REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.12.2001

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

Criminal Revision No. 2324 of 2001

Sri Ram Chander ...Revisionist (in Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Shiv Chander (In person)

Counsel for the Opposite party:
Sri D.K. Singh (A.G.A.)

Child Labour (Prohibition and Regulation) Act, 1986- section 14 (1)- it is the duty of the prosecution to file such certificate to prove the age of child specially when the applicant had not admitted the age of the child given by the Enforcement Officer in the inspection note. In case, the prosecution itself could not prove the age of the child as required by the Act, the applicant cannot be compelled to fill up the lacuna of the prosecution. (Held in para 18).

The revision is, accordingly, allowed and conviction and sentence of the applicant under Section 14 (1) of the Act is quashed and he is acquitted of the said offence. The applicant is in custody and shall be released forthwith unless wanted to be detained in some other case.

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

1. This revision has been directed against the judgement and order dated 16.11.2000 passed by Additional Sessions Judge, Varanasi, Court No. 14 in Criminal Appeal no. 297 of 2000 dismissing the appeal and confirming the conviction of the applicant under Section 14 (1) of Child Labour (Prohibition and Regulation) Act, 1986 and sentence of three months R.I. recorded by IVth Additional Chief Judicial Magistrate, Varanasi in Criminal Case no. 722 of 2000, vide order dated 16.11.2000.

2. The prosecution story, briefly stated, was that on 26.3.1995 at about 4.45 A.M. Sri O.P. Gupta, Labour Enforcement Officer, Varanasi, along with Sri S.K. Srivastava inspected the carpet loom of applicant situate at Dhaurpur, P.S. Rohania, district Varanasi and found that a boy named Chaturi, S/o Bachau aged about 11 years was working at the said establishment. The Enforcement Officer prepared spot note and filed complaint against the applicant for the offence punishable under Section 14 (1) of Child Labour (Prohibition and Regulation) Act, 1986, hereinafter called the Act. During Trial the prosecution examined Hira Lal Sharma (P.W.1), S.K. Srivastava (P.W.2) and Sri O.P. Gupta (P.W.3). The applicant examined Shiv Nath (D.W.1), Bachau (D.W.2) and Chaturi (D.W.3) and also filed extract of kutumb register, pass book of U.P. Electricity Board and age certificate of the child. Learned Magistrate on considering the evidence of the parties held that applicant had employed Chaturi a boy aged about 11 years and had committed an offence punishable under Section 14(1) of the Act.

3. With these findings he convicted him in said Section and sentenced to under go R.I. for a period of three months.

4. Aggrieved with his above conviction and sentence, the applicant filed Criminal Appeal no. 297 of 2000.

The Appellate Court concurred with the findings of the trial Court, dismissed the appeal and confirmed the conviction and sentence of the applicant under said Section.

5. The above order has been challenged in this revision.

6. Heard the learned counsel for the applicant and the learned A.G.A. and perused the record.

7. The first point raised by learned counsel for the applicant was that it was not proved that applicant was running a power loom. But on this point there is specific finding of the Magistrate as well as the Appellate Court that when the Enforcement Officer inspected the power loom of the applicant, he found it in operation. Both the Courts have also discussed the certificate given by Pradhan and the Block Development Officer and have recorded a finding of fact that the applicant was running a power loom. As such there is no ground to interfere with the above finding of fact in this revision.

8. The next point raised by learned counsel for the applicant was that there was no evidence that Chaturi Prajapati, who was allegedly found working on the power loom was a child as defined in the Act.

9. Section 14 (1) of the Act, which provides penalty for taking work from child says that whoever employs any child or permits any child to work in contravention of the provisions of section 3 shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.

10. "Child" as defined in Section 2 (ii) means a person, who has not completed his 14 years of age.

11. In this case, the case of the prosecution was that Chaturi, who was found working at the establishment of the applicant was aged about 11 years. Contrary to it, the applicant contended that age of Chaturi was about 18 years. He had also filed certain documents regarding his age, such as extract of kutumb register attested by Pradhan of the village as well as medical certificate based on extract of kutumb register and certificate of the Pradhan. The learned Magistrate has observed that the medical certificate filed by the applicant was not in accordance with Section 16 (2) of the Act and therefore, it cannot be relied on in evidence. The Appellate Court has observed that in case the occupier of the establishment did not agree with the age given in the inspection note of the Inspector, he should have moved an application prior to statement of the Inspector regarding certificate of the age of the child to be obtained by the prescribed medical authority. In case, the trial Court had rejected the above application, he would have filed revision. But since, applicant had not done so, the medical certificate filed by him cannot be accepted.

12. It means that the trial Court as well as the Appellate Court have casted burden of proof of the age of the child on the accused applicant. As required by Section 14 (1) the initial burden is of the prosecution to prove that the applicant

had employed a person below 14 years of age and only then the ingredients of Section 14 (1) can be said to have been proved by the prosecution. The burden of proving negative fact that the boy, who was found working was not below 14 years of age cannot be sifted on the accused.

13. Section 10 of the Act says that if any question arises between an Inspector and an occupier as to the age of any child, who is employed or is permitted to work by him in an establishment, the question shall, in the absence of a certificate as to the age of such child granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority.

14. Section 16 (2) of the Act says that every certificate as to the age of a child which has been granted by a prescribed medical authority shall, for the purposes of this Act, be conclusive evidence as to the age of the child to whom it relates.

15. In this case, admittedly, there was no certificate of the prescribed medical authority. It is true that the medical certificate relied on by the applicant was also not issued by a prescribed medical authority. But it was the duty of the prosecution to file such certificate to prove the age of child specially when the applicant had not admitted the age of the child given by the Enforcement Officer in the inspection note.

16. The Appellate Authority had adopted a novel method that it was the duty of the applicant accused to move application prior to statement of the Inspector for obtaining medical certificate by a prescribed medical authority. In case, the prosecution itself could not prove the age of the child as required by the Act, the applicant cannot be compelled to fill up the lacuna of the prosecution.

17. Therefore, in this case, the basic ingredients of Section 14 (1) of the Act that the applicant had employed a child at his establishment has not been proved, as required by the Act and therefore, the applicant could not be convicted and sentenced under said section. The revision thus succeeds.

18. The revision is, accordingly, allowed and conviction and sentence of the applicant under Section 14 (1) of the Act is quashed and he is acquitted of the said offence. The applicant is in custody and shall be released forthwith unless wanted to be detained in some other case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 36940 of 2001

Sri Harish Chandra Mishra ...Petitioner
Versus
U.P. Cooperative Spinning Mills Federation Ltd. & others ...Respondents

Counsel for the Petitioner:
Sri Ravi Pratap

Counsel for the Respondents:
Sri R.K. Ojha

U.P. Cooperative Societies Act Section 128- the termination order challenged- the petitioner has an alternative remedy

by means of a petition under Section 128 of the U.P. Co-Operative Societies Act and thereafter if he feels aggrieved by the order of the Registrar, he can file an appeal under section 98 of the Act. Petitioner has further a remedy before the industrial Court. (Held in para 3)

The definition of the officers of the Co-operative societies under Section 2 Clause (0) includes Secretary as one of the officers. A perusal of the aforesaid definition clause read with Section 128 of the Act clearly demonstrates that petitioner can approach the Registrar under Section 128 of the Act. The petitioner has further a remedy as suggested by Sri Ojha, before the industrial court.

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

1. Petitioner, who claims to be an employee of Nagina Sahkari Katai Mills Ltd., Nagina, District Bijnor, which is a co-operative society registered under the U.P. Co-operative Societies Act, 1965, has challenged the order dated 01.06.2001 by means of this writ petition under Article 226 of the Constitution of India whereby the services of the petitioner have been terminated on account of the fact that the mill has been finally closed down with immediate effect. The termination order also says that according to the service conditions the emoluments of other payments, which are payable to the petitioner shall be paid to the petitioner as soon as the grant of State Government is received and after furnishing no dues certificate by the petitioner.

2. Heard learned counsel appearing on behalf of the petitioner and Sri R.K. Ojha, learned counsel representing respondent no. 3. Sri Ojha has raised three objections; firstly that since the order dated 01.06.2001 is challenged by means of this writ petition in the month of November, 2001, petitioner is therefore guilty of latches as no explanation has been submitted by the petitioner as to why he has not filed this writ petition, which ought to have been filed normally within ninety days. The second objection raised by Sri Ojha that the petitioner has an alternative remedy by means of a petition under Section 128 of the U.P. Co-operative Societies Act and thereafter if he feels aggrieved by the order of the Registrar, he can file an appeal under Section 98 of the Act. The third objection raised by Sri Ojha is that the petitioner can approach the labour Court and for all these aforesaid three reasons, this writ petition is liable to be dismissed.

3. Learned counsel for the petitioner stated that the provisions of Section 128 of U.P. Co-operative Societies Act will not be attractive under the circumstances because the order has been passed by the Secretary/ General Manager. This argument of the petitioner's counsel is misconceived. The definition of the officers of the co-operative societies under Section 2 Clause (0) includes Secretary as one of the officers. A perusal of the aforesaid definition clause read with Section 128 of the Act clearly demonstrates that petitioner can approach the Registrar under Section 128 of the Act. The petitioner has further a remedy, as suggested by Sri Ojha, before the industrial Court. The writ petition therefore fails on all the three accounts and is accordingly dismissed. There will be no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL REVISION
DATED: ALLAHABAD 06.12.2001

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

Criminal Revision No. 2510 of 2001

Smt. Rakesh Devi ...Revisionist
Versus
State of U.P. and others...Opposite Party

Counsel for the Revisionist:
Sri V.P. Srivastava

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

Criminal Procedure Code-section 204-the Magistrate is not required to give reasons for summoning the accused-while issuing the process under section 204 Cr.P.C. and summoning the accused-the Magistrate was not required to pass a detailed order.

(Held in para 9).

While issuing the process under Section 204 Cr.P.C. and summoning the accused the Magistrate was not required to pass a detailed order.
Cases referred:
1999 (1) JIC 163 ALL
AIR 1977 SC 1489
AIR 2000 SC 1456

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

1. This revision has been directed against the order dated 17.9.2001 passed by A.C.J.M. 2nd Bijnor in case no. 790 of 2001 taking cognisance of the offence and summoning the applicant under Section 409, 420 and 468 I.P.C.

It appears that Yasspal Singh opposite party no. 2 moved an application under Section 156 (3) Cr.P.C. before the Magistrate for registration and investigation of case against the applicant, who was the Pradhan of Gaon Panchayat of Barampur and Magnesh Kumar husband of the applicant with the allegation that vide resolution dated 5.3.1998 contribution for the construction of latrine at the rate of Rs. 850/- to general person and Rs. 725/- to Scheduled Caste persons was to be collected. In all 81 persons were selected for beneficiary of the above scheme and material for construction of 100 latrine was collected and its cast was withdrawn from the Panchayat, but only 98 latrine were constructed and the Pradhan and her husband embezzled cast of two latrine. A sum of Rs. 3375/- was collected from the persons of general persons and Rs. 42775/- from the Scheduled Caste persons but only a sum of Rs. 25475/- was shown in the cash book and the accused embezzled a sum of Rs. 50450/-. Another sum of Rs. 20,000/- was embezzled by making forged receipt for return of money. A sum of Rs. 350/- was collected from one Meeru S/o Nanhey, but above amount was not shown in the cash book. On the basis of above application and on the order of the Magistrate a case under Section 409, 420, 120-B, 467 and 468 I.P.C. was registered against the applicant and her husband. After investigation the police submitted charge sheet against the applicant and her husband. The learned Magistrate on receipt of charge sheet ordered registration of case and summoned the applicant and her husband vide order dated 17.9.2001. The above summoning order has been challenged in this revision.

3. Heard Sri V.P. Srivastava learned counsel for the applicant and learned A.G.A. and perused the record.

4. Learned counsel for the applicant challenged the summoning order mainly on two grounds;

(1) The learned Magistrate has passed the summoning order mechanically and without applying mind and taking into consideration of requirements of Section 190 Cr.P.C. as the charge sheet did not disclose any offence.

(2) Several affidavits were filed by the applicant during investigation which were sent to the Investigating Officer, but it were not taken into consideration.

5. Learned counsel for the applicant contended that Criminal Courts are required to make speaking order while summoning accused persons for trial and speaking order does not mean to critical order and that the order under revision was passed mechanically without considering the material available on record. In support of his above contention he placed reliance on single judge decision of this Court in Hazi Shafi Vs. State of U.P. and another, [1999 (1) JIC 163 (All)]. In the said case the learned single judge has held that in a number of cases, this court has required the courts functioning as Criminal Courts to make speaking order while summoning the accused persons for trial. Speaking order does not mean the critical order, touching all the aspects of the case and also the defence version, if set out at that very stage, but to examine the material made available by the Investigating Officer along with the charge-sheet and satisfy himself, if the material evidence as such unchallenged is sufficient to prima facie make out the case against the accused persons. If he does so, definitely he applies his mind.

6. Further reliance was placed on Apex Court decision in the case of State of Karnataka Vs. L. Muniswamy and others, A.I.R. 1977 Supreme Court, 1489. It was held that in the said case that it is clear from Section 227 of the new Criminal Procedure Code that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion for reasons to be recorded that there is no sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record its reasons is to enable the superior Court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused.

7. So far as the observations made in Hazi Shafi's case (supra) it will suffice to say that the said decision has been overruled by a Division Bench of this Court in Criminal Misc. Application No. 3346 of 1999. Jag Mohan Lal and others Vs. State of U.P. and another decided on 19.07.2001 in view of Apex Court decision in U.P. Pollution Control Board, Appellant Vs. M/s Mohan Meakins Ltd. and others, respondents, A.I.R. 2000 Supreme Court 1456 where in it was held that while issuing the process under Section 204 Cr.P.C. and summoning the accused the Magistrate was not required to pass a detailed order. Therefore, the Magistrate is not required to pass a

detailed order while summoning the accused.

8. The case of State of Karnataka Vs. L. Muniswamy's case (supra) relied on by the learned counsel for the applicant is also not applicable to the facts of present case as in the said case the accused was discharged by the Sessions Court under Section 227 Cr.P.C. by an order without recording reasons that there was no sufficient ground for proceeding against the accused. Section 227 Cr.P.C. requires reasons for so doing (discharging accused). No such requirement is made under Section 204 Cr.P.C. while summoning the accused. No doubt the reasons are to be recorded while not summoning the accused and dismissing complaint u/s 203 Cr.P.C.

9. Therefore the Magistrate is not required to give reasons for summoning the accused.

10. The next point raised by learned counsel for the applicant was that the affidavits filed by the witnesses which were part of the case diary were not considered and that the learned Magistrate has also not considered the departmental enquiry report which ended in favour of the applicant. As mentioned above the Magistrate was not required to mention the documents which he considered for satisfying himself to take cognisance. Moreover, those papers related to defence of the applicant/accused which are not required to be considered at the stage of summoning. There are other stages when the contention of the applicant are to be taken into consideration but not at the stage of summoning. Therefore, on the above ground the order under revision cannot be said to be illegal or irregular.

11. The revision, having no merit, is rejected summarily.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.12.2001

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.

Criminal Misc. Application No. 6193 of 2001

Masuriyadin alias Nate and others ...Applicants

Versus

Additional Session Judge, Allahabad and others ...Respondents

Counsel for the Applicants:
Sri Hare Krishna Mishra

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code- section 156 (3)- Directions issued to all subordinate courts to control the power of arrest by the police for the purpose of investigation- if the police, after preliminary investigation, discover some reliable evidence of the involvement of accused in the offence and if the police require his arrest for the purpose of investigation, it would be open to the police to place the facts and material before the Magistrate, who will consider whether arrest on those facts and material would be necessary for the purpose of investigation or not, and accordingly issue or refuse to issue warrant of arrest (Held in para 11).

For the investigation pursuant to the Magistrate's order dated 25.4.2001 the police will not arrest the applicants without first obtaining the warrant of arrest from the Magistrate, if the arrest is considered necessary.

(Delivered by Hon'ble Sushil Harkauli, J.)

1. This petition under section 482 Cr.P.C. has been filed by the three accused challenging the order passed by a Magistrate directing investigation by police into an alleged offence of dowry death. I have heard the learned counsel for the applicants and the learned Assistant Govt. Advocate.

THE FACTS

2. An application under Section 156 (3) Cr.P.C. was moved by the opposite party no. 4 alleging that his daughter had been married to the applicant no. 1 three years ago. She was being harassed for dowry and suddenly on 4.1.2001 the father of the girl heard that the applicants had murdered the girl and thrown her on the railway line. On this application the learned Magistrate passed an order dated 25.4.2001 directing the police to register and investigate the case.

3. A revision filed by the applicants against the order of the Magistrate has been dismissed by the Additional Sessions Judge Court No. 12, Allahabad by judgment dated 24.7.2001.

4. The applicants are relying upon a compromise entered into between the parties, a copy of which has been filed as Annexure 2 with the affidavit, in which girls side has admitted that the husband's side is innocent and not guilty and certain other terms were agreed between the parties.

5. It has been argued by the learned counsel for the applicant that by way of after thought this application under section 156 (3) Cr.P.C. was moved by the father of the girl.

A GENERAL PROBLEM

6. Orders under section 156 (3) Cr.P.C. merely mean that an alleged cognizable offence should investigated. It should not normally be open to the accused to say before the revisional or the High Court that the allegation about a cognizable offence should not even be investigated. Thus interference by superior Courts with an order of a Magistrate U/s 156 (3) should normally be confined to cases in which there are some very exceptional circumstances.

7. However, the major problem faced by the accused persons in such cases is the apprehension of arrest pending investigation by the police, and more importantly, the apprehension about misuse by the police of this power of arrest. It is this apprehension which is causing the accused to file revisions and thereafter applications U/s 482 Cr.P.C. or writ petitions. Much of this litigation in superior Courts can be curtailed if every Magistrate while passing an order under Section 156 (3) Cr.P.C. also examines, having regard to the peculiar facts and circumstances of each case, the advisability of including in his order an incidental direction as to whether the power of arrest by the police for the purpose of that investigation should be controlled by saying that the police will not make arrest for the purpose of investigation without a first obtaining an warrant for the arrest from the Magistrate.

8. The power to arrest without warrant in cognizable offences is no doubt conferred upon the police by section 41

Cr.P.C. {Only clause (a) of sub-section (1) of that section is relevant for the present case}. But that power has been subjected to the control and supervision of a Magistrate by virtue of Article 22 (2) of the Constitution of India and section 167 Cr.P.C. It is also well settled that arrest is part of investigation. It may be kept in mind that this investigation is under directions of a Magistrate and is thus slightly different from the normal investigation of a cognizable offence. Wherever a power to do something is conferred, all powers ancillary and incidental to achieving that purpose are necessarily implied. Thus the Magistrate while exercising his power of directing investigation can issue further incidental directions with regard to the investigation as above.

9. In those cases where such a restriction is placed by the Magistrate, if the police, after preliminary investigation, discover some reliable evidence of the involvement of accused in the offence and if the police require his arrest for the purpose of investigation, it would be open to the police to place the facts and material before the Magistrate, who will consider whether arrest on those facts and material would be necessary for the purpose of investigation or not, and accordingly issue or refuse to issue warrant of arrest.

10. The Registrar General of this Court will get a copy of this order circulated to all the Judicial Magistrates of the State within two weeks.

ORDER

11. In view of what has been stated above, it is directed that for the investigation pursuant to the Magistrate's order dated 25.4.2001 the police will not arrest the applicants without first obtaining the warrant of arrest from the Magistrate, if the arrest is considered necessary.

12. The complainant has an interest in the final outcome of investigation, but he does not have any vested interest in the arrest of the accused, therefore it is not necessary to hear the complainant before passing this order. With the above directions, this application is disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 7.12.2001

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

Criminal Misc. Application No. 2505 of 2001

Sri Guru Pal Singh ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Laksmi Kant Davey

Counsel for the Respondents:
A.G.A.

Indian Evidence Act- section 73- this section cannot be made use of for collecting specimen writings during investigation and recourse to it can be had only when the court before which the enquiry or the trial of a proceedings is pending, requires the writings for the purpose of enabling it for comparison. (Held in para 11).

That order dated 13.3.2000 passed by the learned Additional Chief Judicial Magistrate-II, Shahjahanpur directing the petitioner to give his specimen signature is contrary to law and

consequently the same is quashed. In the result criminal miscellaneous application is allowed.

Cases referred:

A.I.R. 1980 SC 791: 1980 (17) ACC 174

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

1. A short, but interesting question, that arises for consideration is whether the court can compel an accused to give his specimen writings in order to facilitate the police to collect evidence in course of investigation by comparing the same with disputed writings.

