APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.1.2002

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

Special Appeal No. 48 of 2002

Ram Chandra Tandon ...Appellant
Versus
The Regional Manager, Bank of Baroda and another ...Respondents

Counsel for the Appellant:
Mr. Ajai Srivastava

Counsel for the Respondents:
Mr. C.P. Misra

Constitution of India, Article 226- Alternative Remedy- Petitioner a Bank employee of Bank of Baroda- opted retirement under V.R.S. Scheme- entire post retiral benefits credited in personal amount of the employee- cheque for Rs. 10,000/- dishonored- writ petition dismissed on the ground of alternative remedy by filing civil suit-held- W.P. can not be dismissed.
Held- Para 2
It is quite true, if disputed questions of facts are there, instead of granting relief in the writ petition, the matter can be relegated to the suit. In the instant case since no counter affidavit has been filed and the writ petition was dismissed in limine only on the ground of alternative remedy, we are of view that the respondent being a nationalized bank under article 12 of the Constitution of India the writ petition is maintainable against the bank.

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

Sri Ajai Srivastava, learned counsel for appellant and Sri C.P. Misra, learned counsel for the respondents appeared.

1. The short facts involved in this special appear inter alia are that the writ petitioner appellant (hereinafter referred to as the petitioner) has retired from the post of Head Cashier from Bank of Baroda, Branch Aonla, district- Bareilly. He claimed that he had an unblemished and excellent service record and there was no complaint of any kind against him throughout his service career. He applied for the retirement under the Bank of Baroda Employees Voluntary Retirement Scheme and accordingly his application was considered on 31.3.2001 by the respondents. A true copy of the acceptance letter date 31.3.2001 has been filed as Annexure-1 to the writ petition. Thereafter all the retiral benefits including Provident Fund, Gratuity and Additional Retirement Benefits were credited in his Saving Bank Account no. 2559. The amounts of Provident Fund Rs. 3,10,736.34, Gratuity of Rs.2,48,274/- and the additional retirement benefit of Rs.80,883/- were credited to his savings bank account on 14.6.2001, 28.6.2001 and 10.8.2001 respectively the total amount being Rs. 6,39,893.34. On 24.7.2001 he presented a cheque for Rs. 10,000/- for withdrawal which was not honoured by the concerned branch of the bank and after enquiry he was informed that the payment could not be made without permission of the Branch Manager/Regional Manager which is endorsed on the Ledger Book. It is alleged that the respondents have stopped operation of account of the petitioner without giving any notice or show cause to him, in most arbitrary and illegal manner. It is further alleged that the petitioner moved an application to the respondent no. 1 on 25.7.2001 stating therein his sufferings and also prayed for the release of his amount illegally

withheld. It is also alleged in the said application that the wife of the petitioner has been suffering seriously and is also advised to undergo the operation which required handsome amount. Under such circumstances the petitioner in the writ petition has prayed for release of the amount of Gratuity, Provident Fund and Additional Retiral benefits deposited in the respondent bank.

2. Learned single Judge however, by his order dated 5.12.2001 held that the petitioner has an alternative remedy to file a suit and dismissed the writ petition on the ground of availability of the alternative remedy. It is quite true, if disputed questions of facts are there, instead of granting relief in the writ petition, the matter can be relegated to the suit. In the instant case since no counter affidavit has been filed and the writ petition was dismissed in limine only on the ground of alternative remedy, we are of view that the respondent being a nationalized bank under article 12 of the Constitution of India the writ petition is maintainable against the bank.

3. The petitioner has complained of arbitrary action against the bank and also violation of natural justice. Such matter unless disputed on affidavits, should not be dismissed only on the ground of alternative remedy. Right to equality of opportunity in the matters of public employment has been granted under Article 16 of the Constitution of India and has been recognized as fundamental right and the petitioner being a retired employee of the nationalized bank having made out the allegations in the writ petition that he has suffered due to arbitrary action of the bank, there is no reason for relegating the writ petitioner for alternative remedy of suit at the initial stage when no counter affidavit has been filed disputing the allegations. Under such circumstances, we are of view that the writ petition is maintainable and the question of alternative remedy of filing suit does not arise at this stage.

4. We accordingly set aside the order dated 5.12.2001 passed by learned single Judge and are of the view that the writ petition should be heard on merits. Counter affidavit, if any, may be filed within three weeks as prayed for and rejoinder affidavit may be filed within a week thereafter. List the writ petition for hearing before the learned single Judge taking up such writ petitions.

5. With the aforesaid observations the Special Appeal is allowed. It is expected that the writ petition will be disposed of at an early date as the writ petitioner is a retired employee, subject however, to the convenience of the learned Single Judge.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.1.2002

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

Special Appeal Defective No. 271 of 2001

State of U.P. and others ...Appellants
Versus
Hari Shankar Dubey ...Respondent

Counsel for the Appellants:
Mr. S.K. Mehrotra
S.C.

Counsel for the Respondent:
Mr. V.K. Shukla

Limitation Act- Section 5- Condonation of Delay- Special Appeal filed beyond 225 days- no material disclosed by which the court can construed liberally- while the valuable Right of the other party involved- court expressed its great concern with the said state of affairs under which the litigation are being conducted by the authorities- Chief Minister be informed accordingly for necessary action.

Held- Para 2

It is true that application filed under section 5 of the Limitation Act is to be liberally construed but construct liberally has to be made on the basis of the materials disclosed. If no material is disclosed, it is not possible to construe the petition liberally because very valuable rights of the order party are involved and the same cannot be ignored.

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

1. We have heard Sri S.K. Mehrotra, learned Standing Counsel for the State Applicants and Sri V.K. Shukla, learned Advocate for the respondent- writ petitioner on the delay condonation petition.

2. This is an application for condonation of delay of 225 days in preferring special appeal against the order passed by the learned single Judge allowing the writ petition. The order was passed in the writ petition on 28th August, 2000. No material has been disclosed nor any fact has been alleged on the basis of which we can come forward to give any aid to the State Government to condone the delay. The order was passed on 28th August, 2000 and the limitation for filing the special appeal expired on 27th September, 2000. The only fact, disclosed in the delay condonation petition, is that permission was sought from the State Law Department on 14th March, 2001. What is the reason for seeking such permission after such a long time has also not been disclosed. It also appears that the Law Department granted permission on 11th April, 2001 after one month. No reason has been disclosed as to why the Law Department took one month's time for granting permission. Thereafter other formalities were complied with by the State and the papers were made ready and ultimately the appeal was filed on 28th April, 2001. Apart from the aforesaid dates on which the applicant-State Government relied upon we do not find any other (sic) coming out in the application filed under section 5 of the Limitation Act for condoning the delay in preferring the appeal. This discloses a very sad state of affairs on the basis of which litigation is conducted by the State Government in the State. It is well settled that when a proceeding is barred by limitation valuable rights accure in favour of the other party. Under such circumstances, without having any material before us on the basis of which we can grant any relief to the applicant, we cannot ignore the rights of the respondent-writ petitioner. In that view of the matter, there is no other alternative for us but to dismiss the application of the applicant- State Government. In view of the above facts and circumstances of the case, we feel that because of the sad state of affairs of the State Government, the valuable rights of the public at large should not be suffered. In that view of the matter, we most reluctantly direct that the order passed in this matter may be brought to the notice of the Chief Minister of the State, who may pass appropriate direction so that litigation's may be

conducted in proper manner. As learned Standing Counsel submits, the Additional L.R. who is posted at Allahabad High Court is directed to communicate this order to the Chief Minister of the State forthwith.

3. It is true that the application filed under section 5 of the Limitation Act is to be liberally construed but such interpretation on construing liberally has to be made on the basis of the materials disclosed. If no material is disclosed, it is not possible to construe the petition liberally because very valuable rights of the other party are involved and the same cannot be ignored.

4. In the above facts and circumstances of the case the application filed under section 5 of the Limitation Act is dismissed with the aforesaid observations.

5. Since the delay condonation petition has been dismissed, the special appeal itself stands dismissed and the same need not be registered and shall be taken out of the file of this Court.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: 3.1.2002

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

Special Appeal No.1181 of 2001

M/s Gokul Dairy, Allahabad and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Miss Bushra Maryam
Sri P.K. Agarwal

Counsel for the Respondents:
Mr. Pankaj Bhatiya
Mr. Ran Vijai Singh (S.C.)

Constitution of India, Article 215- jurisdiction of puisne judge- sitting in writ jurisdiction whether can exercise suo moto power under Article 215 of the Constitution of India ? held- No - pursuant to earlier direction of High Court- on default in repayment of loan appellant filed another writ petition with specific offer to Bank- instead of arrest, the Bank to realise the whole amount from the property which is already under pledged with the Bank- learned single Judge send the Appellant in Jail by exercising suomoto power under Article 215- learned single judge has no jurisdiction to entertain, hear and decide either the contempt matters or the proceedings under Article 215 unless authorised otherwise by the Chief Justice.

Held- Para 8 and 9

We are, however, surprised that the learned Single Judge instead of considering the problem involved in the matter issued contempt notice in the writ petition by passing the impugned order dated 7.12.2001 and ultimately sent him to jail. That apart on 10.12.2001 the learned Single Judge has also passed a very drastic order. In our view, the learned Single Judge has no jurisdiction to pass such orders as he had no jurisdiction to entertain, hear and decide contempt matters both arising under the provisions of the Contempt of Courts Act or under Article 215 of the Constitution of India, as no such jurisdiction or authority was conferred upon the learned Single Judge by the Chief Justice.

It is well settled that the power under Article 215 of the Constitution of India, as was sought to be exercised by the

learned Single Judge cannot be exercised in the manner as has been done by the learned Single Judge. Such a power as contemplated cannot be exercised by the learned Single Judge without being conferred upon such authority or jurisdiction by the Chief Justice. The said proposition of law is well settled by the following decisions:

1. **State Vs. Devi Dayal, AIR 1959 Alld. 421**
2. **Sahan Lal Baid Vs. State of West Bengal & others AIR 1990 Cal-168**
3. **Raj Kishore Yadav Vs. Principal, Kendriya Vidyalaya Bareilly and others (1997) 1 U.P.L.B.E.C.-26.**
4. **High Court of Judicature at Allahabad through its Registrar Vs. Raj Kishore Yadav & others (1997) 3 SCC-11**
5. **State of Rajasthan Vs. Prakash Chand & others (1998) 1 SCC-1**
6. **Dr. L.P. Mishra Vs. State of U.P. (1998) 7 SCC-379.**

Case Law discussed:

AIR 1959 Alld.-421
AIR 1990 Cal.-168
1997 (1) U.P.L.B.E.C.-26
1997 (3) SCC-11
1998 (1) SCC- I
1998 (7) SCC-379

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

1. We have heard Sri K.P. Agarwal, learned Senior counsel assisted by Ms. Bushra Maryam for the appellant-writ petitioner, Sri Pankaj Bhatia, learned counsel appearing on behalf of respondent No.4 and Sri Ran Vijay Singh, learned standing counsel appearing on behalf of the State-respondents.

2. Since both the special appeals arise out of two separate orders passed by the learned Single Judge in the same writ petition being Civil Misc. Writ Petition No.41020 of 2001, they have been heard together and are being decided by a common order.

3. Special appeal No. 1181 of 2001 is directed against the order dated 7.12.2001 passed in Writ Petition No. 41020 of 2001, whereby, the learned Single Judge has passed the following order:

"Mr. Ramji Pandey, petitioner no.2, one of the partners of the firm, petitioner no. 1, is present in person.

Heard learned counsel for the petitioners and Mr. Pankaj Bhatia, Advocate, who has appeared for respondent No. 4.

According to Mr. Bhatia, an amount of Rs. 16,00,000 is due against the petitioners at present. The petitioners approached this court several times and this court taking a lenient view in the matter directed the petitioners to deposit the amount within the time prescribed, but the petitioners deliberately and willfully did not deposit the amount in question till date. The petitioners including Mr. Ramji Pandey, have thus flouted the order dated 28.5.1999 passed in Writ Petition No. 23269 of 1999, order dated 28.6.1999 passed in Special Appeal No. 504 of 1999, order dated 18.4.2001 passed in Writ Petition No. 27565 of 2000 and order dated 15.5.2001 passed on an application filed in Writ Petition No. (sic) of 2000 by this Court. All the petitioners are prima facie guilty of contempt of this Court. I, therefore, in exercise of power under Article 215 of the Constitution of India, direct the Court Officer of this court to take Mr. Ramji Pandey in judicial custody till

Sunday. He shall be produced before me on Monday. On the said date Mr. Ramji Pandey and petitioners No. 3 and 4 will show cause as to why they should not be punished for committing contempt of this Court.

Issue notices to the petitioners No. 3 and 4 accordingly.

List/put up on Monday."

4. The other Special Appeal No. 1199 of 2001 is directed against the order dated 10.12.2001 passed in the aforesaid writ petition, whereby, the learned Single Judge has passed the following order:

"Vide order dated 7.12.2001, Mr. Ramji Pandey, one of the petitioners was directed to be taken into judicial custody and it was also directed that he shall be produced before this Court today. The Court further directed Sri Ramji Pandey and two others to show cause as to why they be not punished for committing contempt of this Court. Today when the case was taken up Mr. Ramji Pandey was produced in person, but learned counsel appearing for him did not show any cause. On the other hand he prayed for two days further time to show cause. Request is accepted. Two days further time is granted to the learned counsel for Mr. Pandey to show cause.

List/put up on 13.12.2001. Till then Mr. Ramji Pandey shall remain under judicial custody and shall be sent to Naini Jail, Allahabad. On the aforesaid date he shall be again produced in person before this Court."

5. The facts, inter-alia, involved in these special appeals are that the writ-petitioner/appellant obtained loan from Bank of India, Sulemsarai Branch, Allahabad, for the purpose of business. The amount of the loan could not be paid and the appellants approached the Bank for its payment in installments, which was ultimately agreed upon. However, the writ petitioners- appellants paid some of the installments, but subsequently, committed default. When the recovery proceedings were initiated the writ petitioners-appellants filed Civil Misc. Writ Petition No. 23269 of 1999, wherein the learned Single Judge while disposing of the writ petition vide judgment and order dated 25.5.1999 permitted the writ petitioners-appellants to deposit the amount of the monthly instalment of Rs. 5 lacs each beginning Ist July 1999. The aforesaid order was challenged by the writ petitioners-appellants in Special Appeal No. 504 of 1999. This Court disposed of the appeal vide judgment and order dated 28.6.99. While maintaining the aforementioned judgment this Court observed that if an objection to the recovery proceedings is filed before the Recovery officer, the same shall be decided within two weeks and the recovery proceedings were stayed for a period of 3 weeks. Since, further default was committed, the bank pressed for recovery against the writ petitioners-appellants. Thereafter, the writ petitioners-appellants filed another Writ Petition No. 27165 of 2000, whereby, the Division Bench of this Court while finally disposing of the writ petition stayed the recovery proceedings on the statement given by the petitioners-appellants that they shall deposit Rs.5,00,000 in cash or by bank draft on or before 18th May, 2001 and permitting the petitioners to make a

representation before the Bank for re-schedulement of the balance amount which may be found due and payable. However on an application made by the writ petitioners-appellants the time for depositing the sum of Rs. 5 lacs was extended by one month.

6. Once again the writ petitioners-appellants failed to pay the agreed amount and therefore the Bank of India took steps for recovery of the amount and a citation was issued on 4.8.2001. The writ petitioners-appellants challenged the citation by filing Civil Misc. Writ Petition No. 41020 of 2001 in which the learned Single Judge had passed the impugned orders against which these two special appeals have been filed.

7. It is quite true that the writ petitioners-appellants were granted indulgence in the writ proceedings earlier and obtained benefit of payment by instalments and also for re-scheduling of instalments from time to time, we do not appreciate the attitude of the writ petitioner-appellants in not paying the instalments. However, we feel that since the writ petitioners-appellants had failed to pay the instalments and approached this Court on the ground that the value of their property was 50 lacs, which has been pledged with the bank, the same should be sold first and the amount due against the writ petitioners-appellants should be realised from the sale proceedings before arresting them.

8. We are, however, surprised that the learned Single Judge instead of considering the problem, involved in the matter issued contempt notice in the writ petition by passing the impugned order dated 7.12.2001 and ultimately sent him to jail. That apart on 10.12.2001 the learned Single Judge has also passed a very drastic order. In our view, the learned Single Judge has no jurisdiction to pass such orders, as he had no jurisdiction to entertain, hear and decide contempt matters both arising under the provisions of the Contempt of Courts Act or under Article 215 of the Constitution of India, as no such jurisdiction or authority was conferred upon the learned Single Judge by the Chief Justice.

9. It is well settled that the power under Article 215 of the Constitution of India, as was sought to be exercised by the learned Single Judge cannot be exercised in the manner as has been done by the learned Single Judge. Such a power, as contemplated can not be exercised by the learned Single Judge without being conferred upon such authority or jurisdiction by the Chief Justice. The said proposition of law is well settled by the following decisions:

1. State Vs. Devi Dayal, AIR 1959 Alld. 421
2. Sahan Lal Baid Vs. State of West Bengal & others AIR 1990 Cal-168
3. Raj Kishore Yadav Vs. Principal, Kendriya Vidyalaya Bareilly and others (1997) 1 U.P.L.B.E.C.-26.
4. High Court of Judicature at Allahabad through its Registrar Vs. Raj Kishore Yadav & others (1997) 3 SCC-11
5. State of Rajasthan Vs. Prakash Chand & others (1998) 1 SCC-1
6. Dr. L.P. Mishra Vs. State of U.P. (1998) 7 SCC-379.

10. The principles of law being well settled as has been specifically laid down by us in the case of Prof. Y.C. Simhadri, Vice-Chancellor, Banaras Hindu

University, Varanasi and others v. Deen Bandhu Pathak reported in (2001) 3 UPLBEC 2373 are reproduced hereunder:

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. That puisne Judges 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 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."

11. Since we have discussed the law at length on the point in the aforesaid decision, it is not necessary for us to deal in detail herein. We reiterate the same once again.

12. Following the aforesaid decision, we are of the view that the same principle will also apply to the facts and circumstances of the instant special appeals, as the jurisdiction to entertain, hear and decide contempt matters had not been assigned to the learned Single Judge by the Chief Justice.

13. We, accordingly, hold that the orders passed by the learned Single Judge impugned in the instant special appeals are without jurisdiction and nullity and as such no effect can be given to the same.

14. In view of the foregoing discussions, both the special appeals succeed and are accordingly allowed. The impugned order dated 7.12.2001 and 10.12.2001 passed by the learned Single Judge are hereby set aside and the contempt notice issued to the writ petitioners-appellants and the entire proceedings taken pursuant thereto stands quashed. However, it is made clear that we have not adjudicated the case on merits.

15. In view of the order passed by us in the aforementioned appeals, the bail bonds, if any, furnished by the writ petitioners-appellants are cancelled and the sureties are discharged.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 9.1.2002

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

Special Appeal No. 997 of 1995

Kailash Nath Tiwari ...Appellant
Versus
Union of India and others ...Respondents

Counsel for the Appellant:
Sri Sudhakar Pandey

Counsel for the Respondents:
Subodh Kumar
S.C.

Constitution of India, Article 226- Territorial jurisdiction writ petition challenging the validity of order passed by the Chief of the Army Staff- can not be dismissed on the ground of territorial jurisdiction- held- Chief of the Army Staff can be send any where in the country.

Held- Para 4

Following the principle as laid down by the Supreme Court in the aforesaid decision, we are of the view that the writ petition should not have been dismissed merely on the ground of territorial jurisdiction and should be heard and disposed of on merits.

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

1. Heard Sri Sudhakar Pandey, learned Advocate for the appellant and Sri Subodh Kumar, learned counsel for the respondents.

2. This special appeal is directed against an order of the learned single judge dismissing the writ petition filed by the writ petitioner-appellant.

3. In the instant case the Chief of the Army Staff being the appellate authority had dismissed the appeal under the Army Act which was preferred by the writ petitioner. It may also be taken note of that the writ petition was filed in the year 1984 and dismissed only on the ground of territorial jurisdiction in the year 1995. In this connection we may refer to an unreported decision of the Supreme Court in Civil Appeal No. 92 of 2001 (Dinesh Chandra Gahtori vs. Chief of Army Staff and another) decided on 19th January, 2001 wherein it has, inter alia, been held:

"The writ petition was filed in 1992. The impugned order was passed in 1999. This is a fact that the High Court should have taken into consideration. More importantly, it should have taken into consideration the fact that the Chief of Army Staff may be sued anywhere in the country. Placing reliance only on the cause of action, as the High Court did, was not justified."

4. Following the principle as laid down by the Supreme Court in the aforesaid decision, we are of the view that the writ petition should not have been dismissed merely on the ground of territorial jurisdiction and should be heard and disposed of on merits.

5. Accordingly, the special appeal is allowed and the order of the learned single judge is set aside. The writ petition is restored to file and it shall be listed before the learned single Judge dealing with such matters. Sri Subodh Kumar prays for and is allowed three weeks' time to file counter affidavit. Rejoinder

affidavit be filed within one week thereafter. List the writ petition after six weeks. It is expected that the writ petition shall be taken up and disposed of early since this is a very old matter subject, however, to the convenience of the learned single Judge.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.1.2002

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

Civil Misc. Writ Petition No. 316 of 1998

M/s Trade Link India, Ghaziabad ...Petitioner

Versus

The Trade Tax Officer, Ghaziabad and another ...Respondents

Counsel for the Petitioner:
Mr. Mahesh Manglik

Counsel for the Respondents:
S.C.

U.P. Trade Tax act- 1948- Section 29 (2) refund of amount- imposition of penalty of Rs. 25,000/- by T.T.O.- on 31.1.98 Deputy Commissioner set-aside the order of penalty- despite of repeated representation amount not refunded- direction issued to refund the entire amount within 4 weeks alongwith 18.1% interest per annum w.e.f. 9.2.98 to 7.3.99.

