APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.2.2000

BEFORE
THE HON'BLE N.K. MITRA, C.J.
THE HON'BLE M. KATJU, J.

Special Appeal No. 1012 of1999.

Principal, Rastriya Inter College, Bali Nichlaul, District Maharajganj and another ... Appellants.
Versus
District Inspector of Schools, Mahrajganj and others ...Opp. Parties.

Counsel for the Appellants:
Shri Suresh Chandra Dwivedi

Counsel for the Respondents:
Shri K. Ajit
S.C.

U.P. Intermediate Education Act readwith U.P. Intermediate Education Regulations, Regulations 31 and 100-Dismissal of Class IV employee without approval of DIOS-
Held- Illegal.
Cases referred.
1998(2) UPLBEC 1101
1979-ALJ-1351

By the Court

This Special Appeal has been filed against the impugned judgment of the learned single Judge dated 10.9.99. We have carefully perused the said judgment and find no infirmity in the same.

The respondent no.3 in this appeal was a Daftari (peon) in the Rastriya Inter College, Bali Nichlaul, district Mahrajganj and he was dismissed by the Principal by order dated 8.7.99 but the said order was disapproved by the District Inspector of Schools by his order dated 23/28.8.99. Against that order of the District Inspector of Schools the appellant filed a writ petition in this Court which was dismissed by the impugned judgment of the learned single Judge.

The short question in this case is whether prior approval/permission from the District Inspector of Schools is necessary before dismissing a Class-IV employee.

A learned single Judge of this Court (Hon'ble Alok Chakrabarti,J.) in Daya Shankar Tewari vs. Principal and others 1998(2) UPLBEC 1101 has held that such prior approval is necessary. The learned single Judge has gone into the matter in great detail and has examined the relevant provisions in the U.P. Intermediate Education Act as well as Regulation 31 and 100 of the Regulations made under in the aforesaid Act.

We are in respectful agreement with the aforesaid decision of the learned single Judge in Daya Shankar Tewari's case. The decision of the full Bench of this Court in Magadh Ram Yadav vs. Dy. Director of Education and others 1979 ALJ 1351 which is relied upon by the learned counsel for the appellant is in our opinion not applicable as it has not considered Regulation 31 and 100 of the U.P. Intermediate Education Regulation.

In view of the above there is no merit in this appeal and it is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18TH JANUARY 2000.

BEFORE
THE HON'BLE O.P. GARG, J.
THE HON'BLE V.K. CHATURVEDI, J.

Criminal Misc. Writ Petition No. 3897 of 1999

Dr. Pradumn Singh ...Petitioner.
Versus
State of U.P. through its Home Secretary, & others ...Respondents.

Counsel for the Petitioner:
Shri Satish Chandra Misra

Counsel for the Respondents:
Shri R.K. Ojha

Shri Mahendra Pratap
A.G.A.

Constitution of India, Article 226- the writ petition for quashing the F.I.R. and staying the arrest- the court should not embark upon an inquiry as to probability or reliability or genuiness of the allegation made in the F.I.R. if on consideration of the relevant materials, the court is satisfied that primafacie no cognizable office is disclosed, the court may interfere.
Held-.

A cognizable offence against the petitioners is clearly made out from the averments made in the F.I.R. It is not a case fit enough in which intervention of this court is warranted in the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. (para 14)
Cases referred.
AIR 1982 SC p.949, SCC 1995 p.194, AIR 1958 SC p. 376,
AIR 1988 SC p.709, AIR 1992 SC p.604, SCC 1992 (Crl.)p.192,SCC 1994(Cri) p.1181, SCC 1996 (Cri) p. 150

By the Court

1. Dr. Pradumn Singh and Indra Deo Pandit, who are respectively Principal and Assistant Accountant in Budha Post Graduate College, Kushinagar, District Kushinagar have been arraigned of the offences punishable under Sections 408/419/420/467/468/471 I.P.C. pursuant to the F.I.R. laid by Chanan Singh Dhillon – Secretary of the Committee of Management of the said college, at P.S. Kasiya, District Kushinagar giving rise to Crime No. 345 of 1999.

2. By means of Criminals Misc. Writ No. 3897 of 1999, Dr. Pradumn Singh Principal of the College, who has since been suspended pending departmental enquiry, prayed that the impugned F.I.R. be quashed and a direction be issued to the respondents not to arrest him in the aforesaid crime. On 30.7.1999, this court passed an interim order directing that till the next date of listing or until the submission of the charge sheet, whichever is earlier, the arrest of Dr. Pradumn singh in the aforesaid crime shall remain stayed. The interim order was extended till further orders on 11.11.1999. Counter and rejoinder affidavits have been exchanged.

3. Subsequently, Criminal Misc. Writ No. 7730 of 1999 came to be filed on behalf of Indra Deo Pandit, who has prayed for the relief's as have been claimed by Dr. Pradumn Singh. When the writ petition was taken up for hearing on 5.1.2000, learned counsel for the parties made a statement that the counter affidavits filed in Civil Misc. Writ No. 3897 of 1999 filed by Dr. Pradumn Singh may also be read in the subsequent petition and that both the petition be disposed of on merits. Accordingly we proceed to decide these two petitions on merits.

4. Heard Sri Satish Chandra Misra, learned counsel for petitioners, Sri R.K. Ojha appearing on behalf of first informant-Chanan Singh Dhillon and Sri Mahendra Pratap, Learned A.G.A., for the respondents, at considerable length.

5. Dr. Pradumn Singh, petitioner eulogizing himself as a praiseworthy Principal of the college has levelled certain allegations against Dilip Singh Majithia, President, and Chanan Singh Dhillon, Secretary of the Committee of Management of the College. According to him, they always wanted to harass him and demanded money from the college funds for their personal use and since the petitioner did not oblige them, they felt incensed and annoyed. In support of the allegations, Dr. Pradumn Singh has relied upon a number of documents annexed with the petition. It is further pleaded that he was falsely implicated in the case of murder of J.N. Singh, a Lecturer of the college, at the behest and in collusion of some office bearers of the Committee of Management, and since the investigations of the murder case has since been transferred to C.B.C.I.D., a false and

fabricated report, with a view to humiliate and vex the petitioner has been lodged against him. It is alleged that according to the impugned F.I.R. itself, it is clear that the entire money was paid through vouchers, which were approved by the office bearers of the committee of management itself.

6. Sri Indra Deo Pandit, in his turn, has alleged that all the allegations in the F.I.R. are against the Principal of the college and that he has worked under his subordination as Assistant Accountant and, was bound to obey the directions of the Principal. It is further alleged that he is not responsible for any embezzlement as he himself had no power to work independently and as such the allegations are of no consequence against him. He has also made certain allegations of malafide against the management and has assigned the reasons for his false implication as a contempt petition was filed by him before this court in which certain directions were issued.

7. Sri Satish Chandra Misra, learned counsel for the petitioners urged that the allegations contained in the F.I.R. are nothing but a conglomeration of calumny and falsehood and, therefore, investigation on the F.I.R. against the petitioners would be unwise. It was also urged by him that the F.I.R. is the product of the mala fide or lack of bona fide on the part of the Secretary of the Committee of management who for extraneous considerations was impelled to lodge the report. Both the submissions have been repelled by the learned counsel for the first informant as well as the State.

8. To begin with, it may be mentioned that both the petitioners are involved in Case Crime No. 345 of 1999 under Sections 408/419/420/467/468 and 471 I.P.C. P.S. Kasiya, district Kushinagar. A bare reading of the F.I.R. would indicate that prima facie, a cognizable offence is made out against both the accused persons who were directly concerned with the handling of the accounts of the institution. Learned counsel for the petitioners has also not argued before this court that from the averments made in the F.I.R. a cognizable offence is not disclosed. The only submission on behalf of the petitioners is that the allegations contained in the F.I.R. are false and, in any case, they are the product of mala fide. Counter affidavits brought on the record are indicative of the fact that after the receipt of the audit report, it was found that the petitioners have squandered substantial money of the college, in question.

9. The gravamen of the charge against the petitioners, therefore, is that in their capacity as Principal and Assistant Accountant, they have embezzled huge amount by withdrawing the same on the basis of forged and fictitious vouchers. It is well embedded and settled proposition of law that the Court has to be cautious and circumspect while exercising the power of quashing a criminal proceeding. Such power has to be exercised very sparingly and that too in the rarest of rare cases. The apex court has taken the consistent view that the Court should not, except in extraordinary circumstances, exercise its jurisdiction to quash the prosecution proceedings after they have been launched. In the case of *Rupam Deol Bajaj V. Kunwar Pal Singh Gill*-1995(6) SCC-194, it was observed, that the Court will not be justified in embarking upon the enquiry as to reliability or genuineness or otherwise of the allegations made in the F.I.R or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice. The classic exposition of law is to be found in *State of West Bengal V. Swapna Kumar Guha* – A.I.R. 1982SC-949 in which it was laid down as follows:

"….the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed; if, however, the materials do not disclose an offence, no investigation should normally be permitted …… Once an

offence is disclosed, an investigation into the offence must necessarily follow in the interests of justice. If, however, no offence is disclosed, an investigation cannot be permitted, as any investigation, in the absence of any offence being disclosed, will result in unnecessary harassment to a party, whose liberty and property may be put to jeopardy for nothing. The liberty and property of any individual are sacred and sacrosanct and the Court zealously guards them and protects them. An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequence and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the Court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of justice suffers. It is on the basis of this principle that the Court normally does not interfere with the investigation of a case where an offence has been disclosed……"

10. If on consideration of the relevant materials, the Court is satisfied that an offence is disclosed, the Court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence. Without burdening the judgement with series of decisions on the point, it would be proper to make a passing reference to the decision of the apex court reported in Talab Haji Hussain V. Madhukar Purshottam Mondekar –A.I.R. 1958 SC- 376; Madhavrao Jiwaji Rao Scindia V. Sambhajirao Chandrojirao Angre –A.I.R. 1988 SC-709; State of Haryana Vs Bhajan Lal- A.I.R. 1992 SC – 604; State of Bihar V. P.P.Sharma- 1992SCC(Cri)-192; Meenakshi Bala V. Sudhir Kumar- SCC(Cri)-1181 ; and State of Maharashtra V. Ishwar Piraji Kalpatri and Others –1996 SCC(Cri.)-150.

11. In the backdrop of the above decisions and the firm legal position, which flows from them, this Court would not sift the merits of the defence taken by the petitioners or embark upon an enquiry as to probability or reliability or genuineness of the allegations made in the F.I.R. The fact remains that prima facie, a cognizable offence is disclosed from the various averments made in the F.I.R. against the petitioners.

12. Now it is the time to consider the question whether the F.I.R. is, in fact, actuated by mala fide. According to the learned counsel for the petitioners, the President and Secretary of the Committee of Management were on inimical terms and on account of acrimonious relations, a false charge has been foisted against the petitioners. The allegation of mala fide cannot be accepted mere for the asking. If from the allegations made in the F.I.R. and the supporting material, it is desclosed that a cognizable offence is made out the conduct of the first informant, which may have been tainted with mala fide or due to lack of bona fide would not at all be relevant. In State of Maharashtra V. Ishwar Piraji Kalpatri and others (Supra), it was observed that if the complaint which is made is correct and an offence had been committed which will have to be established in a court of law, it is of no consequence that the complainant was a person who was inimical or that he was guilty of malafide. If the ingredients which establish the commission of the offence of misconduct exist then, the prosecution cannot fail merely because there was an animus of the

complainant or the prosecution against the accused. If was further laid down that the allegations of mala fides may be relevant while judging the correctness of the allegations or while examining the evidence. But the mere fact that the complainant is guilty of mala fide would be no ground for quashing the prosecution. After having heard learned counsel for the parties and taken into consideration the material available on record, we are not persuaded to hold that the allegations of mala fide or lack of bona fide are substantiated in the instant case.

13. We have refrained ourselves from making any observation touching the merits of the case and have deliberately avoided to sift the factual aspect of the controversy lest it may prejudice the case of either of the parties at the trial.

14. In conclusion, we find that cognizable offence against the petitioners is clearly made out from the averments made in the F.I.R. In view of the seriousness of the allegations and gravity of the offence, we are of the view that it is not a case fit enough in which intervention of this court is warranted in the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India. The writ petitions are not well merited.

15. Both the writ petitions (Nos. 3897 and 7730 of 1999) are hereby dismissed. The interim order dated 30.7.1999, which was extended till further orders on 11.11.1999 in Criminal Misc. Writ No. 3897 of 1999 is hereby discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.1.2000

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

Civil Misc. Writ Petition No. 17358 0f 1999

Jaswant Singh and others ...Petitioner
Versus
State of Uttar Pradesh through its Chief Secretary & others ...Respondent

Counsel for the Petitioners:
Shri N.P. Naithani
Shri Amrendra Nath Singh
Shri A.N. Tripathi
Shri B.D. Mandhyan
Shri Somesh Khare
Shri P.K. Sinha
Shri Ashok Bhushan

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Right to appointment- Selection made by Public Service Commission- for the post of Assistant Engineers- State Government instead of appointing in accordance with the merit of selection list man other candidates- below in merit appointed- great illegalities and irregularities in appointment noticed- disappriciated by the Court-direction issued for fresh appointment strict in accordance with the merit of selection list.

Held –

It would be ridiculous to hold so, and Article 14 of the Constitution would be violated. Hence it is obvious that the government in issuing the appointment letters in question has committed illegality. We are of the opinion that the State Government should reconsider the matter again and issue afresh appointment letters in accordance with merit of the candidates from their own category as recommended by the Commission. We make it clear that a candidate superior in merit to and other in the same category cannot be treated inferior vis- vis those of the same

category who are lower in the select list. The State Government will now take a fresh decision and pass fresh orders of appointment in the light of the observations mentioned above.(Para 8)

By the Court

Heard learned counsel for the petitioner and learned standing counsel.

1. In this writ petitions as well as in connected Writ Petition No. 37304 of 1999 the petitioners have prayed for a writ of mandamus directing the respondents to issue appointment letters to the petitioners in pursuance of the result declared by the U.P. Public Service Commission and the list submitted to the State govt. on 15.5.98. The petitioners appeared in Civil State Engineering Service Examination, 1996 which was held by the U.P. Public Service Commission (hereinafter referred to as Commission).

2. It appears that 505 vacancies were advertised but the Government decided to fill up only 322 vacancies.

3. In para 11 of the writ petition it is stated that the Commission called the petitioners for written test in which they were declared successful and thereafter the Commission interviewed them as stated in para 13 of the writ petition. The Commission declared the result vide Annexure 6 to the writ petition. In para 17 of the writ petition it is stated that the Commission prepared a combined list of successful candidates in order of merit and on the basis of preference given by the petitioners and others. In this list 524 candidates were recommended by the Commission for three departments. The petitioners underwent medical test and were declared successful.

4. In para 21 of the writ petition it is stated that the State Govt. adopted a peculiar method in appointing Assistant Engineers in three departments in U.P. Instead of issuing appointment letter from the top of the merit list/select list prepared by the Commission they picked up the candidates from the lowest of the list and first they tried to fill up the posts in Minor Irrigation department. In para 22 and 23 of the petition it is alleged that the government issued letters of appointment to certain candidates. In para 24 of the petition it is alleged that the candidates who were issued letters of appointment in Minor Irrigation Department did not figure in the merit top select list recommended by the Commission. They were given appointments although they were either at the bottom in the list or opted for first preference similar list has been prepared for other departments.

5. A counter affidavit has been filed in this case and thereafter an interim order dated 17.8.99 was passed by this Court in which it was state that since according to the counter affidavit 322 posts of Assistant Engineer out of 505 were being released these 322 post should be filled up. In pursuance of this interim order appointment orders were issued to 322 candidates.

Heard Sri L.P.Naithani, B.D. Mandhyan, P.K. Sinha, Somesh Khare and Ashok Bhushan learned counsel for the petitioners and learned standing counsel for respondents.

6. It has been submitted on behalf of the petitioners that the appointments made by the State Govt. were illegal. To give an example Ajai Kumar Verma who is petitioner no.31 and Jai Prakash Yadav who is petitioner no. 42 are at serial Nos. 184 and 181 of the select list, petitioner no 12 Ugra Sen is at Serial no. 344 of the select list, Virendra Singh petitioner no. 28 is at serial no. 346 in the select list, Alok Pratap Singh petitioner no.10 is at Serial No. 345 in connected Writ Petition No. 37304 and petitioner no. 2 Rajiv is at serial no. 178 in the select list. All the above mentioned candidates belong to the backward class category, and their grievance is that

while they have not been given appointment letters persons from serial nos. 361to 362,363,365,366,369,370,374,375,377 and 378 who also belong to the backward class category (whose names are given in the supplementary rejoinder affidavit of Virendra Singh) have been appointed. Thus it is strange that while persons belonging to backward class who are higher in the select list have not been given appointment while candidates belonging to the backward class who are lower in the select list have been appointed. Similarly Surya Mani Singh petitioner no. 45 who is at serial no. 476 in the select list and belongs to scheduled caste has not been appointed while candidates who are at serial nos. 500, 503 to 507 and who belong to schedules caste have been appointed.

7. The same mistake has also been made in the general category. Petitioner nos. 19 and 68 who are at serial nos. 145 and 162 in the select list have not been given appointment, and petitioner nos. 34 and 60 who are serial nos. 133 and 155 respectively have not been appointed, whereas general category candidates who are at serial nos. 187 and 207 and further below (as mentioned in the supplementary rejoinder affidavit) have been given appointment. The petitioner no. 1 in Writ Petition No. 37307 of 1999 who is at serial no. 167 has not given appointment while candidates below him have been given appointment.

8. The above facts show that there has been total illegality and discrimination in issuing the appointment letters issued by the State Govt. No doubt it has been held in several decisions of the Supreme Court and of this Court that if a backward class or scheduled cast candidate is so superior in merit that even if he is treated as a general candidate he deserves to be appointed then such backward class or scheduled caste candidate should be treated in the general category, and the reserved category quota will not thereby be reduced. These decisions however do not mean, and they cannot be stretched, so far as to mean that if two candidates belong to the same reserved category therefore meritorious should be treated wrose off than the less meritorious. It would be ridiculous to hold so and Article 14 of the Constitution would be violated. Hence it is obvious that the government in issuing the appointment letters in question has committed illegality. We are of the opinion that the State Govt. should reconsider the matter again and issue afresh appointment letters in accordance with merit of the candidates from their own category as recommended by the Commission. We make it clear that a candidate superior in merit to another in the same category cannot be treated inferior vis-à-vis those of the same category who are lower in the select list. The State Govt. will now take a fresh decision and pass fresh orders of appointment in the light of the observations mentioned above. The vacancies must be filled up legally as mentioned above. The State Govt. shall do the same preferably within six weeks of production of certified copy of this order, but it must issue a show cause notice to any person who has been appointed before cancelling his appointment.

9. As regards the prayer that all the advertised vacancies must be filled up we do not agree with this submission. It is for the State Government to decide how many posts to fill up, and the State Government can change its mind subsequently in this connection. As held by the Supreme Court, even a selected candidate has no absolute right to get appointment vide Dr. J. Shashidhara Prasad. V. Governor of Karnataka and another AIR 1999 SC 849.

The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.1.2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc Writ Petition No. 54711 of 1999

M/S Triveni Engineering & Industries Limited, Unit Khatauli Sugar Unit District MuzaffarNagar (U.P.) ...Petitioners
Verses
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Shri Vineet Saran
Shri Krishna Murari
Shri Shanti Bhushan

Counsel for Respondent:
S.C.
Shri S.P. Gupta
Shri Tarun Agarwal

U.P. Sugar Cane(Regulation of supply and purchase) Act 1953 Section 15 (1) reservation order passed by Cane Commissioner without Notice to the Cane growers society—principle of natural justice violated.
Held—
As mentioned earlier, the impugned order has been passed without giving any opportunity of hearing to the petitioners. Sub Section (1) of Section 15 of the act, enjoins a duty upon the Cane Commissioner to pass a reservation order after consulting the Factory and Cane- grower's Co-operative Society nor any opportunity of hearing was given to them. For these reasons, the impugned order is clearly illegal and has to be set aside. (Para 13)
Case Law discussed:
A.I.R. 1970 SC 1401
A.I.R. 1987 SC 88

By the Court

1. Both the writ petitions are directed against the same orders passed by Special Secretary, Government of U.P. and Cane Commissioner, U.P., therefore they are being disposed of by a common order. Writ petition No. 54711 of 1999 shall be treated as the leading case.

2. M/S Triveni Engineering & Industries Limited (Petitioner of Writ petition No.54711 of 1999) has a Sugar Mill at Mawana in the district Meerut. M/S Tikaula Sugar Mills Ltd., respondent no.4 has set up a new Sugar Mill in Tikaula in the district of Muzaffarnagar, which started production in the year 1998-99. U.P. Sugarcane (Regulation of Supply And Purchase) Act. 1953 (here in after referred to as the Act) has been enacted to regulate the supply of sugarcane required for use in sugar factories. The Cane Commissioner, U.P. exercising powers under section 15 of the Act passed an order on 25.10.1999 assigning purchase centers to various Sugar Mills including the petitioners of the two writ petitions and respondent no.4. Feeling aggrieved by the aforesaid order of the Cane Commissioner, the two petitioners as well as respondent no.4 preferred separate appeals before the State Government under sub-section (4) of section 15 of the Act. The appeal preferred by respondent no.4 was allowed by the order dated 18.12. 1999 and the order dated 25.10.1999 of the Cane Commissioner was set aside. The Cane Commissioner was directed to reconsider the matter and pass a fresh reservation order with regard to certain purchase centers originally assigned to Mawana and Khatauli Sugar Mills in the light of the discussion and facts mentioned in the Appellate order. Thereafter, the Cane Commissioner passed a fresh order on 20.11.1999 whereby the purchase centers mentioned in the operative part of the order passed by the State Government and which had earlier been assigned in favour of Mawana and Khatuli Sugar Mills were assigned in favour of Tikaula Sugar Mills Ltd. (respondent no.4.)

3. M/s. Triveni Engineering & Industries Limited filed writ petition no.54711 of 1999

impleading (1) State of U.P., (2) Special Secretary, Government of U.P., Chini Udyog Anubagh , (3) Cane Commissioner , U.P. and (4) M/S Tikula Sugar Mills Ltd. as respondents. The prayer clause of the writ petition has some bearing on the controversy raised and therefore in is being reproduced below:-

a) issue a writ, order or direction in the nature of certiorari calling for the records of the case and to quash the impugned order dated 18.12.1999 passed by the Appellate Authority (Respondent no.2.) filed as Annexure—8 to the writ petition;

b) Issue a writ, order or direction in the nature of certiorari calling for the records of the case and to quash the impugned order dated 20.12.1999 passed by the respondent no.3 filed as Annexure-9 to the writ petition;

c) Issue a writ, Order or direction in the nature of mandamus directing the Cane Commissioner to modify the reservation order for the year 1999- 2000 and thereafter so that the cane area reserved for each factory is proportionate to their individual requirements of Sugarcane;

d) Pass such other or further suitable orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

e) award costs in favour of the petitioners.

