the prayer of Mr. Ajit Kumar, learned counsel for the respondents in respect of this transfer application on behalf of the opposite party. He pointed out from the counter affidavit that Smt. Zohara Begum the petitioner no. 1 died on 20th July, 1998 whereas this petition was moved on 27th July, 1998. Therefore, this petition could not be maintained. In support of his contention, he had pointed out from Annexure CA-1 that the appellant-petitioners had made an application in the appeal intimating the court that the appellant no. 1/1 died on 20th July,1998.

2. But in the said application, it has been pointed out that the appellant no. 1/2 to 1/7 the heirs of Smt. Zohra Begum are already on record as appellants. In this petition, the said heirs of Smt. Zohra Begum are petitioners no. 1/2 to 1/7. Thus even if Smt. Zohra Begum is dead, the point raised by Mr. Manu Saxena cannot be acceded to. The petition may be dismissed as against Smt. Zohra Begum, petitioner no. 1/1, but it cannot be dismissed as against the other petitioners, namely, the petitioners no. ½ to 1/7. Therefore, this point does not help Mr. Saxena in opposing maintainability of the application of transfer.

3. The other ground he had pointed out is that the officer concerned before whom the appeal is pending and against whom allegation had been made had since been transferred. So far as this point is concerned, it may be discussed at a later stage in this order.

4. Mr. Krishna Mohan, learned counsel for the petitioner on the other hand submits that he wants 24 hour's time to file rejoinder affidavit to the counter affidavit. Since I have not looked into the counter affidavit and since the first point is immaterial, therefore, at least in order to counter the first point taken by Mr. Saxena, no rejoinder would be necessary.

5. So far as the second point is concerned, if the officer is transferred, in that event no amount of rejoinder affidavit could help Mr. Krishna Mohan. However, Mr. Krishna Mohan very fairly concedes that he has no information as to whether the officer has been transferred or he is still there.

6. Be that as it may. It may not be necessary to decide the said question as to whether the officer concerned is transferred or not if there are no grounds for transfer of the appeal on merit. The other ground is in relation to; the allegations against the officer concerned.

7. The allegation is to the extent, apart from the allegation against the officer is that the petitioner has a reasonable apprehension that he will not begetting justice if the appeal is decided by any officer in the district since the opposite party is an office-bearer of the local Bar Association and therefore, the appeal filed by her would be decided in her favour. This apprehension according to Mr. Krishna Mohan can be reasonably apprehended by the appellant petitioner on account of the fact that the appellant petitioner had lost the case in the learned trial court.

8. If every such apprehension is to be accepted, in that event all cases in which a lawyer is involved has to be transferred outside the courts or districts in which he is practicing. This apprehension that has been expressed is a subjective one. It cannot be substantiated objectively. Subjective apprehension is a particular state of mind of a particular person. Such ground of subjective satisfaction cannot be accepted. Even though Mr. Krishna Mohan refers to various

decisions of the High Courts as well as Supreme Court with regard to the proposition laid down therein. It is settled principle of law that if there is sufficiently reasonable suspicion, however little it may be, in the mind of the litigant, in such circumstances the same has to be taken into account and weighed with as a factor for the purpose of deciding as application under Section 24 of the Code of Civil Procedure. But such suspicion must have some nexus or some objectivity. If some one comes and says that he has some suspicion and apprehension in his mind, in that event it will be too general a proposition and will destroy the entire infrastructure of the judicial system. Defeat of a case in the learned trial court cannot be a ground for suspicion. If such a proposition is accepted, in that event whenever a litigant looses then he will be asking for transfer of his appeal, and in that event all appeals are to be transferred simply on the basis of subjective suspicion on the part of the appellant. It will be too wide a proposition which is very difficult to accept. In view of the settled principle the suspicion should be a suspicion to be accepted under the judicial norms and principles to be a suspicion which could be reasonably harbored by a litigant. The court has to find out the situation and the circumstances whether the suspicion so harbored could be harbored reasonably by a sensible man.

9. In the facts and circumstance of this case as discussed above, I do not feel that the apprehension in the mind of the appellant could be termed as a reasonable suspicion. Therefore the ground on which it has been sought to be transferred, cannot be acceded to.

10. It seems that the petitioner had made wide allegations both against the counsel and as against the court. The way the allegations have been made and the suspicion has been put forward supporting the apprehension, does not seem to be bonafide. Inasmuch as while making allegation against the lawyer, the petitioner has also made allegation against the court. In case the officer has already been transferred, then there could be no basis for harboring any suspicion any further. Even if he is not transferred even then the allegation that has been made does not appeal to me to be sufficient to accept that the petitioner has a reasonable apprehension as against the officer.

11. In that view of the matter, I am not inclined to interfere. The petition of transfer is, therefore dismissed. Interim order, if any, stands discharged. It is expected that concerned officer may decide the appeal as early as possible. Preferably within a period of six months from the date a certified copy of this order is produced before the concerned officer. However, it is expected that if the same officer is continuing, he may overlook and ignore the allegations made against him and it is expected that he will decide the matter strictly on merits and in accordance with law without being influenced by any observation made either in this order or any allegation made by the petitioner in this application.

12. Let a certified copy of this order be issued to the learned counsel on payment of usual charges at the earliest.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD MARCH 16, 2000

BEFORE
THE HON'BLE RATNAKAR DASH, J.