Held- Para 8 and 10

From a conjoint reading of Section 29 (2) of the Act and Rule 90 of the Rules, it is clear that the Statute had itself taken care to afford sufficient time to the authorities for scrutinising the record and making verification of the claim of refund and that is why a period of three months has been stipulated, after expiry of which, the interest would start running, if amount is not refunded within the said period. The manner in which the interest is to be calculated, its starting point, as also the date upto which the interest shall be paid, has all been specified in Section 29(2) of the Act. Thus, the plea of bonafide making enquiry and taking about an year in actually refunding the amount will not absolve the respondents from their liability to pay interest as per Section 29 (2) of the Act. There is no justification on the part of the respondents in not paying the interest at the rate of 18% per annum from the date of order till date of refund in terms of Section 29 (2) of the Act.

In view of the foregoing discussions, we find force in the submission of the learned counsel for the petitioner. We accordingly direct that the interest at the rate of 18% per annum from 9.2.1998 upto 7.3.1999 should be paid by the authorities concerned within four weeks from the date of communication of a certified copy of this order.

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

1. The petitioner- Trade Link India, 68 Palika Bazar, Ghaziabad through its Partner Sushil Kumar, have approached this Court by means of the present writ petition under Article 226 of the Constitution of India, seeking a writ order or direction in the nature of mandamus commanding the respondents to refund the amount of Rs. 25,000/- alongwith uptodate interest thereon under Section 29 (2) of the U.P. Trade Tax Act, 1948.

2. The facts giving rise to the present petition in brief are that the petitioner is a registered partnership firm, engaged in the business of manufacture and sale of Gas Cylinders. It is a

registered dealer under the provisions of U.P. Trade Tax Act (hereinafter referred to as the Act). On 17.1.1992, a consignment of goods, which was being transported by Truck No. M.H.-12/4909, was checked by the Trade Tax Officer, Mobile Squad Shahjahanpur. Certain discrepancies were found whereupon the goods were detained, and subsequently released only after security deposit of Rs. 25,000/- in cash. The Additional Trade Tax Officer, Sector 4, Meerut, initiated penalty proceedings under Section 13-A (4) of the Act, and vide order dated 27.9.1995, imposed a sum of Rs. 25,000/- as penalty. By the same order, he adjusted the amount of Rs. 25,000/- which had already been deposited by the petitioner on 22.1.1992 as security. Feeling aggrieved thereby, the petitioner preferred an appeal under Section 9 of the Act, before the Deputy Commissioner (Appeals) II, Trade Tax, Ghaziabad, who vide order dated 31.1.1998, allowed the appeal and set aside the imposition of penalty. He also directed for the refund of the amount, if any deposited by the petitioner. Thereafter the petitioner filed an application on 9.2.1998 before the Trade Tax Officer Sector 4 Ghaziabad, respondent No. 1 seeking refund of the amount of Rs. 25,000/-. When nothing was done, the petitioner sent several reminders and ultimately approached this Court by filing the present writ petition.

3. In the Counter affidavit filed by the respondent no. 1 it has been admitted that the Department did not prefer any appeal against the order dated 31.1.1998 passed by the Deputy Commissioner (Appeals). A refund voucher for Rs. 25,000/- was prepared in favour of the petitioner on 25.3.1998 and it was sent to the Trade Tax Officer, Mobile Squad Shahjahanpur on 31.3.1999 for obtaining his counter signature. However, the Trade Tax Officer, Mobile Squad, vide letter dated 20.4.1999 informed the respondent no. 1 that there was no record of deposit of Rs. 25,000/- in the account as claimed by the petitioner. The respondent no. 1 made enquiry from the petitioner with regard to the amount which was alleged to have been deposited by the petitioner whereupon the petitioner submitted the proof. Thereafter, correspondence continued with the Trade Tax Officer, Mobile Squad, Shahjahanpur, who only on 5.3.1999 returned the refund voucher duly countersigned by him and the refund voucher was handed over to the petitioner. On account of non-payment of Rs. 25,000/- within time as provided under Section 29 (2) of the Act, the petitioner claimed for payment of interest on the delayed refund, which is subject matter for consideration before this Court in this petition.

4. We have heard Shri M. Manglik, learned counsel for the petitioner and Shri S.P. Keshwarwani learned Standing Counsel for the respondents.

5. The learned counsel for the petitioner has submitted that vide order dated 31.1.1998, the Deputy Commissioner (Appeals) Ghaziabad, while allowing the appeal filed by the petitioner, had set aside the imposition of penalty and directed for the refund of the amount deposited, if any, by the petitioner. This order was served upon the respondent no. 1 by the petitioner on 9.2.1998 alongwith an application seeking refund, and since the refund was made only on 5.3.1999, the petitioner is entitled for interest at the rate of 18% per annum from the date of the order till the date of

actual refund in the terms of Section 29 (2) of the Act.

6. On the other hand, the learned standing counsel vehemently submitted that the respondents are not liable to pay any interest whatsoever on the amount of refund, as the respondent no. 1 was bonafidely taking steps, in accordance with law, for verification in regard to the amount alleged to have been deposited by the petitioner and thus, the delay, if any, occurred in getting the verification report from the Trade Tax Officer, Mobile Squad, Shahjahanpur, is genuine and does not warrant for payment of interest by the respondent. In support of this submission, he relied upon Rule 90 of the U.P. Trade Tax Rules (hereinafter referred to as the Rules) and urged that when a claim for refund is made, it is obligatory on the part of the Trade Tax Officer to make proper scrutiny of all relevant records and make necessary verification and is to satisfy himself that amount is refundable and only thereafter the amount is to be refunded. Thus, for the time taken in regard to completion of verification to ascertain the deposit so made by the petitioner, no interest is payable by the Department.

7. For a correct appreciation of the controversy involved in this case, Section 29 of the Act as well as Rule 90 of the Rules are reproduced below:

Section 29 Refunds.

(1) The Assessing authority shall, in the manner prescribed, refund to a dealer any amount of tax, fees of other dues paid in excess of the amount due from him under this Act:

Provided that the amount found to be refundable shall first be adjusted towards the tax or any other amount outstanding against the dealer under this Act or under the Central Sales Tax Act, 1956 and only the balance, if any, shall be refunded.

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

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

[(3) Notwithstanding any judgment, decree or order of any court or authority no refund shall be allowed of any tax or fee due under this Act on the turnover of sales or purchases or both, as the case may be, admitted by the dealer in the returns filed by him or at any stage in any proceedings under this Act.]

Explanation I:
The date of refund shall be deemed to be the date on which in intimation regarding preparation of the refund voucher is sent to the dealer in the manner prescribed.

Explanation II
The expression 'refund' includes any adjustment under the proviso to sub-section (1)"

Rule 90.

When a claim for refund is made, the Sales Tax Officer shall, after proper scrutiny of all relevant records and necessary verification, satisfy himself that the amount is refundable. If no dues are outstanding against the dealer for any year, the refund voucher shall be prepared. If any dues are outstanding against the dealer for any year or if the dealer makes a request for adjustment of the refundable amount against future dues, an adjustment voucher shall be prepared for the adjustment of the excess refundable amount towards such dues."

8. From a conjoint reading of Section 29 (2) of the Act and Rule 90 of the Rules, it is clear that the Statute had itself taken care to afford sufficient time to the authorities for scrutinising the record and making verification of the claim of refund and that is why a period of three months has been stipulated, after expiry of which, the interest would start running, if amount is not refunded within the said period. The manner in which the interest is be calculated, its starting point, as also the date upto which the interest shall be paid, has all been specified in Section 29 (2) of the Act. Thus, the plea of bonafide making enquiry and taking about an year in actually refunding the amount will not absolve the respondents from their liability to pay interest as per Section 29 (2) of the Act. There is no justification on the part of the respondents in not paying the interest at the rate of 18% per annum from the date of order till date of refund in terms of Section 29 (2) of the Act.

9. Moreover, the plea taken by the respondent no. 1 that it took about an year for getting the verification of the amount deposited by the petitioner with the Trade Tax Officer, Mobile Squad, Shahjahanpur cannot be accepted in as much as in the penalty order passed by the respondent no. 1 the amount of Rs. 25,000/- deposited by the petitioner by Bank Draft No. 116848 dated 22.1.1992 with the Trade Tax Officer, Shahjahanpur, as mentioned in his letter no. 358 dated 1.2.1992, has been adjusted towards the penalty. Thus, the fact regarding the deposit of amount of Rs. 25,000/- could not be disputed or doubted by the respondent no. 1.

10. In view of the foregoing discussions, we find force in the submission of the learned Counsel for the petitioner. We accordingly direct that the interest at the rate of 18% per annum from 9.2.1998 upto 7.3.1999 should be paid by the authorities concerned within four weeks from the date of communication of a certified copy of this order. The writ petition is allowed to the extent indicated above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2001

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

First Appeal From Order No. 1270 of 2000

Raja Ram Soni ...Appellant
Versus
Kanpur Development Authority and others ...Respondents

Counsel for the Appellant:
Sri Sidhharth Verma

Counsel for the Respondents:
Sri Lal Ji Sinha

Civil Procedure Code- Section 96- First Appeal from order- application for Interim injunction- Rejection by Trial Court- Disputed property a commercial complex- construction started 1992- inaugurated 1993- completed 99- Defaults invested huge amount- can not be restrained Rejection of Interim Application- held- proper.

Held- Para 6

The complex is alleged to have been constructed in the year 1992 and it was inaugurated in the year 1993. In the year 1999, when the construction was completed, the Suit was filed. There is, therefore, no justification for issue of any interim injunction during the trial of the case.

Case law discussed:
1993 ALJ-533
1989 ACJ-13
1995 ACJ-551

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

1. The appellant filed a Suit No. 114 of 1999 for injunction against the respondents for restraining them from constructing a commercial complex over plot, bearing no. 207 of Jagannath Mohal at Kohna area, Kanpur city. The appellant also moved an application under Order 39 Rules 1 and 2 C.P.C. for temporary injunction to restrain the respondents from constructing their commercial complex over the disputed plot. The application was opposed by the respondents. The same has been rejected by the order, dated 17.5.2000 by the Additional Chief Judicial Magistrate, Kanpur Nagar. Aggrieved by it, the present appeal has been preferred.

2. It is contended that the appellant got the land from Triyugi Narayan Dubey, who has since died, that he is owner and in possession of the land. The case of the respondents is that they have acquired the land and commercial complex has already been constructed, named, "RAINA MARKET" that it was completed in the year 1992 consisting of 60 to 70 shops, that there is also a Library and Reading Room, known as "Raina Library". It was inaugurated on 2.6.1963 that, therefore, no injunction can be granted.

3. I have heard Sri Siddharth Verma, learned counsel for the appellant and Sri Lal Ji Sinha, learned counsel for the respondents.

4. The learned counsel has argued that it is a Suit for injunction and in such a Suit the parties should be directed to maintain strict status-quo. The learned counsel in support of the argument has referred to the decision of Rahmullah and others vs. District Judge, Siddharthnagar and others 1999 ACJ page 533. In this case it was observed that prima facie case does not mean that the plaintiff is certain to succeed, that if triable issues have been raised which require consideration, the temporary injunction should be granted. Similar view was in the Ram Kalap vs. IV Additional District Judge, Gorakhpur and another, 1989 ACJ, page 13 . It was held that if the suit is for permanent injunction and the matter is to be heard and decided, proprietary demands that strict status quo be maintained between the parties.

The third case referred to is Ram Dularey Pandey vs. II Additional District

Judge, Allahabad and others, 1995, ACJ, page 551. It was observed in this case that parties should not be permitted to raise constructions on the joint land and strict status-quo should be maintained.

5. I have considered the authorities. I am of the view that none of these authorities are relevant in the present case. It appears that the commercial complex consisting of large numbers of shops, library and Reading Room have already been constructed. A huge amount might have been spent by the respondents in the same. There is no justification to order that the respondents may not use the Complex, which has been constructed.

6. The Complex is alleged to have been constructed in the year 1992 and it was inaugurated in the year 1993. In the year 1999, when the construction was completed, the Suit was filed. There is, therefore, no justification for issue of any interim injunction during the trial of the Case.

I do not find any illegality in the impugned order passed by the trial court.

7. The appeal is, therefore, without merit and is, hereby, dismissed. The stay order, if any, is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2001

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

Civil Misc. Writ Petition No. 36144 of 2001

M/s M.M. Accessories and another ...Petitioners

Versus

M/s U.P. Financial Corporation and another ...Respondents

Counsel for the Petitioners:
Sri Manish Goyal

Counsel for the Respondents:
Sri Satish Chaturvedi

Constitution of India, Article 226- Writ of mandamus- scope and Limit- Explained of cycle spokes- advance higher amount from U.P. F.C.- failure to repay the loan enterned into one time settlement- on refusal approached before the court for writ of mandamus seeking the UPFC may be commanded to accept the one time settlement-cannot be issued.

Held- para 7

In a matter where a creditor is enforcing its liability upon the debtor, the debtor has no legal right to claim that the claim be settled on favourable terms proposed by him whereby the claim of the creditor is reduced. Therefore, in our opinion, the prayer made by the petitioners that this court should issue a writ of mandamus to the respondents to accept the proposal of one- time settlement made by them cannot be granted as it does not come within the principles on which a writ of mandamus can be issued under Article 226 of the Constitution.

Case law discussed:
AIR 1977 SC-2149
AIR 1966 SC-334

AIR 1962 SC-1210
2001 (4) AWC-2778
2001 (2) SCC-451
JT (4) SC-366
(1992) 1 SCC-91

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

1. This writ petition under Article 226 of the Constitution has been filed for issuance of certain directions to the U.P. Financial Corporation.

2. The case set up in the writ petition is that petitioner no. 1 is a firm which was constituted for carrying on business of manufacturing cycle spokes. The petitioners approached the U.P. Financial Corporation (for short, UPFC) for loan and an amount of Rs. 15 lakhs was sanctioned on 24.7.1993 and an additional amount of Rs. 3.80 lakhs was sanctioned on 31.3.1996. The manufacturing unit of the petitioners was closed in 1997. The petitioners made a request to the UPFC to reschedule the loan and the said request was accepted and the loan was re-scheduled on 20.4.2000. Sometime thereafter on 24.9.2001 the petitioners made a proposal to the respondents for one time settlement where under they offered to deposit the balance of the principal amount plus 10 percent of the outstanding simple interest. The petitioners also deposited Rs. 1.80 laks through a demand draft which represented 10 percent of the total outstanding dues as per the settlement offered by them. The respondents sent a reply dated 10.10.2001 that one -time settlement can be considered on full liability basis and not on the terms proposed by the petitioners. The respondents also sent a letter dated 24.10.2001 asking the petitioners to participate in the meeting of the core group for finalizing the terms of the proposal of one time settlement. In the meeting convened for the purpose, the General Manager of the UPFC informed the petitioners that the proposal of one time settlement could not be accepted on the terms offered by them. The case of the petitioners further is that their proposal was on the same terms in which one time settlement had been accepted in the case of M/s D.B. Ice Factory and Cold Storage, and by rejecting their proposal they have been discriminated against. The principal relief's claimed in the writ petition are that the order dated 10.10.2001 passed by the respondents be quashed, a writ of mandamus be issued commanding the respondents to produce the entire record of M/s D.B. Ice Factory and Cold Storage, and the UPFC be commanded to enter into one time settlement with the petitioners on the same terms and conditions as was done in the case of the aforesaid unit. A further prayer has been made that a writ of prohibition be issued for restraining the respondents from initiating any recovery proceedings against the petitioners.

3. Sri Manish Goyal has submitted that after the loan had been sanctioned and money had been disbursed to the petitioners, they had commenced production but on account of recession in the market the unit was closed in the year 1997. The petitioners have been making necessary efforts to repay the loan amount by making deposits from time to time. The request for re-schedulement of loan was accepted by the respondents on 20.4.2000, but on account of closure of business the petitioner were finding it difficult to deposit the installments as fixed in the re-scheduled plan and, therefore, they made a request on 24.9.2001 to the respondents to enter into

one time settlement. The terms and conditions of the one time settlement proposed by the petitioners were similar to that which had been accepted by the respondents in the case of M/s D.B. Ice Factory and cold storage. Learned counsel has submitted that the respondents having entered into one time settlement with M/s D.B. Ice Factory and Cold Storage on the same terms and conditions as was proposed by the petitioners, they committed manifest illegality by not accepting the proposal made by the petitioners and the impugned order passed on 10.10.2001 rejecting the proposal is wholly arbitrary and discriminatory.

4. It is averred in paragraph 6 of the writ petition that the petitioners had approached the respondents for re-schedulement of its loan and this request was accepted by them and the loan was re-scheduled on 20.4.2000. It was thereafter on 24.9.2001 that the petitioners made a proposal to the respondents for one time settlement. What the petitioners want is that a writ of mandamus be issued commanding the respondent -UPFC to accept the proposal of the petitioners for one time settlement.

5. Before considering whether such a prayer can be granted, it is necessary to understand the precise meaning of the word 'settlement'. In the context in which the word is used here, its meaning in the New Shorter Oxford Dictionary is - settling or payment of an account, the action of coming to terms with a person. In Black's Law Dictionary, its meaning is - adjustment or liquidation of mutual accounts, the act by which the parties who have been dealing together arrange their accounts and strike a balance, an adjustment of difference or accounts, a coming to an agreement. In Law Lexicon by P. Ramanatha Aiyar, the meaning of the expression ' settlement of accounts is-- a compromise or a contract between two parties by means of which they ascertain the state of the accounts between them and strike a balance, a determination by agreement, a mutual adjustment of accounts between different parties and an agreement upon the balance. Therefore, the dictionary meaning of the word shows that settlement pre-supposes consent of both the parties where under a creditor relinquishes his claim to a sum of money due to him and voluntarily agrees to take a lesser amount for the liquidation of the liability of the debtor. It is obvious that there can be no settlement without the consent of both the parties especially that of the creditor. The agreement or consent of the creditor is sine qua non for a settlement and in absence of his consent, there can be no settlement of accounts.

6. The principal relief claimed by the petitioners is that a writ of mandamus be issued commanding the respondents to enter into one time settlement with the petitioners on the terms proposed by them. The principles on which a writ of mandamus can be issued have been stated as under in **'The Law of Extraordinary Legal Remedies'** by F.G. Ferris and F.G. Ferris, Jr. :

Note 187- Mandamus, at common law, is a highly prerogative writ, usually issuing out of the highest court of general jurisdiction, in the name of the sovereignty, directed to any natural person, corporation or inferior court within the jurisdiction, requiring them to do some particular thing therein specified, and which appertains to their office or duty, Generally speaking, it may be said

that mandamus is a summary writ, issuing from the proper court, commanding the official or board to which it is addressed to perform some specific legal duty to which the party applying for the writ is entitled of legal right to have performed.

Note 192- Mandamus is, subject to the exercise of a sound judicial discretion, the appropriate remedy to enforce a plain, positive, specific and ministerial duty presently existing and imposed by law upon officers and others who refuse or neglect to perform such duty, when there is no other adequate and specific legal remedy and without which there would be a failure of justice. The chief function of the writ is to compel the performance of public duties prescribed by statute, and to keep subordinate and inferior bodies and tribunals exercising public functions within their jurisdiction. It is not necessary, however, that the duty be imposed by statute, mandamus lies as well for the enforcement of a common law duty.

Note 196- Mandamus is not a writ of right. Its issuance unquestionably lies in the sound judicial discretion of the court, subject always to the well settled principles which have been established by the courts. An action in mandamus is not governed by the principles of ordinary litigation where the matters alleged on one side and not denied on the other are taken as true, and judgment pronounced thereon as of course. While mandamus is classed as a legal remedy, its issuance is largely controlled by equitable principles. Before granting the writ the court may, and should, look to the larger, public interest which may be concerned- an interest which private litigants are apt to over look when striving for private ends. The court should act in view of all the existing facts, and with due regard to the consequences which will result. It is in every case a discretion dependent upon all the surrounding facts and circumstances.

Note 206- …… The correct rule is that mandamus will not lie where the duty is clearly discretionary and the party upon whom the duty rests has exercised his discretion reasonably and within his jurisdiction, that is, upon facts sufficient to support his action.

These very principles have been adopted in our country. In the *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and others*, AIR 1977 SC 2149, after referring to the earlier decisions in Lekhraj Satramdas Lalvani Vs. Deputy Custodian -cum-Managing Officer, AIR 1966 SC 334, Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College, AIR 1962 SC 1210 and Dr. Umakant Saran Vs. State of Bihar, AIR 1973 SC 964, the Apex Court observed as follows in paragraph 15 of the Reports :

" … There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of the officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which

imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance …….In the instant case, it has not been shown by respondent no. 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent no. 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same."

7. Therefore, there must be a legal right with the party asking for the writ to compel the performance of some statutory duty cast upon the authorities. The petitioners have not been able to show that there is any statute or rule having the force of law which casts a duty on the UPFC to accept the proposal of one time settlement made by a borrower where under he has given his own terms. It is important to note that at the time when the loan was disbursed to the petitioners, a contract was entered into by them which provided for the rate of interest and mode and manner of payment. The amount of installment and the date by which it had to be paid was also mentioned therein. The UPFC is not acting contrary to the terms of the contract which has been entered into between the parties. The request made by the petitioners for re-schedulement of the loan was also accepted by the UPFC and the loan was re-scheduled. What the petitioners want now is that their proposal for one time settlement, which contains terms advantageous to them, specially a rate of interest lesser than what they had agreed upon at the time of entering into the contract and disbursement of the loan, be accepted. The State Financial Corporations Act, which governs the working of the UPFC, does not contain any provision for entering into a one time settlement. A court cannot issue any direction to a party to enter into a compromise or settlement. By the very nature of things a settlement involves consent and it is a voluntary act of the party. The only statutory provision which requires the Court to achieve a settlement between the parties is Section 9 of the Family Courts Act. This section lays down that in every suit or proceedings, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings. The matters dealt with by the family courts are of entirely different nature where invariably the best solution for all the disputes is an amicable settlement between the parties. But even here, the only requirement of law is that the Court shall make an endeavor to assist and persuade the parties in arriving at a settlement. The Family Court cannot compel or force the parties to arrive at a settlement nor any such direction can be issued. In a matter where a creditor is enforcing its liability upon the debtor, the debtor has no legal right to claim that the claim be settled on favourable terms proposed by him whereby the claim of the creditor is reduced. Therefore, in our opinion, the prayer made by the petitioners that this Court should issue a writ of mandamus to the respondents to accept the proposal of one time settlement

made by them cannot be granted as it does not come within the principles on which a writ of mandamus can be issued under Article 226 of the Constitution.