2. The Petitioner has been arraigned as an accused in case crime No. 291 of 2000, under Sections 364-A/392/411/368/120-B, I.P.C., police station Banda, district Shahjahanpur. The prosecution case in short is that on 19.12.2000 at about 7 A.M. Virendra Kumar, brother of the informant Ash Kumar, accompanied by one Srikrishna left for the temple in a motorcycle to perform Puja. On the way, three persons kidnapped him in a Jeep and while going, they handed over a letter written in Gurmukhi language to Srikrishna in which a demand of rupees ten lac was made as ransom. According to the prosecution, the said letter was written by the present petitioner. In order to make use of the said letter as evidence against the petitioner, the police, making investigation into the said case moved the learned Additional Chief Judicial Magistrate-III, Shahjahanpur to summon the petitioner for obtaining his specimen writings for comparison with the said letter. This prayer was objected to by the petitioner. Learned Magistrate, by order dated 13.3.2001, copy whereof at Annexure 10 allowed the prayer and directed the petitioner to appear before him on a date to give his specimen writings as required by the police for comparison. Assailing the correctness of the said order, petitioner has approached this Court by filing the present petition.

3. Different provisions are enumerated in the Code of Criminal Procedure with regard to the powers of the police to investigate into cognizable offences. During investigation the police in certain matters takes the help of the Magistrate to collect evidence in order to ascertain the involvement of accused with the crime, such as, holding of test identification parade, recording of the confessional statement of the accused and the statement of the witnesses under Section 164 of the Code of Criminal Procedure.

4. There is, however, no statutory provision enabling the police to move Magistrate for a direction to the accused to give his specimen writings for the purpose of comparison with the disputed writings when the case is at the stage of investigation. Now a days offences like cheating, forgery, abduction for ransom etc. are on the rise and in most of such cases, letter or document alleged to have been written by the accused is a material piece of evidence to bring home the charge against him. Unless the police gets such letter or document examined by the handwritings expert with the admitted writings, it may be difficult to file charge sheet with scanty evidence.

5. The only provision with the aid of which the court can direct for examination of the disputed writings with the admitted writings is Section 73 of the Evidence Act. For better appreciation, the aforesaid provision is reproduced hereunder:

"73. Comparison of signature, writing or seal with others admitted or proved- In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person."

6. The expression "for the purpose of enabling the court to compare" appearing in second paragraph of the aforesaid section indicates that the prerequisite for exercise of the power to direct a person to give his specimen writings is that there must be some proceeding pending in which the court feels it necessary to compare the specimen writings with the disputed writings. In other words, Section 73 of the Evidence Act is an enabling provision which helps the court to get the disputed writings examined by an expert with the admitted writings in order to ascertain whether the accused was the author of the disputed document. Therefore, when a case is under investigation, the court lacks jurisdiction to give direction to the accused in exercise of powers under section 73 to give his specimen writings for comparison by the investigating officer. In absence of any legislative mandate the police cannot use the court as a means to collect evidence to make use of the same in the course of trial.

7. Similar question, as in the present case, arose for consideration in the case of **State of U.P. Vs. Ram Babu Misra** 1980 (17) ACC 174: AIR 1980 SC 791. In the said case, prayer was made by the investigating officer to direct the accused to give his specimen writings for the purpose of comparison with certain disputed writings. The learned Magistrate rejected the said prayer observing that he had no such power since the case is under investigation. The view taken by the Magistrate was upheld by this Court. Aggrieved thereby, the State preferred appeal to the Supreme Court. Interpreting Section 73 of the Evidence Act, the Court held that if a case is still under investigation there is no proceeding before the court in which or as a consequence of which it might be necessary to compare the writings. The language used in the section does not permit a court to give a direction to the accused to give specimen writings anticipating the necessity for comparison in a proceeding which may later be instituted in the Court. The Court made reference to Section 5 of Identification of Prisoners Act, 1920 which empowers the Magistrate to direct a person to allow his measurements or photograph to be taken for the purpose of investigation. Similar provision being not there for obtaining writings or signatures of an accused during investigation either in the Code of Criminal Procedure or in any other statute, the Court suggested for suitable legislation on the analogy of Section 5 of the aforesaid Act. The said suggestion, it is submitted has been kept in cold storage and no anxiety has been shown to bring out any legislation.

8. Similar question also arose in later decision in the cases of **Sukhvinder Singh and others Vs. State of Punjab** (1994) 5 SCC 152 and **Amarjit Singh Vs. State of U.P.** (1998) 8 SCC 613.

9. In Sukhvinder Singh (Supra) the Court held that Section 73 of the Evidence Act cannot be made use of for collecting specimen writings during investigation and recourse to it can be had only when the court before which the enquiry or the trial of a proceedings is pending requires the writings for the purpose of enabling it for comparison. In other words, a court which is not holding any enquiry under the Code of Criminal Procedure or conducting the trial is not permitted to issue any direction as contained in the second paragraph of Section 73. Having held thus, the Court observed that the writing obtained from the appellant could not be made use of during the trial and the report of the hand writing expert is rendered of no consequence at all and cannot be used against him to connect him with the crime.

10. On the same line is the decision rendered in Amarjit Singh (Supra).

11. In view of the settled position of law as laid down by the Supreme Court in the decisions referred to above, I would hold that order dated 13.3.2000 passed by the learned Additional Chief Judicial Magistrate-II, Shahjahanpur directing the petitioner to give his specimen signature is contrary to law and consequently the same is quashed. In the result criminal miscellaneous application is allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 6.12.2001

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

Criminal Misc. Writ Petition No. 6895 of 2001

Devendra Deo Sharma and another
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri R.P.S. Kashyap

Counsel for the Respondents:
A.G.A.

Constitution of India-Article 226- Gram Pradhans of the village are looting the funds of the Gram Samaj wherever they could do so-the system of Gram Sabha and Gram Samaj has failed totally in this country, and they have become dens of corruption. Instead of looking after the interest of the welfare of the people in the villages these Gram Sabhas and Gram Pradhans only look after their selfish self-interest and indulge in casteism and corruption. Hence the whole system of Gram Sabhas and Gram Pradhans should be revived from top to bottom – The Central and State Governments should do this forthwith.

(Held in para 4).

On perusal of the impugned FIR it cannot be said that no offence is prima-facie made out against the petitioner. The petition is dismissed.

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

1. Heard learned counsel for the petitioners.

2. It appears from the record that the petitioner was a Gram Pradhan and the allegation against him in the impugned First information Report is that he has cut away the trees of the Gram Samaj, sold the same and embezzled Rs. 10 lakh.

3. In a large number of cases we have found that Gram Pradhans of the villages are looting the funds of the Gram Samaj wherever they could do so. They have embezzled the fund of the Jawahar Rojgar Scheme etc. damaged the Gram Samaj Property and let out the land of the Gram Samaj by taking bribe. It appears that the system of Gram Sabha and Gram Samaj has failed totally in this country, and they have become dens of corruption. Instead of looking after the interest of the welfare of the people in the villages these Gram Sabhas and Gram Pradhans only look after their selfish self –interest and indulge in casteism and corruption. Hence the whole system of Gram Sabhas and Gram Pradhans should be revived from top to bottom. The Central and State Governments should do this forthwith, and we direct accordingly.

4. On perusal of the impugned F.I.R. it cannot be said that no offence is prima-facie made out against the petitioner. Therefore, we cannot interfere in this matter. The petition is dismissed but the bail application of the petitioners shall be decided by the Court concerned expeditiously. The observations made in the judgement shall not prejudice the trial Court.

5. Let a copy of this order be sent by the Registrar General to the Central and State Governments through their respective Secretaries.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.1.2002

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

Civil Misc. Writ Petition No. 816 of 1996

Hazi Nasirullah and another ...Petitioners
Versus
The State of U.P. through its Chief Secretary and others ...Respondents

Counsel for the Petitioners:
Sri C.K. Parekh

Counsel for the Respondents:
Sri K.B. Mathur
Sri Ranvijai Singh
S.C.

Uttar Pradesh water Supply and Sewerage Act 1976- Section 52 (2)- Water Tax and Sewerage Tax- enhacement of 15% water every year- pleas for enhancement- taken by Jal Sansthan- about Ram Chandra Agarwal Case- held not available- Water value is different than the water tax- it can not inhance more than 14% of the valuation of the house in question- Court not considered the view taken in Ram Chandra Agarwal as case in absence of controversy raised by the Petitioner.

Held- Para 8

From a bare reading of sub section (2) of section 52 of the Act reproduced above, it is absolutely clear that water tax cannot be more than 14 percent of the assessed annual value of the premises and likewise sewerage tax cannot be more than 4 percent of the assessed annual value of the premises. Thus, the respondent Jal Sansthan cannot increase water tax by 15 percent every year and sewerage tax by 4 percent every year. The decision relied upon by Sri Mathur in

the case of Ram Chandra Agarwal (supra) considered the case of increase in water charges by 15 percent every year as provided by Notification dated 24.11.1994. This notification has been issued in exercise of powers under section 59 of the Act, fixing the rate of water charges as also providing for increase in water charges. It has nothing to do with the fixing of rate of water tax and sewerage tax. The decision of this court in the case of Ram Chandra Agarwal (supra) will be of no help to the respondents, as this Court had only upheld the increase of water charges by 15 percent every year under the aforesaid Notification. This Court was not called upon to consider the question as to whether water tax and sewerage tax can be increased by 15 percent every year or not in view of sub section (2) of Section 52 of the Act.

Case law discussed:

W.P. No. 36331 of 96 decided on 31.7.97

Editorial Notes- Keeping in view of this land mark judgement, the view taken in Ram Chandra Agarwal's case requires reconsideration in better interest of the citizens.

(Delivered by Hon'ble S.K. Sen, C.J.)

By means of the present writ petition Hazi Nasirullah and Zaida Bibi have approached this Court under Article 226 of the Constitution of India seeking a writ, order or direction in the nature of certiorari quashing the bill/ notice dated 8.11.96 filed as Annexure- 7 to the writ petition. They further seek a writ, order or direction in the nature of certiorari quashing the Notification dated 24th November 1994/ Ist December, 1994 and declaring it as ultra vires and arbitrary particularly clauses 4,5 (1) and 7 of the said Notification.

We have heard Sri C.K. Parekh, learned counsel for the petitioners, Sri K.B. Mathur, learned counsel for the Jal Nigam, respondent no. 3 and Sri Ranvijai Singh, learned Standing Counsel representing respondent No. 1.

Briefly stated the facts giving rise to the present writ petition are as follows:

The petitioners claim themselves to be the owner and residents of premises no. K-55/54 Rajapura, Varanasi. The premises in question is being assessed to municipal taxes. Jal Sansthan, Varanasi is levying water-tax and sewerage-tax in accordance with the provisions of the Uttar Pradesh Water Supply and Sewerage Act, 1975 (hereinafter referred to as the Act). According to the petitioners, Jal Sansthan, Varanasi had sent the bills for the years 1995-96 and 1996-97 wherein irrespective of the annual value of the house determined by the Nagar Nigam, Varanasi, the water-tax and sewerage-tax have been increased by about 15 percent of the previous year charges.

Learned counsel for the petitioners submitted that under Section 52 (2) of the Act the minimum and maximum rate of water-tax and sewerage-tax which can be charged, has been fixed. The said sub-section provides for levying water-tax not less than 6 percent and not more than 14 per cent; whereas sewerage-tax shall not be less than 2 per cent and not more than 4 per cent of the assessed annual value of the premises as the State Government may declare by Notification in the Gazette. According to him, the water-tax and sewerage-tax have been increased by 15 per cent every year, which is not permissible under law and is contrary to

the mandate given under Section 52 (2) of the Act. He further submitted that the Notification dated 24th November, 1994/ Ist December, 1994 which permits the increase of water-tax and sewerage-tax by 15 per cent every year is contrary to the provisions of Section 52 (2) of the Act and is ultra vires.

Sri Mathur, learned counsel for Jal Nigam submitted that the clause in the aforesaid Notification permitting increase by 15 per cent every year has been upheld by this Court in Civil Misc. Writ Petition No. 36331 of 1996 Shri Ram Chandra Agarwal versus State of U.P. and another, decided on 31st July, 1997 and therefore, the bills issued by Jal Sansthan do not call for any interference.

Learned counsel for the petitioners has not made any submission with regard to the increase in water-charges by 15 per cent every year in terms of the aforesaid Notification, but has only confined his arguments with regard to increase in water-tax and sewerage-tax by 15 per cent every year.

Section 52 of the Act provides for taxes, which can be levied by Jal Sansthan. Sub section [a] of section 52 of the Act empowers the Jal Sansthan to levy water tax; whereas sub section [b] of section 52 of the Act empowers the Jal Sansthan to levy sewerage tax. However, sub section 52 of the Act prescribed minimum and maximum limit at which water tax and sewerage tax can be levied. Sub section [2] of section 52 of the Act is reproduced below:

"[2] The taxes mentioned in sub-section [1] shall be levied at such rate which in the case of water tax shall be not less than 6 percent and not more than 14 percent and in the case of sewerage tax shall be not less than 2 percent and not more than 4 percent of the assessed annual value of the premises as the Government may, from time to time after considering the recommendation of the Nigam, by notification in the Gazette, declare."

From a bare reading of sub section [2] of section 52 of the Act reproduced above, it is absolutely clear that water tax cannot be more than 14 percent of the assessed annual value of the premises and likewise sewerage tax cannot be more than 4 percent of the assessed annual value of the premises. Thus, the respondent Jal Sansthan cannot increase water tax by 15 percent every year and sewerage tax by 4 percent every year.

The decision relied upon by Sri Mathur in the case of Ram Chandra Agarwal [supra] considered the case of increase in water charges by 15 percent every year as provided by Notification dated 24.11.1994. This notification has been issued in exercise of powers under section 59 of the Act fixing the rate of water charges as also providing for increase in water charges. It has nothing to do with the fixing of rate of water tax and sewerage tax. The decision of this Court in the case of Ram Chandra Agarwal [supra] will be of no help to the respondents, as this Court had only upheld the increase of water charges by 15 percent every year under the aforesaid Notification. This Court was not called upon to consider the question as to whether water tax and sewerage tax can be increased by 15 percent every year or not in view of sub section [2] of Section 52 of the Act.

In view of the foregoing discussions, the bills issued by the Jal Sansthan, the copy of which have been filed as Annexures-6 to 9 to the writ petition, which imposes water tax and sewerage tax by increasing it by 15 percent every year cannot be sustained and are hereby set aside. Accordingly, we direct the respondent No. 2 to correct the bills and supply fresh bills to the petitioners in accordance with law.

With these observations, the writ petition succeeds and is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2002

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

First Appeal No. 809 of 1993

Ran Singh and others ...Appellants
Versus
U.P. State through the Collector, Ghaziabad ...Respondents

Counsel for the Appellants:
Sri S.P. Gupta
Sri Vivek Chaturvedi
Sri Pankaj Mithal

Counsel for the Respondents:
S.C.

Land Acquisition Act, enhancement of compensation- adjoining plots to the Appellant compensation awarded at the rate of 84/- per sq. yard, - claim can not be rejected on the ground of limitation when the court fee has been paid.

Held- Para 10

In view of this principle laid down by the Apex Court, the appellants are entitled to compensation @ Rs. 84/- per sq. yards for the land acquired notwith-standing that in the memo of Appeal initially compensation @ Rs. 40/- per sq. yards only was claimed. Subsequently, the claim has been enhanced to Rs. 100/- per sq. yards and the court fee has been paid. The claim can not be rejected on the ground that enhancement of the claim has been made after the expiry of period of limitation. The limitation in this matter is not material in view of the above observation of the Apex Court.
1985 (3) SCC-737

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

1. The Ghaziabad Development Authority framed a scheme for the development of the city within the municipal limits and for that purposes the land of the appellants and of other persons was acquired. The notification under section 4(1) of the L.A. Act (hereinafter referred to as 'Act') was issued on 28.12.1963 and the notification under section 6 was issued on 22.9.1986. Against that award on the request of the appellants reference was made before the District Judge, Ghaziabad. That reference no. 25 of 1987 was decided by the judgment dated 30.3.1991 alongwith other references by Vth Additional District Judge, Ghaziabad. He has awarded compensation @ Rs. 8/- per sq. yards to the appellants for their acquired land. 30% solitium has also been awarded alongwith 9% interest.

2. The appellants felt dissatisfied with award and filed this appeal claiming that the compensation be awarded @ Rs. 40/- per sq. yards. Later on the memo of appeal was amended and the claim was enhanced and compensation @ Rs. 100/- per sq. yards has been claimed. The required court fee has also been paid.

3. I have heard Sri S.P. Gupta, learned Senior Advocate assisted by Sri Vivek Chaudhary, learned counsel for the appellants and the learned Standing Counsel and have perused the entire records.

4. After considering the arguments I am of the view that only short point is involved for consideration in this appeal. The land in the present case was acquired for the development of two colonies within the municipal limits of Ghaziabad city. The land in dispute is situated in village Raheespur in district Ghaziabad. The other land of Sewak Ram and Anoop Singh situated in village Jatwara Kalan was also acquired for development of the same colonies.

5. It has been argued that though the land of the present appellants is in the different village but is adjoining to the land of Anoop Singh and Sewak Ram of village Jatwara Kalan. In this connection, learned counsel for the appellants has referred to the statement of Ram Kishan, PW -1. He has stated that the land of village Jatwara Kalan of Anoop Singh and Sewak Ram are adjoining to the disputed land. It is contended that the statement of Ram Kishan is unrebutted.

6. Learned counsel has also referred to the judgement of the reference court. In para 33 of the judgment, the reference court has observed that the land of Sewak Ram is in approximity of the land of the present appellants. The notification under section 4 (1) of the Act regarding the land of Jatwara Kalan was made on 18.6.1962 and under section 6 on 27.10.1964 and possession was taken on 22.12.1964 and the award was given on 26.6.1967. On the basis of this, it has been argued that the appellants are entitled to compensation at the same rate at which the compensation has been awarded for the land of village Jatwara Kalan of Sewak Ram and Anoop Singh.

7. It has been further argued that the reference of Anoop Singh and others in L.A. reference no. 376 of 1982 was decided on 31.5.1984 and then they were awarded compensation @ Rs. 40/- per sq. yards by the Ist Additional District Judge, Ghaziabad. On that basis, the appellants claimed compensation in the memo of appeal @ Rs. 40/- per sq. yards.

8. It is further contended that Anoop Singh and other filed appeal before this Court which was First Appeal No. 288 of 1985 against the above judgment. This first appeal was decided by this Court by judgement dated 5.2.1993 by Hon'ble P.P. Gupta, J., that this court has awarded compensation for the land @ Rs. 84/- per sq. yards, that therefore, the appellants are entitled for compensation at the same rate.

9. It has also been argued that the appellants are entitled to compensation at the same rate at which the order tenure holders are granted compensation notwithstanding the fact that initially in the appeal, the compensation @ Rs. 40/- per sq. yards only was claimed. Learned counsel for the appellants in support of the argument has referred to the decision of the Apex Court in Bhag Singh and others Versus Union Territory of Chandigarh, 1985 (3), SCC, 737. In this case, High Court enhanced the compensation and directed that the enhanced amount shall be given subject to the claim put forward in the memo of appeal preferred by the claimants and payment of court fee. The appeal was

preferred to the Division Bench which further enhanced the compensation only in respect of the claimants, who had paid proper court fee. The matter came to the Apex Court and the following observation of the Apex Court is material:

"We are of the view that when the learned Single Judge and the Division Bench took the view that the claimants whose land was acquired by the State of Punjab under the notifications issued under Sections 4 and 6 of the Act, were entitled to enhance compensation and the case of the appellants stood on the same footing, the appellants should have been given an opportunity of paying up the deficit court fee so that, like other claimants, they could also get enhanced compensation at the same rate as the others. The learned Single Judge and the Division Bench should not have, in our opinion, adopted a technical approach and denied the benefit of enhanced compensation to the appellants merely because they had not initially paid the proper amount of court fee. It must be remembered that this was not a dispute between two private citizens where it would be quite just and legitimate to confine the claimant to the claim made by him and not to award him any higher amount than that claimed though even in such a case there may be situations where an amount higher than that claimed can be awarded to the claimant as for instance where an amount is claimed as due at the foot of an account. Here was a claim made by the appellants against the State Government for compensation for acquisition of their land and under the law, the State was bound to pay to the appellants compensation on the basis of the market value of the land acquired and if according to the judgements of the learned Single Judge and the Division Bench, the market value of the land acquired was higher than that awarded by the Land Acquisition Collector or the Additional District Judge, there is no reason why the appellants should have been denied the benefit of payment of the market value so determined. To deny this benefit to the appellants would tantamount to permitting the State Government to acquire the land of the appellants on payment of less than the true market value."