Criminal Misc. Application No. 5300 of 1996

Shiv Narain and others ...Applicants
Versus
The State of U.P. and others ...Oppo. parties

Counsel for the Applicants:
Shri S.P. Singh
Shri Sanjay Kumar Singh

Counsel for the Opposite Parties:

A.G.A.

Cr.P.C. Section 319 –Power under section 319 can be exercised even on the basis of the evidence of a witness or witnesses recorded in examination –in-chief
Held-

Once the Sessions court takes cognizance of the offence pursuant to the committal order the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under section 319 of the Code can be invoked. (para 7)
Cases referred-
1999 (38) A.C.C. P. 123
1993 (3) S.C.C. P. 167
1998 Cr. Law Journal P. 4618

By the Court

1. The petitioners in this petition under section 482 Code of Criminal Procedure 1973 (for short Cr. P.C.) have sought to quash the order of the learned III Additional Sessions Judge, Kanpur whereby he by invoking power under section 319 Cr. P.C. has arrayed them as accused persons in the Sessions Case registered as S.T. No. 323 of 1994 under Section 498 and 306 I.P.C.

2. The prosecution case in short is that Bitola (hereinafter referred to as the deceased) daughter of Surajan, the informant was given in marriage to accused Balwan Singh about seven years before the incident. Petitioners no.2 and 3 are the parents and petitioner no. 1 is the brother of Balwan Singh. It is alleged that the deceased was tortured and ill treated by the petitioners as well as her husband as sufficient dowry had not been given in the marriage. She had been complaining to her parents that she was being pastered to get scooter, some gold ornaments and cash of Rs, 20,000/- Ultimately when their demand was not satisfied they committed her murder. A written report was lodged to the local police on receipt of which a case under sections 498-A and 302 I..P.C. was registered and investigation commenced and on completion there of a charge-sheet was led only against accused Balwan Singh under section 498-A and Section 306 I.P.C. After commitment, the case was transferred to the file of III Additional Sessions Judge, Kanpur for trial in accordance with law. During trial, the learned trial judge recorded the evidence of Surjan, the informant (P.W.1) who in his examination –in-chief supported the prosecution version as set out in the first information report. He specifically stated that accused Balwan Singh as well as these petitioners tortured the deceased on account of non-fulfilment of demand of dowry. In view of such evidence learned counsel appearing for the State filed a petition under section 319 Cr. P.C. to bring the petitioners to the array of the accused and to proceed with the trial. Upon hearing, the learned trial Judge allowed the prayer by order dated 26th July, 1996, a copy whereof is at Annexure-6 and issued process to the petitioners for their appearance Aggrieved by the said order, the petitioners have approached this court by filing the present petition.

3. Learned counsel appearing for the petitioners has strenuously contended that the statement of informant, P.W. 1 with regard to the petitioners' involvement in the incident being not complete in all respect, inasmuch as, the statement so given by P.W.1 in examination –in-chief implicating the petitioners in the incident having not been tested by cross-examination, the same should not be construed as 'evidence' for taking action under section 319 Cr. P.C. Par centra, learned counsel appearing for the State would urge that in view of the law laid down by a Division Bench of this court in the case of *Ram Gopal v. State of U.P.* 1999 (38) A.C.C. p. 123,it was not obligatory of the court to complete the examination of P.W. 1 for summoning the petitioners as accused with the aid of the aforesaid provision. In view of the submissions made at the Bar the sole question for consideration is whether statement of P.W.1 recorded in examination-

in-chief having not been tested by cross-examination can be treated as evidence to enable the court to add the petitioners as accused by invoking power under section 319, Cr.P.C.

4. Word 'evidence' defined in Section 3 of the Evidence Act means and includes;-

(1) all statement which the court permits or requires to be made before it by witnesses, in relation to matters to fact under inquiry ; such statements are called oral evidence;

(2) all documents produced for the inspection of the court, such documents are called documentary evidence.

According to Wigmore the term 'Evidence' represents ;

" Any knowable fact or group of facts, not a legal or a logical, principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of proposition, not of law, or of logic, on which the termination of the tribunal is to be asked'

Tayler used the word 'Evidence' to mean "all the legal means exclusive of mere argument which tend to prove or disprove any fact that true of which is submitted to judicial investigation." Thus, the word 'evidence' signifies the instruments by means of which the relevant facts are brought before the court, such as, witnesses and documents.

5. Chapter X under caption 'of the examination of witnesses' in the Evidence Act has catalogued various sections of which Sections 137 and 138, relevant for the purpose may be referred to. A party to a proceeding examines a witness to get all material facts from him within his knowledge to support his (party's) case and such examination is called 'examination-in-chief' The evidence so given by the witness when challenged by the adversary in order to impeach his credibility is called 'cross-examination'. After cross examination, if there appears some ambiguity in the evidence of the witness, the party calling him may further examine him which is called ' re-examination' After all these procedures are followed, inasmuch as, a witness is examined-in-chief, cross-examined and re-examined then the evidence becomes complete for appreciation of the court. There is, however, exception to this normal rule. In certain circumstances the statement of a witness recorded in examination-in-chief can be treated as evidence even before the same is tested by cross-examination. Reference in this context may be made to the provisions contained in Chapter XIX of the Cr. P.C. In a case arising out of a complaint which is triable as a warrant case, the Magistrate records the statement of the witnesses produced by the complainant in support of the accusation, where-after on consideration of such statement if he is of the opinion that the same is sufficient to presume that the accused has committed any offence then he shall frame the charge accordingly (See sections 244,245 and 246 Cr. P.C.) A reading of the aforesaid provisions clearly goes to show that the statement of the witnesses recorded in the examination-in-chief even though has not passed through the test of cross-examination can for the limited purpose of framing a charge be treated as 'evidence' Therefore, it cannot be said as universal proposition of law that so long as a witness is not cross-examined his statement so given in examination-in-chief cannot be accepted as 'evidence'

