APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2002

BEFORE
THE HON'BLE G.P. MATHUR, A.C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. (589) of 2002

Anand Mohan Sharma ...Appellant
Versus
Niranjan Lal Gupta and others ...Respondents

U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act- 1972- 16(i) (h) release application- undertaking given by the tenant- writ petition dismissed by granting three months period, provided the undertaking is given before the R.E.C.O. within three days- despite of undertaking the tenant preferred Appeal- R.E.C.O. issued form 'e' but refused by the District Magistrate- challenge made before High Court- allowed the writ petition- direction issued to the District Magistrate for eviction- can not be interfered in Special Appeal.

Held- Para 20

It is clear that High Court while exercising jurisdiction under Article 226 of the Constitution can issue appropriate directions for enforcing an undertaking given by a party before it and learned single Judge while allowing the writ petition vide its judgement dated 23rd October, 2002 has not committed any error in exercise of jurisdiction under Article 226 of the Constitution. We do not find any error in the judgment of learned single Judge allowing the writ petition. There is one more reason due to which tenant is not entitled for any indulgence in this appeal, i.e., according to undertaking as given in the affidavit, the tenant was liable to vacate the accommodation within one year from the date of disposal of the writ petition i.e. within one year from 16th August, 1996 i.e. by 15th August, 1997. Even after 15th August, 1997 more than five years elapsed and the land lord has not been able to get possession. This is an additional reason for not exercising any discretion in favour of tenant in writ jurisdiction.

Case law discussed:
2000(5) SCC -44
AIR 1979 SC-1528
1995 Supp. (2) SCC-539
1998 (6) SCC-507
JT 1992 (2) SC-65
AIR 1980 Delhi 39
AIR 1984 SC 1826

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

1. We have heard Sri Ravi Kant, Senior Advocate, appearing alongwith Sri Manoj Kumar Pandey for the appellant and Sri Arjun Singhal appearing on behalf of respondent no. 1.

2. By this appeal, the appellant has challenged the judgment dated 23rd October, 2002 passed by learned single Judge in Writ Petition No. 35613 of 2002 (Niranjan Lal Gupta vs. District Magistrate, Allahabad and another) allowing the writ petition filed by respondent no. 1.

3. The facts giving rise to this appeal, briefly stated, are; father of respondent no. 1 moved an application under Section 16 (1) (b) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 for release of accommodation of which appellant was tenant. . The release application was rejected by Rent Control and Eviction Officer vide his order dated 13th January, 1987. A revision was filed against the above order which too was dismissed vide order dated 20th November, 1990. Father of

respondent no. 1, late Sri Kundan Lal, filed writ petition no. 3351 of 1991 challenging both the orders dated 13th January, 1987 and 20th November, 1990. Kundan Lal died during pendency of the writ petition and in his place respondent no. 1 was substituted as his heir. In writ petition no. 3351 of 1991 a joint affidavit was filed by the appellant as well as respondent No. 1 to the effect that appellant is ready to vacate the disputed accommodation within a period of one year from the date of filing the compromise. Respondent no. 1 agreed to allow time to vacate. On the basis of aforesaid affidavit filed by appellant and respondent no. 1 and other heirs of Kundan Lal, this Court passed an order dated 16th August, 1996 dismissing the writ petition in view of the facts stated in the application filed on 15.5.1995. Appellant filed an application in the aforesaid writ petition for recall of the order dated 16th August, 1996 which was dismissed on 1st August, 2001, respondent no. 1 filed an application before the Rent Control and Eviction Officer for execution of the order passed by this Court which according to him, amounted to an order of release of the building in favour of the land lord. The Rent Control and Eviction Officer recommended for issuance of Form-C. Form C was issued but thereafter Form-D was not issued. Respondent No. 1 filed writ petition no. 9836 of 2002 which was disposed of on 7th March, 2002 directing the District Magistrate to pass appropriate order in accordance with law on the recommendation of the Rent Control and Eviction Officer dated 22nd December, 2001. The District Magistrate passed an order dated 21st May, 2002 refusing to issue Form-D. The order dated 21st May, 2002 was challenged by respondent no. 1 by filing writ petition no. 35613 of 2002. The aforesaid writ petition has been allowed by learned single Judge vide his judgment dated 23rd October, 2002 against which present special appeal has been filed. At the time of passing of judgment dated 23rd October, 2002, the appellant, who was present in the Court, offered to vacate the building provided he is granted reasonable time. Learned single Judge while passing the judgment dated 23rd October, 2002 granted three months time to the appellant to vacate the building subject to condition that appellant submit an undertaking in writing before the Rent Control and Eviction Officer, Allahabad within three days. Counsel for the respondents has stated that in pursuance of the order of this Court dated 23rd October, 2002, the appellant has submitted a written undertaking before the District Magistrate, Allahabad on 25th October, 2002 which fact has not been denied by counsel for the appellant.

4. The counsel for the respondents has raised a preliminary objection by submitting that appellant having undertaken in writ petition no. 35613 of 2002 to vacate the premises within three months and having also filed a written undertaking before the District Magistrate, Allahabad on 25th October, 2002, is not entitled to appeal against the said judgment of learned single Judge. The learned counsel for the respondents contended that the appellant having given undertaking before learned single Judge to vacate the premises, he is not entitled to file this appeal and this appeal is not liable to be entertained on this ground alone.

5. Sri Ravi Kant, Senior Advocate, appearing for the appellant, refuting the above submissions, submitted that special appeal is fully maintainable and undertaking given by the appellant was in pursuance of the direction of this Court dated 23rd October, 2002 and the said undertaking cannot preclude the appellant from preferring this appeal. He placed reliance on apex court judgment in (2000) 5SCC 44, ***Jagdish Lal vs. Parma Nand***.

6. Sri Ravi Kant while making his submission on merits of the appeal, raised following contentions:

(i) In earlier writ petition no. 3351 of 1991 no undertaking on behalf of the appellant can be read in the affidavit filed in the Court. He contended that the statement in paragraph 10 of the affidavit as extracted by learned single Judge in his judgment, was subject to extension of certain facilities by the landlord and the landlord having not extended the facilities, the appellant immediately moved an application for recall of the said order, hence there was no undertaking on his behalf to vacate the premises and learned single Judge committed error in reading the affidavit of the appellant as undertaking.

(ii) The District Magistrate has rightly refused to issue Form-D for eviction of the appellant since there was no order of release in favour of respondent no. 1.

7. We have heard counsel for both the parties and perused the record. Before proceeding with the merit of the appeal, it is necessary to consider the preliminary objection raised by counsel for respondent no. 1 regarding entertainability of the appeal against the judgment of learned single Judge in which undertaking was given by the appellant to vacate the premises within three months. Although Sri Ravi Kant, counsel for appellant submitted that undertaking which has been filed by the appellant before the District Magistrate on 25th October, 2002 is not an undertaking by the appellant on his own volition but is an undertaking under the direction of this Court and it cannot be treated to be an undertaking, but the fact remains that it was the appellant who offered to vacate the premises provided he is granted reasonable time to vacate the building, in view of the aforesaid facts, we are proceeding on the premise that appellant gave an undertaking to vacate the premises within three months in pursuance of the judgment dated 23rd October, 2002.

8. The word 'undertaking' has been defined in P. Ramanatha Aiyar, the Law Lexicon (Second Edition) in following words :

"Undertaking is a promise, engagement or stipulation. The term is frequently used in the special sense of a promise given in the court of legal proceedings, by a party or his counsel, generally as a condition of obtaining some concession from the court on opposite party."

9. The apex court in AIR 1979 SC 1528, ***Babu Ram Gupta vs. Sudhir Bhasin and another*** considered as to what amounted to undertaking. In paragraph-7 of the judgment, the apex Court laid down that a person appearing before the Court can give an undertaking in two ways. Relevant extract of

paragraph 7 of the aforesaid judgment is extracted below :

"7. Coming to the first point, the contention of Mr. Asthana was that there was no undertaking given by the appellant to the court at all. Our attention has not been drawn by counsel for the respondent to any application or affidavit filed by the appellant which contains on undertaking given by the appellant to hand over possession to the receiver appointed by the High Court by virtue of the impugned order. It is manifest that any person appearing before the Court can give an undertaking in two ways: (1) that he files an application or an affidavit clearly setting out the undertaking given by him to Court, or (2) by a clear and express oral undertaking given by the contemnor and incorporated by the court in its orders……..

10. The question to be considered is as to whether a party who files an undertaking before the Court is precluded to challenge the judgment by way of appeal. This question arose in an appeal filed under Article 136 of the Constitution before the apex court from judgement of High Court in which tenant gave undertaking to vacate within specified time. Two Judge Bench of the apex Court in 1995 Supp. (2) Supreme Court cases 539, ***Prashant Ramachandra Deshpande vs. Maruti Balaram Haibatti*** vide order dated 7th April, 1995 made a reference to a Larger Bench in view of earlier two decisions that such appeal cannot be filed by tenant who has given undertaking to vacate . In pursuance of the aforesaid reference three Judges Bench of the Apex Court decided the question in (1998) 6 SCC 507; ***P.R. Deshpande vs. Maruti Balaram Haibatti***. The apex Court laid down in paragraphs 11 and 12 of the judgment are quoted as below :-

*"**11**. A party to a lis can be asked to give an undertaking to the court if he requires stay of operation of the judgment. It is done on the supposition that the order would remain unchanged. By directing the party to give such an undertaking, no court can scuttle or foreclose a statutory remedy of appeal or revision, much less a constitutional remedy. If the order is reserved or modified by the superior court or even the same court on a review, the undertaking given by the party will automatically cease to operate. Merely because a party has complied with the directions to give an undertaking as a condition for obtaining stay, he cannot be presumed to communicate to the other party that he is thereby giving up his statutory remedies to challenge the order. No doubt he is bound to comply with his undertaking so long as the order remains alive and operative. However, it is open to such superior court to consider whether the operation of the order or judgement challenged before it need be stayed or suspended having regard to the fact that the party concerned has given undertaking in the lower court to abide by the decree or order within the time fixed by the Court.*

12. *We are, therefore, in agreement with the view of Sahai and Venkatachala, J.J., that the appeal filed under Article 136 of the Constitution by special leave cannot be dismissed as not maintainable on the mere ground that the appellant has given an undertaking to the High Court on being so directed , in order to keep the High Court's order in abeyance for some time.*

11. The judgment in ***Jagdish Lal's*** case (supra) relied by the counsel for the appellant do support the contention raised by the appellant that he is not precluded to file the present appeal merely on the ground that he has given undertaking before learned single Judge. In the aforesaid judgement the apex court following the three Judges judgment in P.R. Deshpande's case (supra) has laid down that tenant has right to approach higher court despite the undertaking given by him to vacate the premises. Paragraph 5 of the apex court judgment in Jagdish Lal's case (supra) is extracted below :-

*"**5**. The question was examined by this Court in a subsequent decision in P.R. Deshpande vs. Maruti Balaram Haibatti in which it was laid down by a Bench of three Judges of this Court that even if the tenant gives an undertaking in the High Court to vacate the premises, his right to approach this Court under Article 136 of the Constitution is not affected. The tenant would still have a right to approach the higher court and even seek interim relief of stay of eviction despite the undertaking given by him to vacate the premises. This decision, decisively and clearly, has the effect to overruling the earlier decision in Thacker Hariram Motiram case as also two other decisions in Vidhi Shanker vs. Chandanmal Rupchand. The preliminary objection is accordingly overruled."*

12. In the aforesaid **Jagdish Lal's** case (supra) Hon'ble D.P. Wadhwa, J. while agreeing with the judgment of Hon'ble S. Saghir Ahmad, J. emphasized that in case tenant has given undertaking in the High Court, the question before the appellate Court would be that whether in facts of case discretion be exercised by the appellate Court to grant leave to appeal. It was laid down in paragraph 23 of the aforesaid judgment which is extracted below:

*"**23**. There is no gainsaying that jurisdiction of this Court under Article 136 of the Constitution cannot be impugned upon. But then the Court has absolute discretion in the matter to grant leave to appeal to it under this article. The judgment in P.R. Deshpande case in my view, cannot be read as laying down an universal rule that this Court in a petition under article 136 cannot, while exercising its discretion, examine the circumstances under which undertaking was given- as to whether the petitioner has not misled the Court or duped the other party. This Court cannot close its eyes to a solemn undertaking given by a party to the Court. Two things come to mind. Take the case where order of eviction has been passed against the tenant. On the request of the tenant the Court grants him time to approach the higher court and meanwhile stays the operation of the judgment on undertaking given by the tenant. In the other case the tenant requests the Court to grant him time to vacate the premises, which could be for a longer period than the period prescribed for filing the appeal, the Court grants time on the tenant giving the usual undertaking. In the latter case it would be a moot question if the Court will still exercise its discretion in granting leave to appeal under Article 136 of the Constitution."*

13. From the aforesaid discussion, it is clear that preliminary objection raised by counsel for the respondents has no substance and this Court cannot refuse to entertain the appeal of the appellant on

the ground that appellant has given undertaking before the learned single Judge to vacate the premises.

14. Now the submissions raised by counsel for the appellant on merits of the appeal need to be examined. From the facts which have come on the record, it is clear that in earlier Writ petition no. 3351 of 1991 filed by father of respondent no. 1 a joint affidavit was filed by respondent no. 1 and other heirs of late Kundan Lal and the appellant clearly stipulating that appellant is ready to vacate the accommodation within a period of one year from the date of final disposal of the writ petition. The affidavit was filed in the aforesaid writ petition by appellant in which relevant statement was made in paragraph 10 of the affidavit which has been extracted by learned single Judge in his judgement. On the basis of the representation made by the appellant, learned single Judge did not proceed to decide the writ petition, learned single Judge clearly noted in the order that writ petition is dismissed in view of the fact stated in the application filed on 15.5.1995. Respondent no. 3 (appellant in the present appeal) also filed an application for recall of the said order dated 16th August, 1996 which application was rejected by the Court on 1st August, 2001. While rejecting the application of respondent no. 3, this Court noted the fact that order dated 16th August, 1996 was passed on the basis of facts stated in the application dated 15th May, 1995 which was supported by an affidavit of both the parties. Thus writ petition no. 3351 of 1991 was decided on the basis of averments made in the affidavit of the parties and the application dated 15.5.1995. As noted above, the apex Court has laid down in ***Babu Ram Gupta's*** case (supra) the manner in which undertaking is to be given in a court. The appellant unequivocally has stated in the affidavit, in paragraph 10, that he will vacate the premises within one year from disposal of the writ petition. The said affidavit filed by the appellant clearly contained undertaking on his behalf. It is to be noted that the order dated 16th August, 1996 has become final as after rejection of the application of respondent no. 3 (appellant in the present appeal), the matter was not further pursued by the appellant. The Apex Court in ***P.R. Deshpande's*** case (supra) has also laid down that a party giving undertaking is bound to comply with his undertaking so long as the order remains alive and operative. The appellant represented to the Court, which was hearing writ petition no. 3351 of 1991, that he will vacate the premises within one year, hence the Court did not proceed with the writ petition further and the land lord also did not pursue the writ petition on the undertaking by the tenant. The Apex Court in (1976) 2 SCC 951, ***Chhaganbhai Norsinbhai vs. Soni Chandubhai Gordhanbhai and others*** while considering the question of breach of undertaking has stated in paragraph 5 as under :

*"**5**. Before parting with this case we may refer to Halsbury's Laws of England-Fourth Edn. Vol. 9 page 42 (paragraph 71) where after citing Dashwood v. Dashwood for the proposition that, when a party fails to comply merely with the terms of a consent order,*

the remedy of the injured party is to apply, not for committal, but for an order for specific performance or an injunction, and then to base proceedings for

contempt of any subsequent breach the observation is made:

Where, however, there is an express ***direction or undertaking*** *in body of the order, a breach will enable an immediate application for committal to be made.*

In the same volume, at page 44 (para 75) we find the law thus stated :

An undertaking given to the court by a person or corporation in pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt. '

15. Judgment of learned single Judge dated 23rd October, 2002 is not based merely on the undertaking which was offered by the appellant at the time of hearing to the Court but judgment is based on; the affidavit filed by appellant in writ petition no. 3351 of 1991 in which the appellant had undertaken to vacate the premises within one year from disposal of the writ petition. Learned single Judge while allowing the writ petition has held that the appellant has given undertaking in writ petition no. 3351 of 1991.

16. The submission of Sri Ravi Kant that in paragraph 10 of the affidavit, as mentioned above, no undertaking on behalf of the appellant can be read since the said undertaking was on the condition that land lord will extend certain facilities has no merit, Admittedly, respondent No. 3 (appellant in the present appeal) moved application to recall the order dated 16th August, 1996 making all such plea which is sought to be raised in support of the above submission and the said application having been rejected by this Court on 1st August, 2001, the said submission can neither be canvassed any further nor can be accepted by this Court. From paragraph 10 of the affidavit, as extracted by learned single Judge in his judgment, it is clear that there was unambiguous and clear undertaking by the appellant to vacate the premises and the above submission cannot be accepted.

17. The second submission of Sri Ravi Kant to the effect that District Magistrate did not commit any error in refusing to issue Form-D has to be considered. As noted above, writ petition no. 3351 of 1991 was dismissed in view of the application dated 15.5.1995. As observed above, in the aforesaid writ petition there was clear undertaking by appellant to vacate. Now the question is as to whether learned single Judge can enforce the undertaking given by appellant in writ petition no. 3351 of 1991 while exercising jurisdiction under Article 226 of the Constitution. The jurisdiction under Article 226 of the Constitution is wide enough to enable the High Court to do complete justice. While considering the extent of jurisdiction of the High Court under Article 226 of the Constitution, the apex court in JT 1992 (2) SC 65, ***M.V. Elisabeth and others vs. Harwan Investment & Trading Pvt. Ltd.*** laid down in paragraph 102, relevant portion of which is extracted as under :-

"102*……Without entering into any comparative study of jurisdiction of High Court of England and the High Courts in our country the one basic difference that exists today is that the English courts derive their creation, constitution and jurisdiction from Administration of Justice Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under*

it Article 225 preserved the jurisdiction, which existed on the date of Constitution came into force and Article 226 enlarged it by making it not only a custodian of fundamental rights of a citizen but as repository of power to reach its arms to do justice ……
The High Courts in India being courts of unlimited jurisdiction, repository of all judicial power under the Constitution except what is excluded are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction……

18. The Delhi High Court in AIR 1980 Delhi 39, ***Saleemuddin and another vs. Sharufuddin and others*** laid down in paragraph 27 that the High Court has jurisdiction to enforce an undertaking given before it. Paragraph 27 of the said judgment is extracted below:-

*"**27**. Counsel for the land lord submits that warrant of possession be also issued as the undertaking was given to this Court and this court ought to enforce it. The Court is not powerless to deliver possession to the land lords. The Court has the power to enforce an undertaking. It can be enforced by committal. It can be enforced by execution. I, therefore accept this prayer and order that a warrant of possession be issued in respect of premises No. 7687 Ward No. XVI, Gali Takhat Wali, Qasabpura, Delhi. Police aid be given to the land lords for obtaining possession of the premises as there has been resistance to the delivery of possession in the past."*

19. The Apex Court in AIR 1984 SC 1826, Mohammad Idris and another vs. Rustam Jehangir Bapufi and others had laid down that in case of breach of undertaking given by a party, the High Court was justified in giving appropriate direction to close the breach in addition to punishing the party for contempt of court. The apex court in paragraph 4 of the aforesaid judgement laid down as under :

*"**4**. On merits, the learned counsel submitted that the undertaking given was not in respect of the property concerned and that in any case the learned Single Judge was not justified in giving certain directions in addition to punishing the petitioners for contempt of court. We find no substance in the submissions made by the learned counsel. There was a clear breach of the undertaking given by the petitioners and we are of the opinion that the Single Judge was quite right in giving appropriate directions to close the breach. The Special Leave petition is, therefore, dismissed.*"

20. From the aforesaid, it is clear that High Court while exercising jurisdiction under Article 226 of the Constitution can issue appropriate directions for enforcing an undertaking given by a party before it and learned single Judge while allowing the writ petition vide its judgment dated 23rd October, 2002 has not committed any error in exercise of jurisdiction under Article 226 of the Constitution. We do not find any error in the judgement of learned single Judge allowing the writ petition. There is one more reason due to which tenant is not entitled for any indulgence in this appeal, i.e., according to undertaking as given in the affidavit, the tenant was liable to vacate the accommodation within one year from the date of disposal of the writ petition i.e. within one year from 16th August, 1996 i.e. by 15th August, 1997. Even after 15th August, 1997 more

than five years have elapsed and the land lord has not been able to get possession. This is an additional reason for not exercising any discretion in favour of tenant in writ jurisdiction.

21. Learned single Judge has rightly, in the judgment, stated that District Magistrate should have accepted the recommendation of Rent Control and Eviction officer for issuing Forms-C and D. Learned single Judge has rightly observed that the District Magistrate in refusing to issue Forms-C and D committed error. Non issuance of Form-D by District Magistrate vide his order dated 21st May, 2002 has become inconsequential in view of the directions issued by learned single Judge in its impugned judgment. Learned single Judge has rightly issued a direction that in case the appellant fails to vacate the building in question or undertaking is not given within the time, the Rent Control and Eviction Officer/District Magistrate shall evict the tenant in accordance with law. We do no find any error in the judgment of learned single Judge and the submissions raised by counsel for the appellant are without any substance.

22. This appeal lacks merit and is dismissed without any order as to cost..

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2002

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

First Appeal From Order No. 378 of 2002

National Insurance Company Limited
...Opposite party/ Appellant
Versus
Brij Pal Singh and another
...Claimant/Respondent

Counsel for the Appellant:
Sri A.K. Sinha

Counsel for the Respondents:
Sri V.P. Singh Charak
Sri D.R. Choudhary
Sri R.P. Singh Tomar
Sri Abha Tomar
Sri Shubhra Pareshar

Motor Vehicles Act Section 173/174- it is still more important to interpret the law in a manner which has the effect of preventing the accidents- If the owner is held liable to pay compensation where there is breach of specified condition of policy, it may act as a deterrent and he may also take effective measures to prevent accidents by having a mechanically sound vehicle which is not over loaded and a duly licensed and competent driver. (Held in para)

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

This appeal under Section 17 of the Motor Vehicles Act has been preferred against the judgment and award dated 6.1.2002. of Motor Accidents Claims Tribunal/Additional Judge, Court No. 19, Meerut, by which the claim petition filed by Brij Pal Singh (Respondent No. 1) was allowed and the appellant-Insurance

Company was directed to pay Rs.1,28,400/- as compensation along with interest at the rate of 9 percent from the date of filing of the claim petition till the date of payment.

The appeal was heard for admission on 15.4.2002 when notice was issued to the respondents and a direction was issued to summon the trial court record. In response to the notice Sri V.P. Singh Charak and Sri D.R. Chowdhary put in appearance on behalf of Pramod Kumar (respondent no. 2). Thereafter with the consent of the parties, the appeal was finally heard at the admission stage.

Brij Pal Singh, respondent no. 1, filed a claim petition on 18.2.1998 under Sections 140 and 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the Act) impleading Pramod Kumar and National Insurance Company Ltd. (hereinafter referred to as the Insurance Company Ltd. (hereinafter referred to as the Insurance Company) as opposite parties to the petition. The case set up in the claim petition was that on 17.11.1997 the claimant was going to Barot in bus no. UHN-1082. At about 5.45 P.M. truck no. DL-1GA-5419 which was being driven rashly and negligently at a very fast speed came from the opposite direction. The truck collided with the bus due to which two passengers sitting in the bus died and few others including the claimant received injuries. All the injured were removed to Government Hospital at Barot where they were provided medical aid. The claimant subsequently got himself treated in a private nursing home. He received fracture in his leg and several other injuries. According to the claimant he was 30 years of age and was earning about Rs.5,000/- per month from the agriculture and working as conductor of a bus. It was prayed that an amount or Rs.3,00,000/- along with the interest at the rate of 18 percent be awarded as compensation to him.

Pramod Kumar (respondent no. 2 in the appeal), who is owner of the truck no. DL-1GA-5419, filed a written statement denying in toto the case set up in the claim petition. In additional pleas, it was stated that the truck was being driven at a low speed on the left side and the accident took place on account of rash and negligent driving of the bus no. UHN-1082. It was further pleaded that the truck was insured with National Insurance Company on the date of accident and, therefore, the liability to pay the compensation was that of the insurer.

The appellant-Insurance Company also filed a written statement wherein the case set up in the claim petition was not admitted and it was pleaded that the claimant should prove the allegations made by him. The insurance of the truck was admitted and also the fact that the insurance policy was valid from 26.11.1996 to 25.11.1997. It was also pleaded that the accident took place due to the sole negligence of the driver of the bus. In paragraphs 31 to 33 of the written statement it was pleaded that without admitting involvement of the insured vehicle in the alleged accident and any liability thereto, the insured illegally entrusted the truck to a person who did not hold a valid and effective driving licence and the insured knowingly and intentionally committed breach of terms of conditions of the insurance policy and, therefore, the insurer is not liable to pay any compensation. It was also pleaded that if the insured (owner of the truck)

fails to discharge its obligations, or acts in collusion with the claimants, the insurer be allowed to contest the petition on all the grounds available to insured as per Section 170 of the Act.

Brij Pal Singh, claimant, examined three witnesses and filed some documentary evidence. Pramod Kumar (owner of the truck) after filing his written statement did not appear in court and did not lead any evidence. The appellant- Insurance Company contested the petition and moved some applications etc. reference of which will be given later on. The Tribunal after consideration of the evidence on record held that the accident took place on account of rash and negligent driving of truck no. DL-1GA-5419 in which the claimant sustained injuries. The claimant had sustained disability to the extent of 42 percent and his annual income was Rs.15,000. Applying the multiplier of 18, it was held that the claimant was entitled to Rs.1,13,400/- as compensation. Besides this amount, a sum of Rs.10,000/- was awarded towards medical expenses and Rs.5000/- towards mental pain. On these findings, the claim petition was allowed and the appellant insurance company was directed to pay Rs.1,28,400/- along with interest at the rate of 9 percent from the date of presentation of the claim petition till the date of payment to the claimant.

Feeling aggrieved by the judgement and award of the claims Tribunal, the Insurance Company has preferred this appeal under Section 173 of the Act. Sri A.K. Sinha, learned counsel for the appellant, has submitted that after filing of the written statement the owner of the truck did not at all appear in the proceedings before the Tribunal and did not lead any evidence, which clearly showed that there was collusion between him and the claimant Brij Pal Singh. Sri Sinha has also urged that the evidence on record clearly showed that the accident took place on account of rash and negligent driving of the bus in which the claimant was travelling as a passenger and the said accident did not take place on account of any fault of the driver of the truck. Learned counsel has further submitted that there was a breach of specified condition of the policy inasmuch as the truck was being driven by a person who was not duly licensed and, therefore, the appellant-Insurance Company is not liable to satisfy the award passed by the Claims Tribunal. Sri V.P. Singh Charak, learned counsel for Pramod Kumar, respondent no. 2 (owner of the truck), has submitted that the accident did not take place on account of fault of the driver of the truck but took place on account of rash and negligent driving of the bus by its driver and, therefore, no award should have been made in favour of the claimant. Sri Charak also challenged the submission made by the learned counsel for the appellant (insurer) that the Insurance Company was not liable to satisfy the award. Learned counsel has submitted that there was no breach of any specified condition of the insurance policy and, therefore, the appellant Insurance Company is liable to satisfy the award.

The claimant examined himself as PW 1 and stated that on 17.11.1997 he was going to Barot in bus no.UHN-1082. At about 6 P.M., truck no. DL-1GA-5419 came from the opposite direction at the speed of 80-90 kms. Per hour and dashed against the side of the bus. The bus was being driven at the speed of 0-5 kms per

hour but the driver of the truck was driving his vehicle rashly and negligently. In the accident many people received injuries, and two persons died on the spot. The people of the village carried the injured to Government Hospital, Barot. He was subsequently admitted in a nursing home where he remained as indoor patient till 20.11.1997. He sustained injuries in his leg. He further stated that his income was about Rs.5,000/- from agriculture and working as conductor of a bus. He was cross-examined by the counsel for the Insurance Company wherein he reiterated that the truck was being driven rashly and negligently at the speed of 80-90 Kms. per hour. Nothing material was brought out in his cross-examination to cast doubt on his testimony.

Another passenger, Balesh @ Baleshwar, was examined by the claimant as PW 2. He stated that on 17.11.1997 he was going from Shamli to Barot. At about 6 p.m. truck no. DL-1GA-5419 came from the side of Barot at a very fast speed of 80-90 kms and dashed against the side of bus no. UHN-1082 which was coming from the opposite direction at the speed of 0-5 kms per hour. Due to accident two persons died on the spot and 15-16 persons including him and the claimant Brij Pal Singh received injuries. Both he and Brij Pal Singh were taken to the Barot hospital for treatment. He has also filed a claim petition claiming compensation for the injuries received by him. In his cross-examination he denied the suggestion that the accident did not take place on account of rash and negligent driving of the driver of the truck. The third witness examined by the claimant is PW, Dr. S.M. Sharma, Senior Orthopedic Surgeon, in P.L. Sharma Hospital, Meerut. He examined the claimant on 9.2.1999 and advised for x-ray examination of his left leg. On the basis of the x-ray report, he opined that the claimant had suffered 42 percent disability. It is noteworthy that the claimant did not examine the doctors who had attended to his injuries soon after the accident. Sri Sharma examined him after more than one year on 9.2.1999.

The claimant also adduced some documentary evidence in support of his case. He filed copies of the F.I.R. of Case Crime No. 517 of 1997 of P.S. Barot, copy of the charge-sheet, copy of the site-plan prepared by the investigating officer and some other documents.

We have given above the gist of the evidence which is available on the record. Both PW 1, the claimant, and PW 2, Baleshwar, were travelling in the ill-fated bus and had received injuries in the accident. They are therefore, the best witnesses to depose about the manner in which the accident took place. Both of them have stated that the bus was being driven at the speed of 0-5 kms per hour while the truck no.DL-1GA-5419 was being driven rashly and negligently at the speed of 80-90 kms per hour and the accident took place on account of the fault of the driver of the truck. It is, therefore, fully established that the claimant received injuries on account of rash and negligent driving of the truck driver. Learned counsel for the appellant has not been able to point out any error in the amount of compensation determined by the Tribunal. We are, therefore, in agreement with the view taken by the Tribunal that the claimant-respondent no.1 is entitled to Rs.1,28,400/- as compensation. He is also entitled to interest at the rate of 9 percent from the

date of filing of the petition till the date of payment.

Sri A.K. Sinha, learned counsel for the appellant, has vehemently urged that the insurance policy of the truck contained a clause that the Insurance Company will be liable to satisfy the award only if at the time of accident it was being driven by a person who was duly licensed and since the appellant-Insurance Company had taken a specific plea in the written statement filed by it that the driver of the truck was not duly licensed and Pramod Kumar, respondent no. 2 (owner of the truck) neither disclosed the name of the driver nor led any evidence to show that he was duly licensed, the appellant was not liable to satisfy the award made by the Tribunal. Sri Sinha has contended that under Section 149 (2) (a) (ii) of the Act, the insurer is entitled to be made a party to defend the action on the ground that there has been a breach of the specified condition of the policy, namely, the condition excluding the driving by any person who is not duly licensed. In paragraph 31 of the written statement filed by the appellant a plea had been taken that the insured entrusted the vehicle to a person who had no effective and valid driving licence. Inspite of this specific plea, the owner of the truck led absolutely no evidence to show that the driver of the truck was holding a valid driving licence. In fact, after filing of the written statement the owner of the truck did not at all participate in the proceedings of the case and did not even disclose the name of the driver. According to Sri Sinha, in such circumstances a presumption has to be drawn that the driver of the truck was not duly licensed and no award could be made against the appellant-Insurance Company.

Paragraphs 31 and 32 of the written statement of the Insurance Company read as follows:-

"31. That without admitting involvement of insured vehicle in the alleged accident and any liability, it is submitted that at relevant time of alleged accident, the insured entrusted the insured vehicle to a person to drive the insured vehicle illegally who has not held a valid and effective driving licence to drive the insured vehicle with necessary endorsement. Thus the insured knowingly and intentionally had committed breach of terms & conditions of insurance policy and the answering OP is not liable to pay any compensation, if any,

32. That in continuance of the proceedings, if it is being revealed that insured has not discharged his obligations or failed to contest the petition or is in collusion with petitioner, then the answering OP deserved to be allowed to contest the petition on all grounds available to insured as per Sec. 170 of the Motor Vehicles Act, 1988."

The appellant-Insurance Company also moved an application (paper no. 52-ga) stating that the owner of the truck has not been appearing in the court and has completely failed to contest the case on merits and, therefore, as provided under Section 170 of the Act, the appellant-Insurance company may be allowed to contest the case on merit on all the grounds that are available to the owner/insured.

Sub section (1) of Section 149 of the Act lays down that if, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgement or award in respect of any such liability as is required to be covered by a policy in clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were judgment debtor in respect of the liability. Sub section (2) of Section 149 lays down that no sum shall be payable by a insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings, the insurer had notice through the court or the Claims tribunal of the bringing of the proceedings. It further provides that an insurer to whom notice as aforesaid has been given shall be entitled to be made a party and to defend the action on any of the grounds enumerated in clauses (a) and (b) it is, therefore, clear that subsection (2) of section 149 gives a right to the Insurance Company to defend the action. It is no doubt not open to the Insurance Company to take any kind of plea for defending the action but the same must be confined to the kinds enumerated in clauses (a) and (b) of sub-section (2) of Section 149. Sub-clauses (ii) of clauses (a) of sub-section (2) of Section 149 of the Act clearly gives a right to the Insurance Company to defend the claim petition on the ground that the vehicle was being driven by a person who was not duly licensed. Therefore, if it is established that the vehicle, by which the accident has been caused, was being driven by a person who was not duly licensed, then the Insurance Company would not be liable to satisfy the award. Section 170 of the Act provides that if the Claims Tribunal is satisfied that there is a collusion between persons making the claim and the person against whom the claim is made, or the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceedings and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. This section is an exception , to sub section (2) of Section 149, which gives only a restricted right to the Insurance Company to contest and defend a claim petition as the said right is circumscribed by clauses (a) and (b) of sub-section (2). Under Section 170 if the Tribunal is satisfied that there is a collusion between the person making the claim and the owner of the vehicle or the owner of the vehicle has failed to contest the claim, the Insurance Company so impleaded shall have the right to contest the claim petition on all or any of the grounds that are available to the owner of the vehicle.

It may now be examined whether in view of the pleadings of the parties and the evidence available on the record, a finding can be recorded on the question

whether the driver of the truck was duly licensed or not. As mentioned earlier, the appellant-Insurance Company took a specific plea in the written statement that the driver of the truck was not duly licensed. Pramod Kumar, respondent no. 2 (owner of truck) in his written statement did not state a single word whether the driver of the truck was duly licensed and even the name of the driver of the truck was not disclosed. There is not even a whisper about the driving licence of the person who was driving the truck at the time of accident. In fact, the owner did not lead any evidence before the Tribunal.

Sri V.P. Singh Charak, learned counsel for the owner of the truck, has submitted that the burden to establish that the driver of the truck was not duly licensed was upon the Insurance Company and the Insurance Company having failed to lead any evidence on this point, it must be held that the driver of the truck was not duly licensed. In our opinion, having regard to the scheme of the Motor Vehicles Act and the ground realities, it will be wrong to decide the issue on general principle contained in Sections 101 and 102 of Evidence Act, namely, who would fail if no evidence at all was given on the either side. Section 3 of the Motor Vehicles Act provides that no person shall drive a motor vehicle in any public place unless he holds an effective driving licence. Section 4 gives the age limit for driving which is 18 years for ordinary motor vehicle and 20 years for a transport vehicle. Therefore, any person above the age of 20 years can obtain a licence to drive a transport vehicle. Section 9 gives the procedure for grant of driving licence and it provides that any person, who is not for the time being disqualified for holding or obtaining a driving licence, may apply to the licensing authority having jurisdiction in the area in which he ordinarily resides or carries on business, or in which the school or establishment referred to in section 12 from where he is receiving or has received instruction in driving a motor vehicle is situated, for the issue to him of a driving licence. Therefore, a person can obtain a driving licence by making an application to the appropriate licensing authority anywhere in the country. Under Section 14, the driving licence to drive a transport vehicle is effective for three years and section 15 provides for renewal of a driving licence. There does not appear to be any specific provision prescribing the maximum age for grant of a licence. The licence can no doubt be revoked under section 16 if the licensing authority has reasonable grounds to believe that the holder of the driving licence is, by virtue of any disease or disability, unfit to drive the motor vehicle. These provisions show that after obtaining a licence to drive a transport vehicle at the age of 20 years, a person may continue to have a licence renewed until the licensing authority has reasonable grounds to believe that by virtue of any disease or disability he is unfit to drive the motor vehicle. Therefore, in normal course, a person after attaining the age of 20 years can continue to have his licence renewed till the age of 50 or 60 even thereafter. In view of Section 13 of the Act a driving licence shall be effective through out India. A person having obtained a driving licence in Arunachal Pradesh or Dibrugarh in Assam can drive a vehicle in Kanya Kumari or anywhere in India. Therefore, even if the name and address of the driver is disclosed it is absolutely

impossible for a third person to find out and lead evidence whether he holds a valid driving licence or not unless complete details viz. the date of issue and number of the licence is given. Section 106 of the Evidence Act lays down that if any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) of this Section is -'A' is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him. There cannot be even a slightest doubt that holding of a driving licence is especially within the knowledge of the person concerned as no one else can have the knowledge of the said fact. This will be more so in situations covered by section 149 of the Act as the Insurance Company cannot have any knowledge regarding the driving licence of the driver of the vehicle which is involved in an accident. Therefore, the burden to prove that the driver of the vehicle had a valid driving licence is upon the owner of the vehicle and not upon the Insurance Company.

Though in a criminal case the general rule is that the burden of proof is on the prosecution but if any fact is especially within the knowledge of the accused, he is to lead evidence to prove the said fact. In Shambhu Nath Mehra vs. The State of Ajmer, AIR 1956 SC 404, it was held as follows :

"Section 106 is an exception to S. 101. The latter with its illustration (a) lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.'

In collector of Customs, Madras and others vs. D. Bhoormull, AIR 1974 SC 859, proceedings were initiated under section 167 (8) (c) of the Customs Act for confiscation of contraband or smuggled goods and it was observed as under :

"…Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the accused, it is not obliged to prove them as part of its primary burden"'

(para 31)

"…On the principle underlying S. 106 Evidence Act, the burden to establish those facts is cast on the person concerned, and if he fails to establish or explain those facts, an adverse interference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty."

(para 32)

In State of West Bengal Vs. Meer Mohd. Umar 2000 (8) SCC 382, it was held that the legislature engrafted special rule in Section 106 of the Evidence Act to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which

are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. This principle was reiterated in Sanjai @ Kaka vs. State (NCT of Delhi), (2001) 3 SCC 190, and Ezhil and others vs. State of Tamilnadu, JT 2002 (4) SC 375.

In R. v Oliver, 1943 All. E.R. 800, the accused was charged with having sold sugar as whole sale seller without the necessary licence. It was held that whether the accused had a licence was a fact peculiarly within his own knowledge and proof of the fact that he had a licence, lay upon Firm. It also further held that in the circumstances of the case of the prosecution was under no necessity to give prima facie evidence of non-existence of a licence. In this case reference is made to some earlier decisions and it will be useful to notice the same. In R. v. Turner, (1816) 5 M & S 206=14 Digest 430, the learned Judge observed as follows :

"I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative."

In Williams Vs. Russel, (1993) 149 LT 190, the learned Judge held as under:

"On the principle laid down in R v Turner and numerous other cases where it is an offence to do an act without lawful authority, the person who sets up the lawful authority must prove it and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

The principle discussed above would be fully applicable here and the burden of proof that the driver of the truck had a valid and effective driving licence would be entirely upon the owner of the truck. The said burden can never be shifted to the Insurance Company, as it cannot be asked to discharge a negative burden with regard to a fact which is especially within the knowledge of the driver who is an employee of the owner of the vehicle.

Section 114 of the Evidence Act provides that the courts can presume existence of certain facts. Illustration (g) of this section is material and it provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. In Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif and others, AIR 1968 SC 1413, it was held as under :

"Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In Murugesam Pillai v. Ghana Sambandha Pandara Sannadhi, 44 IInd App 98 p. 103 = (AIR 1917 PC 6 at p. 8) Lord Shaw observed as follows :

A practice has grown up in Indian Procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough- they have no responsibility for the conduct of the suit, but with regard to the parties to the suit it is, in their Lord ships' Opinion, an inversion of Sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.'

In National Insurance Company Ltd. Vs. Jugal Kirshore and others, (1988) 1 SCC 626, it was held that it is duty of the party which is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. In United India Insurance Co. Ltd. vs. Gyan Chand (1997) 7 SCC 558, the Tribunal had recorded a finding that respondent no. 1 in the appeal was not having any driving licence. It was held that the insured (owner of the vehicle) did not step in the witness box to prove his case, an adverse inference necessarily had to be drawn against him to the effect that the vehicle had been handed over by him for being driven by an unlicensed driver (respondent No. 1). It was further held that in these circumstances the insurance company would get exonerated from its liability to meet the claims of the third party who might have suffered on account of vehicular accident caused by such unlicensed driver.

Sri V.P. Singh Charak, learned counsel for respondent no. 2 (owner of the vehicle) has placed reliance on Manohar Jamamal Sondhi Vs.Ranguba, 1994-ACJ 1288, United India Insdurance Co. V Matdig Thappeta Ramakka, 1995 ACJ 358, Surjeet Singh Vs. Heera Lal, II (1996) ACC 443 and Oriental Insurance Company vs. Teerath Kaur, I (1994) ACC 226. These are decisions of the different High Courts wherein it has been held that the onus of proof that the person driving the offending vehicle at the relevant time did not hold a valid driving licence, rests upon the insurer and the only way of discharging this onus is by the insurer leading positive evidence to the effect that the person driving the vehicle did not possess a driving licence. In none of these decisions, the provisions of the Motor Vehicle Act to the effect that anyone above the age of 20 years can obtain a licence from a licensing authority and can drive the vehicle anywhere in India, were considered, nor the question was examined deeper that in absence of any particulars of the licence having been given by the driver or the owner of offending vehicle it is absolutely impossible for the insurance company to lead evidence to show that the driver did not possess a valid driving licence. The holding of a valid driving licence, being especially within the knowledge of the driver, the burden lay upon him to prove the said fact in view of the clear provisions of Section 106, Evidence Act, was also not considered. For the reasons indicated earlier, we are unable to accept the principle laid down in the above - mentioned cases.

Pramod Kumar, respondent no. 2 (owner of the truck) having not produced the driving licence of the driver of the

truck, it must be held that he had no valid driving licence. In view of this finding, the appellant- Insurance Company is not legally liable to satisfy the award given against the owner of the vehicle.

We are, however, of the opinion that having regard to the object for which Chapters XI and XII of the Motor Vehicles Act were enacted and the conditions under which victims of road accidents are placed in this country, it will not be proper course of action to just allow the appeal and set aside award of the Tribunal rendering the claimant helpless. A practical solution of the problem has to be found out.

As mentioned earlier under Section 149 of the Act the insurer (Insurance Company) is liable to pay to the person entitled to the benefit of the decree a sum not exceeding the sum assured thereunder as if he was the judgment-debtor. The claim petition is an action in tort which is basically against the owner of the vehicle which has caused the accident. The claimant cannot possibly know whether the vehicle was insured or not, and if so, who was the insurer. Normally, it is the owner of the vehicle who comes out with a case that the vehicle was insured and there was no breach of conditions of the policy so that the award given against him may be satisfied by the insurer. Therefore, there must be an award against the owner, so as to attract Section 149 of the Act and liability may be fastened upon the insurer to pay the amount to the person entitled to the benefit of judgment and award. In the present case, the Tribunal has not passed any award against Pramod Kumar, the owner of the truck. However, this error can be easily rectified under order 41 Rule 33 Code of Civil Procedure. The operative portion of the order passed by the Tribunal is accordingly modified and the claim petition is allowed against both the opposite parties, namely, Pramod Kumar (owner of vehicle) and National Insurance Company Ltd.

The victim of an accident may find it extremely difficult to recover the amount from the owner of the vehicle. He may be having his place of business or residence at a place which is far away from the place of accident or the place where the tribunal which gave the award is situate. It is possible that he may be residing in a different state. Looking to the practical problems involved in such a case, the claimant may not be able to execute the award against the owner and may not get any compensation . In order that prompt payment of the compensation amount is made to the claimant, we consider it just and proper that the Insurance Company should pay the amount awarded by the Tribunal to the claimant and, thereafter the Insurance Company should be entitled to recover the amount from the owner in accordance with Section 174 of the Act. The Insurance Companies have their offices throughout India and have the necessary resources to pursue the mater even in a different state. By this course of action, their interests would not be prejudiced.

It is common knowledge that there are frequent road accidents in India in which large number of people lose their lives, or become maimed or permanently disabled. No amount of monetary compensation can bring solace to a family which has lost one of its members or relieve the pain or sufferings of a person who has been maimed or permanently disabled. Award of monetary

compensation may help in tiding over the financial problems in a small manner where the main bread earner has died. One of the main objects of the Motor Vehicles Act is to lay emphasis on the road safety standards and the need for effective ways of tracking down the traffic offenders. The law regarding the grant of compensation to the victims of the road accidents has, over the years, developed in a manner so as to ensure payment of compensation to the victims of the accidents. But it is still more important to interpret the law in a manner which has the effect of preventing the accidents. As the law stands today, no liability of any kind, civil or criminal, is fastened on the owner of the vehicle which has caused the accident. The criminal liability is fastened only on the driver who is a poorly paid employee. The vehicles are often not mechanically sound, their steering system is bad, the brakes do not work and they cannot be easily maneuvered on the road. They are often overloaded, which makes the task of the driver still more difficult. The owners often ask the drivers to drive fast so that the vehicle may cover the distance faster and may make greater number of trips. The drivers are overworked and they are compelled to drive for long hours. Section 91 of the Act provides that hours of work of any person engaged for operating a transport vehicle shall be such as provided in the Motor Transport Workers Act, 1961. However, scant regard is paid to this provision. The overworked drivers sometimes hand over the control of the vehicle to the cleaners, who have either no licence or have no experience of driving a transport vehicle. Our experience shows that in claim petitions some sort of practice has developed in the State of U.P. where inspite of service of summons, either the owner does not put in appearance or after filing a written statement does not participate in the proceedings and does not give any particular of the licence of the driver of the vehicle and the main reason for this is that the award is given only against the insurance company and not against the owner. Even if the award is given against both, the claimants execute the award only against the insurance company as it is easy to recover money from them and the owner is not required to pay anything. The result is that owner of the vehicle is not fastened with any kind of liability even though his vehicle may have been responsible for causing number of deaths. If the owner is held liable to pay compensation where there is breach of specified condition of policy, it may act as a deterrent and he may also take effective measures to prevent accidents, by having a mechanically sound vehicle which is not overloaded and a duly licensed and competent driver.

In the present case the claimant is resident of a small town in the interior of district of Meerut. He appears to be a person of humble means. It will be extremely difficult for him to recover the compensation amount from the owner of the vehicle who is resident of Delhi. The appellant- Insurance company should, therefore, pay the amount of compensation to the claimant and, there after, recover the said amount from the owner in accordance with Section 174 of the Act.

In the result, the appeal is partly allowed and the award made by the Tribunal is modified. It is directed that the appellant- insurance company shall pay the amount of compensation to the

claimant, Brij Pal Singh. After the payment has been made, the appellant-insurance company will be entitled to recover the entire amount from the owner of the vehicle, namely, Pramod Kumar respondent no. 2, by taking proceedings in accordance with Section 174 of the Motor Vehicles Act or by any other mode permissible in law.

CRIMINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10TH SEPEMBER, 2002

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

Civil Misc. Writ Petition No. 1025 of 2001 (Tax)

Smt. Vidya Gupta & others ...Petitioners
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri C .P. Ghildyal
Sri H.P. Dubey
Sri A.R. Dubey
Sri A.D. Saunder
Sri B.B. Singh

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Sri S.C. Misra, Adv. General
Sri S.P. Keserwani
Sri Ranvijai Singh
S.C.

U.P. Motor Vehicles Taxation Act 1997- Section 6 (I-A)- whether the State is competent to enact the provisions regarding the liability of vehicle owners to pay additional tax if used on public place carrying 9 passengers including the driver? - held- 'Yes'

In our view the aforesaid decision does not assist the petitioners for one simple reason that in the instant case, the Act and the Rules as already noted above provide safeguards, both to the State against the evasion of tax and as also to the bonafied owner or operator to surrender the vehicle by following the procedure under Section 12 of the Act read with Rule 22 of the Rules to claim and obtain a certificate of non- user from the Prescribed Authority and thereby to be relieved from payment of tax or additional tax. Accordingly the legislation imposing tax or additional taxes does not become arbitrary or ultra vires. The decisions relied upon by the writ petitioners, in our view , do not really assist them. The reasons assigned by learned Advocate General in his submissions distinguishing the decisions cited by learned counsel for the writ petitioners, in our view , cannot be said to be without any substance.

Case law discussed:
AIR 1975 SC-17, AIR 1962 SC-1406,AIR 1980 SC 1547 AIR 2000 SC-2175, 2002 ALJ -2627, 1992 (supply II) SCC-436, 1972 (83) ITR 678, 1980 (124) IT 40 (SC)

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

1. In the writ petition no. 1025 of 2001 (Tax) and in all the connected writ petitions, common questions of facts and law are involved and, therefore, they are being disposed of by this common judgment. Civil Misc. Writ Petition No. 1025 of 2001 (Tax) is being treated as the leading case, and the final decision in all other connected writ petitions will be governed by the decision in this writ petition (Civil Misc. Writ Petition No. 1025 of 2001 (Tax).

2. The writ petitioners are stage carriage operators. The petitioners are challenging the validity of amendment in Section 6 of the U.P. Motor Vehicles

Taxation Act, 1997 (hereinafter referred to as 'the Act') whereby Section (1-A), has been added to it on the grounds that (a) the State Legislature is not competent to make this enactment, (b) the amendment is repugnant to the Motor Vehicles Act, 1988 as well as the Act, (c) assent of the President under Article 254 (2) of the Constitution of India has not been obtained, and (d) the impugned enactment is punitive in nature.

3. It has been contended on behalf of the writ petitioners that tax ' under the Act has been enacted by the State Legislature in exercise of power conferred by Entries 56 to 57 of the State List of VIIth Schedule to the Constitution. Entry 56 relates to tax on goods and passengers carried road or on in land waterways whereas Entry 57 relates to tax on vehicles- whether mechanically propelled or not, suitable for use on roads, including tram-car subject to the provisions of Entry 35 of List III. The case of the petitioners is that the tax on Motor Vehicles is compensatory in nature and revenue earned by such imposition of tax is spent by the State in the construction and maintenance of roads to facilitate use of public place by motor vehicles. Thus, Entries 56 and 57 empower the State Government to legislate on the subject in case of use of public place by a vehicle. However, these entries do not empower the State Government to levy additional tax. The words 'passenger carried' used in Entry 56 presuppose use of public road and the words 'tax on vehicles whether mechanically propelled or not suitable for use on roads' pre suppose use of vehicles on roads. According to the petitioners, this view is fortified by decisions of apex court in Dalmia Cement Bharat Ltd. vs. The Regional Transport Officer Bellary (Mysore)- AIR 1975 SC-17 and State of Mysore and others vs. Sundaram Moto-s Pvt. Ltd.- AIR 1980 SC 148.

