ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2002

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

Civil Misc. Writ Petition No. 44196 of 2001

Katwaru ...Petitioner
Versus
Special Secretary Industrial Development Anubhag 5 U.P. Govt., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Singh

Counsel for the Respondents:
Sri Ajit Kumar Singh
S.C.

Mines and Minerals (Regulation and Development) Act 1957- read with U.P. Minor Minerals (Concession) Rules 1963- rule 9-A- Preferential Rights- grant of mining lease for sand or morrow or Bajari or Boulder found in river bad- provision for giving preference to certain case, mentioned under the section questioned- full Bench held- Provision of Section 9A and 53 A are ultra vires- Hon'ble Supreme Court in S.L.P. directed to maintain status Quo- Does not mean to grant renewal for another 3 years after expiry of the original lease period.

Held- Para 7

The earlier lease which had been granted in favour of the petitioner on 24.10.1998 expired on 23.10.2001 subsequent to the order of Hon'ble Supreme Court dated 10.9.2001. In terms of the said order, the petitioner became entitled to excavate the mineral even after the decision of the Full Bench on 27.3.2001 till the expiry of his lease. However, the interim order does not mean that he can get a fresh lease in his favour on preferential basis for a further period of 3 years.

Case law discussed
w.p. 256 (MB)/97 decided on 27.03.2001(FB)

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

1. The petitioner was granted a mining lease to excavate sand for a period of 3 years from 28.10.1998 to 29.10.2001. Before the expiry of his lease he made an application on 19.3.2001 for renewal of the lease for a further period of 3 years. The District Officer, Gorakhpur, by his order dated 1.10.2001 sanctioned renewal of lease for a further period of 3 years, which was to expire on 26.10.2004. Virendra Singh, respondent no. 6 moved an application before the State Government that in view of subsequent Government Order dated 22.9.2001, the lease granted in favour of the petitioner on 24.10.1998 could not be renewed for a further period of 3 years. The State Government, thereafter, passed an order on 7.12.2001 by which the operation of the order dated 1.10.2001 passed by District Officer, Gorakhpur was suspended. By the same order, the District Officer was directed to submit his comments on the application moved by Virendra Singh so that further action in the matter may be taken. Thereafter, the District Officer, Gorakhpur, passed an order on 14.12.2001 directing that the petitioner shall not be permitted to excavate sand until further orders as the renewal of lease granted in his favour on 1.10.2001 had been suspended by the State Government. The present writ petition under Article 226 of the Constitution has been filed for quashing the order dated 7.12.2001 of the State Government and the order dated 14.12.2001 of the District Officer, Gorakhpur.

2. In exercise of power conferred by section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, the State Government made the U.P. Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as the Rules). Sand is a minor mineral within the meaning of Rule 2 (7) of the Rules. Rule 3 provides that no person shall undertake any mining operations in any area within the State of any minor mineral to which the Rules are applicable except under and in accordance with the terms and conditions of a mining lease or a mining permit granted under these Rules. Chapter II lays down the procedure for grant of mining lease and Chapter VI lays down the procedure for grant of mining permit. Rule 6 provides for moving an application for grant of a mining lease and Rule 6-A provides that an application for grant of a mining lease and Rule 6-A provides that an application for renewal of mining lease may be made at least six months before the date of expiry of the mining lease. Rule 8 lays down the manner of disposal of an application moved under Rule 6 for grant of a mining lease and under Rule 6-A for renewal of a mining lease. Sub-rule (1) of Rule 9-A, which has a bearing on the controversy in hand, reads as follows:

"9-A. Preferential right of certain persons in respect of sand etc.:- (1) Notwithstanding anything contained in Rule 9, in respect of mining lease for sand or morrum or bajari boulder or any of these in mixed state exclusively found in the river bad, preference shall be given in the following order to a person or group of persons, whether or not incorporated who;

(a) belong to socially and educationally backward classes of citizens, engaged in carrying on the occupation of excavation of sand or morrum as a profession and are resident of the same district in which the lease is applied for; is situate;

(b) have established or intend to establish the aforesaid minor mineral based industry in the State.

Explanation:- For the purpose of clause (a) the persons belonging to socially and educationally backward classes of citizens, engaged in carrying on the excavation of sand or morrum as profession means Mallah, Kewat, Bind, Nishad, Manjhi, Batham, Dhiwar, Themar, Chai, Sorahia, Turha, Raikwar, Kaiwrat, Khulwat, Tiyar, Gaudia, Godia and Kashyap and includes such other persons as are specified as such by the State Government by notification in the Official Gazette."

3. The petitioner, Katwaru, belongs to one of the castes mentioned in the explanation and, therefore, he is entitled to the benefit of Rule 9-A of the Rules. It is not in dispute that the original lease granted in his favour on 24.10.1998 and which expired on 23.10.2001 had been granted in view of his preferential right under Rule-9-A of the Rules. The constitutional vires of Rule 9-A and Rule 53-A of the Rules was challenged in Writ Petition No. 256 (M/B) of 1997 (Ram Chand Versus State of U.P. and another) and the matter was referred to a Full Bench. The Full Bench by the judgment and order dated 27.3.2001 held that Rules 9-A and 53-A are ultra vires to the Constitution of India and the provisions of Mines and Minerals (Regulation and Development) Act, 1957. Thereafter, the State Government issued a Government Order on 13.6.2001, copy of which has

been filed as Annexure-6 to the writ petition Para 3 of this Government Order lays down that there would be no restrain or embargo on the mining leases which had been sanctioned executed before 27.3.2001. It further provided that there is no prohibition in entertaining applications for renewal of mining leases where the question of grant of preference does not arise. The State Government also filed Special Leave Petition in Hon'ble Supreme Court challenging the decision of the Full Bench in Writ Petition No. 256(M/B) of 1997. It is stated in para 14 of the writ petition that on 10.9.2001, the following order was passed:

"Permission to file S.L.P. allowed.

Since the validity of rule 9-A and 53-A is subject matter of consideration in this bunch of cases. Leave granted.

Status quo as on today be maintained.
Intervention applications are allowed."

4. Thereafter, the State Government issued another Government Order on 22.9.2001 to the effect that in view of the order passed by the Hon'ble Supreme Court, status quo be maintained.

5. Sri S.P. Singh, learned counsel for the petitioner has assailed the impugned orders on the ground that in view of the order passed by Hon'ble Supreme Court for maintaining status quo the right of the petitioner to have his mining lease renewed cannot be taken away and, therefore, the impugned order of the State Government and also of the District Officer, Gorakhpur, is illegal.

6. The petitioner claimed preferential right for grant of a mining lease under Rule 9-A of the Rules as he belongs to a caste which is enumerated in explanation appended to sub-rule 1 thereof. He was granted a mining lease on a preferential basis on 24.10.1998 for a period of 3 years. The period of his lease expired on 23.10.2001. Prior to the expiry of the lease, the Full Bench of this Court by the judgment and order dated 27.3.2001 struck down Rule 9-A of the Rules as being violative of the Constitution of India and the provisions of Mines and Mineral (Regulation and Development) Act, 1957. In view of the this decision, the petitioner cannot claim any preferential right to get a mining lease. Rule 6-A of the Rules no doubt provides for renewal of a mining lease but the effect of renewal of a mining lease which had been granted on preferential basis would be that a right acquired under Rule 9-A on preferential basis would be perpetuated or get a fresh lease of life for a further period of 3 years. The copy of the order passed by the District Officer on 1.10.2001 shows that the renewal had been granted on the same terms and conditions on which the original lease had been granted and in addition some other conditions of miner nature has also been imposed. The effect of the renewal would be that the mining area would continue to be operated by a person on the basis of a preferential right with effect from 24.10.2001, though the very foundation of a preferential right as provided under Rule 9-A of the Rules has disappeared after the decision of the Full Bench on 27.3.2001 when the said provision was declined to be ultra vires. Therefore, any one who had got a mining lease on preferential basis under Rule 9-A of the Rules cannot claim

renewal of his lease under Rule 6-A after the decision of the Full Bench.

7. Sri Singh has submitted that Hon'ble Supreme Court has granted special leave against the decision of the Full Bench on 10.9.2001 and has also passed an order of maintaining status quo and, consequently, the right of the petitioner to get his mining lease renewal under Rule 6-A continued to exist. We are unable to accept the contention raised. It is noteworthy that the Hon'ble Supreme Court has not stayed the operation of the judgment and order dated 27.3.2001 passed by the Full Bench. Had the operation of the judgment and order been stayed, the provisions of Rule 9-A of the Rules which provide for grant of a preferential right would have remained in existence on the statute book. The interim order only directs that "status quo as on today be maintained." In our opinion, the effect of this order is that the leases already granted under Rule 9-A of the Rules would not be effected and the lessees would continue the right to excavate the mineral till the expiry of the lease. The interim order would only protect the existing leaseholders. After the order of renewal of lease is passed, a fresh lease has to be executed again and fresh rights are created in favour of the lessees. The order of maintaining status quo cannot mean that such lessees who had got the right on preferential basis under Rule 9-A would also get a right to have a fresh lease executed in their favour which would confer them right to excavate the mineral for a further period of 3 years with effect from a date subsequent to the date on which the order of maintaining status quo was passed namely, 10.9.2001. The earlier lease which had been granted in favour of the petitioner on 24.10.1998 expired on 23.10.2001 subsequent to the order of Hon'ble Supreme Court dated 10.9.2001. In terms of the said order, the petitioner became entitled to excavate the mineral even after the decision of the Full Bench on 27.3.2001 till the expiry of his lease. However, the interim order does not mean that he can get a fresh lease in his favour on preferential basis for a further period of 3 years.

8. Sri S.P. Singh has next submitted that the District Officer having passed an order on 1.10.2001 for renewal of lease in his favour, the said order could not be suspended without giving him an opportunity of hearing. In our opinion, the contention raised is wholly misconceived. The impugned order has been passed in view of the decision of the Full Bench. The result thereof is that Rule 9-A no longer remains on the statute book and, consequently, the petitioner who had got the mining lease on the basis of the said provision, cannot claim to have his lease renewed for a further period of 3 years. In these circumstances, there was hardly any occasion to give an opportunity of hearing to the petitioner. It is noteworthy that after the order dated 1.10.2001 had been passed by the District Officer, the petitioner had moved an application praying that the requisite agreement be executed in his favour (Annexure-11 to the writ petition). But no agreement had in fact been executed and, thus, no rights had accrued to him.

9. Sri Singh has lastly urged that the Government Order dated 22.9.2001 is discriminatory inasmuch as it only prohibits renewal of such leases of such persons who had been initially granted leases on preferential basis under Rule 9-A but it does not prohibit renewal of other

leases. The contention has hardly any merit. The Full Bench has merely struck down Rule 9-A of the Rules which provide for grant of a mining lease on preferential basis and naturally this decision can only effect the right of renewal of only those persons who owe their existence to a preferential right under Rule 9-A of the Rules. The decision cannot effect those who had got mining leases without claiming any preferential right and naturally the benefit of Rule 6-A which provides for renewal of a mining lease would still be available to such category of persons. The question of discrimination, therefore, does not arise.

10. It may also be mentioned here that the impugned order passed by the State Government on 7.12.2001 and the order dated 14.12.2001 passed by the District Officer have merely suspended the operation of the order by which the prayer of the petitioner for renewal of lease had been granted. The last part of the order passed by the State Government shows that comments have been called far from the District Officer to enable it to take further decision in the matter. Being merely an order of suspension, it is not at all a fit case where this Court should exercise discretion under Article 226 of the Constitution at this stage.

11. For the reasons mentioned above, we do not find any merit in the writ petition, which is hereby dismissed summarily at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18 JANUARY, 2002

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

Civil Misc. Writ Petition No. 44340 of 2000

Shahjahan Khan ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Rakesh Bahadur
Sri R.C. Deepak

Counsel for the Respondents:
S.C.

Government Conduct Rules 1956 Rule 29-(i) Dismissal order- a Police Constable- despite of having living wife started leaving with another woman for the last 7 months-Tribunal found second marriage not proved-held- not amount to misconduct of bigamy- considering modern time- change of value- old can not import old ideas into modern time- dismissal order quashed.

Held - Para 5,6 and 12

In our opinion merely because a man lived with a woman it does not mean that he is married to her. Unless the evidence proves the second marriage it cannot be inferred that merely because the petitioner lived with Champa Devi for seven months he was married to her. In paragraph 13 of its judgment the 'Tribunal has stated that though the second marriage is not strictly proved by the evidence yet it is an act unbecoming of a Government servant. In our opinion Rule 29 of the Government Conduct Rules will only apply if there was a second marriage i.e. bigamy. Since the Tribunal itself has held that the second marriage was not proved we fail to

understood how the petitioner could have been held guilty of bigamy. This may be regarded immoral by society but it is not illegal. We may mention there is difference between law and morality as the British jurist, Bentham and Austin pointed out. Hence, merely because the petitioner lived with a woman voluntarily who was not his wife for seven months this in our opinion does not amount to the misconduct of bigamy, as there was no marriage. In the modern times values have changed, and we cannot import old ideas into modern case.

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

1. This writ petition has been filed against the impugned order of the U.P. Public Service Tribunal dated 31.7.2000 (Annexure-1 to the petition) and the order dated 8.7.88 (Annexure-8 to the petition) and the order dated 30.9.89 (Annexure-10 to the petition).

2. The petitioner was appointed as a Constable in Uttar Pradesh on 14.2.77. It is alleged that his work and conduct was good and there was no adverse entry against him. On 21.9.85 the petitioner was suspended and a charge-sheet served on him on 21.3.87 vide Annexure-2 to the petition. The petitioner sent a reply (copy of which is Annexure-3 to the petition). Thereafter an enquiry was held and after show cause notice he was dismissed on 1.7.88 vide Annexure-8 to the petition. The petitioner filed an appeal, which was dismissed on 30.8.89, vide Annexure-10 to the petition. The petitioner then went to the Tribunal, which rejected his claim petition. Hence this writ petition.

3. A large number of points have been raised in this petition but in our opinion the first argument itself is sufficient to allow this petition and hence we are not going into the other arguments of learned counsel for the petitioner.

4. The charge against the petitioner as seen from the chargesheet is that although he had a married wife, he lived with one Champa Devi for seven months and this was in violation of Rule 29 to the Government Conduct Rules which prohibits bigamy.

Rule 29 (1) of the U.P. Government Servant Conduct Rules, 1956 states:

"No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent servant is permissible under the personal law for the time being applicable to him"

5. In our opinion merely because a man lived with a woman it does not mean that he is married to her. Unless the evidence proves the second marriage it cannot be inferred that merely because the petitioner lived with Champa Devi for seven months he was married to her. In fact Champa Devi had filed a case under section 376/366 I.P.C. against the petitioner but the petitioner was acquitted in that criminal case vide judgment dated 11.9.86 (Annexure-11 to the petition).

6. In paragraph 13 of its judgment the Tribunal has stated that though the second marriage is not strictly proved by the evidence yet it is an act unbecoming of a Government servant. In our opinion Rule 29 of the Government Conduct Rules will only apply if there was a second marriage i.e. bigamy. Since the Tribunal itself has held that the second marriage was not proved we fail to

understood how the petitioner could have been held guilty of bigamy.

7. The Tribunal has relied on the decision of the Supreme Court in Ministry of Finance v. S.B. Ramesh 1998(3) SCC 227 we have carefully perused the aforesaid decision and in our opinion the same is distinguishable.

8. In paragraph 8 of the aforesaid decision the Supreme Court has quoted the following observations of the Tribunal:-

"Though it would be ideal if sexual relationship is confined to legal wedlock, there is no law in our country which makes sexual relationship of two adult individuals of different sex, unlawful unless the relationship is adulterous or promiscuous. If a man and a woman are residing under the same roof and if there is no law prohibiting such a residence, what transpires between them is not a concern of their employer".

9. The Supreme Court in paragraph 9 of its judgment has merely said that it disapproves the above observation of the Tribunal. However, no reasoning has been given in the aforesaid decision of the Supreme Court as to why it disapproved the above observations of the Tribunal. It is a settled principle that a decision is an authority for the principle of law it has laid down vide AIR 1975 S.C. 1087, AIR 1990 S.C.781, AIR 1983 S.C. 1246(61), 1996 (6) S.C.C. 44 and AIR 1985 S.C. 218. Hence, the aforesaid decision is clearly distinguishable:

10. It may be mentioned that the misconducts for which a Government servant can be punished are stated in the U.P. Government Servants, Conduct Rules. In our opinion unless an act is regarded as a misconduct under the relevant service rules no punishment can be given for it.

11. In **Pravina Solanki v. State of U.P. (2001 (2) ESC 719)** this Court held that unless an employee does some act which interferes with his/her official function then ordinarily whatever he/she does in his/her private life cannot be regarded as misconduct.

12. This Court in **Payal Sharma v. Nari Niketan AIR 2001 Allahabad 254** has held that a man and woman can live together if they wish without marrying. This may be regarded immoral by society but it is not illegal. We may mention there is difference between law and morality as the British jurist Bentham and Austin pointed out. Hence, merely because the petitioner lived with a woman voluntarily who was not his wife for seven months this in our opinion does not amount to the misconduct of bigamy, as there was no marriage. In the modern times values have changed and we cannot import old ideas into modern times.

13. For the reasons given above this writ petition is allowed.

14. The impugned order of the Tribunal dated 31.7.2000 as well as the order dated 8.7.88 and 30.9.89 are quashed. The petitioner will be reinstated within a month from the date of production of a certified copy of this order before the authority concerned and shall be given back salary from the date of suspension till the date of reinstatement within two months with 12% interest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31ST JANUARY, 2002

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 1056 of 2002

Faujdar ...Petitioner
Versus
Deputy Director of Consolidation, Azamgarh and others ...Respondents

Counsel for the Petitioner:
Sri Ram Niwas Singh
Sri V.K.S. Chandel

Counsel for the Respondents:
S.C.

U.P. Consolidation of Holdings Act-1953- Section 48- Power Revision- whether the Dy. Director of consolidation can entertain the Revision directly against appealable order? Held- in view of difference of decisions of different Single Judges- let the question be referred before larger bench.

Held- Para 14

From the above discussion, it is clear that although the language of Section 48 is in very wide term and does not admit any exception to the effect that the power of revision cannot be invoked against an appealable order passed by the Consolidation Officer if the appeal has not been filed but in view of conflicting views of different learned Single Judges on the aforesaid controversy it has become necessary to refer this matter to Hon'ble the Chief Justice for constituting a larger Bench to resolve the conflict between the conflicting decisions of different Learned Single Judges of this Court.

Case law discussed
1995 RD-534
1998 (89) RD 578
1999 (90) RD 363
2000 RD-608

(Delivered by Hon'ble Ashok Bhushan, J.)

1. One of the questions which has arisen in the writ petition is as to whether the Deputy Director of Consolidation while exercising jurisdiction under Section 48 of the U.P. Consolidation of Holdings Act, 1953 (hereinafter to be referred as "the Act") can directly hear the revision against an order passed under section 9A of the Act. The submission of the counsel for the petitioner Sri R.N. Singh is that the Deputy Director of Consolidation has no jurisdiction to entertain a revision under Section 48 of the Act directly against the order passed under Section 9A. He has submitted that there is provision of appeal under Section 11 of the Act hence revision can neither be filed nor can be entertained by the Deputy Director of Consolidation. In support of his submission the counsel for the petitioner has placed reliance on the following decisions:-

1. 1995 R.D. Page 534 **Damodar Prasad** vs. **Deputy Director of Consolidation, Allahabad and others**.

2. 1998 (89) R.D. page 578 **Santosh Kumar and others** vs. **U.P. Sanchalak Chakbandi, Faizabad and others**.

3. 1999 (90) R.D. page 363 **Ranjeet and others** vs. **Deputy Director of Consolidation Ballia and others**.

4. 2000 R.D. page 608 **Hari Har Ram** vs. **Deputy Director of Consolidation Ballia and others**

5. Judgment dated 28.9.1999 passed in writ petition No.26527 of 1999 **Rama Shanker Singh and others** vs. **Deputy Director of Consolidation, Varanasi and another**.

2. In **Damodar Prasad's case (supra)** learned single Judge has taken the view that an order passed under Section 9-B being appealable even challenged in revision without availing of the remedy of appeal, could be destructive of a remedy under the Act. Paragraph 6 of the aforesaid judgment is extracted below:-

"6. It may also be pertinent to observe that an order under Section 9-B being appealable, its challenge in revision without availing of the remedy of appeal would be destructive of a remedy under the Act. The order dated 21.02.1990 was certainly an order under Section 9-B of the U.P. Consolidation of Holdings Act. The jurisdiction under Section 48 of the Act ought not to be exercised in a manner which may be destructive of a statutory remedy. This aspect of the matter also needs to be examined at the end of the Deputy Director of Consolidation."

3. In **Santosh Kumar's (supra)** it was held by the learned single Judge that the revision should not have been entertained directly by the Deputy Director of Consolidation. It was held by the learned Single Judge in the judgment:-

"It has been urged by the learned counsel for the petitioners that although language of Section 48 is very wide which empowers the Deputy Director of Consolidation to revise any order and the proceedings taken by any subordinate authority and may call for the record for satisfying as to the regularity of the proceedings or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings, may, after allowing parties concerned of being heard, make such order in the case or proceedings as he thinks fit but Section 11 of the said Act which is applicable to the proceedings under Section 12 provides an appeal against the orders passed by the Consolidation Officer and therefore, revision should not have been entertained directly by the Deputy Director of Consolidation. In view of the above, it is directed that the Deputy Director of Consolidation shall not dispose of the said revision preferred by opposite party No. 2 and shall direct him to prefer an appeal under Section 11 of the Consolidation of Holdings Act."

4. In **Ranjeet's case (supra)** again the learned Single Judge took the view relying on the case of Santosh Kumar that challenge in revision under Section 48 of the Act without availing the remedy of appeal is destructive of statutory remedy. It was held in paragraph 6 of the judgement:-

"6. The facts of these three cases relied upon by the learned counsel for the respondent No. 2 are different, in all these three cases the appeal before the Settlement Officer was not pending, in the instant case, as seen above the appeal and cross- appeals were pending before the Settlement Officer (Consolidation), the petitioners specifically urged before the Deputy Director of Consolidation that in view of the pendency of the appeal, the revision was not maintainable. The present case is a case where the jurisdiction exercised by the Deputy Director of Consolidation is destructive of

the statutory remedy of appeal and it is a fit case which calls for interference in petitions under Articles 226/227 of the Constitution of India."

5. In Hari Har Ram and Ram Shanker Singh's cases learned Single Judge of this Court took the view that the order passed by the Deputy Director of Consolidation in revision preferred directly against the order of the Consolidation Officer, is not maintainable.

6. Section 48 of the U.P. Consolidation of Holdings Act as it was originally enacted provided:-

"Section 48 (Revision):- The Director of Consolidation may call for the record of any case if the Officer, (other than the arbitrary) by whom the case was decided, appears to have exercised a jurisdiction not vested; in whom by slaw or to have failed to exercise jurisdiction so vested, or to have acted in exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it may think fit."

7. After several amendments finally Section 48 was substituted by U.P. Amendment Act No. VIII of 1963. Section 48 as it now stands in the statute book provides:-

"48. Revision and reference, ---- (1) The Director of Consolidation may call for an examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order (other than interlocutory order) passed by such authority in the case of proceedings and may, after allowing the parties concerned an opportunity of being heard, make such order in the case of proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub section (3)

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation (1) For the purposes of this section, Settlement Officers of Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2) For the purposes of this section the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceedings or collateral thereto as does not have the effect of finally disposing of such case or proceeding."

8. Looking to the plain and simple language of Section 48 sub-section (1) which provides that the Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority makes it clear that this Section empowers the Director of Consolidation to revise orders passed by any subordinate

authority. The explanation (1) of Section 48 provides that for the purpose of this Section Settlement Officers of Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation. Thus Section 48 (1) read with Explanation (1) clearly contemplate the power of revision with Deputy Director against any case decided or proceedings taken by any subordinate authority as explained in Explanation (1). The provision of Section 48 as amended clearly contemplate exercise of power of revision by Director against the order of any subordinate authority without any exception. The Division Bench of this Court in 1972 R.D. page 80 **Mst. Kailashi** vs. **Dy. Dir. of Consolidation and others** held that Section 48 of the U.P. Consolidation of Holdings Act confers power upon the Deputy Director of Consolidation to reach on facts and law every kind of order passed by any subordinate consolidation authority. The Division Bench held that:-

"The Consolidation Officer condoned the delay in filing an objection under Section 9, U.P. Consolidation of Holdings Act, the other side feeling aggrieved filed a revision. The Deputy Director went into the merits and held that there was no sufficient explanation for the delay. On this ground he allowed the revision and set aside the order condoning the delay. Learned counsel for the applicant has urged that the Deputy Director had no jurisdiction to go into the merits of the application for the condonation of delay. Section 48 of the U.P. Consolidation of Holdings Act confers powers upon the Deputy Director to reach on facts and law every kind of order passed by a subordinate consolidation authority. The order condoning the delay was subject to the revisional powers under Section 48 of the Act."

9. The above observations of the Division Bench supports the view that the Deputy Director of Consolidation can revise every order passed by any subordinate consolidation authority. Learned counsel for the petitioner submitted that the observations of the Division Bench in the above case is only obiter. He has submitted that the question which has been raised in the present writ petition was not before the Division Bench hence the Division Bench cannot be held to be authority for the proposition. He has submitted that the order condoning the delay in filing objection under Section 9 does not fall within the scope of order under Section 9 or 10 and was not an appealable order hence the Deputy Director interfered in the aforesaid order. He submitted that the said judgment is not an authority for the proposition that even if the order under Section 9 is appealable, revision can be entertained.

10. There are series of decisions of this Court by various single Judges taking the view that the revision is not maintainable under Section 48 of the Act before the Deputy Director of Consolidation directly against an order passed by the Consolidation Officer. In following judgments different learned Single Judges of this Court has taken the aforesaid view:-

1. 1979 R.D. page 308 **Ram Das and another** vs. **Deputy Director of Consolidation and others**.

2. 1982 R.D. page 78 **Hori Lal** vs. **Deputy Director of Consolidation, Allahabad and others.**

3. 1985 All.L.J. 1343 **Ram Saran** vs. **Assistant Director of (Consolidation) and others**.

4. 1990 R.D. page 160 **Ram Surat and others** vs. **Gram Sabha, Nagar, Haraiya Mirzapur and others.**

11. In **Ram Das's case** (supra), the learned Single Judge of this Court held that normally revision should not be filed directly against an order if appeal lies but there is no bar express or implied either under section 21 or under section 48 prohibiting the direct revision. It was held in the aforesaid judgment:-

"The order was also challenged as being without jurisdiction as the opposite party did not prefer any appeal against the order of the Consolidation Officer. It is true that normally revision should not be filed directly against an order, if appeal lies, but there is no bar express or implied either under Section 21 or Section 48 prohibiting a direct revision. Even the rule 111 which provides limitation for filing revision; lays down that 'an application under Section 48 shall be presented by the applicant or his duly authorized agent to the District Deputy Director of Consolidation within 50 days of the order against which the application is directed. It removes any doubt if there be any, and permits filing of revision against any order."

12. In the case of **Hori Lal** (supra) it was held that the Director of Consolidation if he finds on facts and circumstances of the case that the order passed by the Consolidation Officer or Assistant Consolidation Officer suffers from any maifest error of law he can very well interfere with such order in exercise of powers under Section 48 (1).

13. In **Ram Saran's** case (supra) the learned Single Judge has elaborately considered the effect of amendment made in Section 48 by U.P. Act No. VIII of 1963 it was held in the aforesaid case in paragraphs 6,10 and 11:-

"6. Thus, in my opinion, a person, ever if he is not a party in the proceedings but is aggrieved by an order passed under S. 9-A of the Act can invoke the revisional jurisdiction of the Deputy Director of Consolidation even without filing an appeal against the order. The Deputy Director of Consolidation, after summonsing the record and giving opportunity of hearing to the parties would pass such orders as may be deemed fit and proper on the facts and circumstances of the case. In this view of the matter I find that the revision filed by the petitioner against the impugned order dated 17.3.1982 passed by the Assistant Consolidation Officer was maintainable and the Deputy Director of Consolidation erred in rejecting the revision as not maintainable on the erroneous ground that the petitioner has not filed appeal against that order.

10. It, therefore, appears to me that the revision filed by the petitioner could not be thrown out merely on the ground that he had not filed an appeal against the impugned order dated 17.9.1982 passed by the Consolidation Officer. Similar question cropped up for consideration before me in writ petition no. 2202 of 1976, Ram Ajore v. Deputy Director of

Consolidation, decided on 14.10.1981: 1982 All.L.J. 1160, wherein it was held that a revision can be filed by the aggrieved party under Section 48 of the Act without preferring an appeal before the Settlement Officer of Consolidation against that order; See also 1982 All. Learned Single Judge 223 Hori Lal v. Deputy Director of Consolidation, Allahabad. Similar view was taken by K.P. Singh, J. in Smt. Taluka Devi v. Assistant Director of Consolidation, Azamgarh, 1981 RD 120. In another decision Ram Das v. Deputy Director of Consolidation 1979 All. W. 513; (1979 All. L.J. 761) R.M. Sahai, J. also took similar view.

11. It is, thus, well settled that revisional jurisdiction can be invoked by the aggrieved party even without filing an appeal, and as such, the Deputy Director of Consolidation, in my opinion, committed grave error of jurisdiction in dismissing the revision filed by the petitioner on the aforesaid erroneous ground."

14. From the above discussion, it is clear that although the language of Section 48 is in very wide term and does not admit any exception to the effect that the power of revision cannot be invoked against an appealable order passed by the Consolidation Officer if the appeal has not been filed but in view of conflicting views of different Learned Single Judges on the aforesaid controversy it has become necessary to refer this matter to Hon'ble the Chief Justice for constituting a larger Bench to resolve the conflict between the conflicting decisions of different Learned Single Judges of this Court. Following are the questions which need consideration by the larger Bench.

A. Whether the Deputy Director of Consolidation can exercise revisional jurisdiction under section 48 against the appealable order passed by the Consolidation Officer where no appeal has been filed?

B. Whether the decisions of learned Single Judges in:-

1. 1995 R.D. page 534 **Damodar Prasad** vs. **Deputy Director of Consolidation, Allahabad and others**.

2. 1998 (89) R.D. page 578 **Santosh Kumar and others** vs. **U.P. Sanchalak Chakbandi, Faizabad and others**.

3. 1999 (90) R.D. page 363 **Ranjeet and others** vs. **Deputy Director of Consolidation Ballia and others**.

4. 2000 R.D. page 608 **Hari Har Ram** vs. **Deputy Director of Consolidation Ballia and others**.

5. Judgment dated 28.9.1999 passed in writ petition No.26527 of 1999 **Rama Shanker Singh and others** vs. **Deputy Director of Consolidation, Varanasi and another**.

lays down correct law or the view taken by the learned Single Judge in following cases lay down the correct law?

1. 1979 R.D. page 308 **Ram Das and another** vs. **Deputy Director of Consolidation and others**.

2. 1982 R.D. page 78 **Hori Lal** vs. **Deputy Director of Consolidation, Allahabad and others**.

3. 1985 All.L.J. 1343 **Ram Saran** vs. **Assistant Director of (Consolidation) and others.**

4. 1990 R.D. page 160 **Ram Surat and others** vs. **Gram Sabha, Nagar, Haraiya Mirzapur and others.**

Let the record of this writ petition be placed before the Hon'ble Chief Justice for constituting a larger Bench.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 4.2.2002

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

Habeas Corpus Writ Petition No. 38414 of 2001

Rakesh Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri I.M. Khan

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

Constitution of India, 226- Detention order- challenged on the ground of 5 days delay in deciding the representation- Petitioner usurped the Gaon Sabha Land - depriving general Public from use- held- effecting Public life. Detention order is proper.
Held- Para 5
Learned counsel for the petitioner submitted that it is a case of law and order and not public order. We do not agree with this submission. Apparently the petitioner with his associates had grabbed the Gram Sabha property and the deceased was trying to get it released. It is well known that in Uttar Pradesh almost the entire land of the Gram Sabha has been grabbed by the people having muscle power and money. The land of the Gram Sabha is meant to be used for serving the people of the village, particularly the poor people by setting up a school or dispensary or cold storage or for some other such purpose, but instead people with power or money have grabbed the entire land of the Gram Sabha and the result is that the poor people of the Villages are deprived of the use of such land.

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

Heard learned counsel for the parties.

1. The petitioner has challenged the impugned detention order dated 23.8.2001 Annexure-1 to the petition passed under the N.S.A. A perusal of the grounds of detention shows that it is alleged that on 27.6.2001 the petitioner and his two associates at about 4.30 P.M. shot dead one Sunil Kumar Singh on National High Way because Sunil Kumar Singh was objecting to the petitioner getting the two ponds of the Gram Sabha released and had been doing pairvi to get the illegal possession of the petitioner over the said ponds vacated. Litigation was going on in this connection in various courts. The petitioner after the murder went with a revolver in his hand firing in the air to create panic and terror in the public on the road, and due to terror in the locality the shopkeepers closed their shops. The residents of the village ran to their fields and starting running here and there. There was terror in the area. There are allegations that the petitioner had earlier committed several crimes under various provisions of the Indian Penal Code

including crimes under Sections 302, 307 I.P.C. etc.

2. A counter affidavit has been filed by the District Magistrate in which it has been stated that the District Magistrate was fully satisfied and when it was found necessary only then the preventive action was taken against the petitioner under the National Security Act because the activities of the petitioner had created terror and panic in the area.

3. A counter affidavit has also been filed by the Deputy Jailor about the representation submitted by the petitioner. Learned counsel for the petitioner submitted that the name of one Indra Sen has been introduced in the first information report which was subsequently removed and in his place the name of his younger brother Ugra Sen has been introduced. This has been explained in Para 7 of the counter affidavit of the District Magistrate wherein it has been stated that this mistake occurred due to hurry. At any event the petitioner is neither Ugra Sen Singh nor Indra Sen Singh and hence that mistake will not affect the case against the petitioner.

4. Learned counsel for the petitioner has submitted that there was 8 days delay in deciding the representation. We are of the opinion that the law of habeas corpus should not be made over technical. Delay of 8 days or so some times take place in deciding the representation but that delay in our opinion will not necessarily vitiate the detention order. That will depend on the facts of each case. The representation was submitted on 30.8.2000 which was received in the office of the District Magistrate on 31.8.2000 who called for a report from the police on 1.9.2000. On receipt of the police report, the District Magistrate sent the papers to the State Govt. which was received by the State Govt. on 3.9.2000 (vide paragraph 10 of the counter affidavit of the District Magistrate) and that was sent to the Advisory Board on 4.9.2000. On 5.9.2000 it was forwarded to the State Govt. and the State Govt. submitted it to the Secretary and the Secretary after examination sent it to the State Government and it was rejected on 8.9.2000. Thus there is no delay as submitted by the learned govt. counsel.

5. Learned counsel for the petitioner submitted that it is a case of law and order and not public order. We do not agree with this submission. Apparently the petitioner with his associates had grabbed the Gram Sabha property and the deceased was trying to get it released. It is well known that in Uttar Pradesh almost the entire land of the Gram Sabha has been grabbed by the people having muscle power and money. The land of the Gram Sabha is meant to be used for serving the people of the village, particularly the poor people by setting up a school or dispensary or cold storage or for some other such purpose, but instead people with power or money have grabbed the entire land of the Gram Sabha in U.P. and the result is that the poor people of the Villages are deprived of the use of such land.

We are clearly of the view that the incident relates to public order as it created panic and terror in the locality and the petitioner was illegally trying to resist efforts to release the Gram Sabha land grabbed by him. Thus there is no force in this petition and it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.2.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.6902 of 2002

Balram ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri N.K. Trivedi
Sri O.P. Tripathi

Counsel for the Respondents:
Sri Prakash Krishan
S.C.

Constitution of India, Article 226- Recovery of Public money-the guarantor and the Chief debtor both are equally liable. It is sole discretion of creditor to proceed either of them- but No recovery charges shall be realized.

Held- Para 3

Learned counsel for the petitioner has submitted that respondents nos. 2 and 3 should first proceed against the Principal debtor before proceeding against the guarantor. There is no such requirement in law, and hence we cannot give any such direction. It is the discretion of the creditor whether to proceed against the Principal debtor or the guarantor, we, however, direct that no recovery charges shall be realized from the petitioner.

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

1. Heard Sri N.K. Trivedi, learned counsel for the petitioner and Sri Prakash Krishan, learned counsel for the respondents.

2. The petitioner has challenged the impugned recovery certificate dated 22.1.2002. The petitioner is a guarantor of the loan granted to Shiv Pal Singh by respondent no. 3. It is well settled that the liability of the guarantor is co-extensive with that of the principal debtor. Hence we cannot interfere with the impugned recovery.

3. Learned counsel for the petitioner has submitted that respondents nos. 2 and 3 should first proceed against the Principal debtor before proceeding against the guarantor. There is no such requirement in law, and hence we cannot give any such direction. It is the discretion of the creditor whether to proceed against the principal debtor or the guarantor. We, however, direct that no recovery charges shall be realized from the petition.

4. With the aforesaid observations, the writ petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R. TIWARI, J.

Civil Misc. Writ Petition No. 8248 of 2002

Shambhu Dayal ...Petitioner
Versus
Union of India through Cabinet Secretary and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Singh
Sri Vijay Sinha
Sri P.S. Bhagel

Counsel for the Respondents:
Sri Ajeet Kumar

S.C.

Central Administrative Tribunal Act 1985- Section 6 (2)- Appointment of Vice-Chairman in the CAT- only those mentioned in Section 6 (i) of the Act having legal back ground- should be appointed. The Secretary or executive member can be appointed for short time-stop gap arrangement- only when the judicial back ground the official are not available.
Held- Para 9
However we are certainly of the opinion that the Vice- Chairman must be a person with a legal background since the person who presides over a bench must inspire confidence in the public. The very object of Article 50 will be subverted, in our opinion, if the Presiding Officer is a person from the executive. The Directive Principles in Constitution cannot be treated as merely ornamental, as held by the Supreme Court in Keshavnanda Bharati v. State of Kerala 1973, (4) SCC 225, Minerva Mills v. Union of India 1980 SC 1789 and Unnikrishnan v. State of A.P. 1993 SC 2178. In our opinion the persons who have been a Secretary or Additional Secretary of the Govt. of India can only be appointed as Vice Chairman in exceptional circumstances if no person with a legal background as mentioned in Clause (a) of Section 6 (2) is available and even in this situation such appointment can only be a stop gap arrangement for a short period till the person mentioned in Clause (a) of Section 6 (2) become available.
Case law discussed:
AIR 1998 SC-1233
1973 (4) SCC-225
AIR 1980 SC-1789
AIR 1993 SC 2178

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

1. Heard Sri V.B. Singh learned Senior Advocate and Sri P.S. Bhagel Advocate for petitioner, and learned counsel for the Central Govt.

2. Learned counsel for respondent prays for and is granted 3 weeks to file counter affidavit.

Issue notice to respondent nos. 4,5 and 6 returnable at an early date.

3. List peremptorily on 24.3.2002 on which date the petition may be finally disposed off.

4. The petitioner has prayed for quashing the panel prepared for the posts of Vice Chairmen in various benches of the Central Administrative Tribunal (hereinafter referred to as CAT).

Section 6 (2) of the Administrative Tribunals Act, 1985 states:

"A person shall not be qualified for appointment as the Vice Chairman unless he is, or has been (or is qualified to be) a Judge of a High Court; or

(a) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India, or

(b) has for at least five years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of an Additional Secretary to the Government of India; or

(c) has, for a period of not less than three years, held office as a Judicial Member or an Administrative Member."

5. At first glance a perusal of the above provision gives the impression that even a Secretary or Additional Secretary to the Govt. of India can be appointed as Vice Chairman. However, we are of the opinion that Section 6 (2) cannot be read in isolation but it must be read alongwith Article 50 of the Constitution, which states:

"Separation of judiciary from executive- The State shall take steps to separate the judiciary from the executive in the public services of the State"

6. The object of Article 50 of the Constitution was that there should be separation of the judiciary from the executive so that there may be an independent judiciary in which alone the public can have confidence. This view is also supported by the decision of the Supreme Court in State of Maharashtra Vs. Labor Law Practitioners Association and others, AIR 1998 S.C. 1233.

7. In our prima facie opinion the Vice Chairman of CAT can only be a sitting or retired High Court Judge or an Advocate who is qualified for appointment as a High Court Judge.

8. A person who has been in executive service for 20 to 30 years naturally develops a pro-executive approach and his thinking process becomes coloured thereby. However, since the CAT is a judicial body that has to decide judicial matters it must function as an independent body, as that alone can inspire the confidence of the public. A person who comes from a legal background has an independent mind, whether he is or has been a High Court judge or an advocate having more than 10 years practice.

9. We are not expressing any opinion on the point whether a member of the Tribunal should also be a person with a legal background. However we are certainly of the opinion that the Vice Chairman must be a person with a legal background since the person who presides over a bench must inspire confidence in the public. The very object of Article 50 will be subverted, in our opinion, if the Presiding Officer is a person from the executive. The Directive Principles in the Constitution cannot be treated as merely ornamental, as held by the Supreme Court in Keshavananda Bharti V. State of Kerala 1973, (4) S.C.C. 225, Minerva Mills V. Union of India 1980 S.C. 1789 and Unnikrishnan V. State of A.P. 1993 S.C. 2178. In our opinion the persons who have been a Secretary or Additional Secretary of the Govt. of India can only be appointed as Vice Chairman in exceptional circumstances if no person with a legal background as mentioned in clause (a) of Section 6 (2) is available, and even in this situation such appointment can only be a stop gap arrangement for a short period till the person mentioned in Clause (a) of Section 6 (2) become available.

10. We make it clear that we are not making any derogatory comment on members of the executive, many of whom are doing their duty excellently and honestly. We are only concerned with the confidence of the public in the judiciary, which is only possible if the judiciary is

not only independent but also appears to be independent.

