APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 21.5.2001

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

First Appeal From Order No. 739 of 2001

United India Insurance Company Ltd.
... Appellant
Versus
Smt. Sarvati Devi & others...Respondents

Counsel for the Appellant:
Shri A.C. Nigam

Counsel for the Respondents:
Shri K.B. Dixit

Article 137 of the Limitation Act- this Article which prescribes three years rule of limitation, has not been made applicable to an application for compensation filed under section 166 of the Motor Vehicles Act 1988-no period stands prescribed by the Statue for filing of a claim petition. (Held in paragraph 4)

Accordingly the solitary submission is rejected and no other submission having been made to show prima facie that the finding of the tribunal awarding only Rs. 1,73,400/- as compensation on account of rash and negligent act of the driver of the bus in question resulting in death of Roop Singh the bread earner of the family of the claimant, we dismiss this appeal summarily.

(Delivered by Hon'ble B.K. Roy, J.)

The Appellant- United India Insurance Company Ltd. assails validity of the judgment dated 16.2.2001 passed by Sri Jagannath, H.J.S. Vth Additional District Judge, Mainpuri/ Motor Accident Claims Tribunals, Mainpuri.

2. The sole submission made by Sri A.C. Nigam on the question of admission of this appeal is that the claim petition having been filed after six years from the date of accident it ought to have been rejected under the residuary Article 137 of the Limitation Act as only three years period was available for its filing.

3. In our view the submission is wholly devoid of substance for more than one reasons:-

(a) Earlier under subsection (3) of Section 166 of the Motor Vehicles Act six months period was prescribed for filing a claim petition. Under its proviso a jurisdiction was also vested in the Claims Tribunal to entertain time barred petitions upto 12 months. However, subsection (3) was omitted by section 53 of Act 54 of 1994 with effect from 14th November 1994. Thus, the net result is that no period stands prescribed by the Statute for filing of a claim petition.

(b) Article 137 of the Limitation Act, which prescribes three years rule of limitation, has not been made applicable to an application for compensation filed under section 166 of the Motor Vehicles Act, 1988.

4. Accordingly the solitary submission is rejected and no other submission having been made to show prima facie that the finding of the tribunal awarding only Rs.1,73,400/- as compensation on account of rash and negligent act of the driver of the bus in question resulting in death of Roop Singh the bread earner of the family of the claimant, is erroneous we dismiss this appeal summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 25 MAY, 2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 10619 of 2001

Dr. P.D. Hajela, Ex. Vice Chancellor ...Petitioner

Versus

Chancellor/Governor of U.P., Raj Bhavan, Lucknow &others...Respondents

Counsel for the Petitioner:
Shri Vijay Sinha
Shri V.B. Singh

Counsel for the Respondents:
Shri Neeraj Tripathi
Shri R.G. Tripathi
Dr. R.G. Padia

Constitution of India Article 226- the petitioner cannot be discriminated against since persons similarly situate e.g. Prof. A.B. Lal; Prof. A.D. Pant; Prof. L.R. Singh and Prof. D.N. Singh etc. have been granted the same benefits. (Held in para 8)

Hence we are of the opinion that the petitioner is also entitled to pensionary benefit and we direct accordingly. The petitioner shall also be paid arrears of Pension from the date he resigned till date of payment with 12% per annum interest within three months from the date of production of a certified copy of this order before the State Government.

(Delivered by Hon'ble M. Katju, J.)

1. Heard learned counsel for the petitioner, Sri Neeraj Tripathi for the Chancellor, learned standing counsel for respondent no.2 and 4 and also Dr. R.G. Padia learned counsel for the respondent no. 3.

2. This writ petition has been filed for a mandamus directing the respondents to grant pensionary benefit to the petitioner.

3. The petitioner was appointed as permanent Lecturer in the Department of Economics in Allahabad University on 11.8.1947 and continued there till 24.11.71 i.e. for about 25 years and thereafter he joined Punjabi University at Patiala. Thereafter petitioner was appointed Vice Chancellor of Allahabad University and Sagar University and also served in various Institutions of National importance viz. Indian Council for Social Science Research, UGC, HPA, and JAMR etc. upto November 1993.

4. The State Government issued a G.O. dated 24.12.83 copy of which is Annexure-1 to the petition granting pensionary benefits to University teachers of State University who retired on or after 1.1.84. The State Government thereafter to give pensionary benefit to teachers who retired even before 1.1.84 issued G.O. dated 3.1.93 vide Annexure-2 to the petition.

5. The Executive Council of the Allahabad University vide resolution dated 3.3.94 had resolved to treat the resignation of teachers of Allahabad University submitted earlier as voluntary retirement in order to give the pensionary benefits to teachers who even resigned. True copy of the resolution is Annexure-3 to the petition.

6. In paragraph 6 of the petition it is stated that other teachers who were

similarly situate as the petitioner e.g. Pro. A.B. Lal and Prof. A.D. Pant were given pensionary benefits although these teachers had resigned before the due date of retirement. Prof. A.B. Lal resigned and had become Vice Chancellor of Rajasthan University and A.D. Pant had resigned and became Director of G.B. Pant Social Science Institute. Similarly in paragraph 7 of the petition it is mentioned that Prof. D.N Sinha of Psychology and Prof. L.R. Singh resigned before the year 1984 and had been given pensionary benefits with back date from the respective date on which they had resigned.

7. In paragraph 9 of the petition it is stated that Prof. L.R. Singh who joined the University in the year 1957 resigned in the year 1978 and was granted pensionary benefits and hence there was no reason to deny the same to the petitioner. In paragraph 12 of the petition it is stated that the University made a recommendation to the State Government through Director of Higher Education for grant of pensionary benefits to the petitioner. True copy of the G.O. dated 9.8.94 which gives procedure for grant of pensionary benefits is Annexure –4 to the petition. The Director of Higher Education has also made recommendation to the State Government in this connection on 30.4.97 vide Annexure-5 to the petition. However, the State Government rejected the recommendation of the Vice Chancellor for grant of pensionary benefits to the petitioner. The Pensioners Association of Allahabad University had made a recommendation dated 1.6.99 in favour of the petitioner vide Annexure-6 to the petition. The petitioner also made a representation dated 27.6.2000 Annexure-7 and 8 to the petition. The Finance Officer of the University had also made a recommendation dated 10.7.97 in favour of the petitioner to the State Government. The State Government has issued letter dated 21.7.98 clarifying the position, copy of which is Annexure-10 to the petition. The petitioner had submitted an option to accept pensionary benefit on 7.3.84 copy of which Annexure-12 to the petition. The Government had also invited options and copy of the option submitted by the petitioner dated 17.11.2000 is Annexure-13 to the petition. Since pensionary benefit was not granted to the petitioner in our opinion this petition has to be allowed as the petitioner cannot be discriminated against since persons similarly situate e.g. Prof. A.B. Lal; Prof. A.D. Pant; Prof. L.R. Singh and Prof. D.N. Singh etc. have been granted the same benefits.

8. Hence we are of the opinion that the petitioner is also entitled to pensionary benefit and we direct accordingly. The petitioner shall also be paid arrears of Pension from the date he resigned till date of payment with 12% per annum interest within three months from the date of production of a certified copy of this order before the State Government.

9. The petition is allowed. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.5.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 19562 of 1985

Anantha Ram ...Petitioner
Versus
Addl. Civil Judge, Mirzapur and others ...Respondents

Counsel for the Petitioner:
Shri Sankatha Rai

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

Constitution of India- Article 226- the omission by the plaintiffs to sign the plaint is merely a formal error and not a serious defect which went to the root of the matter, so as to vitiate the whole institution of the suit. In such a case, the Court has power to allow the plaintiff to remedy the defect at a later stage, even though the period of limitation for filing the plaint may have already expired. (Held in para 6).

In the present case, the plaint was signed by the son of the plaintiff-petitioner. The plaint was also signed by the counsel. The defect was curable and when the petitioner had asked permission of the court to put his signatures on the plaint an verify it, there was no justification for the Court to reject his prayer.

(Delivered by Hon'ble Sudhir Narain, J.)

1. This writ petition is directed against the order dated 21.11.1985 whereby respondent No.1 rejected the application of the petitioner for putting his signatures on the plaint and Vakalatnama.

2. The petitioner filed Suit No.32 of 1977 for ejectment of defendant No. 1 and for demolition of construction raised by him. The suit was contested by three defendants by filing three separate written-statements. The parties led evidence in the case and the suit was dismissed on merits. The trial court further held that the plaint was not signed by the plaintiff but it was signed by his son Lakshmi Narain and as such the plaint was not properly presented. The petitioner preferred an appeal against the judgment of the trial court. During the pendency of the appeal, he filed an application that he may be permitted to put his signatures on the plaint and Vakalatnama. This application has been rejected by the court by the impugned order dated 21.11.1985.

3. The pleading is to be signed in accordance with Order 6 Rule 14, C.P.C. which provides that every pleading shall be signed by the party and his pleader (if any): provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. Order 6 Rule, 15 C.P.C. provides for the verification of plaint.

4. The plaint was presented on behalf of the petitioner but it was signed by his son Lakshmi Narain and he had also signed Vakalatnama. He did not give any specific reason as to why the plaintiff-petitioner did not sign the plaint. The application was, however, filed by the petitioner that he may be permitted to put his signatures on the plaint.

5. In ***Bombay Baroda and Central India Ry. Co. Ltd. Vs. Siyaji Mills Co., Ltd. Baroda, AIR 1927 Alld. 514*** it was held that any irregularity in the signature or verification of the plaint is a mere defect of procedure and cannot be fatal in second appeal when the merits of the case have not been affected. The defect can be cured even at the appellate stage. In ***Subbiah Pillai alias S.S.M. Subramania Pillai Vs. Sankarapandiam Pillai and others AIR 1948 Mad. 369*** the Court was of the opinion that the omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court and is curable under the provisions of Section 99. The appellate Court ought not to dismiss the suit or interfere with the decree of the lower Court merely because the plaint has not been signed. In ***Kalu Ram Pannalal and another Vs. Jagannath Kalua, AIR 1963 MP, 151*** the Court observed that the omission by the plaintiffs to sign the plaint is merely a formal error and not a serious defect which went to the root of the matter, so as to vitiate the whole institution of the suit. In such a case, the Court has power to allow the plaintiff to remedy the defect at a later stage, even though the period of limitation for filing the plaint may have already expired. In ***Karam Singh Vs. Ram Rachhpal Singh and others AIR 1977 HP 28***, the Court permitted the plaintiff to sign and verify the plaint where originally it was not signed by him but by his pleader alone and further observed that before the Court dismissed his plaint on this ground, the Court should provide an opportunity to the plaintiff or his Mukhtar to verify and sign the plaint.

6. In the present case, as noted above, the plaint was signed by the son of the plaintiff-petitioner. The plaint was also signed by the counsel. The defect was curable and when the petitioner had asked permission of the court to put his signatures on the plaint and verify it, there was no justification for the Court to reject his prayer.

7. It may be noted that the evidence had been led by the parties in the case and the matter is pending in appeal. If the plaint is rejected on the ground that it is not duly verified, it will cause hardship. As noted above, the Court can permit a plaintiff even during the pendency of appeal to put signatures on the plaint and verify it taking into consideration all the relevant factors.

8. In view of the above, the writ petition is allowed and the order dated 23.11.1985 is hereby quashed. The petitioner shall be permitted to put his signatures on the plaint and Vakalatnama as also shall verify the pleadings.

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

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 3.7.2001

BEFORE
THE HON'BLE J.C. GUPTA, J.

Criminal Revision No. 268 of 2001

Ishwar Saran Shukla and another
...Petitioners
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioners:
Sri K.S. Jateley

Counsel for the Respondents:
A.G.A.

Section 245 Cr.P.C.-At the time of framing of charge the material and evidence collected against the accused is not to be weighed in golden scales. (Held in para 4)

Magistrate is required to examine the evidence which the prosecutor proposed to prove the guilt of the accused and if on taking the same at its face value no offence is made out, the Magistrate would be justified in passing an order of discharge but where the Magistrate finds that there are sufficient grounds for presuming that the accused has committed an offence on the basis of the unrebutted evidence, he has to frame a charge and proceed with the trial in accordance with law. The truth, veracity and effect of the evidence are not to be meticulously judged at that stage nor any weight is to be attached to the probable defence of the accused.

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard Sri K.S. Jetley for the applicants in revision and the learned A.G.A. appearing for the State.

2. By means of this revision applicants have challenged the order dated 28.11.2000 of A.C.J.M. II, Saharanpur rejecting the objections raised on behalf of the applicants and thereby refusing to discharge the applicants. Subsequently the learned Magistrate has framed charge under Section 3 of the Railway Property Unlawful Possession Act (in short R.P.U.P. Act) by the order dated 15.12.2000.

3. It has been submitted by learned counsel for the applicants that since in the present case property which is alleged to have been recovered from the possession of the applicants was not produced before the court below, there was no possibility of the case resulting into conviction and in support of his submission reliance has been placed on a decision of a learned Single Judge of Delhi High Court, ***Ms. Taposhi Chakervarti Vs. State reported in 2001(1) RCR (Criminal) 109***. I have gone through the said decision. In peculiar facts and circumstances of that particular case the learned Single Judge was of the opinion that the material placed on record of that case showed that accused would be acquitted and trial would be a futile exercise and an abuse of process of court. The facts of the present case are entirely different. It has rightly been urged by learned A.G.A. that the occasion to produce case property would arise only when the prosecution witnesses are produced and further cross examined.

4. It is well settled that at the time of framing of charge the material and evidence collected against the accused is not to be weighed in golden scales. Procedure for trial of warrant cases instituted otherwise than on police report is laid down in Chapter XIX B part from Section 244 onwards. Section 245 lays down that if, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. While Section 246 lays down that where the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall

frame in writing a charge against the accused. It is true that while considering the question whether accused is to be charged or discharged the Magistrate is not to act merely as a post-office or mouth piece of the prosecuting agency and he has to apply his mind to the material placed on record in support of the accusation made against the accused. This, however, does not mean that the Magistrate should make a moving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. Accused can be discharged only when the Magistrate considers that no case against the accused has been made out which if rebutted would warrant his conviction. While considering the said question Magistrate is required to examine the evidence which the prosecutor proposes to prove the guilt of the accused and if on taking the same at its face value no offence is made out the Magistrate would be justified in passing an order of discharge but where the Magistrate finds that there are sufficient grounds for presuming that the accused has committed an offence on the basis of the unrebutted evidence, he has to frame a charge and proceed with the trial in accordance with law. The truth, veracity and effect of the evidence are not to be meticulously judged at that stage nor any weight is to be attached to the probable defence of the accused.

5. The learned Magistrate in the impugned order has dealt with in detail all the objections raised on behalf of applicants while rejecting their prayer for discharging the order. He has assigned cogent and valid reasons for coming to the conclusion that there were sufficient grounds to presume that the applicants have committed an offence punishable under Section 3 of the R.P.U.P. Act, and was fully justified in framing a charge under the said Section. Whether or not the said charge will result into acquittal or conviction that question has to be decided on the basis of entire evidence brought on record.

6. For the reasons stated above, this Court finds no sufficient reasons to make interference in the impugned orders of the trial court.

7. The present case was registered on 12.9.1989 and even after a lapse of about 12 years the trial is still pending. In the circumstances, the trial court is directed to expedite and conclude the trial on priority and on day today basis as expeditiously as possible, preferably within a period of three months from the date of communication of this order.

8. Office is directed to communicate this order forthwith to A.C.J.M. (Court Room No.19), Saharanpur for compliance.

9. Revision is accordingly dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 4.7.2001

BEFORE
THE HON'BLE R.R. YADAV, J.

Civil Misc. Writ Petition No. 23918 of 2001

Jahid Hasan and others ...Petitioners
Versus
The Dy. Director consolidation, Saharanpur and others ...Respondents

Counsel for the Petitioners:
Sri V.M. Zaidi

Counsel for the Respondents:
S.C.

Sub Section (3) of Section 48 of the U.P. Consolidation of Holdings Act-manipulation in the revenue records during consolidation operation-petitioners have efficacious alternative remedy under Sub-Section (3) of Section 48 of the U.P. Consolidation of Holdings Act (Held in para 8).

In the present case conditions precedent for issuing a writ of mandamus is neither averred in the writ petition nor demonstrated before the Court by the learned counsel for the petitioners, hence I decline to issue a writ of mandamus especially when the averments made in the writ petition do not inspire my confidence.

(Delivered by Hon'ble R.R. Yadav, J.)

1. Heard learned counsel for the petitioners, Sri V.M. Zaidi, at length.

2. Perused the averments made in the writ petition together with the Annexures filed in support of the writ petition.

3. It is contended by Sri V.M. Zaidi, learned counsel for the petitioners, that the records of the whole village had been manipulated and in such a situation the petitioners would be satisfied if the enquiry report submitted by the Joint Director of Consolidation is implemented in letter and spirit.

4. The aforesaid contention of the learned counsel for the petitioner is not acceptable for the reasons given herein below.

5. It is conceded by the learned counsel for the petitioners that the correction of the records during consolidation operation is based on judicial pronouncements of Consolidation Authorities. No corrections in the revenue records during consolidation operation can be incorporated without judicial order passed by the Consolidation Authorities as envisaged under U.P. Consolidation of Holdings Act. Entries incorporated on the basis of judicial orders are made subject to appeal and revision under the said Act.

6. It is well to remember that all the Consolidation Authorities, while exercising their powers in deciding objections, appeals or revisions, perform their duties as Judicial Officers and they are protected under the Judicial Officers Protection Act, 1850. Under the aforesaid Act, the immunity granted to Consolidation Authorities, while exercising their judicial power is exceedingly wide so that they may act fearlessly, impartially and with a sense of security. The Judicial Officers' Protection Act is extendable even in those cases where Consolidation authorities have acted without jurisdiction in passing judicial orders, on the basis of which revenue records are corrected. Vague allegations relating manipulation in revenue records during consolidation operation without making specific averments in the writ petition by the petitioners do not make them entitle to seek relief prayed for under extra-ordinary jurisdiction under Article 226 of the Constitution of India. The allegations made in the present writ petition are vague and as such it deserves to be dismissed on this ground alone.

7. It is observed that if there is any manipulation in the revenue records during consolidation operation as alleged in the writ petition, the petitioners have efficacious alternative remedy under Sub-Section (3) of Section 48 of the U.P. Consolidation of Holdings Act and the instant writ petition is liable to be dismissed on this ground also. It is to be imbibed that disputed questions of fact cannot be gone into under writ jurisdiction.

8. It is stated by the learned counsel for the petitioners Sri Zaidi that the enquiry report submitted by the Joint Director of Consolidation is to be implemented by issuing a writ of mandamus. It is held that writ of mandamus cannot be issued as a matter of course unless conditions precedent are satisfied for issuing such a prerogative writ. In the present case conditions precedent for issuing a writ of mandamus is neither averred in the writ petition nor demonstrated before the Court by the learned counsel for the petitioners, hence I decline to issue a writ of mandamus especially when the averments made in the writ petition do not inspire my confidence. Suffice is to say in this regard that there is presumption about the honesty and integrity of an officer and I am of the view that if any enquiry is conducted as alleged in the writ petition by Joint Director of Consolidation, it is expected from the appropriate authority to take disciplinary action against those who are found guilty in the enquiry report.

9. With the aforesaid observation, the instant writ petition is dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 11, 2001

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

Civil Misc. Writ Petition No. 8169 of 2001

Nikhil Kumar Yadav ...Petitioner
Versus
Secretary, U.P. Public Service Commission, U.P. &another...Respondent

Counsel for the Petitioner:
Sri P.K. Yadav

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

U.P. Civil Services (Executive Branch) Rules, 1982-Sub-Rule (4) of Rule 15- if two or more candidates obtained equal marks in the aggregate in which event" the name of the candidates obtaining higher marks in the written examination shall be placed higher in the list. (Held in para 6).

The aggregate of the marks obtained by the petitioner in the written examination was more than that of Abhishek Srivastava and, therefore, even according to the second part of Sub-rule (4) of Rule 15, the petitioner was entitled to be selected in preference to Abhishek Srivastava in that unlike the policy decision as quoted herein above, the rule makes no distinction between compulsory and non-compulsory subjects. Rather, it speaks of 'aggregate marks at the written examination'.

(Delivered by Hon'ble S.R. Singh, J.)

1. Petitioner, a candidate in the lower Subordinate Examination, 1998 conducted by the Public Service Commission U.P. for appointment in

group 'C' category posts advertised by the respondent-Commission in Daily Newspapers displaying 1395 vacancies, was allotted roll no. 026172. He succeeded in the preliminary examination and thereafter, appeared in the main written examination and on the basis of the marks obtained by him in the written examination, he was called for interview vide letter dated 14.10.99 which was held on 3.11.99. The final result was declared by the Commission on 19.12.99 and was published in the Newspapers on 20.12.99 but the petitioner's name did not appear in the list of selected candidates albeit the fact that he had secured a total of 283 marks-equal to four other candidates who were selected. The details of the marks obtained by the petitioner and four other candidates who had secured equal marks are delineated below for ready reference.

	Compulsory Papers			Optional					
	Gen Hindi I	G.K II	Elementary math III	Sub I	Sub II	Inter view	Total Comp Sub. Excluding elementary math	Grand Total	
1. Abhishek Srivastava 130125	67	67	A	55	60	34	283	283	selected
2. Saroja Kumar Tripathi 8387	62	58	61	58	76	29	283	344	selected
3. Arun Kumar Shahi 82695	64	68	57	58	61	32	283	340	selected
4. Anil Kumar Singh 131621	66	65	52	66	56	30	283	335	selected
5. Nikhil Kumar Yadav	71	62	47	56	57	37	283	330	No

2. The case of the petitioner is that Sarv Sri Abhishek Srivastava, Saroj Kumar Tripathi, Arun Kumar Sahi and Anil Kumar Singh having secured 283 marks in the aggregate after excluding the marks obtained in Elementary Maths have been selected while the petitioner having secured equal marks has been illegally denied selection without any legitimate basis. It has been canvassed by the learned counsel for the petitioner that in a writ petition being No. 826(S/B) of 1994 Smt. Renu Mahendra V. State of U.P. and others, a question arose as to what should be the criterion for selection in case of equality of aggregate marks obtained by two or more candidates. In the Supplementary Counter Affidavit filed by one Sri S.A.M. Jamali, Section Officer, Public Service Commission U.P. Allahabad in the said writ petition, it was stated that in such cases, the merits of the candidates is determined on the basis of the following policy decision taken by the Commission.

(i) Candidates who had in the aggregate obtained higher marks in compulsory subjects of written

examination and interview would be placed higher in the merit list.

(ii) In case of equality of the aggregate marks in the written examination of compulsory subjects and interview, the candidates having secured higher marks in interview would be placed higher in merits; and

(iii) In case of equality of marks both in the interview and the compulsory subjects of the written examination, a candidate older in age would be placed higher in merits.

The petitioner, it has been submitted by the learned counsel, had secured in the aggregate more marks in the compulsory subject of the written examination and interview than other candidates mentioned above as would be evident from the chart given herein above. In view of the policy decision taken by the Commission, proceeds the submission, the petitioner was entitled to be selected in preference to the aforesaid candidates who had equal marks in the aggregate of compulsory subjects and interview. For the Commission, however, it has been submitted by the learned counsel relying upon the provisions contained in Rule 15(4) of the U.P. Civil Services (Executive Branch) Rules, 1982 that if two or more candidates obtained equal marks in aggregate, the name of the candidate obtaining higher marks in the written examination shall be placed higher in the merit list.

4. I have given my anxious consideration to the submissions made above, concededly as per policy decision taken by the commission as disclosed in the Suppl. Counter affidavit of **Sri S.M.A. Jamli,** Section officer, Public Service Commission, U.P. Allahabad in writ petition No. 826 of 1994 ***Renu Mahendra V. State of U.P. and Ors.***, the petitioner was entitled to be placed higher in the merit list inasmuch as he had secured higher marks in the aggregate of the compulsory subjects and in the personality test.

5. The petitioner has been denied selection on the basis of rule 15 (4) of the U.P. Civil Services (Executive Branch) Rules, 1982 which visualises that, "The Commission shall prepare a list of candidates in order of their proficiency and aggregate marks obtained by each candidate at the written examination and the Interview and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtain equal marks in the aggregate, the name of the candidate securing higher marks in the written examination shall be placed higher in the list…" The Rules aforestated, however, admittedly apply to Civil Services (Executive Branch) and ex-facie have no application to the Subordinate Services. For the Commission, it has however, been submitted that the commission have taken a decision to prepare the select-list in accordance with the provisions of the rules aforestated vide Commission's order dated 15.9.84 of File No. 18-C-1/83-84. A perusal of the decision of the Commission dated 15.9.84 would be eloquent of the fact that it was restricted to examination of 1983. No policy decision of the Commission was brought to the notice of the Court having the effect of overriding the earlier decision taken by the Commission as delineated in File No. 149 C-79-80 Part 2 page 240 a copy of which has been annexed as Annexure S.C. 1 to

the Suppl. Counter affidavit filed by the petitioner. In such view of the matter, the petitioner was entitled to be selected in preference to other candidates who had obtained in the aggregate obtained equal marks in the compulsory subjects of the written examination and the interview.

6. Assuming that the provisions of the U.P. Civil Services (Executive Branch) Rules, 1982 apply protanto to subordinate services as per policy decision, if any, taken by the Public Services Commission, even then the petitioner was entitled to be selected in preference to at least Abhishek Srivastava whose aggregate of marks was 283 whereas the aggregate of marks obtained by the petitioner was 330 inasmuch as The First part of Sub-rule (4) of rule 15 of the Rules aforestated enjoins a duty upon the Commission to prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate at the written examination and the Interview. The second part of sub-rule (4) of Rule 15 comes into play only if two or more candidates obtained equal marks in the aggregate in which event "the name of the candidates obtaining higher marks in the written examination shall be placed higher in the list". General Hindi and General Knowledge were the compulsory subjects for the posts other than Naib Tahsildar for which elementary Maths was also compulsory. The aggregate of the marks obtained by the petitioner in General Hindi and General Knowledge comes to 133 whereas the aggregate of marks obtained by Saroj Kumar Tripathi, Arun Kumar Shahi, and Anil Kumar Singh was 120,132 and 131 respectively. The aggregate of the marks obtained by the petitioner in the written examination was more than that of Abhishek Srivastava and, therefore, even according to the second Part of Sub-rule (4) of Rule 15, the petitioner was entitled to be selected in preference to Abhishek Srivastava in that unlike the policy decision as quoted hereinanbove, the rule makes no distinction between compulsory and non-compulsory subjects. Rather, it speaks of "aggregate marks at the written examination."