10. In view of this principle laid down by the Apex Court, the appellants are entitled to compensation @ Rs. 84/- per sq. yards for the land acquired notwithstanding that in the memo of appeal initially compensation @ Rs. 40/- per sq. yards only was claimed. Subsequently, the claim has been enhanced to Rs. 100/- per sq. yards and the court fee has been paid. The claim can not be rejected on the ground that enhancement of the claim has been made after the expiry of period of limitation. The limitation in this matter is not material in view of the above observations of the Apex Court.

11. Apart from this, the appellants are also entitled to the solatium @ 30% of the compensation and interest @ 9% on the enhanced amount of compensation.

The parties shall bear their own costs.

The appeal is accordingly disposed of.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2002

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

Civil Revision No. 341 of 1997

M/s Gangotri Sahkari Awas Samiti Ltd. ...Revisionist
Versus
M/s Pushpa Sahkari Avas Samiti Ltd. and others ...Respondents

Counsel for the Revisionist:
Sri Ravi Kant
Sri A.K. Goyal

Counsel for the Respondents:
Sri A.K. Gupta

Code Civil Procedure- Section 47- Execution Proceeding- suit decred on basis of compromise- six months time allowed for payment- execution proceeding filed before expiry of six months period- execution- held- premature.

Held- Para 11 and 12

If the execution was premature when it was filed, it is liable to be rejected and can not be proceeded with because it has prematured during the pendency of the case. In this case, it is admitted that the execution has been filed before the expiry of six months from the date of the decree. It is also not disputed that six months time was granted for payment. Therefore, the execution is premature.

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

1. Suit no. 501 of 1995 was filed by the respondent no. 1 against the revisionist and other respondents for several relief's of permanent and mandatory injunctions. The suit was decided between the revisionist and respondent no. 1 on 6.9.1996 on the basis of the compromise dated 4.9.1996, Annexure no. 2 to the affidavit. The order of the Civil Judge deciding in the suit in terms of the compromises is Annexure no.3 to the affidavit. The respondent no. 1 moved an application for the execution of decree for recovery of money in which the revisionist filed objections under section 47 C.P.C. The objections have been rejected by the impugned order dated 21.7.1997 by Civil Judge, Allahabad. Aggrieved by it, the present revision has been preferred.

2. I have heard Sri Ravi Kant, learned Senior Advocate for the revisionist and Sri A.K. Gupta, learned counsel for the respondent no. 1 and perused the record.

3. Several legal pleas have been raised by Sri Ravi Kant, learned counsel for the revisionist and it is contended that the decree is not executable. The learned counsel has referred to the allegations of the plaint and the compromise decree and it is contended that property has been transferred by compromise decree thereby the payment of court fee and the stamp duty has been evaded, that therefore, this compromise decree is illegal and can not be enforced and also against the provisions of section 17 (2) (6) of the Indian Registration Act. The compromise is also against the public policy and therefore is void under section 23 of the Indian Contract Act.

4. It is further contended that the relief sought in the suit are for mandatory and permanent injunctions only and the money decree could not have been passed, that the decree is executable under

Order 21 Rule 32 C.P.C. only. The execution for recovery of money in accordance with the compromise by attachment and sale of property is not maintainable.

5. The other contention of the learned counsel for the revisionist is that six months time was granted in the decree for the payment of money. The execution is premature having been fled within the period of six months from the date of the decree.

6. It is further contended that the respondent nos. 2 to 14 are the actual owners of the property. There was only an agreement in favour of the respondent no. 1 and a power of attorney and therefore, he had no right to transfer the property, that therefore, compromise entered by him is illegal, that the compromise is also invalid as it does not comply the provision of section 17 (2) (6) of the Indian Registration Act. On the basis of these arguments, it has been contended that the execution is not maintainable and is liable to be struck off, that the court below has erred in rejecting the objections of the revisionist under section 47 C.P.C.

7. As against this, it has been argued by Sri A.K. Gupta, learned counsel for the respondent no. 1 that no such pleas were taken in the objections under section 47 C.P.C., that therefore they can not be raised for the first time in this revision.

8. It is further contended that after the impugned order dated 20.7.1997 two other orders have been passed in the execution and therefore, this revision has became infructous.

9. I have carefully considered the arguments of the learned counsel. The two orders have been passed in the execution after the impugned order, which are annexure nos. CA-5 and CA-6. These orders are regarding the proceedings with the execution after the rejection of the objection under section 47 C.P.C. They are consequential orders after rejection of objection under section 47 C.P.C. and because of the fact that the execution proceedings have been started this revision has not become infructous. After rejection of the objection under Section 47 C.P.C. the trial court was bound to proceed with the execution proceedings and accordingly passed orders in the execution case. For this reason, the objection under section 47 C.P.C. can not be rejected. If the decree might have fully executed, this revision would have became infructous. The first argument of the learned counsel for the opposite party no. 1 is therefore, can not be accepted.

10. Now coming to the second argument, the order of the trial court show that none of the objection was taken in objections under section 47 C.P.C. nor was pressed before the trial court except the objection that the execution is premature having been filed within a period of six months from the date of the decree. Therefore, other objections can not be raised for the first time in this revision and I do not propose to record any finding on them.

11. Now I consider the question whether the execution is premature. It may be mentioned that the judgment and decree by which the suit was decreed in terms of compromise is dated 6.9.1996, annexure no. 2 of the affidavit. It show that six month time was given to make

payment. It is not disputed that the execution was filed before the expiry of the period of six months from 6.9.1996. The executing court has considered this point and held that six months time have already expired during the pendency of execution since the date of the decree and therefore, now the execution can not be rejected on this ground. In my opinion, the approach of the executing court is not correct. The question whether the execution was premature or not is to be decided with regard to the date at which the execution was filed. If a suit is found to have been filed premature, it can not be decreed for the reason that the period has expired during the pendency of the suit. Similar principle will not apply to the execution. If the execution was premature when it was filed, it is liable to be rejected and can not be proceeded with because it has prematured during the pendency of the case.

12. In this case, it is admitted that the execution has been filed before the expiry of six months from the date of the decree. It is also not disputed that six months time was granted for payment. Therefore, the execution is premature.

13. Accordingly, the objection under section 47 C.P.C. are fit to be allowed. The revision is accordingly allowed and the impugned order of the learned Civil Judge, Allahabad is quashed. It is ordered that the execution is premature and is dismissed as premature.

14. In the circumstances of the case, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.1.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. SINGH, J.

Civil Misc. Writ Petition No. 36709 of 2001

R. K. Mittal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Murli Dhar

Counsel for the Respondents:
Sri A.K. Misra
S.C.

Constitution of India, Article 226- a public authority has no power to contravene the bye laws made by that authority- the statutory and municipal rules not regulations have to be strictly followed.

Held- Para 23

We therefore, direct the NOIDA authorities to take immediate strong action against those who have started using the residential plots wholly or partly for commercial or other non - residential use. NOIDA does not appear to have taken any punitive action against the erring lessees even after they were found to have been using the leased property for purposes other than the purpose for which the lease was granted.

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

1. This petition furnishes a typical instance of a widespread malady which has infected our society and body politic, namely, the belief in the rich and mighty of our country that they are above the law.

2. Heard Sri Murli Dhar, Sri S. Farman Ahmad Naqvi, learned counsels for the petitioners, Sri A.K. Misra, learned counsel for respondents 2 and 3 and learned standing counsel.

3. This writ petition has been filed praying for a writ of certiorari for quashing the impugned order dated 18.6.2001, Annexure-1 to the writ petition and for a mandamus directing the respondents to formulate and finalise a comprehensive scheme for compounding and regularizing the non-residential user of the residential premises in question. It is also prayed that the respondent be restrained from canceling the lease granted in favour of the petitioners no. 1, 2 and 3 or to remove by force petitioner no. 4.

4. The facts of the case are that New Okhla Industrial Development Authority (hereinafter referred to as NOIDA measuring 274.37 sq. meter on lease to petitioners no. 1,2 and 3. It was clearly mentioned in Clause 15 of the Transfer Memorandum dated 27.8.99 that the transferee shall use the plot and premise exclusively for residential purpose. It is alleged in paragraph 4 of the writ petition that after acquiring the lease hold rights over the above plot, petitioners no. 1, 2 and 3 had obtained the requisite permission from NOIDA to raise construction in accordance with the relevant rules and bye laws. Thereafter, the petitioners made constructions over the aforesaid plot and started residing in the said premises.

5. It appears that subsequently a portion of the residential premises, which had been given by NOIDA to petitioners 1, 2 and 3 exclusively for residential purpose, was let out by the aforesaid petitioners to petitioner no. 4, Andhra Bank and also to an organization 'Akariti Infotec'. Since this was a clear breach of the Transfer Memorandum, the NOIDA issued notices dated 18.1.2001 and 22.2.2001 intimating petitioners no. 1, 2 and 3 that the use of residential plot for commercial purpose is in violation of the lease deed and asked them to stop commercial activities on the aforesaid plot within thirty days failing which the lease/transfer deed shall be revoked. However, it is evident that the petitioners continued to use the aforesaid plot for commercial activities despite the aforesaid notice.

6. In paragraph 7 of the writ petition the petitioners have mentioned various other residential premises in NOIDA on which commercial activities are being carried out. On this basis learned counsel for the petitioners submitted that since there are other persons who are using their residential plots in NOIDA for commercial purpose, hence the petitioners are being discriminated against since no action has been taken against these other persons. We do not agree with the submission. There is no question of violation of Article 14 of the Constitution of India in illegalities. For instance, a thief can not say that many other thieves in the country have not been apprehended, and hence there is discrimination against him if he is proceeded against in a court of law.

7. Learned counsel for the petitioners then submitted that the Delhi Development Authority and Ghaziabad Development Authority have permitted conversion of residential plots to commercial purpose vide Annexures 5

and 6 to the writ petition. In our opinion, we are not concerned with D.D.A. and G.D.A., but we are concerned with NOIDA alone. In paragraph 13 of the writ petition, it is alleged that NOIDA has published some advertisement consequent to which those who had residential plots started submitting applications for conversion to commercial use, but suddenly NOIDA changed its stand. Learned counsel for NOIDA, Sri A.K. Misra stated that NOIDA never permitted conversion of residential plots to commercial use. Learned counsel for the petitioners has not been able to prove the contrary. At most NOIDA may have invited some suggestions in this connection, but it never changed the relevant rules, which prohibit conversion of residential plots to commercial use. Rather, as stated in paragraph 18 of the petition, NOIDA issued notices to all concerned who having residential plots started commercial user of the same that their allotments will be cancelled if the commercial user of these plots is not stopped.

8. It may be mentioned that Section 9 (2) (b) of the U.P. Industrial Development Area Act 1976 states that the authority constituted under Section 3 may, with the prior approval of the State Government, make regulations providing for the lay out plan of a building, whether industrial, commercial or residential. Hence in the lay out plan for construction of a building the purpose for which the building will be used has to be mentioned. Under Section 14 of the Act, if any condition of the transfer is breached the Executive Officer may resume the site or building so transferred and may further forfeit the whole or any part of the money paid in this respect. Section 14 (2) provides that the Chief Executive Officer may cause possession of the building to be delivered to him, and may use or cause to be used such force for this purpose as may be necessary. Under Section 15 penalty can be imposed for contravening any provision of the Act or Rules.

9. The New Okhla Industrial Development Area (Preparation and Finalisation of Plan) Regulations, 1991 defines 'Residential Use' in Regulation 2 (k) as follows:

"'Residential Use' means use in land and building or part thereof for human habitation and such other uses incidental to residential uses."

10. Regulation 4 (1) (b) provides that the plan for NOIDA should include the area allotted for industrial use, residential use, commercial use, etc.

11. Regulation 11 provides for amendment of the plan. Hence to convert the residential use to commercial use the plan has to be amended, and that has obviously not been done. Further, it is necessary to mention that in NOIDA the Authority does not permit change of user from residential to commercial purpose. Hence, user by the petitioners of the residential plot in question for commercial purpose is clearly illegal.

12. Moreover, the National Capital Region Planning Board Act, 1985 (which applies to NOIDA also) has provided in Section 29 that no development should be made in the region which is inconsistent with the Regional Plan as finally published. Under Section 29 (2) the Board can direct any State which violates the original plan to stop such violation. Thus,

even the State Government can not violate the original plan which has been finally published.

13. In the impugned order dated 18.6.2001 it has been stated, and in our opinion rightly so:

"This is a classic case of violation of law by the most educated and enlightened class of the country. This class in NOIDA has tried to change not only the character of NOIDA but have for its self- interest destroyed the peace of the neighbours."

14. In Clause 5 of the order, it has been stated that "the petitioners changed the land use of the plot without intimating the authority, and did not bother to seek any clarification or obtain permission from the Authority for such change. It is a well known fact that this Authority does not permit commercial activities in the residential plots."

15. Accordingly, the NOIDA has rejected the representation of the petitioners and directed to ensure the vacation of the bank branch and Infotec Office from the residential premises and restore the building according to the prescribed building bye laws within 4 months. It was also stated in paragraph 7 of the impugned order that since the petitioner evaded compliance of the terms of the lease deed for nearly five months on one pretext or the other he was informed that in case of failure to restore the land use of the plot within the stipulated period the Authority shall be free to take further action in accordance with law without further notice.

16. We see no illegality in the impugned order, rather we feel that NOIDA has been too indulgent with the petitioners, and it should have cancelled the petitioners' entire lease and directed them to vacate the premises in question for gross violation of the transfer memorandum. It seems that in NOIDA there are a large number of people who are violating the law in collusion with the officials and they think that they are above the law.

17. In Munshi Ram vs. Union of India, 2000 (7) SCC 22, the Supreme Court has observed (in paragraph 9),

"The continued unauthorized user would give the paramount lessor the right to re-enter after cancellation of the lease deed. As already noticed, DDA is insisting on stoppage of misuser. The misuser is contrary to the terms of the lease on the ground that the zonal development plan of the area has not been framed."

18. In the above case the petitioners had a residential lease, which was being used for commercial purpose and hence proceedings were initiated for unauthorized user. The present case is hence similar to the above case decided by the Supreme Court.

19. In M.I. Builders vs. Radhey Shyam Sahu, 1999 (6) SCC 464, the Supreme Court has observed that unauthorized construction should be ordered to be demolished, even if the builders had spent a considerable amount.

The Court observed (in paragraph 73)

"The High Court has directed dismantling of the whole project and for

restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person whose construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out, judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots."

20. In R.A. Agrawal vs. Corporation of Calcutta, 1999 (6) SCC 532, the Supreme Court directed demolition of a multi-storeyed building, which had been constructed in violation of the building rules. The Supreme Court also granted police protection for carry out the compliance order.

21. In K.R. Shenoy vs. Udipi Municipality, AIR 1974 SC 2177, the Udipi Municipality had permitted construction of a Cinema House in a residential area. This grant of permission was challenged in the Supreme Court, which held that a public authority has no power to contravene the bye laws made by that authority (vide paragraph 27). It was further held by the Supreme Court (in paragraph 28 and 29) that illegal commercial use by constructing a Cinema House invades the right of the residents.

22. The above decisions have clearly laid down the principle that the statutory and municipal rules and regulations have to be strictly followed, otherwise there will be chaos. If NOIDA permits violation of the rules, it means that no rule need be followed, and the Rule of Law is thrown to the winds. This case is a classic illustration of this kind of illegal practice. If seems that the law is hardly followed in NOIDA, or at least the rich and mightily are above the law.

23. We, therefore, direct the NOIDA authorities to take immediate strong action against those who have started using the residential plots wholly or partly for commercial or other non-residential use. NOIDA does not appear to have taken any punitive action against the erring lessees even after they were found to have been using the leased property for purposes other than the purpose for which the lease was granted. If it has not already taken appropriate action consequent upon the breach of the terms of the lease or any statutory rules or regulations it should issue show cause notices to such lessees without any further loss of time and take appropriate action in accordance with the relevant rules expeditiously. If this is not done it will give a wrong signal that the rules and restrictions imposed in regard to the user of the leased property exist only

on paper and are not meant to be taken seriously. Such an attitude may lead to chaotic conditions. If despite these observations NOIDA continues to show laxity in this regard this court would be constrained to take appropriate action against NOIDA.

24. In the result, the writ petition is dismissed, but with the above directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. SINGH, J.

Civil Misc. Writ Petition No. 35364 of 1998

Gopi Krishna Srivastava ...Petitioner
Versus
Deputy Housing Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Singh

Counsel for the Respondent:
Sri V.S. Singh
Sri Rajeev Gupta
S.C.

Constitution of India, Article 226- Maintainability - writ petition against Private Housing Society- not an instrumentality- the Government has no deep pervasive control- held- not maintainable.

Held- para 3

Hence writ will not lie against every co-operative society but only against a co-operative society which is also an instrumentality of the State. In our opinion, Jeevan Beema Karmchari Grih Nirman Sahkari Samiti Limited, Kanpur is not an instrumentality of the State because it has not been demonstrated that the State Government has a deep and pervasive control over it.

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

1. Heard learned counsel for the parties.

2. The petitioner was Secretary of the Committee of Management, Jeevan Beema Karmchari Grih Nirman Sahkari Samiti Limited, Kanpur and he has challenged the impugned order. In our view the respondent society is a purely private body and not an instrumentality of the State and hence no writ lies against it. It is settled law that ordinarily no writ lies against a private body except a writ of habeas corpus.

3. Learned counsel for the petitioner states that a writ lies against co-operative societies. In our opinion a writ will lie against a co-operative society which is an instrumentality of the State because of the deep and pervasive control of the State Government. However, no writ will lie against a co-operative society which is not an instrumentality of the State. Hence writ will not lie against every co-operative society but only against a co-operative society which is also an instrumentality of the State. In our opinion, Jeevan Beema Karmchari Grih Nirman Sahkari Samiti Limited, Kanpur is not an instrumentality of the State because it has not been demonstrated that the State Government has a deep and pervasive control over it.

4. The petition is, therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.1.2002

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

Civil Misc. Writ Petition No. 2523 of 2002

M/s Lily Chemicals Pvt. Ltd. and another ...Petitioners
Versus
Chairperson, Debts Recovery Appellate Tribunal and others ...Respondents

Counsel for the Petitioners:
Anurag Jauhari
Shashi Nandan

Counsel for the Respondents:
Sri Tarun Verma

Recovery of Debts Due to Banks and Financial Institutions Act, 1993- Sections 17 (2) read with Section 20- the order setting aside ex parte decree and putting the petitioners to condition is applicable within the meaning of sub section (2) of Section 17.

Held- Para 11

It is to be imbibed that Act No. 51 of 1993 is a self contained Act. Debts Recovery Appellate Tribunals created under the aforesaid Act is not empowered to go behind the wisdom of Parliament providing appeals against any order passed by Debts Recovery Tribunal before it under Sub- section (2) of Section 20 of the Act prohibiting appeals against consent order passed by Debts Recovery Tribunal. It is held that Debts Recovery Appellate Tribunal in utter breach of mandatory provisions envisaged under sub section 2 of section 17 and sub sections 1 and 2 of Section 20 of Act No. 51 of 1993 on its own assumption and presumption borrowing general principals of general law that such orders are interlocutory orders and on that basis holding that no appeal is maintainable against the order dated 28.2.2001 passed by Debts Recovery Tribunal is not sustainable in eye of law and order impugned dated 15.1.2002 (Annexure- 10 to the writ petition) passed by it deserves to be quashed.

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

1. Heard the learned counsel for the petitioners, Sri Shashi Nandan as well as Sri Tarun Verma, learned counsel representing respondent no. 4, Canara Bank, Saharanpur Road Branch, Dehradun who is only contesting respondent. The respondent no. 1, 2 and 3 are formal parties.

2. Although the present writ petition is posted today for admission but with the consent of the learned counsel for the parties, I propose to decide it on merits at admission stage.

3. The instant writ petition is filed by the petitioners questioning the legality and validity of the order dated 15.1.2002 passed by Chairperson. Debts Recovery Appellate Tribunal, Allahabad, respondent no. 1 on the ground interalia that respondent no. 1 has committed manifest error of law in holding that against an order setting aside ex parte decree and restoring Original Application to its original number, no appeal is maintainable, as order falls within the purview of interlocutory order.

4. Brief resume of facts leading of filing of the present writ petition are that the Original Application filed by respondent no. 4 was decreed ex parte against the petitioners on 11.12.2000. Aggrieved against the ex parte decree, the petitioners moved an application to recall

the aforesaid ex parte decree as envisaged under clause (g) of sub- section (2) of Section 22 of Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Act No. 51 of 1993), which provides for setting aside any order of dismissal of any application for default or any order passed ex parte by the Tribunal. The aforesaid application for setting aside ex parte decree was allowed by the Presiding Officer, Debts Recovery Tribunal. Allahabad on 28.2.2001 and petitioners were put to punitive condition that they shall deposit Rs. thirty lacs with the respondent Bank within a month from the date of setting aside ex parte decree.