11. In the circumstances we direct that in the panel which has been prepared for appointment of Vice Chairmen of various benches of CAT and in future panels also, only the persons referred to Section 6 (2) (a) can be appointed as the Vice Chairmen of the various benches of the CAT.

12. Let a copy of this order be communicated forthwith by the Registrar General of this Court as well as the learned counsel for the Central Govt. to the Union Law Secretary, New Delhi and Chairman of the CAT, New Delhi. The petitioner may also communicate it to the appropriate authorities.

13. Let a copy of this order may be given to the counsel for the parties on payment of usual charges today.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2002

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

Second Appeal No. 24 of 1993

Ami Chand **...Appellant**
Versus
Smt. Subhadra Devi and others **...Respondents**

Counsel for the Appellant:
Sri Vishnu Sahai
Sri B. Dayal

Counsel for the Respondents:
Sri Dhan Prakash
Sri M.A. Siddiqui

Code of Civil Procedure- Section 100- Second Appeal- finding of facts when can be set a side by the Appellate Court relevant contingencies and scope of law discussed.

Held- Para 9 and 10

The findings of the facts of the courts below can be examined in the second appeal, if the same is against the weight of the evidence.

In view of the decisions of the Apex Court, in the circumstances, the findings of the courts below regarding fact can be set aside in this second appeal.

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

1. This second appeal has been preferred against the judgment and decree dated 12.10.1992 passed by Sri Pooran Singh, Special Judge/Additional District Judge, Bulandshahr in Civil Appeal No. 249 of 1975.

The fact giving rise to this appeal are as follows:

2. The appellant filed a suit for specific performance of contract of sale. It is alleged that the respondent no. 1, Smt. Subhadra Devi was owner of the disputed plot no.23, measuring 2 bigha 5 biswas situated in the village Salampur, Pargana Shikarpur, district Bulandshahr. She agreed to sale the said plot in favour of the plaintiff for a consideration of Rs.24,000/-. A sum of Rs.5,000/- was paid in advance and registered agreement to sale was executed on 23.08.1973. It was agreed that the sale deed shall be executed by 30.09.1973 on payment of balance sale consideration of Rs.19,000/-. That on 08.09.1973, the respondent no.1 came to Bulandshahr treasury and

purchased the stamp worth Rs.1,080/- for the execution of the sale deed and agreed to execute the sale deed within five-seven days. That the sale deed was not executed and, therefore, registered notice was given on 13.09.1973 which was served on 15.09.1973. It is further alleged that the appellant was ready and willing to perform his part of contract and therefore, the suit was filed.

3. It is also alleged that the respondent no. 1 executed the sale deed of the disputed land in favour of the respondents nos. 2 to 4 on 28.11.1973 after the institution of the suit; that therefore, the sale deed in their favour is effected by the principle of lis-pendence. The respondent nos.2 to 4 were therefore, implicated in the suit by amendment.

4. The respondent no.1 filed one written statement and the respondent nos. 2 to 4 filed separate written statement. The common ground taken by them is that the respondent no.1 never executed any agreement to sale in favour of the appellant; that prior to the alleged agreement the respondent no. 1 agree to sale the disputed land to respondent nos.2 to 4 on 08.08.1973 for consideration of Rs.25,500/- and executed the agreement to sale and received Rs.2,000/- as earnest money; that they further paid a sum of Rs.8,000/- to the respondent no.1 on 18.08.1973. The sale deed was got executed by the respondent nos.2 to 4 from respondent no. 1 on 28.11.1973. It was further pleaded by the respondent nos.2 to 4 that they are bonafide purchasers for value and that the plaintiff got the agreement executed in his favour by defrauding the respondent no.1.

5. The trial court framed necessary issues and held that the respondent no.1 agreed to sale the disputed land in favour of the appellant as alleged, that the respondent nos. 2 to 4 are purchasers with notice of the agreement and sale deed in their favour is also effect by the principle of lis-pendence; that the alleged agreement dated 08.08.1973 in favour of respondent nos. 2 to 4 is forged document. The trial court accordingly, decreed the suit. Aggrieved by it, appeal no.249 of 1975 was preferred by respondent nos.2 to 4 which have been allowed. The first appellate court has held that the alleged agreement in favour of the appellant is forged document. Therefore, the suit has been dismissed with costs. Aggrieved by it, the present appeal has been preferred.

6. I have heard Sri V. Sahai, learned counsel for the appellant. At the time of hearing of the appeal no body appeared for the respondents and therefore, could not be heard. However, I have gone through the entire record and the evidence.

7. It is alleged by the appellant that the registered agreement to sale in favour of the appellant was executed by the respondent no.1 and for in pursuance of that agreement, advance money was paid and the stamps were purchased for execution of the sale deed. The said agreement has been proved by Giriraj Singh, who was also plaintiff in his statement as PW-1, and he supported the plaint case. The respondent no.1 no doubt in the written statement has denied the execution of the agreement and alleged that the same is forged. However, after filing the written statement, she preferred to remain absent and did not appear in the

suit as well as in the first appeal or even in the second appeal. She did not enter into witness box to deny the agreement and to say that it has not been signed and executed by her. It is very important to mention that the respondent nos.2 to 4, who contested the suit, in their written statement has not alleged that the agreement in favour of the appellant is forged or was not executed by the respondent no.1. On the other hand, they pleaded that inspite of the agreement in favour of respondent nos.2 to 4 by the respondent no.1 the plaintiff got executed a registered agreement in his favour in order to cause illegal loss to respondents nos.2 to 4. Therefore, the execution of the agreement by the respondent no. 1 in favour of the appellant is admitted to the contesting respondents nos.2 to 4. As such the finding of the first appellate court that the agreement in favour of the appellant is forged document and was not executed by the respondent no.1 is against the evidence and also against the pleading of the parties based on surmises and conjectures and extraneous consideration. In this case, it will not be out of place to mention that the first appeal was preferred by the respondents nos.2 to 4 only and not by the respondent no.1. She was respondent in the first appeal, in which the above finding was recorded. She, therefore, did not challenge the finding; that she executed the agreement for sale in favour of the appellant. This finding was challenged by the respondent nos.2 to 4, who as said above in the written statement has admitted the execution of the agreement. Therefore, it was not open to them to challenge this finding in the first appeal against their pleadings. I am surprised that this important aspect has totally been ignored by the first appellate court in order to decided the appeal in a particular way and the agreement has been discarded on non existent ground.

8. It will not be out of place to mention that the trial court has held that alleged agreement in favour of the respondents nos.2 to 4 dated 08.08.1973 is forged document and has been got prepared afterwards. The sale deed in favour of the respondents nos.2 to 4 dated 28.11.1973 was executed after the suit was filed on 01.10.1973. Therefore, the purchasers by this sale deed shall be presumed to have notice of agreement in favour of the appellant and the sale is also effected by the principle of lis-pendence. This finding of fact has not been touched by the first appellate court and no finding has been recorded on this point. Only on the basis of one finding that the alleged agreement is forged document, which in my opinion is totally perverse finding.

9. The findings on the facts of the courts below can be examined in the second appeal, if the same is against the weight of the evidence. In this connection, I may refer to the decision of the Apex Court in **M.S.V. Raja and another Versus Seeni Thevar and others, (2001) 6 S.C.C., 652.** In this case, it was observed by the Apex Court that propriety of finding recorded by both lower courts without any evidence in support thereof, is itself a substantial question of law.

10. The other decision on this point is **Saraswathi and another Versus S. Ganapathy and another, (2001) 4 S.C.C., 694.** Where it was held by the Apex Court that even if there is contrary concurrent findings of fact but are contrary to the evidence on record the High Court can set aside the findings in the second appeal.

11. In the case of **Vishnu Prakash and another Versus Sheela Devi (Smt.) and others, (2001) 4 S.C.C., 729**. The Apex Court has held that where the lower courts have ignored evidence on record, including positive statements of witnesses or findings in judgments in earlier related cases or where parties have made certain admissions in earlier cases, the High Court can interfere in the second appeal.

12. In the case of **D.S. Thimmappa Versus Siddaramakka (1996) 8 S.C.C., 365**. It was observed that where the first appellate court has failed to draw proper inference from proved facts and to apply law in proper perspective, the High Court can interfere in the second appeal.

13. In the case of **Jagdish Singh Versus Natthu Singh, 1992 A.L.J., 620**. It was observed by the Apex Court that findings of fact of the courts below due to non-consideration of relevant evidence or by essentially wrong approach are vitiated and the High Court is not precluded from recording proper findings.

14. In view of the decisions of the Apex Court, in the circumstances, the findings of the courts below regarding fact can be set a side in this second appeal.

15. Accordingly, the second appeal is allowed with costs throughout and the judgment and decree of the first appellate court are quashed and that of the trial court is restored.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2002

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

Civil Misc. Writ Petition No. 16899 of 2001

Surendra Kumar Pandey and another
...Petitioners
Versus
State of Uttar Pradesh and others
...Respondents

Counsel for the Petitioners:
Sri Umesh Narain Sharma
Sri Arun Kumar Mishra
Sri Jai Prakash Rai

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

Article 226 of the Constitution of India- the validity of waiting list- the life of the waiting list is for a period of one year and no reshuffling can be made after expiry of that period from the candidates of that waiting list, and the remaining vacancies will have to be filled up by a fresh selection.

(Held in para 6)
The life of the waiting list is for a period of one year and no reshuffling can be made after expiry of that period from the candidates of that waiting list, and the remaining vacancies will have to be filled up by a fresh selection. Now there is no provision of preparation of waiting list and in view of the decision as has been given by this court the life of the waiting list also lapses after one year and therefore on either court it appears that the petitioners are not entitled go get any relief.
Case law Discussed-
(1995) 2 UPLBEC 985
AIR 1990 SC 405

(1999) 3 SCC 696

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

1. By means of this writ petition, the petitioners have prayed for issuance of a writ in the nature of Mandamus commanding the respondents no. 1 and 3 to inform the vacancies to the respondents no. 1 and 3 to inform the vacancies to the respondent no.2 for recommending the name of candidates from the waiting list which is said to be maintained.

2. The facts as stated in the writ petition are that for filling up different posts in the State of U.P. through the Combined State Upper Subordinate Examination, 1999 an advertisement was published in the daily newspaper dated 1.1.1999. The petitioners filled their forms for appearing in the said examination. In the final result so declared petitioner No.2 was finally selected and was allotted the post of Assistant Director (Industry) but petitioner No. 1 was not selected. It is stated in paragraph 11 of the writ petition that the State Government has issued two government orders dated 29.8.92 and 31.1.94 for declaration of result, preparation of the waiting list and the life span of the waiting list. According to the petitioners in accordance with the government orders dated 29.8.92 and 31.1.94 the vacancies are liable to be informed by the respective departments within one year of the result to the respondent No. 2 (U.P. Public Service Commission) about the posts on which the candidates have not turned up to join their respective assignments, upon which respondent No.2 has to sent recommendations of the candidates from the waiting list. As this exercise was not done by the respondent, the petitioners have come to this court seeking a direction to the respondents in this regard to send names from the waiting list and reshuffle the appointments.

3. We have heard learned counsel for the petitioner, learned Standing Counsel who represents the respondents no. 1 and 3 and learned counsel appearing on behalf of the respondent No. 2 and have also examined the facts as stated in the writ petition and in the counter affidavit filed on behalf of the respondents.

4. Learned counsel for the petitioner has submitted that there was inaction on the part of the respondents no. 1 and 3 in not informing the vacancies to the respondent no.2 which remained unfilled in the combined State Upper Subordinate Examination, 1999, on account of which respondent No. 2 could not make recommendation of the candidates out of the waiting list, which is clearly illegal and arbitrary. Learned counsel has submitted that the respondents are under a legal obligation to accept the petitioners claim in the light of the government orders dated 29.8.92 and 31.1.94 (Annexure 6 and 7 to the petition). It has been pointed out that in the event of acceptance of the claim as prayed in this writ petition, there is every chance that the petitioner no. 2 could get a better placement as per his preference and petitioner no. 1 could get himself selected on any post as he is virtually at the top of the waiting list. Lastly, it has been submitted that on similar set of facts in pursuance of the directions issued by this court in writ petition No. 54131 of 1999, decided on 22.12.99 (vide annexure 12) respondents have completed the exercise

and after reshuffling, recommended the name of the candidates from the waiting list and therefore the petitioner claim that suitable directions be issued to the respondents. In support of his submissions learned counsel for the petitioner has relied on the decision given by this court in writ petition No. 18096 of 2001 dated 20.12.2001 Bibhakar Dwivedi and others Vs. State of U.P. and other and decisions reported in (1995) 2 U.P.L.B.E.C. 985 (Ram Darash Rai and others V. State of U.P. and others), AIR 1990 SC 405 (P. Mahendran and others V. Matteesh Y. Annigeri and others), and (1999) 3 SCC 696 (Virendra S. Hooda and others V. State of Haryana and another).

5. Learned Standing Counsel who represents the respondents no. 1 and 3 and learned counsel who represents respondent no. 2 have taken the same stand during the course of their submission. It has been submitted that the claim of the petitioner for consideration of their claim and issuance of a direction to the respondents no. 1 and 3 for information regarding the vacancies to enable the respondent no. 2 to send recommendations, based on the government order dated 29.9.92 and 31.1.94 is clearly untenable as by the subsequent government order dated 15.11.99 (Annexure-7 to the petition) the government has now stopped the preparation of the waiting list. Learned counsel submitted that the result of the Combined State Upper Subordinate Examination, 1999 in respect of which the relief is being claimed was published on 6.5.2000 in which no waiting list could be prepared and there was no occasion for the respondents for reshuffling and sending the name of any candidates. Learned counsel submitted that the decision referred to by the learned counsel for the petitioner in Bibhakar Dwivedi and others (Supra) had no application to the facts of the present case as in that case it was observed by this court that <u>the result of the examination was published before the said government orders and hence it was held that the government order was not applicable to the facts of that case.</u>

6. In view of the aforesaid submission advanced from both sides it appears that the result of the Combined State Upper Subordinate Examination, 1999 was published on 6.5.2000 as stated in para 8 of the writ petition. The government order which at present holds the field has been issued on 15th November, 1999 which clearly provides that no waiting list will be prepared except in respect to selection which is for a single post. It has been further provided in the said government order that no reshuffling exercise will be now undertaken. In view of this government order dated 15th November, 1999 the claim of the petitioner about intimation about the remaining vacancies for the purpose of reshuffling and sending of the names from the waiting list do not appear to be justified. Otherwise also as has been stated by the petitioners themselves, within the period of one year no name has been asked by the department from the Commission to be recommended from the waiting list and therefore, petitioners cannot claim any relief of sending names out of the waiting list. Even according to clause 5 of the earlier Government Order dated 31.1.94 (Annexure 7 to the petition) the waiting list cannot survive after 1 year of the result unless within that period of 1 year the department concerned asks the commission to send names from the

waiting list. In the present case it appears that the department concerned did not ask the commission to send names within 1 year and hence the list has lapsed. This Court has had occasion to consider about the life of the waiting list which was prevalent prior to the government order dated 15.11.99. It has been held that the life of the waiting list is for a period of one year and no reshuffling can be made after expiry of that period from the candidates of that waiting list, and the remaining vacancies will have to be filled up by a fresh selection. Reference can be made to the decisions given in writ petition No. 26913 of 2001 decided on 18.1.2002 Dharmendra Singh Vs. State of U.P. and others. The decisions as has been referred by the learned counsel for the petitioner in (1995) 2 UPLBEC 985 (Ram Darash Rai and others V. State of U.P. and others), AIR 1990 SC 405 (P Mahendran and others V. Matteesh Y Annigeri and others) and (1999) 3 SCC 696 (Virendra S Hooda and others V. State of Haryana and another), have no application to the facts of the present case, as we are of the opinion that now there is no provision of preparation of waiting list and in view of the decision as has been given by this court the life of the waiting list also lapses after one year and therefore on either count it appears that the petitioners are not entitled to get any relief.

7. In view of the aforesaid discussion, this writ petition fails and it is accordingly dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 16.3.2002

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 8375 of 2002

Committee of Management, Nagar Sahkari Bank Ltd. and another …Petitioners
Versus
Registrar, Cooperative Societies, Gorakhpur and others …Respondents

Counsel for the Petitioners:
Sri Shashi Nandan

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

Constitution of India- Article 226- Section 2 of U.P. Ordinance No. 27 of 2001- the amending Ordinance came into force on 24.12.2001, which is prior to the expiry of the term of the petitioners which would have come to an end on 28.12.2001 and, consequently, they would be entitled to get the benefit of the Ordinance and have got a right to function for a period of five years.
(Held in para 11)
The alleged acquiescence on the part of the petitioner nos. 2 cannot effect or alter the legal position namely, that the earlier Committee of Management whose term was to expire on 28.12.2001 would continue to function till 28.12.2003. The writ petition, therefore, deserves to be allowed.

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

1. The question which requires consideration here is whether the Committee of Management of a

Cooperative Society get an extended lease of life in view of U.P. Ordinance No. 27 of 2001 if its original term of three years had not expired before 24.12.2001.

2. Parties have exchanged affidavits and on their request, the writ petition is being disposed of finally at the admission stage.

3. Nagar Sahkari Bank Ltd., Gorakhpur, is an Urban Cooperative Bank. The election to elect the Committee of Management of the aforesaid Cooperative Society was held on 28.12.1998 and a Board of Directors was elected. The Board of Directors in its meeting held on 29.12.1998 elected the Chairman and Vice -Chairman. Ram Singh, who was elected as the Chairman of Committee of Management of Nagar Sahkari Bank Ltd. is petitioner no. 2 in the writ petition. Sub Section (2) of section 29 of U.P. Cooperative Societies Act (hereinafter referred to as the Act), at the relevant time, laid down that the term of every committee of Management shall be three years and the term of the elected members of the Committee of Management shall be co-terminus with the term of such Committee. Sub-Section (3) of section 29 provides that election to reconstitute the Committee of Management of a Cooperative Society shall be completed as latest fifteen days before the expiry of the term of the existing Committee of Management. In accordance with the said provision steps were taken for holding fresh election and the Secretary of the Cooperative Society wrote a letter to the Assistant Registrar, Cooperative Societies on 28.8.2001 in accordance with Rule 407 of U.P. Cooperative Societies Rules (hereinafter referred to as Rules) to take appropriate steps for holding of the election. The Registrar, Cooperative Societies, U.P. fixed 21.12.2001 as the date for holding the election of Committee of Management and 22.12.2001 as the date for sending the delegates to other societies. In accordance with the said programme, the election to constitute the new Committee of Management was held on 21.12.2001 and the Chairman and Vice Chairman thereof were elected on 22.12.2001. Two days thereafter i.e. on 24.12.2001, the Governor of U.P. promulgated the U.P. Cooperative Societies (Amendment) Ordinance, 2001 (U.P. Ordinance No. 27 of 2001) by which sub- section (2) of section 29 was amended and the term of Committee of Management was extended to five years. The petitioners claim that in view of the aforesaid ordinance, they are entitled to continue and function as Committee of Management and Chairman respectively up to 28.12.2003 and the Committee of Management, which was elected on 21.12.2001 is not entitled to function or exercise any power.

4. In order to appreciate the contentions raised at the Bar, it will be convenient to take note of the relevant statutory provisions.

5. Sub- sections (2) and (3) of section 29 of the Act (after its amendment by U.P. Act No. 19 of 1998), reads as follows:

(2) (a) The term of every Committee of Management shall be three years and the term of the elected members of the Committee of Management shall be co-terminus with the term of such Committee.

(b) The provisions of clause (a) shall apply also to a Committee of Management in existence on the date of commencement of the Uttar Pradesh Co-operative Societies (Second Amendment) Act, 1998 and to the elected members of such Committee.

(c) The term of a Committee of Management, which has completed, on or before the date of the commencement of the Act referred to in Clause (b), the period of three years from the date of its constitution, and the term of its elected members, shall expire on such commencement.

(3) Election of reconstitute the Committee of Management of a co-operative society shall be completed in the prescribed manner under the superintendence, control and direction of the Registrar at least fifteen days before the expiry of the term of the Committee of Management and the members so elected shall replace the Committee of Management whose term expires under sub-section (2):

Provided that, where for any extraordinary circumstances, the election of the members of the Committee of Management has not been completed, or could not be completed, the Registrar may, for reasons to be recorded, extend the term of the outgoing committee of Management so however, that any single extension does not exceed three months and the total extension does not exceed three months and the total extension does not exceed six months and it shall be the duty of the Registrar to get the Committee of Management reconstituted before the expiry of the term so extended and such committee of Management shall replace the outgoing Committee of Management even though its extended term may not have expired."

6. Section 2 of U.P. Ordinance No. 27 of 2001, which was promulgated on 24.12.2001, reads as follows:

2. In Section 29 of the Uttar Pradesh Co-operative societies Act, 1965 for sub-section (2) the following sub-section shall be substituted namely,

2. (a) the term of every Committee of Management shall be five years and the term of elected members of the Committee of Management shall be co-terminus with the term of such Committee.

(b) the provision of clause (a) shall apply also to a Committee of Management in existence on the date of the commencement of the Uttar Pradesh Co-operative Societies (Amendment) Ordinance, 2001 and to the elected members of such Committee.

7. Sri Shashi Nandan, learned counsel for the petitioners has submitted that the election for electing the Committee of Management of the Co-operative Society was held on 28.12.1998 and the Chairman and Vice-Chairman thereof were elected on 29.12.1998 and as the term of the Committee was three years its terms would have come to an end on 28.12.1998. Since the said Committee was in existence on 24.12.2001, the date when the Ordinance was promulgated, it is entitled to continue for a period of five years under sub-section (2) of section 29 as substituted by the Ordinance refers to a factual situation by using the word "Committee of Management in existence on the date of the commencement". Since

fresh election had been held to constitute the new Committee of Management on 21.12.2001 and the Chairman and Vice-Chairman thereof had been elected on 22.12.2001, it is the said Committee which would get the benefit of the amending Ordinance and would be entitled to function. He has also submitted that sub-section (2) of section 29 of the Act had been earlier amended by U.P. Act No. 17 of 1994 by which the term had been extended from three years and then the Legislature had used the expression " whose term has not expired on the date of such commencement" and this shows that the Governor wanted to give benefit to the existing Committees of Management irrespective of the fact whether they had completed their original term of three years or not.

8. There is no factual dispute that the election of petitioner no.1 namely, Committee of Management of Nagar Sakhari Bank Ltd., Gorakhpur, was held on 28.12.1998 and petitioner no. 2 Ram Singh was elected as Chairman in the election held on 29.12.1998. This fact is admitted in para 5 and annexure S.C.A.-1 of the counter affidavit. The question which is to be examined is whether the petitioners would get the benefit of the amending Ordinance. Sub Section (2) (a) of section 29 of the Act, as it stood prior to the amending Ordinance, provided in unequivocal terms that the term of every Committee of Management shall be three years. Sub section (3) of section 29 lays down that election to reconstitute the committee of Management shall be completed at least fifteen days before the expiry of the term of the Committee of Management and the members so elected shall replace the Committee of Management whose term expires under sub section (2). The combined effect of original sub-section (2) (a) and sub section (3) of section 29 of the Act was that the term of Committee of Management was three years and the newly elected Committee of Management could replace the earlier Committee of Management could not replace the already existing Committee of Management by merely holding the election before the expiry of the term. The election to elect the new Committee of Management has no doubt to be held at least fifteen days before the expiry of the term of the existing Committee of Management in view of the mandate of sub section (3) of section 29 of the Act but that cannot have any effect on the term of the existing Committee of Management which must get a period of three years. The use of the expression '"in existence on the date of the commencement' in clause (b) of sub-section (2) of section 29 of the amending Ordinance therefore refers to a Committee of Management validly in existence or which is in existence in law. It can not be a Committee of Management which has merely been elected on account of holding of an election which in view of sub-section (3) of section 29 has to be held before the expiry of the term of the existing Committee of Management. If the contention of Sri Khare is accepted, it would lead to an anomalous situation whereunder there would simultaneously be two Committees of Management of a Cooperative Society in existence namely, the existing Committee whose term has not come to an end and the Committee which has been elected. Such an interpretation can never be accepted.

9. It appears that the words 'in existence ' in clause (b) of sub section (2)

of section 29 of the amending Ordinance have been used to also take within its fold the situation contemplated by the proviso to sub-section (3) of section 29 of the Act where on account of any extraordinary circumstance the election of the members of the Committee of Management has not been completed before the expiry of the term of the outgoing Committee. The Legislature has given power to the Registrar, for reasons to be recorded, to extend the term of such outgoing Committee of Management so however, that any single extension does not exceed three months and the total extension does not exceed six months. It is to give the benefit of extension of five years to such type of Committee of Management also that the word 'in existence ' has been used in clause (b) of sub section (2) of amended section 29.

10. There is no dispute between the parties that the amending Ordinance came into force on 24.12.2001, which is prior to the expiry of the term of the petitioners which would have come to an end on 28.12.2001 and, consequently, they would be entitled to get the benefit of the Ordinance and have got a right to function for a period of five years.

11. Sri Khare has next submitted that the petitioner no. 2 Ram Singh never made any protest and participated in the election held on 22.12.2001 in which the Chairman and Vice Chairman of the new Committee were elected. He also participated in subsequent meetings held in January and February 2002. According to learned counsel, the petitioner no. 2 acquiesced in the functioning of the new Committee of Management and, therefore, he is not entitled to claim that the petitioners have a right to function up to 28.12.2002. In our opinion, the submission made has no substance. Annexure-6 is a copy of the letter which was sent by petitioner no. 2 to the Secretary of the Cooperative Society on 24.12.2001 wherein it was written that in view of the amended provision, the earlier Committee should be permitted to function up to 28.12.2003. Annexure 6,7,8 and 9 are copies of the letters sent by petitioner no. 2 to the Secretary of the Society on 24.12.2001, Assistant Registrar, Cooperative Societies on 17.1.2002, Deputy Registrar, Cooperative Societies on 15.1.2002 and to the Registrar, Cooperative Societies on 10.1.2002, wherein, it was specifically mentioned that in view of the amending Ordinance which has come into force on 24.12.2001, the petitioners are entitled to continue till 28.12.2003. It is, therefore, not correct to say that the petitioner no. 2 acquiesced in the functioning of the new Committee of Management. That apart, the alleged acquiescence on the part of the petitioner no. 2 cannot effect or alter the legal position namely, that the earlier Committee of Management whose term was to expire on 28.12.2001 would continue to function till 28.12.2003. The writ petition, therefore, deserves to be allowed.

12. The writ petition is accordingly allowed. A writ of mandamus is issued commanding the respondents not to interfere in any manner with the functioning of petitioner no. 1 as Committee of Management and petitioner no. 2 as Chairman of Nagar Sahkari Bank Ltd., Gorakhpur.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.3.3002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 33620 of 2001

Dr. (Mrs.) Vimala ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Dr. (Ms.) Vimala Y. (In person)
Sri A.K. Pandey

Counsel for the Respondents:
S.C.
Sri Neeraj Tripathi

Constitution of India, Article 226 Reservation- Single post of professior in the Department of Botany- advertisement for a OBC- candidate under reserve quota- illegal.

Held- Para 3

In the advertisement in question this post has been stated to be reserved for OBC. In paragraph 4 of the writ petition it is mentioned that there is only one post of Professor in the Department of Botany in the Meerut University and this fact is not disputed. Hence in view of the decision of the constitution bench of the Supreme Court in Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association 1998 (4) SCC 1 we hold that the post in question cannot be reserved as it is single post and has to be treated as a post for general category.

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

1. Heard learned counsel for the parties.

2. The petitioner has prayed for quashing of the Selection proceedings for the post of Professor in the Department of Botany in Meerut University in pursuance of the advertisement dated 29.7.2000 (Annexure- 2 to the petition).

3. In the advertisement in question this post has been stated to be reserved for OBC. In paragraph 4 of the writ petition it is mentioned that there is only one post of Professor in the Department of Botany in the Meerut University and this fact is not disputed. Hence in view of the decision of the constitution bench of the Supreme Court in **Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association 1998 (4) SCC1** we hold that the post in question cannot be reserved as it is single post and has to be treated as a post for general category.

4. The impugned advertisement dated 29.7.2000 is quashed so far as the post of Professor in the Department of Botany is concerned and the Meerut University is directed to re-advertise the post forthwith and fill it up in accordance with the direction given above.

The petition is finally disposed off.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.3.2002

BEFORE
THE HON'BLE BINOD KUMAR ROY; J.
THE HON'BLE R.C. DEEPAK, J.

Criminal Misc. Writ Petition No.1369 of 2002

Markandey Singh & others ...Petitioners
Versus
The State of U.P. & others...Respondents

Counsel for the Petitioners:
Sri U.N. Sharma
Sri A.K. Pandey
Sri S.P. Upadhyaya

Counsel for the Respondents:
Sri L.V. Singh
A.G.A.

Constitution of India- Article 226- quashing of first information report- there appears to be some under- hand transactions between the accused persons and the M.L.A. concerned. This a serious aspect of the matter. The M.L.A. is a representative of the people who has been given funds for development of the society. The members of the Legislative Assembly are also trustees of the public and they cannot squander money allotted to them to be used for their personal purpose or for any other purposes except under the scheme for which it has been allotted.

(Held in para 6)

There appears to be some under- hand transactions between the accused persons and the M.L.A. concerned. This is a serious aspect of the matter. The M.L.A. is a representative of the people who has been given funds for development of the society. The members of the Legislative Assembly are also trustees of the public and they cannot squander money allotted to them to be used for their personal purposes or for any other purposes except under the scheme for which it has been allotted.

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

1. The four Petitioners have come up with a prayer to quash the First Information Report dated 28th February, 2002 giving rise to registration of case crime no. 68 of 2002 Police Station Line Bazar District Jaunpur under Sections 467, 468, 471, 472, 419, 409, 420 I.P.C.

2. Sri U.N. Sharma, learned counsel appearing on behalf of the Petitioners urged that the impugned F.I.R. has been lodged at the instance of Mr. Barkhu Ram Verma, Member of the Legislative Assembly, Uttar Pradesh as the Petitioners had refused to oblige him which is apparent from the documents Annexures 4, 6 and 6A. No offence has been made out against the Petitioners inasmuch as out of Rs.15 lacs only a sum of Rs.13,20,000/- was released and balance of Rs.1,80,000/- is yet to be released for which the work is still pending.

3. A perusal of the F.I.R. in question shows that the accusation against the Petitioners is in relation to misappropriation of Rs.2,16,468/- by preparing forged and fabricated documents while doing the work of laying down earth and of painting of 2 Kilometers Judpur- Gopalapur Road for which a sum of 15 lacs of Rupees were sanctioned and it was lodged by Sri Umashanker Singh, the Project Director, District Village Development Abhikaran, Jaunpur against the Petitioners.

4. Apparently, prima-facie the accusations made do constitute commission of cognizable offences by the Petitioners.

5. In fairness to Sri Sharma we also looked at the three documents brought on the record. Annexure-4 shows that it is an undated letter or note of Sri B.R. Verma, M.L.A. addressed to the Chief Development Officer, Jaunpur intimating, interalia, that after enquiry the width of the earth was found less and thus amount be released after deducting the appropriate cost of the earth used.

Annexure 6 shows that it is a letter dated 13.6.2000 allegedly written by Mehi Lal Patel representative of the M.L.A. Sri B.R. Verma to one J.E. Saheb (it does not show as to whom it has been addressed) requesting him to arrange for Rs.1 lac and that he will meet tomorrow in Jaunpur Ganna Office and this obligation will be definitely compensated. Annexure 6A is a note or letter dated 29.11.2000 written again by Mehi Lal to J.E. Ganna Vibhag, asking him to meet him tomorrow dated 30.11.2000 intimating that he is in dire need of money and that the second instalment of the M.L.A. Fund is under encashment.

6. The correspondence prima-facie shows, interalia, that there appears to be some under-hand transactions between the accused persons and the M.L.A. concerned. This is a serious aspect of the matter. The M.L.A. is a representative of the people who has been given funds for development of the society. The members of the Legislative Assembly are also trustees of the public and they cannot squander money allotted to them to be used for their personal purpose or for any other purposes except under the Scheme for which it has been allotted. He has tried to illegally collect or obtain money for his personal gains. A civil servant cannot be coerced by anyone to breach his loyalties to the Government. He is a trustee and he must discharge his duty without any influence of any one and strictly in accordance with law. In our socialistic welfare democratic fabric if people, who are representatives of the people will act collusively then the God alone can save the fate of our country. We, thus, direct the Investigating Officer of the Crime Case in question to find out the truth in this regard under the supervision of the Superintendent of Police, Jaunpur and also to find out who others were responsible for misappropriating the Government money and to book all of them under appropriate laws.

7. With these directions this writ petition is dismissed.

8. Let a copy of this order be handed-over within one week to Sri L.V. Singh, learned A.G.A. for its intimation to and follow up action by the Police authority concerned.

9. The office will also dispatch a copy of this order within one week to the Chief Secretary of the State for its intimation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.3.2002

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Review/Correction Application No. 101974 of 2000

M/s Vidyawati Construction Co. ...Applicant
Versus
Union of India and others...Respondent

Counsel for the Applicant:
Sri S.K. Garg

Counsel for the Respondents:
Lalji Sinha

The Arbitration and Conciliation Act, 1996- section 11 (4)- the parties are free to determine the number of Arbitrators, provided that such number 'shall not be an even number'- in arbitration proceedings with more than one arbitrator, the decision of the Tribunal

shall be made by a majority of its members.

Held (para 8 and 9)

In the facts and circumstances of the present case, the Act of 1996 shall be applicable.
Sri P.K. Sharma was appointed as Umpire by this Court. There was no dispute regarding the proposal of his name. He shall now be treated as Presiding Arbitrator of the Tribunal instead of Umpire.
Case law discussed:
(1601) G SCC p. 356
(1998) 5 SCC p.599

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

1. The applicant has prayed that Sri P.K. Sharma, who was earlier appointed as Umpire may be treated as the Presiding Arbitrator of the Arbitral Tribunal.

2. Briefly, the facts are that the applicant filed Civil Misc. (Arbitration) Application No. 36 of 1998 for appointment of arbitrators under section 11 (4) of the Arbitration and Conciliation Act, 1996 (in short the Act). The application was allowed by this Court on 26.8.1998 appointing Smt. Taneja Pandey, Deputy F.A. and C.A.O./Core/A.L.D. and Sri O.P. Narang, Deputy Chief Engineer (Retired) Track Machines, Northern Railway, G-101, Prayag Kunj Apartments, 3, Stratchy Road, Allahabad as arbitrators.

3. The applicant also filed another application No. 47 of 1998 for appointment of an Umpire. This application was disposed of on 1.11.1999 and Sri P.K. Sharma, as agreed between the parties, was appointed as Umpire.

4. In the present application it has been stated that Sri P.K. Sharma be treated as Presiding Arbitrator instead of as an Umpire.

5. Learned counsel for the applicant submitted that under Section 10 of the Act, 1996 the parties are free to determine the number of Arbitrators, provided that such number 'shall not be an even number. Similarly Section 29 of the Act provides that in arbitration proceedings with more than one arbitrator, the decision of the Tribunal shall be made by a majority of its members. A reading of both the sections clearly indicates that the Arbitral Tribunal cannot consist of an even number of arbitrators and the composition of a Tribunal contrary to these provisions could be one of the grounds for setting aside the Arbitral award as provided under Section 34 of the Act. This Court had passed an order appointing Sri P.K. Sharma, as Umpire but a Presiding Arbitrator of the Tribunal can be appointed. It is submitted that Sri P.K. Sharma be treated as Presiding Arbitrator of the Arbitral Tribunal instead of appointing him as Umpire.

6. Learned counsel for the respondent urged that the provisions of the Arbitration Act, 1940 would be applicable in the present proceedings as the new Act came into force on 22.8.1996 vide Notification dated 22.8.1996. The applicant is alleged to have given the notice on 18.5.1996 and, therefore, the Arbitral proceedings shall be deemed to commence on 18.5.1996 prior to the coming into force of the Act and, therefore, the provisions of the Arbitration Act, 1940 would be applicable. The 1996 Act was preceded by three Ordinances, the first of which was promulgated on

16.1.1996 to be effective from 25.1.1996. The second Ordinance came into force on 26.3.1996 and it was replaced by a third Ordinance on 26.6.1996. All these three Ordinances were made effective from 25.1.1996. The first Ordinance itself had repealed the Act of 1940. The new Act numbered as 26 of 1996 received the assent of the President on 16.8.1996 and was published in the Gazette on 19.8.1996. The notification reads as under:-

"In exercise of the powers conferred by sub-section (3) of Section 1 of the Arbitration and Conciliation Act, 1996 (26 of 1996) the Central Government hereby appoints the 22nd day of August 1996 as the date on which the said Act shall come into force.

7. As the old Act stood repealed w.e.f. 25.1.1996 and the Ordinances referred to above, were effective, the Arbitral proceedings shall be deemed to have been commenced under the Act of 1996 and the provisions of 1996 Act will be applicable. The controversy has now been settled by the decision of the Apex Court in **Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd. (2001) 6 Supreme Court Cases 356** wherein the award was given on 13.8.1996 and, thereafter the execution proceedings were commenced. It was urged that as the award was given on 13.8.1996, the Act of 1940 was applicable. Their Lordships of the Supreme Court held that the Act of 1996 was a continuation of the Ordinance and deemed to have been effective from 25.1.1996 and the execution application under the Act of 1996 was applicable.

8. Learned counsel for the respondent has placed reliance upon the decision **Shetty's Construction Co. Vs. Konkan Railway Construction and others 1998 (5) SCC 599** wherein it was held that if the request is made prior to the commencement of Act of 1996 then the proceedings could be governed by the Old Act. In this case it was not shown that the proceedings were started after 25.1.1996. This case has no application to the facts of the present case. In the facts and circumstances of the present case, the Act of 1996 shall be applicable.

9. Sri P.K. Sharma was appointed as Umpire by this Court. There was no dispute regarding the proposal of his name. He shall now be treated as Presiding Arbitrator of the Tribunal instead of Umpire.

10. The application is, accordingly, allowed and the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2002

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

Civil Misc. Writ Petition No. 7299 of 2002

Ghaziabad Development Authority, Ghaziabad ...Petitioner
Versus
Umesh Chand and others ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Misra

Counsel for the Respondents:
S.C.

Land Acquisition Act- Section 18- even if the reference is wrongly made by the

Collector, the court will still have to determine its validity for the very jurisdiction of the court to hear a reference, depends on a proper reference being made under section 189 and if reference is not proper, the court will have no jurisdiction to hear the reference.

Held in para 4

It goes without saying that in case the Court converges to the conclusion that references should have been made by the Special Land Acquisition Officer within the period of three years prescribed by Article 137 of the Indian Limitation Act, 1963 it would decline to answer the reference. In case, it is held by the civil court that Article 137 prescribes Limitation for making application for which no limitation is prescribed and is not intended to lay down a limitation for making an order of reference, it would proceed to answer the reference in accordance with law.

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

1. Since common questions of law are involved in these writ petitions, and the facts in the petitions being identical they are amenable to common disposal by a composite judgment and order. Civil Misc. Writ Petition No. 7299 of 2002 shall be the leading petition and the decision in this petition will branch out to have its consequential effects on all the petitions aforestated. These petitions under Article 226 of the Constitution instituted by the Ghaziabad Development Authority, Ghaziabad seek issuance of a writ in the nature of certiorari quashing the order dated 6.1.2002 (annexure 1 to the petition) passed by Special Land Acquisition Officer, Ghaziabad/ Addl. District Magistrate (Land Acquisition) (Irrigation) Ghaziabad whereby the latter has made reference to the civil court under section 18 of the Land Acquisition Act 1894 on the applications moved by individual land holders of village Makanpur, Tahsil Dadri District Ghaziabad against the award dated 30th July 1991 made by the Special Land Acquisition Officer (Irrigation) Ghaziabad in different cases relating to land situated in village Makanpur Pergana Loni Tahsil Dadri District Ghaziabad.

2. We have heard Sri A.K. Misra, Learned counsel representing the petitioners, standing counsel representing the State authorities, and perused the writ petition. Sri A.K. Misra has submitted that award in the case was given in the year 1991 and the reference made vide impugned orders (of different dates separately stated in all the petitions aforestated and the order dated 6.1.2002 being the impugned order in writ petition no. 7299 of 2002) being barred by time, is without jurisdiction. The application for reference, it appears, was filed on 9.9.1991, but the order of reference was made on 16.1.2001 (in writ petition no. 7299 of 2002). The question that surfaces for consideration is whether any limit is prescribed for making reference under section 18 of the Land Acquisition Act. Placing reliance on the decisions of the Supreme Court in Karala State Electricity Board v. T.P. Kunhallunima, and Addl. Spl. Land Acquisition Officer v. Thakoredas, Sri A.K. Misra has submitted that though section 18 by itself prescribes limitation for making an application for reference and does not prescribe any time limit within which the Collector or for that purpose, the Special Land Acquisition Officer should make a reference, the provisions of Article 137 of the Limitation Act, 1963 could be attracted and, therefore, proceeds the

submission, the reference made by the Special Land Acquisition Officer in the instant case, beyond the period of three years was obviously barred by time and hence the referring orders impugned herein are without jurisdiction. The Standing counsel representing the State and the Special Land Acquisition Officer, Ghaziabad in opposition has submitted that proviso to Section 18 of the Land Acquisition Act, 1894 prescribes limitation for the purposes of moving an application and does not prescribe a limitation within which the collector, or for that purpose the Special Land Acquisition Officer should pass an order making a reference under the section. Article 137 of the Limitation Act, 1963, it has been submitted by the Standing Counsel, could be invoked for the purpose of making an application and not for the purpose of making an order of reference under section 18 of the Land Acquisition Act, 1894. The learned Standing Counsel also submits that the decision in Addl. Special Acquisition Officer Bangalore (supra) and the one in Kerala State Electricity Board (supra) relied upon by Sri A.K. Misra were rendered while interpreting the provisions of section 18 (3) (b) of the Karnataka Act 17 of 1961 and Sec. 16 (3) of the Telegraphic Act, 1885 respectively and are not intended for application to the constructions of Sec. 18 of the Land Acquisition Act, 1894 as is applicable to the State of U.P. In the rejoinder, it was submitted by Sri A.K. Misra that the plea sought to be raised herein could be raised by the petitioner even before the Court.