4. Words 'suitable for use on road' came up for consideration before the Supreme Court in Automobile Transport (Rajasthan) Ltd. Vs. State of Rajasthan and others (AIR 1962 SC-1406) and it was held in that case that the words 'suitable for use on roads' describe the kind to vehicles and not their condition. They exclude from the entry form, machinery, aeroplane, railways etc., whether mechanically propelled or not. Apex court reiterated this view in Travancore Tea Co. Ltd., etc. v. State of Kerala and others-AIR 1980 SC-1547.

5. Therefore, the petitioners have come before us with a case that user of road is condition precedent for levy of the tax under Entries 56 and 57, referred to above. They have further drew our attention to a decision of the apex court in State of Gujrat v. Kaushin Bhai K. Patel- AIR 2000 SC-2175.

6. Therefore, it was argued that it is amply clear that tax under the provisions of the Act, as amended, cannot be validly levied merely on possession of a motor vehicle, which is not used in public place. The imposition of such tax is clearly beyond the competence of the State Legislature and against the power conferred on it by virtue of Entries 56 and 57, referred to above. Even otherwise, the impugned enactment is repugnant to Section 6 of the Act and, therefore, the same is void ab initio.

7. According to the petitioners, control of transport vehicles is provided in Chapter V of the Motor Vehicles Act,

1988 Section 66 whereof clearly provides that no owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods have in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority or authorizing him use of a vehicle in that public place in the manner in which the vehicle is being used. A person using a motor vehicle in a public place, without a valid permit, can be severely punished- to the extent of imprisonment under Section 192-A of the Motor Vehicle Act, 1988. The petitioners have, therefore, sought the relief of declaring Section (1-A) of the amended Act as well as Section 6 of the Act to be ultravires.

8. We have heard S/sri C.P. Ghildyal, H.P. Dubey, A.R. Dubey, A.D. Saunder and B. B. Singh, learned counsel for the petitioners as well as Sri S.C. Misra, learned Advocate General, Sri S.P. Kesarwani and Sri Ranvijai Singh, learned Standing Counsel for the State - respondents.

9. While submissions of the learned counsel for the petitioners have already been stated in the foregoing paragraphs of this judgment, it was contended by the learned Advocate General that the amended provision (1-A) of the Act is perfectly within the four corners of the legislative Entry 57 of List II of the Seventh Schedule of the Constitution. He drew our attention to Travancore Tea Co. Ltd. (supra) and contended that similar provision contained in Kerala Motor Vehicle Taxation Act (24 of 1963) came up for consideration before the apex court wherein, while explaining the use of the expression' vehicle used or kept for use', the apex court upheld the levy to be in conformity with the powers of State Legislature under Entry 57, List 11 of Seventh Schedule of the Constitution. It was specifically observed by the apex court that the said provision safeguards the revenue of the State by relieving it from the burden of providing that the vehicle was used or kept for use on the public roads of the State and at the same time, the interest of bonafide owner is safeguarded by enabling him to claim and obtain a certificate of non user from the prescribed authority. He further contended that so far as this State is concerned, in the Act in question, safeguards are provided under Section 12 of the Act read with Rule 22 of the U.P. Motor Vehicle Taxation Rules, 1998. He also brought to our notice that validity of section 6 of the Act has already been upheld in H.C. Misra v. State of U.P.- 2000 AALJ 2677. Sections 5 and 6 of the Act clearly provide that every motor vehicle falling within the purview of liability of tax under section 4 is liable to pay additional tax. In support of this contention, he placed implicit reliance on the decisions in Sundaram Finance Ltd. vs. Regional Transport Officer-1992 (supp-2) SCC-436, C.I.T v. Piyara Singh-1980 (124) IT-40 (SC). In C.I.T. V. Piyara Singh it has been held that illegal business is business and income from such business is liable to tax. According to learned Advocate General, the ratio laid down in the decisions cited on behalf of the petitioners, is not, at all, applicable to the facts of the present cases. Much emphasis has been laid by the learned counsel for the petitioners in State of Gujrat (supra) but the said decision has absolutely no application so far as the

present cases are concerned in view of the provisions of Section 12 (2) of the Act read with Rule 22 of the Rules framed under the Act. In the Act and U.P. Motor Vehicle Taxation Rules 1998, there is no restriction or burden, at all. The operator or owner of the motor vehicle, if he does not want to use his motor vehicle, he is required to surrender the registration certificate and the token, if any and if the same is surrendered as per procedure provided under Rule 22 of the Rules read with Section 12 (2) of the Act, the owner shall not be liable to pay tax or additional tax. Thus, surrender of all papers is the only requirement under the provisions of the Act and Rules to show non-use of the vehicle and exemption from liability to pay tax and additional tax.

10. We have considered the submissions made by the learned counsel for the writ petitioners and also of the learned Advocate General for the State.

11. The amended provision of Section 1-A of the Act, for the sake of convenience, is being quoted herein below :-

"(1-A): Save as otherwise provided in this Act no motor vehicle registered or adapted, to carry more than nine persons excluding the driver shall be kept for use without a permit under section 66 of the Motor Vehicles Act, 1998 unless there has been paid in respect thereof in addition to the tax payable under section 4 an additional tax twenty five percent more than the additional tax payable in respect of that category of vehicles under clause (a) of Article V of the Fourth Schedule:

Provided that the provisions of this sub section shall not apply to a Motor Vehicle refered to in sub section (3) of Section 66 of the said Act."

12. The Statement of objects and Reasons necessitating the impugned amendment read as follows :

"The Uttar Pradesh Motor Vehicle Taxation Act, 1997 (U.P. Act No. 21 of 1997) has been enacted to provide for the imposition of tax in the State on Motor Vehicles and additional tax on Motor Vehicles engaged in the transport of passengers and goods on hire. The said Act does not provide for effecting control over Motor Vehicles plying in the State without a permit. The said Act, no doubt, provides for restriction on the use of transport vehicles within the State under a temporary permit issued by an authority having jurisdiction outside the State without payment of tax or additional tax under the said Act and in case of default thereof, imposition of penalty equivalent to ten times of tax and additional tax, but there is no such provisions with respect to transport vehicles operating under national or to tourist permit.

13. In our view, on proper interpretation of the amended provision of Section 1-A of the Act, there is no reason to doubt that the same'squarely comes within the scope of Entry 57, List 11 of VII Schedule of the Constitution. The aforesaid view finds support from the judgment and decision in the case of Travencore Tea Co. Ltd. etc. (supra) wherein on consideration of similar provision in Kerala Motor Vehicles Taxation Act (24 of 1963) the Supreme Court upheld the levy to be in conformity with the powers on the State Legislature. While upholding the same, the Supreme Court also observed that the said

provision safeguards the revenue of the State by relieving it from the burden of proving that the vehicle was used or kept for use on the public roads of the State and at the same time the interest of the bonafide owner is safeguarded by enabling him to claim and obtain a certificate of non-user from the Prescribed Authority. It would be apposite to quote the relevant observation of the apex court, which is as follows:-

"If the words 'used or kept for use in the State are construed as used or kept for use on the public roads of the State, the Act would be in conformity with the powers conferred on the State Legislature under Entry 57 of List 11. If the vehicles are suitable for use on public roads they are liable to be taxed. In order to levy tax on vehicles used or kept for use on public roads of the State and at the same time to avoid evasion of tax the legislature has prescribed the procedure. Sub section (2) of Section 3 provides that the registered owner or any person having possession of or control of a motor vehicle of which a certificate of registration is current shall for the purpose of this Act be deemed to use or keep such vehicle for use in the State except during any period for which the Regional Transport Authority has certified in the prescribed manner that the motor vehicle has not been used or kept for use. Under this sub section there is a presumption that a motor vehicle for which the certificate of registration is current shall be deemed to be used or kept for use in the State. This provision safeguards the revenue of the State by relieving it from the burden of provide that the vehicle was used to kept for use on the public roads of the State. At the same time, the interest of the bonafide owner is safeguarded by enabling him to claim and obtain a certificate of non user from the prescribed authority. In order to enable the owner of the vehicle or the person who is in possession or being in control of the motor vehicle of; which the certificate of registration is current to claim exemption from tax he should get a certificate in the prescribed manner from the Regional Transport Officer."

14. The following observations of the apex court in Dalmia Cement Bharat Ltd. (supra) are also relevant for the purpose of the present case :

"….The validity of taxing power under Entry 57 of List 11 of the Seventh Schedule read with Article 201 of the Constitution of India depends upon the regulatory and compensatory nature of taxes. It is not the purpose of the Taxation Act to levy taxes on vehicles, which do not use the roads or in any way form part of flow of traffic on roads which is required to be regulated. The regulations under the Motor Vehicles Act for registration and prohibition of certain categories of vehicles being driven by persons who have no driving licence, even though those vehicles are not plying on the roads are designed to ensure safety of passengers and goods etc. for that purpose, it is enacted to keep control and check on the vehicles. Legislative power under entry 35 of List 111 (concurrent list) does not bar such a provision. But entry 57 of List 11 is subject to the limitations that the power of taxation thereunder cannot except the compensatory nature, which must have some nexus with the vehicles using the road viz. public roads. If the vehicles do not use the roads, notwithstanding the fact that they are registered under the Motor Vehicles Act, they cannot be taxed ……"

15. Likewise, State of Mysore and others (supra), the following view of the apex court is relevant for the purpose of the instant case :-

"The word 'kept' has not been defined in the Taxation Act. We have, therefore, to interpret it in ordinary popular sense, consistently with the context. The word 'kept' has been repeatedly used in the section. In sub-section (1), it occurs in association with the phrase 'for use on road'. In that context, the ordinary dictionary meaning of the word 'kept' is 'to retain', 'to maintain' or cause 'to stay' or 'remain in a place', 'to detain' 'to stay or continue in a specified condition, position etc.' In association with the use of the vehicle, therefore, the word 'kept' has an element of stationeries. It is something different from a mere state of transit or a course of journey through the State. It is something more than a mere stoppage or halt for rest, food or refreshment etc., in the course of transit through the territory of the State."

16. However, the factual position of the cases on hand, is altogether different. In the present cases, Section 12 of the Act read with Rule 22 of the U.P. Motor Vehicle Taxation Rules 1998 clearly provide safeguards, both to the revenue as also to the operator or owner of the vehicle. That apart, in the case of H.C. Misra and others vs. State of U.P. and others reported in 2002 All.L.J. 2627, a Division Bench of this Court on consideration of Sections 5 and 6 of the Act, held that the levy of additional taxes on goods carriages and public service vehicles under sections 5 & 6 of the Act is covered by Entry 57 of List II of Schedule 7 of the Constitution and, therefore, within Legislative competence of the State. The Division Bench further held that it can not be said that the additional taxes levied under sections 5 and 6 of the Act on use of Transport vehicles in any public in Uttar Pradesh in addition to the one time tax payable under section 4 of the Act is really a confiscation in the guise of taxation. The legislation, in question, does not suffer from the vice of colorable exercise of power nor is it hit by doctrine of 'fraud on Constitution.' Even if it be assumed that the tax liability under the new Act has increased, that by itself would be no ground to hold that the legislation has lost its regulatory and compensatory character. The questions, if the levy of the additional taxes under sections 5 & 6 of the Act satisfies the test of 'reasonableness' and 'public interest' and if the same are violative of Article 301 and Article 19(1) (g) of the Constitution, were considered in the said decision, and it was held that the said sections and the imposition of the additional taxes were not violative of Article 301 and Article 19 (1) (g) of the Constitution. The Division Bench specifically took the view that the said legislation does not result in breach of the freedom guaranteed under Article 301 of the Constitution and further that the levy of additional taxes under the Act is not confiscatory or unreasonable. There was no question of violation of the individual citizens right guaranteed under Article 19(1) (g) of the Constitution. Submission made on behalf of the petitioners to the contrary does not commend itself to be countenanced. The Division Bench was of the considered view that the test of reasonableness and public interest cannot be held to be violative of Article 301 and Article 19 (1) (g) of the Constitution. In our view the U.P. Motor Vehicles Taxation Rules, 1988 (hereinafter referred

to as the Rules) really do not impose any burden on the owner or operator of the motor vehicle if he does not want to use or he keeps the vehicles not for use or does not use the vehicle on road, he may surrender the registration certificate in accordance with the procedure prescribed under Rule 22 of the Rules read with Section 12 of the Act and in that event the owner shall not be liable to pay tax or additional taxes. What is required under the aforesaid provisions of the Act and Rules is that the owner or operator who intends not to use the vehicle shall surrender the vehicle according to the procedure prescribed and in that event he has not to pay tax or additional taxes and non compliance of the procedure for surrender as prescribed, shall really mean that the vehicle has not been surrendered. When the statute prescribes a procedure and manner to be followed for surrendering the vehicle, the same is required to be done in that manner only. The judgment and decision relied upon by the learned counsel for the petitioners in the case of **Sundaram Finance Ltd. vs. Regional Transport Officer** (supra) does not, in our view, come in aid of the writ petitioners. The decision in the case of **State of Gujrat vs. Kaushikbhai K. Patel** (supra) has also to be taken note of. In the said decision the question of imposition of such tax on motor vehicle not used in a public road or public place was considered. The learned counsel drew our attention to the following observations of the apex court:-

"…..It is well settled in law that the tax imposed on vehicle under the Act is compensatory in nature for the purpose of raising revenue to meet the expenditure for making and maintaining the Rule and Regulation of traffic. To put it differently, the taxes are levied on the vehicles using the roads or in any way forming the part of the flow of traffic on the roads which is required to be regulated and not on the vehicles which do not use the roads at all. What is material and relevant is use of road by vehicles for levy of tax under the Act. The reasons for non use of roads is immaterial and irrelevant when the nature of the tax itself is compensatory for use of roads, It follows from sub section (2) section 3 of the Act that where a motor vehicle is not using the roads no tax is levied thereon….. If the vehicles are clandestinely, put to use without the certificate of registration, fitness certificate or taxation certificate, it is open to the authorities to take action against the owner in accordance with law. Mere apprehension of clandestine use of a vehicle cannot be a ground for imposing tax on omnibuses which are not put on road or kept away from use. Looking to the statement of objects and reasons for the Amendment, it appears that the appellants do not trust the owners of omnibuses or their own officers and machinery.mere apprehension of the appellants that omnibuses will be clandestinely operated and claim would be made for refund on the ground of their non use, in our opinion, can not justify for the insistence of satisfaction as to the reasons beyond the control of the owner of person for non use of a omnibus. This apart, there is no good reason put forward as to why the omnibus are singled out. Even heavy goods transport vehicles are also purchased by investing heavy amount."

17. In our view the aforesaid decision does not assist the petitioners for one simple reason that in the instant case, the Act and the Rules as already noted

above provide safeguards, both, to the state against the evasion of tax and as also to be bonafied owner or operator to surrender the vehicle by following the procedure under section 12 of the Act read with Rule 22 of the Rules to claim and obtain a certificate of non user from the Prescribed Authority and thereby to be relieved from payment of tax or additional tax. Accordingly the legislation imposing tax or additional taxes does not become arbitrary or ultra vires. The decision relied upon by the writ petitioners, in our view, do not really assist them. The reasons assigned by learned Advocate General in his submissions distinguishing the decisions cited by learned counsel for the writ petitioners, in our view, cannot be said to be without any substance.

18. Considering the facts and circumstances of the case, we do not find any merit in the writ petitions. The writ petitions accordingly fail and are dismissed. Interim order, if any stand vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.9.2002

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

Special Appeal No. 207 of 2002

Chairman, Sri Gopi chand College of Pharmacy & Management Aahera, Baghpat, U.P. and another ...Appellants
Versus
Pankaj Kumar and others ...Opp. parties

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

Counsel for the Respondents:
Sri V.M. Zaidi
Sri Anurag Khanna
Smt. Aanita Tripathi

U.P. State Universities Act.-1973- Section 13- Power of Vice Chancellor- to transfer the students from one institution to another - duly affiliated to the concern university- B. Pharma students after facing UP SEAT 1999- allotted the Gopichand College of Pharmacy and management Baghpat- due to mismanagement on agitation pursuant to enquiry conducted by the District Magistrate- in Tripartite meeting- the Vice Chancellor transferred all these students from the institution in question to K.N. Modi College- held- proper the parties can not reseind from their stand who participated in Tripartite meeting- direction issued to give admission in transferred college.

Held - para 9

In this view of the matter the objection raised by Dr. Padia that the Vice Chancellor, Ch. Charan Singh University, Meerut, was not at all authorized to order transfer of the respondents- writ petitioners from the appellants college to another college cannot be sustained as he could exercise such a power under section 13 of the U.P. State University Act 1973. Moreover, the State Government was conscious of the fact that it had no jurisdiction to order transfer of students of B. Pharma II year Course from one college to another, as they were admitted prior to the coming into force of U.P. Technical University Act 2000 and that is why it had issued directions for transfer of the students of B. Pharma Ist year course from one college to another college. It is seen from the order dated 31.5.2001, that the Chairman and the Director of both the colleges were present in the meeting held by the Vice Chancellor, Ch. Charan Singh University, Meerut and they had agreed to the proposal of transfer of

these respondents- writ petitioners. Thus, the appellants, who were party to the proceedings before the Vice Chancellor, which culminated into the order dated 31.5.01 cannot be permitted to resile.

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

1. The present special appeal has been filed by the Chairman and the Principal of Sri Gopichand College of Pharmacy & Management, Ahera, district Baghpat, challenging the judgment and order dated 7.2.2002 passed by the learned Single Judge in Civil Misc. Writ Petition No. 24130 of 2001, whereby the writ petition filed by respondent nos. 1 to 15 has been allowed and a writ of mandamus was issued to the respondent nos. 2 to 4 i.e. the present appellants and the Chairman of Ram Ish Institute, Noida, district Ghaziabad to comply with the order of the Vice Chancellor dated 31.5.2001 within a period of three weeks.

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

2. According to the respondents-writ petitioners, they have appeared in the Uttar Pradesh State Engineering Admission Test 1999 (in short U.P. SEAT-99) for getting admission in B. Pharma Ist year course conducted by the Institute of Engineering and Technology, U.P., Lucknow. They qualified in the said admission test and were allotted free sets. The admission committee allotted them Sri Gopichand College of Pharmacy & Management, Baghpat (hereafter referred to as the Baghpat College). According to the respondents-writ petitioners after depositing the requisite amount relating to admission fee, examination fee and other expenses, they were granted admission in the said college. It may be mentioned here that at the time when the admissions were granted to the respondents- writ petitioners, the Baghpat College was affiliated with Ch. Charan Singh University, Meerut. It is alleged that after getting admissions, they were being harassed by the college authorities. They completed Ist year B. Pharma course and appeared in the examination. The students for the year 1999-2000 and 2000-01 took recourse to the path of agitation against the mis-management and harassment meted out to them . They made complaints to the Vice Chancellor, Ch. Charan Singh University, Meerut, as also to the State Government. It appears that on the basis of the complaints/representations made by the petitioners, the State Government directed the District Magistrate, Baghpat to hold an enquiry in the matter, who submitted his report. On the basis of the said report, the State Government directed to transfer those students of Ist year B. Pharma course of the Baghpat College to other institutions according to the options given by the students in accordance with merit on the basis of the marks obtained in the first year examination. The State Government further gave instructions for giving protection to the students. A tripartite meeting was held by the Vice Chancellor of Ch. Charan Singh University on 31.5.2001 in which the Chairman and Director of Baghpat college and Ram Ish Institute, Noida, (hereinafter referred to as the Noida Institute) participated and it was unanimously decided that 18 students of B.Pharma IInd years studying in the Baghpt College be transferred to the Noida Institute. The respondents-writ petitioners approached the Noida Institute for admission, but were not granted any

admission. The respondents-writ petitioners also approached the Baghpat College for issuing transfer certificate/No objection certificate, but they were not issued. Faced with this situation the respondents-writ petitioners approached this Court under Article 226 of the Constitution of India by means of a writ petition.

3. In the counter affidavit filed in the writ petition on behalf of the Baghpat College, a plea was taken that all these respondents- writ petitioners have been admitted on payment seats and they have not paid the full amount of fee. Further, inter-institutional transfer of Ist year students have been banned by the State Government vide Government order dated 13.12.1991.

4. The learned Single Judge by means of impugned judgment held that the order dated 31.5.2001 passed by the Vice Chancellor by which the respondents-writ petitioners have been transferred to Noida Institute has not been challenged by the college in any forum, therefore, this order is binding on them. The plea of admission made on payment seat was not accepted on the ground that the Baghpat College has not produced any material to show that the respondents-writ petitioners have been admitted on payment seats and the admission letter issued by the college authority did not make any mention as to whether the admissions have been made on payment seats or free seats and thus, it was held that the admissions were made on free seats. Accordingly, the learned Single Judge allowed the writ petition and issued a writ of mandamus to the Chairman and Principal of the Baghpat College as also the Chairman and Principal of the Noida Institute to comply with the order of the Vice Chancellor dated 31.5.2001. The said order is under challenge in the present special appeal.

5. We have heard Dr. R.G. Padia, learned Senior Counsel assisted by Sri Prakash Padia for the appellants and Sri V.M. Zaidi, learned counsel appearing on behalf the respondents-writ petitioners.

6. Learned counsel for the appellants submitted that the writ petition itself was not maintainable as there was no existing cause of action and there was no legal provision, which could be said to have been violated. In any event in view of the Government order dated 13.12.1991, which had put a complete ban on inter-institutional transfer in respect of technical education at degree level, the respondents writ petitioners cannot claim any transfer from the Appellants' college to the Noida Institute. He further submitted that the Vice Chancellor, Ch. Charan Singh University, Meerut, had no jurisdiction to pass any order directing the transfer of the respondents- writ petitioners from the appellant's college to another college in exercise of powers under section 13 of U.P. State Universities Act, 1973. According to him the U.P. Technical Universities Act 2000 has been enacted and has come into existence on 8.5.2000 and thus, the Vice Chancellor, Ch. Charan Singh University had no jurisdiction to pass any order after 26.7.2000 when section 4 of the said Act was enforced. Dr. Padia further submitted that all the respondent-writ petitioners were admitted on payment seats and as they have not deposited the full fee, they cannot be transferred and they are not entitled for transfer.

7. Sri V.M. Zaidi, learned counsel for the respondents- writ petitioners, however submitted that all the respondents- writ petitioners have been admitted against free seats in the Baghpat College pursuant to the entrance examination held in the year 1999 i.e. UP SEAT 1999. At that time the said college was affiliated to Ch. Charan Singh University, Meerut. He further submitted that because of lack of infrastructural facilities and the harassing attitude of the college authorities, the students of B. Pharma Part -I and Part-II, who were studying in the said college started agitation, whereupon, the State Government entrusted the District Magistrate to hold an enquiry and submit his report. Acting on the basis of the said report, the State Government itself transferred all the students of B.Pharma Ist year Course, who were admitted pursuant to U.P. Seat 2000 admission to K.N.Modi Institute of Pharmaceutical & Research, Modinagar, vide order dated 29.5.2001 and since the respondents - writ petitioners were admitted pursuant to the admission test of U.P. SEAT-1999 when U.P. Technical University Act 2000 was in force, the Vice Chancellor, Ch. Charan Singh University, Meerut, in a tripartite meeting in which the Chairman and Director of both the Colleges have agreed for transfer, passed an order transferring the respondents- writ petitioners. He further submitted that the Vice Chancellor, Ch. Charan Singh University, Meerut was thus, fully justified in ordering transfer of the respondents-writ petitioners from the Baghpat College the Noida Institute. He further submitted that the Government order dated 13.12.1991 is not at all applicable in the present case, inasmuch as, the said Government order specifically related to certain colleges in which the present two colleges have not been mentioned. According to him the Vice Chancellor was perfectly well within his jurisdiction to exercise his power under section 13 of U.P. State Universities Act, 1972 and the provisions of the U.P. Technical University Act, 2000 is not applicable to the respondents-writ petitioners, who were pursuing their studies in the technical institution in any other college or institutions, which were existing on the date of commencement/enforcement of the Act. He specifically referred to section 4 of U.P. Technical University Act, 2000. Lastly, he submitted that the Chairman and Director of both the colleges having given their consent in the meeting held on 31.5.2001 for transfer of the respondents-writ petitioners are estopped from taking altogether a different stand.

According to Sri V.M. Zaidi, all the respondents have been admitted on free seats and not on payment seats.

8. Having heard the learned counsel for the parties, I find that the plea of the applicability of the provisions of U.P. Technical University Act 2000, was not raised by the appellants before the learned Single Judge. However, since it goes to the root of the matter, the provisions of the said Act has to be examined. Section 4 of the U.P. Technical University Act 2000 reads as follows :

"4. Territorial exercise of Powers- (1) The University shall, in the exercise of the powers under this Act, have jurisdiction over the whole of Uttar Pradesh.

(2) Every college or institution other than an existing college, imparting technical education in the

State on the date of commencement of this Act shall, with effect from such date as may be notified in this behalf by the State Government, be deemed to be affiliated to the University established under Section 3 and shall cease to be affiliated to or associated with the University established by or under the Uttar Pradesh State Universities Act, 1973, hereinafter referred to in this section as erstwhile University :

Provided that a student pursuing his study in technical education in any college or institution, other than existing college, on the date of such commencement, shall be entitled and be allowed to continue and complete such study under the erstwhile University after such commencement and the erstwhile University shall hold examination of such student and confer degree or any other academic distinction on him in accordance with the procedure in force for the time being in the erstwhile University."

9. From a reading of the aforesaid provisions it is seen that all those students, who have been admitted in a technical course prior to enforcement of this section are to be governed by the Universities to which the said college/institution is affiliated. It is not in dispute that all the respondents- writ petitioners have been admitted in B. Pharma Ist year course in the Baghpat College in the year 1999 i.e. prior to coming into force of the U.P. Technical University Act 2000, and have been pursuing their studies in technical education in the said college, which during the relevant period was affiliated to Ch. Charan Singh University . Thus, they are excluded from the applicability of section 4 of the aforesaid Act as their case squarely falls under the proviso to section 4 of the said Act. In this view of the matter the objection raised by Dr. Padia that the Vice Chancellor, Ch. Charan Singh University, Meerut, was not at all authorized to order transfer of the respondents- writ petitioners from the appellants college to another college cannot be sustained as he could exercise such a power under section 13 of the U.P. State University Act 1973. Moreover, the State Government was conscious of the fact that it had no jurisdiction to order transfer of students of B. Pharma IInd year Course from one college to another, as they were admitted prior to the coming into force of U.P. Technical University Act 2000 and that is why it had issued directions for transfer of the students of B. Pharma Ist year course from one college to another college. It is seen from the order dated 31.5.2001, that the Chairman and the Director of both the colleges were present in the meeting held by the Vice Chancellor, Ch. Charan Singh University, Meerut and they had agreed to the proposal of transfer of these respondents-writ petitioners. Thus, the appellants, who were party to the proceedings before the Vice Chancellor which culminated into the order dated 31.5.01, cannot be permitted to resile.

10. So far as the question as to whether the respondents -writ petitioners were admitted on payment seats or on free seats in the Baghpat college is concerned, it may be mentioned here that it was a specific case of the respondents- writ petitioners that they have been admitted on free seats whereas the stand taken by the Baghpat college was that they have been admitted on payment seats. The college authorities did not produce any

material before the Court to establish that the respondents- writ petitioners have been admitted against payment seats. From a perusal of the Brochure annexed with the affidavit filed along with Stay Vacation Application No. 40367 of 2002 by the respondents- writ petitioners it appears that a student was required to pay a total sum of Rs.32,000/- per year for free seat and Rs.68,000/- against payment seats. The respondents- writ petitioners have deposited the amount of fee towards free seats only. The appellants have not produced any document to show that the respondent-writ petitioners have been admitted against payment seats. The stand taken by the respondents-writ petitioners that they have been admitted on free seats appears to be justified. In this view of the matter it is held that the Vice Chancellor, Ch. Charan Singh University, Meerut, was well within his jurisdiction to order transfer of the respondents-writ petitioners from the Baghpat College to the Noida Institute.

11. In view of the foregoing discussions,, we do not find any legal infirmity in the order passed by the learned Single Judge. The Special appeal fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.9.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 29111 of 1995

Ex.No.6893825 F Havildar J.S. Bansal
...Petitioner
Versus
The Union of India and others
...Respondents

Counsel for the Petitioner:
Sri G.D. Mukerji
Sri Satyajit Mukerji

Counsel for the Respondents:
Sri U.N. Sharma
S.C.

Army Regulation 1987- Regulation 377, 378, 379, 381- Desertion-Army Person proceeded on 10 days leave- during course of Journey after enjing tea lost his memory- on 10.7.87- after being normal approached for joining- refusal on the pretext no documentary evidence produced- held illegal- pertinently where the authorities neither initiated any proceeding despite of permanent address of the army men- where after completing 22 years services- Petition became entitled for the benefit of pension and only 7 days remained in maturity of the claim- cannot be held guilty of desertion.

Held- Para 12,13 and 14

The petitioner had submitted a petition dated 31.1.1995 forwarding therewith a medical certificate dated 11.1.1995 issued by Dr. P.K. Sharma, Physician, District Hospital, Agra stating that he was suffering from psychiatric problem. This has been rejected only on the ground that no documentary proof for his suffering of the above disability since November, 1987 has been produced by the petitioner.

The petitioner was suffering from 1987 loss of memory. He got treatment in 1995 after being find by the family members in a band of Sadhus, hence rejection of petition was irrational and on irrelevant grounds.

From the aforesaid facts, it is established that the petitioner is not at fault or guilty of desertion. The respondents have proceeded in the case of the petitioner without application of mind in a very

harsh perverse and the petitioner is not a deserter.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. By means of this writ petition a prayer for a writ of certiorari has been made for quashing the letter dated 19.7.1995 (Annexure-3) to the writ petition, issued by Army Head Quarter rejecting the application of the petitioner for retire mental benefits to him after regularizing his absence from services.

2. Facts of the case are that the petitioner was enrolled in the Indian Army Ordinance Corp. on 13.10.1965. He was promoted to the rank of Havildar with effect from 22.4.1980 and was to retire on 31.10.1987 on completion of 22 years of service. He was retained in service for two more years on the recommendation of screening Board for enhanced service limit.

3. In July 1987, the petitioner while serving in the 8th Mountain Division of the Unit was granted 10 days part of annual leave with effect from 10.7.1987. On his way to home station Agra he was offered tea in the train by some civilian passengers. After consuming the said tea, the petitioner fell asleep and thereafter did not reach home.

4. On 17.10.1994, the wife of the petitioner had gone to Haridwar to attend the funeral of her uncle. She, perchance spotted the petitioner with memory less in the company of Naga Sadhus and managed to extricate her husband from their company. The petitioner was got treated as District Hospital Agra in November, 1994 and when he recovered some of his memories, the petitioner reported at the Army Ordinance Corp. Centre, Secunderabad on 14.11.1994 and stayed there for about 7 days alongwith his wife and a relative Parmal Singh who has accompanied them. They met the officers and J.C.Os. and explained to them the situation in which the petitioner was found by the wife after loss of memory while on homeward journey on annual leave w.e.f. 10.7.1987.

5. The petitioner was neither on the ground of desertion as per the provisions of section 38 AA read with regulations 376, 377, 378, 379 and 381 as contained in section 3 pertaining to the deserters in the Army Regulations, 1987 nor any action was taken by the Army under section 106 of the Army Act. Relevant regulations 376, 379 and 381 are as under:-

"376. Deserters from the Regular Army- A person subject to AA who is declared absent under AA, section 106 does not thereby cease to belong to the corps in which he is enrolled though no longer shown on its returns, and can, if subsequently arrested, be treated by court-martial for desertion. When arrested he will be shown on returns as rejoined from desertion.

379. Reports of Recovery or Rejoining of Deserters/Absentees- The officer commanding unit/ record office will ensure that all authorities who have been notified of a desertion are at once informed when the deserter/absentee returns to his unit or ceases to be liable to apprehension or the fact of his fraudulent re-enrolment in another unit is discovered. This is most important and will civil district (within Indian Union only) to

which the recovered deserter/absentees belongs:-

(a) Number and date of desertion report.
(b) Regimental number, rank and name of deserter/absentee.
(c) Home address (including police station)
(d) Date of return of deserter/absence to unit.

381. Trial of Deserters- Under normal circumstances trial by summary court martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column one of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by summary court martial by the OC of that unit when the unit shown in column one is serving counter -insurgency operation or active hostilities or Andaman and Nicobar Islands.

In no circumstances will a man be tried by summary court martial held by a CO other than the CO of the Unit to which the man properly belongs, a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs:

TABLE

Column One	Column Two
Armoured Corps Regiment	Armoured Corps Centre and School
A unit of Artillery	Regimental Centre Concerned
A unit of Engineers	Headquarters Engineeers GroupConcerned
A unit of Signals	Signal Training Centre, Jabalpur
Infantry Battalion	Regimental Centre concerned
Gorkha Rifle Battalion	Gorkha Regimental Centre concerned
A.S.C. Unit	A.S.C. Centre concerned
R.V. Group	R.V.C. Centre

This rule is not intended to limit the power of any convening officer, who at his discretion may order trial by General, Summary General or District Court Manual at any place, if such a course appears desirable in the interest of discipline

6. Section 106 of the Army Act is a mandatory provision under which a court of enquiry has to be constituted whenever any person subject to Army Act has been absent from his duty without due authority for a period of 30 days or more. If the Court of Enquiry finds that the act of absence is without due authority or without sufficient cause, then such person is declared as deserter. If a person has been declared as a deserter, it is reported by express letter in Form IAFD 925 by the officer commanding the unit to various Military and Civil authorities as given in Regulation 377 and thereafter provisions of regulation 378 of the Army Act dealing with apprehension and custody of deserters follow. If a deserter is apprehended or reports for rejoining, he is tried in accordance with the provisions of regulation 381. In the instant case, none of the procedures under section 106 or regulations 377,379 and 381 were

followed. Neither any court of enquiry was held in accordance with the provisions of section 106 AA of the Army Act nor the petitioner was arrested or tried as a deserter when he reported alongwith his wife at the Army Ordinance Corps Centre, Secunderabad. The respondents also had the home address of the petitioner as is clear from Annexure-2 to the writ petition informed by letter dated 25.2.1995 that he had been declared as deserter with effect from 21.10.1987 and he can be arrested/apprehended upto ten years of the date of desertion. It is also apparent from Annexure CA-2 and CA-3-to the Counter Affidavit, letters dated 18.3.1995, and 5.5.1995 respectively that the petitioner's wife was asked to direct her husband to report to AOC Centre, Secunderabad.

7. It is wholly in- understandable why the petitioner was not arrested when he had reported for re-joining on 14.11.1994 and explained the circumstances in which he was missing and issued letter dated 25.2.1995 declaring him to be a deserter w.e.f. 21.10.1987 why the petitioner was not proceeded with or arrested at that time when he had stayed for about 7 days there and had met and explained to the various officers and JCOs about the incident. No reason has been given by the respondents why mandatory procedure as prescribed under regulations 376 to 381 were not complied with by them at that time.

8. It is only when the petitioner requested for his retiremental benefits that Annexure CA-1, CA-2 and CA-3 were issued threatening the petitioner with dire consequences of arrest and rigorous imprisonment for 10 years.

9. It is not intentional case of desertion. The Military authorities should have been sympathetic to a member of their force who had lost his memory on home ward journey and had been found by the wife after five years in band of Naga Sadhus. She had got treated the petitioner and immediately reported thereafter to the Army Ordinance Corps Centre at Secunderabad on 14.11.1994.

10. This case can be looked from another angle i.e. the petitioner was supposed to retire on 31.10.1987 on completion of 22 years of service. He was granted annual (sic) with effect from 10.7.1987 for 10 days i.e. upto 20.7.1987. Why would a person take the risk of being declared a deserter when only 11 days of his full pensionable service remained and even otherwise also he would have retired on 31.10.1987 and would not be declared deserter remaining absent from his duty without due authority for a period of 30 years days, would not be attracted as he was to retire only after 10 days. In any case, as started earlier, this is not voluntary or intentional case of desertion from services and is a case being depend and of loss of memory. The petitioner could not be expected to report for his duty or even visit his house due to loss of memory as he was not responsible for his actions. The provisions from regulations 376 to 381 will therefore be applicable only to cases where the person is knows about the implications desertion and is conscious about his acts.

11. The petitioner had submitted a petition dated 31.1.1995 forwarding therewith a medical certificate dated 11.1.1995 issued by Dr. P.K. Sharma, Physician, District Hospital, Agra stating that he was suffering from psychiatric

problem. This has been rejected only on the ground that no documentary proof for his suffering of the above disability since November, 1987 has been produced by the petitioner.

12. The petitioner was suffering from 1987 loss of memory. He got treatment in 1995 after being find by the family members in a band of Sadhus, hence rejection of petition was irrational and on irrelevant grounds.

13. From the aforesaid facts, it is established that the petitioner is not at fault or guilty of desertion. The respondents have proceeded in the case of the petitioner without application of mind in a very harsh perverse and the petitioner is not a deserter.

14. In view of the above, the writ petition succeeds and is allowed. The impugned order dated 19th July, 1995 is quashed. The respondents are directed to pay all the retiral benefits to which the petitioner would have been entitled had he not been declared as a deserter. No order as to costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.9.2002

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

First Appeal From Order No. 1673 of 2002

Shoib Ullah and others ...Appellants
Versus
Bhartesh Chandra Jain and another ...Respondent

Counsel for the Appellant:
Sri Vishnu Gupta

Counsel for the Respondents:
Sri Sidheshwari Prasad
Sri Someshwari Prasad
Sri A.S. Dubey

Code of Civil Procedure - Order 43 r. 1 (U)- Desecriation exercised by Trail Court- deciding particular issue as Preliminary issue- being suit barred by section 67 of the Act- can not be interfered by the first Appellate Court.

Held- Para 13

The above decisions does not leave any room for doubt that the Court has discretion to decide even an issue of law with other issues and it is not obligatory on the Trail Court to decide an issue of law on which the case may be disposed of as preliminary issue. However, these authorities are absolutely of no help to the plaintiff respondent no. 1. The reason is that in this case the Trial Court exercised discretion in favour of the appellants and decided an issue of law as preliminary issue. It has also recorded a finding on that preliminary issue against the opposite party no. 1. Therefore, there can be no reason for the first appellate court to interfere in the discretion of the trial court.

Case law discussed
AIR 1991 Alld. 89
AIR 1988 Alld-299

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

1. This First appeal from order under Order 43 Rule 1 (U) of C.P.C. has been preferred against the order dated 16.7.2002 passed by VIIth Additional District Judge, Allahabad in Civil Appeal No. 27 of 2000. The facts necessary for the disposal of this Appeal are as follows .

2. The respondent no. 1 filed the Suit No. 550 of 1998 in the Court of Civil

Judge (Senior Division), Allahabad for the following reliefs :

(1) Decree for accounting of the firm M/s S.U. Builders
(2) Mandatory injunction to restrain the respondents 3 to 6 from taking any payment from respondent no. 1.

3. The present appellants contested the Suit. One of the pleas taken by them is that firm M/s S.U. Builders is an un-registered firm and therefore, the suit is barred under section 69 of the Indian Partnership Act (hereinafter referred to as 'the Act'). The Trial Court framed an issue on this plea and recorded finding on 19.2.2001 that the suit is barred by section 69 of the Act and therefore, dismissed the suit. Aggrieved by the order the plaintiff-respondent no. 1 filed a Civil Appeal No. 27 of 2001 which has been allowed by the impugned order and wherein it has been held that the suit is maintainable so far as the relief of accounting which is relief no. 1 in the plaint but is not maintainable for relief no. 2.

4. Aggrieved by it the present F.A.F.O. has been preferred by the defendants appellant. No appeal has been filed by the plaintiff against finding that suit is not maintainable for relief no. 2.

5. I have heard Sri Vishnu Gupta, learned counsel for the appellants and Sri Sidheshwari Prasad learned Senior Advocate assisted by Sri Someshwari Prasad for the plaintiff-opposite party no. 1.

6. From the arguments of the learned counsel the first question that arise for decision is whether the suit is barred by provisions of Section 69 of the Act for relief 1 as well. The bar has been provided for the suit by Clause (1) of Section 69. However, in Clause (3) there is an exception, which has been relied upon by the appellate court, the relevant portion of which is extracted below :

"Clause (3): The provisions of sub sections (1) and (2) shall apply also to a claim to set off or other proceeding to enforce a right arising from the contract, but shall not affect--

(a) the enforcement of any right to sue for the dissolution of a firm or for accounts of dissolved firm, or any right or power to realize the property of a dissolved firm, or
(b) ……..

7. After carefully considering, the above provision I am of the view that the present suit for accounting of the dissolved firm is not covered by the exception. Therefore the suit is barred by clause (1) of the Section 69 of the Act.

8. The learned counsel for the opposite parties has referred to the decision of Krishna Motor Service Vs. H.B. Vittala Kaamath (1996) 10 Supreme Court Cases page 88. In this case the apex court was considering the application for reference of dispute under section 20 of the Arbitration Act. This case, therefore, is not applicable to the facts of the present case.

9. The learned counsel for the respondent no. 1 has defended the order by going through the order and the observation of the appellate court that the issue involved both the question of fact and law. It is argued that as it is a mixed

question of fact and law therefore, it is proper that this issue be decided at the final decision of the suit and should not be decided as a preliminary issue. The learned counsel has also referred to the provisions of Order XIV Rule 2 C.P.C. and contended that it is no more mandatory on the trial court to decide an issue of law as a preliminary issue. Clause 2 of Order XIV of C.P.C. provides that notwithstanding that a case may be disposed of on a preliminary issue the court shall subject to the provisions of sub rule (2) pronounce judgment on all issue. It is contended that this clause over-ride the provision of Clause (2) of Rule 2 and it is not mandatory for the Court to decide an issue of law as a preliminary issue. That therefore, the discretion of the Court should not be interfered with in this appeal.

The learned counsel for the plaintiff opposite party no. 1 has referred to several cases on this point.

10. The first case referred to is a Full Bench decision of this Court in Sunni Central Waqf Board v. Gopal Singh Visharad (FB) reported in AIR 1991 Allahabad page 89. After considering the provisions of Rule 2 the Full Bench of this Court held that :

"Now it is discretionary for the Court to decide the issue of law as a preliminary issue or to decide it alongwith the other issues. It is no longer obligation for the Court to decide an issue of law as a preliminary issue."

11. The other case referred to is a Division Bench decision in the case of The Manager , Bettiah Estate Vs. Sri Bhagwati Saran Singh & others AIR 1993 Allahabad page 2. It was observed that :

"An issue of law can be decided as a preliminary only where it is such that its decision does not necessitate investigation into facts and it relates either to the jurisdiction of the Court or to the suit being barred under any prevailing law, and that, in the opinion of the court the decision of the issue will result in the decision of the whole or apart of the suit. The discretion in this regard must always be exercised on the basis of sound judicial principles. However, even if an issue of law can be decided as a preliminary issue as aforesaid the court is not always bound to decide it as a preliminary issue and can in its discretion, postpone its decision also along with other issues whether of law or fact."

12. The other case referred to is M/s Ram Babu Singhal vs. M/s Digamber Prasad Kirti Parshad AIR 1988 Allahabad 299. It was observed in this case that :

"However, when the Court comes to the conclusion that the question of jurisdiction of the court depends upon the detailed evidence of the parties which are almost identical with the matter which relates to other issues in the suit and the court comes to the conclusion that this could not be decided as a preliminary issue it cannot be said that the court committed any error of jurisdiction or illegality. There is nothing in s. 21 which makes mandatory for the Court to decide the question of jurisdiction as a preliminary issue."

13. The above decisions does not leave any room for doubt that the Court has discretion to decide even an issue of

law with other issues and it is not obligatory on the Trial Court to decide an issue of law on which the case may be disposed of as preliminary issue. However, these authorities are absolutely of no help to the plaintiff respondent no. 1. The reason is that in this case the Trial Court exercised discretion in favour of the appellants and decided an issue of law as preliminary issue. It has also recorded a finding on that preliminary issue against the opposite party no. 1. Therefore, there can be no reason for the first appellate court to interfere in the discretion of the trial court. The discretion of the trial court cannot be given to the first appellate court. Therefore, the above decisions are of no help to the respondent no. 1. It is no doubt true that had the trial court refused the request to decide the above issue as preliminary issue it would not have been proper for me to interfere in its discretion. Therefore, it was also not proper for the first appellate court to interfere in the exercise of the discretion.

14. In this connection I may also refer to the Full Bench decision of this Court in the case of Babu Ram Ashok Kumar & another vs. Antarim Zila Parishad AIR 1964 Allahabad page 534. This case has also been referred by the learned counsel for the respondent no. 1. It was observed in this case that :

"A court of appeal would not interfere with the exercise of discretion by the Court below, if the discretion has been exercised in good faith, after giving due weight to relevant matters and without being swayed by irrelevant matters. If two views are possible on the question, then also the Court to appeal would not interfere, even though it may exercise discretion differently, were the case to come initially before it. The exercise of discretion should manifestly be wrong."

15. A perusal of the judgment of the appellate court show that there was no ground for interference by the first appellate court and there is no finding recorded that the trial court had not exercised jurisdiction in good faith and after giving weight to the relevant matters. Therefore, the first appellate court should not have interfered in the discretion of the trial court to decide the above issue as a preliminary issue.

16. Another reason for the same is that the suit is for accounting which involved recording of lot of evidence and may take valuable time of the Court. If after recording of the evidence it is found that the suit is barred by section 69 of the Act the entire exercise will be in vain. Therefore, the trial court properly exercised its jurisdiction to decide the above question as preliminary issue and the first appellate court has erred in interfering the same.

17. The finding of the first appellate court that it is a mixed question of fact and law is also totally mis-conceived. The learned counsel for the opposite party no. 1 has referred to this finding, but could not support the finding and to demonstrate as to how it is a mixed question of fact. The question whether the suit for accounting against the firm and the partners where the partnership is un-registered is a pure question of law. It is admitted that the partnership is unregistered.

18. In my opinion, the trial court has therefore rightly exercised jurisdiction in deciding the above question as a

preliminary issue. It has also rightly held that the suit is barred by section 69 of the Act.

19. The First Appeal From Order is accordingly allowed and the order of the appellate court is quashed and that of the trial court is restored.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.9.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 414 of 2002

Prem Pal Singh ...Petitioner
Versus
Additional Director of Education and others ...Respondents

Counsel for the Appellant:
Sri V.K. Singh
Sri G.K. Singh
Sri R.N. Singh

Counsel for the Respondents:
Sri M.K. Gupta
Sri B.B. Paul
Sri Nandlal Singh Yadav
Dr. R.G. Padia
S.C.

U.P. Intermediate Education Act- 1921- Chapter III- Regulation- 55-61 read with section 16- Transfer of Lecturer from one aided institution to another - competent authority granted permission by putting condition concealment of fact, fraud if found order can be revoked- in column 18 and 19 purposely given false information that no requisition has been send to the board- revocation of permission held- proper needs no interference.

Held - Para 11

When particular information are solicited in a prescribed proforma, it is presumed that only correct and truthful information are to be sent. If correct information's are not sent, the consideration of an issue on the basis of incorrect information is likely to be vitiated.

Constitution of India- Article 226- Service law- Natural justice- permission for transfer of the appellant from one Institution to another- granted pursuant to the particulars found false- during course of enquiry Appellant made protest by several times- permission revoked- Principle of natural justice not violated.

Held- para 15

Appellant was, thus, aware of the enquiry and has also made his protest by the aforesaid letter. However, in view of the fact that the power of cancellation of transfer was exercised by the Additional Director of Education on the basis of stipulation reserved in the transfer order dated 30th June, 2001 that if any fact is found incorrect the transfer may be cancelled and further the Additional Director of Education has not taken into consideration any other material apart from information given by petitioner in the transfer application, we are not persuaded to accept that there was any violation of principle of natural justice in passing the cancellation order. The action was being taken on the basis of information submitted by the appellant in the transfer application which was found to be untrue. Before the learned Single Judge or before us, the appellant has failed to prove that information given in the transfer application in columns no. 18 and 19 were correct information. The observance of principle of natural justice vary from fact situation of each case. Thus, we are of the view that order dated 24th November, 2001 is not vitiated on account of the aforesaid submission.

Case law discussed
AIR 1989 SC-997

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

1. Heard Sri R.N. Singh, Senior Advocate assisted by Sri V.K. Singh, Advocate for the appellant, Dr. R.G. Padia, Senior Advocate appearing for respondent no. 5 and learned Standing counsel.

2. This special appeal has been filed by the appellant challenging the judgment and order dated 10th April, 2002 of learned single Judge in Writ petition no. 40150 of 2001 by which the writ petition filed by the appellant has been dismissed.

3. Facts giving rise to this appeal, briefly stated, are appellant has been selected by U.P. Secondary Education Service Selection Board, Allahabad (hereinafter referred to as the Board) for the post of Principal in Budhsen Prem Chandra Inter College, Bulandshahr, where he joined on 22nd February, 1999 and was subsequently confirmed. Gopi Ram Paliwal Inter College, Aligarh (hereinafter referred to as College) is a recognized institution where the post of principal fell vacant on 30th June, 1989 due to retirement of principal. The requisition of the post of principal of the college was sent to the Board for filling the post by direct recruitment. The Board published the vacancy of principal of the college on 26th December, 1995 but selection could not take place in pursuance of the said advertisement. Subsequently again the Board published the vacancy which was published in the newspaper 'Amar Ujala' on 14th August, 1998. Various persons held the post of principal on adhoc basis up to 30th June 2001 when the last incumbent, Sri Devendra Singh retired. The advertisement made in the year 1998 was challenged by the then adhoc principal, Sri B.K. Paliwal, by filing a writ petition in this court. Devendra Singh who lastly held the post on adhoc basis has also filed writ petition no. 44128 of 1999 challenging the advertisement made in the year 1998 which petition was dismissed by this Court in February, 2001.

4. The appellant who was working at Bulandshahr made an application for his transfer to the college in February, 2001. The committee of management of both the colleges also passed resolution showing their concurrence to the proposed transfer. The application of transfer was made in prescribed proforma in accordance with provisions of Regulations 55 to 61 of Chapter-III of U.P. Intermediate Education Act, 1921. On the said application, an order was passed by Additional Director of Education dated 30th June, 2001 transferring the petitioner from Budhsen Prem Chandra Inter College, Bulandshahr to the college. The transfer order also contemplated that if it comes into light that concerned principal/regional authorities have obtained transfer by concealment of any fact then the Directorate will be free to cancel the transfer order. Mahendra Singh who was senior most lecturer of the college filed a writ petition in this Court challenging the said transfer order dated 30th June, 2001 and also filed complaint before the education authorities. After receiving the complaint from Mahendra Singh, the Additional Director of Schools and Deputy Director of Education submitted their reports to the Additional Director of Education. The District Inspector of

Schools in his report dated 19.9.2001 stated that requisition for vacant post of principal was sent in the year 1989 to the Secretary of the Board and the post was advertised by the Board in the year 1995-96. Again the post was advertised by the Board on 14th August, 1998. It was stated that from 1989 to 30th June, 2001 various senior teachers functioned as principal in pursuance of the interim order granted by the High Court. The appellant also wrote letter to the District Inspector of Schools praying that no action be taken in the matter with regard to transfer of the appellant. The District Inspector of Schools also wrote a letter to the Manager of the college asking report with regard to complaint made by Mahendra Singh against the transfer dated 30th June, 2001. The Manager submitted a reply to the letter of the District Inspector of Schools. The Additional Director of Education after receiving the various reports passed the order dated 24th November, 2001 cancelling the order dated 30th June, 2001 transferring the petitioner in the college. It was stated in the letter that after enquiry it has come to notice that the said transfer was obtained by concealment of facts, the requisition for the post of principal of the college was sent to the Board but in the transfer application it was mentioned that no requisition has been sent to the Board. In view of the above, the transfer order was cancelled. The appellant filed writ petition challenging the aforesaid order dated 24th November, 2001. The writ petition has been dismissed by learned single Judge vide its judgment dated 10th April, 2002 against which present special appeal has been filed.