7. The next question that surfaces for consideration is whether the petitioner can be granted relief without impinging upon the selection/appointment of any of the candidates selected and appointed on the basis of the recommendations made by the Commission. It brooks no dispute that the result of the examination as originally announced, was subsequently modulated on 24.6.2000 thereby rescinding the result of 13 candidates who were declared selected and instead, declaring 12 new candidates who were not earlier declared selected in the list dated 19.12.99. The 13 candidates whose results were cancelled included 3 candidates of general category and 12 candidates who were declared successful according to the modified result dated 26.6.2000 included 2 candidates belonging to general category. Thus there remains one post vacant in the general category. The petitioner, in my opinion, being a general candidate can be assimilated in this vacancy without impinging upon the appointment/selection of the other candidates having secured equal marks.

8. As a result of foregoing discussion, the petition succeeds and is allowed. The respondent commission shall recommend the name of the

petitioner for appointment on some suitable post according to the merit within one month from the date of receipt of a copy of this order and the State Government in its turn, shall issue appointment letter to the petitioner within one month from the date of receipt of the recommendation by the Commission.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 4.7.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.B. MISRA, J.

First Appeal From Order No. 782 of 2001

M/s Bharat Steel Industries
...Objector Appellant.
Versus
Regional Director, Employees State Insurance Corporation ...Respondent.

Counsel for the Appellant:
Shri Shashi Kant Gupta

Counsel for the Respondent:
Shri P.K. Pandey

Section 75(2-B) of the Employees State Insurance Act- No proper reasons have been given in the same for refusing the prayer for waiver of the deposit of 50% respondent should have applied his mind to the affidavit filed by the appellant alongwith with his waiver application. (Held in para 3).

All these matters should have been considered by the respondent before disposing of the application under Section 75(2-B). Since that has not been done we are of the opinion that the impugned order dated 23.4.2001 is arbitrary and illegal and it is hereby quashed. The matter is remanded to the authority concerned who will pass a fresh order for considering any material adduced by the appellant and after giving proper reasons.

(Delivered by Hon'ble M. Katju, J.)

1. Heard Shri S.K. Gupta learned counsel for appellant and Shri P.K. Pandey for respondents.

2. The petitioner has challenged the impugned order dated 23.4.2001 passed under Section 75(2-B) of the Employees State Insurance Act. It appears that that a notice under Section 45-B of the Employees State Insurance Act was issued to the appellant and thereafter he raised a dispute under Section 75 alleging inter alia that its unit was not covered by the Act and the impugned recovery was illegal. The applicant also applied under S. 75(2-B) for waiver of the deposit of 50% of the amount in question, but that application has been rejected by the impugned order, hence this appeal.

3. We have carefully perused the impugned order dated 23.4.2001 and find that no proper reason have been given in the same for refusing the prayer for waiver of the deposit of 50% all that has been stated in the impugned order is that the appellant has not been given sufficient ground for getting the waiver. In our opinion this is not the proper way to decide the application of the appellant under Section 75(2-B). The respondent should have applied his mind to the affidavit filed by the appellant alongwith with his waiver application. A true copy of the said affidavit is Annexure 10 to the stay application. In that affidavit the applicant alleged that he has no money to make the deposit in question as he has a very small bank account. He also made after averments in support of his plea. All

these matters should have been considered by the respondent before disposing of the application under Section 75(2-B). Since that has not been done we are of the opinion that the impugned order dated 23.4.2001 is arbitrary and illegal and it is hereby quashed. The matter is remanded to the authorities concerned who will pass a fresh order for considering any material adduced by the appellant and after giving proper reasons.

4. Till the disposal of the said application the impugned recovery shall remain stayed.

Appeal is allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: 4.7.2001

BEFORE
THE HON'BLE J.C. GUPTA, J.

Criminal Revision No. 1675 of 2001

Rakesh Kumar Saini ...Applicant/ Revisionist(In Jail)
Versus
State of U.P. ...Opposite party

Counsel for the Applicant:
Sri A.S. Diwakar
Sri R.K. Asthana

Counsel for the Opp. Party:
A.G.A.

Section 248(2) of Cr.P.C.- Revisionist was not given any opportunity of placing evidence/material having a bearing on the question of sentence as contemplated under the mandatory provision contained in Section 248 (2) Cr.P.C. This non-compliance of the mandatory provision has certainly prejudiced the applicant- accused in the matter of hearing on the question of sentence. Had that opportunity been afforded to the applicant, the court would have been in a better position to select an appropriate and proper sentence for meeting the ends of justice. (Held in para 8)

Conviction of the applicant in revision under section 506 IPC is upheld. While the sentence of imprisonment is set aside but fine of Rs.1500/- is maintained.

(Delivered by Hon'ble J.C. Gupta, J.)

1. In the peculiar set of facts and circumstances of the case and with the consent of parties' counsel this revision is disposed of finally at the admission stage itself. The applicant was tried for an offence punishable under Section 506 I.P.C. and by the judgment and order dated 8.12.99 the learned Magistrate convicted and sentenced the applicant to one year R.I. and to pay a fine of Rs.500/- under Section 506 I.P.C.. Against the said order applicant filed appeal which has been disposed of by the impugned order dated 22.6.2001 maintaining the conviction of applicant under Section 506 I.P.C. but reducing the sentence to six months R.I. but simultaneously enhancing fine to Rs.1500/-.

2. So far as conviction of applicant under Section 506 I.P.C. is concerned both the courts below have recorded finding of guilt on evaluation of evidence brought on record. Learned counsel for the applicant could not bring to the notice of this Court any defect in the said finding of courts below. The order of conviction of applicant under Section 506 I.P.C. thus calls for no interference.

3. So far as question of sentence is concerned it is submitted by applicant's counsel that the case in question proceeded as a warrant case under Chapter XIX-II and therefore, it was incumbent upon the trial court to have made compliance of the provisions of Sub-section(2) of Section 248 Cr.P.C. which inter-alia contemplates that the Magistrate shall give an opportunity of hearing to the accused on the question of sentence. Since in the present case no such opportunity was afforded to the applicant in revision, he was deprived of this valuable right conferred upon him by law makers. After going through the judgment of the trial court as well as Appellate court, this Court finds force in the above submission of the learned counsel. After the enforcement of new Cr.P.C. of 1973 a new provision in the shape of Section 235(2) Cr.P.C. in relation to Session trials and Section 248(2) Cr.P.C. in relation to trial of warrant cases under Chapter XIX has been introduced. New Code of Criminal Procedure recognises the theory that punishment should be awarded with reformative angle. Similar view was expressed by the Apex Court in the case of ***Mohd. Gayasuddin Vs. State AIR 1977 S.C. 1926.***

4. In the case of ***Santa Singh Vs. State of Punjab A.I.R. 1976 S.C. 2385*** and ***Alauddin Mian Vs. State of Bihar 1989 AWC 911*** the Apex Court has laid emphasis for strict compliance of the provisions of Section 235 (2) Cr.P.C. or Section 248(2) Cr.P.C. as the case may be. It was held in those decisions that the said provisions are mandatory and serve dual purpose that is it satisfies the rule of natural justice by affording to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence being awarded in the case. It was further emphasised that since the provision is mandatory, it has not to be treated as a mere formality. The opportunity must be real and effective. Hearing as contemplated under the said provision is not confined merely to the hearing of oral submissions but is extends to giving an opportunity to the accused and the prosecution to place before the court facts and material relating to the various factors bearing on the question of sentence. The object behind this provision is to give an opportunity to the accused to place on record evidence/ material regarding showing his antecedents, social and economic background, mitigating and extenuating circumstances etc. It is also well settled that sentencing an accused is a sensitive exercise of discretion and not a mechanical and routine prescription acting on hunch. Many factors are to be considered and weighed while choosing appropriate sentence particularly in cases where no minimum sentence is prescribed and the court has to choose appropriate sentence from a wide range of period of sentence.

5. In the present case a perusal of the judgment of the trial court itself indicates that the court after recording the order of conviction on the same day simply heard accused orally on the question of sentence. He was not given any opportunity of placing evidence/material having a bearing on the question of sentence as contemplated under the mandatory provision contained in Section 248(2) Cr.P.C.. This non-compliance of the mandatory provision has certainly prejudiced the applicant-accused in the matter of hearing on the question of

sentence. Had that opportunity been afforded to the applicant, the court would have been in a better position to select an appropriate and proper sentence for meeting the ends of justice.

6. Learned counsel for the applicant submitted before the court that the incident is of the year 1994 and it was of a very trivial nature. There is nothing on record to indicate that any harm was caused by the applicant in the revision to the complainant of this case in pursuance of the letter of threatening alleged to have been sent by the applicant. There is also nothing on record to show that applicant has any criminal history or bad antecedents.

7. Having regard to the facts and circumstances of the case and the antecedents of the applicant, this court finds that sentence imprisonment was not at all called for.

8. For the reasons assigned above, this revision is allowed in part. Conviction of the applicant in revision under Section 506 I.P.C. is upheld. While the sentence of imprisonment is set aside but fine of Rs.1500/- is maintained. He is allowed one month's time to deposit the same. The applicant shall be released forthwith unless required to be detained in connection with any other case.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.7.2001

BEFORE
THE HON'BLE J.C. GUPTA, J.

Criminal Revision No. 1762 of 2001

Manoj and another ...Revisionists.
Versus
The State of U.P. and another
...Opposite party

Counsel for the Revisionists:
Sri S.K. Pundir

Counsel for the Opposite parties:
A.G.A.

Section 319 Cr.P.C.-Question referred to Full Bench- whether power under Section 319 Cr.P.C. can be invoked in relation to a person who was named as an accused in the first information report but was not charge sheeted by the police.

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard applicants' counsel in revision and the learned A.G.A..

2. By means of this revision applicants have challenged the order of the learned Addl. Sessions Judge, Saharanpur (Court No.2) in Special Session Trial No. 1153/99 whereby applicants have been summoned as accused in exercise of powers under Section 319 Cr.P.C. to face their trial alongwith the accused already named by the police in the charge sheet submitted after investigation.

3. Learned counsel for the applicants submitted before the court that in this case both the applicants in revision were

named in the first information report alongwith remaining two accused persons, who are facing trial before the court below, but during investigation their involvement was found doubtful, and therefore, they were not charge sheeted. In such a situation the applicants could not be summoned by the trial court in exercise of powers under Section 319 Cr.P.C.. In support of this submission learned counsel for the applicants placed reliance upon a Single Judge decision in ***Pradeep Kumar Vs. State of U.P. & others 2001 (42) ACC 1021*** wherein the learned Judge expressed the opinion that in a case where a person who was already named as accused in the first information report, but is not charge sheeted, the provisions of Section 319 Cr.P.C. can not be invoked. In support of this holding, the learned Judge placed reliance on the Apex Court's decision in ***Michael Machado Vs. C.B.I. 2000 (40) ACC 795.***

4. I have gone through the said decision and find myself unable to locate any such proposition therein, which in the opinion of the learned Judge has been laid down by the Apex Court. In that case the persons who were summoned as additional accused persons under Section 319 Cr.P.C. were neither named in the first information report nor were charge sheeted. Even the C.B.I. had chosen to recommend only departmental proceedings against those persons, instead of arraigning them as accused alongwith the four persons named in the first information report. Even during the trial until 49 witnesses were examined by the prosecution, their names did not figure in the evidence anywhere and the trial court had no reason to feel the necessity to implead them as additional accused persons. But when evidence of remaining three witnesses was recorded, it appeared to the trial court that the additional accused persons were also involved in the crime and it summoned them under Section 319 Cr.P.C. The Apex Court in the peculiar set of facts and circumstances of that case observed that even according to the trial court the first 49 witnesses did not utter a single word against any of the accused persons, who were later summoned under Section 319 Cr.P.C. The Apex Court felt that in these circumstances where prosecution had already examined quite a large number of witnesses and they were cross examined by the defence, summoning of additional accused under Section 319 Cr.P.C. at that stage was not warranted. It was further held that the court while deciding the question whether to invoke power under Section 319 of the Code must also address itself about the other constraints imposed by the first limb of Sub-Section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. If the witnesses already examined are in quite a large number, the court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned, the court should refrain from adopting such a course of action. The Apex Court further held that the basic requirement for invoking the aforesaid provision is that it should appear to the court from the evidence collected during trial or in the enquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be

tried together with the accused already arraigned. It appears to me that perhaps on the basis of these observations, the learned Single Judge has taken the view that once a person has been nominated as an accused in the first information report but is not sent up for trial by the investigating agency, powers under Section 319 Cr.P.C. can not be invoked as he was a person already arraigned as an accused in the case being named in the first information report.

5. To my mind the expression "who is not arraigned as an accused in that case" would mean a person who is not facing trial as an accused in that particular case and not a person who was merely named as an accused in the first information report. I may also refer to another decision of the Apex Court in ***Kishun Singh Vs. State of Bihar 1993 ACC (167)***. In that case it was held that Section 319 Cr.P.C. contemplates existence of some evidence in the course of trial wherefrom the court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the powers conferred by Section 319 of the Code. I am further fortified in my view in the decision of the Apex Court in ***Municipal Corporation Vs. R.K. Rohatagi, 1983 SC 67.***

6. For the above reasons, and with respect I am unable to agree with the view expressed by my learned brother in the aforesaid decision of **Pradeep Kumar's** case. It is, thus, necessary that this question of law is examined and answered by a larger Bench.

7. Let the record be placed before the Hon'ble the Chief Justice for constituting a larger Bench to consider the question -

"Whether the view expressed in the case of ***Pradeep Kumar Vs. State of U.P.,*** reported in 2001 (42) A.C.C. 1021 that in relation to a person who was named as an accused in the first information report but was not charge sheeted by the police, powers under Section 319 Cr.P.C. can not be invoked, is correct"?

8. Meanwhile it is directed that execution of non-bailable warrants issued against the applicants shall remain stayed, provided they appear before the court concerned on or before 30.7.2001.

ORIGINAL JU RISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 9, 2001

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

Civil Misc. Writ Petition No. 13529 of 1989

Narendra Kumar Jain ...Petitioner
Versus
Food Corporation of India and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri Madhav Jain
Sri R.S. Maurya
Sri B.P. Srivastava
Sri V.K.S. Chaudhary

Counsel for the Respondents:
Sri N.P. Singh
Sri Prabodh Gaur
S.C.

Constitution of India- Article 226- normally it is within the domain of disciplinary authority as to what punishment should be awarded and in case the Court finds that punishment in a given case is disproportionate to the misconduct, it should normally leave it to the punishing authority to award appropriate punishment. (held in para 5).

Upon regard being had to the chequered history of the case and the fact that the petitioner has already attained the age of superannuation coupled with the fact that the incident giving rise to this case dates back to the year 1985, we are of the considered view that it would meet the ends of justice if the petitioner be of compulsorily retired w.e.f. 29.9.1988 not as a measure of punishment but on the ground of being a dead wood.

(Delivered by Hon'ble S.R. Singh, J.)

1. This petition has a chequered history. The petitioner initially joined as Godown Clerk in the Ministry of Food and Agriculture Department of Food and was subsequently absorbed in Food Corporation of India in which he earned promotion as Assistant Manager (Depot) and came to be posted at Etah on 12.7.1982. On 25.7.1984 he joined as Assistant Manager (Depot) on GAP storage at Airstrip, Lalitpur having storage capacity of one lakh metric tonne under the District Manager, Food Corporation of India, Jhansi. On 1.10.1985 he proceeded on leave on receipt of a message about serious condition of his mother who died on 4.10.1985 at Tundla (Agra) and was on leave up to 30.10.1985 and joined his duties on 31.10.1985 after expiry of the leave period. It appears that there was heavy rains during October, 1985 in which the wheat stored at the Airstrip, Lalitpur was damaged resulting in huge financial losses to the Corporation. The petitioner was placed under suspension vide order dated 12.4.1986 and on 10.4.1987 he was served with the charge sheet dated 3.3.1987. The charges against the petitioner were as under:

"Shri N.K. Jain, Assistant Manager (Depot) while posted and functioning as such at Airstrip, Lalitpur during 1984-85 failed to maintain absolute integrity devotion to duty and to serve the Corporation honestly and sincerely in as much as he failed to supervise depot operations i.e., maintenance of stocks account, gunny and dead stock account, submission of monthly stock accounts and other periodical returns, protection of stocks from losses and damages during storage and in preservation of the stocks. Due to his criminal negligency and failures, the Corporation has suffered huge financial losses on account of storage loss/shortages and damages to the wheat stock/gunny stored at Airstrip Lalitpur. The above acts and failures has also caused damages to the image of the Corporation in public and loss of national property. Thus contravened regulations 31 and 32 of the Food Corporation of India (Staff) Regulations, 1971."

2. The petitioner denied the charges and pleaded that the charges were vague indefinite and factually incorrect; The basic requirements were not fulfilled in relation to posting of required number of staff and entrusting of responsibilities; the essential facilities i.e. office accommodation, steps for keeping dead articles and other amenities were not at all provided to the petitioner and these shortcomings vitally affected day to day work; gunnies, ropes, nets and covers

were not supplied at the needy hours rather all these accessories were arranged when loss to the food grains had already occurred and that the stock was arbitrarily shown under free sale scheme and responsibilities of watch and ward was not determined. The charged officer (C.O.) i.e. the petitioner demanded certain documents on a prescribed proforma submitted to the enquiry officer with a view to enabling him to prepare proper defence. Some of the documents demanded by him were not supplied and the enquiry officer submitted a report dated 31.12.1987 holding that **"proper supervision was not being conducted by C.O. willfully."** The enquiry officer came to the conclusion that **"there is sufficient evidence on the record to show that damages were caused due to stacks left fully uncovered/ partially covered. Although sufficient polythene covers were available at Airstrip, Lalitpur. As per job description it was the duty of the C.O. to ensure that covers were properly mounted on the stacks and laced after the days operation."** In the ultimate conclusion the enquiry officer held that **"although there were lapses on the part of the supervisory officer also but with regard to charges under Article-I against the C.O. without repeating facts and analysis are proved."** Relying upon the report of the enquiry officer the punishing authority dismissed the petitioner from service vide order dated 29.9.1988. A copy of the order dated 29.9.1988 alongwith enquiry report dated 31.12.1987 was served upon the petitioner on 15.10.1988. The petitioner preferred an appeal which came to be dismissed vide order dated 16.3.1989. The writ petition was filed challenging the orders aforesaid. By judgment dated 24.2.1992, this Court allowed the writ petition and quashed the impugned orders dated 29.9.1988 and 16.3.1989 with a command super added to it that the petitioner would be treated as reinstated on the strength of the decision the Apex Court in **Union of India and another Vs. Mohd. Ramzan Khan**[1] inasmuch as copy of the enquiry report was not supplied to the petitioner before passing the order of dismissal of the petitioner from service on the basis of the enquiry report. The Hon'ble Supreme Court, however, set aside the judgment of this Court vide judgment and order dated 17.3.1993 in Civil Appeal No. 1350 of 1993 and remitted matter back to this Court for decision afresh in view of the fact that ratio in **Mohd. Ramzan's** case was operative prospectively and hence there was no scope for the High Court to have applied the same to the facts of the present case. Thereafter the writ petition came to be dismissed vide judgment and order dated 20.5.1996. The said judgment, however, came to be set aside by the Apex Court vide judgment and order dated February 3, 1997 on the premise that one of the Hon'ble Judges constituting the Bench **"should have reclused himself and not heard the writ petition"** in view of the fact that he had earlier appeared in the case as a counsel. That is how the matter has again come up before this Court.

3. We have had heard **Sri R.N. Singh, Senior Advocate** for the petitioner and **Sri Prabodh Gaur,** learned counsel representing the Food Corporation of India and have given our anxious considerations to the facts and circumstances of the case and the submissions made across the Bar.

[1] 1991(1) S.C.C. 588

4. Indisputably the petitioner has already attained the age of superannuation. It has been submitted by Sri R.N. Singh that there has been a grave error in the decision making process inasmuch as relevant papers demanded by the petitioner in order to defend himself were admittedly not supplied by the enquiry officer and the findings recorded by the enquiry officer to the effect that, **"the condition of stacks at the airstrip, Lalitpur was never up to the mark, Airstrip was not being cleaned/loose grain filled properly. The restacking was not undertaken by him earlier as the condition of stock reflected by Shri Maithy during his inspection of June, 1985"**, being based on the report of Sri Maithy, which was never supplied to the petitioner, ought not to have relied upon by the punishing authority without giving an opportunity to the petitioner to have his say on the points. It has also been submitted by Sri R. N. Singh that even according to the enquiry officer **"there was lapses on the part of the supervisory officer also"**. Substantial part of the damage, proceeds the submission, was caused during the period the petitioner was on sanctioned leave from 3.10.1985 to 30.10.1985 for which the petitioner cannot be blamed and the extreme penalty of dismissal from service, on the basis of the report of Sri Maithy that the condition of stacks at the airstrip, Lalitpur was never upto to the mark and that restacking was not undertaken by the petitioner, was not justified. Sri Prabodh Gaur, learned counsel appearing for the respondents tried to refute the submission made by Sri R. N. Singh Senior Advocate and urged that the impugned orders do not suffer from any patent infirmity in the decision making process so as to justify interference by this Court under Article 226 of the Constitution. It cannot be gainsaid that this Court does not exercise the power of superintendence over the respondents under Article 227 of the Constitution but nevertheless the orders impugned herein are open to judicial review under Article 226 of the Constitution. This Court will not hesitate in interfering in case it is found that the orders impugned herein were passed in unjust and unfair manner or i.e. there has been a grave error in the decision making process itself. Admittedly, the inspection report of Sri Maithy which has been relied on by the enquiry officer in his report dated 31.12.1987 was never supplied to the petitioner. In our opinion it would be unfair to hold, merely on the basis of the inspection note of Sri Maithy, that **"restaking was not undertaken"** by the petitioner before he proceeded on sanctioned leave from 3.10.1985. That apart on the finding recorded by the enquiry officer that there had been **"lapses on the part of the supervisory officer also"** the punishment of dismissal was not justified. It would be quite unfair if the petitioner is awarded extreme penalty of dismissal from service particularly when no action was taken against the supervisory staff and no endeavour was made to fix the corresponding responsibilities and liabilities of the supervisory staff and those of the petitioner. The finding that **"proper supervision was not being conducted by the C.O. willfully"** is based on no valid material. Certain degree of negligence and laches might be attributed to the petitioner but it is difficult to hold, in the fact situation of the case, that the negligence was **"willful"** one particularly when the petitioner would not receive desired assistance from his supervisory staff. The

damage to the stocks may have been caused due to lack of efficiency on the part of the petitioner and supervisory staff attached to him but that will not constitute misconduct in the absence of culpability. It is true that if a servant conducts himself in a manner inconsistent with the faithful discharge of duty that would be a case of misconduct and he may be subjected to disciplinary action but every negligence in performance of duty and a lapse in performance of duty. An **"error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high.**[2] In the present case, as noticed above, the petitioner was on leave for about a month and the extent of damage that might have occurred during the leave period has not been ascertained by the enquiry officer. That apart the petitioner was not solely responsible for the damage to the stock even according to the enquiry officer. In the totality of the facts and circumstances of the case, we are of the considered view that the punishment of extreme penalty of dismissal from service was not warranted.

5. Sri R.N. Singh, Senior Advocate has very fairly conceded and we are of the view, that it would meet the ends of justice if the order of punishment of dismissal be converted into one of compulsory retirement. We are conscious of the legal position that normally it is within the domain of the disciplinary authority as to what punishment should be awarded and in case the Court finds that punishment in a given case is disproportionate to the misconduct, it should normally leave it to the punishing authority to award appropriate punishment but upon regard being had to the chequered history of the case and the fact that the petitioner has already attained the age of superannuation coupled with the fact that the incident giving rise to this case dates back to the year 1985, we are of the considered view that it would meet the ends of justice if the petitioner be of compulsorily retired w.e.f. 29.9.1988 not as a measure of punishment but on the ground of being a dead wood.

6. In the result the writ petition succeeds and is allowed. The impugned orders are quashed. The petitioner shall, however, be deemed to have been compulsorily retired not as a measure of punishment but on the ground of being dead wood in accordance with the provisions relating to superannuation and retirement and he shall be entitled to all consequential benefits.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6 JULY, 2001-12-20

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

Second Appeal No. 1611 of 1982

Krishna Mohan and another ...Appellants
Versus
Smt. Girja Devi (widow) late Sri Bal Krishana Chaturvedi and others
...Respondents

Counsel for Appellant:
Shri C.B. Mishra
Shri Sri Kant

[2] Union of India Vs. J. Ahmed, AIR 1979 SC 1022

Shri Sankatha Rai

Counsel for the Respondents:
Shri A.N. Bhargava

Civil Procedure Code- Section 100- though the appellants could not prove their ownership or title by adverse possession over house no. 587 and yet their possession over said house is admitted. The respondent no. 1 had also failed to prove his title over said house as it was not purchased in auction sale or ouster of his possession. Therefore, a person in possession is entitled to the relief for permanent injunction against all except the true owner. Therefore, the appellants are entitled to the relief for permanent injunction in respect of house no. 587 against respondent no. 1 who is not its true owner.

Held - para 46

In view of my findings on the above substantial questions of law the appellants were entitled to decree for permanent injunction against the respondent no. 1 in respect of house no. 587 and they were not entitled to decree or permanent injunction over the land of plot no. 905 Respondent no. 1 was entitled to a decree for possession over the open land of plot no. 905 but he was not entitled for decree for possession over house no. 587.

(Delivered by Hon'ble U.S. Tripathi, J.)

1. All the above four appeals have been filed against the judgement and decree dated 13.5.1982 passed by Sri K.C. Bhargava, the then learned Ist Additional District Judge, Allahabad in Civil Appeal No. 46 of 1979, 45 of 1979, 642 of 1979 and 571 of 1979 respectively which were decided by a common judgement.

2. Krishna Mohan and Ram Mohan, Appellants in all four appeals (hereinafter called the appellants) filed Original Suit No. 91 of 1968 on 24.5.1967, through their next friend, against Bal Krirshna Chaturvedi, the respondent no. 1 in all the four appeals, for permanent injunction, restraining the respondent no. 1 from interfering in their peaceful possession over the open land shown with green colour in the plaint map and house shown with letters Aa, Ba, Sa, Da and red colour in plaint map. The case of the appellants, briefly stated was that the house shown with letters As, Ba, Sa, Da existing over plot no. 905 of Mohalla Daraganj, Allahabad City, was constructed by their father Ram Avtar and he was in possession over it till his life time. The open land shown with green colour in the plaint map was appurtenant to the said house and was being used by their father for the purpose of 'Sehan' for tethering cattle, preparing cow dung cakes and for keeping other domestic articles. After death of their father the appellants came in possession over the house and the land in suit as its owners. They further pleaded that their father Ram Avatar had perfected his title over the house and land in suit by way of adverse possession and the same was inherited by the appellants. Respondent Bal Krishna Chaturvedi had no concern or connection with the house and land in suit, but he threatened to take forcible possession over it. They further alleged that the mental condition of their mother was not sound and therefore, she was not competent to become their next friend.