3. We have given our anxious consideration to the submissions made across the bar. In Mohd. Hasnuddin v. State of Maharashtra the Supreme Court has held that the power of Collector to make reference under section 18 is circumscribed by the condition laid down therein and making of an application for reference within the time prescribed by the proviso to Sec. 18 (2) is a sine qua non for a valid reference by the Collector. In fact, there is no quarrel with the proposition that the power of the Collector to make a reference under section 18 is circumscribed by the condition laid down therein and, therefore, it necessarily follows that the application for reference must be filed within the period prescribed by the proviso to Sec. 18 (2) of the Land Acquisition Act but what has been submitted by Sri A.K. Misra appearing for the petitioner, is that referring order should be made within the period prescribed by Article 137 of the Indian Limitation Act, 1963 for no time limit is prescribed for that purpose under the provisions of the L.A. Act 1894.

4. In Mohd. Hasnuddin (supra), it has been held that even if the reference is wrongly made by the Collector, the Court will still have to determine its validity for the very jurisdiction of the Court to hear reference, depends on a proper reference being made under section 189 and if reference is not proper, the court will have no jurisdiction to hear the reference. We, therefore, feel persuaded to the view that in case any objection regarding competence or maintainability of reference is preferred on behalf of the petitioners before the court hearing the reference, the court will decide such objection as a preliminary issue. It goes without saying that in case the court converges to the conclusion that reference should have been made by the Special Land Acquisition Officer within the

period of three years prescribed by Article 137 of the Indian Limitation Act, 1963 it would decline to answer the reference. In case, it is held by the civil court that Article 137 prescribes limitation for making application for which no limitation is prescribed and is not intended to lay down a limitation for making an order of reference, it would proceed to answer the reference in accordance with law.

5. The petitions are dismissed without prejudice to the rights of the petitioners to raise the plea of maintainability of reference before the civil court and subject to the direction that if any such plea is raised by the petitioners, the civil court will examine and decide the same in accordance with law. It may however, be clarified that any observation made in this order will not impinge upon the aspects required to be decided by the civil court on merits of the issues involved in the case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21 MARCH, 2002

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

Criminal Misc. Habeas Corpus Writ Petition No. 23183 of 2001

Mohammad Suleman ...Petitioner
Versus
State of U.P. through Principal Secretary and others ...Respondents

Counsel for the Petitioner:
Sri Daya Shanker Misra
Sri M.A. Qadeer
Sri Chandrakesh Misra

Counsel for the Respondents:
Sri Mahendra Pratap
A.G.A.

Under Article 22 (5) of the Constitution of India - Detention under section 3(2) of N.S.A. (National Security Act) In the absence of copies of petitioner's bail application and the comments of police thereon the petitioner was certainly denied the right of making an effective representation and accordingly Article 22 (5) of the Constitution of India has been violated.

The impugned order of detention is not sustainable on account of vital and relevant material having been not placed before the detaining authority viz-a viz each of the five grounds on the basis of which the impugned detention order was made. The continued detention of the petitioner also stands vitiated on account of the fact that even if each ground of detention is taken as a separate order of detention, the petitioner was not supplied with the relevant documents to enable him to make an effective representation against each of the grounds of detention and thereby the right conferred upon him under Article 22 (5) of the Constitution of India has been infringed.

Case law discussed:
1985 SCC (Criminal) 125,
2001 (42) ACC 995, 2000 (40) ACC 729,
1988 SCC (Crl.) 107, 1990 SCC (Crl.) 258,
2002 (2) JT SC 365

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

1. The petitioner- Mohd. Suleman has been detained under section 3 (2) of the National Security Act, 1980, hereinafter referred to as 'NSA' on the basis of order dated 8.4.2001 passed by Sri B.S. Bhullar, the then District Magistrate, Kanpur Nagar which was served upon the petitioner alongwith the grounds of detention. The grounds of

detention were based upon a number of incidents in respect of which cases have been registered at different police stations. They were crime no.91 of 2000, 7 of 2001, 20 of 2001, 39 of 2001 and 92 of 2001. In the grounds of detention after narrating the facts relating to the aforesaid crime numbers, the District Magistrate recorded his subjective satisfaction that on account of criminal activities of the petitioner and his associates public order of the entire Kanpur District has been disturbed. In the said order it has been also stated that the petitioner was already detained in jail in connection with case crime no. 91 of 2001 under section 147, 323, 336, 427 I.P.C. 7 Criminal Law Amendment Act and 6 United Provinces Special Power Act police station Kotwali, Kanpur Nagar and in case crime no. 20 of 2001 under section 147, 148, 149, 307, 332, 353, 436,338, 427, 295 IPC and 7 Criminal Law Amendment Act police station Bekanganj and in case crime no. 39 of 2001 under section 153-A/ 153-B I.P.C. and 7 Criminal Law Amendment Act police station Chamanganj, Kanpur Nagar and whereas the petitioner has filed applications for bail in those cases whose copies have been annexed as Annexure 26 to 28 and whereas in case crime no.91 of 2001 the petitioner has already succeeded in obtaining order of bail in his favour from court of District Judge, Kanpur Nagar on 4.4.2001 and since the detenu was likely to be released on bail in other cases, it was necessary to detain the petitioner under the NSA because if he was released on bail the petitioner would repeat the criminal activities prejudicial to the maintenance of public order. It was further stated in the order that hearing of bail applications in case crime no.20 of 2001 was fixed in respective courts for 9.4.2001 and 10.4.2001. The grounds of detention were duly served upon the petitioner mentioning therein that the detenu may make representation to the State Government against the said order of detention and the same would be placed before the Advisory Board and before it, the detenu would be afforded opportunity of personal hearing.

2. The order of detention has been challenged mainly on following grounds:

1) that the order of detention suffers from virus of casualness showing that there was no real subjective satisfaction for detaining the petitioner under the NSA,
2) that vital and relevant materials relied upon in the grounds of detention were not placed before the detaining authority and the impugned order of detention was passed in a routine manner without application of mind.
3) That relevant and basic material relied upon in the grounds of detention were also not supplied to the petitioner which has resulted in denial of petitioner's right of making effective representation and therefore, Article 22 (5) of the Constitution of India has been violated, and
4) That the order of detention is based upon extraneous consideration.

3. The detaining authority, respondent no. 3 as well as other respondents have filed counter affidavits. On behalf of the petitioner rejoinder affidavit was filed and since it contained some new facts the respondents were given opportunity of filing supplementary counter affidavit. Accordingly respondent no. 3 has filed his own supplementary counter affidavit.

4. We have heard Sri Daya Shanker Misra, learned counsel for the petitioner and Sri Mahendra Pratap, learned A.G.A. for the respondents.

5. With regard to the first ground it has been argued by Sri Misra that the grounds mentioned in the detention order are verbatim reproduction of the dossier forwarded by the sponsoring authority to the detaining authority. He submitted that even spelling and grammatical mistakes which occurred in the dossier have been repeated in the grounds of detention that itself shows how casually the detaining authority dealt with the matter without applying his own mind independently. Mistakes such of verbs, construction of sentences etc. have been repeated. In support of his submission Sri Misra placed reliance upon the decisions in **Jai Singh Vs. State of Jammu and Kashmir, 1985 SCC (Criminal) 125 Bidla Vs. Supdt. District Jail 2001 (42) ACC 995, and Tunnu Vs. District Magistrate 2000 (40) ACC 729**. Per contra, Sri Mahendra Pratap submitted before the court that if we go through the dossier of the sponsoring authority and the detention order carefully it cannot be inferred conclusively that the detaining authority has not applied his own mind to the facts of the case. In the dossier the sponsoring authority had given life history of the petitioner. However, the detaining authority in the grounds of detention has not mentioned the facts pertaining to the life history of the petitioner, obviously for the reason that those facts were not relevant for the subjective satisfaction of the detaining authority. Only those facts were reproduced which were contained in the report of Officer Incharge of the police station and mere fact that the facts giving rise to the activities of the petitioner which were mentioned in the dossier have been repeated in the impugned detention order by the detaining authority would not lead to the conclusion that there was total non application of mind. What the detaining authority repeated, were the facts mentioned in the report of the Officer Incharege of the police station Kanpur. We ourselves have gone through the dossier which was sent by the sponsoring authority to the detaining authority as well as the grounds of detention and we find that it cannot be said that the detaining authority has in the detention order reproduced verbatim the language of dossier without applying his own mind. In the dossier no satisfaction was recorded whereas in the detention order the District Magistrate has recorded his own satisfaction regarding the activities of the petitioner which were prejudicial to the maintenance of public order. The above referred cases which have been relied upon by the petitioner lend some assurance to the contention of the petitioner's counsel but by reason of the factual situation being different, are clearly distinguishable from the facts of the present case because in all those cases the court had recorded a categorical finding that the detaining authority had reproduced the language of the dossier verbatim in the detention order without applying his own mind whereas in the present case such an inference is not deducible.

6. We now take up second and third grounds together. It was argued by Sri Misra that admittedly in relation to crime no. 7 of 2001 and 92 of 2001, copies of F.I.R. of those cases were neither placed before the detaining authority nor were furnished to the petitioner while serving

the detention order and accordingly the order of detention is vitiated on this ground alone. Reliance was placed on the decisions in **Tushar Thakkar Vs. Union of India, 1981 SCC (Criminal) 13, Sardar Gurdeep Singh Vs. Union of India, AIR 1981 SC 362, State of U.P. Vs. Kamal Krishna Saini, 1988 SCC (criminal) 107, M. Ahamedkutty Vs. Union of India 1990 SCC (Criminal) 258, Ahmad Nassar Vs. State of Tamil Nadu J.T. 1999 (8) SC, V.C. Mohan Vs. State of Rajasthan and others 1986 SCC (Criminal) 104**. From the above decisions it emerges that the requisite subjective satisfaction on the part of the detaining authority the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are either withheld or suppressed by the sponsoring authority and not considered by the detaining authority before issuing the detention order. It is also clear from the aforesaid decisions that the detenu has a right to be furnished with the grounds of detention alongwith the documents relied on in order to enable him to make an effective representation guaranteed under Article 22 (5) of the Constitution of India. If copies of vital and material documents which would be having a bearing on the satisfaction of the detaining authority were not furnished to the detenu, that would be violative of Article 22 (5) of the Constitution of India and continued detention of the detenu is vitiated. In the counter affidavit it could not be disputed that as far as crime no., 92 of 2001 is concerned no document such as F.I.R. copies of statement of witnesses recorded under Section 161 Cr.P.C. or charge sheet were either placed before the detaining authority or were furnished to the petitioner alongwith the detention order. It also could not be denied that no copy of F.I.R. of case crime no. 7 of 2001 was placed before the detaining authority nor the same was furnished to the petitioner.

7. Shri Mahendra Pratap, learned A.G.A. appearing for the respondents, however, submitted that in the present case the impugned detention order is based of five distinct and separate grounds relating to five different crime numbers, therefore, the entire detention order will not stand vitiated even if it be held that relevant and material documents pertaining to crime no. 7 of 2001 and 92 of 2001 were neither placed before the detaining authority nor were supplied to the petitioner, because each ground of detention partakes the character of a separate detention order and in view of Section 5A of NSA the detention order could still be maintained on other grounds. In support of his submission Shri Mahendra Pratap placed reliance upon a Nine Judges decision of the Apex Court in **Attorney General for India Vs. Amratlal Prajivandas and others 1994, SCC (Criminal) 1325**. In the aforesaid decision it was held that Section 5-A is in two parts. Where the order of detention is based on more than one ground, the first part creates a legal fiction, viz., it must be deemed that there are as many orders of detention as there are grounds which means that each of such orders is an independent order. The second part of it is merely clarificatory and explanatory, which is evident from the fact that it begins with the word 'accordingly'- apart from the fact that it is joined to the first part by the word ' and'. As a result, if it is found that the ground of detention in

support of some of the deemed orders is vague or irrelevant, the same would be quashed but the remaining deemed order supported by the relevant ground would stand. Parliament is competent to create a legal fiction and it did so in this case. Article 22 (5) does not in terms or otherwise prohibit making of more than one order simultaneously against the same person, on different grounds. Parliament is competent to say, by creating a legal fiction, that where an order of detention is made on more than one ground, it must be deemed that there are as many orders of detention as there are grounds. If this creation of a legal fiction is competent, then no question of any inconsistency between the section and Article 22 (5) can arise. Had there been no first part, and had the section consisted only of the second part, one can understand the contention that the section is in the teeth of Article 22 (5).

8. From the aforesaid decision and from a plain language of section 5A of NSA it is thus clear that where detention order is based on two or more grounds each of such ground is an independent detention order. While examining the validity of the detention order which is based on more than one ground, the court has to examine if detention order is vitiated on account of legal infirmity of each ground. In a given case the court would not quash the detention of the detenu where it finds that the detention is in accordance with law on any of the several grounds upon which detention order has been passed. For example A is detained on three separate and independent grounds 1,2 and 3. In respect of grounds no. 1 and 2 the court finds that relevant and vital documents were not placed before the detaining authority by the sponsoring authority but at the same time comes to the conclusion that all relevant material had been placed before the detaining authority in relation to ground no. 3 and copies thereof had also been furnished to the detenu and no prejudice of any kind whatsoever was caused to the detenu, the court can still maintain the detention of the detenu though the same was not maintainable as far as grounds no. 1 and 2 are concerned.

9. Since in the present case the detention order is based on five separate grounds relating to five different crime numbers it has to be seen and find out if the detention order stands vitiated or continued detention of detenu is illegal for the reason that relevant and material documents relating to each crime numbers were not placed before the detaining authority or were not supplied to the petitioner thereby depriving him of his right of representation, enshrined under Article 22 (5) of the Constitution of India.

10. We now propose to examine the material placed on record of this writ petition to find out if the detention order stands vitiated on the basis of the above submission made by learned counsel for the petitioner.

11. The impugned detention order is based on five separate and independent grounds. Each ground contained facts of a particular crime number giving rise to the activities of the petitioner, which in the opinion of the detaining authority were prejudicial to the maintenance of the public order. Those crime numbers were 91 of 2000, 7 of 2001, 20 of 2001, 39 of 2001 and 92 of 2001.

12. As far as grounds pertaining to crime no. 7 of 2001 and 92 of 2001 are concerned undoubtedly they cannot be sustained as admittedly no copies of the first information report of these crime numbers were either placed before the detaining authority or supplied to the petitioner.

13. In the detention order it has been stated that the petitioner is in jail in connection with crime no. 91 of 2000, 20 of 2001 and 39 of 2001 and he has already obtained bail in crime no. 91 of 2000 and the petitioner has moved bail applications in other crime nos. i.e. 20 of 2001 and 39 of 2001 and he was likely to be released on bail in these cases also. We now take up these crime numbers separately.

14. As far as crime no. 91 of 2000 and 20 of 2001 are concerned it has been stated in the detention order that the copies of the bail applications moved by the petitioner are annexed as Annexures 28 and 29. It is, however, noteworthy that instead of supplying copies of bail applications moved by the petitioner before the Sessions Judge, Kanpur Nagar, the sponsoring authority had placed before the detaining authority the copies of bail application moved by co-accused Mohd. Anwar and copies of the same were furnished to the petitioner alongwith the grounds of detention. This fact is admitted in the supplementary rejoinder affidavit filed by respondent no. 3 that the sponsoring authority had placed before him only the copies of bail applications moved on behalf of co-accused Mohd. Anwar and copies of bail applications moved on behalf of the petitioner before the Sessions Judge, Kanpur Nagar in the aforesaid crime numbers were neither placed before him nor were supplied to the petitioner. However, it was claimed that as the grounds raised in the application of Mohd. Anwar were almost identical and similar to the grounds of bail raised in the applications of the petitioner, non-consideration of his bail applications and their non supply to the petitioner would not make any difference as far as satisfaction of the detaining authority is concerned. We have ourselves gone through both the applications which have been brought on record and find that it cannot be said that the grounds raised in the bail applications of the petitioner were identical to the grounds raised in the bail application of co-accused Mohd. Anwar. Once it was mentioned in the report submitted by the sponsoring authority that copies of bail applications moved on behalf of the petitioner in the aforesaid crime numbers are annexed but those copies were in fact of the bail applications of co-accused Mohd. Anwar and not of the petitioner that fact itself shows how casually the matter was dealt with by the detaining authority without application of his own mind. Had there been application of mind, the detaining authority would have certainly asked for the bail applications of the petitioner. Admittedly the petitioner was only supplied with the copies of bail applications moved on behalf of the co-accused Mohd. Anwar and he was not supplied the copies of his own bail applications moved before the Sessions Judge. We have already found above that the grounds for bail raised in the bail application of Mohd. Anwar were different from those raised by the petitioner in his own application. In the absence of copies of petitioner's bail applications and the comments of police thereon the petitioner was certainly denied the right of making an effective

representation and accordingly Article 22 (5) of the Constitution of India has been violated. In the case of **Nandgopal Saha Vs. Union of India 1988 SCC (Criminal) 107** copies of statement of Mrs. Jhunu Rani Saha, the statement of the petitioner and the documents which accompanied handwriting expert's opinion were held to be vital to enable the detenu to make a proper representation. It was held that the detenu was denied a fair opportunity of making effective representation and accordingly detention order was quashed.

15. In the case of State of U.P. Vs. Kamal Kishore Saini (supra) names of the detenus were not mentioned in the F.I.R. in respect of incident in ground no. 1 and the basis of their complicity came to be known only in the material found in the course of the investigation. The detenus were supplied only with the copy of the F.I.R. and also extract of the charge sheet and not the statements of the witnesses recorded under Section 161 Cr.P.C. It was undisputed that the charge sheet was subsequently submitted in the court, and accused persons were furnished with the copies of the statements of the witnesses long after the passing of the order of detention communicating the grounds of detention. Similarly with regard to ground no. 3 the application of the co-accused as well as the statement made in the bail application filed on behalf of the detenus alleging that they had been falsely implicated in the same case and the police report thereon, were not produced before the detaining authority before passing of the detention order. The Apex Court held that the High Court was justified in holding that the assertion made in the return that even if the material had been placed before the detaining authority he would not have changed the subjective satisfaction as this has never been accepted as correct proposition of law. It is incumbent to place all the vital materials before the detaining authority to enable him to come to a subjective satisfaction as to the passing of the order of detention as mandatorily required under the Act. In this view of the matter of contention of Shri Mahendra Pratap, learned A.G.A. cannot be accepted that even if bail applications of the petitioner in the aforesaid crime numbers had been placed before the detaining authority instead of the bail applications of co-accused Mohd. Anwar that would not have made any difference so far as the subjective satisfaction of the detaining authority was concerned. At a subsequent stage it cannot be shown that the subjective satisfaction would not have changed even if vital, relevant and correct material would have been placed before the detaining authority. In the aforesaid Apex Court decision it was further held that the order of detention becomes illegal and bad prior non supply of vital documents to the detenu to enable him to make an effective representation against the grounds of detention and as such his right to make a representation as contemplated under Article 22 (5) of the Constitution of India is infringed rendering his continued detention illegal and bad.

16. In the present case as far as detention order based upon grounds relating to crime nos. 7 of 2001, 92 of 2001, 20 of 2001 and 91 of 2001 is concerned the same cannot be sustained for the above mentioned illegalities, namely, non placement of relevant and material documents before the detaining

authority and their non supply to the petitioner.

17. We are now left with the sole ground which is based upon facts relating to crime no. 39 of 2001. It is true that if no infirmity or illegality is found viz a viz this ground, still the detention order could be maintained but on facts again we find that in this case neither the police report with parawise comments relating to the grounds raised in the bail application of the petitioner were placed before the detaining authority nor were they supplied to the petitioner. We further find that the allegations which have been disclosed in respect of crime no. 39 of 2001 do not amount to disturbance of public order. The impugned detention order was passed for maintenance of public order and not for preventing from acting in any manner prejudicial to the security of the State. Even as per the detention order bail application moved on behalf of the petitioner in crime no. 39 of 2001 was pending before the concerned Sessions Judge when the impugned order of detention was passed. However, there was no material before the detaining authority to apply his mind and consider whether the grounds raised in the bail application moved on behalf of the petitioner had any truth therein as police report with parawise comments with regard to the grounds raised in the bail application had not been placed before the detaining authority by the sponsoring authority. Not only this, bail application in crime no. 39 of 2001 of co-accused Mohd. Anwar had also been not placed before the detaining authority. Since vital and relevant documents had not been placed before the detaining authority, the order of detention stands vitiated on the ground that there was no proper subjective satisfaction of the detaining authority.

18. Therefore, for the above reasons we find that the impugned order of detention is not sustainable on account of vital and relevant material having been not placed before the detaining authority viz-a-viz each of the five grounds on the basis of which the impugned detention order was made. The continued detention of the petitioner also stands vitiated on account of the fact that even if each ground of detention is taken as a separate order of detention, the petitioner was not supplied with the relevant documents to enable him to make an effective representation against each of the grounds of detention and thereby the right conferred upon him under Article 22 (5) of the Constitution of India has been infringed.

19. In view of what has been discussed above, this writ petition succeeds. The impugned detention order dated 8.4.2001 stands quashed and set aside and it is directed that the petitioner shall be set at liberty forthwith unless required to be detained in jail in connection with any other offence in addition to the impugned detention order.

20. In the circumstances no order as to costs is made.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R. TIWARI, J.

Civil Misc. Writ Petition No. 14520 of 2000

Surendra Nath Singh ...Petitioner
Versus
Deen Dayal Upadhyay Gorakhpur University and another ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Amrendra Singh

Counsel for the Respondents:
Sri Dilip Gupta
S.C.

Statute "2.(19) of U.P. State Universities Act, 1973- the Act does not make any distinction between a full time or part time teacher- after crossing the age of 60 years, a part time teacher can be continued only on contract basis, if there is no staff and if proper teacher is not selected. This can not give any right to the appointee to continue on the post after 60 years.

(Held in para 7).

After crossing the age of 60 year, a part time teacher can be continued only on contract basis, if there is no staff and if proper teacher is not selected. This can not give any right to the appointee to continue on the post after 60 years. A teacher has no right to continue after the age of 60 years. Only short time contract can be given after the age of 60 years without having any right to the post and such contract appointment may be terminated at any time.

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

1. Heard Sri Ashok Khare learned senior counsel for the petitioner and Sri Dilip Gupta for the respondent-University.

2. The petitioner is a practising lawyer in the Civil Court, Gorakhpur and he was also appointed as a lecturer on purely adhoc basis in the Gorakhpur University for a period of 6 months by order dated 5.4.1989, Annexure-1 to the writ petition, on the fixed emolument of Rs.1100/- per month. This amount was subsequently increased to Rs.5000/- per month.

3. Under Statute 16.24 of the Gorakhpur University the retirement age of a teacher of the University is 60 years. Statue 16.24 states as follows:

"16.24(1) Subject to the provisions of statutes 16.25 and 16.26, the age of superannuation of a teacher of the University governed by the new scale of pay shall be sixty years.

(2) The age of superannuation of a teacher of the University not governed by the new scale of pay shall, subject to statute 16.25, be sixty years.

(3) No extension in service beyond the age of superannuation shall be granted to any teacher after the date of commencement of these Statutes:

4. Thus, whether the teacher of the University is governed by the new scale of pay or not his retirement age shall be 60 years.

5. A teacher is defined under the U.P. State Universities Act, 1973, as follows:

"2.(19)"teacher of University" means a teacher employed by the University for imparting instruction and guiding or conducting research either in the University or in an Institute or in a constituent college maintained by the University."

6. The above definition in the Act does not make any distinction between a full time or part time teacher. Hence we do not agree with the contention of the petitioner that a part time teacher is entitled to continue beyond the age of retirement of 60 years. It will be strange to say that while a full time teacher will be retired at the age of 60 years a part time teacher will continue as long as he lives.

7. In our opinion, after crossing the age of 60 year, a part time teacher can be continued only on contract basis, if there is no staff and if proper teacher is not selected. This can not give any right to the appointee to continue on the post after 60 years. Learned counsel for the petitioner submitted that many part time teachers have been continued even after 60 years. In our opinion this was only on contract basis and such a teacher has no right to continue after the age of 60 years. Only short time contract can be given after the age of 60 years without having any right to the post and such contract appointment may be terminated at any time.

8. With these observations, the writ petition is dismissed.

9. Let a copy of this judgement be sent to the State Government and the Chancellor of the University for necessary action by the Registrar General of this Court.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2002

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

Criminal Misc. Application No.1385 of 2000

Nauratan Mal Daga and others ...**Applicants**
Versus
State of U.P. and another ...**Opposite parties.**

Counsel for the Petitioners:
Sri Shashi Kant Gupta

Counsel for the Opposite parties:
Sri Rajiv Gupta
A.G.A.

Code of Criminal Procedure- section 482- even if the allegations of the complaint are accepted as gospel truth the offence under sections 420 and 120-B I.P.C. is not made out. It was business transaction and the real dispute between the parties is regarding the payment of the goods taken. The dispute is purely of civil nature and the complaint has been filed only with malafide intention to harass the petitioners and to extract unlawful gain from them. (Held in para 10).

The learned Magistrate has passed the order without application of mind and has not considered that no criminal offence is made out. He should remain very careful in summoning the accused persons in future at lease in cases where

the accused persons are resident of far off places.

Case Law preferred:

(1) 1998 (35) ACC 20 (SC)

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

1. This petition under section 482 Cr.P.C. has been filed to quash the proceedings of complaint case no. 39/1994 Rajiv Gupta Versus Nauratan and others under sections 420 and 120-B I.P.C. pending in the Court of IVth Additional Chief Judicial Magistrate, Meerut and the orders passed in that case.

2. The complaint was filed by opposite party no.2 which is Annexure-1 to the petition in which it was alleged that he is the manager of M/s Mithlesh Handloom Factory which supply cloths to the dealers; that the revisionists who are resident of Alipur Dwar in West Bengal were known to the complainant from before and used to visit the premises of the complainant. On 11.3.1992 they visited the premises of the complainant and seen the cloths and booked order no. 491 and agreed to pay the price within two months of the receipt of the goods; that the goods were, therefore, supplied by the complainant during the period from 21.3.1992 to 31.3.1992. However, the revisionists did not pay the sale price inspite of promises to pay; that, therefore, it appears that the revisionists had malafide intention from very beginning.

3. The learned Magistrate recorded the statement under section 200 Cr.P.C. of the complainant and summoned the revisionists to stand trial under sections 420 and 120-B I.P.C. The revisionists appeared and filed objections which were rejected by the learned Magistrate on 30.6.1997. Against that order, the revisionists preferred Criminal Revision No. 214 of 1997 which was rejected on 6.1.2000 by the VIIth Addl. District Judge, Meerut without hearing the counsel for the petitioners. Therefore, this petition has been preferred.

4. I have heard Sri S.K. Gupta, learned counsel for the petitioners, Sri Rajiv Gupta, learned counsel for opposite party no.2 and the learned A.G.A. and have perused the entire record.

5. It has been contended that the dispute is purely of civil nature and the courts below have erred in summoning the petitioners on the above complaint.

6. I have already referred to the allegations made in the complaint. According to the complainant the cloth was purchased and the price was agreed to be paid afterward, but the same was not paid. Therefore, even if the allegations of the complaint are accepted as gospel-truth, the offence under sections 420 and 120-B I.P.C. is not made out. It was a business transaction and the real dispute between the parties is regarding the payment of the goods taken. The dispute is purely of civil nature and the complaint has been filed only with malafide intention to harass the petitioners and to extract unlawful gain from them.

7. It has been argued by the learned counsel for the opposite party that objections, Annexure-4 to the petition were filed before the Magistrate by the petitioners; that however, they have not alleged that they have not taken the delivery of the goods alleged by the complainant. This argument does not appear to be correct. In the objections, it has clearly been mentioned that the

petitioners does not know the complainant, never met him and the complainant even could not identify them. Not only this, they have further mentioned that this fact can be verified by putting them for test identification from the complainant. Therefore, the allegation of the petitioners is that there has been absolutely no transaction between them nor there was any occasion for the transaction as alleged as they never met the complainant.

8. As against this, the complainant has alleged that the petitioners were known to him from before. However, it is not shown that they have even purchased any article from the complainant prior to the articles in question.

9. The sole intention to file the complaint is to black mail the petitioners who are resident of West Bengal. The learned Magistrate has not considered the facts in the right prospective and passed summoning order without application of mind and ignoring the principles laid down in the various case by the Apex Court. The Apex Court in the case of M/s Pepsi Foods Ltd. Versus Special Judicial Magistrate reported in 1998(35) A.C.C., 20(S.C.) has observed that "Summoning of an accused in a criminal case is a serious matter. Criminal Law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the Criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused".

10. The learned Magistrate has passed the order without application of mind and has not considered that no criminal offence is made out. He should remain very careful in summoning the accused persons in future at least in cases where the accused persons are resident of far off places.

11. The petition is, accordingly, allowed and the above complaint and all the orders passed thereon are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD:08.04.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 42108 of 2001

Shafat Ullah ...Petitioner
Versus
Commissioner, Varanasi Division, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri Yogesh Agarwal

Counsel for the Respondents:
Sri C.K. Parekh
Sri B.N. Singh
Sri A.K. Singh
Sri Niraj Tiwari

Constitution of India-Article 226- before passing a dismissal order an enquiry should be held intimating the accused employee of the date, time and place of enquiry.

(Held in para 7)

The accused employee does not reply to the letter asking whether he wants to give evidence or wants a hearing he must be sent a letter informing the date, time and place of the enquiry in which he must be given opportunity to produce his witnesses and cross-examine, the witnesses against him. It is only where the employee specifically writes a letter to the employer that he does not want to lead evidence or does not want to produce witnesses or cross examine that these need not be provided. However, even in such case the employer must lead its own evidence otherwise the charge will fail.

Case Law Preferred:
(I) 1999(4) A.W.C. 3227
(II) 2001 (3) AWC-2043
(III) 2002(1) UPLBEC 425
(IV) AIR 1962- SC 1348
(V) 1997(77) FLR 520
(VI) 1984 (49) FLR 38
(VII) 1981 (43) FLR 194

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

1. Heard learned counsel for the petitioner and Sri C.K. Parekh learned counsel for the respondent.

2. The petitioner has challenged the impugned orders dated 21.9.2001 and 23.1.2001 (Annexure-1 and 2 to the petition).

3. The petitioner was Law Officer in the service of the Nagar Nigam, Varanasi. He was chargesheeted vide Annexure-5 to the petition and additional charge sheet vide Annexure-8 to the petition. He gave a reply to the same dated 29.11.96 and 2.12.96 vide Annexure-9 to the petition.

4. In paragraph 15 it is stated that thereafter no enquiry took place and petitioner was never informed any date of the enquiry and no witness was examined in his presence. No documents were produced before the Enquiry Officer in the presence of the appellant and he was not given opportunity to rebut any document against him. Instead suddenly a letter dated 21.8.97 was sent by the Enquiry Officer alongwith his report. Copy of the same is Annexure-10 to the petition. The petitioner gave reply to the show cause notice vide Annexure-CA-7 to the counter affidavit. Thereafter the impugned order dismissing the petitioner dated 20.10.97 was passed. Against that order the petitioner filed an appeal which was allowed on 31.12.99 vide Anenxure-4 to the petition. In the appellate order it has been stated that there was violation of Rule 33 of U.P. Nagar Mahapalika Seva Niyamavali since approval of the U.P. Public Service Commission was not taken. Thereafter the respondents took approval from the Commission, and the impugned order dated 23.1.2001 (Annexure-2 to the petition) was passed. Thereafter the petitioner filed an Appeal, which was dismissed, vide Anenxure-11 to the petition. Hence this writ petition.

5. In our opinion this petition can be disposed of on a short point viz. that the petitioner was not informed of the date, time and place of the enquiry. This fact has been stated in paragraph 15 of the writ

petition and has not been denied by the respondents. It has been repeatedly held by this Court in *Subhas Chand Sharma v. Managing Director, U.P.Co-op. Spg. Mills Federation Ltd. Kanpur and another 1999(4) AWC 3227; Radhey Shyam Pandey v. Chief Secretary, U.P. and others 2001 (3) AWC 2043 and K.K. Dutta v. Managing Director, U.P.Co-op. Spg. Mills Federation Ltd. Kanpur and another 2002* ***(1) UPLBEC 425*** that before passing a dismissal order an enquiry should be held intimating the accused employee of the date, time and place of enquiry.

6. The facts of this case appear to be squarely covered by the above decisions. However, learned counsel for the respondents has relied on Annexure-5 to the petition which is a chargesheet, and in it is mentioned in the last paragraph that if the petitioner wishes to produce any evidence or if he desires a hearing or cross-examination he should inform the Enquiry Officer. It was argued by the learned counsel for the respondents that since the petitioner did not inform the Enquiry Officer that he wanted a hearing or to produce witnesses a presumption should be drawn that the petitioner never wanted a hearing nor did he want to examine witnesses or opportunity of cross-examination. We do not agree with this contention. Since the charge was made by the employer against the employee the burden was on the employer to prove its case by leading evidence to prove the charges. If no one produces evidence then the charge will fail. It has been held in the Imperial Tobacco Company of India Ltd. v. Its Workmen AIR 1962 SC 1348 that even if the accused employee withdraws from the enquiry the enquiry should have been completed and all the evidence should have been taken ex-parte and thereafter it was the duty of the Branch Manager to appraise that evidence and record his conclusion as to what misconduct has been proved and also to decide what punishment should be given.

7. Hence in our opinion even if the accused employee does not reply to the letter asking whether he wants to give evidence or wants a hearing he must be sent a letter informing the date, time and place of the enquiry in which he must be given opportunity to produce his witnesses and cross-examine the witnesses against him. It is only where the employee specifically writes a letter to the employer that he does not want to lead evidence or does not want to produce witnesses or cross examine that these need not be provided. However, even in such case the Employer must lead its own evidence otherwise the charge will fail as has been held in the cases of *Messrs. Delta Engineering Co. Pvt. Ltd. Meerut v. The P.O. Industrial Tribunal V, Meerut and others 1997(77) FLR 520, Airech Private Ltd. v. State of U.P. and others, 1984 (49) FLR 38, and V.K. Raj Industries v. Labour Court, 1981(43) FLR 194.*

8. For the reasons given above the writ petition is allowed. The impugned order dated 21.9.2001 and 23.1.2001 (Annexure-1 and 2 to the petition) is quashed.

9. However, it is open to the respondent no.2 to hold an enquiry after giving opportunity of hearing to the petitioner and take appropriate action.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24 MAY, 2002

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

Special Appeal No. 719 of 1997

Raghuvendra Babu Mishra ...Appellant
Versus
District Inspector of Schools, Etah and others ...Respondents

Counsel for the Appellant:
Sri R.S. Dwivedi
Sri V.S. Dwivedi

Counsel for the Respondents:
Sri Sabhajit Yadav
S.C.

U.P. Secondary Education Services Selection Board Act, 1982- Section 33-B (1)- the right of a teacher appointed in a short term vacancy on or before the date specified in section 33-B (1) accrues only upon the short term vacancy being converted into a substantive vacancy and a teacher appointed in short terms vacancy on or before the specified dates, who is not found 'suitable' and 'eligible' for substantive appointment shall cease to hold the appointment on such date as the State Government may by order specify and not on the date the short terms vacancy came to be converted into substantive vacancy. (Held in para 14).

The special appeal succeeds and is allowed. The respondent no. 1 is directed to refer the matter relating to the grant of substantive appointment to the appellant- writ petitioner to the Selection Committee constituted under sub section (2) of Section 33-B of U.P. Secondary Education Services Selection Board Act, 1982 and till such time any decision is taken by the said committee, the appellant- writ petitioner be permitted to continue on the post in question and be paid salary.

Case Law Preferred:
(I) 1997 (2) UPLBEC 1329
(II) 1999 (2) UPLBEC 1420
(III) 2000 (3) ESC 1990
(IV) AIR 1997 SC-3071

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

1. The present special appeal has been filed by Raghvendra Babu Mishra against the judgment and order dated 3.9.1997 passed by the learned Single Judge in Writ Petition No. 10210 of 1994, wherein the learned Single Judge had held that the petitioner is not entitled to regularization/substantive appointment on the post of lecturer and had dismissed the writ petition.

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

3. The appellant-writ petitioner was appointed as a lecturer in Physics in Gandhi Vidya Mandir Inter College, Fatehpur- Etah (hereinafter referred to as the College,), on 15.7.1989 in a short term vacancy caused by the existing lecturer Rama Nand Misra proceeding on leave. The appellant- writ petitioner was appointed under the provisions of U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order 1981 (hereinafter referred to as the Second Removal of Difficulties Order). His appointment was approved by the District Inspector of Schools on 16.9.1989. He continued to work and received salary from the State exchequer. On 17.1.1994 he received a letter from the Manager of the college stating therein that the leave of Ram Nand Misra was going to be over on 31.1.1994 and, therefore, he shall be relieved from the post in case

Rama Nand Misra joins. The petitioner approached this Court by filing a writ petition under Article 226 of the Constitution of India, seeking a writ of mandamus directing the opposite parties to pass an order of regularization as lecturer in Physics in the institution in view of section 33-B, which was inserted in U.P. Secondary Education Services Selection Board Act 1981 (hereinafter referred to as the Act,) which came into force on 7.8.1993. According to the appellant- writ petitioner the short term leave vacancy on which he was appointed on adhoc basis became substantive vacancy, when Rama Nand Misra did not join the college after the expiry of his leave on 31.1.1994. The District Inspector of Schools did not accept the claim of the appellant-writ petitioner on the ground that the short term vacancy was converted into a substantive vacancy on 8.2.1990 on; which date Rama Nand Misra was absorbed and confirmed as Head Master in Uchchattar Madhyamik Vidyalaya, Talesra, Aligarh and on the said date the appellant- writ petitioner ceased to be a lecturer in Physics. The learned Single Judge relying upon a Full Bench decision of this court in the case of Smt. Pramila Misra v. Deputy Director of Education, Jhansi Division, Jhansi and others, reported (1997) 2 UPLBEC- 1329 held that the appellant- writ petitioner ceased to work on the post of lecturer in Physics on 8.2.1990 on which date Rama Nand Misra, who had gone on leave was finally absorbed and confirmed on the post of Head Master in another institution and further the continuation of the petitioner as lecturer in Physics in said college after 8.2.1990 was not by virtue of his own right. The learned Single Judge further found that the essential requirement for regularization of service under the newly inserted provisions of section 33B that the persons, who continued to be in service on 7.8.1993 on which date the new section came into force is lacking in the present case and accordingly, the appellant- writ petitioner is not entitled for regularization.

4. We have heard Dr. R.S. Dwivedi, learned Senior counsel assisted by Sri V.S. Dwivedi on behalf of the appellant-writ petitioner and Sri Sabhajit Yadav, learned standing counsel appearing on behalf of the respondents.

5. Dr. Dwivedi, learned senior counsel submitted that the appellant writ petitioner was admittedly appointed on a leave vacancy caused by Rama Nand Misra on 15.7.89. His appointment was made after following the due procedure of law and was also given approval by the District Inspector of Schools. The college had sanctioned the leave of Rama Nand Misra till 31.1.1994. Rama Nand Misra did not join the college after 31.1.1994 and the appellant- writ petitioner continued to work as lecturer in Physics in the said college till 31.1.94 and was paid his salary under the U.P. High School and Intermediate Colleges (Payment of salaries to teachers and other employees) Act, 1971 (hereinafter referred to as the Payment of Salaries Act) by the State Government without any objection. The short term leave vacancy of Rama Nand Misra stood converted into a substantive vacancy on 31.1.94, when his leave expired. He also emphasized that Rama Nand Misra had not at all informed the college authorities about his absorption and confirmation as Head Master in Uchchattar Madhyamik Vidyalaya, Talelsra, Aligarh on 8.2.90. According to him in view of the newly

inserted section 33-B in the Act w.e.f. 7.8.93, since the appellant-writ petitioner continued in service as lecturer in Physics in the said college on adhoc basis, his case is liable to be considered for that purpose. He further submitted that the Full Bench decision of this court in the case of Smt. Pramila Misra (supra) has been considered subsequently by a Division Bench of this Court in the case of Raj Kumar Verma v. District Inspector of Schools, Saharanpur and others reported in (1999) 2UPLBEC-1420 wherein the Division Bench has held that the right of a teacher appointed in a short term vacancy on or before the date specified in section 33-B (1) accrues only upon the short term vacancy being converted into a substantive vacancy and a teacher appointed in short term vacancy on or before the specified dates, who is not found 'suitable' and 'eligible' for substantive appointment shall cease to hold the appointment on such date as the State Government may by order specify and not on the date the short term vacancy came to be converted into substantive vacancy. He further relied upon a Division Bench decision of this Court in the case of Smt. Shashi Saxena and others v. Deputy Director of Education (Secondary) U.P. and others, reported in 2000 (3) Education and Service Cases-1990 and submitted that the decision in Raj Kumar Verma (supra) has been followed and this Court had held that an appointment on adhoc basis on the post of assistant teacher in L.T. grade being converted into a substantive vacancy on the retirement of the person holding the substantive post does come to an end automatically. Thus, according to Dr. Dwivedi the appointment of appellant-writ petitioner did not come to an end automatically on conversion of short term vacancy post into a substantive vacancy post and he is entitled for being considered for regularization/substantive appointment.