6. Adverting to the question posed in this case it need be stated that Section 319 Cr. P.C. does not specifically provide at what stage of the trial the court with the aid of the said provision can bring a person to the array of the accused for being tried along with other accused. Judicial opinion is not unanimous in this regard; some High Courts say that resort

to Section 319 can be had only after the cross examination of the witness or witnesses is complete. On the other hand, in the opinion of the other High Courts power under section 319 can be exercised even on the basis of the evidence of a witness or witnesses recorded in examination-in-chief. So far this court is concerned conflicting views were expressed by the Single Benches. Ultimately the matter came up for adjudication before a Division Bench in Ram Gopal (supra) where their Lordships having made a discussion of various provisions of the Cr. P.C. and referring to a catena of decisions answered the question in the panel ultimate paragraph of the judgement as under :

" the term 'evidence' as used in Section 319 Cr.P.C. does not mean an 'evidence ' complete by cross-examination and the court can take action under Section 319 Cr. P.C. on the statement made in examination-in-chief of one or more witnesses."

As a judicial precedent, the aforesaid decision is binding on me and I also concur with the view expressed by the court as extracted above. In that view of the matter I am of the opinion that no fault can be found with the trial Judge in summoning the petitioners as accused persons on the basis of the evidence of P.W.1 recorded in examination-in-chief. Resultantly. The criminal miscellaneous application fails and the same is dismissed.

7. However, before parting with, I would like to observe that the court in **Ram Gopal** (supra) relying upon the decision in **Kishun Singh v State of Bihar** 1993 (3) S.C.C. 167 has held that a court of session has power to summon a person as an accused without recording evidence if materials on the record annexed to the report under section 173 Cr. P.C., revealed his involvement. In **Kishun Gopal** (supra) the Hon'ble Supreme Court has taken the view that on the Magistrate committing the case under section 209 Cr. P.C. to the court of Session, the bar of section 193 is lifted thereby investing the court of Sessions a complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on the record. I may note the aforesaid view has been over-ruled by a larger bench of the Hon'ble Supreme Court in the case of **Ranjit Singh v State of Punjab** 1998 Criminal law journal p. 4618, where in paragraph 19 of the judgment Their Lordships observed:

" Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under section 319 of the Code can be invoked"

8. In view of the above that part of the judgment rendered by this court in Ram Gopal (supra) that looking to the materials annexed to the report under section 173 of the Cr,. P.C. the court of sessions can add a person as accused is no longer good law.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD MARCH 16, 2000

BEFORE
THE HON'BLE RATNAKAR DASH,J .

Criminal Misc. Application No. 4965 of 1996

Shabihul Hasan Jafari ...Applicant
Versus
Zarin Fatma and another ...Respondents

Counsel for the Applicants:
Sri Haider Zaidi

Counsel for the Opp. parties:
A.G.A
Shri Ashok Kumar Srivastava

Muslim Women (Protection of Rights on Divorce) Act, 1985 read with Code of Criminal Procedure, 1973, Ss. 125 & 126 –A proceeding under section 125 Cr. P.C. being civil in nature, the Magistrate can invoke inherent power to recall his earlier order and finally dispose of the proceeding.

Held-

That due to petitioner's absence a maintenance proceeding either under the Act or the Code can be dismissed and subsequently on the prayer being made the said order of dismissal can be recalled or set aside and the case can be restored to its original position for effective adjudication on merits. (para 8)

Cases referred-

1986 A.C.C. P. 346
1989 Cr.L.J. P. 1866
1991 Cr.LJ .P.2035
1987 Cr. L.J. P. 726
A.I.R. 1963 SC P. 1521
(1949)2 All ER 155.

By the Court

1. A question of quite considerable importance that falls for determination is whether a maintenance proceeding arising under the Muslims Women (Protection of Rights on Divorce) Act, 1985 (for short the Act) having once been dismissed for default of the petitioner could be restored for adjudication on merit. In the present case, parties are Muslims and are governed by their personal law. Admittedly, opposite party no.1 being a divorced woman approached the competent court claiming maintenance for herself during the Iddat period as also for her minor child as provided in Section 3 of the Act. On the date of hearing she being found absent, the learned Magistrate dismissed the case for default. Thereupon, she moved an application to recall the order of dismissal and to decide the case on merit .Her prayer was allowed and consequently the order was recalled and the case was restored. Aggrieved thereby, the petitioner filed a petition to recall the said order. The learned court below, however, on consent of the parties dismissed the said petition as not pressed, inasmuch as, the parties agreed that the case may be disposed of on merit on the basis of the evidence to be adduced by them. Accordingly date was fixed for hearing. In the meanwhile the petitioner filed another petition to recall the order of restoration mainly on the ground that Act did not permit the court to restore the case once it was dismissed for default. By the impugned order, the court rejected the petition and it is against that order the present case has been filed.