3. Respondent no. 1 Bal Krishna Chaturvedi contested the above suit by filing written statement contending therein inter alia that he purchased the land in suit on 22.4.1961 in auction sale in Execution Case No. 11 of 1960, Lala

Munni Lal and others Vs. Kullu Lal and others relating to the Court of Additional Civil Judge, Allahabad, arising out of decree in O.S. No. 59 of 1957 and obtained possession through Amin of the Court on 19.7.1966. Since then he was in continuous possession over the land in suit. In the above Execution case Smt. Ram Kali for herself and as guardian of the appellants filed objection under order 21 Rule 90 C.P.C. which was rejected on 4.3.1967. Thereafter the mother of the appellants did not file any declaratory suit, therefore, the suit filed by appellants was barred and not maintainable. The mother of the appellants previously claimed herself and her husband as tenant of the house in suit but subsequently the appellants asserted themselves as its owners. Therefore, the suit was barred by principle of estoppel and acquiescence. He further contended that the suit was barred by time, it was not properly valued and the Court fee paid was insufficient.

4. Thereafter respondent Bal Krishna Chaturvedi filed Original Suit No. 164 of 1971 on 2.10.1971 against Smt. Ram Kali, the appellants, Smt. Malati and Smt. Shanti for recovery of possession over plot no.905 with super structures and fixtures standing thereon, numbering 587 and for damages amounting to Rs. 288/- with pendente lite and future damages at the rate of Rs.8/- per month. The case of respondent Bal Krishna Chaturvedi was that plot no. 905 was Parti land belonging to one Kunnu Lal. He purchased the above plot in auction sale for Rs. 2050/- on 22.4.1961. Kunnu Lal had put a temporary structure in the shape of Kachcha Jhopri over the said land. He got actual possession over the whole of the plot including fixtures standing thereon, in Dakhal Dihani through Court Amin on 10.7.1966 and continued in actual possession thereon. After delivery of possession to the respondent no. 1 Smt. Ram Kali filed objection on 20.7.1966 alleging that her husband Ram Avtar was tenant of the house existing over the above plot and prayed to take back the possession of the property sold in auction sale. She also represented herself as guardian of her minor children Krishna Mohan and Ram Mohan, the appellants and her daughters Malti and Shanti. The above objection of Smt. Ram Kali was registered as Misc. Case No.46 of 1966 Smt. Ram Kali Vs. Bal Krishna Chaturvedi and was dismissed on 4.3.1967 by 1st Additional Civil Judge and the possession of Bal Krishna was upheld. Thereafter no declaratory suit was filed by Smt. Ram Kali or her sons and order dated 4.3.1967 became final. After filing written statement by Bal Krishna Chaturvedi in suit no. 91 of 1968 filed by appellants Krishna Mohan and Ram Mohan. Smt. Ram Kali took unlawful possession of the property in the middle of June, 1968, which compelled him to file the suit.

5. The appellants Krishna Mohan and Ram Mohan contested the above suit on the grounds which they had taken in their suit no. 91 of 1968 and raising further pleas of non-joinder and limitation etc.

6. The Trial Court (Additional Civil Judge) framed necessary issues in both the suits, separately but consolidated the above suits and decided the same by a common judgement. On considering the evidence of the parties the Trial Court held that Ram Mohan and Krishna Mohan had not been able to prove that they are owners of land in suit, that according to

sale certificate Bal Krishna Chaturvedi purchased plot no. 905 which was parti land and not structure over it and he did not become owner of the structure in suit. Only land was auctioned that according to Dakhalnama. Bal Krishna got possession over the parti plot no. 905 and he did not get possession over the house existing over it. The theory of dispossession of Bal Krishna by Smt. Ram Kali had not been proved and Krishna Mohan and Ram Mohan are still in possession till now. He further held that as parti land was auctioned and Bal Krishna got possession over parti land of plot no. 905 and as such he can not be owner of house no. 587, because he would not get more than what he purchased in auction sale. That suit no.91 of 1968 and the suit filed by Sri Bal Krishna Chaturevedi were not barred by limitation. Bal Krishana was not entitled for possession over the house no. 587 and he was entitled for possession over plot no.905 and that Krishna Mohan and others were entitled for possession over house no. 587. With these findings the Trial Court partly decreed the suit no.91 of 1968 and 164 of 1971 restraining Bal Krishna from interfering in peaceful possession of Krishna Mohan and others over house no. 587 and for possession over remaining parti land of plot no.905 except house no. 587 in favour of Bal Krishna and partly dismissed above suits for remaining relief's.

7. Aggrieved with the above judgement and decree Bal Krishna filed Civil Appeal No. 45 of 1979 (aggrieved with partly decree of suit no.91 of 1968) and Civil Appeal No. 46 of 1979 (aggrieved with partly dismissal of suit no. 164 of 1971), while appellants Krishna Mohan and Ram Mohan filed Civil Appeal No. 571 of 1979 (aggrieved with partly decree of suit no.164 of 1971) and Civil Appeal No. 642 of 1971 (aggrieved with partly dismissal of suit no. 91 of 1968.

8. All the four appeals were also decided by a consolidated common judgement. The Lower Appellate Court on reappraisal of the evidence of the parties held that disputed house was not constructed by Ram Avatar and Krishan Mohan and others have also not acquired title by adverse possession over the house and land in suit. The property in question (plot no. 905) was purchased by Bal Krishna in auction sale and by virtue of section 8 of Transfer of Property Act, the house existing over it will also pass on to the transferee. That Bal Krishna was owner of the land as well as house standing over it and Smt. Ram Kali took forcible possession over the same in June, 1968. The suits have been filed within time and Bal Krishna Chaturvedi was entitled to take possession of the land as well as the house standing over the same. With these finding the Lower Appellate Court concluded that suit no.91 of 1968 filed by Krishna Mohan and others against Bal Krishna was liable to be dismissed in toto while suit no. 164 of 1971 filed by Bal Krishna Chaturvedi against Ram Kali and others was to be decreed. It accordingly allowed Civil Appeal No. 45 of 1979 and 46 of 1979 filed by Bal Krishna Chaturvedi respondent no. 1 and dismissed Civil Appeal No. 571 of 1979 and 642 of 1979 filed by appellants Krishna Mohan and Ram Mohan and decreed the suit no. 164 of 1971 in toto and dismissed suit no. 91 of 1968 in toto.

9. The above judgement and decree of Lower Appellate Court has been

challenged by the appellants in these Second Appeals.

10. The above Second Appeal were admitted on the following substantial question of law :-

Second Appeal No.1611 of 1982

(A) Whether Section 5 and 8 of Transfer of Property Act apply in respect of the property sold in auction?

(B) Whether auction purchaser can have right in the house which was in existence and was not mentioned in the auction sale and sale certificate?

(C) Whether Dakhalnama was the basis of claim of respondent no. 1?

(D) Whether Dakhalnama required proof under section 90-(2) of Indian Evidence Act as amended in U.P. ?

(E) Whether the admission made by witness of a party is binding on the party ?

Second Appeal No. 1840 of 1982

(A) Whether section 5 and 8 of Transfer of Property Act apply in respect of the property sold in auction ?

(B) Whether auction purchaser can have a right in the house which was in existence and was not mentioned in the auction sale certificate ?

(C) Whether Dakhalanama was the basis of claim of respondent no. 1?

(D) Whether Dakhalnama required proof under section 90-(2) of Indian Evidence Act as amended in U.P. ?

(E) Whether the admission made by witness of a party is binding on the party ?

Second Appeal No. 2214 of 1982

(1) Whether the Dakhalnama was the basis of defence ?

(2) Whether the Dakhalnama required proof ?

(3) Whether the admission of the appellant no. 1 in his written statement was erroneously made and is not binding on him ?

(4) Whether the plot purchased by the defendant/respondent identical with the plot in dispute ?

Second Appeal No. 2830 of 1982

(1) Whether the plaintiff/respondent had not purchased plot no. 905 i.e. land in dispute and as such he cannot get a decree in respect of open land ?

(2) Whether admission of the appellant in written statement that the plaintiff had purchased the land in dispute was erroneous and not binding on them ?

(3) Whether the Lower Appellate Court erred in holding that the sale certificate was not the basis of the suit ?

(4) Whether the finding of the Lower Appellate court on the question of possession is wholly illegal and erroneous as it was against the admission made by the defence witnesses ?

11. I have heard Sri Sankatha Rai, assisted by Sri Shree Kant learned counsel

for the appellants and Sri A.N. Bhargava, learned counsel for the respondent no. 1 in all the four appeals and perused the record.

12. All the four appeals arose out of a common judgement and therefore, with the consent of the learned counsel for the parties, are being taken up together for decision.

FINDINGS.

Substantial question no. A and B of Second Appeal No. 1611 of 1982 and substantial question no. A and B of Second Appeal No. 1840 of 1982.

13. The above questions are closely connected with each other and are taken up together for findings.

14. The appellants alleged in their plaint of suit no. 91 of 1968 that the house in suit was constructed by their father Ram Avatar and the remaining open land was being used as Sahan land. Admittedly the land in suit is part of plot no. 905 and house existing thereon was numbered as 587 in Nagar Mahapalika records. The contention of the respondent no. 1 Bal Krishan Chaturvedi was that he purchased the entire plot no. 905 with structure existing thereon in auction sale on 22.4.1961 in Execution case no. 11 of 1960 arising out of Original suit no. 59 of 1957.

15. The trial court on consideration of documentary as well as oral evidence of the parties held that Bal Krishna Chaturvedi purchased plot no. 905 which was a parti land and not the structure existing over it. Bal Krishna therefore, cannot be said to have become owner of the structure in suit as only land was auctioned which he purchased in auction sale. The Lower Appellate Court also recorded a finding that the property sold in auction has been described as parti land no. 905. From perusal of sale certificate it is proved that plot no. 905 was sold in execution and the same was purchased by Bal Krishna Chaturvedi. He further held that no doubt it is correct that the sale certificate does not speak that the house in dispute standing over this land has also been transferred but relying on provisions of Section 8 of Transfer of Property Act and the decision of Kerala High Court in George Vs. South Indian Bank Limited and another, A.I.R. 1959, Kerala 294 held that the land over which house stands has been purchased by Bal Krishana Chaturvedi in auction sale, therefore, the house will also pass on to the transferee.

16. The contention of the learned Counsel for the appellants was that plot no. 905 was allegedly acquired by Bal Krishna Chaturvedi, respondent no. 1, through auction sale in execution of a decree and therefore, the provisions of Section 8 of Transfer of Property Act would not apply to such sales and the above provision is confined to private sale only. In support of his above contention he placed reliance on a Full Bench decision of this Court in Umrao Singh Vs. Khacheru Singh, A.I.R. 1939 Allahabad 415 (F.B.).

17. Section 8 of Transfer of Property Act, which relates ' of transfers of property by act of parties' reads as under:-

(8) Operation of transfer - Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the

interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto the rents and profits thereof accruing after the transfer and all things attached to the earth;

And, where the property is machinery attached to the earth, the moveable parts thereof;

And where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks keys, bars, doors, windows, and all other things provided for permanent use therewith;

And, where the property is a debt or other actionable claim, the securities, therefor (except where they are also for other debts or claims not transferred to the transferee) but not arrears of interest accrued before the transfer;

And where the property is money or other property yielding income, the interest or income thereof accruing after the transfer taken effect."

18. The application and effect of above section 8 was considered in the above noted Full Bench decision of this Court which consisted of five Hon'ble Judges of this Court. The question referred to the Full Bench was ' whether the property in the house in suit passed to the plaintiff Khacheru Singh under the auction sale of 26th January, 1932 or not?'

The majority decision of Full Bench was as below:-

"Section 8 of the Transfer of Property Act does not apply to a transfer which takes place by operation of law or by a court sale. Section 2 clause (d) of Transfer of Property Act provides:

But nothing herein contained shall be deemed to effect;

(d) save as provided by Section 57 and Chapter 4 of this Act, any transfer by operation of law or by , or in execution of decree or order of court of competent jurisdiction ……

Whether the question is what has been sold in a Court sale, it will have to be decided from what the Court intended to sell and will be judged from the sale certificate issued by the Court."

19. It was further held by the majority decision in the said case that rights of the purchaser at a court sale are different from those of a purchaser at a voluntary sale. It may be said that though the provisions of Section 8 of Transfer of Property Act do not apply to a sale by operation of law, the principle underlying these provisions may apply to a purchaser made at a Court sale in execution of a mortgagee decree as it would be anomalous if there were constructions of the transfer of the same property which has been mortgage in mortgage deed and sold in execution of the decree obtained thereon ……. In a Court sale it will always be a question to ascertain what the Court intended to sell and actually sold, and it will have to be judged from the sale certificate granted by the Court specifying the property sold. Section 8 of the Transfer of Property Act will not apply to the interpretation of the sale certificate the sale certificate which is the title deed of

the auction purchaser, will have to be interpreted independently of Section 8 of the Transfer of Property Act …… In the absence of anything in the sale proceedings and the sale certificate to show clearly that a land with the building thereon was sold the sale of mere land will not pass building thereon to the purchaser. Accordingly the question referred to the Full Bench was answered that the property and the house in suit did not pass to the plaintiff Khacheru Singh etc. under the auction sale of the 26th January, 1932.

20. In the instant case admittedly a parti land of plot no. 905 was sold in auction sale to the respondent Bal Krishna Chaturvedi. The sale certificate doesn't indicate that anything else except the parti land was auctioned and therefore, in view of the above Full Bench decision the respondent Bal Krishna through auction sale acquired right and title only over the parti land and not over the structure or house existing thereon and the provisions of Section 8 of Transfer of Property Act will not apply to the present case.

21. Learned counsel for the respondent Bal Krishna, however, contended that the provisions of Section 8 of Transfer of Property Act equally apply to the auction sale and if a particular land is sold in auction sale, everything attached with the said land passes to the transferee and structure of the house is a thing attached with the earth as defined in Section 3(b) of Transfer of Property Act. In support of his above contention he placed reliance on the following decisions; Commissioner of Income Tax Vs. Bhurangaya Coal Company, A.I.R. 1959 S.C. 254, Divisional Forest Officer, Sarahan Forest Division of Simla Vs. Daut and others, A.I.R. 1968 S.C. 612, Mrs. Christine Pais Vs. K. Ugappa Shetty, A.I.R. 1966, Mysore, 299, M.S. Boda Narayana Murthy and Sons Vs. Valluri Venkata Suguna, A.I.R. 1978 Andhra Pradesh, 257, Ram Dayal Vs. L. Mishri Lal, 1972 A.L.J. 333 and Bhoop Singh Vs. Sri Ram A.I.R. 1940 Alld. 427.

22. Having gone through the above decisions, I find that those decisions do not relate to the matter under controversy involved in these appeals.

23. The case of Commissioner of Income Tax Vs. Bhurangaya Coal Company (supra) was a case of private sale of immovable property and therefore, it was held that as to the sale of immovable (sic) under the sale deed dated 17.5.1946 the matter was governed by Section 8 of the Transfer of Property Act under which unless a different intention was expressed or necessarily implied a transfer of property passed forthwith to the transferee all the interest which the transferor was then capable of passing in the property and in the legal incidents thereof, and those incidents included all things attached to the earth. Fixtures would pass under this section to transferee, unless it was provided otherwise.

24. Undoubtedly, the provision of Section 8 of Transfer of Property Act applies to a private sale but in the instant case it was not a case of private sale, but an auction sale. Therefore facts of above case are distinguishable.

25. In the case of Divisional Forest Officer, Sarhan Forest Division of Simla (supra) the question related to compensation under Section 11 of the

Himanchal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953. Certain land belonging to the Government were under the tenancy of one Moti Ram who was granted proprietary rights in the land by Compensation Officer. Moti Ram applied for compensation of land and trees existing thereon. The Forest Officer objected on the ground that trees belonged to Forest Department and tenant had no interest in the trees standing thereon. The Apex Court held that expression " right title and interest of the land owner in the land" in Section 11 is wide enough to include trees standing on the land. Under Section 8 of Transfer of Property Act unless a different intention is expressed or implied, transfer of land would include trees standing on it. The facts of the above case are totally different with the facts of the present case and, therefore, the above decision does not apply to the present case.

26. However, in the case of Mrs. Chritine Pais (supra) Hon'ble Single Judge of the Mysore High Court held that contract of sale executed by the court in pursuance of decree for specific performance is a transfer by court on behalf of judgement debtor and has got all characteristics of transfer inter -vivas. The question involved in the above decision was also different as the sale in pursuance of an agreement to sale or a contract by individual or through court are on same footing. In such sales the extent of property is considered in the light of agreement or contract. Such type of sales through Court in execution of a decree for specific performance cannot be equated with the auction sale of the property as sale in pursuance of a contract by Court is presumed to have been made on behalf of the party to the contract wherein in an auction sale the auction purchaser is not a party to the suit or the execution and under an auction sale he gets only that much what is sold and not more than it. Therefore, the above decision is also not applicable to the facts of present case. Moreover in view of the Full Bench Decision of this Court the decision of the Hon'ble Single Judge of another High Court will not over ride the principle laid down by the Full Bench.

27. In M/s Boda Narayan Murthy (supra) a Division Bench of the Andhra Pradesh High Court held that even though the title deed deposited relates to land only, if at the time the deposit was made, there were any structure on it, equitable mortgage would be created both with regard to the land as well as the structures thereon. The facts of the above case are also distinguishable from the facts of the present case and the above decision does not help the respondent no.1.

28. In the case of Ram Dayal Vs. L. Mishri Lal (supra) the dispute related to plot no.148. Plaintiff claimed proprietorship of 11 Biswas area while defendant was Zamindar of balance 10 Biswas area. Defendant made construction on said plot. Plaintiff complained that the construction had been made on plaintiff's 11 biswas area and filed suit for demolition of the construction, injunction, possession and damages, Defence was that the construction had been made in the 10 biswas land belonging to defendant. The Trial Court and Lower Appellate Court recorded finding that construction had been made by defendant in 11 biswas area of the plot of which the plaintiff was proprietor.

29. This Court while interpreting Section 3 (d) and Section 8 of the Transfer of Property Act held that walls or building which are embedded in the earth are attached to the earth and it will be apparent that the owner of the land is owner of the walls and buildings embedded in the earth. The facts of the said case are also distinguishable from the facts of the present case.

30. In Bhoop Singh's case (supra) the Division Bench of this Court held that in the case of sole proprietor he cannot have inferior rights as a grove holder as well as full proprietor's right as a Zamindar in the land in which he has planted a grove. His right in the groves or trees planted by him merge completely in his zamindari rights. The trees pass to the purchaser with the auction sale of the zamindari. The facts of the above case are also distinguishable with the facts of the present case.

31. In this way the decisions relied on by the learned counsel for the respondent no. 1 Bal Krishan Chaturvedi are of no avail and the principle laid down by the Full Bench of this Court referred to above, have to be applied as facts of the above case are fully applicable to the facts of the present case.

32. Thus, it is clear that the provisions of Section 8 of the Transfer of Property Act do not apply in respect of the property sold in auction.

33. So far as the provision of Section 5 of Transfer of Property Act are concerned, it defines the transfer of property by a living person in favour of one or more other living persons. The above section is also contained in Chapter II of the Transfer of Property Act, which relates to the transfer of property by act of the parties i.e. private transfers. As such the above provisions of section 5 are also not applicable in respect of the property sold in auction sale.

34. In the result the respondent Bal Krishna Chaturvedi can be held owner of parti land of plot no. 905, which alone he purchased in auction sale and since there was no mention of any structure or house in the auction sale or sale certificate or Dakhalnama, the respondent Bal Krishna cannot be said to have acquired any right, title or interest over house no.587 by virtue of provisions of section 8 of Transfer of Property Act. The findings of the Lower Appellate Court contrary to it, therefore, cannot be sustained. The questions are answered accordingly.

Substantial Question No. C of Second Appeal No. 1611 of 1982, C of Second Appeal No. 1840 of 1982 and No. 1 of Second Appeal No. 2214 of 1982 :

35. These questions are identical and are taken up together.

36. As held by Full Bench decision in Umrao Singh Vs. Khacheru Singh (supra) the sale certificate is title deed of the auction purchaser. Dakhalnama is a document showing factum of delivery of possession. Dakhal or possession is delivered according to auction sale or sale certificate. Thus the title of the auction purchaser is derived from the sale certificate and not from the Dakhalnama which is simply a document of delivery of possession. Therefore, the Dakhalnama cannot be said to be a title deed and it can also not be said (to be) the basis of claim

or defence. The questions are answered accordingly.

Substantial Question No. D of Second Appeal No. 1611 of 1982, D of Second Appeal No. 1840 of 1982, 2 of Second Appeal No. 2214 of 1982 and 3 of Second Appeal No. 2830 of 1982.

37. The contention of the learned counsel for the appellants was that since the Dakhalnama was the basis of the suit of respondent Bal Krishna Chaturvedi required proof. But it was not proved according to law and, therefore, the respondent Bal Krishna Chaturvedi could not establish his right, title and interest over the land which he allegedly purchased in the auction sale. As held in the findings on substantial question no. C of Second Appeal No. 1611 of 1982, C of Second Appeal No. 1840 of 1982 and 1 of Second Appeal No. 2214 of 1982, Dakhalnama is not the basis of the suit, but the deed of title was the sale certifaicate. No doubt the trial court has held that witnesses of Dakhalnama, Ext.5 and A-6namely, Shesh Narain and Deena Nath Pandey have not been examined and, therefore, the Dakhalnama is merely a document of possession and not a document of title. That Bal Krishna Chaturvedi has come to the Court on the basis of title and not merely on the basis of possession. Dakhalnama was the certificate copy of a document which was part of record of the court of justice and therefore, the presumption available under Section 90-A of Indiana Evidence Act as amended in U.P. can be safely drawn in this case. Since the Dakhalnama was not the basis of the suit or defence, the presumption under Section 90-A of Indian Evidence Act was rightly drawn by the Lower Appellate Court in respect of the Dakhalnama.

The questions are answered accordingly.

Substantial Question No. 3 of Second Appeal No. 2214 of 1982 and 2 of Second Appeal No. 2830 of 1982.

38. The claim of respondent Bal Krishna Chaturvedi in Original Suit No. 164 of 1971 was that he purchased the property in suit of plot no. 905. The appellants Krishna Mohan and Ram Mohan filed written statement in the said suit and in para 12 of said written statement, they pleaded that they were owners in possession over the plot no. 905. Appellant no. 1 Krishna Mohan had also appeared in the witness box as P.W. 1 in leading suit no. 91 of 1978. He had admitted in his cross-examination in clear and unequivocal terms that house no. 587 was constructed over plot no. 905. Now contention of the learned counsel for the appellants was that above admission of appellant no. 1 in the written statement was erroneously made and is not binding on him. For proving any admission erroneous. The party concerned or a person claiming through him must explain and prove that the admission was erroneous. No such attempt was made by Krishan Mohan, appellant no. 1 either in his written statement or in his evidence. Therefore, the bare arguments without any basis is not tenable. The points are answered in the negative.

Substantial Question No. E of Second Appeal No. 1611 of 1982, E of Second Appeal No. 1840 of 1982 and 4 of Second Appeal No. 2830 of 1982.

39. Learned counsel for the appellants contended that Dev Narain, D.W. 2 witness of respondent no. 1 has admitted in his evidence that Ram Avtar, the father of appellant was residing in the house over land in suit and was tethering cows and she buffaloes over the open land for the last 20 years and after the death of Ram Avtar, Krishana Mohan and Ram Kali came in possession over the disputed house and land and were in possession till date. That the above admission of the witnesses is binding on respondent no. 1 to hold that the respondent no. 1 was not in possession and had not acquired any possession on the basis of the alleged sale certificate. This question was considered by the trial court as well as Lower Appellate Court. The Trial Court clearly held that the appellants were not owners of open land of plot no. 905 as they had not pleaded source of their title and no evidence was led to prove their ownership over plot no. 905. However, the Lower Appellate Court has held that the possession was taken by the respondent no., 1 over the entire land and house in suit and respondent no. 1 was subsequently dispossessed by Smt. Ram Kali and others in the month of June, 1968. Assuming that the father of the appellants and thereafter the appellants were tethering their cattle over the open land of plot no. 905, their above act will not confer any proprietary right on them. Stray and occasional act of tethering cattle is not proof of possession. The Trial Court as well as Lower Appellate Court have recorded concurrent finding of fact that the appellants could not prove their title over the land in suit by way of adverse possession. The admission of Smt. Ram Kali in her affidavit Ext. A/8 filed in Misc. Case No. 46 of 1966 arising out of Execution case no. 11 of 1960 clearly shows that she claimed that her husband Ram Avtar was a tenant of Kunnoo Lal in the house and land in suit. In this way tethering of cattle over the open land would have been with permission and implied consent of the owner of the land in suit. The above finding of Trial Court and Lower Appellate Court are pure findings of fact and cannot be re-agitated in the Second Appeal.

40. Therefore, the admission of D.W. 2 Deo Narain does not mean that appellants became owner of open land of plot no.905. The respondent had also sought relief of possession on the basis of his title and both the Court below held that he is owner of open land and it is clear that appellants could not prove their title over suit land and therefore the Trial Court and Lower Appellate Court rightly held that respondent Bal Krishna was entitled to recover possession over open land of plot no. 905 of which he was owner.

41. Moreover, the admission is a best piece of evidence against the maker. The admission is binding on the person or the party making it. Admission of a witnesses is not binding on the party. The admission of a witness maybe used for the purposes of contradiction or drawing an inference by the Court. In any way the admission of a witnesses cannot be treated an admission of a party and is not binding on the party.

The points are answered accordingly.

42. The contention of the learned counsel for the appellants was that the land in suit was not purchased by respondent no. 1 through auction sale as the boundaries given in sale certificate do

not tally with the boundaries of the land in the suit. It may be mentioned at the very out set that this question was not raised before the Trial Court or the Lower Appellate Court. No plea was taken that the land in suit mentioned in the plaint of suit no. 164 of 1971 was not identifiable on the spot. Moreover, a commission was issued by the trial court to prepare map of suit land. The Commissioner has shown the land in suit with boundaries of the land given in the sale certificate. There is nothing on record to show that the land purchased by the respondent no. 1 through sale certificate is not the land plot no. 905, which was claimed by the appellants themselves. As held above, the respondent no. 1 had purchased plot no. 905 through sale certificate. It has also been held by the Trial Court and Lower Appellate Court that the appellants were not the owners of plot no.905 and they had also failed to prove their title by way of adverse possession over the said plot. The possession of the appellants over the open land of plot no.905, if any was permissive and unauthorised and therefore, the respondent no. 1 who acquired the title over plot no. 905 through the auction sale was entitled to decree of possession in respect of the said open land of plot no. 905.