6. Learned standing counsel, however, submitted that the short term vacancy post which the appellant- writ petitioner was occupying stood converted into a substantive vacancy post on 8.2.90, when Rama Nand Misra was absorbed and confirmed on the post of Head Master in another institution and the appointment of the appellant - writ petitioner, in view of the Full Bench decision in the case of Smt. Pramila Misra ceased on that day itself. He further submitted that if the appellant- writ petitioner, had continued to work thereafter and received salary even from the state exchequer uptill 31.1.94, that would not give any right, benefit or advantage to him to claim regularization of his services on the substantive post of lecturer in Physics in the said college under section 33-B of the Act, as he would be deemed not to be in service on the date of commencement of the said section. He relied upon a decision of the Hon'ble Supreme Court in the case of Committee of Management, Arya Nagar Inter College, Kanpur, through its manager and another v. Sree Kumar Tewary and another reported in AIR 1997 SC-3071.

7. Having heard the learned counsel for the parties, we find that in the present case the question is as to whether the appellant- writ petitioner, who was appointed in a short term leave vacancy on 15.7.89 and whose appointment was approved by the District Inspector of Schools on 16.9.89 and continued to work till 31.1.94, is entitled for being considered for regularization under

section 33-B of the Act or not. It is not in dispute that the appellant- writ petitioner was appointed under the provisions of Second Removal of Difficulties Order after following the due procedure. He continued to work till 31.1.94 without any let or hinerance from any quarter and also received salary from the State exchequer under the provisions of the Payment of Salaries Act. Section 33-B of the Act deals with regularization of certain appointment. It reads as follows:

"33-B Regularization of certain other appointments:-

a) (i) was appointed by promotion or by direct recruitment in the Lecturer grade or Trained graduate grade on or before May 14, 1991 or in the Certificate of teaching grade on or before May 13, 1989 against a short term vacancy in accordance with Paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (second) Order, 1981 and such vacancy was subsequently converted into a substantive vacancy; or

(ii) was appointed by direct recruitment on or after July 14, 1981 but not later than July 12, 1985 on ad hoc basis against a substantive vacancy in the Certificate of Teaching grade through advertisement and such appointment was approved by the Inspector; or

(iii) was appointed by promotion or by direct recruitment on or after July 31, 1988, but not later than May 14, 1991 on adhoc basis against a substantive vacancy in accordance with Section 18, [as it stood before its substitution by the Uttar Pradesh Secondary Education Services Commission and selection Boards (Second Amendment) Act, 1992];

b) possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with, the provisions of the Intermediate Education Act, 1921;

c) has been continuously serving the Institution from the date of such appointment up to the date of the commencement of the Act referred to in sub-clause (iii) of Clause (a);

d) is not related to any member of the management or the Principal or Head Master of the Institution concerned in the manner specified in the explanation to sub-section (3) of Section 33-A;

e) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under sub-section (2), shall be given substantive appointment by the management.

2.(a) For each region, there shall be a Selection Committee comprising--

i) Regional Deputy Director of Education of that region, who shall be the Chairman.

ii) One officer holding a Group 'A' post [specified as such by the State Government from time to time] in any department other than Education department, to be nominated by the State Government.

iii) Regional Inspectress of Girls School of that region; Provided that the Inspector of the District shall be co-opted

as a member while considering the cases for regularization of that district.

(b) The Selection Committee constituted under Clause (a) shall consider the case of every such teacher and on being satisfied about his eligibility and suitability in view of the provisions of sub-section (1) shall, subject to the provisions of sub-section (3) recommend his name to the Management for appointment under sub-section (1) in a substantive vacancy.

(3) (a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment.

(b) if two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(4) Every teacher appointed in a substantive capacity under sub section (1) shall be deemed to be on probation from the date of such substantive appointment.

(5) A teacher who is not found suitable under sub-section (1) and a teacher who is not eligible to get a substantive appointment under that sub-section shall cease to hold the appointment on such date as the State Government may by order specify.

(6) Nothing in this section shall be construed to entitle any teacher to substantive appointment, if on the date of commencement of the Act referred to in sub-clause (iii) of Clause (a) of sub-section (1), such vacancy had already been filled or selection for such vacancy has already been made in accordance with this Act."

8. From a reading of the aforesaid section, it is clear that a person, who has been appointed by direct recruitment in the lecturers' grade on or before 14.5.91 against a short term vacancy in accordance with para-2 of the Second Removal of Difficulties Order and such vacancy was subsequently, converted into a substantive vacancy and he possesses the qualification prescribed or is exempted from such qualification under the provisions of Intermediate Education Act, 1921, and has been continuously serving the college upto the date of the commencement of the Act and is not related to any member of the management or the Principal or the Head Master of the college and has been found suitable for appointment for a substantive capacity by a selection committee constituted under section (2) shall be given substantive appointment by the management. When considered as to whether the appellant-writ petitioner fulfils the requirement of section 33-B (i) or not, we find that the appellant-writ petitioner was appointed before 14.5.91 i.e. on 15.7.1989 in the lecturers'/grade under the provisions of Removal of Difficulties Order, which appointment has also been approved by the District Inspector of Schools. He has been continuously working since 15.7.89 till 31.1.1994 i.e. even after the commencement of the Amending Act, which is 6.8.93. Thus, he is entitled for being considered for regularization by a Selection Committee duly constituted under sub-section (2) of Section 33-B of the Act.

9. In the case of Smt. Pramila Mishra (supra), the Full Bench of this Court has held that--

"A teacher appointed by the management of the institution on adhoc basis in a short term vacancy (leave vacancy/suspension vacancy), which is subsequently converted into a substantive vacancy in accordance with the provisions of the Act, Rules and Orders, (on death, resignation, dismissal or removal of the permanent incumbent), cannot claim a right to continue. He has, however, right to be considered alongwith other eligible candidates for adhoc appointment in the substantive vacancy if he possesses the requisite qualifications."

10. The decision of the Full Bench in the case of Smt. Pramila Mishra (supra) was considered subsequently by a Division Bench in the case of Raj Kumar Verma (supra), wherein the Division Bench has held as follows:

"The question for consideration before the full Bench in the case of Pramila Mishra (supra), was whether a teacher appointed on adhoc basis in a short term vacancy, such as a vacancy caused due to leave, was entitled; as of right: to continue on the said post even after the short term vacancy had been converted into a permanent vacancy due to death, resignation, retirement or termination of the permanent incumbent. The full Bench noticed that the answer to the question would depend on the interpretation of Section 33-B of the U.P. Secondary Education Service Commission and Selection Boards Act, 1982 [U.P. Act No. 15 of 1982] and its "interaction with the provisions of the U.P. Secondary Education Service Commission [Removal of Difficulties] [Second] Order, 1981. The Full Bench held as under:

"In the case of adhoc appointment in a short term vacancy paragraph-3 of the Second Order specifically lays down that the appointment will come to an end if the short term vacancy otherwise ceases to exist. It follows, therefore, that when a vacancy caused due to grant of leave to or suspension of the permanent incumbent becomes a substantive vacancy on account of his death resignation or termination or removal from service, the short term vacancy ceases to exist and substantive vacancy is created in its place. On a perusal of the relevant provisions anxious consideration to the matter, we do not find any provision which directly or even indirectly vests a right in a person appointed as an adhoc teacher in a short term vacancy to continue even after the said vacancy has ceased to exist and a substantive vacancy has been created in its place. What we want to stress and which is clear to us is that he cannot claim as a matter of right that he is entitled to continue the post till the candidate selected by the Commission/Board joins even if the short term vacancy has ceased and a substantive vacancy in the post of teacher has been created in its place."

Paragraph-3 of the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981, as amended by para-3 of the U.P. Secondary Education Service Commission (Removal of Difficulties]

[Third] Order 1982 provides that every appointment of an adhoc teacher under paragraph-2 shall cease to have effect [i] when the teacher, who was on leave or under suspension joins the post or [ii] when the short term vacancy otherwise ceases to exist. The full Bench in support of its conclusions aforestated has placed reliance on the provisions continued in para-3 of the Second Removal of Difficulties Order, 1981 referred to above. The Full Bench, in support of its conclusion referred to above, also noticed the difference in the manner of appointments under the provisions in the following words:

"A clear distinction has been maintained between substantive vacancy and short term vacancy of the post of teacher. The authority to make the appointment, the procedure to be followed in making the appointment and the considerations to be made in making the appointments in the two cases are distinct and different from each other."

The question herein is not whether a teacher appointed in a short term vacancy is entitled to continue as of right even after the vacancy is converted into a substantive vacancy. The question involved in the instant case is whether the appellants are entitled to be considered for being given substantive appointment under section 33-B accrues only upon conversion of the short term vacancy into substantive vacancy as provided in sub-section [1] of Section 33-B. A teacher appointed in short term vacancy on or before the dates specified in sub-clause [a][i] of sub-section [1] of Section 33-B if not found 'suitable' and 'eligible' to get substantive appointment would cease to hold the post on such date as the state Government may by order specify. That is how the provisions contained in Section 33-B of U.P. Act No.5 of 1982 "interact" with those of the U.P. Secondary Education Service Commission [Removal of Difficulties] [Second] Order, 1981 in respect of teachers appointed prior to the date specified in the Section. The question as to how do the two provisions "interact" has not been specifically answered by the Full Bench in Pramila Mishra's case [supra]. In our opinion the right of a teacher appointed in a short term vacancy on or before the date specified in Section 33-B [1] accrues only upon the short term vacancy being converted into a substantive vacancy and a teacher, appointed in short term vacancy on or before the specified dates, who is not found 'suitable' and 'eligible' for substantive appointment shall cease to hold the appointment on such date as the state Government may by order specify and not on the date the short term vacancy came to be converted into substantive vacancy. The question in our considered opinion needs to be examined by the duly constituted Selection Committee comprehended by sub-section [3] of Section 33-B as the appellants were concededly appointed in Certificate of Teaching Grade before the specified date namely, May 13, 1989. Whether they fulfill other conditions of being given substantive appointment is a question which is to be decided by the Selection Committee."

11. The Division Bench decision in the case of Raj Kumar Verma was

subsequently followed by another Division Bench of this Court in the case of Smt. Shashi Saxena (supra) and held that the services of a person does not come to an end automatically on the post being converted into substantive vacancy. In the case of Smt. Shashi Saxena (supra), the facts were that one Smt. Rama Dikshit, who was holding the substantive post of assistant teacher in L.T. Grade was given adhoc promotion against short term vacancy on the post of lecturer. Smt. Shashi Saxena was appointed on adhoc basis in the short-term vacancy caused by the adhoc promotion of Smt. Rama Dikshit. Smt. Rama Dikshit retired from service. The substantive post held by Smt. Rama Dikshit i.e. the assistant teacher in L.T. grade fell vacant. On these facts after considering the provision of section 33-B of the Act, and the Second Removal of Difficulties Order 1981 the Division Bench while allowing the special appeal held that the services of Smt. Shahsi Saxena cannot be said to have come to an end automatically on the post of assistant teacher in L.T. grade on being converted into substantive vacancy on the retirement of Smt. Rama Dikshit.

12. We are in respectful agreement with the decision given in the case of Raj Kumar Verma and Smt. Shashi Saxena (supra) and hold that there is noting in Smt. Pramila Mishra's case, which prohibits giving of a substantive appointment by the management if the person has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under Sub-section [2] of Section 33-B of the Act and is found to fulfill all other requirements of sub section [1] of Section 33-B of the Act. In the case of Committee of Management, Arya Nagar Inter College, Kanpur (supra) relied upon by the standing counsel, the Hon'ble Supreme Court was considering the question as to whether a person is entitled to the benefit of section 33-B [1][a][i] of the Act, where the services came to be terminated on June 30,1988. The Hon'ble Supreme Court had found that the services of the teacher concerned was terminated on May 30, 1988 w.e.f. 30.6.88. The said teacher continued to remain in service on account of an interim order passed by this Court in the writ petition filed by the said teacher. On these facts, the Hon'ble Supreme Court found that admittedly, the services of the teacher came to be terminated w.e.f. 30.6.88, though, he had obtained a stay order and continued to be in service, which was not by virtue of his own right under the order of an appointment but he continued in the office with the permission of the management. In this view of the matter the provisions of Section 33-B [1][a][i] of the Act had no application.

13. Admittedly, in the present case, the appellant-writ petitioner worked without any let or hindrance till 31.1.1994. Even, the person, namely, Rama Nand Mishra on whose leave vacancy, the appellant-writ petitioner had been appointed, did not inform the authorities about his absorption and confirmation as Head Master in another college on 8.2.1990. The appellant-writ petitioner was being paid salary under the Payment of Salaries Act, from the state exchequer during his appointment as subsisting. The period of leave of Rama Nand Mishra expired on 31.1.94, when the management gave the notice of cessation of service of the appellant-writ petitioner. Thus, when the Amending Act, namely U.P. Act No. 1 of 1993, which

inserted section 33-B in the U.P. Secondary Education Services Selection Board Act 1982, came into force w.e.f. 7.8.93, the appellant-writ petitioner would be treated to be continuously serving the institution from the date of his appointment till the commencement of the Amending Act and is thus, entitled for being considered by the Selection Committee constituted under sub-section [2] of Section 33-B of the Act in accordance with law. The decision of the Hon'ble Supreme Court in the case of Committee of Management, Arya Nagar Inter College, Kanpur (supra) would not be applicable to the facts of the present case, since the appellant-writ petitioner had continued in service in the institution/college without any let or hinderance by any of the authorities and his services was never terminated by the management or by the District Inspector of Schools.

14. In view of the foregoing discussions, the special appeal succeeds and is allowed. The respondent no. 1 is directed to refer the matter relating to the grant of substantive appointment to the appellant-writ petitioner to the Selection Committee constituted under sub-section [2] of Section 33-B of U.P. Secondary Education Services Selection Board Act, 1982 and till such time any decision is taken by the said committee, the appellant-writ petitioner be permitted to continue on the post in question and be paid salary. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 10.5.2002

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

Civil Misc. Writ Petition No. 21328 of 1999

Chandan Singh Rathi ...Petitioner
Versus
District Magistrate, Gautam Budh Nagar and another ...Opposite Parties

Counsel for the Petitioner:
Sri M.D. Singh

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- the petitioner has not been furnished of the documents which he was demanding during the course of enquiry- since in this case no regular and proper inquiry was held nor was subsistence allowance paid hence in these circumstances, it is clear that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principle of natural justice and fair play- A dismissal order being major punishment has serious consequences and should be passed only after complying with the rules of natural justice. The inquiry report is not sustainable and therefore it cannot be relied, upon therefore, the dismissal order dated 30.11.1998 is liable to be set aside.

(Held in para 23).

Keeping in view the gravity of the charges against the petitioner the State Government is at liberty to make inquiry afresh and to conclude the inquiry preferably within six months from the date of receipt of the certified copy of this order, in accordance with the law

and in the light of the observations made above till then respondent is at liberty not to engage the petitioner on employment.

Case Law Preferred:

(1) 2001 (4) AWC 3061
(2) AIR 1988 SC 117
(3) AIR 1996 SC 2474
(4) AIR 1997 SC 1393
(5) AIR 1973 SC 1183
(6) 1999 (2) UPLBEC 1280 (SC)
(7) AIR 1999 SC 1416
(8) JT 1987 (3) SC 532
(9) 1983 (3) SCR 337
(10) 1983 (3) SCC 387
(11) AIR 1983 SC 803
(12) JT 1986 SC 394
(13) 1973(1) SCC 656
(14) AIR 1973 SC 1183
(15) (2000) 7 SCC 96
(16) 2001 (1) UPLBEC-908
(17) 2002 UPLBEC-1321
(18) 1998 (2) SCC-746
(19) 1994 (4) AWC 3227
(20) AIR 1963 SC 1719
(21) 1995 Supp(3) SCC 212
(22) AIR 1960 SC 160
(23) 1963 II LLJ 3961
(24) 1963 II LLJ 78

(Delivered by Hon'ble R.B. Misra, J.)

1. In this writ petition the petitioner has prayed to quash the order dated 9.4.1999 (Annexure -9 to the writ petition) whereby the service of the petitioner has been dismissed.

2. Heard Sri M.D. Singh, learned counsel for the petitioner as well as learned Standing counsel for the respondents.

3. The facts necessary for adjudication of the writ petition are that the petitioner was appointed on 21.12.1982 to the post of class- III as Ahalmad under the control of District Magistrate, Meerut at the relevant time now under the control of District Magistrate, NOIDA district Gautam Budh Nagar. While working in Land Acquisition Unit 'NOIDA' Ghaziabad, the petitioner was suspended by an order dated 19.3.1997 (Annexure-1 to the writ petition). A charge sheet dated 14.3.1997 was served to the petitioner alongwith suspension order. The petitioner made a representation dated 1.4.1997 for supply of the documents/inspection by giving a list of 17 documents so that the petitioner may give effective reply of the charge sheet. Similar requests were made by the petitioner on 4.4.1997 and 10.4.1997, however, neither the documents were furnished to him nor the petitioner was permitted to inspect the documents as desired by him, therefore, the petitioner filed writ petition no. 4960 /1997 in respect of non supply of the documents, and non payment of subsistence allowance. The, above writ petition was disposed by order dated 30.11.1998 (Annexure-3 to the writ petition) with following directions.

(i) Inquiry Officer/Disciplinary Authority directed to furnish the relevant document to the petitioner within 15 days. In case the document could not be supplied, the petitioner should be permitted to inspect the document and take note of the said document.

(ii) Inquiry Officer had been directed to conclude the inquiry within a period of 10 weeks and Disciplinary Authority had been directed to pass final order within a period of 6 weeks.

(iii) In case the departmental proceeding is not concluded within the stipulated period, suspension order shall stand revoked; and

(iv) The disciplinary authority was directed to pay subsistence allowance

within a period of one month from the date of production of copy of the order with condition if the petitioner is not paid subsistence allowance within the period, suspension order shall stand revoked.

4. The petitioner made a detail representation on 20.2.1999 (Annexure-4 to the writ petition) to the District Magistrate submitting:

(i) for payment of subsistence allowance;
(ii) for supply of the documents by making reference to the order of Hon'ble High Court dated 30.11.1998 and,
(iii) a request was made to change the inquiry officer.

5. According to the para 12 and 13 of the writ petition the petitioner has stated about the non-supply of the relevant documents as well as non-permission to inspect the relevant document by the petitioner and non-providing the proper opportunity to defend the petitioner before the Inquiry Officer. The petitioner also made a request for payment of subsistence allowance by his application dated 20.2.1999 and before Disciplinary Authority in his reply to the show cause notice dated 3.4.1999, however, admittedly the subsistence allowance had not been paid to the petitioner. The enquiry was concluded and punishment of dismissal order dated 9.4.1999 (Annexure-9) to the writ petition was passed which has been challenged in the present writ petition. The petitioner by his application dated 20.2.1999 (Annexure-4 to the writ petition) requested for change of the inquiry officer but before the disposal of the said application ex parte enquiry report dated 15/17.3.1999 (Annexure -7 to the writ petition) was submitted.

6. The counter affidavit was filed and according to para 7 of the same it revealed that all documents enclosed with the charge sheet were since already made available to the petitioner therefore, there was no necessity felt by respondents to furnish any other documents to the petitioner other than which were supplied to him. The fact that the petitioner was not paid subsistence allowance despite the request made by the petitioner from time to time admitted in 14 of the counter affidavit while replying the contents of para 31 of the writ petition therefore it is clear that the subsistence allowance was not paid in spite of the direction of this Court dated 30.11.1998 as indicated above.

7. The averments in respect of change of inquiry officer made in para 10 of the writ petition was not controverted in para 5 of counter affidavit.

8. On the other hand, it has been argued by learned Standing Counsel on behalf of the respondents that the petitioner was given sufficient opportunities and the relevant documents were furnished to him and there was no necessity to change the inquiry officer therefore, dismissal has been correctly made. Learned Standing Counsel on behalf of the respondents contended that there was no specific pleading pointing out which particular relevant document was not supplied to the petitioner due to which he was prejudiced. It was also submitted in reference to (a) Chandrama Tewari v. Union of India, AIR 1988 SC 117; (b) State of Tamil Nadu v. Thiru K. V. Perumal and others, AIR 1996 SC

2474 and (C) Secretary to Government and others v. A.C.J. Britto, AIR 1997 SC 1393, where Supreme Court found that it was not necessary to supply every document asked for rather the obligation was only to supply material and relevant documents only, thus, the enquiry proceedings had not vitiated for non supply of irrelevant documents.

9. The relevant part of Article 311 (2) of the Constitution of India read as follows:

"(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges;

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed…."

10. In Chanshyam Das Srivastava v. State of Madhya Pradesh, AIR 1973 SC 1183, when the delinquent Forest Ranger failed to attend the departmental enquiry due to paucity of funds resulting from non payment of subsistence allowance, the 5 Judges Constitution Bench quashed the order of the government dismissing him from service though giving liberty to the Government to start a fresh enquiry in accordance with law against him, observing as follows:

"5…..As he did not receive subsistence allowance till March 20, 1965, he could not, in our opinion attend the enquiry. The first payment of subsistence allowance was made to him on March 20, 1965, after a part of the evidence had already been recorded on February 9,10 and 11, 1965. The enquiry proceedings during those days are vitiated accordingly. The report of the Inquiry Officer based on that evidence is infected with the same defect. Accordingly, the order of the Government dismissing him from service cannot stand. It was passed in violation of the provisions of Article 311 (2) of the Constitution for appellant did not receive a reasonable opportunity of defending himself in the enquiry proceedings."

11. In State of Maharashtra v. Chandrabhan Tale (1983) 3 SCC 387, the Supreme Court has held the second proviso to Rule 151 (1) (ii) (b) as unreasonable and void being violative of Article 311 (2) of the Constitution of India providing payment of allowance of only Rupee 1/- per month to a suspended Government servant holding that normal subsistence allowance must be paid during the pendency of the trial of the criminal proceedings, appeal and even appeal before the Supreme Court, which is evident from Paragraph 23 of the judgment which reads as follows :

"Any departmental enquiry made without payment of subsistence allowance contrary to the provision for its payment, is violative of Article 311 (2) of the Constitution as has been held by this Court in the above decision. Similarly, any criminal trial of a civil servant under suspension without payment of the normal subsistence allowance payable to him under the rule would be violative of that Article. Payment of subsistence

allowance at the normal rate pending the appeal filed against the conviction of a civil servant under suspension is a step that makes the right of appeal fruitful and it is therefore, obligatory. Reduction of the normal subsistence allowance to the nominal sum of Rs.1 per month on conviction of a civil servant under suspension in a criminal case pending his appeal filed against that conviction, whether the civil servant is on bail or has been lodged in prison on conviction pending consideration of his appeal, is an action which stultifies the right of appeal and is consequently unfair and unconstitutional just as it would be impossible for a civil servant under suspension who has no other means of subsistence to defend himself effectively in the trial court without the normal subsistence allowance- there is nothing on record in these cases to show that the civil servants concerned in these cases have any other means of subsistence- it would be impossible for such civil servant suspended to prosecute his appeal against his conviction fruitfully without payment of the normal subsistence allowance pending his appeal. Therefore, Baban's contention in the writ petition that the subsistence allowance is required to support the civil servant and his family not only during the trial of the criminal case started against him but also during the pendency of the appeal filed in the High Court or this Court against his conviction is correct. If any provision in any rule framed under Article 309 of the Constitution is illusory or unreasonable, it is certainly open to the civil servant concerned to seek the aid of the Court for declaring that provision to be void. In these circumstances, I hold that the second proviso is unreasonable and void and that a civil servant under suspension is entitled to the normal subsistence allowance even after his conviction by the trial court pending consideration of his appeal is disposed of finally one way or the other, whether he is on bail or lodged in prison on conviction by the trial court." (emphasis supplied).

12. In Fakirbhai Fulabhai Solanki vs. Presiding Officer, AIR 1986 SC 1168, it was held as follows:

"Denial of payment of at least a small amount by way of subsistence allowance would amount to gross unfairness and violative of principles of natural justice." (Paragraphs 8 and 9).

13. In Captain M. Paul Anthony Vs. Bharat Gold Mines Ltd and others (1999) 2 UPLBEC 1280 (SC) = AIR 1999 SC 1416 the Supreme Court had held as follows:

"……Suspension notwithstanding non-payment of subsistence allowance is an inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demobilized and the salary is also paid to him at a reduced rate under the nickname of subsistence allowance, so that the employee may sustain himself. This Court in O.P. Gupta vs. Union of India and others, JT 1987 (3) SC 532, made the following observations with regard to subsistence allowance;

"An order of suspension of a Government Servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand v. Union of India,

that he continues to be a member of the Government service but is not permitted to work and further during the period of suspension he is paid only some allowance- generally called subsistence allowance- which is normally less than the salary instead of the pay and allowances he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental inquiry is concluded within a reasonable time, affects a Government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'subsist' as given in Short Oxford English Dictionary, Vol. (II) at p. 2171 is 'to remain alive as on food, to continue to exist'. 'Subsistence' means- means of supporting life, especially a minimum livelihood."

If, therefore, even that amount is not paid, then the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of non-payment of subsistence allowance, would gradually starve himself to death.

On joining Government service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Government. The Government, only because it has the power to appoint, does not become the master of the body and soul of the employee. The Government by providing job opportunities to its citizen only fulfils its obligations under the Constitution, including the Directive Principles of the State Policy. The employee, on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer, like Instrumentalities of the Government or Statutory or Autonomous Corporations etc., is regulated by the terms of contract of service or Service Rules made by the Central or the State Government. Under the proviso to Article 309 of the Constitution or other Statutory Rules including certified standing orders. The fundamental rights, including the Right to Life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. That was the reason why this Court in State of Maharashtra Vs. Chanderbhan, 1983 (3) SCR 337, 1983 (3) SCC 387: AIR 1983 SC 803, struck down a Service Rule which provided for payment of a nominal amount of rupees one as subsistence allowance to an employee placed under suspension. This decision was followed in Fakirbhai Fulabhai Solanki vs. Presiding Officer and another, JT 1986 SC 394, and it was held in that case that if an employee could not attend the departmental proceedings on account of financial stringencies caused by non-payment of subsistence allowance, and thereby could not undertake a journey away from his home to attend the departmental proceedings, the order of punishment, including the whole proceedings would stand vitiated. For this purpose, reliance was also placed on an earlier decision in Ghanshyam Das Srivastava v. State of Madhya Pradesh (1973) 1 SCC 656: AIR 1973 SC 1183.

Since in the instant case the appellant was not provided any subsistence allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by

medical certificates, was refused resulting an ex parte proceedings against him. We are of the opinion that the appellant has been punished in total violation of the principles of natural justice and he was liberally not afforded any opportunity of hearing. Moreover, as pleaded by the appellant before the High Court as also before us that on account of his penury occasioned by non-payment of subsistence allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the Inquiry Officer at such proceedings, which were held ex parte, stand vitiated' (Emphasis supplied).

In view of the discussions aforesaid, we hold that due to non-payment of subsistence allowance, the inquiry, the punishment of dismissal of the petitioner and dismissal of his appeal, all are void and liable to be quashed by this Court by grant of a writ of certiorari.

14. The Petitioner has placed reliance on the decision **Jagdamba Prasad Shukla vs. State of U.P. and others** (2000) SCC 90 para 8:

"where the Supreme Court has held that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance, No justifiable ground has been made out for non payment of the subsistence allowance all through the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of non- payment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show cause notice stated that even if he was to appear in inquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed."

15. The petitioner also placed reliance on the judgments of this High Court **2001 (1) UPLBEC 908 K.P. Giri Vs. State of U.P. and others** Para 7 and 8 as well as on **(2002 UPLBEC 1321 Bajrang Prasad Srivastava Vs. U.P. Pariyojana Prabandha U.P. State Bridge Corporation Ltd. and others**. It was held in the case of **K.P. Giri (supra)**

"even in the absence of any reply submitted by the petitioner to the charge sheet, it was incumbent upon the enquiry officer to fix the date in the enquiry and to intimate the petitioner about the same which has not been done in the present case. Moreover, from a perusal of the order of dismissal dated 20.3.98 it will be seen that the management had produced the evidence in support of the charges leveled against the petitioner making had been accepted by the enquiry officer, without making any effort to confront the same to the petitioner. Thus, the entire proceedings have been conducted in gross violation of equity, fair play and is in breach of the principles of natural justice.'

16. In respect of change of inquiry officer the petitioner has further placed reliance on **1994 (2) SCC 746** page 12

(Registrar of Co-operative Societies Madras and another Vs. F.X. Farnando) where it was held that justice must not only be done but must be seen to be done, therefore, the Supreme Court has directed that an another enquiry officer be appointed in order to remove any apprehension of bias on the part of respondent. In **1994 Supp. (2) SC 256 Para 5 Indrani Bai (Smt.) Vs. Union of India and others**. The Supreme Court has held that:

"it is seen that right through the delinquent officer had entertained a doubt about the impartiality of the enquiry to be conducted by the enquiry officer. When he made a representation at the earliest, requesting to change the enquiry officer, the authorities should have acceded to the request and appointed another enquiry officer, other than the one whose objectivity was doubted. "

17. The petitioner has placed reliance on **1999 (4) A.W.C. 3227 Para 5 Subhash Chand Sharma Vs. M.D. U.P. Co-Op. Spg. Mills. Fed. Ltd**. In this judgment of this Court it was held that:

"In our opinion, after the petitioner replied to the charge sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry, then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case, it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge sheet, he was given a show cause notice and thereafter the dismissal order was passed. In our opinion, this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion, the impugned order is clearly violative of natural justice."

18. In **Meenglas Tea Estate V. Workmen AIR 1963 SC 1719**, the Supreme Court observed

"It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions byway of cross examinations he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and the requirement must be substantially fulfilled before the result of the enquiry can be accepted."

19. In **S.C. Girotra Vs. United Commercial Bank 1995 Supp. (3) SCC 212** Supreme Court set aside the dismissal order which was passed without giving the employee an opportunity of cross examination. In **Punjab National Bank V. AIPNBE Federation, AIR 1960 SC 160 (vide para 66**) the Supreme Court held that in such enquiries evidence must

be recorded in the presence of the charge sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in **ACC Ltd. Vs. Their Work Man 1963 II LLJ 396 and in Tata Oil Mills Co. Ltd. Vs. Their Workmen 1963 II LLJ 78 SC.**

20. The petitioner has also placed reliance on (2001 (4) AWC 3061, P.C. Chaturvedi Vs. U.P. State Textile Corporation Ltd. and another) where the subsistence allowance were not paid despite the request made by the petitioner and the Inquiry Officer passed ex parte order and recommended dismissal against the petitioner and the disciplinary authority passed the dismissal on the recommendation made by the Inquiry Officer such dismissal was quashed.

21. The writ- petitioner when not paid the subsistence allowance for the period from the date of suspension to the date of ex parte inquiry and for non payment of subsistence allowance the writ -petitioner had suffered, constitutional rights of the writ petitioner were found to have been violated, thus the entire proceedings commencing from suspension of the petitioner leading to his dismissal treated to be actuated with malice in law was therefore quashed.

22. The petitioner placed reliance on the judgement dated 25.5.2001 of this court (DB) (M. Katju, R.B. Misra, JJ) in writ petition no. 7133/2001 (Radhey Shyam Vs. Secretary Minor Irrigation Department and Rural Engineering Services U.P. and others) where the writ petitioner working as Incharge executive engineer in the rural engineering services and minor irrigation department was charge sheeted for his alleged involvement of embezzlement, financial irregularities and financial loss however was made handicapped to participate in the inquiry for non-payment of subsistence allowance as well as legal dues during his suspension and the request of change of inquiry officer was not accepted by the competent authority and the ex parte inquiry was conducted behind his back without adopting proper procedure, no specific date, time and place of inquiry was fixed oral and documentary evidence against the writ petitioner was not adduced in his presence and he was not afforded opportunity to produce his own witnesses and evidence. The ex parte inquiry was found illegal and the order of dismissal of writ petitioner was quashed while allowing the writ petition, however, keeping in view the financial loss and irregularities it was made open to the respondents to hold a fresh inquiry in accordance with law and pass a fresh order. It is pertinent to mention that the Special Leave Petition 15226/2001 (State of U.P. vs. Radhey Shyam Pandey and others) preferred against the above order dated 25.5.2001 was dismissed on 1.1.2002 by the Supreme Court.

23. It appears that the petitioner has not been furnished of the documents which he was demanding during the course of enquiry. Since in this case no regular and proper inquiry was held nor was subsistence allowance paid, hence in these circumstances, it is clear that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principle of natural justice and fair play. A dismissal order being major punishment have serious consequences and should be passed only

after complying with the rules of natural justice. The inquiry report is not sustainable and therefore it cannot be relied upon, therefore, the dismissal order dated 30.11.1998 is liable to be set aside. However, keeping in view the gravity of the charges against the petitioner the State Government is at liberty to make Inquiry afresh and to conclude the Inquiry preferably within six months from the date of receipt of the this order, in accordance with the law and in the light of the observations made above till then the respondent is at liberty not to engage the petitioner on employment.

24. Let a certified copy of this order be given to the learned counsel for the petitioner on payment of usual charges within a week.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2002

BEFORE
THE HON'BLE YATINDRA SINGH, J.

Civil Misc. Writ Petition No. 16180 of 2002

Rameshwar ...Petitioner
Versus
Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioner:
Sri R.P.S. Chauhan
Sri Ajay Banot

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

U.P. Zamindari Abolition Act- Section 122-B (4F)- benefit can only be given over land vested in a Gaon Sabha- when Gaon Sabha is declared to be a town area or Nagar Panchayat then it ceases to exist and is divested of all properties- Gaon Sabha ceased to exist on 10th April 1974 and did not hold any property on the relevant date under section 122-B (4F) of the Z.A., the petitioners did not acquire any rights over the land in dispute.

Held in para 19

Section 117 (2) or Section 117 A of the Z A Act perhaps applies to a case when property within the jurisdiction of one local authority is vested in any other local authority, but in case the property itself falls within the jurisdiction of other authority, then they do not apply. Rule 3 AAA (2) (a) and (b) are also relevant and clarify this point. Perhaps the moment the property of Gaon Sabaha goes to another local authority then the other local authority becomes owner immediately, and no fresh notification is necessary, but this will await a suitable case.

Case law referred-
1970RD 450, AIR 1975 SC 2159, AIR 1977 K 83 FB, AIR 1973 All. 403

(Delivered by Hon'ble Yatindra Singh, J.)

1. These writ petitions consider if benefit under sub section (4-F) of Section 122-B {section 122-B (4-F)} of the UP Zamindari Abolition and Land Reforms Act, 1950 (the ZA Act) could be given over land not vested in a Gaon Sabha and consequences of declaration of a Gaon Sabha to be Town Area under section 3 of the Town Area Act, 1914 (the TA Act).

THE FACTS

2. The land in dispute vested in Gaon Sabha Rithaura, Bareilly under section 117 of the ZA Act. The Gaon Sabha Rithaura was upgraded as town Area Rithaura by notification dated

10.4.1974 under the TA Act. This Act has been since repealed and now all town areas, according to their population, have been renamed and are governed by U.P. Municipalities Act 1914. Town Area Rithaura has now become Nagar Panchayat Rithaura.

3. It is not clear from the records when consolidation operations were started under U.P. Consolidation of Holdings Act 1953 (the Consolidation Act) but the petitioners filed objections under section 9-A of the Consolidation Act alleging that:

- They are landless agriculturists belonging to scheduled caste.
- They are in possession over the plots in dispute since the time of their ancestors.
- Their names may be recorded over property in dispute in view of section 122-B (4F) of the ZA Act.

The Consolidation Officer allowed these objections on 19.1.1999 directing their names to be recorded as Bhumidhar with transferable rights. He held that petitioners are in possession over the Gaon Sabha property prior to 3rd June 1995 and are entitled to benefit of section 122-B (4F) of the ZA Act.

4. The state filed appeals. These appeals were allowed by the Settlement Officer Consolidation (the SOC) on the ground that the petitioners were not in possession over the land in dispute. The petitioners filed revisions which were dismissed by the Deputy Director of Consolidation (the DDC) on 11.3.2002 on the ground that the benefit under section 122-B (4F) of the ZA Act could not be given over the land in dispute as it had ceased to be Gaon Sabha land din view of notification dated 10th April 1974 under Section 3 of the TA Act declaring Gaon Sabha Rithaura to be Town Area Ruithaura. Hence the present writ petitions.

POINTS FOR DETERMINATION

5. I have heard Sri Ajay Bhanot and Sri RPS Chauhan counsels for petitioners, standing counsel and Sri V K Singh counsel for respondents. The following points arise for determination:

(i) Whether benefit under section 122 -B (4F) of the ZA Act can be given over land vested in a local authority other than Gaon Sabha?

(ii) Whether the land in dispute was vested in the Gaon Sabha Pithaura on the relevant date under section 122-B of the ZA Act?

1st POINT: BENEFIT-ONLY OVER GAON SHABHA LAND

6. Rule 115 C to 115 H of the UP Zamindari Abolition and Land Reforms Rules (the ZA Rules) provide summary procedure for ejectment of trespassers. These rules were declared illegal by the High Court. Section 122-B was introduced by UP Act no. 38 of 1981 to provide necessary sanction of law for the summary procedure for ejectment of a trespasser. Sub Section (1) of section 122 B (section 122 B (1) of the ZA Act provides for speedy recovery of property of Gaon Sabha or a local authority. It also permits imposing compensation for damages, misappropriation or wrongful occupation of such property.

7. Section 122 B as enacted did not contain sub section 4 F. It was introduced by UP Act no. 30 of 1975. Section 122 B (4F) of the ZA Act (quoted below)[1] is an exception to section 122B. It starts with notwithstanding clause and provides that the authorities will take no action under section 122 B in case conditions mentioned in sub section 4 F are fulfilled. One of the conditions was that the land should have been occupied prior to June 30 1975. The date 30th June 1975 has been amended since then, and now by U.P. Act no. 9 of 1997. It has been substituted by June 3, 1995.

8. Section 122 B (1) of the ZA provides for eviction from the land not only vested in Gaon Sabha but also in a local authority i.e. to say sub section (1) specifically refers to Gaon Sabha and local authority but section 122 B 4 F only provides for benefit over land vested in a Gaon Sabha. It does not refer to local authority. This shows that the benefit under section 122 B 4f is available only in respect of land vested in Gaon Sabha and does not extend to land vested in the State or in any other authority apart from Gaon Sabha. The Board of Revenue in its two decisions (quoted below)[2] has rightly taken the view that benefit under section 122 B 4F can be given in respect of land vested in Gaon Sabha. Of course a person has to fulfil other conditions mentioned in that sub section before the benefit can be given.

2nd POINT: LAND IN DISPUTE -NOT OF GAON SABHA

9. Notification dated 10.4.1974 declaring Gaon Sabha Rithaura to be Town Area Rithaura was issued under section 3 of the TA Act. This section prescribed conditions on which any village could be declared a town area. Here there is no challenge to the notification, but the dispute relates only to its legal consequences.

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[1] The relevant part of section 122-B of the ZA Act is as follows:

122-B of the Land Management Committee and the Collector (1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or Local Authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

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(4-F) Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a scheduled caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under section 117 (not being land mentioned in Section 132) having occupied it from before June 3, 1995 and the land so occupied together with land, if any, held by him from before the said date as bhumidhar sirdar or asami does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and it shall be deemed that he has been admitted as bhumidhar with non- transferable rights of that land under section 195.

[2] Nagar Mahapalika Kanpur vs. Rikhi Lal 1989 RD 332 and Smt. Sikandra Devi vs. Bhagwan Deen 1997RD 190

10. Section 8 (quoted below)[3] of the UP Panchayat Raj Act 1947 (the Panchayat Raj Act) provides that in case whole or part of the area of a Gram Panchayat is included in any other local body then Gram Panchayat would cease, and its assets and liabilities would stand transferred in the manner prescribed. This manner is prescribed in Rule 3 AAA of the Panchayat Raj Rules (quoted below)[4] Sub rule (1) of this Rule 3 AAA (1) is applicable when whole area of Gaon Sabha is included in a local authority. Sub Rule 2 of this rule is applicable when only part of Gaon Sabha land is included in any other local authority. Rule 3 AAA (1) provides that the Gaon Sabha shall cease and its all assets and liabilities shall be transferred to the local authority. If the Gaon Sabha is not in existence then it can not hold any property. So is the case here. Gaon Sabha Rithaura was declared Town Area Rithaurad on 10th April 1974; it ceased to exist and could not hold any property after that date.

11. I have already held that section 122 B (4F) is applicable on the land vested in a Gaon Sabha. Gaon Sabha, Rithaura was neither in existence, nor held any land on the relevant date under this section 122 B (4F) of the ZA Act, its benefit can not be given to the petitioner.

Shafi Case Is Not Applicable

12. Counsel for the petitioner has brought to my notice sub section (2) and (3) of Section 117 and Section 117 A and submitted that till a fresh notification is made in favour of Town Area Rithaura, the property in dispute will continue to vest in Gaon Sabha Rithaura even though it may not be in existence. He has also cited a Division Bench decision in Mohd. Shafi vs. Gram Sabha Bisauli, 1970 RD 450 (shafi case) to support his submissions.

13. In Shafi case Gaon Sabha Bisauli had filed a suit for ejectment. It was dismissed. Gaon Sabha Bisauli filed an appeal. During pendency of the appeal, part of property of Gaon Sabha Bisauli (which included property in dispute in that case) was included in the town area Achhalda. The defendant filed an application to dismiss the appeal on the ground that Gaon Sabha Bisauli was not entitled to maintain the appeal as the property was vested in town area Achhalda. This application was dismissed. The defendant filed a revision. In this revision the question of maintainability of appeal by Gaon Sabha Bisauli was referred to the larger bench. The Division Bench of this court, while deciding the reference, made some

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[3] **8. Effect of change in population or inclusion of the area of a Gram Panchayat in Municipalities, etc**.- If the whole of the area of Garm Panchayat is included in a city, municipality, cantonment, notified area, or Nagar Panchayat the Gram Panchayat shall cease, and its assets and liabilities shall be disposed of in the manner prescribed. If a party of such area is so included, its jurisdiction shall be reduced by that part.

[4] The relevant part of rule 3-AAA is as follows:

3-AAA. If the whole of the area of a Gaon Sabha is included, in a municipality, cantonment, notified area or town area the Gaon Sabha shall cease and its assets and liabilities shall be transferred to the local body in which such area is included.