4. Feeling aggrieved by the order of the Cane Commissioner, the petitioners preferred the present writ petitions in which the following order was the passed by the Division Bench:-

"Hon'ble A.A. Desai-J.
Hon'ble Bhagwan Din-J.

Heard Sri S.C. Maheshwari assisted by Sri Vineet Saran, Counsel for the Petitioner, learned Chief Standing Counsel appearing for respondents no.1, 2, & 3 and Sri Rakesh Dwivedi appearing for respondent no.4 and perused the papers.

Learned Counsel appearing for the petitioner made a statement that he is confining to relief no.2 and giving up relief no.1.

The respondent no.4 is granted 10 days time to file counter affidavit. The Chief Standing Counsel may file counter affidavit on behalf of respondent no.3 within the same time.

List on 12th January, 2000.

Till then the operation of the order dated 20.12.1999 passed by the Cane Commissioner shall remain stayed.

23.12. 1999"

Exactly similar order was passed in writ petition no.54853 of 1999.

5. We have heard Sri Shanti Bhushan learned Senior Counsel for the petitioners, Sri S.P. Gupta, learned Senior Counsel for the respondent no.4 and have perused the record.

Learned counsel for the petitioners has challenged the order passed by the State Government on 18.12.1999 on several grounds and has urged that looking to the production capacity of the petitioners and their requirement of sugarcane, the impugned order allowing the appeal preferred by respondent no.4 and remitting the matter to the Cane Commissioner for passing a fresh order with regard to certain purchase centers which had earlier been reserved in favour of the petitioners is wholly illegal. The submission made by the learned counsel relates to relief (a) claimed in the writ petition. The order dated 23.12.1999 passed by this Court shows that the learned counsel

for the petitioner had made a statement that he was giving up the aforesaid relief and he was confining to the second relief at that time when the petition was heard. In view of the aforesaid statement made by the counsel, we are of the opinion that it is not open to the petitioner to assail the validity of the order dated 18.12.1999 passed by Appellate Authority (respondent no.2)

6. Sri Shanti Bhushan next urged that the Cane Commissioner passed the impugned order dated 20.12.1999 without giving any opportunity of hearing to the petitioner and, as such, the same was passed without complying with the provisions of the Act/ and was also contrary to principles of natural justice. It is urged that the order of the Appellate Authority was passed on 18.12.1999 which was a Saturday and the file reached the Cane Commissioner on 20.12.1999 (Monday) and on the same day he passed the impugned order. The validity of the order has also been assailed on merits and it has been urged that the factors relevant for assigning an area in favour of a sugar factory as enumerated in rule 22 of U.P. Sugar Cane (Regulation of Supply And Purchase) Rules, 1954 (hereinafter referred to as the rules) have not been taken into consideration and consequently the same is liable to be quashed.

Paragraph—37 of the writ petition reads as follows:-

"That the impugned order dated 20.12.1999 passed by the Respondent no.3 is an ex-party order without any notice or opportunity of hearing to the petitioner. The said order has been passed mechanically, without any application of mind by the respondent no.3 and is wholly against the provisions of the Act and the Rules besides being against the principles of natural justice."

7. The reply to paragraph—37 of writ petition has been given in paragraph—89 of the counter affidavit filed on behalf of M/S Tikaula Sugar Mills Ltd. (respondent no.4) and it reads as follows:--

"That contents of para –37 of the said writ petition are not admitted and specifically denied. The order of respondent no.2 is self-contained, which was to be complied with by respondent no.3 and the same have been complied with. Question of hearing or opportunity at the level of respondent no.2 does not arise. However, no prejudice could be, or has been caused to the petitioner in view of the fact that appellate order is no more under challenge."

8. The reading of paragraph—89 of the counter affidavit does not show that any opportunity of hearing was given to the petitioners of the two writ petitions as a plea has been raised that the question of giving opportunity of hearing did not arise and that no prejudice had been caused to the petitioner. The date of the order as well as sequence of events themselves show that the Cane Commissioner passed the impugned order without giving opportunity of hearing to any party. The State Government (Appellate Authority) passed the order on Saturday and the Cane Commissioner passed the impugned order on the very next working day i.e. on Monday. In fact, the learned counsel appearing for respondent no.4 did not dispute the assertion of the petitioner that the Cane Commissioner had passed the impugned order without giving any opportunity of hearing to the two writ petitioners.

9. At this stage, it will be convenient to refer to certain provisions of the Act and Rules which have a bearing on the controversy in issue. Under sub-section (1) of section 15 the Cane Commissioner may, after consulting the Factory and Cane- growers Co-operative Society in the manner to be prescribed, reserve and assign any area for the purposes of cane to a factory in accordance with the provisions of section 16 and may likewise at any time cancel such order or alter the boundaries of an area so reserved or

assigned. Section 16 confers power upon the State Government to regulate the sale or purchase of cane in any reserved or assigned area. It also confers power to regulate the manner in which cane grown in the reserved area or the assigned area shall be purchased by the factory for which the area has been so reserved or assigned. Section 17 provides that the occupier of a factory shall make provision for speedy payment of the price of cane purchased by him and upon the delivery of cane he shall be liable to pay immediately the price there of . Section 5 of the Act lays down the manner in which Development Council will be constituted and section 6 lays own the functions thereof basically for improving the quality and yield of sugarcane. In exercise of powers conferred by section 28 of the Act, the State Government has framed U.P. Sugarcane (Regulation of Supply And Purchase) Rules, 1954 . Rule 2 (f) defines `Purchase Centre' and it means any place at which cane is purchased, supplied, delivered, weighed, or paid for and includes such portion of the premises of a factory as is used for any of these purpose. Rule 22 of the Rules reads as follows:-

" 22. In reserving an area for or assigning an area to a factory or determining the quantity of cane to be purchased from an area by a factory, under section 15, the Cane Commissioner may take into consideration—

a) the distance of the area from the factory,
b) facilities for transport of cane from the area,
c) the quantity of cane supplied from the area to factory in previous year,
d) previous reservation and assignment order,
e) the quantity of cane to be crushed in the factory,
f) the arrangements made by the factory in previous years for payment of purchase tax, cane price and commission,
g) the views of the Cane-growers Co-operative Society of the area,
h) efforts made by the factory in developing the reserved or assigned area."

Chapter IX of the rules give in detail the procedure for payment of price of cane supplied to a sugar factory.

10. A perusal of section 15 of the Act would show that the order assigning or reserving any area has to be made after consulting the factory and Cane-growers' Co-operative Society. The ownership of the cane vests with the producer and normally he is entitled to sell the same to any one he likes. Naturally, he would like to sell the sugarcane to the person who offers him the best price without any delay, The Act, however, imposes a restriction upon him and by virtue of an order issued under sub-section (1) of section 15, the cane –grower is compelled to sell his sugarcane to the factory to whom his area has been assigned or reserved. The legislature has enacted Section17 which makes provision for immediate payment of price to the seller of sugarcane. Therefore, the promptness with which the price is paid is a very important factor which has to be kept in mind at the time of passing of an order assigning or reserving any area in favour of a sugar factory. The Cane-growers Co-operative Society is expected to watch the interest of the producers and it is for this reason that it is obligatory upon the Cane Commissioner to consult the Society before passing any order of assignment or reservation.

11. Rule 22 gives some guidelines as to how the power of assigning or reserving any area has to be exercised by the Cane Commissioner. It mentions several factors which have to be taken into consideration. Apart from the distance of the area from the factory, of transport, previous reservation and assignment orders, quantity of cane to be crushed in the factory, views of the Cane-grower's Co-operative Society, arrangements

made by the factory for payment of price etc. in previous years and efforts made by the factory in developing the area also to be taken into consideration . Sub-rule (b) lays emphasis upon facilities for transport which is also important inasmuch as in a given case an area may be at short distance from one factory than another but on account of better facility of transport it may be more convenient for the cane-growers to supply sugarcane to the factory which is at a greater distance. Similarly, sub-rule (f), which makes the payment of price in earlier years relevant, is very important from the point of view of cane- growers. If the factory has defaulted in payment of price and the dues of the cane-growers are not paid for a long time, they would not be willing to supply their produce to such a factory. Prompt payment of price is of primary importance to the cane-growers as it takes almost a year before sugarcane crop is ready for harvesting. The cane-growers who have nurtured their crop for about a year would not like to wait for further period if they have made the supply to the sugar-factory. Under sub-rule (h) effort made by the factory in developing the area for producing more and better quality of cane also becomes relevant. If a factory has invested heavy amount in developing an area as a result where of the quality of sugarcane has improved, naturally it would like the said cane to be supplied to its factory . The provisions of the Act and Rules show in unmistakable terms that the order for assignment or reservation of an area has to be passed after taking into consideration various factors and it cannot be based upon one solitary consideration. May be in a given case one single factor may far out weigh the effect of all other remaining factors. For example, an area may be right at the gate of the Sugar Mill and in such a situation distance alone can be taken into consideration for assigning or reserving that area in favour of that sugar factory . It is for the authorities., who are experts in the field, to take into consideration all the factors and after balancing them pass appropriate orders which best sub serve the interest of the sugar factory and the cane-growers.

12. The impugned order dated 20.12.1999 of the Cane Commissioner shows that he merely made reference to the findings recorded by the Appellate Authority in the order dated 18.12.1999 and thereafter passed the operative portion of the order assigning all the purchase centres in favour of respondent no.4 No doubt, the Cane Commissioner had to take into consideration the observations made in the order of the Appellate authority but he was also legally bound to take into consideration the observations made in the order of the Appellate Authority but he was also legally bound to take into consideration the factors mentioned in rule 22 of the Rules. Once the matter had been remanded to him, he could not base his order entirely upon the order of the Appellate Authority as if it was a direction to him to assign, the purchase centers in favour of a particular Sugar Mill and to ignore the statutory provision.

13. In Hindustan Steel Ltd. Versus A. K. Rai, AIR 1970 SC 1401, the Apex Court has ruled that if a statutory tribunal exercises its discretion on the basis of irrelevant considerations or without regard to relevant considerations, certiorari may be issued to quash its order. As mentioned earlier, the impugned order has been passed without giving any opportunity of hearing to the petitioners. Sub-section (1) of section 15 of the Act, enjoins a duty upon the Cane Commissioner to pass a reservation order after consulting the Factory and Cane-growers Co-operative Society. The manner in which the impugned order has been passed clearly shows that neither any notice was issued to Cane-growers Co-operative Society nor any opportunity of hearing was given to them. For these reasons, the impugned order is clearly illegal and has to be set aside.

14. At the fag end of the arguments, an application was filed where in a prayer has been made to (a) permit the petitioner for pursuing relief no.1 in a separate writ petition before the Single Judge, (b) Clarify that relief nos. (c), (d) and (e) have not been given up and continue in the present writ petition.

15. We are of the opinion that in view of the statement made by the counsel for the petitioner and liberty having not been granted to them to file a separate writ petition for seeking relief no.1{in fact relief no.(a)} such a prayer cannot be granted. We are fortified in our view by a decision of the Apex Court in Sarguja Transport Service Versus State Transport Tribunal, A.I.R. 1987 SC 88. The other prayer regarding clarification of the order can only be granted by the same Bench which heard the matter on 23.12.1999.

16. In the result, both the petitions succeed and are hereby allowed. The impugned order dated 20.12.1999 of Cane Commissioner (Annexure-8 to the writ petition) is quashed. The Cane Commissioner is directed to pass a fresh order after giving opportunity of hearing to all the parties concerned and in accordance with law.

17. The petitioner and respondent no.4 are directed to appear before the Cane Commissioner, U.P. on 18.1.2000. The Cane Commissioner shall make endeavour to pass final order expeditiously preferably by 31.1.2000. Learned counsel for respondent no.4 has under taken that his client will personally serve all the parties as may be directed by the Cane Commissioner.

18. It is being made clear that it should not be understood that this Court is expressing any opinion regarding merits of the claim of any party. The Cane Commissioner shall exercise his independent judgment after taking into consideration all the relevant factors and shall pass orders in accordance with law.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.1.2000

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

Criminal Misc. Application No. 3072 of 1997

Shiv Sahain Mishra alias Raju, and others ...Applicants.
Versus
State of U.P. and others ...Opposite parties.

Counsel for the Applicants:
Shri Amit Saxena
Shri P.N.Saksena

Counsel for the Respondent:
A.G.A.
Shri Pankaj Rai

Cr.P.C. Section 319 The term "EVIDENCE" as used in section 319 Cr.P.C. does not mean an evidence completed by cross examination. The cross examination of the witnesses is not necessary for summoning the person u/s 319 Cr.P.C. Only requirement is that there should be evidence before the court regarding the involvement of the person concerned.
Held-
That the summoning order under Section 319 Cr. P. C. is not liable to be quashed in this proceeding. (para 11)
1983 (20) A.C.C. p.50 (S.C)
1996 (51) A.C.C. p. 45
1999 (38) A.C.C. p. 123
1979(16)A.C.C. 43(SC).

By the Court

1. The above two application under Section 482 Cr.P.C. have been preferred for quashing of proceeding against the applicants on the basis of order dated 4.4.1997 passed in Criminal Case No. 512 of 1994. State Vs. Krishna Kumar and others. Under Section 323, 325, 504 and 506 I.P.C. P.S. Bakewar, district Fatehpur pending in the Court of Additional Chief Judicial Magistrate Fatehpur.

2. Smt Bhagwani Devi opposite party no. 2 in both the applications, lodged a report on 22.1.1994 at P.S. Bakewar district Fatehpur against the applicants of both the application and four others with the allegation that on 21.1.1994 at about 6.00 p.m. while her son and daughter were milching cow, Krishna Kumar, Gokaran Nath, Taju armed with rifles along with Bhagwati Prasad, Dhannar, Rajan, Dileep, Vindoo, Krishna Devi, Mahesh, Girija Shankar, Uma Shankar, wife of Girija Shankar and Mukesh Kumar in all of 14 persons raided her house and started causing injuries to her son and daughter. They also fired from rifle and gun, set fire in her chhappar, damaged Chabootara and stonned at the house. They also caused injuries to animals and threatened them to remove from the village. The police registered a case at crime no. 10 of 1994, under Section 323, 504 and 506 I.P.C. After investigation the police submitted charge sheet only against four persons namely Krishna Kumar, Mahesh, Uma Shankar and Mukesh Kumar. During trial before the Magistrate Smt. Asha Devi daughter of opposite party no. 2 was examined on oath. In her statement she named four persons against whom police had submitted charge sheet as well as the applicants, in all 14 persons, involved in the offence. Thereafter Smt. Bhagwani Devi opposite party no. 2 moved an application for summoning the applicants of both the applications under Section 319 Cr.P.C. on the ground that report was lodged against them also and they were also involved in the offence. The learned Magistrate found that there was sufficient ground for proceeding with against the applicants and therefore, he summoned them under Section 323, 325, 504 and 506 I.P.C. in the exercise of power under Section 319 Cr. P.C. for trial alongwith other accused. The above summoning order has been sought to be quashed in these applications.

3. Heard learned counsel for the applicants in both the applications as well as the learned counsel for the opposite party no. 2 and the learned A.G.A. and perused the record.

4. The summoning order under Section 319 Cr.P.C. has been challenged on the ground that the complainant and other witnesses have not named the applicants in their statement under Section 161 Cr.P.C. and police had submitted charge sheet only against four persons. The applicants Krishna Kumar and Mahesh Narain were not present on the spot and were on their respective duty place on the date of occurrence and implication of applicants was false. The learned Magistrate had wrongly summoned them and that the summoning order was passed prior to completion of cross examination of Smt. Asha Devi P.W.I. and therefore her statement could not be considered for the purpose of summoning the applicants.

5. Having considered the facts deposed in the affidavits and the submission of the learned counsel for the parties I found no force in the above contention.

6. Section 319 Cr.P.C. says that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

7. In the case of Joginder Singh and another Vs. State of Punjab and another, 1979(16) ACC 43(SC) it was held by Hon'ble Supreme Court that the expression any person not being the accused occurring in Section 319 Cr.P.C. clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like section 319 (1) clearly shows that even persons who have been dropped by the police during investigation but against whom

evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression. This view was repeated by the Hon'ble Supreme Court in another case of Municipal Corporation of Delhi Vs. Ram Kishan Rastogi and others, 1983(20) A.C.C. 50(SC). Therefore, it is clear that the Court may summon the persons who have been dropped by the police if there is evidence.

8. In some cases like Dileep Singh Vs. State of U.P. 1996(3) 45 (Hindi Section) Surendra Kumar Sharma Vs. State of U.P. 1996 ACC(51) (Hindi Section) and Brij Pal Singh Vs. State of U.P. 1996 (33) ACC(4) single Judges of this Court held that the summoning order under Section 319 Cr.P.C. cannot be passed before conclusion of the cross examination of the witness. But controversy was finally resolved in subsequent Division Bench case of Ram Gopal and another Vs. State of U.P. in Criminal Misc. Application No. 1823 of 1995, decided on 12.10.1998 and reported in 1999 (38) ACC 123. The above single/Judge cases were over ruled and it was held that the term "EVIDENCE" as used in Section 319 Cr.P.C. does not mean an evidence completed by cross examination and the court can take action under Section 319 Cr.P.C,. even on the statement made in examination-in-chief of one or more witness. Thus, it is clear that the cross examination of the witness is not necessary for summoning the persons under Section 319 Cr.P.C. and only requirement is that there should be evidence before the court regarding involvement of the person concerned. Moreover, in this case the cross-examination of Smt. Asha Devi (P.W.D.) was also done.

9. The next contention of the learned counsel for the applicants was that applicants were not named by witnesses in their statement under Section 161 Cr.P.C. has no force as Smt. Asha Devi (P.W.1) stated that she had named all the 14 persons, but the police did not mention their name. Moreover, the actual involvement of the applicants shall be decided by the Trial Court and the veracity and correctness of the evidence cannot be considered at this stage because only primafacie conclusion is to be drawn by the Court and it is not necessary to record a finding regarding the correctness of the statement of the witnesses.

10. The next contention of the learned counsel for the applicants was that two of the applicants namely Shiv Sahain Mishra and Bhagwati Prasad were not present on the spot. The plea regarding alibi of these applicants shall be considered on merit as it has to be proved like other fact.

11. In view of the above discussion and observation I find that the summoning order under Section 319 Cr.P.C. is not liable to be quashed in this proceeding. The applications have no force and are liable to be rejected. Both the applications, Criminal Misc. Application No. 3072 of 1997 Shiv Sahain Mishra Mishra alias Raju and others Vs. state of U.P. and another and Criminal Misc. Application No. 33 of 1997, Gokaran Nath Misra and others Vs. State of U.P. and another are hereby rejected summarily. Stay orders dated 14.5.1997 are vacated.

12. Copy of this order be sent to C .J.M. Fatehpur.

Application Rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 1,2000

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

Special Appeal No.609 of 1999

Maheshwar Prasad Tiwari ...Appellants.
Versus
Joint Director of Education and others ...Respondents

Counsel for the Appellant:
Shri R.K. Ojha

Counsel for the Respondent:
S.C.

U.P. Secondary Education Service Commission Rules 1995 r.10-Adhoc appointment of lecturer 50% quota provided from promotion amongst senior most lecturer and 50% by Direct recruitment earlier direction under Removal of Difficulty order 81-not proper.
Held-
If the vacancy determined in the aforesaid manner falls in the quota of promotion and the conditions precedent as visualized in Section 18 (1) are satisfied, it can be filled in on adhoc basis only in the manner prescribed by Rule 16 of the Rules as prescribed in Section 18(3) and not by direct recruitment under sub-section (2) read with sub-Section (8) of Section 18 and Rule 15 of the Rules except on pains of invalidation of appointment in terms of section 16 (2) of the Act.
In our opinion therefore if the vacancy falls in the quota of direct recruit then the same cannot be filled by adhoc promotion under Rule 16 of the Rules which provides procedure for adhoc appointment by promotion where such appointments are to be made under Section 18 of the Act ' in respect of the vacancies to be filled in by promotion ' it may be observed that the U.P. Secondary Education Services Commission (Removal of Difficulties) order, 1981 has since been rescinded and the procedure laid down in the Rules holds the field of adhoc appointment .(Para8)

Case law discussed.
1990 (1) UPLBEC-160
1994 (3) UPLBEC-1551
1996 (3) UPLBEC-1959

By the Court

1. The question that crops up for consideration in this Special Appeal is as to whether Adhoc appointment of a Lecturer in a recognized intermediate College can be made by promotion under Section 18 of U.P. Secondary Education Service Selection Board Act,1982 in short the Act read with provisions confined in the U.P. Secondary Education Service Commission Rules, 1995 in short the Rules in respect of a "vacancy" which is ultimately to be filled in by direct recruitment in accordance with the provisions of the Act read with Rule 14 of the Rules.

2. The facts of the case lie in a short compass. Lady Prasanna Kaur Inter College Sardar Nagar Gorakhpur is recognized intermediate College in short the College. A substantive vacancy in the post of Lecture (English) occurred on 1.7.1996. The vacancy fell in the 50% quota prescribed for direct recruitment. The Committee of Management of the college however, passed a resolution on 16.11.1995 for giving adhoc promotion to the appellant in the vacant post of Lecturer in English as the appellant according to the Committee of Management was qualified for appointment to the post of Lecturer in English. The papers were sent to the District Inspector of Schools vide letter dated 11.3.1997 for financial approval for the promotion of the appellant. The letter dated 11.3.1997 states that the Committee of Management had taken the vacancy in question to be one falling within 50% quota to be filled in by promotion. It appears that no decision in the matter was communicated by the District Inspector of Schools to the Management of the college whereupon the appellant filed a Writ Petition being Civil Misc. Writ Petition No.30587 of 1997 seeking issuance of writ of mandamus commanding

the respondents therein to pay him salary in the Lecturer's grade since the date he started functioning as such. The said writ petition was disposed of by judgment and order dated 18.9.1997 with the direction that the petitioner would submit a representation before the District inspector of Schools who would examine as to whether ad-hoc promotion of the appellant was valid in accordance with the provisions of the U.P. Secondary Education Services Commission (Removal of Difficulties) Order.1981. It appears that the attention of the learned Judge was not invited to the amended Section 18 and the Rules providing for ad-hoc appointment of teachers and that is why the direction was to examine whether the ad-hoc promotion was valid in accordance with the provisions of The U.P. Secondary Education Services Commission (Removal of Difficulties) Order 1981. The District Inspector of Schools rejected the representation vide order dated 16.3.1998. Where upon the appellant filed another writ petition being Civil Misc. Writ Petition No. 10770 of 1998 which was dismissed on the ground that the appellant-petitioner had an alternative remedy to approach the Regional Deputy Director of Education under clause 7 of the U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1981 as amended by U.P. Secondary Education Service Commission (Removal of Difficulties) (Fourth) Order, 1982. Thereafter the matter was taken up in Special Appeal wherein the question raised was that the rule of 50% quota of promotion and direct recruitment would not be applicable to ad-hoc appointments. The Special Appeal Bench declined to interfere with the order passed by the learned Single Judge but disposed of the appeal with the direction that the Regional Deputy Director of Education will take note of the contention and dispose of the matter in accordance with law.