5. Sri R.N. Singh, Senior Advocate, appearing for the appellant in support of this appeal has raised following submissions :-

(i) The fact that requisition for the post of principal was sent to the Board and the post was advertised by the Board was not an impediment in transfer of the appellant and the aforesaid fact was not relevant fact for cancellation of transfer of the appellant. Sri R.N. Singh has placed reliance on three judgments of learned single Judges of this Court for the aforesaid preposition, namely, judgment dated 18th April, 1996 in Writ Petition No. 12037 of 1996 **(Smt. Puspha Sharma vs. Director of Education and others)**, judgment dated 22nd April, 1996 in Writ Petition No. 14248 of 1996 (**Darshan Singh vs. State of U.P. and others**) and 2002(1) E.S.C. 214; **Narendra Kumar vs. State of U.P. and others**.

(ii) In the transfer application, which was filed seeking transfer, it was not the appellant who concealed any fact and even if any fact was concealed, it was by the Management for which appellant cannot be held guilty. Further there was no concealment in column 19 of the transfer application.

(iii) Even though appellant was not entitled for oral hearing before the authorities, he was entitled for notice and opportunity before cancelling his transfer. The counsel contended that appellant's submission was not to the effect that he was entitled for oral hearing.

6. Dr. R.G. Padia, Senior Advocate appearing for respondent no. 5 contended that transfer order dated 30th June, 2001 having been obtained by concealment of facts, the same was rightly cancelled by

Additional Director of Education. Dr. Padia submitted that since the order of cancellation was passed on the information submitted by appellant himself, hence there was no occasion to give any opportunity of hearing to the appellant before passing the order of cancellation. It was contended that there was clear concealment of fact in the transfer application which was duly signed by the appellant himself and the appellant cannot be heard in saying that he never concealed a fact. In the facts of the present case, no opportunity of hearing was required to be given to the appellant.

7. The first and second submission being interrelated, are being considered together. The submission of Sri R.N. Singh, Senior Advocate is that transfer of a principal is fully permissible even if post of principal has been advertised by the Board and for this submission he has placed reliance on three judgments of this Court as referred above. Sri R.N. Singh very fairly stated that judgment of this Court in **Narendra Kumar's** case (supra) has been referred to Larger Bench by another Hon'ble Single Judge of this Court which is pending consideration. From the submissions made before the learned single Judge in the writ petition, it appears that counsel for respondents proceeded with the assumption that even though advertisement of vacancy by the Board may not be an impediment in filling the post by transfer but transfer can be cancelled if it was obtained by concealment of fact. Thus it appears that submission raised by counsel for the appellant in this appeal that transfer is permissible even if post has been advertised by the Board has not been seriously challenged. In view of this, we are not inclined to enter into or decide the question as to whether advertisement of vacancy by the Board puts any fetter on filing of the post by transfer. Further this appeal can be decided on other questions involved in the appeal. Now the submission of counsel for the appellant that information regarding requisition of vacancy to the commission was not relevant fact nor its non disclosure in the transfer application will have any effect and the order of cancellation founded on this ground cannot be sustained is to be examined. The transfer order dated 30th June, 2001 contains a clear stipulation to the effect,

"यदि संबंधित प्रधानाध्यापक/प्रधानाचार्य क्षेत्रीय अधिकारियों द्वारा कोई तथ्य छिपाकर स्थानान्तरण करने की बात प्रकाश में आयी तो निदेशालय इस स्थानान्तरण आदेश को निरस्त करने हेतु पूर्ण स्वतंत्र होगा ।"

8. Copy the transfer application is on the record as Annexure CA-7 to the counter affidavit of Mahendra Singh. The transfer application is in prescribed proforma, which contain various columns requiring giving of various details for purposes of considering the application of transfer. The various columns of the transfer application solicit various kind of information for purposes of effectively considering the transfer application. The provisions of Section 16 of U.P. Secondary Education Service Commission and Selection Boards Act, 1982 provides as under :-

"16. Appointment to be made only on the recommendation of the Board*-(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but subject to the provisions*

21-B, 21-C, 21-D, 33, 33-A and 33-B, every appointment of a teacher, shall, on or after the date of commencement of the Uttar Pradesh Secondary Education Service (Commission and Selection Boards (Amendment) Act, 1992, be made by the management only on the recommendation of the Board.

Provided that in respect of retrenched employees, the provisions of Section 16- Executive Engineer of the Intermediate Education Act, 1921, shall mutates mutandis apply.

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

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

9. The second proviso to Section 16 only provides that appointment of a teacher by transfer from one institution to another may be made in accordance with regulations made under clause (c) of sub section (2) of Section 16-G of U.P. Intermediate Education Act. Regulations 55 to 61 are the regulations framed under section 16-G as well as Regulations 55 to 61 only provide that post can be filled up by transfer. Provisions of Section 16 as well as aforesaid regulations do not give any right in a teacher to claim transfer except that he can apply for transfer. Transfer can be sought by a teacher in accordance with regulation but the said transfer can be effected only on recommendation of committee referred in Regulation 59. Regulations 55 to 61 do not expressly provide the criteria on which transfer application is to be considered except certain grounds in which transfer can not be made. For example, Regulation 61 sub clause (2) provides that transfer is permissible to only from one aided institution to another aided institution .and from one unaided institution to another unaided institution. If a teacher gives an application for transfer from one unaided institution to an aided institution, the application is liable to be rejected. Further regulation 55 provides that L.T. grade teacher can be transferred even outside the region. The various columns in prescribed proforma of transfer seek required information for effectively considering the application of transfer of a teacher. In the counter affidavit of respondent no. 5 two letters of Secretary of the Board have been enclosed as Annexure CA-3 and 4. Annexure CA-3 to the counter affidavit is letter dated 26th June, 1999 Secretary of the Board of Additional Director of Education, Directorate at Allahabad which states that Secretary has been directed to state that no objection from selection Board be obtained before effecting proceeding of transfer with regard to those posts of Principal which have been advertised by the Board. Another letter Annexure CA-4 to the counter affidavit is letter dated 30th April, 2001 of Secretary of the Board which is again on the same subject regarding obtaining of no objection certificate regarding post of principal, lecturer and L.T. grade teachers. The letter states that as far as possible after sending requisition for a post transfer be not made and the if any unavoidable circumstances transfer is to be made then permission of Board be taken. The Secretary of the Board having informed the Additional Director of Education by the aforesaid letter seeking no objection, it appears that the column in

the transfer application to the effect that as to whether the requisition of the post has been sent to the Selection Board is in accordance with the aforesaid letter. In view of the above, it cannot be said that column no. 19 in the transfer application which requires an information as to whether the requisition has been sent to the Commission is not a relevant information. As observed above, we have not entered into and are not deciding the question as to whether after requisition the transfer can be made or not made since in this appeal, the counsel for respondents has proceeded on the premises that transfer can be made even after sending of the requisition and advertisement of the vacancy. Thus the column no. 19 cannot be said to be irrelevant for considering the claim of transfer of a teacher. Now looking to column nos. 18 and 19 of the transfer application, it is not disputed that against the said columns it was mentioned that requisition has not been sent. Sri R.N. Singh, Senior Advocate tried to explain the aforesaid column no. 19 by saying that since the management was under impression that vacancy has arisen on 30th June, 2001 by retirement of adhoc principal and since thereafter no requisition was sent, the said information was given by the Manager. When particular information are solicited in a prescribed proforma, it is presumed that only correct and truthful information are to be sent. If correct information are not sent, the consideration of an issue on the basis of incorrect information is likely to be vitiated. It is not disputed that Sri Devendra Singh who retired on 30th June, 2001 was only an Adhoc principal and by retirement of adhoc principal the substantive vacancy do not arise. The U.P. Secondary Education Service Commission and Selection Service Boards Rules, 1998, Section 2 (e) defines vacancy as follows :-

"2 (e) Vacancy means a vacancy arising out as a result of death, retirement regarding dismissal or removal of a teacher or creation of new post or appointment or promotion of the incumbent to any higher post in a substantive capacity."

10. Vacancy thus will arise only when a teacher holding the post in substantive capacity retires. In the present case, it has not been disputed that substantive vacancy arorse on the post of Principal in the year 1989, thus the relevant column which required the reason of vacancy and the date meant cause of vacancy and the date. Thus information in column no. 18 which pertain to cause and date of vacancy against which 30th June, 2001 was filled and information in column no. 19 were incorrect. There is no denial that the said prescribed proforma has been signed by the appellant. Prem Pal Singh on 14.2.2001. According to Regulation 55, the process of transfer starts by making application by a teacher. Application will initiate only through the teacher concerned. Thus all information which are given in the application has to be basically imputed to the teacher concerned. There is no force in the submission of counsel for the appellant that the aforesaid information were given by the Management for which appellant cannot be held responsible. Under Regulation 55, it is the teacher concerned who can seek transfer, hence all the information is to be imputed to the teacher concerned and he is responsible for the same.

11. We have found that there was concealment of information regarding date of the vacancy and the concealment of fact that requisition was already sent of the vacancy of the post of principal in the transfer application, which were facts relevant for consideration of transfer. We have already noted that transfer order dated 30th June, 2001 clearly stipulated that if any information given in the transfer application is found to be incorrect, the Directorate is free to cancel the said transfer. In view of the aforesaid , the authorities were fully entitled to invoke the aforesaid clause in the transfer order and cancel the transfer order when they found that relevant information were concealed in the transfer application.

12. The question as to on what ground an administrative order can be cancelled has engaged attention of this Court and Apex Court in several cases. The order approving the transfer of the appellant is an administrative order passed in exercise of jurisdiction given to competent authority under section 16 of U.P. Act No. V of 1982 as well as Regulations 55 to 61 of Chapter III of Regulations framed under U.P. Intermediate Education Act, 1921. The Apex Court had occasion to consider the question as to on what ground permission granted under Section 15 of U.P. Urban Planning and Development Act, 1973 can be cancelled. The Apex Court in ***State of U.P. and others vs. Maharaja Dharmander Prasad Singh etc.***, AIR 1989 SC 997 held in paragraph 23 B as under :

***"23 B**. Indeed, the submissions of Sri Thakur on the point contemplate the exercise of the power to cancel or revoke the permission in three distinct situations. The first is where the grant is itself vitiated by fraud or misrepresentation on the part of the grantee at the time of obtaining the grant. To the second situation belong the class of cases where the grantee, after the grant violates the essential terms and conditions subject to which the grant is made. In these two areas, the power to grant must be held to include the power to revoke or cancel the permit, even in the absence of any other express statutory provisions in that behalf."*

13. The cancellation of administrative order, which was passed on concealment of relevant facts, has always been connected to with the authority. Furthermore, in the present case in the order dated 30th June, 2001 there was clear stipulation that in the event of any fact being found to be incorrect, the authorities have right to cancel the order.

14. From the aforesaid discussions, it is clear that the information regarding requisition of vacancy to the Board was relevant information, which was concealed in the transfer application. No error was committed by the authorities in cancelling the said transfer on the aforesaid ground. The transfer order itself reserved the right with the authorities to cancel the same if it was obtained by concealment of any fact. Thus we do not find any error in the order cancelling the transfer. Learned single Judge in his judgement has found that it was a clear case of giving incorrect information. We are of the considered opinion that learned single Judge rightly decided the issues and no error was committed by the learned single Judge in holding that correct information was concealed by the petitioner (appellant).

15. The last submission of the counsel for the appellant is with regard to violation of principle of natural justice. The counsel for the appellant contended that even though oral hearing was not required but the petitioner (appellant) was entitled for notice before cancellation. From the facts brought on the record of the writ petition, it appears that after filing of the complaint by respondent no. 5 reports were called by Additional Director of Education from the education authorities. The District Inspector of Schools has also called for report from the management of the college to which management has also replied. The appellant was also fully aware of the complaint and the enquiry which was going on the aforesaid complaint. This fact is proved from the letter of the appellant himself dated 8th September, 2001 copy of which has been annexed as Annexure CA-II to the counter affidavit of respondent no. 5. The appellant wrote to the District Inspector of Schools on 8th September, 2001. The aforesaid letter also takes notice of the fact that respondent no. 5 has sent complaint dated 17th August, 2001 to the Additional Director of Education. In the letter, the appellant also refuted the grounds mentioned in the complaint of Mahendra Singh and has stated that his transfer has been made after following the procedure prescribed. The appellant was, thus, aware of the enquiry and has also made his protest by the aforesaid letter. However, in view of the fact that the power of cancellation of transfer was exercised by the Additional Director of Education on the basis of stipulation reserved in the transfer order dated 30th June, 2001 that if any fact is found incorrect the transfer may be cancelled and further the Additional Director of Education has not taken into consideration any other material apart from information given by petitioner in the transfer application, we are not persuaded to accept that there was any violation of principle of natural justice in passing the cancellation order. The action was being taken on the basis of information submitted by the appellant in the transfer application which was found to be untrue. Before the learned single Judge or before us, the appellant has failed to prove that information given in the transfer application in Columns no. 18 and 19 were correct information. The observance of principal of natural justice vary from fact situation of each case. Thus, we are of the view that order dated 24th November, 2001 is not vitiated on account of the aforesaid submission.

16. In view of what has been said above, we do not find any substance in any of the submissions of counsel for the appellant. No error has been committed by the learned single Judge in dismissing the writ petition of the appellant.

17. This special appeal has no merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEP. 26, 2002.

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

Civil Misc. Writ Petition No. 40307 of 2001

Sanjay Bhatia and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Amreshwar Pratap Sahi
Sri Govind Kumar Singh

Sri R.N. Singh

Counsel for the Respondents:
Sri Ravi Kant
Sri L.M. Singh
Sri P. Padia
S.C.

Constitution of India, 226-Public Interest litigation- Disputed Plot- out for setting up Industry- sub tenant started installing Petrol pump- against public interest- highly inflammable Petrol Product- an obnoxious trade- admittedly seven petrol pumps are already gaving on the same vicinity- restriction imposed in lease- only with regards to transfer mortgage, sub letting, assignment or relinquishment of the demised property- proposed project being very global, and International standard being in better interest of Government. Mr. Tandon the concerned minister committed no error in forwarding the same- No malafide action can be attributed.

Held- Para 12

The restriction is only in regard to transfer, mortgage, sub -letting, assignment or relinquishment of the demised property and also the embargo is created only with regard to user of the plot in clause (g) of the present lease deed- on carrying on any obnoxious trade or business or its user for any religious purpose. Sri Ravi Kant is also justified in his submission that the opinion of Director of Industries that the change in the land user cannot be permitted since the site in question is meant for industry, is only an individual opinion of the officer and cannot override or abrogate or supersede the terms of the lease. It appears to us that the project, in question, shall be of a very global and international standard that shall be in the interest of the State and it would be fit and proper for the State Government to accept such proposal and as such, Mr. Tandon, the concerned Minister, on the representation of a delegation of Indian Industries Association led by Sri Anil Pandey, its General Secretary, forwarded the matter. In such circumstances, no malafide action can be attributed on the basis of facts on record.

Case law discussed:
2002(2) SCC 465, 2000(7) SCC-552, AIR 1987 SC-294, AIR 1979 SC-49, AIR 1976 SC-1766, 2002 (2) SCC-333, 2001 (4) SCC-469, 2001 (9) SCC-297

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

1. In the instant writ petition, stated to be a 'Public Interest Litigation', the petitioners seek to restrain the respondents from raising construction/installing a Petrol Pump on plot no. 5-A Government Industrial Estate, Kalpi Road, Kanpur (hereinafter referred to as 'the plot in dispute') (in pursuance of direction of Mr. Lalji Tandon, the then Urban Planning and Development Minister, State of U.P. and consequential Government order dated 28.4.2002). The petitioners have claimed to have filed this petition as 'Public Interest Litigation'.

2. The case of the petitioners, in brief, is that the plot, in dispute, was initially leased out to one Girish Chandra Poddar. After the death of Sri Poddar, his heirs could not develop the land for the purpose for which it had been leased out. Therefore, the proposal of the respondent no. 7 for sub letting the plot in dispute to Sri B.D. Agarwal was considered by the District Industries Centre. It is mandatory under the terms and conditions of the lease deed that the plot, in dispute, can be utilized only for the purpose of setting up of an industry and the same cannot be used for commercial purposes. It is alleged that the respondent no. 7 made a proposal for setting up an industry to

manufacture certain petroleum products. District Industries Administration permitted negotiation of sub letting of the plot in dispute and accordingly, a lease deed was executed on 20.7.1999, contained in Annexure 3 to the writ petition. It stipulates that no charge- either by way of transfer or any conveyance thereafter shall be done without the previous consent, in writing, of the Industrial Estate Administration. The petitioners allege that the respondent no. 7 is bound by the aforesaid terms of the lease deed. That apart, it is alleged that a hire purchase agreement was entered into by the respondent no. 7 with the Director of Industries, U.P., contained in Annexure 4 to the writ petition, which contains a clause that the land shall not be utilized for carrying on any business of dangerous, noisy or offensive nature and that the property shall neither be sold, mortgaged assigned nor otherwise conveyed nor transferred except with the previous permission, in writing of the Industrial Estate Administration. The petitioners allege that the parties are bound by the agreement, the respondent no. 7, it is alleged, in collusion with respondent no. 8. agreed for getting the Petrol Pump installed despite the fact that there was no such proposal before the District Industries Department. Respondent no. 7 has been able to procure the impugned letter dated 27.8.2000, contained in Annexure 5 to the writ petition, from the concerned Minister directing the Director, Industries Department to give permission and consent for the conversion of the plot, in dispute, for commercial use. The petitioners claim that the proposed Petrol Pump is against public interest, inasmuch as, trading in highly inflammable petrol product is an obnoxious trade and is seriously hazardous to the people, residing in the locality.

3. Respondent no. 7 is main respondent in the present case. It is the case of respondent no. 7 that the petitioners have been able to unnecessarily stall the project of establishment of a world class Automobile Workshop-Petrol Pump within the industrial estate at Kanpur Nagar by obtaining a stay order from this Court. The petitioners are mere busy bodies and it is sheer misnomer to label the present petition as 'Public Interest Litigation'. It is alleged that the petitioners have been set up by the trade rival of respondent no. 7, namely, M/s Kishori Lal Jogendra Lal. Annexure CA-7 to the counter affidavit filed by respondent no. 7 is the objection filed by the aforesaid rival firm. Moreover, petitioner no. 1 resides at a place which is more than 56 kilometers away from the plot in dispute. Same holds true for petitioner no. 2 as well. He resides in House no. 118/241 Kaushalpuri, Kanpur Nagar which too is about 6 kms away from the plot in dispute. The petitioner no. 2 has wrongly described residential address as 123/1-A, which actually is the address of the rival firm, namely , M/s Kishori Lal Jogendra Lal. This clearly shows the nexus of the petitioners with the rival firm. At least seven or eight petrol pumps already exist in the concerned area. If these petrol pumps do not cause any danger to the ecology, there is no reason for denying the respondent no. 7 to install petrol pump.

4. Heard Sri R.N. Singh, learned Senior Advocate, assisted by Sri A.P. Sahi on behalf of the petitioners and Sri Ravi Kant, learned senior Advocate

assisting by L.M. Singh on behalf of the respondent no. 7.

5. Sri R.N. Singh, learned Senior Advocate strenuously urged that if the respondent no. 7 is allowed to install petrol pump in the concerned locality, the entire ecological balance will be disturbed and the residents of the locality will be the worst suffers. He, therefore, claimed that the instant is 'Public Interest Litigation'. In support of his contention, he cited two decisions of the apex court in ***Chairman Railway Board V. Chandhima Das***-(2000) 2 SCC-405 and ***M.S. Jayaraj Vs. Commissioner of Excise***-(2000) 7SCC-552. Sri Singh further contended that in order to uphold the cleanliness in public life and rule of law, the bar of locus standi is not as rigorous as in other petitions of adversial nature. In support of this contention he relied upon paragraphs 50 and 51 of the Report in ***Nilangekar Patil V. Mahesh Madhav Gosavi***- AIR 1987 SC-294, Sri Singh vehemently urged that the present is a case of malice in law and, therefore, he urged that the impugned action on the part of the State Government deserves to be deprecated by this court. In support of this contention, he drew our attention to the law laid down by apex court in ***Smt. S.R. Venkataraman V. Union of India and another***-AIR 1979 SC-49 and ***The Regional Manager and another Vs. Pawan Kumar Dubey***- AIR 1976 SC-1766.

6. In reply to the allegation of the respondent no. 7, in the counter affidavit, that 7 or 8 petrol pumps are already existing in the locality, Sri Singh pointed out that the other existing petrol pumps are outside the vicinity of the Industrial Estate and not within the Industrial Estate. Thus, the plea of the respondent no. 7 to the contrary is misconceived. Moreover, according to Sri Singh, installation of petrol pump is contrary to the policy and guidelines framed by the State Government as per Government orders dated 18.2.2001 and September 2001, contained in Annexure R.A. 1 and R.A. 4 respectively to the Rejoinder Affidavit. A bare perusal of these Government orders will reveal that they clearly prohibit the change of user of the land from industrial to commercial purpose. Precisely, because of this reason, Sri Singh asserted that till date, there does not exist any permission of the Director of Industries, or for that matter, any other officer of the Industries Department. Sri Singh alleged that the respondent no. 7, therefore, contacted Sri Lalji Tandon, Minister who used his good offices to pass an order in favour of the respondent no. 7 in utter breach of the provisions of law. Sri Singh vehemently urged that the action of the State Government in proceeding to accord permission to the respondent no. 7 to install a petrol pump is patently without jurisdiction. It is a glaring example of abuse of power having been exercised arbitrarily and maliciously at the behest of the concerned Minister. Sri Singh drew our attention to the contents of paragraphs 5 and 6 of the counter affidavit of Sri O.P. Srivastava of Industries Department wherein it has been averred that permission and consent, in writing, are sine qua non for change of user of the land. So far as the case in hand is concerned. Sri Singh asserted that a bare perusal of the counter affidavit on behalf of the Director of Industries reveals that no such permission was ever granted by the Director of Industries or the Industries Department. The impugned order has been passed straightaway without at all following the procedures prescribed by

law. Sri Singh, therefore, strenuously urged that the impugned orders deserve to be quashed and the petition deserves to be allowed with costs.

7. Sri Ravi Kant, learned Senior Advocate appearing on behalf of respondent no. 7, on the other hand, submitted that by means of the present petition, in insidious attempt has been made to frustrate the ambitions project of establishment of an automobile workshop- petrol pump of repute within the industrial estate at Kanpur Nagar. He vehemently urged that the petitioners are mere busy bodies and the instant is not, at all, a "Public Interest Litigation'. According to Sri Ravi Kant, the petitioners are mere proxies, having been set up by M/s Kishori Lal Jogendra Lal- a rival firm of the respondent no. 7. Sri Ravi Kant, learned Senior Advocate submitted that the gravamen of averments made in the writ petition is breach of provisions of the lease deed rather than disturbance of ecological equilibrium. The main plank of attack of the petitioners is that the respondent no. 7 proposes to use the land in dispute for commercial purposes rather than industrial purposes. However, on the own showing of the petitioners, there are seven or eight petrol pumps in the vicinity, Sri Ravi Kant stressed on the word 'vicinity' and pointed out that the word 'vicinity' means 'surrounding' or 'nearness'. Thus, if seven or eight petrol pumps in vicinity do not cause any harm to the ecology of the area, it passes one's comprehension as to how the proposed petrol pump would ruffle the ecological equilibrium. Thus, the petitioners have made sweeping and bald allegations.

8. Sri Ravi Kant, in the forefront, contended that by no stretch of imagination can instant petition be said to espouse any public cause. On the other hand, in real sense, it is private interest litigation. To support his view, Sri Ravi Kant placed reliance on paragraphs 77, 78, 79,80,81,82,88,97 and 99 of the latest decision of the apex court in ***Balco Employees' Union (Regd.) V. Union of India and others***- (2002) 2 SCC and he dubbed the present litigation as private interest litigation. Sri Ravi Kant drew our attention to the address of petitioner no. 2, mentioned in the writ petition, which is that of M/s Kishori Lal Jogendra Lal , the person who had filed the objection. He, therefore, contended that this itself is sufficient to establish the nexus between the petitioners and M/s Kishori Lal Jogendra Lal, which is too close and patent. It was also contended by Sri Ravi Kant that it has not been averred by the petitioners, anywhere, that they suffer any injury or that any of their interests is being prejudiced. In this behalf, Sri Ravi Kant placed reliance on the decisions in ***T.N. Civil Supplies Corporation Workers' Union V. T.N. Civil Supplies Corporation Ltd. and others***- (2001) 4 SCC-469; ***Vinay Kumar V. State of U.P.*** (2001) 4 SCC-734 ***Union of India V. Alok Kumar Dass***- (2001) 9 SCC-297. According to Sri Ravi Kant, the decisions cited by Sri R.N. Singh, learned Senior Advocate on behalf of the petitioner are of no assistance to the petitioner and, they, in fact, on the other hand support the case of the respondent no.7.

9. Sri Ravi Kant, next contended that the substantive/parent document governing the relations between Kanpur Nagar Maha Palika and the State Government through the Director of

Industries, contained in Annexure-CA-7 to the counter affidavit of respondent no. 7. Its prefatory part recites that it is the Governor of Uttar Pradesh who is the lessee. Thus , the land vests in the State Government. Clauses (d) (g) and (k) of the aforesaid document authorize the user of the demised plot for workshop. The term 'industrial estate' in clauses (d) and (k) has been defined inclusively and not exclusively. Thus, it expands the meaning of the term 'industrial estate'. 'Industrial estate' therefore, includes any ancillary or any other industry which has connection with the industries in the State.

10. Sri R.N. Singh, learned Senior Advocate appearing on behalf of the petitioners seriously refuted the aforesaid assertion and contended that it is not the aforesaid lease deed, but the lease deed executed between the respondent no. 7 and the Director of Industries which is material.

11. Sri Ravi Kant, learned Senior Advocate appearing on behalf of the respondent no. 7 replied that even if the aforesaid version of Sri Singh is accepted, the same would not alter the complexion or the rules of the game. According to Sri Ravi Kant, reliance has been placed by Mr. R.N. Singh on the counter affidavit of Sri O.P. Srivastava on behalf of the Director of Industries. Sri Ravi Kant pointed out that in his counter affidavit, Sri O.P. Srivatava placed reliance on clause (h) and (i) of the lease deed executed between the predecessor-in-interest of the respondent no. 7 and the Director of Industries. There is absolutely no material difference between the two. Neither clause (k) nor clause (g) nor clause (i) imposes any restriction on change of user. The restriction is only in regard to transfer, mortgage, subletting, assignment or relinquishment of the demised property. The only embargo regarding user of the plot in clause (g) of the present lease deed is on carrying on any obnoxious trade or business or its user for any religious purpose. As regards the opinion of the Director of Industries that the change in the land user cannot be permitted since the site in question is meant for industry. Sri Ravi Kant submitted that it is only the individual opinion of an officer and it cannot trench upon, abrogate or supersede the terms of the lease. Sri Ravi Kant lastly contended that the project , in question, is an ambitious project and the State Government would be gaining and is anxious to have it located in this State. Mr. Tandon, the concerned Minister acted accordingly and no exception can be taken, much less any mala fide attributed to such an action. Mr. Tandon has not showered any patronage on an individual rather it goes to a public body/corporation. Sri Ravi Kant vigorously urged that it is easy to allege mala fide but too difficult to prove it. The standards of proving mala fide are, indeed, very rigorous. In support of this contention, he relied upon the decisions of the summit court in ***Express Newspapers Pvt. Ltd. and others vs. Union of India and others***- AIR 1986 SC-872, ***E.P. Royappa V. State of Tamil Nadu and another*** -AIR 1974 SC-555 and ***S. Pratap Singh Vs. State of Punjab***- AIR 1964 SC-72, Sri Ravi Kant, therefore, vehemently urged that the writ petition being devoid of any merit and substance, deserves to be dismissed and the petitioners are liable to be saddled with heavy and exemplary costs.

12. Having heard learned counsel for the parties and gone through the entire

materials, placed before us, we are of the view that it cannot be said that the submissions of Sri Ravi Kant, learned Senior Advocate is without substance. The submission of Mr. Ravi Kant that neither clause (k) nor clauses (g), (h) and (i) imposes any restriction on change of user appears to us to be correct. The restriction is only in regard to transfer, mortgage, sub-letting, assignment or relinquishment of the demised property and also the embargo is created only with regard to user of the plot in clause (g) of the present lease deed- on carrying on any obnoxious trade or business or its user for any religious purpose. Sri Ravi Kant is also justified in his submission that the opinion of Director of Industries that the change in the land user cannot be permitted since the site in question is meant for industry, is only an individual opinion of the officer and cannot override or abrogate or supersede the terms of the lease. It appears to us that the project, in question, shall be of a very global and international standard and shall be in the interest of the State and it would be fit and proper for the State Government to accept such proposal and as such, Mr. Tandon, the concerned Minister, on the representation of a delegation of Indian Industries Association led by Sri Anil Pandey, its General Secretary, forwarded the matter. In such circumstances, no mala fide action can be attributed on the basis of facts on record. We may take note of the decisions of the apex court in ***Express Newspapers Pvt. Ltd. and others Vs. Union of India and others***- AIR 1986 SC-872 ***E.P. Royappa V. State of Tamil Nadu and another*** -AIR 1974 SC-555, ***S. Pratap Singh V. State of Punjab***- AIR 1964 SC-72 in which in fact, rigorous standard has been laid down by the Supreme Court. Since the site, in question, is meant for industry, decision of the apex court in ***Balco Employees' Union (Regd.)*** (supra) is relevant. The apex court has clearly emphasized the necessity of distinguishing between the 'Public Interest Litigation and private interest litigation as well as a publicity interest litigation'. It also stressed that mere interlopers, by standards or busy bodies have no locus standi to maintain the petition. The case, on hand, does not fall within any of the parameters enumerated in ***Balco Employees' Union (Regd.) (Supra)***. Thus, the reliance on the decisions in ***Chairman Railway Board*** (supra) and ***M.S. Jayaraj*** (supra) placed by Sri R.N. Singh, learned Senior Advocate on behalf of the petitioners, is utterly misplaced. Chairman Railway Board (supra) is clearly distinguishable as in that case, the modesty of a Bangladesh national was outraged by many, including the employees of Railway in a room at Yatri Niwas at Howrah station. The apex court distinguished between public law and private law and recorded a finding that the inaction of the authorities to bring to book such criminals fall within rainbow of public law. The offence committed was at a public place. It amounted to most flagrant breach of the most cherished right to life which includes the right to live with human dignity contained in Article 21 of the Constitution of India. It was in this context that the apex court permitted the petition by a public spirited person, a practicing Advocate of Calcutta High Court. Thus, no parallel can be drawn between ***Chairman Railway Board*** (supra) and the present case. So far as ***M.S. Jayaraj*** (supra) is concerned, this too was not a public interest litigation. It was instituted by rival trader. The Supreme Court held that even a rival trader can impugn the locale of another

liquor shop near his shop. The apex court specified three categories of persons, vis-à-vis, locus standi (i) a person aggrieved (ii) a stranger and (iii) a busybody or a meddlesome interloper. It was held that any one belonging to third category is easily distinguishable and such person interferes in the things which do not concern him as he masquerades to be a crusader of justice. Petition by such person has to be rejected at the very threshold. The instant case squarely falls in the third category. Not a single entrepreneur from the industrial estate has come forward to complain about the project, in question. Supreme Court, has very clearly held in ***T.N. Civil Supplies Corporation Workers' Union Vs. T.N. Civil Supplies Corporation Ltd. and others***- (2001) 4 SCC-469, ***Vinay Kumar V. State of U.P.*** (2001) 4 SCC-734 ***Union of India Vs. Alok Kumar Dass***- (2001) 9SCC-297 that a person shall have no locus standi to file writ petition if he is not personally affected by the impugned order or his Fundamental Rights have neither been directly or substantially invaded nor is there any imminent danger of such rights being invaded or his acquired interests have been violated ignoring the applicable rules. The relief under Article 226 of the Constitution is based on the existence of a right in favour of the person invoking the jurisdiction. The exception to the general rule is only in cases where the writ applied for is a writ of Habeas Corpus or Quo Warranto or instituted in the public interest. In ***Nilangekar Patil*** (supra), the apex court stressed the necessity to cleanse public life. It equated the pollution in values and standards as equally grave as pollution in the environment. Thus, ***Nilangekar Patil*** (supra) too is of no assistance to the petitioners.

13. We also find ourselves unable to accept the argument of Sri Singh, learned Senior Advocate that the present is a case of 'malace of law'. Sri Singh has sought to distinguish between 'malice of fact' and malice of law'. In this behalf, paragraph 28 of the writ petition is relevant wherein it has been alleged by the petitioners that the Minister was won over and, therefore, the Minister with a mala fide intention and for extraneous consideration favoured the respondent no. 7 with the impugned letter dated 27.8.2000. Use of words' won over' 'mala fide intention and ' extraneous consideration' can only mean 'malice in fact' and not 'malice in law'. It is precisely because of this reason that Mr. Lalji Tandon has been impleaded as a respondent in the writ petition. Had it been a case of 'malice in law', there was absolutely no need to implead Mr. Tandon in the instant case.

14. Considering the facts and circumstances of the case, noted as aforesaid, we are of the view that there is no merit in the writ petition. The writ petition, accordingly, fails and is dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 6.9.2002

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Writ Tax No. 2447/2002

Manoharlal ...Petitioner
Versus
Bhoora ...Respondent

Counsel for the Petitioner:
Sri M.R. Jaisawal

Counsel for the Respondent:
S.C.

Constitution of India- Article 226- Release of vehicle- Demand notice for Rs.2,16,971/- undertaking given for deposit of entire amount within two weeks as per direction of the Court- if the entire amount is deposited to the satisfaction of the concerned authority as per direction- the vehicle in question be released during pendency of the writ petition.

Held- Para 3

The writ petitioner undertakes to pay demanded dues of Rs.2,16,971, (Two Lac Sixteen thousand Nine hundred Seventy one) in cash and balance Rs.1,00000/- (one lac) by way of Bank guarantee and further Rs.1,00000/- (one Lac) by any other security to the satisfaction of respondent no. 3.

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

1. Sri M.R. Jaisawal Advocate appears for writ petitioner. Sri S.P. Kesarwani learned Standing Counsel appears for State respondents.
Admit.

2. Counter affidavit to be filed within two weeks. Rejoinder affidavit may be filed within one week thereafter. List the mater after four weeks.

3. The writ petitioner undertakes to pay demanded dues of Rs.2,16,971, (Two Lac Sixteen thousand Nine hundred Seventy one) in cash and balance Rs.1,00000/- (One Lac) by way of Bank guarantee and further Rs.1,00000/ (one Lac) by any other security to the satisfaction of respondent no. 3 in respect of each vehicle within two weeks. In the event of compliance of such direction there shall be stay of the demand notice dated 6.8.2002 (Annexure 1 to writ petition) and the vehicles in question shall be released. In default of compliance of the directions within two weeks as stated, the interim stay shall stand automatically vacated.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.9.2002

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

Civil Misc. Writ Petition No. 37833 of 2002

Sanjay Kumar Gupta ...Petitioner
Versus
District Magistrate, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Sri H.N. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Recovery Proceeding- against the Director of company- Electric dues Rs.95,99,446/- plea about corporate body- avoiding personal liability- held- not available- court declined to interfere.

Held - Para 15

Hence we are of the opinion that so far as electricity dues are concerned this Court will pierce the veil of corporate personality and shall not give shelter to the businessmen who seek protection under the doctrine of corporate personality.

Case law discussed
1988 (4) SCC-59,
1964 (6) SCR-895
AIR 1995 SC-40

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

1. This writ petition and the connected writ petition no. 37836 of 2002 are being disposed of by a common judgement.

2. This writ petition has been filed against the impugned recovery certificate issued by the Executive Engineer, Electricity Distribution Division, U.P. Power Corporation, Fatehpur dated 17.7.2002 as well as the citation issued by the Tahsildar sadar, Kanpur Nagar.

Heard learned counsel for the parties.

3. The petitioner is Director of M/s Sushila Alloys Pvt. Ltd. , district Fatehpur which is a company registered under the Indian Companies Act. The company applied for sanction of electricity connection which was sanctioned vide order dated 30.10.1995 Annexure-1 to the writ petition. An agreement was entered into between the petitioner and the U.P. State Electricity Board on 2.11.1996 and the supply was released on 8.11.1996 vide Annexure-2 to the writ petition. Bills were issued in the name of the company vide Annexure-4 to the writ petition.

4. The Executive Engineer has issued recovery certificate dated 17.7.2002 for a sum of Rs. 95,99,446.85 vide Annexure-5 to the writ petition. The recovery certificate was sent to the Collector, Kanpur who sent it to Tahsildar Sadar, Kanpur Nagar alongwith collection charges.

5. The grievance of the petitioner is that the company is a distinct legal entity and hence the recovery cannot be made against the Director of the Company but only against the company.

6. A copy of the agreement for supply of electrical energy is Annexure -2 to the writ petition. This agreement made on 9.11.1999k is between the U.P. State Electricity Board and the petitioner.

7. Learned counsel for the petitioner submitted that the agreement is really between the company and the electricity Board. In our opinion, even if that is so it is not a fit case for interference under Article 226 of the Constitution.

8. It is well known that huge dues of electricity are due to the U.P. State Electricity Board (whose successor is the U.P. Power Corporation Ltd.). Because of these huge unpaid dues the electricity Boards in the country are running at huge losses of thousand of crores of rupees.

9. It is true that the legal principle is that a company is a separate legal entity distinct from its Directors and share holders vide Solomon vs. Solomon & Co. Ltd. 1897 AC.22 (HL). However, the principle of piercing the veil of corporate personality has also been evolved by the Courts vide Subhra Mukherjee vs. Bharat Coking Coal Ltd. 200 0 (3) SCC-312, Calcutta Chromotype Ltd. vs. Collector of Central Excise J.T. 1998 (2) SC 747, New Horizons Ltd. vs. Union of India 1995 (1) SCC478, Delhi Development Authority vs. Skipper Construction Co. Pvt. Ltd. 1996 (4) SCC 622, CIT vs. Minakshi Mills AIR 1967 SC 819, Juggilal Kamapat vs. CIT AIR 1969 SC 932, etc.

10. In Delhi Development Authority case (supra), the Supreme Court, following its decision in Tata Engineering and Locomotive Company Ltd. vs. State of Bihar AIR 1965 SC 40 observed.

"The law as stated by Palmer and Gower has been approved by this Court in Tata Engineering and Locomotive Company Ltd. vs. State of Bihar, (1964) 6 SCR 895 (AIR 1965 DV 400). The following passage from the decision is apposite (Para 27 of AIR):

"Gower has classified seven categories of cases where the veil of a corporate body has been lifted. But it would not be possible to evolve a rational consistent and inflexible principle which can be invoked in determining the question as to whether the veil of the corporate personality should be lifted or not. Broadly, where fraud is intended to be prevented, or trading with enemy is sought to be defeated, the veil of corporation is lifted by judicial decisions and the shareholders are held to be persons who actually work for the corporation."

11. In the same decision the Supreme Court also observed that the concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people. Where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the Court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned. The Supreme Court also observed quoting 'Gower's Modern Company Law' - where the protection of public interest is of paramount importance, or where the company has been formed to evade obligation imposed by the law, the Court will disregard the corporate veil.'

12. In the present case the public interest demands that electricity dues be paid, otherwise the State electricity undertakings will run at huge losses, as has been going on in our country for decades. Hence in cases of demand of electricity dues the Court should pierce the veil of corporate personality, as that is only used to defraud the State Electricity undertaking of its genuine dues or to evade existing obligations.

13. In State of U.P. vs. Renu Sagar Power Co. 1988 (4) SCC 59 the Supreme Court observed :

"It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The horizon of the doctrine of lifting of corporate veil is expanding."

14. In Tata Engineering's case (supra) The Supreme Court observed that the doctrine of the lifting of the veil thus marks a change in the attitude that law had originally adopted towards the concept of the separate entity or personality of the Corporation. As a result of the impact of the complexity of economic factors, judicial decisions have sometimes recognized exceptions to the rule about the juristic personality of the corporation. It may be that in course of time these exceptions may grow in number and to meet the requirements of

different economic problems, the theory about the personality of the corporation may be confined more and more.

15. Thus the Supreme Court itself has stated that with the passage of time the exceptions to the rule of corporate personality can grow in number to meet the new requirements, and these exceptions have an expanding horizon. In our opinion, the doctrine of piercing the veil of corporate personality must be adopted by our Courts, in the matter of electricity dues, as this has assumed mam moth dimensions of hundreds or thousands of crores of rupees which unscrupulous businessmen are not paying under cover of the doctrine of corporate personality. Hence we are of the opinion that so far as electricity dues are concerned this Court will pierce the veil of corporate personality and shall not give shelter to the businessmen who seek protection under the doctrine of corporate personality.

16. In the present case dues against the company are almost a crore of rupees. Hence there is no reason why recovery should not proceed against the Directors including the petitioners in both these petitions.

17. There is no mention in the writ petition of the value of the assets of the company. This seems to have been deliberately concealed. Hence it can be reasonably inferred that the value of the assets of the company are negligible, or a tiny fraction of the electricity dues. In this situation the only way of realizing the electricity dues is to be proceed against the Directors.

18. Moreover writ jurisdiction is discretionary jurisdiction and we are not inclined to exercise our jurisdiction in this case even assuming that there is a violation of law.

19. For the reasons given above, both the petitions are dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.10.2002

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE N.K. MEHROTRA, J.

Civil Misc. Writ Petition No. 32802 of 2001

Subhash Chandra Dixit and another ...Petitioner

Versus

Uttar Pradesh Public Service Commission and another ...Respondents

Counsel for the Petitioner:
Sri Subhash Chandra Dixit (In person)
Yogesh Agarwal
Sri S.C. Budhwar
Sri Shiv Nath Singh
Sri Vikram Bahadur Yadav (In person)

Counsel for the Respondents:
Sri B.N. Singh
Sri C.K. Shukla
Sri Pushpendra Singh
Sri Sudhir Agarwal
S.C.

U.P. Nyayik Sewa Niymawali 1951- R. 15- Mode of Examination- vacancy of Civil Judge (J.D.) advertised- marks obtained in written examination- completely aultured by process of scaling- held- not justified or supported by any valid statutory provision- result - set-a-side.

Held- Para 42

In the present case, the Commission had completely altered and changed marks which had been awarded o the candidates by the examiners by a process of sealing. As shown earlier the sealing done is destructive of the examination process and the scaled mark depict an altogether artificial picture wholly different from the real assessment of the candidates done by the expert examiners who had occasion to thoroughly examine answers given by them. The scaling is also not justified or supported by any valid statutory provision. Therefore, the result of the examination prepared after scaling the marks cannot be sustained and must be set a side.

(b) U.P. Nyayik Sewa Niymawali 1951- Rule 15- Purpose of holding competitive examination- to judge the comperative merit of candidate- any formula - affecting actual marks secured by the candidate completely the result of examination - can not sustain.

Held- Para 10 and 14

The purpose of holding a competitive examination is to judge the comparative merit of the candidates. The purpose is not to award him a division or the scores in passing a particular class like X or XII. Any formula which affects the actual marks secured by a candidate by taking Mean or average of the marks secured by all the candidates examined by one examiner cannot be used at all in judging the comparative merit of a candidate. The scaling of marks done by the formula applied by the Commission affects or alters the actual marks secured by candidates to a great degree by taking into account some kind of a Mean or average of the group and thus they cease to be a true guide for assessing their comparative merit. The scaling of the marks, which completely vitiates the result of the examination, has no rational basis and therefore cannot be permitted in any manner.

The scaling process by which the actual marks secured are drastically altered by applying a formula in which the Mean or average of whole group examined by one examiner plays in important role is wholly destructive of the examination process.

Case law discussed

1984 (4) SCC-27
1989 Supp (1) SCC-574
AIR 1987-2267
1982 (3) Alld.E.R. 154

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

1. This petition under Article 226 of the Constitution has been filed for quashing the result of the Civil Judge (Jr.Div.) Examination, 2000, which was declared on 25.9.2001. A further prayer has been made that the U.P. Public Service Commission be directed to declare the result of the aforesaid examination on the basis of actual marks secured by the candidates without applying the formula of scaling or in the alternative the scaling system should be applied to the marks awarded in interview and the result be declared thereafter.

2. The U.P. Public Service Commission (for short Commission) issued an advertisement for making selection on the post of Civil Judge (Jr. Div.) and it was notified that the last date for submission of application form for Civil Judge (Jr.Div.) Examination, 2000, was 30th November, 2000. The petitioners submitted their application forms and appeared in the written examination, which was held from 4th to 6th August 2000. The result of the written examination was declared on 6th January 2001 in which they qualified and

thereafter they appeared in the interview conducted by the Commission. The final result of the examination was declared on 25th September 2001. The petitioners were not selected, as their names did not appear in the merit list. It is averred in the writ petition that the Commission applied a system of scaling to scale the marks awarded by the examiners who examined the copies. In this process of scaling the marks actually awarded by the examiners who examined the copies was completely changed, high marks of bright candidates were reduced and the low marks of poor and mediocre candidates were enhanced. The main ground for assailing the result of the examination is that the same has not been prepared on the basis of actual marks awarded by the examiners but on altogether different marks which had been arrived at by a process of scaling.

3. In the counter affidavit filed on behalf of Commission (shown on 23.11.2001). It is averred that there had been constant pressure on the Commission to introduce the system of scaling as was being done by Union Public Service Commission. There are many subjects and large number of examiners which results in great deal of variation of standard in evaluating the answer books. In order to reduce the aforesaid variation in evaluation by different examiners, the scaling system was applied using the appropriate statistical techniques and the system is uniformly applied to all the candidates appearing in the examination. In the supplementary counter affidavit (sworn on 31.7.2002), it is averred that before introducing the system of scaling an in depth study was done by a Committee consisting of three professors, who made their recommendation on 2nd September 1996. The Commission in its meeting held on 7th September 1996, approved the recommendation and resolved to apply the formula of scaling and thereafter it was made applicable to P.C.S. (Preliminary) Examinations, 1996, and also in P.C.S. (Main) Examination. Thereafter, the Commission in its meeting held on 30th March 1999 decided to apply the scaling system in all the examinations.

4. Before adverting to the scaling formula and the challenge made thereto it will be convenient to have in idea as to how the actual marks secured by the candidates have been effected by scaling. On the direction of the Court, learned counsel for the Commission supplied the details of the marks secured by the candidates who are amongst the first hundred in the merit list. Table 'A' given below shows the actual marks, scaled marks, addition/subtraction in marks and the percentage of enhancement/ subtraction to the marks actually secured by some of the candidates.

Table A
ACTUAL AND SCALED MARKS
(MAXIMUM MARKS - 850)

S. No.	Roll No.	Actual Marks	Scaled Mark	Difference in Mark	Percentage
1	005573	461	610	149	32.32
2	004122	530	583	53	10.00
3	003368	546	592	46	8.42
4	002101	441	574	133	30.16
5	006161	531	601	70	13.18
6	001677	437	568	131	29.98
7	003744	517	571	54	10.44
8	000632	508	574	66	12.99

9	005620	441	581	140	31.75
10	003495	517	563	46	8.90
11	001766	439	575	136	30.98
12	003792	479	562	83	17.33
13	001758	434	563	129	29.72
14	005228	579	552	– 27	– 4.66
15	005919	430	574	144	33.49
16	003719	532	557	25	4.70
17	002192	426	547	121	28.40
18	005778	379	549	170	44.85
19	001709	428	555	127	29.67
20	005559	377	545	168	44.56
21	002821	484	542	58	11.98
22	000706	469	548	79	16.84
23	005539	430	544	114	26.51
24	005741	380	540	160	42.11
25	005739	375	530	155	41.33
26	005040	525	529	4	0.76
27	004405	402	528	126	31.34
28	004721	402	546	144	35.82
29	005213	545	533	– 12	– 2.20
30	002853	484	526	42	8.68
31	005747	413	578	165	39.95
32	005616	400	565	165	41.25
33	005972	442	584	142	32.13
34	007711	503	581	78	15.51
35	002154	425	553	128	30.12
36	001440	459	544	85	18.52
37	004252	473	549	76	16.07
38	004696	424	548	124	29.25
39	003983	481	557	76	15.80
40	000573	454	543	89	19.60
41	000893	483	571	88	18.22
42	006551	467	568	101	21.63
43	001006	478	563	85	17.78
44	000143	475	547	72	15.16
45	001601	426	531	105	24.65
46	004339	444	543	99	22.30
47	006608	438	536	98	22.37
48	003826	450	529	79	17.56
49	005522	411	529	118	28.71
50	006837	458	534	76	16.59
51	001341	447	542	95	21.25
52	001942	385	530	145	37.66
53	004156	445	529	84	18.88
54	006628	467	536	69	14.78
55	005782	379	549	170	44.85
56	004529	429	565	136	31.70
57	005527	426	539	113	26.53
58	001278	443	542	99	22.35
59	000774	436	536	100	22.94
60	003609	462	523	61	13.20

(–) sign denotes reduction in marks

Some glaring features of the result of scaling are as under:

(i) With regard to serial nos. 1, 9, 18, 20, 24, 25, 31, 32 and 55, the marks have been enhanced by 149, 140, 170, 168, 160, 155, 165, 165 and 170 respectively and the percentage of enhancement to the actual marks secured varies from 31.75 per cent to 44.85 per cent.

(ii) The marks actually secured by the candidates at serial nos. 14 and 29 have been reduced by 27 and 12 respectively.

(iii) The marks of candidate at serial no. 26 have been enhanced by 4 only.

(iv) Though the candidates at serial nos. 18 and 20 had actually secured 379 and 377 marks respectively but as a result of scaling their marks have been enhanced to 549 and 545. The candidate at serial no. 14 had secured 579 marks which after scaling has been reduced to 552 marks. This candidate had secured 200 marks more than the candidate at serial no. 18 but after scaling the difference has been reduced to 3 marks only.

(v) The candidate at serial no. 20 had secured 377 marks which have been scaled to 545.The candidate at serial no. 14 had actually secured 579 marks i.e. 202 marks more than this candidate but after scaling he has been given 552 marks and the

difference has been reduced to just 7 marks.

(vi) The candidate at serial no. 19 had actually secured 428 marks which have been scaled to 555 marks. The candidate at serial no. 26 had secured 525 marks which have been scaled to 529 marks. Though he had secured 97 marks more than the candidate at serial no. 19 but after scaling his marks are 26 less than him.