2. Learned counsel for the petitioner strenuously contended that once the case was dismissed for default of opposite party no.1 the learned Magistrate became functus-officio and, therefore, had no jurisdiction to recall the order and to restore the case for fresh hearing. According to the counsel, the said order being revisable, it was open to the opposite party no.1 to approach the revisional authority to get the same annulled/set aside . In support of his submission he relied upon the decision of the Apex Court in the case of **Major General A.S. Gaurava and another v. S.N. Thakurand another** (1986 A.C.C. 346)

On the other hand, learned counsel for the opposite party no.1 controverting the aforesaid submission urged that a maintenance proceeding under the Act being civil in nature, it was within the competence of the Magistrate to recall the order of dismissal passed for non appearance of the opposite party no.1 and to restore the case for effective adjudication on merits. In view of the aforesaid contentions made at the Bar , the questions that rise for determination are:

1. Whether a petition for maintenance filed either under the Act or the Code of Criminal Procedure can be dismissed for default of the petitioner?

2. Whether the Magistrate having dismissed such petition on the petitioner's absence can recall the order of dismissal and restore the case?

3. Prior to the Act came into force, a married woman, whether divorced or nor on being refused of maintenance by her husband was entitled to approach the Magistrate Ist. Class under section 125 of the Code of Criminal Procedure, 1973 (for short "the Code") for grant of maintenance. However, separate provision was made in the Act to claim such relief by a divorced woman of the Muslim community for herself as well as for her minor child. The Act contains in total seven sections of which Section 2 is the definition section. Section 3 relates to the entitlement of maintenance of a divorced woman as well as for her child besides 'mahr' or dower agreed to be paid to her at the time of marriage and the other properties given to her before or at the time of marriage. Section 4 envisages necessary orders for maintenance to be passed by the Magistrate. Section 5 makes provision enabling either party to made a declaration by affidavit to approach the common law forum for resolution of the dispute. Section 6 relates to the Rule making power of the Central Government and section 7 is a transitory provision. In exercise of power conferred by section 6 of the Act the Central government has framed Rules namely; Muslim Women (Protection of Rights on Divorce) Rules, 1986 (for short "the Rules") of which Rule 4, relevant for the purpose reads as under:

"4. Evidence.- All evidence in the proceedings under the Act shall be taken in the presence of the respondent against whom an order for the payment of provision and maintenance, mahr or dower or the delivery of property is proposed to be made or, when his person al attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner specified for summary trials under the Code:

Provided that if the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on application made within seven days from the date there of subject to such terms as to payment of cost to the opposite party as the Magistrate may think just and proper"

4. The aforesaid Rule is peri-materia with Section 126 of the Code with a little variation. Proviso to the Rule envisages that the Magistrate may hear and determine the case ex parte on being satisfied that the opposite party is either wilfully avoiding service or neglecting to attend the court . Such ex parte order, however, can be set aside in the event the opposite party makes an application within seven days there of showing good case for non-appearance. A similar provision has also been made in sub-section 2 of section 126 of the Code for setting aside the ex parte order on an application being filed within three months of passing of such order. It is, therefore, manifest that the Legislature has provided scope to the opposite party both under the Act and the Code to move the court to have the ex parte order set aside, but there is omission of a similar provision enabling the petitioner to seek for restoration of the case in the event it is dismissed for default. A married women who is either deserted or divorced needs a roof over her head and food and clothing for sustenance. Therefore, under both the statutes provisions are made to secure her much needed relief in order to prevent starvation and vagrancy. To achieve such object within a reasonable time power has been conferred upon the magistrate to adjudicate the claim by adopting summary procedure. Some times a woman for the reasons beyond her control fails to attend the court resulting dismissal of the case. In such a situation, taking advantage of absence of any provision for restoration, if it is held that the court lacks jurisdiction to restore the case, then the very object and purpose of the legislature would be frustrated. Needless to

say, an Act being the will of the legislature, the paramount rule of interpretation which over-rides others is that statute is to be expounded according to the intent of them that made it. Therefore, if there is any lacuna in the statute, it obligates the court to legislate judicially in order to give effect to the will of the legislature. But while doing so, the court should bear in mind that it does not travel of its course. In this context it is apposite to refer to what Lord Denning, an eminent jurist, said in the case of **Seaford Court Estates Ltd. v. Asher** (1949) 2 All ER 155; said:

"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament… and then he must supplement the written word so as to give 'force and life' to the intention of the legislature…A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the textured of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

5. Similar question as in the case on hand came for consideration before the Punjab and Haryana High Court in the case of **Smt. Kamla Devi and others v. Mehma Singh** 1989 Criminal law Journal, p. 1866, where the court in paragraph 7 of his judgment observed thus:

"**There is no specific provision in Chapter IX of the Cr. P.C. dealing with application for grant of maintenance to wives, children and parents to dismiss such applications for non-appearance of the petitioner. Since such applications are not to be equated with criminal complaints which necessarily are to be dismissed for non-appearance of the complainant in view of S 256 of the Cr. P.C. it is only in the exercise of inherent power of the Court that for non-appearance of the petitioner, application under S. 125 of the Code is dismissed. If that is so there is no reason why there should not be inherent power with the Court to restore such applications dismissed in default on showing sufficient cause by the petitioner for his non-appearance."**

To the same effect also is the view of the Calcutta High Court in the case of **S.K. Alauddin alias Alai Khan v. Khadiza Bibi alias Mst. Khodeja Khatun and others** 1991 Criminal Law Journal, 2035. In the said case, application under section 125 Cr. P.C. was petition for restoration, the Magistrate allowed the same and restored the case to file. The petitioner challenged the correctness of the said order in the High Court by filing a revision. Following the decision of the Supreme Court in the case of **Mst. Jagir Kaur v. Jaswant Singh;** A.I.R. 1963 S.C. 1521, the Court held that a proceeding under section 125 Cr. P.C. being civil in nature, the Magistrate can invoke inherent power to recall his earlier order and finally dispose of the proceeding.

6. There is of course a decision of the Andhra Pradesh High Court in the case of **Abdul Wahed v. Hafeeza Begum and others** 1987 Criminal Law Journal 726, which to some extent supports the case of the petitioner. In the said case a similar situation arose where petition for maintenance of the opposite parties was dismissed for default. They moved an application to recall/set aside the said order which was also dismissed. Feeling aggrieved they preferred revision and the learned Sessions Judge being of opinion that the order of dismissal was illegal set aside the same. The revisional order come to be challenged by the petitioner in the High Court. The court while agreeing with the view of the learned Sessions Judge that the Magistrate had no power to dismiss the case observed:

"The trial court is not empowered to pass an order dismissing the application for default and much less the application for setting aside the default order cannot be entertained. It is obvious that the trial court has no power to pass a default order. The revision has been filed before the Sessions Court against the order declining to ----aside the ex parte order and restore the same on file. The Magistrate has no power to pass default order or set aside such ex parte order and the sessions court invoking the revisional jurisdiction cannot clothe such power with the magistrate in the absence of provision to that effect in the Cr. P.C. Though the revision petition before the sessions court is confined to the order declining to set aside the ex parte order, the session court under the powers vested in revisional jurisdiction is justified in setting aside the original order dismissing the application for default. The Sessions Court has ample power under revisional jurisdiction to revise any illegal order passed by the subordinate court and need not be fettered by the subject matter in the revision petition."

With respect I do not agree with the aforesaid proposition of law. It will be wrong to say that since there is no express provision in the Code, the Magistrate does not have power to dismiss the proceeding for default of the petitioner. Supposing that the petitioner being no more interested does not appear in the case, then should the Magistrate helplessly adjourn the case or should he issue any process for compelling the petitioner's appearance or should he proceed with hearing and record the evidence of the opposite party and finally dismiss the case on the basis of the evidence so collected? If these questions are answered in affirmative, in my opinion, it will be an absurd proposition of law. The petitioner having lost interest in the case if does not turn up on the date of hearing, it will be futile exercise to proceed with the hearing by asking the opposite party to lead evidence in support of his defence and then pass the order dismissing the case. The matter may be judged from another angle. Assuming that the trial court has no power to dismiss the case on petitioner's default, as observed by the Hon'ble Judge because of absence of an express provision in the Code then in the case the order of dismissal being without jurisdiction is non-est in the eye of law and, therefore the Magistrate would be competent to recall the said order and to restore the case to its original position. To undo the wrong committed by the Magistrate, the petitioner should not be forced to approach the revisional court.

7. Next I will deal with the decision of **Maj. Gen. A.S. Gaurav and another** (supra) relied upon by the learned counsel for the petitioner. In that case the question before the Apex Court was whether the Magistrate could restore the complaint to his file by revoking his earlier order dismissing it. Having made a in-depth study on the question involved Their Lordships answered the question in negative. There is no doubt about the aforesaid proposition of law enunciated by the Apex Court. The said decision is quite distinguishable. A petition for maintenance can not be termed as complaint. The word complaint' defined in section 2 (d) of the Code means an allegation made orally or in writing to a Magistrate with a view to his taking action under the code, that some person whether known or unknown has committed an offence, but does not include a police report. Refusal to maintain wife, child and parents by a person is not an offence under the Indian Penal Code or under any Statute. In that view of the matter, the ratio of the aforesaid decision has no application to the case in hand.

8. In view of discussion made above, I am of the opinion that due to petitioners absence a maintenance proceeding either under the Act or the Code can be dismissed and subsequently on the prayer being made the

said order of dismissal can be recalled or set aside and the case can be restored to its original position for effective adjudication on merits Resultantly, the present misc. case fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 4.4.2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil Misc. Writ Petition No. 10281 of 1999

Rattan Anmol Singh and another ...Petitioners
Versus
New Okhla Industrial Development Authority and others ...Respondent

Counsel for the Petitioners:
Shri Shambhu Chopra

Counsel for the Respondents:
U.S. Awasthi
Mrs. Mridul Tripathi

Constitution of India Article 226 -Restoration application-for the fault of the office of the Hon'ble Court, neither the counsel nor the petitioner should suffer restoration allowed.
Held-
The mistake was of the Court's office we should not allow the cause of justice to frustrate on account of technicality invoking yet another legal doctrine the refusal of the Restoration Application will mean piling unreason upon technicality. (para 4)