43. It is clear from the findings on other questions that though the appellants could not prove their ownership or title by adverse possession over house no. 587 and yet their possession over said house is admitted. The respondent no. 1 had also failed to prove his title over said house as it was not purchased in auction sale or ouster of his possession. Therefore, a person in possession is entitled to the relief for permanent injunction against all except the true owner. Therefore, the appellants are entitled to the relief for permanent injunction in respect of house no. 587 against respondent no. 1 who is not its true owner.

44. The points are answered accordingly.

45. In view of my findings on the above substantial questions of law the appellants were entitled to decree for permanent injunction against the respondent no. 1 in respect of house no. 587 and they were not entitled to decree or permanent injunction over the land of plot no. 905. Respondent no. 1 was entitled to a decree for possession over the open land of plot no. 905, but he was not entitled for decree for possession over house no. 587.

46. In the result, Second Appeal No. 1611 of 1982 and 1840 of 1982 are allowed and Second Appeals No. 2214 of 1982 and 2830 of 1982 are dismissed. Accordingly the judgement and decree of Lower Appellate Court in Civil Appeal No. 45 of 1979 and 46 of 1979 are set aside and the judgement and decree of Trial Court partly decreeing suit no. 91 of 1968, and partly dismissals of suit no. 164 of 1971 in respect of house no.587 are restored and the judgement and decree of Lower Appellate Court in Civil Appeal No. 571 of 1979 and 642 of 1979 confirming the judgement and decree of Trial Court in respect of partly dismissal of suit no. 91 of 1968 and partly decree of suit no. 164 of 1971 in respect of open land of plot no. 905 are confirmed.

47. In the circumstances of the case the parties shall bear their own costs throughout.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: THE ALLAHABAD: 17.7.2001

BEFORE
THE HON'BLE J.C. GUPTA, J.

Criminal Revision No. 1168 of 2001

Ram Lochan and another ...Revisionist
Versus
State of U.P. and others...Opposite party

Counsel for the Revisionist:
Sri S.K. Sharma

Counsel for the Opposite Party:
A.G.A.

Criminal Procedure Code-Section 319- Prosecution does not become entitled to get a person summoned as accused to face trial in addition to those who are already facing trial merely on ipse dixit of the statement of a particular witness. While giving weight to the statement of a particular witness, all the facts and circumstances appearing in the case should also be taken into consideration before exercising powers under section 319 Cr.P.C. Therefore the above order which does not contain any reason cannot be sustained- the trial court has not assigned any reason as to why the accused has been summoned and thus it followed that there has been no application of mind. (Held in para 10).
Unless the court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned, the court should refrain from adopting such a course of action. This duty is cast upon every court before ordering summoning of an accused under section 319 Cr.P.C. In the instant case either of the orders passed on the application or on the order sheet does not indicate that the learned Session Judge has exercised powers under section 319 Cr.P.C. for any compelling reasons. Both the orders, therefore, are vitiated in law.

(Delivered by Hon'ble J.C. Gupta, J.)

1. Heard Sri H.K. Sharma for the applicants in revision, learned A.G.A. for the State and Sri Sanjay Kumar for the complainant- opposite party no. 3.

2. This revision is directed against the order dated 12.2.2001 passed by VII Additional Session Judge, Allahabad in Session Trial No. 166/99 State Vs. Ram Chandra and others whereby the application of complainant moved under Section 319 Cr.P.C. has been allowed and the applicant has been summoned as accused in addition to the accused who is already facing trial. Learned counsel for the complainant has filed certified copy of the order sheet of the aforesaid trial. Alongwith the memo of revision the applicant has also filed certified copy of the application moved by complainant purporting to be under section 319 Cr.P.C. This application is dated 11.1.2001. There is an endorsement of A.D.G.C. (Cr.). "Filed by State". Then beneath this, order of learned Session Judge runs as follows:

"Allowed.

Summon the accused."

There is yet another endorsement of the office, " Summons issued of 12.2.2001.

3. Learned counsel for the applicant in revision submitted before the court that the above order passed by the learned Magistrate itself shows that the trial court has not assigned any reason as to why the

accused has been summoned and thus it follows that there has been no application of mind. This submission of the learned counsel is not devoid of force. It is well settled that orders without reasoning have no value in the eye of law. Obligation to give reasons introduces clarity and excludes or at any rate minimizes the chances of arbitrariness and the higher forum can test the correctness of those reasons.

4. Justice Asprey of Australia in **Pettit Vs. Dankley (1971) (1) NSWLR 376 (CA)** said that the failure of a court to give reasons is an encroachment upon the right of appeal given to a litigant.

5. In the case of **Kishun Singh Vs. State of Bihar 1993 A.C.C. 167 (S.C.)** and **Sohan Lal Vs. State A.I.R. 1990 S.C. 2158,** it was held that there can be no doubt that if it appears to the court from the evidence tendered in the course of an inquiry or trial that any person not being the accused before it has committed any offence for which he could be tried together with the accused, the court can summon that person to face trial. This power can be exercised only if it so appears from the evidence recorded during inquiry or trial and not otherwise. Existence of some evidence is thus sine qua non of the applicability of section 319 Cr.P.C.

6. In **Municipal Corporation of Delhi Vs. R.K. Rohatgi and others A.I.R. 1983 S.C. 67**, it was held that power under section 319 Cr.P.C. is really an extra ordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the person against whom action has not been taken.

7. The power conferred on the courts is not to be exercised in a routine and mechanical manner without application of judicial mind. Prosecution does not become entitled to get a person summoned as accused to face trial in addition to those who are already facing trial merely on ipsedixit of the statement of a particular witness. While giving weight to the statement of a particular witness all the facts and circumstances appearing in the case should also be taken into consideration before exercising powers under Section 319 Cr.P.C. Therefore, the above order which does not contain any reason cannot be sustained.

8. Learned counsel for the complainant Sri Sanjay Kumar submitted before the court that the order sheet of the aforesaid trial indicates that the learned Magistrate has passed a detailed order thereon on the same date which runs as follows:

"Later on application 13 Kha is moved by the prosecution. Accused Vijay Kumar and Ram Lochan were named in F.I.R. During investigation they were, (by the I.O.) and no charge sheet was filed against them. P.W. 1 Karan Singh during his examination in chief has again made allegation against these accused. The accused be summoned accordingly, as prayed by the prosecution."

9. Firstly, I must say that it is highly suspicious if in fact this order had been passed on 11.1.2001, in as much as it is clear from the certified copy of the order sheet that the trial court has already adjourned the case to 3.3.2001. Secondly,

if this order had in fact been passed, there was no occasion or necessity of passing another order on the application itself which was moved under section 319 Cr.P.C. According to the applicants' counsel there has been tempering in the order sheet of the proceedings of the trial court . Be that as it may, even the order passed on the order sheet is also otherwise not sustainable. A perusal thereof would indicate that the learned Session Judge has merely narrated facts that the applicants were named in the F.I.R. but were not charge sheeted and their names have been disclosed by P.W. 1 Karan Singh during his examination in chief. What allegations have been made against them by P.W. 1 are not disclosed in the order nor the learned Session Judge appears to have examined the whole facts of the case with a view to find out whether there was any possibility of the case ending into conviction of the accused - applicants.

10. In the decision in **Michael Machdo Vs. C.B.I. (40) A.C.C. 795,** it was held by the Apex court that unless the court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned, the court should refrain from adopting such a course of action. This duty is cast upon every court before ordering summoning of an accused under section 319 Cr.P.C. In the instant case either of the orders passed on the application or on the order sheet does not indicate that the learned Session Judge has exercised powers under section 319 Cr.P.C. for any compelling reasons. Both the orders, therefore, are vitiated in law.

11. For the reasons stated above, this revision is allowed. The order of the learned Session Judge dated 11.1.2001 summoning the applicants as accused purporting to be in exercise of powers under section 319 Cr.P.C. is set aside and he is directed to decide the application of the complainant moved under section 319 Cr.P.C. afresh in accordance with law and in the light of observations made above.

Revision is accordingly disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 12.6.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 10247 of 1986

Zonal Chief Engineer, U.P. Jal Nigam and others ...Petitioners
Versus
Presiding Officer and another ...Respondents

Counsel for the Petitioners:
Sri K.B. Mathur

Counsel for the Respondents:
S.C.
Sri Ram Chandra Shukla

Section 25 F of Industrial Disputes Act-provision of section 6-N, which is pari-materia to the provisions of Section 25-F of the Industrial Dispute Act need not be observed while terminating the services of a daily wager as a daily wager employee has no right to the post. (Held in para 2)

Provision of section 6-N, which is pari-materia to the provisions of section 25-F of the Industrial Disputes Act need not be observed while terminating the services of a daily wager as a daily wager employee has no right to the post.

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

1. This petition under Article 226 of the Constitution of India by the petitioner-Zonal Chief Engineer, U.P. Jal Nigam, Gorakhpur challenges the award of the Labour Court, Gorakhpur in Adjudication Case No.256 of 1984. Respondent no. 2 Jayant Kumar Misra referred to as workman, filed his written statement pursuant to the reference by the State Government as to whether the employers in terminating the services of respondent no. 2 workman with effect from Ist of May, 1982 is legal and justified, if not to what relief the workman is entitled.

2. The petitioner as well as respondent no. 1 filed their written statements before the Labour Court. The case set up by respondent workman was that he was appointed on the post of Operator with effect from 11th of July,1979 by Executive Engineer, U.P. Jal Nigam, Gorakhpur and was posted at Pumping Station Jal Nigam, Elahibagh, Gorakhpur and since then he was in continuous service and at the time of termination of his service, who is drawing wages at the rate of Rs. 324/- per month and was lastly posted at Nautanwa Drinking Water project. The employers have illegally dismissed him from service with effect from 30th of April, 1982 without giving him any opportunity for submitting his explanation. He further stated that due to illness of his wife he submitted the application for leave on 4th of April, 1982 and left the working place. On that very day the Superintending Engineer made a surprise inspection and found the workman concerned absent. The services of the respondent - workman were terminated with effect from Ist of May, 1982, which is wholly illegal as the workman concerned was not given any opportunity for hearing. The employers in their written statement denied the case set up by the workman concerned. The employers' case is that the workman was appointed on the post of operator on 11th of July, 1979. His appointment was purely as daily wager and he was not given any letter of appointment. Since the work for which the workman was appointed as daily wager, came to an end. The requirement of the workman was no more in the department and therefore, his services were terminated. His daily wager appointment was terminated on Ist of May, 1982. The employer further states that in fact the workman was posted as Chaukidar and he was found absent from his duty by the higher authority, but since he was only a daily wager, his services were terminated as no longer required. He was not a permanent employee. Therefore, he was not given any opportunity before terminating his services. The employee also set up his case that Jal Nigam is not an industry as defined under U.P. Industrial Disputes Act. Therefore, the reference is not in accordance with law. The Labour court has found that Jal Nigam is an industry and therefore, the dispute was rightly referred to the Labaour Court. Since it is no more in doubt that Jal Nigam is covered by the definition of industry. This question has not been disputed by the petitioner. So far as the merit of the case is concerned, it is admitted case of the parties that before terminating the services of the workman concerned, no domestic enquiry was conducted nor any opportunity was given to the workman concerned for submitting his defence. In reply to this, the employers have stated that the services have been terminated by a simple order of termination and the

workman was only a daily wager. Therefore it was not necessary to give him an opportunity. However, it is admitted by the workman concerned that petitioner's services were terminated because he was found absent without leave. It is settled by the Apex Court that the termination whatever form it may be, is covered by the definition of retrenchment under the provisions of U.P. Industrial Disputes Act. Therefore, it was incumbent on the part of the employers to follow the provisions of section 6-N of the U.P. Industrial Disputes Act before terminating the services of respondent-workman. Counsel for the petitioner has relied on two decisions- one of Hon'ble Supreme Court in the case of ' Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others, reported in 1997 Vol. 76 F.L.R. page 237' and another decision of the Single Judge of this Court in the case of Channey Lal and others Vs. Director, Malaria Research Centre, New Delhi and another, reported in 1999 All L.J. page 1053,' wherein the Apex Court as well as this court has found that provision of section 25-F of the Industrial Dispute Act need not be observed while terminating the services of a daily wager as a daily wager employee has no right to the post. Learned counsel for the petitioner has accepted the concept of the daily wager that he is an employee for afixed term. That the contract of the employment begins with the day and ends at the end of the day automatically and therefore, for this reason also the daily wager is covered by the exception of the Industrial Disputes Act, 1947. Exception, which is an excuse as to what would not amount to retrench within the meaning of the words used under the Act. That one more decision is relied upon by the learned counsel for the petitioner in the case of 'Municipal Committee Tauru Vs. Harpal Singh and another, reported in (1998) Vol. 5 Supreme Court cases page 635'; wherein the Hon'ble Supreme Court has held that in case of the inconsistent statement with regard to the claim by the workman, the Labour Court cannot justify in granting any relief ignoring the inconsistency in claim on the ground of substantial justice. Here in this case the workman has set up the case that he was appointed as Operator and was working at the relevant time at Nautanwa Drinking Water Scheme, when on hearing his wife illness, he has submitted his application for leave and left the place without even waiting for the result of the application nor could be any time thereafter to ascertain as to whether the leave has been sanctioned or not. When the employer's case was set up that on the same day on inspection by the Superintending Engineer the concerned workman was found absent from the place of posting. That before terminating his services, he was not afforded any opportunity. The fact that he was found absent, has not been denied rather admitted and justified by the workman and he states that on hearing the illness of his wife, he proceeded on leave after submitting an application. In these circumstances and by the law laid down by the Apex Court and the learned Single Judge of this Court to which I also agree. I found that the view taken by the Labour Court in holding that since the services of the concerned workman have been terminated without complying of the provisions of section 6-N of the U.P. Industrial Disputes Act which is pari-materia to Section 25-F of the U.P. Industrial Disputes Act and that being the position, the termination is held to be illegal and reinstatement with continuity of service has been granted by the Labour

Court. I am of the view that the relief granted by the Labour Court is contrary to the law laid down by the Apex Court and followed by this Court. In the facts and the circumstances of the case the relief granted by the Labour Court for reinstatement of workman with continuity of service with back wages is not justified. The award of the Labour Court Annexure-IV to the Writ petition deserves to be quashed and is hereby quashed.

3. In view of what has been stated above, the award of the Labour Court is modified to this extent that the workman is not entitled for any relief as held by the Apex Court in view of inconsistent stand taken by the workman, the workman is not entitled for any relief. In the facts and the circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: JULY 4, 2001

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 3151 of 1997

Rajendra Kumar Srivastava and others ...Petitioners
Versus
Samyut Kshetriya Gramin Bank and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare

Counsel for the Respondents:
Sri Vineet Saran

Constitution of India- Article 226- where a candidate for selection knowing fully well the relevant facts voluntarily appeared for interview without raising any objection, he cannot subsequently turn round and question the selection. (Held in para 16)

Where a candidate for selection knowing fully well the relevant facts voluntarily appeared for interview without raising any objection, he cannot subsequently turn round and question the selection.

(Delivered by Hon'ble M. Katju, J.)

1. This writ petition has been filed praying for a writ of certiorari for quashing the impugned order dated 20.12.1996 Annexure 14 to the writ petition passed by the Chairman, Samyut Kshetriya Gramin Bank, Azamgarh and for quashing the entire proceeding undertaken by the respondent Bank for grant of promotion from among the officers Scale-1 to officers Scale-II and for a mandamus directing the respondents to make fresh promotion to the post of officers Scale II strictly in accordance with law.

2. We have heard the learned counsel for the parties and have perused the affidavits.

3. The respondent bank was established as a Regional Rural Bank under the provisions of the Regional Rural Bank Act, 1976. The bank has been sponsored by the Union Bank of India and its management is vested in the Board of Directors comprising of Directors nominated by the Central Government, State Government and the Sponsoring Bank. Under the Act power is conferred on the Central Government to issue directions as also to frame rules. Regulation making power has been conferred on the Board of Directors of the

Regional Rural Bank to be exercised in consultation with the Reserve Bank of India and with previous sanction of the Central Government.

4. The petitioners are officers Scale-I in the respondent bank and posted in various branches in the State. Their dates of appointment are from 1979 to 1982 on various dates as mentioned in paragraph 6 to the writ petition. On 22.2.1991 an award was given by the National Industrial Tribunal under which the pay scale and categorisation of officers of the Regional Rural Banks was brought at par with the pay scale of the sponsoring bank w.e.f. 1.9.1987. As a consequence of this award the petitioners were granted designation of officers scale-I in the pay scale of 2100-4200 w.e.f. 1.9.1987. Above this designation is the grade of officers scale -II carrying the pay scale of Rs. 3060-4390.

5. It is alleged in paragraph 11 of the writ petition that the work and conduct of the petitioners have been satisfactory and there is no adverse entry and they have received appreciation letters vide Annexure 1 to 4 to the writ petition. A seniority list of the officers was published by the Chairman by order dated 4.12.1996 vide Annexure 6 to the writ petition. In this seniority list the petitioners 1 to 7 are at serial nos. 18, 39, 56, 10, 29 and 91 respectively. The Regulations were framed in 1980 by the respondent bank with the previous approval of the Central Government but these Regulations do not provide for promotion criteria. The Central Government issued a notification dated 28.9.1998 in exercise of powers under section 17 read with section 29 of the Act notifying a set of rules, true copy of which is Annexure 6 to the writ petition. In pursuance of this notification a circular letter was issued on 2.1.1989 by the Chairman vide Annexure 7 to the writ petition. The consequential letter dated 10.4.1989 is Annexure 8 to the writ petition. On 5.11.1996 a circular letter was issued by the Chairman notifying the procedure of sealed cover regarding the persons against whom the proceedings were pending. True copy of the same is Annexure 9 to the writ petition. On 17.9.1994 a seniority list was issued by the National Bank for Agriculture and Rural Development addressed to all the sponsoring Banks and Regional Rural Banks notifying the recruitment and promotion policy vide Annexure 10 to the writ petition. An earlier circular letter dated 1.12.1987 specifying the meaning to be given to the criteria seniority cum merit is Annexure 11 to the writ petition.

6. Under the notification dated 28.9.1988 the minimum eligibility criteria for promotion to scale II is having put in eight years service as officers in the concerned Regional Rural Bank with rider that the Board of Directors may grant exemption of two years with prior approval of the sponsored bank if the candidates possessing the required length of service were not available for promotion. In the circular dated 10.5.1989 the candidates with the ratio two is to one are to be called for the post of promotion. By means of circular dated 4.12.1996 the Chairman of the respondent bank notified that the Board of Directors has taken a decision for filling up 64 posts of officers scale -II in accordance with the notification dated 28.9.1988 and the circular dated 17.9.1994. True copy of the circular letter dated 4.9.1996 is Annexure 12 to the writ petition. It is stated in paragraph 27 of the writ petition that by

circular dated 4.12.1996 the respondent bank unauthorisedly extended the zone of consideration to include a very large number of officers with ulterior motive to give promotion to very junior officers.

7. By means of interview letter dated 5.12.1996 issued under the signature of the Chairman all the eligible officers fulfilling eight years length of service as on 10.5.1995 were called for interview on different dates from 16.12.1996 to 19.12.1996. True copy of one of the letters is Annexure 13 to the writ petition.

8. In paragraph 30 of the writ petition it is stated that a total number of 200 officers fulfilled the eligibility condition of having put in more than eight years of service on 10.5.1995 and all such officers were interviewed. It is alleged in paragraph 33 of the writ petition that the petitioners were perfunctorily interviewed for a few minutes each only and on 20.12.1996 the order has been issued by the Chairman notifying 64 persons as having been selected as officers scale-II vide Annexure 14 to the writ petition. These 64 persons are respondents 4 to 67 in the present writ petition. In paragraph 36 of the writ petition it is alleged that many of the officers selected are juniors to the petitioners. All such selected persons are junior to many of the petitioners. In paragraph 38 it is stated that the selections were made on the basis of allocation 60 marks for performance appraisal and 40 marks for oral interview although that has not been notified earlier. It is alleged in paragraph 40 of the writ petition that by adopting the aforesaid basis the respondent has given a total go-by to the criteria of seniority cum merit specified in the notification dated 28.9.1988. In paragraph 42 it is alleged that many persons against whom there was adverse material have been selected. Thus in paragraph 45 it is alleged that Hari Lal who has been mentioned at serial number 35 in the order dated 20.12.1996 has been granted promotion even though he has been charge sheeted and disciplinary proceedings were pending against him. In paragraph 46 it is alleged that many persons were promoted who have been departmentally punished on the basis of disciplinary proceedings. The details of such persons are given in paragraph 46 of the writ petition. Aggrieved this petition has been filed in this Court.

9. A counter affidavit has been filed on behalf of the Chairman of the respondent bank. In paragraph 5 it is stated that merely because there was no adverse entry or not starting any disciplinary proceeding against an employee does not mean that there was no deficiency in his work. It is alleged that work and conduct of the petitioners have neither been satisfactory nor they have a clean service record. The petitioner no. 1, R.K. Srivastava was issued show cause notice for gross irregularities during his tenure as Branch Manager, Kasimabad where he disbursed a larger number of loans contravening the instructions/ directives of the Bank. Similarly the petitioner no. 2 has not worked properly and he was issued advisory memo on 9.6.1989 with monetary recovery. There were complaints against other petitioners details of which are given in paragraph 5 of the counter affidavit. It is alleged that the petitioners were incompetent, inefficient and found incapable of shouldering higher responsibilities and thus not found fit for promotion in scale II. They resorted to rowdyism, illegal

confinement of Chairman, General Manager and other senior officials of the bank on 6.1.1997 with the result that the bank had to seek police intervention for security and protection. The petitioner nos. 1 to 5 alongwith active support of other petitioners illegally started agitation and dharna programme soon after the publication of the result with a motive to refrain the loyal and willing staff of the bank from discharging their duties and disrupting the smooth functioning of the bank. They used abusive languages and slogans against the officers and threatened to cut off the hands of the officers and hence the bank had to seek a temporary injunction which was granted by the civil court. The bank was also forced to take police protection as the petitioners committed criminal and rowdy behaviour. In paragraph 8 of the counter affidavit it is alleged that rules have been made by the NABARD vide its circular dated 10.2.1988 which is in continuation to its circular dated 1.12.1987. The guidelines contained in circular dated 1.12.1987 cannot be interpreted to mean that the promotion would be automatic without any screening. The management are not precluded from making any objective assessment of the officers potential for considering their suitability for promotion. In paragraph 10 of the counter affidavit it is stated that under the notification dated 28.9.1988 seniority-cum-merit is the criterion but the mode of selection will be interview and assessment of performance report for the proceeding three years. In paragraph 15 of the counter affidavit it is stated that in view of the rider attached to the schedule of the government notification and the NABARD notification dated 10.2.1988 the seniority cum merit criteria was diluted and the appraisal report of three years had to be looked into and performance of the candidate seen in the selection. In paragraph 17 of the counter affidavit it is stated that sufficient time was devoted to each candidate in the interview and it is not for the candidate to assess as to how much time should be devoted to them. In paragraph 19 of the counter affidavit it is stated that seniority alone cannot be seen. In paragraph 21 of the counter affidavit it is stated that it was decided by the selection committee that 60% marks will be kept for appraisal report and 40% marks for the interview and on this basis the promotion will be made on the basis of seniority. In paragraph 23 it is stated that the principle of seniority cum merit has not been given a total go-by and in fact those who were senior and have proper appraisal report and have qualified in the interview have been selected for promotion. In paragraph 24 of the counter affidavit it is stated that the orders of the Central Government and NABARD have been followed and it is wrong to impute any motive to anyone. The Chairman has no interest in any particular officer. In fact he joined the service of the bank a few days earlier and he did not know the officers. In paragraph 26 of the counter affidavit it is stated that so far as Hari Lal is concerned he is scheduled caste candidate and otherwise he is senior enough. The only technical charge against him is that he did not rectify some irregularities pointed out in audit report on his branch earlier but later on he was exonerated. In paragraph 27 of the counter affidavit it is stated that the persons at serial nos. 23, 30, 35 and 36 were subject to disciplinary proceeding more than three years back but the appraisal report for the last three years was good. In paragraph 34 it is stated that

the selection committee can determine the criteria of the interview.

10. A supplementary counter affidavit has also been filed by the Chairman of the Bank. In paragraph 2 of the same it is stated that the directions of the Government of India and NABARD were strictly followed in the matter of promotion. In paragraph 4 it is stated that the selection was done by allotting 60% marks for performance appraisal and 40% marks for interview. The Board of Directors decided that those who will secure 78% marks and above will be declared eligible and out of them the senior most 64 persons who were found qualified were promoted.

11. A counter affidavit has also been filed by respondent no. 44. In paragraph 5 it is alleged that the Board of Directors have full jurisdiction to fix the criteria for promotion. In paragraph 6 of the counter affidavit it is alleged that the petitioners duly appeared in the interview and having been declared unsuccessful in the selection and they cannot now be permitted to challenge the promotion on the ground of criteria fixed by the respondent bank. In paragraph 11 of the counter affidavit it is alleged that the records of none of the petitioners is free from blemishes e.g. petitioner no. 1 Mr. Rajendra Kumar Srivastava and petitioner no. 5 Sushil Kumar Rai are facing disciplinary proceedings and O.P. Khanna has been awarded punishment in a departmental enquiry. In paragraph 16 it is alleged that as per the circular of NABARD dated 10.2.1988 it was specifically clarified that the guidelines contained in the circular dated 1.12.1987 cannot be interpreted to mean that promotion would be automatic without any screening. It is alleged that the management of the bank is not precluded from making any assessment of the persons suitable for promotion. True copy of the circular dated 10.2.1988 is Annexure C.A. 1 to the counter affidavit. In paragraph 22 of the counter affidavit it is stated that the circular dated 4.12.1996 has been issued strictly in accordance with the guidelines of the NABARD as well as the Government of India notification dated 28.9.1988 as also per the decision taken by the Board of Directors at its meeting dated 29.11.1996. In paragraph 23 of the counter affidavit it is stated that the circular of the NABARD dated 10.2.1988 clearly provides that seniority -cum-merit as defined in the circular dated 1.12.1987 stands superseded and as such the circular dated 1.12.1987 has nothing to do with promotions made after 10.2.1988 and hence it is alleged that the respondent bank has made promotions validly. In paragraph 24 of the counter affidavit it is alleged that all the petitioners had appeared in the interview without any prejudice and as such they are estopped from raising objection as to the promotion. In paragraph 26 of the counter affidavit it is stated that all the 200 eligible candidates were screened and interviewed as per prevailing norms and guidelines. Those candidates who were found most suitable and fit for promotion were declared successful and promoted as officer scale -II w.e.f. 20.12.1996. In paragraph 32 it is stated that the proceeding against Hari Lal have been completed and specific and correct reply can be given by the respondent bank or by Hari Lal himself. In paragraph 35 of the counter affidavit it is stated that after the interview was over the performance appraisal of each candidate was placed

before the selection committee. In paragraph 36 it is stated that the promotions have been made in accordance with Rule 10 (5) notified by Government of India by notification dated 29.9.1988 vide Annexure C.A. 2. In paragraph 37 of the counter affidavit it is stated that the promotion was made in accordance with law. In paragraph 39 it is stated that for promotion in scale II the service record and performance of the officers are relevant factors. In paragraph 41 to 43 reply has been given regarding specific persons mentioned in the writ petition.