(vii) The candidate at serial no. 14 had secured 579 marks which were scaled to 552. The candidate at serial no. 1 had secured 461 marks which were scaled to 610. Though, serial no. 14 had taken a lead of 118 marks over serial no. 1 but after scaling the position has reversed and serial no. 1 has taken a lead of 58 marks over serial no. 14. Similar is the position of serial no. 15. His 430 marks became 574 after scaling. Though serial no. 14 had taken a lead of 149 marks over him but after scaling the position has changed and serial no. 15 is leading by 22 marks.

5. The Language II Paper which is of 40 marks requires a candidate to transliterate from Urdu to Hindi or from Hindi to Urdu. Table 'B' below shows the actual marks awarded and the scaled marks given to some of the candidates in the aforesaid paper.

Table B
Language II Paper
Maximum Marks 40

S. No.	Roll No.	Actual Marks	Scaled Mark	Difference in Mark
1	007705	25	25	0
2	005573	0	18	18
3	003230	1	18	17
4	002495	31	29	– 2
5	004122	31	27	– 4
6	003368	25	26	1
7	005747	21	27	6
8	000055	4	19	15
9	001677	10	22	12
10	003744	0	17	17
11	000632	29	28	– 1
12	001121	23	26	3
13	003792	0	17	17
14	006791	27	26	– 1
15	001039	35	30	– 5
16	005616	27	30	3
17	005228	28	26	– 2
18	004700	30	27	– 3
19	003719	37	29	– 8
20	002154	13	23	10
21	005778	3	19	16
22	001440	31	31	0
23	006171	34	30	– 4
24	003101	19	24	5
25	003983	6	19	13
26	002821	2	18	16
27	000706	6	20	14
28	006551	13	21	8
29	000098	23	24	1
30	005741	16	25	9
31	006161	0	18	18
32	001766	10	22	12
33	001191	0	18	18
34	002322	8	21	13
35	005919	23	28	5
36	005972	0	18	18
37	005444	0	18	18
38	003194	0	18	18
39	004252	0	17	17
40	005559	0	18	18
41	007158	0	17	17
42	002207	28	30	2
43	000573	0	17	17
44	000893	30	28	– 2
45	007075	27	26	– 1
46	001006	0	18	18
47	000098	23	24	1
48	000143	7	19	12

49	003420	0	18	18
50	006885	32	27	– 5
51	004331	9	20	11
52	006176	28	28	0
53	001601	0	18	18
54	004339	35	29	– 6
55	'006608	0	17	17
56	005739	7	21	14
57	007019	37	29	– 8
58	003826	0	17	17
59	005040	0	17	17
60	001341	0	18	18
61	004405	0	17	17
62	004721	0	17	17
63	007635	11	21	10
64	001942	0	18	18
65	004156	0	17	17
66	006628	25	25	0
67	005782	0	18	18
68	000256	28	26	– 2
69	005213	33	27	– 6
70	001290	30	30	0
71	003629	9	20	11
72	001278	8	21	13
73	003530	6	20	14
74	000774	0	18	18
75	003609	0	17	17
76	003141	5	20	15

(–) sign denotes reduction in marks

Some glaring features of the result of scaling are as under:

(i) Many candidates had secured only zero marks in this paper. However, after scaling the marks of majority of them have been enhanced to 18 while for some it has been enhanced to 17. The candidates at serial nos. 8, 25 and 48 had actually secured 4, 8 and 7 marks respectively but they have all been awarded 19 marks after scaling. Thus, the candidates who secured zero and the candidate who secured 7 marks have been put at par.

Table C
Law I Paper
Actual Marks and Scaled Marks
Maximum Marks 200

Sl. No.	Roll No.	Actual Marks	Scaled Mark	Difference in Mark	Percentage of Variation
1	005573	88	133	45	51.14
2	005747	118	172	54	45.76
3	002101	61	132	71	116.39
4	001677	60	130	70	116.67
5	005620	85	130	45	52.94
6	001766	61	132	71	116.39
7	005616	109	160	51	46.79
8	001758	50	114	64	128.00
9	005919	85	130	45	52.94
10	005972	116	169	53	45.69
11	002192	68	143	75	110.29
12	002154	55	122	67	121.82
13	005778	90	136	46	51.11
14	001709	57	125	68	119.30
15	004696	86	121	35	40.70
16	005539	79	122	43	54.43
17	005741	84	128	44	52.38
18	007019	109	139	30	27.52
19	001942	52	117	65	125.00
20	000774	105	126	21	20.00
21	003141	111	127	16	14.41

Some glaring features of the result of scaling are as under:

(i) The marks of candidates at serial nos. 3, 4, 6, 7, 11, 12, 14 and 19 have been increased by over 100 per cent.

(ii) The candidates at serial nos. 3, 4, 6, 12 and 14 had secured 61, 60, 61, 55 and 57 marks respectively but they have been enhanced by 71, 70, 71, 67 and 68 marks. Thus, the marks added after scaling are more than the marks originally secured by them.

(iii) The candidates at serial nos. 20 and 21 who had secured 105 and 112 marks respectively have gained by only 21 and 16 marks but at the same time the candidates at serial nos. 2, 7 and 10 who had secured 118, 109 and 116 marks respectively have gained by 54, 51 and 53 marks.

6. In the supplementary counter affidavit, it is averred that the formula applied for scaling the marks is that given in the book SCALING TECHNIQUES written by V.Natarajan and K. Ganasekaran. The precise formula used is as under:

$$Z = \text{Assumed Mean} + \frac{(x - M)}{S.D.} \times \text{Assumed S.D.}$$

Z is the Scaled Score

x is the Raw Mark or actual marks awarded by examiner

M is the Mean of Raw Marks of the group/subject (as the case may be)

S.D. is the Standard Deviation of Raw Marks of the group/subject (as the case may be)

Assumed Mean will be taken as Half of the maximum marks of the group/subject.

Assumed S.D. will be taken as 1/5th of the assumed mean.

If after scaling the scaled marks are less than zero, the candidate will be given zero mark in that subject.

If after scaling the scaled marks exceed the maximum mark, the candidate will be given the maximum marks in that subject.

In the preliminary examination scaling will be done at the stage of optional paper and in the mains examination scaling will be done of all the papers at examiner's level.

The merit will be determined after adding the scaled marks in each subject.

If the scaled score is in decimal, the same will be converted into whole number according to practice.

The **standard deviation** is calculated in the following manner:

If five candidates secure 20, 25, 32, 15 and 28 marks –

Mean marks of the group = $\frac{20 + 25 + 32 + 15 + 28}{5}$

$= \frac{120}{5}$

$= 24$

Actual Mark x	Deviation from Mean $\delta = x - m$	Square of Deviation δ^2
20	–4	16
25	1	1
32	8	64
15	–9	81
28	4	16
		=178

Standard Deviation $(\sigma) = \sqrt{\frac{\sum \delta}{n}}^{2}$

$$= \sqrt{\frac{178}{5}}$$
$$= \sqrt{35.6}$$
$$= 5.96$$

7. It is important to note that for making any calculation in accordance with the above noted formula, the whole exercise is done examiner-wise. There were fourteen set of different examiners who examined the copies of Law papers. For finding out the **Mean** of the raw marks, the **Mean** of the marks awarded by only one examiner was determined. The **Mean** of all the candidates who appeared in a particular paper was neither determined nor was taken into consideration. Similarly, the **Mean** of all the papers was neither determined nor was taken into consideration. There was no comparison of the marks of all the fourteen examiners who examined the Law papers. The formula as applied by the Commission did not take care of the varying standards which may have been applied by different examiners but has sought to reduce the variation of the marks awarded by the **same** examiner to different candidates whose copies he had examined. The table given in Annexure-1 to the supplementary affidavit shows that the examiners were mostly given three hundred copies and the entire exercise of calculating the **Mean** marks and the **standard deviation** has been done individually and separately for each examiner. The working of the formula was explained to the Court by Sri B.N. Singh, learned counsel for the Commission who was assisted by Sri Shukla, System Analyst in U.P. Public Service Commission. He also made a statement that the scaling has been done with reference to each examiner and not subject-wise.

8. Table 'A' given earlier demonstrates how the scaling done by the Commission has affected the marks awarded to the candidates by the examiners. Those who actually got 377 or 379 marks were enhanced to 545 and 549 marks respectively while a candidate who had actually secured 579 marks was reduced to 552. Thus, a lead of 200 marks secured by a far superior candidate was reduced to just 3 marks. A lead of about 149 marks secured by a candidate was completely reversed and the candidates securing lesser marks went higher and took a lead of a substantial number of marks. Table 'B' which shows the marks of Language II paper depicts the same position. This paper was of 40 marks. A large number of candidates had secured zero mark in this paper on account of the fact that they have absolutely no knowledge of Urdu language and are wholly ignorant thereof. However the marks of those candidates were enhanced to 18. Thus they have been awarded 45 per cent marks (18 x 100/40 = 45). The marks of the candidates securing 31 or 34 marks were reduced to 27 and 30 respectively. Zero is zero. Zero multiplied by a million or a billion is zero and zero multiplied by infinity is zero. However, by the scaling done by the Commission, zero has been enhanced to 18 which means 45 per cent marks. Zero was discovered by the Indian mathematicians in the seventh century B.C. Aryabhatta (A.D. 476-520) the great, Indian astronomer, expounded the properties of zero. But the formula devised by V. Natarajan and K. Gunasekran makes zero as 17 or 18 and this has been blindly

accepted by the Commission to scale the marks actually awarded by the examiners.

9. Some one not knowing Latin or Greek will get zero even in a simple examination of the said subjects. But if by a process of scaling, as has been done here by the Commission he is awarded 45 per cent marks, it will convey an impression that he has at least a workable or reasonable knowledge of the subject. This clearly demonstrates that the very purpose of holding the examination viz., to test a candidate's knowledge and ability is completely defeated by the scaling process.

10. The drastic and substantial alteration in the marks as a result of scaling has occurred on account of the fact that the **Mean** of the marks plays a major role in the formula applied for determining scaled mark. As mentioned earlier, the **Mean** is determined by totalling or adding the marks secured by all the candidates examined by one examiner and dividing the same by the number of candidates. Again in calculating the **standard deviation**, the **Mean** of the marks plays a major role. Thus, if in a set of examination copies examined by one examiner majority have secured very poor marks and few bright candidates have secured high marks, their marks will be considerably reduced as the **Mean** of the whole set or group will be less. The formula itself contemplates that impossible situations may arise. After scaling a candidate's marks may become less than zero or may get marks in minus. According to the formula he would be given zero mark. It also contemplates that after scaling the marks may exceed the maximum marks. Here he would be allotted the maximum marks. The purpose of holding a competitive examination is to judge the comparative merit of the candidates. The purpose is not to award him a division or the scores in passing a particular class like X or XII. Any formula which affects the actual marks secured by a candidate by taking **Mean** or average of the marks secured by all the candidates examined by one examiner cannot be used at all in judging the comparative merit of a candidate. The scaling of marks done by the formula applied by the Commission affects or alters the actual marks secured by candidate to a great degree by taking into account some kind of a **Mean** or average of the group and thus they cease to be a true guide for assessing their comparative merit. The scaling of the marks, which completely vitiates the result of the examination, has no rational basis and therefore cannot be permitted in any manner.

11. Another fallacy which lies in the process of scaling is that the same is done examiner-wise only. It is the marks awarded by one single examiner to a group of candidates, whose copies he has examined, which are scaled. This is done by recourse to a formula which takes into account the **Mean** or average of the marks secured by that particular group. There can be a strict examiner who awards less marks or a liberal examiner who awards comparatively more marks but in normal course an examiner will apply the same yardstick to the entire group whose copies he has examined. If the same examiner awards very poor marks to some candidates and awards very high marks to some others, he does so consciously applying his own yardstick, which can not be faulted. The scaling formula does not take into consideration the average or

Mean of all the candidates in one particular paper but takes **Mean** of only that group of candidates which have been examined by one single examiner. The reduction or enhancement of marks of candidates only on account of the fact that the average or **Mean** of the marks secured by the group (viz. the whole lot examined by one examiner) in which they fall is different has absolutely no basis and cannot be accepted by any process of reasoning. There can always be some outstanding boys and some very poor boys in one group which were examined by a single examiner. If per chance the average or **Mean** of the whole group is around 50 per cent, the marks secured by the outstanding candidate who may be of the calibre of 80 or 90 per cent would be drastically reduced and the marks secured by the poor candidate who may be of the calibre of around 10 per cent would be considerably enhanced. This kind of a system can have no place in an examination which is conducted for judging the comparative merit of a candidate.

12. The reasoning for applying the system of scaling has been given in para 4 of the counter affidavit and it will be useful to reproduce the same:

".....The grounds for introducing scaling system have been numerous. There are various subjects and separate set of examiners are engaged in evaluation and other processes, causing great deal of variation of standard in evaluation of answer books. In order to reduce the variation in evaluation by different examiners and to do justice to all the candidates the scaling system was applied, using appropriate statistical technique, and prominent technical expert have examined the system....."

13. It may be accepted that there may be variation in standard of evaluation of answer books by different examiners. There can also be wide disparity in the marks secured by the candidates in different subjects on account of unusually easy or simple paper having been set in one subject and an unusually difficult paper having been set in another subject. In such a case the candidates opting for the subject in which the paper was easy may get advantage. But the system of scaling adopted here does not obviate anyone of the aforesaid two contingencies. There is no comparative evaluation of marks awarded by different examiners of the same subject to bring them to a common scale. Similarly, there is no comparative evaluation of marks of candidates who have opted for different subjects. In the present case, namely, Civil Judge (Jr. Div.) examination, there is no optional paper and all the papers are compulsory and, therefore, there is no occasion for comparative evaluation of marks of different subjects. I have pointed out this fact in order to demonstrate the fallacy of the scaling technique which the Commission has adopted.

14. The marks secured by the candidates in interview, wherein sitting judges of this Court sat as experts, also show wide disparity. There are candidates who have secured between 30 and 40 per cent marks and there are others who have secured 75 per cent marks in interview. This was the position when the candidates who had been called for the interview were the top echelon of the whole lot who had appeared in the written examination. The disparity in the marks of the candidates who appeared in the written examination would be far greater. This may be on account of variety of reasons.

All those who take up a competitive examination are not necessarily very serious. Anyone with any kind of career is entitled to appear in the examination. There is a bar of three years of practice but after enrolment many may not have devoted to the legal practice and may not have been in touch with the subject of law which has three papers of two hundred marks each. There may have been some really bright and laborious candidates who may have prepared the subject very well. Therefore, the scaling process by which the actual marks secured are drastically altered by applying a formula in which the **Mean** or average of whole group examined by one examiner plays an important role is wholly destructive of the examination process.

15. As mentioned earlier, the Commission has applied the formula given in the book "SCALING TECHNIQUES by V. Natrajan and K. Gunasekaran". It is not known who these gentlemen are, what are their academic qualifications, where they are working and whether the formula suggested by them has been tested on a practical plain. The book was published in 1985. There is no material to show that the formula has actually been found to be correct by the authorities who deal with the subject of education. It will be useful to reproduce a few lines from what the authors have said in Chapter **'Introduction'** on page 4 of the book:

"Scaling techniques will have to be introduced whenever and wherever the situation warrants. If different sets of marks are to be added and/or to be compared they need to be scaled to a common standard where such standard is lacking....."

In Chapter "**Need for Scaling Techniques**" on page 23, it has been said as under:

".....The analysis of the marks awarded by the examiners showed that they differ in average marks, range of marks awarded and the merit of individual candidates, even though they all received equivalent batches of answer scripts."

17. Even the above quoted views of the authors are not being achieved by the system adopted here as there is no comparative evaluation of marks awarded by one examiner with that of another examiner. There is no comparative evaluation of marks awarded in different subjects. What is being done is to re-evaluate the marks awarded to a group of candidates by the same examiner. It can be safely presumed that an examiner applies the same standard to all the candidates of his group or whose copies he has to examine. The same examiner is not likely to adopt different standards to different candidates while examining copies of a particular paper.

18. In view of the fact that the scaling is applied on the basis of a statistical formula it will be useful to have an idea as to what is **Statistics** and what is its purpose. In Volume 18 of **The World Book Encyclopaedia** (published in 1990 by World Book, Inc.) it has been defined as under:

*"**Statistics** is a set of methods that are used to collect and analyze data. Statistical methods help people identify, study, and solve many problems. These methods enable people to make good decisions about uncertain situations.*

Statistical methods are used in a wide variety of occupations. Doctors use such methods to determine whether certain drugs help in the treatment of medical problems. Weather forecasters use statistics to help them predict the weather more accurately. Engineers use statistics to set standards for product safety and quality. Statistical ideas help scientists design effective experiments. Economists use statistical techniques to predict future economic conditions...."

19. In volume 25 of **Encyclopedia Americana** (1986 Ed.), at page 629, it has been described as under:

Statistics. *Originally, the word "statistics" was used to designate collections of data pertaining to matters of importance to a political state, such as population counts, deaths, tax returns, and the amount of internal or external trade. Over the years, its original use has been extended to include almost any kind of numerical data, including major league base ball records, theatre attendance, monthly rainfall or automobile production per year. When used as a plural noun the word "statistics" refers to such quantitative data. As a singular noun to a branch of mathematics that deals with such data.*

20. As a field of study statistics is the science and art of obtaining and analyzing quantitative data in order to make sound inferences in the face of uncertainties. A statistical inference may be an estimate based on the data from a single experiment or a limited sample of some population or aggregate that contains more items than the sample contains. Also, a statistical inference may require a test of some hypothesis by means of information from the experiment or sample.

21. The uncertainty arises from the incompleteness of the data with which statisticians work. Inductive reasoning based on the mathematics of probability is used to assess the fallibility of an estimate or test. Furthermore, the measure of the fallibility of the estimate or test is calculated from the observed data themselves.

22. Since statistics used inductive reasoning based on the mathematics of probability, this aspect of statistics is branch of applied mathematics. Its method stem from the axioms and theorems of probability, which in turn is a field of pure mathematics. However, valid and efficient measures of fallibility of inferences, in terms of exact probability statements are possible only if certain steps are taken in a given investigations. Consequently, statistics finds itself concerned with such matters as the collection and tabulation of numerical data, the description of group characteristics of the particular data observed, the design of experiments and sample surveys, experimental and survey techniques, questionnaire construction, and the training and super vision of interviewers and enumerators...."

23. Some formulas are also given which use ***Mean****,* ***standard deviation*** *and* ***variance*** *as parameters. In the filed of* ***analytical statistics****, on page 632, it is said as under:*

"ANALYTICAL STATISTICS

Two important branches of analytical statistics are the design and analysis of

sample surveys and the design and analysis of experiments.

Design and Analysis of Sample Surveys. In many important investigations – for example, marketing studies, public-opinion polling, readership studies, monthly labor-force studies, crop and livestock inventories, and forest inventories – it may not be feasible or desirable to obtain observations on the characteristics of all of the members of a population. For such investigations, statistics provides a number of survey sampling techniques. ..."

24. In volume 28 ***Encyclopaedia Britannica*** *(1985 Ed.), on page 230, it has been described as under:*

"Statistics is the art and science of gathering, analyzing, and making inferences from data. Originally associated with numbers gathered for governments, the subject now includes large bodies of method and theory....

The ideas of effective design for data gathering are also basic to the construction of sample surveys, a branch of statistics most popularly known for its contributions to public opinion polling, to pre-election forecasting, and to market research. Perhaps even more significant is this branch's service to government through, for example, estimates of amount of unemployment and cost of living which have become indispensable in attempts to regulate the economy. Sample survey methods have found uses in accounting, inventory control, and other areas."

25. Here also a large number of formulas have been given for solution of various kinds of problems, which involve feeding of different kinds of parameters.

26. It will thus be seen that the statistics is the science of obtaining and analysing quantitative data in order to make reliable inference in the face of uncertainties. It requires calculation and tabulation of numerical data and determining the characteristics of the particular data observed. The statistical data can never be applied to individual cases, nor the merit or worth or potential of the individuals can be determined on its basis. The purpose of statistics is entirely different and is used for taking policy decisions with regard to a large group or segment of population or the matter under consideration.

27. Application of statistical data to individuals may result in gross absurdities. In **India 2002** published by the **Ministry of Information and Broadcasting, Government of India** (on page 292) the per capita income in the country in the year 1999-2000 is mentioned as Rs.16,047/-. Using the said data, can it be said that the income of every Indian was Rs.16,047/- in that year? Even applying a deviation of fifty percent on either side, it will come to Rs. 8,000/- to Rs.24,000/- per annum. There are many Indians whose income is far less and there are some whose income is in crores. Similarly, regarding life expectancy it is mentioned on page 205 that it has risen from 37.1 years (male) and 36.2 years (female) in 1951 to 62.3 years (male) and 65.27 years (female) in 1999. Can this data be used to say that a particular individual female will necessarily live upto the age of 65 years and will necessarily not live beyond that age? A deviation of 25 percent on either side will

mean 49 to 81 years, which would make a world of difference for the concerned individual. This data can no doubt be used in the face of uncertainty, namely, for assessing the life expectancy in the case of accidental death or in laying down the health policy by the Government. But it can never be used where the facts and figures are known as in the case of competitive examination where the marks secured by each candidate is known with exactitude. Therefore, to apply any principle of statistics to scale the marks of the candidates and then to determine their comparative merit would be wholly wrong and cannot be countenanced in any manner.

28. **M.J. Moroney**, a Fellow of the Association of Incorporated Statisticians and of the Royal Statistical Society, has written a book '**Facts From Figures**' which has been published by Penguin Books Ltd. The title of the first Chapter in the book is **Statistics Undesirable** and the opening lines are as under:

"There is more than a germ of truth in the suggestion that, in a society where statisticians thrive, liberty and individuality are likely to be emasculated. Historically, Statistics is no more than State Arithmetic, a system of computation by which differences between individuals are eliminated by the taking of an average. It has been used – indeed, still is used – to enable rulers to know just how far they may safely go in picking the pockets of their subjects....."

29. A few lines from the last two paragraphs of the same Chapter gives a true picture of statistics and the same is being reproduced below:

".....There still remains the sorry spectacle of opposing factions in politics and medicine (to mention only two of the most obvious cases) who bolster up their respective cases by statistics in the confident hope that 'figures cannot lie' or, as they often hope, that 'you can't dispute the figures'. All this is very sad indeed, for these ardent computers are usually truly sincere in their convictions even where they are rash with their statistical deductions. The cynic sums it up in the old tag: 'There are lies, damned lies, and statistics.'

For the most part, Statistics is a method of investigation that is used when other methods are of no avail; it is often a last resort and a forlorn hope. A statistical analysis, properly conducted, is a delicate dissection of uncertainties, a surgery of suppositions. The surgeon must guard carefully against false incisions with his scalpel very often he has to sew up the patient as inoperable....."

30. There is another book **How to Lie with Statistics** written by **Darrell Huff** (published by Penguin Books Ltd.). It gives various examples how statistical data often produces misleading results.

31. It is also necessary to take note of the fact that in order to find out the **Mean** and **standard deviation**, the marks secured by each candidate in the group examined by one examiner have to be taken into consideration and, thereafter, the calculation is made. Learned counsel for the Commission has made a statement that the marks are fed in computer wherein necessary programming has been done and the **Mean** and the **Standard Deviation** are calculated and, thereafter, the scaled marks are determined. Even

one error in feeding the data will alter the **Mean** or **Standard Deviation**, resulting in a faulty reading of the scaled marks of the whole group. The error committed would not even be known unless the entire data is fed all over again. It is human beings who will feed the data in the computer and a single mistake will affect the whole group, which in the present case will mean 300 candidates. The chances of error in the system of scaling are far more than where the merit is determined on the basis of the marks actually secured.

32. Learned counsel for the petitioners has submitted that the selection for the post of Civil Judge (Jr. Division) is made in accordance with U.P. Nyayik Sewa Niyamawali, 1951, which was made by the Governor of U.P. in consultation with the High Court and Rule 15 thereof provides for holding of a written examination. Learned counsel has submitted that when the rules require holding of a written examination, they contemplate that the marks actually obtained in the said examination would be taken into consideration for determining the inter se merit of the candidates. But the Commission has adopted a procedure of scaling of the marks without consulting the High Court and, thus, the variation of marks as a result of scaling contravenes Article 234 of the Constitution. Sri B.N. Singh, learned counsel for the Commission has, on the other hand, submitted that in exercise of power conferred by the U.P State Public Service Commission (Regulation of Procedure and Conduct of Business) Act, 1974, the Commission has made the U.P. Public Service Commission (Procedure and Conduct of Business) Rules, 1976. The 1974 Act has been repealed and has been replaced by 1985 Act, and Section 14(1) (ii) of this Act saves the aforesaid rules. Learned counsel has referred to Rule 51, which reads as under:

"51. The mark-sheets so obtained shall be opened on the last day of interview and immediately thereafter the marks of interview/personality test shall be added to the marks obtained by the candidates in the written examination. Thereafter on the basis of the totals so obtained the merit list shall be prepared and placed before the Commission for final declaration of the result.

PROVIDED that the Commission may, with a view to eliminating variation in the marks awarded to candidates at any examination or interview, adopt any method, device or formula which they consider proper for the purpose."

33. Sri Singh has submitted that the Commission can adopt any method, device or formula which it considers proper for the purpose of eliminating variation in marks awarded to the candidates and, therefore, the scaling of the marks done by the Commission is perfectly valid. It is difficult to accept this submission. Rule 51 says that the merit list shall be prepared after adding the marks of interview/personality test with the marks secured by the candidates in the written examination. The expression that the "marks obtained by the candidates in the written examination" means the actual marks awarded by the examiner. The proviso cannot completely change the meaning or import of the main provision. The expression "variation in the marks" does not mean a disparity in the marks awarded by the same examiner in the same subject in the same group which he

was required to examine. In the context in which the expression has been used, it may refer to a wide variation of marks awarded to candidates in different optional subjects.

34. It is extremely doubtful whether the Commission has any power to frame a rule as is contained in proviso to Rule 51. The rule making power is contained in section 11 of U.P. State Public Service Commission (Regulation of Procedure) Act, 1985, and it provides that the Commission may make rules not inconsistent with the provisions of the Act for the regulation of its procedure. Section 9 of the Act provides for appointment of paper setters, moderators and valuers. Section 10 of the Act lays down that every question paper shall be set by three different paper setters who shall not belong to the same place and the moderators shall moderate all three question papers out of which one will be chosen. There is no provision in the Act which may either directly or indirectly permit any kind of alteration in the marks awarded by the examination. That apart, it is not suggested from the side of the respondents that the 1976 rules have been made by the Commission in consultation with the High Court and, therefore, the proviso to Rule 51 can have no application to an examination held for the purpose of making recruitment for the post of Civil Judge (Jr. Division).

35. Sri Singh has submitted that scaling of marks is part of the examination system and a policy decision has been taken by the Commission to apply scaling in all the examinations including that of Civil Judge (Jr. Division) and being a policy decision it is not open to the Court to review the same. In support of his submission, learned counsel has placed reliance on Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Paritosh Bhupeshkumar Sheth and others, (1984) 4 SCC 27, wherein it has been held that the Court cannot examine the wisdom, merits or efficacy of the policy of the legislature or its delegates to see if it effectuates the purpose of the Act. Reliance has also been placed on State of Andhra Pradesh and another Vs. V. Sadanandam and others, 1989 Supp (1) SCC 574, wherein it has been held that the mode of recruitment and the category, from which recruitment to a service should be made, are matters within the exclusive domain of the executive and it is not for judicial bodies to sit in judgment over the executive decisions in these matters. In my opinion, the principle enunciated in the authorities cited by the learned counsel has no application to the case in hand. The question here is whether the marks actually awarded to a candidate by an examiner on the basis of objective assessment of the answers given by him can be altered in such a drastic manner by adopting a process of scaling which has brought about a complete change in the marks. In fact, the marks awarded by the examiner have lost their identity and have been substituted by altogether different marks which have no correlation to the answers given by the candidate. The Commission is not at liberty to frame any kind of policy and to apply any kind of formula which has the effect of affecting the sanctity of the written examination and changing the marks awarded by an examiner who is presumed to be an expert in the field.

36. Umesh Chandra Shukla Vs. Union of India, AIR 1985 SC 1351, is a case relating to selection for the post of Subordinate Judge in Delhi Judicial Service and the recruitment was governed by Delhi Judicial Service Rules, 1970. The High Court resolved to add two marks to the marks obtained in each paper by way of moderation on the ground that a few candidates who had otherwise secured very high marks might have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or qualifying marks prescribed in the particular paper. It was held that the addition of two marks by way of moderation to the marks obtained in any written paper or to the aggregate of the marks in order to make a candidate eligible to appear in the viva voce test would indirectly amount to amendment of clause (6) of the appendix. Such an amendment to the Rules could be made under Article 234 only by the Lt. Governor after consulting the High Court in that regard. It was further held that the candidates who appeared at the examination under the Delhi Judicial Service Rules acquired a right immediately after their names were included in the list prepared under rule 16 of the Rules which limited the scope of competition and that right could not be defeated by inclusion of certain marks by way of moderation. In Durgacharan Misra Vs. State of Orissa and others, AIR 1987 SC 2267, it was held that where the rules did not prescribe minimum qualifying marks for viva voce test, the Public Service Commission on its own could not prescribe minimum qualifying marks for viva voce test and the exclusion of candidates on that count was not justified. The mandate of rule 18 is that the Commission shall add marks secured at the written test and viva voce test, no matter what those marks are at viva voce test and on the basis of the aggregate marks in both the tests, the names of candidates have to be arranged in order of merit. It was further held that the rules having been framed under proviso to Article 309 read with Article 234 of the Constitution in consultation with the High Court, the Commission must faithfully follow the rules.

37. Sri B.N. Singh has placed strong reliance on a decision of Rajasthan High Court given in D.B. Civil Writ Petition No. 2685 of 1994 (Mahesh Kumar Khandelwal and others Vs. State of Rajasthan and others) decided on 19th August, 1994, wherein the scaling of marks by applying the formula given in the book **Scaling Techniques** by V. Nataraja and K. Gunasekaran was upheld. With profound respects and for the reasons already indicated in the earlier part of the judgement I am unable to accept the view taken by the Rajasthan High Court. The case is also distinguishable on facts. In paragraph 38 the Court observed as under:

"... In the present case, the RPSC has not entered into any exercise in the name of moderation to pull up named & specified candidates, even though they were ineligible. In the present cases, moderation was thought proper because candidates had taken various optional papers with different standards and different scorabilities. That was not the case in either the Haryana case or the Delhi case, where the papers were common. Hence, to our mind, case of Umesh Chandra Shukla (supra) also does not assist the petitioners in any way."

38. The reason which weighed with the Court to uphold the scaling was that the candidates had taken various optional papers with different standards and different scorabilities. In the case in hand, there are no optional papers at all and every candidate has to appear in all the papers which are compulsory. It does not appear from the judgement that scaling done by the Rajasthan Public Service Commission is similar to that done by the U.P. Public Service Commission wherein there is no inter se comparison and evaluation of marks of different examiners or of different papers, but it is confined to the group which has been examined by the same examiner in the same subject. Learned counsel has also referred to a decision of a learned single Judge of this Court in C.M. Writ Petition No. 14213 of 2000: (Ram Surat and others Vs. U.P. Public Service Commission, Allahabad and others, decided on 10.1.2001. The learned Judge upheld the scaling system by observing that as many as 23 examiners had examined the Hindi Essay paper, who may be either tough or lenient and, therefore, in order to appreciate about the objectivity and to eliminate the element of subjectivity the moderation of marks was proper. It was also observed that the marks of the petitioners of the said case had increased by scaling and, therefore, they had been put in an advantageous position. In my opinion, in a case where selection is to be made on comparative merit, the adoption of any such process which has the effect of adding marks to the actual score of the candidate, is destructive of the system wherein the object is to select a small number of best candidates on the basis of their merit out of thousands of those who have appeared in the examination. The other case relied upon by Sri Singh, namely, Shailendra Upadhya Vs. U.P. Public Service Commission (C.M. Writ Petition 25071 of 2001, decided on 16.8.2001), can be of little assistance as it related to U.P. Combined State/Subordinate Services (Prelim) Examination, wherein there are several optional subjects. The Court dismissed the writ petition with the observation that the object of scaling at the stage of preliminary examination is confined to rationalisation of marks to ensure representation in said service of candidates having studied different subjects. The manner in which the scaling formula is applied and its ultimate effect were not at all examined.

39. Though it is not germane in the present case as all the papers are compulsory but in view of the submissions made I feel constrained to observe a few words even where there are several optional papers. It is a fallacy to think that the intellectual capacity of all the candidates opting different optional subjects in a competitive examination is exactly equal and therefore, it is necessary to apply a system of scaling so that the marks secured by various candidates in different optional subjects come to the same level. Every subject or department in the same university does not carry the same reputation having regard to demand or scope in the subject, the quality of the students and the teachers teaching there. Very often the last student admitted in some prized or sought after subject would have secured more marks in the qualifying examination than the best admitted in a subject which is of less importance or having less scope. If both the subjects are optional subjects in a competitive examination conducted by the Commission, it will be highly improper to

equate the marks secured by the candidates in the two subjects by applying a process of scaling as there is basic difference in the intellectual capacity of the candidates in the two subject. This can be demonstrated by giving an example. For admission to the various I.I.Ts. in the country a competitive examination is held in which lakhs of students appear and finally a small number is selected. The top position holders opt for most prized branches like electronics or computer science while those at the bottom of the select list are offered much less important branches like textile engineering or ceramics. The last candidate who got admission in electronics or computer science would invariably be far superior in intellect and merit to the best or no. 1 in textile engineering or ceramics.

40. I am fully conscious of the fact that in judicial review of an administration action, the Court is concerned with reviewing not merits of the decision, but the decision making process. In Chief Constable of the North Wales Police versus Evans, (1982) 3 All ER 141 at 154. It was observed as follows:

"The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treatment, reaches on a matter, it is authorised by law to decide for itself a conclusion which is correct in the eyes of the Court."

41. In Ashbridge Investment Ltd. Versus Minister of Housing and Local Government, (1965) 1 WLR 1320, it was held that if the decision making body has gone wrong in its interpretation, its order can be set aside. In Padfield Versus Minister of Agriculture, 1968 AC 997, it was held that if the decision making body is influenced by considerations which ought not to influence it or fails to take into account matters which it ought to take into account, the Court will interfere. Similarly, in Anisminic Ltd. Versus Foreign Compensation Commission, 1969 (2) AC 147, it was held that if the decision making body goes outside its powers or misconstrues the extent of its powers, the Court can interfere.

42. In the present case, the Commission had completely altered and changed marks which had been awarded to the candidates by the examiners by a process of scaling. As shown earlier the scaling done is destructive of the examination process and the scaled marks depict an altogether artificial picture wholly different from the real assessment of the candidates done by the expert examiners who had occasion to thoroughly examine answers given by them. The scaling is also not justified or supported by any valid statutory provision. Therefore, the result of the examination prepared after scaling the marks cannot be sustained and must be set-aside.

43. In the result, the writ petition succeeds and is hereby allowed. The result of Civil Judge (Jr. Div.) Examination, 2000, which was declared on 25.9.2001 is quashed. The U.P. Public Service Commission is directed to declare the result of the aforesaid examination on the basis of the actual marks secured by the candidates without applying the formula of scaling.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 19.9.2002

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

Civil Misc. Writ Petition No. 18567 of 1995

Tilak Ram and others ...Petitioners
Versus
Deputy Director of Consolidation, Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri H.N. Shukla
Sri R.R. Shukla

Counsel for the Respondents:
S.C.

Constitution of India, Article 226 Doctrine of merger- order passed by the inferior court- superseded by Superior Court- having binding effect- 'held- principle of merger is fully applicable.

Held- Para 13 and 17

From what is noted above, it is clear that if the judgement and order of an inferior court is subject to an appeal by the superior court and in such proceedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior court and the judgment of the superior court shall remain operative and binding upon the parties. It would not be open to any one of the parties to say that judgment and order passed by the inferior court were still alive or operative.

From the above noted authorities cited by learned counsel for the petitioner, it is abundantly clear that the orders passed by the subordinate authorities merge in the orders passed by the Consolidation Officer and the Settlement Officer Consolidation were merged in the order passed by the Deputy Director of Consolidation, which was ultimately quashed by this Court. Thus, the only judgment which remained operative between the parties was the judgment of this Court passed in the above noted writ petition. Learned counsel for the petitioners is right in his submission that the theory of merger was fully applicable in the present case.

Case law discussed.
AIR 2000 sC-1623
AIR 2000 SC-2587
AIR 2001 SC-203
1969 (3) SCC-489

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

1. Heard learned counsel for the parties.

2. By means of this petition filed under Article 226 of the Constitution of India, petitioners pray for issuance of a writ, order or direction in the nature of certiorari quashing the order dated 16.6.1995 passed by respondent no. 1.

3. The relevant facts of the case, giving rise to the present petition, in brief, are that in the basic year, the name of Badri, father of the contesting respondents was recorded in the revenue papers over the land in dispute. On receipt of C.H. Form No. 5, objection was filed by the petitioners contending that the land in dispute was ancestral property and Badri, father of the respondent no. 2 to 4, got illegally and fictitiously recorded his name over the land in dispute in the revenue papers. Parties produced evidence, oral and documentary, in support of their cases. The Consolidation Officer after going through the material on the record, allowed the objection filed by the petitioners by his judgment and order dated 14.2.1979. Feeling aggrieved

by the judgment and order passed by the Consolidation Officer, Badri filed an appeal before the Settlement Officer Consolidation. The Settlement Officer Consolidation allowed the appeal by his judgment and order dated 31.3.1979. The petitioner, therefore, had to file a revision under Section 48 of the U.P. Consolidation of Holdings Act before the Deputy Director of Consolidation. The revision filed by the petitioners was dismissed by the Deputy Director of Consolidation by his judgment and order dated 17.4.1980. Therefore, the petitioners filed writ petition no. 4365 of 1980. The said writ petition was, after hearing the parties, allowed by this Court by judgment and order dated 13.9.1994 and the impugned order dated 17.4.1990 was quashed. The said order has become final as no appeal against the said order was filed by the contesting respondents. It appears that after about 11 years, Badri made an application before the Deputy Director of Consolidation for making a reference. On the said application a reference was made and ultimately the Deputy Director of Consolidation vide order dated 13.9.1984 expunged the names of the petitioners from the revenue papers, hence the present petition.

4. On this petition, notices were issued to the contesting respondents who have filed their counter affidavit controverting the facts stated in the writ petition in reply of which a rejoinder affidavit has also been filed, denying the facts stated in the counter affidavit and reasserting the facts stat ed in the writ petition.

5. Learned counsel for the petitioners vehemently urged that the judgment and order passed by this Court in writ petition No. 43465 of 1980 has become final between the parties. The same operates as res judicata. It has also been urged that the orders passed by the authorities below merged in the order passed by this Court in writ petition no. 4365 of 1980. The Deputy Director of Consolidation, therefore, had no jurisdiction to subsequently pass an order contrary to the order passed by this Court. According to him, the Deputy Director of Consolidation has committed contempt of this Court. It was further urged that the contesting respondents have slept over their rights for about 11 years, therefore, there was justification for the Deputy Director of Consolidation to entertain their application for inviting a reference, he should have rejected the said application as not maintainable and barred by limitation.

6. On the other hand, learned counsel for the contesting respondents supported by the validity of the order passed by the Deputy Director of Consolidation. It has been urged that this Court in Writ petition no. 4365 of 1980, only quashed the order passed by the Consolidation Officer and the Settlement Officer Consolidation was right in passing the impugned order. According to him, writ petition had no merit., the same is liable to be dismissed.

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

8. In the present case, the question is as to whether in one case between the same parties, there can be two judgments in operation. It is not disputed that judgment and order dated 13.9.1980 passed by this Court in writ petition no. 4365 of 1980 became final. The said

judgment was between the same parties and in respect of the same property which is involved in the present case. The judgments and orders passed by the authorities below merged in the order passed by the Deputy Director of Consolidation, which was ultimately quashed by this Court and the judgment and order passed by this Court became final. The said judgments, thus, operate as res judicata between the parties.

9. On the question of merger of the orders passed by the subordinate authorities in the order of the superior court or Tribunal, learned counsel for the petitioners has referred to and relied upon the following decisions of the Apex Court. -

(i) V.M. Salgaocar and Bros. Pvt. Ltd. v. Commissioner of Income Tax, reported in AIR 2000 SC 1623;
(ii) Kunhayammed and others v. State of Kerala and another, reported in AIR 2000 SC 2587; and
(iii) Amba Bai and others v. Gopal and others , reported in AIR 2001 SC 203.

10. Learned counsel for the respondents in support of his submissions referred to and relied upon the following decisions :-

(i) Thakur Birendra Singh v. The State of Madhya Pradesh and others, reported in 1969 (3) SCC 489;
(ii) Special Appeal No. 363 of 1970, Vishwa Swarup v. Kamla Prasad and others, decided by this Court on 14.12.1970;
(iii) Order passed on Misc. Application No. Nil of 1981 in Civil Misc. Writ Petition NO. 7458 of 1978, Kamta Singh v. Lalta and others.

11. In the case of V.M. Salgaocar (supra), ultimately the Special Leave Petition under Article 136 was dismissed by the Supreme Court. Under these circumstances, it was ruled as under:-

"In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed order of the High Court is merged with that of the Supreme Court. We quote the following paragraph from the judgement of this Court in the case of Supreme Court Employees Welfare Association v. Union of India, (1989) 4 SCC 187: AIR 1990SC 34:

"22. It has been already noticed that the special leave petitions filed on behalf of the Union of India against the said judgments of the Delhi High Court were summarily dismissed by this Court. It is now a well settled principle of law that when a special leave petition is summarily dismissed under Article 136 of the Constitution, by such dismissal this Court does not lay down any law, as envisaged by Attorney General. In (AIR 1986 SC 1780) it has been held by this Court that the dismissal of a special leave petition in limine by a non-speaking order does not justify any inference that, by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court. It has been further held that the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be

that the Supreme Court had decided only that it was not a fit case where special leave petition should be granted. In Union of India v. All India Services Pensioners Association, (1988) 2 SCC 580 : (AIR 1988 SC 501) this Court has given reasons for dismissing the special leave petition when such reasons are given, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. It, therefore, follows that when no reason is given, but a special leave petition is dismissed simpliciter, it cannot be said that there has been a declaration of law by this Court under Article 141 of the Constitution.

12. In the case of Kanhayammed (supra), it was ruled by the Supreme Court as under:

"12. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When decree or order passed by inferior Court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way-whether the decree or order under appeal is set aside or modified or simply confirmed, it is decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the Court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid of which could have been laid shall have to be kept in view.

"We may look at the issue from another angle. The supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage.

To sum up our conclusions are:-

(i) where an appeal or revision is provided against an order passed by a Court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remain operative and is capable of enforcement in the eye of law.
(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

"44. Having thus made the law clear, the case at hand poses no problem for solution. The earlier order of the High Court was sought to be subjected to exercise of appellate jurisdiction of Supreme Court by the State of Karela. Wherein it did not succeed. The prayer contained in the petition seeking leave to appeal to this Court was found devoid of any merits and hence dismissed. The order is a non-speaking and unreasoned order. All that can be spelt out is that the Court was not convinced of the need for exercising its appellate jurisdiction. The order of the High Court dated 17.12.1982 did not merge in the order dated 18.7.1983 passed by this Court. So it is available to be reviewed by the High Court."

In Amba Bai (supra), it was ruled by the Supreme Court as under :-

"If the judgment or order of an inferior court is subject to an appeal or revision by the superior court and in such proceedings the order of judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior Court. The juristic justification for such doctrine of merger is based on the common law principle that there cannot be, at one and the same time, more than one operative order governing the subject matter and the judgment of the inferior court is deemed to lose its identity and merger with the judgment of the superior court. In the course of time this concept which was originally restricted to appellate decrees on the ground that an appeal is continuation of the suit, came to be gradually extended to other proceedings like revisions and even the proceedings before quasi-judicial and executive authorities.

13. From what is noted above, it is clear that if the judgment and order of an inferior Court is subject to an appeal by the Superior Court and in such proceedings the order or judgment is passed by the superior court determining the rights of parties, it would supersede the order or judgment passed by the inferior Court and the judgment of the superior court shall remain operative and binding upon the parties. It would not be open to any one of the parties to say the judgment and order passed by the inferior Court were still alive or operative.

14. The judgment in Thakur Birendra Singh case (supra) was the judgment on the facts of that case. In that case it was held by the Supreme Court that in the opinion of the High Court the appellate authority having overlooked this aspect of the matter and the order by the Collector or those in appeal could not be allowed to stand. It was observed that the High Court quashed the order dated June 3, 1960, January 14, 1960 and July 27, 1964 directing at the same time that the case is remitted to the Collector for fresh decision with deference to the observation made in this order after giving an opportunity to the petitioner of being heard. The Supreme Court, in these circumstances, has taken the view that the High Court was wrong in giving further direction and that once the order complained are quashed, the matter should have been left at large without any further direction leaving the revenue authorities free to take any steps allowable under the law and the proceeding out of which the said proceedings arose, were pending disposal.

The said case has got no application to the facts of the present case.

15. In Vishwa Swarup case (supra), the said case was also decided on the facts of that case. There was dispute regarding an entry which showed Kamala respondent in the said case as sub-tenant. It was observed that an entry in that case in Khasra 135 F. which has got the special status under the law. The said entry confers the right of occupant under Section 20 of the U.P. Zamindari Abolition and Land Reforms Act and further confers the right of Adhivasi. The said view was taken by the single Judge. The Deputy Director of Consolidation held to the contrary. Once the order of the Dy.Director of Consolidation was quashed, this Court was right in holding that the case was to be re-considered by the Deputy Director of Consolidation.

16. In Kamta Singh (supra), the order was passed on an misc. application. It is not known as to what had happened in the case ultimately, therefore, the said order has got no binding effect.

17. From the above noted authorities cited by learned counsel for the petitioner, it is abundantly clear that the orders passed by the subordinate authorities merge in the orders passed by the superior authority. In the present case , orders passed by the Consolidation Officer and the Settlement Officer Consolidation were merged in the order passed by the Deputy Director of Consolidation, which was ultimately quashed by this Court. Thus the only judgment which remained operative between the parties was the judgment of this Court passed in the above noted writ petition. Learned counsel for the petitioners is right in his submission that the theory of merger was fully applicable in the present case. So far as the decisions referred by learned counsel for the respondents are concerned, for the reasons stated above, they have got no application to the facts of this case. They are decisions of the facts of those cases and are, therefore, distinguishable from the facts of the present case.

18. In view of the aforesaid discussion, this petition deserves to be allowed.

19. The writ petition succeeds and is hereby allowed. The order dated 16.6.1995 passed by the respondent no. 1 is hereby quashed.

20. It is further directed that the name of Badri from the revenue papers be expunged and of Shri Nath and Radhey Shyam, who claim their rights on the basis of sale deed executed by Badri and the names of the petitioners be entered in revenue papers.

No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.9.2002

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.

Civil Misc. Writ Petition No. 37313 of 2002

Mohd. Ilyas Ahmad ...Petitioner
Versus
The XIII Additional District Judge, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Tandon
Sri S.N. Misra

Counsel for the Respondents:
Sri K.M. Asthana
S.C.

U.P. Act No. 13 of 1972- Section 20 (4)- Ejectment- on the ground the son of tenant possess own residential house in the same city- whether ejectment can be made despite of the fact-- son not comes within the meaning of family ?- held- 'Yes'.

Held- Para 9

On the other hand learned counsel for the respondent has relied upon a decision of a learned single Judge of this Court which directly covers the issue. The said decision is Sri Iiya Uddin Vs. ADJ reported in 1982 ARC 200. In the said decision it has been held that the requirement of being dependent on the tenant or normally residing with the tenant is not necessary in Section 20 (4) proviso.

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

1. I have heard learned counsel for both sides.

2. The benefit of Section 20 (4) of U.P. Act No. 13 of 1972 has been denied to the petitioner tenant under the proviso to that sub section.

3. The finding of fact returned by the impugned order states that the son of the tenant has acquired a; house in vacant state in the same city and the tenant himself has, by inheritance, got another accommodation in which at least two rooms are vacant.

4. Learned counsel for the petitioner has argued that the son of the petitioner should not be treated to be a 'member of the tenant's family' within the meaning of the proviso to Section 20 (4). For ready reference Section 20 (4) along with the proviso is reproduced below :

"20.

(4) In any suit for eviction on; the ground mentioned in clause (a) of sub section (2) if at the first hearing of the suit, the tenant unconditionally pays or tenders to the landlord or deposits in court the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the land lord's costs of the suit in respect thereof, after deducting there from any amount already deposited by the tenant under sub section (1) of Section 30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground.

Provided that nothing in this sub section shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area.'

5. In this connection two other provisions of the Act which are relevant are Section 3 (g) and proviso to Section 12 (3) and 'Explanation (b)' to that sub section.. These two provisions are also reproduced below:

"3 (g) "family" in relation to a landlord or tenant of a building means his or her-
(i) spouse
(ii) male lineal descendants

(iii) such parents, grandparents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendent, as may have been normally residing with him or her.

and includes in relation to a land lord any female having a legal right of residence in that building"

"12 (3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquire in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy:

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

EXPLANATION- For the purposes of this sub section-

(a)……..
(b) the expression' any member of family', in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant.'

6. In the light of above provisions, for the purpose of interpreting the words 'member of the tenant's family' as used in the proviso to Section 20 (4), the definition in section 3 (g) would be used and by such use the son of the petitioner would be a member of the family of the petitioner, though the son may not be wholly dependent or normally residing with the tenant.

7. Learned counsel for the petitioner has relying upon (1) the decision of Supreme Court in the case of Harish Tandon Vs. ADM reported in 1995 (1) ARC 220, (2) the decision of a learned single Judge of this Court in ;the case of Som Nath Shet Vs. II ADJ reported in 1981 ARC 82, (3) the decision of a Division Bench of this Court in the case of Sri Nath Tandon Vs. RCEO reported in 1979 ARC 351, (4) the decision of a learned single Judge of this Court in the case of Mohan Vs. III ADJ reported in 1995 (1) ARC 45, (5) the decision of a learned single Judge of this Court in the case of Madan Goptal Maheshwari v. District Judge and others reported in 1999 (2) ARC 241, and (5) the decision of Supreme Court in the case of *Mancheri Vs. Kuthipavattam reported in (1996) 6 SCC 185*, has submitted that under section 20 (4) the son would not be a member of family of the tenant unless the said son was wholly dependent upon the tenant or was normally residing with the tenant in the accommodation in dispute. The decision of Supreme Court in the case of (1996) 6 SCC 185 does not deal with the issue at all. The decision in 1995 (1) ARC 45 is also not on the point as it was a case where the spouse of the tenant had purchased a plot and not a house. All the remaining cases cited above deal with Explanation to Section 12 (3) of the Act. None of the cases deal with proviso to Section 20 (4).

8. As will be noticed from the express words, Explanation (b) to Section

12 (3) indicates that the modified definition of 'member of family' is for the purposes of that sub section only i.e. for the purposes of section 12 (3). There is no logical reason to apply the modified definition to section 20 (4) of the Act.

9. On the other hand learned counsel for the respondent has relied upon a decision of a learned single Judge of this Court which directly covers the issue. The said decision is *Sri Jiya Uddin Vs. II ADJ reported in 1982 ARC 200.* In the said decision it has been held that the requirement of being dependent on the tenant or normally residing with the tenant is not necessary in Section 20 (4) proviso.