By the Court

1. Heard Sri Shambhu Chopra. Learned counsel appearing on behalf of the petitioners and Mrs. Mridul Tripathi, learned counsel appearing on behalf of the Respondents. Sri Shambhu Chopra learned counsel for the writ petitioners of C.M.W.P. No. 10281 of 1999 informs us that since his name was printed incorrectly as B Chopra in the Court 's daily cause list dated 15.5.1999 and hence he-could not bonafide mark the daily cause list and thus the default was not wilful. He also takes up a ground that in misprinting his name in the daily cause list the mistake was of the Courts office and, thus, it will be in the interest of justice to restore back the writ petition to its original file and number under our inherent powers. Mrs. Mridul Tripathi, learned counsel appearing on behalf of the Respondents raises a technical objection that since this application has been filed for the restoration of the Restoration Application dated 15.03.2000, the prayer made by Sri Chopra may not be allowed .

2. Admittedly, the name of Sri Shambhu Chopra, learned counsel for the petitioners, was misprinted as B. Chopra. It is well known that a counsel normally marks his cases printed in the daily cause list with reference to his name. In not printing the name of Sri Shambhiu Chopra as counsel for the petitioners in the daily cause list, the office has committed a mistake. Actus Curie Neminem Gravabit (acts of the Court prejudices none) is a well known maxim. Consequently, for the fault of the office neither Sri Chopra or the petitioners should suffer.

3. The prayer made in this Restoration Application is not only for restoration of the Restoration Application dated 15.3.2000 but also of the writ case both.

4. Since we have already recorded a finding that the mistake was of the Court's office, we should not allow the cause of justice to frustrate on account of technicality invoking yet another legal doctrine that refusal of the Restoration Application will mean piling unreason upon technicality.

5. For the aforementioned reasons exercising our inherente powers for the purposes of rectifying the mistake of the office, we restore back C.M.W.P. No. 10281 of 1999 to its original file and number.

6. This Restoration Application is disposed of accordingly. But without cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.4.2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE LAKSHMI BIHARI, J.

First Appeal From Order No. 220 of 2000

Appeal against the Judgment and order dated 14.2.2000 passed by Commissioner, Workman Compensation Act 1923 and Assistant Labour Commissioner U.P. Lohia Nagar, Ghaziabad in Case No. WCA 28/97 Smt. Manju Sharma and others Versus Goesi M.G. Gases Ltd. and another.

M/s Goel M.G. Gases Ltd. & another
...Defendant Appellants
Versus
Smt. Manju Sharma & others
...Plaintiff Respondents

Counsel for the Appellants:
Shri J.N. Tewari
Shri Rakesh Tewari

Counsel for the Respondents:
Sri Y.K. Sinha

Section 30 of workmen's Compensation Act- the substantial questions of law have to be mentioned in the memo of appeal- Held- (para 3).

An appellant is required to state what are the substantial questions of law involved in his appeal because the legislature categorically lays down a condition that no appeal shall lie against any order unless substantial question of law is involved in the appeal.

By the Court

1. When we pointed out to Shri J.N. Tiwari, learned Senior Counsel appearing on behalf of the appellant as to where are the substantial questions of law in the memorandum of appeal, he comes up with a stand that the same is not required to be stated. We are astonished by the stand taken by Shri Tiwari.

2. Section 30 of the Workmen's Compensation Act reads as under:-

"**30. Appeals:-** (1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely –

(a) an order awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or part for a lump sum;

[(aa) an order awarding interest or penalty under Section 4-A;]

(b) an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependent;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of Section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same subject to conditions:

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and, in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided further that no appeal shall lie in any case in which the parties have agreed to

abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties:

[Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.]

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of Section 5 of the Limitation Act, 1963 (36 of 1963), shall be applicable to appeals under this section."

3. Under the first proviso an appellant is required to state what are the substantial questions of law involved in his appeal because the legislature categorically lays down a condition that no appeal shall lie against any order unless substantial question of law is involved in the appeal.

4. We, accordingly, overrule the stand of Mr. Tiwari, but instead of dismissing this appeal for the aforementioned infirmity we grant time till 13th April, 2000 to file the substantial questions of law allegedly involved in this appeal, failing which the memorandum of appeal shall stand dismissed without further reference to a Bench.

Shri J.N. Tiwari, learned Senior Counsel appearing on behalf of the appellant prays for and is granted one month time to file the necessary certificate evidencing the factum of deposing the necessary amount, failing which the Appeal shall not be placed by the office for its entertainment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.2.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil misc. Writ petition No. 5066 of 1998

Ved Prakash Sahu ...Petitioners
Versus
Civil judge /Prescribed Authority, Jhansi & others ...Respondents

Counsel for the Petitioner:
Shri Udai Karan Saxena
Shri K.M. Dayal

Counsel for the Respondents:
S.C.
Shri A.N. Bhargava
Shri B.N. Agrawal

U.P urban buildings (Regulation of letting ,Rant and eviction) Act, 1972 SS. 21(1) (a) & 34 -application by land lord for release of shop for his unemployed son - disputed shop fell into share of land lord after partition - tenant - petitioners owning two Hotels besides other properties - prescribed authority allowed release application - appeals also dismissed - Both the courts found land lords ' third son is assisting his father as he had no independent shop, will not initiate his desire and right to carry on independent separate business - Hence writ petition dismissed .(Held - para 11)Both the authorities have found that Ashok Kumar will carry on business independently in the disputed premises and as such it is bona fide required by respondent no. 3. The view taken by the respondents does not suffer from any illegality.