8. The petitioners contend that the proposal for one time settlement made by them was similar to that made by M/s D.B. Ice Factory and Cold Storage and by not acceptance of the same they have been discriminated against. They have also prayed that the respondents be directed to produce the relevant records relating to the settlement with the aforesaid concern. Industrialisation is prime requirement of the country for generating employment and economic upliftment of the people. The Financial Corporations have been established to provide medium and long term credit to the industrial undertakings which fall outside the normal activities of the commercial banks. The Financial Corporations advance loans and provide capital for setting up an industry. Once the industrial unit becomes viable, it attains the position to start repayment of that loan. Unless the Financial Corporations get back the money advanced by them, they cannot advance loans to others and the very object of establishing them would be defeated. Therefore, it is absolutely necessary that the money advanced by the Financial Corporations is repaid to them along with interest so that more and more people are able to take advantage of it by setting up more industries which may provide employment to large number of people and generate economic wealth. If an industrial undertaking comes under a financial crisis and is not in a position to meet its commitment regarding repayment of loan, the State Financial Corporation Act provides several remedies to a Financial Corporation for recovering its dues. It may proceed under Section 29 of the Act, take over the management or possession or both of the industrial concern and may transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to it. It can proceed under Section 31 of the Act and apply to the District Judge for an order for sale of the property pledged, mortgaged, hypothecated or assigned to it, or for transferring the management of the industrial concern to it. The taking over of possession or transfer or sale of the unit often results in closure of the industrial concern. Broadly speaking, two options are open to the Financial Corporation if an industrial concern has defaulted in repayment of the loan. It may proceed under Section 29 or Section 31 of the Act which will invariably result in closure of the unit, or it may re-schedule the loan or enter into a settlement on some favourable terms to the borrower. If some favourable settlement is entered into, the industrial concern may continue with its activity and may be able to revive. Which particular course of action should be taken by the Financial Corporation, would depend upon a variety of factors. It is likely that the revival of an industrial concern may be in larger public interest. By way of example, if the industrial concern is employing a large workforce, its closure may throw a large number of persons out of employment. The industrial concern may be situated in a backward area which the Government wants to develop and its closure may have a serious adverse impact as it may deter other entrepreneurs in setting up industry in that area. It may be carrying on a business which is of public utility and its closure may adversely affect a large cross-section of people. In these types of cases, the

Financial Corporation, having regard to the public interest involved enter into a settlement so that the industrial concern may not be closed and the production activity may go on. There may be cases where the nature of the activity of the industrial concern may not be of such a character and its closure may not have any adverse impact of any significance. The need to enter a settlement may also depend upon the fact as to how best the money of the Financial Corporation can be retrieved. If the industrial concern has valuable land or building or machinery, its sale may give sizeable amount. However, if the condition of the industrial unit is such where sale of its unit or hypothecated property may not give sufficient money, it may be prudent to enter into a settlement. The human element also cannot be ignored altogether. The unit may be substantially damaged on account of some natural calamity like earth-quake, flood or fire or some calamity may fall upon the main person running the industrial concern like death or serious ailment. In such a situation the Financial Corporation, taking a humanitarian view may enter into a settlement. These are matters to be examined and determined by the experts of the Financial Corporation as to what will be the ideal course to be adopted in a given case. The courts have neither the expertise nor the knowledge to go into all these questions and then to examine why in one case the offer of one time settlement was accepted and why in another case it was refused. The exact idea of the nature and position of the industrial concern can never be had by the affidavits filed by the parties. This will require an inspection of the spot. The assessment of the valuation of the land, building and machinery and a host of other factors. It is well-nigh impossible for the Courts to enter into such kind of exercise in proceedings under Article 226 of the Constitution. It is also noteworthy that if a prayer is entertained on the part of a defaulting unit to compel or direct the Financial Corporation to enter into one time settlement on the terms proposed by it, then a profit making industrial concern which is capable of paying its dues as per the terms of the agreement entered into by it would also like to get a one time settlement in its favour. Who would not like to get his liability reduced and pay less than what he is liable to pay under the contract executed by him?

The plea of the petitioners is that they have been discriminated against by rejection of the proposal of one time settlement made by them while similar proposal of M/s D.B. Ice Factory and Cold Storage has been accepted. As the name shows, it is a cold storage and an ice factory. A cold storage renders valuable service to agriculturists and farmers by storing their agricultural produce like potatoes etc. Often the labour and earnings of farmers depend upon the fact whether they are able to properly store their produce and sell in the market at an appropriate time. Therefore, it is in public interest that a cold storage is not closed. Similarly, production of ice is also necessary as it is an article of mass consumption. May be, on all overall consideration of the various aspects, including retrieval of their money, the respondents thought it prudent to enter into one time settlement with the aforesaid concern. The petitioners unit was manufacturing cycle spokes where hardly any public element is involved. Therefore, the plea as urged on the ground

of discrimination cannot be entertained by this Court.

Learned counsel has placed reliance on *Subedar Singh Vs. State of Haryana*, 2001 (4) AWC 2778 (SC), *W.B. State Electricity Board Vs. Patel Engineering Company*, (2001)2 SCC 451, *LIC India Vs. Consumer Education*, JT (4) SC 366 and *Lakshmanasami Gaundar Vs. CIT Selvianani* (1992) 1 SCC 91. These are decisions on the principle of fairness which has to be adopted by public authorities. In our opinion, there is no violation of principle of fairness on the part of the respondents by not accepting the offer of one time settlement made by the petitioners.

Sri Goel has also referred to a document, copy of which has been filed as annexure-10 to the writ petition, in support of his submission that the respondent- UPFC should have entered into one time settlement. These guidelines have been issued by Reserve Bank of India for recovery of Non-Performing Assets and are meant for Public Sector Banks. Paragraph 3 of the guide lines mention that they are operative till 31.3.2001. Clearly, they have no application to a loan given by a Financial Corporation.

For the reasons mentioned above, we are of the opinion that there is no merit in the writ petition which is hereby dismissed summarily at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2001

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

Civil Misc. Writ Petition No. 12173 of 1989

Satya Pal Singh ...Petitioner
Versus
U.P. Public Services Tribunal III, Lucknow and others ...Opposite Parties

Counsel for the Petitioner:
Sri V.S. Dwivedi
Dr. Rama Shanker Dwivedi

Counsel for the Opposite Parties:
Sri B.D. Mandhyan
Sri Vinay Malviya
S.C.

U.P. Public Service Tribunals Act 1976- Section 4A -(1) Jurisdiction- termination order- claim decided by single member- held- order without jurisdiction- only the two member can decide such question.

Held- Para 17

Without examination and final determination of the nature of the order, in the light of the pleadings and evidence, it cannot be said that the impugned termination order did not amount to ' dismissal' or ' removal' for the purposes of sub-section (1) of Section 4-A of the Act. That being so, the claim petition of the petitioner had to be decided by a Bench of two members of the Tribunal as required by sub- section (1) of Section 4-A of the Act, and a Single Member of the Tribunal did not have the jurisdiction to decide the same. The impugned order deciding the claim petition having been passed by a Single Member of the Tribunal is held to be without jurisdiction, and liable to be quashed on that ground.

(B) Words and Phrases- Dismissal Removal-n and Termination- Difference if any ? If the court gives restrictive meaning as used in the Act ? held 'No' court perceives no justification to give restricted meaning.

Held- Para 13

Tested on the above touchstone, in the opinion of the Court, the words 'dismissal' and 'removal' used in Sub-section (1) of Section 4-A of the Act will include 'termination' of any kind. The Act is a remedial Legislation warranting liberal and extensive construction, as opposed to technical and restrictive construction. Therefore, the Court perceives no justifiable reason to give restricted meaning to the words 'dismissal' and' removal', and exclude the 'termination'.

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

1. Heard Dr. Rama Shanker Dwivedi, learned Senior Advocate, appearing for the petitioner, Shri B.D. Mandhyan learned counsel representing the respondent nos. 2,3 and 4 and Sri Vinay Malviya, learned Standing Counsel of the State of U.P. appearing for the respondent no. 1 at length and in detail.

2. Shri Satya Pal Singh, the petitioner, was appointed as Kamdar in the cadre of class IV employees in the Krishi Utpadan Mandi Samiti, Gulawathi, District Bulandshahr on 6th July, 1969. His services were terminated on 31st May, 1974. Aggrieved by the termination order, he pursued departmental remedies. On being unsuccessful, he instituted in civil court at Bulandshahr Suit No. 136 of 1975 on 24th March, 1975, challenging the validity of the order of termination of the services. The suit was not contested by the Mandi Samiti. Thus, it proceeded exparte, and was decreed on 27th July, 1977. A copy of the judgment decreeing the suit is appended to the petition as Annexure '1'. Pursuant to the decree and judgment dated 27th July, 1977, the petitioner was reinstated.

3. After lapse of more than three years, the services of petitioner were again terminated by the order dated 7th May, 1980, a copy of which is Annexure '3' to the writ petition. This led the petitioner of filing of claim petition no. 343 P/111 of 1980, under Section 4 of the U.P. Public Services (Tribunals) Act, 1976, hereinafter called the Act. The claim petition has been dismissed by the order dated 21st April, 1989. The petitioner seeks to challenge this order through instant writ petition.

4. The impugned order has been passed by a Single Member of the U.P. Public Services Tribunal III, Lucknow.

5. The learned counsel appearing for the petitioner contends that the impugned order is without jurisdiction, inasmuch as under sub-section (1) of Section 4-A of the Act, as it stood at the relevant time, that is, on21st April, 1989, the claim petition of the petitioner was mandated to be heard and decided by a Bench comprising two members of the Tribunal and single member of the Tribunal did not have jurisdiction to decide the claim petition.

6. Countering the submission of the learned counsel of the petitioner, the learned counsels appearing for the respondents submit that it was competent for a Single Member of the Tribunal to decide the claim petition of the petitioner, inasmuch as it sought to challenge the

validity of the termination, not the 'dismissal' or 'removal' which were required to be heard by a Bench comprising two members of the Tribunal. According to the learned counsels of the respondents the subject matter of challenge in the claim petition being an order of termination, it could be decided by a Single Member of the Tribunal as provided in sub-section (2) of Section 4-A of the Act.

7. The rival contentions of the learned counsels of the parties call upon determination of the question whether the words 'dismissal' and 'removal' used in sub-section (1) of Section 4-Aa of the Act, include 'termination' also.

Section 4-A of the Act, as it stood on 21st April, 1989 runs as below.

'**4-A. Hearing of reference in Tribunal** - (1) A reference of claim wherein the validity of any order of dismissal or removal from service or reduction in rank is involved, shall be heard and finally decided by both members of the Tribunal:

Provided that any order other than an order finally disposing of the case, may be passed, evidence may be received and proceeding (except hearing of oral argument for final disposal of the case) may be conducted, by either of the members.

(2) A reference of claim other than that referred to in sub-section (1) may be heard and finally decided by a single member of the Tribunal.

(3) Anything done by a single member of the Tribunal under sub-section (1) or sub -section (2) shall be deemed to have been done by the Tribunal.'

(Emphasis supplied)

8. The words 'dismissal', removal' and termination' have not been defined in the Act. In the absence of any statutory definition of the words 'dismissal', 'removal' and 'termination' given by the Legislature, these words have to be given meaning as is understood in common parlance. To find out the sense in which the words 'dismissal', removal and termination are understood in common parlance, it is appropriate and permissible to look to the dictionary meaning.

9. In the present context, according to the dictionary, the word 'dismissal' means the act of removal or discharge of an incumbent or employee from an office or employment, and the word 'removal' means an act of discharge or dismissal of an incumbent from an office or displacing someone from a position or taking away something. The word 'termination' means an act of determination, that is to say an act of bringing an end.

10. Whether an employee is dismissed or removed or terminated, the net result of all the three situations is an end to his employment. Every dismissal, removal and termination leads to legally ending of the employment of the employee, and his discharge or dismissal from the office held by him. He is displaced from the office held by him, and his tenure to the office stands determined, and comes to an end, resulting in cessation of the bond of law between him and the employer.

11. It is true that sometimes bringing an end of employment may have the

punitive element, and for that reason it may be held dismissal or removal, as understood technically in the service jurisprudence. Likewise, in the absence of punitive element it may be held as termination simpliciter in the technical sense. But, in the context of the Act, indisputably, the Legislature has not defined the 'dismissal' or 'removal' artificially or technically, These words appear to have been used in sub-section (1) of Section 4-A of the Act in the sense in which they are understood in common parlance, and in contradistinction to the artificial or technical sense. In common parlance these words are understood in the sense of an act of removal or discharge of an incumbent or employee from an office or employment or displacing him from the position held by him, resulting in determination of the employment and the cessation of the bond of law between him and the employer.

12. After all, in reference to the context of the Act, either it be 'dismissal' or 'removal' or 'termination' all have the effect of bringing an end to the employment of the employee or discharging him from the office held by him, whether by way of punishment or otherwise.

13. Tested on the above touchstone, in the opinion of the Court, the words 'dismissal' and removal' used in sub-section (1) of Section 4-A of the Act will include 'termination' of any kind. The Act is remedial Legislation warranting liberal and extensive construction, as opposed to technical and restrictive construction. Therefore, the Court perceives no justifiable reason to give restricted meaning to the words 'dismissal' and 'removal' and exclude the 'termination.'

14. If the employment of the employee, who is a public servant as defined in the Act, is determined or brought to an end or he is dismissed or removed or terminated and he is discharged from the office held by him, he has a right to prefer a claim petition under Section 4 of the Act for redressal of his grievance against his 'dismissal', removal or 'termination' from his service. It is a different matter that the Tribunal may decline to interfere holding that act of 'dismissal', 'removal', or 'termination' of his employment to be termination simpliciter, in terms of the conditions of his employment or statutory rules governing the employment or being devoid of any punitive element.

15. It cannot be gainsaid that, normally, the jurisdiction of a Court or Tribunal is to be determined on the basis of the pleadings contained in the plaint or petition. In the instant case, a copy of the claim petition is available on record as Annexure '4' to the petition. Paragraph nos. 11, 16 and 17 of the claim petition read as follows:

"11. That the impugned order costs a stigama against the claimant and the order is liable to be quashed on this ground alone."

"16. That the services of the claimant have been terminated on the basis of the past conduct of the claimant therefore a show cause notice was necessary before passing of the order."

"17. That an departmental enquiry was necessary before passing of the order."

16. A conjoint and meaningful reading of the above pleadings, contained

in paragraph nos. 11, 16 and 17 of the petition, leads to an irresistible conclusion that the petitioner sought to challenge an order terminating his services on the ground of its containing punitive element, a well recognized ground for interference, if the order is found to have been passed without following due procedure of law.

17. Without examination and final determination of the nature of the order, in the light of the pleadings and evidence, it cannot be said that the impugned termination order did not amount of 'dismissal' or 'removal' for the purposes of sub-section (1) of Section 4-A of the Act. That being so, the claim petition of the petitioner had to be decided by a Bench of two Members of the Tribunal as required by sub-section (1) of the Act, and a single Member of the Tribunal did not have the jurisdiction to decide the same. The impugned order deciding the claim petition having been passed by a Single Member of the Tribunal is held to be without jurisdiction, and liable to be quashed on that ground.

18. In the result, the petition succeeds, and is allowed. The impugned order dated 21st April, 1989, a copy of which is Annexure '6' of the petition, is quashed, without expressing any opinion on merits of the case. The claim petition of the petitioner would be deemed to be pending, and shall be decided by the Tribunal in accordance with law afresh. In view of the fact that the matter is very old, the Court directs the Tribunal to decide the claim petition as early as possible, but not later than six months from the date of presentation of a certified copy of this judgment and order before it.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 7.12.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE V.M. SAHAI, J.

Civil Misc. Writ Petition No. 32344 of 2001

Smt. Shakira Khatoon Kazmi and others
...Petitioners
Versus
State of U.P. and others
...Proforma Respondents

Counsel for the Petitioner:
Sri S.U. Khan
Sri A.K. Gaur

Counsel for the Respondents:
Sri Ashok Mehta
Sri Sanjay Goswami
Sri Sakeel Ahmad Almi

Constitution of India- Article 226- Cancellation of lease deed-renewal granted by the Government for 30 years in the year 1997- Land urgently required by Government for public purpose- whether can the lessee be evicted forcibly?

Held- Para 19

After the State Government had passed the order on 15.12.2000 and the period of notice given by the District Magistrate had expired, the lessees have no legal right to remain in possession. However, they continue to be in juridical possession. In view of what has been discussed above, the State Government cannot dispossess them forcibly but can take possession in accordance with procedure established by law.

Case law discussed:
AIR 1973 SC-2520
AIR 1986 SC-872
AIR 1980 Punj. & Hy. -339
AIR 1964 Alld 236

AIR 1924 P.C.144
AIR 1959 Alld 1
AIR 1954 358
AIR 1968 SC 620
AIR 1989 SC 997

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

1. This petition under Article 226 of the Constitution has been filed for quashing of the Government order dated 15.12.2000, notice dated 11.1.2001 and the order dated 24.8.2001 passed by the District Magistrate, Allahabad. Parties have exchanged affidavits, and therefore, the writ petition is being disposed of finally at the admission stage.

2. The dispute relates to plot no. 59, Civil Station, Allahabad having an area of 1 acre and 4272 sq. yards (9112 sq. yards or 7618 sq. metres). A lease of the aforesaid plot was granted in favour of Thomas Crow by for a period of 50 years on 11.1.1868 by the Secretary of State for India in Council and it was signed by the Commissioner of Allahabad Division. A fresh lease was executed in favour of his successors for a period of 50 years on 12.4.1923 which was to operate from 1.1.1918. With the permission of the Collector, Allahabad, the successors of the lease transferred their leasehold rights in favour of Purshottam Das in the year 1945. Thereafter, on 31.10.1958, the legal representatives of Purshottam Das transferred the leasehold rights in favour of petitioner no. 1 Smt. Shakira Khatoon Kazmi, respondent no. 3 Smt. Sabira Khatoon Kazmi and their mother Smt. Maimonona Khatoon Kazmi. Petitioners no. 2,3 and respondent no. 4 to 6 in the writ petition are heirs of late Smt. Maimoona Khatoon Kazmi. The lease, which had been granted on 12.4.1923, expired on 31.12.1967 but the same was not renewed for long period. Subsequently, a fresh lease deed was executed on behalf of Governor of Uttar Pradesh in favour of the petitioners and respondents no. 3 to 6 on 19.3.1996 for a period of 30 years which was to operate with effect from 1.1.1968. This deed contained a clause that the lease deed may be renewed for two successive terms of 30 years each but the total period shall not exceed 90 years including the original term. The period of this deed expired on 31.12.1997 and on 17.7.1998 it was again renewed for a further period of 30 years with effect from 1.1.1998. The State Government passed an order on 15.12.2000 for cancelling the lease and resuming the possession of the plot in question. The District Magistrate, Allahabad, thereafter gave a notice dated 11.1.2001 to the petitioners and respondents no. 3 to 5 (hereinafter referred to as the lessees) intimating them that the State Government had passed an order on 15.12.2000 cancelling the lease and resuming possession of the plot in question as the same was required for a public purpose. The notice further mentioned that the lessees should remove the structure standing on the plot failing which possession will be taken in accordance with the clause 3 (c) of the lease deed. The lessees filed an objection against the notice before the District Magistrate on 2.2.2001. They further claim to have sent an objection to the Chief Minister of Uttar Pradesh on 31.1.2001 praying for revocation of the order of the State Government dated 15.12.2000. The District Magistrate considered the objection and rejected the same by his order dated 24.8.2001. A copy of the aforesaid order along with cheques representing the compensation for the building standing over the plot

(cheques for total amount of Rs. 10 lakhs) were served upon the lessees. The respondents no. 1 and 2 tried to dispossess the lessees on 1.9.2001 and their stand is that possession of open land was taken. It was at this state that the present writ petition was filed and a stay order was passed on 2.9.2001 staying the dispossession of the petitioners.

3. The first question which requires consideration is whether the order passed by the State Government on 15.12.2000 for cancellation of the lease and resumption of possession is legally valid. There is a clear recital in the lease deed executed in favour of the lessees by the Governor of Uttar Pradesh on 19.3.1996 that the same is being done under the Government Grants Act, 1895, Clause 3 (c) of the deed reads as follows :

3 (c) That if the demised premises are at any time required by the lessor for his or for any public purpose he shall have the right to give one month's clear notice in writing to the lessees to remove any building standing at the time on the demised premises and within two months of the receipt of the notice to take possession thereof on the expiry of that period subject however to the condition that if the lessor is willing to purchase the building on the demised premises, the lessees shall be paid for such building such amount as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department.