12. A rejoinder affidavit has been filed and we have perused the same. We are of the opinion that the criteria for promotion was seniority subject to rejection of unfit as noted in the various notification/circular placed before us. However, as held by the Supreme Court in ***B.V. Sivaiah Vs. K.Addanki Babu 1998 (6) SCC 720*** even where the criterion of promotion is seniority cum merit (which is the same as seniority subject to rejection of unfit) it is necessary in order to be considered for promotion to have the minimum necessary merit requisite for efficiency of administration. For assessing the merit of the candidate minimum standard was prescribed and it was decided whether he is eligible to be considered for promotion. Such assessment of minimum merit can be made by assigning marks on the basis of appraisal of performance.

13. No doubt in B.V. Sivaiah's case (supra) it has been held that where selection is to be made on the basis of seniority cum merit the selection of only those officers who have secured higher number of marks will be illegal. However, in the present case that has not been done. What the selection committee has done is that those who secured 78% marks were considered for promotion. Those who secured more than 78% marks were considered as having the minimum eligibility and from among them promotion was done on the basis of seniority as stated in paragraph 7 and 8 of the supplementary counter affidavit. As stated in paragraph 23 of the main counter affidavit of the Chairman, the principle of seniority cum merit has not been given a total go by. In fact those who secured the minimum requirement (78% marks) in the interview and appraisal were considered to be in the field of eligibility and from amongst them selection were made on the basis of seniority. As stated in paragraph 23 of the counter affidavit the officers in scale II have to do a lot of administrative work and have to shoulder higher responsibility in comparison to officers in scale I and hence suitability has also to be seen.

14. No doubt in Sivaiah's case (supra) more than 50% marks set apart for interview and performance but in that case only those who secured highest marks were ultimately promoted and that was declared illegal by the Supreme Court. The present case is distinguishable. This is not a case where those who got highest marks in the interview and appraisal were promoted, rather those persons who got minimum of 78% marks were considered eligible and from them promotion was made on the basis of seniority. It is settled law even where the selection is done on the basis of seniority-cum-merit a minimum eligibility requirement can be fixed by the authorities.

15. Moreover the petitioners and others appeared in the interview and thus were obviously aware of the fact that in the interview merit is also to be taken into consideration. Hence they should have protested at that time but they appeared in the interview without any protest. Hence as held by the Supreme Court in Union of India Vs. N. Chandresekharan 1998 (3) SCC 694 they cannot subsequently turn around and challenge the selection. In Jagathigowda vs. Chairman 1996 (9) SCC 677 the Supreme Court held that NABARD circular dated 7.4.1986 clarified the earlier circular dated 31.12.1984 and specifically provided that the selection of the eligible candidates should be based on performance of the respective candidates in the Bank. The Supreme Court held that the High Court fell into patent error in holding that the guidelines were not applicable to the impugned promotions. The cumulative reading of the two guidelines issued by the NABARD clearly shows that the promotions were to be made on the basis of the comparative assessment of the performance appraisal of the officers concerned. The Supreme Court further held that it is a settled proposition of law that even while making promotion on the basis of seniority-cum-merit the totality of the service record of the officer concerned has to be taken into consideration.

16. In Dr. G. Sarana vs. University of Lucknow, A.I.R. 1976 (sic) 2428 it was held by the Supreme Court that where a candidate for selection knowing fully well the relevant facts voluntarily appeared for interview without raising any objection, he cannot subsequently turn round and question the selection.

17. Thus there is no force in this petition and it is dismissed accordingly. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.7.2001

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No. 44405 of 1998

Dr. Pradeep Kumar Srivastava..Petitioner
Versus
State of Uttar Pradesh and others
...Respondents

Counsel for the Petitioner:
Dr. R.G. Padia
Sri Prakash Padia

Counsel for the Respondents:
Sri B.N. Agarwal
S.C.

Uttar Pradesh Higher Service Commission Act (Amendment) Act 1992- Section 31-C-Regularisation- those who appointed between 3.1.84 to 22.11.91 can claims for Regularisation – appointment of lecturer by management on 25.11.91-rightly not considered.

Held – Para 10

In the instant case, admittedly, the petitioner was appointed on 25th November 1991, which was after 22nd November 1991. Obviously, the petitioner having been appointed on 25th November 1991 he does not satisfy the requirement of continuous service in the college up to the date of commencement of the 1992 Amendment Act, which, as noticed earlier, is 22nd November 1991. Thus, the petitioner, it cannot be gainsaid, does not satisfy the statutory conditions precedent for being eligible to

claim the benefit of Section 31-C of the Principal Act. That being so, the question of consideration of the claim of the petitioner for regularisation is not maintainable.

(Delivered by Hon'ble D.S. Sinha, J.)

1. Heard Dr. R.G. Padia, the learned Senior Advocate appearing for the petitioner and Sri B.N. Agarwal, the learned Standing Counsel of the State of U.P., representing the respondent Nos. 1, 2 and 3.

2. Relying upon Section 31-C of the Uttar Pradesh Higher Education Services Commission Act, 1980, hereinafter called the 'Principal Act', as amended by the Uttar Pradesh Higher Education Services Commission (Amendment) Act, 1992, hereinafter called the 1992 Amendment Act, and the Uttar Pradesh Higher Education Services Commission (Amendment) Act, 1997, hereinafter called the 1997 Amendment Act, the petitioner prays for issuance of a writ, order or direction including a writ in the nature of mandamus, commanding the statutory selection committee, constituted under Section 31-C (2) of the 1997 Amendment Act, Directorate of Higher Education, Allahabad through its Director, to consider his case for regularisation on the post of lecturer in Economics in Sri Murli Manohar Town Degree College, District Ballia, hereinafter called the 'Institution'.

While entertaining the petition, this Court passed an order dated 4th January 1999, which is extracted below: -

"----------

Meanwhile the Statutory Selection Committee, constituted under Section 31-C (2) of the U.P. Higher Education Services Commission (Amendment) Act, 1997, Directorate of Higher Education, Allahabad is directed to consider the question of regularisation of petitioner or to show cause by filing a counter – affidavit by 15th March, 1999. List on 22.3. 1999.

4.1.1999 Sd./- B.Diskshit
Sd./-A. Chakrabarti."

3. In response to the order of the Court dated 4th January 1999, the respondent no. 2 had opted to show cause by filing counter-affidavit instead of considering the question of regularisation of the petitioner. The principal stand taken by the respondent No. 2 is that the alleged appointment of the petitioner on the post of lecturer in Economics in the institution was void *ab initio*. Therefore, the claim of the petitioner for consideration of his regularisation under Section 31-C of the Principal Act on the post is not tenable.

Undisputed acts and events constituting the facts of the case are as below.

4. For the purpose of his appointment, the selection committee made recommendation in favour of the petitioner on 10th October 1991. Following the recommendation of the selection committee, the managing committee of the institution met on 16th October 1991 and passed unanimous resolution approving the selection of the petitioner and directing requisite further steps to be taken.

5. Exercising the power under Section 16 of the Principal Act, the managing committee of the institution issued on 25th November 1991 an appointment letter to the petitioner, and the petitioner joined the post on the same day.

6. For the proper appreciation of the controversy raised herein, it would be apposite to extract below the Section 3 of the 1992 Amendment Act and Section 31-C of the Principal Act, as amended by the 1992 Amendment Act and 1997 Amendment Act.

"3. Omission of Section 16 – Section 16 of the Principal Act shall be omitted."

"**31-C. Regularisation of other ad hoc appointments** – (1) Any teacher, other than a Principal who –
(a) was appointed on ad hoc basis after January 3, 1984 but not later than November 22, 1991 on a post –
(i) Which after its due creation was never filled earlier, or

(ii) Which after its due creation was filled earlier and after its falling vacant, permission to fill it was obtained from the Director; or

(iii) Which came into being in pursuance of the terms of new affiliation or recognition granted to the College and has been continuously serving the college from the date of such ad hoc appointment up to the date of commencement of the Uttar Pradesh Higher Education Services Commission (Amendment) Act, 1992;

(b) was so appointed after three months of the notification of the Commission under sub-section (1) of Section 16 as it stood before its omission by the Act referred to in clause (a), or if appointed within such period, no recommendation was made by the Commission within such period;
(c) possessed on the date of such commencement, the qualifications required for regular appointment to the post under the provisions of the relevant statutes in force on the date of such *ad hoc* appointment;

(d) is not related to any member of the management or the principal, of the college concerned in the manner mentioned in the explanation to Section 20 of the Uttar Pradesh State Universities Act, 1973;

(e) Has been found suitable for regular appointment by a Selection Committee constituted under sub-section (2);

may be given substantive appointment by the management of the college, if any substantive vacancy of the same cadre and grade in the same department is available on the date of commencement of the Act referred to in clause (a).

(2) The Selection Committee consisting, the following members namely –

(i) a member of the Commission nominated by the Government who shall be the Chairman;
(ii) an officer nor below the rank of Special Secretary, to be nominated by the Secretary to the Government of Uttar Pradesh in the Higher Education Department;
(iii) the Director;

shall consider the cases of every such *ad hoc* teacher and on being satisfied about his eligibility in view of the provisions of sub-section (1), and his work and conduct on the basis of his record, recommend his name to the management of the college for appointment under sub-section (1).

(3) Where a person recommended by the Commission under section 13 before the commencement of the Act referred to in sub-section (1) does not get an appointment because of the appointment of another person under sub-section (1) in the vacancy for which he was so recommended, the State Government shall make suitable order for his appointment in a suitable vacancy in any college and the provisions of sub-section (5) and (6) of Section 13 and of Section 14 shall ***mutatis mutandis*** apply.

(4) A teacher appointed on *ad hoc* basis referred to in sub-Section (1) who does not get a substantive appointment under that sub-Section and a teacher appointed on ad hoc basis who is not eligible to get a substantive appointment under sub-Section (1) shall cease to hold the ad hoc appointment after March, 31, 1992."

7. At the out set, it may be noticed that Section 16 of the Principal Act from which the managing committee of the institution derived the power to appoint the petitioner on 25th November, 1991 stood repealed with effect from 22nd November 1991, and indeed, the managing committee had no power to appoint the petitioner. Accordingly, the stand taken by the respondent no. 2 that the appointment of the petitioner was void *ab initio* is not devoid of substance, and has to be upheld. It is upheld accordingly.

8. A bare perusal reveals that sub-section (1) of Section 31-C of the Principal Act contemplates that for being eligible to claim the benefit of regularisation of ad hoc appointment, the incumbent must be a teacher, other than a Principal, who was appointed on ad hoc basis after January 3, 1984 but not later than November 22, 1991 on a post which was never filled earlier after its due creation, or which was filled earlier after its due creation and after its falling vacant, permission to fill it was obtained from the Director; or which came into being in pursuance of the terms of new affiliation or recognition granted to the college and has been continuously serving the college from the date of such ad hoc appointment up to the date of commencement of the 1992 Amendment Act.

9. Clearly, inter-alia, the appointment of the claimant-incumbent must have been during the period between 3rd January 1984 and 22nd November 1991 and he must have been continuously serving the college from the date of such ad hoc appointment up to the date of the commencement of the 1992 Amendment Act, which is, indisputably, 22nd November 1991.

10. In the instant case, admittedly, the petitioner was appointed on 25th November 1991, which was after 22nd November 1991. Obviously, the petitioner having been appointed on 25th November, 1991 he does not satisfy the requirement of continuous service in the college up the date of commencement of the 1992 Amendment Act which, as noticed earlier, is 22nd November 1991. Thus, the petitioner, it cannot be gain said, does not satisfy the statutory conditions precedent

for being eligible to claim the benefit of Section 31-C of the Principal Act. That being so, the question of consideration of the claim of the petitioner for regularisation is not maintainable.

11. For what has been said above, in the opinion of the Court, the claim of the petitioner for regularisation of his ad hoc appointment has rightly not been considered by the respondent no. 2. He is not entitled to any relief in this petition. The petition is devoid of substance. Accordingly, it is dismissed. There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.7.2001

BEFORE
THE HON'BLE R.R. YADAV, J.

Civil Misc. Writ Petition No. 25819 of 2001

Oswal Fats and Oils Ltd. ... Petitioner
Versus
Additional Commissioner (Administration), Bareilly Division, Bareilly and others ... Respondents

Counsel for the Petitioner:
Sri Vijay Kumar Rai
Sri Dr. Vinod Kumar Rai
Sri Sankatha Rai

Counsel for the Respondents:
S.C.

U.P. Zamindari Abolition and Land Reforms Act 1951, Section – 152 (i) – Transfer of land in favour of company neither Registered nor performing public duty – Land excess to 12.50 acres – shall vest in State Government being free from all encumbrances.

Held – Para 14

Now since it is admitted that transfer made in favour of the petitioner company, is in excess of 12.50 acres in the State of Uttar Pradesh, therefore, without filing suit for eviction by Collector, surplus land of more than 12.50 acres shall vest in the State Government free from all encumbrances and an argument, contrary to it, is not acceptable.

Case Law Discussed
W.P. No. 7111 of 88 Decided on 16.3.89

(Delivered by Hon'ble R.R. Yadav, J.)

1. Heard learned counsel for the petitioner Sri Sankatha Rai at length.

2. Perused the order dated 30.5.2001, passed by Additional Commissioner (Administration), Bareilly Division, Bareilly (Annexure –1 to the writ petition) and the order dated 24.5.1993, passed by Collector, Pilibhit (Annexure-2 to the writ petition), whereby both the Courts below have passed orders making petitioner Company entitled up to 12.50 acres land in Uttar Pradesh and the excess of 12.50 acres land have been declared to have vested in the State Government free from all encumbrances.

3. It is urged by the learned counsel for the petitioner that the Additional Commissioner and Collector, respondents No. 1 and 2, have based their findings on the affidavit of Sri T.R. Sharma, General Manager of the Company dated 19.5.1993 (Annexure-7 to the writ petition), but neither Sri T.R. Sharma has any authority of the Company under resolution dated 14.10.1991 passed by the Board of Directors of the Company (Annexure-10 to the writ petition) to enter into compromise and giving consent to relinquish the land in dispute in favour of

the State Government nor any such consent has been given in the affidavit to relinquish the land in excess of 12.50 acres in favour of the State Government, therefore, the findings of the Commissioner and Collector are perverse and liable to be set aside on this ground.

4. For the reasons given herein below the aforesaid argument of the learned counsel for the petitioner is not acceptable.

5. It is to be noticed that the State Legislature has enacted Section 152 of U.P. Zamindari Abolition & Land Reforms Act (hereinafter referred as U.P. Act No. 1 of 1951) that the interest of a Bhumidhar with transferable rights shall subject to the conditions enumeratedin subsequent provisions of the said Act would be transferable. Sub-Section (1) of Section 154 of the said Act imposes restriction on transfer by a Bhumidhar and provides that same as provided in sub-Section (2) ***no Bhumidhar shall have the right to transfer by sale or gift any land other than tea gardens to any person where the transferee, as a result of such sale or gift, becomes entitled to lato, which together with land, if any, held by his family will, in the aggregate, exceed 12.50 acres in Uttar Pradesh.*** Sub-Section (2) of the aforesaid section provides that subject to the provisions of any other law relating to the land tenures for the time being in force, the State Government may, by general or special order, authorize transfer in excess of limit prescribed in Sub-Section (1) of Section 154 of U.P. Act No. 1 of 1951 provided if State Government is of opinion that such transfer is in favour of a Registered Co-operative Society or an Institution established for charitable purpose which does not have land sufficient for its needs or that the transfer is in the interest of general public. It is further to be noticed that Section 166 of the said Act provides that every transfer made in the contravention of the provision of U.P. Act No. 1 of 1951 shall be void. Section 167 fo the said Act provides consequences, which ensue in respect of every transfer, which is void by virtue of Section 166 of the Act.

6. A combined reading of Sections 152, 154, 166 and 167 of U.P. Act No. 1 of 1951 leads towards an irresistible conclusion that no Bhumidhar shall have the right to transfer by sale or gift any land in excess of 12.50 acres in Uttar Pradesh and in those cases where such transfer exceeds 12.50 acres, the transferee, as a result of such sale or gift, becomes entitled to land which, together with land, if any, held by his family in aggregate does not exceed 12.50 acres unless the land transferred by a Bhumidhar by sale or gift is tea gardens or the State Government by general or special order authorizes transfer in excess of the limit prescribed provided the State Government is of the opinion that such transfer is in favour of Registered Co-operative Society or an Institution established for charitable purpose which does not have land sufficient for its needs or that the transfer is in the interest of general public.

7. Learned counsel for the petitioner Sri Sankatha Rai fails to bring the case of the petitioner company within any one of the exceptions enumerated hereinabove to make the petitioner company entitled to hold land in excess of 12.50 aces in Uttar Pradesh. It is apparent on face of record that petitioner Company has no

authorization either general or special to hold land in excess of 12.50 acres by State Government. Indisputably the petitioner company is not a Co-operative Society registered under the Co-operative Societies Act nor Petitioner Company is established for charitable purposes. Nothing is brought to my notice that the present Company is established in the interest of general public. Contrary to it, there are overwhelming materials on record and also from attending circumstances it is inferable that the petitioner Company is an establishment established with profit orientation for its shareholders. It is pertinent to mention here that the petitioner Company has not produced its certificate of registration under the Companies Act. During the course of argument articles of association of Nuskar Enterprises Ltd. is produced by the learned counsel for the petitioner. It is not understandable as to why the certificate of registration under the Companies Act is not produced before the Court. It is also not understandable as to how the Articles of Association of Nuskar Enterprises Ltd. has nexus with the petitioner Company. I am of the view that even if the affidavit dated 19.5.1993 (Annexure-7 to the writ petition) of the General Manager of the petitioner Company giving consent to relinquish the land in excess of 12.50 acres in favour of State Government is ignored even then the finding of respondents No. 1 and 2 are sustainable for the reasons given hereinabove.

8. It is next contended by the learned counsel for the petitioner that the expressions '***family'*** and ***'person'*** used under Section 154 of U.P. Act No. 1 of 1951 are attracted to the petitioner Company.

9. The aforesaid contention raised by the learned counsel for the petitioner is attractive, but fallacious. The expressions ***'family'*** and ***'person'*** both are to be interpreted in the light of explanation added to Section 154 of Act No. 1 of 1951. The explanation added under Section 154 of the said Act provides that for the purposes of this Section the expression ***'family'*** shall mean the transferee, his or her wife or husband, as the case may be, and minor children, and where the transferee is a minor also his or her parents. Thus, the expressions ***'family'*** and ***'person'*** used in Section 154 of the Act are to be made applicable to human beings alone and these expressions are not extendable to a registered Company, which is an inanimate entity, and to whom juristic personality is attached by legal fiction. It is held that such a Company having juristic personality by legal fiction is not capable to have wife or husband or minor children as explained by the State Legislature itself in the explanation appended to Section 154 of U.P. Act No. 1 of 1951, therefore, these two expressions are not extendable to the petitioner Company.

10. It is to be imbibed that whenever any Act is passed or any Section is amended by Parliament or State Legislature, it intends to remove some anomalies. Here in the present case, the solemn object of Sections 152, 154, 166 and 167 of U.P. Act No. 1 of 1951 is to check the transfer by sale or gift by a Bhumidhar, any land other than tea garden in excess of 12.50 acres and another object is that no one should be made entitled to acquire Bhumidhari land more than 12.50 acres in Uttar Pradesh unless such transferee brings his/her/its case within any one of the exceptions

mentioned hereinabove in extenso. To my mind, the aforesaid interpretation of Sections 152, 154, 166 and 167 of U.P. Act No. 1 of 1951, in the present case, is in consonance with Article 38 of the Constitution, which provides that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life. The State is to minimize the inequalities in income, and endeavour to eliminate inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations. The petitioner Company is a fats and oil producing establishment with profit orientation to its members/shareholders has purchased land by several sale-deeds between January 1992 to April 1992 against the letter and spirit of the aforesaid Sections of U.P. Act No. 1 of 1951 and both the Courts below have committed no error in passing the impugned orders vesting the land in dispute in the State of Uttar Pradesh free from all encumbrances.

11. The learned Counsel for the petitioner relied upon a decision rendered by learned Judges constituting Division Bench in Civil Misc. Writ Petition No. 7111 of 1988 (Kasturi Sanyukt Sahkari Krishi Samiti Ltd. Sultanpur Vs. State of U.P. & others), decided on 16.3.1989, a copy whereof is filed and marked as Annexure – 12 to the writ petition, and the decision rendered by learned Judges constituting another Division Bench in Civil Misc. Writ Petition No. 20518 of 1998, Lokpriya Housing Co-operative Society Ltd. Vs. State of U.P. and others. Learned Counsel for the petitioner has invited my attention to a decision rendered by Supreme Court in Civil Appeal No. 1618 of 1989, State of U.P. & others Vs. Kasturi Sanyukt Sahkari Krishi Samiti Ltd., wherein the Supreme Court affirmed the decision rendered by Division Bench in Civil Misc. Writ Petition No. 7111 of 1988, decided on 16th March 1989.

12. There is no quarrel with the proposition of law laid down by the learned Judges constituting Division Bench in case of Kasturi Sanyukt Sahkari Krishi Samiti Ltd. (supra), affirmed by Apex Court in S.L.P., and decision rendered by another Division Bench of this Court in case of Lokpriya Housing Co-operative Society Ltd. (supra), but the facts of the aforesaid cases are distinguishable to the facts and circumstances of the present case. The aforesaid cases cited by the learned counsel for the petitioner fall within one of the exceptions enumerated under Sub-Section (2) of Section 154 of U.P. Act. No. 1 of 1951 whereas the learned counsel for the petitioner fails to bring the case of the petitioner Company within the four corners of any one exceptions enumerated under sub-section (2) of the said Section.

13. I have gone through the orders passed by Additional Commissioner (Administration), Bareilly Division, Bareilly dated 30.5.2001 and the order passed by Collector, Pilibhit dated 24.5.1993. In my considered opinion, the aforesaid two orders are just and proper and do not require interference under limited jurisdiction of Article 227 of the Constitution. I am of the opinion that by

the impugned orders, material justice has been done between the parties, therefore, I decline to make these orders impugned ineffective by issuing a prerogative writ under Article 227 of the Constitution, which is expected to be exercised by this Court on recognised lines evolved by various judicial pronouncements of High Courts and Supreme Court.

14. In the present case, it is apparent on the face of record that all the transfers had been made in favour of the petitioner Company between, January 1992 to April 1992. It is to be noticed that prior to 3.5.1981 for evicting the transferees, who occupied the land on the basis of sale or gift in excess of 12.50 acres in Uttar Pradesh, the Collector was required to file a suit for eviction, but aforesaid provisions had been deleted and sub-section (1) of Section 167 is substituted providing that if the land is in excess of 12.50 acres, it is to vest in the State Government free from all encumbrances. Now since it is admitted that the transfer made in favour of the petitioner Company, is in excess of 12.50 acres in the State of Uttar Pradesh, therefore, without filing suit for eviction by Collector, surplus land of more than 12.50 acres shall vest in the State Government free form all encumbrances and an argument, contrary to it, is not acceptable.

As a result of aforesaid discussion, the present writ petition is hereby dismissed in limine.

Office of the Registry of this Court is hereby directed to send a copy of this order to the Chief Secretary, State of Uttar Pradesh, Lucknow to ensure to take over possession of excess land of more than 12.50 acres from petitioner Company, which is vested in State Government free from all encumbrances through Collector, Pilibhit to avoid further delay to take over possession from the petitioner Company, which is illegally occupying the land of the State Government for more than nine years against the mandatory provisions of U.P. Act No. 1 of 1951 and also against the Constitutional philosophy enshrined under Article 38 of the Constitution.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: AUGUST 16, 2001

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

Civil Misc. Writ Petition No. 23999 of 2001

Professor Ram Vir Singh ... Petitioner
Versus
The Chairman, Kendriya Hindi Shikshan Mandal, Minister Human Resources Development Department of Education, Shastri Bhavan, New Delhi and others
...Respondents

Counsel for the Petitioner:
Sri Rajeshwar Yadav

Counsel for the Respondents:
Sri S.N. Srivastava
S.C.

Constitution of India, Article 226 Service Law – appointment of Director in Kendriya Hindi Shiksha Mandal Agra – post of Director is not purely administrative post but a academic significance post – in post senior most Professor was given the charge-appointment of I.A.S. Officer held not proper only those who possess knowledge acumen expertise in education be preferred-direction issued to appoint senior most professor to

appoint as Head of the Institute till availability regular selected candidate.

Held – Para 4

The post of Director as seen above is not purely an administrative post. The academic significance of the post is not to be whittled down by according higher priority to the administrative importance of the post. The allegations made in the writ petition that in the past as and when the vacancy occurred in the Institute, the senior-most Professor was given the charge, has not been repudiated by the respondents. In writ petition no. 2012 (S/B) 2000 decided by Lucknow Bench of the Court, Dr. N.N. Bhatnagar assailed the order, dated 18.12.2000 passed by the Secretary, Medical Health and Family Welfare, Govt. of Uttar Pradesh, giving additional charge of Acting Director of the said Institute of Health and Family Welfare to Sri M.A.A. Khan, IAS, Special Secretary, Medical Health and Family Welfare in place of Dr. N.N. Bhatnagar who happened to be the Joint Director of Medical Health and Family Welfare. The Division Bench of the Court deprecated the practice to appoint IAS officer on post of academic importance. It was held that only those persons who possessed knowledge, acumen, and expertise in Medical Sciences to the concerned discipline should be preferred for appointment as Director of the concerned Institute. We are of the view that the respondents have denied, in a way- ward manner, the opportunity to the petitioner to work as officiating head of the institute.

Case Law Discussed:

AIR 1978 SC-851
W.P. No. 2012 (S/B.) 2000
Decided on 18.12.2000 relied on.

(Delivered by Hon'ble S.R. Singh, J.)