5. Aggrieved against the order dated 28.2.2001, the petitioners filed an appeal before the Chairperson, Debts Recovery Appellate Tribunal, Allahabad, respondent no. 1 and the respondent no. 1 after hearing the learned counsel for the parties, arrived at a conclusion that against the order dated 28.2.2001 no appeal is maintainable. It is held by the respondent no. 1 that the order dated 28.2.2001 setting aside ex parte decree is an interlocutory order, therefore, no appeal lies within the meaning of Section 20 of Act No. 51 of 1993.

6. It is contended by the learned counsel for the petitioners. Sri Shashi Nandan that against the order dated 28.2.2001 setting aside ex parte decree and putting the petitioners to condition is appealable within the meaning of sub section (2) of Section 17 read with Section 20 of Act No.51 of 1993.

7. The aforesaid argument of the learned counsel for the petitioners is refuted by Sri Tarun Verma, learned counsel appearing on behalf of contesting respondent no. 4. It is urged by Sri Verma that every memorandum of appeal under Section 20 of Act no. 51 of 1993 shall be accompanied with a fee provided under sub- rule (2) of Rule 8 of Debts Recovery Appellate Tribunal (Procedure) Rules, 1994 (hereinafter referred to as the Rules of 1994) and such fee may be remitted either in the form of crossed demand draft drawn on a nationalized bank in favour of the Registrar and payable at the station where the Registrar's office is situated or remitted through a crossed Indian Postal Order drawn in favour of the Registrar and payable in Central Post Office of the station where the Appellate Tribunal is located. Sri Verma invited my attention to sub- rule (2) of Rule 8 of Rules of 1994, which provides for quantum of fee payable on memorandum of Appeal in support of his aforesaid argument.

8. I have given my thoughtful consideration to the rival contentions raised by learned counsel for the parties.

9. From a conjoint reading of sub-section (2) of Section 17 and sub- sections (1) and (2) of Section 20 of the Act No. 51 of 1993 it is revealed that respondent no. 1 is to entertain appeals against any order made, or deemed to have been made, by a Tribunal under the Act no. 51 of 1993. Sub section (2) of Section 17 of the said Act provides that an Appellate Tribunal shall exercise on and from the appointed day jurisdiction, powers and authority to entertain appeals against any order made or deemed to have been made by a Tribunal. Sub- section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in

the matter. Sub section (2) of the aforesaid Section further provides that no appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

10. Indisputably, in the present case, the order impugned against which an appeal was preferred before Debts Recovery Appellate Tribunal was not passed with the consent of the parties. Thus, by corollary of reasons, the order impugned passed by Debts Recovery Tribunal was appealable before Debts Recovery Appellate Tribunal within the meaning of sub- section (2) of Section 17 and sub- section (1) of Section 20 of Act No. 51 of 1993 subject to payment of fee as prescribed under sub- rule (2) of Rule 8 of the Rules of 1994.

11. It is to be imbibed that Act No. 51 of 1993 is a self contained Act. Debts Recovery Appellate Tribunals created under the aforesaid Act is not empowered to go behind the wisdom of Parliament providing appeals against any order passed by Debts Recovery Tribunal before it under sub section (2) of Section 17 and carving out an exception under sub section (2) of Section 20 of the Act prohibiting appeals against consent order passed by Debts Recovery Tribunal. It is held that Debts Recovery Appellate Tribunal in utter breach of mandatory provisions envisaged under sub section (2) of Section 17 and sub sections (1) and (2) of Section 20 of Act No. 51 of 1993 on its own assumption and presumption borrowing general principles of general law that such orders are interlocutory orders and on that basis holding that no appeal is maintainable against the order dated 28.2.2001 passed by Debts Recovery Tribunal is not sustainable in eye of law and order impugned dated 15.1.2002(Annexure- 10 to the writ petition) passed by it deserves to be quashed.

12. There is yet another reason to arrive at aforesaid conclusion. It is settled principle of law that if there is conflict between two Sections of the same Act, it is to be resolved following the principle of harmonious interpretation. It is well to remember that while following the principle of harmonious interpretation Courts and Tribunals are to keep in view that both the Sections are made workable. It is to be imbibed that Courts and Tribunals have to interpret the conflicting Sections in such a manner that none of these Sections become redundant. Here in the present case, if interpretation of Section 20 of Act No. 51 of 1993 of Appellate Tribunal is accepted, it will certainly make sub- section (2) of Section 17 redundant, which would be impermissible under rules of interpretation of statute adopted by Courts of law from time immemorial.

13. In my considered opinion, right of appeal is a creation of statute which cannot be taken away by any Court or Tribunal without taking into account all the relevant Sections of an Act conferring right of appeal against an order. In the instant case. Section 20 of Act No. 51 of 1993 cannot be interpreted in isolation of sub section (2) of Section 17 of the said Act.

14. Upshot of the aforementioned discussion is that instant writ petition is hereby allowed and the order impugned dated 15.1.2002. Annexure -10 to the writ petition, is quashed with a direction to Chairperson. Debts Recovery Appellate

Tribunal, Allahabad, respondent no. 1 to decide the appeal on merits in accordance with law after affording opportunity of being heard to both the parties, subject to payment of fee by petitioners as envisaged under sub- rule (2) of Rule 8 of Rules of 1994. Learned counsel for the parties are hereby directed to inform the petitioners and contesting respondent no. 4 to remain present before respondent no. 1 on 28.1.2002 to cooperate in decision of the appeal on merits.

15. It is ordered that till decision of appeal on merits, the auction scheduled to take place on 22.1.2002 shall be kept in abeyance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.1.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. SINGH, J.

Civil Misc. Writ Petition No. 30612 of 2001

Tej Bhan Singh ...Petitioner (in jail)
Versus
Union of India and others...Respondents

Counsel for the Petitioner:
Sri G.S. Chaturvedi
Sri Avanish Mishra

Counsel for the Respondent:
A.G.A.
S.N. Srivastava
S.C.

National Security Act- Section 3 (2)- Detention order- based on solitary incident- held- proper- considering the gravity of act- relates to public order.

Held. - Para 3

We have carefully perused the impugned detention order and we are of the opinion that the incident relates to public order, and even if it is solitary incident the detention order is justified. There is no absolute principle that a detention order can not be validly passed on the basis of a solitary incident. In fact it has been held in several decisions that a detention order can be passed even on the basis of a solitary incident depending on the facts and circumstances of the case and gravity of the offence.

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

1. Heard learned counsel for the parties.

The petitioner has challenged the impugned detention order dated 30.4.2001 passed under Section 3 (2) of the National Security Act.

2. Learned counsel for the petitioner submitted that the incident on the basis of which the detention order was passed is a solitary incident and it does not relate to law and order. Hence he submitted that the impugned order is illegal. We do not agree.

3. We have carefully perused the impugned detention order and we are of the opinion that the incident relates to public order, and even if it is a solitary incident the detention order is justified. There is no absolute principle that a detention order can not be validly passed on the basis of a solitary incident. In fact it has been held in several decisions that a detention order can be passed even on the basis of a solitary incident depending on the facts and circumstances of the case and the gravity of the offence.

4. The grounds of detention given in Annexure- 3 are that the petitioner not only killed one Rajiv Singh but also spread terror in the vicinity due to which the entire public was terrorized. The petitioner and his brother threatened the public not to leave their homes and not to give evidence. Moreover, the petitioner with his associate took the body of Rajiv Singh in a gunny bag (Bora) on a motorcycle and reached the Jamuna river and cut the body into pieces and threw them into the Jamuna river. This created panic in the locality, and people stopped coming out of their houses and no body even dared to report the incident to the police.

5. Such acts of terrorism can not be condoned. We are of the opinion that the incidents mentioned in the grounds of detention relate to public order. As regards the petitioner's submission that there was delay in deciding the representation, we are of the opinion there was no unreasonable delay in deciding the representation. The petition is dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 22.1.2002

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

Civil Revision NO. 41 of 1998

M/s Excellent Foundary Fluxes Co. and others ...Revisionist

Versus

Syndicate Bank ...Respondent

Counsel for the Revisionist:
Sri M.D. Singh
Sri V. Singh
Sri Dinesh Tewari

Counsel for the Opposite Party:
Sri D.P. Bahadur
Sri Rajiv Pratap Bahadur
Sri Sanjay Pratap Bahadur

Recovery of Debts due to Banks and Financial Institutions Act 1993- Section 18-31- Transfer of suit- filed by Bank at Ghaziabad- on the ground the property mortgaged to the Bank situated at Ghaziabad- Civil Judge by impugned order Transfer the case before the D.R.T. at Delhi- held - order without jurisdiction- after the enforcement of the DRT Act every suits pending before civil court shall be stand transferred- only the Tribunal has jurisdiction.

Held- Para 8

He had also no jurisdiction to decide any issue framed in the suit. The entire jurisdiction was given to the Tribunal.
Recovery of Debts Due to Banks and Financial Institutions Act 1993- Section 31- Loan taken at Delhi, property situated at Ghaziabad mortgaged- suit pending at Ghaziabad- whether is after the enforcement of DRT Act, the Transfer of case at DRT Delhi proper ?

Held- 'Yes' Civil Judge rightly transferred the case before DRT at Delhi.
Held- Para 11

The plea of the revisionists is that the Delhi court have the jurisdiction to try the suit. Beside this plea , it is admitted in this case that the entire loan was given at Delhi and not at Ghaziabad. Therefore, the Delhi court had jurisdiction to try the suit. In case the suit would have been filed after the enforcement of the above Act, it would have been filed before the Tribunal at Delhi. Therefore in accordance to the provisions of Section 31, mentioned above, the learned Additional civil judge has rightly transferred the case to the Tribunal at Delhi.

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

1. This revision under Section 115 C.P.C. has been preferred against the order, dated 3.1.1998 passed by the Ist Addl. Civil Judge (Senior Division), Ghaziabad in suit no. 1031/92. The facts enumerated in the revision are as follows:

2. The opposite party, Bank, filed the original suit no. 1031 of 1992 in the court of civil judge (Senior Division), Ghaziabad for recovery of Rs. 26,63,631.35 p. against the revisionists. The suit was transferred to the court of Ist Addl. Civil Judge (senior division) for disposal. The revisionists contested the suit. One of the pleas taken by them was that the entire transaction of loan took place at Delhi and cause of action for the suit arose at Delhi, that, therefore, the court of Ist Addl. Civil Judge (Senior Division), Ghaziabad has not territorial jurisdiction to try the suit. Preliminary issue was framed on this point and the case was fixed for disposal of that preliminary issue.

3. In the meantime (The) Recovery of Debts due to Banks and Financial Institutions Act, 1993, (Act No. 51 of 93) (hereinafter called as 'Act') was enforced w.e.f. 27th August, 1993. On the enforcement of this Act, the plaintiff opposite party moved an application 96-C under Section 31 of the Act to transfer the suit to the Tribunal, constituted under the Act. The learned Addl. Civil Judge (Senior division) by the impugned order has allowed the application and has ordered that the suit be transferred for disposal to the Debt Recovery Tribunal at New Delhi under Section 31 of the Act. Aggrieved by it the present revision has been preferred.

4. I have heard Sri M.D. Singh, 'Shekhar', learned counsel for the revisionists and Sri D.P. Bahadur, learned counsel for the opposite party and have perused the record.

5. It has been argued by Sri M.D. Singh, 'Shekhar' learned counsel for the revisionists that question of territorial jurisdiction was raised and this question was to be decided by the Civil Judge, that before the decision of that question he had no jurisdiction to transfer the case to the Debt Recovery Tribunal, that, therefore, the order is without jurisdiction. The second contention raised by the learned counsel for the revisionists is that any case the learned Addl. Civil Judge (Senior Division) at Ghaziabad had no jurisdiction to send the case to the Debt Recovery Tribunal at New Delhi and the impugned order is without jurisdiction, that in any case he should have transferred the case to the Debt Recovery Tribunal created for the State of U.P.

6. I have considered the arguments. Few provisions of the Act are material to appreciate the contentions.

Clause (1) of Section 17 of the Act provide regarding the jurisdiction of the Tribunal. It reads as follows:

> "(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions."

Section 18 of the Act provide for bar of the jurisdiction of the civil courts and it read as follows:

"On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17."

7. Regarding pending cases, the provision has been made under Section 31 of the Act. The case has been transferred by the learned Ist Additional Civil Judge (Senior Division), Ghaziabad by the impugned order under the said provision of the Act. Clause (1) of that Section 31 is as follows:

"(1) Every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal, shall stand transferred on that date to such Tribunal."

8. I have considered the above provisions. Section 18 bar the jurisdiction of the civil court to hear the suit. Therefore, on the enforcement of the Act, the learned Additional Civil Judge ceased of the jurisdiction to decide the suit. If it was so, he had also no jurisdiction to decide any issue framed in the suit. The entire jurisdiction was given to the Tribunal.

9. The learned Additional civil Judge was not left with the jurisdiction to decide any issue of the suit, therefore, he could not have decided the issue whether he had territorial jurisdiction to decide the suit. The approach of the learned Addl. Civil Judge was, therefore, correct and he has rightly refused to decide the issue regarding the territorial jurisdiction. The jurisdiction stand transferred and is vested in the Tribunal for which the learned Addl. Civil Judge (Senior Division), Ghaziabad was required to transfer the suit under Section 31 to the Tribunal.

10. Section 31, as extracted above, show that the suit shall stand transferred to the Tribunal which would have jurisdiction to try the suit had it been filed after the establishment of the Tribunal.

11. In this case, it is admitted that loan was taken at Delhi. The opposite party filed the suit at Ghaziabad only for the reason that the mortgaged property is situated in district Ghaziabad and alleged that the Ghaziabad court has also the jurisdiction to try the suit. The revisionists pleaded that the court at Ghaziabad had no territorial jurisdiction and the suit should have been filed at Delhi. Therefore, now they cannot plead that Tribunal at Delhi has no jurisdiction to decide the matter.

12. The plea of the revisionists is that the Delhi court have the jurisdiction to try the suit. Beside this plea, it is admitted in this case that the entire loan was given at Delhi and not at Ghaziabad. Therefore, the Delhi court had jurisdiction to try the suit. In case the suit would have been filed after the enforcement of the above Act, it would have been filed before the Tribunal at Delhi. Therefore in accordance to the provisions of Section 31, mentioned above, the learned Addl. Civil Judge has rightly transferred the case to the Tribunal at Delhi.

13. In view of the above discussion, none of the argument of the learned counsel for the revisionists has any merit. This revision has been filed simply with the intention to delay the disposal of the suit, which is for recovery of the huge amount.

14. The revision is without merit and is, hereby, dismissed with costs. The record of the case shall be sent immediately to the Tribunal at Delhi, as directed by the court below for the decision of the case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 9.1.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. SINGH, J.

Civil Misc. Writ Petition No. 1035 of 2002

Dr. S.A.R. Chaurasia ...Petitioner
Versus
Union of India and others...Respondents

Counsel for the Petitioner:
Sri Yogesh Agarwal

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

Constitution of India, Article 226- Writ Petition- scope and limitations- writ against a Private person can not be issued except the Habeas Corpus Petition- termination of an employee working as consultant private limited- held can not be challenged under Article 226 of the Court.

Held- para 4

There are well settled limitations on the powers of the High Court to issue writs, and one such limitation is that writs will not be issued ordinarily to a private body except a writ of Habeas Corpus, ordinarily writs will be issued only to the government or statutory body or an instrumentality of the State vide Manmohan vs. Commissioner, AIR 1981 SC 487 etc. Learned counsel for the petitioner submitted that respondent no. 4 is building a bridge which is a State function. In our opinion this argument is not acceptable as the respondents no. 4 is not performing a statutory or public duty.

Case law discussed.

AIR 1966 SC 81, AIR 1985 SC 364, AIR 1981 SC 487

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

1. Heard learned counsel for the parties.

2. This writ petition has been filed against the impugned order dated 27.11.2001 and the order dated 23.11.2001 transferring and promoting the petitioner and thereafter terminating the service on 20.12.2001.

3. In our opinion this writ petition is not maintainable, as the petitioner is an employee of Span Consultants Private Limited, respondent no. 4 which is a purely private body. In our opinion ordinarily no writ lies against a private body except a writ of Habeas Corpus. No doubt Article 226 is very widely worded. Article 226 of the Constitution states that writs will lie to any person or authority and it will lie in enforcement of fundamental rights or for any other purpose. However, the words ' to any person' cannot be interpreted literally. The correct interpretation of this expression means that writs will lie to a person or

authority to which writs were traditionally issued by British Courts on well established principles. Similarly though Article 226 states that writs can be issued ' for any other purpose,' this expression also cannot be construed literally. It means that writs can be issued for the purpose for which writs were traditionally issued by the British Court on well established principles.

4. No doubt in Dwarka vs. I.T.O., AIR 1966 SC-81, the Supreme Court has held that the powers of Indian Courts for issuing writs is wider than that of British Courts, but that does not mean that writs can be issued for any purpose whatsoever and to any person whomsoever. There are well settled limitations on the powers of the High Court to issue writs, and one such limitation is that writs will not be issued ordinarily to a private body except a writ of Habeas Corpus. Ordinarily writs will be issued only to the government or statutory body or an instrumentality of the State vide Manmohan vs. Commissioner, AIR 1985, SC 364, Francis vs. Director of Education, AIR 1990 SC, 428 Ajai vs. Khalid, AIR 1981 SC 487 etc. Learned counsel for the petitioner submitted that respondent no. 4 is building a bridge which is a State function. In our opinion this argument is not acceptable as the respondents no. 4 is not performing a statutory or public duty.

5. For the reasons given above, we are of the opinion that this writ petition is not maintainable as it is against a purely private body.

Hence the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24 JANUARY, 2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. SINGH, J.

Civil Misc. Writ Petition No. 32830 of 2001

Dr. V.P. Goyal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Dr. V.P. Goyal (In person)
Sri Swapnil Kumar

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service law- Notional Promotion and other consequential benefits-under Provincialization scheme option on 23.12.77 given to become employee of Government but previous working with Punchayat Raj not given- State Tribunal granted the continuity with effect from initial appointments date- but seniority not given- after retirement direction issued for Notional Promotion and to release the arrears of salary alongwith 12% interest.

Held- Para 7

In our opinion when this court had in its judgement dated 20.12.99 (Annexure -2 to the petition) upheld the award of the Tribunal and the judgement of this court became final, the matter had become conclusive, and hence we cannot understand how the petitioner can be denied the benefits which have already been granted to him by the Tribunal in its judgement Annexure 1 to the petition and this court in its judgment Annexure 2 to the petition.

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

1. Heard learned counsel for the parties.

2. This writ petition has been filed praying for a writ of certiorari to quash the impugned order dated 28.2.2001 (Annexure -5 to the petition) and for a mandamus directing the respondents to issue order for notional promotion and grant of personal pay scale to the petitioner with interest.

3. The petitioner who possessed a MBBS degree joined as Medical Officer in Zila Parishad Dispensary, Etmadpur, district Agra on 6.10.1963 on a substantive post, which was under the control of Panchayat Raj Department, State of U.P.

4. Under the provincialization scheme the State Government in the year 1977 provincialised the dispensary and the petitioner gave option on 23.12.77 and opted to join the service of Medical Department of the U.P. Government. However, the petitioner was denied benefit of his service in the Panchayat Raj Department from 6.10.1963 to 23.12.1977. Hence he approached the U.P. Public Service Tribunal which allowed his claim petition by means of its judgment dated 30.7.99 (Annexure-1 to the petition). The Tribunal granted the petitioner benefit of seniority from 6.10.63 and also promotion and interest as well as arrears.

5. Against the aforesaid judgment of the Tribunal the State Government filed a writ petition in this Court which was dismissed on 20.10.99 vide Annexure-2 to the petition. This judgement of this Court became final.

6. Subsequently, the respondents fixed the petitioner's seniority as per the direction of the Tribunal vide Annexure - 3 to the petition, but did not grant him the other benefits awarded by the Tribunal, hence the petitioner approached this Court by another writ petition being Writ Petition No. 17288 of 2000 wherein a direction was given to decide the representation of the petition. This representation has been rejected by the impugned order. Hence this writ petition.

7. In our opinion when this Court had in its judgment dated 20.12.99 (Annexure-2 to the petition) upheld the award of the Tribunal and the judgment of this Court became final, the matter had become conclusive, and hence we cannot understand how the petitioner can be denied the benefits which have already been granted to him by the Tribunal in its judgement Annexure-1 to the petition and this Court in its judgement Annexure-2 to the petition.

8. The petitioner admittedly retired on 30.7.1997 and now he can only be given notional promotion and other benefits with arrears.