4. Section 2 and 3 of the Government Grants Act, 1895 have been amended by U.P. Act No. 13 of 1960 with retrospective effect and the substituted sections read as follows:

"2. (1) Transfer of Property Act, 1882, not to apply to Government Grants- Nothing contained in the Transfer of Property Act, 1882, shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein, heretofore made or hereafter to be made, by or on behalf of the Government to or in favour of any person whomsoever, and every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

(2) U.P. Tenancy Act, 1939 and Agra Tenancy Act, 1926 not to affect certain leases made by or on behalf of the Government- Nothing contained in the U.P. Tenancy Act, 1939, or the Agra Tenancy Act, 1926, shall affect or be deemed to have ever affected any rights, created, conferred or granted, whether before or after the date of the passing of the Government Grants (U.P. Amendment) Act, 1960, by leases of land by, or on behalf of, the Government in favour of any person, and every such creation, conferment or grant shall be construed and take effect, notwithstanding anything to the contrary contained in the U.P. Tenancy Act, 1939 or the Agra Tenancy Act, 1926.

(3) Certain leases made by or on behalf of the Government to take effect according to their tenor- All provisions, restrictions, conditions and limitations contained in any such creation, conferment or grant referred to in Section 2, shall be valid and take effect according to their tenor, any decree or direction of a Court of law or any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

Provided that nothing in this section shall prevent, or deemed ever to have prevented the effect of any enactment relating to the acquisition of property, land reforms or the imposition of ceiling on agricultural lands."

5. In State of U.P. Versus Zahoor Ahmad, A.I.R. 1973 SC 2520 (-para 15 and 16) it has been held that the effect of section 2 of the Government Grants Act is that in the construction of an instrument governed by the Act, the Court shall construe such grant irrespective of provisions of Transfer of Property Act. It has been further 'held that section 3 of the Act declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. The Government has unfettered discretion to impose any conditions, limitations or restrictions in its grants and the rights, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. The rights of the parties have therefore, to be determined with reference only to the terms contained in the deed and the provisions of any other enactment like, Transfer of Property Act have to be completely ignored and cannot be taken into consideration. The State Government cancelled the lease and directed for resumption of possession thereof as the plot in question is required for extension of Allahabad High Court and also for the extension of the office of Advocate General, U.P. The plot is situate just in front of the gate of the High Court on the Kanpur Road across the road and is therefore most suitable and ideal place for the aforesaid purpose. Several court rooms and chambers for the judges have been constructed in the past but there has been no addition of office space with the result that there is hardly any place to keep the records. Even pending files are being kept by having a make shift and temporary arrangement of enclosing the verandas. Similarly, there is acute shortage of space in the office of Advocate General. There is no place at all where the State Counsel may sit and do the drafting work or for keeping the files. The grounds for passing of the order, namely, extension of High Court and extension of office of Advocate General is undoubtedly a public purpose and the same has rightly not been challenged by the learned counsel for the petitioners. Clause 3 (c) clearly confers power upon the lessor namely, the Governor of U.P. that if the plot in question is required by the Government for its own purpose or for any public purpose, it shall have the right to give one months' notice in writing to the lessees to remove any building standing on the plot and to take possession thereof on the expiry of two months from the date of service of the notice. There is a further condition in the clause that if the lessor is willing to purchase the building standing on the plot, the lessee shall be paid such amount as may be determined by the Secretary to Government of U.P. in the Nagar Awas Department. The deed of renewal executed on 17.7.1998 is a very short one and it does not contain any terms or conditions. It recites that the renewal is being done on the same terms and conditions including the clause for re-entry as is contained in the original lease deed dated 19.3.1996 and the terms and conditions of the aforesaid deed would be binding upon the parties. Though a plea has been taken by the petitioners that the clause of re-entry was introduced for the

first time in the deed executed in 1996 but the same is not factually correct as the lease deed of 12.4.1923 also contained a clause to the effect that if the Government shall at any time require to re-enter on the demised plot it can do so, on paying the cost of the building that may be on the site and that the lessee shall have no further claim of any sort against the Government. In fact in the deed executed on 19.3.1996, the right of re-entry has been fettered by the condition 'required by the lessor for his or for any public purpose'. As the State Government is resuming the lease for a public purpose, which under the terms of the grant it has absolute power to do, the order passed by it on 15.12.2000 is perfectly valid and does not suffer from any illegality.

6. The principal submission of Sri S.U. Khan, learned counsel for the lessees is that initially a proposal was made to acquire the disputed plot the same purpose in accordance with the provisions of Land Acquisition Act. The District Magistrate, Allahabad, then wrote a letter to the State Government on 29.10.1998 that looking to the area of the plot the estimated amount of compensation, including 30 per cent solatium, 12 percent additional amount and interest, etc. would come to Rs. Two Crores and Sixty Two lacs. The said proposal was not accepted by the State Government and was rejected by the order dated 17.7.2000. The State Government took possession of few other Nazul lands in Allahabad but the same was done under Land Acquisition Act, wherein a good amount of compensation was paid to the lessees. The contention is that if the State Government had taken recourse to the provisions of Land Acquisition Act for acquiring the plot in question, the lessees would have got compensation of Rupees Two Crores and Sixty Two lakhs and by not adopting the said mode, the lessees have been discriminated against and, consequently, the impugned order of the State Government dated 15.12.2000 violates Article 14 of the Constitution. In the writ petition as it was originally filed on 2.9.2001, there was no averment to the effect that in the past the State Government had taken recourse to the provisions of Land Acquisition Act for acquiring Nazul land in Allahabad. This plea has been taken by means of an amendment application which was filed on 2.11.2001 at the time when the case was taken up for hearing and a new para being para 23 has been added, wherein it is averred that Civil Stations No. 24, 35 and Bungalow no. 7 B and 8 B, Muir Road, had been acquired under the provisions of Land Acquisition Act. The plea of discrimination has been raised by the lessees on the basis of the aforesaid averment. But the lessees have not filed the copies of the lease deeds which had been executed by the State Government with regard to the properties mentioned above. In absence of the lease deeds, it is not possible to know whether they also contained a similar clause of re-entry as is contained in the lease deed in favour of the lessees of the present case. The mere fact that the properties referred to above were Nazul lands leads us no where, nor is decisive of the matter.

7. In para 7 of the supplementary counter affidavit filed in reply to the amendment application, it is averred that the properties, reference of which has been made in para 23 of the writ petition, were in fact acquired at the instance of Allahabad Development Authority for building of residential and commercial

complex and for development of the area and the proceedings for acquisition had commenced on the basis of proposals received from Allahabad Development Authority. In para 8 of the supplementary counter affidavit, it is averred that when Nazul plot no. 13, Civil Station, Allahabad, which is situate in civil Lines area, was resumed by the State Government for the purpose of construction of a bus station, the same was done in exercise of power vested with it in a similar clause of lease deed and no proceedings under the Land Acquisition Act had been initiated. The resumption by the State Government in the said case was challenged by the lessee of the plot by filing Civil Misc. Writ Petition No. 44517 of 1988, which was dismissed by a Division Bench on 16.12.1999 and Special Leave Petition No. 4329 of 2000 preferred against the judgment of the High Court was summarily dismissed by the Supreme Court on 7.9.2001. The contention of the lessees that it was for the first time in their case that a lease had been cancelled and the plot has been resumed by the State Government under the terms of the deed is, therefore, not correct as a similar course of action has been taken in the past also. With regard to other properties, reference of which has been made in para 23 of the writ petition, the important distinction is that there the land had been acquired at the instance of Allahabad Development Authority for construction of commercial and residential complexes and for development of the area which shows that the land was not taken over by the State Government for its own purpose. In absence of complete details, it is not possible to ascertain the precise purpose for which the land was acquired.

8. It may also be pointed out that the consequences which would follow in adopting the two modes namely, in acquiring the property under the provisions of Land Acquisition Act or in taking action under the terms of the grant whereby the lease deed is cancelled and property is resumed would also be different. If the State Government decides to acquire the property in accordance with the provisions of Land Acquisition Act, no separate proceedings have to be taken for getting possession of the land. It may even invoke the urgency provisions contained in section 17 of the said Act and the Collector may take possession of the land immediately after the publication of the notice under section 9. In such a case, the person in possession of the land acquired would be dispossessed forthwith. However, where the Government proceeds under the terms of the grant as contained in clause 3 (c) noted above, even after the lease is cancelled and the Government becomes entitled to take possession, it cannot do so forcibly and it will have to take recourse to proceedings before an appropriate authority for dispossessing the lessee to get the possession of the land. Why it is necessary to do so will be considered later. If proceedings are initiated under U.P. Public Premises (Eviction of Unauthorised Occupants) Act, the final decision of the case will naturally take some time and if the decision goes against the lessees they will have a statutory right to challenge the same by filing an appeal. The decision of the appellate authority is no doubt final but some times writ petitions are filed. All these proceedings take time and the lessee will continue to enjoy the possession of the demised premises. Therefore, if the State Government proceeds under the terms of

the deed, the lessee cannot be evicted forthwith nor the State Government can get immediate possession of the property. Therefore, such a course of action is not detrimental to the interest of the lessees but is to their advantage.

9. The problem can be considered from another angle. If in the past in ignorance of its legal rights, the State Government proceeded in a manner wherein it had to pay some amount of compensation to the lessees it does not mean that at a later stage it is estopped or precluded from enforcing its lawful rights in a manner which is more beneficial to it. When the State Government proceeds under the Land Acquisition Act to acquire some land, it acquires title over the land which belonged to another person prior to its acquisition. If the State Government itself is the owner of the land, the proceedings under Land Acquisition Act ought not to be taken as there is no question of acquiring ownership of ones own property. S/Sri Sanjay Goswami and Anil Mehrotra, learned standing counsel have rightly submitted that if in the past proper legal advice was not given to the State Government, the action taken now, which is in accordance with law, can not be struck down on the ground that the same is discriminatory. They have also drawn attention of the Court to a circular issued on 11.2.1998 by the Director, Land Acquisition. Board of Revenue, U.P. Government, to all the Additional District Magistrates (Land Acquisition) and all Special Land Acquisition Officers of the State specifically laying down that land belonging to State Government, Nazul land, Gram Sabha land and land declared as surplus in ceiling proceedings are outside the purview of Land Acquisition Act and no proposal should be made for acquisition of such types of land. It further provides that in case of violation of the aforesaid directions, strict and serious action shall be taken against the concerned officers. This shows that after the correct import of the rights of the State Government had been understood at the higher level a general order has been issued for the whole of State not to make any proposal for acquisition of Nazul land.

10. The mode adopted by the State Government can neither be said to be unjust nor there is any special equity in favour of the lessees. The total area of the plot in question is 9112 sq. yards and it is situate just in front of the gate of the High Court on National Highway No. 2 (commonly called as Kanpur Road in the city of Allahabad, which has been renamed as Purshottam Das Tandon Marg). It is a big property situate in a prime area of Allahabad which has a huge commercial value. It is the own case of the writ petitioners in para 16 of the writ petition that the actual market value of the property in dispute must not in any case be less than Rupees five crores. The lease deed dated 19.3.1996 shows that for such a valuable property the lessees paid a premium of Rupees One lakh two thousand five hundred ten only and the yearly rent was Rs.753.05 which means about Rs. 62.70 per month. It is also important to note that the earlier lease had expired on 31.12.1967 and the renewal ought to have been done on 1.1.1968. What they were required to pay on the said date, they paid almost three decades later in March 1996 when during this period the prices of land in urban areas and big cities have risen by almost hundred times. The deed also provided that it could be renewed for two further

terms of 30 years each (total period of 90 years) and while granting renewal the rent could be enhanced at a rate not exceeding 50 per cent. When a further renewal of 30 years was granted on 17.7.1998 for which no premium was paid, the rent alone was enhanced to Rs. 1130/- per year, which comes to about Rs. 94/- per month. This shows that the lessees are enjoying a huge and very valuable property virtually for a song. Who would not like to have such a big and valuable property by merely paying a sum of Rupees one lakh two thousand and odd and thereafter a monthly rent of less than Rs. 100/- and enjoy it for a long period of 90 years by which time even the third generation of original lessee may be extinct (assuming that the property is taken near about the age of forty)? For the amount which the lessees paid to the State Government at the time of execution of lease in their favour in March 1996, it is doubtful whether they could have purchased even 25 square yards of land on a modest estimate of Rs. 4000/- per sq. yard for the land in a residential area in that locality. It is not possible to visualize its potential value as a commercial property which in fact it has.

11. The lease deed dated 19.3.1996 and the deed of renewal dated 17.7.1998 have also been signed by the lessees which is the requirement of law in view of section 107. Transfer of Property Act and they are bound by the terms and conditions contained therein. Clause 3 (C) of the lease deed gives absolute power that if the land is required for its own purpose or for any public purpose, the State Government shall have right to give one month's notice to the lessees to remove any building standing on the demised premises and within two months of the receipt of the notice to take possession thereof on the expiry of that period. The rights, privileges and obligations of the lessees have to be regulated only according to the terms of the grant in view of section 3 of Government Grants Act. It has been held in Express Newspapers Pvt. Ltd. Versus Union of India, AIR 1986 SC 872 (head note C) that the over riding effect of section 3 is that a grant of property by the Government partakes of the nature of law since it over rides even legal provisions which are contrary to the tenor of the document. Land Acquisition Act is a general law providing for acquisition of land. The terms of the lease deed create special provisions governing the rights of the parties. On the legal maxim specialia generalibus derogant, the special provisions prevail over the general provisions. Therefore, it is not open to the lessees to contend that the State Government should have taken recourse to a general provision like, the Land Acquisition Act instead of proceeding under clause 3 (C) of the lease deed. A similar contention that the State Government should have taken recourse to the provisions of Land Acquisition Act was considered by a Division Bench in Tek Chand and others Versus Union of India and another AIR 1980 Punjab & Haryana 339, but was repelled with the finding that it did not amount to any discrimination.

12. Sri S.U. Khan has next submitted that the public purpose, if any existed prior to 17.7.1998 when the lease was renewed and by renewal of the lease, the State Government is estopped from pleading that there is a public purpose. Learned counsel has further submitted that by renewal of the lease, the lessees

legitimately expected that they will remain in occupation for 30 years from 1.1.1998, the date from which the lease was renewed. In support of this submission, learned counsel has placed reliance upon Punjab Communications Versus Union of India, AIR 1999 SC 1801. In our opinion, the contention raised has no substance. The existence of a public purpose is not a new development. The petitioners have filed a copy of the letter dated 29.8.1998 sent by the District Magistrate to the Special Secretary. State Government, wherein, he had given estimate of the expenses involved in acquiring the property under the provisions of Land Acquisition Act. This letter makes reference to some earlier correspondence which had taken place between the Chief Standing Counsel of U.P. Government and the District Magistrate on 2.12.1997. This clearly shows that even before the renewal of the lease in favour of the lessees, the taking over of possession of the property for expansion of the High Court and the office of Advocate General, U.P. was being seriously considered. It is, therefore, wrong to suggest that the requirement of the land for a public purpose was not in existence when the lease was renewed. We fail to understand as to how the State Government is estopped from resuming the land merely on account of renewal of the lease in favour of the lessees. Since the very inception when the lease was executed in favour of the successors of Thomas Crowby on 12.4.1923 and then again when the lease was executed in favour of the present lessees on 19.3.1996, there has always been a clause that the lessor will have a right to resume the lease and take possession of the plot. The lessees took the lease and got its extension subject to such a condition and they were fully aware of the same. That apart, it is not their case that they have altered their position to their detriment after renewal of the lease on account of any representation done by the State Government. The doctrine of legitimate expectation can have no play here in view of the specific clause in the lease deed. Therefore, the contentions raised by Sri Khan have no substance and must be rejected.

13. Now we come to another important question involved in the case namely, whether the State Government can take forcible possession of the demised premises or they can take possession only in accordance with and in a mode recognized by law. Learned standing counsel has submitted that in view of the specific terms in clause 3 (c) of the lease deed ' within 2 months of the receipt of the notice to take possession thereof on the expiry of that period,' the State Government is entitled to take possession thereof on the expiry of the period of notice. In support of his submission he has placed reliance on a Division Bench decision of this Court in Lakshmi Narain Versus State of U.P. AIR 1964 Alld. 236, wherein, it has been held that the act of resumption implies the right to re-enter even though the actual re-entry may follow the proclamation of resumption.

14. The possession of a tenant after expiry of lease is a juridical possession. The expression ' juridical possession' is the same thing as the 'legal possession' in a more impressive form. It means possession which has been founded on some right and which has been got neither by force nor by fraud. Juridical possession is possession protected by law against

wrongful possession but can not per se always be equated with lawful possession. A possession cannot be said to be juridical, where it is taken behind the back of the real owner or one who is in law entitled to possession and who does not acquiesce therein but seeks to evict him as soon as he discovers his dispossession. The latter may, if he does not acquiesce, re-enter and reinstate himself, provided he does not use more force than is necessary. Such a re-entry will be viewed only as a resistance to a intrusion upon a possession which had never been lost. The owner cannot be sued by the trespasser, who has entered by force and fraud, for ejectment on the strength of his prior temporary possession. Juridical possession though not equivalent to lawful possession is distinguishable from a mere act of trespass. Possession of a tenant after expiry of lease is a juridical possession as law protects him from forcible dispossession but at the same time his possession can not be said to be lawful.

15. In Midnapur Zamindary Co. Ltd. Versus Naresh Narayan Roy, AIR 1924 P.C. 144, it was observed that in India persons are not permitted to take forcible possession, they must obtain such possession as they are entitled to through a Court. In K.K. Verma Versus Naraindas C. Malkani, AIR 1954 Bom. 358 Chagla, C.J. held as under:

"Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under Section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the land lord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Section 9 and claim possession against the true owner."

16. In a Full Bench decision of our Court in Yar Mohammad Versus Lakshmi Das AIR 1959 All 1 it was observed :

"Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause."

17. In Lallu Yaswant Singh Versus Rao Jagdish Singh and others, AIR 1968 SC 620 (para 15), the above noted three decisions were quoted with approval and it was observed that the law on the point has been correctly stated therein. This question was again considered in State of U.P. versus Maharaja Dharmander Prasad Singh , AIR 1989 SC 997 and in para 15 it was held as follows :

"A lessor, with the best of title, has no right to resume possession extra judicially by use of force, from a lessee, even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression 're-entry' in the lease deed does not authorize extra judicial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible dispossession is prohibited, a lessee cannot be dispossessed otherwise than in due course of law. In the present case, the fact that the lessor is the State

does not place it in any higher or better position. On the contrary, it is under an additional inhibition stemming from the requirement that all actions of Government and Governmental authorities should have a 'legal pedegree'. In Bishandas v. State of Punjab, (1962) 2 SCR 69: (AIR 1961 SC 1570), this Court said (at pp. 1574 and 1575 of AIR):

"We must, therefore, repel the argument based on the contention that the petitioners were trespassers and could be removed by an executive order. The argument is not only specious but highly dangerous by reason of its implications and impact on law and order.

Before we part with this case, we feel it our duty to say that the executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law.

Therefore, there is no question in the present case of the Government thinking of appropriating to itself an extra judicial right of re-entry. Possession can be resumed by Government only in a manner known to or recognized by law. It cannot resume possession otherwise than in accordance with law. Government is, accordingly, prohibited from taking possession otherwise than in due course of law.

18. In M/s Anamallai Club Versus Government of Tamil Nadu and others, AIR 1997 SC 3650 (para 8 and 9), it was observed that law makes a distinction between persons in juridical possession and rank trespassers and that law does not permit any person to take law into his hands and to dispossess a person in actual possession without having recourse to a Court. It was further observed that after determination of the grant, though the lessees have no right to remain in possession, the State cannot take unilateral possession without taking recourse to the procedure provided under the Public Premises Eviction of Unauthorised Occupants Act.

19. After the State Government had passed the order on 15.12.2000 and the period of notice given by the District Magistrate had expired, the lessees have no legal right to remain in possession. However, they continue to be in juridical possession. In view of what has been discussed above, the State Government cannot dispossess them forcibly but can take possession in accordance with procedure established by law.

20. In view of the discussion made above, we find no illegality in the order passed by the State Government on 15.12.2000, the notice dated 11.1.2001 and the order passed by the District Magistrate on 24.8.2001. The writ petition accordingly fails and is hereby dismissed. It is, however, made clear that the State Government is not entitled to take forcible possession. It may take possession of the demised premises in accordance with the procedure established by law.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.12.2001

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

First Appeal No. 663 of 2001

Laxmi Kant Upadhyay ...Appellant
Versus
Sri Dev Narayan Mishra ...Respondents

Counsel for the Appellant:
Sri Ravi Kiran Jain
Sri Ashish Kumar Singh

Counsel for the Respondents:
Sri O.P. Gupta

Code of Civil Procedure- Section 96- Jurisdiction of the Court- Suit for eviction and arrears of Rent- wrongly Regd. and decided as Regular suit- as a matter of fact- traible by small causes court- whether is the first appeal maintainable? Held "No" appeal permitted to convert in Revision.

Held- Para 16

I, accordingly, decide that the appeal is not maintainable. However, the appeal has wrongly been filed for the reason that the suit was registered and tried as regular suit. Therefore, the appellant is permitted to convert this appeal into revision under section 25 of Provincial Small Causes Court Act. The necessary steps may be taken. The eviction of the appellant from the disputed shop shall remain stayed for two months from today.

Case law discussed:
AIR 1978 Alld.-129
AIR 1936 Pat.-4064
AIR 1937 Mad.-227
AIR 1956 Punj.-233
AIR 1930 Rangoon-139
AIR 1977 Alld.-103
AIR 1983 Alld. 275 (DB)
1970 ALJ-670

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

1. This first appeal has been filed against the judgment and decree dated 24.7.2001 passed by Additional District Judge, Allahabad, in suit no. 38 of 1986 by which the suit for eviction from the shop in dispute and for recovery of arrears of rent has been decreed. At the time of admission of the appeal Sri O.P. Gupta, learned counsel for the respondent appeared and raised a preliminary objection that this appeal is not maintainable. On this objection it was ordered that the record be summoned and thereafter it be listed for admission. The record of the case has been received. I also called for the report from the District Judge, Allahabad regarding the nature of the suit, who has sent a report that this suit was registered as regular suit in register form no. 3 maintained for regular suits. The original register form no. 3 maintained for regular suit in the court of District Judge in which it was registered has also sent, which show that this suit was registered as regular suit. The question therefore is whether the first appeal under section 96 C.P.C. is maintainable or a revision under section 25 Provincial Small Causes Act could be filed.