1. Kendriya Hindi Shikshan Mandal (hereinafter referred to as the 'Mandal') is a society registered under the Societies Registration Act, 1860 the registered office of which is situated at AGRA. The objects professed in the Memorandum of Association of the aforestated society for which the Mandal is established are: "To establish and to carry on the administration and management of the Central Institute of Hindi i.e. Kendriya Hindi Sansthan, Agra (hereinafter to be called in abbreviated form as the "Sansthan")". The functions of the Mandal are to improve the standard of teaching of Hindi at various levels, to train Hindi teachers, to provide for the advanced study of Hindi language and literature and comparative linguistics of different Indian languages in relation to Hindi, to organize research in the teaching of the subject, to formulate, undertake, and facilitate such courses as are conducive to the development and propagation of Hindi as an all India language as envisaged in Art. 351 of the Constitution amongst other functions enlisted in Para 3 of the memorandum of Association Kendriya Hindi Sansthan Mandal, Agra, which is approved by the Ministry of Education & Social Welfare OM No. F-24-18/73-H (D.II) dated 1.9.1976. The Mandal consists amongst others, of the Minister/Dy. Minister of Education and Culture in the Ministry of Education and Social Welfare as its Chairman amongst other members and office bearers. The Chairman, the Vice-Chairman and the Director or Secretary are the office bearers of the Mandal. According to the bye-laws of Kendriya Hindi Sansthan Mandal, Agra, the Director of the Kendriya Hindi Sansthan shall be the Principal Executive officer of the Mandal and shall be appointed by the Ministry of Education, Government of India out of a panel of three names suggested by the Governing Council. The

Vice-Chairman is nominated by the Chairman. According to Bye-law No. 16, the Director shall be the administrative and Academic Head of the Institute i.e. Sansthan and shall be accountable/responsible for its proper functioning and without prejudice to the generality of the provisions embodied in the clause 16, the Director shall perform the duties and exercise powers as are set forth in Part II of the schedule of powers appended to the bye-laws.

2. The petitioner is working as the senior-most professor and head of the department of Tribal Language and Research and Material Production Unit of the Sansthan. Professor Mahavir Saran Jain, the Director of the Institute retired in the afternoon of 31.1.2001 and by the impugned order dated 1.2.2001, Smt. Bela Banerji, Joint Secretary Languages Human Resources Development Ministry (Madhyamik Shiksha Evam Uchatar Shiksha Vibhag New Delhi) has been drafted to take over the charge of Director of the Institute in addition to her own duties until appointment of the Director of the Kendriya Hindi Sansthan. The case of the petitioner is that being the senior-most professor in the Institute, he was entitled to take over the officiating charge of the post of Director until the appointment of a new Director.

3. The order impugned herein was challenged earlier by the petitioner in Writ Petition No. 8487 of 2001 which was disposed of by order dated 12.3.2001 attended with a direction to dispose of the representation preferred by the petitioner staking his claim for the post of Director, Kendriya Hindi Sansthan, Agra until appointment of the regular Director. Pursuant to the directions contained in the order dated 12.3.2001, the petitioner filed representation dated 17.4.2001 in continuation of his earlier representations dated 5.2.2001, 8.2.2001 and 19.3.2001. The matter was delved into by the Ministry of Human Resource Development, Department of Secondary education and Higher Education (Language Division) and by order dated 17.4.2001, the petitioner was communicated that after taking the matter into reckoning in some detail, the Selection Committee did consider his application alongwith those of other applicants but regrettably did not find him eligible for the post of Director of the Sansthan. It was also held that the post of Director being basically an administrative post could be filled up on selection basis through direct recruitment and keeping in view the responsibilities of the post of Director and the interests of the Sansthan, the post was not to be filled up simply on seniority basis. Aggrieved the petitioner has filed the instant petition canvassing the legality of the order dated 1.2.2001 and 17.4.2001.

4. We have heard Sri Rajeshwar Yadav for the petitioner and Sri S.N. Srivastava, Senior Standing Counsel Union of India at prolix length. Clause 16 of the Bye-laws indubitably envisages that the Director shall be the Administrative and Academic head of the Institute and shall be accountable for its proper functioning. It is true that post is to be filled up on selection basis through direct recruitment for which an advertisement has been issued but the question that surfaces for determination is whether the petitioner being the senior-most professor of the Sansthan was entitled to officiate as Director till appointment of a regular Director and

whether Smt. Bela Banerji, an I.A.S. officer is qualified to hold the post of Director of the Sansthan even on temporary basis? According to the advertisement (Annexure 6 to the petition), one of the essential qualifications is "(1) Nirantar Uttam Shaikshik Record ke Saath Hindi, Basha Vigyan Athva Shiksha Shastra Me Pratham Athva Uchcha Dutiye Shreni (B+) Ya Uske Samkaksha Grade Ke Saath Master Degree." The post of Director is not purely an administrative post and rather, it is the post having blend of administrative and academic importance. The director is both the Administrative and the Academic Head of the Institute as per clause 16 of the Bye-laws as passed by the Mandal. An IAS officer is not equipped with requisite qualifications in terms of the advertisement to be appointed in the post of Director. The representation filed by the petitioner has been rejected on erroneous assumptions that he was not eligible and that the post is basically an administrative post. The petitioner no doubt did satisfy the age qualification as per advertisement initially published but according to modified advertisement he concededly fulfils the age qualification (See-Para 15 of the counter affidavit). The post of Director as seen above is not purely an administrative post. The academic significance of the post is not to be whittled down by according higher priority to the administrative importance of the post. The allegations made in the writ petition that in the past as and when the vacancy occurred in the Institute, the senior-most Professor was given the charge, has not been repudiated by the respondents. In writ petition no. 2012 (S/B) 2000 decided by Lucknow Bench of the Court, Dr. N.N. Bhatnagar assailed the order dated 18.12.2000 passed by the Secretary, Medical Health and Family Welfare, Govt. of Uttar Pradesh, giving additional charge of Acting Director of the said Institute of Health and Family Welfare to Sri M.A.A. Khan, IAS, Special Secretary, Medical Health and Family Welfare in place of Dr. N.N. Bhatnagar, who happened to be the Joint Director of Medical Health and Family Welfare. The Division Bench of the Court deprecated the practice to appoint IAS officer on post of academic importance. It was held that only those persons who possessed knowledge, acumen, the expertise in Medical Sciences to the concerned discipline should be preferred for appointment as Director of the concerned Institute. We are of the view that the respondents have denied, in a way-ward manner, the opportunity to the petitioner to work as officiating head of the institute.

5. Sri S.N. Srivastava, then canvassed that the petitioner was not found suitable for giving officiating charge in that in the past when he was given officiating charge, he was visited with the penalty of warning for certain misconduct. In my opinion, submission made by the learned counsel does not commend itself for acceptance. The order rejecting the representation contains no such ground in vindication. It is well settled that validity of an order is to assayed on the anvil of reasons embodied therein and not on the basis of reasons given in the affidavit- (See Mohindra Singh v. Chief Election Commissioner, AIR 1978 SC 851). In the above conspectus, therefore, the impugned orders are liable to be quashed.

6. As a result of foregoing discussion, the petition succeeds and is

allowed. The impugned orders are quashed and the respondents are enjoined to pass on the officiating charge of the post of Director to the petitioner attended with condition that he would continue on the post until the availability of duly selected candidate.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.8.2001

BEFORE
THE HON'BLE R.R. YADAV, J.

Civil Misc. Writ Petition No. 28807 of 2001

Jagpati ...Petitioner
Versus
Chief Revenue Officer, Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Sher Bahadur Yadav

Counsel for the Respondents:
S.C.
Shri L.P. Tiwari

Constitution of India, Article 226-Quasi Judicial Order-authorities are bound to record the reason in support of conclusion-Notice under ZA for 49 A given petitioner denial the allegation-without carrying out demarcation of the chak road-eviction order by emposing Rs. 4,000/- towards damage – held – without jurisdiction – order quashed.

Held – Para 5

It is held that when judicial power is exercised by an authority normally performing executive or administrative functions, this Court insists upon disclosure of reasons in support of the order and also disclosure of definable material on the basis of which such orders are passed, the two grounds, one, that the party aggrieved in a proceeding before the High Court may have an opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous, the other, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.
AIR 1971 SC 862 – discussed.

(Delivered by Hon'ble R.R. Yadav, J.)

1. By way of filing the present writ petition, the petitioner is seeking a relief of quashing the order dated 16-6-2001 (Annexure – 2) passed by respondent no. 2 and order dated 13.7.2001 (Annexure-4) passed by respondent no. 1.

2. It is submitted by learned counsel for the petitioner that when the petitioner received notice under Z.A. form 49A prescribed by Rules framed under U.P. Act No. 1 of 1951, he filed an objection to the effect that he has not encroached upon chak road and he is in possession only over his chak which was allotted to him during consolidation operation. It is next contended by the learned counsel for the petitioner that the respondent no. 2 did not afford an opportunity to petitioner to adduce evidence in support of his objection. It is urged by the learned counsel for the petitioner that the respondent no. 2 had passed an order evicting the petitioner and imposing damages of Rs. 4,000/- upon him by a cryptic order. In support of the order impugned dated 16.6.2001 (Annexure –2 to the writ petition), the respondent no. 2 has not recorded reason as to why he was not persuaded to believe the objection filed by the petitioner that he has not encroached upon the chak-road ear-marked during consolidation operation. It

is further submitted by the learned counsel for the petitioner that aggrieved against the aforesaid order, when a revision was filed before respondent no.1, the respondent no. 1 instead of setting aside the aforesaid cryptic order, has affirmed the order passed by respondent no. 2 mechanically with closed mind, which is perse illegal.

Learned Standing Counsel, Sri L.P. Tiwari, with feeble voice, made an attempt to support the orders impugned passed by respondents no. 1 and 2.

3. From the facts and circumstances, averred in the writ petition and from perusal of impugned orders, I am satisfied that respondents no. 1 and 2, both have committed manifest error of law in passing the orders impugned evicting the petitioner and imposing damages of Rs. 4,000/- upon him on conjectures and surmises. The orders of eviction and imposition of damages upon the petitioner are not based on definable material. The respondents no. 1 and 2 have not recorded reasons in support of their conclusion. It is known to all of us that reasons have link to the conclusion and it indicate about the application of mind by the authorities to the facts and circumstances of the case.

4. It is conceded at the Bar that the orders impugned passed by respondents no. 1 and 2 are amenable to writ jurisdiction, therefore, the petitioner is entitled to demonstrate before this Court that the reasons which persuaded the Authorities to reject his case, were erroneous or based on non-existent ground. From perusal of the orders impugned, it is apparent on face of record that neither any definable material has been discussed in support of the findings nor any reason has been given by both the courts below as to why the petitioner should be evicted and as to why Rs. 4,000/- as damages, should be imposed upon him, while he is stating that he is not in possession over chak-road.

5. It is held that when judicial power is exercised by an authority normally performing executive or administrative functions, this Court insists upon disclosure of reasons in support of the order and also disclosure of definable material on the basis of which such orders are passed, on two grounds, one, that the party aggrieved in a proceeding before the High Court may have an opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

I am fortified in taking the aforesaid view from the decision rendered by Apex Court in the case of M/S Travancore Rayons Ltd. V. The Union of India and others reported in AIR 1971 SC 862.

6. Here, in the present case from perusal of the orders passed by respondents no. 1 and 2, the arbitrary eviction of the petitioner and imposition of Rs. 4,000/- as damages upon him is writ large which pricks my judicial conscience. The respondents no. 1 and 2 have no authority to pass a cryptic order of eviction against petitioner and impose damages upon him without affording an opportunity of being heard and without allowing him to adduce evidence in support of his case. The orders passed by

respondents no. 1 and 2 are perse illegal and not sustainable in the eye of law. In the facts and circumstances of the present case, the respondents no. 1 and 2 have no jurisdiction to pass impugned orders without carrying out demarcation on the spot of the chak-road alleged to be encroached upon by the petitioner and his chak adjoining to the chak-road on the basis of existing survey map.

7. As a result of aforementioned discussion, the instant writ petition is allowed and the impugned order dated 13.7.2001 (Annexure-4) and dated 16.6.2001 (Annexure – 2) passed by respondents No. 1 and 2 respectively are hereby quashed and the case is remanded to respondent no. 2, Tahsildar, Handia, Allahabad with a direction to decide the case afresh on merit by a speaking order, after giving reasonable opportunity of hearing to the parties in the light of observation made in body of the order.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: THE ALLAHABAD: 13.7.2001

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

Criminal Revision No. 1366 of 1989

Kamal Uddin ...Applicant
Versus
Smt. Raisa Begum and another
...Opposite Parties

Counsel for the Applicant:
Sri M. Islam

Counsel for the Opposite Parties:
Sri M.A. Qudeer

Section 125 (1) Cr.P.C.- the order passed under section 125 (1) Cr.P.C. prior to the enforcement of the Act of 1986 had not been affected or curtailed in any way and those orders will operate. (Held in para 8)

Act of 1986 does not provide any procedure for setting aside an order of maintenance or order on the application under section 127 Cr.P.C. that has already been passed before the Act of 1986 came into force. This Act does not say that any decree or order of the court or order for maintenance passed in favour of Muslim Woman will become void, or will be revised in accordance with the provisions of the Act 1986. So the Act of 1986 does not disturb existing or accrued rights that were there on the date of the passing of the Act of 1986, except to the extent specifically provided in section 7.

(Delivered by Hon'ble U.S. Tripathi, J.)

1. This revision has been directed against the order dated 4.8.1989, passed by Special Judge/Addl. Sessions Judge, Hamirpur in Criminal Revision No. 129 of 1988, allowing the revision and setting aside the order dated 6.9.88, passed by the Magistrate and directing the Magistrate to ensure that the maintenance allowance of Rs. 130/- per month to the opposite party no. 1 be paid regularly in the light of observation made by this court in order dated 21.7.86 in Criminal Misc. Case No. 8812 of 1986.

2. The facts giving rise to this revision are that the applicant and respondent no. 1 are husband and wife respectively. The wife respondent no. 1 moved an application under section 125 Cr.P.C. against the applicant before the Magistrate for grant of maintenance allowance at the rate of Rs. 250/- per month. Here above application was allowed by the Chief Judicial Magistrate,

Hamirpur, vide order dated 28.11.85 and the applicant was directed to pay maintenance allowance at the rate of 250/- per month. The applicant challenged the above order in a revision before the Sessions Judge, but the same was dismissed on 24.4.86. Thereafter the applicant moved this court in a petition under section 482 Cr.P.C. (Criminal Misc. Application No. 8812 of 1986). In the above petition it was contended that the opposite party no. 1 was a divorced Mohammadan woman and, therefore, was not entitled to receive maintenance allowance with effect from the date of passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986. This court observed that an identical question was raised by the petitioner in execution proceedings pending before the Magistrate who had accepted the contention and has held that divorced Mohammadan woman is not entitled to get maintenance allowance on the basis of those orders from the date of commencement of the Act. That the above order of the Magistrate, in execution proceedings will therefore, be considered and determined in the revision filed by the wife and it was not necessary to determine the said question in the above proceedings under section 482 Cr.P.C. With the above observation the petition was dismissed, vide order dated 1.2.89.

3. It appears that during pendency of the petition under section 482 Cr.P.C. before this court, the wife opposite party no. 1 moved an application under section 128 Cr.P.C. for realization of maintenance allowance from 1.7.1987 up to the date of application at the rate of Rs. 250/- per month. In the said case, the applicant raised objection that he had divorced the opposite party no. 1 in the year 1983 and, therefore, she being a divorced wife was not entitled to maintenance allowance after enforcement of the Muslim Woman (Protection of Rights on Divorce) Act, 1986 (hereinafter called the Act of 1986). The learned Magistrate on hearing learned counsel for the parties held that it has been proved that the applicant divorced the opposite party no. 1 on 20.1.1984 and, therefore, her right to recover the maintenance allowance were effective only up to 19.5.1986, before the date of enforcement of the Act of 1986. Consequent upon the enforcement of the Act of 1986, the opposite party 1 was not entitled to any maintenance allowance thereafter. With this observation he rejected the application.

4. The opposite party no. 1 filed Criminal Revision no. 129 of 1988 against the above order of the Magistrate and the learned Sessions Judge on hearing learned counsel for the parties and relying on single bench decision of this court in Mohd. Azizur Rehman Khan Vs. Smt. Ibrat Ara, reported in 1989 Lucknow Criminal Reports page 7, held that the rights which had already been acquired by the wife and that had consequent(sic) to her under provisions of Cr.P.C. would not come to an end just by passing of the Act of 1986 and the right which had accrued and become vested continued to be capable of being enforced notwithstanding that the repeal of the statute under which that right accrued unless repealing statute has taken away such right expressly or impliedly. With this observation he allowed the revision of opposite party no. 2, set aside the order of the Magistrate dated 6.9.88 and directed the Magistrate to ensure that maintenance allowance of Rs. 130/- per month be paid

regularly in the light of the interim order passed by this court on 21.7.86 in Criminal Misc. Application No. 8812 of 1986.

5. The above order of the Sessions Judge has been challenged in this revision.

6. I have heard Sri M.A. Islam learned counsel for the applicant and learned AGA as none appeared from the side of opposite party no. 1.

7. It is not disputed that the applicant and opposite party no. 1 were the husband and wife respectively. It is also not disputed that the opposite party no. 1 was divorced during pendency of the application under section 125 Cr.P.C. before the Magistrate. It is also not disputed that the opposite party no. 1 had not remarried. Under section 125 Cr.P.C. even a divorced wife if not remarried is entitled to maintenance allowance as the definition of wife given in Explanation (b) to section 125 Cr.P.C. included a woman who has been divorced by her husband or has obtained a divorce from her husband and has not remarried.

8. The contention of the learned counsel for the applicant was that with effect from 19.5.1986 the Act of 1986 came into force and, therefore, after enforcement of the Act of 1986 a divorced Muslim woman was not entitled to recover the maintenance allowance from her husband. Having gone through the relevant provisions of the Act of 1986. I find no force in the above contention. The applicability of the Act of 1986 was considered by this court in case of Mohd. Azizur Rehman Khan vs. Smt. Ibrat Ara 1989, Lucknow Criminal Reports, page 7 and it was held that the Act of 1986 does not provide any procedure for setting aside an order of maintenance or order on the application under section 127 Cr.P.C. that has already been passed before the Act of 1986 came into force. This Act does not say that any decree or order of the court or order for maintenance passed in favour of Muslim Woman will become void, or will be revised in accordance with the provisions of the Act of 1986. So the Act of 1986 does not disturb existing or accrued rights that were there on the date of the passing of the Act of 1986, except to the extent specifically provided in section 7. The above decision of single Judge was affirmed by a subsequent decision of Division Bench of this Court in Smt. Shamim Bano Vs. Mohd. Ismail and others, 1992, JIC, 828. In the said case the Division Bench of Lucknow Bench of this court held that none of the sections of the Act of 1986 contain non-obstante clause 'notwithstanding any judgement decree or order of a court of law'. In the absence of such a clause it is not possible to hold that the order of maintenance made in favour of the appellant has become inexecutable from the date of enforcement of Act of 1986. Sections 3 and 4 do contain non -obstante clause, but they do not supersede judgement decree or order of a court. Section 3 opens with the words 'notwithstanding any thing contained in any other law for the time being in force.' The term 'law' used here obviously means law made by the Legislature and not judgment, decree or order of Court. The non-obstante clause in Section 4 reads ' notwithstanding any thing contained in the foregoing provisions of this Act or any other law for the time being in force'. In view of this non obstante clause the provisions of section 4 prevail over earlier

provisions of the same Act and also over the provisions of any other enactment in force. The non-obstante clause do not supersede the order of maintenance passed under section 125 (1) Cr.P.C.

9. It was further held that there are other provisions in the Act of 1986 which so that the Parliament never intended to nullify an order of maintenance made under section 125 (1) Cr.P.C. Section 5 of the Act of 1986 preserves the provisions of Section 125 to 128 of the Code for Muslims……If the applicability of these provisions to Muslims has been specifically preserved there is no occasion to treat the order passed under section 125 (1) prior to enforcement of Act of 1986 as inexecutable on the mere application of the husband against whom the order is operating, when no provision to that effect has been made in the Act itself. Considering the effect of transitory provision contained in section 7 of the Act it was held that this section also does not say any thing regarding the order of maintenance already passed before the commencement of the Act of 1986.

10. In the result the order passed under section 125 (1) Cr.P.C. prior to the enforcement of Act of 1986 had not been affected or curtailed in any way and those orders will operate. Thus, it was rightly held by the learned Addl. Sessions Judge that order of maintenance passed earlier is executable.

11. Therefore, the revision has no force.

12. The revision is accordingly dismissed and it is made clear that the learned Magistrate shall ensure the payment of maintenance allowance to the opposite party no.1 at the rate of Rs. 250/- per month as the interim order dated 21.7.86, passed by this Court in Criminal Misc. Case No.8812 of 1986 stood vacated when the above petition was finally disposed of on 1.2.1989.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.9.2001

BEFORE
THE HON'BLE R.R. YADAV, J.

Civil Misc. Writ Petition No. 31868 of 2001

Mansha Ram and another ...Petitioner
Versus
Deputy Director of Consolidation, Bulandshahr and others ...Respondents

Counsel for the Petitioner:
Sri B.D. Mandhyan

Counsel for the Respondent:
S.C.

Indian Limitation Act- Section 5- practice and procedure- Condonation of delay-a condition precedent- merit of the case should not be touched without candoning the delay-consolidation authorities rejected the objection on merit without candoning the delay- held without jurisdiction.

Held- para 6

It is settled law that condonation of delay is a condition precedent to enter into the merits of the case. In the present case, although delay has not been condoned, yet the Deputy Director of Consolidation has entered into the merits of the case. It is held that unless delay is condoned, the Deputy Director of Consolidation has no jurisdiction to embark upon the merits of the case. As a matter of fact, a court or tribunal gets jurisdiction to decide a lies between the

parties on merits only after condoning the delay.

(Delivered by Hon'ble R.R. Yadav, J.)

1. Heard the learned counsel for the petitioners and learned Standing Counsel.

2. The present writ petition is directed against the order dated 17.10.1985, passed by the Assistant Consolidation Officer in conciliation proceedings, against the order dated 20.1.2001 passed by Settlement Officer, Consolidation in appeal dismissing it on the ground of limitation and the order dated 6.8.2001, passed by the Deputy Director of Consolidation, affirming the order passed by Settlement Officer, Consolidation and also touching the merits of the case.

3. From perusal of the orders impugned, it appears that Assistant Consolidation Officer has passed an order on 17.10.1985 on the basis of alleged conciliation wherein it is alleged that the petitioners have signed it. It is urged by the learned counsel for the petitioners that the petitioners are illiterate persons. They are living in remote village and are not conversant with legal complications. It is submitted by the learned counsel for the petitioners and also supported from the material available on record that after taking extract of Khatauni it transpired that on the basis of conciliation, the area of plot no. 562 was reduced from 1 bigha 13 biswa to 18 biswa only, causing loss of 15 biswa land to the petitioners. It is averred by the petitioners in the present writ petition that neither they have signed any conciliation proceeding before the Assistant Consolidation Officer nor they have any knowledge about such conciliation reducing 15 biswa area of their plot no. 562 from 1 bigha 13 biswa to 18 biswa.

4. The Settlement Officer, Consolidation has dismissed the appeal filed by the petitioners on the ground of limitation, holding that the appeal has been filed after inordinate delay of 13 years. When the matter came up before Deputy Director of Consolidation, he affirmed the order passed by the Settlement Officer, Consolidation, touching the merits of the case.

5. It is amazing to note that the Settlement Officer, Consolidation and the Deputy Director of Consolidation, without directing demarcation about the actual area of plot no. 562 on the spot, have passed orders that during consolidation operation, the area of the aforesaid plot can neither be increased nor can be decreased. The aforesaid observation made by the Deputy Director of Consolidation cannot be said to be accurate without directing demarcation of the aforesaid plot on the spot in view of the provisions contained in Chakbadi Manual.

6. It is settled law that condonation of delay is a condition precedent to enter into the merits of the case. In the present case, although delay has not been condoned, yet the Deputy Director of Consolidation has entered to the merits of the case. It is held that unless delay is condoned, the Deputy Director of Consolidation has no jurisdiction to embark upon the merits of the case. As a matter of fact, a court or tribunal gets jurisdiction to decide a lie between the parties on merits only after condoning the delay.

7. From perusal of the orders passed by the Settlement Officer, Consolidation as well as Deputy Director of Consolidation, I am satisfied that Settlement Officer, Consolidation and Deputy Director of Consolidation have not construed the provisions of Section 5 of the Indian Limitation Act liberally, specially when it is demonstrated before them that the plot in dispute is excluded from Chak operation. No finding is recorded that the alleged conciliation before the Assistant Consolidation Officer bears the signatures or thumb impressions of the petitioners. The question of conciliation arises before Assistant Consolidation Officer if some dispute is detected at the time of field to field 'Partal' and conciliation proceeding pre-supposes two parties between whom conciliation is to be recorded. Here, in the present case, there is no opposite party, therefore, reducing the area of plot no. 562 from 1 bigha 13 biswa to 18 biswa, causing serious prejudice to the petitioners, is not acceptable without directing demarcation of the plot in dispute on the spot. When the matter was raised before the Settlement Officer, Consolidation by the petitioners by filing an appeal, instead of dismissing the same on the ground of limitation, the settlement officer, Consolidation ought to have got the aforesaid plot demarcated on the spot to advance substantial justice to the petitioners who belong to poor peasantry class and are illiterate persons.

8. It is to be imbibed that consolidation proceedings are settlement proceedings for all time to come, hence the petitioners cannot be deprived of 15 biswa of their land of plotno.562 without demarcation on the spot. Such disputes cannot be settled by any stretch of imagination by Assistant Consolidation Officer on the basis of conciliation recorded by him without demarcating the plot in dispute on the spot. In such a case the poor petitioners should not have a feeling that their claim has been negatived arbitrarily. Nothing corrodes the human heart more than the feeling of injustice.

9. In my considered opinion the controversy involved in the present petition cannot be resolved without demarcating plot no. 562 of the petitioners on spot.

10. What has been discussed hereinabove, the instant writ petition is allowed. The order dated 17.10.1985, passed by Assistant Consolidation Officer, the order dated 20.1.2001, passed by Settlement Officer, Consolidation and the order dated 6.8.2001 passed by Deputy Director of Consolidation are hereby quashed and the case is remanded back to Settlement Officer Consolidation to decide it afresh on merits in accordance with law in the light of observations made in the body of this order.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.9.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Writ Petition No. 5896 of 2000

Dr. Mehboob Alam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the petitioner:
Sri B.D. Pandey
Sri J.P. Misra

Counsel for the Respondent:
A.G.A.
Sri Vinod Prasad

Medical Council Act 1956- Section 15 (2) and (3)- Right to Practice Bachelor of Unani Medicine and Surgery- whether entitled to prescribe drugs in allopathic?- held- 'No" G.O. dated 27.10.1950 and 13.3.61 can not override the statutory provisions.

Held- para 17

In view of this clear statutory provision, the Government orders issued by the Uttar Pradesh Government, which are antecedent in point of time, have become nonest and cannot be of any assistance to the petitioner. The Government orders being contrary to an Act of Parliament are wholly ultra vires.
Case law discussed.
AIR 1996 SC- 2111 Relied on
AIR 1999 SC-468 Relied on

(Delivered by Hon'ble G.P. Mathur, J.)