9. A counter affidavit has been filed and we have perused the same. In paragraph 6 of the counter affidavit a reference has been made to the cases of Dr. Kamal Uddin and Dr. R.D. Tripathi but we do not see how these cases could have been relevant to the petitioner's case, since the petitioner's case has become final by the judgments which are Annesure-1 and 2 to the petition. It seems that the respondents never challenged the

judgment of this Court dated 20.12.99 and hence they cannot challenge the same in these proceedings. It seems to us that the respondents have unnecessarily harassed the petitioner.

10. The petitioner is therefore, allowed and a mandamus is issued to the respondents to give notional promotion, personal pay scale with arrears and interest at 12% as claimed by the petitioner.

The petition is allowed. No orders as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.2.2002

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

Special Appeal No. 98 of 2002

Anwar Ali ...Petitioner
Versus
Prescribed Authority and others ...Respondents

Counsel for the Petitioner:
Sri Avinash Mishra

Counsel for the Respondents:
Sri S.P. Singh
Sri Ran Vijay Singh
S.C.

U.P. Panchayat Raj Act, 1947, Section 12 -C (1) (b)- recounting as a matter of course, should not be directed. Recounting can only be directed where the alleged material irregularity affects the result if recounting is done. From the perusal of the irregularity, which has been alleged in the petition, it can be seen that the result of the election shall not materially be effected. (Held- in para 5).

It is apparently clear that even assuming that two votes which has been alleged by the respondent no. 5 should have been included in the number of votes, and both the votes have gone in favour of the respondent no. 5, even then, the same would not have materially affected the result of the election since the writ petitioner had won by eight votes. In that view of the matter, we are of the view that the Sub Divisional Magistrate has committed apparent error in directing for the recounting of votes.

(Delivered by Hon'ble S.K. Sen, C.J.,)

1. We have heard Sri Avinash Misra learned counsel for the appellant- writ petitioner, Sri S.P. Singh learned counsel for the respondent no. 5 and Sri Ran Vijay Singh learned Standing Counsel for the other respondents.

2. This Special Appeal is directed against the judgment and order dated 21.1.2002 passed by the learned Single Judge dismissing the writ petition. In the writ petition, the writ petitioner- appellant has challenged the order of the Sub Divisional Magistrate directing for recounting of the votes.

3. It is the contention of the writ petitioner that he has won by eight votes whereas the dispute raised by the respondent no. 5- herein, is with regard to two votes. The contention of Mr. S. P. Singh learned counsel for the respondent no. 5 is that there was inaccuracy in mathematical calculation, which resulted in apparent error of two votes, in as much as in all, 1166 number of votes were shown to be polled whereas actually 1168 number of votes were polled.

4. We have considered this aspect of the matter. Even assuming the contention of Mr. S.P. Singh to be correct if the two votes are taken into account the result of the election will not materially be affected. It is well settled proposition of Election law that recounting, as a matter of course, should not be directed. Recounting can only be directed where the alleged material irregularity affects the result if recounting is done. From the perusal of the irregularity, which has been alleged in the petition, it can be seen that the result of the election shall not materially be affected. In fact, Section 12-C (1) (b) of U.P. Panchayat Raj Act, 1947, incorporated the relevant provision of the Representation of the People Act, 1951. Section 12-C (1) (b) of the U.P. Panchayat Raj Act, 1947 is given below:

"**12-C. Application for question the elections**. (1) The election of a person as Pradhan or as member of Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that -

(a)……..
(b) that the result of the election has been materially affected -
(i) by the improper acceptance or rejection of any nomination, or
(ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder.

The aforesaid provision is in pari materia with the provision of Section 100(1) (d) of the Representation of the People Act, 1951 which is given below:

"**100. Grounds for declaring election to be void** - (1) Subject to the provisions of sub- section (2) if the High Court is of opinion -
(a)
(b)
(c)
(d) that the result of the election, in so far it concerns a returned candidate has been materially affected-
by the improper acceptance of any nomination, or
(ii) by any correct practice committed in the interest of the returned candidate by an agent other than his election agent, or
(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act.

the High Court shall declare the election of the returned candidate to be void.

5. It is well settled on the basis of several decisions of the Hon'ble Apex Court that unless the result of election is affected, there is no scope for recounting. The same view should also be made applicable in the case, in hand, while interpreting the provisions of Section 12-C(1) (b), and it is apparently clear that even assuming that two votes which has been alleged by the respondent no. 5 should have been included in the number of votes, and both the votes have gone in favour of the respondent no. 5, even then, the same would not have materially affected the result of the election since the writ petitioner had won by eight votes. In that view of the matter, we are of the view that the Sub Divisional Magistrate has

committed apparent error in directing for the recounting of votes.

6. In view of the foregoing discussions, the judgement and order dated 21.1.2002 passed by learned Single Judge is hereby set aside and the order dated 26.12.2001 passed by the Sub Divisional Magistrate is hereby quashed. The writ petition as well as the Special Appeal are allowed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.2.2002

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

Civil Misc. Writ Petition No. 2518 of 2002

Manoj Dubey ...Petitioner
Versus
The Election Commission of India and others ...Respondents

Counsel for the Petitioners:
Sri Ravi Kant
Sri S.M.A. Qazmi
Sri U.N. Sharma
Sri D.R. Sharma
Sri L.N. Sharma
Sri R.N. Srivas
Sri A.K. Srivas
Sri J.P. Singh.

Counsel for the Respondents:
Sri S.P. Gupta
Sri S.N. Srivastava
Sri R.V. Singh
Sri Subodh Kumar

Registration of Electors Rules 1960- Rule 28- An elector who figures in the electoral roll cannot be denied his statutory right to vote merely on the ground that he does not possess any of the documents mentioned in the impugned notification- In case photo identity card has not been provided, the procedures- prescribed under Rule 28 of the Registration of Electors Rules 1960 and Rule 35 of the Conduct of Elections Rules 1961 shall be followed by the Presiding Officer- (Held in para 32)

That it will be open to the Presiding Officer, in the event a challenge is made with regard to the identity of an elector, this shall be accepted or rejected the Presiding Officer, after taking into consideration the evidence thereof before him in accordance with law but no voter will be deprived of his vote only on this ground if his genuineness is not challenged or otherwise proved.

Cases referred-
AIR 1978 SC 851, (1993) 3 SCC 161 AIR 1973 SC 1461, AIR 1984 SC 921, JT 2000 (9) SC 529, AIR 1952 SC 64

(Delivered by Hon'ble. S. K. Sen, C.J.)

Present: Sri Ravi Kant, Senior Advocate, Sri U.N. Sharma, Sri S.M.A. Qazmi, Sri Diwakar Rai Sharma, Sri H.N. Sharma, Sri H.N. Srivastava, Sri A.K. Srivastava and Sri Jai Prakash Singh, learned Advocates for the writ petitioners.

Sri S.P. Gupta, Senior Advocate, Sri S.N. Srivastava, Learned Chief Standing Counsel, Sri Ran Vijay Singh, learned Standing Counsel and Sri Subodh Kumar, Learned Advocates for the respondents.

1. In all these four aforementioned writ petitions, since similar questions are involved with the consent of the parties, they are taken up together and are being disposed of by a common judgment and order.

2. The short controversy involved in these petitions is whether the Election

Commission is entitled to prescribe alternative mode of identification for the electors apart from that provided under the Registration of Electors Rules, 1960 and Conduct of Elections Rules, 1961. Rule 28 of the Registration of Electors Rules, 1960 reads as under:

"28. Identity cards for electors in notified constituencies-

(1) The Election Commission may, with a view of preventing impersonation of electors and facilitating their identification at the time of poll, by notification in the Official Gazettte of the State, direct that the provision of this rule shall apply to (any such constituency or part thereof) as may be specified in the notification."

(2) The registration officer for such notified constituency shall, as soon as may be after the issue of the notification under sub rule (1) arrange for the issue to every elector of an identity card prepared in accordance with the provisions of this rule.

(3) The identity card shall-

(a) be prepared in duplicate;

(b) Contain the name, age, residence and such other particulars of the elector as may be specified by the Election Commission;

(c) Have affixed to it a photograph of the elector which shall be taken at the expense of the Government, and

(d) Bear the facsimile signature of the registration officer;

Provided that if the elector refuses or evades to have his photograph taken, or cannot be found at his residence by the official photographer in spite of repeated attempts, no such identity card shall be prepared for the elector and a note of such refusal or evasion or that the elector could not be found at his residence in spite of repeated attempts shall be made in the copy of the roll maintained by the registration officer.

(4) One copy of the identity card prepared under sub- rule (3) shall be retained by the registration officer and the other copy shall be delivered to the elector to be kept by him for production at the time of poll.

3. The said rule is intended to prevent impersonation of electors and facilitating their identification at the time of poll. The proviso of said rule also mentions that in the event the elector refuses or evades to have his photograph taken, or can not be found at his residence by the official photographer in spite of repeated attempts, in that event a note of such refusal or evasion or that the elector could not be found at his residence in spite of repeated attempts, the same shall be made in the copy of the roll maintained by the Registration Officer and a note to that effect shall also be made in the electoral roll.

4. Rule 35 of the Conduct of Elections Rules, 1961 provides the procedure for identification of electors which reads as follows:

"35- Identification of electors: (1) The presiding officer may employ at the polling station such persons as he thinks fit to help in the identification of the electors or to assist him otherwise in taking the poll.

(2) As each elector enters the polling station, the presiding officer or the polling officer authorized by him in this behalf shall check the elector's name and other particulars with the relevant entry in the electoral roll and then call out the serial number, name and other particulars of the elector..

(3) Where the polling station is situated in a constituency, electors of which have been supplied with identify cards under the provisions of the Registration of Electors Rules, 1960, the elector shall produce his identity card before the presiding officer or the polling officer authorized by him in this behalf.

(4) In deciding the right of a person to obtain a ballot paper the presiding officer or the polling officer, as the case may be , shall overlook merely clerical or printing errors in an entry in the electoral roll, if he is satisfied that such person is identical with the elector to whom such entry relates.

5. From perusal of the aforementioned Rules, it appears that Statutory Rules are exhaustive and provide exhaustive way out for the purpose to prevent impersonation of electors, malpractice and to check falsification. In the said Rules no further such mode has been contemplated.

6. Learned Advocates for the writ petitioners have challenged the validity of the notification dated 23rd January, 2002 on the ground that the said notification is an alternative procedure and is contrary to the provisions, not authorized under the Statute or Statutory Rules and therefore, cannot have any binding force. Learned Advocates for the writ petitioners have further submitted that the Election Commission has no power to supplant any Statute and Statutory Rule. The Statute and Statutory Rules, which are exhaustive in nature, cannot be changed by notification without making any amendment in the Statutory Rules. It is also pointed out to us that photo identity card is provided under the Statutory Rules to prevent impersonation of electors.

7. Mr. S.N. Srivastava, on behalf of the respondents taking the question of maintainability of the writ petition, contended that the writ petition is not maintainable since notification for election has been issued and there is no scope for entertaining the writ petition at this stage. He has referred to Articles 324 and 329 of the Constitution. He has further submitted that the Election Commission has power of superintendence, direction and control of elections under Article 324 of the Constitution. He has also referred to Article 329 of the Constitution and submitted to us that the same is barred from Court's interference.

8. Mr. S.P. Gupta, learned Senior Advocate subsequently argued on behalf of the Election Commission and urged that the Election Commission has been vested with wide and plenary power under Article 324 of the Constitution read with Section 61 of the Representation of People Act, 1951 to issue instructions or guide lines to prevent impersonation of electors. He has however, submitted that he already advised the Election Commission of India that alternative mode provided in the issued notification is not exhaustive in nature and it is expected to bring out another fresh notification prescribing some more details

by way of the precaution so that the electors shall not be deprived to their statutory voting rights. He has further submitted that under Article 324 of the Constitution the power of superintendence, direction and control of elections lies with the Election Commission in the interest of fair election and the Election Commission of India has exercised such power by issuing notification and the same cannot be challenged. Mr. S.P. Gupta is however, fair enough to submit that right to vote is specifically provided under Section 62 of the Representation of People Act, 1951 and that can never be curtailed by any other procedure. The procedure prescribed by notification is only for the purpose of preventing impersonation in voting and is not intended in any way to take away the voting rights of the petitioners or any of the electors. He has further submitted before us that voting right cannot be denied only on the basis of non-production of any of the document, mentioned in the impugned notification and this however shall be taken into account for the purpose of identification.

9. We have taken note of the submissions made by the respective Advocates for the parties and we are of view that so far as the question of maintainability of the writ petitions is concerned, it is well settled proposition of law that after notification for election is issued, the election process shall not be stopped or stalled. In the instant case, however, it is not the prayer of the writ petitioners to stop or stall the election. On the contrary writ petitioners claim that their right to franchisee may not be denied in the absence of identity card which admittedly has not been issued to many of the electors.

10. It appears to us that every elector has a statutory right to cast his vote and that cannot be denied. Rule 28 of the Registration of Electors Rules, 1960 has to be read alongwith Rule 35 of the Conduct of Elections Rules, 1961. In our view the Rules prescribe a check with regard to impersonation of the voting and have nothing to do with taking away the right to cast vote by the true and genuine voter.

11. Section 62 of the Representation of the People Act, 1951 reads as under:

"62. Right to vote- (1) No person who is not and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualification's referred to in Section 16 of the Representation of the People Act, 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for that constituency more than once, and if he does so vote, all his votes in that constituency, shall be void.

(5) No person shall vote an any election if he is confined in a prison. Whether under

a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police.

Provided that nothing in this sub section shall apply to a person subjected to preventive detention under any law for the time being in force.

12. Under these circumstances, in our view, specific mode of identification has been provided under the Statute. Section 28 of Registration of Electors Rules 1961, which has already been set out hereinbefore, has clearly specified the mode of identification. Since the manner and mode of preventing the misuse of voting right or impersonation have been specifically provided under the Statutory Rules, the same is required to be followed strictly. It is well settled that if the Statute specifies a particular procedure or mode to be followed the same is to be followed in that way and in no other way.

13. The Supreme Court in the case of Shiv Kumar Chadha vs. Municipal Corporation of Delhi and others, reported in (1993) 3 SCC 161 has held as follows:

" If a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well-known cases of Taylor vs. Taylor and Nazir Ahmed V. Emperor. This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke vs. Govind Joti Chavare."

14. Both the parties have placed reliance on the judgment of Supreme Court rendered in the case of **Mohinder Singh Gill Vs. The Chief Election Commission, Delhi**, reported in AIR 1978 SC 851.

15. The scope of Article 324 of the Constitution of India has been interpreted elaborately by the Constitution Bench of the Supreme Court in the aforesaid decision. While it was held that the plenary power has been provided under Article 324 of the Constitution of India vesting whole responsibility for holding National and State elections and also necessary powers have been conferred to discharge such functions to the Election Commission. However, the Supreme Court also held following the decision in Bharati's case reported in AIR 1973 SC 1461 that the rule of law is basic structure of the Constitution apart from democracy and the same postulates the pervasiveness of the spirit of law throughout the whole range of Government in the sense of excluding arbitrary official action in any sphere and as such the Commission also is bound by the rule of law. In this connection the Supreme Court in the aforesaid decision of Bharati's case, in paragraph 38 of the said judgment at page 869 inter alia held and observed as follows:

"And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Art. 324, Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system."

16. In paragraph 39 of the said judgment at page 869, the Supreme Court observed as under :

"Even so, situations may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Art. 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor malafide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify, less is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control' as well ' conduct of all elections' are the broadest terms. Myriad may be too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election. It has been argued that this will create a constitutional despot beyond the pale of accountability, a Frankenstein's monster who may manipulate the system into elected despotism- instances of such phenomena are the tears of history. To that the retort may be that the judicial branch at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the men as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra (1958 SCR 308: AIR 1957 SC 896) and Harishankar (1955)I SCR 380: (AIR 1954 SC 465) discretion vested in a high functionary maybe reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J. (at page 2465 of AIR 1975 SC):

"But the electorate lives in the hope that a sacred power will not so flagrantly be abused and moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power."

17. The power of the Election Commission under Article 324 of the Constitution of India was also considered by the Supreme Court in the case of **A.C. Jose Vs. Sivan Pillai and others** reported in AIR 1984 SC 921 wherein Mohinder Singh Gill's case (supra) was considered and the Supreme Court struck down the election to the Kerala Legislative in which voting machines were utilized under the directives of the Election Commission, on the ground that those directives were contrary to the specific Rule which excludes the mechanical process and held that the directives of the Election Commission, on the ground that those directives were contrary to the specific Rule which excludes the mechanical process and held that the directives of the Election Commission for casting of ballot by machines in some of the polling stations was without jurisdiction and could not have been resorted to.

18. In the aforesaid decision while dealing with the ambit of power of the Election Commission under Article 324

of the Constitution of India, the Supreme Court inter alia held in paragraph 5 of the said judgment at page 922 as follows:

" This is a very attractive argument but on a closer scrutiny and deeper deliberation on this aspect of the matter, it is not possible to read into Article 324 such a wide and uncanalised power, which is entrusted to the Commission as Mr. Jethmalani would have us believe. Part XV of the Constitution contains Arts. 324 to 328 which relate to the manner in which elections are to be held, the rights of persons who are entitled to vote, preparation of electoral rolls, delimitation of constituencies, etc. but this is merely the storehouse of the powers and actual exercise of these powers is left to Parliament under Arts. 325 to 329. In other words, Art. 324 has to be read in harmony, with, and not in isolation of Arts. 326 to 329.

19. The supremacy of valid law over the Election Commission has been again reiterated by the Supreme Court in the aforesaid decision and the observation in the case of Mohinder Singh Gill (supra) to the effect " No one is an imperium in imperio in our Constitutional order." It was also observed quoting from the judgement of the case of Mohinder Singh Gill (supra). "Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system."

20. In paragraph 18 of the said judgment in the case of A.C. Jose (supra) the Supreme Court also reiterated the two limitations already laid down by it in Mohinder Singh Gill's case (supra) in the aforesaid decision.

21. The Supreme Court in the aforesaid decision in the case of A.C. Jose (supra) in paragraph 25 of the said judgment at page 927 of the report summed up the legal and constitutional position as follows:

(a) When there is no parliamentary legislation or rule made under the said legislation the Commission is free to pass any orders in respect of the conduct of elections.

(b) Where there is an Act and express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Art. 324,

(c) Where the Act or Rules are silent, the Commission has no doubt plenary powers under Art. 324 to give any direction in respect of the conduct of election, and

(d) where a particular direction by the Commission is submitted to the Government for approval, as required by the Rules, it is not open to the Commission to go ahead with implementation of it at its own sweet will even if approval of the Government is not given,"

22. While holding that voting by mechanical process is not permissible under the Rules which were discussed at length in the aforesaid decision, the Supreme Court in the last sentence of

paragraph 28 of the aforesaid judgment observed as under:

"As we have already indicated, these Rules are binding on the Commission and it cannot by an executive fiat either override them or act contrary to the statutory provisions of the Rules."

23. The Supreme Court further held in paragraph 29 of the said judgment as follows:

"On a proper and detailed analysis of these Rules it is clear that the Act by framing the Rules completely excluded the mechanical process which if resorted to, would defeat in a large measure the mandatory requirements of the Rules."

24. The Supreme Court having wide discussions on all aspects of the matter held in paragraph 35 of the said judgment as follows:

"Having regard to these circumstances, therefore, we are clearly of the opinion that according to the law as it stands at present, the order of the Commission directing casting of ballot by machines in some of the polling stations as indicated above, was without jurisdiction and could not have been resorted to:

25. We may also take note of the judgment and decision in the case of **Election Commission of India through Secretary Vs. Ashok Kumar and others** reported in JT 2000 (9) SC 529. While reiterating the earlier views taken by the Supreme Court in the case of Mohinder Singh Gill (supra) and **N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency and others** reported in AIR 1952 SC 64 summed up its conclusion in paragraph 32 including different sub paragraphs of which sub paragraphs 2 and 3 appear to us relevant for the purpose of deciding the controversy involved in this case, are as follows:

"32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:

1……..

2. Any decision sought and rendered will not amount to ' calling in question an election' if it sub serves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

3. Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4. ……..……."

26. Taking into consideration that in the instant writ petitions, the petitioners by challenging the impugned notification prescribing alternative procedure to that which is provided under the statutory Rules to check impersonation, does not in fact attempt or seek to stall the election

rather have come forward to facilitate the process of election so that the genuine voter or elector may not be deprived of his valuable right as provided under the statute which, in effect, shall only be taken as an aid to the process of facilitation for the purpose of proper holding of election in terms of the procedure prescribed under the statutes and Rules framed thereunder to which the Election Commission is also bound.