2. I have heard Sri Ravi Kiran Jain, Senior Advocate for the appellant and Sri O.P. Gupta, learned counsel for the respondent.

3. The suit has been titled by plaintiff-respondent as regular suit and have been filed in the court of District Judge, Allahabad. The relief claimed in the suit is for eviction of the appellant from the shop in dispute and for recovery of arrears of rent. The valuation of the suit is Rs. 12,850/-. The classification of the suit as mentioned by Munsarim on the back of the plaint is that it is suit for ejectment, and rent.

4. From the above facts born out from the records, it is clear that the suit was filed as regular suit and was registered as such. There is also no dispute about the fact that the suit is of the

nature of small causes triable by Judge Small Cause Court. There is no dispute that after amendment in the Provincial Small Cause Courts Act and Bengal, Agra and Assam Civil Courts Act, the present suit is triable as Small Cause suit. The suit upto the valuation of Rs. 25,000/- are triable by Judge Small Causes/ Civil Judge and above the same are trible by District Judge/ Additional District Judges.

5. It has been contended by learned counsel for the plaintiff-respondent that the suit was treated as small cause suit and according to the provisions of Order 5 Rule 5 C.P.C. the date was fixed for final disposal immediately after the suit was registered. The summons were sent for final disposal of the suit as is apparent from the order sheet dated 17.09.1986; that therefore, it was treated as small cause suit.

6. It is also argued by Sri O.P. Gupta, learned counsel for the respondent that there is custom in the district of Allahabad of registering a small cause suit in the register form no. 3 of original suits. However, this argument does not lead us anyway, as there is no evidence regarding it. It is true that at the first stance the summons were sent for final disposal of the suit, but subsequently the procedure prescribed for small causes suit was not followed. The issues in this case were framed on 21.3.198 (sic). The memorandum of evidence was not prepared but the evidence of the witnesses was recorded word to word. The decree of the regular suit have been prepared and the decree on the proforma of the small cause suit has not been prepared. Therefore, from the above facts no inference could be drawn that it was a small cause suit.

7. The next argument of Sri O.P. Gupta, learned counsel for the respondent that even if the suit was instituted and tried as regular suit, it will not change the nature of the suit and the suits of present nature according to law are triable by the Judge, Small Cause. I have already stated that no doubt could be entertained regarding the fact that the suit of the present nature was triable at the date when the suit was filed as a suit of nature of small cause.

8. The learned counsel for the respondent has referred to the decision in **Trilok Singh Versus Smt. Jamuna Devi and another, A.I.R. 1978 Alld., P.129**. It has been held in this case that if a suit of the nature of small causes is filed in the court specially invested with the jurisdiction to try the suit under section 25 (2) of Bengal, Agra and Assam Civil Courts Act, it is not obligatory to state the said fact in the title of the plaint nor it is necessary that in the body of the plaint there should be such a recital.

The other case referred to is **Kukur Sahu Versus Bibi Salihan, A.I.R., 1936, Patna, P.406**. In this case it was observed that where the suit is decided by Munsif and it is not mentioned that it is being tried by Judge Small Causes Courts even then no appeal will lie if the suit is of the nature of small causes.

9. In **Gopalkrishna Navakar Versus Madhavanavaki Ammal and others, A.I.R., 1937 Madras, P. 227**. It was observed that the suit of small causes suit does not loose its character as such if mistakenly it is transferred and tried as a regular suit and no appeal will lie.

10. Similar view was taken in **A.S. Gilani Versus Maharaj Sri Pateshwari Parshad Singh, A.I.R., 1956 Punjab, P. 233**. It was observed that small causes suit tried as ordinary suit by the court having small causes jurisdiction. The nature of the suit will remain as small causes suit.

11. In the case of **Maung Tin Versus Kvinnahon, AIR, 1930 Rangoon, P.139**. it was held that where the same Judge is invested with the powers of Township Court and the small causes court and tries the suit as Township Court even then no appeal will lie as the character of the suit will remain as small cause suit.

12. As against this Sri Ravi Kiran Jain, learned Senior Advocate has argued that the suit was instituted as a regular suit which was registered as such and also tried as such. Therefore, a regular decree has been passed and the appeal under section 96 C.P.C. is maintainable. He has referred to the certain decisions. The first case is of Full Bench decision of this Court in **Bisheshwar Prasad Gautam Versus Dr. R.K. Agarwal, A.I.R., 1977, Alld., P.103**. In this case the suit was filed before the enforcement of U.P. Civil Laws Amendment Act, 1972. According to the section 9 of the Act, The suit should have been transferred from the regular court to the court of Judge, Small Cause Courts. However, by mistake it was not transferred and no objection as to the jurisdiction was raised. On these facts it was held that it continued to retain its nature, namely, Small Causes, hence second appeal is incompetent under section 102 C.P.C.

13. The other case referred to is **Lala Hari Shyam Versus Mangal Prasad, A.I.R., 1983, Alld. (D.B.) P. 275**. In this case the suit was filed for recovery of Rs. 1,360/- and filed in the court of Munsif, Allahabad. The objection regarding the jurisdiction was not raised. The suit was decreed. It was held that the decree is not nullity for the reason that the Munsif has no jurisdiction to try the suit.

14. The another decision referred to is again a Full Bench decision of this court in **Manzurul Haq and another Versus Hakim Mohsin Ali, A.L.J., 1970, P. 670**. Reliance has been placed on the observation that the court of small causes is the court of preferential jurisdiction and not of exclusive jurisdiction. On its basis, it has been argued that the suit was not filed in the court of preferential jurisdiction and therefore, the nature of the suit is of regular suit. In this case the suit was filed in the court of Munsif in an area where there was no court of small causes. Therefore, it was held that the Munsif has no jurisdiction to entertain and decide the suit though the suit is of the nature of small causes suit. The following observation of the court is material "It only losses jurisdiction when a court of preferential jurisdiction exists."

15. After carefully considering the case law cited above, I am of the view that the suit is no doubt is a suit of the nature of small causes suit. It can also not be disputed as it was filed, registered and tried as regular suit. However, even then it will not loose its character and will remain a suit of the nature of small causes. Therefore, no appeal under section 96 C.P.C. is maintainable.

16. I, accordingly, decide that the appeal is not maintainable. However, the

appeal has wrongly been filed for the reason that the suit was registered and tried as regular suit. Therefore, the appellant is permitted to convert this appeal into revision under section 25 of Provincial Small Causes Courts Act. The necessary steps may be taken. The eviction of the appellant from the disputed shop shall remain stayed for two months from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.12.2001

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 3278 of 1992

Ram Surat Ram ...Petitioner
Versus
General Manager, Feeder Balancing Dairy and others ...Respondents

Counsels for the Petitioner:
Sri S. Jhingan
Sri A.R. Dubey
Sri D.S.M. Tripathi
Sri R.N. Rao
Sri A. Sunder
Sri C.V. Vatsyan
Sri G.K. Gupta
Sri G.D. Misra

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226 service law- Dismissal order- Petitioners working Assistant Cashier- subjected to loat caused loss of Rs. 89,000/- for same charges got fair acquittal by criminal court- but found negligent- held dismissal order bad- direction for concluding deputtal proceeding within 4 months from the date of reinstatement.

Held- Para 9

Accordingly allowed, and the order dismissing the petitioner dated 31.12.1990 is set aside. The petitioner shall be reinstated in service. The counsel for the respondent submitted that the petitioner can still be held guilty of negligence for failing to observe rules and guidelines laid down by the department, and taking such precaution which could have averted the incident. I find that the Magistrate also recorded a finding that although the petitioner is not guilty to charge under section 406 I.P.C. he should have taken more care and precaution and that such charge can still be a ground of misconduct of course to a lesser punishment. In the circumstances, I direct that whereas the petitioner shall be reinstated, he shall be treated under suspension and paid the suspension allowance with effect from the date of dismissal to the date of reinstatement within a period of two months from the date of serving a certified copy of the order on the respondent.

Case law discussed:
1999 (82) FLR 627
1999 (82) FLR 784
1997 (75) FLR 559
1987 SCC 146
1997 (76) FLR 532
1996 (75) FLR 2550

(Delivered by Hon'ble Sunil Ambwani, J.)

1. The petitioner was appointed as Assistant Cashier in Feeder Balancing Dairy, Ram Nagar, District- Varanasi on 30.12.1980 and was serving as permanent Assistant Cashier in the department. On 24.1.1989 when he went to deposit the money amounting to Rs. 2,96,000/- in three bags in Oriental Bank of Commerce, Nichi Bagh, District- Varanasi, it is alleged that some miscreants pushed the petitioner due to which the petitioner fell down and some miscreants snatched the bag which contains Rs. 89,000/-. The General Manager, Sri B.K. Tiwari was

informed on phone to lodge the first information report about the incident. A charge-sheet dated 2.7.1990 was issued to the petitioner with the allegation that on 14.1.1989 when he went to deposit Rs.2,96,000/- in the vehicle of the institution No. GRM 9922 with Oriental Bank of Commerce, Nichi Bagh, Varanasi, according to delinquent employee, some one pushed him on which he fell down holding three cash bags out of which one bag containing Rs. 87,000/- was snatched on account of which the institution suffered loss of Rs. 87,000/- and from this, it appears that the delinquent employee has caused negligence in performance of the duties and failed to discharge of duties which is a serious indiscipline and serious misconduct. An inquiry was conducted, in which the petitioner submitted his reply. Upon inquiry a inquiry report was submitted which has been annexed as an annexure-6 to the counter affidavit. In this inquiry, Gunman Sri Gulab Das Keshari did not appear. His written statement, however, was supported by Sri B.K. Tiwari, General Manager of the Bank, Sri Lal Ji Singh, Accountant and Sri B.K. Kundu an officer of Oriental Bank of Commerce, Nichi Bagh, Varanasi. The Inquiry Officer observed that the gunman Sri Gulab Das Keshari, who was employed through a secured agency, did not appeared as he had left the security agency. The Inquiry Officer also found the fact that the petitioner was carrying three bags was not supported by affidavit of Sri C.L. Tiwari, Chief Assistant (Sales), Bhola Singh, Telex Operator, Hari Ram Cleaner and Sri Ram Lal, Driver of the vehicle. In effect the defense of the petitioner that he was carrying three bags and was pushed upon which he fell and the third have snatched the bag was not believed. On the report of the Inquiry Officer the petitioner was dismissed from service by order of Managing Director of the Bank dated 31.12.1991 which is the subject matter of the challenge of this writ petition.

2. A supplementary affidavit has been filed by the petitioner Ram Surat Ram along with stay application stating that the charge-sheet was submitted in pursuance of the F.I.R. in crime case No. 12 of 1989 under section 406 I.P.C. In the trial Sri B.K. Tiwari, General Manager of the bank, Sri Gulab Das Keshari, Gunman, Sri V.K. Kundu was examined as PW-1 to PW-4. The petitioner examined Sri Kamlesh Kumar as DW-1. The Court of Judicial Magistrate- Ist Class, Varanasi acquitted the petitioner with the finding, after assessment of evidence, that the petitioner had fallen down on the Channel gate of the bank where the money was looted away. The Gunman, Gulab Das Keshari deposed that he was with the petitioner until the General Manager came on the spot and supported the defence version that the petitioner had fallen down and the money was taken away. Documentary evidence was also taken into evidence in which stealing of Rs. 87,000/- was reported. The Magistrate also believed the defence of the petitioner who deposed that after he fell down 2-3 persons took the bundle of notes and ran away and other persons were chasing them. The Magistrate recorded a finding that from the evidence the incident as alleged by the defence appears to have happened and the embezzlement is not proved. He further recorded a finding to the effect that the accused did not take such precaution as were expected from him, in that if he had taken money in box it could not have been

stolen. In the end he was acquitted on the charge of section 406 I.P.C.

3. I have heard Ms. Suman Sirohi for the petitioner and Sri G.D. Misra for the respondents. The respondent has firstly taken a preliminary objection that the petitioner is a 'workman', and that he has an alternative remedy to challenge the order by way of raising an industrial dispute under U.P. Industrial Disputes Act, 1947. The writ petition was filed in the year 1992. A counter affidavit was called. Thereafter counter and rejoinder affidavits have been exchanged and the parties also exchanged supplementary affidavits. The matter is governed by U.P. Cooperative Employees Regulations, 1975 and has been pending in this Court for the last nine years. It is, therefore, just and proper to hear the matter on its merits.

4. The counsel for the petitioner has relied upon Supreme Court decision in **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. (S.C.) 1999 (82) FLR 627**. Paragraphs 32 & 33 are quoted below:

"32. There is yet another reason for discarding the whole of the case of the respondents. As pointed out earlier, the criminal case as also the departmental proceedings were based on identical set of facts, namely, 'the raid conducted at the appellant's residence and recovery of incriminating articles therefrom. The findings recorded by the Inquiry Officer, a copy of which has been placed before us, indicate that the charges framed against the appellant were sought to be proved by Police Officers and Punch witnesses, who had raided the house of the appellant and had effected recovery. They were the only witnesses examined by, the Inquiry Officer and the Inquiry Officer, relying upon their statements, came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case but the Court, on a consideration of the entire evidence, came to the conclusion that no search was conducted nor was any recovery made from the residence of the appellant. The whole case of the prosecution was thrown out and the appellant was acquitted. In this situation, therefore, where the appellant is acquitted by a judicial pronouncement with the finding that the "raid and recovery" at the residence of the appellant were not proved, it would be unjust, unfair and rather oppressive to allow the findings recorded at the ex-parte departmental proceedings to stand.

33. Since the facts and the evidence in both the proceedings, namely, the departmental proceedings and the criminal case were the same without there being any iota of difference, the distinction, which is usually drawn as between the departmental proceedings and the criminal case on the basis of approach and burden of proof, would not be applicable to the instant case."

5. On the other hand, the counsel for the respondent has relied upon the **Sr. Supdt. of Post Offices, Pathanamthitta and others Vs A. Gopalan reported in 1999(82) FLR 784; State of Karnataka and another Vs. T. Venkataramanappa, 1997 (75) FLR 559; Kamal Kishore Lakshman Vs. Management of M/s Pan American World Airways Inc. and others, (1987) Supreme Court Cases 146; High Court of Judicature at Bombay Vs. Uday**

Singh and others, 1997 (76) FLR, 532; State of Rajsthan Vs. B.K. Meena and others, 1996 (75) FLR 2550.

6. In Sr. Supdt. Of Post Offices, Pathanamthitta and others Vs. A. Gopalan, (supra) the Supreme Court found that whereas the respondent A. Gopalan were subjected to two charges, and was imposed with penalty in respect of one charge and since the second charge relating to misappropriation of fund was not the subject matter of criminal trial, the order of Tribunal setting aside the dismissal was not justified. In State of Karnataka Vs. T. Venkataramanappa (supra) it was held that the prosecution evidence in the criminal complaint may have fallen short of the standard of proof with regard to bigamy under section 494, I.P.C. but that did not debar the State from invoking Rule 28 of the Karnataka Civil Service Rules which forbids a Government Servant to marry a second time without permission of the Government. In Kamal Kishore Lakshman Vs. Management of M/s Pan American world Airways and others (supra) it was held that termination of service on the ground of loss of confidence is stigmatic and does not amount to retrenchment. A question whether termination casted stigma and it was held that it will vary from case to case. Retrenchment means termination of service for any reason whatsoever otherwise than by punishment inflicted by way of disciplinary action, and that if the Court proposes for opportunity of adjudication before the Labour Court the matter may be sent to it. Since the Court is not proposing the matter to be sent back for availing alternative remedy this judgment does not apply on the present facts of the case. In the High Court of Judicature at Bombay Vs. Udai Singh and others (supra) it was held that disciplinary proceedings are not a criminal trial and that doctrine of proof beyond doubt has no application. In disciplinary inquiry preponderance of probabilities and some material on record will be necessary to reach a conclusion whether or not the delinquent has committed a misconduct. In State of Rajsthan Vs. B.K. Meena and others (supra) the Supreme Court held that standard of proof, the mode of the inquiry and the rules governing inquiry and trial are entirely distinct and different than the departmental proceedings. The disciplinary proceedings are meant not really to punish the guilty but to keep administrative machinery unsullied by getting rid of bad elements. The interest of delinquent officer lies in a prompt conclusion of disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law.

7. Upon considering the inquiry report, dismissal order and order of acquittal passed by Criminal Court, I find that the entire basic foundation of dismissal of the petitioner was establishment of charges of loss caused to the Cooperative Society on account of negligence of the petitioner. The defence of the petitioner that he was pushed by some miscreants and that the money was looted was not believed by the Inquiry Officer. The incident was thereafter subject matter of trial. The Magistrate considered the statement of same witnesses namely Sri B.K. Tiwari, General Manager of the Society, Sri V.K. Kundu an officer of the Oriental Bank of Commerce, Sri Gulab Das Keshari,

Gunman who accompanied the petitioner and who had not appeared before the Inquiry Officer. He however, appeared before the Magistrate and supported the defence taken by the petitioner. The Magistrate as such examined the same witnesses and came to a different conclusion. In a criminal trial the witnesses appeared and dispose under oath, and they are subjected to cross-examination, which abides by the Indian Evidence. The Magistrate who is a trained judicial officer conducts a trial to find out the truth of the allegations constituting the charge. The standard of proof and the mode of trial by Magistrate inquiry inspires greater public confidence.

8. It was submitted by the counsel for the respondent that in departmental proceedings the charge of misconduct was under examination whereas the criminal court was considering the charge under section 406 I.P.C. Accepting the arguments of the counsel for the respondent, I find that in both departmental proceedings as well as criminal charge, the defence of the petitioner that some miscreants pushed him upon which he fell down and money out of one bag was looted away was under consideration. The same incident and the same witnesses were subject matter of inquiry in departmental proceedings and the subject matter of trial before the Magistrate and the conclusion of the Magistrate is contrary to the conclusion drawn in the departmental proceedings whereas in the departmental proceedings this defence of the petitioner was not believed. The Magistrate, after examining the same witnesses and one more witness in defence, came to a conclusion that the incident happened in the same manner as alleged by the petitioner. The entire foundation of punishment in disciplinary inquiry was taken away with the finding recorded by the Magistrate. In the circumstances the decision of Supreme Court in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. is applicable to the present case, and that the order of dismissal deserves to be set aside.

9. The writ petition is accordingly allowed, and the order dismissing the petitioner dated 31.12.1990 is set aside. The petitioner shall be reinstated in service. The counsel for the respondent submitted that the petitioner can still be held guilty of negligence for failing to observe rules and guidelines laid down by the department, and taking such precaution which could have averted the incident. I find that the Magistrate also recorded a finding that although the petitioner is not guilty of charge under section 406 I.P.C. he should have taken more care and precaution and that such charge can still be a ground of misconduct of course to a lesser punishment. In the circumstances, I direct that whereas the petitioner shall be reinstated, he shall be treated under suspension and paid the suspension allowance with effect from the date of dismissal to the date of reinstatement within a period of two months from the date of serving a certified copy of the order on the respondent. The respondent shall proceed with the inquiry from the stage of serving charge-sheet upon the petitioner or any amended charge which the department may consider necessary and conclude the inquiry in accordance with the provisions of U.P. Cooperative societies Service Regulations, 1975, within a period of four months from the date of reinstatement of the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 38282 of 2001

Rajmuni Devi ...Petitioner
Versus
District Inspector of Schools, Ghazipur and others ...Respondents

Counsels for the Petitioner:
Sri U.K. Mishra
Sri A.K. Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226 Family Pension- G.O. dated 24.2.89 Provides benefit of Family pension to such employee whose husband died after 1.12.89- petitioner's husband died on 31.8.87- whether denial can the part of Government arbitrary? Held-Yes- in view of D.S. Nakara' case not permissible in law.

Held- Para 2

The claim of the petitioner has been rejected solely on the ground that in view of the Government order dated 24th February, 1989, the family pension of such employee is payable only to such family members whose bread earner had died after 1st December, 1989 whereas the petitioner's husband died on 31st August, 1987. This view is wholly arbitrary in view of the decision of the Apex Court in the Case of D.S. Nakara Versus Union of India, reported in A.T.R. 1983, S.C. 130. By the aforesaid Government order amounts to carving out a class from a homogenous class of persons who are entitled for the family pension on the basis of which is not permissible under Law.

Case relied by Court A.T.R. 1983 SC-130

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

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents. Petitioner by means of this writ petition under Article 226 of the Constitution, has challenged the order dated 27th September, 2001.

2. The petitioner is a widow, who claimed the family pension on account of the death of her husband. The claim of the petitioner has been rejected solely on the ground that in view of the Government Order dated 24th February, 1989, the family pension of such employee is payable only to such family members whose bread earner had died after 1st December, 1989 whereas the petitioner's case is that petitioner's husband died on 31st August, 1987. This view is wholly arbitrary in view of the decision of the Apex Court in the case of D.S. Nakara Versus Union on India reported in A.T.R. 1983 S.C. 130. By the aforesaid Government Order amounts to carving out a class from a homogenous class of persons who are entitled for the family pension on the basis of which is not permissible under law. In this view of the matter the order dated 27th September, 2001 is quashed.

3. The writ petition is allowed. The petitioner is entitled for family pension from the date from which all other persons are allowed by the respondents and the benefit of family pension shall not be denied only on the ground that the husband of the petitioner had died before 01.12.1989. Order accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 36269 of 2001

Sri Pramod Kumar Badal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arun Prakash

Counsel for the Respondents:
Sri Pramod Kumar Sharma
(S.C.)