3. Thereafter the matter was examined by the Joint Director of Education 7th Region, Gorakhpur who rejected the representation and maintained the order passed by the District Inspector of Schools though on a different ground holding that the ad-hoc promotion of the appellant was not in accordance with the provisions of the Act and the Rules referred to above. The Joint Director clearly held that the U.P. Secondary Education Services Commission (Removal of Difficulties) Order 1981 would not apply and instead the provisions in the U.P. Secondary Education Service Commission Rules, 1995 would govern the appointment. Aggrieved against the order dated 15.2.1999 passed by the Joint Director of Education, the appellant filed the writ petition which came to be dismissed wide judgment and order under challenge in this appeal. The learned Single Judge was of the view that the U.P. Secondary Education Services Commission Rules. 1995 which came into force on 8.5.1995 would govern the present case and the Rule of 50% quota of direct recruitment and promotion would govern ad-hoc appointment as well. Aggrieved the petitioner-appellant has filed the instant appeal.

4. We have had heard Shri R.K. Ojha, learned counsel appearing for the appellant and Standing Counsel representing the respondents 1and 2.

5. The thrust of the submissions made by Shri R.K. Ojha is that in the matter of ad-hoc appointment the rule providing the 50% vacancies would be filled by direct recruitment and 50% by promotion as visualised by Rule 10 of the Rules need not be adhered to. Learned counsel for the appellant placed reliance on the Division Bench decision of this Court in Charu Chandra Tiwari Vs. District Inspector of Schools, Deoria and another[1]; Full Bench decision in Radha Raizada Vs. Committee of Management[2] and the Supreme Court decision

[1] 1990(1) U.P.L.B.E.C.160
[2] 1994(3) U.P.L.B.E.C.1551

in Prabhat Kumar Sharma Vs. State of U.P.[3] in support of his contention that if an occasion arises for ad-hoc appointment in terms of Section 18 of the Act, every vacancy will have to be filled in by ad-hoc promotion if suitable and qualified candidates are available for promotion. Recourse to appointment by direct recruitment, proceeds the submission, may be taken only if no suitable and qualified candidate is available for giving ad-hoc promotion to the post of Lecturer. The submission made by the learned Counsel for the appellant cannot be countenanced. The Division Bench decision in the case of Charu Chandra Tiwari (Supra) is based upon consideration of the provisions contained in the U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981 wherein there was a clear stipulation in para 4(2) that every vacancy in the post of a teacher in Lecturers grade may be filled by promotion by the senior most teacher of the institution in the trained graduate (L.T.) grade. Recourse to ad-hoc appointment by direct recruitment it was provided in paragraph 5 was to be taken only "where any vacancy cannot be filled by promotion under Paragraph 4" The Division Bench had no occasion to examine Section 18 of the Act as it stands substituted by U.P. Act No. 24, 1992 w.e.f.14.7.1992 and again by U.P. Act No.1 of 1993 and the provisions contained in Rules 9-A and 9-B of U.P. Secondary Education Services Commission Rules 1983 or those of the U.P. Secondary Education Service Commission Rules.1995 which contain the procedure for ad-hoc appointment by direct recruitment and by promotion respectively.

6. The full Bench of this Court in Radha Raizada case (Supra) no doubt noticed the substituted/amended Section 18 as well as U.P. Secondary Education Service Commission Rules. 1983 but the question that has arisen in the present case was neither raised nor decided by the Full Bench in that case. The Supreme Court decision in Prabhat Kumar Sharma (Supra) too did not go in to the question raised in the present case. The question raised herein was neither examined nor decided in that case.

7. Accordingly, we are of the view that the decisions aforestated are not of much avail to the appellant for the purpose of construction of the provisions contained in Rules 15 and 16 of the Rules. Appointments of teachers in recognised High Schools and Intermediate Colleges are governed by the Act. Earlier the field was occupied by Intermediate Education Act. 1921. Section 16(1) of the Act as it stands amended up to date envisages that "every appointment of a teacher shall on or after the date of commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 1995, be made by the management only on the recommendation of the Commission". This is however, subject to certain exceptions e.g., ad-hoc appointment under Section 18; absorption of reserve pool teacher' under Chapter IV-A; appointments under the provisions to sub-Section (1) of Section 16 etc. 'Any appointment' in contravention of the Act it is provided in sub-section (2) of Section 16 shall be void". By amendment vide U.P. Act No.25 of 1998 the word Commission has been substituted by the word "Board". Section 18(1) provides that where the Management has notified a vacancy to the Board in accordance with Section 10(1) and the post of a teacher actually remained vacant for more than two months " the Management may appoint by direct recruitment or promotion a teacher on purely ad-hoc basis in the manner hereinafter provided " Sub-Section (2) and (3) of Section 18 read as under :

"(2) A teacher other than a principal or Headmaster, who is to be appointed by direct recruitment may be appointed on the recommendation of the Selection committee referred to in sub-section (8).

[3] 1996(3) U.P.L.B.E.C.1959

(3) A teacher other than a Principal or Headmaster, who is to be appointed by promotion, may in the prescribed manner be appointed by promoting the senior most teacher possessing prescribed qualifications-

(a) In the trained graduate's grade as a lecturer, in the case of a vacancy in the lecturer's grade;

(b) In the certificate of Teaching grade, as teacher in the trained graduates grade, in the case of a vacancy in the Trained graduate's grade."

8. It would be evident from the provisions quoted above that ad-hoc appointment by direct recruitment may be made only on the recommendation of the Selection Committee referred to in sub-Section (8) while appointment by provisions in the Lecturer grade is required to be made in "prescribed manner" by promoting the senior most teacher in the L.T. grade possessing prescribed qualifications. The manner is prescribed in the Rules, Rule 15 of the Rules provides the procedure for ad-hoc appointment by direct recruitment under Section 18 of the Act "in respect of vacancies to be filled in by direct recruitment "Rule 16 provides the procedure for ad-hoc appointment under Section 18 of the Act by promotion "in respect of the vacancies to be filled in by promotion". It is not disputed that 50% of the posts in the Lecturer's grade are to be filled by promotion and 50% by direct recruitment vide Rule 10 of the Rules. The expression "in respect of the vacancies to be filled in by direct recruitment" and "in respect of the vacancies to be filled in by promotion' occurring in Rule 15 (1) and 16 (1) respectively are significant. These expressions in our opinion have reference to vacancies as determined and notified in accordance with Section 10 read with Rules 10 and 11 of the Rules. The notification of vacancies to the Board contains statement of vacancies for each category of posts to be filled in by direct recruitment or by promotion. Ad –hoc appointment under Section 18 is permissible only on fulfilment of the twin conditions precedent: firstly, the vacancy had been notified, and secondly; the post remained vacant for two months. If the vacancy determined in the aforesaid manner falls in the quota of promotion and the condition precedent as visualized in Section 18(1) are satisfied, it can be filled in on ad hoc basis only in the manner prescribed by Rule 16 of the Rules as prescribed in Section 18(3) and not by direct recruitment under sub-Section (2) read with sub-Section (8) of Section 18 and Rule 15 of the Rules except on pains of invalidation of appointment in terms of Section 16 (2) of the Act. In our opinion therefore if the vacancy falls in the quota of direct recruit then the same cannot be filled by ad-hoc promotion under Rule 16 of the Rules which provides procedure for ad-hoc appointment by promotion where such appointments are to be made under Section 18 of the act "in respect of the vacancies to be filled in by promotion" it may be observed that the U.P. Secondary Education Services Commission (Removal of Difficulties) Order, 1981 has since been rescinded and the procedure laid down in the Rules holds the field of ad hoc appointment. The view taken by the learned Single Judge warrants no interference.

9. Before parting with the case, it may be observed that the Act has been amended in certain respects by U.P. Act No.25 and Rules have been replaced by the U.P. Secondary Education Service Selection Board Rules, 1998 but the legal position discussed above remains unaltered even under the new Rules. In the instant case the 1995 Rules were very much in force at the time of the appointment in question herein. Regular promotion is now to be made on the recommendation of a Selection Committee constituted under Section 12 inserted by U.P. Act No. 25 (preceded by Ordinance No.3 of 1998)

In view of the above discussion the appeal fails and is dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2000

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

Civil Misc. Writ Petition No. 25956 of 1997

Ajay Kumar Sharma. ...Petitioner
Versus
State Government of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri S.A. Shah
Shri B.S. Kulshreshtha
Shri B.C. Naik
Shri S.C. Dwivedi
Shri P.C. Singh

Counsel for the Respondents:
S.C.

Dying in Harness Rules 1974- Termination order- compassionate appointment- termination of service relying upon the provisions of U.P. Temporary Government employees termination of service Rules 1975-
Held- illegal.
Held-
impugned order shows that the authority passing the impugned order has relied upon the provision of U.P. Temporary Government Employees (Termination of Service) rules 1975. As stated above and not disputed on behalf of the respondent, the impugned order of termination could not be passed under aforesaid Rules in the facts of the instant case in as much as of the petitioner is to be treated as permanent. (Para 7)
Case law discussed.
1997 ALJ 834

By the Court

1. One Shyam Bihari Lal Sharma was an employee on Class-III post as Village Development Officer alleged to be civil post of government of U.P. at Block Bahadarabad, District Haridwar. Unfortunately he died on 9.2.90 leaving behind him the petitioner (Ajay Kumar Sharma) and three other sons as mentioned in para 4 of the writ petition.

2. In the writ petition it has been categorically stated that petitioner was given appointment on compassionate ground under relevant 'dying in harness rules, 1974' which were applicable to the facts of the instant case. This fact has not been disputed by the respondent in the counter affidavit. A copy of the appointment letter has been filed on 25.05.90 which has been filed as annexure-1 to the writ petition. In pursuance of the aforementioned appointment letter, the petitioner joined the post of peon on 7.6.90, the appointment letter however, mentioned that appointment of the petitioner was temporary.

3. By the order dated 26.9.95, filed as annexure –3 to the petition issued by Block Development Officer, Banadarabad, District Haridwar indicates that the petitioner was appointed on 7.6.90. and thereafter he was given benefit of annual increment in salary uninterruptedly. Another order of Jt. Development Commissioner dated 14.1.97 (annexure-4) to the writ petition shows that petitioner was sought to be transferred.

4. The aforesaid facts have not been disputed in the counter affidavit as also admitted to the learned standing counsel. In view of the above it appears that petitioner was treated as temporary employee but he was treated as purely temporary employee. Even otherwise this court in the decision reported in 1997 ALJ 834 held that compassionate appointment cannot be for short- term.

5. Needless to mention that appointment in dying in harness rules cannot and should

not be temporary or adhoc as it will frustrate the very purpose of the rules 'namely to save the family from distress'.

6. Ajay Kumar Sharma (petitioner), son of the deceased employee Shyam Bihari Lal Sharma, has filed this petition challenging the validity of the impugned order of termination of service dated 7.7. 97 passed by the District Development Officer Haridwar (annexure-5) to the writ petition.

7. The impugned order shows that the authority passing the impugned order has relied upon the provision of U.P. Temporary Government Employees (Termination of Service) rules 1975. As stated above and not disputed on behalf of the respondent, the impugned order of termination could not be passed under aforesaid rules in the facts of the instant case in as much as the petitioner is to be treated as permanent. Further, the counter affidavit (para-8) shows that the termination of the petitioner cannot be justified on the ground that it cast stigma if the 'veil' is lifted and true nature of the termination is being ascertained. It is well settled, now that court can always x-ray the facts and find out the correct nature of the termination order and if it is found that it is penal in nature, the same cannot be sustained if passed in violation of principle of natural justice or the relevant rules requiring opportunity of hearing or termination is or punishment to the delinquent employee.

8. In view of the above impugned order dated 7.7.97 (annexure-5) passed by the respondent no.3 (District Development Officer, Haridwar) is nearby set-aside, the respondents are directed to ignore the impugned order as being ab-initio treat the petitioner in service continuously and pay salary as well as arrears as may be due in accordance with law giving benefit of increment etc. within two months of the receipt of a certified copy of this judgement and continue to pay few salary month by month as is being paid to other similarly stress employee in the department. It is further made clear that it any person has been appointed on the post held by the petitioner, he shall not be thrown on street and will be adjusted in accordance with law. If there is no post a supernumerary post shall be sanctioned to safeguard the interest of a person who is not before this court. This order is passed in consonance with the order dated 13.8.97 passed by this court on the writ petition which provided that any appointment made on the post held by the petitioner shall be subject to the final result of the writ petition.

9. Petitioner shall be entitled to the salary only with effect from the date of actual joining of the duty in pursuance to this Judgement, copy of this Judgement be filed before the concerned authorities within six weeks from today. The question of arrear of salary for absentee period may be considered by the authorities in accordance with law, namely whether he has been employed gainfully or not during the period in question.

The writ petition stands allowed subject to the observations made above. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 10101 of 1998

Ved Prakash Tyagi ...Petitioner.
Versus
Ist A.D.J., Pilibhit & another ...Respondents.

Counsel for the Petitioner:
Shri K.K. Arora

Counsel for the Respondents:
S.C.
Shri A.K. Goyal

Section 20 (4) of U.P. Urban Building (Regulation of letting Rent and Eviction) Act, 1972- in order to claim the benefit of section 20 (4) of the Act, the tenant is not required to deposit the amount of house and water taxes as well as the amount of Electricity charges.
Held-

For claiming the benefit of section 20 (4) of the Act a tenant is not required to deposit the amount of house and water tax. Similarly, the tenant while claiming the benefit of Section 20 (4) of the Act is not required to deposit the entire amount of electricity charges. The petitioner having deposited the entire amount of rent as claimed in the relief clause 'b' of the plaint, is entitled to the benefit of provision of Section 20 (4) of the Act.(para 7)
Cases referred.
1990 ACJ page 607
1991 (2) ARC page 354

By the Court

1. This writ petition is directed against the judgment of the Judge Small Causes Court dated 30.8.1991 decreeing the suit for recovery of arrears of rent and ejectment against the petitioner and the order of the revisional court dated 21.2.1998 affirming the findings recorded by the trial court.

2. Briefly stated the facts are that the landlord-respondent filed suit for recovery of arrears of rent and ejectment with the allegation that the petitioner was a tenant of the disputed accommodation on monthly rent of Rs.50/- besides he was liable to pay Rs.20/- per month as electricity charges and Rs.7.50 per month towards house and water tax as part of rent. The tenant failed to pay arrears of rent after September 1982. He gave a notice demanding arrears of rent and terminating the tenancy. The petitioner, after having received it, did not comply with the same. The petitioner contested the suit. It was alleged that the rate of rent was Rs.20/- per month. He admitted his liability to pay electricity charges at the rate of Rs.20/- per month as well as water tax and house tax. He denied that he had received any notice. The trial court recorded a finding that the petitioner had received the notice. The rate of rent was Rs.50/- per month and in addition to it Rs.20/- per month as electricity charges and Rs.7.50 per month towards house and water tax as part of the rent. This finding has been affirmed by the revisional court.

3. The petitioner had also claimed the benefit of provision of Section 20(4) of the Act. He alleged that he had deposited rent at the rate of Rs.50/- per month on the date of first hearing with interest and the cost of the suit. The petitioner has been denied the benefit of this provision only on the ground that he had not deposited the amount of electricity charges along with the rent.

4. The core question is whether the petitioner is liable to deposit electricity charges as well to get the benefit of the provisions of subsection (4) of Section 20 of the Act. There was no written agreement between the parties to show that Rs.20/- per month was being charged towards electricity charges as part of the rent. The plaintiff and defendant both appeared in the witness box. The plaintiff as P.W.4 stated that the defendant was liable to pay Rs.50/- per month as the rent of the accommodation, Rs.20/- per month towards electricity charges and Rs.7.50 per month towards house tax. She nowhere stated that the electricity charges and the amount towards house and water tax formed part of the rent. It was not the case of the plaintiff that the defendant was liable to pay Rs.77.50 as rent which included the amount of electricity charges, house and water tax. The plaintiff filed the suit claiming the amount of rent Rs.2,015/- under clause (b) and Rs.720/- towards electricity charges under clause (d) of the relief mentioned in the plaint.

5. Section 105 of the Transfer of Properties Act defines the lease. The lessor is entitled to get consideration for the lease from the lessee which is agreed between the parties. In case a

lessor provides other amenities or furniture in addition to the accommodation which has been let out, unless the intention of the parties is that the amount fixed for providing such amenities be also treated as rent, the amount taken separately for furniture and other amenities may not form part of rent. Normally the electricity charges are taken by the landlord for the purpose that he is providing electricity to the tenant and for such facility he has to pay the amount of electricity charges to the Electricity Board or such authority from whom the electricity connection has been taken and the landlord is liable to pay for the consumption of electricity by the tenant. In absence of any specific agreement or proof in this respect it cannot always be termed that the amount of electricity charges forms part of the rent.

6. Learned counsel for the respondent has placed reliance upon the decision Puspa Sen Gupta v. Susma Ghose, 1990 ACJ 607, wherein it has been held that the additional sum of Rs.8/- per month agreed by the tenant to be paid to the landlord may. Amount as part of the rent. This was based on the interpretation of the provision of sub-section (3) of Section 8 of the West Bengal Premises Rent Control Act. This case has no application to the facts of the present case where the plaintiff has to prove that the amount was liable to be paid by the petitioner as part of the rent

7. The next question is as to whether the tenant is also liable to deposit the amount of electricity charges for claiming the benefit of sub-section (4) of Section 20 of the Act. Section 7 of the Act provides that water tax shall form part of the rent. In Kumud Kumar Kaushik v. IV Additional District Judge, Ghaziabad and others, 1991 (2) ARC 354, it has been held that for claiming the benefit of Section 20(4) of the Act a tenant is not required to deposit the amount of house and water tax. Similarly, the tenant while claiming the benefit of Section 20(4) of the Act is not required to deposit the amount of electricity charges. The petitioner having deposited the entire amount of rent as claimed in the relief clause 'b' of the plaint, is entitled to the benefit of provision of Section 20(4) of the Act.

8. In view of the above, the writ petition is partly allowed. The orders passed by the courts below dated 30.8.1991 and 21.2.1998 in respect of ejectment of the petitioner are hereby quashed.

9. Considering the facts and circumstances of case the parties shall bear their own cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEB 1, 2000

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

Special Appeal No. 426 of 1998

Sanjeev Kumar Dubey ...Petitioners.
Versus
District Inspector of Schools, Etawah and others ...Respondents.

Counsel for the Appellant:
Shri Yogesh Kumar Saxena

Counsel for the Respondent :
S.C.
Shri V.K. Saxena

Constitution of India, Article 14 readwith Intermediate Education Act- 1921 – Regulation 103 to 107- compassionate appointment – whether a dependent of a teacher is entitled to claim the appointment as L.T. grade Teacher ? held- yes- Provisions of Regulation 103 to 107 are not ultravires.
Held-
In our opinion, therefore, the third proviso to sub-sec. (1) of Sec. 16 and the Notification dated 5.2.98 by which regulations 103 to 107 of Chapter iii of the Regulations made under the U.P. Intermediate Education Act

were substituted are not ultravires the Article 14 of the Constitution. Broader perspective of social justice sought to be achieved by these provisions must be borne in mind while examining the reasonableness of the classification made by the Legislature. (para 6)

Case Law discussed.

1994 J.T. (3) SC- 525
JT 1998(4) SC 155,
AIR 1985 SC 167

By the Court

1. The vexed question that begs determination in this Special Appeal is whether the third proviso to Sec. 16 (1) of the U.P. Secondary Education Service Selection Boards Act, 1982 and the Notification No. 300/XVI/72 (1) /90 Shiksha Anubhag-7 Lucknow dated Feb 2 1995 which enable appointment of the dependent of a teacher or other employee of an institution dying-in-harness as a teacher in trained graduate grade, are ultra-vires the Constitution.

2. A brief sketch of necessary facts giving rise to Special Appeal No. 426 of 1998 is that the appellants father, Sri Narain Prasad Dubey, a Science demonstrator in Sri Radha Ballabh Inter College Phaphund in the district of Etawah, was spirited away by death while in harness on 31.12.1993. The appellant staked his claim for compassionate appointment as demonstrator in the institution vide application dated 24.07.1995. The Committee of Management of the institution adopted a resolution on 10.03.1996 for appointing the appellant as demonstrator on compassionate ground. The resolution passed by the Committee of Management was frowned upon with disapproval on the premises that the appellant fell short of requisite training in order to qualify for appointment as a teacher. The appellant was communicated with accordingly by the District Inspector of Schools vide letter dated 30.9.1997 which was made the subject matter of impingement in the writ petition from which has stemmed the instant special appeal.. The learned Single Judge held the view that the third proviso to sub-sec (1) of Section 16 of the U.P. Secondary Education & Service Selection Boards Act, 1982 which enables appointment of the dependent of a teacher or other employees of an Institution dying-in-harness as a teacher in trained graduate grade in accordance with the regulations made under sub-section (4) of Sec. 9 of the U .P. Intermediate Education Act, 1921, is ultravires the Article 14 of the constitution. The Notification dated 2.2.95 was also struck down by the learned Single Judge on the ground that it constituted infraction of Art. 14 of the Constitution.

We have had heard counsel for the appellant and the learned standing counsel representing the State.