27. In view of the settled law as already noted hereinbefore, we are of view that the writ petitions are maintainable.

28. We also take note of the very fair submission made by Sri S.P. Gupta, Senior Advocate which we have noted earlier. We are also of view that it cannot be disputed that the Election Commission is empowered to superintendence of election process and part of the election but the same is circumscribed by the Rules and Statute and by any valid piece of legislation that the Election Commission is bound to act in a reasonable and fair manner. We have also taken note of the fact that the statute in the instant case as provided for the particular procedure to check impersonation of the voting and that statutory rule is required to be followed. The Election Commission has no power to supplant the procedure provided under the Rules, since it is settled law as we have already indicated referring to the decisions of the Supreme Court that the mode and manner in which that procedure has to be exercised, has to be followed in that manner or not at all.

29. Learned Counsel for the respondent Commission during course of argument referred an order of the Hon'ble Supreme Court passed in Writ Petition (civil) No. 2 of 1995. **R.D. Bhandari and others vs. Election Commission of India and others**, a copy of which is annexed as Annexure R-4 to the counter affidavit. A perusal of the aforesaid order of the Supreme Court it is apparent that the matter was not decided on merit rather the writ petition was disposed of in view of the averment made in paragraph 6 of the affidavit filed on behalf of the Election Commission of India and on the basis of the suggestions of the parties and no law or ratio has been laid down in the aforesaid decision.

30. Reliance has also been placed on behalf of the respondents in the two unreported Division Bench decisions. (1st) of the High Court of Judicature at Madras dated 2.4.2001 in W.P. Nos. 5235 of 2001 and 7467 of 2001 and (2nd) High Court of Judicature, Andhra Pradesh at Hyderabad dated 16.2.2001 in W.P. Nos. 2598, 2601 and 2637 of 2001. In view of the fact that several points raised and argued before us and exhaustively dealt with including several Supreme Court decisions in these cases, have not been considered in the aforesaid decisions, we feel that the said decisions are in the nature of per incurium and cannot come to the aid of the respondents.

31. Considering all the aspects of the matter, we are of view that the photo identity card is only intended to facilitate the process of election in case of a challenge to the identity of an elector or voter as provided under the statutory Rules. In case photo identity card has not been provided, the procedures prescribed under Rule 28 of the Registration of Electors Rules, 1960 and Rule 35 of the

Conduct of Elections Rules, 1961 shall be followed by the Presiding Officer. The alternative modes provided in the impugned notification may only be taken collaterally for the purpose in case of any challenge of identity of an elector but it cannot be substitute of photo identity card. An elector who figures in the electoral roll cannot be denied his statutory right to vote merely on the ground that he does not possess any of the documents mentioned in the impugned notification.

32. It is made clear that it will be open to the Presiding Officer, in the event a challenge is made with regard to the identity of an elector, this shall be accepted or rejected by the Presiding Officer, after taking into consideration the evidence thereof before him in accordance with law but no voter will be deprived of his vote only on this ground if his genuineness is not challenged or otherwise proved.

33. In the result, with the above observations/directions, the writ petitions are disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.1.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHISH N. TRIVEDI, J.

Special Appeal No. 40 (SB) of 2002

Rakesh Chandra Srivastava ...Appellant
Versus
Sri Santosh Kumar Mishra...Respondents

Counsel for the Appellant:
Mr. Amit Bose
Mr. B.P. Singh

Counsel for the Respondent:
Mr. S.M.K. Chaudhary

Constitution of India, Article 226- After the disposal of writ petition, only an application for review or clarification can be made but no further relief can be prayed for – an order can be passed on an application for review, modification or clarification of the final order, but in the garb of clarification, the Court has no power to pass such orders for enforcement of its order and to ask for explanation or and call upon the appellant to appear in person.

The puisine Judges can only do that work which is allotted to them by the Chief Justice or under his directions. No judge or Bench of judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice-- strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the High Court. No departure from it can be permitted. The learned Single Judge had no jurisdiction to pass the order in the manner it has been done. The order dated 15.1.2002 passed by the learned Single Judge is accordingly set aside and the Special Appeal is allowed.

(Held in para 20).

Cases referred- (1987) 2 SCC 179
1993 (1) UPLBEC 218
AIR 1966 SC 81
2001 (3) HVD 140
AIR 1990 Cal 168
1998 1 SCC 1
1998 (7) SCC 379

(Delivered by Hon'ble S.K. Sen, C.J.)

1. We have heard Sri B.P. Singh holding brief of Sri Amit Bose, learned Counsel for the Appellant and Sri S.M.K. Chaudhary, learned counsel for the

Respondent No. 1/ Writ Petitioner (hereinafter referred to as the Petitioner).

2. This Special Appeal is directed against an order passed by the learned Single Judge directing the Appellant to appear in person and to explain why the orders passed in the writ petition by the learned Single Judge have not been carried out.

3. Short facts are that the Petitioner filed a writ petition claiming to be appointment on compassion at ground under the Dying in Harness Rules and he was granted relief in the writ petition.

4. The contention of the Respondents- State Government in the application, which has been filed by the Petitioner, is two fold, firstly the writ petitioner's father was only a work charge employee and secondly there was a ban imposed by the State Government in making appointment on daily wages or in work charge establishment.

5. The question that arises for consideration in this Special Appeal is whether after the writ petition is finally disposed of, further orders can be passed on a Miscellaneous Application.

6. It is well settled that after the disposal of the writ petition, only an Application for Review or clarification can be made but no further relief can be prayed for. In this connection, we take note of the decision of the Supreme Court in the case of State of U.P. Vs. Brahma Datt Sharma and another reported in (1987) 2 SCC 179, wherein inter alia it was held in paragraph 10 of the judgment as follows:

"The High Court's order is not sustainable for yet another reason. Respondents' writ petition challenging the order of dismissal had been finally disposed of on August 10, 1984, thereafter nothing remained pending before the High Court. No miscellaneous application could be filed in the writ petition to revive proceedings in respect of subsequent events after two years. If the respondent is aggrieved by the notice dated January 29, 1986 he could have filed a separate petition under Article 226 of the Constitution challenging the validity of the notice as it provided as separate cause of action to him. The respondent was not entitled to assail validity of the notice before the High Court by means of a miscellaneous application in the writ petition which had already been decided. The High Court committed error in entertaining the respondent's application which was founded on a separate cause of action. When proceedings stand terminated by final disposal of writ petition it is not open to the court to reopen the proceedings by means of a miscellaneous application in respect of a matter which provided a fresh cause of action. If this principle is not followed there would be confusion and chaos and the finality of proceedings would cease to have any meaning."

7. Mr. S.M.K. Chaudhary, learned counsel for the respondent no. 1- writ petitioner placed reliance upon a Division Bench decision of this Court in the case of Jitendra Pal Vs. Committee of Management and others reported in 1993 (1) UPLBEC 218 wherein it was held that power of the High Court under writ jurisdiction is not confined till disposal of the writ petition but High Court can pass

appropriate orders even after its disposal. While making said finding, the Division Bench relied upon two decisions of the Supreme Court, namely, Dwarka Nath Vs. I.T.O., (AIR1966 SC 81) and M.V. Elizabeth v. Harwan Investment and Trading Pvt. Ltd. (1992 (2) JT 65).

8. The Division Bench also quoted the relevant portion of the judgment given in M.V. Elizabeth vs. Harwan Investment and Trading Pvt. Ltd. (supra) which is as follows:-

"The High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent plenary powers. Unless expressly or impliedly barred, and subject to the appellate or discretionary jurisdiction of this court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers, (See Naresh Shridhar Mirajkar and others v. State of Maharastha and another, 1966 (3) SCR 744). As stated in Halsbury's laws of England, 4th Edition Vol. 10 para 713.

Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular court."

9. In paragraph 8 of the aforesaid judgment Division Bench considering said observations of the Supreme Court held that the High Court has all power to do justice unless there is some express curtailment of the power in the Constitution. It is quite true that the power of the High Court under Article 226 of the Constitution is not only limited to enforcement of fundamental rights but also it can be exercised for other purposes but that does not mean and in fact the Division Bench has considered the Supreme Court decision which has only held that High Court can under Article 226 of the Constitution of India pass orders to secure ends of justice. The Supreme Court in the said decisions did not take the view that after the writ petition is disposed of it is open to the High Courts in miscellaneous application to pass any order granting further relief's.

10. We are accordingly constrained to observe that the later part of the decision of the Division Bench of this Court has not been taken into consideration in the judgment of the Supreme Court in the case of State of U.P. Vs. Brahma Datt Sharma and another (supra).

11. In that view of the matter, the judgment and decision of the aforesaid Division Bench appears to us to be per incuriam and not binding being contrary to the decision of the Supreme Court.

12. We accordingly, following the aforesaid decisions of the Supreme Court in the case of State of U.P. vs. Brahma Datt Sharma and another (supra), set aside the judgment and order dated 15.1.2002 of the learned Single Judge and opine that the learned Single Judge has no jurisdiction to pass such order in a Miscellaneous Application filed in the same proceeding in the writ petition when the writ petition itself has already been disposed of.

13. It is of course true that an order can be passed on an application for review, modification or clarification of the final order, but in the garb of clarification the Court has no power to pass such orders for enforcement of its order and ask for explanation of and call upon the appellant to appear in person. Learned Single Judge, it appears, has passed the impugned order as if he is sitting in a Contempt jurisdiction. It is well settled by several Supreme Court decisions as also by a recent Division Bench decision of this Court reported in 2001 (3) HVD 140, Prof. Y.C. Simbadri and others vs. Deen Bandhu Pathak independent jurisdiction of original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India and that the Chief Justice being the Master of the roster as such the contempt jurisdiction having been given to another Judge exercising the jurisdiction in contempt matters, the learned Single Judge has no jurisdiction to issue Notice calling for an explanation sitting in the writ jurisdiction for violation of its orders.

14. In the aforesaid decision we have taken note of several decisions which are as follows :-

(1) State vs. Devi Dayal AIR 1959 Alld. 421
(2) Sohan Lal Vaid Vs. State of West Bengal and others AIR 1990 Cal. 168
(3) Raj Kishsore Yadav vs. Principal Kendriya Vidyalaya and others (1997 (1) UPLBEC 26).
(4) High Court of Judicature of Allahabad vs. Raj Kishore Yadav and others 1997 (3) SCC 11.
(5) State of Rajasthan vs. Prakash Chand and others 1998 (!) SCC 1
(6) Dr. L.P. Misra vs. State of U.P. 1998 (7) SCC 379

15. As early as in the year 1959 a Division Bench of this Court in the case of State vs. Devi Dayal (supra) has clarified the position and in the case of Prof. Y.V. Simbhadri and others Vs. Deen Bandhu Pathak (supra). We have taken note of the same. In the aforesaid decision as also in the case of state vs. Devi Dayal (Supra) the Division Bench has considered the question in appropriate manner. The short facts and relevant finding of the same Division Bench are set out herein – below :

"…..A Division Bench of this Court consisting of Mr. Justice James and Mr. Justice Takru had directed a notice to be issued to the opposite party, Devi Dayal, to show cause, within three weeks why the sentences which had been passed on him by the Magistrate by his order dated 29th October 1957, be not enhanced. This notice was directed to be issued by the aforementioned Bench ostensibly in the exercise of as they said, " the High Court's power of Revision'. When the matter came in revision before the Bench consisting of Mr. JUSTICE B. Mukerji and Mr. Justice H.P. Asthana it was held that on the facts of the case it was clear that the matter was not placed before the learned judges who directed notice to be issued, by either the chief Justice or in accordance with any direction given by him and the case appears to have been taken by the Bench suo motu. The question that came for consideration was whether under the aforementioned circumstances of the case l the order of the Bench directing issue of notice to Devi Dayal to show cause why his sentence should not be enhanced, was

within the jurisdiction of that Bench or not while dealing with the said question, the Division Bench held that notice for enhancement can be issued by this Court under revisional jurisdiction. The relevant portion of the order reads as under:

"Revisional jurisdiction in Criminal cases is conferred on the High Court by S. 435 of the Code of Criminal Procedure. The jurisdiction that this section confers is on the High Court and not on any individual judge of the court or on any Bench of the Court. The powers which the High Court can exercise while exercising its revisional jurisdiction are provided for in S. 439 of the Code of Criminal Procedure and here too it may be noticed, the powers that are described there are the powers of the High Court and not of any individual judge or any individual or particular Bench of the High Court.

If there is nothing else in the law then whenever any revisional power had to be exercised by the High Court that power could only be exercised by the entire court and not by any single judge or a Division Bench of the court."

The jurisdiction of the High Court and the powers are provided for by Article 225 of the Constitution. The perusal of that article necessitates the consideration of the provisions contained in S. 223 of the Government of India Act, 1935 and S. 108 of the Government of India Act, 1915. In pursuance of the power vested in the High Court by these provisions, Rule 1 of Chapter V of the Rules of the Allahabad High Court has been made. On a consideration of the aforementioned constitutional position and the rule, the Court came to the conclusion that it is only the Chief Justice who has the right and the power to decide which judge is to sit alone and what cases such judge can decide, further, it is again for the Chief Justice to determine which Judge shall constitute Division Benches and what work those Benches shall do. Under the rules of the High Court, it is for the Chief Justice to allot work to Judges and Judges can do only such work as it allotted to them. It is not open to a Judge to make an order, which could be called an appropriate order, unless and until the case in which he makes the order has been placed before him for order either by the Chief Justice or in accordance with his directions. Any order which a Bench or a Single Judge may choose to make in a case that is not placed before them or him by the Chief Justice or in accordance with is directions is an order which, if made, is without jurisdiction (sic.).

In the aforesaid case when the Bench of the High Court purported to make an order directing a notice to issue under S. 439, Criminal P.C. to an accused to show cause why his sentences should not be enhanced even though it was not a case that had been directed by the Chief Justice to be placed before that Bench for order, it was held that the Bench had no jurisdiction to issue notice to the accused to show cause for the enhancement of the sentences passed against him.

16. Similar view has also been taken by the Division Bench of the Calcutta High Court in the case of **Sohan Lal Baid Vs. State of West Bengal and others** reported in AIR 1990 Cal. 168 in which one of us (the then Hon'ble Mr. Justice S.K. Sen) was a party. The said decision has been exhaustively dealt with and considered by the Division Bench in the case of Prof. Y.V. Simbadri and others

(supra) of this Court in which one of us (Hon'ble the Chief Justice) was a party.

17. The apex court had also the occasion to deal with the same question in the case of **High Court of Judicature at Allahabad** (Supra) whereby the appeal preferred was allowed and the decision therein was reversed. The findings of the apex court in this connection is summarized as follows:

13. In the case of Raj Kishore Yadav Vs. Principal, Kendriya Vidyalaya, Bamrauli and others (Supra) it was held that Rule 4 (a) is repugnant to the Constitution of India to the extent that it places a case of civil contempt before a Bench or a division of a Court which may not have passed the order, direction or judgment. The relevant portion of the judgment is set out herein below:

"The Rules of the Allahabad High Court dislocate the civil contempt jurisdiction, inconsistent with the understood concept of a Court of Record. This has resulted in adding arrears to the already pending cases. Of every contempt case, civil contempt, two proceedings are born. The main case and the contempt case. (sic) Each is registered separately. It is monitored separately right from notice to Judge. The records of the two cases are strangers to each other. This is not all. On record there are several instances of more than one contempt case and more than one case itself (out of which the contempt arises) pending on the same subject matter, between the same parties. Statistics reveal that on the same controversy, counsel intimated the Court of there existing three, four, five or even six cases, between the case and contempt proceedings. In a Court of record this is not meant to happen. This had caused concern to Chief Justice Hon'ble B.P. Jeevan Reddy, as he then was.

In the circumstances, it is found that Rule 4 (a) is repugnant to the Constitution of India to the extent and it places a case of civil contempt before a Bench or a division of a Court which may not have passed the order, direction or judgment. A matter of civil contempt may be placed before a learned judge, but this would be a jurisdiction so nominated by the Hon'ble Chief Justice, of cases referred by subordinate courts to the High Court. But of contempt, that is, civil contempt alleged for the violation of an order, direction or judgment of the High Court, as a Court of Record, the only Court would be the Court which passed such an order, direction or judgment and no other.

Consequently and for the reasons given in this order sub clause (1) of Rule 4 of Chapter XXXV-E of the Rules framed under Section 23 of the contempt of Court Act, 1971, and appended to the Allahabad High Court Rules, for the presentation and hearing of civil contempt case, in so far as they relate to the examination and allegation of a civil contempt on the breach or violation of an order, direction or judgment of a Bench of the High Court, but misplaces the case before a Court which may not have passed the order, direction or judgment, render this particular Rule inconsistent in its contempt to a court of Record and specifically ultra vires to Article 215 of the Constitution of India. This rule as is contained in sub-clause (a) of Clause 4, to Chapter XXXV-E is struck off accordingly.

14. The matter went up to the apex court. The Apex Court in the case of High Court of Judicature at Allahabad vs. Raj Kishore Yadav and others [(1997) 3 SCC 11] allowed the appeal and reversed the decision of the Division Bench. The finding of the apex Court in this connection may be summarized as follows:

"Clause (a) of Rule 4 of Chapter XXXV-E of the Rules of the High Court of Judicature at Allahabad is valid and legal and not inconsistent with Article 215 of the Constitution of India. A conjoint reading of section 108 of the Government of India Act, 1915, Section 223 of the Government of India Act, 1935 and Article 225 of the Constitution of India makes it clear that every High Court by its own rules can provide for exercise of its jurisdiction, original or appellate, by one or more Judges or by division courts consisting of two or more Judges of the High Courts and it is for the Chief Justice of each High Court to determine what Judge in each case is to sit alone or what Judges of the court whether with or without the Chief Justice are to constitute several division courts. In exercise of the aforesaid rule-making power which inhered in all existing High Courts at the time of the advent of the Constitution of India and which was expressly saved by Article 225 of the Constitution of India, the Full Court of the High Court had framed these Rules in 1952. The procedure for exercise of contempt jurisdiction can be laid down by the High Court concerned by framing suitable Rules under section 23 of the Contempt of Courts Act, 1971. Pursuant to Rule 4 (a) of the said Rules of the Chief Justice was entitled to nominate a learned Single Judge to decide civil contempt cases arising under the Contempt of Courts Act, 1971. The aforesaid Rule, therefore, clearly falls in line with the constitutional scheme in connection with the exercise of jurisdiction of the High Court. Thus enactment of the impugned Rule squarely falls within the administrative power of the High Court well preserved by the aforesaid provisions.

All the Article 215 states is that every High Court shall be a court of record meaning thereby all the original record of the court will be preserved by the said court and it shall have all the powers of such a superior court of record including the power to punish for contempt of itself. As a superior court of record the High Court is entitled to preserve its original record in perpetuity. Even part from the aforesaid attribute of a superior court of record the High Court as such has two fold powers. Being a court of record the High Court (I) has power to determine the question about its own jurisdiction and (ii) has inherent power to punish for its contempt summarily.

As regards the contention that the Full Court of the Allahabad High Court by framing the impugned Rule had enacted a provision which fell foul on the touchstone of Article 215 of the Constitution it may be stated that the High Court as an institution has the seisin of the relevant record pertaining to custody of the author of the order giving rise to contempt proceedings. The cases may be pending or might have been disposed of. Civil Contempt might be alleged in connection with interim orders in pending matters and can also be alleged in connection with final orders in matters which are already disposed of. The record of such matters would be available in the

High Court. All that the impugned Rule has done is to entitle the Chief Justice to assign the work of hearing civil contempt matters to one of the Judges. Such an exercise is perfectly legal and valid in the light of the constitutional scheme. When civil contempt is alleged in connection with breach of any order of the High Court, whether final or interim, while deciding the said question the learned Judge to whom this work is assigned is entitled to look into the relevant record which obviously is available in the High Court and thereby the learned Judge is not depriving any other Judge of the said record. So far as matters which are finally disposed of are concerned, such an eventuality can never arise but even in pending matters where breach of interim orders is alleged, when contempt proceedings in connection with such orders are placed for examination and scrutiny before the learned Judge to whom the work is assigned by the Chief Justice under the Rules it cannot be said that the record of the case in any way gets adversely affected or disturbed. It is the question of internal arrangement and transmission of record from court to court as per the exigencies and necessities of the case.