In the circumstances this writ petition is devoid of merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.9.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 27968 of 1992

Ashok Kumar ...Petitioner
Versus
U.P. State Transport Corporation and others ...Respondents

Counsel for the Petitioner:
Sri S.A. Gilani
Sri S.N. Singh

Counsel for the Respondents:
Sri Samir Sharma
Sri S.K. Sharma
S.C.

Constitution of India, Article 226- Carrying passengers- without ticket after full fledge enquiry- Petitioner was found guilty- Industrial Tribunal also found the termination order valid- held- warrants no interference.

Held- Para 18

The findings of fact cannot be normally interfered with by this Court in exercise of powers under Article 226 of the Constitution of India until and unless there are strong reasons of mala fide and perversity on the face of record. There is no illegality or infirmity in the impugned award and it is not a fit case for interference by exercise of extra ordinary powers under Article 226 of the Constitution of India.

Case law discussed:
JT 1995 (8) SC-65
1996 (i) UPLBEC 2
1999 () UPLBEC 102, 103
2000 (i) ESC -82 (Alld)
2000 (2) AWC 1475 (SC)

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard the learned counsel for the petitioner and perused the records.

2. The petitioner has filed the present writ petition challenging the award dated 3.4.1992 passed by the labour court, Annexure 3 and the order of termination dated 20.4.1982 passed by respondent no.2, Aannexure-1 to the writ petition.

3. The petitioner was appointed as a Bus Conductor on 10.6.1990 in U.P. State Transport Corporation. He was issued charge sheets dated 21.1.1981 and 24.10.1981 for carrying passengers without ticket on four occasions in order to embezzle the Corporation revenue. His services were terminated by order dated 20.4.1982 passed by the Assistant

Regional Manager, U.P. State Transport Corporation, Muzaffarnagar, respondent no. 2 after holding enquiry in the charges.

4. The petitioner raised an industrial dispute against order of his termination, which was referred to by the State Government to the Labour court (1) UP Meerut, where it was registered as I.D. Case No. 89 of 1`98. The Labour Court by award dated 3.4.92 has held that all the charges of misconduct against the petitioner stood proved and has given finding of fact that the punishment awarded to him cannot be said to be disproportionate to the charges in the circumstances of the case. It has further been held that he is not entitled to reinstatement in service with back wages or other benefits.

5. The petitioner has assailed the award on the ground that the findings given by the labour court are against the evidence ion record and are unwarranted in the eyes of law as no charge is made out against him. The further ground of challenge is that the punishment awarded against him is disproportionate and is not tenable in the eyes of law. It is alleged that when the labour court came to the conclusion that the existing enquiry against the petitioner is not in accordance with law, the termination of his service should have been treated from the date of the impugned award i.e. 3.4.92 and not from the date of termination of service by respondent no. 2 vide order dated 20.4.1982

6. Counsel for the petitioner has relied upon the following cases:

(1) B.C.Chaturvedi Vs. Union of India and Ors., JT 1995 (8) SC 65

(2) Shri Chand Vs. Addl. Commissioner, Gorakhpur Division, Gorakhpur and others, (1996) 1 UP LBEC 2

(3) Ram Pratap vs. State of U.P. and others, (1999) 3 UPLBEC 102

(4) Unnati Chaturvedi (Dr.) (Smt.) v. Director of Education, Allahabad and others, (1999) 3 UPLBEC 103

(5) P.C. Srivastava v. Registrar, Cooperative Societies and others, 2000 (1) ESC 82 (Alld.)

(6) U.P. State Road Transport Corporation and others v. Mahesh Kumar Misra and others, 2000 (2) AWC 1475 (SC).

7. In the peculiar facts and the circumstances of the instant case, the petitioner has been found to be carrying the passengers without tickets earlier also on four occasions. The labour court has considered all the facts and the circumstances of the case and has come to the conclusion that the punishment awarded to the petitioner is neither disproportionate to the charges nor severe. It was not required any interference by this court.

8. The counsel for the respondents has contended that the petitioner was found to be carrying passengers without ticket so as to embezzle the Corporation revenue on four occasions and committed the offence of criminal misconduct, as such he has rightly been dismissed from service. It is further contended that the punishment awarded to him cannot be said to be disproportionate to the charges. He has relied upon the following cases :

9. In ***B.C. Chaturvedi vs. Union of India and Ors. JT 1995 (8) SC 65*** (supra) was a case of misconduct in which the appellant was found in possession of

assets disproportionate to his known source of income. It was held by the Apex Court that the High Court while exercising the powers of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal.

10. In ***Shri Chand vs. Additional Commissioner, Gorakhpur Division, Gorakhpur and others, (1996) 1 UPLBEC 2***, this Court found that the charge of embezzlement of stamp of Rs.10/- was only disproportionate and perverse and in these circumstances, quashed the order of punishment on the ground that no proper opportunity of hearing was given to the petitioner and he was directed to be reinstated in service on deposit of Rs.10/-.

11. In ***Ram Pratap vs. State of U.P. (1999) 3 UPLBEC (Sum.) 102***, it was held that the order of dismissal from service containing no reasons for conclusion was quashed as it was a non-speaking order. In this case similar charges have been leveled as were leveled against the petitioner, were also leveled against one Khushal Singh, Assistant Engineer working with the petitioner. The Administrative Tribunal conducted the enquiry and recommended for his dismissal from service, but he was awarded only a minor punishment of stoppage of three yearly increments as was awarded in the case of Khushal Singh. In the counter affidavit filed in that case no reason whatsoever had been disclosed as to why discriminatory treatment was given to the petitioner and as to why the petitioner was removed from the service, when Khushal Singh was awarded only minor punishment on same charges and in same circumstances.

12. In ***P.C. Srivastava vs. Registrar, Co operative Societies and others, 2000 (1) ESC 82 (All)***, it was held that the petitioner was dismissed after suspension. On enquiry it was found that the real culprit was Rati Pal and not the petitioner, though he was over all in charge and he should have exercised proper control of the affairs of the Cooperative Store. In these circumstances, the punishment of dismissal was held to be highly disproportionate to the misconduct alleged.

13. In ***U.P. State Road Transport Corporation and others vs. Mahesh Kumar Misra and others, 2000 (2) AWC 1475 (SC)***, it was held that the petitioner was dismissed from service. In this case the charge against the Conductor of the bus as that he had issued tickets from Zero Road to Manauri and charged only Rs. 1.50 P. instead of Rs. 1.80, though it was not on long distance bus but intercity bus. It was a case of allowing the passengers to travel without ticket. This Court directed reinstatement of respondent with 25% back wages, as the dispute whether the passengers boarded at High Court or at Zero Road, could not be proved, even though they being local passengers, their statements was not recorded on the point of place of their boarding. Thus the above judgment cited by the petitioner is also of no help to him.

14. ***In Shri Krishna Sharma vs. The Assistant Regional Manager, (supra)*** it has been held that if a passenger is found travelling without ticket, the conductor of the bus is responsible for it. The inference

drawn that the petitioner failed to perform duties as provided in the rules, cannot be said to be erroneous. The misconduct of carrying passenger without ticket is very serious and his service could be dispensed with.

15. In ***Imtiaz Ahmad vs. U.P. State Road Transport Corporation, Lucknow (supra),*** it was held that the petitioner was employed as Bus conductor. His duty was not only to conduct the bus but also realize fare and if a conductor is found guilty of not realizing the fare and permitting the passengers to travel without tickets, it cannot be said to be a minor charge for awarding lesser punishment than the dismissal from service. This Court held in these circumstances, there was no justification to retain him in service and the impugned order does not suffer from any error of law.

16. ***In Shitla Prasad Srivastava Vs. U.P. State Road Transport Corporation (supra)*** a Division Bench of this Court held that the finding of the Inquiry Officer that the appellant did not issue any tickets to the passengers and thereby misappropriated the money cannot be faulted with and the punishment of termination of service cannot be said to be disproportionate to the charges.

17. In a similar case in ***U.P.S.R.T.C. and others vs. Har Narain Singh and others***, the Apex Court has held that where High Court reappraised the evidence led in the enquiry and quashed the order passed by the Tribunal as also, the order passed by the disciplinary Authority it clearly exceeded its jurisdiction in doing so because the High Court was not sitting in appeal over the findings given by the disciplinary authority. The Apex Court set aside the impugned order of the High Court and restored the order of the Tribunal.

18. In the instant the findings of fact have been given by the labour court, which have upheld the punishment given by the Corporation after enquiry. In the charges of serious misconduct for carrying passengers without ticket for which the only appropriate punishment is dismissal from service. In the past also the conduct of the petitioner was not without blemish. Corruption is now rampant in the society and has to be rooted out by strict enforcement of law. The punishment in the aforesaid circumstances cannot be said to be highly disproportionate so as to shock the conscience of the Court. The disciplinary authority as well as the labour court has come to the conclusion that there is no justification to retain him service. The findings of fact cannot be normally interfered with by this Court in exercise of powers under Article 226 of the Constitution of India until and unless there are strong reasons of malafide and perversity on the face of record. There is no illegality or infirmity in the impugned award and it is not a fit case for interference by exercise of extra ordinary powers under Article 226 of the Constitution of India.

19. No other point has been raised before this Court.

20. For these reasons, the writ petition fails and dismissed. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.9.2002

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

Civil Misc. Writ Petition No. 40592 of 2002

Ajay Kumar Singh ...Petitioner
Versus
The Tehsildar Sahjanwan, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri A.R. Dube

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Recovery Proceeding arrears in respect of contract- as arrears of land Revenue- held- proper.

Held- Para 3

Counsel for the petitioner submitted that the recovery cannot be made as arrears of land revenue. He has relied on the Division Bench decision of this Court in Ram Bilas Tibriwal versus Chairman, Municipal Board, Titri Bazar and others, 1998 (2) AWC 1468. We have distinguished the above decision in our judgment in Writ Petition No. 37629 of 2002, Smt. Malka Begum Versus State of UP decided on 24.9.2002. Hence we cannot agree with the submission of the learned counsel for the petitioner.

Case law discussed:
1998 (2) AWC 1468
W.P. No. 37629 of 02 Decided on 24.9.02

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

1. The petitioner has challenged the recovery in respect of a contract granted to him for realization of Park fee as well as Tahhazari from Nagar Panchayat Sahjanwan, district Gorakhpur.

Heard learned counsel for the parties.

2. The petitioner had applied against an advertisement and had been granted the contract for realization of Park fee as well as Tahbazari from the area concerned as mentioned in the advertisement.

3. Learned counsel for the petitioner submitted that recovery cannot be made as arrears of land revenue. He has relied on the Division Bench decision of this Court in Ram Bilas Tibriwal Versus Chairman, Municipal Board, Titri Bazar and others, 1998 (2) AWC 1468. We have distinguished the above decision in our judgment in Writ Petition No. 37629 of 2002, Smt. Malka Begum Versus State of U.P. decided on 24.9.2002. Hence we cannot agree with the submission of the learned counsel for the petitioner.

4. As regard the petitioner's allegation that he was restrained from realizing park fee/tahbazari, he may make a representation in this connection to the District Magistrate, Gorakhpur who will decide the same preferably within 6 weeks thereafter in accordance with law after hearing the petitioner as well as the respondent no. 3.

5. With the aforesaid direction, this writ petition is disposed off.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.9.2002

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE N.K. MEHROTRA, J.

Civil Misc. Writ Petition No. 18283 of 1998

Commissioner of Income Tax and another ...Petitioner
Versus
Ajai Singh and another ...Respondents

Counsel for the Petitioners:
Sri Amit Sthalekar

Counsel for the Respondents:
Sri O.P. Gupta

Constitution of India, Article 226- the employer states that the Services were not unsatisfactory, would not ipso facto mean that the services of the probationer were being terminated by way of punishment- the order of termination was neither punitive nor cast any stigma upon the petitioner. There was absolutely no necessity to hold any departmental enquiry and the view to the contrary taken by the Tribunal is wholly erroneous in law.

Held (Para 4)

The order nowhere mentions that his services were being terminated on account of satisfactory work. The whole basis of the order passed by the Tribunal is that the services of respondent no. 1 had been terminated on account of unsatisfactory work and, consequently, it was obligatory upon the writ petitioner to hold a formal enquiry. The view taken by the Tribunal is, therefore, not borne out from the material on record and, thus cannot be sustained.

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

1. This writ petition under Article 226 of the Constitution has been filed for quashing the judgment and order dated 2.4.1998 passed in O.A. No. 1273 of 1973 by the Central Administrative Tribunal, Allahabad.

2. Ajai Singh, respondent no. 1 to the writ petition, was appointed as a casual IV th Class employee in the office of the Commissioner, Income Tax, Allahabad, on 7.9.1994, and his services were terminated on 4.11.1997. He challenged termination of his service by filing an Original Application. The Tribunal held that as the services of respondent no. 1 had been terminated on account of non satisfactory work, it was incumbent upon the writ petitioner to hold a formal departmental enquiry and as the same was not done, the termination of his services was illegal.

3. We have heard Sri Amit Sthalekar for the petitioner, Sri O.P. Gupta for respondent no. 1 and have perused the record.

4. It may be stated at the very outset that before the Tribunal Ajai Singh neither filed copy of the appointment order nor the copy of the order by which his services were terminated. It was stated in paragraph 4 (i) of the Original Application that annexure-1 thereof is the copy of the notice given to him on 4.11.1997. In the said notice he has been described as a daily wager and it was mentioned therein that his services would stand terminated w.e.f. 4.11.1997. The order nowhere mentions that his services were being terminated on account of unsatisfactory work. The whole basis of

the order passed by the Tribunal is that the services of respondent no. 1 had been terminated on account of unsatisfactory work and, consequently, it was obligatory upon the writ petitioners to hold a formal enquiry. The view taken by the Tribunal is, therefore, not borne out from the material on record and thus cannot be sustained.

5. In reply to the Original Application which was filed by Ajai Singh before the Tribunal, the writ petitioner filed a counter affidavit and therein it was stated that his services had been terminated on account of his unsatisfactory work and not by way of punishment. The reference to unsatisfactory work of respondent no. 1 in the counter affidavit should not be read in isolation but should be read in the context in which it has been used and the pleas taken by the writ petitioner should be read as a whole. The Tribunal has erred in dissecting one word from the counter affidavit and, thereafter, proceeding to hold on its basis that the services of the respondent had been terminated on account of any specific charge. It was a simple order of termination which will be evident from the notice given to respondent no. 1. There was absolutely no material to show that the same had been done on account of any imputation or charge. The order did not visit him with any evil consequence.

6. Learned counsel for the respondent has, on the strength of the decision in DR. Mrs. Sumati P. Shere Vs. Union of India and others, (1989) 3 SCC 311, submitted that the termination of services of Ajai Singh without holding any enquiry was illegal. We are unable to accept the submission made. In Pavenendra Narayan Verma Vs. SGPGI of Medical Sciences, 2002 SCC (L & S) 170, the services of the employee had been terminated and it was mentioned in the termination order that in the extended period of probation his work and conduct had not been found to be satisfactory. A similar contention was raised on behalf of the employee that the order was punitive and cast a stigma on him and consequently it could not be sustained without a full-scale departmental enquiry.

7. The Court after considering a number of earlier decisions on the point held as follows, in para 21 of the report :

"One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been ;held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld."

8. In Krishnadevaraya Education Trust Vs. L.A. Balkrishna, (2001) 9SCC 319, it has been held that the mere fact that in response to the challenge,. The employer states that the services were not satisfactory, would not ipso facto mean that the services of the probationer were being terminated by way of punishment.

9. Applying the principle laid down by the Apex Court in the above mentioned case, we are clearly of the opinion that the order of termination was neither punitive nor cast any stigma upon

the petitioner. There was absolutely no necessity to hold any departmental enquiry and the view to the contrary taken by the Tribunal is wholly erroneous in law.

10. The writ petition accordingly succeeds and is hereby allowed. The impugned order dated 2.4.1998 of the Central Administrative Tribunal is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.9.2002

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

Civil Misc. Writ Petition No. 41079 of 2002

M/s Hakim JI Brik Industries (eit Udhyog) ...Petitioner
Versus
The State of U.P. & others ...Respondent

Counsel for the Petitioner:
Sri S.K. Gaur

Counsel for the Respondents:
S.C.

U.P. Minor Minerals (Concessions) Rules 1963- Bhumidhari right is not proprietary right but tenancy right. No doubt bumidhari right is a very high kind of tenancy right because it is heritable and transferable, never the less it is not proprietary right.

Held in para 3
SCC 2000 (8) P. 655
Bhumidari right is not proprietary right but tenancy right. No doubt bhumidhari right is a very high kind of tenancy right because it is heritable and transferable, nevertheless it is not proprietary right. The proprietor of the land is the State in whom the land vests under Section 4 of the U.P. Zamindari Abolition and Land Reforms Act. Thus, there is no force in this writ petition. The writ petition is dismissed.

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

1. The petitioner is challenging demand of royalty vide notice dated 12.7.2002, Annexure 1 to the petition. The royalty is being charged under the U.P. Minor Minerals (Concessions) Rules, 1963.

2. Learned counsel for the petitioner has submitted that the petitioner is excavating earth from his own bhumidhari land and hence no royalty can be charged. He has relied on the Supreme Court decision in ***Quarry Owner's Association versus State of Bihar, 2000 (8) SCC 655***.

3. The submission of the learned counsel for the petitioner proceeds on a misconception. Buumidari right is not proprietary right but tenancy right. No doubt bhumidhari right is a very high kind of tenancy right because it is heritable and transferable, nevertheless it is not proprietary right. The proprietor of the land is the State in whom the land vests under Section 4 of the U.P. Zamindari Abolition and Land Reforms Act. Thus, there is no force in this writ petition. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.9.2002

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

Criminal Misc. Application No. 8422 of 2002

Mahendra Pal Sharma and others
...Applicants
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Applicants:
Sri Sunil Kumar

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

Code of Criminal Procedure- Section 190 (1) (b) the cognizance of the case was taken under section 190 (1) (b) Cr.P.C. and therefore provisions contained in proviso to Section 202 Cr.P.C. is not applicable in this case.

Held in para 19

The learned Magistrate was also not justified while recalling the order dated 8.1.1999 on the ground that since the case was exclusively triable by the Court of Sessions, all the witnesses have to be examined. The above observation was probably in view of proviso to Section 202 Cr.P.C. But the above procedure has to be adopted in complaint case. As held above cognizance of the case was taken under section 190 (1) (b) Cr.P.C. and therefore provisions contained in proviso to Section 202 Cr.P.C. is not applicable in this case. Therefore, the Revisional Court rightly held that the order of the Magistrate dated 23.10.2000 by which he recalled the order dated 8.1.1999 was not in accordance with law.

Case law referred:
(1995) 6 SCC P. 194
1993 (3) ACC P. 665

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

1. This application under Section 482 Cr.P.C. has been filed for quashing the entire proceedings of Criminal Case No. 1255 of 2002 Yogendra versus Mahendra and others under Sections 323, 307, 452 and 504 IPC P.S. Pahasu, district Bulandshahr pending in the court of Additional Civil Judge (Junior Division), l Khurja (Bulandshahr) and for setting aside the order dated 2.2.2002 passed by Additional Sessions Judge, Court No. 4, Bulandshahr in Criminal Revision No. 77 of 2001.

2. The facts giving rise to this application, briefly narrated, are that on 2.4.1998 Rakesh Kumar Sharma applicant no. 2 lodged a report against Yogendra opposite party no. 2 and three other persons under Sections 323, 504 and 427 IPC with the allegations that on 1.4.1998 at about 6 p.m. while he was returning to his house from his duties and reached in front of house of Suresh Chandra, the accused of the said case namely Suresh Chandra, Pintoo and Yograj caused injuries on him with lathi danda and also extended threats. During marpit a sum of Rs.6,000/- which he was keeping in his pocket had fallen down and could not be traced. On the basis of above report a non cognizable report under Sections 323, 504, 427 IPC was written at P.S. Pahasu. Subsequently, the case was altered under Section 308 and 325 IPC and registered at crime no. 64 of 1998 on 28.4.1998 and was investigated. The police after investigation submitted charge sheet against Suresh Chandra and Devraj on 13.5.1998 and latter on supplementary charge sheet was submitted against Yogendra opposite party no. 2 and Pintoo on 14.6.1998.

3. On 2.4.1998 the opposite party no. 2 moved an application before the Superintendent of Police for registering a case against the applicants with the allegations that on 2.4.1998 when he was taking his food in his house about 9 a.m. the applicants armed with knife, sariya and lathi came to his house and started abusing him on his objection caused injuries on him with knife, sariya and lathi. The Superintendent of Police ordered registration of case on the above application. Accordingly, an F.I.R., was lodged and a case at Crime no. 58 of 1998 under Sections 452, 307, 323, 504 IPC was registered against the applicants on 13.4.1998. After investigation, the police submitted final report in the said crime no. 58 of 1998.

4. On the receipt of the final report, the learned Magistrate issued notice to the complainant opposite party no. 2, who filed protest petition. The learned Magistrate on considering the evidence collected during investigation and the protest petition, allowed the protest petition, rejected the final report and summoned the applicants for trial under Sections 307, 323, 452 and 504 IPC, vide order dated 8.1.1999.

5. Thereafter, the applicants moved protest petition under Section 204 Cr.P.C. for recalling the order dated 8.1.1999 on the ground that only two affidavits were filed from the side of complainant and witnesses and doctor were not examined. The learned Magistrate on considering the above application held that affidavit of only two witnesses were filed, the other witnesses and the doctor were not examined. The case was triable by Court of Sessions and therefore all the witnesses were to be examined. With these finding he allowed the above petition and recalled summoning order dated 8.1.1999, vide order dated 23.10.2000.

6. Aggrieved with the above order dated 23.10.2000, the opposite party no. 2 filed Criminal Revision No. 77 of 2001. The learned Additional Sessions Judge, Court No. 4 who decided the revision held that by order dated 8.1.1999 the learned Magistrate had taken cognizance of the case under Section 190 (1) (b) Cr.P.C. rejecting the final report and therefore he was not required to adopt the procedure of complaint case, to examine all the witnesses of fact, as required by proviso to Section 202 Cr.P.C. and therefore, the learned Magistrate wrongly set aside the order dated 8.1.1999. With these findings he allowed the revision by order dated 2.2.2000 and set aside the order dated 23.10.2000 passed by the Magistrate.

7. The above order of the Revisional Court has been challenged in this application under Section 482 Cr.P.C. and further relief has been sought for quashing the criminal proceeding.

8. Heard Sri Sunil Kumar, learned counsel for the applicant, learned A.G.A. and perused the record.

9. The learned counsel for the applicant contended that the F.I.R. lodged by opposite party no. 2 was mala fide as counter blast of report lodged by applicant no. 2 and to save his liability in the said case. That on submission of final report, the Magistrate was empowered to take cognizance only under Section 190 (1) (a) Cr.P.C. after adopting procedure of complaint case and recording evidence under Section 200 and 202 Cr.P.C. He further contended that on receipt of final

report notice was issued to the complainant which indicated that the Magistrate was not satisfied with the evidence collected during investigation and that cognizance could not be taken on protest petition, as there is no such provision in the Cr.P.C. He further contended that protest petition comes under the definition of complaint as given in Section 2 (d) of Cr.P.C., therefore, before taking cognizance on it, the Magistrate had to adopt procedure contained in Chapter XV of the Cr.P.C. and that the Revisional Court wrongly allowed the revision without issuing notice to applicants.

10. On the other hand, the learned A.G.A. contended that the learned Magistrate had jurisdiction to summon the applicants after taking cognizance under Section 190 (1) (b) Cr.P.C. and subsequent protest petition filed by the applicants was not maintainable in view of Full Bench decision of this Court in Ranjeet Singh and others vs. State of UP and another, 2000 (40) ACC 342.

11. I have thoroughly considered the contentions of the learned counsel for the applicants.

12. The learned Magistrate on receiving final report submitted in the case issued notice to the opposite party no. 4, the complainant of the case in view of decision of the Apex Court in Abhinandan Jha Vs. Dinesh Misra, AIR 1985 SC, 1285 though no such specific provision is contained in the Cr.P.C. The question as to what is the position when the Magistrate is dealing with the report submitted by the police under section 173 Cr.P.C. has been answered by the Apex Court in the case of Abhinandan Jha vs. Dinesh Misra (supra) and it was held that the Magistrate on receiving of such report may accept the final report and close the proceeding. But there may be instances when the Magistrate may take a view on consideration of the final report, that the opinion formed by the police is not based on full and complete investigation in which case the Magistrate will have ample jurisdiction to give directions to the police under Section 156 (3) Cr.P.C. i.e. if the Magistrate feels after considering the final report that the investigation is unsatisfactory or incomplete or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct police to make further investigation under section 156 (3) Cr.P.C. The police after such further investigation may submit a charge sheet or again submit a final report, depending upon the further investigation made by them. If ultimately, the Magistrate forms opinion that the facts set out in the final report constitute an offence he can take cognizance of the offence, under section 190 (1) (b) Cr.P.C., notwithstanding the contrary opinion of the police expressed in the final report. It was further held in the said case that it is open to the Magistrate to treat the respective protest petitions as complaint and take further proceedings according to law.

13. The above view of Apex Court was again reiterated in the case of Rupan Deol Bajaj (Mrs.) and another versus Kanwar Pal Singh Gill and another, (1995) 6SCC, 194 and held as below :-

"In Abinandan Jha v. Dinesh Misra (supra) the question arose whether a Magistrate to whom a report under Section 173 (1) Cr.P.C. had been

submitted to the effect that no case had been made out against the accused , could direct the police to file a charge sheet on his disagreeing with that report. In answering the question this Court first observed that the use of the words 'may take cognizance of any offence' in sub section (1) of Section 190 Cr.P.C. imports the exercise of 'judicial discretion' and the Magistrate who receives the report under Section 173 Cr.P.C. will have to consider the said report and judicially take a decision whether or not to take cognizance of the offence. The Court then held, in answering the question posed before it, that the Magistrate had no jurisdiction to direct the police to submit a charge sheet but it was open to the Magistrate to agree or disagree with the police report, if he agreed with the report that there was no case made out for issuing process to the accused he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under section 156 (3). It was further held that if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance thereof notwithstanding contrary opinion of the police expressed in the report."

14. Thus, it is settled view that the Magistrate on receipt of final report is not debarred from taking cognizance under section 190 (1) (b) of Cr.P.C. and he has not to adopt procedure of complaint case. Therefore, the contention of the learned counsel for the applicants that on receipt of final report, the Magistrate can only take cognizance after adopting procedure of complaint case under Section 190 (1) (a) Cr.P.C. is not correct.

15. The next contention of the learned counsel for the applicants that the protest petition is complaint as defined under Section 2 (d) of the Cr.P.C. has also no force, as a complaint should contain the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. It is true that there is no specific provision in the Cr.P.C. for filing protest petition. As per direction of the Apex Court, the Magistrate had to issue a notice to the complainant on receipt of final report and may pass order after considering the protest petition. The best precedence on the permissibility of preferring protest petition is reported in the decision in Abhinandan Jha, (supra) wherein the practice of filing protest petition against Final Report has been specifically noted and countenanced by the Hon'ble Supreme Court.

16. The notice to the complainant before accepting final report has been made mandatory by the direction of the Apex Court and therefore it is fallacious to say that issuance of notice indicated that the Magistrate was not satisfied that a prima facie case was made out.

17. In these circumstances, the Magistrate vide order dated 8.1.1999 had rightly taken cognizance rejecting the final report, under Section 190 (1) (b) Cr.P.C. i.e. on police report and not on complaint and he was not required follow the procedure of complaint case.

18. After passing of the order dated 8.1.1999 the applicants/accused filed protest petition probably in view of the Division Bench decision of this Court in

Kailash Chaudhary vs. State of U.P. and another, 1993 (3) ACC, 665. But the above decision in Kailash Chaudhary's case was not found correct in Full Bench decision of this Court in Ranjeet Singh and others vs. State of U.P. and another (supra) and therefore the applicants had no right to file protest petition on summoning them rather they had to wait to the stage of charge to show that no offence was made out against them.

19. The learned Magistrate was also not justified while recalling the order dated 8.1.1999 on the ground that since the case was exclusively triable by the Court of Sessions, all the witnesses have to be examined. The above observation was probably in view of proviso to Section 202 Cr.P.C. But the above procedure has to be adopted in complaint case. As held above cognizance of the case was taken under Section 190 (1) (b) Cr.P.C. and therefore provisions contained in proviso to Section 202 Cr.P.C. is not applicable in this case. Therefore, the Revisional Court rightly held that the order of the Magistrate dated 23.10,.2002 by which he recalled the order dated 8.1.1999 was not in accordance with law.

20. The next contention of the learned counsel for the applicants that the Revisional Court wrongly allowed the revision without issuing notice to the applicants is also not supported by the record, as the revisional order itself shows that notices were issued to the applicants (opposite parties to the said revision) but despite of service of notice none appeared, (vide paragraph 3 of the judgment of the Revisional Court).

21. In view of the above discussions and observations I find that the impugned orders as well as Criminal proceedings in the Criminal Case are not liable to be quashed.

22. The applicants, therefore, has no force and is, accordingly, rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.9.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 31573 of 1999

Abdul Kafi ...Petitioner
Versus
District Magistrate, Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh
Sri Islam Ahmad

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Gun licence- Licencing Authority rejected the application - due to lack of information about particulars of the person for apphrension to life- can not be rejected.

Held- Para 6

The Scheme of the Arms Act does not contemplate that a licence of fire arm shall be granted only when somebody has apprehension of his life from someone. In this view of the matter, learned counsel for the petitioner has submitted that the view taken by the licensing authority, as stated above, that since the petitioner has not mentioned as to who are the persons from whom he has apprehension to his life and property and further there is no police report to

this effect also, therefore application of the petitioner for grant of firearm licence is liable to be rejected, amounts to rejection of application of firearm licence on wholly irrelevant consideration and it is also submitted that in this view of the matter, the order passed by the licensing authority rejecting the application for grant of firearm licence of the petitioner deserves to be quashed and petitioner is entitled for grant of the licence, applied for.

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

1. This writ petition was heard and allowed by me vide my order dated 5th September, 2002 for the reasons to be recorded later on. Now here are the reasons for allowing the aforesaid writ petition.

2. The present petition under Article 226 of the Constitution of India is directed against the order passed by the Licensing Authority/District Magistrate, Allahabad dated 17th June, 1999, Annexure-7 to the writ petition, whereby petitioner's representation has been rejected, who had applied for grant of fire arm licence i.e. a D.B.B.L. gun despite the reports of all the concerned authorities in favour of petitioner for grant of licence. It is submitted that petitioner has also deposited the National Saving Certificate worth Rs.5,000/- on 1st July, 1992, in this regard. The City Magistrate, Allahabad vide his report dated 20th July, 1992 has also recommended for grant of licence. However, licensing authority overruling the aforesaid recommendation, as already stated, vide his order dated 25th August, 1992 passed an order refusing to grant the firearm licence of the petitioner merely on the ground that petitioner has not stated in his application form as to from whom person he has danger to his life and there is no such police report also. In this view of the matter, the application has been held to be not maintainable and has been rejected.

3. Aggrieved by the aforesaid refusal to grant of firearm licence, the petitioner preferred an appeal before the appellate authority. The appellate authority vide its order dated 3rd July, 1995 allowed the appeal and remanded back the matter before the licensing authority with a direction to pass a reasoned order. The mater remain pending before the licensing authority when petitioner filed writ petitioner no. 22718 of 1996 before this Court and this Court vide its order dated 23rd July, 1996 disposed of the petition. The operative portion of the order dated 23rd July, 1996 is reproduced below:-

"Under the facts and circumstances of the present case, I direct that the respondent no. 1 to dispose of the application filed by the petitioner for grant of the licence, by means of speaking order, within a period of one month from the date a certified copy of the order of this Court is produced before him.

With these observations, the writ petition is disposed of finally."

4. Pursuant to the aforesaid direction issued by this Court, the licensing authority vide its order dated 6th September, 1997 reiterated his earlier order that the petitioner has not mentioned the necessity and justification for fire arm and there is no such reference in the police report also. In this view of the matter, the application for grant of firearm licence of the petitioner is liable to be rejected and is hereby rejected. Thereafter petitioner filed a representation before the

licensing authority, which remains pending when petitioner filed second writ petition before this Court being 38706 of 1997, which has been disposed of by this Court on 28th November, 1997. The operative portion of the order dated 28th November, 1997 is reproduced below :-

"I direct the respondents to decide the representation of the petitioners within a period of three months. With these observations, this petition is disposed of."

5. The petitioner alongwith the aforesaid order passed by this Court filed a representation addressed to the Licensing Authority/District Magistrate, Allahabad , a copy whereof is appended as Annexure -6 to the writ petition. The licensing authority again rejected the petitioner's application/representation for grant of fire arm license on the ground that petitioner has not filed any representation and therefore pursuance to the direction of this Court, petitioner's application is liable to be rejected as the petitioner has reiterated the same reasons and grounds for which the application for grant of fire arm licence has already been rejected. This order was passed by the licensing authority on 17th June, 1999. The petitioner by means of the present writ petition has challenged the order dated 17th June, 1999 passed by the licensing authority with a further prayer that a writ of mandamus be issued directing the respondents to grant fire arm licence to the petitioner.

6. Heard learned counsel for the parties. Learned counsel appearing on behalf of the petitioner has submitted that an application for grant of firearm licence under the provision of Arms Act can be refused only on the ground, which is relevant in the context of the grant of firearm license. The Scheme of the Arms Act does not contemplate that a licence of firearm shall be granted only when somebody has apprehension to his life from someone. In this view of the matter, learned counsel for the petitioner has submitted that the view taken by ;the licensing authority, as stated above, that since the petitioner has not mentioned as to who are the persons from whom he has apprehension to his life and property and further there is no police report to this effect also, therefore application of the petitioner for grant of firearm liocence is liable to be rejected, amounts to rejection of application of firearm licence on wholly irrelevant consideration and it is also submitted that in this view of the matter, the order passed by the licensing authority rejecting the application for grant of firearm licence of the petitioner deserves to be quashed and petitioner is entitled for grant of the licence, applied for.

7. Learned Standing Counsel appearing for the respondents tried to justify the order passed by licensing authority, which has been challenged in the present petition but, in my opinion, he failed to substantiate and support the reasoning given in the order. Learned Standing Counsel also could not point out any provision under the Arms Act on the basis whereof the reasoning given by the licensing authority for rejecting the petitioner's application for grant of firearm licence can be justified.

8. In this view of the matter, the order impugned in the present writ petition refusing to grant of the firearm licence of the petitioner on the ground

mentioned in the said order is not supported by any statutory provision and cannot be said to be relevant consideration on which the application of the petitioner should be rejected. In this view of the matter, the order dated 17th June, 1999 is liable to be quashed and is hereby quashed. The prayer of mandamus prayed for by learned counsel for the petitioner that licensing authority may be directed to grant the firearm licence to the petitioner cannot be granted. However, a direction is issued to the licensing authority to consider the petitioner's application for grant of firearm licence in accordance with law and not to reject the same on the ground on which it has been rejected by the present impugned order. The petitioner is directed to file an application alongwith the certified copy of the order passed by this Court before the licensing authority within fifteen days from today, who shall decide the same in accordance with law within a period three months from the date of production of a certified copy of this order before the licensing authority.

9. In view of what has been stated above, this writ petition is allowed. The order dated 17th June, 1999, Annexure-7 to the writ petition is quashed. Order accordingly.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.9.2002

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

Civil Misc. Writ Petition No. 39740 of 2002

Anuj Gupta (Minor) ...Petitioner
Versus
Central Board of Secondary Education, Delhi and another ...Respondents

Counsel for the Petitioner:
Sri K.D. Tiwari

Counsel for the Respondents:
Sri H.N. Pandey
S.C.

Central Board of Secondary Education , Delhi 1995- By laws 61- Revaluation of marks- can not be made- except the verification of marks.

Held- Para 11

In view of the provisions of Bye-law 61 and in view of the decision of the learned Single Judge in Kshitij Singh case, it is evident that the petitioner cannot be granted reliefs sought for by him in the writ petition. The petitioner can only seek verification of his marks as provided in clause (i) of the Bye-law 61.

Case law discussed:
2001(3) AWC-2191
AIR 1984 SC-1543

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The petitioner has filed this writ petition under Article 226 of the Constitution of India, interalia praying for following reliefs :

"(a) issue a writ, order or direction in the nature of mandamus commanding the

respondents to produce the copy of subject Code No. 087 Social Science of the petitioner of supplementary examination 2002 of Central Board of Secondary Education Delhi in this Hon'ble Court.

(b) issue a writ, order or direction in the nature of mandamus directing the respondents to revaluation the subject Code No. 087 Social Science of the petitioner of supplementary Examination, 2002 of Central Board of Secondary Education, Delhi,

(c) Pass an appropriate writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(d) Award cost of writ petition in favour of the petitioner."

2. From the averments made in the writ petition, it appears that the petitioner appeared in Secondary school examination of 2002 conducted by the Central Board of Secondary Education, Delhi. The petitioner was awarded 20 marks out of 100 marks in the subject Social Science and was awarded grade 'E'. The result of the petitioner was shown as compartment (photo stat copy of the mark sheet of the petitioner has been annexed as annexure no. 2 to the writ petition). It further appears that the petitioner was permitted to appear in the compartmental examination in the subject Social Science for the year 2002. The petitioner, it appears, appeared in the compartmental examination and was awarded 14 marks out of 100 marks and was given grade 'E' (photo stat copy of the mark sheet of the compartmental examination of the petitioner in respect of the subject Social Science has been annexed as annexure no. 4 to the writ petition). The petitioner has again been permitted to appear in the compartmental examination.

3. Thereafter, the petitioner has filed this writ petition, interalia, seeking the reliefs quoted above.

4. I have heard Sri K.D. Tiwari , learned counsel for the petitioner and Sri H.N. Pandey, learned counsel for the respondents.

5. Sri K.D. Tiwari, learned counsel for the petitioner submits that the petitioner was expecting 60% marks in the compartmental examination of the subject social science but was awarded 14 marks out of 100 marks. Therefore, he submits, the answer books of the petitioner in respect of the compartmental examination of Social Science be summoned by this Court and direction be given for revaluation of the same.

6. Sri H.N. Pandey, learned counsel for the respondents submits that the examinations are held by the Central Board of Secondary Education, Delhi in accordance with the examination Bye Laws of the Central Board of Secondary Education, Delhi 1995. Sri Pandey submits that under the said Bye Laws, a candidate can apply for verification of his marks awarded in particular subject, but no re-valuation of the answer book or supplementary answer book (s) shall be done. Sri Pandey further submits that under Bye Law 61b clause (iv), no candidate shall claim, or be entitled to, revaluation of his /her answers or disclosure or inspection of the answer books or other documents. Thus, the contention proceeds, the relief sought by the petitioner seeking summoning of the answer books and revaluation thereof

cannot be granted. Sri Pandey has placed reliance of the decision of the learned single Judge of this Court in ***Kshitij Singh Vs. Joint Secretary, Central Board of Secondary Education, Allahabad and others, 2001 (3) AWC 2191.***

I have considered the submissions made by the learned counsel for the parties.

7. Bye Law 61 of the Examination Bye Laws of the Central Board of Secondary Education, 1995 (in short the 'Examination Bye Laws') are quoted below:

"Verification of marks obtained by a Candidate in a subject

(i) A candidate who has appeared at an examination conducted by the Board may apply to the concerned Regional Officer of the Board for verification of marks in any particular subject. The verification will be restricted to checking whether all the answers have been evaluated and that there has been no mistakes in the totaling of marks for each question in that subject and that the marks have been transferred correctly on the title page of the answer book and to the award list and whether the supplementary answer books attached with the answer book mentioned by the candidate are in tact. No revaluation of the answer book or supplementary answer books shall be done.
(ii) Such an application must be made by the candidate within one month from the date of the declaration of results.
(iii) All such applications must be accompanied by payment of fee as prescribed by the Board from time to time.
(iv) No candidate shall claim, or be entitled to, revaluation of his/her answers or disclosures or inspection of the answer books or other documents.
(v) A candidate shall not be entitled to refund of fee unless as a result of the verification his/her mark are changed.

Bye Law 61 (i) a shows that a candidate who has appeared at an examination conducted by the Board may apply to the concerned Regional Officer of the Board for verification of marks in any particular subject. The verification will be restricted to checking whether all the answers have been evaluated and that there has been no mistake in the totaling of marks for each question in that subject and that the marks have been transferred correctly on the title page of the answer book and to the award list and whether the supplementary answer books attached with the answer book mentioned by the candidate are in tact. It is specifically stated in clause (i) of Bye Law 61 of the Examination Bye Laws that no revaluation of the answer book or supplementary answer books shall be done.

8. Again, clause (iv) of Bye Law 61 of the Examination Bye Laws lays down that no candidate shall claim, or be entitled to, revaluation of his/her answers or disclosures or inspection of the answer books or other documents.

9. In view of these provisions contained in the Examination Bye Laws of the Central Board of Secondary Education, it is evident that a candidate cannot make any claim for revaluation of

the answer book or supplementary answer books. Only verification of the marks as provided under clause (i) of Bye Law 61 can be done if a candidate makes the requisite application for that purpose.

10. In Kshitij Singh (supra), learned single Judge of this Court considered the provision of Bye Law 61 and the decision of the Apex Court in ***Maharashtra State Board of Secondary and Higher Secondary Education and another Vs. Pritosh Bhkupedh Kurmarsheth etc. AIR 1984 SC 1543***, Learned Single Judge laid down as follows (Paragraph No. 7 of the said AWC):

"Rule 61 further contains a provision that no revaluation of the answer book or supplementary answer book shall be done. The examination of the Central Board of Secondary Education is thus conducted under the bye laws which in detail prescribe the procedure of examination, evaluation and all other connected matter. The bye laws only permit verification of marks and specifically contain a provision of prohibiting revaluation of the answer book of every student who appears in the Board Examination. There is uniform procedure of examination and its evaluation conducted by the Board. The petitioner appears in the examination conducted by the Board in accordance with the bye laws and subject to procedure and rules prescribed therein. Rule 61 provides only verification of marks obtained by a candidate in a subject, hence the petitioner can avail only that benefit which is provided under the bye laws. When the bye laws prohibit the revaluation, the petitioner can not ask this Court to issue direction to the Board to act to the contrary to the bye laws. In the writ petition, there is no challenge to bye law 61 which itself provides that there will be no revaluation of the answer book."

11. In view of the provisions of Bye law 61 and in view of the decision of the learned single Judge in **Kshitij Singh** case, it is evident that the petitioner cannot be granted reliefs sought for by him in the writ petition. The petitioner can only seek verification of his marks as provided in clause (i) of the Bye law 61.

12. In the circumstances, this writ petition is disposed of with the following directions:

13. In case, the petitioner makes an application for verification of his marks awarded in compartmental examination in the subject Social Science within six weeks from today, the application of the petitioner will be entertained without raising any objection as to limitation, if any, for filing such application. The verification of the marks as provided in clause (i) of Bye law 61 will be done expeditiously, preferably within a period of one month from the date of filing of such application by the petitioner. The result of verification of marks will be pasted on the answer book of the petitioner and will be communicated to the petitioner by registered post at the earliest. The answer book of the petitioner in respect of the compartmental examination in the subject Social Science will be preserved for a minimum period of six months from the date of dispatch of communication by registered post to the petitioner regarding the result of the verification of marks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.10.2002

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

Civil Misc. Writ Petition No. 38940 of 2002

Smt. Aaisha Siddique ...Petitioner
Versus
Senior Terminal Manager, IOC Terminal and another ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan

Counsel for the Respondents:
Sri P. Padia

Constitution of India- 226- Tender submitted beyond 10 minute- Prescribed Period 12-00 No.- whether the Court can extend it by 10 minute ? - "No" if 10 minutes extended , why not 10 hours on ten months- one has to be strict in such matter.

Held - para 3

In our opinion, time is of the essence in such matters, otherwise the legal position will be totally chaotic. For example, if in an election on the election day the voting can take place from 8.00 a.m. to 4.00 p.m. and a voter reaches the polling station at 4.10 p.m. and states that he be allowed to cast his vote, in our opinion he cannot be allowed to do so, whatsoever may be reason for the delay. Similarly, this Court cannot extend the time for submission of the tenders. If we extend it by 10 minute, then why not for 10 hours or ten days ? Where will the line be drawn. Hence the only correct view can be that one has to be strict in such matters. Since the petitioner did not reach in time her tender it cannot be accepted.

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

1. Heard learned counsel for the parties.

2. The petitioner has prayed that the respondents be directed to entertain and consider the petitioner's tender in pursuance of the tender notice 29.7.2002. The last date and time of submitting the tender in pursuance of the tender notice dated 29.7.2002 was 21.8.2002 by 12.00 Noon. It has been alleged in paragraph 4 of the writ petition that because of traffic jam the petitioner's driver could not reach at the office of the respondents at 12.00 noon but reached there at 12.10 p.m., that is, he was late by 10 minutes. Although, in paragraphs 6 and 9 of the counter affidavit it has been stated that in fact the petitioner's tender was not given on 21.8.2002 but was given on 22.8.2002, but even assuming that the allegation of the petitioner is correct there is no doubt that the tender was late by 10 minutes.

3. In our opinion, time is of the essence in such matters, otherwise the legal position will be totally chaotic. For example, if in an election on the election day the voting can take place from 8.00 a.m. to 4.00 p.m. and a voter reaches the polling station at 4.10 p.m. and states that he was late by 10 minutes because of a traffic jam and insists that he be allowed to cast his vote, in our opinion he cannot be allowed to do so, whatsoever may be reason for the delay. Similarly, this Court cannot extend the time for submission of the tenders. If we extend it by10 minutes, then why not for 10 hours or ten days ? Where will the line be drawn. Hence the only correct view can be that one has to be strict in such matters. Since the

petitioner did not reach in time to submit her tender it cannot be accepted.

4. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD OCTOBER 9, 2002

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

Civil Misc. Writ Petition No. 43250 of 2000

Manveer Singh and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri S.G. Hasnain

Counsel for the Respondents:
Sri B.D. Mandhyan
S.C.

Land Acquisition Act- section 3- even assuming that there was some construction on the land in question, this Court cannot interfere with the acquisition because the word 'land' in section 3 of the Land Acquisition Act includes 'Buildings and trees' also. Hence even assuming that the land was abadi or there were constructions on the land in question, in our opinion the said land can be acquired under the Land Acquisition Act and this Court cannot interfere.

Held in para 19

Moreover, we are of the opinion that in fact the land in question was agricultural land and it was only after the notification under Section 4 that the petitioner tried to give a colour that the land was abadi and there were constructions.

Case Law referred:
AIR 1971 SC 1033, (1986) 4 SCC 251, (1996) 10 SCC 721, 1991 AWC 1210, 1989 AWC 1137, (1991) AWC 341, AIR 1969 SC 255, 1980 ACJ 583

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

1. This writ petition alongwith connected writ petition no. 3301 of 2001 are being disposed of by a common judgment.

2. Heard learned counsel for the parties.

3. The petitioners had challenged the impugned notification dated 21.11.1996 published by public notice dated 24.8.1999 under Section 4 (1) of the Land Acquisition Act and the notification dated 23.8.2000 published through public notice dated 23.8.2000 under Section 6/17 of the Land Acquisition Act vide Annexure 7 and 10 to the writ petition. The petitioners have also prayed for mandamus directing the respondent not to proceed in the matter of acquisition proceedings and not to demolish the constructions on the land in dispute.

4. The petitioner no. 1 claims to be owner of plot no. 30 and the petitioner no. 2 of plot no. 31 in village Wajidpur, paragana and Tahsil Khurja, district Bulandshahr. It is alleged in paragraph 3 of the writ petition that the said land has been used by the petitioners as abadi land. The Khasra entries are Annexure 1 and 2 to the writ petition. In paragraph 4 of the writ petition it is alleged that the petitioners have raised constructions over the said land and then sought permission to change the nature of the land under Section 143 of the U.P.Z.A. & L.R. Act. On the application of the petitioner the S.D.M., Khurja after receiving report of

the Tahsildar and other officers of the revenue department passed an order dated 12.8.1999 declaring the land ask abadi land. True copies of the orders in this connection are Annexure 3 and 4 to the writ petition. After declaration of the land as abadi land they were recorded as such in the revenue record vide Annexure 5 and 6.

5. In paragraph 7 of the writ petition it is alleged that the State Government issued a notification under Section 4 of the Land Acquisition Act on 21.11.1996 alleged to have been published on 21.11.1996 and also in two daily newspapers, 'Rashtriya Sahara' and 'Danik Jagran' on 21.12.1996 and 5.8.1998 and the said declaration has been mentioned in the public notice dated 24.8.1999 and notification was issued under Section 4/17 of the Act through the aforesaid notice. True copy of the public notice is Annexure 7 to the writ petition. The said notice/ declaration dated 24.8,.1999 states that the land is sought to be acquired for construction of a market yard for Mandi Samiti, Khurja.

6. In paragraph 9 of the writ petition it is alleged that according to the public notice dated 24.8.1999 it has been declared that the notification under Section 4 of the Land Acquisition Act was notified on 21.11.1996 which was published in the gazette dated 21.11.1996 and thereafter published in two newspapers on 21.12.1996 and thereafter on 5.4.1998. However, the public notice has been made only on 24.8.1999 and hence it is alleged that there was no urgency for dispensing with Section 5-A of the Act. It is also alleged that there was no public purpose for the acquisition.

7. In paragraph 11 of the writ petition it is alleged that the petitioners made representation to the Director, Land Acquisition on 28.9.1999 stating that there were constructions over the land in question which is abadi land. True copy of the representation is Annexure 8 to the writ petition. In paragraph 12 of the writ petition it is alleged that on the representation of the petitioner, the Director, Land Acquisition sought a report from the Collector with regard to the site and nature of the plots. The revenue authorities made an inspection and submitted a report on 24.2.2000 in respect of the said plots and other plots.. In this report it has been mentioned that the said plots are abadi. True copy of the report is Annexure 9 to the writ petition. In paragraph 13 of the writ petition it is alleged that the some other plots can be acquired instead of the plots of the petitioners.

8. In paragraph 14 of the writ petition it is alleged that despite the report of the revenue authorities the Collector, Bulandshahr published a public notice on 23.8.2000 under Section 6/17 of the Act, copy of which is annexure 10 to the writ petition. The said notice has been published in two newspapers.

9. In paragraph 15 of the writ petition it is alleged that all the proceedings prescribed under Section 6/17 of the Act were done simultaneously on the same day i.e. 23.8.2000 and hence this procedure is illegal. In paragraph 16 of the writ petition it is alleged that the newspapers in which the said notice under Section 6/17 of the Act were published are not widely circulated newspapers and all the acquisition proceedings are not for public purpose. In paragraph 18 of the

writ petition it is alleged that no gazette publication has been made of the notice under Section 6 and the procedure under the said provision has not been followed and the proceedings have lapsed as they are beyond the prescribed time.

10. Two counter affidavits have been filed in this case. In the counter affidavit on behalf of the State Government it is stated in paragraph 5 thereof that the petitioner had tried to get the land in dispute declared as abadi but the S.D.M. has subsequently set aside the order declaring the land as abadi. The order of the S.D.M. dated 14.9.2000 setting aside the earlier order dated 12.8.1999 declaring the land as abadi is Annexure C.A. 1 to the counter affidavit. In paragraph 8 of the counter affidavit it is stated that the publication of the gazette notification under Section 4 of the Act was made on 21.12.1996 and 5.4.1998 and the general information was made on 24.8.1999. The delay has occurred due to the fact that the acquiring body has made available the necessary amount only on 12.8.1999. However, the urgency was already existing and hence the notification under Section 6 was issued well within time.