3. The U.P. Secondary Education Service Selection Boards Act, 1982 encapsulates provisions for appointments of teachers in the secondary institutions recognised by the U.P. Board of High School and Intermediate Education. Earlier such appointments were governed by the Intermediate Education Act. 1921 and regulations made thereunder. Sec. 16 of the Act being germane to the vexed question under consideration is excerpted below:

" 16. Appointment to be made only on the recommendation of the Board- (1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but subject to the provisions of Sections [18,21-B], 21-C, 21-D, 33, 33-A and 33-B, every appointment of a teacher shall, on or after the date of commencement of the U.P. Secondary Education Services Selection Boards (Amendment) Act, 1995 be made by the management only on the recommendation of commission]

Provided that in respect of retrenched employees, the provisions of Section 16-EE of

the Intermediate Education Act. 1921, shall mutatis mutandis apply.

Provided further that the appointment of a teacher by transfer from one institution to another, may be made in accordance with the regulations made under clause (c) of sub-section (2) of Section 16- of the Intermediate Education Act, 1921.

[Provided also that the dependent, of a teacher or other employee of an institution dying in harness, who possess the qualifications prescribed under the Intermediate Education Act, 1921 may, be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under sub-section (4) of Section 9 of the said Act]

(2) Any appointment made in contravention of the provisions of sub-section (1) shall be void.

4. The third Proviso to sub-section (1) of Sec. 16 was inserted by the U.P. Act 15 of 1995 with effect from 28.12.94 Sub-section (1) of Section 16 envisages that subject to the provisions of Sec. 18, 21-B, 21-C, 21-D, 33, 33-A and 33-B, every appointment of a teacher is to be made by the management only on the recommendations of the Selection Board constituted under the Act notwithstanding anything to the contrary contained in the Intermediate education Act, The third proviso to sub- section (1) however, carves out an exception to this method of recruitment in respect of dependants of teachers or other employees of an institution dying in harness and postulates that such dependent may be appointed as a teacher in the trained graduate grade in accordance with the regulations made under sub-section (4) of Sec 9 of the U.P. Intermediate Education Act. 1921.

5. In **Direction of Education (Secondary) v. Pushpendra Kumar**[1] the quintessence of what has been held is that the provision for grant of compassionate employment which savours of the nature of an exception to the general provision, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the posts which would have been forthcoming to them but for the provisions enabling appointment being made on compassionate grounds of the dependant of a deceased employee. Regard being had to the social justice objective sought to be achieved by the revisions providing for compassionate appointment, we feel persuaded to the view that the third proviso to sub-sec (1) of sec.16 which provides a different procedure of appointment to L.T. grade in respect of dependants of a teacher and other employees in an institution dying in harness, is not in antagonism of Article 14 of the Constitution. In **Umesh Kumar Nagpal v. State of Haryana**[2] the Supreme Court held that the provision of compassionate employment in the lowest post by making an exception to the general rule of appointment could be justifiable and valid in the favourable treatment given to dependants of the deceased employees has a rational nexus with the object sought to be achieved viz. relief against destitution. The exception made in favour of the deceased employee was vindicated on the ground that it would be in consideration of the services rendered by him and the legitimate expectations, and the change in status and affairs of the family engendered by the erstwhile employment which are suddenly upturned.

6. The appointment as a teacher in the trained graduate grade in an Institution recognised under the U.P. Intermediate Education Act, 1921 is an appointment in the lowest grade of teaching staff of secondary institutions after the abolition of C.T grade. It

[1] JT 1998 (4) SC 155,
[2] JT 1994 (3) SC 525,

cannot be gain-said that appointment under the proviso may be made only if the candidate is equipped with the qualifications prescribed under the Intermediate Education Act, 1921. The essential qualifications have not been dispensed with. The procedure for such appointment is laid down in regulations 105 and 106 of Chapter III of the Regulations as they stand substituted by impugned notification dated Feb 2, 1995 issued in exercise of power under Sec 9 (4) of the U.P. Intermediate Education Act. It forms a class in itself and the classification so made has a reasonable and rational nexus with the object sought to be achieved viz. relief against destitution as held in Umesh Kumar Nagpal (supra). The procedure as laid down in regulation 105 of Chapter III of the Regulations made under the U.P. Intermediate Education Act visualises selection by a duly constituted Selection Committee consisting of the District Inspector of Schools, the Lekhandhikari, office of District Inspector of Schools and Zila Basic Shiksha Adhikari. Since a teacher serves as a melting pot in shaping the career, character and weaving moral fibre and aptitude for educational excellence in impressionable young children and being principal instrument to awakening the child to the cultural ethos, intellectual excellence and discipline the enabling provision contained in the third proviso to sub-sec (1) of Section 16 of the Act and those contained in regulations 105 and 106 of Chapter III of the Regulations made in exercise of power under Sec. 9 (4) of the U.P. Intermediate Education Act must be so construed as to enable the selection committee to select the dependant only if he is found suitable. The third proviso to sub-sec (1) of Sec. 16 of the Act is only an enabling provision and the word 'may' used in the proviso imparts discretion in the Selection Committee referred to in regulation 105 to select the dependant of a teacher or other employees dying in harness for appointment in trained graduate grade only if the candidate is found by the Selection Committee suitable, qualified for and deserving of such appointment. In our opinion, therefore the third proviso to sub-sec (1) of Sec. 16 and the Notification dated 5.2.98 by which regulation 103 to 107 of Chapter III of the Regulations made under the U.P. Intermediate Education Act were substituted are not ultravires the Article 14 of the Constitution. Broader perspective of social justice sought to be achieved by these provisions must be borne in mind while examining the reasonableness of the classification made by the legislature.

7. In Prabodh Verma v. State of U.P.,[3] the Supreme Court has laid the test of a valid classification in the following words:

" The principle underlying the guarantee of Art. 14 is not that the same rules of law should be applicable to all persons within the territory of India irrespective of differences of circumstances. It only means that all persons similarly circumstance should be treated alike and there should be no discrimination between one person and another if as regards the subject matter of the legislation, their position is substantially the same. By the process of classification, the State has the power to determine who should be regarded as a class for the purposes of legislation and in relation to a law enacted on a particular subject. The classification to be valid, however, must not be arbitrary but must be rational. It must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable nexus or relation to the object of the legislation. In order to pass the test, two conditions have to be fulfilled, namely,: (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together form others and (2) the differentia must have a rational nexus or relation to the object sought to be achieved by the legislation (see in re The

[3] AIR 1985 SC 167

Special Courts Bill, 1978 (1979) 2 SCR 476 535:AIR 1979 SC 478 at P. 509)

8. The impugned provisions satisfy the tests aforestated.

9. **In Director of Education (supra**) the impugned notification dated 2.2.95 was not held violative of Art. 14. In that case, some of the respondents therein, were appointed on class- 4 posts on compassionate ground. Subsequently, they filed writ petition seeking appropriate order/direction for being appointed on class-3 posts on the ground that they were possessed of the requisite qualification for promotion on class-3 posts of clerk. The High Court quashed the order of such appointment and directed that they be appointed on class 3 posts provided they were possessed of necessary qualification for the post super-added with a command to create a post in case the vacancies were not available. The Supreme Court viewed the direction given by the High Court with disapproval holding that if the regulations were so construed they would be open to challenge on ground of being violative of the right to equality in the matter of employment inasmuch as other persons who are eligible for appointment and who may be more meritorious than the dependants of deceased employees, would be balked of their right of being considered for such appointment under the rules. The provisions were not struck down by the Apex Court. Instead, they were rationalised by construing to mean that in the matter of appointment of a dependant of a teaching/non-teaching staff in non-government recognised aided institutions dying in harness, if a post in class-3 is not available in the Institution in which the deceased was employed or any other institution in the district, the dependant would be appointed on a class-4 post in the institution in which the deceased employee was employed and for the purpose, supernumerary post in class-3 would be created. The language employed in the third proviso to sub-sec (1) of Sec 16 of the Act does not confer an absolute right in the dependent of a teacher and other employee of an Institution dying in harness who is possessed of prescribed qualification to claim appointment as a teacher in the trained graduate grade as of right. The selection Committee referred to in regulation 105 can reject the claim of the dependant if he is not found suitable for the job.

10. True, the language used in regulation 106 of Chapter III of the Regulations as it stands substituted by notification dated 2.2.92 is of mandatory character but it is settled by a catena of decisions of the Supreme Court that a compassionate appointment cannot be claimed as a matter of course irrespective of the financial status of the family of the deceased and qualifications and suitability of his dependant seeking compassionate appointment. A construction, which leads to invalidity of a statutory provision, should be avoided. The gloss of construction which we are putting on the impugned provisions will go a long way to strike a reasonable balance between the interest of the family of the deceased and that of the student community without unduly encroaching upon the fundamental right of equality of opportunity of other eligible and qualified persons.

11. Without meaning disparagement to the learned Single Judge, the view taken by him on the validity of the third proviso to Sec. 16 (1) of the U.P. Secondary Education Service Selection Boards Act, 1982 and the G.O, dated 2.2.95 does not commend itself for acceptance. We, however, forbear from expressing any opinion as to whether the appellant could be appointed on the post of demonstrator for the question has not been delved into by the learned Single Judge and in our opinion, the matter should be relegated to the Single Judge for decision of the writ petition de novo.

SPECIAL APPEAL NO . 510 OF 1998

12. In so far as Special Appeal aforestated is concerned, suffice it to say that the learned Single Judge allowed the writ petition filed by the Committee of Management vide judgment under challenge in this appeal in view of his judgment in the case of **Sanjeev Kumar Dubey v. District Inspector of Schools and ors. (supra)** holding that no appointment of a teacher can be made under dying in harness rules and that any rule permitting such appointment is ultravires the Article 14 of the Constitution. The facts of this case are that the District Inspector of Schools, Deoria by his order dated 31.12.97 appointed the appellant as Asstt. Teacher in untrained grade in Janta Junior High School Mail Deoria taking cue from the provisions contained in the G.O. dated 31.1.97 referred to in the appointment order dated 31.12.97. The Committee of Management, however, despite reminders from the office of the Zila Basic Shiksha Adhikari Deoria declined to permit the appellant herein to join his duties in the institution who filed a writ petition being writ petition No. 7041 of 98 which came to be disposed of vide judgment and order dated 5.3.98 with a direction that in case a representation was filed by the Committee of Management, the same would be disposed of by the Zila Basic Shiksha Adhikari in accordance with law. The Zila Basic Shiksha Adhikari, by his order dated April 25, 1998 rejected the representation. The said order was challenged in the writ petition-giving rise to Special Appeal No. 510 of 1998.

13. It brooks no dispute that the provisions for compassionate appointment as Asstt. Teacher in Basic Schools is provided in the Government Order no. 231/XV-6-97-28 (66) /90 Shiksha (6) Anubhag, Lucknow dated Jan, 31. 1997. The learned Single Judge without adverting himself to this G.O. was pleased to allow the writ petition filed by the Committee of Management holding that any rule permitting compassionate appointment would be ultravires the Art. 14 of the Constitution. The view taken by the learned Single Judge cannot be viewed in approval in view of what we have discussed in Special Appeal No. 426 of 1998. The appeal therefore, merits to be allowed.

CIVIL MISC . WRIT PETITION NO. 35079 OF 1999

14. The petition aforestated, though cognisable by a Single Judge Bench, has come up before us in view of the order dated 18.8.99 passed by the learned Single Judge directing the matter to be taken up along with the Special Appeal **No. 510 of 1998 Alok Kumar v. State of U.P.** The writ petitioner staked his claim for compassionate appointment and his application, it is alleged, was forwarded to the District Inspector of Schools. Since the petitioner seeks appointment as an Asstt. Teacher in L.T. grade in an intermediate college, such appointment would be governed by the provisions contained in the third proviso to Sec. 16 (1) of the U.P. Secondary Education Service Commission and Selection Boards Act, 1982 and regulations 103 to 106 of chapter III of the Regulations made under the U.P. Intermediate Education Act as amended by Notification dated 2.2.95 which in our opinion, is intra-vires. The matter, however, needs to be considered by the Selection Committee referred to in regulation 105 of Chapter III of the Regulations made under Sec. 9 (4) of the U.P. Intermediate Education Act. 1921 in the light of the observations made in this judgment while discussing the case of Special Appeal No. 426 of 1998.

15. As a result of foregoing discussions, the Special Appeals and the Writ Petition are disposed of in the following manner.

(1) Special Appeal No. 426 of 1998 is allowed. The order of the learned Single Judge is set aside. The matter is remitted to the appropriate Single Judge Bench for

decision afresh in accordance with law and in the light of the observations made in this judgment;

(2) Special Appeal No. 510 of 1998 succeeds and is allowed. The impugned order passed by the learned Single Judge is set aside. The matter is remitted to the appropriate Single Judge Bench for decision of the writ petition afresh in accordance with law and in the light of this judgment; and

(3) Writ petition No. 35079 of 1999 is disposed of with the directions that in case the petitioner stakes his claim for compassionate appointment as Asstt Teacher, his case will be considered by the Selection Committee referred to in regulation 105 of Chapter III of the Regulations made in the U.P. Intermediate Education Act. 1921 and the Notification dated 2.2.95.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.3.2000

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

Civil Misc. Writ Petition No. 9732 of1999.

Raghvendra Lal Srivastava...Petitioner.
Versus
Principal Secretary (Education) and another ...Respondents.

Counsel for the Petitioner:
Shri Salil Kumar Rai
Shri S.N. Srivastava

Counsel for the Respondents:
S.C.

U.P. Government Services (Medical Attendance) Rules 1946- petitioner being posted as senior assistant in District Non Formal Education officer; Basti –undergone open-heart surgery– claimed Reimbursement of Rs, 60,000/- on 21.1.95 recommendation by Additional Directors Medical Health and Family for Rs. 42,277- direction issued to give the recommended amount alongwith 12% interest thereon w.e.f. the date of recommendation.
Held –
In any case once the director of health and family welfare , U.P. Lucknow approved this amount in 1995 it was the responsibility of the authorities to ensure its payment . In my opinion interest of Justice will be served if an interest of 12% per annum is awarded to the petitioner from the date the additional director (Chikitsa Upchar), Lucknow recommended the amount of medical reimbursement. (para 5)

By the Court

1. The Petitioner is posted as Senior Assistant in the office of district Non Formal Education Officer, Basti. He is a heart patient He had to undergo open – heart surgery on 21.4.93. at Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow (in brief SGPGI) He moved an application on 7.7.93 to respondent no.1through District Basic Education Officer, Siddharth Nagar claiming reimbursement of the amount spent by him on open-heart surgery in pursuance of U.P. Government services (Medical Attendance) Rules 1946 He submitted original receipts and documents in support of expenses incurred in the operation. The District Basic Education Officer forwarded the letter to the Additional Director of Education (Basic) Allahabad. When nothing was heard the petitioner filed another application on 24.9.93 which was forwarded by the District Basic Education Officer, Siddharth Nagar on 12.10.1993 who forwarded it to Additional Director (Basic) Allahabad to take appropriate action so that the claim of the petitioner could be settled. The Director of Education,. U.P., Allahabad with reference to the letter dated 12.10.1993 wrote a letter on 25.1.1994 to District Basic Education Officer, Siddharth Nagar asking for the records of petitioner and the recommendation made by Director of Medical Health and Family Welfare, U.P. The petitioner along with letter dated 4.2.1994

addressed to Director Medical Health and Family Welfare, U.P. sent a photo copy of the receipts and other documents relating to surgery and expenses and prayed that he be reimbursed. This letter was forwarded by the Director to District Basic Education Officer, Siddharth Nagar by letter dated 8.2.1994. The Additional Director (Chikitsa Upchar) working in the office of Director, Medical Health and Family Welfare, U.P. Lucknow, by his letter dated 28.1.1995 recommended payment of Rs.42,277=00 (Rupees forty two thousand two hundred and seventy seven only) out of Rs.60,445=05 claimed by the petitioner, and this letter was sent to Additional Director of Education (Basic), Allahabad. The Assistant Director (Services), Directorate of Education, U.P. Lucknow wrote to respondent no. 2 by his letter dated 4.12.1996 for expeditious disposal and payment to the petitioner in accordance with law. When no action was taken for more than a year by respondent no.2 the petitioner sent another letter on 2.2.1998 requesting for reimbursement of his medical expenses. No action was taken by the respondents inspite of reminder dated 26.10.1998. Therefore, the petitioner filed the instant writ petition for issuing a direction to the respondents for reimbursement of the petitioner's medical expenses incurred by him in relation to open-heart surgery at SGPGI as far back in 1993.

2. Learned counsel for the petitioner Shri Salil Kumar Rai has urged that inspite of recommendation having been made by the Director of Health and Family Welfare, U.P. Lucknow on 28.1.1995, the amount has not been released by the respondents to the petitioner arbitrarily. He, therefore, seeks a direction from the court for the payment of amount along with 18% interest. On the other hand, Shri S.N. Srivastava learned standing counsel has urged that for non-payment of medical reimbursement to the petitioner the respondents have already taken action and two officers have been suspended. It has further been stated in the counter affidavit that duplicate copy of the letter of recommendation dated 28.1.1995 issued by the Director was got prepared and the matter has been referred to the State Government for sanctioning the amount.

3. When the petition came up for preliminary hearing before Hon'ble R.R.K. Trivedi, J, he passed an order on 16.3.1999 directing the respondents either to pay a sum of Rs.42,277=00 to petitioner or show cause within three months. But no payment has been made to petitioner. The respondents did not show cause within three months. A counter affidavit was sworn by the Assistant Director, Series-2, Directorate of Education U.P. Allahabad on 31.7.1999. The facts stated in the petition are not disputed. The delay is explained in paragraph 3 (iii) of the counter affidavit and it is stated that the recommendation and the letter of Assistant Director of Education (Basic), Gorakhpur was sent to the Director of Education U.P. Allahabad on 19.7.1993 and it was received in the office of Director on 2.8.1993 but due to negligence of certain employees it was misplaced. Consequently two of the employees have been suspended and duplicate copies have been sent on 12.5.1999 and 26.5.1999 and as soon as the sanction is received from the government the payment shall be made.

4. There is no dispute that the petitioner under the rules is entitled for reimbursement for open-heart surgery. It is further not disputed that even though the petitioner had claimed Rs.60,445=05 the appropriate authority recommended for reimbursement of Rs. 42,277=00 only. The respondents themselves admit that the relevant papers were received by the Director of Education in 1993 but they were probably misplaced, may be deliberately, by the employees who have been suspended. Even the duplicate copies were made available and papers were sent in May 1999 after the petitioner approached this court for direction to state government for

reimbursement of medical expenses. This counter affidavit was sworn on the last day of July 1999 but there is no explanation for non-sanctioning the amount. The learned standing counsel could not make any statement even today whether the amount has been sanctioned, if not why. The petitioner is only an Assistant in the office. The open-heart surgery was performed in 1993. Even though the expenditure incurred was Rs. 60,445=05 the petitioner did not object to recommendation of Rs. 42,277=00 only. He is running for more than six and half years for reimbursement of the amount spent by him on his medical treatment. Since there is no explanation it has to be accepted that petitioner is entitled to the amount recommended by the Additional Director (Chikistsa Upchar), Lucknow. It appears due to long delay the responsibility is being avoided. This is not fair to the petitioner. It is unfortunate that even when there is no dispute the authorities for the reasons best known to them are not acting promptly. This leads to unnecessary litigation and expenses. This court directed the respondents to pay within three months or show cause. The respondent did not pay due attention to this order. In any case the papers having been forwarded in May 1999, there appears no justification for sanctioning authority to keep quiet. There is no option but to direct respondents to make payment of the recommended amount immediately.

5. Learned counsel for the petitioner claims that on a sum of Rs. 42,277=00 he is also entitled for interest at the rate of 18% per annum which is opposed by the learned standing counsel. The delay in payment is due to the conduct of the employees in the respondents office. The papers were received in 1993 in Directors office but no action could be taken for six years. The employees have no doubt been suspended but that does not redress the grievance of the petitioner. He has to be compensated for this delay. In any case once the Director of Health and Family Welfare, U.P. Lucknow approved this amount in 1995 it was the responsibility of the authorities to ensure its payment. In my opinion interest of justice will be served if an interest of 12% per annum is awarded to the petitioner from the date the Additional Director (Chikitsa Upchar), Lucknow recommended the amount of medical reimbursement.

6. In the result the writ petition succeeds and is allowed. Writ of mandamus is issued to respondent no.1 to sanction sum of Rs. 42,277=00 medical reimbursement to the petitioner alongwith 12% interest and pay it within a period of two months from the date a certified copy of; this order is produced before respondent no.1. It is clarified that 12% interest payable to the petitioner shall be calculated from 28.1.1995, when the Additional Director (Chikitsa Upchar) Lucknow recommended the medical reimbursement.

The petitioner shall be entitled to his costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAAHABAD 14.3.2000

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

Special Appeal No. 196 of1999.

Manmindar Singh ...Appellant.
Versus
M/s Chandra Cold Storage and others ...Respondents.

Counsel for Appellant:
Mr. Y.K. Saxena
Mr. P.C. Shakya.

Counsel for Respondent :
Mr.Pankaj Bhatiya.
Mr. R.N. Singh.

Constitution of India - Article 226 Power of the Court apart from prerogative writs - High Court can issue any such order/direction which may be deem fit and proper in the end of justice for enforcement of Fundamental rights direction of Single Judge to make certain deposits to avoid confirmation of sale-purchaser no vested Right to get the auction sale confirmed.
Held-- Para 8

High Court under article 226 of the Constitution has the power not only to issue prerogative writs but it can also issue such orders or directions as may be deemed fit and proper in the ends of justice for the enforcement of the rights conferred by Part III and ' for any other purpose.' In the fact situation of the case discussed above, the learned Single Judge, in our opinion, was justified in giving time to the respondent cold storage to make necessary deposits and avoid confirmation of the auction sale. The appellant suffered no loss since he had acquired no vested right to get the auction sale confirmed.
Case law discussed
1991 India Cases 268
1987 R.D. - 380
1995 A.W.E. 896
A.I.R. S.C. 349.

By the Court

1. This appeal is directed against the judgement and order dated 12.2.1999 passed in Civil Misc. Writ Petition No. 5350 of 1999 in Re: Chandra Cold Storage Versus State of U.P. and others as well as against the order dated 23.2.1999 passed on the Modification Application moved in the writ petition aforestated.