The civil contempt alleged is the contempt of the High Court as such and not the contempt of the author of the order being the Judge concerned who might have passed the said order, whether interim or final. When civil contempt by way of breach of such an order is alleged it is the institution of the High Court as such which is said to have been contemptuously dealt with by contemnor concerned. For upholding the majesty of the institution as such, therefore, the High Court as a court of record can look into the grievance centering round the alleged breach of its order and it is this power to punish the contemnor that flows from Article 215 of the Constitution of India as well as from the relevant provisions of the Contempt of Courts Act. But how this grievance of the aggrieved party is to be processed and examined pertains to the realm of distribution of work and jurisdiction of the High Court amongst different Division Benches and that exercise is permissible to the Chief Justice of the High Court as per the rules framed by the High Court on its administrative side. That exercise has nothing to do with Article 215. Article 215 saves the inherent powers of the High Court as a court of record to suitably punish the contemnor who is alleged to have committed civil contempt of its order. Order might have been passed by any of the learned Judges exercising the jurisdiction of the High Court as per the work assigned to them under the Rules by the orders of the Chief Justice, but once such an order is passed by a learned Single Judge or a Division Bench of two or more Judges the order becomes the order of the High Court. Breach of such an order which gives rise to contempt proceedings also pertains to the contempt of the High Court as an institution. At that stage Article 215 does not operate, but it is only Article 225 read with the Rules framed by the High Court on administrative side and the power inhering in the Chief Justice, of assigning work to the appropriate Bench of Judge or Judges, under section 108 of the Government of India Act, 1915 read with Section 223 of the Government of India Act, 1935 which would have its full play. Consequently if under the impugned Rules the task of considering the grievance of the aggrieved party in connection with civil contempts of High

Court's orders is assigned to one of the Judges of the High Court it cannot be said that thereby the impugned Rule has in any manner affected the status of the High Court as a court of record.

The analogy of Order 39, Rule 2-A CPC cannot be pressed into service while judging the validity of the impugned Rule on the touchstone of Article 215. Rule 2-A is mainly pressed into service before subordinate courts which at most of the centers consist of sole presiding Judges of the courts. In such cases where the subordinate courts working at these centers consist of only one presiding Judge the applications under Order 39, Rule 2-A CPC will have to be; filed in the very same court and would go to the same Judge or his successor-in-office. Such is not the case with the High Court functioning as a superior court of record under Article 215 of the Constitution of India. The High Court consists of a Chief Justice and such other Judges as the President may from time to time deem (sic.) it necessary to appoint as laid down by Article 216. Consequently plurality of Judges appointed to the High Court collectively constitute the High Court.

Again, while exercising original jurisdiction under Contempt of Courts Act, 1971 in connection with Civil contempt of its own orders the High Court is not exercising any review jurisdiction wherein statutorily the proceedings may have to be placed for decision of the same Judge or Judges if they are available. Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the contempt for Courts Act or under Article 215 of the Constitution of India. How such original jurisdiction can be exercised is a matter which can legitimately be governed by the relevant Rules framed by the High Court on its administrative side by exercising its rule-making power under Section 23 of the Act or under its general rule-making power flowing from the relevant provisions of the constitutional scheme. Consequently it cannot be said that the-impugned Rule is violative of Article 215."

In the case of State of Rajasthan vs. Prakash Chand and others [(1998) 1 SCC 1] the Supreme Court while allowing the appeal held as follows:

"While on the judicial side the Chief Justice of the High Court is only the first amongst the equals, the administrative control of the High Court vests in the Chief Justice of the High Court alone and it is the prerogative to distribute business of the High Court both judicial and administrative.

The Chief Justice is the master of the order. He alone has the right and power to decide how the Benches of the High Court are to be constituted; which Judge is to sit alone and which cases he can and is required to hear as also as which Judges shall constitute a Division Bench and what work those Benches shall do.

The puisne Judge can only do that work which is allotted to them by the Chief Justice or under his directions. No Judge or a Bench of Judges can assume jurisdiction in a case pening (sic.) in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the High Court. No departure from it can be permitted.

Till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting such bench cannot sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.

In the event a Single Judge or a Division Bench considers that a particular case requires to be listed before it for valid reasons, it should direct the Registry to obtain appropriate orders from the Chief Justice. The puisne Judges are not expected to entertain any request from the advocates of the parties for listing of case which does not strictly fall within the determined roster. In such case, it is appropriate to direct the Chief Justice and obtain appropriate orders. This is essential for smooth functioning of the High Court.

The Chief Justice can take cognizance of an application laid before him under the High Court Rules (Rule 55 herein) and refer a case to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case. The Chief Justice has the authority and the jurisdiction to refer even a part-heard case to a Division Bench for its disposal in accordance with law where the Rules so demand. It is a complete fallacy to assume that a part-heard case can under no circumstances be withdrawn from the Bench and referred to a larger Bench, even where the Rules make it essential for such a case to be heard by a larger Bench.

The puisne Judges cannot "pick and choose" any case pending in the High Court and as sign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.

No Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given the Chief Justice."

18. The same question also came up in an appeal arising out of the judgment of this Court before the Hon'ble Supreme Court in Dr. L.P. Misra's case reported in 1998 (7) SCC 379 wherein the Supreme Court after hearing the Solicitor General who was requested to appear and assist the Court held as follows:-

"12. After hearing learned counsel for the parties and after going through the materials placed on record, we are of the opinion that the court while passing the impugned order had not followed the procedure prescribed by law. It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law. It is in these circumstances the impugned order cannot be sustained."

19. Considering all the aforesaid decisions, the Division Bench of this Court in Prof. Y.C. Simbadri and others Vs. Deen Bandhu Pathak (supra) inter alia held as follows:-

(1) The administrative control of the High Court vests in the Chief Justice alone and it is his prerogative to distribute business of the High Court both judicial and administrative.

(2) The Chief Justice alone has the right and power to decide how the

Benches of the High Court are to be constituted which Judge is to sit alone and which cases he can and is required to hear as also which Judges shall constitute a Division Bench and what work those Benches shall do.

(3) The Puisne Judges can only do such work which is allotted to them by the Chief Justice or under his directions. No Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice.

(4) Any order which a Bench or a Single Judge may choose to make in a case that is not placed before them or him by the Chief Justice or in accordance with his direction is an order without jurisdiction and void.

(5) Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the contempt of Courts Act or under Article 215 of the Constitution of India.

(6) For exercising the jurisdiction under Article 215 of the Constitution of India the procedure prescribed by law has to be followed.

20. It, therefore, appears that the learned Single Judge had no jurisdiction to pass the order in the manner it has been done. The order dated 15.1.2002 passed by the learned Single Judge is accordingly set aside and the Special Appeal is allowed.

21. We, however make it clear that we have not adjudicated the matter on merits including the contentions raised and it will be open to the petitioner to proceed in accordance with law.

ORGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.02

BEFORE
THE HON'BLE ANJANI KUMAR , J.

Civil Misc. Writ Petition No. 39567 of 2001.

Musammat Sajida Begum ...Petitioner
Versus
Secretary, Basic Education, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Ch. N.A. Khan

Counsel for the Respondents:
Sri N.D. Rai
S.C.

Constitution of India, Article 226-Family Pension-denial on ground the G.O. dated about Family Pension enforced w.e.f. 8.3.78 While the Husband of the Petitioner retired on 30.11.72 held classification of family members of deceased employees on the ground of cut off date amount to carving out a class from amongst the homogeneous class of the Family Pension holder-arbitrary and discriminatory.

Held-Para 7

So far as the refusal of the family pension of the petitioner only on the ground that since the petitioner's husband has retired on 30.11.1972 and the scheme has been made applicable w.e.f. 8.3.1978, when the petitioner's husband has already retired, is not tenable, Admittedly, the family pension is payable to the family members of the deceased employee and the occasion will arise only after the death of the said employee. Whether he retired before the

issuing of the G.O. with regard to family pension or thereafter, the classification of the family members of deceased employee in the matter of the payment of pension only on the ground of the cut-off date of the issuance of the G.O. amounts to carving out a class from amongst the homogeneous class of the family pension holders, which is not permissible and is par se, arbitrary and discriminatory as held by Hon'ble Supreme Court of India in the case of D.S. Nakara Versus Union of India and others, reported in AIR 1983 SC 130.

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

1. Heard Sri Ch. N.A. Khan, learned counsel appearing on behalf of the petitioner and learned Standing Counsel representing the respondents 1 and 2 as well as Sri N.D. Rai, learned counsel for the respondent No. 3.

2. By means of the present writ petition, the petitioner who is widow of an employee of the State Government, has claimed for the following relief's:-

"A. issue a writ, order of direction in the nature of certiorari quashing the order dated 30.7.2001 passed by Basic Shiksha Adhikari, Ghazipur (Annexure no.6 to the writ petition).
B. issue a writ, order of direction in the nature of mandamus commanding the Respondent to pay the family pension to the petitioner.
C. issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the present case,.
D. Award the costs of petition in favour on the petitioner."

3. The order impugned in the present writ petition dated 30.7.2001 has been passed in pursuance of the direction issued by this Court in Civil Misc. Writ petition No. 2923 of 2001 Mussammat Sajida Begum Vs. State of U.P. and another, decided on 25.01.2001 whereby this court has issued certain directions, which run as under:-

"Having heard the learned counsel for the petitioner and the learned counsel representing the respondents and taking into consideration the entire facts and circumstances of the case in the interest of justice, the respondent No 1 is directed to pass appropriate orders in accordance with law on the aforementioned representation/application of the petitioner expeditiously preferably within a period of two months from the date a certified copy of the said representation for is filed before him.

With the aforesaid observations, the writ petition is finally disposed of.
Dated: 25.1.2001 Sd/
R.K.Agrawal, J."

4. The order impugned herein purported to reject the claim of the petitioner for family pension of the ground that the petitioner's husband has retired on 30.11.1972 and he was paid his pension through his life time. It has further stated in the order that petitioner's husband had died on 12.01.1994 whereas the petitioner, according to the records available in the office of Finance and Accounts Officer, Basic Shiksha Adhikari, Ghazipur, has been paid pension for her husband up to April, 1994 and excess amount that has been transferred in the account of the petitioner's husband towards pension amount has not yet been returned back by the petitioner. Petitioner has further

prayed for the payment of family pension to her. The respondents have refused to pay the family pension to the petitioner on the ground that family pension is made payable by the G.O. dated 31.03.1982 and it is payable to family of such employees w.e.f. 01.10.1981 and the said scheme of family pension is made applicable to the teachers of the institution run and managed by the Basic Siksha Parishad like that of one where the petitioner's husband was working has been made applicable w.e.f. 08.03.1978, therefore since the husband of the petitioner has already retired on 30.11.1972, the petitioner is not entitled for the family pension.

5. So far as the first objection with regard to the excess payment of family pension of the petitioner is concerned, which is for the months of January, 1994 to April 1994 it has been stated that the same has been transferred in the account of petitioner's husband, whereas according to the order impugned herein petitioner's husband has died on 12.01.1994. The tenure of the order goes to say that as if the petitioner has realised the said amount without recording the finding as to whether petitioner has in fact withdrawn that amount from the Bank or not, is not tenable.

6. In any view of the matter, it is only the matter of accounting. If the petitioner has realised this amount the same may be adjusted in view of my findings, which are going to be recorded with regard to the eligibility of the family pension from the family pension payable to the petitioner.

7. So far as the refusal of the family pension of the petitioner only on the ground that since the petitioner's husband has retired on 30.11.1972 and the scheme has been made applicable w.e.f 08.03.1978, when the petitioner husband has already retired, is not tenable. Admittedly, the family pension is payable to the family members of the deceased employee and that occasion will arise only after the death of the said employee. Whether he retired before the issuing of the G.O. with regard to family pension or thereafter, the classification of the family members of deceased employee in the matter of the payment of pension only on the ground of the cut-off date of the issuance of the G.O. amounts to carving out a class from amongst the homogeneous class of the family pension holders, which is not permissible and is per se, arbitrary and discriminatory as held by Hon'ble Supreme Court of India in the case of D.S. Nakara Versus Union of India and others, reported in A.I.R. 1983 S.C. 130.

8. In view of what has been stated above, the denial of the family pension to the petitioner is per se, arbitrary and discriminatory. The impugned order dated 30.7.2001 passed by respondent No. 3 Annexure-5 to the writ petition, deserves to be quashed and is hereby quashed. The respondents are hereby directed to pay the family pension to the petitioner as is being paid to other family members of the deceased employee in terms to the G.O. in question.

9. With the aforementioned observations, the writ petition succeeds and is allowed. There will be, however, no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.2.2002

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

Special Appeal No. 1365 of 1999

Chiraunji Lal ...Petitioner
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Sri B.K. Narayan

Counsel for the Respondents:
Sri Manish Goyal
S.C.

Constitution of India, Article 226 – Alternative Remedy – Writ Petition for regularization pending for 9 years – No disputed question of facts envolved held can not be through out on the ground of alternative remedy.

Held – Para 6 and 7

We find that the writ petition was filed in the year 1991 and remained pending before this Court for eight years and therefore it would not be in the interest of justice to throw out the petition on the ground of availability of alternative remedy. In the case of L. Hirday Narain, supra the Hon'ble Supreme Court has held as follows:

12. An order under section 35 of the Income Tax Act is not appellable. It is true that a petition to revise the order could be moved before the Commissioner of Income Tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition. Hirday Narain could have moved the commissioner in revision, because at the date on which the petition was moved the period prescribed by section 33-A of the act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer under Section 35 but was not moved, the High Court would be justified in the dismissing as not maintainable the petition, which was entertained and was heard on the merits.

The above principles laid down by the Hon'ble Supreme Court are fully applicable in the present case. Moreover, no disputed questions of facts are involved in the present case and only interpretation of the Government Order is to be made. Thus we are of the considered opinion that the learned Single Judge was not justified in dismissing the writ petition on the ground of availability of alternative remedy and ought to have decided it on merits.
Case law discussed – AIR 1971 SC-33

Constitution of India, Article 226 – Service Law – Regularization Petitioner continuously worked 240 days in three consecutive years – held G.O. dated 25.10.1989 is in consonance with the provisions of Section 2 (g) of U.P. Industrial disputed Act.

Held – Para 9

We cannot accept the contention of Sri Goyal with regard to the Government Order. We have considered the Government order dated 25 October, 1989 carefully and find that 210 days continuous service in each of the 3 consecutive years shall be sufficient for the purposes of entitling the writ petitioner – appellant to get the benefit of the Government Order does not really require completion of 3 years service, as we have already indicated that the Government order is in consonance with Section 2 (g) of the U.P. Industrial Disputes Act. The requirements of both Section 2 (g) as also the Government

order appear to us that the completion of work for a period of 240 days in each of the 3 consecutive years, shall be sufficient for being entitled for regularization.

(Delivered by Hon'ble S.K. Sen, C.J.)

1. We have heard Sri B.K. Narayan, learned counsel for the appellant and Sri Manish Goyal, learned counsel appearing for the respondents.

2. This special appeal is directed against the order dated 22nd July, 1999 passed by the learned Single Judge in Civil Misc. Writ Petition No. 21562 of 1991, where by the learned Single Judge dismissed the writ petition only on the ground of availability of alternative remedy under the U.P. Industrial Disputes Act.

3. Short facts involved in the writ petition as also in the special appeal, inter-alia, are that the writ petitioner-appellant was originally appointed as apprentice clerk on8th January, 1986 and was working as daily wager since 10th January, 1987 in Nagar Nigam, Aligarh. In view of the government Order dated 25th October, 1989 if the daily wager has worked for 240 days continuously for three years, such daily wager is entitled for the benefit of regularization. Accordingly, the writ petitioner-appellant claims that since he has continuously worked for 240 days in each of the 3 years i.e. 1987, 1988 and 1989 as daily wage employee, by virtue of the Government Order dated 25th October, 1989 he is entitled to the benefit of regularization.

4. The learned counsel for the writ-petitioner-appellant has submitted that the writ-petition seeking regularization of his service was filed by the petitioner before this Court on 25th July, 1991, which was entertained on 29th July, 1991, This Court was pleased to direct issue of notice to the President, Nagar Palika, Aligarh fixing 4th September, 1991. The writ petition remained pending for a period of about eight years. Vide the impugned judgment and order dated 22nd July, 1999, the learned Single Judge had dismissed the writ petition on the ground of availability of alternative remedy. According to him, the learned Single Judge was not justified in dismissing the writ petition on the ground of availability of alternative remedy, when the writ petition remained pending before this Court for eight long years. In support thereof the learned counsel for the writ-petitioner-appellant relied open the decision of the Hon'ble Supreme Court in the case of L. Hirday Narain Vs. Income Tax Officer, Bareilly, reported in AIR 1971 Supreme Court 33.

5. Sri Narayan further submitted that leaving aside the period during which the petitioner had worked as apprentice and taking into account only three years i.e. 1987, 1988 and 1989, the writ-petitioner-appellant has continuously worked for 240 days in each of the 3 c consecutive years and is accordingly entitled to the benefit of the regularization under the said Government Order.

6. So far as the question of relegating the writ-petitioner-appellant to the alternative remedy available under the U.P. Industrial Disputes Act is concerned, we find that the writ petition was filed in the year 1991 and remained pending before this Court for eight years and therefore it would not be in the interest of justice to throw out the petition on the

ground of availability of alternative remedy. In the case of L. Hirday Narain, Supra, the Hon'ble Supreme Court has held as follows:

"12. An order under Section 35 of the Income-Tax Act is not appellable. It is true that a petition to revise the order could be moved before the Commissioner of Income-Tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-Tax Officer under Section 35, was not moved, the High Court would be justified in dismissing as not maintainable the petition which was entertained and was heard on the merits."

7. The above principles laid down by the Hon'ble Supreme court are fully applicable in the present case. Moreover, no disputed questions of fact are involved in the present case and only interpretation of the Government Order is to be made. Thus we are of the considered opinion that the learned Single Judge was not justified is dismissing the writ petition on the ground of availability of alternative remedy and ought to have decided it on merits.

8. Coming on the merits, we find that admittedly the writ-petitioner-appellant had worked continuously for 240 days in three consecutive years, namely, 1987, 1988 and 1989 and is thus entitled for the benefit of the Government Order dated 25th October, 1989.

9. The said Government Order, in our view, is in conformity with Section 2 (g) of the Uttar Pradesh Industrial Disputes Act, 1947 which provides as follows:

"(g) 'Continuous service' means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman, and a workman, who during a period of twelve calendar months has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry."

10. Sri Manish Goyal, learned counsel appearing for the respondents has submitted before us that on cut off the date i.e. 11th October, 1989 the writ-petitioner-appellant did not complete three years continuous service and as such he is not entitled to the benefit of the Government Order. We can not accept the contention of Sri Goyal with regard to the Government Order. We have considered the Government Order dated 25th October, 1989 carefully and find that 240 days continuous service in each of the 3 consecutive years shall be sufficient for the purposes of entitling the writ-petitioner-appellant to get the benefit of the Government Order. The Government Order does not really require completion of 3 years service, as we have already indicated that the Government Order is in consonance with Section 2(g) of the U.P.

Industrial Disputes Act. The requirements of both Section 2 (g) as also the Government Order appear to us that the completion of work for a period of 240 days in each of the 3 consecutive years, shall be sufficient for being entitled for regularization.

11. In that view of the matter, we direct the respondent-authority to consider the case of regularization of the writ-petitioner-appellant forthwith and to take appropriate decision in accordance with law within four weeks from the date of communication of this order. Since the writ-petitioner-appellant has not worked after 31.07.1991, he shall not be entitled for salary and other emoluments during the period in which he had remained out of job.

12. With the aforesaid observations, both the special appeal and the writ-petition are allowed and the order dated 22nd July, 1999 passed the learned Single Judge is set aside. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 9, 2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE R.P. MISRA, J.

Civil Misc. Writ Petition No. 33688 of 2001

Ms. Kirti Overseas, Mathura and others ...Petitioners
Versus
Debt Recovery Appellate Tribunal, Allahabad and others ...Respondents.

Counsel for the Petitioner:
Shri Ravi Kant
Shri Manoj Kumar Pandey

Counsel for the Respondent:
Shri S. Mohan

Income Tax Rules—Rules 48 to 51—Virus of rules challenged—in order to achieve the object for which the Act has been enacted, namely, expeditious recovery of the dues of banks and financial institutions, the parliament has not only fixed a time schedule but also made a departure from the normal provision of Code of Civil Procedure. Therefore the contention of the petitioners that provisions of Income Tax Rules are ultra virus the Constitution, cannot be accepted. (Held in para 10).

The writ petition lacks merit and is dismissed summarily at the admission stage.

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

1. This petition under Article 226 of the Constitution has been filed praying that a writ of mandamus be issued restraining the Debt Recovery Tribunal, Allahabad from taking any action for recovery of Rs. 93,88,386/- with interest from the petitioner in any manner whatsoever including by coercive measures in pursuance of the orders dated 15.10.1999, 19.6.2001 and 6.9.2001. A further prayer has been made that Rules 48 to 51 of the Income Tax Rules be declared as null and void.