(2) If a part of such area is so included, the jurisdiction of the Gaon Sabha concerned shall be reduced by that part and the division of assets and liabilities of the Gaon Sabha shall be made in the following manner:

observations whether Gaon Sabha Bisauli continued to be vested with the property or not, but these observations are merely obiter and were not necessary for deciding the case. The court (in paragraphs 4 and 6) held:

"In the present case, some of the plots included in territorial limits of the Gram Sabha, Bisauli have been included in the territorial limits of the Town Area Acchalda. So, the Gram Sabha, Bisauli did not cease to exist, but its jurisdiction was excluded in relation to such plots"

"Under section 34 the property belonged to the Gaon Sabha. The same stood transferred to the Town Area. There was no change in the nature, or quality or quantum of the rights. This is case of assignment of the interest. Since it has been effected by force of the statutory rules, the assignment is statutory, to which order 22 Rule 10, CPC will apply".

14. Once the court held that the case was covered by order 22 rule 10 then the suit could be continued by the Gaon Sabha Bisauli or by the Town Area Acchlda by leave of the court and appeal by Gaon Sabha Bisauli was competent. It was not necessary to decide whether the property continued to vest in Gaon Sabha Bisauli or not'. The cases covered by order 22 rule 10- unlike the case covered by rule 3 or rule 4- do not abate. Sarkar's Law on civil procedure 9th Edition Vol. 2 (page 1670) explains:

"Or 22 r 10 is based on the principle that trial of a suit cannot be brought to an end merely because interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit, but that suit may be continued against the person acquiring the interest with the leave of the court (Rikhu v. Som AIR 1975 SC 2158) R 10 enables only continuance of the suit by leave of the court. Where by reason of r 3 or r 4, as the case may be, there is abatement there would be no scope for continuance (Goutami v. Madhavan AIR 1977 K 83 FB)"

15. Apart from above, the Shafi case was concerned with question when only part of the property of Gaon Sabha was transferred to the Town Area. It was not the case where the Gaon Sabha itself was declared to be a Town Area. The court in the Shafi case itself pointed out the differences. This is clear from paragraph 10 of the report. The court in this paragraph cited an unreported decision of a single judge in Town Area Committee Kore Jahanabad v. Rai Bahadur Adya Sarana Singh (Adya Saran case)[5]. This decision is a case where Gaon Sabha itself was declared a Town Area, as the case in the writ petition. The single Judge in the Adya Saran case held:

'The moment Gaon Sabha ceased, the property would revert back to the State.'

16. The division bench in the Shafi case while dealing with it observed.

'This proposition may apply where the entire territories of the Gaon Sabha are transferred with the result that the Gaon Sabha ceased, but, we are unable to hold that the same consequence would follow where only a part of the area of the Gaon Sabha is transferred to a Town Area or any other local body. In such a case,

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[5] SA No. 1983 of 1962 decided on 1st April 1969

the existing rights of the Gaon Sabha in the land would continue to remain vested in the Gaon Sabha.'

This shows that Shafi case itself made a distinction between the case where the Gaon Sabha ceased as in the present case and the case where Gaon Sabha continued to exist but only part of its property was transferred. The Shafi case is not applicable to the facts of this case. On the contrary these two cases show that when a Gaon Sabha is declared to be Town Area, it ceases and is no longer vested with any property.

SOME OBSERVATIONS

17. In this case I have considered the question whether Gaon Sabha Rithaura is vested with the land in dispute or not, I have negated it. The question, whether the Town Area Rithaura and thereafter Nagar Panchayat Rithaura is vested with land in dispute is now involved here. Some observations, regarding this question, have been made in Adya Saran and Shafi case. I would like to make few observations.

18. Adya Saran case has held that Gaon Sabha after it ceased to exist did not hold any land, and the same reverted back to the State. It has also held that the Town Area is not the owner, till it is proved that the land was transferred to the Town Area. This, to my humble submission, is not correct. Rule 3 AAA (1) indicates that in such event assets and liabilities are transferred and the transfer being automatic does not require any fresh notification under section 117 (1) of the ZA Act. Two single Judges- one in a case relating to Town Area (quoted below)[6] and the other in a case relating to Nagar Palika (quoted below)[7]-have rightly held that transfer is automatic and does not require any fresh notification. I would have referred this question to the larger bench if I had to decide this question.

19. I have already indicated that the Shafi case is not applicable here and the observations made by the division bench that property is not vested in the town area are obiter. Apart from it, in my humble opinion, observations regarding section 117, 117-A of ZA Act and rule 3-AAA (2) of the Panchayat Raj Rules by the Court are not correct. Section 117 (2) or Section 117 A of the ZA Act perhaps applies to a case when property within the jurisdiction of one local authority is vested in any other local authority. But in case the property itself falls within the jurisdiction of other local authority, then they do not apply. Rule 3 -AAA (2) (a) and (b) are also relevant and clarify this point. Perhaps the moment the property of Gaon Sabha goes to another local authority then the other local authority becomes owner immediately, and no fresh notification is necessary, but this will await a suitable case.

CONCLUSION

19. My conclusions are as follows:

(i) Benefit under section 122-B (4F) can only be given over land vested in a Gaon Sabha.

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6 Gaon Sabha Jhinjhak vs. State of U.P.; AIR 1973 Allahabad 403

7 Mohd. Amir vs. Lala Ram; 1983 UPLBEC 685

(ii) When Gaon Sabha is declared to be a town area on Nagar Panchayat then it ceases to exist and is divested of all properties.

(iii) Gaon Sabha Rithaura ceased to exist on 10th April 1974 and did not hold any property on the relevant date under section 122-B (4F) of the ZA Act, the petitioners did not acquire any rights over the land in dispute.

(iv) The petitions have no merits and are dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2002

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

Civil Misc. Writ Petition No. 3945 of 1998

Sunit Kumar Tyagi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan

Counsel for the Respondents:
Sri Ranjeet Saxena
Sri U.S. Awasthi
S.C.

Land Acquisition Act- Section 48- Interest of justice requires that the respondents should take a quick decision whether they would pursue with the acquisition proceedings and would take possession of the land or they would like to withdraw from acquisition of the land by taking appropriate action in accordance with the section 48 of the Act. The respondents are accordingly directed to take a final decision expeditiously preferably within 4 months in the matter whether they would still proceed with the acquisition proceedings and take possession of the land by dispossessing those who had raised constructions over the plot in dispute or they would withdraw from the acquisition of the land.

(Held in para 16).

If a decision is taken to withdraw from acquisition of the land, appropriate steps shall be taken by the government to issue a notification in that regard. If, however, the respondents decide not to withdraw from the acquisition proceedings to its logical end, the award for the acquired land under section 11 of the Act shall be made expeditiously and in accordance with law. Without being influenced in any manner by the interim order passed by this Court on 7.10.1998. The Collector/Special Land Acquisition Officer would also adjudicate the question as to who is entitled to get the compensation.

Case law referred.
1997 (1) SCC 134
1979 RD 226

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

1. This writ petition under Article 226 of the Constitution has been filed praying that a writ, order or direction in the nature of mandamus be issued commanding the respondents to pay 80 percent of the estimated amount of the compensation as provided by section 17 (3-A) of Land Acquisition Act to the petitioner in respect of plots no. 947 and 1019/2 of village Makanpur, Tehsil Dadri, district NOIDA, along with 24 per cent interest from 13.11.1997, when the respondents took possession over the aforesaid plots. The writ petition was filed on 29.1.1998 and subsequently on 27.1.1999, an amendment application was

moved wherein a prayer has been made to amend the body of the writ petition and also to add another relief that a writ, order or direction in the nature of mandamus be issued commanding the respondents no. 2 and 3 to make an award in respect of the petitioner's land under section 11 of the Land Acquisition Act within the shortest possible time fixed by the Court.

2. The case set up in the writ petition is as follows. The petitioner was bhumidhar in possession of plot no. 947 area 1 bigha 16 biswas and plot no. 1019/2 area 2 Bighas 3 Biswas situate in village Makanpur, Pargana Loni, Tehsil Dadri, district Ghaziabad. Originally plot no. 1019/2 had an area of 2 bigha 14 biswas but the petitioner transferred 11 biswas area of this plot by a power of attorney to Rameshwar Prasad. The State Government issued a notification under section 4 (1) read with section 17 of the Land Acquisition Act (hereinafter referred as the Act) on 20.6.1995 for acquiring large number of plots in village Makanpur for a public purpose namely, for Planned Industrial Development in district Ghaziabad. This was followed by a notification under section 6 of the Act, which was published on 27.7.1995. The notification mentioned that the Government was satisfied that the case was one of urgency and the provisions of section 17 (1) of the Act were applicable to the same. Accordingly, a direction was issued to the Collector of Ghaziabad to take possession of the land mentioned in the Schedule annexed to the notification after expiry of 15 days from the date of publication of the notice mentioned in sub- section (1) of section 9 though no award under section 11 of the Act had been made. Thereafter, the notice under section 9 (1) of the Act was issued on 15.11.1995 and the possession over the aforesaid two plots was taken over on 13.11.1997. The petitioner approached respondent no. 2 several times but 80 percent of the estimated amount of the compensation was not paid to him which he was entitled to get under section 17 (3-A) of the Act.

3. The main counter affidavit on behalf of the respondents has been filed by Jagdamba Prasad Gupta, Tehsildar, Gautam Budh Nagar and the case set up therein is that plot nos. 947 and 1019/2 of village Makanpur, Pargana Loni, Tehsil Dadri district Ghaziabad, were previously recorded as property of Gram Samaj, Makanpur. The petitioner filed a suit under section 229-B of U.P. Z.A. & L.R. Act, in which he was declared as Bhumidar of the plots and thereafter his name was recorded over the said plots in the revenue records. The notification under section 4 (1) read with section 17 of the Act was issued on 10.4.1995 for acquiring the land for a public purpose namely, for Planned Industrial Development through NOIDA. After the publication of the notice in the locality and also the publication of the notification under section 6 of the Act dated 27.7.1995, which was published in the Gazette on 8.8.1995, the petitioner executed a power of attorney with regard to 11 biswas area in favour of Lokesh Sharma son of Ram Bharose Sharma to manage and transfer by way of sale the aforesaid plot. On the basis of the aforesaid power of attorney, latter on Lokesh Sharma executed a sale deed of 11 Biswas area of plot no. 1019/2 on 8.3.1996 in favour of Rameshwar Prasad. The aforesaid sale deed had been executed after the notification under section 4 (1) and 6 of the Act had been

published. A joint survey of plots no. 947 and 1019/2 was conducted by Vijay Kumar, Amin, Land Acquisition, NOIDA, Jagveer Singh, Lekhpal, NOIDA, Ram Singh, Kannoongo, NOIDA and Naib Tehsildar, NOIDA on 13.8.1997 and it was found that 51 persons had raised constructions over plot no. 947 and 23 persons had raised constructions over plot no. 1019/2 and were residing therein. A notice was issued on 11.11.1997 by Additional Collector (Land Acquisition), NOIDA to the petitioner directing him to remove the illegal encroachments from the acquired land. It was mentioned in the notice that the 80 percent of the estimated amount of the compensation would be paid to him only after he had removed all the illegal encroachments from the aforesaid plots. A survey was conducted on 14.7.2000 and 15.7.2000 and at that time more than 25 persons who have raised constructions over the disputed plot gave a written application to the A.D.M., Gautam Budh Nagar stating that they had purchased different portions of the land from Rohtash to whom a power of attorney had been executed by the petitioner Sunit Kumar Tyagi on 4.3.1989 and in case they were dispossessed they would be completely ruined. They further prayed that no compensation should be paid to the petitioner Sunit Kumar Tyagi. A copy of this application has been filed as Annexure -5 and a copy of the report of the ADM dated 18.7.2000 has been filed as Annexure CA -6 to the counter affidavit. In his report the ADM mentioned that the entire land is now covered by the constructions raised by many people and the same can not be of any use of NOIDA. It is averred in para 8 of the counter affidavit that the inspection report dated 13.8.1997, which is annexed alongwith Annexure CA -4 shows that the construction had been raised in the entire area which had been acquired. A copy of the power of attorney executed by the petitioner Sunit Kumar Tyagi with regard to plot no. 947 in favour of Rohtash on 4.3.1989 by which he empowered the later to do anything on the land namely, to do plotting on the same and to sell it or to execute any agreement with regard to the same or to carry on any other kind of activity or to move applications and a copy of similar power of attorney executed by the petitioner in favour of Lokesh Sharma for plot no. 1019/2 on 22.2.1996 have been filed as Annexure CA-7 to the counter affidavit. It is averred in para 11 that when the symbolic possession of the aforesaid plots was delivered to NOIDA, the same was done with the construction standing over the same. In para 12, it is averred that the petitioner had illegally transferred plot nos. 947 and 1019/2 to various persons who are still in occupation of the same and, therefore, he is not entitled to any compensation. In compliance of an interim order passed by the High Court on 7.10.1998, the petitioner has been paid compensation amounting to Rs.8,94,700/- . In para 13, it is averred that the petitioner had not come to Court with clean hands and he had concealed the material fact that he had sold the plots in dispute to many persons and that he was not in possession over the land on the date when a symbolic possession was delivered to NOIDA.

4. A Counter affidavit sworn by Narendra Pal Sharma, Naiyab Tehsildar, has also been filed by NOIDA, which has been impleaded as respondent no. 4 to the writ petition. The case set up therein is that after acquisition of the land compensation amount had been paid by

NOIDA to District Magistrate, Ghaziabad. NOIDA was given possession on papers only on 13.11.1997. The petitioner had transferred the land in dispute to a large number of persons who had raised constructions. The NOIDA (respondent no. 4) had requested the District Magistrate, Ghaziabad on 6.1.1998 to remove encroachment and unauthorized constructions existing over the plot in dispute and to deliver actual physical possession of the same to it. Even before possession had been delivered to NOIDA on paper, it had written to the District Magistrate to get the unauthorized constructions removed and to deliver it actual physical possession of the land. It is further pleaded that the petitioner is not entitled to any compensation as he had sold the land to more than 53 persons who had raised constructions over the same.

5. In the rejoinder affidavit filed by the petitioner, it has been stated that the possession was taken over by NOIDA on 13.11.1998 and the petitioner had not transferred land of plot no. 947 to 51 persons nor of plot no. 1019/2 to 23 persons as alleged in the counter affidavit. It is also pleaded that few encroachments and illegal constructions were created by the NOIDA authorities.

6. The record shows that before the admission of the writ petition time for filing counter affidavit was granted to the learned State Counsel by the order dated 3.2.1998. The matter was heard on 7.10.1998 and till then no counter affidavit had been filed. On the said date an order was passed directing the respondents to pay 80 per cent of the estimated amount of compensation to the petitioner within six weeks. In pursuance of this order, Rs.8,94,700/- was paid to the petitioner. The writ petition was admitted thereafter on 23.3.1999.

7. Sri W.H. Khan, learned counsel for the petitioner has submitted that the State Government has acquired the petitioner's plots by issuing notifications under section 4(1) and 6 of the Act and, therefore, the Collector is bound to make an award under section 11 of the Act and to pay compensation to him. He has referred to Ramniklal N. Bhutta and another versus State of Maharashtra and others, (1997) 1 SCC 134, wherein it has been held that once a notification under section 4 and a declaration under section 6 of the Act is made, the Land Acquisition Officer has no power to decline to pass the award in respect of land(s) notified either partially or holly. It has been further held that unless and until the lands are de notified under and in accordance with section 48, the Land Acquisition Officer has to pass an award with respect to the lands notified.

8. Learned standing counsel has on the other hand submitted that the requirement of law under section 17 (3-A) of the Act is that before taking possession of any land, the Collector has to tender 80 per cent of the estimated amount of compensation to the persons interested and entitled thereto and it has to be paid to them unless prevented by some one or more of the contingencies mentioned in section 31 (2) of the Act. It has been urged that a large number of persons to whom the petitioner had transferred the land and who had raised construction over the same had lodged a serious protest that the compensation should not be paid to the petitioner as in the event they were dispossessed they will be completely

ruined. A copy of the application given by these persons to the District Magistrate, Gautam Budh Nagar, on 17.7.2000 has been filed as Annexure CA -5 to the counter affidavit. A copy of the report dated 18.7.2000 submitted by ADM (Land Acquisition) to the Rajashav Adhikari, NOIDA, wherein, it is mentioned that applications had been given by those who have raised constructions and also a video cassette showing the constructions on the spot was made available to him has been filed as Annexure CA-6 to the counter affidavit of the State Government. It is, thus, urged that there is a dispute as to the title to receive the compensation. Learned standing counsel has further submitted that if the possession is taken after demolition of the structures, the real sufferer would be those whose constructions would be demolished. The petitioner had already earned huge amount of money by transferring plots to these persons and in these circumstances no compensation should be paid to the petitioner.

9. There is another aspect of the case to which attention of the Court has been drawn by the learned standing counsel. The petitioner claims that he had been declared as bhumindar of the plots in dispute by virtue of a decree passed in his favour in a suit instituted by his father under section 229-B of U.P.Z.A. & L.R. Act. A Division Bench of this Court had passed order on 20.2.2001 and then on 12.3.2001 directing the petitioner to file a certified copy of the judgment and decree which had been passed in his favour. In pursuance of the said direction, the petitioner filed photocopy of the judgment of Second Appeal No. 242 (z) of 1982-83 (Ram Kumar versus State) decided by the Board of Revenue, Allahabad on 13.3.1989. Though the direction issued was for filing a certified copy of the judgment but only a photocopy of the judgment and decree have been filed. In the judgment the name of the appellant is mentioned as Ram Kumar while in the decree the name of the parties is mentioned as Sunit Kumar Tyagi versus State of U.P. The petitioner Sunit Kumar Tyagi claims to be son of Ram Kumar. The attention of the Court has also been drawn to certain facts appearing in the judgment which are as under.

10. The plaintiff Ram Kumar instituted a suit under section 229-B of UPZA & LR Act against (1) State of UP and (2) Gaon Sabha, Makanpur, for a declaration that he is sirdar of the land in dispute. The plea taken in the plaint was that on account of his continuous adverse possession he had matured his rights and had perfected his title under section 210 of UPZA & LR Act. The suit was contested by the defendants on the ground that the land was banjar land (barren and uncultivated land) which vests in the Gaon Sabha and the plaintiff had forcibly occupied the land for the first time in 1380 fasli and, as such, there was no question of his maturing rights by adverse possession under section 210 of UPZA & LR Act. The Additional Sub Divisional Officer dismissed the suit on 29.12.1975. The appeal preferred by the plaintiff was also dismissed by the Additional Commissioner, Meerut on 10.6.1983. Thereafter, the plaintiff preferred a Second Appeal before the Board of Revenue which lies on same grounds as that of section 100 C.P.C. This Second Appeal was allowed by the Board of Revenue on 13.3.1989. It appears from the judgment that the name of the plaintiff

was not found recorded in the Khasra continuously and it was urged by DGE (Revenue) that no right could accrue in favour of the plaintiff. In the judgment there is an observation to the following effect.

"……The omission of the plaintiff's name in the years between 1365 to 1375 fasli seems to be either clerical or intentional and as such omission can not cause any adverse effect on his title….."

11. It is not understandable as to how some one can mature rights by adverse possession if his name is not recorded continuously for a period of ten years in the revenue records. The judgment further shows that the learned DGC (Revenue) had argued that on account of the amendments made in UPZA & LR Act in 1976 and 1977, the period of limitation prescribed there under for filing a suit against Gaon Sabha had been removed altogether and, consequently, no rights could accrue on Gaon Sabha land by adverse possession. Reliance had also been placed on a decision rendered by the Allahabad High Court in Chattar Singh Versus Sahayak, 1979 RD 226, where this point had been examined threadbare and it was held that on account of amendments in the Act, no sirdari rights can accrue over Gaon Sabha land by adverse possession. However, the Board of Revenue brushed aside this argument and allowed the Second Appeal and decreed the suit and declared the plaintiff to be bhumidar of the land in dispute. To say the least, the Board of Revenue could not have brushed aside an authority of High Court where this point had been specifically. The period of limitation of filing a suit by the Gaon Sabha has been amended several times and in such a manner that no one can mature rights over the Gaon Sabha land by adverse possession. The last amendment which was made by U.P. Land Laws (Amendment) Act, 1976, before expiry of the period then prescribed for filing of the suit, reads as follows:

"For Section 210 of the principal Act, the following section shall be substituted and be deemed always to have been substituted, namely:-

"210. If a suit for eviction from any land under Section 209 is not instituted by a bhumidhar, sirdar or asami, or a decree for eviction obtained in any such suit is not executed by him, within the period of limitation provided for the institution of such suit or the execution of such decree, as the case may be, the person taking or retaining possession shall --

(i) where the land forms part of the holding of a bhumidhar or sirdar, become a sirdar of such land, and the rights, title and interest of an asami, if any, in such land shall be extinguished.

(ii) where the land forms part of the holding of an asami, on behalf of the Gaon Sabha, become an asami thereof holding from year to year."

12. The result of this amendment was that the effect of non -filing of the suit by the Gaon Sabha as contemplated in Section 209 (1) (b) of the Act, which was provided in sub-section (ii) of Section 210, was taken away. It has been held by several decisions of this court that after the aforesaid amendment a person in possession for 12 years over the property of a Gaon Sabha would not acquire sirdari

rights. It has been further held that the effect of amendment having been given retrospective effect means that a trespasser even from July, 1952, could not acquire sirdari rights on the land belonging to Gaon Sabha (see Bhurey Vs. Board of Revenue, 1984 Revenue Decision 294 and Chatar Singh Vs. Sahayak Sanchalak, Chakbandi, UP Lucknow and others, 1979 Revenue Decision 226). It is, therefore, obvious that the petitioner could not have matured any kind of rights over the Gaon Sabha land. However, the Board of Revenue by a strange process of reasoning held that the petitioner had matured rights by adverse possession and had consequently become sirdar and thereafter bhumidar of the land.

13. The averments made in the counter affidavit filed on behalf of the State Government and also by NOIDA show that a notification dated 10.4.1995 under section 4(1) of the Act was published in the Gazettee on 20.5.1995. Public notice of the notification was given in the locality by beat of drums on 20.6.1995. Thereafter, a declaration under section 6 of the Act was made on 27.7.1995, which was published in the Gazettee on 8.8.1995. The petitioner had executed a registered power of attorney with regard to plot no. 947 in favour of Rohtash son of Nakli Singh on 4.3.1989 (Annexure CA-7 to the counter affidavit). By this he gave right to Rohtash to do any thing on the land including plotting, selling of plots, entering into agreement for sale, to deliver possession or to move application etc. This power of attorney was executed more than six years before the notification under section 4 was published in the Gazette. He executed another similar power of attorney with regard to plot no. 1019/2 in favour of Lokesh Kumar Sharma, son of Ram Bharose Sharma on 22.2.1996, who in turn executed a sale deed in favour of Rameshwar Prasad on 8.3.1996. It is specifically averred in para 6 of the counter affidavit that on 13.8.1997, a joint survey of the aforesaid plots was made by Vijay Kumar Amin, Land Acquisition, NOIDA, Jagveer Singh, Lekhpal, NOIDA, Ram Singh, Kanoongo, NOIDA and also by Naiyab Tehsildar, NOIDA and they found that 51 persons were in occupation of different portions of plot no. 947 (area varying from 50 sq. yds, to 450 sq. yds.) and had made construction over the same. Similarly, 23 different persons were in occupation of different portions of plot no. 1019/2 (area varying from 50 sq.yds. to 200 sq. yds.) and had made constructions over the same. A copy of this report dated 13.8.1997 has been filed as part of Annexure -4 to the counter affidavit. Thereafter, a **Kabja Parivartan Adhikar Patra** (document authorising transfer of possession) was executed on 13.12.1997. When the ADM (Land Acquisition) NOIDA and other officials went to the spot on 17.7.2000, the persons in possession of the plots gave application in writing that they had purchased small area in plot no. 947 and 1019/2 from the power of attorney holder after paying heavy amount and had made constructions of their houses. They also submitted photocopies of the registered sale deed executed in their favour and also a video cassette showing the constructions standing on the spot. In the application they prayed that no compensation should be paid to the petitioner Sunit Kumar Tyagi as he had already sold the land to them. A copy of this application has been filed as Annexure CA -5 and a copy of the report

of the Amin (Land Acquisition) has been filed as Annexure CA -6 to the counter affidavit. It is noteworthy that the petitioner had executed power of attorney in favour of Rohtash on 4.3.1989 more than 6 years before the notification under section 4 (1) was published. Thereafter he executed sale deeds in favour of 51 persons of plots of different sizes and now 51 houses are standing over the same. The power of attorney with regard to 1019/2 was also executed within six months of the publication of the declaration under section 6 of the Act. Houses belonging to 23 persons have been constructed over this plot. The document regarding delivery of possession dated 13.11.1997 has been described as **Kabja Parviartan Adhikar Patra**, which means an authority to transfer possession. It is clear that actual physical possession over the plot was never taken by the State or by the NOIDA. On the contrary, a document showing symbolic delivery of possession has been executed. The material filed with the counter affidavit shows that the entire acquired land is covered by the constructions raised by many people and there is absolutely no possibility of the State or NOIDA getting physical possession over the land until the constructions standing over the same are demolished.

14. The petitioner can claim compensation for the acquired land provided he was owner of the same on the date of publication of notification under section 4 (1) of the Act. So far as plot no. 947 is concerned, the record shows that he had already executed a power of attorney with regard to the said plot in favour of Rohtash, son of Nakli Singh more than six years earlier on 4.3.1989 who in turn executed sale deeds in favour of large number of persons. Therefore, the petitioner can not claim any right to get compensation for plot no. 947.

15. So far as plot no. 1019/2 is concerned, the petitioner executed power of attorney in favour of Lokesh Kumar Sharma on 22.2.1996 i.e. about six months after publication of declaration under section 6 of the Act. Lokesh Kumar Sharma sold the plot to Rameshwar Prasad on 8.3.1996 who then sold different portions thereof to various people. The petitioner played a fraud by executing the power of attorney after the publication of the notification under section 4 (1) and 6 of the Act whereby a large number of persons, who were ignorant of the aforesaid notifications, purchased different portions of the plot and raised construction over the same. The petitioner by his fraudulent conduct has frustrated the acquisition proceedings. The persons who purchased land of plot no. 1019/2 have been cheated by the fraudulent conduct of the petitioner. The reliefs claimed in the writ petition are that the writ petitioner should be paid 80 per cent of the estimated amount of compensation under section 17 (3-A) of the Act and the respondents may be directed to make an award of the acquired land under section 11 of the Act. The petitioner succeeded in getting an interim order where under he was paid Rs.8,94,700/- as interim compensation. He has also made money by transferring the same land to various persons. There can be no manner of doubt that the petitioner had played great fraud and he wants compensation for the same land which he has sold to various people. The proceedings under Article 226 of the Constitution are equitable in nature and they are not meant to aid and help a

dishonest person. In our opinion, on account of the fraudulent act of the petitioner, the relief's claimed by him in the writ petition can not be granted and he is not entitled to any compensation.

16. In order to get possession of the acquired land, the authorities will have to demolish more than 74 houses, which is well-nigh impossible looking to the ground realities. There should not be a stalemate in the matter. The document of possession - **Kabja Parivartan Adhikar Patra** executed on 13.11.1997 merely gave an authority to NOIDA to take possession of the land. However, it is fully established that actual physical possession over the land has not been taken either by the State or by the NOIDA on account of the fact that about 74 houses are standing over the same which have been constructed by the transfers of the petitioner. So long as actual physical possession has not been taken, it is open to the State to withdraw from the acquisition of any land in view of section 48 of the Act. The persons who have raised constructions should not be left under a constant fear and threat that their houses can be demolished and physical possession of the land may be taken. Interest of justice requires that the respondents should take a quick decision whether they would pursue with the acquisition proceedings and would take possession of the land or they would like to withdraw from acquisition of the land by taking appropriate action in accordance with section 48 of the Act. The respondents are accordingly directed to take a final decision expeditiously preferably within 4 months in the matter whether they would still proceed with the acquisition proceedings and take possession of the land by dispossessing those who had raised constructions over the plot in dispute or they would withdraw from the acquisition of the land. If a decision is taken to withdraw from acquisition of the land, appropriate steps shall be taken by the government to issue a notification in that regard. If, however the respondents decide not to withdraw from the acquisition and take the acquisition proceedings to its logical end, the award for the acquired land under section 11 of the Act shall be made expeditiously and in accordance with law. Without being influenced in any manner by the interim order passed by this Court on 7.10.1998. The Collector/Special Land Acquisition Officer would also adjudicate the question as to who is entitled to get the compensation.

17. Subject to the directions made above, the writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.5.2002

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

Second Appeal No. 417 of 2002

Dinesh Chandra...Defendant/Appellant
Versus
Bal Kishan Misra and others
...Defendants/Proforma Respondents

Counsel for the Appellant:
Sri Dhruva Narayana
Sri Bala Krishna Narayana

Counsel for the Respondents:

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972- section 3, (U.P. Act No. 13 of 1972)- such married daughters, who make no claim

and by their conduct abandoned their right in the non residential building in question are stopped in law, meaning thereby a daughter who was married in the life time of family and has not come forward to make claim, cannot be said to be a necessary party in absence of which suit cannot be decreed. (Held in para 11).

Smt. Kalawati (the daughter of the erstwhile tenant Smt. Raj Kumari) is not a necessary party to the suit particularly when the attending circumstances indicate that she has not come forward to insist upon her tenancy rights, if any and at all conferred in law.

Case Law Preferred:

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

1. This second appeal arises out of concurrent judgment and decree dated 16.2.1993 passed by Munsif Magistrate, Kannauj, District Farrukhabad in Original Suit No. 421 of 1982 (Bal Kishan Versus Dinesh Chandra) whereby the Trail Court dismissed the suit and appellate Court, vide judgment and decree dated February 27, 2002 affirmed the judgment and decree passed by the trial Court.

2. Heard Sri Dhruv Narain, Advocate, on behalf of the defendant appellant and perused the record.

3. Plaintiff filed suit against the defendants Dinesh Chand, Son of Chimman Lal and Chimman Lal Son of Laxman Prasad (both being son and father respectively) seeking decree for ejectment and recovery of mesne profit/damages w.e.f. June, 1982 on the ground that defendant unlawfully, without authority, unauthorisedly and without the consent of the owner/landlord (the plaintiff) took possession and failed to vacate in spite of registered notice being sent.

4. The defendants, however, on the other hand, in their written statement alleged that they were tenants since the time of the father of the plaintiff Suraj Prasad (grand father of the plaintiff Balkrishna). Trial Court framed issue and while suit was pending, an objection was taken regarding non-impleadment of Chimman Lal, a necessary party to the suit.

5. The plaintiff, however, impleaded Chimman Lal as defendant and removed the defect.

6. Perusal of the judgment and decree passed by the two courts below indicate, as also fairly conceded by the learned counsel for the appellant Sri Dhruv Narain, Advocate, that neither issue was framed nor pleading was raised regarding maintainability of the suit in absence of non impleadment of Kalawati (daughter of erstwhile tenant Smt. Raj Kumari wife of Late Maiku Lal the erstwhile tenant).

7. It has also come on record of the case and not disputed before the Court below that Smt. Kalawati was married prior to the death of her mother-Smt. Raj Kumari on June 3, 1982. It is evident that original suit is also of the year 1982 which shows that said suit was filed immediately after some time after the death of Smt. Raj Kumari. This establishes that the defendants did occupy the shop some where between the death of Smt. Raj Kumari (i.e. on 3.6.1982) and the date of the issuance of registered notice (i.e. dated 17.7.1982). This confirms that suit was filed by the plaintiff expeditiously as soon as the cause of action had arisen.

8. Before this Court the only submission for maintaining second appeal is that suit could not be decreed and judgment and decrees passed by the two courts below cannot be sustained in as much as the suit suffered from fundamental defect of non impleadment of Smt. Kalawati who happened to be the 'heir of the Tenant (Smt. Raj Kumari) as defined under Section 3 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 (for short called 'the Act'). For ready reference, Section 3A(2) of the Act, which deals with non residential building, is reproduced:-

"Definition- In this Act, unless the context otherwise requires-

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

(1) ………..

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

Explanation---

……………………………….."

9. This Court in the cases of Smt. Anju Sharma versus Suresh Chand Jain and others-1993 (1) Allahabad Rent Cases 291-Pr.13 and Abdul Sattar versus VI Additional District Judge, Allahabad and others-1994 (1) Allahabad Rent Cases. 117 has held that under Section 3A (2) of the Act such married daughters, who make no claim and by their conduct abandoned their right in the non residential building in question are stopped in law, meaning thereby a daughter who was married in the life time of family and have not come forward to make claim cannot be said to be a necessary party in absence of which suit cannot be decreed.

10. There is no plea in the written statement nor raised before the courts below. The concurrent judgments and decrees passed by the two courts below cannot be assailed on this new ground for the first time before this Court in Second Appeal. The 'Defendant-Appellant' cannot be permitted to challenge the said judgments and decrees by taking the plea for the first time, particularly when such a plea would require adjudication of facts after parties have lead evidence.

11. In my opinion Smt. Kalawati (the daughter of the erstwhile tenant Smt. Raj Kumari) is not a necessary party to the suit particularly when the attending circumstances indicate that she has not come forward to insist upon her tenancy rights, if any and at all conferred in law.

12. The concurrent finding of the two courts below on the issue of unauthorized and unlawful possession of the shop by the Defendants, I find no good ground to interfere with the same and no legal ground, much less substantial question of law, worth consideration in the second appeal by this Court.

13. Second appeal is dismissed in limine.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.5.2002

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

Writ Petition No. 47893 of 2000

Smt. Indu Tripathi ...Petitioner
Versus
The Director of Education (Madhyamic), Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Radha Kant Ojha
Shri Dinesh Chandra Tripathi

Counsel for the Respondents:
Shri Manoj Kumar Pandey
Shri Ravi Kant
S.C.

Constitution of India-Article 226-a selected candidate cannot be permitted to be deprived of his right on account of the fact- that the employer sits over the matter and permits the time as prescribed for exhausting panel to run over. For the fault of the committee/ Board in taking erroneous decision, if a post has been taken over by some body, even then the right of a candidate so validly found to be entitled for that post, cannot be denied. (Held in para 14).

The action on the part of the management for denying the petitioner's right is neither fair nor justified nor bonafide nor legally acceptable and therefore, decision of respondent no.4 dated 10.9.2000 (annexure 6 to the writ petition) as impugned in this petition deserves to be quashed.

Case Law Preferred:
1999 SCC Vol.6
AIR 1996 SC 1145
1997 JT Vol.(3) page 736

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

1. By means of this writ petition, the petitioner has prayed for issuance of a writ in the nature of certiorari quashing the order dated 10.9.2000 (annexure 6 to the writ petition) passed by respondent no.4. A further prayer has been made for a direction to the respondents to permit the petitioner to work as Assistant Teachers and to pay her salary.

2. There is an intermediate college known as Rama Devi Balika Inter College, Allahabad (hereinafter referred to as the College). There happened three vacancies of teachers in BTC grade in respect to which the management held selection in accordance with the provisions of Education Act. For all these posts, different sets of panel of two candidates each were prepared. The dispute survives only in respect to the post which is being claimed by the petitioner which is general category post for which, admittedly, Smt. Neelam Kapoor was placed at Sl. No. 1 and the petitioner was placed at Sl. No.2. The petitioner claims that Smt. Neelam Kapoor was not eligible and qualified and therefore, her name in the panel at Sl. No.1 was clearly illegal and her selection as such was void and the petitioner being next, on top was entitled to be given appointment. It appears that the management recommended the name of Km. Durga Singh who was at Sl.No.2 in the panel prepared for backward class candidates to be appointed in place of Smt. Neelam Kapoor which was challenged by the present writ petitioner in writ petition no.18253 of 1998. This Court on 22.5.1998 disposed of the writ petition with the direction to the District Inspector of Schools to decide the

petitioner's representation by reasoned order. It is in pursuance of the direction of this Court, the District Inspector of Schools decided the representation of the petitioner by order dated 28/29.9.1998 and found that the petitioner being at Sl. No.2 in the panel prepared for general category candidates was entitled to be appointed as Smt. Neelam Kapoor who was at Sl. No.1 was not having proper B.Ed. certificate, Km. Durga Singh challenged the order of the District Inspector of Schools dated 28/29.9.1998 by which the claim of the present petitioner for the post in question, was accepted by the District Inspector of Schools by filing writ petition no.33321 of 1998, which was dismissed by this Court on merits by its judgment dated 19.8.1999. The relevant extract from the judgment of this Court for the purposes of this case, is useful to be quoted as under:

"Once it was found that Smt. Neelam did not possess proper B.Ed. certificate, Smt. Indu Tripathi being at Sl. No.2 was entitled under the law to be appointed. I do not find any illegality in the impugned order passed by the District Inspector of Schools and the order dated 28/29.9.1998 is liable to be maintained."

3. As inspite of the orders of the District Inspector of Schools, the petitioner was not given appointment, the representations were made by the petitioner which were also not attended then the petitioner filed writ petition no.37607 of 2000 which came to be disposed of by this Court by order dated 25.8.2000 by issuing direction to the committee of management to decide the petitioner's claim by a reasoned order. It was also mentioned in the order that the committee will decide the matter without being influenced by any observation made in the judgment. It is thereafter, the respondent no.4 proceeded to consider the petitioner's claim and has rejected the same by its resolution dated 10.9.2000 as communicated by letter dated 19.10.2000 (annexure 6 to the writ petition). It is against this decision of the management, the petitioner has filed this writ petition.

4. Learned counsel for the petitioner has assailed the decision of respondent no.4 on various grounds and it has been submitted that firstly, the view taken by the committee that the District Inspector of Schools has passed orders in favour of the petitioner on 28.9.1998 and by that time, life of the panel being of one year has already expired and therefore, the petitioner's right came to an end is totally incorrect. Learned counsel submits that in the present case, there is no question of panel having been exhausted as selection of Smt. Neelam Kapoor who was at sl.No.1 was void. It was found that she was lacking in the requisite qualification and thus the petitioner being at Sl.No.2 was entitled to be appointed. It is on account of the litigation and inaction on part of the management, delay in acceptance of the petitioner's claim has taken place for which, the petitioner cannot be permitted to be pensalised. In support of this submission, learned counsel for the petitioner has placed reliance on a decision reported in **1999 SCC Vol.6 page 49 Purshottam Vs. Chairman, MSEB and another** for the proposition that duly selected candidate cannot be deprived of her appointment on the pretext that some one has been appointed.

5. It was then contended that the ground as has been mentioned by the

management for not accepting the petitioner's claim that B.Ed. certificate cannot be validly accepted, as it has been obtained through correspondence course in the year 1995-96 from Mahatma Gandhi Gramodyog College, Chitrakoot, Satna which is not recognized under the National Council for Teachers Education Act 1993, also according to learned counsel, is not acceptable. It has been pointed out that the petitioner has got the B.Ed. degree in the year 1995-96 from the aforesaid vishvidayala which was established by the State of M.P. under Act no. 1/91 which is recognized by all states as per Appendix-A-Chapter-II of U.P. Intermediate Education Act. It has been further argued that the recognition from National Council for the Teachers Education was not required for the year 1995-96 as the National Council for Teachers Education was established on 17.8.1995 and the regional committee was constituted on 6.1.1996 and the rules were framed on 24.2.1996 and thus it is for this reason, the Western Regional Committee of National Council for Teachers Education has itself directed by letter of 7.10.1999 (Annexure 1 to the rejoinder affidavit) that from Session 1996-97 m recognition from National Council for Teachers Education is required. Thus the ground as given by the management that the degree of B.Ed. of the petitioner has no recognition by the National Council for the Teachers Education, is absolutely illegal and accordingly, the petitioner is entitled to get herself appointed on the post. Lastly, it has been submitted that the committee of management has not challenged the order of the District Inspector of Schools dated 28.9.1998 by which it was held that the petitioner is entitled to be appointed on the post in question and the management was directed to issue appointment letter and therefore, now it is not open for the management to challenge the impugned decision and that too after dismissal of the writ petition filed by Km. Durga Singh i.e. writ petition no.33321 of 1998, which in fact was got filed by the management itself.

6. In view of the aforesaid premises, it has been submitted that the decision of the management not permitting the petitioner to join the post for which she was selected is clearly unjust.

7. In response to the aforesaid submissions, learned counsel, who appears for respondent no. 4 submits that the District Inspector of Schools had no authority to take up the name of the petitioner from the select list and approve the same for appointment as the same is clearly against the provisions of Section 16-F of the Act. It has been further submitted that the petitioner is not possessed with the minimum qualification and therefore, the direction of the District Inspector of Schools was clearly illegal and was not to be implemented by the management. It has also been pointed out that writ petition no. 37607 of 2000 filed by the petitioner for the same relief, was dismissed by this Court and therefore, the order of the District Inspector of Schools looses its significance. Lastly, it has been pointed out that even assuming that the petitioner was eligible for appointment, mere placement of a candidate in the select list does not confer any right on him/her to get appointment and as the panel of the candidates having life of one year, by time, the order of the District Inspector of Schools was passed, it has expired and thus panel was exhausted and

therefore, on all these grounds, the claim of the petitioner has been resisted.

8. In view of the aforesaid submission, as has come from both sides, pleadings as has been set forth and the materials brought on record, have been examined.