2. Respondent M/s. Chnadra Cold Storage had taken certain loan from the Bank of India, Fatehgarh Branch, Farrukhabad which was repayable in instalments. It appears that on default being made in payment of the instalments a writ of demand and citation was issued which was challenged in Civil Misc. Writ Petition No. 30427 of 1998. The writ petition came to the disposed of vide judgement and order dated 18.9.1998 thereby directing that the petitioner therein would deposit the entire amount of loan in tri-monthly four instalments. It was provided that the first instalment would be payable on or before 31.12.1998 up to which dated the proceeding for recovery would remain stayed and upon deposit of the first instalment seal and lock put on the petitioner's cold storage would be removed by the District Magistrate and the recovery proceeding would remain stayed so long as the petitioner went on depositing the instalments. In the event of failure to deposit any of the instalments, it was provided that the stay order would cease to be operative. It appears that the respondent deposited a sum of Rs.3,00,000/- but failed to deposit the entire outstanding dues whereupon the cold storage of the respondent was put to auction on 31.1.1999 pursuant to an advertisement in that regard published in Amar Ujala and Dainik Jagran on 21.11.1999. The appellant herein was the highest bidder having offered Rs.52,40,000/- for the purchase of the properties belonging to M/s. Chandra Cold Storage. He deposited a sum of Rs.1,00,000/- in cash and Rs.12,10,000/- in the shape of bankers cheque no. E.M.G./C No. 968833 dated 30.1.1999 on the fall of the fall of the hammer in his favour. The rest of the 3/4th amount i.e. Rs.39,30,000/- is said to have been deposited on 10.2.1999 vide another hankers cheque.

3. The writ petition giving rise to this Special Appeal came to be filed by the respondent cold storage challenging the aforestated auction sale. The learned Single Judge after hearing the counsel for the parties directed that 3/4th of the outstanding amount of loan might be deposited by 15th March, 1999 and the remaining 1/4th outstanding amount of loan by 30th April, 1999. This direction contained an stipulation that in the event of default to deposit 3/4th of the outstanding amount of loan the sale already held would be confirmed after 15th March, 1999. A clarification application was filed on the premises that it was not clear as to what

amount was to the deposited under the orders of the Court. The said application came to the disposed of by the order dated 23.2.1999 with the direction that the petitioner, (respondent herein) would deposit 3/4th of the amount which was due to be paid by it with the respondent bank by the date fixed by order dated 12.9.1999. The two orders dated 12.2.1999 and 23.2.1999 are under challenge in this Special Appeal.

4. We have had heard Sri Y.K. Saxena for the appellant and Sri R.N. Singh, Senior Advocate for the respondent clod storage.

5. The submissions made by Sri Y.K. Saxena, learned counsel for the appellant is three fold. Firstly, that the writ petition giving rise to this Special Appeal was not maintainable in view of the fact that earlier the respondent cold storage had filed a writ petition challenging the recovery proceeding which had been disposed of by fixing certain instalments and the second Writ Petition challenging the auction proceeding was being based on the same cause of action was not maintainable; secondly, that the petitioner had on alternative remedy under the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1050 and Rules made thereunder; and thirdly, that the learned Single Judge ought not to have issued direction a in exercise of power under Article 226 of the Constitution which had the effect of depriving the appellant of his right to get the auction sale confirmed after expiry of 30 days from the dated of auction. Sri R.N. Singh, Senior Advocate appearing for the respondent cold storage has submitted that the writ petition giving rise to this Special Appeal was based on a different cause of action; that the alternative remedy stipulated under the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter refereed to as the Act of 1950) was not an absolute bar; and that the appellant had no vested right to get the auction sale confirmed which was not held after giving thirty days clear notice.

6. In so far the maintainability of the Writ Petition is concerned suffice it to say that the alternative remedy being no an absolute bar we are not inclined to dismiss the writ petition on the plea of alternative remedy particularly in view of the fact that in compliance of the order dated 12.2.1999 and 23.2.1999 of the learned Single Judge, the respondent cold storage deposited the entire outstanding amount, on the deposit of which the auction sale could have been set aside by the Collector in exercise of power under Rule 285-H of U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter refereed to as the Rules) and the appellant herein has already withdrawn the amount so deposited.

Coming to the question whether the appellant has any vested right to the sale being confirmed we may refer to the related provisions. Rule 285-H Rules provides that any person whose holding or other immovable property has been sold under the Act may, at any time within thirty days from the date of sale apply to have the sale set aside on his depositing in the Collector's office :-

"a) for payment to the purchaser, a sum equal to 5 per cent of the purchase money; and

b) for payment on account of the arrears, the amount specified in the proclamation in Z.A. Form 74 as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been paid on that account; and

c) the costs of the sale."

7. It is further provided therein that on the making of such deposit the Collector shall pass on order setting aside the same. It may be observed that though earlier there was some dispute at the Bar as to whether the entire amount stipulated in Rule 285-H of Rules of 1952 had been deposited by the respondent cold storage but on 7.2.2000 when the matter came up for hearing it was agreed

at the Bar that the respondent clod storage had deposited the entire amount which has already been withdrawn by the appellant herein. The auction sale has not been confirmed till date. True, on the expiration of the 30 days from the date of sale the Collector was enjoined to pass an order confirming the sale after satisfying himself that the purchase of the land in question by the bidder would not contravene the provisions of Section 154 of Act of 1950 provided that no application as mentioned in Rule 285-H and 285-I of the Rules of 1952 had been made for cancellation of the auction sale or if made had been rejected by the Collector. A learned Single Judge of this Court has held in Raghunath Prasad Versus Board of Revenue 1987 R.D. 380 that the highest bidder would acquire right, title or interest in the property only after the confirmation of the sale and till then he would not acquire any interest in the property merely on his depositing the amount of highest bid offered at the auction sale and further that the Collector, apart from having a power regarding making of confirmation of sale or its refusal as envisaged under Rule 285-J of the Rules has also an inherent power either to accept or reject the highest bid on the ground that the bid offered was inadequate. We agree with the view taken in Rathunath Prasad (Supra) and accordingly held that the appellant herein acquired no right in the property merely because he had deposited the entire amount offered by him at the auction sale. On merit also the auction sale was liable to be set aside firstly due to the reason the 30 days clear notice was not given and secondly, because 25% of the amount of the bid was not deposited "immediately" as stipulated by Rule 285-D of the Rules of 1952 inasmuch as the deposit by cheque was not a valid deposit as per law laid down by the Apex Court in Mahmood Ahmad Khan (dead) through L.Rs. Versus Ranbir Singh and others, 1995 A.W.C. 896. We are of the view that the auction sale was no sale at all in the eye of law and 25% of the purchase money had not been deposited "immediately" on the appellant being declared as the highest bidder. In the circumstances it would be deemed that no sale had taken at all as held by the Apex Court in Mani Lal Mohana Lal Versus Syed Ahmed, AIR 1954 SC 349.

8. In so far as the question whether the order passed by the learned Single Judge has the effect of defeating the provisions of Rules 285-H and 285-I of the Rules of 1952 is concerned, it has been submitted by Shri Y.K. Saxena, learned counsel for the appellant that the statute provides 30 days time to deposit the amount or move an application before the Commissioner with the same period for setting aside the sale to get an order of cancellation on the ground that there had been material irregularity to avoid confirmation thereof stands defeated by the order passed by the learned Single Judge who gave time up to 30.4.1999 to deposit the entire amount. In our opinion the submission made by the learned counsel is misconceived. As stated (Supra) the appellant acquired no vested right to get the auction sale confirmed automatically and that apart the power of this Court to extend the period of depositing the amount stipulated in Rule 285-H of the Rules of 1952 is not in any manner fathered by Rule 285-J of the Rules. In Gulab Chandra Vs. Bahuria Ram Murat Koar, 1911 Indian Cases 268 (13 Calcutta Law Journal 432) a question arose as to whether the Court had the power under Section 11 of the Court Fees Act to enlarge the time fixed for payment of court fees even when the application to enlarge the time was made after the expiry of the time within which the court fees were ordered to be paid. It has been held by Calcutta High Court in that case that, "It is not reasonable construction of Section 11 of the Court fees Act to hold that the Court has no power to enlarge the time originally fixed for the payment of court fees" and further that" application to the Court to enlarge the time for giving security might be made either before or after the expiration of the time within which the security had been ordered to be furnished,

and the Court might thereupon enlarge the time according to any necessity which might arise, where it was proper that they should do so." The High Court under Article 226 of the Constitution has the power not only to issue prerogative writs but it can also issue such orders or directions as may be deemed fit and proper in the ends of justice for the enforcement of the rights conferred by Part III and "for any other purpose." In the fact situation of the case discussed above, the learned Single Judge, in our opinion, was justified in giving time to the respondent cold storage to make necessary deposits and avoid confirmation of the auction sale. The appellant suffered no loss since he had acquired no vested right to get the auction sale confirmed. The auction sale suffered from serious infirmities and irregularities in conduct thereof. We are, therefore, not inclined to interfere with the order passed by the learned Single Judge.

9. The appeal fails and is dismissed without there being any order as to costs.

Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.3.2000

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

Civil Misc. Writ Petition NO. 36434 of 1999

Hari Nath Singh Yadav ...Petitioner.
Versus
The Administrator/Chairman, Provincial Co-operative Federation &others ...Respondents

Counsel for the Petitioner:
Sri T.P. Singh

Counsel for the Respondents:
S.C.
Shri Pradeep Chandra

Article 226 of the Constitution of India- The relevant documents which were referred to in the charge sheet and which were relied on by the inquiry officer, were not supplied to the petitioner. Now supply of these documents was not denied in the counter affidavit. The impugned order is quashed the documents referred in the charge sheet have to be supplied to the petitioner.
Held-

The reply to the relevant paragraphs in the writ petition alleging that the relevant documents referred to in the charge sheet were not supplied to him is contained in paragraph 12 of the counter affidavit, but this paragraph does not dispute the allegation that the copies of the aforesaid documents were not supplied to the petitioner. This assertion of the petitioner that the copies of the relevant documents referred to in the charge sheet were not supplied to him has not been seriously disputed by the respondent.
Case referred –AIR 1998 SCp.3038. (Para5)

By the Court

1. Heard Learned counsel for the parties.

2. The petitioner is challenging the impugned order dated 8.6.1999 Annexure 27 to the writ petition by which his service had been terminated and recovery has been ordered against him. The petitioner was an employee of the U.P. Co-operative Federation having been appointed on 21.12.1966 as Assistant Accountant and thereafter he was promoted in June 1981 as superintendent. In 1989 he was posted as District Manger of the Federation at Etah when he was suspended but the suspension order was stayed by the High Court on 7.5.1990 as stated in paragraph 5 of the writ petition. Thereafter an enquiry was held and his service was terminated. Hence this petition.

3. Several ground have been taken by the petitioner in this petition but it is not necessary for us to go into all of them as we are of the opinion that this petition deserves to be allowed on one ground alone.

4. Learned counsel for the petitioner has relied on a decision of the Supreme Court in

State of U.P. Vs. Shatrughan Lal A.I.R 1998 SC 3038 in which it has been held that the relevant documents which are referred to in the charge sheet and which are relied on by the enquiry officer have to be supplied to the charge-sheeted employee. In paragraphs 14,15,16,17,18,19,20,21,22,23 and 69 of the writ petition it has been contended that copies of the documents referred to in the charge sheet were not supplied to the petitioner despite his requests. A perusal of the charge sheet, copy of which is Annexure 3 to the writ petition, shows that a large number of documents have been referred to therein. Hence in view of the aforesaid decision of the Supreme Court copies of these documents should have been supplied to the petitioner, but it appears that despite his repeated requests they were not supplied to him.

5. The reply to the relevant paragraphs in the writ petition alleging that the relevant documents referred to in the charge sheet were not supplied to him is contained in paragraph 12 of the counter affidavit, but this paragraph does not dispute the allegation that the copies of the aforesaid documents were not supplied to the petitioner. This assertion of the petitioner that the copies of the relevant documents referred to in the charge sheet were not supplied to him has not been seriously disputed by the respondent.

6. Hence in view of the decision of the Supreme Court in state of U.P. Vs. Shatrughan Lal (Supra) this writ petition has to be allowed The writ petition is allowed. The impugned order dated 8.6.1999 is quashed. However, it is open to the authority concerned to hold a fresh enquiry and pass a fresh order after gibing opportunity of hearing to the petitioner in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 2, 2000

BEFORE
THE HON'BLE M. KATJU, J.

Civil Misc. Writ Petition No. 13436 of 1995

Mashooq Ahmad ...Petitioner
Versus
Manager(Personal & Industrial Relations), B.P.C. Ltd. Naini, Allahabad ...Respondent

Counsel for the Petitioner:
Sri Tej Pratap Singh
Sri A.K. Srivastava

Counsel for the Respondent:
S.C.
Sri P.K. Mukherjee

Constitution of India, Article 14, 226- Transfer of class III employee transferred from Allahabad to Bombay- Principle of exigency can not be considered isolation- Petitioner does not opt for voluntarily transfer scheme. Which resulted the impugned order to get rid of him- No letter or contract can override Article 14 of the Constitution.
Held-
It has been mentioned in the petitioner's appointment letter that he can be transferred to the bra ches of the corporation but said clause cannot override Article 14 of the Constitution. In my opinion, the statement in the aforesaid letter that the petitioner can be transferred to the branches of the corporation cannot mean that the corporation can act arbitrarily in the matter. No letter or contract can override Article 14 of the Constitution. The respondent corporation is an ins trumentality of the State and hence its action is subject to Article 14 of the Constitution. (para 11)
AIR 1978 SC 597

By the Court

1. This writ petition has been filed against the impugned transfer order dated 10.10.1994. Annexure 1 to the writ petition.

Heard learned counsels for the parties.

2. The petitioner was appointed as class III employee on 13.10.1993 in the service of the respondent corporation, which is a public sector undertaking and hence an instrumentality of the State within the meaning of Article 12 of the Constitution. On 30.9.1989 the petitioner was promoted as Assistant-cum-typist and since then he has been working at Allahabad on the post as stated in paragraph 2 of the writ petition. By the impugned order dated 10.10.1994 he was transferred from the Allahabad to Bombay office of the respondent. He made a representation against that order but to no avail. Hence he filed writ petition no. 36888 of 1994 which was disposed of by this court with the direction that the petitioner may make a representation vide Annexure 3 to the writ petition. The petitioner again made another representation but again to no avail. The petitioner has alleged that his family lives in Allahabad and he is only a clerical employee and it is not possible for him to take his family to Bombay and hence he will have to maintain two establishments one at Allahabad and another at Bombay, which is not possible for him or his meagre salary. Hence he filed this writ petition.

3. An interim order dated 15.10.1998 was passed in this case which was set aside in special appeal no. 972 of 1998 by order dated 12.1.1999. However, as I am deciding the petition finally the aforesaid orders of this Court pertaining to the interim orders are no longer relevant.

4. A counter affidavit has been filed on behalf of the respondent and in paragraph 9 of the same it is stated that the petitioner's service was transferable. In paragraph 10 of the counter affidavit it is stated that the respondent has branches throughout India, and as a routine course on account of exigencies of work the employees are transferred from the head office to other branches and also between the branches. In paragraph 11 of the counter affidavit it is stated that a vacancy of typist arose at the Bombay office on account of voluntary retirement of a typist. Hence the petitioner was transferred from Allahabad to the Bombay office. In paragraph 20 of the counter affidavit it is stated that the petitioner went on medical leave w.e.f. 2.12.1994 stating that when he is fit he will carryout the transfer order. True copy of the letter dated 6.12.1994 is Annexure C.A. 7 to the counter affidavit. He wrote another letter dated 10.4.1995 vide Annexure C.A.8 stating that he is still ill and shall join at the Bombay office as soon as he is fit. In paragraph 23 of the counter affidavit it is stated that several other workmen have been transferred to various branches of the respondent corporation.

5. In the rejoinder affidavit the petitioner has stated in paragraph 1 that earlier on 17.8.1995 this court stayed the operation of the transfer order until further orders of but against that order a special appeal had been filed which was allowed. In paragraph 7 of the rejoinder affidavit it is stated that the transfer order was passed as a measure of harassment to get rid of the employees who were not succumbing to the pressure of opting for ;the voluntary retirement scheme, and hence it was malafide. In paragraph 8 of the rejoinder affidavit it is stated that the transfer order was in violation of the relevant standing orders. In paragraph 14 of the rejoinder affidavit it is stated that the petitioner was suffering from liver abscess and was admitted in Nazreth Hospital at Allahabad in December 1994 and he has no money to continue his treatment. When he tried to get medical reimbursement the same was granted only on the condition that he joins at Bombay. It is stated that the petitioner was directed to get the medical bills sanctioned by the Regional Manager (Bombay) where the petitioner was transferred. In paragraph 15 of the rejoinder affidavit it is stated that four employees whose names are given therein had been

transferred to various branch offices. They filed a writ petition which was dismissed but thereafter they filed a special appeal before this court and during the pendency of the special appeal they were informed by the letter of the company dated 15.11.1997 that if they withdraw the special appeal their transfer orders will be cancelled and they will be permitted to rejoin in the office at Allahabad. Hence they got their special appeal dismissed as withdrawn and the transfer orders of these persons were then cancelled.

6. In paragraph 20 of the rejoinder affidavit it is stated that the normal practice of the respondent company is that whenever they required any personnel for any of their branch offices they issue circulars inviting applications from the interested employees who wish to join the said branch office. Copy of the one of the said circulars dated 15.11.1997 is Annexure 6 to the rejoinder affidavit. However in the case of the petitioner he was compelled to join at the Bombay branch. In paragraph 47 of the rejoinder affidavit it is stated that the petitioner was not a position to join at Bombay.

7. On the facts and circumstances of the case I am of the opinion that the transfer order is arbitrary and illegal. It may be noted that the transfer orders of several persons whose names are mentioned in paragraph 15 of the rejoinder affidavit viz. S/Sri L.N. Tiwari, B.P. Yadav, K.K. Misra and R.P. Pandey who were also working at Naini branch at Allahabad were cancelled. Hence in my opinion there is discrimination against the petitioner.

8. It may also be mentioned that the petitioner is only a class III employee and it is economically impossible for a class III and class IV employee in these hard days of high inflation to live and survive with his family at Bombay after transfer from Allahabad. It must be under stood that in big cities like Bombay living expenses are very high and for a class III or class IV employee who has been living at Allahabad to be sent to Bombay will really be an indirect way of depriving him of his job because he simply cannot survive at Bombay. He will have to take a house on heavy rent and also bear other heavy expenditures which on his paltry salary he cannot afford. This court must take a realistic view in the matter. No doubt it has been held in many cases that transfer is an exigency of service, but at the same time it must also be understood that no government authority or instrumentality of the State can act arbitrarily, as arbitrariness violates Article 14 of the Constitution vide Meneka Gandhi Vs. Union of India AIR 1978 SC 597. Thus the principle that transfer is an exigency of service cannot be considered in isolation, but it must be read alongwith the equally important principle that every government authority or instrumentality of the State (e.g. a public sec to undertaking like the respondent) must act in a non-arbitrary manner. We cannot consider only the first principle and ignore the second one. In fact the second principle i.e. the principle that arbitrariness violates Article 14j of the Constitution is a constitutional principle. Hence any transfer order which is arbitrary becomes illegal as it is in violation of Article 14 of the Constitution.

9. In my opinion the transfer of a class III or class IV employee of a public sector undertaking from the middle size town like Allahabad to a far away big city like Bombay is arbitrary as it fails to take into consideration the fact that such an employee cannot in these hard days of inflation survive in such a far away big city. The living expenses in the big cities are very high and for class III or class IV employee it is very difficult to survive there. This Court cannot function in an ivory tower divorced from economic realities prevailing in the country, but must take a practical common sense view.

10. If the respondent corporation really needed a typist at Bombay it could have advertised the post of typist in a Bombay newspaper and could have selected a good typist who lives in Bombay. The fact that the petitioner who lives in Allahabad has been transferred to Bombay supports the version of the petitioner that the real purpose of his transfer was because he refused to opt for the voluntary transfer scheme, and thus it was an indirect method to get rid of him. In my opinion this is clearly malafide.

11. No doubt it has been mentioned in the petitioner's appointment letter that he can be transferred to the branches of the corporation but the said clause cannot override Article 14 of the Constitution. In my opinion, the statement in the aforesaid letter that the petitioner can be transferred to the branches of the corporation cannot mean that the corporation can act arbitrarily in the matter. No letter or contract can override Article 14 of the Constitution. The respondent corporation is an instrumentality of the State and hence its action is subject to Article 14 of the Constitution.

For the reasons given above the petition is allowed. The impugned transfer order dated 10.10.1994 and 10.1.1995. Annexure-1 and 4 to the petition are quashed. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.2.2000

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

Civil Misc. Writ Petition No. 237 of 2000

Vinay Kumar Madhok ...Petitioner
Versus
Om Prakash and others ...Respondents

Counsel for the Petitioner :
Shri Aditya Narain

Counsel for the Respondents:
S.C.
Shri Rajesh Tandon

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act – 1972 – S.21 (i) (a) – Bonafied need – application for release by the land lord for his own residential purpose – Tenant objected as being the only means for his business – court found the need of land lord to be more bonafied – s the business can be started in so many ways – but the shelter depends solely upon the accommodation in question.
Held –
Need for shelter takes precedence, as there is no substitute for it. One can, however, manage business in many ways. Moreover, in the instant case petitioner is not solely dependent on income from shop, land lord solely dependent upon from shop, landlord solely dependant upon the accommodation for his residential need., which is found to be bonafide. In its absence he and his family are bound to suffer irreparably. (para 22)
Case law discussed
1984 (1) ARC - 114
1982 (1) ARC - 783
1990 (1) ARC - 103

By the Court

1. This is a tenant's petition under Article 226. Constitution of India praying for writ of certiorari to quash the impugned order dated 3.11.1999 passed by Respondent no.2/ Additional District Judge, Dehradun in Rent Control Appeal no. 10 of 1999 (Om Prakash Versus Vinay Kumar Madhok) filed by landlord against the judgment and order dated January 8, 1990 passed by the Prescribed Authority/ Respondent no.3 dismissing release application of the landlord under Section 21 (1) (A), U.P. Urban Building (Regulation of letting, Rent and Eviction) Act, 1972. U.P. Act No. XIII of 1972 (for short called 'the Act'), being P.A. Case no. 168 of 1987 (Om Prakash Versus Vinay Kumar Madhok).

2. Both the parties in the instant case were initially tenants of the residential house

no.101/120, Sayeed Mohalla, Dehradun (called the accommodation). Om Prakash purchased said house (which was in his possession as well as in possession of Vinay Kumar Madhok, (tenant/petitioner) vide sale deed dated January 20, 1983.

3. After lapse of four years of the purchase Release application was filed. Record indicates that parties have been litigating and not no good terms and consequently rent is being deposited under Section 30 of the Act.

4. It has also come on record that the tenant –petitioner also intended to purchase the entire house but his wish did not fructify and Om Prakash, Respondent no. 1 succeeded in purchasing the entire accommodation (see para 2 of the affidavit of Vinay Kumar Madhok-respondent no.1-filed as Annexure 3 to the writ petition particular page 57-58).