1. The question which requires consideration here is whether a person having the degree of Bachelor of Unani Medicine and Surgery is entitled to practice modern medicine and to prescribe allopathic drugs.

2. The petitioner obtained the degree of Kamil-e-Tib-0-Jarahat from Aligarh Muslim University in the year 1990 which is also described as Bachelor of Unani Medicine and Surgery in the degree awarded by the University, a photocopy of which has been filed as Annexure-2 to the writ petition. The Janta Nursing Home being run by the petitioner in Kolhui district Maharajganj was inspected by a team consisting of a senior Medical Officer. A S.D.M. and a Drug Inspector on 26.8.2000 and it was found that allopathic drugs were being prescribed and administered to patients. A F.I.R. was then lodged under section 420 I.P.C. and section 15 of Indian Medical Council Act, against the petitioner and one Aurangzeb, who claimed to be the compounder at the Nursing Home. The present writ petition under Article 226 of the Constitution has been filed for quashing of the F.I.R. and investigation of the case.

3. The petitioner claims that he was awarded the degree of Bachelor of Unani Medicine and Surgery (for short BUMS) by Aligarh Muslim University in the year 1990 and thereafter he completed six month's rotatory internship at A.K. Tibbiya College, Aligarh Muslim University, Aligarh and in the District Hospital, Sahjahanpur. His name has been entered in the register maintained by Board of Indian Medicine on 29.9.1992. On the basis of the aforesaid degree and registration of the name, the petitioner contends that he is entitled to practice as a doctor and prescribe allopathic medicines as well apart from unani medicines.

4. In order to examine the contention raised it is necessary to briefly refer to relevant statutory provisions which have a bearing on the controversy raised. The statutes which have to be looked into are as under:

U.P. ACTS

(1) The United Provinces Medical Act, 1917 (U.P. Act No. III of 1917)

(2) The United Provinces Indian Medicine Act, 1939 (U.P. Act X of 1939)

CENTRAL ACTS

(1) Indian Medical Degrees Act, 1916 (Act No. VII of 1916)

(2) Indian Medical Council Act, 1956 (Act No. 102 of 1956)

(3) Indian Medicine Central Council Act, 1970 (Act No. 48 of 1970)

(4) Homeopathy Central Council Act, 1973 (Act No. 59 of 1973)

(5) Drugs and Cosmetics Act, 1940 (Act No. 23 of 1940)

The preamble of the United Provinces Indian Medicine Act, 1939, which was published on September 23, 1939 says that it is an Act to provide for the development of the Indian Systems of Medicines and to regulate their practice in the United Provinces. Section 2 gives the definition and sub- section (ii), (iii-b), (v), (vii), (x) and (xi) thereof are being reproduced below:

"(ii) 'Indian system of medicine' means the Ayurvedic or the Unanai Tibbi system of medicine, whether supplemented or not by such modern advances as the Board may from time to time have determined.

(iii-b) 'Faculty' means 'Faculty of Ayurvedic and Unani Tibbi systems of medicine' constituted under section 36-A.

(v) 'Practitioner' means a practitioner of an Indian system of medicine.

(vii) 'Register' means the register of Vaidyas and Hakims, surgeons and midwives maintained under section 25.

(viii)' Registered practitioner' means a practitioner whose name is for the time being entered in the register.

(x) 'Vaidya' means a practitioner of Ayurvedic system of medicine and surgery.

(xi) 'Hakim' means a practitioner of Unani Tibbi system of medicine and surgery.'

5. The definition clause of the Act shows that the Ayurvedic or the Unani Tibbi System of medicine is known as Indian System of Medicine and, therefore, a vaidya who practices Ayurvedic system and a Hakim who practices Unani Tibbi system come within the purview of Indian Medicine system. Section 3 of this Act provides that the State Government may establish a Board to be called as the Board of Indian Medicine. Section 25 provides that the Registrar of the Board shall maintain a register of Vaidyas and Hakims practising in Uttar Pradesh in the prescribed form.

6. The Indian Medicine Central Council Act, 1970 was enacted by the Parliament and was published on 21.12.1970. Its preamble shows that it is an Act to provide for the Constitution of a Central Council of Indian Medicine and the maintenance of a Central Register of Indian Medicine and for matters connected therewith. Section 2 (1) of this Act gives the definition clause and clauses (b), (c), (d), (e), (j) and (h) of section 2 (1) read as follows:

'(b) 'Board' means a Board, Council, Examining Body or faculty of Indian Medicine (by whatever name called)

constituted by the State Government under any law for the time being in force regulating the award of medical qualifications in, and registration of practitioners of, Indian medicine.

(c) 'Central Council' means the Central Council of Indian Medicine constituted under section 3.

(d) 'Central Register of Indian Medicine' means the register maintained by the Central Council under this Act.

(e) 'Indian medicine' means the system of Indian medicine commonly known as Ashtang, Ayruveda, Siddha or Unani Tibb whether supplemented or not by such modern advances as the Central Council may declare by notification from time to time.

(h) 'recognized institution' means any institution within or without India which grants degrees, diplomas or licences in Indian medicine.

(j) 'State Register of Indian Medicine' means a register or registers maintained under any law for the time being in force in any State regulating the registration of practitioners of Indian medicine.'

7. Section 2(1) (e) shows that 'Indian Medicine' means the system of Indian medicine commonly known as Ashtang Ayurveda, Siddha or Unani Tibb. It is important to note that Allopathic system of medicine is not included in the aforesaid definition. Chapter III of this Act deals with recognition of medical qualifications and section 14 thereof provides that the medical qualifications granted by any University, Board or other medical institution in India which are included in the Second Schedule shall be recognized medical qualifications for the purposes of this Act. The Second Schedule to the Act gives a long list of recognized medical qualifications in Indian medicine granted by Universities, Boards and other Medical Institutions in India. Part I of this Schedule deals with Ayaurveda and Siddha and Part II deals with Unani. The degree possessed by the petitioner viz. Kamil-e-Tib-Jarahat (B.U.M.S.) is noted at Serial No. 21 of Part II of the Schedule. Section 17 (1) of this Act provides that subject to the other provisions contained in this Act, any medical qualification included in the Second Schedule shall be sufficient qualification for enrolment on any State Register of Indian Medicine. Sub-Section 2 of section 17 imposes certain restrictions and clause (b) thereof lays down that no person other than a practitioner of Indian medicine who possesses a recognized medical qualification and is enrolled on a State Register or the Central Register of Indian Medicine shall practice Indian Medicine in any State. This provision clearly shows that unless a person possesses a recognized medical qualification as laid down in the Schedule of the Act and is enrolled on a State Register or the Central Register of Indian Medicines, he cannot practice Indian medicine. A similar restriction is contained in clause (a) of section 17 (2) namely, that unless a person possesses a recognized medical qualification and is enrolled on a State Register or the Central Register of Indian medicine, he cannot hold office as Vaidya, Siddha, Hakim or Physician or any other office in Government or in any institution maintained by a local or other authority. Section 17 (4) provides that any person who acts in contravention of any

provisions of sub section (2) shall be punished with imprisonment for a term which may extend to one year or with fine which may extend to one thousand rupees or with both. The provisions of Indian Medicine Central Council Act, 1970 show that a person holding a qualification recognized by the aforesaid Act in the system of Indian medicine commonly known as Ashtang, Ayurveda, Siddha or Unani Tibb is entitled to practice only in the discipline in which he has acquired the qualification. The Act does not authorize him to practice in Allopathy system of medicine.

8. Though it is not very relevant for the decision of the present case but as we are dealing with the controversy we may also take notice of Homoeopathy Central Council Act, 1973. Section 2(1) of the Act gives the definition and clauses (d), (g) and (i) thereof read as under:

"(d) 'Homoeopathy' means the Homoeopathic system of medicine and includes the use of Biochemic remedies.

(g) 'recognized medical qualification' means any of the medical qualifications in Homoepathy, included in the Second or the Third Schedule.

(i) 'State Register of Homeopathy' means a register or registers maintained under any law for the time being in force in any State regulating the registration of practitioners of Homoepathy."

9. Section 13 (1) provides that the medical qualifications granted by any University, Board or other Medical Institution in India which are included in the Second Schedule shall be recognized medical qualification for the purposes of this Act. The Second Schedule gives a long list of recognized medical qualifications in Homoepathy which are granted by Universities, Boards or Medical Institutions in India. Section 15 provides that no person other than a practitioner of Homoeopathy who possesses a recognized medical qualification and is enrolled on a State Register or the Central Register of Homoepathy shall practice Homoepathy in any State. This Act also does not authorize a practitioner of Homoeopathy, who only possesses a recognized medical qualification as enumerated in Second or Third Schedule of this Act to practice Allopathy or any other system of Indian medicine like, Ashtang, Ayurveda, Siddha or Unani Tibb.

We may now consider the statutes which deal with Allopathic medicines.

10. The earlier Act namely, the United Provinces Medical Act, 1917 may be considered first. Section 2 of this Act gives the definition and sub-section (b) provides that the expression ' the Council' means the Council established under section 3 and sub-section (c) provides that the expression ' registered practitioner' means a person registered under the provisions of this Act. Section 3 provides that a Council shall be established and called 'Uttar Pradesh Medical Council' and such council shall be a body corporate and have perpetual succession and common seal. Section 16 provides that the Council shall, makes orders for regulating the maintenance of the register of medical practitioners. Section 18 provides that every person referred to in the Schedule shall, be entitled to have his name entered in the register of medical practitioners. The Schedule to the Act

enumerates and identifies the persons who are entitled to have their names entered in the Register of medical practitioners. Para 1 of the Schedule is being reproduced below:

"Every person who holds a degree, diploma or licence which is included in Schedule I or II to the Indian Medical Council Act, 1933 (XXVII of 1933), or granted by the Universities in India established by an Act of the Governor-General in Council or of the Governor of any Province in India."

11. Paragraphs 2 and 3 of the Schedule enumerate certain other categories of persons. The provisions of this Act show that a person holding any kind of degree or diploma or certificate in Ashtang, Ayurveda, Siddha or Unani Tibb is not included in the Schedule and he cannot get his name entered in the register of medical practitioners which is maintained under this Act as the Schedule refers to only Allopathic qualification.

12. Now we come to most important enactment namely, The Indian Medical Council Act, 1956. Section 2 of the Act gives the definition and sub-sections (d), (f), (h) and (k) are being reproduced below:

" (d) 'Indian Medical Register' means the medical register maintained by the Council.

(f) 'medicine' means modern scientific medicine in all its branches and includes surgery and obstetrics, but does not include veterinary medicine and surgery.

(h) 'recognized medical qualification' means any of the medical qualifications included in the Scheduled.

(k) 'State Medical Register' means a register maintained under any law for the time being in force in any state regulating the registration of practitioners of medicine."

13. Section 11 of this Act provides that the medical qualifications granted by any University or Medical Institution in India which are included in the First Schedule shall be recognized medical qualifications for the purposes of this Act. The First Schedule enumerates the recognized medical qualifications granted by Universities or Medical Institutions in India. Section 15(1) provides that subject to the other provisions contained in this Act, the medical qualifications included in the Schedule shall be sufficient qualification for enrolment on any State Medical Register. Section 15(2) (b) provides that save as provided in section 25, no person other than a medical practitioner enrolled on a State Medical Register, shall practice medicine in any State. Section 15(3) lays down that any person who acts in contravention of any provision of sub section (2) shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. An analysis of the relevant provisions of this Act show that ' medicine' means the modern scientific medicine in all its branches and includes surgery and obstetrics. It is entirely different from Indian medicine commonly known as Ashtang, Ayurveda, Siddha or Unaani Tibb. It is only a person who possesses the qualification enumerated in

the First Schedule of this Act, and which have been recognized for the purposes of the Act, is entitled for enrolment on any State Register and unless a person is enrolled on a State Register he is not entitled to practice medicine namely, modern scientific medicine in all its branches including surgery and obstetrics in any State.

14. There is no dispute that the petitioner does not possess any one of the qualifications which have been recognized and have been enumerated in the First Schedule of Indian Medical Council Act, 1956. He is neither enrolled on a State Medical Register maintained under the aforesaid Act nor he is entitled to claim enrolment, as he does not possess the requisite qualification. Consequently, he is not entitled to practice ' medicine' in view of clear bar created by Section 15 (2) (b) of this Act. Since the allegations in the F.I.R. are that he was practising and was prescribing allopathic medicines, which comes within the definition of medicine as given in section 2 (f) of the Act, he has committed an offence punishable under section 15 (3) of the Indian Medical Council Act, 1956.

15. The scope of section 15 of Indian Medical Council Act, 1956 was considered in Poonam Verma Versus Ashwin, A.I.R. 1996 S.C. 2111 and in para 31, it was held as follows:

"31. The impact of the above provisions is that no person can practice medicine in any State unless he possesses the requisite qualification and is enrolled as a Medical Practitioner on State Medical Register. The consequences for the breach of these provisions are indicated in Sub-section (3). If a person practices medicine without possessing either the requisite qualification or enrolment under the Act on any State Medical Register, he becomes liable to be punished with imprisonment or fine or both."

16. In the same decision, it was observed in para 34 and 36 of the reports that the significance of mutual exclusion is relevant inasmuch as the right to practice in particular system of medicine is dependent upon registration which is permissible only if qualification, and that too, recognized qualification is possessed by a person in that system. It was further observed that merely because the Autonomy and Physiology are similar, it does not mean that a person having studied one System of Medicine can claim to treat the patient by drugs of another system which he might not have studied at any stage.

17. The petitioner has filed a supplementary affidavit wherein he has annexed copies of Government Orders issued by the State Government on October 27, 1950 and March 17, 1961. The first Government Order says that under section 39 (1) and 41 (2) of United Provinces Indian Medicine Act, 1939, the Ayurvedic and Unani practitioners who have been registered under the said Act enjoy same status as the Allopathic Registered Practitioner and that there is no provision in the Indiana Drugs Act and Rules framed thereunder specifically prohibiting the registered Ayurvedic and Unani practitioners from prescribing sulpha drugs and accordingly no objection should be raised to Vaidyas and Hakims using sulpha drugs, streptomycin and other allopathic medicines and drugs in treating their patients. By the second Government Order, the government

declined to grant permission to withdraw the earlier Government order. On the strength of the aforesaid Government Orders, Shri J.P. Mishra has urged that the petitioner is entitled to prescribe drugs used in allopthatic system of medicine. Sub sections (2) and (3) of section 15 of Indian Medical Council Act, 1956 were inserted by an amendment dated June 16, 1964 and they clearly prohibit practice of medicine by any person who is not enrolled in the State Medical Register. In view of this clear statutory provision, the Government orders issued by the Uttar Pradesh Government, which are antecedent in point of time, have become nonest and cannot be of any assistance to the petitioner. The Government orders being contrary to an Act of Parliament are wholly ultra vires.

18. Sri Misra also placed reliance upon a notification dated October 30, 1996 issued by Central Council of Indian Medicine which says that institutionally qualified practitioner of Indian System of Medicine (Ashtang, Ayurveda, Sidda and Unani) are eligible to practice Indian System of Medicine and modern medicine including surgery, gynaecology and obstetrics based on their training and coaching prescribed by Central Council of Indian Medicine after approval of the Government of India. The notification further says that the right of practitioners of Indian System of Medicine to practice modern scientific system of medicine (Allopathic Medicine) are protected under section 17 (3) (b) of Indian Medicine Central Council Act, 1970. On the strength of the aforesaid notification, it has been urged that the petitioner is entitled to practice Allopathic medicine. The effect of this notification has been considered by the Apex Court in Dr. Mukhtiar Chand Versus The State of Punjab and others, A.I.R. 1999 S.C. 468 and in para 46 and 47 of the reports, it was held as under:

46… In our view, all that the definitions of 'Indian medicine' and the clarifications issued by the Central Council enable such practitioners of Indian medicine is to make use of the modern advances in various sciences such as Radiology Report, (X-ray). Complete blood picture report, lipids report, E.C.G., etc. for purposes of practising in their own system. However, if any State Act recognizes the qualification of integrated course as sufficient qualification for registration in the State Medical Register of that State, the prohibition of Section 15 (2)(b) will not be attracted.

47. A harmonious reading of Section 15 of 1956 Act and Section 17 of 1970 Act leads to the conclusion that there is no scope for a person enrolled on the State Register of Indian medicine or Central Register of Indian medicine to practise modern scientific medicine in any of its branches unless that person is also enrolled on a State Medical Register within the meaning of 1956 Act.'

19. Neither it is averred in the writ petition nor it has been urged that the petitioner is enrolled on a State Medical Register as defined in section 2 (k) of Indian Medicine Council Act, 1956 and, therefore, he is not entitled to practice modern scientific medicine or to prescribe allopathic drugs. Learned counsel has also referred to certain provisions of Drugs and Cosmetics Rules but in our opinion they are wholly irrelevant as they deal with import, manufacture, distribution and

sale of drugs and they neither confer nor deal with the right to practice medicine.

20. The allegations made in the F.I.R., if accepted on their face value, show that the petitioner has committed as offence punishable under section 15 (3) of Indian Council Act, 1956. No ground has, therefore, been made out to quash the F.I.R., which clearly discloses commission of an offence.

21. Before parting with the case, we would like to place on the record that Sri Vinod Prasad, who was appointed amicus curiae to argue the case, rendered valuable assistance to Court.

22. The writ petition lacks merit and is hereby dismissed. The stay order staying the arrest of the petitioner, as extended from time to time, is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2001

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

Civil Misc. Writ Petition No. 30483 of 2001

Kamlesh Kumar Pandey ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Shri Manoj Misra

Counsel for the Respondents:
S.C.

Constitution of India, Article 141, Binding Precedent-View taken by learned Single Judge of High Court just contrary to the settled view of Supreme Court- can not be treated as a binding precedent.
Held- Para-7
Case law discussed.
(1994) 4 SCC- 448, (1994) 6 SCC-560

The above conclusion is without referring to the 'aims and objects' and various provisions of 'Dying in Harness Rules' as well as ignoring binding 'precedents' rendered by Supreme Court directly touching the issue in question. The said judgement, therefore, cannot be treated as 'binding precedent' having force of law and have to be treated as 'per incurium'- Supreme Court judgements are binding on this Court. It is mandatory upon this Bench to decide this case, following the principles to consistency and finality, in accordance with the judgement of the Apex Court in the case of State of Haryana Versus Naresh Kumar Bali (1994) 6 SCC 560 (Para 8).

Constitution of India- Compassionate appointment- once given appointment on class 4th post- claimant cannot be permitted claim higher post- the distress and immediate hardship do not survive in future- if permitted- there shall be endless litigation.
Held- Para 9
Claimant for compassionate appointment cannot be allowed to claim higher post in future as by that time, 'distress and' immediate hardship' do not survive after accepting job may be lone Class IV post. Permitting promotion/appointment to higher grade will be in negation of the very object of compassionate appointment, may be on Class IV post under existing situation out of will and volition, the 'chaper' of Dying in Harness is closed. No one should be permitted to re-agitate this matter in future on the basis of change of circumstances in future leaving everything in turmoil and in a state of indecisiveness. It if is permitted no litigation will ever come to an end.
Case law discussed:
J.T. 1994(3) SC-525

(1996) 2 U.P.L.B.E.C. 843 (49)
J.T. 1996 (6) SC-7
J.T. 2001 (6) SC-260

(Delivered by Hon'ble A.K. Yog, J.)

1. Heard Sri Manoj Mishra, Advocate, representing the Petitioner and Sri S. K. Garg, learned Standing Counsel appearing on behalf of all the Respondent Nos. 1 & 2. Petition is finally decided at the admission stage as contemplated under 'Rules of Court' and also agreed by the learned counsels for the parties.

2. One Shyam Narain Pandey (father of the Petitioner) holding a Class III post in a Department of Government of U.P. died on 29.6.1999. Petitioner applied for compassionate appointment, disclosing that he had passed Intermediate Examination-1988 from U.P. Board. There is no explanation for the period between 1988 to June 1999. Petitioner was given compassionate appointment under Dying in Harness Rules vide appointment letter dated 18-04-2000/Annexure-6 to the Writ Petition mentioning that services of the Petitioner were absolutely temporary and liable to be terminated any time without prior notice. It also recited that Petitioner's services were initially on probation of one year. Petitioner accepted, along with above conditions, the offer vide said appointment letter (Writ Petition Annexure-6) without raising objection regarding recital in the appointment letter to the effect that his appointment- (i) on Class IV post was temporary and/or (ii) not in consonance with regard to his academic qualification which entitled him to an appointment on Class III post.

3. Vide para 9 of the Writ Petition it is alleged that Petitioner filed representation dated 30.8.2000 as well as representations dated 22-09-2000, 09-11-2000, 07-03-2001 and 13-06-2001, filed as Annexures-7, 8, 9, 10 and 11 respectively. Petitioner remained contented for about 16 months (30-08-2001 till filing of Writ Petition) except for filing alleged representations and has now approached the Court by means of this Writ Petition. It may be noted that the Petitioner has failed to disclose as to how, when and in what manner alleged Representations were filed. Endorsement on it does not show who received it. Endorsement on Annexure-8 to Writ Petition shows that it is got received in some Complaint Cell.

4. Learned counsel for the Petitioner, at the outset, submitted that present Writ Petition, as far as the relief regarding appointment on a higher post in Class III post is concerned, is not pressed.

Even otherwise, the Petitioner having once accepted an appointment on Class IV post, cannot be permitted to re-open the closed chapter.

5. Petitioner, once appointed on Class IV post in the past, cannot claim in future, in view of his educational qualification, reconsideration of his case on Class III post. Having accepted appointment on Class IV post, may be under unavoidable and compelling situation, question of "Distress" or "immediate hardship," which is a condition precedent for compassionate appointment, does not arise. Apex Court in 1998 (33) ALR 468(S.C.) Director of Education (Secondary) Versus Pushpendra Kumar and this Court in 1999

(83) FLR 617 (All) held that existence of "Distress" is sine qua non for seeking compassionate appointment.

6. This Court takes notice of the judgment and order dated 11-12-2000 passed by learned single Judge in Writ Petition No.1846 of 1996 (S/S)-Sudhakar Srivastava Versus Deputy Director of Education (Secondary), IX Region, Faizabad and others wherein, a learned single Judge made a sweeping observation to effect that—'if a person, under compelling circumstances, accepted 'compassionate' appointment on Class IV post on being offered to him that will not deprive such a person in future to claim a higher post according to his educational qualifications'.

7. The above conclusion is without referring to the 'aims and objects', and various provisions of 'Dying in Harness Rules' as well as ignoring binding 'precedents' rendered by Supreme Court directly touching the issue in question. The said judgment, therefore, cannot be treated as a 'binding precedent' having force of law and have to be treated as 'perincurium'. Supreme Court judgments are binding on this Court. It is mandatory upon this Bench to decide this case, following the principles of consistency and finality, in accordance with the judgment of the Apex Court in the case of ***State of Haryana Versus Naresh Kumar Bali (1994) 4 SCC 448 and State of Rajasthan Versus Umrao Singh- (1994) 6 SCC 560 (Para 8).***

8. The judgment of the learned Single Judge in the case of Sudhakar Srivastava (supra), without noticing aforesaid two judgments of the Supreme Court has to be ignored and need not be referred to the Hon'ble the Chief Justice for constituting a larger Bench to reconsider the matter.

9. For 'compassionate appointment', availability of post is not a 'condition precedent'. It is now well settled that a Class-III post, (for which a claimant may be eligible according to his academic qualifications under Dying in Harness Rules) not being available, job may be offered on Class IV post, if available, and if that also is not available then supernumerary Class IV post be created. The object and the genesis of compassionate appointment is on account of "immediate hardship" and to mitigate 'distress' in the family of a deceased employee. It is not planned and cannot be delayed or postponed, as that will frustrate the very object of the compassionate appointment. See (i) JT 1994 (3) SC 525 (Pr 2 to 7) Umesh Kumar Nagpal Versus State of Haryana and others, (ii) (1996) 2 UPLBEC 843 (49)- Haryana State Electricity Board Versus Naresh Tiwari and another and (iii) JT 1996 (6) SC 7- The State of Bihar and others Versus Samusuz Zoha etc.). Contingency and need to make 'compassionate appointment' is in itself a per force outcome of compulsive situation arising from unforeseen circumstances. Claimant for compassionate appointment cannot be allowed to claim higher post in future as by that time, 'distress' and 'immediate hardship' do not survive after accepting job may be lone Class IV post. Permitting promotion/appointment to higher grade will be in negation of the very object of compassionate appointment under Dying in Harness Rules. Therefore, once having accepted an appointment, may be on Class IV post under existing situation out of will and volition, the

'chapter' of Dying in Harness is closed. No one should be permitted to re-agitate this matter in future on the basis of change of circumstances in future leaving everything in turmoil and in a state of indecisiveness. It if is permitted, no litigation will ever come to an end. Similar view, the under different circumstances but practically under similar situation, has been taken by the Apex Court in Arvind Kumar Kankane Versus State of U.P. and others JT 2001 (6) SC 260 in the matter of exercise of option for subject while considering admission in Medical Courses.

10. The second submission of the Petitioner is that Petitioner should not be treated as a 'temporary employee' on the basis of his appointment letter dated 18.4.200/Annexure-6 to the writ petition. The contention of the petitioner has substance and deserves to be accepted for the following reasons:

11. The appointment letter itself shows that Petitioner offered appointment on the probation of one year. Earlier recital in the appointment letter to the effect that petitioner's services were temporary and liable to be determined without prior notice gets nullified by subsequent recital providing for appointment on probation. Even otherwise, it is now well settled through several decisions of this Court that appointment under Dying in Harness Rules on compassionate ground should not be for short term or on temporary basis. This Court has held time and again that compassionate-appointee is not to be left on the mercy of the authorities offering employment, refer to – 1999 (2) ESC 972 (DB) and 1991 ALJ 1475.

Petition stands partly allowed to the extent indicated above.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.9.2001

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE R.K. AGARWAL, J.

Special Appeal No. 857 of 1997

Bunni Lal Chaurasia ...Appellant
Versus
Deputy Registrar, Co-operative Societies Gorakhpur Region, District Gorakhpur and others ...Respondents

Counsel for the Appellant:
Shri K.M. Misra

Counsel for the Respondent:
Sri K.N. Misra

U.P. Cooperative Societies Act 1956- Section –68- Dismissal Order- Notice in proceeding under Section 68- can not be treated the show cause notice of proposed punishment-held Dismissal order can not be passed.

Held- Para 14

From the perusal of the order dated 20.1.94 it appears that no notice was given to the appellant writ petitioner regarding the proposed punishment. Thus in our considered view an order of dismissal could not have been passed in the proceedings under section 68 of the Act as it only empowers the Registrar of the Co-operative Societies to order for restoring the property or repaying the money or any part thereof with interest at such rate or the contribution and costs or compensation to such an extent as may be considered just and equitable.