9. There appears to be no dispute about the fact that the petitioner was duly selected by the management against vacancy of general category and she was placed at Sl.No.2 in the select list. Smt. Neelam Kapoor was placed at Sl.No.1 i.e. above the petitioner. The selection appears to have taken place on 10.8.1997. The Selection/placement of Smt. Neelam Kapoor at Sl. No.1 was challenged by the petitioner before this Court and after a direction in writ petition no. 18253 of 1998, the District Inspector of Schools, after giving opportunity to the petitioner, Smt. Neelam Kapoor and the management by its order dated 28.9.1998 held that Smt. Neelam Kapoor is not possessed with the requisite qualification and therefore, the petitioner being at Sl. No.2 was held to be entitled for the post. It cannot be disputed that the order of the District Inspector of Schools dated 28.9.1998 was passed after full hearing to the management and a copy of the same was also sent to the management. The order of the District Inspector of Schools dated 28.9.1998 was challenged by one Km. Durga Singh who had obviously no claim for the post as her name was at Sl. No.2 in the list of panel of OBC candidates and therefore, obviously she has no locus standi to lay any claim for the post in question for which it has been suggested in para 12 of the writ petition that it is the management who inspired aforesaid Km. Durga Singh to file writ petition. It in this back ground now the claim of the petitioner has to be examined. The order of the management by which the petitioner's claim has been rejected states two grounds namely (i) that the life of the panel being one year on the date on which the District Inspector of Schools has passed order i.e. 28.9.1998, it has come to an end (ii) the petitioner is not having valid B.Ed. degree as it is through correspondence course and Vishwavidyalaya from where the degree has been obtained, on account of coming into existence the National Council for Teachers Education Act, 1993, recognition automatically came to an end. In so far the ground as has been taken by the management and the submission as has been made on behalf of the respondents about life of the panel having came to end after expiry of one year is concerned, in the given set of facts, the selectee at Sl. No.1 has been found to be not possessed with the requisite qualification. As the candidate at Sl. No. 1 lacked in requisite qualification that cannot be said to be a valid selection in the eye of law and therefore, the petitioner has to get the birth which may be at Sl. No.2. It is not a case where the valid selectee has joined the post and for some reason, he/she has left the same or for any latches on the part of the petitioner, he has not reported within one year, making him disentitled under law for the post in question. Here is the case where from very beginning the petitioner took up a fight to challenge selection of Smt. Neelam Kapoor, selectee at Sl. No. 1 and it is a matter of common knowledge, the litigation takes quite reasonable time and therefore, in the event, final decision of the District Inspector of Schools came in favour of the petitioner on 28.9.1998, no blame can be attributed to the petitioner

for expiry of period of one year. Here it is the management which is guilty of selecting a candidate who was not qualified and therefore, in the event, Smt. Neelam Kapoor would not have been selected/placed at Sl. No.1, obviously the petitioner would have placed at Sl. No.1 in this view of the matter, I feel that the respondents cannot be permitted to take expiry of one year to nullify the legitimate due of the petitioner. In such a situation if one sticks to the period of one year, in respect to the life of the panel then it will be very easy for any body, not interested in permitting valid claimant, to take over, to file writ petition or take some objection before the educational authorities and get the matter some how or the other lingered on; for a period of one year in passing of final order in favour of the selectee and even thereafter, his/her ouster on account of expiry of one year. It cannot be said to be the intention of the life of the panel. In view of this, objection of the respondents. In this respect has to rejected.

10. In connection with submission of learned counsel for the respondents that mere placement of the candidate in the select list does not confer any right to get the appointment also cannot be accepted in the facts of the present case as it is not a case where the vacancy is not to be filled up or there may be any situation that for any reason entire selection process has been set aside and therefore, the contention in this respect also has to be rejected. The decision as has been referred by learned counsel for the respondents reported in **AIR 1996 SC 1145 State of Bihar Vs. Md. Kalimuddin and others and 1997 JT Vol.3 page 736 Basudev Pati Vs. State of Orissa** has no application to the facts of the present case.

11. In respect to the submission of the respondents that the petitioner was not possessed with minimum qualification as she has no proper degree of B.Ed. on account of fact that on coming into force the National Council of Teachers Education Act, 1993, Vishvidydalaya from where petitioner has obtained degree has no recognition, suffice to say that on record, there is a letter of Western Regional Committee which clearly states that the recognition will be required from the Session 1996-97 and thus in view of the fact that the Vishvidyalaya was duly established by the State of M.P. under M.P. Act No. 9 of 1991 the degree from which may to be recognized by all the States as per the Appendix-A, Chapter-II of the Intermediate Education, the B.Ed. degree of the petitioner being of the year 1995-96, cannot be said to be improper. Learned counsel for the respondent in this connection has taken the Court to various provisions as contained in National Council of Teachers Education Act, 1993 but in view of the letter of the Western Regional Committee of the NCTR itself (annexure 1 to the rejoinder affidavit) it is not required to examine those aspects in detail. Otherwise also, it is not a case of any concealment or playing fraud on the part of the petitioner and on the basis of the materials so supplied, the management has duly selected the petitioner and place her in the panel.

12. Admittedly, the petitioner has been selected by the management and she was placed at Sl. No.2 in the panel. In the event, Smt. Neelam Kapoor would not have been placed at Sl. No. 1, in normal course, at that very stage, the petitioner could have been appointed. It is only on account of dispute having arisen in respect to selection of Smt. Neelam

Kapoor, all the differences appear to have crept between the management and the petitioner. Ultimately, the petitioner succeeded in getting order in her favour. The management who is an active participant in the decision of the District Inspector of Schools dated 28.9.1998, has not chosen to file any writ petition before this Court or to challenge the same taking any other recourse, can be safely said to have submitted to the order of District Inspector of Schools. As argued by learned counsel for the respondents that the order of the District Inspector of Schools is void and non-est and therefore it required no challenge and thus it is open for the management not to comply the same and resist the claim of the beneficiary as and when it is taken for implementing the said order, cannot be accepted. The decision of the District Inspector of Schools has come in pursuance of the direction of this Court given in writ petition no.37607 of 2000. The decision of the District Inspector of Schools after rejection of the candidature of Smt. Neelam Kapoor, in respect to the present petitioner, is just a necessary consequence which ought to have been there at the first instance when the selection took place, in the event the candidature of Smt. Neelam Kapoor is ignored from scene. To my mind non challenge of the order of the District Inspector of Schools dated 28.9.1998 by the management, operates as estoppel in respect to non acceptance of the petitioner's claim and the effect of the order of the District Inspector of Schools cannot be permitted to be nullified by taking a pretext by the management that it is void and non-est. The order of the District Inspector of Schools on the facts, even assuming for the sake of arguments, submissions of the respondents, cannot be said to be non-est and at the most, it can be termed as erroneous and in view of the law settled by Apex Court, even erroneous judgment/order between the parties, has binding effect. Thus the claim of the petitioner is to be accepted on this ground alone. Although after the aforesaid finding; it is not very much necessary to examine other aspects but as various aspects have been placed before this Court, it appears to be just and proper that the some finding, in the light of the submission may also come.

13. In view of the aforesaid discussions, it appears that the panel neither exhausted on account of joining of the selected candidate nor it is a case of there being any lapse on the part of the petitioner and on the other hand the selection of the candidate who was placed at Sl. No. 1 was not valid selection in the eye of law and therefore, the petitioner being next in order of merit, is certainly entitled to the discretion of the Court. It is also not the case where authority has decided not to fill up the post or for any other reason, the entire selection process has been decided to be invalidated and therefore, the submission that mere empanelment of a candidate does not confer any right to get appointment, also is not acceptable. On the other hand, the Apex Court has clearly laid down that a selected candidate cannot be permitted to be deprived of his right on account of the fact that the employer sits over the matter and permits the time as prescribed for exhausting panel to run over. It has also been held by the Apex Court that if for the fault of the committee/Board in taking erroneous decision, if a post has been taken over by some body, even then, the right of a candidate so validly found to be

entitled for that post, also cannot be denied.

14. In view of the aforesaid discussions, it appears that the action on the part of the management for denying the petitioner's right is neither fair nor justified nor bonafide nor legally acceptable and therefore, decision of respondent no.4 dated 10.9.2000 (annexure 6 to the writ petition) as impugned in this petition deserves to be quashed.

15. Accordingly, this petition succeeds and is allowed. The impugned order dated 10.9.2000 (annexure 6 to the writ petition) is hereby quashed. The respondent no. 4 is commanded to implement the order of the District Inspector of Schools dated 28.9.1998 and permit the petitioner to join the post for which she was selected.

Parties to bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.7.2002

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

Misc. Writ Petition No. 5014 of 2001

Vidya Prakashan Mandir Limited and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Pushkar Mehrotra
Sri R.K. Jain

Counsel for the Respondents:
Sri Arvind Tewari
A.G.A.

Copy right Act- section 62- petitioners have not violated any of provisions of copyright Act as the books published by the petitioners are for the students of class IX and X and these books were published only according to the syllabus prescribed by the Board and there is no violation of any of the provisions of copy-right Act-thus the impugned First Information Report does not disclose commission of any cognizable offence against the petitioners and is liable to be quashed. (Held in para 15).

The impugned F.I.R. registered as Case Crime No. 317/2001 police Station Transport Nagar, Meerut and further proceedings on the basis of the impugned first information report against the petitioners are hereby quashed. The Books seized by the opposite parties shall be returned to the petitioners forthwith.

Case Law referred
(1) AIR 1982 Calcutta 245

(Delivered by Hon'ble Imtiyaz Murtaza, J.)

1. The present writ petition is directed for quashing the F.I.R. registered as case crime No.317/2001 Police station Transport Nagar, Meerut against the petitioners by District Inspector of Schools, Meerut, respondent No. 2 under sections 3,4, 7 and 8 of the Uttar Pradesh Course Books Act 1978 and section 63 of Copyright Act 1957.

2. According to the allegations of the First Information report the complainant had received information from the District Magistrate, Meerut that he had received complaint that M/s Vidya Prakashan Kendra Ltd. Meerut is publishing, books for which they have no permission from the Department. Additional City Magistrate, Meerut had

raided the godown of the publisher and seized the following books:

1. Sanskrit Parichayika-Class 9
2. Sanskrit Parichayika-Class 10
3. Intermediate English Prose
4. Intermediate English Poetry
5. Rang Bharti

3. It is alleged that publication of these books was unauthorized as they were not allotted for publication of these books and on the said allegations a report was registered against the petitioners under the aforesaid sections.

4. We have heard Sri R.K. Jain, learned counsel for the petitioners and Sri Arvind Tewari Government Advocate.

5. A perusal of the F.I.R. indicates that the main allegations against the petitioners are that they have violated the provisions of section 3,4, 7 and 8 of U.P. Course Books Act 1978 and section 63 of Copyright Act. Sections 3,4,7 and 8 of U.P. Course Books Act provides as under:-

6. (3) Dealer not to withhold from sale or charge excess price

(1) No dealer shall-

(a) Withhold from sale any course book held in stock by him,

(b) Charge for any course book a price which exceeds its notified price

(2) No publisher shall, subsequent to the commencement of this Act, use any paper other than concessional rate paper for the printing or publishing of textbook,

(a) Prescribed or recommended for use in any class by the Board or by the Department of Education, as the case may be,

(b) Written according to the Syllabus in respect of the subject for which the Board has not recommended or approved any book:

Provided that nothing contained in this sub-section shall be deemed to require a publisher to use concessional rate paper for the printing or publishing of any book referred to above if concessional rate paper cannot be made available to him for any reason.

7. (4) Requisition of stock of course books-

(1) Where the prescribed Authority has reason to believe that any dealer has stored or continued to store or acquired for storage, whether on his own account or on account of or in partnership with, any other person, any course books, the Prescribed Authority may, by order, require, him to sell at the notified price the whole or a specified part of such stock to the State Government or to such person or class of persons and in such manner and within such time as it may specify in this behalf.

(2) Where any person against whom an order is passed under sub-section (1), fails to comply with it, the Prescribed Authority may take, or cause to be taken such stock of course books or part thereof, as the case may be, in its custody, and may deliver or cause to be delivered such stock or part thereof to the State Government or such person or class of persons as may have been specified in the order, and may cause to be paid to the dealer the notified price thereof.

8. Power of State Government to Notify prices of course Books- The State

Government may be notified orders fix fair prices of course books specified or referred to therein.

9. **Penalties:-** If any person contravenes the provisions of Section 3, he shall be punishable-

(i) in the case of contravention of sub-section (1) of that section with imprisonment for a term which may extend to one year and shall also be liable to fine, and

(ii) in the case of any other contravention, with imprisonment for a term which may extend to three years and shall also be liable to fine.

10. A perusal of sections 3,4,7 and 8 of Uttar Pradesh Course Books Act 1978 shows that under section 8 violation of section 3 has been made punishable and sections 4 and 7 which are mentioned in the F.I.R. are not Penal provisions. The allegations in the F.I.R. against the petitioners are that they had published course books referred in the F.I.R. without any authority and without any permission from the Department. The contention of the counsel for the petitioners is that no such authority or sanction is required under the provisions of Uttar Pradesh Course Books Act 1978. The only restriction placed under section 3 of the Act is that no dealer shall with hold the sale of any course books held in stock by him or charge any course books price which exceeds its notified price. A perusal of the F.I.R. indicates that there is no such allegation in the F.I.R. that petitioners are charging any price exceeding the price which is notified nor there is any allegation that the course books are printed on concessional rate paper. The counsel for the petitioners has rightly argued that the price of the course books in question have not been notified by the State Government under section 7 of the Act hence there can be no question of violation of section 3 of the Act. Similarly there is no allegation that petitioners had with held the sale of any course books in his stock. Learned counsel has further argued that the petitioners had not published any book on concessional rate paper as mentioned in the Act. Therefore the provisions of Uttar Pradesh Course Books Act are not applicable against the petitioners.

11. The learned counsel for the State did not dispute that the petitioners were not allotted any concessional rate paper by the State or by the Central Government. We are of the opinion that the impugned First Information Report does not state any violation of any of the provisions of U.P. Course Book Act 1978. The State Government had not notified the price of the books under section 7 of the Act. There is no allegation that petitioners had withheld the sale of the book or any concessional rate paper was used for publishing the books. The petitioners have thus not violated any of the provisions of U.P. Course Act 1978.

12. The other allegation in the F.I.R. is regarding violation of section 63 of Copyright Act which reads as under:

63. Offence of infringement of copyright of other rights conferred by this Act.

Any person who knowingly infringes or abets the infringement of -

(a) The copyright in a work or

(b) any other right conferred by this Act (except the right conferred by section 53-A),

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two lacs rupees:

Provided that (where the infringement has not been made for gain in the course of trade or business) the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months or a fine of less than fifty thousand rupees).

Explanation: Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.

13. As regards the violation of section 63 of the Copyright Act the contention of the petitioners counsel is that course books published by the petitioners are not "Government work" within the meaning of section 2(k) of the Act. The course books are published according to the syllabi of the Department of Education of Uttar Pradesh. The Course Books Act, 1978 puts restriction on printing of text books by recognized publisher only with regard to the students of class 1 to 8. These books are published under the authority and control of the Government and they are Government Work within the meaning of section 2 (k) of Copyright Act. Learned counsel for the petitioners further submitted that the petitioners had not published any book for the students of class 1 to 8. The books which are published by the petitioners are according to the syllabi of the Department and they are not published under the authority or control of the Government. The reliance was placed by learned counsel for the petitioners in a case reported in **A.I.R. 1982 Calcutta 245 Nag Book House and another Vs. State of West Bengal and others**.

In this case it was observed "The guidelines for the authors and publishers of text books issued by the Board of Secondary Education, West Bengal annexed as annexure 'A' to the petition prescribing the syllabus cannot be taken as original work being the product of labour, skill and capital of some men engaged by the Board. The syllabi merely prescribing the guidelines which are to be followed by the text books writers cannot be termed as an original work having some quality or character of its own different from the raw material used. Therefore, in my opinion, the syllabi that has been prescribed by the Board being not a product of labour, skill and capital and not having an independent character and quality of its own the question of any copyright does not arise from this. The submission of the learned Standing Counsel that in accordance with the syllabi the text books prepared by the petitioners is an infringement of the copyright is without any merit and hence the same is over ruled."

14. We have considered the submissions of the learned counsel for the petitioners and in our opinion petitioners have not violated any of provisions of Copyright Act as the books published by the petitioners are for the students of class IX and X and these books were published

only according to the syllabus prescribed by the Board and there is no violation of any of the provisions of Copyright Act. Thus the impugned First Information Report does not disclose commission of any cognizable offence against the petitioners and is liable to be quashed.

15. In the result the writ petition is allowed. The impugned F.I.R. registered as Case Crime No.317/2001 police Station Transport Nagar, Meerut and further proceedings on the basis of the impugned first information report against the petitioners are hereby quashed. The Books seized by the opposite parties shall be returned to the petitioners forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JULY 10, 2002

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

Civil Misc. Writ Petition No. 54346 of 2000

Raja Ram Verma ...Petitioner
Versus
Union of India through Secretary and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Sharma
Sri Shiv Nath Singh
Sri G.K. Singh
Sri V.K. Singh

Counsel for the Respondents:
Sri Dinesh Kakkar
Sri S.N. Verma
Sri Yashwant Verma
S.C.

Constitution of India-Article 73- Policy decisions taken by the Board of Governors pursuant to the various decisions of the Department of Education, Ministry of Human Resource Development, Government of India- Directors of the Indian Institutes of the country in their meeting held on 3.5.99 took a policy decision that the age of superannuation of those officers- who were to be superannuated on attaining the age of 58 years would be 60 years and that of the officers whose age of retirement was initially 60 years under the service rules would now be 62 years. The Government orders referred to hereinabove had the force of law by virtue of Article 73 of the Constitution of India.

(Held in para 7)

The Government decisions apply to the Institute inasmuch as nothing in the Act precludes the Board of Governors to take policy decision to enhance the age of retirement of the employees of the Institute. I.I.T. Kanpur though is an autonomous body is under the administrative control of the Ministry of Human Resource Development. The policy decision taken by the Board does not appear to have been reversed in the light of clarificatory letter dated 16.2.2000 issued by the Government of India.
Case referred-

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

1. The petitioner who was appointed Assistant Registrar, Indian Institute of Technology, Kanpur (in short the Institute) on 11.11.1983, has questioned the legality of his superannuation at the age of 60 years w.e.f. 31.12.2000 vide impugned order dated July 17, 2000 (copy of which has been annexed as annexure no.11). A perusal of the impugned order would show that the employees including the petitioner, referred to therein, were informed that they would be retiring from

the services of the Institute on the dates noted against their names in column 7 as per decision of the Board of Governors in its meeting held on 22.5.2000. The petitioner at the relevant time was working as Assistant Registrar (Admin Section) of the Institute.

2. Statue 13(2) of the Indian Institute of Technology Statute framed under the Institute of Technology Act, 1961 prescribes the age of superannuation of a confirmed appointee. It reads as under:

"13 (2) Subject to the provisions of the Act and the Statutes, all appointments to posts under the Institute shall ordinarily be made on probation for a period of one year after which period the appointee, if confirmed shall continue to hold his office subject to the provisions of the Act and the Statutes, till the end of the month in which he attains the age of 60 years.

Provided that where the Board considers that in the interests of students and for the purposes of teaching and guiding the research scholars any member of the academic staff should be re-employed, it may re-employ such a member till the end of the semester or the academic session as may be considered appropriate in the circumstances of each case.

Provided further that where it becomes necessary to re-employ any such member beyond the end of the semester or academic session as the case may be, the Board may with the previous approval of the Visitor, re-employ any such member for a period upto three years in the first instance and upto two years thereafter and in no case exceeding the end of the academic session in which he attains the age of 65 years.

Provided also that in no circumstances such member shall be re-employed for any purposes other than those of teaching and guiding the research scholars."

3. It would be evident from the provision aforestated that the right of a confirmed employee of the Institute to continue in service 'till the end of the month in which he attains the age of 60 years', is 'subject to the provisions of the Act and the Statutes'. Petitioner claims entitlement to continue in service till he attains the age of 62 years on the basis of the decision contained in letter dated 27.7.1998 issued by the Ministry of Human Resource Development addressed to the Secretary, University Grants Commission with copies forwarded to the Vice Chancellors of all Central Universities; Member Secretary, A.I.C.T.E. and Secretary, Indian Council for Agricultural Research, New Delhi providing therein that the age of superannuation of University and College teachers would be 62 years with liberty reserved to the Universities or Colleges to re-employ superannuated teachers upto 65 years within the existing guidelines framed by the U.G.C. and subsequent letter dated 31.8.1998 of the Department of Education, Ministry of Human Resource Development addressed to the Director, Indian Institute of Technology with regard to increase in age of superannuation of academic stock including personnel of Registry, Library and Physical Education. A copy of the letter dated 31.8.1998 has been annexed as annexure no.2 to the writ petition. The petitioner has placed reliance also on

clarificatory letter dated November 6, 1998 issued by the Department of Education, Ministry of Human Resource Development, Government of India in continuation of earlier letter dated 27.7. 1998 providing therein that the provisions indicated in para 1 (vi) of the letter dated 27.7.1998 shall also be applicable to Registrar, Librarian, Physical Education personnel, Controllers of Examination, Finance Officers etc. Another letter dated 24.3.1999 was issued by the Department of Education, Ministry of Human Resource Development, Government of India addressed to the Secretary, University Grants Commission removing doubts raised from certain quarters as to whether benefit of enhancement in the age of superannuation be allowed in the case of Readers, Professors is available to non-teaching employees with comparable designation such as System Analyst, Scientific Officer, Engineering etc. The answer as per letter is as under:

"The benefit of enhancement in the age of retirement is available only to Teachers and Registrars/Librarians Physical Education, Personnel/Controllers of Examinations/Finance Officers only. In the case of other non-teaching employees the age of retirement will be 60"

4. Yet another letter dated 30.3.1999 issued by the Department of Education, Ministry of Human Resource Development, Government of India specifically in relation to I.I.Ts., I.I.Ms. and I.I.Sc. pursuant to its earlier decision contained in the Ministry's letter dated 27.7.1998 visualizing that the age of superannuation of 62 years indicated in para 1(vi) of the Ministry's letter dated 27.7.1998 would also be applicable to Registrars, Librarians, Physical Education, Personnel Controllers of Examination, Finance Officers and such other University employees who are being treated at par with the teachers and whose age of superannuation was 60 years. It would appear that pursuant to the aforesaid directions issued by the Department of Education, Ministry of Human Resource Development, the I.I.T., Kanpur took a policy decision that retirement of the incumbents will be 60 years or 62 years depending on whether the date of superannuation under the service rules at the time of appointment was 58 years or it was 60 years. A letter dated 24.6.1999 containing the said policy decision has been annexed as annexure no. 5 to the writ petition. By means of the said letter the Chairman, Board of Governors was requested to approve the proposal contained in the letter. The said proposal, it is stated in the writ petition, was duly approved by the Chairman, Board of Governors, I.I.T., Kanpur.

5. **Sri R.N. Singh, Sr. Advocate** appearing for the petitioner submitted that the petitioner, a personnel of Registry, was entitled to continue up to the age of 62 years in view of the above policy decisions taken by the Board of Governors pursuant to the various decisions of the Department of Education, Ministry of Human Resource Development, Government of India. It has also been submitted by the learned counsel that the Directors of the Indian Institutes of the country in their meeting held on 3.5.1999 took a policy decision that the age of superannuation of those officers who were to be superannuated on attaining the age of 58 years would be 60 years and that of the officers whose age of retirement was initially 60 years under the service rules would now be 62 years. Sri

R.N. Singh has also submitted that Sri S.H. Bakre and Sri S.K. Gupta have been extended the benefit of the above decisions in relation to the age of superannuation while the petitioner, a similarly circumstanced personnel of the registry, has been denied the benefit of enhancement of age of superannuation. **Sri S.N. Verma, Senior Advocate** appearing for the Institute contended that the Statute 13.2 prescribing the age of superannuation having not been amended, the petitioner cannot claim entitlement to continue in service upto the age of 62 years merely on the strength of the Government Orders or the policy decision taken by the Board of Governors. The first Statutes, submitted Sri Verma, have been framed by the Council with the previous approval of the Visitor and any addition to the Statute or any amendment or repeal of the Statute by the Board requires 'previous approval of the Visitor' as provided in Section 27 (3) of the Institutes of Technology Act, 1961 and as provided by Section 27 (4) of the Act, a new Statute amending the existing Statutes has no validity unless it has been accented to by the Visitor. Sri Verma placed reliance on clarificatory letter F. No. 23-8/98-TS-I (Govt. of India) Ministry of Human Resource Development, Department of Secondary and Higher Education, Technical Science-1, Shastri Bhavan, New Delhi Dated February 16, 2000.

6. We have given our anxious consideration to the submissions made across the Bar. The terms and conditions of service of permanent employees are laid down in Statute 13 extracted herein before. Clause (2) of Statute 13 provides that an appointee to a post under the Statute if confirmed, "**shall continue to hold his office subject to the provisions of the Act and Statutes, till the end of the month in which he attains the age of 60 years"**. This is applicable to both teaching and non-teaching employees of the Institute. Right of a confirmed employee of the Institute to continue in office 'till the end of the month in which he attains the age of 60 years is subject to the provisions of the Act and the Statute'. Attention of the Court was not invited to any provision in the Act or the Statute forbidding the Board of Governors from taking a policy decision pursuant to any direction given by the Ministry of Human Resource, Government of India to allow the employees of the Institute to continue till the age of 62 years. In other words nothing in the Act or the Statute prohibits enhancement of age of superannuation of employees of the Institute pursuant to a policy decision. Such policy decision, if uniformly applied, would not be violative of Statute 13 (2) of the Statutes. In fact the Institute has done so in the case of the teachers and certain members of the Registry- for example Sri S.H. Bakre and Sri S.K. Gupta. On the contrary, selective implementation of a policy decision would be violative of Article 14 of the Constitution. It is true that the petitioner cannot claim, as of right, any extension in the prescribed age of superannuation but the Institute having taken policy decision keeping in view the directions issued by the Ministry of Human Resource and Development, Government of India cannot be permitted to apply the said policy in a selective manner depending upon the whims of those who matter.

7. The Government Orders referred to herein above had the force of law by virtue of Article 73 of the Constitution of India. In para 4 of the counter affidavit

filed by Sri Sanjay Bhatnagar, Assistant Registrar (Legal and Confidential) in the Institute it has been clarified that the I.I.T., Kanpur is a body corporate established under the provisions of the Act and "the decision of the Government of India do not ipso facto apply to the institute" unless and until they are adopted by the Board of Governors of the Institute in accordance with the provisions of the Act in relation to the Institute. As stated herein above the Government decisions were approved by the Board of Governor's and, therefore, even according to what is stated in para 4 of the counter affidavit the Government decisions apply to the Institute inasmuch as nothing in the Act precludes the board of Governors to take policy decision to enhance the age of retirement of the employees of the Institute. I.I.T., Kanpur though is an autonomous body is under the administrative control of the Ministry of Human Resource Development as stated in para no. 22 of the counter affidavit filed by Sri Sanjay Bhatnagar on behalf of the Institute. The policy decision taken by the Board does not appear to have been reversed in the light of clarificatory letter dated 16.2.2000 issued by the Government of India, reliance on which was placed by Sri S.N. Verma during the course of arguments. In the fact situation of the case, therefore, the petitioner is entitled to the reliefs claimed in the writ petition.

8. Accordingly, the writ petition succeeds and is allowed. The impugned order superannuating the petitioner w.e.f. 31.12.2000 is quashed. Respondents are directed to allow the petitioner to continue in service till he attains the age of 62 years and grant him all consequential benefits. Parties are directed to bear their own costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.7.2002

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

Criminal Misc. Writ Petition No. 1754 of 1999

Siddhu and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri R.K. Jain
Sri Shree Prakash Singh
Sri V.N. Vishwakarma

Counsel for the Respondents:
Sri R.K. Asthana
Sri A.K. Banerjee
A.G.A.

Constitution of India- Article 226- Death in Police custody-if a persons while in the police custody died an unnatural death and there were anti mortem injuries on his person, it is for the police to explain how he received the injuries which resulted in his death-compensation awarded to the petitioners-The amount of compensation would be recovered from the concerned Police Officers.

So taking an overall view of the facts and circumstances of the case, we direct the State respondent no.1 to pay a compensation of Rs.2,50,000/- (Rs.1,50,000/- to petitioners no.1 and 2 and Rs.1,00,000/- to petitioner no. 3) within one month hence. The aforesaid amount may be recovered by the State from the concerned police officers for

the death of the deceased in the police lock up.

Case Law referred

(1) AIR 1984 SC 571
(2) 1997 Crl. L.J. 743
(3) (1994) 4 SCC 260

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

1. Murahoo alias Manendra (hereinafter referred to as 'the deceased'), a young and able bodied man of aged twenty seven years met tragic death while in police custody of Golhaura police station in 1998. Petitioners No. 1 and 2 are the father and mother and petitioner No. 3 is the widow of the deceased.

2. The case of the petitioners is that deceased, the sole bread winner of the family was taken to the police station on 14.10.1998, kept in lock-up and was done to death by the police officials. The case of respondents-police officers including Superintendent of Police, Siddharthnagar is that the deceased, while in police lock-up, committed suicide.

3. The facts adumbrated in the pleadings of the parties may be stated thus:

An F.I.R. was lodged on 10.10.1998 by one Jugul Kishore Tiwari alleging that his daughter was enticed away by the deceased and two others. On the basis of the said report police registered case crime no.91 of 1998, under Sections 363/366 I.P.C. and the deceased, it is alleged, was arrested on 14.10.1998 at 4 P.M. from the medicine shop of Jugul Kishore Tiwari by a constable. He was taken to the police station and kept in the lock-up for three days, mercilessly beaten, as a consequence he breathed his last. The police took the dead body for post mortem examination and could manage to obtain a report that the deceased died as a result of hanging and thereafter cremated it. Uncle of the deceased moved the court under Section 156 (3) Cr.P.C. and pursuant to the direction of the court, first information report under Sections 302/384/342/323/201/504/506 I.P.C. read with Section 3 of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act was registered against the police personnel who committed murder.

4. It is alleged that petitioner No. 1, father of the deceased is an old and blind man and has no independent source of income to support the family. He is a landless person belonging to the scheduled castes and the whole family was depending upon the earning of the deceased, who was a labourer. By filing the present writ petition the petitioners have prayed for a direction to conduct an enquiry by a sitting or retired District Judge and to pay them adequate compensation.

5. The case of the respondents-police officers, on the other hand, is that in the kidnapping case, the deceased being one of the accused came to the police station on 16.10.1998 along with informant, confessed his guilt and thereupon, he was taken to custody and lodged in the lock-up of the police station where he committed suicide by hanging. Immediately the higher authorities as well as the district administration were informed. The dead body was sent for post mortem examination and thereafter it was handed over to family members of the deceased. They have denied the petitioners' allegation that they physically tortured and caused the death of the deceased. They have, however, admitted

that on the direction issued by the Magistrate in exercise of power under Section 156 (3) Cr.P.C. a case has been registered against some police personnel, the investigation of which has been transferred to CBCID. Since the deceased committed suicide by hanging, it is asserted; the petitioners are not entitled to any compensation.

6. From the factual matrix as narrated above, it stands admitted that the deceased met his Maker while in police custody. Petitioners' specific case is that the deceased was kept confined in the police lock-up for three days where he was brutally tortured, as a consequence he breathed his last. The case of the contesting respondents-police officers is that the deceased being accused in a kidnapping case was arrested, put behind the lock-up of the police station where he committed suicide. This plea of the respondents as to the cause of death of the deceased cannot be accepted as true. Lock-up room which is otherwise called as 'thana hazat' is a part of the police station. When a person suspected of commission of an offence is arrested and kept in the police custody till he is produced in the court, the lock-up room is kept under guard by the police. Besides, in view of nature of work, all the times, some officers remain in duty in the police station. Therefore, it raises a question mark how the deceased in presence of the police officers and the guard committed suicide by hanging. It may be noted, no specific plea has been taken by the respondents-police officers whether the deceased hanged himself with the help of a rope, napkin or any other material. Moreover, nothing is borne out from their pleadings as to how the material used for hanging could be made available to the deceased when he was in the lock-up. Preparation preceding to hanging and accomplishment of the act must have taken some time. So, if at all the deceased committed suicide by hanging the guard as well as the police officers present in the police station could have rushed to save the life of the deceased. Nothing has been whispered by the respondents in their counter affidavit as to if any attempt was made in that regard. In view of such facts and circumstances, we would hold that the plea taken by the respondents-police officers that the deceased committed suicide is too big a pill to be swallowed and it militates against their plea of innocence. If a person while in police custody received some injury or died an unnatural death, it is for the police to prove how he received injury or how he died. Statement of the injured that he was physically tortured by the police cannot be thrown out on the ground that the same was not corroborated by any independent witness. No outsider can be expected to be present in the police station when such incident happened. Similarly if a person while in the police custody died an unnatural death and there were anti mortem injuries on his person, it is for the police to explain how he received the injuries which resulted in his death. This view of ours is based on Section 106 of the Evidence Act, which provides that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. Besides the aforesaid statutory provision the Supreme Court in the case of **Sebastian M Hongray Vs. Union of India,** AIR 1984 SC 571 ruled that the burden is obviously on the respondents to make good the positive stand taken by them in response to the notice issued by the Court by offering proof of the stand taken, when it

is shown that the person detained was last seen alive under the surveillance, control and command of the detaining authority.

7. Respondents-police officers in support of their case that deceased committed suicide, have relied upon the copy of the post mortem report, Annexure CA-2 to the counter affidavit. The said report being not legible, we could not ascertain if the deceased had any anti mortem injury, besides the cause of death. Moreover, presumption of correctness is not attached to the report to support the stand taken by the respondents. Added thereto, it is borne out from the pleadings of the contesting respondents-police officers that any near relative of the deceased was called to be present either at the time of inquest or post mortem examination. Moreover, since the death of the deceased occurred in police lock-up, in all fairness the police should have requisitioned the services of executive magistrate or any other responsible officer and in their presence, inquest as well as post mortem examination should have been conducted. All these circumstances persuade us to hold that the police officers and the autopsy doctor were hand in gloves and the latter in order to save the police officers from criminal prosecution fabricated the report.

8. From the pleadings of the parties and the circumstances narrated above, it is deducible that the deceased was brutally tortured by the police while in the lock-up of the police station and on account of such inhuman treatment he lost his life. True it is, he was arrested by the police in a cognizable offence registered under Sections 363/366 I.P.C. and was put behind bar in the police station, but while doing so, the concerned police officer failed to comply with the directions of the Supreme Court as laid down in **D.K. Basu Vs. State of West Bengal**, 1997 Crl.L.J. 743. In paragraph 36 the Court held that the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest. The arrestee shall also be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has to be informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is. The Court also directed that copies of all the documents including the memo of arrest should be sent to Illaqa Magistrate for his record.

9. Had the police in the present case followed the above directions, there would have been no scope for the petitioners to complain that the deceased was arrested on 14.10.1998 and detained in the police station till 16.10.1998 when he died while in lock-up. If at all the deceased was arrested on 16.10.1998 as pleaded by the respondents-police officers, necessary records of the police station should have been produced before

us for our scrutiny. We, therefore, find no ground to reject the stand taken by the petitioners that the deceased was arrested and kept in the police lock up for three days.

10. Information to the police and their power to investigate are provided in Chapter XII of the Code of Criminal Procedure. Arrest of a person involved in a cognizable offence is a step to further investigation, but it is not always necessary to arrest him without being satisfied that the information so received is credible one or reasonable suspicion exists about his involvement in the offence. In this context it is worthwhile to refer to the decision of the Apex Court in **Joginder Kumar Vs. State of U.P.**, (1994) 4 SCC 260 where the Court held that "no arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest is one thing. The justification for the exercise of it is quite another… No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter."

11. Three persons including the deceased were arraigned as accused in case crime No.91 of 1998 under Sections 363/366 I.P.C. Counter affidavit of the respondents-police officers is silent as to if the deceased was the main accused or he was the abettor. Further nothing is available on record as to what necessitated the police to arrest the deceased and whether there was any material before them for their satisfaction that the deceased was involved in the incident. To our mind, it appears that the police did not act in the manner as provided under law in the matter of arrest of the deceased and with some oblique motive they arrested and confined him in the lock-up for three days.

12. The police, more particularly of this State, have earned ill repute by their action and behaviour to general public. A person wronged, feels hesitant to go to police station to lodge complaint. His grievance is not heeded to and police do not extend helping hand to redress his suffering. Similarly, a person suspected of commission of an offence on being arrested when taken to police station, he is treated ruthlessly as if he is an unwanted element in the society and has no right to live in the country. The police by their action have lost their credibility. They are looked down upon by the society on account of their mis-deeds. There are many instances where the police by misusing their 'Wardi' have committed heinous crimes like murder and rape inside the police station. **Bhagalpur Blinding case and Maya Tyagi case** are shameful incidents of police atrocities.

13. Torture by one human being to the other casts a stigma on the civilized society. It not only creates bodily pain, but also affects the dignity and honour of a person. Custodial death and torture by the police are on the rise. If such types of crime are not checked and brought to a halt, India one of the largest democratic countries in the world may not have moral to advocate to uphold the fundamental rights of citizen. Any form of torture or inhuman treatment by the police either in course of investigation or otherwise is prohibited by Article 21 of the Constitution. The police being custodian

of law, is to protect law and not to abduct it. So if by misusing their 'Wardi' they depredate the liberties guaranteed by the Constitution, they should be dealt with in heavy hand otherwise, it would encourage others to disobey the law. They are instances where innocent persons having suffered at the hands of the police ransacked the police station, assaulted the police personnel in order to take revenge of their illegal acts. Therefore, if the abuse of power by the police is not checked and long arm of law fails to apprehend them and their belief is reinforced that no harm can be caused to them by any authority, the people will loose faith in prevailing law as well as the law enforcing machinery.

14. In the case on hand, as discussed earlier, it was the police personnel present at the relevant time in the police station mercilessly tortured and eliminated the deceased while he was in lock-up. For deprivation of life of the deceased at the hands of the police, State is liable to pay compensation to the petitioners on the principle that the state is responsible for the tortuous acts of its employees. Instead of asking the petitioners to enforce their rights through ordinary process of the court, this Court has ample power under Article 226 of the Constitution to award them compensation for death of the deceased in police lock-up.

15. Now the question arises as to the quantum of compensation which would be just and proper in the facts and circumstances of the case. Human life is precious. Loss sustained by the blind father, old mother and the wife, the petitioners herein, cannot be compensated. The parents, as their old age, lost their young and able bodied son who was maintaining them from his day's income as a labourer. The widow, petitioner No.3 at young age lost her husband. Can any amount of compensation that we may determine, fill up the loss sustained by them or give them solace? Our answer to this is emphatic 'No'.

16. So taking an overall view of the facts and circumstances of the case, we direct the State- respondent No. 1 to pay a compensation of Rs.2,50,000/- (Rs.1,50,000/- to petitioners No. 1 and 2 and Rs.1,00,000/- to petitioner No.3) within one month hence. The aforesaid amount may be recovered by the State from the concerned police officers responsible for the death of the deceased in the police lock-up.

17. We are, however, not inclined to issue any direction to initiate any enquiry by any sitting or retired District Judge since a case of murder has been registered and investigation taken up by the CBCID.

18. With the above observations and directions, the writ petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2002

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

Civil Misc. (Trade Tax) Writ Petition No. 10613 of 2002

Israr Ahmad ...Petitioner
Versus
Tehsildar Sadar, Muzaffarnagar and others ...Respondents

Counsel for the Petitioner:
Sri Rajiv Gupta

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.

Partnership Act 1932 Section 25- Liability of a partner-after the dissolution of firm- the individual property of the partner- can held liable to the extent of his share.

Held- Para 4 and 5

Therefore, the liability of a retiring partner of the firm continues for the period during which he was partner of the firm and the debts and assets of the individual partner can be made liable and the creditor can proceed for recovery of the amount from the partner to the extent of his share.

In the instant case, admittedly, the writ petitioner was partner of the firm when the said debt or liability was incurred and therefore, even if subsequently, he retired from the firm, he is liable for the debt of the firm incurred before his retirement.

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

1. Heard Sri Rajiv Gupta learned counsel for writ petitioner and Sri S.P. Kesarwani learned Standing Counsel for State Respondents no. 1 to 3.

2. In this writ petition, the writ petitioner has prayed for following reliefs:

"(i) To issue a writ order or direction in the nature of certiorari quashing the impugned recovery citation dated 4.8.2000 (Annexure-1 to the writ petition) issued by respondent no. 1 and also the impugned orders dated 17.08.2000 (Annexure-9) and 17.4.2001 (Annexure-11) passed by respondent Nos. 2 and 3 respectively.

(ii) To issue a writ, order or direction in the nature of mandamus directing the respondents not to recover any amount and not to harass, the petitioner in any manner whatsoever in pursuance of impugned recovery citation issued by respondent No. 1 and impugned orders passed by respondent Nos. 2 and 3.

(iii) To issue writ order or direction in the nature of mandamus directing the respondent No. 2 to decide the application of petitioner under Section 8 BB of Act (Annexure-8) afresh, after quashing the impugned orders taking into the fact that the application of reconstitution filed on 5.5.1992 (annexure-4 to writ petition) is also time barred and is yet to be disposed of.

(iv) To issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper.

(v) To award the cost of the writ petition in favour of the petitioner."

3. The contention of the writ petitioner is that he was partner only for four months in the year 1992. Thereafter he retired from partnership and the firm was dissolved and a new firm was constituted and notice under Section 8BB was given to appropriate authority which was rejected on 17.8.2000. The contention of Mr. Gupta learned counsel for writ petitioner is that there was no scope for rejection of the application under Section 8 BB since there is no provision for the same in the U.P. Trade Tax Act. The said rejection order was passed in the year 1993 and no step was taken by the petitioner against the said rejection order. That apart, we are of the view that the scope of Section 8-BB is very limited. Section 8-BB is set out below:

"8-BB Information to be furnished regarding change of business:

If any dealer to whom the provisions of section 8-A or section 8-B apply:

(a) transfers his business or any part thereof by sale, lease, leave, licence, hire or in any other manner whatsoever, or otherwise disposes of his business or any part thereof, or

(b) acquires any business, whether by purchase or otherwise; or

(c) effects or comes to know of any other change in the ownership of constitution of his business; or

(d) discontinues his business or changes his place of business or warehouse or opens a new place of business or warehouse; or

(e) changes the name, style or nature of his business or effects any change in the class or description of goods in which he carries on his business as specified in his certificate of registration; or

(f) enters into partnership or other association in regard to his business, or

(g) starts a new business or joins another business either singly or jointly with other persons,

(h) in the case of a company incorporated under a statute effects any change in the constitution of Board of Directors,

(i) effects any change in the particulars furnished in application for the grant of any certificate under section 4-A, or section 4-B or section 8-A or section 8-B,

he shall within thirty days of the occurring of any of the events aforesaid, inform the assessing authority in the form and manner as may be prescribed."