Constitution of India, Article 226- Service Law- appointment of Assistant Teacher in Basic Primary School- Petitioner holds certificate of Vyayam Visharad- whether equivalent to C.P.Ed.? Held- No.

Held- Para 3

In view of this judgement the petitioner who holds the certificate of 'Vyayam Visharad' and not of C.P.Ed., is not entitled for the benefit of the judgement passed in writ petition no. 30711 of 1977. Decided on 11.6.2000.
Case law discussed:
W.P.No. 30711 of 1977, Decided on 11.6.2000.

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

1. Heard learned counsel for the petitioner and Shri P.K. Sharma appearing for the respondents 2 and 4 as well as learned Standing Counsel for the State.

2. By means of this writ petition the petitioner has prayed seeking a direction in the nature of mandamus directing the respondents for the purpose of making appointment on the post in question in Basic Primary School in view of the judgement dated 28.8.1998 passed in the writ petition No. 30711 of 1997 providing the benefits of the reservation to it being a backward class candidate or in the alternative on the post of Vyayam Visharad. The judgement relied upon by the petitioner namely passed in writ petition No. 30711 of 1997, which has been annexed as Annexure-1 to the writ petition. The said judgment has been disposed of finally by a Division Bench of this Court vide its judgment dated June 11, 2000, which reads as under:

"The writ petition no. 30711 of 1997 from which the aforesaid special appeal has arisen and all other writ petitions of this Bunch are disposed of finally with the direction that C.P. Ed. Candidates trained in State run institutions or recognised institutions by the State of U.P. or trained from any other institutions, which had been recognised equivalent to U.P.C.P.Ed. course shall be considered for appointment strictly in terms of the Government Orders dated 23.3.1995 and 28.2.1996. It is further provided that C.P. Ed. candidates who have obtained certificate from Amrawati shall also be considered on the basis of the judgement dated 11.2.1997 of Hon'ble Aloke Chakrabarti, J."

3. In view of this judgement the petitioner who holds the certificate of 'Vyayam Visharad' and not of C.P. Ed., is not entitled for the benefit of the judgement passed in writ petition No. 30711 of 1997. The other points of learned counsel for the petitioner in the circumstances of the Special Appeal do

not arise for consideration. The writ petition is accordingly dismissed.

4. The present recruitment is going on in pursuant to the advertisement for the year 2001 and the petitioner has no where said that he has applied in pursuance to the advertisement of the year 2001. For this reason also the petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 39346 of 2001

Neeraj Trivedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Srivastava

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

Constitution of India, Article 14 and 16- Discrimination- Petitioner obtained B.T.C. Training from District Rampur- applied for Assistant Teacher in District Kanpur Dehat-rejection of candidature on the ground the Training not obtained from the same district- held against the principle of equality.

Held- Para 3

B.T.C. Training is the qualification which is the eligibility criteria. There can not be any restriction for obtaining such eligibility criteria from particular places, if such a restriction is enforced in that event it will against the principles of equality and violating the provisions of Article 14 and 16 of the constitution.

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

1. The petitioner alleged that he has done B.T.C. Training from Rampur while he was resident of Kanpur Nagar. He has applied for the post of Assistant Teacher in Primary Schools in persuance to an advertisement published.

2. Learned counsel for the petitioner Sri S.K. Srivastava contends that the petitioner has been informed that since he is resident of district Kanpur Nagar, he ought to have been obtained B.T.C. Training from Kanpur Nagar. Since he has taken B.T.C. Training from Rampur being resident of Kanpur Nagar, his case would not be considered.

3. B.T.C. Training is the qualification which is the eligibility criteria. There can not be any restriction for obtaining such eligibility criteria from particular place, if such a restriction is enforced in that event it will against the principles of equality and violating the provisions of Article 14 and 16 of the constitution.

4. In such circumstances, after hearing learned counsel for the petitioner and learned Standing Counsel, this writ petition is disposed of by directing the concerned respondents to consider the petitioner's application in accordance with law having regard to the observation made here-in-above and consider his case in the process of Selection provided the petitioner is otherwise eligible in law to be so considered, such consideration is to be made by the respondent no. 3 before the Selection process takes place, if not already been taken place.

5. However, there will be no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2001

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

Criminal Revision No. 2270 of 2000

Smt. Hem Lata Gupta ...Revisionist
Versus
State of U.P. and another...Opposite Party

Counsel for the Revisionist:
Sri Shashi Kant Gupta

Counsel for the Opposite Party:
Sri Rajendra Kr. Pandey
Dr. Archana Pandey

Code of Criminal Procedure Section 156 (3)- complaint under section 138 of Negotiable Instruments Act filed on 26.6.98 cognizance taken by Court on 18.11.98 whether the complaint be treated in competent? Held-No- congizance taken much after 15 days.

Held- Para 11

In this way, the controversy in the case has been finally settled by the Apex Court that in case the complaint is filed prior to expiry of 15 days of the notice, it cannot be said in competent. The bar of expiry of 15 days is for taking cognizance. In the instant case, though complaint was filed on 26.6.1998 but cognizance was taken on 18.11.1998 which was much after 15 days from the date of notice i.e. 13.6.1998 and therefore, no cognizance was taken within 15 days of the date of notice. The learned Sessions Judge, therefore, wrongly allowed the revision. Thus, the order of learned Additional Sessions Judge cannot be sustained.

Case law discussed:
J.T. 2000 (10) SC-141

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

1. This revision has been directed against the order dated 30.6.2000 passed by Xth Additional Sessions Judge, Kanpur Nagar in Criminal Revision no. 428 of 1999 allowing the revision and setting aside the order dated 8.10.1999 passed by IInd Additional Chief Metropolitan Magistrate in Criminal Case no. 861 of 1998 rejecting the objection of the opposite party no. 2 against the summoning order.

2. It appears that applicant, Smt. Hem Lata Gupta, filed a complaint against opposite party no. 2. Smt. Manju Rathi on 26.6.1998 under Section 138 Negotiable Instruments Act with the allegations that on 29.5.1998, the opposite party no.2 had issued four cheques of different amounts relating to Punjab National Bank, Nayaganj-Branch, Kanpur payable to applicant. The applicant presented above cheques to her Bank for realisation. On 11.6.1998 she was informed that the account of Smt. Manju Rathi had been closed and therefore, the cheques were disonoured. The applicant, accordingly, sent a notice to opposite party no. 2 on 13.6.1998. But the opposite party no. 2 neither paid any amount nor replied the notice; hence she filed complaint on 26.6.1998.

3. The applicant examined herself under Section 200 Cr.P.C. and her witnesses Rajendra Kumar (P.W.1) and Satish Singh Chauhan (P.W.2) under Section 202 Cr.P.C. On perusal of the statement of complainant under Section 200 and her witnesses under Section 202

Cr.P.C. the learned Additional Chief Metropolitan Magistrate summoned the opposite party no. 2 under Section 138 Negotiable Instruments Act, vide order dated 18.11.1998.

4. On appearance her opposite party no.2 filed objection against the summoning order on the ground that the cheques issued by her were post dated. According to complainant, the notices were issued on 13.6.1998, but the complaint was filed only on 26.6.1998, while complaint could be filed only after 15 days of the service of the notice. Therefore, complaint was liable to be dismissed on this ground.

5. The learned Additional Chief Metropolitan Magistrate on considering the above objection held that complaint cannot be dismissed merely on the ground that it was filed prior to expiry of 15 days from the date of service of notice. Therefore, objection had no force. With these findings he rejected the objection of the opposite party no. 2, vide order dated 8.10.1999.

6. Aggrieved with the above order, the opposite party no. 2 filed Criminal Revision no. 428 of 1999 before the Sessions Judge. The revision was decided by Xth Additional Sessions Judge, Kanpur Nagar, who held that since the complaint was filed prior to expiry of 15 days of the date of notice, it was premature and not maintainable. With these finding, he allowed the revision set aside the order of the Additional Chief Metropolitan Magistrate and dismissed the complaint being premature.

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

7. The opposite party no. 2 was served with the notice and also filed vakalatnama of Sri Rajendra Kumar Pandey and Dr. Archana Pandey, Advocates, but on the date of hearing none appeared from the side of opposite party no. 2.

8. Heard the learned counsel for the applicant and learned A.G.A. and perused the record, as none appeared from the side of opposite party no. 2.

9. It was contended by the learned counsel for the applicant that the Additional Sessions Judge allowed the revision and dismissed the complaint simply on the ground that complaint under Section 138 Negotiable Instrument Act was filed premature, prior to expiry of 15 days from the notice. He further contended that Section 138 of Negotiable Instruments Act bars taking of cognizance within 15 days from the date of service of notice, but there is no bar in filing complaint prior to expiry of 15 days, as filing of complaint and taking cognizance are two different stages. In support of his above contention he placed reliance on Apex Court decision in Narsingh Das Tapadia v. Goverdhan Das Partani & another, JT 2000 (10) SC 141.

10. In the case Narsingh Das (supra) the respondent borrowed a sum of Rs. 2,30,000/- from the applicant and issued a post dated cheque in his favour. When the cheque was presented for payment on 3.10.1994, the same was dishonoured by the Bank on 6.10.1994 due to "in-sufficient fund". The appellant demanded

accused to re-pay the amount, vide his telegram sent on 7.10.1994 and 17.10.1994. A notice was also issued to respondent on 19.10.1994 demanding to repay the amount. Despite receipt of notice on 26.10.1994, the respondent neither paid the amount, nor gave any reply. The complainant, therefore, filed complaint under Section 138 of Negotiable Instruments Act on 8.11.1994. The Court, however, took cognizance on 17.11.1994. The High Court held that the original complaint having been filed on 8.11.1994 was premature and liable to be dismissed. In appeal, the Apex Court held as below:

"No period is prescribed before which the complaint cannot be filed and if filed not disclosing the cause of action in terms of Clause (c) of the proviso of Section 138, the Court may not take cognizance till the time the cause of action arises to the complainant.

"Taking cognizance of an offence" by the court has to be distinguished from the filing of the complaint by the complainant. Taking cognizance would mean the action taken by the court for initiating judicial proceedings against the offender in respect of the offence, regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence it must be shown, that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied the mind not for the purpose of taking action upon the complaint but for taking some other kind of action contemplated under the Code of Criminal procedure such as ordering investigation under Section 156 (3) or issuing a search warrant, he cannot be said to have taken cognizance of the offence.

Mere presentation of the complaint in the court cannot be held to mean that its cognizance had been taken by the Magistrate. If the complaint is found to be pre-matured, it can await maturity or be returned to the complainant for filing later, and its mere presentation at an earlier date need not necessarily render the complaint liable to be dismissed or confer any right upon the accused to absolve himself from the criminal liability for the offence committed."

11. In this way, the controversy in the case has been finally settled by the Apex Court that in case the complaint is filed prior to expiry of 15 days of the notice, it cannot be said in competent. The bar of expiry of 15 days is for taking cognizance. In the instant case, though complaint was filed on 26.6.1998 but cognizance was taken on 18.11.1998, which was much after 15 days from the date of notice i.e. 13.6.1998 and therefore, no cognizance was taken within 15 days of the date of notice. The learned Sessions Judge, therefore, wrongly allowed the revision. Thus, the order of learned Additional Sessions Judge cannot be sustained.

12. The revision is, accordingly, allowed. The order under revision dated 30.6.2000 passed by Xth Additional Sessions Judge, Kanpur Nagar in Criminal Revision No. 421 of 1998 is quashed and the order of Additional Chief Metropolitan Magistrate dated 8.10.1999 in criminal case no. 861 of 1998 is restored. The Magistrate is directed to

proceed with the case in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.12.2001

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

Civil Misc. Writ Petition No. 39340 of 2001

Sri Mukhtar Ahmad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Viqar Ahmed Ansari

Counsel for the Respondents:
C.S.C.

U.P. Punchayat Raj Act, Section-95 (I) (g)- Removal of Up Pradhan- even complaint not examined- neither charge sheet nor opportunity of hearing given before passing the removal order- held- illegal order entails civil consequences.

Held- Para 8

The order impugned has civil consequences, therefore, reasonable opportunity of being heard is to be afforded to the petitioner. In the facts and circumstances of the present case reasonable opportunity of being heard is denied to the petitioner before passing the impugned order, hence the order impugned deserves to be quashed. It is held that denial of reasonable opportunity of being heard to the petitioner in the present case is sufficient prejudice caused to him which makes the order impugned perse illegal.

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

Heard the learned counsel for the petitioner as well as the learned Standing Counsel. Perused the order impugned dated 12.9.2001 (Annexure-1 to the writ petition) whereby the petitioner has been removed from the office of Up Pradhan.

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

3. A close scrutiny of the order impugned reveals that some irregularities were found against the petitioner in the meeting dated 31.7.2001 and five persons of the village have made allegations against the petitioner in the aforesaid open meeting.

4. The petitioner was served with a show cause notice, Annexure-2 to the writ petition and it appears that since the petitioner has not given any explanation to the show cause notice issued to him, therefore, he was removed from the office of Up Pradhan.

5. It is to be admitted that the order impugned, Annexure-1 to the writ petition, passed by District Magistrate, Bijnor is amenable to writ jurisdiction under Article 227 of the Constitution. Therefore, this Court is entitled to know the reasons which persuaded the District Magistrate to remove the petitioner from the office of Up Pradhan. The reasons are linked to the conclusion. As a matter of fact, the conclusion arrived at relating to allegations made against the petitioner must be based on definable evidence. In the present case from perusal of order impugned, it is apparent that no reference has been made what was the definable evidence before the District Magistrate,

Bijnor which persuaded him to believe that allegations made against the petitioner are proved. Since the order impugned is amenable to writ jurisdiction, therefore, the petitioner is entitled to demonstrate before this Court that the order is based on non-existent ground and the reasons which persuaded the District Magistrate, Bijnor to arrive at the conclusion that the petitioner is not entitled to hold the office of Up Pradhan are erroneous.

6. A close scrutiny of the order impugned reveals that the District Magistrate, Bijnor has not referred any evidence whatsoever in support of the order impugned. It seems to me that he was under impression that since petitioner has not given reply to the show cause notice, therefore, the allegations contained in the show cause notice are sufficient evidence to remove him from the office of Pradhan. It is held that a show cause notice cannot be a substitute of evidence for removing a person from the office of Up Pradhan. There must be some definable evidence in support of the allegations contained in the show cause notice served upon him. Even in those cases where the delinquent Up Pradhan fails to adduce any evidence, still it is the duty of the district administration to adduce evidence in support of the allegation made in the show cause notice. Here in the present case from the order impugned it does not appear that even five persons who made allegations against Up Pradhan were examined in presence of the petitioner. Examination of witnesses in presence of delinquent is an integral part of natural justice. It goes without saying that prior to removal of Pradhan or Up Pradhan a charge-sheet is to be served on the delinquent disclosing the articles of charges and evidence sought to be relied upon in support of each charge. In the instant case neither charge-sheet was served upon the petitioner nor evidence in support of charges were disclosed to him.

7. It is contended by the learned Standing Counsel that evidence was recorded by the Enquiry Officer. The basic question would be whatever report is submitted and evidence recorded by the Enquiry Officer is subject to approval or disapproval of the District Magistrate and the order passed by the District Magistrate must indicate his application of mind and his application of mind can be inferred only from the reading of the order passed by him. But, from reading of the order passed by the District Magistrate, no such definable evidence is referable from the order impugned and no reason has been given by the District Magistrate in support of the order impugned except stating therein that the petitioners fails to give explanation to show cause notice.

8. The order impugned has civil consequences, therefore, reasonable opportunity of being heard is to be afforded to the petitioner. In the facts and circumstances of the present case reasonable opportunity of being heard is denied to the petitioner before passing the impugned order, hence the order impugned deserves to be quashed. It is held that denial of reasonable opportunity of being heard to the petitioner in the present case is sufficient prejudice caused to him which makes the order impugned perse illegal.

As a result of the aforementioned discussion, the instant writ petition is allowed. The order impugned dated 12.9.2001, Annexure-1 to the writ

petition, is hereby quashed and the case is remanded to the District Magistrate, Bijnor to take action under Section 95 (1) (g) of U.P. Panchayat Raj Act in accordance with law against the petitioner after serving a charge-sheet upon him disclosing evidence in support of articles of charges in the chargesheet. It is made clear that the petitioner will co-operate with the enquiry and if he fails to co-operate with the enquiry, the District Magistrate, Bijnor would be at liberty to proceed exparte against him and pass a fresh order disclosing definable material in support of the order in the light of observation made in the body of the order.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE R.B. MISRA, J.

First Appeal From Order No. 71 of 1991

Smt. Phulbasi Devi & others ...Petitioner
Versus
The National Insurance Company Ltd. and others ...Opposite Party

Counsel for the Petitioner:
Sri V.N. Agarwal

Counsel for the Opposite Party:
Sri A.K. Sinha

Motor Vehicle Act 1988- Section 110- decease award of compensation- deceased at aged about 29 years- getting salary of Rs. 484/- per month- compensation of Rs. 1,18,655/- lump sum payment- held not proper- Tribunal oversighted this fact- deceased being young man just appointed in service- could have earned higher amount if alived till 60 years.

Held- Para 15

As observed above, the Tribunal has not taken into consideration the fact that the deceased was a young man and was just appointed in service and he could have earned higher amount if he had lived till the age of 60 years or more, the deduction of 1/3rd amount on account of lump sum payment, in the facts and circumstances of the case, is not justified.

Case law discussed:
AIR 1994 SC-1631
1987 ACJ-957
1999 (3)-TAC 781

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

1. The claimant-appellants have filed this appeal for enhancement of the amount of compensation.

2. Briefly stated the facts are that on 3rd August 1987 at about 9.15 A.M. Jagat Narain Verma, husband of appellant no. 1 and father of appellants 2 to 5, while going on foot, was dashed by Truck No. UTE-1327. He succumbed to his injuries. The claimant-appellants filed claim petition no. 75 of 1987 with the allegations that the accident was caused due to rash and negligent driving by the driver of the truck in question.

3. The claim petition was contested by the owner of the truck as well the Insurance Company. They denied that the accident was caused due to rash and negligent driving of the driver of the truck. They further pleaded that the amount claimed was excessive.

4. The Tribunal, on consideration of material evidence placed before it, came to the conclusion that the accident was caused due to rash and negligent driving

of the driver of the truck and awarded a sum of Rs. 1,18,655/- as compensation along with interest of 7% on the amount so awarded.

5. The claimant-appellants being dissatisfied with the amount of compensation awarded to them have preferred this appeal.

6. Sri A.K. Sinha, Advocate, has put in appearance on behalf of respondent no. 1. Nobody has but in appearance on behalf of respondent no. 2.

7. We have heard Sri A.K. Sinha learned counsel for respondent no. 1.

Learned counsel for the appellants submitted that the amount awarded is too meagre and not in accordance with legal principles and evidence adduced in the case.

8. The Tribunal has recorded a finding that on the date of accident i.e. 3rd August 1987 the age of the deceased was 29 years. He was employed with Unani and Ayurvedic Department and was getting salary of Rs. 848/- per month. The Tribunal has taken into account the fact of the age and the earning of the deceased and held that he might have spent about 40% of his salary on himself and the rest he might have spent on his family. It calculated total amount of his salary and deducted 40% from such amount. The Tribunal further deducted 1/3 amount as it was being paid in lump sum.

9. Learned counsel for the appellants urged that the Tribunal, without taking into consideration the total number of family members of the deceased, has held that 40% of his income, the deceased might have spent on himself. It is contended that the Tribunal assumed that the deceased might have spent 40% of his income on himself. The question as to how much amount one has to incur upon his family, depends upon the number of members of the family. If the number of family members is large, the deceased might have incurred less amount of salary upon himself and rest of the amount upon his family.

10. In ***General Manager, Kerala State Road Transport Corporation, Trivendram v. Mrs. Sushma Thomas and others, AIR 1994 SC 1631,*** Hon'ble Supreme Court held that the deduction should be made taking into consideration all the factors. The two factors are important, firstly the number of family members of the deceased and secondly, his life style.

11. The deceased at the time of his death had the family of five members, namely, his widow Phulbasi Devi aged about 30 years, three sons Jitendra Kumar Verma aged about 13 years, Upendra Kumar Verma aged about 10 years, Veer Bahadur Verma aged about 7 years and one daughter Km. Mandhawati aged 12 years besides he had his mother Smt. Kalpatia Devi aged about 73 years. In these circumstances he would not have spent not more than 1/3 from his salary on himself. The Tribunal without examining this aspect wrongly deducted 40% of the salary on the ground that the deceased might have spent this amount on himself.

12. The next question is whether the Tribunal is justified in deducting 33% of the amount of compensation being paid in lump sum to the claimant-appellants. The deceased had joined the service on 5th

May 1987 at the age of 29 years. He was getting salary of Rs. 848/- per month at the time of his death on 3rd August 1987. His salary might have increased annually and he could have also got further promotions. The deduction of the amount on account of payment of the amount in lump sum depends upon the facts of each case. In ***U.P. State Road Transport Corporation v. Mohammad Moonis, 1987 ACJ 957***, a Division Bench of this Court held that it depends upon facts of each case as to whether the deduction should be made on account of lump sum payment made to the claimants but it is not necessary that in every case the deduction should be made. It was observed as under:-

"Learned counsel for the Corporation further urged that the Tribunal failed to make any deduction for the lump sum payment which is being made to the claimant. It is true that when lump sum payment is made, some deduction is made, but this is not a right principle. The question whether any deduction on account of lump sum payment should be made or not depends on the facts of each case. In the instant case, the deceased was a young man since he was unmarried, his parents are entitled to compensation. The parents are aged but they are healthy. The compensation has been determined on the basis of their longevity. Having regard to these facts we think, the Tribunal has rightly made no deduction for the lump sum payment. There is, therefore, no merit in the appeal by the Corporation and it is liable to be dismissed."