11. In paragraph 10 of the counter affidavit it is alleged that the S.D.M. has himself inspected the spot and passed the order dated 14.9.2000 referred to above. The petitioner has not shown any permission from any competent authority for sanction of the map for the construction. At the time of the initial notification under Section 4 the land was recorded as agricultural land. The order under Section 143 of U.P.Z.A. & L.R. Act was passed after the initial notification under Section 4 and even that order has subsequently been set aside as stated above. In paragraph 12 it is stated that the gazette notification was published on 23.8.2000 and the notification was also published in two newspapers on the same day. It is stated that the simultaneous publication does not vitiate the acquisition proceedings. True copy of the U.P. Gazette notification dated 23.8.2000 under section 4(1) read with section 17 of the Land Acquisition Act is Annexure CA 2. In paragraph 13 it is denied that there was any bungling. It is further stated that the newspapers in which the notices were published are widely circulated in the locality. The public notice was also given on 23.8.2000 and the same was also made available to the Gram Pradhan on the same day. All this was done as the matter was important and the proceedings would have lapsed if the publication under Section 6 would not have been done well within time. In paragraph 14 of the counter affidavit it is stated that the publication of the notification under Section 6 was in accordance with law. In paragraph 15 of the counter affidavit it is stated that all the legal formalities regarding the publication were complied with. In paragraph 16 of the counter affidavit it is stated that the substance of the notice was made available to the Gram Pradhan on 28.3.2000. It is alleged that the entire acquisition proceedings are in accordance with law. The two newspapers publications are annexure CA 3 and 4 to the counter affidavit.

12. In paragraph 18 of the counter affidavit it is stated that the acquiring body was made available the requisite money, and hence on making available the requisite money the necessary publication under Section 4 was made on 24.8.1999 and thereafter a proposal was

sent to the Director, Land Acquisition by the Collector, Bulandshahr on 10.9.1999. Some time was taken by the Director and the State Government before the final publication under section 6 but it is well within the time. In paragraph 25 of the counter affidavit it is stated that the public notice dated 28.3.2000 under section 6 of the Land Acquisition Act is in accordance with law. In paragraph 27 of the counter affidavit it is stated that the land in dispute is agricultural land and the petitioner wants to take illegal advantage by saying that he has raised constructions. In paragraph 29 of the counter affidavit it is stated that the Mandi Samiti, Khurja is facing great difficulty in carrying out its activities.

13. A counter affidavit has also been filed on behalf of the Mandi Samiti, Khurja. In paragraph 3 of the same it is stated that the land has been acquired for construction of the market yard of Mandi Samiti, Khurja. The said construction of market yard is urgent and the acquisition is for planned development. The provisions of Section 17 of the Land Acquisition Act have been applied as it is an urgent scheme which brooks no delay because of the fact that the old existing market yard was highly congested and unable to handle the large arrivals of agriculture produce. The existing market yard lacks the facilities of storage, parking etc, and it has outlived its utility. Residential colonies have grown at the place , and therefore there is crying need to shift the whole sale trade from the old market yard which is situate in a densely populated area to a place outside the city and construct a hygienic market yard.

14. In paragraph 5 of the counter affidavit it is stated that the land in dispute was agricultural holding on the date of the notification under Section 4 of the Act. For the purpose of saving the land from acquisition or claiming exorbitant compensation, the petitioner moved an application under Section 143 of the U.P.Z.A. & L.R. Act, and the S.D.M. without making proper enquiry allowed the application and declared the land as abadi. However, when the Mandi Samiti came to know about that order it moved an application and on that application the S.D.M. by the order dated 14.9.2000 has cancelled his earlier order.

15. In paragraph 7 it is stated that the land in dispute is not abadi. In paragraph 8 it is stated that there is no construction on the land in dispute but the petitioner has built some boundary walls. In paragraph 9 it is stated that the notification under Section 4 was issued on 21.11.1996 and it was also published in two newspapers on 21.12.1996 and 5.8.1998 but the last publication of the notification was done by affixing public notice at the place where the land in dispute is situate on 24.8.1999. Therefor the last publication of the notification would be deemed to be 24.8.1999 and the notification under Section 6 was issued on 23.8.2000. Hence the notification under section 6 has been issued within one year from the date of publication of notification under Section 4. The delay in publication was due to the official lapses and the would not affect the acquisition. It is stated that there is urgency in the matter as the market yard has to be constructed soon. In paragraph 10 of the counter affidavit it is denied that the plots are abadi site and have big rooms. In paragraph 11 it is stated that the report from the office of the Director of Land Acquisition was manipulated and was a

result of the political pressure to abandon the land and acquire some other land,. The land in question was selected by the Committee consisting of responsible officers and it is more suitable land for construction of a market yard. The petitioner would get adequate compensation. It is denied that there are houses and shops over the land in dispute. The notification under Section 6 has been issued on 23.8.2000 within one year from the last publication of notification under Section 4 of the Land Acquisition Act. In paragraph 12 it is stated that there is nothing illegal in simultaneous publication. The acquisition would have lapsed if the notification had not been made in the gazette dated 23.8.2000. In paragraph 14 it is stated that it is not impossible to publish notification under Section 6 simultaneously on 23.8.2000 and also get it published in two local newspapers on the same day. There is no improper motive involved and it is a straightforward scheme of acquisition of the land for the construction of market yard.

16. We have also perused the rejoinder affidavit.

In our opinion there is no merit in this petition. The acquisition of the land for the market yard of a Mandi Samiti is clearly for a public purpose and there is urgency as stated in the counter affidavit. This Court in Civil Misc. Writ Petition No. 15586 of 2001 Ram Charittar and others vs. State of UP and others decided on 4.10 .2002, following several decisions of the Supreme Court and of this Court has held that the Court cannot go into the question whether the purpose for which the land was needed is for public purpose or not.

In ***Jage Ram V. State of Haryana AIR 1971 SC 1033*** it was held by the Supreme Court that unless it is shown that there was colourable exercise of power the Court cannot go behind the declaration of the Government and find out in a particular case whether the purpose for which the land was needed was a public purpose or not. In ***State of U.P. v. Smt. Pista Devi and others (1986) 4 Supreme Court Cases 251*** the Supreme Court held that even if there are some superstructures standing on the land they cannot be left out from the acquisition. In ***Ajay Krishan Shinghal and others v. Union of India and others (1996) 10 SCC 721*** it was held that acquisition for planned development is a public purpose. In ***Bal Krishan Gulati v. State of U.P. and others 1991 AWC 1210*** it was held that where there is recital of urgency the Court should not ordinarily interfere. In ***M/s Garg Farms and others v. State of U.P. and others 1989 AWC 1137*** this Court held that if the Government formed the opinion that the matter was one of urgency under section 17 (2) and it had some material for this opinion the Court should not interfere. In Kunwar Lal and others v. State of U.P. and others (1989) 1 UPLBEC 772 it was held that dispensation of enquiry under section 5-A depends on subjective satisfaction of the State Government. It was also held that where the declaration has been made by the State Government under section 6(3) that a particular land is needed for a public purpose, the said declaration shall be conclusive evidence of the fact that it is so needed. The same view has been taken by this Court in ***Ram Narain Rai vs. State of U.P. (1991) AWC 341***.

17. It may be pointed out that section 3 (a) of the Land Acquisition Act states :-

"(a) the expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

18. The above definition shows that even building and trees will be deemed, by a legal fiction, to be land for the purpose of Land Acquisition Act as they are attached to or permanently fastened to the earth vide Chaturbhuj Pande v. Collector, AIR 1969 SC 255 (Paras 8 and 9), S.P. Gupta vs. State of U.P., 1980 ACJ 583, etc. Hence it cannot be said that when land is being sought to be acquired the buildings or trees standing thereon have to be exempted. No doubt compensation has to be given for the building and trees also, but it does not mean that exemption from acquisition must be granted to the buildings or trees, or the land on which the building or trees stands. If a contrary view is taken it can disrupt the entire scheme for which the acquisition is being done.

19. The allegations of the petitioner that they had residential houses on the land in dispute have been denied by the respondents. The order declaring the land in question as abadi has also been subsequently cancelled by the SDM. However even assuming that, there was some construction on the land in question this Court cannot interfere with the acquisition because the word 'land' in section 3 of the Land Acquisition Act includes 'buildings and trees' also. Hence even assuming that the land was abadi or there were constructions on the land in question, in our opinion, the said land can be acquired under the Land Acquisition Act and this Court cannot interfere. Moreover, we are of the opinion that in fact the land in question was agricultural land and it was only after the notification under Section 4 that the petitioner tried to give colour that the land was abadi and there were constructions.

20. In our opinion, there was no illegality in the notification under Section 6 issued on 23.8.2000 as it was within one year from the publication of the notification under Section 4 on 24.8.1999.

21. The construction of market yard of Mandi Samiti is clearly for public purpose as it will serve the agriculturists and it is urgent.

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

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.10.2002

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

Civil Misc. Petition No. 42383 of 2002

Badan Singh and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri K.G. Srivastava
Sri Rahul Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- read with U.P. Ordinance No. 10 of 2002-ord. 2 (kha)-term of managing committee expired on 6.3.02 prior to the cut off date –e.g. 4.7.2002-tenure cannot be extended from 3 years to 5 years-whether those management can claim benefit of ordinance O 2002-whose terms expired during existence of stay order? Held- 'No"

Held- Para 4,5 and 8

In other words the U.P. Ordinance No.10 of 2002 will only apply to the societies which were in existence on 4.7.2002. Hence where the term of 3 years of any cooperative society expired before 4.7.2002 the society will not get the benefit of U.P. Ordinance No. 10 of 2002. It is only those societies whose 3 years term had not expired on or before 4.7.2002 which will be entitled to continue in existence for five years.

We also make it clear that if any cooperative society is continuing on the strength of an interim order of this Court that will not get the benefit of U.P. Ordinance No. 10 of 2002 if the original term of 3 years had expired before 4.7.2002.

Since the petitioner, society was not legally in existence on 4.7.2002 it could not in its own right exist beyond the period of 3 years of its election and hence it cannot get the benefit of U.P. Ordinance No. 10 of 2002. The writ petition is, therefore, dismissed.

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

1. By means of this writ petition, the petitioners have prayed for a writ of certiorari to quash the impugned orders dated 23.4.2002 and 26.4.2002, Annexures 3 and 4 to the writ petition and for a mandamus directing the respondents not to interfere with the functioning of the petitioner no. 2 as committee of management of the cooperative society in question till 6.3.2004.

2. The petitioners are relying on the U.P. Cooperative Societies (Amendments) Ordinance, 2001, being Ordinance No. 27 of 2001 copy of which is Annexure 2 to the writ petition. By means of this Ordinance the term of the society has been extended from 3 years to 5 years.

3. In Committee of Management Versus Registrar, Cooperative Societies, 2002 (2) AWC 1353, a Division Bench of this Court held that if the term of the Committee of Management has not expired before the date of the promulgation of the above Ordinance on 24.12.2001, its term will continue for five years in view of the above Ordinance. However, subsequently the same Bench in Civil Misc. Modification Application/Review Petition No. 87293 of 2002 in Writ Petition No. 8375 of 2002 reviewed its own judgment dated 16.3.2002 (referred to above) and has held that since the Ordinance has lapsed hence the term of the committee of management will only be 3 years and not five years. Accordingly the Division Bench allowed the review application.

4. Thereafter another development took place namely that on 4.7.2002 the U.P. Govt. issued another Ordinance being U.P. Ordinance No. 10 of 2002 a copy of which is Annexure 5 to the petition. Section 2 (ka) of the said Ordinance states that the term of the committee of management will be five years. However, Section 2 (kha) of the said Ordinance states that this Ordinance will be applicable to the society which is in existence on the date of the Ordinance.

In other words the U.P. Ordinance No.10 of 2002 will only apply to the societies which were in existence on 4.7.2002. Hence where the term of 3 years of any cooperative society expired before 4.7.2002 the society will not get the benefit of U.P. Ordinance No. 10 of 2002. It is only those societies whose 3 years term had not expired on or before 4.7.2002 which will be entitled to continue in existence for five years.

5. We also make it clear that if any cooperative society is continuing on the strength of an interim order of this Court that will not get the benefit of U.P. Ordinance No. 10 of 2002 if the original term of 3 years had expired before 4.7.2002.

6. Learned counsel for the petitioner referred to the Supreme Court decision in T. Venkata Reddy V. State of A.P., 1985 (3) S.C.C. 198 (vide para 19). We have carefully perused the said decision and find that it is distinguishable. In that decision the facts were that the A.P. Abolition of Posts of Part-time Village Officers Ordinance, 1984 had abolished the posts of part-time village officers in Andhra Pradesh. Since that Ordinance lapsed it was urged that the posts of part time village officers revived. Repelling this contention the Supreme Court held that abolition of posts was an accomplished fact. In the present case a perusal of the new Ordinance (U.P. Ordinance No. 10 of 2002) shows that it has specifically been mentioned in S.2(kha) that only those committees existing on the date of the Ordinance (i.e.4.7.2002) will have their term extended to 5 years. Hence the petitioner can derive no help from the above mentioned Supreme Court ruling. If a contrary view is taken then it will mean that despite the clear language of Section 2 (kha) that the term of only those committees existing on 4.7.2002 will be extended, the term of committees whose 3 years term expired prior to 4.7.2002 will also stand extended. This will create an anomaly, and hence such an interpretation is to be avoided.

7. The petitioner no. 2 was elected on 6.3.99 and its three years term expired on 6.3.2002. It only continued in existence because of U.P. Ordinance No. 27 of 2001 but that Ordinance had lapsed as stated in the order of this Court in Review Petition No. 87293 of 2002. Hence, the petitioners cannot get the benefit of U.P. Ordinance No. 27 of 2002, nor of U.P. Ordinance No. 10 of 2002.

8. Since the petitioners society was not legally in existence on 4.7.2002 it could not in its own right exist beyond the period of 3 years of its election and hence it cannot get the benefit of U.P. Ordinance No. 10 of 2002. the writ petition is, therefore, dismissed.

9. Since a large number of similar writ petitions are pending in this Court, we make it clear that this judgment will be applicable to all the pending writ petitions in which similar points are involved, and will not be confined to this petition alone.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.9.2002

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

Civil Misc. Petition No. 4651 of 2000

Saraswati Vidhya Mandir Rewatipur, District Ghazipur ...Petitioner
Versus
State of U.P. through Secretary and others ...Respondents

Counsel for the Petitioner:
Sri Shamim Ahmad
Sri Om Prakash Chaubey

Counsel for the Respondents:
Sri G.K. Pandey
S.C.

Constitution of India- Article 226 the petition has not been filed on behalf of the committee of management or on behalf of the society, if any, registered under the Societies Registration Act. Obviously, the school or the Manager cannot be aggrieved on behalf of the committee of Management. It is the Society and the committee of Management which is legally entitled to challenge the orders of the Deputy Director of Education- the Manager is not the Managing committee or the Society and he cannot maintain a writ petition in this Court unless he is authorized to do so. (Held in para 13).

Learned counsel for the Petitioner, however, submitted that he be allowed time to correct the description. This cannot be permitted by amendment as has been held in the V.V. Inter College (Supra). However, by dismissal of the Writ Petition management/society of the institution, which own, runs and manage, shall not be precluded from approaching the concerned authority to seek redressal of his grievance and recall the impugned order dated 16th July, 1999 providing review its decision after affording opportunity to the management/society running the institution to file documents and such information as may be required by such authority and holding enquiry as may be required.

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

1. Heard Sri Shamim Ahmad, Advocate, appearing on behalf of the petitioner and Sri G.K. Pandey, learned Standing Counsel, on behalf of the respondents.

2. Petitioner before this Court is **'Saraswati Vidhya Mandir Rewatipur, District Ghazipur through its Manager Smt. Ram Sakhi Devi'** purporting to be an institution, called 'Saraswati Vidhya Mandir Rewatipur', which is not a legal entity.

3. This Court in Writ Petition no. 10663 of 1976, **Sardar Patel Higher Secondary School, Dev Nagar, Mathura Versus The Deputy Director of Education, Agra Region, Agra and others, 1976 AWC (Journal)18,** vide judgment and order dated 1.3.1976 observed-

"Sri N.C. Upadhya, learned counsel for the respondent no. 3, Babu Lal Sharma raised a preliminary objection to the maintainability of the petition at the instance of the Manager Kedar Nath. He urged that the Committee of Management had authority to hold enquiry and to dismiss the petitioner from service, its proposal to dismiss respondent no. 3 was disapproved by the Deputy Director of Education in appeal, therefore the

aggrieved party was the Committee of Management and the petitioner could be filed only by it, the Manager Sri Kedar Nath had no locus standi to maintain this petition I find considerable force in this contention. In paragraph 43 of the second affidavit of respondent No. 3 it was clearly stated that the petition was not maintainable on behalf of the School as it was not the legal entity itself and it ought to have been filed by the Committee of Management. It was further stated that no proof has been shown that the Managing Committee had directed the Manager to file the petition. Reply to this assertion is contained in paragraph 45 of the rejoinder affidavit filed by the petitioner. It states that the contents of paragraph 43 are wholly misconceived and are not admitted, the same being argumentative will more adequately be replied at the time of arguments. There is thus no assertion in the rejoinder affidavit that the Committee of Management had adopted any resolution to challenge the order of the Deputy Director of Education nor there is any assertion that Kedar Nath was authorised by the Committee of Management to file the present petition. There is further no assertion in the rejoinder affidavit that the Committee of Management was aggrieved or that it had permitted the Manager to file the petition. In fact the averments contained in paragraph 45 of the rejoinder affidavit have been shown on legal advice, it does not contain any assertion of facts.

4. The present petition has been filed by Sardar Patel Higher Secondary School through its Manager Sri Kedar Nath. The petition has not been filed on behalf of the Committee of Management or on behalf of the Society, if any, registered under the Societies Registration Act. Obviously, the school or the Manager cannot be aggrieved on behalf of the Committee of Management. It is the Society and the Committee of Management which is legally entitled to challenge the orders of Deputy Director of Education. The Manager cannot assume the functions of the Committee of Management unless he is authorised to do so. Sardar Patel High Secondary School is not a legal entity to maintain any legal action on behalf of the Society or the Committee of Management.

5. In Mahtab Rai, Manager, Har Narain Intermediate College V. Deputy Director of Education (Civil Misc. Writ No. 5808 of 1970, decided on 7th January, 1974) a learned Single Judge of this Court, almost in similar circumstances, held that the Manager or the School has no locus standi to maintain petition against the order of the District Inspector of Schools or the Deputy Director of Education refusing to grant approval. The learned Single Judge observed that the appointment of principal of College and termination of his services were within the power of the Managing Committee or the Society and it was the Managing Committee alone which exercises control. That being so, the Manager is not the Managing Committee or the Society and he cannot maintain a writ petition in this Court unless he is authorised to do so. Relying on a Full Bench decision of this court in Hari Raj Swarup V. Secretary to Government of U.P. (A.I.R. 1951 Allahabad, 1) the learned Judge dismissed the petition on the ground that it was not filed on behalf of the Managing Committee or the Society. I am in respectful agreement with the view taken by the learned Single Judge in Mahtab Rai's case. In the instant case, neither the

Society nor the Managing Committee has filed the writ petition nor there is any material before the Court to show that the Committee of Management or the Society authorised the Manager to file this petition. In the circumstances the petition is not maintainable.

6. During the course of hearing learned counsel for the petitioner made a request for adjournment of the hearing to enable him to file documentary evidence to show that he had been authorised by the Committee of Management. I find no good ground to adjourn the hearing to enable the petitioner to produce evidence to show authorization by the Committee of Management. As already noted, respondent no. 3 had clearly stated that the petitioner had no locus standi to maintain the petition and no proof was placed before the Court that the Committee of Management had authorised him. In the rejoinder affidavit, the petitioner did not even whisper that he was been authorised. If the petitioner had made any statement in the rejoinder affidavit that the Committee of Management had authorised him to file the petition, I would have granted adjournment but in the absence of any such averment in the rejoinder affidavit I do not consider it desirable to adjourn the hearing to enable the petitioner to produce authorization by the Committee of Management.

7. In the result the writ petition is dismissed as not maintainable. There will be no order as to costs. The stay order's is vacated.
Dated/-1.3.1976 Sd/-K.N. Singh "J"

8. Again in the Writ Petition nos.6879 of 1974 and 12582 of 1975-**V.V. Inter College, Shamli Versus U.P. Shiksha Nideshak, Pratham Mandal, Meerut and others**, vide judgment and order dated 7.4.1976 observed:-

"…. These two petitions were taken up for hearing on 6th April 1976. At the very outset of the hearing learned counsel for the respondent-principal raised preliminary objection about the maintainability of these two petitions. He urged that the petitions have not been filed by the aggrieved party, instead these have been filed by V.V. Inter College, Shamli which is neither aggrieved party nor a juristic person to maintain the petitions. I find considerable force in the contention. It is admitted between the parties that there is a registered society which runs and maintains the Vaish College, Shamli, Muzaffarnagar. The College is recognised under the U.P. Intermediate Education Act, 1921. The college is run and managed by a Committee of management constituted in accordance with the Scheme of Administration approved by the authorities under the Act. Under the provisions of the Act and the Regulations framed thereunder, it is the Committee of Management which is empowered to make appointments, to take disciplinary action and to pass orders of removal or suspension against the Principal or a teacher. No other member, or authority of the registered society has any power to exercise jurisdiction in these matters. The Committee of Management is empowered to file appeal against the orders of District Inspector of Schools. The Committee of Management is a statutory authority under the Act and the Regulations and it is legally entitled to take action in matters relating to the affairs of the administration of the College. The Committee of

Management has not filed these petitions. The petitions as framed are not maintainable because the V.V. Inter College, Shamli cannot be an aggrieved person to challenge the impugned orders. The aggrieved party, if any could be the Committee of Management of the Society itself. In writ petition no.10663 of 1975 decided on 1st March 1976, I took a similar view. Another learned Single Judge of this court dismissed Writ Petition no. 580 of 1970 on 7th January, 1974, precisely on this very ground. The view taken by me and the other learned Single Judge is fully supported by a Full Bench decision of this Court in Indian Sugar Mills Association through its President Hari Raj Swarup V. Secretary to Government (A.I.R. 1951 All., 1).

9. During the course of hearing amendment applications were filed seeking relief for the amendment of the Writ petitions for adding Committee of Management as petitioner. The applications have been rejected by me by a separate order.

10. So far as writ petition no. 12582 of 1975 is concerned, there is another reason to dismiss the same without going into merits. The writ petition was presented before this court on 17th December,1975. It appears that during the course of the preliminary hearing the Bench observed that the petitioner should file appeal before the Deputy Director of Education. The petitioner College thereupon filed appeal before the Deputy Director of Education, Meerut region, against the impugned order of the District Inspector of Schools dated 6th December,1975. The appeal has not been disposed of as yet, instead it is still pending. There is no dispute that the appeal against the order of the District Inspector of Schools refusing to accord approval is maintainable under section 16-G (3) (c). There is further no dispute that the petitioner College has availed that remedy and appeal is pending before the Deputy Director of Education. It is thus clear that the petitioner has availed statutory alternative remedy of appeal available to him in law and that remedy is still being persued by him. In the circumstances it would not be a sound exercise of discretion under Article 226 of the Constitution to hear an adjudicate the issues raised by the petitioner in the present petition which can effectively be decided by the Deputy Director of Education. The petitioner is not entitled to relief on this ground also.

In the result both the petitions fail and are dismissed. There will be no order as to costs.

Dated/-7.4.1976 Sd/-K.N.S"

11. Aforesaid judgment was affirmed by Division Bench in intra court appeal (Special Appeal no.154 of 1976, V.V. Inter College, Shamli, versus U.P. Shiksha Nideshak Pratham Mandal, Meerut and others)- vide judgment and order 2.8.1976 quoted below:-

" Sri R.K. Jain, learned counsel for the appellant, state that he does not press this appeal. The appeal is accordingly dismissed."

Dated/-2.8.1976 Sd/-G.C.M.
Sd/-K.C.A."

12. In view of the aforesaid decisions, petition is not maintainable in the name of the petitioner as it stands today.

13. Learned counsel for the Petitioner, however, submitted that he be allowed time to correct the description. This cannot be permitted by amendment as has been held in the V.V. Inter College (Supra). However, by dismissal of the Writ Petition management/society of the institution, which own, runs and manage, shall not be precluded from approaching the concerned authority to seek redressal of his grievance and recall the impugned order dated 16th July, 1999 providing review its decision after affording opportunity to the management/society running the institution to file documents and such information as may be required by such authority and holding enquiry as may be required.

14. Writ Petition stands dismissed.

15. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.10.2002

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

Civil Misc. Writ Petition No. 12663 of 2002

Baijnath Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shesh Kumar

Counsel for the Respondents:
Sri S. Chaturvedi
Sri Atul Mehra
Sri V.B. Singh
S.C.

Land Acquisition Act- Section 3 (a)- Land acquired for purpose of developing colony by Varanasi Development Authority- after depositing compensation possession taken and the land developed as Patrkar Colony- the objection that only the open land was acquired and not the building and trees standing over the plot. Held- 'wrong'- land includes building and trees- fastened to the plot in question.

Held- Para 16

The expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. '

Case law discussed:
AIR 1993 SC 2517, AIR 1971 SC- 1033, 1996 (10) SCC -721, 1989 AWC 1137, 1991 AWC 341 AIR 1969 SC-255, 1980 ACJ 583

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

1. This writ petition and connected writ petitions are being disposed of by a common judgment.

Heard learned counsel for the parties.

2. This writ petition has been filed for a writ of certiorari for quashing the notifications dated 7.3.1996 and 8.1.1997 under sections 4 and 6 of the Land Acquisition Act (Annexure 6 and 7 to the writ petition) so far as they relate to the petitioner's plot no. 133/1 in which the petitioner claims 1/4th share in village Chuppepur, paragana Shivpur, tahsil and district Varanasi.

2A. The petitioner is claiming 1/4th share in plot no. 133/1 situate in village Chuppepur, pargana Shivpur, Tahsil and district Varanasi. In paragraph 4 of the petition it is alleged that on part of the aforesaid land there are pakka

constructions raised sometime in the year 1970 consisting of two rooms, three shops, verandah etc. Annexure-1 is the photocopy of the alleged site from various angles. The petitioner has alleged that he is living in the said pakka construction with his family and the construction has been regularized by paying compounding fee under the voluntary compounding scheme. It is alleged in paragraph 8 of the writ petition that the petitioner has no other house to live in. The petitioner has taken water, electricity and telephone connection.

3. In paragraph 13 of the writ petition it is alleged that the State Government issued a notification dated 7.3.1996 under Section 4 (1) read with Section 17 (1) of the Land Acquisition Act, copy of which is annexure 6 to the writ petition, which was published in the U.P. Gazette dated 7.3.1996 vide Annexure 6 to the writ petition. A perusal of the said notification shows that the land is proposed to be acquired for building a residential colony under the planned development scheme of the Varanasi Development Authority (hereinafter referred to as 'VDA'). The notification also states that the Governor is of the opinion that the land is urgently required for the said purpose and hence section 5-A was dispensed with. In paragraph 15 of the writ petition it is stated that although the notification under Section 4/17 was published on 7.3.1996 the notification under Section 6 was published on 8.1.1997. Hence it was alleged that there was no urgency for dispensing with proceeding under Section 5-A. True copy of the notification under Section 6 dated 8.1.1997 is Annexure 7 to the writ petition.

4. In paragraph 17 of the writ petition it is stated that under Section 11-A of the Land Acquisition Act an award has to be made within two years of the declaration under Section 6 but in the present case the award was prepared on 30.7.1999 vide Annexure 8 to the writ petition. Hence it is alleged that the acquisition proceedings had lapsed.

5. In paragraph 19 of the writ petition it is stated that the petitioner was assured by the authorities that the constructed portion including the living house, shop etc. will be exempted and hence the petitioner did not approach this Court earlier. In this connection the notice dated 25.7.2001 is Annexure 9 to the writ petition.

6. In para 20 it is alleged that the employees/agents of the respondents came on the spot in order to demolish the constructions . They were obstructed by the local residents, and hence an FIR dated 16.8.2001 was lodged against the petitioner and others vide Annexure 10 to the writ petition. However, a final report has been filed vide Annexure 11 to the writ petition.

7. It is alleged that there was no urgent need and hence Section 5-A should not have been dispensed with. It is alleged that Section 11-A has been violated.

8. Two counter affidavits has been filed on behalf of the V.D.A. In the counter affidavit of Ram Dhani Yadav it is stated in paragraph 3 that the plot in dispute has been legally acquired by the VDA for the construction of the residential colony and the V.D.A. was given possession of the plot in dispute by the Special Land Acquisition Officer,

Varanasi on 1.6.1998. At present the V.D.A. is in physical possession of the plot in question and it has constructed its boundary wall and has further developed the acquired land by filing it with mud worth Rs. 18 lacs. Rs. 7 lacs have been spent for the construction of boundary wall. The petitioner has received Rs.6,36,632/- as compensation on 10.10.2001 after passing of the award dated 30.7.1999. True copy of the order dated 1.6.1998 is annexure CA 1 to the counter affidavit. Since the aforesaid property has vested in the V.D.A. and the name of V.D.A. has been entered into the revenue records, the Special Land Acquisition Officer issued a parawana on 16/17.1.2002 to the Tahsildar (vide Annexure A-2 and as such the petitioner has no right to challenge the notification under Section 4 and 6 of the Land Acquisition Act.

9. In paragraph 4 of the counter affidavit it is stated that the V.D.A. is in possession of the plot and petitioner has received compensation as awarded by the Special Land Acquisition Officer, Varanasi. In paragraph 5 of the counter affidavit it is stated that the Special Land Acquisition Officer, Varanasi in his award dated 30.7.1999 has no where stated that there are any constructions on the disputed plot. Since the petitioner has received compensation on the basis of the aforesaid award, therefore, the land in question fully vests in the V.D.A. and the petitioner has no right to challenge the notification under Section 4 and 6. In paragraph 6 of the counter affidavit it is denied that there is any residential house on the plot in dispute about which the petitioner was informed on 26.12.1999.

10. In paragraph 7 of the counter affidavit it is stated that the Special Land Acquisition Officer, Varanasi has handed over the possession of the plot in dispute and a full-fledged residential Patrakar colony is to be developed by the respondent no. 1 and the construction work is in full swing and the land is vested in the V.D.A. and the petitioner has been paid full compensation. Hence he has no right to challenge the same at a belated stage.

11. In paragraph 17 of the counter affidavit it is stated that in view of the decision of the Supreme Court in Satyendra Prasad Jain vs. State of UP AIR 1993 SC 2517 the provisions of Section 11-A will not be applicable where the acquisition is made under Section 17. It was on the basis of the aforesaid judgment that G.O. dated 30.11.1993 was issued vide Annexure CA-3.

12. In paragraph 13 of the counter affidavit it is stated that the petitioner was never pressurized to lift the amount of compensation and he never objected to the same. The possession has been taken by the V.D.A,. and the land is vested in it. Hence the petitioner has no right to challenge the notification.

13. A supplementary counter affidavit has also been filed by the V.D.A. and in paragraph 4 it is stated that the other tenure holders whose land was acquired under the notification dated 7.3.1996 and 8.1.1997 had filed writ petition no. 20609 of 1998 Mohammad Siddique and others vs. State of U.P. and others which was dismissed by this Court on 7.7.1999. True copy of the judgment of this Court dated 7.7.1999 is Annexure SCA-1. In paragraph 6 it is stated that the

award was not challenged by means of reference under Section 18 of the Land Acquisition Act. In paragraph 7 it is stated that the full-fledged colony had already been developed on the disputed land the V.D.A. is on the verge of allotting the same and any interim order granted in favour of the petitioner will cause irreparable loss to the respondent.

14. We have perused the judgment of this Court in writ petition no. 20609 of 1998 dated 7.7.1999 and we are fully in agreement with the said judgment. The land has been acquired and vested in the V.D.A. and this writ petition filed in the year 2002 is highly belated and is liable to be dismissed on this ground itself. Moreover, we find no illegality in the notification under Section 4 and 6. Building of a residential colony under the planned development scheme is clearly for the public purpose and is urgently required as there is shortage of residential accommodation.

15. In ***Jage Ram v. State of Haryana AIR 1971 SC 1033*** it was held by the Supreme Court that unless it is shown that there was colourable exercise of power the Court cannot go behind the declaration of the Government and find out in a particular case whether the purpose for which the land was needed was a public purpose or not. In ***State of U.P. v. Smt. Pista Dei and others (1986) 4 Supreme Court Cases 251*** the Supreme Court held that even if there are some superstructures standing on the land they cannot be left our from the acquisition. In ***Ajay Krishan Shinghal and others v. Union of India and others (1996) 10 SCC 721*** it was held that acquisition for planned development is a public purpose. In ***Bal Krishan Gulati v. State of UP and others 1991 AWC 1210*** it was held that where there is a recital of urgency the Court should not ordinarily interfere. In ***M/s Garg Farms and others v. State of U.P. and others 1989 AWXC 1137*** this Court held that if the Government formed the opinion that the matter was one of urgency under Section 17 (2) and it had some material for this opinion the Court should not interfere. In Kunwar Lal and others vs. State of U.P. and others (1989) 1 UPLBEC 772 it was held that dispensation of enquiry under Section 5-A depends on subjective satisfaction of the State Government. It was also held that where the declaration has been made by the State Government under Section 6 (3) that a particular land is neede for a public purpose, the said declaration shall be conclusive evidence of the fact that it is so needed. The same view has been taken by this Court in ***Ram Narain Rai v. State of U.P. (1991) AWC 341***.

16. It may be pointed out that section 3 (a) of the Land Acquisition Act states :-

(a) the expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth."

17. The above definition shows that even building and trees will be deemed, by a legal fiction, to be land for the purpose of the Land Acquisition Act as they are attached to or permanently fastened to the earth vide Chaturbhuj Pande v. Collector, AIR 1969 SC 255 (Paras 8 and 9), S.P. Gupta v. State of U.P., 1980 ACJ 583, etc. Hence it cannot be said that when land is being sought to be acquired the building or trees standing

thereon have to be exempted. No doubt compensation has to be given for the building and trees also, but it does not mean that exemption from acquisition must be granted to the building or trees or the land on which the building stands. If such a view is taken it can disrupt the entire scheme for which the land is being acquired.

18. It may be noted that writ petition no. 20609 of 1998 had been filed in the year 1998 whereas these three writ petitions have been filed in the year 2002. Thus they are clearly belated and it is not open to the petitioners to challenge the notifications under section 4 and 6 at this late stage.

19. As regards the plea of the petitioner that they have residential plots we have discussed this aspect in the decision of Ram Charittar and others vs. State of U.P. and others decided on 4.10.2002 and have held that even buildings or trees can be acquired under the Land Acquisition Act because the definition of land under section 3 (a) of the Land Acquisition Act by a legal fiction includes building and trees.

20. Thus there is no force in these petition and they are dismissed. The interim orders are vacated . No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.9.2002

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 37931 of 2002

Satya Pal Singh and others ...Petitioners
Versus
M.A.C.T./F.T.C., IId Saharanpur and others ...Respondents

Counsel for the Petitioners:
Sri Y.K. Sinha

Counsel for the Respondents:
S.C.

Motor Vehicle Act- 1988- Section 166 (3)- Limitation for filing claim petition- accident took place on 19.4.02- claim filed on 19.4.01- rightly rejected- in view of law laid down by Hon'ble Supreme Court AIR 1996 SC 2155- No Limitation prescribed.

Held- Para 6 and 9
Case law discussed:
AIR 1999 SC-3502, AIR 1966 SC-2155, AIR 1991 SC 2156

From the above pronouncement of the apex court it is clear that in view of the amendment made by the Amendment Act 54 of 1994 there was no limitation for filing an application in respect of any accident. The apex court also; held that when sub section (3) of Section 166 has been omitted then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The Motor Accident Claims Tribunal has rightly relied on the said judgment of the apex court while rejecting the objection raised by the writ petitioner.

Present case are fully covered by the apex court judgment in Dhannalal v. D.P.

Vijayvargiya and others (supra). The application filed by respondent no. 2 was not barred by time and the Motor Accident Claims Tribunal has rightly decided issue no. 4. None of the submissions raised by the counsel for the petitioner has any merit.

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

Heard Sri Y.K. Sinha counsel for the petitioners.

1. By this writ petition the petitioners have prayed for quashing of the order dated 24.8.2002 and entire proceedings of Motor Accident Claim Case No. 71 of 2001 pending before the Motor Accident Claims Tribunal/FTC 2nd Saharanpur.

2. The facts of the case given in the writ petition are;

Pawan Kumar son of respondent no. 2 died on 2.5.1992, An application for compensation in accordance with the provisions of Motor Vehicles Act, 1988 was filed on 19.4.2001. Written statement was filed by the petitioner in which plea was taken that application having been filed after nine years of the alleged accident, is not maintainable as being barred by limitation. Issues were framed by the Tribunal including Issue No. 4 as to whether the application is time barred. The Tribunal vide order dated 24.8.2002 held that the application is not barred by time. The order dated 24.8.2002 has been challenged in this writ petition.

3. Counsel for the petitioners in support of the writ petition has submitted that the question of limitation for filing application under Motor Vehicles Act has to be considered with reference to the date of death. The counsel submitted that at the time when death took place i.e. 2.5.1992 Section 166 (3) provided:

"166 (3) No application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident.

Provided that the claims Tribunal may entertain the application after the expiry of the said period of six months but not later than twelve months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.

4. The counsel for the petitioners has also placed reliance on the judgment of the apex court in AIR 1991 Supreme Court 2156 **Vinod Gurudas Raikar** v. **National Insurance Co. Ltd. and others** and AIR 1999 Supreme Court 3502 ***Kerala State Electricity Board and another vs. Valsala K. and another etc***. Counsel contended that although the provision of Section 166 (3) has been deleted by Motor Vehicles (Amendment) Act 54 of 1994 with effect from 14.11.1994 but said deletion has no effect on the present case.

5. I have heard counsel for the petitioners and perused the record. The only issue which has arisen for determination in the writ petition is as to whether the application for compensation under Motor Vehicles Act filed by the respondent no. 2 is barred by time or not. There is no dispute that the death occurred on 2.5.1992 and the application has been filed on 19.4.2001. On 19.4.2001 the provision of Section 166 (3) as quoted above stood deleted by the Motor Vehicles (Amendment) Act 54 of

1994. On the date when the application was filed there was no limitation prescribed under Section 166. This question is fully covered by the judgment of the apex court in AIR 1996 Supreme Court 2155 **Dhannalal** vs. **D.P. Vijayvargiya and others**. Facts in the case before the apex court were that the appellant met with an accident on 4.12.1990 and the application was filed for compensation on 7.12.1991. The apex court in the aforesaid judgment noted the effect of omission of sub section (3) of Section 166 of the Motor Vehicles Act with effect from 14.11.1994. The apex court held that the effect of the amendment with effect from 14.11.1994 that there is no limitation for filing claim before the Tribunal in respect of an accident. In paragraphs 6 and 7 the apex court laid down:

"6. Before the scope of sub section (3) of section 166 of the Act is examined, it may be pointed out that the aforesaid sub section (3) of Section 166 of the Act has been omitted by Section 53 of the Motor Vehicles (Amendment) Act, 1994, which came in force w.e.f. 14.11.1994. The effect of the Amending Act is that w.e.f. 14.11.1994, there is no limitation for filing claims before the Tribunal in respect of any accident. It can be said that Parliament realized the grave injustice and injury which was being caused to the heirs and legal representatives of the victims who died in accident by rejecting their claim petitions only on ground of limitation. It is a matter of common knowledge that majority of the claimants for such compensation are ignorant about the period during which such claims should be preferred. After the death due to the accident of the bread earner for the family, in many cases such claimants are virtually on the streets. Even in cases where the victims escopes death some of such victims are hospitalized for months if not for years. In the present case itself the applicant claims that he met with the accident on 4.12.1990 and he was being treated as an indoor patient till 27.9.1991. According to us, in its wisdom the Parliament rightly thought that prescribing as period of limitation and restricting the power of Tribunal to entertain any claim petition beyond the period of twelve months from the date of the accident was harsh inequitable and in many cases was likely to cause in justice to the claimants. The present case is a glaring example where the appellant has been deprived by the order of the High Court from the claiming the compensation because of delay of only four days in preferring the claim petition.

In this background, now it has to be examined as to what is the effect of omission of sub section 3 of Section 166 of the Act. From the Amending Act it does not appear that the said Section has been deleted retrospectively. But at the same time there is nothing in the Amending Act to show that benefit of deletion of sub section (3) of Section 166 is not to be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub section (3) from Section 166 of the Act can be tested by an illustration. Suppose on accident had taken place two years before 14.11.1994 when sub section (3) was omitted from section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14.11.1994. Can a claim petition be not filed after 14.11.1994 in respect of such accident ? Where a claim petition filed after 14.11.1994, can be rejected by the

Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub section (3) of Section 166 was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub section (3) of Section 166 w.e.f.14.11.1994 ? According to us the answer should be in negative. When sub section 3 of Section 166 has been omitted then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub section (3) of Section 166 was in force. '

6. From the above pronouncement of the apex court it is clear that in view of the amendment made by the Amendment Act 54 of 1994 there was no limitation for filing an application in respect of any accident. The apex court also held that when sub section 3 of Section 166 has been omitted then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The Motor Accident Claims Tribunal has rightly relied on the said judgment of the apex court while rejecting the objection raised by the writ petitioner.

7. Counsel for the petitioner placed reliance on the apex courts 'judgment in the case of **Vinod Gurudas Raikar** v. **National Insurance Co. Ltd. and others** (supra) reported in AIR 1991 Supreme Court, 2156. In the aforesaid case the apex court considered the question as to what will be effect on limitation after repeal of the old act i.e. 1939 Act. The apex Court in the aforesaid judgment considered the provisions of Section 6 of General Clauses Act for considering the effect of repeal. The apex court in the aforesaid case has held that the question of condonation of delay must, therefore, be governed by the new law. The aforesaid case is not attracted in the facts of present case since in the aforesaid case the apex court considered the effect of repeal of old Act and further in paragraph 11 it was laid down that the question of condonation of delay be governed by new law. The aforesaid judgment does not help the petitioner in any manner.

8. The next judgment of the apex court in the case of **Kerala State Electricity Board and another** vs. **Valsala K. and another etc. etc.** (supra) reported in AIR 1999 Supreme Court 3502 was with regard to workmen 's compensation Act, 1923 as amended with effect from 1995. The question before the apex court was as to what is the relevant date for determination of amount of compensation. The apex court held that the relevant date for determination is the date of accident and not the date of adjudication of the claim. The aforesaid case relates to determination of question of compensation payable. It was held that the workmen immediately after the accident became entitled for compensation hence the relevant date is the date of accident. The amendment made in 1955 regarding enhancing the amount of compensation and rate of interest was held not to be attracted in the above case. The aforesaid case is clearly distinguishable and is not applicable in the present case. The question in the present case is not the question regarding determination of amount of compensation rather the question of limitation for filing the application. When an application is

filed for compensation the question as to whether the said application is barred by time or not, has to be considered with regard to date on which the said application has been filed and the law governing the limitation on the said date.

9. In view of what has been said above, the facts of the present case are fully covered by the apex court judgment in **Dhannalal** vs. **D.P. Vijayvargiya and others** (supra). The application filed by respondent no. 2 was not barred by time and the Motor Accident Claims Tribunal has rightly decided issue no. 4. None of the submissions raised by the counsel for the petitioner has any merit.

The writ petition lacks merit and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.10.2002

BEFORE
THE HON'BLE S.P. SRIVASTAVA, J.
THE HON'BLE K.N. SINHA, J.

Special Appeal No. 516 of 2002

Jagdish Singh and others ...Petitioners
Versus
The Additional District Magistrate and another ...Respondents

Counsel for the Petitioners:
Sri A.P. Tewari
Sri S.S. Tripathi

Counsel for the Respondents:
Sri H.N. Sharma, S.C.

Allahabad High Court Rules 1952- Chapter VIII rule-5- Special Appeal- Maintainability- appeal against the judgment of single Judge - arises out from the order passed by revisional court under Consolidation of Holdings Act 1953- statutory born emposed by section 4 of the U.P. High Court (Abolition of letters Patent Appeal) Act 1962- held- Special Appeal not maintainable.

Held- Para 8 and 14
Case law discussed.
2001 (2) JLJ page I
In view of the statutory prohibition envisaged under section 4 of the Act, no appeal arising from a suit or proceedings instituted or commenced whether prior or subsequent to the commencement of that Section was to lie to the High Court from a judgment or order of one Judge of the High Court made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution, in respect of a judgment, decree or order made or purported to be made by the Board of Revenue under the United Provisions Land Revenue Act, 1901, or the U.P. Tenancy Act, 1939, or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 or the Uttar Pradesh Urban Area Zamindari Abolition and Land Reforms Act, 1956 or the Jaunsar-Bawar Zamindari Abolition and Land Reforms Act, 1956, or the Kumaun and Uttarkhand Zamindari Abolition and Land Reforms Act, 1960, or by the Director of Consolidation (including any other officer purporting to exercise the powers and to perform the duties of the Director of Consolidation) under the U.P. Consolidation of Holdings Act, 1953.

As has already been noticed herein above, the judgment/order impugned in the writ petition giving rise to this Special Appeal had been passed in the proceedings under the U.P. Consolidation of Holdings Act, 1953 as amended and the said order had been passed by the Deputy Director of Consolidation exercising the revisional powers vesting in the Director of Consolidation. The order of the learned single Judge under Appeal has only maintained the order passed by the Deputy Director of Consolidation by dismissing the writ

petition. Such an order passed by a learned Single Judge is clearly not appealable.

(Delivered by Hon'ble S.P. Srivastava, J.)

1. Heard counsel.

Perused the record.

Learned Standing Counsel representing the respondent no. 1 has raised a preliminary objection to the maintainability of this Special Appeal and has urged that since the order impugned in this Special Appeal is an order passed by the learned Single Judge finally disposing of a writ petition directed against an order passed by the Deputy Director of Consolidation exercising the revisional jurisdiction envisaged under the provisions of the U.P. Consolidation of Holdings Act, 1953 as amended. This Special Appeal is not maintainable/entertainable in view of the statutory prohibition envisaged under the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962 and deserves to be dismissed on this ground alone.

2. Learned counsel for the petitioner- appellant has, however, urged that the Special Appeal is maintainable and has challenged the report of the Stamp Reporter indicating that the Special Appeal is not maintainable in view of Chapter VIII Rule 5 of Allahabad High Court Rules, 1952.

3. The present Special Appeal has been filed under the provisions contained in Chapter VIII Rule 5 of the Rules of the Court, which is to the following effect:

"An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award--(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matter enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

4. It may be noticed that Allahabad High Court Rules (Rules of the Court, 1952) were framed by the High Court of Judicature at Allahabad in exercise of the powers conferred by Article 225 of the Constitution of India and all other powers enabling it on that behalf. The High Court of Judicature at Allahabad was established under the Letters Patent of His Majesty published in Government Gazette North Western Provinces dated 27.6.1866. Clause 10 of the Letters Patent contained a provision regulating the appeal to the High Court from the Judges of the said Court. It was stipulated in clause 10 of the Letters Patent that except certain specified categories of cases an

appeal shall lie to the said High Court of Judicature at Allahabad from the judgment of one Judge.

5. The contention of the learned counsel for the petitioner is that in view of clause 10 of the Letters Patent, the present Special Appeal is clearly maintainable specially when the order which had been challenged in the writ petition giving rise to this appeal had been passed in the proceedings under the U.P. Consolidation of Holdings Act by an authority which could not be deemed to fall within the ambit of tribunal court or statutory arbitrator as indicated in Chapter VIII Rule 5 of the Rules of the Court.

We have given our anxious consideration to the rival submissions made by the learned counsel for the parties.

6. In the year 1962 an Act with the nomenclature "The Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962" (U.P. Act No. XIV of 1962) was brought into force providing for abolition of Letters Patent Appeals in the High Court of Judicature at Allahabad. The provisions contained in Sections 3, 4 and 5 of the aforesaid Act imposed a statutory bar against the entertainability/maintainability of Special Appeals from the judgment or order of one Judge of the High Court in the same Court that is intra court appeals in respect of different specified categories of cases. The provisions contained in Section 3 of the Act provided that no appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of the said Act, shall lie to the High Court from a judgment and order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the superintendence of the High Court.

7. The provisions contained in Section 4 of the aforesaid Act provided for the abolition of appeals from the judgment and order of one Judge of the High Court, made in the exercise of writ jurisdiction in certain other cases.

8. In view of the statutory prohibition envisaged under section 4 of the Act, no appeal arising from a suit or proceedings instituted or commenced whether prior or subsequent to the commencement of that Section was to lie to the High Court from a judgment or order of one Judge of the High Court made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution, in respect of a judgment, decree or order made or purported to be made by the Board of Revenue under the United Provinces Land Revenue Act, 1901, or the U.P. Tenancy Act, 1939, or the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 or the Uttar Pradesh Urban Area Zamindari Abolition and Land Reforms Act, 1956 or the Jaunsar-Bawar Zamindari Abolition and Land Reforms Act, 1956, or the Kumaun and Uttarkhand Zamindari Abolition and Land Reforms Act, 1960, or by the Director of Consolidation (including any other officer purporting to exercise the powers and to perform the duties of the Director of Consolidation) under the U.P. Consolidation of Holdings Act, 1953.

9. The provisions contained in Section 5 of the aforesaid Act provided for the abolition of Appeals from the judgment or order of one Judge of the

High Court made in the exercise of writ jurisdiction in certain other cases.

10. In the present case, we are not, however, concerned with the effect of the provisions contained in Section 5 of the Act.

11. From what has been noticed hereinabove, it is apparent that in view of the statutory prohibition imposed with the enforcement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962 the appeal arising from a proceeding under the U.P. Consolidation of Holdings Act, 1953 directed against an order or judgment passed by the Director of Consolidation or any other Officer purporting to exercise the powers and to perform the duties of Director of Consolidation under the provisions of the U.P. Consolidation of Holdings Act, 1953 ceased to be entertainable/maintainable.

12. At this stage it may be noticed that the Hon'ble Apex Court in its decision in the case of Vijay Laxmi Sadho (Dr.) Vs. Jagdish reported in 2001 (2) JLJ page 1 had clarified that rules framed by the High Court in exercise of powers under Article 225 of the Constitution of India are only rules of procedure and do not constitute substantive law.

13. We are of the considered opinion that in such a situation the substantive provisions contained in the U.P. High Court (Abolition of Letters Patent Appeal) Act, 1962 had to prevail over the procedural law and an appeal which might have been entertainable/maintainable either under Clause 10 of the Letters Patent or under the Chapter VIII Rule 5 of the Rules of the Court could not by any stretch of imagination be taken to lie in the teeth of the statutory prohibition/bar imposed on the entertainability/maintainability of such an appeal with the enforcement of the aforesaid Act abolishing certain specified categories of Letters Patent Appeals.