Case law discussed
AIR 1982 SC-1249
1998(7) SCC.-84

(Delivered by Hon'ble R.K. Agarwal, J.)

1. Bunni Lal Chaurasia appellant writ petitioner has filed the present special appeal against the judgment and order dated 4.9.1997 passed by the learned Single Judge whereby the writ petition filed by the appellant writ petitioner has been dismissed.

2. Briefly stated the facts giving rise to the present special appeal are as follows:

The appellant writ petitioner was appointed as Co-operative Supervisor in the U.P. Co-operative Federal Authority on 28.6.78. He was working at Kisan Sewa Sahkari Samiti Ltd. Vigrameer, Vikas Khand Sameriyawan, Tehsil Khalilabad District Basti and was confirmed on the said post on 5.11.88. He was placed under suspension vide order dated 13.9.90. Two separate charge sheets were served on him on 6.11.90 and 19.9.1991 which was duly replied by him on 4.12.90 and 4.10.91 respectively. The Inquiry Officer has conducted the inquiry and submitted his report on 11.11.91. The Inquiry Officer found the appellant writ petitioner guilty in respect of charge Nos. 4,5,8,11 and 12. However, the Inquiry Officer found that the Charge No. 1,2,3,6,7,9 and 10 were not proved against him. The Inquiry Officer also recommended appropriate action under section 68 of the U.P. Co-operative Societies Act (hereinafter referred to as the Act) to be initiated against the appellant writ petitioner in order to determine the amount of loss caused on account of breach of trust willful negligence etc. The proceedings under Section 68 of the Act were initiated against him. According to the report dated 30.6.1992 a sum of Rs.1,34,742.38 was found to be recoverable from the appellant writ petitioner under section 68 of the Act. A show cause notice was issued by the Chairman, Regional Committee on 13.7.1993 calling upon the appellant writ petitioner to show cause. The Regional Committee fixed 29.7.93 as the date for consideration of the matter. When the appellant writ petitioner did not submit any reply to the show cause notice, a notice was published in Hindi daily news paper "Dainik Jagaran" on 25.11.93. Another notice was sent by Registered Post to the appellant writ petitioner on 4.12.93 fixing 21.12.93, but for the reasons best known to the appellant writ petitioner he did not appear and, therefore, on the date fixed i.e. on 21.12.93 the Regional Committee after considering the entire material on record passed an order dismissing the appellant writ petitioner from service and also for recovery of Rs.1,49,860.03. This amount 1,49,860.03 P. included the amount of Rs.1,34,742.38 P. found to be recoverable from the appellant writ petitioner under section 68 of the Act and a sum of Rs.15,177.65 P. which was found by the Inquiry Officer to have been embezzled by the appellant writ petitioner. The Chairman Regional Committee, Co-operative Societies communicated the resolution passed by the committee to the appellant writ petitioner vide order dated 20.1.94. The said order was challenged by the appellant writ petitioner before this Court by means of writ petition which has been dismissed by the learned single Judge by the impugned judgment and order 4.9.1997.

3. We have heard Sri K.M. Mishra learned counsel for the appellant writ petitioner and Shri K.N. Mishra learned counsel for the respondents.

4. The learned counsel for the appellant writ petitioner submitted that since the Inquiry Officer had exonerated the appellant writ petitioner from charge Nos. 1,2,3,6,7,9 and 10 and recommended for action under section 68 of the Act in respect of the remaining charges, it was not open to the Regional Committee to disagree with the said findings without giving any notice and opportunity to the appellant writ petitioner intimating him that the committee is going to differ with the findings of the Inquiry Officer. He relied upon a decision of the Hon'ble Supreme Court in the case of *Punjab National Bank and others Vs. Kunj Bihari Mishra reported in (1998) 7 S.C.C. Page 84*. He further submitted that under section 68 of the Act there is no power with the Regional Committee to dismiss a person from service and only the amount which is found due can be ordered to be recovered from the person concerned.

5. Learned counsel for the appellant on the other hand submitted that before the learned single Judge the appellant writ petitioner has raised only one question to the effect that he was not afforded an opportunity of showing cause in the proceedings under section 68 of the Act as would be clear from the impugned judgment and order of the learned single Judge itself.

6. According to the learned counsel for the respondent the appellant writ petitioner cannot be permitted to raise any other question in appeal before this Court when he had not raised and argued them before the learned single Judge. He relied upon a decision of the Hon'ble Supreme Court in the case of State of Maharastra Vs. R.S. Nayak reported in A.I.R. 1982 S.C. 1249. He further submitted that if it is the case of appellant writ petitioner that he had raised and argued all the points, which he is raising and arguing now in Special Appeal, before the learned single Judge then the proper course would be to make an application before the learned single Judge seeking correction of the statement of facts recorded by the learned single Judge in the impugned judgment.

7. Learned counsel for the respondents further submitted that the Inquiry Officer was not at all justified in recommending as to what punishment should be given to the delinquent employee and it was for the Regional Committee to consider the report and come to its own conclusion regarding the punishment to be given. According to him the appellant writ petitioner has not been dismissed from the service in exercise of power conferred upon the Regional Committee for taking disciplinary action and under section 68 only the amount has been quantified.

8. So far as the objection raised by the learned counsel for the respondents to the effect that before the learned single Judge the petitioner had confined his submission only with regard to the challenge to the impugned order on the ground that the order is vitiated and it has to be set aside as reasonable opportunity of hearing and to place his point of view in the proceeding under section 68 of the Act was not afforded is concerned we find that the learned single Judge had recorded a statement of fact that only the legal question has been raised on behalf of the

petitioner that he was not afforded an opportunity of showing cause in the proceedings under section 68 of the Act is to be considered by the Court and the learned counsel has confined his statement only with regard to the aforesaid question. In the case of State of Maharastra Vs. R.S. Nayak (supra) the Hon'ble Supreme Court has held as follows:-

"When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we can not launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us Judicial decorum restrains us. Matter of judicial record are unquestionable. They are not open to doubt Judges cannot be dragged into the arena. "Judgments can not be treated as mere counters in the game of litigation". (Per Lord Atkinson in Somasundaran Vs. Subramanian, AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (per Lord Buckmaster in Madhusudan v. Chandrabati, AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there."

9. In view of the aforesaid principles laid down by the Hon'ble Supreme Court in the case of State of Maharashtra Vs. R.S. Naik (supra) the appellant writ petitioner is bound by the points raised by his counsel before the learned single Judge. Before the learned single Judge the question raised and argued was only regarding affording of reasonable opportunity of hearing to the appellant writ petitioner in the proceedings under section 68 of the Act. The learned single Judge found that the proceedings under section 68 of the Act were initiated on the basis of the recommendations of the Inquiry Officer and he was afforded opportunity time and again but he absented himself and failed to place his point of view. Notices were sent to him by registered post but the petitioner failed to appear before the authorities concerned who was conducting the proceedings under section 68 of the Act Despite publication of notice in daily news paper "Dainik Jagran" he did not appear before the authority.

10. The learned single Judge after perusing the material on record recorded a categorical finding that the appellant writ petitioner deliberately avoided to appear before the Deputy Registrar, Co-operative Societies, Gorakhpur Region, Gorakhpur in the proceedings under section 68 of the Act, inspite of the fact that the said authority exhausted all possible methods to procure the attendance of the appellant writ petitioner and to enable him to show cause to the notice and to place his point of view. Whatever was possible and was within the means of the said authority to serve the appellant writ petitioner so that he may be able to participate in the proceeding was done and provided but the petitioner himself deliberately failed to participate in the proceedings or to extend his cooperation he has to thank himself. The petitioner cannot take lame excuse after passing of the order of termination that he was not afforded reasonable opportunity of hearing.

11. The learned counsel for the appellant writ petitioner has not been able to disprove the findings recorded by the learned single Judge by pointing out from any material from the record. Thus the findings recorded by the learned single Judge that the appellant writ petitioner was given sufficient opportunity to put his case before the authority concerned in proceedings under section 68 of the Act does not suffer from any illegality or infirmity.

12. So far as the question as to whether in proceedings under section 68 of the Act the appellant writ petitioner can be dismissed from service or not and as to whether the disciplinary authority while differing with the findings recorded by the Inquiry Officer ought to have given a notice to the appellant writ petitioner goes to the root of the matter and the appellant writ petitioner can raise the said points in Special Appeal. Under Section 68 of the Act the Registrar has been empowered to make an order of surcharge requiring the person concerned to restore the property or repay the money or any part thereof with interest at such rate, or to pay contribution and costs or compensation to such an extent as the Registrar may consider just and equitable after affording a reasonable opportunity of being heard to the person concerned. No power has been conferred upon any authority under section 68 of the Act for passing an order dismissing a person from service. Section 68 of the U.P. Co-operative Societies Act, 1965 is reproduced below:

"68 Surcharge—(1) If in the course of an audit, inquiry, inspection or the winding up of a co-operative society it is found that any person, who is or was entrusted with the organisation or management of such society or who is or has at any time been an officer or an employee of the society, has made or caused to be made any payment contrary to this Act, the rules or the by-laws or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such society, the Registrar on his own motion or on the application of the committee, Liquidator or any creditor, inquire himself or direct any person authorised by him by an order in writing in this behalf to inquire into the conduct of such person:

Provided that no such inquiry shall be commenced after the expiry of twelve

years from the date of any act or omission referred to in this sub-section.

(2) Where an inquiry is made under sub-section (1) the Registrar may, after affording the person concerned a reasonable opportunity of being heard, make an order of surcharge requiring him to restore the property or repay the money or any part thereof with interest at such rate, or to pay contribution and costs or compensation to such an extent as the Registrar may consider just and equitable.

(3) Where an order of surcharge has been passed against a person under sub-section (2) for having caused any deficiency in the assets of the society by breach of trust or wilful negligence, or for having misappropriated or fraudulently retained any money or other property belonging to such society, such person shall, subject to the result of appeal, if any, filed against such order, be disqualified from continuing in or being elected or appointed to an offence (office) in any co-operative society for a period of five years from the date of the order of surcharge."

13. From a perusal of the Annexures CA-1, CA-2 and CA-3 filed alongwith the counter affidavit of Shiv Kumar Singh Regional Officer (Writ) Provincial Co-operative Union U.P. in the writ petition it is clear that the notice which was sent to the appellant writ petitioner was regarding proceedings under section 68 of the Act. The first notice which had been published in 'Dainik Jagran' dated 10.7.1993 filed as Annexure CA-1 to the counter affidavit asks the appellant writ petitioner to appear before the Registrar Co-operative Societies U.P. Gorakhpur on 13.7.93. The second notice which was published in 'Dainik Jagran' on 2nd October, 93 filed as Annexure CA-2 to the counter affidavit specifically asks the appellant writ petitioner to submit his explanation to the report under section 68 (1) of the Act. The third notice which has been published in 'Dainik Jagran' dated 28th November, 1993 filed as Annexure CA-3 to the counter affidavit does not specify as the whether the said notice was in respect of disciplinary proceedings or in respect of the proceedings under section 68 of the Act. Thus from the various notice published in the news paper referred to above an inference can be drawn that all the notices were published in relation to proceedings under section 68 of the Act.

14. From the perusal of the order dated 20.1.94 it appears that no notice was given to the appellant writ petitioner regarding the proposed punishment. Thus in our considered view an order of dismissal could not have been passed in the proceedings under section 68 of the Act as it only empowers the Registrar of the Co-operative Societies to order for restoring the property or repaying the money or any part thereof with interest at such rate or the contribution and costs or compensation to such an extent as may be considered just and equitable.

15. In view of the foregoing discussions the Special Appeal succeeds and is allowed. The judgment and order dated 4.9.97 passed by the learned Single Judge is set aside and the order dated 20.1.1994 passed by the Deputy Registrar, Co-operative Societies, U.P. Gorakhpur and Chairman Regional Committee P.C.U. Gorakhpur whereby the appellant writ petitioner has been communicated with the order of dismissal from service is set aside. The appellant writ petitioner shall be entitled for all consequential

benefits. However, there shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.7.2001

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

Second Appeal No. 1395 of 1981

Union of India through General Manager, North Eastern Railway, Gorakhpur
...Defendant-Appellant
Versus
Sri Niwas Singh and others ...Plaintiff/ Respondents

Counsel for the Appellant:
Sri Lalji Sinha

Counsel for the Respondents:
Sri V.K. Singh

Code of Civil Procedure- Section 100- Second Appeal-Jurisdiction of Civil Court employee working as Khalasi on work charge basis- dismissal after expiry of six month juniors retained- Lower Appellate Court directed for reinstatement- question raised in second appeal as to whether the civil court or the Industrial Tribunal has jurisdiction? Violation of Article 14 and 16- pleaded hence the case falls under clause 2 of principle laid down by Supreme Court AIR 1995- SC 1729- suit before civil court held- maintainable.

Held- Para 10

In the instant case the respondents claimed that there was violation of Article 14 and 16 of the Constitution of India as juniors to the plaintiffs-respondents were retained in service while the services of the plaintiffs who were seniors were terminated. Thus there was violation of Articles 14 and 16 of the Constitution of India. Hence the suit was maintainable. (Held Para 12 and 14)

Case law discussed
AIR 1975-SC-2238 relied on
AIR 1995-SC-1729 relied on.
AIR 1979 SC 429
1974 ALJ 040
1970 (2)

(Delivered by Hon'ble P.K. Jain, J.)

1. This is defendant's second appeal, which was admitted on ground no. 2, which is said to be the substantial question of law. The said ground is formulated below:

"Because the plaintiffs-respondents being governed by the provisions of the Industrial Disputes Act, then remedy was to raise an Industrial Dispute and the Civil Court has no jurisdiction to adjudicate the claim of the plaintiffs-respondents."

2. Thus the dispute in this appeal is whether the suit is cognizable by the Civil Court or whether the Industrial Tribunal alone has jurisdiction to adjudicate upon the claim of the plaintiffs-respondents.

3. The brief facts giving rise to the present appeal are that the plaintiffs-respondents were appointed and employed by the defendant-appellant as class IV employees (the date of appointment is not disclosed). Their services were, however, terminated after expiry of 30 days' notice in the year 1967, although they had put in more than 6 months continuous service as Casual labours and temporary workmen and were selected for appointment in the grade of class IV. Their appointments as Khalasis were made against posts duly sanctioned by the Railway Administration and those posts were not either abolished or retrenched. The sanction of the Railway

Administration still exists. After appointment of the plaintiffs-respondents many other persons were appointed some of whom are mentioned at the bottom of the plaint. Many persons who were appointed subsequently to the appointment of the plaintiffs are continuing in service, yet defendant Railway Administration terminated the services of the plaintiffs without following the principle of "last come first go". The order of termination is malafide and unfair. The plaintiffs had a right to continue in service and to hold the posts, which is valuable right guaranteed under the Constitution of India. The order of the plaintiffs' dismissal is violative of the provisions of Articles 14 and 16 of the constitution of India as also Article 311 of the Constitution of India. The plaintiffs have served the defendant for more than one year and prior to issue of notice for termination of service the defendants have not paid any retrenchment compensation as required by Section 25(F) of the Industrial Dispute Act nor notice is served upon the appropriate Government in the prescribed manner. The order of termination is contrary to para 151 of the Indian Railways Establishment Code Vol. I as also para 152 of the said Code. After termination of the services of the plaintiffs the Assistant Signal and Telecommunication Engineer and the District Signal and Telecommunication Engineer Lucknow and other Officers of the Signal Department have made recruitment of Khalasis.

4. The defendant filed written statement denying the plaint allegations. It is stated that the notice under Section 80 C.P.C. is invalid and illegal. The plaintiffs were recruited as casual labours against work charge posts on daily wages and after completion of their six months continuous service they were granted authorized pay scale in the category of Khalasi and no illegality has been committed in giving notice of termination as the plaintiffs were working against work charge establishment and the works on which they worked had been practically completed due to decrease in work-load, construction staffs were retrenched keeping in view the maxim "first come last go." Under the provisions of Industrial Dispute Act 30 days' notice was given and the plaintiffs did not qualify themselves for being absorbed for the regular employment of class IV staff. The plaintiffs were given status of temporary employees for certain benefits after completion of 6 months continuous service. No employee junior to the plaintiffs in the cadre of Khalasi has been retained in service. The services of the persons named at Sl. Nos. 1,2,3,7,8 and 9 of the Schedule attached to the plaint have been terminated on different dates.

5. On the pleadings of the parties the trial Court framed various issues. It held that the notice under Section 80 C.P.C. was invalid; that the impugned order of termination violated the provisions of Sections 25-F and 25-G of the Industrial Dispute Act as well as Article 16 of the Constitution of India and it is also in contravention of the provisions of sections 25-F and 25-G of the Industrial Dispute Act read with Article 16 of the Constitution of India.

6. The suit was, however, dismissed. First appeal preferred by the plaintiffs was also dismissed by the lower appellate court. Then second appeal was preferred in the High Court being Second Appeal No. 1273 of 1973 which was allowed by

judgment and order dated 28.8.79 and the case was remanded to the lower appellate Court for decision of the appeal afresh in the light of the observations made in the body of the judgment. The lower appellate Court allowed the appeal vide judgment and order dated 18.2.81 and decreed the suit of the plaintiffs.

7. Learned counsel for the parties have been heard at great length.

It is vehemently contended on behalf of the appellant that the dispute raised by the plaintiffs was an industrial dispute as defined in Section 2-A of the Industrial Dispute Act and such dispute could be resolved by Industrial Tribunal in view of the provisions contained in Section 25-F of the Act. The suit was not maintainable. Learned counsel for the respondents has, however, submitted that the dispute raised is under general or common law even though it might be an Industrial dispute also, the plaintiffs had both the forums i.e. by filing the suit in the Civil Court or by approaching the Industrial Tribunal.

8. The dispute related to termination of services of an individual workman and under section 25-F of the Industrial Dispute Act it was certainly an industrial dispute. However, the contention is that there was violation of Article 14 and 16 of the Constitution of India and therefore, a suit could also be filed challenging the impugned order. Reliance is placed upon the two decisions of the Hon'ble Supreme Court 1- The Premier Automobiles Ltd. Vs. Kamlakar Shantaaram Wadke and others, AIR 1975 SC-2238 and 2- Sarwan Singh Lamba and others Vs. Union of India and others, AIR 1995 SC-1729. Learned counsel for the appellant has placed reliance on observation of the Hon'ble Supreme Court made in paragraph 24 in Premier Automobile's case (Supra).

9. In Premier Automobile's case (Supra) in para 23 of the judgment the Hon'ble Supreme Court laid down the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute which are as follows.

"To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus:

(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the Civil Court.

(2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the Civil Court is alternative, leaving it to the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.

(3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get adjudication under the Act.

(4) If the right, which is sought to be enforced, is right created under the Act such as Chapter V A then the remedy for its enforcement is either Section 33 C or the raising of an

industrial dispute, as the case may be."

10. Principle no.2 specifically provided that if the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil Court is alternative, leaving it to the election of the suitor concerned. In the instant case the respondents claimed that there was violation of Articles 14 and 16 of the Constitution of India as juniors to the plaintiffs-respondents were retained in service while the services of the plaintiffs who were seniors were terminated. Thus there was violation of Article 14 and 16 of the Constitution of India. Hence the suit was maintainable.

11. In 1974 Allahabad Law Journal page-840 Moti Lal Rajput Vs. State of U.P. and others it was held that "it is well settled that even a temporary employee is entitled to the protection of Article 16 of the Constitution. Even when a temporary employee is removed from service it must be shown that no discrimination has been practiced against him in the sense that he has been asked to quit while his juniors are allowed to continue. If there is retrenchment on account of departmental exigencies the authorities have to follow the rule of last come first go. They can not pick and choose persons for retrenchment."

12. Another decision relied upon is AIR 1979 Supreme Court-429, The Manager Government Branch Press and another Vs. D.B. Belliappa. In this case the Hon'ble Supreme Court held that "if the services of a temporary Government servant are terminated in accordance with the conditions of his service on the ground of unsatisfactory conduct or his unsuitably for the job and/or for his work being unsatisfactory, or for a like reason which marks him off a class apart from other temporary servants who have been retained in service, there is no question of the applicability of Article 16. Conversely, if the services of a temporary Government servant are terminated arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of the employment. Where a charge of unfair discrimination is leveled with specificity, or improper motives are imputed to the authority making the impugned order of termination of the service, it is the duty of the authority to dispel that charge by disclosing to the Court the reason or motive which impelled it to take the impugned action."

13. That was a case in which services of a temporary government servant were terminated without giving any reason while some other employees juniors to him were retained in service. It was held that the order of termination of service was passed arbitrarily and not on the ground of unsuitability or any other reason.

14. Another decision relied upon by the learned counsel for the respondents is a Division Bench of the Allahabad High Court (Lucknow Bench) rendered in A.K. Datta Vs. U.P. State Spinning Mills Co. Ltd. and others, 1990 (2). It was held in this case that "the plea raised by the

petitioner that junior persons have been retained and the principle of "last come first go" has not been followed as one S.K. Mukherji was appointed subsequently and he has been retained in service is not without substance. No explanation to this effect has been given by the opposite parties. In these circumstances, the termination order is unsustainable being violative of Articles 14 and 16 of the Constitution of India as the employer is the 'state' within the meaning of Article 12 of the Constitution of India."

15. Thus the arguments advanced by the learned counsel for the respondents is well supported by various decisions of the Hon'ble Supreme Court as well as of the High Court.

In view of the discussion made above, this second appeal fails and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.9.2001

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

Civil Misc. Writ Petition No. 7759 of 1992

Shubh Narain Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Krishna Mohan Singh

Counsel for the Respondents:
Sri S.K. Srivastava
S.C.

Constitution of India, Article 226- Regularisation- continuos working since 1.12.88 on work charge basis artificial breaks- similar circumstances W.P. No. 8148-90 allowed on 21.7.93- present writ petition allowed with the same terms.

Held- Para 4

Respondents on 1.12.1988, is continuing in service and is being paid his wages on daily wage basis. Thus, the petitioner, being similarly circumstanced those of petitioners of bunch of writ petitions allowed by this Court is also entitled to the similar relief of appropriate direction to the Respondents to pay the salary and other emoluments admissible to class IV regular employees of the department of the Rural Engineering Service.

Case law discussed
W.P. No. 8148/90 decided on 21-7-93
W.P. No. 1999/92 decided on 22-11-95

(Delivered by Hon'ble D.R. Chaudhary, J.)

1. The petitioner herein was appointed on 1.12.1988 as Class IV employee of the Gramin Abhiyantran Seva of the State Government. He continued to serve as such with some artificial breaks. His prayer is that the Respondents be directed to pay the salary and other emoluments admissible to Class IV regular employees of the department of Rural Engineering Services. In counter affidavit filed by the Respondents the facts, aforestated, have not been disputed except that there are breaks in service which, according to the petitioner, are artificial in nature. The similar question came for consideration before this Court in writ petition no. 8148 of 1990 and several other connected petitions, and this Court, after having considered the entire law on the subject laid down by the Hon'ble Supreme Court as well as the High Court, allowed the writ petitions by

means of the judgment dated 21.7.1993 with the following directions:-

"In view of the aforesaid, it does not lie in the mouth of the opposite parties to contend that as the petitioners were engaged as work charge engineers, they are not entitled for the same salary, which are being paid to the regular engineers/employees working in the department of Rural Engineering Services. Such a stand is violative of Art. 14 and 16 of the Constitution and the directive principle of State Policy contained in the Constitution. The engineers who were engaged as work charge engineers are entitled to Rs.1750/- + 750/- as Dearness Allowance per month, in accordance with the recent direction of Hon'ble Supreme Court. Similarly those work charge employees who were engaged as Clerks or Class IV employees are entitled to be paid the minimum scale of pay, which is being given to Class III and IV employees working in Rural Engineering Service department.

I further clarify that those petitioners whose posts come within the purview of State Public Service Commission deserve for regularisation of their services by recruitment through Public Service Commission for vacancies other than the employment under the project and as and when such vacancies arise and are duly notified, the claim of the petitioners will be considered for appointment subject to their satisfying the requisite qualifications, prescribed thereunder by the Rules, and the opposite parties would not stand in the way of regularisation of their services. It would be open to the State Public Service Commission to consider, if any weightage would be available to them for their past services for which no direction is warranted. The continuity of services of the petitioners would be taken into account for over-coming the age bar. It is further provided that all vacancies which would occur henceforth, shall ordinarily be filled up by regularising the employees like the petitioner who were engaged by the department of Respondents and as and when that would not be possible for some reason, on temporary basis, deputationist may be accepted from the other department, but it would be ensured that no deputationist would function for not more than six months.

As far as those employees whose posts do not come within the purview of State Public Service Commission opposite parties are directed to consider their cases for regularisation in accordance with the law laid down by Hon'ble Supreme Court in the case of State of Haryana Vs. Piara Singh and others reported in 1992 (4) SCC 118.

In view of what has been indicated herein above, the writ petitions succeed. A writ in the nature of mandamus is issued commanding the opposite parties to allow the petitioners to work on the same posts held by them in the establishment of Rural Engineering Service ignoring the oral order of discharge/termination passed against them. The petitioners would be deemed to be in service during the period they were not allowed to work in pursuance of the oral order of discharge/termination passed against them. But they would not be entitled for back wages. This order has been passed only for the reason that it would put the department of Rural Engineering Services to a great financial strain. The Engineers

who were engaged as work charge Engineers would be paid the minimum scale of pay, which is being given to Class III and IV employees working in the Respondents department. The opposite parties are directed to consider the cases of the petitioners for regularisation of the services in the light of the observation made above."

2. The judgment and order dated 21.7.1993 passed in writ petition no. 8148 of 1990 (supra) has also been affirmed by the Apex Court vide its judgment dated 24.4.1995 passed in Special Leave Petition no. 20139 of 1994 in the matter of **State of U.P. Vs. Haider Mehdi Rizvi** . Following the aforesaid decision dated 21.7.1993, another bunch of Writ Petitions connected with leading Writ Petition No. 1999 (SS)/1992, **Mahendra Tiwari Vs. State of U.P. and others** involving similar controversy, were allowed by means of the judgment dated 22.11.1995 in the same terms and directions contained in the decision rendered in Writ Petition no. 8148 of 1991 (supra).

3. A number of decisions adjudicating the similar controversy have been placed on record in support of petitioner's claim in the present writ petition, however, the same are not being referred to herein for brevity.

4. The petitioner, herein, undisputedly entered into employment of Respondents on 1.12.1988, is continuing in service and is being paid his wages on daily wage basis. Thus, the petitioner, being similarly circumstanced to those of petitioners of bunch of Writ Petitions allowed by this Court is also entitled to the similar relief of appropriate direction to the Respondents to pay the salary and other emoluments admissible to class-IV regular employees of the department of the Rural Engineering Service.

5. In view of the above, this Writ Petition succeeds and is allowed in terms and directions contained in the judgements dated 21.7.1993 rendered in writ petition no. 8148 of 1990 but with no order as to cost.