5. Release application under section 21 (1) (a) of the Act was presented on the ground that the landlord bonafide required one room of the said house in tenancy of the petitioner and used as shop- hereinafter called "accommodation in question" for residential need of self and his family. The details of the family of landlord /Respondent no. 1 and the accommodation in possession of the landlord's family are not disputed and given hereunder:-

(A) **FAMILY OF THE LANDLORD**

(at the time of filing release application in the year 1987)

(i) Landlord	-	Om Prakash
(ii) Wife		
(iii) Son	-	12 years
(iv) Daughter	-	9 years
(v) Daughter	-	6 years
(vi) Son	-	3 years

ACCOMMODATION (PORTION OF HOUSE NO. 101/120) IN POSSESION OF LANDLORD

(i) Shop - 10' x 10'
(ii) Store (attached with shop) 10' x 5'
(iii) Two Rooms each 12' x 10'
(iv) Kitchen 10' x 5'
(v) Bathroom/latrine
(vi) Gallery

(B) **ACCOMODATION IN QUESTION** : ONE ROOM – 10'x 10'
(used as Shop by the tenant)

6. Landlord claimed that e required a drawing room as well as study room for his children. Who were of growing age. The said shop, according to the petitioner, was managed by his father in his absence while he was on duty being in service in a factory but looked after the shop after his duty hours.

During Appellate stage, it came on record, father and mother of the petitioner died and that Petitioner himself got married. tenant alleged that he has a liability to maintain his two sisters – one being divorced. In Appeal Petitioner admitted that he had taken reemployment with his old employer but his income from service was not sufficient and he had to augment income to support his family and self from the said shop and meet the needs of his family.

7. The Prescribed Authority held that the need of he landlord was genuine and bona fide but it decided the question of comparative hardship, against the landlord. Consequently the release application was rejected vide judgment and order dated 8th January,1990, (Annexure-1 to the Writ Petition).

Feeling aggrieved landlord – Om Prakash (Respondent no.1 in the writ petition) filed Rent Control Appeal no.10 of 1999 under Section 22 of the Act.

8. Appellate Authority discussed the evidence and the respective contention of the parties in detail, confirmed the finding on the question of bona fide need but set aside the

finding on the point of 'Comparative Hardship' (recorded by the Prescribed Authority). The Appellate Authority, Vide its judgment and order dated 3.11.1999 (annexure-2 to the Writ Petition) allowed the appeal, set aside the judgment and order dated 8th January, 190 passed the Prescribed Authority (Annexure –1 to the Writ Petition) directed the landlord to pay compensation equivalent to two years rent within 15 days, tenant to vacate the premises within 30 days and hand over its peaceful possession to the landlord.

9. Respondent no.2 and 3. (Prescribed Authority and Appellate Authority) have been served through the office of Chief Standing Counsel, Contesting parties have exchanged Counter Affidavit and Rejoinder Affidavit.

10. Taking into account the fact that Release was filed in 1987 (thirteen years before) and to avoid further delay, Writ Petition is heard finally at admission stage and none of counsels representing the parties had objection to it.

11. Case was heard at length on merit on 17th and 18the January, 2000 and then adjourned to 20th January, 2000 to enable the learned counsel for the petitioner to contact his client and seek instructions to take time to vacate the accommodation and settle the matter amicably.

Case is being taken up again today and matter has been heard afresh on merit, since the learned counsel for the petitioner stated that petitioner, on being contacted informed him that he will contest the case on merit and there is no scope to settle.

12. Learned counsel for the petitioner in his argument attempted to assail the finding on 'Bona-fide need', on the ground that Appellate Authority has not referred to one room measuring 10' x 5' and admittedly, in possession of the landlord as noted in the judgment of the Prescribed Authority.

13. Appellate Authority has, it is true, not specifically referred to the accommodation measuring 10'x5. The said space, as a matter of fact, not a regular room according to the landlord but a store (10'x 5') attached to the shop, hence not a room to be used for regular living purpose.

14. It has, however, been submitted by the Petitioner if the room 10'x 5' (said to be store) is taken into account it will vitiate the appellate judgment.

15. Learned counsel for the contesting respondent no.1 / landlord submitted that tenant did not lay emphasis on this store to be counted as room before the Appellate Authority and it is now not open to the Petitioner to challenge appellate judgment on this score-particularly when there is no categorical averment in the writ petition that Appellate Court ignored it in the writ petition that Appellate Court ignored it in spite of it being referred to as separate regular room. Secondly – Prescribed Authority was conscious of the said store in possession of the landlord and recorded finding of fact on the question of bona fide need which has been affirmed by the Appellate Authority.

Store measuring 10' x 5', cannot be said to be an independently room when, admittedly, it is attached to the room in possession of the landlord and used as shop. Hence this store cannot be counted as 'room' while considering the need of the landlord for residential purpose.

16. According to the respondent/landlord even otherwise, finding of the appellate authority, on the question of the extent of the need of the landlord cannot be vitiated, even if this store is being taken into account and the ultimate conclusion arrived at by the Appellate Authority will remain the same.

17. Considering the family members, their age and the fact that now the landlord has grown up children (by passage of time), it may be visualized that the grown – up son and daughter will require separate room.

18. Observation of Appellate Authority that eldest son was going to be married is not disputed by the tenant before this Court.

Appellate Authority has dealt with this aspect in its judgment (on page 43 and 44 of the writ paper book). Conclusion drawn by the Appellate Authority is as follows:-

Landlord and wife - One Room (for living)
Son (going to be married)- One Room (for living)
Two daughters (grown-up) - One Room (for living & study)
Son (20years) - One Room (for living & study)
For Drawing room and
Guest (for joint use) - One Room

Total requirement = Five Rooms

Landlord, at present, in his possession has following accommodation:-

1. Two rooms (12' x 10')
2. Room (as Shop) (10' x 10')
3. Room (store)(10' x 5')

Landlord, even according to the tenant does not have more than three rooms-measuring 12' x 10', 12' x 10' and 10' x 5' stay apart from shop in possession of the landlord.

For the sake of argument, even if the need of the drawing room is excluded, landlord will require four rooms. Landlord, admittedly, falls short of one room.

19. Facts are scrutinised by this Court to ascertain whether the finding and the judgment of appellate Court will be vitiated, if store is taken into account, the finding arrived at by Appellate authority will remain the same.

Consequently, submission on behalf of the petitioner does help him in materially assailing the judgment of the appellate Court.

20. The next submission of the petitioner is that, accommodation should not be allowed to be released for residential use particularly when there is a prohibition with respect to the residential accommodation being released for commercial/non-residential purpose.

21. The argument may, on its face, look attractive but it is to be accepted only to be rejected inasmuch as it proceeds on fallacious assumption that 'converse' is also true. Residential accommodation and non-residential accommodation stand on different footing as the criterion to grant release in the two cases varies and they are to be dealt differently.

22. Need for shelter takes precedence, as there is no substitute for it. One can, however, manage business in many ways. Moreover, in the instant case petitioner is not solely dependent on I income from shop, landlord solely dependent upon the accommodation for his residential need-, which is found to be bona fide. In its absence he and his family are bound suffer irreparably.

Moreover Courts have by now settled the controversy that a residential accommodation shall remain residential notwithstanding that a minor portion is used for non-residential purpose.

This submission on behalf of the petitioner does not find favour with this Court.

23. Regarding comparative hardship, learned counsel for the petitioner submitted that court below did not advert itself and filed to appreciate evidence in accordance with law

– particularly the aspect that no shop was available to him on a rent suiting to his pocket and he was not in position to purchase the shop.

24. The submission of the petitioner appears to be that unless a tenant has an alternative suitable accommodation, according to his own standards, 'release' application cannot be allowed by courts. This submission in 'extreme' and isolation cannot be accepted being fallacious misconceived and amounts to stretching things too far in favour of Petitioner ignoring landlord who is generally owner of the accommodation. Law does not require that a tenant must have an alternative accommodation before the release application may be decided against him.

25. The view taken by this Court is supported from the observation made in the judgment reported in 1984(I) ARC 114 (para 126) N.S. Dutta versus VII Additional District Judge, Allahabad and in 1982 (I) ARC 783 – Kamil Khan Versus III Additional District Judge and others.

26. Learned counsel for the petitioner has placed reliance on the decision reported in 1990 (1) ARC 103. In this judgment leaned single (in para 34) has observed that growing need of a party should have been considered. In this view of the matter need of tenant alone cannot be seen but also that of the landlord. The facts of the case indicate that accommodation in question was a shop and landlord wanted release of it for the purpose of a shop. This judgment is clearly distinguishable.

27. In the instant case landlord wants residential accommodation for his growing children, one of the two sons was to be married shortly. Landlord and his wife cannot live with grown up sons and /or daughters nor they can inter se amongst themselves be adjusted in the room of the others. Married son cannot stay in the bedroom of his parents or in the room of his unmarried sisters or room of grown up brother.

28. This release application was filed in the year 1987 and by passage of time it has come on record that during the pendency of the proceedings landlord family is growing and they need extra residential accommodation. On the other hand, the tenant admittedly does not have significant income from the shop and has been able to seek reemployment/ job with his earlier employers. Carrying on business as a side show, for some additional income cannot be given precedence or priority over an acute residential need of the landlord.

29. In view of the above, I do not find any manifest error apparent in the impugned judgment and order dated 3.11.1999 passed by the Additional District Judge, Dehradun, Respondent no.2 and the findings recorded by the Appellate Authority are hereby affirmed.

Writ petition has no merit and it is, accordingly, dismissed.

30. After dictation of the above judgment could be typed and finally signed a mercy application (subsequently numbered 9606 of 2000) on behalf of the petitioner praying for grant of time to vacate the shop in dispute was moved in chambers on 1-2-2000. This application is supported by an affidavit of Sushila Madhok (wife of the petitioner). A copy of this application has also been served on Sri Rajesh Tandon, counsel for respondent no.1- Landlord.

31. Before lunch, I directed learned counsel for the petitioner to inform Shri Tandon, counsel for the contesting Respondent and appear in Court in this case. Shri Rajesh Tandon requested case to be taken up on 2-2-2000. Application was directed to be put up on 2-2-2000. Shri Aditya Narain and Shri Rajesh Tandon, Advocates appeared in Court on 2-2-2000.

32. Keeping in mind the fact that accommodation is being used as shop and it is not easy to find out alternative shop normally prayer made by the petitioner to grant three months time to vacate the shop in question cannot be said to be unjust. The request of the petitioner is very just and it is, accordingly, granted.

33. Consequently petitioner, who has given an undertaking to this Court vide Para 4 of the affidavit referred to above, granted three months time to vacate the shop in question subject, however, further to the following terms and conditions (agreed upon by the parties before this court) contained hereinafter:-

1. The Tenant-petitioner files before concerned Prescribed Authority, on or before 1st March,2000 an application along with his affidavit giving an unconditional undertaking to comply with all the conditions mentioned hereinafter:

2. Petitioner-tenant shall not be evicted from the accommodation in his tenancy up to 30th April, 2000. Tenant-Petitioner, her representative/assignee, etc, claiming through her or otherwise, if any, shall vacate without objection and peacefully deliver vacant possession of the accommodation in question on or before 30th April, 2000 to the landlord or landlord's nominee/representative (if any, appointed and intimated by the landlord) by giving prior advance notice and notifying to the landlord by Registered A.D. post (on his last known address or as may be disclosed in advance by the landlord n writing before the concerned Prescribed Authority) time and date on which Landlord is to take possession from the tenant.

3. Petitioner shall on or before 1st March, 2000 deposit entire amount due towards rent etc. up to date i.e. entire arrears of the past, if any, as well as the rent for the period ending on the 30th April, 2000.

4. Petitioner and everyone claiming under her undertake not to 'change' or 'damage' or transfer/alienate/assign in any manner, the accommodation in question.

5. In case tenant-petitioner fails to comply with any of the conditions/or direction/s contained in this order, landlord shall be entitled to evict the tenant-petitioner forthwith from the accommodation in question by seeking police force through concerned prescribed authority.

6. If there is violation of the under taking of anyone or more of the conditions contained in this order, the defaulting party shall pay Rs.25000/- (Rupees Twenty five thousand only) as damages to the other party besides rendering himself/herself liable to be prosecuted for committing grossest contempt of the Court.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.2.2000

BEFORE
THE HON'BLE B.K.RATHI, J.

Criminal Misc. Application No.870 of 2000

Banajeet Singh S/o Sri Subedar Singh ...Aplicant.
Versus
State of U.P. ...Opp. party.

Counsel for the Applicant:
Shri S.R. Verma

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure- Section 482 - the applicant was released on bail by the court for offence under section 304 I.P.C. Charge sheet was submitted under section 302 I.P.C. Application was moved by the applicant to permit him to file fresh bail bond for section 302 I.P.C. and he may not be required to obtain fresh order for bail - the earlier decisions distinguished- the applicant

was entitled to the bail u/s. 304-A I.P.C. without consideration of the facts. The bail which was granted without consideration of the facts cannot be extended for offence u/s. 302 I.P.C.- Before granting the bail under section 302 I.P.C., the consideration of the fact is necessary. Held (Para 5).

The bail which was granted without consideration of facts can not be extended for offence under section 302 I.P.C. which is heinous offence. Before granting the bail under section 302 I.P.C. therefore, the consideration of the facts is necessary and the applicant can not be permitted to file fresh bail bonds.

Cases Distinguished. -
ACC 1993 P. 531
ACC 1995 P 624
ACC 1991 P 652
JIC 1999(2) P.402.
U.P. Crl. Rulings P 332

By the Court

1. By means of this petition under Section 482 Cr.P.C. the applicant has requested for permission to file fresh bail bonds in case no.169 of 1999, State Versus Banajeet under Section 304 -A I.P.C. now converted under Section 302 I.P.C., P.S. Akbarpur, district Kanpur Dehat.

2. I have heard Sri S.R. Verma, learned counsel for the applicant and the learned A.G.A.

3. It is contended by the learned counsel for the applicant that the applicant was already released on bail, by the court for offence under Section 304-A I.P.C. However, the charge sheet have now been submitted under Section 302 I.P.C. That therefore, the applicant may be permitted to file fresh bail bonds for that offence and he is not required to obtain fresh order for bail. Learned Counsel for the applicant has referred to the following cases:

4. Leading case on the point is **Ugrasen Singh and others Versus State of U.P. and others 1993 (30) A.C.C., 531.** This is a Division Bench decision and in this case the bail was granted under Sections 336, 504, 506 323, 427 I.P.C. The case was converted under Section 308 I.P.C. It was observed that the distinction between Section 323 and 308 I.P.C. can depend upon the allegations, the correctness, which naturally could not be altered and are not on the basis of the alteration wide the report of the police. It was further observed that when a person is once granted bail in respect of particular crime, the subsequent change in the matter of reference to the section under the offences though it may be made by the police will remain subject of consideration by the court.

The above leading case on the point and was followed the case of **Junaid Alam Versus State of U.P. and another, 1995 A.C.C. (32), 624** where the accused, who were granted bail for offence under Sections 323, 324, 504 and 506 I.P.C. were permitted to file fresh bail bonds for change of offence under Section 307 I.P.C. as they did not misuse the bail. Similar view was also taken in the case, **Daddan Singh and others Versus State of U.P. 1994 U.P.Cr.R.332.** In this case, the bail was granted for offence under Sections 323, 452, 504, 506 I.P.C. triable by the Magistrate on conversion of case under Section 308 I.P.C., the applicants were permitted to file fresh bail bonds. In the case of **Radhey Shyam and others Versus State of U.P. and others, 1991 (28) A.C.C. 652,** the accused were granted bail for offence under Section 324 I.P.C. and were permitted to file fresh bail bonds after the conversion of case under Section 307 I.P.C. In **Sumer Chand and others Versus State of U.P. and another, 1999(2) J.I.C. 402.** It was observed that if the accused is granted bail on the same facts, they need not to surrender before the court and apply for fresh bail in the newly added sections and the furnishing of fresh bail bonds is just and proper.

5. I have considered the law laid down in all these cases carefully but is afraid that none

of them is of any help to the applicant. The reason is that the applicant was granted bail for offence under Section 304-A I.P.C. in which the applicant is entitled to the bail as of right under Section 436 Cr.P.C. Therefore, where the offence alleged by the prosecution is under Section 304-A I.P.C., the accused is entitled to the bail without consideration of the facts. Therefore, it can be presumed that while granting bail under Section 304-A I.P.C. to the applicant, the facts were not considered and he was granted the facility of the bail as he was entitled to same as of right. The bail which was granted without consideration of the facts can not be extended for offence under Section 302 I.P.C. which is heinous offence. Before granting the bail under Section 302 I.P.C. therefore, the consideration of the facts is necessary and the applicant can not be permitted to file fresh bail bonds. The petition is therefore, dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.2.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 53191 of 1999

Ishwar Chand ...Petitioner
Versus
Addl. District Magistrate(Civil Supply), Rent Control & Eviction Officer Kanpur Nagar and another ...Respondents

Counsel for the Petitioners:
Sri Harish Chandra Srivastava
Sri Dinesh Chandra Srivastava

Counsel for the Respondents:
S.C.

Hindu Succession Act 1956 S-8 - the father of the petitioner, Prem Das, having purchased another premises and residing therein since before the death of his father, was not entitled to claim the tenancy rights- when his father is not a tenant as contemplated under section 3 (a) of the Act, the petitioner cannot claim any right to occupy the disputed premises as a tenant. Held --after the death of the tenant any of his heirs who normally resided with him at the time of his death is entitled to inherit the tenancy rights and where a person who is entitled to in-herit the tenancy was not normally residing with the tenant at the time of his death, such other person who comes in the category of an heir under the law is entitled to inherit the tenancy if he was residing with the tenant at the ;time of his death. The personal law will determine as to who is the person under the ,law to inherit the tenancy. (para 6)

Case referred.
1979 ARC p.251, 1980 ARC p.519, 1982(1) ARC p. 708. 1984 (2) ARC p. 634

By the Court

1. The petitioner has challenged the order of vacancy dated 25.11.1999 passed by the Rent Control and Eviction Officer, respondent no.1.

2. One Ram Sahodar was tenant of a portion of premises no. 12/470. Gwaltoli, Kanpur Nagar. He died in the year 1998. Respondent no. 2 applied for allotment with the allegations that as Prem Das, son of Ram Sahodar- the tenant, had purchased another portion of the same premises in the year 1986 and he is residing therein, the accommodation in question be treated as vacant. The Rent Control and Eviction Officer called for a report from the Inspector. The Insspector submitted a report that Ishwar Chand, the petitioner, grandson of Ram Sahodar, was found in its possession. Respondent no.1 issued notice to the petitioner to show cause why the disputed accommodation be not treated as vacant.

3. The petitioner filed objection stating that his father, Prem Das, had separated from his father, Ram Sahodar, in the year 1985 and had also purchased another portion of the

same premises in the year 1986. The petitioner, as grandson of Ram Sahodar, is residing in the disputed accommodation. His grandfather, Ram Sahodar, also executed a Will in his favour on 3.10.1989 whereby he bequeathed all his rights and title in all his properties. It was further stated that as the land lords of the house namely Khem Chand and Gyan Chand had entered into an agreement to sell the disputed premises on 20.2.1987 and also handed over possession in pursuance of the agreement, his possession cannot be treated as unauthorised. The Rent Control and Eviction Officer, considering the objection, declared it as vacant. This order has been challenged in the present writ petition.

4. Learned counsel for the petitioner contended that Ram Sahodar had executed a Will in favour of; the petitioner on 20th February 1987and he is entitled to inherit the tenancy rights on ;the basis of the Will. It is settled law that tenancy rights cannot be transferred by a Will in favour of any person vide Ratan Lal v. Additional District Judge, Bulandshahr and others, 1979 ARC 251, Devendra Kumar v. III Additional District Judge and others, 1980 ARC 519 and Abhinandan Prasad Jain v. District Judge, Saharanpur and others, 1982 (1) ARC 708.

5. The next submission of the learned counsel for the petitioner is that at the time of death of the grandfather of the petitioner, he was residing in the disputed premises with him and as such he inherited the tenancy rights. It is admitted to the petitioner that his father Prem Das is alive, who purchased another premises in the year 1986 and admittedly he had shifted there. He is not claiming that he has inherited the tenancy and is continuing in possession of the disputed premises. The petitioner cannot inherit the tenancy in preference to his father who is still alive. Section 3-A defines the tenant as follows:-

"3)a) "tenant", in relation to a building, means a person by whom its rent is payable, and on the tenant's death—

(1) in the case of a residential building, such only of his heirs as normally resided with him in ;the building at the time of his death,

(2) in the case of non-residential building, his heirs.

6. The contention of the learned counsel for the petitioner is that after the death of the tenant any of his heirs who normally resided with him at the time of his death is entitled to inherit the tenancy was not normally residing with the tenant at the time of his death, such other person who comes in the category of an heir under the law is entitled to inherit the tenancy if he was residing with the tenant at the time of his death. The personal law will determine as to who is the person under the law to inherit the tenancy. Section 8 of the Hindu Succession Act, 1956 provides that the property of a male Hindu dying intestate shall devolve according to the provisions mentioned under the Act--

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule,

(b) secondly, if there is no heir of Class I, upon the heirs, being the relatives specified in Class II of the Schedule,

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased, and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

7. Section 9 of the Act provides that among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs, those in the first entry in class II shall be preferred to

those in the second entry, those in the third entry, and so on in succession.

8. The son has preference to succeed to the exclusion of grandson. The inheritance takes place on the death of the tenant. In case he is survived by four sons, such son shall inherit the tenancy who was residing with his father but in case the tenant dies leaving behind him the only son but he was not residing and shifted elsewhere but his grandson is living, he will not inherit the tenancy as for inheritance two conditions are required to be fulfilled; firstly, that he inherits the rights of the deceased tenant to the property under the personal law and secondly, he was residing at the time of death of the tenant in such residential building. In Om Prakash and others vs. Prescribed Authority and others, 1984 (2) ARC 634, Hon'ble Mr. Justice Saghir Ahmad (as he then was) dealt with this question and held that a grandson in the lifetime of his father would not inherit the properties of the grandfather dying intestate.

9. The father of the petitioner, Prem Das having purchased another premises and residing therein since before the death of his father, was not entitled to claim the tenancy rights and when his father is not a tenant as contemplated under section 3 (a) of the Act, the petitioner cannot claim any right to occupy the disputed premises as a tenant.