13. Similar view was expressed by the Supreme Court in ***Renu Bala Kalita and others v. Dhiren Chakravarty and others, 1999 (3) TAC 781.***

14. Learned counsel for the respondent has placed reliance upon the decision Smt. Neelima Arora v. Union of India and others, AIR 1978 Alld. 111, wherein the Court took the view that 33% deduction should be made while making payment in lump sum. This decision itself has not laid down the principle that in every case the deduction should be made when the compensation is paid in lump sum. It depends upon facts of each case.

15. As observed above, the Tribunal has not taken into consideration the fact that the deceased was a young man and was just appointed in service and he could have earned higher amount if he had lived till the age of 60 years or more, the deduction of 1/3rd amount on account of lump sum payment, in the facts and circumstances of the case, is not justified.

16. The last question is whether the Tribunal was justified in awarding interest at 7%. The Tribunal has not assigned any reason for awarding interest at 7%. Normally it should be at 9%.

17. Learned counsel for the respondent no. 1 submitted that the liability of Insurance Company is only up to the extent of Rs. 1,50,000/- as provided under sub-section (2) of Section 95 of the Motor Vehicles Act, 1988. It is further contended that under the policy also the liability is within the said amount. Learned counsel for the appellants has not shown that the liability of respondent no. 1 exceeds either in terms of the policy or in any other law beyond Rs. 1,50,000/-. It is, however, made clear that the liability is on the principal amount but the Insurance

Company will be further liable to pay interest on this amount of liability which is fixed by the Tribunal.

18. In view of the above discussion, the appeal is partly allowed. The Tribunal shall calculate the amount keeping in view the observation made by us above and the award is accordingly modified. The amount which exceeds the liability of respondent no. 1 shall be payable by respondent no. 2 personally.

Considering the facts and circumstances the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2001

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 33209 of 2001

Committee of Management ...Petitioner
Versus
District Inspector of Schools, Shahjahanpur and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Yadav
Sri R.C. Singh
Sri V.K. Singh

Counsel for the Respondents:
Sri Subodh Kumar, S.C.

U.P. Intermediate Education Act 1921, Chapter III- Regulation 25 read with U.P. Act No. V of 1982- Section 16-G (1) and (iii)- Termination of non teaching staff employee- who of un aided institution- whether the provisions of the Act applies to the unaided institution? Held- 'Yes' without prior approval termination- termination order can not be passed.

Held- Para 5

That so far as the unaided but recognised institutions are concerned, these regulations so far as it applies to said institution which received grant-in-aid but for the burden of payment of salary. But security against arbitrary termination, namely no termination except with the prior approval of the District Inspector of Schools is equally available to a teacher and non-teaching staff in both category of institutions whether they are aided or unaided, holding it otherwise would make it per se and in that event the provisions itself arbitrary and the provisions may be hit by Article 14 of the Constitution of India.

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

1. Petitioner, Committee of Management aggrieved by the order of the District Inspector of Schools, Shahjahanpur dated 4/5.10.2001 (Annexure-6 to the writ petition) filed this writ petition under Article 226 of the Constitution of India inter alia on the ground that the District Inspector of Schools has committed the error in holding that the termination of the services of respondent no. 2, Smt. Neela Chaudhary is illegal and suffers from the prejudice and further that the District Inspector of Schools was not justified in the purported exercise of power of the Rules framed under Section 7 AA of the Act for directing that the order of termination dated 19.9.2001 passed by the Manager of the college, Annexure-3 to the writ petition, is illegal whereby the Manager has purported to terminate the services of the petitioner forthwith from the date of the passing of the order dated 19.09.2001. The case set up by the

petitioner that the respondent no. 2 Smt. Neela Chaudhary was designated as Administrative Officer and therefore she was not a teacher.

2. Since the institution in question is an un-aided institution receiving no grants-in-aid from the State Government, therefore the District Inspector of Schools has no jurisdiction to pass the order. In any view of the matter, the order of the District Inspector of Schools in view of the present situation proceeded on the assumption that respondent no.2 is a teacher appointed in accordance with the rules framed under Section 7 AA of the Act. For the aforesaid reason though the termination of the services of respondent no. 2 was forthwith, based on alleged misconduct and without affording any opportunity to the respondent no. 2, should not be interfered with by the District Inspector of Schools and the order impugned to the contrary passed by District Inspector of Schools suffers from the manifest error of law and is liable to be quashed by this Court exercising the powers under Article 226 of the Constitution of India. Learned counsel appearing on behalf of the petitioner also raised the argument that the termination of the services of respondent no. 2, Smt. Neela Chaudhary was on account of the fact that the post of Administrative Officer on which respondent no. 2 was working, stood abolished and for this reason also the services of respondent no. 2 were liable to be terminated.

3. The impugned order has been passed by the District Inspector of Schools on a representation/ appeal filed by respondent no. 2 against the termination order dated 19.9.2001. The District Inspector of Schools after affording opportunity to the management has passed the impugned order. The management has presented its case and reiterated the grounds referred to above. The District Inspector of Schools has recorded findings that the respondent no. 2 though designated as Administrative Officer but was teaching classes of English medium students. The District Inspector of Schools therefore has held that the services cannot be terminated in exercise of powers of rules framed under Section 7 AA of the Act because the rules 7 AA talks of the appointment and termination of part time teachers and instructors. Even on the admitted case of the management though respondent no. 2 was taking classes of English medium, yet she was not appointed as teacher can not be believed.

4. I have heard learned counsel for the parties and perused the decisions relied upon by learned counsel appearing on behalf of the petitioner. It is not in dispute that institution in question is recognised institution under the provisions of U.P. Intermediate Education Act, 1921 and is governed by the provisions of the aforesaid Act and analogous laws. The reliance on the part of the petitioner as well as on the part of the respondents that Section 7 AA of the Act and the rules framed therein contemplates part time appointments even though the institution is un-aided, therefore it can not be left to the discretion of the management to hire and fire a teacher or a non-teaching staff. Thus the contention on behalf of management can not be accepted in view of the statutory provisions contained under Section 16-G (3), read with Section 16-G (1) of the Act and the provisions of the U.P. Act No. 5 of 1982. The regulation

framed under Chapter III of the U.P. Intermediate Education Act, 1921 applies to teaching and non-teaching staff both. Without entering into the question as to whether the respondent no. 2 is a teacher or not as asserted by the management and the findings recorded by the District Inspector of Schools with regard to this aspect of the matter requires reconsideration in view of what has been stated above.

5. The provisions of the U.P. Intermediate Education Act and analogous laws will apply even in the case of teacher appointed under Section 7AA of the Act and the Rules framed therein as Section 16-G read with Section 16 –G (3) and Regulation 25 under Chapter III of the Regulation makes no distinction of the aided or un-aided class of the institution and if the persons appointed in recognised institution. That so far as the un-aided but recognised institutions are concerned, these regulations so far as it applies to said institution which received grant-in-aid but for the burden of payment of salary. But security against arbitrary termination, namely, no termination except with the prior approval of the District Inspector of Schools is equally available to a teacher and non-teaching staff in both category of institutions whether they are aided or un-aided, holding it otherwise would make it per se and in that event the provisions itself arbitrary and the provisions may be hit by Article 14 of the Constitution of India. Since there is no challenge with regard to any of the provisions, referred to above, I need not enter into this controversy. With regard to the present controversy, it would be expedient in the interest of justice if the District Inspector of Schools is directed to re-consider the entire matter taking into account as to whether respondent no. 2 is a teacher or a non-teaching staff and in either case her services can not be terminated except with the prior approval of the District Inspector of Schools since the institution is a recognised institution. The District Inspector of Schools is further directed to look into the case of bias and prejudice set up by the respondent no. 2 against the order of termination dated 19th September, 2001. So far as the order dated 19th September, 2001 is concerned, it is liable to be set aside on the ground that it straightway terminated the services of the respondent no. 2 without affording any opportunity and without giving her the notice or pay to the leave of notice is void. The District Inspector of Schools is therefore directed to look into all these aspects and such other and further aspects as may now be raised by the parties. The order of the District Inspector of Schools dated 4/5.10.2001 is quashed and District Inspector of Schools is directed to look into the matter again in the light of the observations made above. The parties are directed to appear before the District Inspector of Schools within one month from today and it will be open to the parties to file such fresh representations as they may so choose and the District Inspector of Schools shall afford opportunity to both the parties and pass a reasoned order within a period of three months fixing the date by the District Inspector of Schools immediately after the receipt of the representations. The writ petition is allowed in part. The order of the District Inspector of Schools dated 4/5.10.2001 is quashed. The District Inspector of Schools is directed to decide the case as stated above. Till the District Inspector of Schools decides the matter, the petitioner shall not interfere with the

functioning of respondent no. 2. Needless to say that the respondent no. 2 shall be entitled for her entire salary. The interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 9, 2001

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

Civil Misc. Writ Petition No. 1091 of 2001

Gulzari Lal Rai ...Petitioner
Versus
The Collector, Jhansi/Licensing Authority (Excise) Jhansi and others...Respondents

Counsel for the Petitioner:
Sri L.P. Singh

Counsel for the Respondent:
Sri S.P. Kesharwani, S.C.

U.P. Excise (Settlement of Licencees for retail sale of country liquor) Rules 2001, rule-20 (i)- opportunity of hearing-cancellation of licence show cause notice issued before passing the cancellation order opportunity of hearing not given-order can not sustain.

Held- Para 3
We feel that in view of the mandatory requirements of the Rule providing for opportunity of hearing the authority concerned should have given opportunity of hearing to the writ petitioner. In that view of the matter, the order passed in the instant case, being contrary to the Rules, cannot be said to, be valid and as such the same should be set aside.

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

1. We have heard Sri L.P. Singh, learned Advocate for the writ petitioner and Sri S.P. Kesharwani, learned Standing Counsel for the State respondents.

2. The contention of the learned counsel for the writ petitioner is that no opportunity of hearing was given to him before passing impugned order of cancellation of his licence in terms of Rule 20 (2) of the Uttar Pradesh Excise (Settlement of Licences for Retail sale of Country Liquor) Rules, 2001 (herein after referred to as the Rules), Rule 20 (2) of the Rules reads as under:

"20 (2) The Licensing Authority shall immediately suspend the licence and forfeit the security deposit on above mentioned grounds. The licensing Authority will also serve a show cause notice for cancellation of licence and the licensee shall submit his explanation within 7 days of the receipt of notice. Thereafter the Licensing Authority will pass suitable orders after giving due opportunity of hearing to the licensee, if he so desires."

3. This contention of the writ petitioner can not be disputed from the record available. No date was fixed for hearing of the writ petitioner. Sri S.P. Kesharwani, learned Standing Counsel submitted before us that the writ petitioner should have asked for opportunity of hearing and also time to reply the show cause notice. We feel that in view of the mandatory requirements of the Rule providing for opportunity of hearing the authority concerned should have given opportunity of hearing to the writ petitioner. In that view of the matter, the order passed in the instant case, being contrary to the Rules, cannot be said to, be valid and as such the same should be set aside. We accordingly set aside the

impugned order dated 30th October 2001 cancelling the licence of the petitioner, challenged in the instant case. We however, make it clear that this order shall not prevent the respondent authority to proceed with the matter on the basis of the show cause notice in accordance with law and to pass a fresh order after giving opportunity of hearing to the writ petitioner.

With the above observations the writ petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: NOVEMBER 19, 2001

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

Civil Misc. Writ Petition No. 12749 of 1988

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

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

Counsel for the Respondent:
Sri Sandeep Mukherji

U.P. Cooperative Societies Act, 1965- Section 95-A- Recovery certificate issued- No opportunity given held- recovery proceeding bad in law.

Held- Para 6

Admittedly, the petitioner having not been given opportunity as required by law, the impugned recovery is bad. For so long as the petitioner is not given due opportunity to contest the allegation of dues against him and the same is not determined by the relevant authority, the proceedings against the petitioner for the recovery of alleged dues cannot go on.

Case law discussed:
1986 AWC- 273
1981 ALJ- 1078

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

1. Heard Sri Prakash Padia, holding brief of Dr. R.G. Padia, learned Senior Advocate appearing for the petitioner, and Sri Sandeep Mookherji, learned Standing Counsel of the State of U.P., representing the respondent nos. 1,2,3,4 and 5. Despite due notice, the respondent no. 6 has not responded.

2. No counter affidavit has been filed. Thus, the averments made in the petition are unrebutted, and taken to be correct.

3. By means of a notice dated 14th May, 1988, a copy whereof is Annexure - 1 to the petition, issued at the behest of Kabirganj Kisan Sewa Sahkari Samiti Ltd., Kabirganj, Pilibhit, the respondent no. 6, the petitioner is called upon to pay a sum of Rs. 11,958/- due on account of loan alleged to have been taken by him from the respondent no. 6.

4. The learned counsel appearing for the petitioner contends that the recovery in pursuance of the impugned notice is bad inasmuch as the petitioner was not given any opportunity before issuance of recovery certificate which is mandatory in view of Section 95-A of the U.P. Co-operative Societies Act, 1965. To buttress his contention, the learned counsel places reliance on the two Division Bench

decisions rendered in M/s Ram Narain Himmat Ram and another Vs. Jalaun Kraya Vikraya Sahakari Samiti Limited, Jalaun and others, and Kashi Prasad Singh Vs. Collector and District Magistrate, Varanasi and others, reported in 1986 Allahabad Weekly Cases at page 273 and 1991 Allahabad Law Journal at page 1078, respectively.

5. The learned Standing Counsel representing the respondent nos. 1 to 5, very fairly, does not dispute that the contention of the petitioner is well founded and fortified by the two Division Bench decisions rendered in M/s Ram Narain Himmat Ram and another Vs. Jalaun Kraya Vikraya Sahakari Samiti Limited, Jalaun and others (supra) and Kashi Prasad Singh Vs. Collector and District Magistrate, Varanasi and others (supra).

6. Admittedly, the petitioner having not been given opportunity as required by law the impugned recovery is bad. For so long as the petitioner is not given due opportunity to contest the allegation of dues against him and the same is not determined by the relevant authority, the proceedings against the petitioner for the recovery of alleged dues cannot go on.

7. In the result, the petition succeeds, and is allowed. The respondents are, jointly and severally commanded not to proceed to recover from the petitioner the amount sought to be recovered in pursuance of the impugned notice (Annexure -1 to the petition) until the petitioner has been given due opportunity to contest, and the objection of the petitioner, if any, is disposed of by the authority competent to do so.

There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 7, 2001

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

Civil Misc. Writ Petition No. 1140 of 1990

Satish Kumar and others ...Petitioners
Versus
Deputy Director of Consolidation, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Faujdar Rai
Sri C.K. Rai

Counsel for the Respondents:
Sri D.P. Srivastava
Sri M.M. Tripathi
Sri Shatrughan Singh
S.C.

U.P. Consolidation of Holdings Act Section 19- Chack allotment- enhancement of numbers of chack from 3 to 5 - pursuant to direction issued by High Court- objection about private source of irrigation, alteration for more than 25% not taken before D.D.C. disputed question of fact can not be adjudicated in writ jurisdiction.

Held- para 6

The question which have been raised and pressed by learned counsel for the petitioners were neither raised nor pressed before the Deputy Director of Consolidation. On the other hand, it has been specifically denied by the contesting respondents that the number of chaks allotted to the petitioners have been enhanced from 3 to 5 and that the valuation of the land has been varied more than 25%. Second proviso to sub-clause (e) provides that no consolidation

made shall be invalid for the reasons merely that the number of chaks allotted to a tenure-holder exceeds three. The question as to whether petitioners have been allotted three chaks or five is a question of fact. It is well settled in law that disputed questions of fact cannot be decided by this Court under Article 226 of the Constitution of India. Similarly, question of source of irrigation and allotment of land near it was neither raised nor pressed by the petitioners before the Deputy Director of Consolidation, therefore, petitioners can not be permitted to raised the said question for the first time before this Court under Article 226 of the Constitution of India, as it involves factual aspect and is denied by the other side.

(Delivered by Hon'ble R.H. Zaidi, J.)

1. Present petition arises out of the allotment proceedings under the U.P. Consolidation of Holdings Act, for short ' the Act' and is directed against the judgment and order dated 6.10.1989 passed by the Deputy Director of Consolidation, Allahabad.

2. The relevant facts of the case giving rise to the present petition, in brief, are that the Assistant Consolidation Officer allotted 3 chaks to the petitioners. Inspite of the objections filed by the contesting respondents, the chaks of the petitioners were not disturbed either by the Consolidation Officer, the Settlement Officer Consolidation or the Deputy Director of Consolidation. Thereafter two writ petitions were filed, one by Hira Lal and others and another by Devi Prasad and others. The said writ petitions were numbered as 2472 of 1986 and 2433 of 1986 respectively. Both the writ petitions were allowed by this Court by its judgment and order dated 24.1.1989 and the case was remanded back to the Deputy Director of Consolidation for decision afresh. The operative portion of the judgment dated 24.1.1989 is quoted below:

"Since the impugned judgment is being quashed at the instance of Hira Lal and others in writ petition no. 2472 of 1986, I quash the impugned judgment even at the instance of the petitioners in this writ petition and direct the revisional court to re-examine the claim of the petitioners and deal with their demand about a chak on plot no. 179 after hearing the parties concerned.

In view of the above observations, both the writ petitions deserve to be allowed and are accordingly allowed and the impugned judgment of the revisional court dated 16.12.1985, is hereby quashed and the revisional court is directed to decide the claim of the petitioners of both the writ petitions strictly in accordance with law and the observation made above. Parties are directed to bear their own costs."

2. The Deputy Director of Consolidation after affording opportunity of hearing to the parties concerned decided the revision filed by Devi Prasad and others by his judgement and order dated 6.11.1989 by which he has made slight alteration in the chaks allotted to Devi Prasad and the petitioners. An area valuing 16.29 paise and measuring 12 biswas 15 dhoors was taken out from the chak of Satish Kumar, the petitioner, out of chak on plot no. 179 and was allotted to Devi Prasad was given to Satish Kumar, the petitioner. Thus, the number of chaks allotted to Devi Prasad i.e., 4, and of the petitioners remained the same.

The petitioners, thereafter, filed the present petition.

3. I have heard learned counsel for the petitioners and learned counsel appearing for the contesting respondents.

4. Learned counsel for the petitioners submitted that the Deputy Director of Consolidation has enhanced the number of chaks of the petitioners from 3 to 5, which is wholly illegal and contrary to the provisions of Section 19 of the Act. According to him, the number of chaks could not be enhanced more than 3 without permission in writing of the Deputy Director of Consolidation. The second submission made by the learned counsel for the petitioners was that the area of the chaks allotted to the petitioners was also varied by more than 25% and third and last submission was that the chaks allotted to the petitioners were away from their private source of irrigation. Therefore, it was contended that the order passed by the Deputy Director of Consolidation was liable to be set aside.

5. On the other hand, learned counsel appearing for the contesting respondents submitted that number of chaks allotted to the petitioners were only 3 and not 5 as claimed by him. It was also urged that the Deputy Director of Consolidation also had the jurisdiction to enhance the number of chaks and to vary the valuation of the land more than 25% without permission of anybody, although in this case, it was not varied to that extent. It was urged that since the order has been passed by the Deputy Director of Consolidation, therefore, there was no question of obtaining permission as provided under Section 19 of the Act. So far as the source of irrigation is concerned, no such objection was either raised before the Deputy Director of Consolidation nor there arose any such question in this case, as the petitioners could move the pumping set owned by them to any place of their choice. According to the learned counsel for the respondents, the writ petition was concluded by findings of fact and was liable to be dismissed.

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

Clauses (d), (e) and (f) of sub-section (1) of Section 19 provide as under:

"19. Conditions to be fulfilled by a Consolidation Scheme:- (1) A Consolidation Scheme shall fulfil the following conditions, namely -

(a) … …
(b) … …
(c) … …

(d) the principle laid down in the Statement of Principles are followed.

(e) every tenure-holder is, as far as possible, allotted a compact area at the place where he holds the largest part of his holdings.

Provided that no tenure-holder may be allotted more chaks than three, except with the approval in writing of the Deputy Director of Consolidation.

Provided further that no consolidation made shall be invalid for the reason merely that the number of

chaks allotted to a tenure-holder exceeds three;

(f) every tenure-holder is, as far as possible, allotted the plot on which exists his private source of irrigation or any other improvement, together with an area in the vicinity equal to the valuation of the plots originally held by him there."

6. The questions which have been raised and pressed by learned counsel for the petitioners were neither raised nor pressed before the Deputy Director of Consolidation. On the other hand, it has been specifically denied by the contesting respondents that the number of chaks allotted to the petitioners have been enhanced from 3 to 5 and that the valuation of the land has been varied more than 25%. Second proviso to sub-clause (e) provides that no consolidation made shall be invalid for the reasons merely that the number of chaks allotted to a tenure-holder exceeds three. The question as to whether petitioners have been allotted three chaks or five is a question of fact. It is well settled in law that disputed questions of fact cannot be decided by this Court under Article 226 of the Constitution of India. Similarly, question of source of irrigation and allotment of land near it was neither raised nor pressed by the petitioners before the Deputy Director of Consolidation, therefore, petitioners can not be permitted to raise the said question for the first time before this Court under Article 226 of the Constitution of India, as it involves factual aspect and is denied by the other side. From a reading of the judgment of the Deputy Director of Consolidation, it appears that Devi Prasad, the respondent no.2, was allotted 4 chaks on his original plots no. 809, etc. He claimed that one of his chaks should be allotted at plot no. 179. The Deputy Director of Consolidation, finding force in the claim made by Devi Prasad, simply allotted one chak to him on plot no. 179 of the valuation of 16.29 paise measuring 12 biswas and 15 dhoors out of the chak, which was allotted to Satish Kumar and the land, which was taken out from the chak of Devi Prasad, which was of the same valuation, was given to Satish Kumar. The Deputy Director of Consolidation recorded congent reasons for the aforesaid alteration in the chaks. In the impugned order, the Deputy Director of Consolidation did not consider any other point nor any other point was pressed by anyone of the parties. Although, the question with respect to the permission of the Deputy Director of Consolidation does not arise in the present case either to enhance the number of chaks more than three or to vary the valuation of land more than 25% but it may be stated that if the order is passed by the Deputy Director of Consolidation himself, no such permission in writing will be required. The submission made by the learned counsel for the petitioners, to the contrary, does not arise in the present case, therefore, can not be accepted. In view of the aforesaid facts and circumstances of the case, no case for interference under Article 226 of the Constitution of India is made out.