2. The petitioner were granted Packing Credit limit of Rs. 25 lacs and Foreign Bill Purchase Limit of the same amount by Union Bank of India, Dayal Bagh Marg, Agra (respondent no.4) and an agreement was executed in that regard on 27.5.1996. In order to ensure repayment of the loan, the petitioners created an equitable mortgage of three houses situated in Mathura City in favour of the respondent bank. Subsequently the

petitioners were sanctioned additional Packing Credit Limit of Rs. 19 lacs and additional Foreign Bill Purchase Limit of Rs. 25 lacs. It appears that the petitioners did not repay the amount to the bank (respondent no.4) and consequently it filed Original Application no. 3 of 1999 against the petitioners for the recovery of the amount before the Debt Recovery Tribunal, Jabalpur. They did not file their written statement and consequently the Tribunal proceeded ex parte against them. Ultimately by its order dated 15.10.1999 decreed the claim of the bank for a sum of Rs. 93,88,386/- together with interest at the rate of 20% per annum with quarterly rests with effect from 6.1.1999 till the realization of the outstanding dues. The order further provided that the bank may press into service its independent right for the sale of the hypothecated property without waiting for any order from the Tribunal and the defendant were debarred from transferring alienating or otherwise dealing with or disposing of the hypothecated/mortgaged properties without prior permission from the Tribunal. The petitioners challenged the aforesaid order of the Tribunal by filing a writ petition in the Jabalpur High Court but the same was dismissed as withdrawn by the order dated 30.7.2001 with liberty to file an appeal. The petitioners claim to have filed an appeal before the Debt Recovery Appellate Tribunal, Allahabad on 7.9.2001 which has not yet been formally registered. The bank applied for issue of the recovery certificate and the Recovery Officer issued a certificate for attachment of the three houses which were mortgaged with the bank on 19.6.2001. Thereafter an order has been passed on 6.9.2001 sanctioning sale of the properties and issuance of sale proclamation. By the same order, the Recovery Officer has fixed reserved price for the three houses which had been mortgaged and thereafter has issued certain procedural direction regarding affixation of copy of proclamation order. The sale proclamation has been published in some local newspapers and has also been announced by beat of drums on or near the property. The grievance of the petitioners is that the Recovery Officer, who is taking steps to recover the decretal amount, has not complied with the requirement of law and as such proceedings initiated by him and consequential orders passed in that regard are illegal.

3. It is not in dispute that a decree for Rs. 93,88,386/- together with interest at the rate of 20% per annum with quarterly rests with effect from 6.1.1999 till the realization of the outstanding dues has been passed against the defendants (writ petitioners) by the Debt Recovery Tribunal, Jabalpur by the judgment and order dated 15.10.1999. It is averred in para 14 of the writ petition that the petitioners have filed an appeal against the judgment and decree of the Tribunal before the Debt Recovery Appellate Tribunal, Allahabad on 7.9.2001 and have also moved an application for staying the execution of the decree but the appeal has not yet been formally registered. There is no averment in the writ petition that the petitioners have deposited seventy-five per cent of the amount of debt as determined by the Tribunal and in view of section 21 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as RDB Act), the appeal cannot be entertained by the Appellate Tribunal and this must be the reason for not registering the appeal. Thus there is no impediment in the way of

the bank to execute the decree and recover the amount. The bank has applied for initiating action for sale of the mortgaged properties and in that connection various orders have been passed by the Recovery Officer which have been impugned in the writ petition. Sub-section (1) of section 30 of the Act provides that notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under the Act, may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal. Therefore the petitioners have a right to prefer an appeal against the impugned orders before the Tribunal and in view of availability of this alternative remedy of appeal, the present writ petition under Article 226 of the Constitution is not maintainable and the same is liable to be dismissed on this ground alone.

4. Sri Ravi Kant, learned senior counsel has submitted that the petitioners have also sought declaration that the Rules 48 to 51 of the Income Tax Rules, which lay down procedures for attachment and sale, are unconstitutional and as this relief cannot be granted by the Tribunal, the writ petition cannot be dismissed on the ground of alternative remedy and the same is maintainable. The attack to the validity of the aforesaid rules may, therefore by briefly examined. Sub section (5) of section 28 of the RDB Act provides that the Recovery Officer may recover any amount of debt due from the defendant by distraint and sale of his movable property in the manner laid down in the Third Schedule to the Income-tax Act. Section 29 of second he RDB Act provides that the provisions of and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax Act. The proviso to the section lays down that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act. Rules 53 and 54 of the Income Tax Rules read as follows:

"53, A proclamation of sale of immovable property shall be drawn up after notice to the defaulter, and shall state the time and place of sale, and shall specify, as fairly and accurately as possible—

(a) the property to be sold:

(b) the revenue, if any, assessed upon the property or any part thereof;

(c) the amount for the recovery of which the sale is ordered;

(cc) the reserve price, if any, below which the property may not be sold; and

(d) any other thing which the Tax Recovery Officer considers it material for a purchaser to know, in order to judge the nature and value of the property.

54(1) Every proclamation for the sale of immovable property shall be made at some place on or near such property by beat of drum or other customary mode, and a copy of the proclamation shall be affixed on a conspicuous part of the property and also upon a conspicuous part of the office of the Tax Recovery Officer.

(2) Where the tax Recovery Officer so directs, such proclamation shall also be published in the Official Gazette or in a local newspaper, or in both; and the cost of such publication shall be deemed to be costs of the sale.

(3) Where the property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Tax Recovery, otherwise by given."

5. Sri Ravi Kant has submitted that the aforesaid rules do not envisage affording of an opportunity of hearing to the defaulter or judgment debtor while as Rules 54 and 66 of Order XXI C.P.C. specifically provide for giving notice to the judgment debtor before settling or drawing up proclamation of sale and on account of the said reasons the rules are likely to cause a serious injury to the judgment debtor (defendant) and consequently they are ultra vires. He has submitted that the provisions of Order XXI Rules 66(2) C.P.C. have been held to be mandatory in Deshbandu Gupta *versus* N.L. Anand (1994) 1 SCC 131 and also that a sale without notice is nullity. Learned counsel has further submitted that the object of the sale is to fetch the best price for the property so that the decree may be satisfied but sub-rule (2) of Rule 54 gives a discretion to the Recovery Officer to publish the proclamation of sale in the Official Gazette or in a local newspaper and he may chose not to make any such publication which is bound to effect the price fetched for sale of the property on account of want of proper publicity. According to the learned counsel casting of such wide discretion upon the Recovery Officer, who is not a very senior or responsible officer, is wholly arbitrary and thus the impugned rules are violative of Article 14 of the Constitution of India.

6. In order to assail the validity of the rules, learned counsel for the petitioners has taken support of and has sought to draw a similarity with the provisions of Code of Civil Procedure. In our opinion, the whole premise of the argument of Sri Ravi Kant is wrong. Prior to the enactment of RDB Act, the normal remedy for the recovery of debts due to banks and financial institutions was to institute a suit in the civil court, which was tried and decided in accordance with the procedure laid down in Code of Civil Procedure and the decree passed by the courts was also executed in accordance with the procedure contained in Order XXI thereof. The procedure of suit was a long and cumbersome process. Often it took years and decades to recover the amount. The funds are advanced out of State and public money and therefore the recovery thereof should be so expeditious that fresh advances may be made available to others who have not yet got any financial assistance from the State agency. The existing procedure for recovery of debts due to banks and financial institutions had blocked a significant portion of their funds in unproductive assets the value of which also deteriorated with the passage of time. Several committees were appointed by the Government to suggest ways and means by which dues to the banks and financial institutions could be recovered expeditiously. It was with that end in view that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was enacted. The preamble of the Act reads as follows—

"An Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for

matters connected therewith or incidental thereto"

7. The brief scrutiny of the provisions of the Act would show that it lays a great emphasis on time schedule so as to meet its objective of expeditious adjudication and detailed procedure for trial of suits and execution of decrees provided under code of Civil Procedure has been given a go bye Sub-section (4) of section 19 of the Act provides that on receipt of the application from a bank or financial institution for the recovery of the amount, the tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted. Sub-section (24) of the same section lays down that the application made to the tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the application finally within one hundred and eight days from the date of receipt of the application. Sub-section (3) of section 20 lays down that every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made by the tribunal is received by him. The period prescribed here is less than the period of limitation prescribed for filing an appeal in the High court, Sub-section (6) of section 20 enjoins that the appeal filed before the appellate tribunal shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months. Thus a time schedule has been fixed for conducting the proceedings including that before the appellate tribunal.

8. Sub-section (1) of section 22 specifically provides that the tribunal and the appellate tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure but shall be guided by the principles of natural justice and, they shall have powers to regulate their own procedure. Chapter V deals with recovery of debt determined by tribunal and a complete procedure for recovery of the debts has been provided in sections 25 to 30. The legislature has consciously and deliberately provided a different mode for recovery of the debts which is very much different from the provisions of Order XXI C.P.C. Section 21 of the Act which enjoins that an appeal shall not be entertained by the appellate tribunal unless the person preferring the appeal has deposited seventy-five per cent of the amount of debt due from him as determined by the tribunal is a very stringent provision and obviously its object is that once a decree is passed by the tribunal, the defendant may not be able to delay or defeat the interest of the bank or financial institutions in getting their dues by filing an appeal and securing a stay order. Sub-rule (2) of rule 54 of the Income Tax Rules casts a discretion on the Recovery Officer to publish the sale proclamation in the Official Gazette or in a local newspaper. This provision is similar to sub-rule (2) of rule 67 of Order XXI C.P.C. with the only difference that here the discretion is with the court and thus there is no major difference between the two provisions. It is common knowledge that publication in Official Gazette is a very time taking process and the publication in a reputed newspaper also takes time. Therefore a discretion has been left with the Recovery Officer whether to publish the sale proclamation

in the aforesaid manner or not having regard to the time constraint.

9. The provisions of the Act referred to above clearly show that in order to achieve the object for which the Act has been enacted, namely, expeditious recovery of the dues of banks and financial institutions, the parliament has not only fixed a time schedule but also made a departure from the normal provision of Code of Civil Procedure. Therefore the contention of the petitioners that provisions of Income Tax Rules are ultra vires the Constitution, cannot be accepted.

10. For the reasons discussed above, the writ petition lacks merit and is dismissed summarily at the admission stage.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: 06.11.2001

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

Criminal Revision No. 2428 of 2001

Lallan Singh ...Revisionist
Versus
State of U.P. & another ...Opposite Party

Counsel for the Revisionist:
Sri Sameer Jain

Counsel for the Opposite Party:
A.G.A.
Shri Aswani Mishra

Juvenile Justice (Care and Protection of Children) Act, 2000 section 20 – if any proceedings is pending on the date of enforcement of the new act,- the trial against the applicant was pending from 30/12/2000 i.e. much prior to the date of enforcement of the new act i.e. 01.04.2001 – the learned sessions judge wrongly held that the provisions of new act are applicable to the instant case, therefore the order under revision suffers from illegality and is without jurisdiction. (held in para 12).

The revision is, accordingly, allowed and the order under revision is hereby set aside. The learned sessions judge is directed to continue and deal with the case of opposite party no. 2 in accordance with law and to conclude the case as if the new act has not been passed.

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

1. This revision has been directed against the order dated 30.10.2001, passed by the Sessions Judge, Chandauli in S.T. No. 28 of 2001, holding accused Ram Singh, opposite party no. 2 as juvenile under Juvenile Justice (care and Protection of Children) Act, 2000.

2. Heard learned counsel for the applicant, learned A.G.A. and Sri Ashwani Mishra, learned counsel for the opposite party no. 2 and perused the record.

3. The opposite party no. 2 was facing trial in S.T. No. 28 of 2001, under section 498-a, 304-b and 201 IPC and ¾ Dowry Prohibition act. The occurrence took place on 18.6.1997 the case was committed to the court of sessions by the magistrate prior to 30.10.2000 and the trial against the opposite party no. 2 was pending on 30.12.2000. Before the sessions judge the applicant moved an application for declaring him juvenile. The above application was opposed by the prosecution on the ground that the

provisions of the Juvenile Justice (Care and Protection) act, 2000, hereinafter called the Act is not applicable to the present proceedings.

4. The learned session judge held that the new act received the assent of the president of India on December 30,2000 and was published in the Gazette Extra-Ordinary, dated December 30,2000, therefore, the commencement of the act was from the said date i.e. 30/12.2000, when the case was pending against the opposite party no. 2 and, therefore, he is entitled to the benefit of new act. Accordingly, he declared the applicant as juvenile under the new act.

5. Aggrieved with the above order, the complainant of the case preferred this revision.

6. The questions which are involved in this case are as to what was the date of commencement of the new Act and whether the provisions of new Act are applicable to the present case.

Section 1 of the new act reads as under:-

(1) This act may be called the Juvenile Justice (Care and Protection of Children) Act, 2000.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall not come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

7. The Central Government issued notification No. S.O. 177 (E), dated February 28, 2001, notifying that the new Act will come into force on April 1,2001. Thus it is clear that the learned Sessions Judge had wrongly held that the Act came into force on 30.12.2000 when it received assent of the President and was published in the Gazette of India dated December 30,2000.

8. It is not disputed that the trial against the applicant was pending from before 30.12.2000, i.e. much prior to the date of enforcement of the new Act i.e. 01/04/2001. Section 20 of the new Act, which deals with the special provisions in respect of the pending cases, reads as under:-

"20- Special provision in respect of pending cases-Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it has been satisfied on inquiry under this act that a juvenile has committed the offence."

9. The wordings of the above section are clear enough to show that if any proceeding is pending on the date of enforcement of the new Act, that proceeding shall be concluded under the provisions of old act. However, it provides that in case the court finds that the accused was juvenile and he committed the offence, the court shall record its finding, but shall not pass any sentence and send the juvenile to the

Board for appropriate orders. The sending of juvenile before the Board would arise after conclusion of the trial and finding that the accused had committed the offence. But it is clear that except said procedure the provisions of new Act would not be applicable to the above proceedings.

10. The learned sessions judge has also referred section 64 of the new act. The provisions of the above section applies to the juvenile in conflict with law who is under going any sentence of imprisonment on the commencement of the new act. That situation or contingency has yet not arisen. Therefore, the provisions of Section 64 of the new act are also not applicable to the present case.

11. In these circumstances the learned session judge wrongly held that the provisions of new act are applicable to the instant case. Therefore, the order under revision suffers from illegality and is without jurisdiction.

12. The revision is, accordingly, allowed and the order under revision is hereby set aside. The learned Sessions Judge is directed to continue and deal with the case of opposite party no. 2 in accordance with law and to conclude the case as if the new act has not been passed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2001.

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

Civil Misc. Writ Petition No. 28117 of 1997

Gyan Singh Parihar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsels for the Petitioner:
Shri Mukesh Kumar
Shri Ashok Khare

Counsel for the Respondents:
S.C.
Sri V.N. Agrawal

Constitution of India-Article 226 – Suspension-whether an employee should or should not continue in his office during the period of disciplinary enquiry is a matter to be assessed by the concerned authority and ordinarily, the court should not interfere with the order unless it is demonstrated to be malafide and without there being a prima-facie evidence on record connecting the employee with the misconduct in question.

(Held in para 5).

It has not been demonstrated before the Court that the order is malafide and without there being a prima-facie evidence on record connecting the petitioner with the alleged misconduct warranting interference by this Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India.
Case relied on –
J.T. 1993 (2) S.C.P. 550.

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

1. Heard Shri Mukesh Kumar, holding brief of Shri Ashok Khare, learned Senior Advocate appearing for the petitioner, and Shri V.N. Agrawal, learned Standing Counsel of the State of U.P., representing the respondent nos. 1 and 2.

2. By means of instant writ petition under Article 226 of the Constitution of India, Shri Gyan Singh Parihar, an employee of the State of U.P., seeks to challenge the order dated 31st July, 1997, a copy whereof is Annexure '5' of the writ petition.

3. The impugned order purports to place the petitioner under suspension pending proposed disciplinary enquiry against him relating to serious charges of fraud, embezzlement, bribery, fabrication of record and datas.

4. Whether an employee should or should not continue in his office during the period of disciplinary enquiry is a matter to be assessed by the concerned authority and ordinarily, the Court should not interfere with the order unless it is demonstrated to be malafide and without there being a prima facie evidence on record connecting the employee with the misconduct in question. (See **U.P. Rajya Krishi Utpadan Mandi Parishad and others v. Sanjiv Rajan,** J.T. 1993 (2) S.C. 550).

5. It has not been demonstrated before the Court that the order is malafide and without there being a prima facie evidence on record connecting the petitioner with the alleged misconduct, warranting interference by this Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India.

6. It is relevant to notice that this petition was presented on 2nd September, 1997, and more than four years have elapsed since then. There was no impediment against proceeding with the enquiry against the petitioner. This Court did not pass any order staying the enquiry. Under these circumstances, it is reasonable to presume that by now the enquiry must have been finalized. If not, the Court expects that the enquiry will be completed as early as possible, but not later than three months from the date of production of a certified copy of this order before the Enquiry Officer.

7. For the reasons given above, and subject to the direction in the preceding paragraph, the petition is dismissed summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATE: ALLAHABAD 23.11.2001

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

Review Petition No. 58028 of 2000

Sri Kamleshwar Nath Srivastava ...Applicant.
Versus
State of U.P. through the Secretary and others ...Respondents

Counsel for the Petitioners:
Sri B.P. Srivastava

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

Constitution of India-Article 226 – compulsorily retirement- the concerned authority can take into account over all performance of the incumbent as mirrored by the service record, including the entries awarded to him prior to the promotion. Even uncommunicated entries also can be taken into account for the purpose of assessing the desirability of retaining the incumbent in service after he attains the age of 50 years of completes the period of qualifying service. (Held in para 10).

There was no illegality in taking into account the entries awarded to the petitioner applicant prior to his promotion in the superior scale in the year 1966 for the purpose of the decision to retire the petitioner-applicant compulsorily.

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

1. Heard Sri B.P. Srivastava, learned counsel appearing for the petitioner-applicant, and Sri V.N. Agarwal, learned Standing Counsel of the State of U.P., representing the respondents.

2. After the lapse of an interminable period of more than eight years, the petitioner-applicant seeks to have the order and judgment of the Court dated 12th October, 1993 reviewed.

3. The review application is accompanied by an application for condonation of delay under Section 5 of the Indian Limitation Act, 1963, and is supported by an affidavit of the registered Clerk of the learned counsel.

4. The Court has perused the averment made in support of the delay condonation application and has not been able to find any tangible ground muchless sufficient to condone the delay. The ground set up is that on 24th July, 2000, the petitioner-applicant came to enquire about the case and, on inquiry from the High Court office by the aforesaid registered Clerk, it was revealed that the petition had been dismissed on 12th October, 1993. On record there is neither any application for inspection of the record nor is there any application seeking information about the status of the case. In the absence of the inspection application and the application seeking information, or any other legal source of information, the assertion that the registered Clerk came to know about the order and judgment dated 12th October, 1993 from the High Court office is too good to be believed.

5. Review application is highly belated and the delay in making the same cannot be condoned for want of any cogent ground.

6. It is appropriate to notice that the order and judgment dated 12th October, 1993 is an order and judgment passed on merits, after due consideration of the relevant material placed on record by the parties. It is true that the learned counsel of the petitioner was not present, but the factum of his absence cannot alter the character of the order and judgment from one being on merits to an exparte order of dismissal in default. It appears that the order and judgment dated 12th October, 1993, though on merits, is perceived by the petitioner-applicant as the order dismissing the petition in default. Indeed, it is not so.

7. On merits of the prayer for review, the petitioner-applicant has not been able to point out any legally

recognised ground for reviewing the order and judgment dated 12th October, 1993.

8. The sole ground pressed by the learned counsel for review of the order and judgment is that the adverse entries awarded to the petitioner prior to the year 1966 when he had been promoted to senior scale were illegally taken into consideration, and this aspect escaped the notice of the Court, resulting in an error apparent on the record. In substance, it appears, doctrine of condonation is being pressed into service.

9. Reliance upon the doctrine of condonation is misplaced in as much as it is well settled that while considering the question of compulsorily retirement, the concerned authority can take into account over all performance of the incumbent as mirrored by the service record, including the entries awarded to him prior to the promotion. Even uncommunicated entries also can be taken into account for the purpose of assessing the desirability of retaining the incumbent in service after he attains the age of 50 years or completes the period of qualifying service. It is to be remembered that an order of compulsory retirement is not an order of punishment. Government have a prerogative to retire its employee on an over-all assessment of his performance. Such an order is not amenable to challenge except on the ground of malafide or perversity or total lack of evidence.

10. In the back-drop of this legal position, there was no illegality in taking into account the entries awarded to the petitioner-applicant prior to his promotion in the superior scale in the year 1966 for the purpose of the decision to retire the petitioner-applicant compulsorily. The order and judgment of the Tribunal is perfect, and in upholding the same the Court did not commit any error apparent on record.

11. All told, in the opinion of the Court, neither the delay condonation application nor the review application has any substance. Accordingly, they are rejected.