4. It appears that under the circumstances mentioned in the aforesaid section the notice is required to be given to the Revenue authorities intimating the dissolution and reconstitution of the firm or any change made in the business or place. That does not take away the liability of the partner of the firm for the debts or liability of the firm incurred when the said person was partner of the firm. In this connection relevant provision of Section 25 of the Partnership Act 1932, may also be considered, which runs as follows:

"25. Liability of a partner for acts of the firm- Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner."

The provisions contained under Section 25 of the Partnership Act 1932, does not contemplate such stand that even if debt or liability is incurred during the period the person was partner, his liability shall cease for that period if the dissolution of the firm takes place but the person under Rules remains partner of the firm and is liable, jointly with all the other partners and also severally, for all the acts of the firm done while he is a partner.

It is well settled that a partner who retires from the firm does not thereby cease to be liable for debt and obligations of the firm incurred before his retirement. Even after dissolution of the partnership the rights and obligations of the partner continues notwithstanding dissolution. However a retiring partner may be discharged from any existing liability by an agreement to that effect between himself and the members of the firm as newly constituted, but it does not affect the rights of the creditors. Therefore, the liability of a retiring partner of the firm continues for the period during which he

was partner of the firm and the debts and assets of the individual partner can be made liable and creditor can proceed for recovery of the amount from the partner to the extent of his share.

5. In the instant case, admittedly, the writ petitioner was partner of the firm when the said debt or liability was incurred and therefore, even if subsequently, he retired from the firm, he is liable for the debt of the firm incurred before his retirement. We do not find any merit in the writ petition and the writ petition stands dismissed. The application for interim relief also stands rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2002

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

Civil Misc. Writ Petition No. (Tax) 411 of 2002

M/s Das's Friends Builders Private Limited ...Petitioner
Versus
Deputy Commissioner of Income Tax Circle-I (2), Agra ...Respondents

Counsel for the Petitioner:
Sri Sah O.P. Agarwal
Sri Rohit Agarwal

Counsel for the Respondent:
Sri A.N. Mahajan
S.C.

Section 148-149 of Income Tax Act- reasons are to be recorded before issuing any notice- the reapons recorded in this case are relevant for forming a reasonable belief that the income has escaped assessment to tax.

(Held- para 3)

We have perused the reasons recorded by the Assessing Authority for initiating the proceedings under Section 147 of the Act and are of the view that the reasons recorded are relevant for forming a reasonable belief that the income has escaped assessment to tax. In that view of the matter, we do not find any merit in the contentions of the learned counsel for the petitioner. The writ petition fails and is accordingly stands dismissed and the application for interim relief is also rejected.

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

1. Heard Shri A.N. Agarwal learned counsel for the petitioner and Shri A.N. Mahajan learned additional Standing Counsel for the respondents.

2. The contention of the learned counsel for the petitioner is that it is incumbent upon the Revenue to record reasons before issuing any notice under Section 148 of the Income Tax Act, 1961. We find in this case that before issuing the notice on 12.5.2000, adequate reasons have been recorded which have also been given to the petitioner vide letter dated 26.2.2002 after the petitioner had filed the return. The reasons recorded by the Assessing Authority for initiating the proceedings under Section 147 of the Act are reproduced below:

"For the detailed reasoning given in the assessing order U/s 143(3) dated 20.3.2000 for A.Y. 1997-98, the total unexplained investment in the Friends Apartment was determined at Rs.2,86,77,365/- relating to F.Y. 1994-95 to 1998-99 (A.Y. 1995-96 to 1999-2000).

(2) The above total unexplained investment of Rs.2,86,77,365 in the Friends apartment, also includes an unexplained investment of Rs.40,89,856/- relating to the period of A.Y. 1996-97. In this case original assessment U/s 143(3) was completed on 18.12.1998 where the unexplained investment of Rs.40,89,856/- has not been considered. Therefore, unexplained investment U/s 69 of Rs.40,89,856/- relating to the A.Y. 1996-97 has to be added in the total income.

(3) In view of the above facts I have reason to believe that unexplained investment U/s 69 of Rs.40,89,856/- relating to the A.Y. has escaped the assessment.

(4) Issue notice U/s 148(1)"

3. We have perused the reasons recorded by the Assessing Authority for initiating the proceedings under Section 147 of the Act and are of the view that the reasons recorded are relevant for forming a reasonable belief that the income has escaped assessment to tax. In that view of the matter, we do not find any merit in the contentions of the learned counsel for the petitioner. The writ petition fails and is accordingly dismissed and the application for interim relief is also rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2002

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

Civil Misc. Writ (Tax) Petition No. 1009 of 2002

M/s Polar Industries Limited ...Petitioner
Versus
The Assistant Commissioner (S.I.B.) and another ...Respondents

Counsel for the Petitioner:
Sri M. Manglik

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.

U.P. Trade Tax Act- sub section (3-A) of Section 13- there is no scope for retaining such account, register or other documents seized for a period beyond thirty days from the completion of all the proceedings under the Act in respect of the relevant year in question.

(Held in para 5).

Admittedly, the assessments for the year 1999-2000 in respect of those documents and books of account, which are relevant, have already been completed and the assessment order has also been passed on 13.3.2002. The period of thirty days shall expire on 12.4.2002. In that view of the matter, it is not open for the respondents to retain the said documents and books of account seized from the petitioner by 12.4.2002. So far as the assessment for subsequent period is concerned the department shall be at liberty to proceed in accordance with law and it will be open to the writ petitioner to take all steps as he may be advised.

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

1. We have heard Sri M. Manglik, learned counsel for the petitioner and Sri S.P. Kesarwani, learned Standing Counsel for the State-respondents.

2. The contention of the writ petitioner is that the books of account and other relevant documents of the writ petitioner were seized on 24.8.1999 and ex-parte assessment order was passed. The writ petitioner is unable to file application for recalling or review of the order Under Section 13 of the U.P. Trade Tax Act for the reason that he cannot prepare his case without those relevant documents and books of account.

3. Section 13 of the U.P. Trade Tax Act provides as under:

"(3) If any officer authorized under sub-section (2) has reasonable grounds for believing that any dealer is trying to evade liability for tax or other dues under this Act, and that anything necessary for the purpose of an investigation into his liability may be found in any account, register or document, he may seize such account, register or document as may be necessary. The Officer shall forthwith grant a receipt for the same and shall be bound to return them to the dealer or the person from whose custody they were seized, within a period of ninety days from the date of such seizure, after having such copies or extracts taken there from as may be considered-necessary; provided the dealer or the aforesaid person, gives a receipt, in writing for the account, register or document returned to him. The Officer may, before returning the account, register or document, affix his signature and his official seal at one or more places thereon, and in such case the dealer or the aforesaid person will be required to mention in the receipt given by him, the number of places where the signature and seal of such officer have been affixed on each account, register or document.

(3-A) Notwithstanding anything contained in sub-section (3), the officer seizing any account, register or other document under that sub-section may for reasons to be recorded by him in writing and with the prior approval of the Commissioner, retain such account, register or other document for such period not extending beyond thirty days from the completion of all the proceedings under this Act in respect of the years for which they are relevant as he deems necessary."

4. On proper interpretation of sub-section (3-A) of Section 13 of the U.P. Trade Tax Act, as mentioned hereinabove, it appears that there is no scope for retaining such account, register or other documents seized for a period beyond thirty days from the completion of all the proceedings under the Act in respect of the relevant year in question.

5. Admittedly, the assessments for the year 1999-2000 in respect of those documents and books of account, which are relevant, have already been completed and the assessment order has also been passed on 13.3.2002. The period of thirty days shall expire on 12.4.2002. In that view of the matter, it is not open for the respondents to retain the said documents and books of account after thirty days. We, accordingly, direct the respondents to return the documents and books of account seized from the petitioner by 12.4.2002. So far as the assessment for

subsequent period is concerned the department shall be at liberty to proceed in accordance with law and it will be open to the writ petitioner to take all steps as he may be advised.

6. With the aforesaid direction, the writ petition is allowed to the extent indicated above.

7. The interim application also stands disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.4.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE V.M. SAHAI, J.

Civil Misc. Writ Petition No. 1116 of 2002

M/s Classic Rugs Private Ltd.
...Petitioner
Versus
Assistant Commissioner (Assessment) Trade Tax, Mathura and another
...Respondents

Counsel for the Petitioner:
Sri Manish Goyal

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.

Sick Industrial Companies (Special Provisions) Act, 1985- section 22-all stages of inquiry and other proceedings before the Board of Industrial and Financial Reconstruction are over where winding up proceeding is pending in Delhi High Court-Section 22 will have no application in this case.

Held (Para 4)

The fact remains that proceedings for winding up of the sick industrial company under Section 20 is pending in Delhi High Court. That itself shows that all proceedings by way of inquiry or otherwise already concluded in the Board of Industrial and Financial Reconstruction. Section 22 of 'The Act' cannot have any application in present case.

Case Law Referred-
1. 1991 SC 169
2. 1997 Company cases Vol. 89 P. 600

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

1. Sri Manish Goyal learned Advocate appears for petitioner and Sri S.P. Kesarwani learned Standing Counsel appears for State Respondents.

2. The petitioner company having its registered office at New Delhi and in respect of which winding up proceeding is pending in Delhi High Court, has moved this writ petition challenging the notice dated 28.2.2002 directing the petitioner company to deposit the amount of Rs.21,34,593.00 as Trade Tax due against the writ petitioner since 1994-95 to 1996-97.

3. The contention of Sri Manish Goyal learned counsel for petitioner is that there is automatic suspension of the proceedings under Section 22 of the Sick Industrial Companies (Special provisions) Act 1985 (hereinafter referred to as 'The Act') and as such complying with the said Section 22, the notice being in the nature of a distress proceeding, the notice should be stayed. It is however on record that all stages of inquiry and other proceedings before the Board of Industrial and Financial Reconstruction are over and the learned counsel for petitioner also can not dispute that the matter has been sent to the

High Court under the relevant provisions of the Said Act and the winding up proceeding is pending under Section of the said Act. Section 20 of the said Act provides as follows:

"Winding up of sick industrial company- (1) Where the Board, after making inquiry under section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all Concerned parties, is of opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.)

(2) The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act 1956 (1 of 1956).

(3) For the purpose of winding of the sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial company and the officer so appointed shall for the purposes of the winding up of the sick industrial company be deemed to be, and have all the powers of, the official liquidator under the Companies Act, 1956 (1 of 1956).

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of section 529 A, and other provisions of the Companies Act, 1956 (1 of 1956).

4. The fact remains that proceedings for winding up of the sick industrial company under Section 20 is pending in Delhi High Court. That itself shows that all proceedings by way of inquiry or otherwise were already concluded in the Board of Industrial and Financial Reconstruction. The first and foremost contention of Mr. Goyal is that there is automatic suspension under section 22 of the 'The Act' cannot have any application in present case and the reliance placed by him on the Judgment and decision in the case of Gram Panchayat and another Vs. Shree Vallabh Glass Works Ltd. and others (1991 S.C. 169) is misconceived. The Supreme Court in the aforesaid decision held that as soon as inquiry under section 16 of the Act is ordered by the Board various proceedings set out under Section (1) of Section 22 would be deemed to have been suspended and no proceeding against any of the property of the company could be proceeded further except with the consent of the Board.

5. In the instant case admittedly, no proceeding is pending with the Board, and all inquiry and other proceedings are over and, as such, the said decision has no application to the facts and circumstances of the present case. Mr. Goyal has also referred to sub section (2) of Section 20 of 'The Act' and submitted that the High

Court has power on the basis of opinion of the Board to consider the case of revival. In our view, the High Court referred to in Sub-section (2) of Section 20 of 'The Act' is Delhi High Court, where winding up proceeding is pending. Section 20 of 'The Act' relates to winding up after the matter is referred to the High Court for passing an order of winding up. It is open to the High Court in the said proceedings to consider all aspects of the matter and to find out if company could be revived. The said provision in our view can not apply to the facts and circumstances of present writ petition. It will be open for the company to approach appropriate Court where winding up proceeding is pending, if the High Court deems fit and proper to revive the company. The contention of Mr. Goyal on this aspect of the matter, therefore, can not be accepted. Mr. Goyal has also relied upon decision of Madras High Court in the case of J.M. Malhotra Vs. Union of India (1997 Company Cases, Vol. 89, 600). The principle relied upon in the said decision can not be disputed, although in our view the same does not apply to the facts and circumstances of the instant case. In the aforesaid decision the matter came up for consideration before the Madras High Court under section 20 for winding up. As we have already noted, it is open to the winding-up Court to consider all aspect of the matter including the viability of the revival of the company at the stage of winding-up. The said principle enunciated in the aforesaid decision, in our view, does not come to the aid of the writ petitioner.

6. Considering all aspects of the matter we are of the view that the writ petition is devoid of any merit and is liable to be dismissed. The same is accordingly dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.5.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 5315 of 1989

Sri Bhola Nath Verma ...Petitioner
Versus
Vth Additional District Judge, Kanpur Nagar and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Kant Gupta

Counsel for the Respondents:
S.C.

U.P. Act No. 13 of 1972- section 21 (1)(a)- the question of bonafide requirement of the premises as well as that of comparative need are questions of fact and, therefore, High Court has no power to correct the question of fact even if erroneously decided. (Held in para 9).

This writ petition deserves to be dismissed as no ground for interference is made out and is hereby dismissed. The interim order, if any, stands vacated.

Case Law Preferred

(1) JT 2002 (1) SC 254
(2) JT 2002 (1) SC 225
(3) 2001(1) ARC 176
(4) AIR 1983 SC 535
(5) AIR 1975 SC 1296
(6) AIR 1974 SC 1696
(7) 1976 U.P.R.C.C. 376
(8) 1976 UPRCC 342
(9) 1977 UPRCC 230
(10) 1996 (2) ARC 409
(11) 1997 (1) ARC 627
(12) AIR 2001 SC 807
(13) 1998 (2) ARC 148

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

1. In pursuance of the order passed by me on 15th March, 2002 this petition is being heard on merits for final disposal with the consent of the learned counsel for the parties.

2. This is a tenant petition arising out of the proceedings under Section 21(1) (a) of the U.P. Act No. 13 of 1972. The brief facts of the case are that the respondent no. 3, who is the landlord of the premises No. 118/479 (1), Kaushalpuri, Kanpur, filed an application for release of the shop in question under Section 21 (1) (a) of the U.P. Act No. 13 of 1972, hereinafter shall be referred to as the 'Act', on the ground that the landlord requires the aforesaid shop for his bonafide purposes and the tilts of the comparative hardship is in favour of the landlord. The Prescribed Authority issued notices to both the parties. The parties have exchanged their pleadings and also their evidence. The Prescribed Authority after considering the pleadings and evidence on record allowed the release application on 09.10.1987, Annexure-10 to the writ petition, and directed to release the shop in question after recording the findings that the shop in question is bonafide required by the landlord and also the comparative hardship tilts in favour of the landlord. Aggrieved by the order dated 09.10.1987, passed by the Prescribed Authority, petitioner-tenant preferred an appeal as contemplated under Section 22 of the Act before the Appellate Authority, which too has been dismissed by the Appellate Authority vide its order dated 25.02.1989.

3. Learned counsel appearing on behalf of the petitioner aggrieved by the orders of the Prescribed Authority as well as Appellate Authority, who have held that the need of the landlord is bonafide and comparison of the need also finds in favour of the landlord allowed the release application and the Appellate Authority has dismissed the appeal filed by the petitioner-tenant, tried to assail before this Court the findings recorded by both the Court below and submitted that the findings recorded by the Prescribed Authority and affirmed by the Appellate Authority do not make out a case that the landlord either requires the shop in question for bonafide need, or the comparison of the hardship has been judged in the correct prospective and thus submitted that the orders impugned in the present writ petition deserve to be set aside and the application filed by the landlord deserves to be rejected on this ground. I have gone through the findings recorded by the Prescribed Authority as well as by the Appellate Authority, I do not find any error, much less an error of law as suggested by learned counsel for the petitioner.

4. In the teeth of the concurrent findings of fact recorded by both the Courts below, this Court will not interfere in exercise of its jurisdiction under Article 226 of the Constitution of India.

5. Learned counsel for the petitioner thereafter submitted that during the pendency of the appeal before the Appellate Authority, one shop, which was occupied by some other tenant, came in the possession of the landlord as the tenant of that shop left the shop and handover the possession thereof to the landlord. This fact should have been taken into account by the Appellate Authority, but this fact was not brought on the record

before the Appellate Authority when the appeal was decided and has been brought on record of this writ petition by filing a supplementary affidavit. Learned counsel for the petitioner relied upon two decisions of the apex Court arising out of Punjab and Haryana Development Authority with regard to the premises, which was let out by the Haryana Urban Development Authority under the provisions of Rent Control Act of the State. The said Act is not applicable, which is reported in **JT 2002 (1) SC 254- Om Prakash Gupta Versus Ranbir B. Goyal.** The another decision relied upon by petitioner's learned counsel is reported in **JT 2002(1), SC 225- Paul George Versus State**, in which it has been held that 'no reasons have been recorded for arriving at the conclusion that the accommodation in question is bona fide required by the landlord'. The relevant portion of the aforesaid judgement is quoted below:-

"It is true that it may depend upon the nature of the matter which is being dealt with by the Court and the nature of jurisdiction being exercised as to in what manner the reasons may be recorded e.g. in an order of affirmance detailed reasons of discussion may not be necessary but some brief indication by which application of mind may be traceable to affirm an order, would certainly be required. Mere ritual of repeating the words or language used in the provisions, saying that no illegality, impropriety or jurisdictional error is found in the judgement under challenge without even a whisper of the merit of the matter or nature of pleas raised, does not meet the requirement of decision of a case judicially."

6. Learned counsel for the landlord-respondent replying the aforesaid arguments has relied upon a decision reported in 1988 (2) Allahabad Rent Cases, 108. Paragraph 23 whereof is reproduced below:-

"23. On the date of hearing of this petition, an application was filed by the petitioner stating therein that Dr. Himanshu Garg, Respondent No.3, alongwith his wife, Dr. Bindu Garg, has opened a Clinic-Cum-Nursing Home in the name and style of City Clinic Maternity Nursing Home at B.S. College, G.T. Road, Aligarh, on 10th November, 1985, and, consequently, it was alleged that this was a subsequent event and, consequently, the need set up in the release application has ceased to exist. In reply to this application, a counter affidavit has been filed by Dr. Sudhanshu Garg wherein it has been stated that since Dr. Sudhanshu Garg had completed his M.D. in the year 1984 and was without a job, he was advised to make a temporary arrangement for starting a clinic. It has been further stated that he along with his wife, who is also a doctor, took on rent a small premises measuring 30' x 20' as a temporary measure for starting a small clinic. The said premises has been taken on an exorbitant rent of Rs.900/- per month and that his arrangement is only a make shift arrangement. In fact, this subsequent event itself proves the bona fide need of the landlord. This circumstance goes against the petitioner. His case, that the landlords do not require the accommodation, is believed by this action on the part of the respondent-landlords. It is further clear consequently that, in fact, the landlord respondents are doctors and are without job, consequently they require the accommodation in

question. In the circumstances, the subsequent event, in fact, has no effect in the release application. On the other hand, it established more clearly the bona-fide need of the respondent-landlord."

7. The another decisions relied upon by learned counsel for the respondent-landlord are reported in **2001 (1) Allahabad Rent Cases, 176-** Pradeep Kumar Rastogi *Versus XVIth Additional District Judge, Meerut and 2 others;* **A.I.R. 1983 S.C., 535 -** *Smt. Labhkumar Bhagwani Shaha Versus Janardan Mahadeo Kalan;* **A.I.R. 1975 S.C., 1296 -** *Babhutmal Raichand Versus Laximbai* and **A.I.R. 1974 S.C., 1696-** *Nattu Lal Versus Radhey.* In A.I.R. 1974 S.C., 1696, it has been held "*High Court under Article 226 of the Constitution has no power to reappraise evidence and to record its own finding."* In A.I.R. 1975, S.C. 1296 the Hon'ble Supreme Court held that "*the High Court has no jurisdiction under Article 227 to reconsider the evidence."*

8. The law laid down in this case is applied to the facts of the present case under Article 226 of the Constitution as well. This Court in the case of *Ram Rakesh Pal and others Versus 1st Additional District Judge and others, reported in* **1976 UPRCC 376**, has held that "*the question of bona fide requirement of the premises as well as that of comparative need are questions of fact and, therefore, High Court has no power to correct the question of fact even if erroneously decided."* A reference may also be made to the decision of this Court in the case of *Jagan Prasad Versus District Judge and others*, reported in **1976 UPRCC 342;** *Laxmi Narain Versus IInd Additional District Judge and others*, reported in **1977 UPRCC, 230;** and *Smt. Nirmala Tandon Versus Xth Additional District Judge, Kanpur Nagar,* reported in **1996 (2) A.R.C., 409**. The matter has recently been considered by the apex Court in the case of *Kamleshwar Prasad Versus Pradumanju Agarwal,* reported in **1997 (1) A.R.C. 627,** wherein it was held that "*under the Act, the order of the Appellate Authority is final and the said order is a decree of the Civil Court and a decree of a competent Court having become final cannot be interfered with by the High Court in exercise of its power of superintendence under Article 226 and 227 of the constitution of India by taking into account any subsequent event which might have happened. That apart, it was further observed that the fact that the landlord needed the premises in question for starting a business which fact has been found by the Appellate Authority, in the eye of law, must be that on the day of application for eviction, which is the crucial day, the tenant incurred the liability of being evicted from the premises. The finality of the decisions cannot be disturbed on account of any subsequent events on a petition under Article 226 of the Constitution of India."* This view has been endorsed by the apex Court in the case reported in **A.I.R. 2001 S.C., 807 Gaya Prasad (supra).** Learned counsel for the respondent-landlord has further relied upon a case reported in **A.R.C., 1998 (2), 148** and also other cases on this issue have been relied upon by the landlord counsel. In this view of the matter, the contention of learned counsel appearing on behalf of the petitioner cannot be accepted wherein it has been stated that the fact which has been sought to be brought on record of the writ petition for the first time even if it has not been taken into account and

possibly the same could not have taken into account because of the fact that for the first time it has been brought on the record of writ petition vitiates the orders impugned in the present writ petition, which as stated above, are otherwise do not warrant any interference by this Court under Article 226 of the Constitution of India as the same are covered by the concurrent findings of fact. No other point was urged by learned counsel for the petitioner.

9. In view of what has been stated above, this writ petition deserves to be dismissed as no ground for interference is made out and is hereby dismissed. The interim order, if any, sands vacated. However, in the facts and circumstances of the case the parties shall bear their own costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD APRIL 03, 2002

BEFORE
THE HON'BLE M.C. JAIN, J.

Criminal Revision No. 1756 of 2001

Ram Babu and others ...Revisionists
Versus
State of U.P. and another
...Opposite Parties

Counsel for the Revisionists:
Sri Tejpal

Counsel for the Opposite Party:
A.G.A.
Sri Amar Saran

Code of Criminal Procedure-section 319 is not to be controlled by the result of the investigation. In exercising power under section 319 Cr.P.C. the Court is to be guided by the evidence that has come before it (held in para 10 & 11).

In view of the evidence that has come up before the Court at the trial they have to be tried for the offences in question alongwith Guddu, who was already facing trial.

The impugned order passed by learned Trial Judge is perfectly justified, not suffering from any illegality, impropriety or incorrectness. The revision is dismissed.
Case Law Preferred
(1) (2) JIC 5 (SC)

(Delivered by Hon'ble M.C. Jain, J.)

1. Heard learned counsel for the revisionists, learned A.G.A. for O.P. no. 1 and Sri Amar Saran, learned counsel for the opposite party no.2- complaint.

2. Through this revision the revisionists seek to challenge the order dated 27.6.2001 passed by the Sessions Judge Jhansi under Section 319 Cr.P.C. summoning them as accused in S.T. No. 112 of 2000. Notice had been issued to the complainant-opposite party no.2 also as per the order dated 11.7.2001 and he put in appearance through his counsel to oppose the revision, which is opposed by learned A.G.A. also on behalf of the State-opposite party no.1.

3. The brief resume of facts is necessary for understanding the controversy properly. One Pramod Kumar was murdered in this incident and his brother Santosh Kumar sustained injuries. Both of them sustained injuries of firearm. Incident took place on 18.4.1999 at 11.30 a.m. and report was lodged 45 minutes later by an eye-witness Suresh Kumar (brother of the deceased and

injured). 10 persons including the present 9 revisionists has been named as accused in the F.I.R. with the allegation that all of them had appeared at the spot armed with firearms when his brother, Pramod Kumar was sitting on a chair on the **Chabutra** under the Banyan tree in front of his house near pond. The weapons of all of them were described in the F.I.R. All of them had allegedly opened fire, killing Pramod Kumar and injuring Santosh Kumar. However, after investigation the police submitted charge sheet only against one person, Guddu who is facing trial in the said case. The Doctor who conducted the autopsy on the deadbody of the deceased and prepared medical examination report of the injured Santosh Kumar, had been examined as P.W. 1. It followed from his testimony that both victims sustained fire arm injuries. Thereafter, the informant Suresh Kumar, P.W.2 was examined, who gave evidence against present 9 revisionists also besides Guddu (facing trial) that all of them had participated in this crime and had opened fire. Thus, evidence came to be there before the Court against present 9 revisionists as participants of this crime where after an application was made for summoning the present revisionists as per provisions of Section 319 of Cr.P.C. As learned Sessions Judge allowed the said prayer, the revisionists have felt aggrieved and have come up with this revision before this Court.

4. It has been argued by the learned counsel for the revisionists that the deceased Pramod Kumar was himself a hardened criminal and even P.W. 2, Suresh Kumar and Santosh Kumar injured are also of same hue and colour. Reference has been made to the copy of the judgement in S.T. No. 124 of 1981 passed by IVth Additional Sessions Judge, Jhansi on 25.7.1984 whereby the deceased, Pramod Kumar and his father were sentenced to life imprisonment. This argument is wholly irrelevant. Even if it is taken for the sake of the argument that the deceased Pramod Kumar had criminal antecedents that did not mean that any body could take away his life. He continued to be the citizen of the country and human being and was entitled to the right of life. The crucial question is as to who were the murderers.

5. Another argument of the learned counsel for the revisionists is that as per the testimony of Doctor examined as P.W. 1, the deceased had received a single gun shot wound of entry and similarly injured, Santosh Kumar also received single injury of firearm. As per Section 149 of I.P.C., every member of unlawful assembly is guilty of the offence committed in prosecution of common object. As per the F.I.R. and according to the evidence of eye-witness, Suresh Kumar, P.W.2 (who also happens to be informant), all the 10 accused persons came to the spot and had opened fire. If it were so, they were members of unlawful assembly with common object of killing, Pramod Kumar and injuring others. As mentioned above, as per Section 149 of I.P.C., every member of an unlawful assembly is guilty of the offence committed in prosecution of common object. Evidence having come against 9 revisionists before the Court as per the testimony of Suresh Kumar, the Court was justified to summon them under Section 319 of Cr.P.C. It is not the stage of critically analyzing the ultimate result of the entire testimony which has to be done at the time of decision of the case. Therefore, this submission also of

learned counsel for the revisionists does not carry conviction.

6. Yet another argument advanced by the learned counsel for the revisionists is that while passing the impugned order, the trial court has also made reference to the statement of Santosh Kumar injured made by him under Section 161 Cr.P.C., though he has not yet been examined at the trial as a witness. I do not think that it makes any difference for the benefit of the revisionists if the trial court has made a reference to such statement of Santosh Kumar recorded under Section 161 Cr.P.C. Truth of the matter is that the evidence has come before the Court through the testimony of eye-witness. Suresh Kumar, P.W.2 that the revisionists were also the participants of the crime, who appeared there with firearms and opened fire. The same found corroboration from the medical evidence as per testimony of the doctor examined as P.W.1. It is also significant to point out that F.I.R. had been lodged without any loss of time within 45 minutes of the occurrence by an eye-witness and therein also all the revisionists were named as culprits with their weapons.

7. Learned counsel for the revisionists then argued that after investigation, the police did not find a case against the revisionists and it was for this reason that only Guddu was charge-sheeted. It has to be clearly understood that the power under Section 319 Cr.P.C. is not to be controlled by the result of the investigation. In exercising power under Section 319 Cr.P.C., the Court is to be guided by the evidence that has come before it.

8. On the face of it, there does not appear to be any reasonable basis for the Investigating Officer to have submitted charge-sheet only against Guddu, one of the ten culprits named in the F.I.R. despite the fact that there was categorical assertion in the F.I.R. that the shots of two, namely, Brijesh Kumar and Ram Babu had hit the deceased and all of them had opened fire. What I mean to emphasis is that the conclusion arrived at by the Investigating Officer is not to be taken as the gospel truth or the last word as to who have to be put on the trial on consideration of the evidence that has come before the Court. The last argument of learned counsel for the revisionists is based on the decision of the Apex Court in the Case of ***Michael Machado & others Versus Central Bureau (2) JIC 5 (SC)***. The Apex Court ruled that doubt or suspicion is not enough to add another person as accused. Reasonable satisfaction from the evidence already recorded is the essential requirement to exercise power under Section 319 Cr.P.C. On the other hand, the submission of learned counsel for the complainant is that the fact of that case was different. In that case 49 witnesses had already been examined. Accused was sought to added on the basis of evidence of the remaining three witnesses who only created suspicion. It may be pointed out that one has to proceed with caution that observations made with reference to the facts of a particular case cannot always be transplanted on another which stands on a different factual premise.

9. This court is of view that the case relied upon by the learned counsel for the revisionists cannot render any help to them in the instant situation. Here, the evidence of P.W.2, Suresh Kumar, eye-

witness does not only create a suspicion against 9 revisionists regarding their participation. It offers foundation for reasonable satisfaction regarding their participation as alleged. It is not to be considered at this stage as to whether ultimately conviction would be sustainable against all or some of the accused or the case would result in acquittal.

10. The question is of trial of revisionists alongwith Guddu and I am of the view that in view of the evidence that has come up before the Court at the trial they have to be tried for the offences in question alongwith Guddu, who was already facing trial.

11. My net conclusion is that the impugned order passed by learned Trial Judge is perfectly justified, not suffering from any illegality, impropriety or incorrectness. The revision is dismissed. The learned Trial Judge shall proceed further in accordance with law in pursuance of the impugned order dated 27.6.2001 passed by him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 13873 of 2002

Ram Murti Tripathi ...Petitioner
Versus
The Registrar, Sampurnanand Sanskrit Vidyalaya, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri K.M. Sahai,

Counsel for the Respondents:
Sri Anil Tiwari

Statutes of Sampurnanand Sanskrit University- 18. 14 and 18.15- the dispute between teachers who claim to be appointed as acting principal shall be decided by the Vice-Chancellor under statute 18.15. (held in para 5)

The petitioner may make a representation to the Vice Chancellor and if he does so the same will be decided preferably within one month thereafter in accordance with law after hearing respondent nos. 3, 6 and others concerned by a speaking order.

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

1. Heard learned counsel for the petitioner Sri K.M. Sahai and Sri Anil Tiwari for respondent nos. 1, 2 and 4.

2. The controversy in this case is as to who is entitled to officiate as Principal of Rama Nand Peeth Sanskrit Mahavidyalaya Badrika Ashram Karn Ghanta Varanasi which is affiliated to Sampurnanand Sanskrit Vidyalaya, Varanasi.

3. The Statutes 18.14 and 18.15 of the First Statutes of Sampurnanand Sanskrit Vishvadalaya are extracted below:

"18.14. All disputes regarding seniority of teachers (other than the Principal) of the same college, shall be decided by the Principal of the college who shall give reasons for the decision. Any teacher aggrieved by the decision of the Principal may prefer an appeal to the Vice Chancellor within 60 days from the date of communication of such decision to the teacher concerned. If the Vice

Chancellor disagrees from the Principal, he shall give reasons for such disagreement.

18.75. All disputes regarding seniority of Principals of affiliated colleges shall be decided by the Vice Chancellor who shall give reasons for the decision. Any Principal aggrieved by the decision of the vice- chancellor may prefer an appeal to the Executive Council within sixty days from the date of communication of such decision to the Principal concerned. If the Executive Council disagrees with the Vice Chancellor, it shall give reasons for such disagreement."

4. Statute 18. 14 relates to dispute of seniority of teachers other than the Principal, whereas State 18.15 relates to dispute of seniority of principal. In the present case although the dispute is between the two teachers as to who is senior, and hence ordinarily it should be decided in accordance with Statue 18.14, but since there is no permanent principal (as the permanent principal has left the institution) the controversy is who is entitled to officiate as acting principal. Statute 12.22 states:

"12.22. In case of office of the Principal of an affiliated college falls vacant the senior most teacher of the college shall act as principal until a duly selected principal assumes office provided that such teacher shall draw the pay he is entitled to get on the post of the teacher and will not get the pay of the post of principal during such period."

5. Where the controversy is as to who can be appointed officiating Principal (pending regular selection of Principal), the application of Statute 18.14 becomes impossible since there is no Principal who can decide the dispute regarding seniority of teachers. Hence in this state of affairs we have to resort to Statute 18.15 which has to be interpreted to mean that a dispute regarding seniority of teachers who claim to be officiating Principal is also to be decided in accordance with Statute 18.15 i.e. by the Vice Chancellor. In our opinion this is the only reasonable interpretation which can be given, otherwise it will be impossible for the dispute of the present nature to be decided. Hence we lay down the principle that in such cases the dispute between teachers who claim to be appointed as acting principal shall be decided by the Vice Chancellor under Statute 18.15. The petitioner claims that he is senior to respondent no.6 who has been appointed as officiating principal of the institution. The petitioner has already made a representation to the Registrar dated 15.1,2002 and 21.2.2000 (Annexure 6 and 8) to the writ petition. The petitioner may make a representation to the Vice Chancellor and if he does so the same will be decided preferably within one month thereafter in accordance with law after hearing respondent nos. 3,6 and others concerned by a speaking order.

6. With the aforesaid direction, the writ petition is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2002

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

Civil Misc. Writ Petition No. 253 of 2001

Murari Lal and others ...Petitioners
Versus
IIIrd Additional District Judge, Kanpur Nagar and others ...Respondents

Counsel for the Petitioner:
Sri Sanjai Kumar

Counsel for the Respondents:
S.C.

U.P. Act No. XIII of 1972- Section 16 (i) (b) - Release Application- the matter of release is only between the rent control authority and the land land/owner- the erstwhile tenant or unauthorized occupant has no concern or locus standi to contest the release matter.
Held- Para 12 and 13

It is aboundantly clear that petitioners have no locus standi to challenge the order of release dated 8.2.1994 passed by delegated authority (respondent no. 2) and subsequently affirmed by the Revisional Court (respondent no. 1) vide its judgment and order dated 4.10.2001.

In view of the above, Murari Lal (since deceased), through his legal representatives, namely the present petitioners nos. 2 to 4 are not entitled to invoke extra ordinary discretionary jurisdiction under Article 226, Constitution of India.

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

1. One Ganesh Shankar Rawat, claiming to be the owner to premises no. 105/28, Prem Nagar, Kanpur Nagar filed release application under section 16 (i) (b) of U.P. Act No. XIII of 1972/ before Delegated Authority/Rent Control and Eviction Officer, Kanpur Nagar on 4.2.1992/ Annexure 2 to the writ petition, on the ground that he was in possession of the aforesaid entire premises except one tin shed room with open terrace, which was earlier in the tenancy of his tenant Sahdeo Prasad, who died about four years prior to the filing of the present release application leaving his widow, Smt. Bitto Devi who lived with her daughter before shifting to her own house- plot no. 65 Sanjay Gandhi Nagar Naubasta, Kanpur about four months prior to the filing of the release application. In para 4 of the release application, it is also contended that the said Bitto Devi had handed over unlawfully the possession of tin shed room with open terrace to one Murari Lal without the consent of the owner (Ganesh Shanker Rawat- respondent no. 3) and that said Murari Lal illegally occupied the accommodation in question without any allotment. It is also stated that the owner or the premises had filed a suit before the civil court for eviction of the said Murari Lal from the accommodation in question against certain portion of the said premises other than the accommodation in question pending in the court of A.C.M.M. IXth Kanpur.

2. It may be noted that Murari Lala died during the pendency of the release proceedings and hence legal representatives/heirs of said Murari Lal were substituted. Petitioner nos. 2, 3 4,5 and 6 proforma respondents/heirs of said deceased Murari Lal. Petitioner no. 1 Murari Lal, even though i.e. is dead.

3. The Rent Control Inspector submitted report dated 14.2.1992 in

pursuance to the directions given by the Delegated Authority (Annexure 4 to the petition). The Rent Control Inspector found that Murari Lal was in possession of the accommodation in question. He also noted that earlier Sahdeo Prasad was the tenant and after having died, his wife Bitto Devi continued to reside therein as tenant. The Rent Control Inspector also noted vide para 2 of his report that Bittoo had handed over possession to said Murari Lal being in collusion with each other and that Bittoo Devi had removed all her goods and shifted to her own house at house plot no. 60 Sanjay Gandhi Nagar Naubasta, Kanpur Nagar and ever since the said Murari Lal was in unauthorized possession of the accommodation in question. The aforesaid information solicited by the Rent Control Inspector was supported by the statement of one Bishun Sarup Saxena R/o 105/3 B, Prem Nagar, Kanpur Nagar. The Rent Control Inspector vide para 4 of his report also noted that Murari Lal claimed to be co-owner of the house in question.

4. Murari Lal thereafter filed his objection dated 7.9.1992/Annexure -5 to the writ petition. There is pleading in the petition, that no counter reply to the said objection filed by Murari Lal, was filed by Ganesh Shanker Rawat (respondent no. 3). Learned counsel for the contesting respondent/Caveator - applicant Sri Atul Dayal, however, made a statement that a counter reply was filed denying the allegation of Murari Lal that he was owner of the house in question. Sri Atul Dayal further informed this court that a regular suit for eviction of Murari Lal was filed by Ganesh Shankar Rawat, respondent no.3 on the ground that he was merely a licensee of some of the portions of the premises. (apart from the accommodation in question).

5. At this very juncture, this Court must make a note of the fact that the petitioners have not approached this Court with clean hands, inasmuch as the petitioners deliberately withheld the relevant facts by concealing them as well as the documents i.e. Counter reply filed by Ganesh Shanker Rawat against his objection. On the other hand, they deliberately made an attempt to represent as if the said objections were uncontroverted on relevant issues. This is nothing but grossest abuse of process of Court, particularly while invoking the jurisdiction of this court under Article 226, Constitution of India. Sri Vijay Prakash, Advocate assisted by Sri Sanjay Kumar, learned counsel appearing on behalf of the petitioners as well as Sri Atul Dayal appearing as counsel for the Caveator/Contesting respondent no. 3 have made a statement that regular suit has been decreed and the appeal against it by Murari Lal (since deceased through his legal representatives) was initially dismissed in default but restored and today is the date fixed for delivery of judgment as per statement of Sri Vijay Prakash, Advocate.

6. The Delegated Authority, vide, its judgment and order dated June 5, 1993 declared vacancy (Annexure 2 A to the petition) and thereafter allowed the release application filed by Ganesh Shankar Rawat, respondent no. 3 vide, its judgment and order dated March 8, 1994 (Annexure 2 to the Writ petition).

7. Feeling aggrieved, aforementioned Murari Lal filed Rent Revision No. 46 of 1994 under section 18 of U.P. Act No.

XIII of 1972 and the same has been dismissed, vide judgment and order dated 6.10.2001 passed by III Additional District Judge, Kanpur Nagar (Annexure 1 to the writ petition).

8. The petitioners (legal heirs of deceased Murari Lal) have filed this petition praying for issuance of a writ of certiorari to quash the aforementioned impugned judgment and order dated 6.10.2001 passed by III Addl. District Judge, Kanpur Nagar (Annexure 1 to the petition) arising out of the impugned judgment and order dated 8.3.1994 passed by Additional City Magistrate/Rent Control & Eviction Officer, Kanpur Nagar (respondent no. 2), copies whereof have been filed as Annexure 1 and 2 to the petition respectively.

9. It may be noted that an amendment application has also been filed on behalf of the petitioners praying for certain amendments/corrections in para 14 and ground no. (iii) of the writ petition by deleting words 'of affidavit' and substitute them by the words ' and affidavit in support thereof' in 8th and 9th lines respectively. The other prayer is to issue a writ for quashing the finding regarding status of the petitioners while passing the order of vacancy dated 5.6.1992 (Annexure 2 -A). The amendment application is allowed, and the petition shall be deemed to be corrected accordingly.

10. Learned counsel for the petitioners has made two fold arguments before this Court. Except the said two points, no other plea has been raised before this Court, probably realizing that all other grounds contained in para 20 of the writ petition, do not indicate manifest error apparent on the face of record and that these grounds shall require appreciation of evidence, which is not normally permissible by this Court while exercising its jurisdiction under Article 226, Constitution of India.

11. Learned counsel for the petitioners is seeking to challenge by way of amendment of the petition, the order dated 5.6.1992 declaring vacancy (Annexure 2 A to the petition). The petitioners can not be permitted to challenge the said order declaring vacancy which was passed way back in June, 1992. There is no explanation for the delay in challenging the said order. The petitioners are guilty of laches. It is obvious that this order is sought to be challenged by way of amendment of the petition as an after thought. This Court can not loose sight of the fact that the order of declaring vacancy has been challenged by the petitioners by approaching court under Article 226, Constitution of India. There is no pleading whatsoever that petitioners were given no advice to challenge it. There is another aspect of the matter, namely, matter of release under Sec. 16 of the Act is only between the Rent Control Authority and the land lord/owner. The erstwhile tenant or unauthorized occupant, after vacancy has been declared, has no concern or locus standi to contest the release matter.