Case referred.
1994 (1) ARC 396
1981 ARC 563
1995(1) ARC 220
1984 (1) ARC 113
AIR 1999 SC 3089

By the Court

1. This writ petition is directed against the order dated 20.7.1994 passed by the

Prescribed Authority releasing the disputed accommodation in favour of the landlord - respondent No. 3 and the order of the appellate authority respondent No.2 and the order of the appellate authority respondent No.2 dated13.1.1998 dismissing the appeal against the aforesaid order.

2. Briefly stated the facts, are that respondent No. 3 filed an application for release of the disputed accommodation against the petitioners and respondent Nos. 4 to 6 under section 21(1) (a) of U.P. urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (in short the act) with the allegation that Bhagwan Das Sahu was a tenant of Shop Nos. 180 and 181 situate in Chaudhariyana Jhansi. After his death, he was succeeded by his three sons and three daughters. One of his sons, Ashok Kumar died and he was succeeded by his window Smt. Sandhya and son Sanjai Kumar .It was stated that he has three sons, namely, Ashok Kumar, Awadh Kumar and Arvind Kumar .His Sons are unemployed and he wants to establish them in the business and the disputed shop was required for that purpose. He himself was carrying on cloth business in shop situate in mohalla khatriyana but his sons will carry on independent business in the disputed shop. It was further stated that the disputed shops were two but the tenant made material alteration and converted into one shop. These shops are in a very dilapidated condition and require demolition and reconstruction. He will use the reconstructed shop after their demolition. The tenants have two hotels namely, Ashok Hotel and Prakash Hotel besides various other shops and properties in their possession and the tenants will not suffer any hardship on their eviction from the disputed shop.

3. The two sets of objections were filed - one by Ved Prakash Sahu petitioner No.1 and another by Smt. Sandhya Sahu -petitioner No.3. They denied that the landlord-respondent requires the disputed shop for carrying on any business. His son Arvind Kumar has been appointed as Lecturer in Mathematics in Bundelkhand Degree College . His another son Awadesh Kumar is an Advocate and his third son Ashok Kumar is assisting his father in business. It was denied that the house was in a dilapidated condition. The landlord has constructed certain shops situate opposite to the District Jail Jhansi. The property in dispute is a joint property of various owners and without their impleadment in the application, it is not maintainable .

4. The prescribed Authority allowed the application by his order dated 20.7.1994 on the finding that Ashok Kumar is unemployed and he requires the disputed shop for carrying on business. The disputed shop fell into the share of the landlord after partition . The tenant petitioners have two Hotels, namely Ashok Hotel and Prakash Hotel, besides other properties and they would not suffer any hardship in case they are evicted. Petitioner Nos. 1 and 3 filed separate appeals and both these have been dismissed by the appellate authority-respondent No.2 on 13.1.1998 . These orders have been challenged in the present petition.

5. I have heard Sri K.M. Dayal, learned counsel for the petitioners and s/Sri A.N. Bhargava and B.N. Agarwal counsel for the contesting respondent.

6. Learned counsel for the petitioner contended that respondent No.3 had impleaded Ashok Kumar as one of the tenants in the application and after his death, he filed an application for substitution of his heirs, namely, his window Smt. Sandhya, son Sanjai Kumar and daughter Priyanka but he did not apply for appointment of guardian-ad-litem for the minor son Sanjai Kumar and daughter Priyanka and in absence of any guardian having been appointed by the Court, the Prescribed Authority had no jurisdiction for pass any order for their eviction.

7. Smt. Sandhya was mother of Sanjai Kumar and Priyanka. She was their natural guardian. she was impleaded as a party . She had filed a separate objection and also represented their wards, namely, Sanjai Kumar and Priyanka. It was never alleged that their mother had any interest adverse to her wards.

8. Learned counsel for the petitioners contended that the provisions of Order 32 Rule 3, C.P.C are mandatory and it is obligatory on the Court to appoint a proper person to be guardian of the minor defendant in suit . He has placed reliance upon the decision Sri Arjun Singh Vs. II Additional Civil Judge, Aligarh and others, 1994 (1) ARC396 wherein it has been held that if the court does not appoint any guardian under Order 32 Rule 3, C.P.C for minor defendant, the decree passed against such minor would be a nullity. This decision relates to a suit filed in a regular civil court. The provisions of Order32 Rule 3, C.P.C are not strictly applicable in a proceeding before the Prescribed Authority. Section 34 of the Act provides that the District Magistrate, the prescribed Authority or any appellate or revising authority for the purpose of holding any enquiry in appeal or revision under the Act shall have the same powers as are vested in Civil Court under the Code of Civil Procedure when trying a suit in respect of the matters enumerated therein. Order 32 Rule 3, C.P.C has not been specifically mentioned in it. A Division Bench of this Court in Ram Naresh Tripathi Vs II Additional Civil Judge, Kanpur and others,1981 ARC 563 held that Order 22 Rule 3 (2) , C.P.C is not applicable in a proceeding under the Act but so far as the prosecution of the case, the principle may be applicable. Similarly , in a case before the Prescribed Authority where a minor has been impleaded and he is represented by a guardian , the proceedings will not be vitiated merely because the prescribed Authority himself has not appointed a guardian for the minor in the proceedings before him. Sanjai Kumar and Priyanka were represented by their mother Smt. Sandhya. She had filed a separate objection resisting the claim of respondent No.3 various grounds .In these circumstances, the mere failure on the part of the Prescribed Authority to appoint her as guardian ad litem, will not vitiate the order passed by him .