14. As has already been noticed herein above, the judgment/order impugned in the writ petition giving rise to this Special Appeal had been passed in the proceedings under the U.P. Consolidation of Holdings Act, 1953 as amended and the said order had been passed by the Deputy Director of Consolidation exercising the revisional powers vesting in the Director of Consolidation. The order of the learned single Judge under Appeal has only maintained the order passed by the Deputy Director of Consolidation by dismissing the writ petition. Such an order passed by a learned Single Judge is clearly not appealable.

15. The preliminary objection in the circumstances noticed hereinabove, is liable to be accepted and is hereby upheld.

16. The Special Appeal in view of what has been indicated hereinabove deserves to be and is dismissed as not maintainable.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2002

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

Special Appeal No. 122 of 2001

Sher Singh ...Appellant
Versus
Union of India and others ...Respondents

Counsel for the Appellant:
Sri Ajay Bhanot

Counsel for the Respondents:
Sri S.N. Srivastava
Sri Narendra Prasad Shukla
S.C.

Army Act 1950 Section 56- Dismissal from service- False accusations against elegant employee- neither from summary court martial proceeding nor the sentence awarded-pointed out any finding regarding false accusation made was knowing by- punishment can not be awarded.

Held Para 15

The condition precedent for making out of an offence section 56 (a) is that person making false accusation knows or has reason to believe such accusation to be false, it does provide that every false accusation which is made unknowingly or under some mistake to be an offence unless it is proved that the false accusation has been made knowingly or having reason to believe such accusation to be false, the offence cannot be said to have been committed. From the proceedings of the summary Court martial and the sentence awarded, it does not appear that any finding has been recorded by the Summary Court Martial that the appellant writ petitioner was making false accusation knowingly or having reason to believe it to be false. Thus the punishment could not have been awarded at all.

Case law discussed:
AIR 1987 SC-2386
AIR 1992 SC-417
1988 UPLBEC-783
AIR 1997 SC-2386
AIR 1982 SC-1413
J.T. 1997 (4) SC-8
AIR 1988 SC-705
J.T. 1993 (5) SC-154

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

1. The present Special Appeal has been filed against the judgment and order dated 10.01.2001 passed by the learned Single Judge in C.M. Writ Petition No. 35346 of 1997 whereby the writ petition has been dismissed.

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

2. According to the appellant writ petitioner he was enrolled in the Indian Army on 25.2.1984. He was shifted to Holding Battery Depot Regiment Nasik Road Camp on 12.6.1996 and thereafter to R.P. Section Depot on 3.7.1996 on medical grounds. According to the appellant writ petitioner he was admonished by one Shri Sulkhan Singh, R.P. Hawaldar on 4.7.1996 and was asked to work under him. It is alleged that he was required to give a Bottle of Rum (wine) as bribe otherwise he was to face dire consequences. The appellant writ petitioner did not oblige and instead reported the matter to the Commanding Officer vide representation dated 16.7.1996. An inquiry was initiated but the appellant writ petitioner was not associated and he was not afforded any opportunity to examine or cross examine the witnesses and summary Court Martial

was held and the appellant writ petitioner was dismissed from service vide order dated 28.10.1996 passed by the Commanding Officer, Artillery Regiment, Nasik Road. The appellant writ petitioner preferred a departmental appeal before the General Officer Commanding in Chief, Southern Command, Poona, Maharastra which was sent by registered post on 24.12.1996. When the appeal was not being decided, he approached the Court by means of a writ petition which was disposed of with the direction to the concerned authority to decide the appeal within two months. The appeal was dismissed vide order dated 25.6.1997. Both the orders of dismissal dated 28.10.1996 and the order dated 25.6.1997 rejecting his appeal was challenged by the appellant writ petitioner before this Court by means of a C.M. Writ Petition No. 35346 of 1997 which has been dismissed by the learned Single Judge vide judgment and order dated 10.01.2001 which is under challenge in the present Special Appeal.

3. We have heard Shri Ajai Bhanot, learned counsel for the appellant writ petitioner and Shri Narendra Prasad Shukla, learned Standing Counsel appearing for the respondents. The learned counsel for the appellant writ petitioner submitted that the summary Court Martial proceedings were in flagrant violation of mandatory provisions of Army Act, 1950 (hereinafter referred as the Act) and the Army Rules, 1954 (hereinafter referred as Rules) which went to the very root of the constitution and the proceedings of the summary Court Martial were enough to vitiate the entire proceedings including the punishment imposed there under. He further submitted that the punishment awarded to the appellant writ petitioner was strikingly disproportionate to the misconduct alleged on the part of the appellant writ petitioner and it should shock the conscience of this Court. The following charge was framed:

"Making a false accusation against a person subject to the Army Act knowing such accusation to be false.

4. In that he, at Nasik Road Camp on 16.7.1996 made written false accusation to Commanding Officer against Number 14348093-M Lance Hawaldar (General Duties) Sulkhan Singh, Regimental Police stating that he takes Rs.50/- (Rupees Fifty Only), or a bottle of Rum from new comers and Rs.100/- (Rupees Hundred Only) from Regimental Staff for any default well knowing the said statement to be false."

Which shows that the summary Court Martial proceedings were initiated against the appellant writ petitioner to check the guilt in respect of the aforesaid offence which resulted in the dismissal. The charge was not so grave so as to warrant the extreme penalty of dismissal from service. He relied upon a decision of the Hon'ble Supreme Court in the case of Ranjeet Thakur Versus Union of India reported in A.I.R. 1987 S.C. 2386 and ***Ex-Naik Sardar Singh Vs. Union of India and others reported in A.I.R. 1992 S.C.417***. He further submitted that the mandatory provisions were violated and procedural impropriety were committed in the Court martial proceedings which was observed more in breach rather than in adherence. He further submitted that Rule 33 (7) and Rule 34 of the Army Rules, 1954 which provided for right of accused to prepare defense and warning of

accused for trial was not complied with neither any charge sheet was served nor the summary of evidence was given to the appellant writ petitioner throughout the proceedings left alone 96 hours interval prescribed by the said provisions between the supply of the aforesaid documents in the commencement of the proceedings. He submitted that the violation of the aforesaid Rule is sufficient and grave enough to viiate the entire Court Martial proceedings. In support thereof he relied upon a decision in the case of ***Ram Pravesh Rai Vs. Union of India and others reported in 1988 UPLBEC 783*** wherein this Court has held that failure to provide a copy of the charge sheet and summary of evidence 96 hours before the actual trial and allowing the gap of 96 hours between the petitioner being so informed of his actual trial would vitiate the entire Court Martial proceedings. However, the information should be given from the Presiding Officer as provided in the Rules.

5. He further submitted that the provisions of Section 33 of the Act and Rule 44 of the Rules have also been violated as the petitioner was not informed about the name of the Presiding Officer and the Members so that he may raise his objection, if any, which vitiate the entire proceedings. He relied upon the decisions of the Hon'ble Supreme Court in the case of ***Ranjeet Thakur Vs. Union of India, 1997 S.C. 2386 and Ltd. Col. Preti Pal Singh Bvedi Vs. Union of India and others AIR 1982 S.C. 1413.*** He further submitted that Rule 129 of the Act and Rule 33 of the Army Rules have also been violated as he was not given the help of any person to assist him during the trial which would violate the principle of natural justice. He relied upon a decision of this Court in the case of Union of India Vs. Rameshwar Mahto 1993 A.W.C. 883.

6. Learned counsel for the petitioner further pressed into aid the principle of bias against the Commanding Officer which had vitiated the entire proceedings. According to him the appellant writ petitioner had made a complaint against Regimental Havaldar to Col. Chandrashekhar Chaturvedi, Commanding Officer, Artillery Depot Regiment which was taken cognizance of by the said Officer. The summary Court Martial proceedings was initiated by the same Commanding Officer which went on to preside over the proceedings of the summary Court Martial and dismissed him from service.

7. According to him the complaint was made to the Commanding Officer Col. Chaturvedi, who alone could have proved the aforesaid complaint as a witness before the summary Court Martial proceedings which was the cause and basis of the entire Court martial against him. Instead of being a witness the Commanding Officer Col. Chaturvedi presided over the summary Court Martial and finally he was dismissed from service. Thus the complaint which formed the cause and basis of Court Martial was never proved. According to him the Commanding Officer had also punished the appellant writ petitioner twice on 19.9.1996 and 6.10.1996.

8. He further submitted that the appellant was summarily tried under section 41 (2) and awarded 28 days rigorous imprisonment on 19.9.96 and immediately after his release at the conclusion of his sentence, the appellant was again awarded a punishment to

undergo vigorous imprisonment on 6.10.1996. Both these sentences was successively handed out to the petitioner by the same commanding officer namely Col. Chandrashekhar Chaturvedi. However, such punishments were not proceeded by any Court martial or trial, as envisaged in section 41 (2).

9. He further submitted that during his internment in pursuance of the aforesaid sentence the appellant fell seriously ill. The appellant accordingly reported sick and was examined by the military doctors namely Lt.Col. (Doctor) A.K. Shukla & Lt. Col. (Doc.) V.K. Nair. The said doctors (in particular Lt. Col. Doc. V.K. Nair) opined that the case of the appellant was serious and he needed specialist medical care which was not available in the M.I. room of his Regiment. Hence, the doctor recommended that the appellant be moved to M.H. Deolali where he could be administered specialist care and attention to cure his illness. However, the commanding Officer was so single minded in his desire to harass and punish the petitioner that he over-ruled the aforesaid specialist's medical opinion. Needless to add Col. Chandrashekhar Chaturvedi had no expertise to over rule the aforesaid Medical advise. Thus, the Commanding Officer ensured that the appellant was precluded from availing specialist Medical attention and he continued to suffer with an aggravated ailment. The aforesaid facts wherein the said Col. Chandrashekhar Chaturvedi awarded consecutive and successive punishments to the appellant in a short span of 2 months prevented the appellant from getting medical treatment, presiding over a Court martial where in fact he should have been a witness shows the bias of the commanding officer against the appellant. It is logical to conclude from the aforesaid factual matrix that the said Court martial proceedings presided over Col. Chandrashekhar Chaturvedi were a mere formality, in view of his bias and malafide intentions. It is clear that after initiating the Summary Court Martial proceedings Col. Chandrashekhar Chaturvedi steered them to their pre-determined destination of finding the appellant guilty and dismissing him from service.

10. He further submitted that Rule 22 of the Rules have also been violated as no pretrial, as contemplated in the said Rules was conducted which is mandatory in nature, thus the entire proceedings have been vitiated. In support thereof he relied upon a decision of the Hon'ble Supreme Court in the case of Lt. Col. Preti Pal Singh Vs. Union of India reported in 1982 S.C. 1413. He submitted that in any event under section 56 of the Act making a false accusation simplicitor against any person is not an offence unless the person making the false accusation makes accusation knowing or having reason to believe such accusation to be false and the conviction upon by Court Martial can be made to suffer imprisonment for a term which may extend to 5 years. The accusation in the present case was not made knowingly and no punishment could have been given. He relied upon a decision of this Court in C.M. Writ Petition No. 29244 of 1999 No. 13883630-K Ex. Sep.Dvt. (MT) M.Z.H. Khan Vs. The Chief of the Army Staff, Army Headquarters, New Delhi and others dated 29.8.2001.

Shri Narendra Prasad Shukla, learned Standing Counsel submitted that the

appellant writ petitioner was detained on duty on 4.7.1996 in the M.T. Area of the Unit. He was found absent from duty. He was again found missing from the Unit lines and instead was found on 4.7.1996 at 7.45 P.M. at Railway Station Nasik. He was ordered to perform duty on the main gate of Artillery Depot Regiment on 7.7.1996 but he refused to obey and declined to perform the duty. He was detained in his place. The incident was reported to the Higher Officer. On 16.7.1996 he wrote a personal letter addressed to the Commanding Officer of Artillery Depot Regiment alleging that Lance Hawaldar Sulkhan Singh demanded a Bottle of Rum from every new inductee and Rs.100/- from each member of the Regiment, Police Section for any mistake committed by them and/or to recommend their leave to the appropriate authority. A Court Martial Enquiry was conducted and the evidence was reduced in writing which established that the appellant writ petitioner had made a false allegations against Lance Hawaldar Sulkhan Singh knowing fully well that they were false. On 12.9.1996, he did not obey the order passed by the Superior Officer and he was placed under arrest for which he was awarded 28 days rigorous imprisonment. While undergoing the punishment he became violent with provocation and broke two glass paries of the ventilator cell. He was given full opportunity to defend and he was provided a copy of the charge-sheet and summary of the evidence, but he refused to take documents which have been witnessed by two independent witnesses. He was tried on 26.10.1996 by summary Court Martial under section 56 (a) of the Act for making a false accusation against a person subject to the Army Act knowing such accusation to be false. He was dismissed from service taking a sympathetic view whereas the offence is punishable with 5 years rigorous imprisonment.

11. According to the learned Standing Counsel the appellant writ petitioner declined to receive and sign the documents whereupon a complete set of facts of Court martial proceedings were sent to him by post at his home address. He further submitted that the provisions of Rule 33 (7) of the Army Rules are not applicable as it has application only to general Court Martial and District Court Martial and not to summary Court Martial. According to him the contention of the learned counsel for the appellant writ petitioner that the Commanding Officer became disqualified as he has taken cognizance of the complaint made by him is incorrect. The said Officer only ordered for a Court of enquiry on the basis of complaint made by him. The Court of enquiry examined the witnesses and submitted the report to the Officer and the provisions of Rule 22 are complied with by making a tentative charge sheet. The summary Court martial procedure was followed and the officer was competent to hold the summary Court Martial. He relied upon a decision of the Hon'ble Supreme Court in the case of Vidya Prakash Vs. Union of India A.I.R. 1988 S.C. 705 and Major General Indrajeet Sharma Vs. Union of India J.T. 1997 (4) S.C. 8 and Bhuvaneshwar Singh Vs. Union of India and others J.T. 1993 Vol. 5 S.C.154.

12. Having heard the learned counsel for the parties we find that as per Annexure 1 enclosed with the Counter Affidavit filed by Major Purushottaman on behalf of the respondents, on

18.9.1996 and charges were explained to the accused i.e. (appellant writ petitioner) and he was apprised of his right to cross examine all the prosecuting witnesses under Army Rules 23 (2) as also produce in his own defense. The summary of evidence was also given to the accused and he had also cross examined the prosecution witness no. 1 Sulkhan Singh, but he declined to cross examine prosecution witness no. 2,3,4,5. Further he did not give any statement and he declined to call any witness for his defense. Evidence was recorded in his presence and has been signed by independent witness. Thus all the procedure as prescribed in the various Rules have been complied with. So far as the violation of Rule 33 (7) and Rule 34 of the Rules are concerned, it may be mentioned here that there is no averments that he was not given summary of evidence before ninety six hours. Neither any violation of Rule 33 (7) of Rule 34 of the Army Rules have been pleaded. We have already found that appellant writ petitioner was provided with the summary of evidence and was also given an opportunity to cross examine, which he availed in respect of P.W. 1 but declined in respect of remaining prosecution witnesses. Thus no breach of Rule 33 (7) or Rule 34 has been made out. The decision of this Court in the case of Ram Pravesh Rai Vs. Union of India (supra) would not be applicable to the facts of the present case. So far as non compliance of Section 130 and Rule 44 of the Rules are concerned, the position is that there is no averment in the writ petition regarding its non compliance and therefore it cannot be raised for the first time in appeal. However, it may mention here that the decision of the Hon'ble Supreme Court in the case of Ranjeet Thakur (supra) wherein the provisions of Section 130 of the Army Act has been held to be mandatory for summary Court martial proceedings already appears to have been reviewed as noticed by Jammu & Kashmir High Court in the case of Balwant Singh Vs. Union of India and another reported in 1992 Criminal Law Journal 1712 wherein the said position has been rectified. The relevant portion of paragraph 8 of the judgment in Balwant Singh's case is reproduced below:

"8. The submission regarding breach of provisions of terms of Ss. 130 and 116 is misplaced and invites rejection on the very thresh-hold. Even a cursory look at S. 130 would show that it brings within its ambit only trials by General, District or Summary General Court Martial. The fourth category of Court Martial i.e. Summary Court Martial is per se excluded. Therefore, there was no question or occasion to ask the petitioner accused as to whether he wanted to object to be tried by an officer sitting on the Court. It is true in AIR 1987 SC 2386: (1988 Cri LJ 158) the Hon'ble Supreme Court held this Section to be applicable even to Summary Court Martial. But on a review, the error stands rectified. Therefore, this issue is no more res integra."

Likewise in the writ petition there is no averment that the provisions of Rule 133 and 129 have been violated.

13. So far as the question as to whether the Commanding Officer was biased or not, it may be mentioned here that neither in the writ petition as originally filed nor even after its amendment by incorporating as many as 23 paragraphs the plea of bias against the

Commanding Officer Col. Chandra Shekhar Chaturvedi was alleged. Bias is basically a question to be decided on the basis of the plea and material filed in support thereof. In the absence of any plea the appellant writ petitioner cannot be permitted to raise such a plea for the first in the Special Appeal. The submission that the provisions of Rule 22 of the Rules have been violated also does not stand scrutiny. We have already found that the charges were read over to the appellant writ petitioner, the evidence was recorded in his presence, he was also permitted to cross examine. Whether or not he availed of that opportunity of cross examination is another thing. From the record it appears that the appellant writ petitioner cross examined P.W. 1 and declined to cross examine any other prosecution witnesses. He also declined to give his statement. The summary of the proceedings have been signed by independent witnesses. In this back ground we are of the considered opinion that the procedure of Rule 22 has been complied with.

14. So far as the question regarding the punishment being disproportionate to the evidence said to have been committed by the appellant writ petitioner is concerned we find that the charge which was framed against the appellant writ petitioner was making a false accusation against a person subject to the Army Act knowing such accusation to be false. The charge was framed under section 56 (a) of the Army Act. Section 56 of the Act is reproduced below:-

"56. False accusations- Any person subject to his Act who commits any of the following offences, that is to say--

(a) make a false accusation against any person subject to this Act, knowing or having reason to believe such accusation to be false; or
(b) in making a complaint under section 26 or section 27 makes any statement affecting the character of any person subject to this Act, knowing or having reason to believe such statement to be false or knowingly and willfully suppresses any material facts;
(c) shall on conviction by Court-martial, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned."

15. The condition precedent for making out of an offence under section 56 (a) is that person making false accusation knows or has reason to believe such accusation to be false, it does not provide that every false accusation which is made unknowingly or under some mistake to be an offence unless it is proved that the false accusation has been made knowingly or having reason to believe such accusation to be false, the offence cannot be said to have been committed. From the proceedings of the summary Court martial and the sentence awarded, it does not appear that any finding has been recorded by the Summary Court Martial that the appellant writ petitioner was making false accusation knowingly or having reason to believe it to be false. Thus the punishment could not have been awarded at all.

16. The learned Single Judge of this Court in the case of No. 13883630-K Ex. Sep.Dvt. (MT) M.Z.H. Khan Vs. The Chief of the Army Staff, Army Headquarters, New Delhi and others has held that unless accusation made by a

person or known to that person to be false or he has reason to believe to be false is found that no offence under section 56 (a) of the Act is made out.

17. There is nothing on record to show that any finding has been recorded in the summary Court martial proceedings that the false accusation made by the appellant writ petitioner was known to him to be false or he has reason to believe it to be false. Thus no punishment could have been awarded for the alleged offence committed under section 56 (a) of the Army Act. The punishment is vitiated.

18. In view of the fact that we are setting aide the punishment, it is necessary for us to go into the question that the punishment, is disproportionate to the alleged offence.

19. In view of the foregoing discussion the Special Appeal succeeds and is allowed and the punishment awarded to the appellant writ petitioner by Summary Court Martial dated 28.1096 and 23.7.1997 are hereby set aside and he shall be entitled for all consequential benefits.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2002

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

Special Appeal No. 387 of 2001

Shobh Nath Singh ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Shailendra

Counsel for the Respondents:
Sri H.N. Pande
Sri Sabhajit Yadav
S.C.

U.P. Secondary Education Service Selection Boards Act 1982- Section 33-A (1-c.) Regularisation- appellant petitioner appointed against short term vacancy caused by on Mr. R.P. Ojha- who was also appointed on ad hoc basis as English lecturer under the Provision of Second Removal of Difficulties Order 1981- proceeded on leave on 1.3.85 subsequently resined on 1.12.85- appellant appointed on 2.12.85 on Adhoc basis – approval granted by D.I.O.S. on 17.2.85- appointment of Respondent no. 4 made by Commission on 7.7.89- remained unchallenged – even in earlier writ petition of the appellant- he was entitled to work till the Regular selected candidate joined- held can not be regularised.

Held- para 13

In the present case, the substantive vacancy arose on 1.1.1986 when according to the own saying of the appellant writ petitioner, resignation of Sri R.P. Ojha was accepted by the Committee of management whereas the appellant writ petitioner was appointed on 2.12.1985. Thus his appointment cannot be said to be under section 18 of the Act. Moreover, as held by this Court in the case of Jagdish Singh Kushwaha (supra), the conditions no. 2 and 3 are not fulfilled. Thus, the appellant- writ petitioner is not entitled for regularisation. The order of regularisation having been passed by the District Inspector of Schools without taking into consideration the relevant law has rightly been cancelled. Moreover in earlier writ petition filed by the appellant- writ petitioner in the year 1986 he was directed to continue till the

regular selection was made. The respondent no. 4 having been regularly selected the continuance of the appellant would cease from the date of his joining.

Case law discussed:

1994 (3) UPLBEC – 1551, 1998 (3) ESC 2006 (Alld), 1999 (3) ESC 1950 (Alld), 1987 (4) ScC –525 1993 HVD (Alld)-Vol. IV 21

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

1. The present Special Appeal has been filed against the judgment and order dated 13.7.2000 passed by the learned Single Judge, whereby the writ petition filed by the appellant- writ petitioner has been dismissed.

2. Briefly stated the facts giving rise to the present Appeal are that a post of lecturer in English in Indira Gandhi Intermediate College, Jamah, Mauaima, district Allahabad (hereinafter referred to as the Institution) was sanctioned on 11.12.1981 by the State Government. One Sri R.P. Ojha was appointed as an adhoc lecturer under the provisions of Second Removal of Difficulties Order 1981. The Committee of Management of the Institution intimated the vacancy to the U.P. Secondary Education Services Commission (hereinafter referred to as the commission) as provided under Section 18 of the U.P. Secondary Education Services Selection Boards Act, 1982 (hereinafter referred to as the Act). The Commission advertised the post in question in the newspapers on 11.8.1984,R.P. Ojha, who was working as adhoc lecturer in English, went on leave on 3.1.1985. Subsequently, he also resigned on 1.12.1985. His resignation was accepted by the committee of Management on 1.1.1986. The committee of Management, put a notice on 10.11.1985, on the notice Board for filling up the vacancy which had occurred due to leave taken by A.P. Ojha and on 1.12.1985 the Committee of Management, resolved to appoint the appellant writ petitioner. The appellant- writ petitioner was given appointment on adhoc basis on 2.12.1985. The District Inspector of Schools, vide order dated 17.2.1985, approved the appointment of the appellant- writ petitioner.

3. It appears, that the Commission, selected one Sri G.P. Misra, respondent no.4, on the post of lecturer in English vide notification dated 7.7.1989. When Sri G.P. Misra, was not being given appointment by the Committee of Management despite instructions given by the District Inspector of Schools, he approached this Court by filing Civil Misc. Writ Petition No. 2695 of 1990 seeking direction to the Committee of Management to issue appointment letter for the post of lecturer in English. This Court issued an interim mandamus on 17.2.1990 to the Committee of Management, either to issue appointment letter to Sri G.P. Misra or to show cause. Pursuant thereto, the Committee of Management issued appointment letter dated 30.1.1992 to Sri G.P. Misra, who joined the Institution on 7.2.1992.

4. The appellant- writ petitioner was claiming regularisation on the ground that he was entitled for regularisation under section 33-A(1-C) of the Act, as amended in the year 1991. He filed Civil Misc. Writ Petition No. 7988 of 1992 before this Court. He also prayed for an interim order and application for such interim order was rejected.. However, the District Inspector of Schools on the representation made by the appellant- writ petitioner, regularised

his services vide order dated 19.2.1992 which order was subsequently cancelled on 26.3.1992. The order dated 26.3.1992 was challenged by the appellant – writ petitioner before this Court by filing civil misc. writ petition no. 17534 of 1992. The said writ petition has been dismissed by the learned single Judge vide judgment and order dated 13.7.2000, which order is impugned in the present special Appeal.

5. We have heard Sri Shailendra learned counsel for the appellant- writ petitioner, Sri H.N.Pande learned counsel for the respondent no. 4 and Sri Sabhajit Yadav learned Standing Counsel appearing for the State- respondents.

6. The learned counsel for the appellant- writ petitioner submitted that in view of Section 33-A (1) of the Act, the service of Sri R.P. Ojha stood regularised on 12.6.1985 since he was appointed on adhoc post in substantive vacancy and, therefore, the Commission could not have proceeded for selection of regular lecturer in English for the Institution. Thus, the selection of the respondent no. 4 is wholly illegal and contrary to law. He further submitted that the District Inspector of Schools vide order dated 19.2.1992 had regularised the services of the petitioner which order was subsequently cancelled on 26.3.1992 without giving any show cause notice or opportunity of hearing to the petitioner and, therefore, the said order having been passed in gross violation of principle of natural justice, equity and fair play, cannot be sustained and ought to have been set-aside. According to him, the services of the appellant- writ petitioner had rightly been regularised under Section 33-A(1-C) of the Act and, therefore, on merit also, the order dated 26.3.1982 is liable to quashed.

7. It may be mentioned here that when regular selection was being made, the appellant writ petitioner had approached this Court by filing civil misc. writ petition no. 12180 of 1986. The writ petition was disposed of vide judgment and order dated 16.12.1986 with the observations that the appellant- writ petitioner would continue till the regularly selected candidates joins the post in question.

8. The learned counsel for the appellant- writ petitioner further submitted that at the time when the petitioner was appointed in a short term vacancy, there was no requirement under law to advertise the vacancy in two news papers and, thus, his appointment could not be invalidated on the ground that the vacancy was only notified on the notice board and not advertised in two newspapers as held by the Full Bench of this Court in the case of Radha Raizada and others vs. Committee of Management, Vidyawati Darbari Girls Inter College and others (1994) 3 UPLBEC 1551. He relied upon the decision of the Division Bench of this court in the case of Ashika Prasad Shukla vs. The District Inspector of Schools, Allahabad and another (1998) 3 SC 2006 (All) wherein it has been held that the decision of Full Bench of this Court in the case of Radha Raizada would not apply to the appointments made prior to the said decision as it has only prospective operation. He further submitted that even though the petitioner was appointed against leave vacancy, but after the resignation of Sri R.P.Ojha was accepted, it was converted into substantive vacancy and since the petitioner continued to work on the said post, in view of the order passed by this Court in civil Misc. Writ

Petition No. 12180 of 1986 decided on 16.12.1986 (filed by the appellant- writ petitioner) he would be deemed to be working on ad hoc post against substantive vacancy and entitled for regularisation of his service. He submitted that the decision of the Full Bench of this Court in the case of Smt. Pramila Misra vs. Deputy Director of Education , Jhansi Division, Jhansi and others (1997) 2 UPLBEC 1329, would not be applicable. He also relied upon the division Bench decision of this Court in the case of Raj Kumar Verma and another vs. District Inspector of Schools, Saharanpur and others 1999 (3) ESC 1950 (All). He further submitted that in any event, the District Inspector of Schools having once passed an order of regularisation cannot cancel the same as he has no power to review. In support of this submission, he relied upon the decision of Hon. Supreme Court in the case of Dr. (Smt.) Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and others reported in (1987) 4 SCC 525.

9. Sri H.N. Pande, learned counsel for the respondent no. 4 submitted that Sri R.P.Ojha who was appointed as adhoc lecturer in English in the Institution went on leave without pay w.e.f. 3.1.1985 and he resigned. The commission had advertised the post on 11.8.1984 pursuant to the requisition sent by the Institution. The appellant- writ petitioner was appointed on ad hoc basis against short term vacancy/leave vacancy of Sri R.P. Ojha the adhoc lecturer The appellant writ petitioner's appointment was made not through any advertisement in the newspaper. The respondent no. 4 was selected by the commission vide notification dated 7.7.1989 and he had been given appointment only on 30.1.1992 pursuant to the interim mandamus issued by this Court. Since then he is working and also getting his salary and he had joined the post of lecturer in English after resignation from his regular service from postal department. He further submitted that when the appellant writ petitioner had approached this court in the year 1986, by filing Civil Misc. Writ Petition No.12180 of 1986, this Court had disposed of the writ petition with the observation that he would continue till regular selection is made. Thus, it is not open to the appellant- writ petitioner to question the selection of the respondent no. 4 as his continuance on the post was only till regular selection is made which has been made in the present case. Thus, he has no right to continue. He further submitted that the appellant- writ petitioner does not fulfil the conditions mentioned in Section 33-A (1-C) of the Act, as he was not appointed against substantive vacancy. He shall continue only against leave vacancy or short-term vacancy. Further the regular selection has already been made by the Commission and, therefore, in view of sub section 3 of Section 33-A, regularisation of the appellant- writ petitioner should not have been made at all. Since the regularisation was done illegally without there being available any post of lecturer in English in the Institution, the District Inspector of Schools was justified in canceling the same. He relied upon a decision in the case of Jagdish Singh Kushwaha vs. U.P. Secondary Education Services Commission and others 1993 HVD (Alld) Vol. IV 21 wherein this Court has held that for claiming regularisation under Section 33-A (1-C) of the Act, the following five conditions have to be fulfilled and if any one of the five

conditions mentioned is not fulfilled, such teacher cannot be regularised. These five conditions are as follows:

"1. The adhoc appointment should be prior to July, 1988,
2. The appointment should be against a substantive vacancy,
3. The appointment should be in accordance with section 18 of the Act,
4. The candidate should either possess qualifications prescribed under the Intermediate Education Act 1921 or he should have been exempted from the requirement or possessing the said qualifications, and
5. The candidate should have been continuously serving the institution from ;the date of adhoc appointment till the commencement of U.P. Act No. 1991 (6.4.1991)."

10. Having heard the learned counsel for the partiers, we find that the following facts are not in dispute.

11. The appellant writ petitioner was appointed on 2.12.1985 when Sri R.P. Ojha, the then adhoc lecturer in English in the Institution, was on leave without pay. He submitted his resignation on 1.12.1985, which was accepted on 1.1.1986. The appellant writ petitioner had earlier approached this Court by filing Civil Misc. Writ Petition No. 12180 of 1986 which was disposed of with the direction that he would continue till the regularly selected candidate comes. His continuance on the post was on account of order passed by this Court. The post of lecturer in English was also advertised by the Commission on 11.1.1984 and respondent no. 4 was selected vide notification dated 7.2.1989 by the Commission.

Since the appellant- writ petitioner has not challenged the selection of the respondent no. 4 we are not called upon to decide the validity of his selection. The only question for consideration is as to whether the appellant- writ petitioner should have been regularised under Section 33-A(1-C) of the Act or not ? Further, whether the District Inspector of Schools, was justified in canceling the earlier order of regularisation of the appellant- writ petitioner or not?

12. It is not in dispute that the appellant writ petitioner was appointed in leave vacancy. It was not a substantive vacancy. The Full Bench of this Court in the case of Smt. Pramila Misra (supra) has held that a teacher appointed by the management of the institution on ad hoc 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, a right to be considered alongwith other eligible candidates for adhoc appointment in the substantive vacancy if he possesses the requisite qualification. In this view of the matter, the petitioner could not have continued after 1.1.1986 on the post of lecturer in English when the post, on which he was appointed on short term vacancy was converted into substantive vacancy. His continuance was on account of action of the Committee of Management and under the order passed by this Court. His appointment was also not made under Section 18 of the Act which provides for notifying the vacancy by the Management to the Commission and the Commission had failed to

recommend any suitable candidates for being appointed as teacher within one year from the date of such notification or the post of such teacher has actually remained vacant for more than two months only then the Management was given right to appoint adhoc teacher.

13. In the present case, the substantive vacancy arose on 1.1.1986 when according to the own saying of the appellant writ petitioner, resignation of Sri R.P. Ojha was accepted by the Committee of management whereas the appellant writ petitioner was appointed on 2.12.1985. Thus his appointment cannot be said to be under Section 18 of the Act.. Moreover, as held by this Court in the case of Jagdish Singh Kushwaha (supra), the conditions no. 2 and 3 are not fulfilled. Thus, the appellant- writ petitioner is not entitled for regularisation. The order of regularisation having been passed by the District Inspector of Schools without taking into consideration the relevant law has rightly been cancelled. Moreover in earlier writ petition filed by the appellant writ petitioner in year 1986 he was directed to continue till the regular selection was made. The respondent no. 4 having been regularly selected the continuance of the appellant would cease from the date of his joining.

14. The principles laid down in the case of Raj Kumar Verma (supra) relied upon the learned counsel for the appellant writ petitioner is not applicable in the present case in as much as in the aforesaid case, this Court has; held that a teacher appointed in a short term vacancy on or before the date 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 and not by the date the short term vacancy came to be converted into substantive vacancy. Since in the present case, the appointment of appellant writ petitioner has not been found to be in accordance with Section 18 of the Act, he is not entitled for regularisation.

15. Since we have held that the appellant writ petitioner was not entitled for regularisation, the order passed by the District Inspector of Schools on 26.3.1992 where by he has cancelled his earlier order of regularisation dated 19.2.1992, setting right the legal position, call for no interference in exercise of powers under Article 226 of the Constitution of India even where neither any notice to show cause nor any opportunity of hearing was afforded as in the present case the appellant writ petitioner has been afforded adequate opportunity of hearing by this Court to prove his case for regularisation.

16. So far as the contention that the services of Sri R.P. Ojha who was appointed on adhoc basis against a substantive vacancy of lecturer in English in the Institution stood regularised on 12.6.1985 and the post being not vacant and not open for selection by the Commission is concerned, we find that Sri R.P.Ojha had proceeded on leave without pay since 3.1.1985 and did not join thereafter. He did not claim any regularisation, which required scrutiny under Section 33-A of the Act. Thus, the post was rightly filled up by the Commission.

17. In view of the foregoing discussions, we do not find any merit in the Special Appeal and it is dismissed.

However, there shall be no order as to costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 21, 2002

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

Income Tax Appeal No. 122 of 2001

The Commissioner of Income Tax, Bareilly and another ...Appellants
Versus
M/s C.L. Gupta & Sons, Moradabad ...Respondents

Counsel for the Appellate:
Sri A.N.Mahajan, S.C.

Counsel for the Respondents:
Sri Vikram Gulati

Income Tax Act 1961 Section 260A- Section 43-B- Deduction of Rs. 3,56,541/- claimed by assessee- towards custom duty- for assessment year 1988-89- not allowed by Assessing Officer as the payment was made in March 1987- appeal dismissed on the ground- the order is not appealable- both orders set a side- deduction held permissible appeal allowed .(Held Para10).

In view of clear provisions of law, the deduction cannot be allowed in the assessment year 1988-89. In our view, both the learned Income Tax Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) fell in error in holding that since the assessee firm debited the cost of the goods imported including the duty paid on delivery of goods in the trading account in April 1987, and before the actual delivery of the goods, the value of the goods and custom duty paid thereon was shown in the balance sheet as document in hands therefore the deduction should be allowed in the assessment year 1988-89, is contrary to the prescription of law.

Case law discussed:
(1997)224 ITR-677
(2002) 254 ITR-498

(Delivered by Hon'ble S.Rafat Alam, J.)

1. This appeal is under Section 260-A of the Income Tax Act, 1961 (in short the Act) against the judgment and order of the Income Tax Appellate Tribunal dated 11.2.1999 in ITAT No. 6797/D/92 whereby the appeal of the revenue appellant challenging the order of the Commissioner Income Tax (Appeals) was dismissed.

2. The short question involved in this appeal is as to whether in view of the provisions contained in Section 43-D of the Act, the assessee can claim deduction for the sum paid against the custom duty in previous years. In other words, whether the benefit for the sum paid against the custom duty can be claimed in the subsequent year or the benefit of such deduction can only be allowed in the year in which the actual payment is made.

3. The admitted fact, in brief, is that in the assessment proceeding for the assessment year 1988-89 the Assessing Officer found that the assessee debited a sum of Rs.3,56,541/- in March 1987 being the custom duty paid in relation to the import of brass scrap weighing 17.443 kg. It was disclosed by the assessee that the aforesaid brass scrap had been shipped from Rotter Dam vide bill of lading dated 7.1.1987. The custom house agent of the

assessee was Frakcht- Forwardes and through them custom duty of Rs.2,87,393/- was paid in the beginning of March, 1987 and further additional duty of Rs.69,148/- was paid on 27.3.1987. The aggregate of two amounts comes to Rs.3,56,541/- . The assessee thus claimed deduction of the above amount in the assessment year 1988-89 which was not allowed by the Assessing Officer on the ground, inter alia, that in view of the provisions contained in section 43-B of the Act, the claim of deduction towards payment of custom duty is permissible only, in which the actual payment is made. Since the payment was made in the month of March, 1987, the deduction can be claimed in the assessment year 1987-88 and not in the assessment year 1988-89, and thus disallowed the deduction. The assessee being aggrieved with the assessment order preferred an appeal before the Income Tax Commissioner, Bareilly vide Appeal No. 13/OC(A) MBD/80-91 on the ground inter alia that in the accounts for the year ending on 31.3.1987 the goods and the custom only paid has been shown under the document in hand' and the custom duty paid was a part of the value of the closing stock but shown under the 'document in hand' as the duty was fully paid only during the relevant previous year and, therefore, the provisions of Section 43-B of the Act is not at all attracted in the facts of the case. Further the case of the assessee respondent was that the goods were finally released on 30.3.1987 on the payment of additional amount of Rs.20,530/- and therefore, the custom duty, even though paid partly earlier, should be treated to have been paid during the relevant previous year.

4. The Income Tax Commissioner (Appeals), Bareilly, having heard the parties, was of the view that since the cost of goods and the custom duty paid thereon in the proceeding year was directly shown in the balance sheet on the assets side, does not preclude the assessee to debit the entire cost of goods alongwith custom duty to the trading account of the year under appeal after release of goods by the Customs in the month of April, 1987 and, therefore, the provision of Section 43-B of the Act is not applicable in the facts and circumstances of the present case. The learned Income Tax Commissioner (Appeals) was further of the view that Section 43-B applies where the deduction is claimed towards any tax or duty, which has actually been not claimed within the prescribed limits. Since in the case in hand the custom duty was paid in the proceeding year in respect of consignment of goods which was actually delivered to the assessee on 22.4.1987 relevant to the assessment year in the appeal, the learned commissioner (Appeals) was of the view that disallowance of Rs.3,56,541/- does not deserve to be sustained and thus allowed the appeal. The revenue went in appeal against the aforesaid order of the learned Income Tax Commissioner (Appeals) before the Income tax Appellate Tribunal, who also vide order dated 11.2.99 in ITAT No. 6797/D/92 upheld the order of the learned commissioner (Appeals) dated 6.7.1992 and dismissed the appeal. It is against these two above orders this appeal has been preferred by the revenue.

5. Sri A.N. Mahajan, learned Standing counsel for the Income Tax Department (Appellant) urged that the sum of custom duty paid by the assessee in March, 1987 is deductible only in the

year in which it is actually paid, i.e. assessment year 1987-88 and not in the assessment year 88-89 and, therefore, both the learned Income Tax Commissioner (Appeals) and learned Tribunal have not correctly appreciated the provisions contained in Section 43-B of the Act which permits deduction of sums paid in the year in which such sum is actually paid by the assessee. In support of his contention he placed reliance on a judgment of the Apex Court rendered in the case of **Allied Motors (P) Ltd. versus Commissioner of Income Tax** reported in (1997) 224 ITR 677 and; on another judgment of Calcutta High Court in the case of **Commissioner of Income Tax versus Berger Paints (India) Ltd**. (No.1) reported in (2002) 254 ITR 498. Relying on the aforesaid two judgments it is urged that in view of Section 43-B of the Act, the sum paid towards tax, duty, cess or fee under any law shall be allowed in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by the assessee and, therefore, in the case in hand the sum paid towards custom duty was deductible only in the assessment year 1987-88 and not in the assessment year 1988-89 which is the subject matter of appeal.

6. On the other hand, Sri Vikram Gulati, learned counsel appearing for the respondent- assessee opposed the appeal and submitted that admittedly the goods were delivered to the respondent- assessee only in the month of April, 1987 when the balance amount of Rs.20,530/- on demand made by the custom department was actually paid. Thereafter, on the delivery of the goods in April, 1987 proper entry was made in the trading account maintained for the assessment year in question, i.e. 88-89. It is submitted that the deposit of Rs.3,56,541/- was paid in advance and the final payment of the remaining amount was actually made in the month of April, 1987 and, therefore, the custom duty paid in advance cannot be considered in isolation and should be linked to the actual delivery of the goods. It is further submitted that both the courts; below have recorded a finding of fact to the effect that the customs duty was paid in advance towards the delivery of goods and if for any reason the goods could not have been delivered to the appellant, the custom duty so paid would become refundable to the appellant, and therefore, before the actual delivery of goods the value of goods as also the custom duty paid were shown in the balance sheet as 'document in hand'.

7. It is not in dispute that sum of Rs.3,56,451/- was paid by the assessee-respondent in March, 1987 towards custom duty in respect of imported brass scrap and further sum of Rs.69,148/- was paid in the month of April, 1987 towards additional duty.

Section 43-B of the Act runs as under :-

Certain deduction to be only on actual payment.

Section 43-B "Not with standing anything contained in any other provision of this act, a deduction otherwise allowable under this act in respect of –

(a) any sum payable by the assess by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force or

(b) any sum payable by the assessee as an employer by way of contribution to

any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees, or

(c) any sum referred to in clause (ii) of sub section (1) of Section 36, or

(d) any sum payable by the assessee as interest on any loan or borrowing from any public financial institution, in accordance with the terms and conditions of the agreement governing such loan or borrowing.

shall be allowed (irrespective of previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in Section 28 of the previous year in which such sum is actually paid by him.

Provided that nothing contained in this Section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) which is actually paid by the assesee on or before the due date applicable in his case for furnishing the return of income under sub section (1) of Section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return:

Provided further that no deduction shall, in respect of; any sum referred to in clause (B) be allowed unless such sum has actually been paid in cash or by issue of cheque or draft or by any other mode on or before clause (v-a) of sub section (1) of Section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date.

Explanation 1- For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in clause (a) of clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the Ist day of April, 1983, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him.

Explanation 2- For this purposes of clause (a), as in force at all material times, 'any sum payable' means a sum for which the assessee incurred liability in the previous year even though such sum might not have been payable within that year under the relevant law.

Explanation 3- For the removal of doubts it is hereby declared that where a deduction in respect of any sum referred to in clause (c) or clause (d) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the Ist day of April, 1988, or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous

year in which the sum is actually paid by him.

Explanation 4- For this purposes of this section, the expression ' public financial institution' shall have the meaning assigned to it in section 4 A of the Companies Act, 1956 (1 of 1956).

8. From a close reading of section 43 –B it is apparent that deduction for any sum payable by the assessee by way of tax or duty under any law for the time being in force, shall irrespective of the previous year in which the liability to pay sum was incurred, be allowed in computing the income of that previous year in which such sum is actually paid by the assessee. This section was inserted by the Finance Act, 1983 and given effect from Ist of April, 1984. It was enacted to curb the practice of tax payers, who on one hand claim the liability of deduction on the ground that they maintain accounts of mercantile on accrual basis and on the other hand, they do not discharge the liability and dispute the same. The Hon'ble Supreme Court while considering the provisions contained in Section 43-B in the case of **Allied Motors (P) Ltd. versus Commissioner of Income Tax** (supra) observed that section 43-B was, therefore, clearly aimed at curbing the activities of those taxpayers, who did not discharge their statutory liability of payment of excise duty employers' contribution to provident fund etc. for long period of time but claimed deductions in that regard from their income on the ground that the liability to pay those amount had been incurred by them in the relevant previous year. It was to stop this mischief that section 43 B was inserted.

9. Explanation I to Section 43 B is for removal of doubts. It provides that where a deduction in respect of any sum mentioned in clauses (a) or (b) of Section 43 B is allowed in computing the income of any previous year, being a previous year relevant to the assessment year in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under Section 43-B in respect of such sum on the ground that a sum has been actually paid by him in that year. Section 43-B, therefore, clearly provides inter alia that a deduction in respect of any sum payable by the assesse by way of tax or duty shall be allowed from the income of the previous year in which such sum is actually paid irrespective of the previous year in which the liability to pay such sum was incurred. The deduction thus in computing the income shall be allowed in the year in which such sum is actually paid by the assessee irrespective of the method of accounting adopted by the assessee.

10. In the case in hand, admittedly the amount of custom duty of Rs.3,56,451/- was paid by the assessee in March, 1987 and, therefore, in terms of Section 43B it is deductible only in the year in which it is actually paid i.e. for the assessment year 1987-88 irrespective of the year in which the assessee incurred the liability on the basis of method of accounting regularly adopted by him; and, therefore, in view of clear provisions of law, the deduction cannot be allowed in the assessment year 1988-89. In our view, both the learned Income Tax Appellate Tribunal as well as the Commissioner of Income Tax (Appeals) fell in error in holding that since the assessee firm debited the cost of the goods imported

including the duty paid on delivery of goods in the trading account in April, 1987, and before the actual delivery of the goods, the value of the goods and custom duty paid thereon was shown in the balance sheet as document in hands, therefore the deduction should be allowed in the assessment year 1988-89, is contrary to the prescription of law. Section 43-B in clear terms provides that the deduction claimed by the assessee in respect of any sum paid by way of tax, duty, cess or fee, shall be allowed only in computing the income referred to in Section 28 of that previous year in which it was actually paid, irrespective of the previous year in which the liability was incurred for payment of such sum as per method of accounting regularly employed by the assessee. For the purpose of claiming benefit of deduction of the sum paid against liability of tax duty, cess, fee etc. the year of payment is relevant and is only to be taken into account. The year in which the assessee incurred the liability to pay such tax, duty etc. has no relevance and cannot be linked with the matter of giving benefit of deduction under Section 43-B of the Act. In this view of the matter, the appeal deserves to be allowed.

11. In the result, the appeal succeeds and is allowed. The impugned order of the learned Income Tax Appellate Tribunal dated 11.2.1999 in ITA No. 6797/D/92 for the assessment year 1988-89, and the order of the learned Commissioner of Income Tax (Appeals), Bareilly dated 6.7.1992 in Appeal No. 13/OC (A) MBD/90-91 are set aside. There shall, however, be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 15, 2002

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

Special Appeal No. 803 of 1993

General Manager, Modipon Fibre Co. ...Appellant
Versus
Narendra Pal Gahlot ...Respondent

Counsel for the Appellant:
Sri V.B. Singh
Sri P.S. Baghel
Sri Vijay Sinha
Sri Ravi Agarwal

Counsel for the Respondent:
Sri R.N. Singh
Sri A.K. Singh
Sri Prakash Gupta

Constitution of India- Article 226 read with Article 12- Maintainability- worker challenged dismissal order- passed by G.M.-; Modipon fiber Company- manufacturing not a statutory company created under any statute- may be public share holder, but business of manufacture and sale of fibers is not a public purpose- writ petition not maintainable.

Held- Para 17

We find that it is not in dispute that Modipon Fiber Company is a company incorporated under the Companies Act and carries its activities in accordance with the various enactments. It is not a statutory company as it has not been created under any statute to carry out any specific purpose, though it may be a public company commonly understood in which the public may be share holders/member, but it does not get the

status of statutory company/corporation owned or controlled by the State. On the other hand it is engaged in the business of manufacture and sale of fibres, which is carried out by the company is not as a result of any statutory provision. In the case of V.S.T. Industries Ltd. (supra), a question arose before the Hon'ble Supreme Court as to whether a company which is engaged in manufacture and sale of cigarette involved any public function so as to make it amenable to writ jurisdiction under Article 226 of the Constitution of India. The Apex Court laid down the principles when an activity of a private body can be said to public function and subject matter of judicial review.

Case law discussed:

JT 2001 (c) SC-36, 2000 (3) AWC –1800, 1990 (3) UPLBEC-1727, AIR 1975 SC-238, 1991 (2) UPLBEC-898 (FB), JT 1998 (8) SC-204, 2001 (3) UPLBEC 571, 1984 (3) SCC 369, JT 1993 (3) SC 617, AIR 1991 SC-101

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

1. The General Manager, Modipon Fiber Company, Modinagar, district Ghaziabad have filed Special Appeal Nos. 803, 804 and 809 of 1993 against the judgment and order dated 1.11.1993 passed by the learned Single Judge in Civil Misc. Writ Petition No. 18116 of 1993, 18117 of 1983 and 18118 of 1993, whereby the learned Single Judge had allowed the writ petitions filed by Narendra Pal Gahlot, respondent writ petitioner in Special Appeal Nos. 803 of 1993, Om Pal Singh Chauhan, respondent writ petitioner in Special Appeal No. 809 of 1993 and Atar Pal, respondent writ petitioner in Special Appeal No. 804 of 1993.

2. Special Appeal No. 413 of 1998 has been filed by Dharam Vir, Rajendra Sharma, Hari Ballabh Maheshwari, Suresh Sharma and Ahibaran Singh against the judgment and order dated 27.4.1998 passed by the learned Single Judge whereby the Civil Misc. Writ Petition No. 30351 of 1993 filed by them has been dismissed.

3. Special Appeal No. 415 of 1998 has been filed by Jasveer Singh, Mool Chandra Gupta and Hari Mohan Goyal against the judgment and order dated 27.4.1998 passed by the learned Single Judge in writ petition No. 054 of 1993 wherein the learned Single Judge has dismissed the writ petition following the judgment and order passed in writ petition no. 30354 of 1993, Raj Kumar and others v. State of U.P. and others, decided on 27.4.1998 itself.

4. Since all these special appeals involve a common question of law, they have been heard together and are being decided by a common judgment.

Briefly stated that facts giving rise to all these special appeals are as follows:

5. All the writ petitioners claim themselves to be the permanent employees of Modipon Fiber Company, Modinagar, district Ghaziabad (hereinafter referred to as the Company). Their services were terminated under clause 19 (a) (bb) of the Certified Standing Orders. Alongwith the termination order the company sent a bank draft to each of the petitioners the amount due upto the date of termination of their services in lieu of notice to pay retrenchment compensation under section 6-N of the Industrial Disputes Act, 1947 and in lieu of notice under clause 19 (a) (bb) of the Certified Standing Orders.

6. The order of termination was challenged before this Court by the petitioners through various writ petitions. The writ petition nos. 18116 of 1993, 18117 of 1993 and 18188 of 1983 were allowed by this Court vide judgment and order dated 1.11.1993 by holding that the certified Standing Orders had statutory effect and the order may be questioned under Article 226 of the Constitution of India, if they are illegal, arbitrary and violative of the principles of natural justice, equity and fair play. This Court further held that the order of termination has been passed without giving any opportunity of hearing to the petitioners and therefore, are violative of the principles of natural justice. The Court held the order of terminations as arbitrary and quashed the same. However, Writ Petition No. 30351 of 1993 and 30354 of 1993 were not decided alongwith the earlier three writ petitions and were decided subsequently, vide judgment and order dated 27.4.1998. This Court relying upon the decision of the Hon'ble Supreme Court in the case of Rajasthan State Road Transport Corporation v. Krishna Kant reported in 1995 (5) SCC-75, dismissed both the writ petitions on the ground that the right which the petitioners claim accrued under a composite statute which provided for a forum of redressal therefore the writ petition should not be entertained. The Court further held that in the present case the respondent company would be deprived of the right to prove their case in support of the impugned orders by producing evidence unless the parties are relegated to forum provided under the U.P. Industrial Disputes Act. The Court distinguished the earlier judgment of the learned Single Judge in the case of Narendra Pal Singh Gahlot on the ground that these two objections were not considered.