7. The writ petition fails and is hereby dismissed. Interim order dated 11.1.1990 granted by this Court is also discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.11.2001

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

Civil Misc. Writ Petition No. 36380 of 2001

Sri Amalendu Das Gupta alias Rajat
...Petitioner
Versus
Smt. Sheela Das Gupta and others
...Respondents

Counsel for the Petitioner:
Sri M.P. Sarraf

Counsel for the Respondents:
Sri A.K. Upadhayay

U.P. Urban Buildings (Regulation of Lettings, Rent and Eviction) Act 1972- Section 21 (i) (a)- comparative Hardships- finding recorded by the Appellate authority regarding comparative hardship of the land lady as bonafide- not challenged in writ petition- eviction of tenant held- proper.

Held- Para 5

Perused the impugned judgment of appellate authority. Considering the number of the Members of the landlady vis- a - vis accommodation in her possession (ignoring accommodation in question) there can be no doubt that the need of the landlady is bona-fide. Learned counsel for the petitioner has not challenged the finding on the point of comparative hardship.

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

1. This is tenant's petition.

Heard Sri M.P. Saraf, learned counsel for the Petitioner and Sri A.K. Upadhaya, learned counsel appearing for Respondent no. 1. Other respondents are not relevant being the Court which decided the release proceedings under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 (for short called 'the Act').

2. The dispute relates to a residential accommodation in possession of the tenant which came to the ownership of the land lord through gift deed (Annexure-1 to the Writ Petition). Release application (Annexure -2 to the Writ Petition) was filed on the ground that land lord required the accommodation (portion of house no. 24/10, P.G. Varanasi, consisting of two rooms, Kitchen, Latrine and Bathroom) and subject matter of release application registered as P.A. case no. 17 of 1998 (Smt. Sheela Das Gupta Versus Amlendu Das Gupta). Tenant filed written statement.

3. Parties exchanged affidavits and thereafter Prescribed Authority rejected the release application vide judgement and order dated 29th July, 2000 (Annexure-7 to the Writ Petition).

4. Appeal under Section 22 of the Act filed by the land lord has been allowed by the Appellate Authority, the District Judge, Varanasi Respondent no. 2 on the finding that the need of the land lord was 'bona fide' and he was to suffer more hardship as compared to the tenant in case of rejection of the release application.

5. I have perused the impugned judgment of appellate authority. Considering the number of the Members of the land lady vis-à-vis accommodation in her possession (ignoring

accommodation in question) there can be no doubt that the need of the land lady is bona fide. Learned counsel for the Petitioner has not challenged the finding on the point of comparative hardship.

6. Learned counsel for the Petitioner, however, raised only one plea and argued that first proviso to Section 21 (1) (a) of the Act was attracted even in the case of gift.

7. The word 'purchased' used in the said proviso is clear, unambiguous and there is no scope for interpretation.

8. Certain observations have been made on this point in the case of Anwar Hasan Khan Versus District Judge, Shahjahanapur and others reported in 2001 (1) Allahabad Rent Cases 43 and held that the use of the word 'purchase' is significant and shows transfer by other mode has been intentionally excluded.

9. The above view taken by me is supported by the decision of another learned Single Judge directly on the point in case of Shyam Sunder Versus III Additional District Judge, Pilibhit and others reported in 1978 Allahabad Rent Cases 204 (para 2 and 3).

10. The aforesaid plea on behalf of the petitioner, thus, fails.

No other ground in the writ petition warrant interference under Article 226, Constitution of India as the same involve appreciation of evidence and it is not permissible for the Court while exercising its writ jurisdiction.

Petition lacks merit and is liable to be dismissed.

It is, accordingly, dismissed.

11. Learned counsel for the Petitioner in the end submitted that on the instruction of his client he prays for time of one year for vacating and delivering possession to the land lady peacefully.

12. Learned counsel for the Respondent has no objection to the same subject, however, to the condition that the petitioner, as per his assurance given to this Court, files an undertaking in writing in the form of affidavit before the concerned prescribed authority to ensure that land lord is not harassed and Court imposes, other usual conditions.

13. Learned counsel for the petitioner submitted that undertaking shall be filed by the petitioner before Prescribed Authority on the terms and conditions imposed by this Court:-

1. The tenant-petitioner shall file before the concerned Prescribed Authority, on or before 10th December, 2001, an application along with his affidavit giving an unconditional undertaking to comply with all the conditions mentioned hereinafter.

2. Petitioner- tenant shall not be evicted from the accommodation in his tenancy for one -year i.e. up to 8th November, 2002. Tenant- petitioner, her representative assignee, etc. claiming through her or otherwise, if any, shall vacate without objection and peacefully deliver vacant possession of the accommodation in question on or before 8th November, 2002 to the land lord or landlord's nominee/representative (if any, appointed and intimated by the land lord)

by giving prior advance notice and notifying to the land lord by Registered A.D. post (on his last known address or as may be disclosed in advance by the land lord in writing before the concerned Prescribed Authority), time and date on which land lord is to take possession from the tenant.

3. Petitioner shall on or before 10th December, 2001 deposit entire amount due towards rent etc. up to date i.e. entire arrears of the past, if any, as well as the rent for the period ending on the 8th November, 2002.

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

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

6. If there is violation of the under taking of any one or more of the conditions contained in this order, the defaulting party shall pay Rs. 25,000/- (Rupees Twenty five thousand only) as damages to the other party besides rendering himself/herself liable to be prosecuted for committing grossest contempt of the Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.11.2001

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

Civil Misc. Writ Petition No. 49883 of 1999

Committee of Management and another ...Petitioner
Versus
Assistant Registrar, Firms, Societies and Chits, Gorakhpur & another...Respondent

Counsel for the Petitioner:
Sri A.P. Sabi
Sri G.K. Singh

Counsel for the Respondents:
SC
Sri Narsingh Dixit

High Court Rules 1952, Chapter V rule 6- Practice and Procedure reference to larger Bench for decision particular point- not specified by learned Single Judge- can not be decided by the Bench unless the question specified by learned Judge.
Para-

The requirement of law, in the opinion of this Bench hearing a case must formulate the question and refer the same to a larger Bench as and when such occasion arises. In the absence of any question or questions, specifically formulated, the Bench to which the matter is referred shall be groping in dark.

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

1. On 14th December, 1999 the learned Single Judge, before whom instant petition was up for consideration for admission, passed the following order:

"Hon'ble S. Harkauli, J.

Heard learned counsel for the petitioners and learned counsel appearing for the respondents.

2. This writ petition arises out of an order passed by the Registrar of the Societies dated 19.11.1999 by which it has been held that respondent no. 2 is validly elected committee of management and petitioner no. 1 is not the validly elected committee.

3. The election of respondent no. 2 is alleged to have been held on 21.3.1999 while election of petitioner no. 1 is alleged to have been held on 20.6.1999. The renewal of certificate of registration of the societies was done in 1991. Consequent upon the election, three applications were filed for renewal of registration. First application was by out going committee of management which did not appear to press the application and the application was impliedly rejected by granting renewal in favour of respondent no.2. Two other applications were made by petitioner no. 1 and respondent no. 2. Consequence to the finding in favour of election dated 21.3.1999 the renewal has been granted in favour of respondent no. 2. The order is challenged by the petitioner on the ground that the Registrar had no power to decide the dispute as to which the committee of management was validly elected committee of management.

4. Learned counsel appearing for respondent no. 2 who has filed a caveat in this case has relied upon Section 4 of the Societies Registration Act, 1860 'as amended in its application to U.P.' to justify the decision of the Registrar. Learned Counsel appearing for respondent no. 2 relies upon two decisions of this Court reported in (1998) 2 UPLBEC 1000 and (1998) 3 UPLBEC 1925.

5. Learned counsel for the petitioners on the other hand relies upon the decision of this Court reported in 1993 ESC 201, Khaparaha Educational Society vs. Assistant Registrar, in which after considering the earlier decisions the learned Single Judge has taken a view that the dispute regarding election should be referred to the Prescribed Authority instead of being decided by the Registrar. An argument was raised in the said reported decision which is contained in paragraph 7 of the Law Report. The said arguments does not appear to have been answered except by saying that if the argument is accepted section 25 (1) would become meaningless. For ready reference section 4(1) proviso as applicable in U.P. and section 25 (1) of the Societies Registration Act is reproduced below :

"Section 4 (1) Once in every year, on or before the fourteenth day succeeding the day which, according to the rules of the society, the annual general meeting of the society is held, or if the rules do not provide for an annual general meeting in the month of January, a list shall be filed with the (Registrar) of the names, addresses and occupations of the governors, council, directors, committee, or other governing body them entrusted with the management of the affairs of the society.

(Provided that if the managing body is elected after the last submission of the list, the counter signatures of the old members, shall as far as possible, be obtained on the list. If the old office-

bearers do not counter-sign the list, the Registrar may, in his direction, issue a public notice or notice to such person as he thinks fit inviting objections within a specified period and shall decide all objections received within the said period).

"Section 25 (1). The prescribed authority may, on a reference made to it by the Registrar or by at least one- fourth of the members of a society registered in Uttar Pradesh, hear and decide in a summary manner any doubt or dispute in respect of the election or continuance in office of an office-bearer of such society, and may pass such orders in respect thereof as it deems fit.

(Provided that the election of an office-bearer shall be set aside where the prescribed authority is satisfied-

(a) that any corrupt practice has been committed by such office- bearer, or

(b) that the nomination of any candidate has been improperly rejected or

(c) that the result of the election is so far it concerns such office-bearer has been materially affected by the improper acceptance of any nomination or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with the provisions of any rules of the society.'

6. In my opinion if interpretation as suggested by learned counsel for the petitioners is accepted then the word ' and shall decide all objections received' in the proviso of Section 4 (1) will become absolutely meaningless.

7. On the other hand the provision of section 25 (1) indicates that the said section is intended to constitute the Prescribed Authority into an election Tribunal dealing with cases of election of individual members who either guilty of corrupt practice or have been improperly elected because of the reasons given in the said proviso. Thus, section 4 (1) and section 25 (1), aforesaid, operate in different and distinct field. Where the dispute is not of the nature referred to in the proviso of section 25 (1), but concerns other matters it has to be decided by the Registrar if the list is not counter signed by out going members and objections are received pursuant to or even without public notice or other notice contemplated by proviso.

In the circumstances, I consider it desirable that the matter be placed before a Bench of at least three Hon'ble Judges (in view of the earlier Division Bench) for clear interpretation of two provisions referred to above so that the question of law may be settled. For this purpose relevant papers may be submitted before the Hon'ble the Chief Justice for instituting a larger Bench. In the mean time if the petitioner is so advised he may institute a suit in accordance with normal law.

Dt. 14.12.1999"

Pursuant to the above order dated 14th December, 1999, the then Hon'ble the Chief Justice passed an order which reads thus :

" Place it before the Bench
presided over by Hon'ble D.S. Sinha, J.
N.K. Mitra
19.1.2000.

8. Consequently, the matter is up before this Bench. The Bench has read and re- read the order with the assistance of Sri A.P. Shahi, learned counsel appearing for the petitioners. Sri Narsingh

Dixit, the learned counsel of the respondent no. 2, and Sri Vinay Malviya, the learned Standing Counsel of the State of U.P., representing the respondent no. 1 in anxiety to find out the question or questions of law which need answer by this Bench.

9. Clause (b) of the second proviso to Rule 2 of Chapter V of the Rules of Court, 1952 (herein after called ' the Rules') empowers a Judge, if he thinks fit, to refer a case which may be heard by a Judge sitting alone or any question of law arising therein for decision to a larger Bench. Obviously, the case has not been referred to this Bench for decision. From a meaningful reading of the order dated 14th December, 1999, the Bench perceives that it is called upon to settle some questions of law. However, the Bench has not been able to identify the question or questions of law referred for answer.

10. Reference to a larger Bench is envisaged in Rule 6 of Chapter V of the Rules, which provides that the Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein.

11. The requirement of law, in the opinion of this Bench, is that the Bench hearing a case must formulate the question and refer the same to a larger Bench as and when such occasion arises. In the absence of any question or questions, specifically formulated, the Bench to which the matter is referred shall be groping in dark.

The learned counsels appearing for the parties, very fairly, concede that framing of question of law is a condition precedent for making reference to a larger Bench for decision, and that in the instant case no question or questions of law having been formulated, it will be an exercise in futility to probe and proceed in the matter further.

On the facts and circumstances noticed above, in the opinion of the Bench, it is expedient that the matter may be remitted to the learned Single Judge for formulating specific question or questions of law which in his opinion require answer by a larger Bench.

Let the papers be laid before the learned Single Judge after obtaining requisite order from the Hon'ble the Chief Justice, at an early date.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 8, 2001

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

Civil Misc. Writ Petition No. 27771 of 2001

M/s Nagina Palace Cinema Hall, Ghazipur and another ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri K.N. Mishra

Counsel for the Respondents:
Sri P.K. Bisaria

S.C.
Sri A.K. Singh

U.P. Cooperative Societies Act- Section 92 (a) and Section 95 A- Loan given by Urban Cooperative Bank- whether can be recovered as arrears of Land Revenue ?

Held 'yes'.
Held – Para 7

The contention of learned counsel for respondent no. 3 (Bank) however, is that Urban Cooperative Bank Ltd., which gave the loan, being a co-operative bank, the provisions of Sections 95 A and 92 (A) of U.P. Cooperative Societies Act are applicable, which permit the dues of the bank to be recovered as arrears of Land revenue.

Constitution of India, Article 226- Writ petition maintainability – Petitioner earlier filed two different writ petition- same cause of action- non disclosure of material facts- even non compliance of direction issued by High Court- conduct of petitioner- disentitle from any relief.

Held- para 8
The jurisdiction under Article 226 of the Constitution is an equitable jurisdiction. The conduct of the petitioners has not been fair and clean inasmuch as they secured stay of the recovery proceedings at the first instance by giving an undertaking which they did not comply. Then again, they secured a stay order by filing another writ petition concealing the fact of filing of the earlier writ petition. In our opinion, the conduct of the petitioners is such which disentitles them to get any relief from this Court in the present writ petition, which is a third writ petition.

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

1. This writ petition under Article 226 of the Constitution has been filed praying that the citation dated 20.5.2001 issued by the Tahsildar, Jamania, District Ghazipur and also the attachment of properties made on 20.7.2001 be quashed and a direction be issued to the respondents not to auction the properties of the petitioner.

2. We have heard the learned counsel for the petitioner, Sri A.K. Singh for respondent no. 3 and learned Standing Counsel for respondent nos. 1 and 2.

3. The petitioners took a loan of Rs. five lakhs from Urban Cooperative Bank Ltd. Ghazipur, which was sanctioned on 21.7.1990. A citation dated 20.5.2001 has been issued by the Tehsildar, Jamania, Ghazipur, for recovery of Rs. 17,97,345/- . In paragraphs 8 and 12 of the writ petition it is averred that the petitioners had filed two writ petitions earlier, but the copies of orders passed in the aforesaid writ petitions were not been filed. We accordingly passed an order for filing of the copies of the orders passed in the said writ petitions. The petitioner thereafter filed a supplementary affidavit which reveals the following facts.

4. On 11.4.1991 a citation for recovery of Rs. 6,39,498/- was issued against petitioner no. 1. The petitioner no. 1 then filed C.M. Writ Petition No. 15461 of 1991 challenging the said citation which was finally disposed of on 18.11.1991 and the operative portion of the order reads as follows:

"After hearing the learned counsel for the petitioner, we are not inclined to go into the merits of the case as the counsel for the petitioner at a very outset has given an undertaking on behalf of the petitioner that the petitioner is ready to pay the entire dues plus uptodate interest

and half of the recovery charge in case the petitioner is permitted to repay the same in four equal instalments. To this the counsel for the respondent has no objection. The petitioner has further given an undertaking that he has not filed any other writ petition against the recovery, we, therefore, stay the recovery proceedings initiated against him for realisation of outstanding dues provided the petitioner deposits the entire dues in four equal instalments plus uptodate interest and half of the recovery charges. The first instalment shall be payable by 18.1.1992, second instalment by 18,.3.1992 , third instalment by 18.5.1992 and ;the fourth instalment by 18.7.1992.

In case of default in deposit of any of the instalments, within stipulated period, the order staying the recovery proceedings shall stand automatically vacated and it will be open to the respondents to realise the entire amount as arrears of land revenue.

5. The petitioners did not comply with the undertaking given to the court and did not deposit the instalments as directed by the order of this court. It appears that after sometime fresh citation was issued against the petitioners and proceedings for recovering the amount were initiated. The petitioner no. 1 then filed C.M. Writ Petition No. 24451 of 1995 challenging the aforesaid citation. In this writ petition an interim order was passed on 1.9.1995 staying the recovery proceedings. This writ petition was dismissed on 29.2.1996 and the order of the Court reads as follows:

"By means of this petition the petitioners have challenged the impugned recovery issued by the respondent no. 4 in respect of loan taken by the petitioners.

The petitioners earlier filed a writ petition no. 15461 of 1991, which was dismissed by a Bench of the Court on 18.11.1991 with some conditions. The second writ petition is not maintainable particularly since no mention about first writ petition has been made by the petitioners in this petition. The writ petition is dismissed. Interim order if any is vacated."

6. The facts mentioned above show that the petitioners filed C.M. Writ Petition No. 15461 of 1991 challenging the citation issued against them and in the said writ petition an undertaking was given that the entire amount shall be deposited in 4 equal instalments, which were payable by 18.1.1992, 18.3.1992, 18.5.1992 and 18.7.1992, and the proceedings for recovery of the amount were stayed. After securing the stay order the petitioner did not bother to comply with the undertaking given by them and did not deposit any amount as directed by this Court. It is not disputed from the side of the petitioners that till 18.7.1992, the last date fixed by this Court for depositing the last and final instalment, nothing was deposited by them. There was a total non-compliance of the orders passed by this Court, though the proceedings for recovery of the amount as arrears of land revenue had been stayed. When the authorities again initiated proceedings for recovery of the amount by issuing a fresh citation, the petitioners filed another writ petition, being C.M. Writ petition no. 24451 of 1995, concealing the fact of filing of the earlier writ petition. In this latter writ petition, again a stay order was obtained on 1.9.1995 staying the recovery

proceedings. This petition was ultimately dismissed on 29.2.1996. The present writ petition is, thus, a third writ petition filed by the petitioners to forestall the recovery proceedings.

7. Learned counsel for the petitioners has submitted that loan taken by them cannot be recovered as arrears of land revenue. The contention of learned counsel for the respondent no. 3 (bank), however, is that Urban Cooperative Bank Ltd., which gave the loan, being a co-operative Bank, the provisions of Sections 95-A and 92 (a) of U.P. Cooperative Societies Act are applicable, which permit the dues of the bank to be recovered as arrears of land revenue.

8. The jurisdiction under Article 226 of the Constitution is an equitable jurisdiction. The conduct of the petitioners has not been fair and clean inasmuch as they secured stay of the recovery proceedings at the first instance by giving an undertaking which they did not comply. Then again, they secured a stay order by filing another writ petition concealing the fact of filing of the earlier writ petition. In our opinion, the conduct of the petitioners is such which disentitles them to get any relief from this Court in the present writ petition, which is a third writ petition.

9. The writ petition is accordingly dismissed summarily at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.11.2001

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

Civil Misc. Writ Petition No. 34551 of 2001

Dr. Ramesh Chandra Tripathi...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ash Khare
Sri Aditya Kumar Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Service Law- Government official- claimed retention of official accommodation- till payment of pension or conclusion of enquiry- held- such claim illegal, otherwise his successor will deprived from such benefits-

Held- Para 4

We are of the opinion that this judgement does not lay down any such legal proposition that a retired government official is entitled to continue in possession of the official accommodation until he is paid his pension or till the enquiry is completed. In fact if it is held that a retired official is entitled to continue in possession of the official accommodation till payment of pension or completion of enquiry his successor will have no place to live in.

Case law discussed:
W.P. No. 1729/99. Decided on 8.12.99.

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

1. Petitioner has retired as Medical Officer (Ayurvedic) on 31.7.2001. He

wants to retain the official accommodation in his possession till completion of a departmental proceeding against him or till disbursement of pension.

2. In our opinion retention of the official accommodation and completion of any enquiry (or payment of pension) are separate issues. A retired government official cannot insist on retaining the official accommodation till his pension is paid or enquiry completed.

3. Learned counsel for petitioner invited our attention in a case of Dr. Prameshwar Shukla and another Vs. Chancellor Chandra Shekhar Azad University in writ petition No. 1729 of 1999 decided by Lucknow Bench of this Court on 8.12.1999.

4. We have perused the said judgement, copy of which is annexure 13 to the writ petition. We are of the opinion that this judgement does not lay down any such legal proposition that a retired government official is entitled to continue in possession of the official accommodation until he is paid his pension or till the enquiry is completed. In fact if it is held that a retired official is entitled to continue in possession of the official accommodation till payment of pension or completion of enquiry his successor will have no place to live in. Hence we do not agree with the submission of learned counsel for the petitioner.

5. Hence this petition is dismissed. However, we direct that the pension of the petitioner shall be finalised expeditiously preferably within two months from the date of production of a certified copy of this order before the authority concerned and payment accordingly must begin soon thereafter. The enquiry should also be completed expeditiously.