10. The last submission of the learned counsel for the petitioner is that the landlords of the premises in question, Khem Chand and Gyan Chand, had entered into an agreement to sell the property in dispute in favour of Ram Sahodar, his grandfather, and therefore he is entitled to continue in possession of the premises in dispute. Mere agreement does not itself create any interest in the property. The agreement itself provides that the possession of the property is not being given but it will be delivered at the time of the execution of the sale deed. The sale deed has yet not been executed. The petitioner, in view of this averment in the agreement, cannot claim any right to continue in the possession of the property after it has been found that the disputed accommodation is vacant under the law.

11. I do not find any merit in the writ petition. It is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 8.2.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 2481 of 1990

Sri Anand Babu alias Anand Swaroop ...Petitioner
Versus
IIIrd Additional District Judge Jalauan at Orai and others ...Respondents.

Counsel for the Petitioners:
Shri V.K. Tiwari,
Shri U.K. Saxena.

Counsel for the Respondents:
S.C.

U.P. Urban Building (Regulation of Letting Rent and Eviction) Act 1972 S. 21(1) (a)- comparative hardship is to be considered keeping in view all the facts and circumstances of the case. Admittedly the tenant owns three shops besides the disputed shop which he has taken on rent. The case remanded for fresh consideration. Held (Para).
Cases referred -
1984 (1) ARCP. 113
AIR 1999 SCP.3089
AIR 1979 SC P. 272

By the Court

1. This writ petition is directed against the order dated 21.12.1989, passed by respondent

no.1, allowing the appeal and rejecting the application filed by the petitioner for release of the disputed shop.

2. Briefly stated the facts are that the petitioner is landlord of the shop in question situate in Mohalla Baldeo Chowk, Town Orai, district Jalaun of which respondent no.3 was tenant who has died during the pendency of the writ petition and his heirs have been substituted. He filed application for release of the disputed shop against respondent no.3 under Section 21(1) (a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 (in short the Act) with the allegations that his family consists of himself, his wife, three sons and two daughters. His eldest son Pramod Kumar Gupta is unemployed and required the disputed shop for opening a general merchant shop. The tenant-respondent owns a big double storied house situate in Mohalla Gopalganj at a distance of about 100 meters where he has three shops on the ground floor and could establish his business there. This application was contested, denying that Pramod Kumar was unemployed. The petitioner-landlord has already a book seller shop and is also carrying on lending business and his son Pramod Kumar Gupta is already engaged with him. It was stated that he is carrying of Sarafa business in the shop and would suffer greater hardship in case he is evicted. The Prescribed Authority allowed the application on the finding that the need of the petitioner to establish his son Pramod Kumar Gupta in business is bonafide and would suffer greater hardship in case his application is rejected. The tenant preferred an appeal. The appeal has been allowed by respondent no.1 on 21.12.1989 and the release application filed by the petitioner has been rejected.

3. I have heard learned counsel for the parties.

4. Respondent no.1 took the view that the petitioner has three shops. One shop is under the tenancy of one Durga Prasad and in another one he has a book shop and in the third shop his business was being carried on in the name of Sangama Ink Industry. This business has been closed and, therefore, a third shop is available to the petitioner to establish his son in any business. This finding has been challenged in the present petition.

5. Respondent no. 1 relied upon the extract of the Municipal Assessment filed as paper no. 45-C. This only refers to premises nos. 132/1, 132/2 and 132/3. A copy of this document has been filed as Annexure-7 to the writ petition. This is an extract of Municipal assessment for the year 1977-78 to 1981-82. In column no.5 it does not clearly specify the name of the tenant and exact portion in occupation of the tenant.

6. The contention of the petitioner is that there is only two shops, one is already in the tenancy of another tenant and in the remaining portion the business of book selling is being carried on by the petitioner. This fact was to be ascertained by appointing an Advocate Commissioner as to what is the extent of the shop in possession of the petitioner and whether on the spot there are two shops. The inference as to number of shops and their extent cannot be ascertained from paper no. 45-C.

7. Learned counsel for the respondent contended that in fact, son of the petitioner had started his business in the name "Sangam Ink Industry" and once that industry has been closed that indicates that he does not require the shop in question. A landlord is entitled to establish his son in independent business. The landlord may be carrying on the business but if his son wants to carry on an independent business irrespective of the income of the father, he is entitled to carry on his business as held in N.S. Datta and others vs. VIIth Additional District Judge, Allahabad and others, 1984 (1) A.R.C. 113. Secondly, even assuming that his son is carrying on

some business till he gets some independent business, that will not deprive his to get a separate accommodation for carrying on independent business. In Smt. Ramka Bai vs. Hazari Mal Dholak Chandak, A.I.R. 1999 S.C. 3089, where the landlady required the premises to set up one of her sons in grocery business but subsequently his son started work of contractor, it was held that his need did not extinguish merely because he started some work. His son cannot be expected to remain unemployed till the suit is finally decided.

8. Lastly, it was urged by learned counsel for the respondent that the tenant will suffer a greater hardship. Admittedly, the tenant owns three shops besides the disputed shop which he has taken on rent. In one of the shops he has printing business, the other two shops are alleged to be on rent. In Bega Begum vs. Abdul Ahad Khan, A.I.R. 1979 S.C. 272, it has been held that the comparative hardship is to be considered keeping in view all the facts and circumstances of the case. The mere fact that the tenant is to be evicted itself is no ground to hold that the application is to be rejected. On the one hand, his son requires to set up his independent business and on the other hand, the tenant has sufficient financial status. The matter is to be examined keeping in view all these facts.

9. In view of the above the writ petition is allowed. The impugned order dated 21.12.1989 is hereby quashed. Respondent no.1 is directed to decide the appeal afresh, keeping in view the above observation and in accordance with law within three months from the date of production of a certified copy of this order before his.

10. The parties shall bear their own costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHBAD 24.01.2000

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

Civil Misc. Writ Petition No. 31134 of 1997

Jagdishwar Prasad Lekhpal and others ...Petitioner
Versus
District Magistrate Allahabad and others ...Respondents.

Counsel for the Petitioners:
Shri S.K, Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 226 – Alternative Remedy-Parties have exchanged the counter and Rejoinder Affidavit- No disputed question of facts envolve Held-

It is now too late to ask the Parties to go back to avail alternative remedy as the parties have already exchanged counter and rejoinder affidavits and there appears to be no dispute on facts required to be considered for deciding the writ petition. (para 3)

See J.T. 1995 (1) 471, (1999) 2 UPLBEC 982, 1971 SC 33 and (1993) 2 UPLBEC 1913, 1998 (8) Sec. 1, 1991 ACJ – 392 (B) U.P. Awar Rajaswa Lipik (Registrar Kannongo and Assistant Registrar, Kannongo) Sewa Niyamawali 1958, rule- 9 (3) –Eligibility list prepared for promotion in accordance with Rule-Some of them promoted- no such subsequent G.O. existed by which after expiry of certain period the list deem to be exhausted)-any circular issued by Board of Revenue give arbitrary pick and choose-subsequently opening flood gate forback door entry- direction issued for promotion with retrospective effective effect . Held-para 13

Petitioners and all similarly situated persons in the eligibility list shall be entitled to similar treatment as the Petitioners and they shall all be given seniority above all who have been appointed from outside the list

against vacancies which existed when list was prepared or thereafter and said tenure shall be reckoned for post retiral benefit if it becomes relevant. They shall not, however, be entitled to the difference of pay, if any, for non working period on the posts of Assistant Registrar Kannongo.

By the Court

1. There petitioners, Jagdishwar Prasad, Shesh Narain Pandey and Om Prakash preferred this petition against impugned order dated 26th July, 1997 (Annexure-2 to the Writ Petition) rejecting Petitioners' representation claming right of consideration of their candidature for the post of Assistant Registrar Kanoongo on the basis of eligibility list (said to have been prepared in the year 1982) , (copy filed as Annexure 1 to the petition).

2. Learned counsel for the Respondents raised preliminary objection regarding alternative remedy of appeal contemplated under statutory rule 9 (3) –U.P. Avar Rajsaw Lipik (Registrar Kanoongo and Assistant Registrar Kanoongo) Sewa Niyamaali, 1958, hereinafter called Rules, 1958.

3. The preliminary-objection regarding availability of alternative remedy cannot be entertained for two reasons.

One, it is now too late to ask the parties to go back to avail alternative remedy as the parties have already exchanged counter and rejoinder affidavits and there appears to be no disputes on facts required to be considered for deciding the writ petition.

See JT. 1995 (1) SC 471; (1999) 2 UPLBEC 982; 1971 SC 33 and (1993)2 UPLEBC 1313 (Para 7) .

Otherwise also alternative remedy is not an absolute bar (1998) 8 SCC 1 and 1991 All Civil Journal 392.

4. Second, hearing of the appeal will be mere formality in the facts of the instant case inasmuch as decision of the appellate authority is foreclosed since the impugned order/decision is as a consequence of Government order dated 4.10.1994 – a mentioned in the impugned order (dated 26th July, 1997, Annexure-2 to the Writ Petition) itself.

In 1979 UPTC AN 837 (para 4) and 1979 UPTC 517 (para 5) this Court observed that alternative remedy will not be a bar when Government view is already known.

5. The submission regarding maintainability of the writ petition-as preliminary objection of the Respondents –has no force.

Writ Petition is, therefore, after hearing the learned counsel for the parties, decided on merits.

Learned counsel for the petitioners submits that once the names of the petitioners were in the eligibility list 9Annexure-1 to the Writ Petition) they ought to have been considered and appointed as Assistant Registrar Kanoongo.

6. Mere fact that name of a person find place in the eligibility list, (from which promotion is to be made) does not confer a vested legal right (enforceable by a law court) when there is no such conferment in the relevant rules. Relevant Rules, 1958 (placed by the learned counsel for the petitioner and disputed by the other side to be amended up to date) shows that the list is not sacrosanct in the sense that names of the persons included in the said eligibility list are liable to be removed and/or altered. I am. Hence, not in agreement with the petitioners.

7. Name of Mustaq Ahmad and two others (in respect of which it is alleged that they were promoted from the said list) are at Sl.

No. 1,2 and 3 in the list. There is no arbitrariness on the part of the Respondents on this score No case of arbitrary action by concerned authority is made out. Petitioners then contend that then names are not being ignored arbitrarily for no valid cause.

8. Copy of the Government Order dated 4.10.94 has been filed as Annexure-2 to the Respondents' Counter Affidavit. The said Government order does not re quire cancelling of the statutory eligibility list as contemplated under aforementioned Rule, 1958. No subsequent Government order or amendment of Rule has been p laced on record on behalf of the Respondent to indicate that the list became non existent on expiry of certain period. Rules 1958 also do not contemplate that list will become non-existent on expiry of a certain period.

9. There is no logical explanation or material to justify for not making promotion from the eligibility list. More so, when it is not the stand of the Respondents that posts of Assistant Registrar Kanoongo had not fallen vacant and were/are not available.

10. The statutory eligibility list prepared cannot be given goodbye b 'Executive Instruction' as has been sought to be done in the present case by placing reliance upon Government Order dated 17.6.94 and Board of Revenue order dated 4..10.1994 referred to in the impugned order dated 26.7.1992 (Annexure-2 to the Writ Petition) If such a situation is allowed to prevail or perpetuate, it would encourage Respondents and its authorities to make appointment of their choice one, according to merit but ignore others who may not be for reasons (non conducive and relevant for the purpose) in good book of these authorities.

11. Secondly, Respondents cannot be permitted to avoid or escape the statutory Rules and from accepting the eligibility list and give effect to the same provided posts of Assistant Registrar Kanoongo are available.

12. No appointment from outside the list, in the past (or in future), could /can be made unless list stood exhausted (after eliminating over age etc.) As otherwise there is no purpose in preparing the list or having the Rules 1958. It gives scope for arbitrary pick and choose may be eliminating those lower in merit-and subsequently opening flood gate for back door entry-like Daily Wager, Muster Roll, StopGap Adhoc, and purely Temporary Officiating work charge etc. See 1997 (3) Education & Service cases 1579.

13. Petitioners and all similarly situated persons n the eligibility list shall be entitled to similar treatment as the Petitioners and they shall all be given seniority above all who have been appointed from outside the list against vacancies which existed when list was prepared or thereafter and said tenure shall be reckoned for post retrial benefit if it becomes relevant. They shall not, however, be entitled to the difference of pay, if any, for non working period on the post of Asstt. Registrar Kanoongo.

14. Order dated 26th July, 1997 (Annexure-2 to the Writ Petition) is quashed and respondent no. 1 and concerned authorities are directed to make appointment n accordance with Statutory Rules against the vacant posts of Asstt. Registrar Kanoogo, which were existing when eligibility list was prepared and those which came into existence thereafter unless the said list s being exhausted (deleting the names under Rules 1958 and particularly Rule 9 (3) of said Rules 1958) in accordance with the merit of the list in question.

Within three weeks from the date of receiving of a certified copy of this order before Respondent nos. 1 and 5 the competent authority shall ensure to process compliance of this Judgment.

Writ petition stands allowed subject to the direction and observation made above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABD 26 NOVEMBER 1999

BEFORE
THE HON'BLE PALOK BASU, J.
THE HON'BLE B.K. SHARMA, J.

Civil Misc. Writ Petition No. 28999 of 1997

Sanjay Kumar Singh ...Petitioner.
Versus
State of U.P. through Secretary, Karmik & another ...Respondents

Counsel for the Petitioner :
Shailendra

Counsels for Respondents:
Mr.Shiv Kumar Singh
S.C. Rai
Addl. Chief S.C.,

Constitution of India, Article 341 and 342-Reservation Quota- Petitioner belonging to Naga Tribes being recognised as S.T. in Nagaland appeared as a S.T. candidate in combined State/Upper Subordinate Services (Preliminary Examination 1994-D.M., Allahabad issued cost certificate as S.T.-petitioner declared successful ultimately placed in the selection list-subsequently cancellation of the candidature as S.T. candidate-as in State of U.P. in the list of S.t. cost "Naga "cost found no place-citizen of India belonging to a particular reservation cost in different state-entitled for the benefit of reservation.
Held –

There is no law and no provision has been brought to the notice of the court which will limit the said reservation quota to be extended only to citizen of the State of U.P. The petitioner has claimed that he should be extended the said benefit being a candidate of Scheduled Tribe of the State of Nagaland. That claim has to be upheld and sustained so long as there is no such Government order or circular as has been issued by the Government of Maharasthara which have been noticed in the decisions cited above. (para 17)

Case law discussed.
1994 (5) SCC 244
1990(3)SCC 130
AIR 1986 Guj 7
AIR 1992 Guj 42

By the Court

1. Petitioner Sanjay Kumar Singh has come to this court under Article 226 of the Constitution of India with the prayer that the impugned order dated 30.06.1997/10701997 passed by the U.P. Public Service Commission, Allahabad, for short commission, copy of which has been filed as Annexure-XI to this petition.

2. Sanjay Kumar Singh is shuttling between good and bad luck, good for the favourable result in the P.C.S. examination declared in his favour by the Commission, and bad because by the impugned order that result stoods cancelled. Again good because by an interim order one post has been kept reserved which continues till date.

3. Petitioner's forefather belonged to old Nagaulaong, Village-Post office paren, B.P.O. Tening, District Kohima, Nagaland and belongs to a sect known as Zeme Naga amongst Naga Tribe citizens. This Naga Tribe is a scheduled tribe in tening Nagaland and a certificate to that effect was issued to the petitioner (Annexure-1).The Additional Deputy Commissioner, Peren, Nagaland also issued a certificate dated 27.6.1997 to that effect. Similarly village council Nagaland also issued a certificate to that effect on 10.4.1996 (Annexure-III). The petitioner than applied for a Scheduled Tribes certificates from the District Magistrate, Allahabad who issued a certificate dated 18.1.1996 based upon the report and certificate from Tehsildar, Allahabad indicating that he is presently a resident of Allahabad. It has been pleaded that

the fore fathers of the petitioner has migrated to Chhapr from Nagaland and ultimately his father, who was Subedar Major in the Indian Army, migrated to Allahabad with whom the petitioner also migrated and completed his educational pursuits

4. On 31.12.1994, the Commission came out with an advertisement for Combined State/Upper Subordinate Service (Preliminary) Examination, 1994. Petitioner applied for the same. Being successful at the preliminary, the petitioner appeared in the main examination with Roll No.023179 held between 26.6.1996 and 4.7.1996. Being successful in the written examination, the petitioner was called for interview by the Commission on 23.10.1996 through the interview letter dated 26.6.1996. Having fair well in the interview also, the petitioner's result was declared on 14.11.1996 and he was successful having been shown at serial no. 5 amongst the successful candidates belonging to the schedule tribe. It is after this, the impugned order dated 1.7.1997 has been issued, the contents of which, translated into English, would read as under:-

Sanjay Kumar Singh was taken to be a candidate in the scheduled tribe category on the basis of facts stated by him during interview. Sri Sanjay Kumar Singh had disclosed that he was of schedule Tribe "NAGA". This Tribe "NAGA" is not one of the tribes enumerated in the list of scheduled tribe in the State of Uttar Pradesh by the Government. Therefore, he is not entitled to the aforesaid reservation.

In view of the aforesaid circumstances, the Commission hereby cancels the selection of Sri Sanjay Kumar Singh in the combined State/Upper Subordinate Examination, 1994.

5. Sri Shailendra, learned counsel for the petitioner Sri Shiv Kumar Singh, learned counsel for the commission and S.C. Rai, Additional Chief Standing Counsel for the State have been heard at considerable length for and against this writ petition. Counter affidavit on behalf of the Commission has been filed by Sri R. Rahman. During the course of arguments on earlier occasions, it was found that an authentic statement from the side of Government should come about the genuineness or otherwise of the claim of the petitioner to be belonging to a scheduled tribe of Nagaland. By a detailed order dated 28.7.1998, the District Magistrate, Allahabad was required to make full fledged enquiry into the allegations of petitioner and to file his own affidavit. It is good that Sri Alok Tandon, I.A.S. , District Magistrate, Allahabad made comprehensive enquiry not only from the local Tahsildar and other officers but contacted all the relevant officers of Nagaland who had issued several certificates reference of which had already been made above. This affidavit of Sri Alok Tandon states that the certificate which has been issued to the petitioner by the Tahsildar, Allahabad has been issued in pursuance of the provisions contained in various government orders and further that there was nothing false or wrong in the averment of the petitioner that he belongs to a scheduled tribe of Nagaland. Rejoinder affidavit has been filed by the petitioner and as prayed by the learned counsel for the parties, the writ petition is finally disposed of on merits at the admission stage.

6. Sri Shailendra, learned counsel for the petitioner has strongly contended three points in support of the petition;

(i) There is no dispute that the petitioner belongs to a Scheduled Tribe and there being no bar to accord appointment to a scheduled Tribe candidate of other State as per the provisions contained in U.P. Public Services(Reservation for SC/ST/OBC) Act,1994, the commission has erred in cancelling the result which was already announced by it declaring petitioner successful.

(ii) Counter affidavit filed by the commission does not justify the action because neither the petitioner has committed any default nor has ever submitted a wrong report about his being Scheduled Tribe candidate. Since it is pleaded consisting which has not been denied either by the commission or by the State that the petitioner's grand father had migrated to chhapra and thereafter to Allahabad and the certificates obtained and used by the petitioner are valid in law, the result cannot be cancelled.

(iii) Articles 341 and 342 of the Constitution of India as interpreted by the Hon'ble Supreme court, read with the provisions contained in the aforesaid State ACT I.S. U.P. PUBLIC services(Reservation for SC/ST/OBC) act 1994,the petitioner cannot be denied appointment on having been declared successful by the commission.

7. Reliance is being placed on four decisions reported in Action Committee Vs. U.O.I. (1994)5 S.C.C.,244, 1990(3) S.C.C.,130 M. Chandra Vs. Dean and others, Km. Manju Singh Vs. Dean and others, A.I.R., 1986 Gujrat and State of Gujrat Vs. R.L. Patel, A.I.R. 1992 Gujrat 42. It may be stated here that the last case has no application to the facts of the case. The candidate there was of Scheuled Tribe which was so described in Nagar Haveli as well as in Gujrat. The other 3 decisions required consideration.

8. Sri Shiv Kumar Singh,. Learned counsel for the commission also placed reliance on the language of Articles 341 and 342 of the Constitution of India and further argued that except the State Government, no one can increase the list of either Scheduled Caste/Scheduled Tribes or Backward Castes and ,therefore, the present attempt of the petitioner to include himself in the list of the Scheduled Tribe in State of U.P. just because he happens to belong to a Scheduled Tribe of Assam is an attempt in futility and the court also could not grant any relief to the petitioner that score. He further contended that in so far as the certificate issued by the District Authorities of Allahabad to the petitioner is concerned, it will, at best come to indicate that the petitioner belongs to a Scheduled Tribe in Assam. That will, according to Sri Shiv Kumar Singh not entitle the petitioner to claim the privileges of reservation to Scheduled Tribe candidates in U.P.

9. Lastly, he contended that the petitioner is not qualified for the reason that the Tribe which he claims to be Scheduled Tribe in Assam is not included in the recognised list in the State of U.P. and, therefore, placing reliance on the aforesaid Supreme Court decisions, he said that the writ petition should be dismissed.

10. Sri S.C. Rai, learned Additional Chief Standing Counsel has said that the petitioner's S.T. certificate has been genuinely issued by the State officials on the basis of the documents which were produced by the petitioner and were available before the officials concerned. He further pointed out that the District Magistrate, Allahabad in his turn has gone to the extreme possible extent to find out whether or not the petitioner belongs to a Scheduled Tribe or not and the findings conveyed through the averments of the affidavit of Shri Alok Tandon, the District Magistrate Allahabad indicates that the petitioner belong to Scheduled Tribe. Sri Rai, therefore contended that whether the petitioner rightly applied for appearing at the said examination has to be adjudged on the aforesaid factual position while it is true that the petitioner does not belong to Scheduled Tribe recognised as such by the State Government.

11. In the instant case, no search for the principles behind carving out reservation for Scheduled Castes, Scheduled Tribes or Backward Castes is involved. It is a simple issue of finding out whether or not the

petitioner should be extended the benefit of having been successful at the main P.C.S. examination as Scheduled Tribe candidate. The facts narrated above leave no manner of doubt that there was no falsehood or mis representation in the action of the petitioner which prima facie showed that he belongs to a Scheduled Tribe known as "NAGA" .The petitioner was permitted to appear at the examination by the commission. He has successfully passed the written examination in the mains P.C.S. examination in the year 1994. He successfully encountered the interview at the commission and was declared as a selected candidate belonging to Scheduled Tribe category. After this had happened, wisdom dawned on the commission to find out whether "NAGA" category of Tribe is or is not a Scheduled Tribe in the State of U.P. No doubt, "NAGA" Tribe is not included in the list of Scheduled Tribes in State of U.P. but was there any provision which prohibited the petitioner from applying for the service on the strength of the aforesaid candidates obtained from the collector Allahabad, which was based on the certificates issued by the relevant authorities of Nagaland? The answer shall have to be that the petitioner's claim of Scheduled Tribe was based on genuinely issued certificates and there was nothing which persevered the petitioner being selected if successful. In this connection, some provisions of the aforesaid U.P. Public Services (Reservation for SC/ST/BC) Act, 1994 shall have to be considered and then the ration laid down by the Hon'ble Supreme court in the aforesaid two decisions has to be applied to one facts of the present case.