9. It may further be noted that after the death of Bhagwan Das Sahu his heirs are joint tenants and if some of the heirs had filed objection against the application of landlord for release of the disputed accommodation, such heirs represent the interest of all the heirs of the deceased tenant. In Harish Tandon Vs. Additional District Magistrate, Allahabad , U.P and others, 1995 (1) ARC220 it has been held that it is a single tenancy which devolves on the heirs and they succeed to the tenancy as joint tenants. After the death of Bhagwan Das Sahu , even if Sanjai Kumar and Priyanka were not properly represented through a guardian appointed by the prescribed authority, their interests were properly and fully represented by other heirs of Bhagwan Das Sahu .

10. The next submission of the learned counsel for the petitioners is that respondent No.3 claimed himself as sole owner for the property without proving that the partition had taken place. Both the authorities below have recorded the concurrent findings that the disputed shop fell into the share of respondent No.3 and this finding is based on assessment of evidence and the matter has been decided in suit no.195 of 1986 (Damodar Das Vs Ram Lakhdhari). I do not find any legal infirmity in this finding.

11. It is next contended that on of the sons of respondent No.3, namely Arvind Kumar is working as Lecturer in Mathematics in Bundelkhand Degree College. Another son Awadh Kumar, after having practised for some time, is now carrying on business in a separate shop and his third son Ashok Kumar is assisting his father in his business and,

therefore, his need is not bona fide. The authorities below have also considered this submission. It has been found that Ashok Kumar requires the disputed shop for carrying on his separate business. The mere fact, that he is assisting his father as he had no independent shop, will not mitigate his desire and right to carry on separate business. In N.S. Dutta and others Vs. VII Additional District Judge, Allahabad and others, 1984(1) ARC113, it has been held that merely a son is assisting his father in his business as a stop gap measure, will not affect his claim to carry on independent business. In Smt. Ramkubai Vs. Hajarimal Dholak Chand. AIR 1999 SC 3089, it has been held that where the son of the landlady started constructions work during the pendency of the proceedings, will not mitigate against his intention to start family business. Both the authorities have found that Ashok Kumar will carry on business independently in the disputed premises and as such it is bona fide required by respondent No3. The view taken by the respondents does not suffer from any illegality.

12. It was contended that respondent No.3 had constructed various shops situate opposite the District Jail, Jhansi. There was no material evidence on record to establish this fact. The respondents recorded a finding that the petitioners failed to prove this fact. Learned counsel for the petitioners submitted that the petitioners had filed certain municipal records to prove this fact but it was wrongly rejected by the Appellate Authority. I have examined the order passed by respondent No. 2 on 12-1-1988. The court had fixed 13.1.1988 for delivery of judgement and the application was filed for taking additional evidence on 12.1.1988. There was no explanation as to why these documents were not filed when such documents were the extract of the municipal assessment year 1987-88 and were available. The matter was pending before the Prescribed Authority since the year 1987 and the matter remained pending for about 11 years and one day just before the delivery of judgement, the extract of the municipal assessment was filed. Respondent No.3 was denying from the very inception that he had constructed any shop as alleged by the petitioners and there was no justification for the petitioners to file any document before the Appellate Authority immediately before the date fixed for delivery for judgement.

13. On the other hand, it had been found that the petitioners are running two Hotels namely, Prakash Hotel and Ashok Hotel. In Prakash Hotel, the petitioners admitted that there are 25 rooms and some shops attached to it have been let out to other tenants. There is another Hotel named "Ashok Hotel and Bar." They also own Bundelkhand Lodge where there are about 50 rooms. In the disputed premises it has been alleged that they are carrying on business of general store while according to respondent No3 It has been sub let to another person.

14. Learned counsel for the petitioners urged that the area of the disputed shop is 48'x18' and a part of it can be released in favour of the landlord. The petitioners had not taken this plea before the Prescribed Authority and the Appellate authority the case of the landlord was that it was in a dilapidated condition. The prescribed Authority had recorded a finding that it is in a dilapidated condition .The Appellate Authority, however, set aside this finding on the ground that the report of the Engineer submitted by respondent No.3 cannot be relied upon as it is not in compliance with the provisions of Rule 17 framed under the Act. It is further case of the respondent no.3 that he will demolish the shop in question and reconstruct a new shop. In view of the fact that the petitioners have already suitable alternative accommodation to carry on business, the plea of the petitioners that only a part of the disputed portion of the shop be released and another portion be left to them, in the facts and circumstances of the case, cannot be accepted..

15. There is no merit in the writ petition, it is, accordingly, dismissed.