12. In view of the above, it is aboundantly clear that petitioners have no locus standi to challenge the order of release dated 8.3.1994 passed by Delegated Authority (respondent no. 2) and subsequently affirmed by the Revisional Court (respondent no. 1) vide, its judgment and order dated 6.10.2001.

As far as the question of status of deceased Murari Lal (now represented though his legal representatives-petitioners nos. 2 to 6 and proforma respondents nos. 4 and 5) is concerned, the facts of the case speak for themselves. It is not disputed by the petitioners that Sahdeo Prasad was erstwhile tenant and Bitto Devi being his wife became tenant but shifted to her own house no. 62 Sanjay Nagar, Kanpur Nagar. There is not even an iota of evidence that Bitto Devi had ever paid rent to Murari Lal. Murari Lal has no allotment order in his favour and thus a trespasser who took law in his own hand and occupied the accommodation in question. Admittedly, decree in original suit no. 1108 of 1987 is in existence against the said Murari Lal.

13. In view of the above, Murari Lal (since deceased), through his legal representatives, namely, the present petitioners nos. 2 to 6 are not entitled to invoke extra ordinary discretionary jurisdiction under Article 226, Constitution of India.

14. Apart from it, the Revisional Court has referred to a decision in the case of Ashok Kapil Versus Sana Ullah (dead) and others reported in 1996 (2) Allahabad Rent Cases, 620 (paras 4 to 11) wherein the Apex Court held that in case rent control proceedings were initiated by the District Magistrate, when the premises had roof, the District Magistrate shall not be ceased to have jurisdiction to pass an allotment order in respect of it, even if it becomes subsequently a roofless structure. The ratio of the decision is 'hence in the normal course respondent can not secure assistance of a court of law for enjoying the fruit of his own wrong.' The reasoning of the said decision is that incase an accommodation is being removed or damaged by a voluntary act of the owner/land lord, the same can not be permitted to snatch and deprive the Rent Control Authorities to allot an accommodation. However, the said decision will not apply to the facts of a case where roof of a certain building falls down of its own. The petitioners concede that this case is against them. I find no manifest error apparent on the face of record in the impugned order dated 8.2.1994 passed by the respondent no. 2 and the same is also affirmed by Revisional Court's judgment and order dated 6.10.2001.

15. In view of the above, it is not a fit case in which an interference by this Court under Article 226, Constitution of India is warranted. The petition lacks merit and is dismissed in limine.

16. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 5.3.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 8546 of 1991

Uttam Chandra ...Petitioner
Versus
VIIIth Additional District Judge, Agra and others ...Opposite Parties

Counsel for the Petitioner:
Sri Pradeep Kumar
Sri Swapnil Kumar

Counsel for the Opposite Parties:
S.C.
Sri Prakash Gupta

U.P. Act No. 13 of 1972- Section 21 (i) (a)- Release application- contested by the brother of the tenant. Court below recorded finding in favour of land lord to be bonafide- writ court not to act as an Appellate Court- when the brother is not within the definition of family member of the tenant- No question of consideration of his comparative hardship arise.

Held- Para 5

The Prescribed Authority has made categorical finding that the need of the land lord is bonafide and genuine. Since Uttam Chandra cannot be said to have inherited the tenancy of Basu Deo and in my opinion rightly the comparison of needs does not arise.

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

1. This is a tenant's writ petition arising out of an application under Section 21 (i) (a) UP Act No. 13 of 1972 with regard to non residential premises for release in favour of the land lord.

2. The application was filed by the land lord for the need of his son and augmenting the income of family which was contested by the petitioner.

3. Prescribed Authority have found that the shop was originally let out to one Basu Deo who admittedly died and petitioner, Uttam Chandra is neither an heir nor a family member. Petitioner contested the aforesaid case set up by the land lord that he is the real brother of the deceased. Basu Deo and he was carrying on the business with Basu Deo and thereafter he himself is carrying on the business in the capacity of Karta of an undivided Hindu Family. The prescribed authority after considering the material on record arrived at the conclusion that the need of the land lord is bonafide and genuine.

4. On the aforesaid pleadings, the prescribed authority considered the case and found that Uttam Chandra, petitioner admittedly is not the family member of Basu Deo and further that Uttam Chanadra failed to demonstrate that he is a person on whom the tenancy of the shop in question will devolve after the death of Basu Deo. The finding of the labour court was affirmed by the appellate court and therefore Uttam Chandra cannot be said to be a tenant of the accommodation in question. On the question of bonafide need the trail court after considering the matter arrived at the conclusion that the land lord's need is genuine and requires the shop in question. On the question of comparative hardship since the prescribed Authority has held that the petitioner is not a family member of Basu Deo hence he cannot inherit the tenancy rights. Prescribed authority allowed the application. Uttam Chandra preferred an appeal. The appellate court affirmed the view taken by the prescribed authority and it is this order against which this writ petition is filed.

5. I have heard Sri Swapnil Kumar in support of his writ petition who tried to make out a case that the findings recorded by the prescribed authority on the bonafide need of the land lord suffers from error of law. But he could not point out any such error. This court will not sit in appeal over the findings recorded by the prescribed authority and appellate authority. The prescribed authority has made categorical finding that the need of the land lord is bonafide and genuine. Since Uttam Chandra cannot be said to have inherited the tenancy of Basu Deo

and in my opinion rightly the comparison of needs does not arise.

6. Sri Swapnil Kumar wanted to raise objection that in any view of the matter, the possession of Uttam Chandra should be deemed to have been regularized under Section 14 of U.P. Act No. 13 of 1972. This point has not been raised either before the prescribed authority or before the appellate authority.

7. In this view of the matter, the petitioner cannot be permitted to raise a point which requires evidence after a gap of about 22 years of filing application under Section 21(i) (a) of U.P. Act No. 13 of 1972.

8. In view of the aforesaid discussion the petition is dismissed. There will, however, be order as to cost.

9. Shri Swapnil Kumar requested that the tenant may be granted sometime to vacate the shop in question. Sri Prakash Gupta has not objected to this. I think in the interest of justice four months' time may be granted from today to petitioner to vacate the accommodation in question and hand over the vacant possession of accommodation provided Uttam Chandra deposits the mean profit at the rate of then existing rent alongwith interest at bank rate and the land lord is entitled to withdraw the same alongwith usual undertaking before the prescribed authority within 15 days from today.

10. The petition is dismissed except with the aforesaid observations.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.07.2002

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

Habeas Corpus petition no. 20142 of 2002

Vijay Kumar Mishra ...Petitioner
Versus
Superintendent, District Jail, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri Daya Shanker Misra
Sri C.K. Misra
Sri L.K. Dwevedi

Counsel for the Respondents:
Government Counsel
Sri Ajit Kumar Singh

Constitution of India, Article 226- Detention order- challenge made in two aspects- authority not told about right of representation- secondly- detention order itself can not fix the period of detention.

Held- Para 4

As already stated above, we were disinclined to interfere in such a case but we have to do so with a heavy heart as the law of Habeas Corpus is a technical law and there are two points on which the petition has to be allowed. Firstly, it is alleged in paragraphs 25,26 and 27 of the petition that the Detaining Authority did not informe the petitioner that he has a right to make a representation against the detention order to the Detaining Authority. This fact is not disputed by the respondents. Hence in view of the Division Bench decision of this Court in Jai Prakash Shastri v. Adhishak Janpad Karagar 2000 (41) ACC 883 which followed the decision of the Supreme Court in State of Maharastra

Vs. Santosh Shastri Acharya JT 2000 (8) SC 374 the impugned detention order becomes illegal. Secondly the argument of learned counsel for the petitioner that the detention order itself. Secondly the argument of learned counsel for the petitioner that the detention order itself cannot fix the period of detention at the initial stage has also to be accepted in view of the decision of the Constitution Bench of the Supreme Court in Makhan Singh Darsikha v. State of Punjab AIR 1952 SC 27, which has been followed by the Division Bench of this Court in Adesh Kumar v. Adhishak Karagar 1997 UP Crl. Rulings 647.

Case law discussed:
2000(41) ACC 883
JT 2000 (8) SC- 374
AIR 1952 SC-27
1997 UP Crl. Rulings 647

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

1. Heard Sri D.S. Misra learned counsel for the petitioner and learned Government counsel for the respondents.

This is a writ petition, which we are allowing with a heavy heart despite all our inclination to the contrary.

2. The petitioner who has been elected MLA from the Samajwadi Party is challenging the impugned order of detention dated 24.4.2002 (Annexsure-1 to the petition) passed under the National Security Act. Annexure-2 to the petition is the ground of detention which mentions as many as 38 Criminal Cases against the petitioner of these, 8 cases are under section 302 IPC, about 10 cases under section 307 IPC and there are other cases under section 376 IPC, 452 IPC and U.P. Control of Goondas Act, Gangsters Act, Arms Act etc.

3. The petitioner Vijay Kumar Misra has been elected Member of the Legislative Assembly of U.P. in the recent election. This case illustrates the level of criminalisation that has taken place unfortunately in our public life. It is well known that a large number of such MLA's are reputed Criminals, Gangsters or Mafia leaders. What will happen to our country in this state of affairs can well be imagined.

4. As already stated above, we were disinclined to interfere in such a case but we have to do so with a heavy heart as the law of Habeas Corpus is a technical law and there are two legal points on which the petition has to be allowed. Firstly, it is alleged in paragraphs 25,26 and 27 of the petition that the Detaining Authority did not informe the petitioner that he has a right to make a representation against the detention order to the Detaining Authority. This fact is not disputed by the respondents. Hence in view of the Division Bench decision of this Court in ***Jai Prakash Shastri v. Adhishak Janpad Karagar 2000 (41) ACC 883*** which followed the decision of the Supreme Court in ***State of Maharastra vs. Santosh Shastri Acharya JT 2000 (8) SC 374*** the impugned detention order becomes illegal. Secondly the argument of learned counsel for the petitioner that the detention order itself cannot fix the period of detention at the initial stage has also to be accepted in view of the decision of the Constitution Bench of the Supreme Court in ***Makhan Singh Darsikha v. State of Punjab AIR 1952 SC 27***, which has been followed by the Division Bench of this Court in ***Adesh Kumar vs. Adhikashak Karagar 1997 U.P. Crl. Rulings 647***.

5.For the reasons given above the petition is allowed.

5. Impugned detention order dated 24.4.2002 is quashed. The petitioner shall be released forthwith unless he is required in some other criminal or preventive detention case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21 MAY, 2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE RAKESH TIWARI, J.

Habeas Corpus Petition No. 44581 of 2001

Brij Nandan ...**Petitioner**
Versus
District Magistrate, Jalaun at Orai and others ...**Respondents**

Counsel for the Petitioner:
Sri Tejpal
Sri Sukhendra Pal

Counsel for the Respondents:
Sri S.N. Srivastava
A.G.A.

Constitution of India, Article 226 Detention order challenged- Petitioner envolving so many serious offences- creating terror by threatening common people- held- amounts not only disturbance of law and order but the Public Order has been disturbed.

Held- Para 5

We are satisfied that the petitioner has disturbed public order and not merely law and order. The large number of serious cases against the petitioner show that he is a hardened criminal and creates terror in the public.

Case law discussed.
2000(i) JIC (SC) 221

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

1. This writ petition has been filed challenging the impugned order of detention dated 26.9.2001 passed under the National Security Act.

2. We have heard learned counsel for the parties.

A perusal of the grounds of detention shows that it is alleged therein that on 8.6.2001 the petitioner with his brother and associates came with guns and shot one Santosh Kumar on his chest due to which he fell down and died. This created terror and panic in the locality and people shut their houses and a case under section 302 IPC was registered. The said incident occurred in a congested locality, which created terror in the public, and public order was disturbed.

3. It is also alleged that on 3.5.2000 the petitioner shot at one Ramji when he had come to appear before the court and a case under section 307 IPC was registered against him. On 14.5.98 the petitioner had given shelter to some anti social elements who had guns and when the Police party arrived at the spot the petitioner and his four associates fired at the Police. The Police had recovered the petitioner's rifle. A case under section 307 IPC has also been registered in this connection. On 28.5.97 at 3.35 p.m. the petitioner and his associates shot dead one Shyam Sharma and a case under section 302/307 IPC has been registered in this connection. On 23.7.97 at 7.15 p.m. the petitioner attempted to kill one Yugal Kishore and Maharaj Singh and case under section 307

IPC had been registered. Petitioner's gun licence was cancelled but he has not deposited his gun due to which a case under section 25/30 Arms Act has been registered.

4. Thus it is alleged that petitioner has committed several crimes and he is trying to obtain bail. It is also alleged that petitioner is getting Gunda Tax collected from the people in the locality. He has threatened the villagers that if anybody gave evidence against him the people will be burnt and will be killed. Hence the District Magistrate was satisfied that petitioner's activities are pre-judicial to public order.

5. We are satisfied that the petitioner has disturbed public order and not merely law and order.

Learned counsel for the petitioner then submitted that the petitioner was in jail since 15.6.2001 and his bail application has been rejected by the court of sessions on 26.7.2001 as stated in paragraph 21 of the petition. Hence it is alleged that the detention order is illegal.

In our judgment in ***Habeas Corpus Petition No. 38005 of 2001 Karesh Pal @ Billu v. District Magistrate decided on 25.1.2002*** we have discussed this aspect of the matter and have held that even if a person is in jail a detention order can be passed. We have relied on the ***Supreme Court decision in Ahmad Nassar v. State Tamil Nadu 2000 (1) JIC (SC) 221*** for the proposition that a valid detention can be passed even when the detenue has not applied for bail.

For the reasons given above there is no force in this petition and it is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.4.2002

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

Civil Misc. Writ Petition No. 15450 of 2002

Mohd. Yaqub ...Petitioner
Versus
Vice Chancellor of Aligarh Muslim University, Aligarh and others ...Respondents.

Counsel for the Petitioner:
Sri M.A. Khan
Sri Mohd. Soud

Counsel for the Respondents:
Sri Dilip Gupta
Sri R.S. Ram
S.C.

Aligarh Muslim University - Chapter 17 of Act 5 (3) 29 (f) (g) 33 and Statute 54 (i) (4) Constitution of India, Article 226-

Education- Petitioner debarred from appearing in the Final Year Examination- due to shortage of attendance statute prescribed 75% attendance mandatory for Regular Student- vires of the Statute not challenged- Court declined to interfere.

Held- Para 7

The Ordenance made by the University laying down objective test of 75% combined attendance for regular students in Engineering regular course of study does not require interference by this court. The pragmatic decision taken by respondents no. 2 and 3 debarring the petitioner on the basis of statutory

objective test of 75% combined attendance laid down in Chapter XVII of Ordinance on examination of Engineering course of study to which category he belonged cannot be interfered with on the idealistic suggestion of learned counsel for petitioner taking lenient view to save the career of petitioner. It is held that where public interest is pitted against individual interests, this Court would prefer public interest in comparison to individual interest. In the present case it goes without saying that after obtaining Engineering Degree from Aligarh Muslim University, Aligarh.

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

1. Heard the learned counsel for the petitioner. Sri M.A. Khan and Sri Dilip Gupta representing respondents. Perused the averments made in the writ petition.

2. The instant writ petition is filed by the petitioner for issuing a writ of mandamus commanding respondents no. 2 and 3 to permit the petitioner to appear in B. Tech. Final Year Examination of the year 2002 which has already started with effect from 4.4.2002. It is brought to my notice by the learned counsel representing respondent no. 2 and 3, Dilip Gupta that the examination of three papers relating to B. Tech. Final Year Examination of year 2002 in which the petitioner intends to appear has already completed.

3. Having heard the learned counsel for both sides. I am of the view that Aligarh Muslim University, Aligarh in order to maintain its academic excellence has prescribed 75% attendance for regular students. In the instant case, indisputably the petitioner was a regular student, therefore, he can be eligible to appear in B. Tech. Final Year Examination of the year 2002 provided he has undergone regular course of study in the University or an Institution maintained by it for the period specified in the Academic Ordinance of the University.

4. For ready reference the relevant Ordinance XVII of the Aligarh Muslim University, Aligarh is reproduced hereinbelow :

Chapter XVII

EXAMINATION
(Act 5 (3), 29 (f) 29 (g), 33 and Statute 5 A (4) (1))

1. Examinations of the University, other than the Doctorate examination shall be open to the following categories of candidates-

(a) regular students, i.e. candidates who have undergone a regular course of study in the University or n institution maintained by the University for a period specified for that course of study.

(b) Private candidates, as defined in clause 4 below :

(c) Ex- students as defined in clause 5 below.

2. A candidate shall be deemed to have undergone a regular course of study for the period specified for the course to be eligible to appear at the examination, if he has fulfilled requirements as given in the chart below :

Faculty	Attendance			
	Lectures	Practical	Tutorials/ Seminars	Sessional requirement
Arts	75%	75%	75%	As per new Academic Ordinances
Social Sciences				
Science				
Commerce				
Engineering (B.Sc.,B.E. & M.Sc.)	75%	Combined		
Diploma	75%			
Law	75%		75%	
Medicine (i) All post graduate Diploma	80%	80%		
(ii) M.B.B.S. (I,II & combined 75% in Practical, Demonstrations and/or Final Professionals) Clinics in each subject.				
(iii) other courses	75%	75%		
Theology (B.Th.& M.Th.)	75%			

5. From perusal of the aforesaid Ordinance it is crystal clear that Examinations of the University, other than the Doctorate examination shall be open to the categories of candidates enumerated therein provided a regular student has undergone a regular course of study in the University or an institution maintained by the University for a period specified for that course of study. Under the aforesaid Ordinance the petitioner is required to complete 75% combined attendance to appear in B. Tech. Examination. Indisputably from perusal of paragraph 10 of the writ petition it is evident that the petitioner has completed only 56% attendance as a regular student upto February, 2002.

6. I am of the view that the respondents have committed no error in debarring the petitioner to appear in B. Tech. Examination, 2002 due to shortage of attendance. It is pertinent to observe here that neither the petitioner has laid foundation challenging the vires of statutory Academic Ordinance of the University quoted hereinabove nor the learned counsel for petitioner raised any argument in this regard questioning the vires of the said statutory Academic Ordinance of the University. It is held that aforesaid statutory Academic Ordinance prescribing 75% combined attendance in lectures and practical for regular students to appear in the examination of Engineering Course of study is just, fair and reasonable to achieve the laudable object of academic excellence of Engineers who happened to obtain degree of Engineering from Aligarh Muslim University, Aligarh. To my mind to maintain efficiency in Engineering Course of study combined attendance of 75% is essential. In case on hand it is not disclosed what is percentage of attendance of the petitioner in lectures and what is percentage of his attendance in practical. It is to be imbibed by all of us that attending Universities itself is integral part of education and a student enhances his knowledge by mixing and interacting with Lecturers. Readers, Professors and his fellow students. The prescribed attendance in statutory Academic Ordinance has tendency to increase the healthy completion of learning amongst students of the University taking their course of studies with all seriousness.

7. There is yet another reason to arrive at the aforesaid conclusion. In my considered opinion the Aligarh Muslim University, Aligarh is an autonomous Corporate Body and it is free to take statutory academic decision prescribing objective test of eligibility for regular students to appear in examinations. The decision taken by the University allowing some students to appear in the Examination whereas debarring some one to appear in such examination is required to be founded on some objective test. In the Academic Ordinance the University has laid down objective test for regular students to appear in the Examination and according to objective test laid down in the Academic Ordinance of the University only those regular students who have undergone prescribed regular course of study in the University or in an Institution maintained by the University are entitled to appear in the Examination. The aforesaid statutory decision has been taken by the expert Academicians of Aligarh Muslim University who are well versed in educational matters and have expertise knowledge and experience in such matters. The Ordinance made by the University laying down objective test of 75% combined attendance for regular students in Engineering regular course of study does not require interference by this Court. The pragmatic decision taken by respondents no. 2 and 3 debarring the petitioner on the basis of statutory objective test of 75% combined attendance laid down in Chapter XVII of Ordinance on examination of Engineering course of study to which category he belonged cannot be interfered with on the idealistic suggestion of learned counsel for petitioner taking linient view to save the carrier of petitioner. It is held that where public interest is pitted against individual interest this Court would prefer public interest in comparison to individual interest. In the present case it goes without saying that after obtaining Engineering Degree from Aligarh Muslim University, Aligarh. The petitioner would engage himself in some employment, trade or calling affecting the lives of the public at large. To my mind lives of public at large is dearest in comparison to individual career of the petitioner based on inefficient learning in Engineering Course of study due to shortage of attendance.

8. Bottom line argument of the learned counsel for the petitioner before this court is that respondent no. 2 has permitted Firoj Anjum who obtained 60% attendance, Manish Varshney who obtained 59% attendance and Mohd. Javed Ansari who obtained 60% attendance upto February, 2002 whereas the petitioner who obtained 56% attendance upto February 2002 is not allowed to appear in the aforesaid Examination.

9. Suffice is to say in this regard that the petitioner who has undergone a regular course of study of only 56% is not comparable to the aforesaid regular students who have obtained 60% or 59% attendance and after February, 2002 they continued to attend the classes. This court has reason to believe that they have completed 75% combined attendance, therefore, allowed to appear in the examination by respondents no. 2 and 3 and an argument contrary to it, as suggested by the learned counsel for the petitioner, is not acceptable to me and it is hereby repelled. After close examination of the material available on record I have no hesitation to hold that the decision

taken by respondents debarring the petitioner to appear to B. Tech. Final Year Examination of the year 2002 due to shortage of his combined attendance is within the scope of authority conferred upon them under statutory Ordinance of examinations in various disciplines of learning in the University and it is also most reasonable for the reasons discussed hereinabove. I decline to issue a prerogative writ making the decision taken by respondents debarring the petitioner to appear in the B. Tech. Final Year Examination, 2002 due to shortage of his combined attendance to be ineffective.

10. It is frankly conceded by the learned counsel for the petitioner that the petitioner has not made any allegation of malafide against respondents no. 2 and 3. In absence of any allegation of malafide against respondents no. 2 and 3, the argument raised by learned counsel for the petitioner that respondents no. 2 and 3 have practiced discrimination with the petitioner does not arise. It is well to remember that there is presumption that an act done by an authority is bona fide unless contrary is proved. In the present case the petitioner fails to prove contrary.

11. For the reasons what have been discussed hereinabove, no ground is made out for interference under Article 226 of the Constitution.

Consequently, the instant writ petition is hereby dismissed in limine.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MAY 24, 2002

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

Special Appeal No. 47 of 1998

Ramesh Chandra Singh and others **...Appellant**
Versus
Sri Amar Nath Singh and others **...Respondents**

Counsel for the Appellants:
Sri U.N. Sharma
Sri Tarun Verma
Sri Anil Bhusan
Sri R.C. Srivastava
Sri Manoj Srivastava
Sri M.M.Lal Srivastava

Counsel for the Respondents:
Sri B. D. Madhyan
Sri Khurshed Alam
Sri Satish Mandhyan
Sri Vijai Sinha
Sri M.I. Jafri
Sri Lalji Sinha

Constitution of India, Article 226- Writ petition challenging order of cancellation of selection process of candidate in R.P.F.- selected candidate who have already joined not impleaded - No-effective order can not be passed.
Held - Para 27

The contention of Sri Anil Bhushan that the candidates who have been selected pursuant to the advertisement no. 1 of 1996 ought to have been impleaded and were necessary parties in the writ petition, in absence of which, no relief could have been granted also cannot be said to be without any merit. In the present case the respondent writ petitioners had challenged the issuance

of fresh advertisement in pursuance of which selection had already taken place and orders for training had also been issued and, thus the selected candidate ought to have been made parties as they were proper and necessary parties, in the absence of which the petition itself was not maintainable. The principles laid down by the Hon'ble Supreme Court in the case of Ram Janam Singh is fully applicable in the present case.

J.T. 2002 (2) SC 191, AIR 1994 SC 1722, JT 1993 (2) 688
JT 1991 (2) SC- 296, JT 2000 (9) SC-168, AIR 1978 (SC) 851, AIR 1991 SC 1612

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

1. The Special Appeal No. 47 of 1998 has been filed by Ramesh Chandra Singh and 20 others against the common judgment and order dated 19.12.1997 passed by the learned Single Judge in Civil Misc. Writ Petition No. 38406 of 1996, Amar Nath Singh Vs. Union of India and 4 others connected with Civil Misc. Writ Petition No. 36605 of 1997, Jagmohan and 6 others Vs. Union of India and 4 others, after obtaining leave to appeal.

2. The Union of India and 3 others who were the respondents in the aforesaid two writ petitions which have been decided by the learned Single Judge vide common judgment and order dated 19.12.1987, have filed two separate Special Appeals being Special Appeals No. 80 and 81 of 1998. Since all these three Special Appeals arise out of a common judgment dated 19.12.1997,hence they are being heard and decided together.

3. The facts giving rise to the present case, in brief are that North Eastern Railway published an employment notice no. 2 of 1994 on 2.6.1995 for filling up 485 vacancies of constables in Railway Protection Force (hereinafter referred to as R.P.F.) in the pay scale of Rs.825-1200. In all 1,10,669 candidates applied for the said post, out of which only 90,000 candidates forms were found in order. After scrutiny of the form, the Railway authorities sent call letters to 78,000 candidates. In the test held between 6.5.1995 to 6.8.1995, only 24,563 candidates appeared. In the 3 member recruitment committee, constituted by the Railway Board the following persons were nominated:

(1) Sri Mewa Lal, the then Divisional Security Commissioner/RPF, Northern Railway, Lucknow (Chairman).
(2) Sri Sekey Ram, Retired Commandant, and
(3) Sri S.A. Hussain, Divisional Security Commissioner/RPF, Crime Wing, Western Railway, Bombay.

4. The recruitment committee submitted the result to the Director General, RPF, Railway Board on 5.1.1996. The papers connected with the result of the recruitment were sent for scrutiny to the Chief Security Commissioner, NER, Gorakhpur, who in turn appointed a three member- scrutiny committee. The scrutiny committee found that there were certain serious irregularities, infirmities and shortcomings in the recruitment which were categorized in the following heads:

(i) Excess recruitment to the extent of 99 candidates has been empanelled as against the notified vacancies.

(ii) Certain S.C. candidates who had secured more marks were not brought on

merit list whereas other S.C. candidates who had secured less mark have been brought on panel.

(iii) Violation of extant rules/circulars in formation of the panel.

(iv) Procedure followed by the Recruitment Committee has not been elaborated in that at no point of time the original application forms were scrutinized/compared and as such the possibility of impersonation by affixing different photographs in the call letter at various stages cannot be ruled out.

5. The above mentioned irregularities were brought to the notice of the chairman of the recruitment committee, and he was asked to remove and rectify the irregularities and mistakes in the result. The chairman, recruitment committee refused to rectify and correct the mistake/irregularities. The Director General, Railway Protection Force, taking into consideration the various irregularities and shortcomings and also on the ground that there was serious complaint of corruption, cancelled the whole process of recruitment as well as the result. Consequently, a news item was published on 4.9.1996 to the effect that the recruitment held pursuant to the employment notice no. 2 of 1994 had been cancelled and rescinded. Another employment notice no. 1 of 1996 was issued and published in local daily on 1.11.1996 inviting applications for recruitment of 800 posts of constables in Railway Protection Force limiting the applicants from the provinces of Uttar Pradesh and Bihar.

6. The respondent - writ petitioners challenged the action of the Railway authorities in cancelling the earlier selection and recruitment and issuing fresh advertisement as wholly illegal, arbitrary and contrary to the principle of natural justice as also violative of the provisions of fundamental rights guaranteed to them under Article 16 (1) of the Constitution of India. Apart from legal ground., the respondent- writ petitioners had also challenged the cancellation of the recruitment on the ground of political pressure being exerted by the Ministry of Railway on account of change in Ministry.

7. In the counter affidavit filed by Sri R.K. Misra, the then Security Commissioner, North Eastern Railway, Varanasi, it has been stated that the recruitment was rightly cancelled in view of serious and glaring irregularities, infirmities and shortcoming which the Chairman, recruitment committee refused to remove as also on the complaint of corruption.

8. A plea was taken that the respondent- writ petitioners had no right to challenge the order of cancellation of the recruitment process which was necessitated on account of the above shortcomings, particularly when it has been notified that all the applicants who participated in the previous recruitment may also appear in the subsequent recruitment test and they have no legal right for appointment on the posts of Constable RPF even though they have been successful in the test or their names find place in the select list.

9. The Chairman of the recruitment committee has also filed counter affidavit denying the allegation of corruption or irregularities, infirmities pointed out by

the Scrutiny Committee. In effect, he supported the case of the writ petitioners.

10. The learned Single Judge after hearing the learned counsel for the parties came to the conclusion that the action of the Railway authorities in cancelling the recruitment was unreasonable and in irrational manner, having done in light vein without realizing the implications and quashed, the order of scrapping of the recruitment process.

11. While allowing both the writ petitions, the learned Single Judge also quashed the employment notice no. 1 of 1996 and directed the respondents Railway authorities to declare the result of the recruitment made pursuant to the notice/notification no. 2 of 1994.

12. Feeling aggrieved by the judgment and order of the learned Single Judge, the Railway authorities have preferred Special Appeals No. 80 and 81 of 1998 whereas the Special Appeal No. 47 of 1998 has been filed by some of the candidates who had been selected pursuant to the recruitment notice no. 1 of 1996 and their appointment letters have been issued and orders for joining the training have been issued.

13. We have heard Sri U.N. Sharma, Sri Tarun Verma, and Sri Anil Bhushan learned counsel for the appellants and Sri B.D. Madhyan learned counsel for the respondent - writ petitioners.

14. The learned counsel for the appellants submitted that the respondent-writ petitioners' name was only included in the select list and no appointment letter had been issued to them and, therefore, in the view of the decision of Hon. Supreme Court in the case of Shankarsan Dash Vs. Union of India reported in AIR 1991 SC 1612, the respondent- writ petitioners did not get an indefeasible right to be appointed. It was also submitted that the decision of this Court in Civil Misc. Writ Petition No. 39772 of 1996 decided on 8.4.1997 and Ramdas Rai vs. State of U.P. and others reported in 1995 (2) UPLBEC 985 which have been relied upon by the learned Single Judge do not lay down the correct law and in fact the decision in the case of Sri Niwas Singh and others vs. Union of India and others had been reversed in Special Appeal by the Division Bench, which has been reported in 1999 (3) UPLBEC 2368 and against which Special Leave Petition has also been dismissed by the Hon. Supreme Court on 10.1.2001.

15. The learned counsels further submitted that admittedly in the present case, large scale irregularities have been found and there was also allegations of corruption and in such circumstances the question of giving opportunity of hearing to the selected candidates did not arise and, therefore, the selection had rightly been cancelled. Reliance was placed upon a decision of the Hon'ble Supreme Court in the case of Union of India and others vs. O. Chakradhar reported in JT 2002 (2) SC 191.

16. Sri Anil Bhushan learned counsel submitted that pursuant to the advertisement notice no. 1 of 1996 issued in November, 1996, the selection process took place and the persons selected therein had also been issued appointment letters and orders for joining the training as such they were necessary parties in; the writ petition and in their absence no relief could have been granted. He relied upon

the decision in the case of Ram Janam Singh vs. State of U.P. and others reported in AIR 1994 SC 1722.

17. Sri B.D. Madhyan learned counsel appearing for the respondent writ petitioners submitted that even though it is well settled that mere inclusion in the select list does not at all confer on the candidates an indefeasible right to be appointed but that is one aspect of the matter. The other aspect of the mater is that the State should act fairly and whole exercise cannot be reduced to a farce. He relied upon the decision of Hon. Supreme Court in the case of Asha Kaul (Mrs.) and another vs. State of Jammu and Kashmir and others reported in JT 1993 (2) 688, wherein it has been held that the **Government has no absolute discretion in the matter. It must act fairly and it cannot pick and choose and approve part of it and reject other part and must record reasons for approval of one set of candidates and disapproval of other candidates. The Government cannot quietly and without good and valid reasons nullify the whole exercise and tell the candidates when they complain that they have no legal right to appointment. No Government can adopt such a stand with any justification today**.

18. He further relied upon the decision of Hon'ble Supreme Court in the case of Maharastra State Board of Secondary Education vs. K.S. Gandhi and others reported in JT 1991 (2) SC 296 wherein it has been held that "**If order cancelling examination came to be passed, the record should indicate reason though the order may not contain reasons, and the order has to confirm the test of reasonableness and fairness. The order must be passed bonafide and on some concrete and tangible material**."

19. According to Sri Madhyan, the irregularities pointed out by the Scrutiny Committee could have been rectified and there was no necessity of cancelling the examination particularly when the Scrutiny Committee did not find any money having changed hands. He relied upon the decision of Hon. Supreme Court in the case of Munna Roy vs. Union of India and others reported in JT 2000 (9) SC 168. He further submitted that the order has to be judged on the basis of reasons mentioned in the order and cannot be supplemented by fresh reasons or in the shape of affidavits or otherwise. He relied upon the decision of Hon'ble Supreme Court in the case of Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others reported in AIR 1978 SC 851.

20. Having heard the submissions of the learned counsel for the parties, we find that large scale irregularities were committed by the Recruitment committee while making selection pursuant to the advertisement no. 2 of 1994. The Recruitment committee had given a complete go bye to the Rules and did not act fairly. It has also come on record by means of supplementary affidavit of Jai Singh Chauhan, Security Commissioner, R.P.F., D.L.W., Varanasi affirmed on 16.8.2000 which forms part of record of Special Appeal No. 80 of 1998 that a C.B.I. enquiry was instituted in respect of the recruitment/selection made by Sri Mewa Lal and Sri Sekey Ram the present chairman who had also done the recruitment of RPF constables in Northern Railway and the C.B.I had

submitted the charge- sheet against the chairman Mewa Lal and Sekhi Ram. A criminal case under Section 120-B of the Prevention of Corruption Act, has been filed before the Special Judge, C.B.I. Lucknow and both these persons were arrested and remained in jail from 20.11.1996 to 7.1.1999 and 28.11.1998 to 14.1.1999 respectively.

21. In this background the question is as to what is the legal right of the respondents- writ petitioners. They have merely been selected and put in panel of select list. No appointment letter has been issued to them. Can such a person claim any right to command writ of mandamus to the authorities to issue appointment letters?'

22. In the case of Shankarsan Dash Vs. Union of India (AIR 1991 SC 1612), the Hon'ble Supreme Court has held that ' it is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed, which cannot be legitimately denied.'

23. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. Hon'ble Supreme Court has held that it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons.

24. Thus, the respondents- writ petitioners do not acquire an indefeasible right to be appointed merely because their names appeared in the select list. The only question which is to be seen as to whether the Railway authorities have acted in a fair manner in cancelling the recruitment or not, or it acted in arbitrary manner. The reasons for cancelling the recruitment as found by the scrutiny committee has already been mentioned above. From perusal of the said reasons, it leaves no manner of doubt that the recruitment committee had acted arbitrarily in making selection by giving a go bye to all the Rules and procedure and when asked to rectify the irregularities, declined to do so. It has come on record that the entire recruitment process was a result of malpractice and corruption. A C.B.I. enquiry was ordered in respect of recruitment made by Sri Mewa Lal and Sri Sekey Ram of RPF constables in Northern Railway and the C.B.I had filed charge sheet against them and both of them were arrested and remained in jail for a considerable period. This is a relevant factor to be taken into consideration. In this background, it cannot be said that the Railway authorities acted in any arbitrary manner in cancelling the result of recruitment pursuant to the advertisement no. 2 of 1994.

25. The Hon'ble Supreme Court in the case of Union of India and others Vs. Tarun K. Singh and others (Civil Appeal Nos. 430-35/2001 decided on 10.1.2001) has held that the process of selection which stands vitiated by adoption of large scale malpractice to a public office, cannot be permitted to be sustained by the Court of law. That apart, an individual applicant for any particular post does not

get a right to be enforced by a Mandamus unless and until he is selected in the process of selection and gets the letter of appointment.

26. In view of the foregoing discussions, it is held that the respondent writ petitioners had no legal right for a mandamus to maintain present petition as their names had only appeared in the select list and appointment letters had not been issued to them.

27. The contention of Sri Anil Bhushan that the candidates who have been selected pursuant to the advertisement no. 1 of 1996 ought to have been impleaded and were necessary parties in the writ petition, in absence of which, no relief could have been granted also cannot be said to be without any merit. In the present case the respondent writ petitioners had challenged the issuance of fresh advertisement in pursuance of which selection had already taken place and orders for training had also been issued and, thus the selected candidate ought to have been made parties as they were proper and necessary parties, in the absence of which the petition itself was not maintainable. The principles laid down by the Hon'ble Supreme Court in the case of Ram Janam Singh is fully applicable in the present case.

28. So far as the decision of Munna Roy (supra) is concerned the Hon'ble Supreme Court, in the said case has held that if the administrative authority takes a decision and the reasons for such decision are erroneous then such a decision can be interfered with by Court of law. In the said case, the successful candidates possessed Graduate Degree whereas the minimum qualification required was matriculation and the selection was cancelled on the ground of higher qualification and dubious method had been adopted for selection. The Hon'ble Supreme Court came to the conclusion that if a candidate possesses a qualification higher than the required qualification and the advertisement itself had prescribed the same then how can the authority come to a conclusion that selection has been made by adopting a dubious method.

29. In the present case, the Scrutiny Committee had pointed out concrete materials to show that irregularities in large scale has been committed by the recruitment committee which inspite of opportunity given to the recruitment committee, the Chairman of the said committee declined to remove for obvious reasons, thus leaving no option but to the authorities to cancel the entire selection.

30. In the case of Maharashtra State Board of Secondary Education, the Hon'ble Supreme Court has held that the order should record some where the examination has been cancelled even though the order may not contain reasons. Admittedly in the present case, the authorities have recorded the reasons for cancelling the recruitment, which has already been mentioned herein above. They cannot be said to be irrelevant or arbitrary.

31. In the case of Asha Kaul (supra), the Hon. Supreme Court has held that it is not open to the State to approve a part of the list and disapprove the balance. No such thing has happened in the present case. The authorities have cancelled the entire select list. Thus, no benefit can be derived from the decision of the Hon'ble

Supreme Court in the aforesaid case. The reasons which led to cancellation of the select list has been examined by the Court and the Court is of the opinion that they are relevant and the authorities have not acted in any arbitrary manner.

32. So far as the question of giving opportunity of hearing to the writ petitioners, before cancelling the select list is concerned, it may be mentioned that they do not have any legal right and, therefore the question of giving opportunity of hearing to them before cancelling the select list does not arise. In the case of Union of India vs. Chakradhar Sharma (supra) the Hon'ble Supreme Court has held that 'If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, in such case it; will neither be possible nor necessary to issue individual show cause notices to each selectee. The only way out would be to cancel the whole selection. Motive behind the irregularities committed also has its relevance.' The principles laid down by the Hon'ble Supreme Court is fully applicable in the present case. Thus, it is held that the writ petitioners were not at all entitled to any show cause notice or opportunity of hearing before the cancellation of the entire selection.

33. In view of the foregoing discussions, the impugned judgment and the order of the learned Single Judge is set aside. All the three Special Appeals are allowed. However the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 18.7.2002

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

Civil Misc. Writ Petition No. 5339 of 2002

Sonebhadra Minor Mineral Lease/Permit Holders Association and others ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Yogesh Kumar Saxena

Counsel for the Respondents:
Sri Vinod Swaroop
Sri S.P. Kesharwani
Sri Vijay Singh
S.C.

Forest Act- section 2 (4) (b) (iv)- the District Magistrate after considering the material submitted before him should decide within one month whether the petitioners minor mineral are forest produce under section 2 (4) (b) of the Indian Forest Act nor not. (held in para 3)

The petitioners should approach the District Magistrate, Sonbhadra with a copy of this order and the District Magistrate, Sonbhadra after considering the material submitted before him should decide with one month whether the petitioners minor mineral are forest produce under section 2 (4) (b) of the Indian Forest Act nor not. If it is found that they are not forest produce no transit fee shall be charged from the petitioners and the transit fee already realized from the petitioners shall be refunded with two months.

Case law referred.
JT 2000 (4) SC 341

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

Heard counsel for the parties

1. The petitioner no. 1 is an Association of Minor Mineral Lease Holders of Sonebhadra district, and the other petitioners are its members. They have challenged the validity of the UP TRANSIT OF TIMBER AND OTHER FOREST PRODUCE RULES, 1978. The validity of the Rules has been upheld by Hon'ble the Supreme Court in **State of U.P. and others Vs. M/s Sitapur Packing Wood Suppliers etc**. JT 2002 (4) SC 341.

2. Learned counsel for the petitioners submitted that the UP TRANSIT OF TIMBER RULES will not apply to a Minor Mineral as it is not a forest produce. In this connection Section 2 (4) (b) (iv) of the Forest Act states that forest produce includes minerals (including lime-stone, laterite, mineral oils, and all products of mines or quarries) which are found in, or brought from a forest. It follows that if the minor mineral excavated was not found in or brought from a forest as defined under the Forest Act no transit fee can be charged from the petitioners.

3. We are not inclined to go into the question whether the minor mineral being excavated by the petitioners is found in, or brought from, a forest as that is a factual controversy and should be decided by the appropriate authority. We are only making the legal position clear so that there may be no doubt in this connection. Hence the petitioners should approach the District Magistrate, Sonbhadra with a copy of this order and the District Magistrate Sonbhadra after considering the material submitted before him should decide within one month whether the petitioners minor mineral are forest produce under section 2 (4) (b) of the Indian Forest Act or not. If it is found that they are not forest produce no transit fee shall be charged from the petitioners and the transit fee already realized from the petitioners shall be refunded within two months.

With the above observation the writ petition is disposed of.