12. Section 2(b)," other backward classes of citizens as those specified in schedule –I appended to the Act and this all about the definition of Scheduled Castes, Scheduled Tribes and Backward classes. Section-9 says" For the purposes of reservation provided under this Act, caste certificate shall be issued by such authority or officer in such manner and form as the State Government may, by order, provide" Through Section-8, it is provided that the State Government may grant such concessions in respect of fees for the candidates mentioned in sub-section 1 of section-3. It has been provided in Section 3(1) that in public services and posts, there shall be reserved at the stage of direct recruitment, according to the roster referred to in sub-section (5) there of;

(a) in the case of Scheduled Castes	21%
(b) in the case of Scheduled Tribes	2%
(c) in the case of other backward classes of citizens	27%

13. It has been provided that the reservation under clause © shall not apply to the category of other backward classes of citizens specified in Schedule-II. There are only two schedule in the Act. Schedule-1 notifying certain castes under Section 2© to be included as OBC and Schedule-II describes the prohibitions of certain candidates who will not get the benefit of reservation. That is all about the reservation in public services concering candidates of Scheduled Tribe in the State of U.P

Coming now to the decision of the Hon'ble Supreme Court in the case of M. Chandra (Supra),it should be at once stated that the said decision was considered in detail by the Hon'ble Supreme Court in the later decision of Action committee (Supra), consequently, the ration in the latter case shall have to be applied to the facts of the present case.

14. It has been held on a reading of the language used under Articles 341 and 342 of the Constitution of India that the Parliament is empowered to include or exclude by law from the list of Scheduled Castes and Scheduled Tribe specified in the notification issued under clauses- I thereof. Article 342 specifically deals with any tribe or tribal community in the same fashion as scheduled

Castes and Scheduled Tribes are dealt with under Article 341. It has been observed by Hon'ble Supreme Court," what is important to notice is that the castes or tribes have to be specified in relation to a given state or Union Territory. That means a given caste or tribe can be a Scheduled Caste or a Scheduled Tribe in relation to the State or Union Territory for which it is specified". After that the Hon'ble Supreme Court has gone on to consider the relevant provisions with which the grievances related to in the petition before the apex court. In para-4 of the judgement, the circulars which were issued by the Maharashtra Government have been dealt with. Applicability of the Government orders issued by Maharashtra Government were found not to be attracted to the migrants who came to settle in Maharashtra after 1950. Admittedly, the challenge before the apex court in the aforesaid case or the Action Committee (Supra) was to the aforesaid Government orders by such persons who claimed to be migrants of Maharashtra after the constitution came into being. On the aforesaid factual background, after referring to the aforesaid decision in M. Chandra's case, which was a constitution bench decision their Lordships hold as under;

"We may add that considerations for specifying a particular caste or tribe or class for inclusion in the list of Scheduled Castes/Schedule Tribes or backward classes in a given State would depend on the nature and extent of disadvantages and social hardships suffered by that caste, tribe or class in that State which may be totally non est in another State to which persons belonging there to may migrate. Coincidentally in may be that a caste or tribe bearing the same nomenclature is specified in two States but the considerations on the basis of which they have been specified may be totally different. So also the degree of disadvantages of various elements which constitute the input for specification may also be totally different. Therefore, merely because a given caste is specified in State a as a Scheduled Caste does not a necessarily mean that if there be another caste bearing the same nomenclature in another State the person belonging to the former would be entitled to the rights, privileges and benefits admissible to a member of the Scheduled Caste of the latter State" for the purpose of this constitution". This is an aspect which has to be kept in mind and which was very much in the minds of the constitution makers as is evident from the choice of language of Articles 341 and 342 of the Constitution."

15. In the concluding paragraph, their Lordships in the apex court made a distinction with regard to certain classes of candidate that," All these decisions were considered by the Constitution Bench which agreed with the latter view. It upheld the view expressed in the communication dated 22.2.1985 and negatived the challenge of the petitioner that the said view was ultra wires Articles 14,15,16 or 21 .it, however, observed that in the facts and circumstances of the case and having regard to the fact that the petitioner student's career was involved it directed the authorities to consider whether the petitioner was a Goudi' and if yes, the institution may consider if he can be allowed to complete his studies in the institution. However, on the Constitution this court was clear in its view that legally speaking he was not entitled to admission in the Scheduled Tribe quota".

16. As stated above, the petitioner's consistent plea in this writ petition that migration had taken place before the constitution was enforced and consequently the castes certificate was applied for by the petitioner from the Nagaland Government which was duly issued. Once, this was so done, he applied for a certificate under Section 9 of the aforesaid Act. The certificate having been granted by the State Government to the effect that the petitioner was a Scheduled Tribe candidate of Nagaland, it was permissible for the petitioner to apply for

the aforesaid post and claim reserved quota for the Scheduled Tribe candidates.

17. The petitioner, therefore, has been able to prove all the facts of his belonging to Scheduled Tribe of the State of Nagaland. Simultaneously, the law and the relevant provisions quoted above did not bar the extending of the benefit of the reservation of 2% in public services to Scheduled Tribe candidates of other State.. it is not a question that the petitioner's joining, if accepted would increase the list of Scheduled Tribes as prevalent in the State of U.P. but it is a question whether a citizen of India may be belonging to a different State, can rightly claim the reservation which is available to the Scheduled Tribe candidate of the State where he is present living. There is no law and no provision has been brought to the notice of the court which will limit the said reservation quota to be extended only to citizen of the State of U.P. The petitioner has claimed that he should be extended the said benefit being a candidate of Scheduled Tribe of the State of Nagaland. That claim has to be upheld and sustained so long as there is no such Government Order or circular as has been issued by the Government of Maharashtra which have been noticed in the decisions cited above.

18. In this view of the matter it is hereby held that the petitioner was rightly permitted to appear at the P.C.S.(Preliminary) Examination 1994, he was rightly permitted to appear in the main examination, rightly permitted to participate in the interview and being successful was rightly declared as having passed the P.C.S. examination, 1994. Therefore, the commission erred in cancelling the result of the petitioner and the said order suffers from an error apparent on the face of the record. Hence, the impugned order has to be quashed.

19. In view of the aforesaid discussions, the wait petition succeeds and is allowed. The order of the commission dated 30.6.1997/ 1.7.1997(Annexure-15 to the writ petition) is hereby quashed. The petitioner shall be taken as having passed the P.C.S. main examination, 1994. The State of U.P. is hereby commanded to afford appointment to the petitioner forthwith in accordance with law. However, parties will bear their own costs.

Petition Allowed.

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

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

Special Appeal No. 441 of 1998

Committee of Management ...Appellant
Versus
District Minority welfare officer, Varanasi ...Respondents

Counsel for the Appellant:
Shri G.K. Singh
Shri V.K. Singh
Shri R.N. Singh
Shri S.N. Singh
Shri A.P. Sahi
Shri G.K. Singh
Shri D.K. Singh
Shri A.A. Khan

Counsel for the Respondent:
Shri Ashok Khare

Uttar Pradesh Ashaskeya Arbi Talha Farsi Madarson Ke Manyata Niyamawali-1987-Regulation-39-power of the Director Minority Welfare-Validity of the appointment of the head of Minority Institution-implied power given by virtue of the provisions of REgulation-39-held- Director can adjudicate the controversy as per direction of High Court for the purposes of payment of salary.

Held-Para 6

The decision aforestated, however, does not support the contention of the learned counsel appearing for the appellant and that the Director minority welfare does not have the implied power to satisfy himself, for administrative purposes and for the purposes of payment of salary, as to who is the principal of the institution. Upon regard being had to the administrative control that the Director of Minority Welfare, UP exercises over the minority institution Particularly the provisions contained in Rule 39 of the Niymawali approved by the Govt. vide Govt. order dated 22.08.1987, we are of the view that in case a dispute arise between two rival claimants tot he post of principal of minority institution, the District Minority Welfare Officer and/Ir. the Director Minority welfare U.P., Lucknow has the power to decide, on administrative level, as to who amongst the two rival claimants had been duly appointed head of the institution by the Management atleast for the purpose of disbursement of salary.

Case law discussed.

1978 AWC 124, 1980 UPLBEC-43, JT 1993 (2) SC-341, AIR 1974 SC-1389, AIR 1988 SC-37, (1979) 2 Sec. 124, 1999 (3) Sec. 676

Constitution of India, Article 30 (1)- implied power given to the Director to adjudicate the revel claim about the Head of the institution whether violate of article 30 (1) of the Constitution of India-held ;'No'.
Held Para 9

In the instant case, the Director Minority welfare, U.P. has been called upon to decide the controversy between the two rival claimants to the post of head of the institution. Such implied power in the Director would not violate article 30 (1) of the Constitution of India.

By the Court

1. This Special Appeal by Committee of Management, Madarsa Dairatul Ishlah Chiragh-E-Uloom, Rasoolpura, Varanasi is directed against the judgment and order dated May 15 1998 passed by the learned Single Judge in Civil Misc. Writ petition no. 33983 of 1996 (Walliullah Versus District Minority Welfare Officer, Varanasi and others). Walliullah, the petitioner arrayed herein as party respondent no. 3 approached this Court for issue of a writ of certiorari quashing the appointment of Mohd. Sabir Ansari, party respondent no. 4, to the post of Principal, Madarsa Dairatul Ishlah Chiragh-E-Uloom, Rasoolpura, Varanasi inter alias on the ground that though he was duly appointed to the post of Principal vide appointment letter dated 29.06.1994 which was approved by the District Basic Shiksha Adhikari, Varanasi on 02.08.1995 yet the post was later on readvertised pursuant which the fourth respondent Mohd. Sabir Ansari was selected and appointed as principal of the institution. The petition was opposed by the appellant, Comm. of Management as well as the fourth respondent Mohd. Sabir Ansari, inter alias on the ground that the petitioner Walliullah was simply authorised to work as officiating principal being the senior most teacher of the institution and was never duly appointed tot he post of principal. The learned Single Judge being of the opinion that the petition involved the disputed questions of fact, disposed it of with the direction tot he Director Minority Welfare to examine the matter on a representation being submitted by the petitioner and dispose of the same by a reasoned order after affording opportunity tot he concerned parties.

2. The judgment of the learned Single Judge has been assailed by Shri R.N. Singh learned Senior Advocate appearing for the appellant basically on two grounds, firstly, that the direction issued by the learned Single Judge is tantamount to creating an adjudicator forum which being a legislative function ought not to be exercised by the courts; secondly that the institution being a minority institution the direction given by the learned Single Judge conferring adjudicator power upon Director Minority welfare would violate Article 30 (1) of the Constitution. Shri Ashok Khare learned counsel appearing for the petitioner respondent Walliullah urged that by

virtue of various administrative powers vested in the Director of Minority Welfare in relation to Arbi and Farsi Madarsas, an implied power to decide the dispute as to who amongst two rival claimants is the Principal of institution may be culled out in the Director Minority Welfare for administrative convenience and desirability. As the argument of Sri R.N. Singh that the direction given by the learned Single Judge to the Director of Minority Welfare to decide the dispute contravenes article 30 (1) of the Constitution, Sri Ashok Khare urged that conferment of adjudicator power with regard to employees of minority institutions upon outside agency would not contravene Article (30) 1 of the Constitution.

3. We have given our consideration tot he submissions made across the Bar Concededly there is no express provision of law conferring any adjudicator power in the Director of Minority Welfare in respect of any dispute regarding appointment of teaching and non teaching staff or Arbi and Farsi Madarsas. The institution in question is on the grant in aid list of the State Government. The question is whether the Director of Minority Welfare has any implied adjudicator power. Pursuant to Govt. Order dated January 31, 1996 being Annexure no. SCA-2 to the Supplementary Counter Affidavit, the functions of Education Department of the Govt. in relation to minority institutions stood transferred to Minority Welfare Department and with a view to ensuring timely of monthly salaries to teaching and non teaching staff of Arbi and Farsi Madarsas, the Government issued another Government Order, it being G.O. No. 664/52-3 96-4/4/10/96 Alp Sankhyak Kalyan Evam Muslim Waqf Anubhag-3 Lucknow dated 27.06.1996 thereby modifying the earlier Govt. Order dated 12.07.1990 in respect of timely payment of monthly salary to teaching and non teaching staff of Arbi and Farsi Madarsas by providing that in place of expression "Shiksha Nideshak (Basic) U.P. Lucknow" the expression "Nideshak, Alp Sankhyak Kalyan Vibhag U.P." and in place of "Zila Basic Shiksha Adhikari" the expression "Zila Alpsankhyak Kalyan Adhikari" be read in the govt. Order dated 12.07.1990. Zila Alpsankhyak Kalyan Adhikari has been vested power to scrutinize the salary bills get the salary bills scrutinised through Lekha Adhikari posted in the office of District Basic Education Officer and to ensure disbursement and payment of salaries to teachers and non teaching staff of the Arbi and Farsi Madarsas and furnish information in this regard to the Director Minority Welfare Department, U.P. and Secretary, Alpsankhayak Kalyan Evam Muslim Waqf Vibhag U.P., Lucknow. The head of a minority institution has to interact with the Inspector and Zila Alpsankhyak Kalyan Adhikari or the Director Minority Welfare U.P., Lucknow. Shri Ashok Khare invited the attention of the Court to Manyata Evam Seva Niymawali known as "U.P. Ashaskiy Arbi Tatha Farsi Madrason Ki Manyata Niyamawali" which was approved by the Governor vide Govt. Order No. 3367/15-17-87-53(5)-86 Shiksha (17) Anubhag, Lucknow dated August 22, 1987 in support of his contention that the Director Minority Welfare has implied power to see as to whether a teacher appointed in such Madrasas has been duly appointed and working in the institution. The said niyamawali though a non statutory one lays down the qualifications for appointment of teachers including Head Master/Principal as well as the procedure to be adopted in respect of disciplinary actions against such teachers/Head Masters. The Niymawali provides for in respect of the institution by the competent authority the power to issue appropriate direction for removal of defects, if any, found during inspection as visualized by Rule 37 of the Niymawali. Rule 39 of the Niymawali lays down in no uncertain terms that in the event of maintenance grant being misused or misappropriated or in the event of committing any grave irregularity the maintenance may be suspended. It further provides that in such eventuality the basic Shiksha Adhikari may

himself withdraw the reimbursement and maintenance grant and pay directly to duly appointment teachers working in the institution the rule 39 being relevant in quoted below:

"KISI BHI PRAKAR KE SHASKIY ANUDAN KE LIYE KEVAL STHAYI MANYATA PRAPT MADRASE HE AHAR HONGE. ANUDAN SUCHI PAR AANE KE LIYE SANSTHA DWARA AAVEDAN KARTE SAMAY YEH DEKHA JAYEGA KE MANYATA KI SHARTON KA PURA PALAN HO RAHA HAI. PRADATT ANUDAN KA DURUPAYOG YA DURVINIYOG KARNE ATHVA KOI ANYA GAMBHIR TRUTI KARNE PAR ANUDAN KA NILAMBAN KIYA JA SAKEGA AUR ANUDAN KE DHANRASHI SAMBANDHIT BASIC SHIKSHA ADHIKARI DWARA AAHRIT KARKE SIDHE SANSTHA KE VIDHIVAT NIYJUKT VA KARYARAT ADHYAPAKON KO UNKE VETANADI KE DAY KE ROOP MEIN BANTI JA SAKEGI" (Emphasis is ours).

4. The underlined portion of Rule 39 of the Niyamawali aforestated clearly suggests an implied power in the Basic Shiksha Adhikari to decide at the administrative level as to whether the salary is being paid by the management to a lawfully appointed teacher working in the institution. But for such power it would not be feasible to ensure that the maintenance in being utilized lawfully. The power of the Basic Shiksha Adhikari has since been delegated to the Minority Welfare Department with the Director of the Minority Welfare at the Headquarter at Lucknow. In such view of the matter it cannot be said that the direction issued by the learned Single Judge to the Director Minority Welfare to decide the controversy in question in tantamount to creation of a forum which is a legislative function. In our considered opinion where there exists an express or implied power in an authority to traverse upon a controversy, the argument that the court has created a forum and has thereby usurp legislative function does not arise.

5. In Committee of Management versus District Inspector of School Meerut[1] a Division Bench of this Court was called upon to decide the question as to whether the District Inspector of School has been vested with the power to adjudicate upon claims of rival contending managing committees. The division bench held that though there was express provision conferring such power on the District Inspector of School, the latter did have an implied power to decide on administrative level as to who according to him were validly elected office bearers of the institution. The same view was reiterated in Jaswant Singh and another versus District Inspector of School and another[2] wherein it has been clearly held that since the District Inspector of School has to perform various administrative function under the provisions of the U.P. Intermediate Act, 1921 and the U.P. High School and Intermediate Colleges (Payment of Salaries of teachers and other Employees) Act, 1971 and since these duties cannot be discharged by him unless he is in a position to find out an administrative level as to who are the real office bearers of the college, he for this limited purpose must of necessity satisfy as to who according to him are the validly elected office bearers of the institution.

6. Sri R.N. Singh placed reliable on Supreme Court decision in Chiranjilal Srilal Goenka versus Jasjit Singh and others[3] wherein it has been held that power to create or enlarge the jurisdiction is legislative in character. This legal proposition has not been disputed by Sri Ashok Khare, learned counsel appearing for the third respondent. The decision aforestated, however, does not support the contention of the learned counsel

[1] 1978 AWC 124
[2] 1980 U.P.L.B.E.C.43.
[3] J.T. 1993(2)S.C. 341.

appearing for the appellant and that the Director Minority Welfare does not have the implied power to satisfy himself, for administrative purposes and /or for the purposes of payment of salary, as to who is the Principal of the institution. Upon regard being had to the administrative control that the Director of Minority Welfare, U.P. Exercises over the minority institution, Particularly the provisions contained in Rule 39 of the Niymawali approved by the Govt. vide Govt. Order dated 22.08.1987, we are of the view that in case a dispute arise between two rival claimants to the post of principal of minority institution, the District Minority Welfare Officer and/or the Director Minority welfare U.P., Lucknow has the power to decide, on administrative level, as to who amongst the two rival claimants has been duly appointed head of the institution by the Management at least for the purpose of disbursement of salary.

7. The nest question that arises for consideration is as to whether such implied power in the District Welfare Officer or Director Minority Welfare, U.P. offends Article 30 (1) of the Constitution. In re : Kerla Education Bill, 1957: AIIR 1958 SC 956 and in Ahemdabad ST. Xavier's College Society versus State of Gujrat[4] it has been held that minority institutions have a right to establish and administer educational institutions of their choice but at the same time if has been propounded that the right to administer connot include the right to mal administration. Regulatory measures, it has been held therein, do not abridge, the right guaranteed by Article 30 (1) of the Constitution. Mathew, J. discussing the type of avocation State would amount guaranteed by Article 30 (1) of the Constitution observed thus:

" The application of the term 'abridge' may not be difficult in certain types of situations. The important ones are where a law is not a direct restriction of the right but is designed to accomplish another objective and the impact upon the right is secondary or indirect. Measures which are directed at other forms of activities but which has a secondary or direct of incidental effect upon the right do not generally abridge a right unless the content of the right is regulated….".

In Christian Medical College Hospital Employees' Union and another versus Christian Medical College Vellore Association and others[5] the Supreme Court was faced with the question as to whether the Industrial Disputes Act offends Article 30 (1) of the Constitution. It has been held that the Industrial Disputes Act which is a general law for prevention and settlement of industrial disputes cannot be said to interfere with the right of the minorities to establish and administer educational institutions. The argument that the application of the provisions of the Act will result in the abridgement of the right of the Management of the Minority educational institution to administer such institutions was repelled by the Supreme Court not with standing the power of the Industrial Tribunal/Labour Court to set orders of the Management in respect of their employees at naught.

8. In St. Xavier's case (Supra) the permission with respect to "selecting method of arbitration for setting major dispute connected with service of staff of education institutions" was held not objectionable. What was held objectionable in that case was giving of power to the Vice Chancellor to nominate an umpire. Same principle has been reiterated in Lily Kurian versus Sr. Lewina and others[6]. The decision of the Director Minority Welfare in the present case on the dispute as to who had been duly appointed head of the institution being an administrative decision is open to judicial review by this court under article 226 of the Constitution of India and can also be assailed by the aggrieved party by

[4] AIR 1974 S.C. 1389

[5] AIR 1988 S.C. 37

[6] (1979) S.C.C. 124

means of a civil suit. Such adjudicator power, in our opinion, does not offend Article 30 (1) of the Constitution.

9. Yunus Ali Sha Versus Mohd. Abdul Kalam[7] reliance on which has been placed by Shri R.N. Singh has no application to the facts of the present case. In that case Section 10 of the Orissa Education Act, 1969 which required prior approval of the Director before termination of the service of a teacher of an aided institution was held inapplicable to minority institution. The Supreme Court in that case has clearly held that while Director of Education, Orissa may have power to supervise the functioning of the said school in order to ensure that it does not malfunction or mal administer in view of Article 30(1) of the Constitution of India, he will have no control over the actual management of the school including hiring or terminating of service of service of a teacher'. In the instant case, the Director Minority Welfare, Uttar Pradesh has been called upon to decide the controversy between the two rival claimants to the post of head of the institution. This does not involve conferral power to approve or disapprove appointment or termination of service of any teacher of the minority institution. Such implied power in the Director would not violate Article 30(1) of the Constitution of India.

10. Before parting with the case, we may observe that the Director Minority Welfare, Uttar Pradesh took a decision in the matter vide order dated 11.9.1998 pursuant to the impugned directions given by the learned Single Judge but we refrain from expressing any opinion regarding legality or otherwise of the said order for that is the subject matter of a separate writ petition pending consideration before appropriate Single Judge Bench.

In the conspectus of the above discussion we are not inclined to interfere with the order passed by the learned Single Judge. The appeal fails and is dismissed without any order as to costs.

Petition Dismissed.

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[7] 1999(3) SCC 676