7. The Company has challenged the judgment and order dated 1.11.1993 passed by the learned Single Judge allowing the writ petition in Special Appeal Nos. 803, 804 and 809 of 1003 whereas the judgment and order dated 27.4.1998 has been challenged by the employees/petitioners in Special Appeal Nos. 413 and 415 of 1998.

8. We have heard Sri Vijay Bahadur Singh, learned Senior counsel assisted by Sri P.S. Baghel and Sri Vijay Sinha, learned Advocates for the Company and Sri R.N. Singh, learned Senior counsel assisted by Sri A.K. Singh for the employees/writ petitioners.

9. Sri V.B. Singh, learned Senior counsel submitted that the writ petitions filed by the employees writ petitioners was not maintainable as it had been filed against M/s Modipon Fibers Company, which is a purely private company and is not a State within the meaning of Article 12 of the Constitution of India. In support he relied upon the following decisions :

1. V.S.T. Industries Ltd. v. V.S.T. Industries Workers Union and another reported in JT 2001(1) SC-36.

2. Workmen of Pepsico India Holdings Ltd. v. Deputy Labour Commissioner, Kanpur and another, reported in 2000(3) AWC-1800.

3. Heera Lal Sharma v. Indo Gulf Fertilizers and Chemical Corporation, Jagdishpur, district Sultanpur and others, reported in (1990)3UPLBEC-1727

4. Rajpal v. Vice Chairman & Managing director, Modi Rubber Ltd.

and others (Civil Misc. Writ Petition No. nil of 1993, decided on 9.12.1993.

10. He further submitted that the employees writ petitioners have an efficacious alternative remedy to challenge the order of termination by raising an industrial dispute under Section 4-K of the U.P. Industrial Dispute Act, 1947 before the Labour Court as all of them are workmen and therefore, the writ petitions filed by them was not maintainable. In support thereof he relied upon the following decisions:

1. The Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke and others reported in AIR 1975 SC-2238
2. Chandra Singh v. Managing Director, U.P. Cooperative Union, Lucknow and others, reported in 1991 (2) UPLBEC –898 (FB).
3. Scooters India and others v. Vijay E.V. Eldred, reported in JT 1998 (8) SC-204.

11. Sri V.B. Singh further submitted that the Certified Standing Orders do not have any statutory force or statutory effect and therefore, neither its provision nor its non compliance can be questioned under Article 226 of the Constitution of India. According to him any person aggrieved can file an application for modification of any of the clause of the Certified Standing Orders under section 10 of the Industrial Employment Standing Orders Act 1946. He relied upon a decision of the Hon'ble Supreme Court in the case of the Rajasthan State Road Transport Corporation and another and Krishan Kant and others, 1995 (5) SCC-75 and submitted that now the Supreme Court had held that the Certified Standing Order have no statutory force.

12. According to him if the matter is referred before the Labour Court, the company will get an opportunity to justify their action, as the Labour Court has full powers and jurisdiction to hold the enquiry itself and permit the parties to lead evidence in case where no enquiry has been held or the enquiry held is found to be defective, which cannot be done by this Court in exercise of powers under Article 226 of the Constitution of India. On merits, he submitted that the services of the writ petitioners were terminated on the ground of gross misconduct, as they were found involved in theft and the company had lost confidence and that is why their services were terminated under clause 19 (a)(bb) of the Certified Standing Orders without any enquiry. He further relied upon the decision of the Hon'ble Supreme Court in the case of Municipal Corporation Greater Bombay v. P.S. Malvenkar and others, (1978) 3 SCC –78 and Bharat Forge Co. Ltd. v. A.B.Zodge and another, (1996) 4 SCC –374. Thus, he submitted that the learned Single Judge had erred in law in allowing writ petitions nos. 803, 804 and 809 of 1993 and quashed the order of termination and justified the judgment and order dated 27.4.1998.

13. Sri R.N. Singh , learned Senior Counsel, however, submitted that the employees- writ petitioners are permanent employees/workmen in the company for the last several years and without giving any show cause notice or any opportunity of hearing their services were terminated, which is wholly arbitrary and is in utter disregard and gross violation of principles of natural justice, equity and fair play. According to him, the Clause-19 (a) (b) and 19 (bb) of the Certified Standing Orders of the Company violates the

fundamental rights guaranteed under Articles 14, 16, 19 and 21 of the Constitution of India and they are further opposed to the Directives Principles of State Policy as enshrined in the Constitution of India under Article 39 (a) and 41 of the Constitution of India.

14. Sri R.N. Singh further submitted that Modipon Fibers Company is a registered public limited company under the provisions of the Companies Act, 1956 and its activities are of vital national importance and welfare of the State. The employment in such a company is a public employment and the property is a public property, though it is not chartere by the Crown but not only the undertaking, but also the Society has a stake in its proper and efficient working. The service condition of those who worked for them must be fair certain and secular. Thus, it is having public duties and responsibilities to perform and if need arises, the Courts should lift the corporate veil to ascertain its activities. According to him, a writ can be issued to any official of a society to compel him to carry out the terms of the statute under or by which the said Society is constituted or governed and also to companies or Corporation to carry out duties placed on them by the statute authorizing their undertaking. According to him a writ can also be issued to companies constituted by the Statute for the purpose of fulfilling the public responsibilities. He submitted that the writ petition filed by the employees were fully maintainable under Article 226 of the Constitution of India, as this Court has ample power under Article 226 of the Constitution of India to exercise jurisdiction over any proceeding for the enforcement of fundamental rights. Thus, he submitted that the learned Single Judge was not justified in dismissing the two writ petitions vide judgment and order dated 27.4.98 on the ground of being not maintainable. He further submitted that the existence of alternative remedy in the present case i.e. raising an industrial dispute is not an absolute bar in entertaining the writ petition under Article 226 of the Constitution of India, as this is a rule of policy, confidence and distinction and not a rule of law and in appropriate cases and exceptional circumstances, the Court can exercise its powers under Article 226 of the Constitution of India. According to him, alternative remedy would not operate as a bar in cases where the writ petition is to seek enforcement of any of the fundamental right, where there is a violation of principles of natural justice or where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged. He relied upon a decision of the Hon'ble Supreme Court in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai, 1998 (8) SCC-1 and a Division Bench decision of this Court in the case of Pradeep Kumar v. State Sugar Corporation and others (2001) Vol. 3 UPLBEC-571.

It was further submitted that Article 226 confers wide power on the High Court to issue writs in the nature of prerogative writs. This is striking departure from the English law. Under Article 226 writs can be issued to 'any person' or authority. The terms 'authority' used in the context must receive a liberal meaning unlike the term of Article 12 which is relevant only for the purpose of enforcement of fundamental rights as well as non-fundamental rights. Words 'any person or authority' used in Article 226 are therefore, not to be confined only to

statutory authorities and instrumentality of the State. They may cover any other person or body performing public duty and owing positive obligation to the affected party. The duty on the person or authority named (need) not be imposed by Statute, and they are, amenable to writ jurisdiction as held by the Hon'ble Supreme Court in case of Andi Mikta Sadguru Shree Muktajee Vandas Swami Suwarna Jayanti Mahotsav Smarak Trust and others v. V.R. Rudani and others (1989) 2 SCC-691. It was also submitted that Parliament enacted the Industrial Employment (Standing orders) Act, 1946 (1946 Act in short), which provided that it was an Act to require employment under them. By section 3, a duty is cast on the employer governed by the Act to submit to the certifying Officer draft standing orders proposed by him for adoption in his industrial establishment. The standing orders of the company has been duly certified under the 1946 Act on 4.6.1970. They have later amended terms and conditions of the termination of services by establishment on 19.12.1988, clause 19 (a), 19 (b) and 19 (bb) confer absolute and unfettered discretions on the employer which had become part of the statutory terms and conditions of service between the employers and his employees. It is also relevant to state that the principle of natural justice must be read into the impugned standing orders. This Court can lift the veil and can judge the fairness and reasonableness under section 4 of the Standing Orders Act 1946. Principle of natural justice is that no man should be condemned unheard intends to prevent the authority to act arbitrarily affecting rights of the concerned person. An order involving civil consequences must be made consistently with the rules of natural justice under Article 14 as laid down by the Hon'ble Supreme Court in case of Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd. and others (1948) 3 SCC-369. It was further submitted that it is well settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of services of an employee visits with civil consequences of not only his livelihood but also career and livelihood of dependents. The deprivation thereof must be in accordance with just and fair procedure prescribed by law, confirming to Articles 14 and 21 and has to be just, fair reasonable and not fanciful, oppressive or at vagary. The principles of natural justice is integral part of the guarantee of equality assured by Article 14. Thus, rules set out in the impugned standing orders are void and ultra vires. The principles laid down by the Hon'ble Supreme Court in case of D.K.Yadav v. J.M. Industries Ltd. J.T. 1993 (3) SC-617 would be applicable. It was further submitted that the termination orders were passed by the respondent no. 2 in pursuance to terms and conditions of termination of services framed in certifying standing order in clause 19 (a), 19 (b) and 19 (bb) empowering the respondent no. 2 to terminate the services of permanent employees without giving any reason and by giving notice, which is void under section 23 of the Contract Act as being opposed to public policy and is also ultra vires and is unconstitutional. It wholly ignores the audi alteram partem rule. The principles laid down in the case of Delhi Transport Corporation v. D.T.C. Mazdoor Congress reported in AIR 1991 SC-101 is fully applicable to the present case. It is also violative of directive principles contained in Article 39 (a) and 41 of the Constitution of India and, it can not be conferred on employees also. The

Court, when called upon to do so, shall strike down unfair and unreasonable contract or unfair and fanciful clause in a contract, entered into between the parties who are not equal of bargaining power. In the above view, it is clear that object or consideration of clause 19 (a), 19 (b) and 19 (bb) is opposed to public policy and is unlawful and void. The impugned termination orders of their services without complying with the provisions of section 6-N of the Act, 1947 is illegal and violative of principles of natural justice. It was apparent on the face of record that section 6-N of the Industrial Disputes Act, 1947 was not taken recourse to by the employers and thus being violative of section 6-N of the said Act. Therefore, writ petitions filed under Article 226 of the Constitution praying a writ of certiorari is maintainable even against the company. It was further submitted that under section 4-A (1) of the 1946 Act the State government may by notification in the official gazette constitute Labour Courts for adjudication of industrial disputes relating to any matter specified in the first schedule and for performing such other function as may be specified in the first schedule and for performing such other function as may be assigned to them under this Act. Thus, the jurisdiction if conferred upon the Labour Court to adjudicate the propriety or legality of an order passed by an employer under the Certified Standing Orders. Thus, the Labour Court under section 4-A of the Act are competent to hear and adjudicate matters falling in the first schedule as well as the Industrial Tribunal under section 4-A of the 1946 Act.

15. He further submitted that the Hon'ble Supreme Court in the case of Rajasthan Transport Corporation (supra) has held that Certified Standing Orders framed under and in accordance with the Industrial Employment (Standing Orders) Act are statutory imposed conditions of service and are binding both upon the employer and employees, though they did not amount to statutory provisions. This case did not consider the case of Hon'ble Supreme Court in D.K. Yadav (supra), nor D.T.C. v. D.T.C,. congress Mazdoor nor Central Inland Water Transport Corporation (supra) has been considered. So far as the relief is concerned in Rajasthan Transport Case also, it has been held that it cannot be denied to an employee. It was submitted that no approval under Section 33 (2) (b) of the Industrial Disputes Act, of his action has been taken when the compliance of section 33 (2)(b) is mandatory. The provisions of Section 33 (2) (b) suggests that authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bonafide. An order of dismissal becomes ineffective from the date of non-approval of the order of dismissal, which contravenes the provisions of section 3 invites punishment under section 31 (1) with imprisonment and fine. The order of dismissal or discharge being incomplete and inchoate until the approval is obtained. It cannot effectively terminate the relationship of the employer and employees. If the approval is not accorded by Tribunal, the employer would be bound to treat the employee and paying his full wages for that period, as held by the Hon'ble Supreme Court incase of Zadpur Zila Sahkari Bhoomi Vikas Bank Ltd. v. Ram Gopal Sharma and others, 2002(4) Supreme Bound Report page- 296.

16. Sri R.N. Singh, learned Senior Counsel further submitted that the learned single Judge while allowing the writ petitions vide judgment and order dated 1.11.1993 had upheld the claim of the writ petitioners by holding that the action/termination order has been passed in gross violation and utter disregard of the principles of natural justice, equity and fair play, whereas another learned Single Judge vide judgement and order dated 27.4.98 had dismissed the other two petitions on the ground of alternative remedy. This Court, should adopt a view ,which advances the cause of justice, and not the technical view of relegating the writ petition as to the alternative remedy of raising an industrial dispute, as the employees/writ petitioners belong to weaker sections. Thus, he submitted that the judgment and order dated 1.11.1993 passed by the learned Single Judge allowing the writ petition should be upheld whereas, the judgment and order dated 27.4.98 be set aside and instead the remaining two writ petitions which have been dismissed should be allowed so that justice be done.

17. Having heard the learned counsel for the parties, we find that it is not in dispute that Modipon Fiber Company is a company incorporated under the Companies Act and carries its activities in accordance with the various enactments. It is not a statutory company as it has not been created under any statute to carry out any specific purpose, though it may be a public company commonly understood in which the public maybe share holders /member, but it does not get the status of statutory company/corporation owned or controlled by the State. On the other hand it is engaged in the business of manufacture and sale of fibers as any other private person. The business of manufacture and sale of fibers, which is carried out by the company is not as a result of any statutory provision. In the case of V.S.T. Industries Ltd. (supra), a question arose before the Hon'ble Supreme Court as to whether a company which is engaged in the manufacture and sale of cigarette involved any public function so as to make it amenable to writ jurisdiction under Article 226 of the Constitution of India. The Apex Court laid down the principles when an activity of a ;private body can be said to public function and subject matter of judicial review. In para 7 of the reports the Hon'ble Supreme Court has held as follows :

"In De Smith, Woolf and Jowell's judicial Review of Administrative Action, 5th Edn., it is noticed that no all the activities of the private bodies are subject to private law., e.g. the activities by private bodies may be governed by the standards of public law when its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated commercial profit should be regarded, at least relating to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After

detailed discussion, the learned authors have summarized the position with the following propositions.

1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a 'public' or a ' private body.
2) The principles of judicial review prima-facie govern the activities of bodies performing public functions.

3) However, not all decisions taken by bodies in the courser of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function.

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied and
(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving dispute (such as arbitration or resolution by private or domestic Tribunals) has been agreed by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.

The Apex Court further held that –

In the present case the applicant is engaged in the manufacture and sale of cigarettes will not constitute any public function. The requirement in setting up a canteen when the establishment has more than 250 workmen is only a condition of service relating to a workman providing better facility to work and to discharge their duties properly and maintain their own health or welfare. In other words it is only a labour welfare device for the benefit of its work unlike a provision where Pollution Control Act makes it obligatory even on a private company not to discharge certain effluents. In such cases public duties is owed to the public in general and not specific to any person or group of persons. Further the damage that would be cause in not observing them is immense. If merely that can be considered a part of the conditions of service of a workman is violated then we do not think that there is any justification to hold that such activity will amount to public duty.

18. In the case of Workman of Pepsico (supra) this Court had held that no public duties is involved where private company terminated the services of its employees and the writ petition is not maintainable. Similar view was taken in the case of Heera Lal Sharma (supra) and Raj Pal (supra).

19. So far as the contention advanced by Sri R.N. Singh, that Modipon Fiber Company has been incorporated under the provisions of companies Act and is governed by the said Act and various other enactments while discharging its day to day functions and the general public is interested in its affairs as it is treated as a public company is concerned, suffice is to mention that the

said company has not been created under any statute for discharging any specific purpose. It is just like any other company doing businesses in the country. It is not involved in discharging any public function or duty while terminating the services of its employees as held by the Apex Court in the case of V.S.T. Industries (supra). Thus, the writ petition is not maintainable against a private company. The decision of the Hon'ble Supreme Court in the case of Sukhdeo Singh and others v. Bhagat Ram 1975 (1) SCC-421, relied upon by Sri R.N. Singh would not be applicable to the facts of the present case, in as much as the said case is related to Corporation constituted under specific enactments and were owned and controlled by the State. Thus, the corporations were held to be covered under the term state as defined under Article 12 of the Constitution of India and it was held by the Apex Court that the order of removal from service of an employees of the said Corporation in the contravention of regulations framed under the respective Acts would enable an employee to approach the Courts for a declaration against the Corporation for continuance in service. Thus, we are of the view that the company is not discharging any public function while it terminated the services of the writ petitioners. In this view of the matter the writ petitions filed by the employee-writ petitioners was not maintainable.

20. So far as the decision of the Hon'ble Supreme Court in the case of Whirpool Corporation (supra) is concerned, in the aforesaid case, the action of the Registrar, Trade Mark in issuing notice to M/s Whirpool Corporation was under challenge as being wholly jurisdiction. The Apex Court repelled the objection regarding alternative remedy.

21. Before the Apex Court, the question of discharging of public function by a private body and its amenability to writ jurisdiction under Article 226 was not involved. In the case of Pradeep Kumar Singh (supra), the employee was terminated from service by U.P. State Sugar Corporation, which was held to be a State within the meaning of the term 'State' as defined under Article 12 of the Constitution of India and therefore, the writ petition was entertained. The decision of the Hon'ble Supreme Court in the case of Anadi Mikta Sadguru Shre Muktajee Vandas Swami Suwarna Jayanti Mahotsav Smarak Trust and others v. V.R. Rudani and others relied upon by Sri R.N. Singh, would be of no assistance of him as it has already been held by us that the company is not discharging any public function, so as to make it amenable to its writ jurisdiction. Moreover, the aforesaid decision has came up for consideration before Hon'ble Supreme Court in the case of V.S.T. Industries Ltd. (supra), the Hon'ble Supreme Court has held that in Anadi Mikta's case, this Court examined the various aspects and the distinction between an authority and a person and after analysis of that decision referred in that regard came to the conclusion that it is only circumstances, when the authority or the person performs a public function or discharges a public duty, Article 226 of the Constitution can be invoked, since it has already been held in the present case that the company is not discharging any public duty or performing any public function, Article 226 cannot be invoked. The decision of the Hon'ble Supreme Court in the case of Sudhir Chand Sarkar v. Tata Iron and Steel Company Ltd. and

others (supra) wherein the Hon'ble Supreme Court has held that the Certified Standing Orders become statutory condition of service and if any provision of such rules read with Certified Standing Orders confer absolute unfettered discretion on the employer to allow or disallow rightful claim of the employees would be unfair and unreasonable and also subject to test of Article 14;and the Court can judge the fairness and reasonableness as of the Certified Standing Orders and declaration is bad and an enforceable the proceedings arose out of a suit and not under writ jurisdiction. The Hon'ble Supreme Court in the case of Rajasthan State Road Transport Corporation (supra) has held that the Certified Standing Orders framed under and in accordance with the Industrial Employment Standing Order Act 1946 are statutorily imposed condition of service and are binding both upon the employees and employers, though they do not amount to statutory provision. Any violation of these Standing Orders entitles an employee to appropriate relief offered before the forum created by the Industrial disputes act or by the Civil Court. Thus, the Certified Standing Orders being not a statutory provision, though they are statutory conditions of service, any violation thereof by a private body not discharging any public function or public duty are not amenable to writ jurisdiction under Article 226 of the Constitution of India and cannot be challenged straight away before this Court. Thus, the writ petitions being not maintainable, are liable to be dismissed.

22. Since we have held that the writ petition itself were not maintainable, we are not going into merits of the matter and leave it open to the writ petitioners to raise their grievances before the appropriate forum.

23. In the result, the special appeal nos. 803, 804 and 809 of 1993 are allowed and the judgment and orders dated 1.11.1993 is hereby set aside and the writ petition nos. 18116 of 1993, 18117 of 1993 and 18118 of 1993 are dismissed. Special Appeal Nos. 413 and 415 of 1998 fail and are hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2002

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

Civil Misc. Application No. 23 of 2002

Syed Takhleekh Hyder and others
...Applicants
Versus
Naziruddin and others ...Opp. parties

Counsel for the Applicant:
Sri J.J. Munir

Counsel for the Respondents:

Code of Civil Procedure- Order 43 (i) (t) read with order 41 r. 23- scope of Appeal- application to rehear the appeal rejected- such order is appealable- court declined to interfere under Article 227 of the Constitution – question of limitation shall be dealt liberally.

Held – Para 4

In the instant case the appellate court on consideration of facts declined to re-hear the appeal and found that no sufficient cause was made out for such re-hearing. Accordingly, we are of the view that the proper course for the applicants is to

prefer an appeal against the order rejecting their application under order 43 Rule 1 (t). There is no scope for interference under Article 227 of the Constitution in such circumstances. Since the applicants proceeded on the basis of wrong advice and bonafide belief that the application under Article 227 of the Constitution lies in this Court, we are of the view that the question of limitation shall be liberally considered and appropriate order may be passed in the event the appeal is preferred on the question of limitation. It is, however, made clear that we have not adjudicated upon the questions raised before us.

(Delivered by Hon'ble S. Rafat Alam, J.)

1. We have heard Mr. J.J. Munir, learned counsel for the applicants.

2. This application under Article 227 of the Constitution has been filed against an order dated 25th September, 2002 whereby the appellate court declined to re-hear the appeal on the application made by the applicants under Order 41 rule 21, who were the plaintiffs in the original suit, which was decreed on merit and subsequently the defendant preferred appeal which was allowed ex-parte. The appellate court went into the question of sufficient cause for restoration and held that no sufficient explanation is made out for restoration of the appeal on merit. We are of the view that such an order declining to re hear the appeal is appealable under order 43 Rule 1 (t) of the Code of Civil Procedure. The provisions contained in Order 41 Rule 21 and also order 43 Rule 1 (t) of the Civil Procedure Code are set-out hereunder :

Order 41 Rule 21

Re-hearing on application of respondent against whom ex parte decree made- where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the Appellate Court to re hear the appeal , and if he satisfied the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

Order 43 Rule 1. Appeal from Orders- An appeal shall lie from the following orders under the provisions of Section 104, namely –
(a) …….
(b) …….
(c) …….
(d) …….
(e) …….
(f) …….
(g) …….
(h) …….
(i) …….
(j) …….
(k) …….
(l) …….
(m) …….
(n) …….
(o) …….
(p) …….
(q) …….
(r) …….
(s) …….
(t) an order of refusal under rule 19 of Order XLI to re admit, or under rule 21 of Order XLI to re hear, an appeal;

3. On proper interpretation of the aforesaid provisions of the Code of Civil Procedure, it appears to us that the scope of order 41 Rule 21 is that the appellate court can order, on sufficient cause being

shown, for re-hearing of the appeal. We are accordingly of the view that the scope of order 43 rule 1 (t) is that in the event the appellate court declines to re hear the appeal, an appeal shall lie.

4. In the instant case the appellate court on consideration of facts declined to re hear the appeal and found that no sufficient cause was made out for such re hearing. Accordingly, we are of the view that the proper course for the application is to prefer an appeal against the order rejecting their application under order 43 rule 1 (t). There is no scope for interference under Article 227 of the Constitution in such circumstances. Since the applicants proceeded on the basis of wrong advice and bonafide belief that the application under Article 227 of the Constitution lies in this Court, we are of the view that the question of limitation shall be liberally considered and appropriate order may be passed in the event the appeal is preferred on the question of limitation. It is, however, made clear that we have not adjudicated upon the questions raised before us.

5. The application, is accordingly, dismissed with the above observation.

Office shall return the certified copy of the impugned order to the learned counsel for the applicants.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2002

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

Special Appeal No. 644 of 2001

No.EX 6803526 L/NK/NA Uma Shanker Rai ...Appellant

Versus

Union of India and others ...Respondents

Counsel for the Appellant:
Sri B.N. Rai

Counsel for the Respondents:
Sri S.K. Rai

High Court Rules Chapter VIII Rule 5- non payment of pension or salary gives rise to a recurring cause of action- Single Judge was not justified in dismissing the writ petition of the appellant on account of delay and he should have decided the question of entitlement of disability pension to the petitioner on merit (Held in para 11).

Case referred:

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

1. Heard Shri B.N. Singh learned counsel for the appellant-writ petitioner and Shri S.K. Rai learned Additional Standing Counsel for the respondents.

2. There is sufficient ground to condone the delay in filing the Special Appeal. The delay is condoned.

3. This Special Appeal arises out of the order passed by the Learned Single Judge dated 29.8.2001 dismissing the writ petition filed for the claim for payment of disability pension.

4. The appellant was posted in Command Hospital, Calcutta in the year 1968, when a Medical Board examined him and on confirmation of findings of the Medical Board by the Director of Medical Services, the appellant was discharged from services on 25.4.1969. The cause of discharge of the appellant was invalidment from service in medical category being unfit for further retention in service for disability "Transient Situational Disturbance".

5. The claim of the petitioner was sent to the Controller of Defence Accounts (Pension) Allahabad vide letter dated 15.7.1969. Controller C.D.A. (Pension) rejected the claim of the appellant vide order dated 7.8.1969 as the disability of the petitioner was neither attributable to nor aggravated by Military Service. The Record Office, Army Medical Corps, Lucknow vide letter-dated 13.8.1969 sent information to the appellant of rejection of his claim for disability pension. The appellant in the writ petition has denied the receipt of the aforesaid letter.

6. Thereafter, several letters and representations were sent by the appellant to the Record Office, Army Medical Corps as well as to C.D.A. (Pension) Allahabad. The appellant's claim in the writ petition is that he received the letter dated 3.2.1993 of Army Medical Corps, Lucknow by hand informing that claim of the appellant for disability pension has been rejected vide letter dated 7.8.1969 of C.D.A. (Pension) whereas the appellant in paragraph 8 of the writ petition has stated that the letter dated 3.2.1993 could only be obtained by hand by the appellant in the month of February, 1995. The appellant filed the writ petition for the following reliefs:

1. to issue a writ, order or direction in the nature of mandamus directing the respondents to pay disability pension as well as service ailment pension of the petitioner with effect from the date of his discharge from service alongwith all the arrears.

2. to issue a writ, order or direction in the nature of certiorari to quash the illegal orders dated 13.8.1969 and 3.2.1993 and give all the benefits of disability pension to the petitioner within reasonable time alongwith entire arrears."

7. The learned counsel for the respondents raised a preliminary objection before the learned Single Judge that the writ petition is liable to be dismissed on the cause of unusual delay and laches. The learned Single Judge having considered the facts in detail with regard to the explanation for delay dismissed the writ petition on the ground of unusual delay.

8. The counsel for the appellant has submitted before us that the learned Single Judge was not justified in dismissing the writ petition of the appellant on account of delay and he should have decided the question of entitlement of disability pension to the petitioner on merit. The learned Single Judge, without considering the said question on merit should not have dismissed the writ petition only account of delay. He also contended that non payment of pension or salary gives rise to a recurring cause of action and, therefore, in the event it is held that the appellant is

entitled to disability pension the appellant shall get benefit of pension in future. In support of this contention he relied upon the following decisions:

1. M.R. Gupta Vs. Union of India and others (1995) 5 S.C.C. 628
2. Major Rajinder Singh Vs. Union of India and others 2002 (2) E.S.C. (Del.) 164.

9. In the case of M.R. Gupta (supra) the Supreme Court, considering the similar question with regard to case where the claim for salary was rejected by the Central Administrative Tribunal on account of fact that the fixation of salary was not made according to the rules, has held that such grievance really amounts to continuing wrong giving rise to a recurring cause of action every month on the occasion of payment of salary. In this connection, we may take note of the relevant portion of the judgment of the Hon'ble Supreme Court, which is set out below:

"4. The Tribunal has upheld the respondents' objection based on the ground of limitation. It has been held that the appellant had been expressly told by the order dated 12.8.1985 and by another letter dated 7.3.1987 that his pay had been correctly fixed so that he should have assailed that order at that time "which was one time action". The Tribunal held that the raising of this matter after lapse of 11 years since the initial pay fixation in 1978 was hopelessly barred by time. Accordingly, the application was dismissed as time barred without going into the merit of the appellant's claim for proper pay fixation.

5. Having heard both sides, we are satisfied that the Tribunal has missed the real point and overlooked the crux of the matter. The appellant's grievance that his pay fixation was not in accordance with the rules was the assertion of a continuing wrong against him, which give rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action.

6. The Tribunal misdirected itself when it treated the appellant's claim as "one time

action" meaning thereby that it was not a continuing wrong based on a recurring cause of action. The claim to be paid the correct salary computed on the basis of proper pay fixation is a right, which subsists during the entire tenure of service and can be exercised at the time of each payment of the salary when the employee is entitled to salary computed correctly in accordance with the rules. This right of a government servant to be paid the correct salary throughout his tenure according to computation made in accordance with the rules is akin to the right of redemption, which is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists, unless the equity of redemption is extinguished. It is settled that the right of redemption is of this kind. (See Thota China Subba Rao V. Mattapalli Raju (AIR 1950 FC1)".

10. The Delhi High Court in the case of Major Rajinder Singh (supra) after considering the aforesaid decision of Hon. Supreme court has held that the pensionery benefits accrue from month to month and is thus analogous to the concept of a salary which a person would be entitled during the course of his service. Thus, the principles laid down in M.R. Gupta's case (supra) apply to the case where the claim is of pension. Thus, if a person approaches the Court belatedly, the same cannot be held against him in denying the benefits of pension at least from the period he approached the Court.

11. In view of the aforesaid decision, we are of the view that the impugned judgment of the learned Single Judge, dismissing the writ petition only on account of delay suffers from legal infirmity and the writ petition is required to be decided on merit. In this view of the matter, the impugned judgement and order dated 29.8.2002 passed by the learned Single Judge, is set aside and the writ petition is remanded back for being decided on merit before the learned Single Judge dealing with such matter. Since the counter and rejoinder affidavit have been filed in the writ petition, which is too old, the writ petition shall be listed in the week commencing 2.12.2002.

12. In the result, the Special Appeal is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 15, 2002

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

Special Appeal No. 172 of 2000

State of U.P. and another ...Appellants
Versus
Rakesh Kumar ...Respondents

Counsel for the Appellants:
Sri Sabhajeet Yadav
S.C.

Counsel of the Respondent:
Sri Jai Krishna Tiwari
Sri Shashi Nandan

Constitution of India, Article 226 Service Law- selection on the Post of Machine Asstt.- Petitioner name found place in selection list- before appointment ban imposed- authorities assured to give appointment after the ban lifted- even after the ban expiry of four years from the deleation of ban- No appointment given - whether can the appointment claimed as a matter of Right? Held- 'yes'.

Held- Para 8
The vacancy on the post of Machine Assistant occurred on 3rd November, 1989, i.e. within one year of the preparation of the select list which was prepared on 24th January, 1989. The select list was valid and was in force during that period. Thus, the respondent-writ petitioner was entitled for appointment on the said post. The submission of the learned standing counsel that the person whose name has been placed in the select list has no right to claim the post, cannot be accepted in view of the authoritative pronouncement in the case of *S. Govindaraju* (supra) which has been followed by this Court in the case of *Pradeep Kumar Misra* (supra).

Case law discussed:
(1981) 2 SCC. 673
1986 (3) SCC.-273
1991 (2) UPLBEC-796
1996 (3) UPLBEC-1944
J.T. 2001 (7) SCC.-519

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

1. The present special appeal has been filed against the judgment and order dated 10th March, 1999 passed by the learned Single Judge whereby a direction in the nature of writ of mandamus has been issued commanding the present appellants who were respondents in the writ petition to give appointment to the respondent-writ petitioner on the post of Machine Assistant which fell vacant on 3rd November, 1989. This Court, however, directed that the service shall be deemed to have commenced after one month from the date when he had approached this Court namely, 14th September, 1993, and the said period shall be counted towards his service. Further, if the petitioner has crossed the age limit in the meantime, the same should be overlooked since he had become eligible for appointment on 3rd November, 1989. However, he shall not be entitled for payment of salary for the period till the date of his appointment pursuant to this order. In case, the petitioner's appointment is made beyond the period of four months as directed by the learned single Judge, in that event, he shall be entitled to payment of salary immediately after expiry of four months from the date a copy of this order is produced before the concerned respondent.

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

3. The appellant advertised post of Machine Assistant. It appears that vacancy against three posts was already in existence. The fourth vacancy was anticipated on account of imminent promotion of one of the Machine Assistants to the post of Rotary Machine Operator. A select list was prepared on 24th January, 1989 against four posts of Machine Assistants. The name of the respondent-writ petitioner was placed at serial no. 4 in the list. Persons appearing at serial nos. 1,2 and 3 were given appointment on the existing vacant posts of Machine Assistants. When Nasir Ahmad, Machine Assistant was promoted to the post of Rotory Machine Operator vide order dated 29th August, 1989 the post held by Nasir Ahmad fell vacant on 3rd November, 1989 on his joining the promoted post. On this post the respondent-writ petitioner was to be accommodated. However, by reason of a ban imposed by the State Government on 26th February, 1989 from filling up the post, the petitioner was informed through letter dated 21st December, 1989 that he could not be appointed because of the ban imposed on direct recruitment, but he will

be given appointment as soon as the ban is lifted. The letter dated 21st December, 1989 is available on record as Annexure 1 to the counter affidavit filed by the present appellant in the writ petition. The ban was lifted in the year 1993 but the petitioner was not given any appointment. The petitioner approached this Court by filing Civil Misc. Writ Petition No. 32743 of 1993, giving rise to the present special appeal. The learned single Judge allowed the writ petition and issued certain directions by judgment and order dated 10th March, 1999 which has been challenged in the present appeal.

4. We have heard Sri Sabhajeet Yadav, learned standing counsel for the appellants and Sri Jai Krishna Tiwari holding brief of Sri Shashi Nandan, learned Advocate appearing on behalf of respondent-writ petitioner.

5. Sri Sabhajeet Yadav, learned standing counsel submitted that the life of the select list which was prepared on 24th January, 1989 was only for one year and if the respondent-writ petitioner has not been given appointment during the aforesaid period the select list ceases to remain in existence and the respondent-writ petitioner cannot claim his appointment as a matter of right. He further submitted that in the year 1989 the State Government had imposed a ban on recruitment and in view of this subsequent development appointment was not given, thus, the respondent-writ petitioner cannot claim any right of appointment. He further submitted that merely the name of the respondent-writ petitioner was placed in the select list, it did not give any right of being appointed. According to him, in the year 1993 when the ban was lifted by the State Government, the post of Machine Assistant was to be filled up from amongst the candidates belonging Scheduled Caste, Scheduled Tribes and Backward Class category as it fell in the share of reserved category post. Thus, the learned single Judge was not justified in issuing writ of mandamus to the appellants and directing them for giving appointment to the respondent-writ petitioner.

6. Sri Jai Krishna Tiwari, learned counsel for the respondent-writ petitioner, however submitted that the name of the respondent-writ petitioner was placed at serial no. 4 in the select list and in fact the advertisement was made for filling the post of Machine Assistant in respect of the vacancy which was to come into existence during the year. He further submitted that the respondent-writ petitioner was informed vide letter dated 21st December, 1989 that he would be given appointment immediately when the ban is lifted and, therefore, after the ban has been lifted he cannot be denied appointment as the promise held out to the petitioner binds the appellants on account of doctrine of promissory estoppel. The respondent-writ petitioner awaited for more than four years in the hope of being appointed on the post of Machine Assistant. Thus the learned single Judge was justified in issuing writ of mandamus commanding the appellants to give appointment to the respondent-writ petitioner. He relied upon a decision of the Supreme Court in the case of ***Bhim Singh and others vs. State of Haryana and others*** [(1981) 2 SCC 673]. He further submitted that the person whose name is included in the select list acquires a right of appointment. In this behalf he cited a decision of the Supreme Court in ***S. Govindaraju vs. Karnataka S.R.T.C.***

and another [(1986) 3 SCC 273]. He next submitted that a person who has been selected for a particular post is entitled to be appointed and any ban on appointment placed by the Government cannot take away the right to be appointed as held by this Court in ***Pradeep Kumar Mishra and others vs. U.P. State Road Transport Corporation, Lucknow and others*** [(1991) 2 UPLBEC 796]. He also relied upon a decision of this Court in ***Vijay Kumar Gupta vs. U.P. State Road Transport Corporation, Lucknow and others*** [(1996) 3 UPLBEC 1944] in which this Court had taken the similar view.

7. In rejoinder Sri Sabhajeet Yadav relied upon a decision of the Supreme Court in the case ***Sri Kant Tripathi and others vs. State of U.P. and others*** (JT 2001 (7) SC 519) wherein Hon'ble the Supreme Court in paragraph 35 of the judgment has interpreted the words "the vacancies likely to occur in the next two years" and held that the expression "vacancies likely to occur in the next two years" would obviously mean the vacancies, which in all probability, would occur and can only refer to the cases when people would superannuate within the next two years and nobody can anticipate as to how many people would die or how many would compulsorily be retired or removed or dismissed. According to him the vacancy, which may be caused on account of promotion of Nasir Ahmad, could not have been taken into account for making the select list. Thus, the respondent-writ petitioner was not entitled for being appointed.

8. Having heard learned counsel for the parties we find that it is not in dispute that the name of the respondent-writ petitioner was included at serial no.4 in the select list for the post of Machine Assistant. There already existed three vacancies which were filled up by the persons whose names stood at serial nos. 1,2 and 3. One post of Machine Assistant was to fall vacant in the year 1989 as Nasir Ahmad was due for promotion and that is why select list of four persons were prepared by the authorities. Nasir Ahmad was, in fact, promoted on 29th August, 1989 and he joined the promotional post on 3rd November, 1989. When the respondent-writ petitioner approached the authorities for giving appointment he was informed in writing that on account of a ban imposed by the State Government on direct recruitment he cannot be given appointment but as soon as the ban is lifted he shall be given an appointment. The ban was lifted in the year 1993. The respondent-writ petitioner waited for more than four years in the hope of getting an appointment pursuant to the promise made by the authorities as contained in the letter dated 21st December, 1989. The question is, as to whether, after the ban was lifted the respondent-writ petitioner is entitled for being appointed on the post of Machine Assistant or not. The Hon'ble Supreme Court in the case of ***S. Govindaraju*** (supra) has held that once a candidate is selected and his name is included in the select list for appointment in accordance with the regulations he gets a right to be considered for appointment as and when vacancy arises. Thus, the respondent-writ petitioner gets a right to be considered for appointment on the post of Machine Assistant since his name was placed in the select list. It is not disputed that the authorities vide letter dated 21st December, 1989 had assured the respondent-writ petitioner that he shall be given an appointment immediately on the

lifting of the ban by the State Government. He waited for more than four years. As held by the Supreme Court in the case of ***Bhim Singh*** (supra) the respondent-writ petitioner having bona fide believed the representation made by the State and having acted thereon cannot now be defeated of his hope to get appointment which has converted into his right on account of the application of the doctrine of promissory estoppel. Thus, the respondent-writ petitioner is entitled for appointment on the post of Machine Assistant as soon as the State Government lifts the ban. It may, however, be mentioned here that this Court in the case of ***Pradeep Kumar Mishra*** (supra) has held that the selected candidates for a particular trade are entitled to be appointed against the vacancies which occurred during the period for which the select list/waiting list is stipulated to remain valid. The vacancy on the post of Machine Assistant occurred on 3rd November, 1989, i.e. within one year of the preparation of the select list which was prepared on 24th January, 1989. The select list was valid and was in force during that period. Thus, the respondent-writ petitioner was entitled for appointment on the said post. The submission of the learned standing counsel that the person whose name has been placed in the select list has no right to claim the post, cannot be accepted in view of the authoritative pronouncement in the case of ***S. Govindaraju*** (supra) which has been followed by this Court in the case of ***Pradeep Kumar Misra*** (supra). So far as the decision of Hon'ble Supreme Court in the case of ***Sri Kant Tripathi*** (supra) is concerned Hon'ble Supreme Court while interpreting the phrase "the vacancies likely to occur in the next two years" in rule 8 (1) of the U.P. Higher Judicial Service Rules, 1975 has held that nobody can anticipate as to how many people would die or how many would compulsorily be retired or removed or dismissed or even would be elevated to the High Court. The expression "vacancies likely to occur in the next two years" would obviously mean the vacancies, which in all probability, would occur. In other words, it can only refer to the cases when people would superannuate within the next two years. In view of the principle laid down by the Supreme Court in the aforesaid decision, we find that the vacancy on account of promotion of Nasir Ahmad from the post of Machine Assistant to Rotory Machine Operator was due in the year 1989 and, therefore, the authorities have rightly anticipated the said vacancy. Thus, the authorities were perfectly justified in preparing the select list for fourth vacancy which was likely to occur in that year. So far as the question that the fourth post of Machine Assistant fell was to be filled up from amongst the reserved category candidate is concerned, suffice it to mention that the learned standing counsel has not brought on record any material to show that the said post was to be filled up from the reserved category candidate. Thus, the plea taken by the learned standing counsel cannot be sustained.

9. In view of the foregoing discussions we hold that the respondent-writ petitioner was entitled for being given appointment on the post of Machine Assistant.

10. In the result we do not find any merit in this special appeal. The special appeal, accordingly, fails and is dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2002

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

Special Appeal No. 743 of 1996

U.P. State Spinning Company Ltd.
...Appellant
Versus
Shri R.S. Pandey and another
...Respondents

Counsel for the Appellant:
Sri V.B. Singh
Sri Vijay Sinha

Counsel for the Respondents:
Sri R.N. Singh
Sri G.K. Singh
Sri V.K. Singh

Constitution of India- Article 226- Alternative Remedy- Writ Petition pending for last 9 to 15 years- counter- Rejoinder affidavits have been exchanged- arbitrary action of the authorities under challenged- can not be dismissed on alternative ground.

Held- Para 8

Learned counsel for the parties we find that the appellant U.P. State Spinning Company Ltd. is a State Government undertaking and is fully controlled by the State of U.P. It thus falls within the term 'State' within the meaning of Article 12 of the Constitution of India. Thus any of its action which is arbitrary and unreasonable can be challenged by an aggrieved person by invoking jurisdiction under Article 226 of the Constitution of India. In the present case the writ petition was filed in the year 1987 and remained pending for 9 long years. Counter affidavits and rejoinder affidavits had been exchanged between the parties. Therefore, after such a long gap relegating respondent writ petitioners to raise an industrial dispute and dismissing the writ petition on the ground of alternative remedy would not be just and proper. In this connection reference may be made to the two decisions of the Hon'ble Supreme Court namely Lala Hridaya Narayan Vs. Income Tax Officer AIR 1971 S.C. page 33 and Dr. Bal Krishna Agrawal Vs. State of U.P. and others 1995 A.L.J. 454 which have been followed by us in the case of Pradeep Kumar Singh (supra). So far as the question that the respondent writ petitioner workmen and can raise an industrial dispute under the Industrial Disputes Act is concerned, all the decisions relied upon by Shri V.B. Singh have been considered by us in the case of Pradeep Kumar Singh (supra) and it has been held that alternative remedy is not a bar where a writ petition has been filed alleging violation of principle of natural justice.

Case law discussed:
AIR 1975 SC-2238
AIR 1996 SC-469
J.T. 1998 (8) Sc-204
2002 (92) FLR 1159
1991 (2) UPLBEC- 898 (FB)
1998 (80) FLR-189
1997 (76) FLR-372
1969 (1) LLJ-734
2001 (3) UPLBEC-2571

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

1. The present Special Appeal has been filed by U.P. State Spinning Company Ltd., against the judgment and order dated 27.8.1996 passed by the learned Single Judge in C.M. Writ Petition No. 15027 of 1987 whereby the learned Single Judge had allowed the writ petition and had quashed the order of termination dated 1.12.1987 passed against the respondent writ petitioner no. 1 and 4.1.1988 passed against the respondent writ petitioner no. 2.

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

2. The two respondents writ petitioners while working in the U.P. State Spinning Company Ltd., Maunath Bhanjan District Azamgarh, made a claim of 15% of the basic pay as interim relief as was being paid to the officer and clerical staff of the Head quarter as there was no reason for refusing the said relief to the staff of Maunath Bhanjan Unit of the appellant Mills. They also submitted a memorandum representing the clerical staff of the Mills. It appears that respondent writ petitioner no.2 met the Chief Executive Officer of the Azamgarh Unit regarding the said demand, who, however, it is alleged threatened him with serious consequences including transfer, termination and other harms unless he withdrew the said demand. Being apprehensive the respondent writ petitioners approached this Court by filing C.M.Writ Petition No.15027 of 1987 with the following reliefs:

(a) to issue a writ, order or direction restraining the respondents from transferring, terminating the services of the petitioners and harassing and causing an harm to the petitioners;

(b) issue a writ, order or direction directing the respondents to pay 15% of the basic pay as interim relief and fixed D.A. of Rs.100/- to the clerical staff of the Maunath Bhanjan Unit Mills;

(c) issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case; and

(d) to award cost of this writ petition to the petitioners against the contesting respondents.

While the writ petition was pending several applications were filed by the respondent writ petitioners for amendment of the writ petition incorporating the various facts and reliefs. Altogether 5 applications for amendment were filed Considering the contents of the writ petition including its prayer, the learned Single Judge allowed the amendment applications which related to dismissal of the respondent writ petitioners. The learned Single Judge found that the notice to show cause was alleged to have been refused by the respondent writ petitioner no. 1 when sent by the appellant on 21.11.1987, whereafter the same show cause notice was sent on 23.11.1987 by registered post which was received by the respondent writ petitioner no. 1 on 26.11.1987. The respondent writ petitioner no. 1 sent his reply to the show cause notice on 26.11.1987 i.e. immediately the next day by registered post which was received by the appellant on 2.12.1987. However a final order was passed on 1.12.87 dismissing the respondent writ petitioner no. 1 from service. The learned Single Judge held that sending of reply by the respondent writ petitioner no. 1 to the appellant by registered post was not in any way irregular. In the back ground of threat extended by the appellant and time to time again threat of transfer, suspension and disciplinary proceedings fully justify the sending of reply by registered post. The delay in receiving of such reply was not for the fault of the respondent writ petitioner no.1 as admittedly he sent the reply on the very next day of receiving show cause notice. Further the delay of 5, 6 days by postal authority to reach the reply to the appellant cannot be treated as a gross delay justifying them to complete the

proceedings on 1.12.1987 when the termination order was being passed and no reason or urgency have been shown in not waiting for a few days for receiving reply to the show cause notice and the whole proceedings appears to have been completed within a very short span of about 10 days. The learned Single Judge held that the appellant have failed to produce any material on record to justify such a hurry and thus for no fault of the respondent writ petitioner no.1 and there being no delay at all on his part, his reply to the show cause notice could not even be considered by the appellant. In the circumstances the order of termination was quashed. So far as the respondent writ petitioner no. 2 is concerned, the learned Single Judge however has held that his services were terminated vide order dated 4.1.1988 for the sole reason that he did not join the transferred place at Akbarpur. The order of termination was published in the news paper dated 4.1.1988. The learned Single Judge held that the appellants have not disclosed any material showing that any show cause notice in respect of the allegations of not joining the transferred post was ever served upon the respondent writ petitioner no. 2. In these circumstances the order of termination dated 4.1.1988 was also quashed.

3. We have heard Shri V.B. Singh learned Senior Counsel assisted by Shri Vijay Sinha Advocate on behalf of the appellant and Shri R.N. Singh, learned Senior counsel assisted by Shri G.K. Singh on behalf of the respondent writ petitioners.

4. Shri V.B. Singh, learned Senior counsel submitted that the respondent writ petitioners had filed the writ petition before this Court when order of termination was not in existence, as the order of termination came to be passed subsequently which could not have been challenged by way of amendment application in the writ petition and instead if at all could have been challenged by a separate writ petition. He further submitted that against the order of termination the respondents writ petitioner no. 1 had an adequate alternative remedy of raising an Industrial dispute under the provisions of Industrial Disputes Act, and thus the writ petition itself was not maintainable. He further submitted that the charge sheet was issued in the month of August, 1987 and the enquiry was concluded on 2.11.1987 and the second show cause notice was not at all required in a domestic enquiry. However the show cause notice was published on 25.11.1987 in the news paper instead of sending a reply by hand as the respondent writ petitioner no. 1 resided in the staff quarter in the Mill premises. The respondent writ petitioner no.1 chose to send the reply by registered post and the reply did not reach the appellant within the stipulated time and therefore the appellant was justified in passing the order of termination. He further submitted that that under the Industrial law if the Labour Court comes to the conclusion that the domestic enquiry is vitiated, the Employer have a right to lead evidence to show that the order of termination is justified on the materials which may be placed on record. He thus submitted that the appellants have been denied the right to prove the charges leveled against the respondent writ petitioners which they could have done before the Labour Court, even if the enquiry was held to be improper or vitiated. He further submitted that the

order of termination passed against the workmen cannot be set aside under Article 226 of the Constitution of India on the ground that proper enquiry was not held and principle of natural justice has not been complied with and the respondent writ petitioners have not suffered any prejudice. He relied upon the following decisions for the proposition that proper remedy is to raise an Industrial Dispute and recourse to Article 226 of the Constitution of India is not proper.

1. **The Premium Automobile Ltd. Vs. Kamlakar Shanta Ram Wadke and others A.I.R. 1975 S.C.2238.**

2. **Rajasthan Road Transport Corporation and another Vs. Krishna Kant and others A.I.R. 1996 S.C.469.**

3. **Scooters India Ltd. and others Vs. Vijay E.V. Eldred JT 1998 (8) S.C. page 204.**

4. **Chandrakant Tukaram Nikam and others Vs. Municipal Corporation of Ahmedabad and another 2002 (92) F.L.R. 1159.**

5. **Chandrama Singh Vs. Managing Director U.P. Cooperative Union Lucknow and others 1991 (2) UPLBEC 898 FB.**

6. **Dharam Veer Singh and others Vs. State of U.P. 1998 (80) F.L.R. page 189**.

5. He further submitted that there is no requirement to supply the enquiry report before terminating the service. In support thereof he relied upon a decision of this Court in the case of M/s J.K. Cotton Spinning and Weaving Mills Co. Ltd. Kanpur Vs. State of U.P. and others 1998 (76) FLR page 372. So far as giving of second show cause notice he relied upon a decision of Supreme Court in the case of Shahdara (Delhi)- Saharanpur Light Railway Company Ltd. Vs. Shahdara Saharanpur Railway Workers' Union 1969 (1) LLJ 734. He also relied upon a decision of the Hon'ble Supreme Court in the case of United Planters Association of Southern India Vs. K.G. Sangameshwaran and another 1997 (4) S.C.C. 741 and submitted that even if there is omission to afford opportunity of hearing during domestic enquiry it can be cured by adducing evidence before the appellate authority in support of the charges which culminated in dismissal of the person concerned.

6. Shri R.N. Singh, learned Senior counsel however submitted that the writ petition was filed on 3.8.1987 when the order of termination was not in existence. The order of termination was passed subsequently on 1.12.87 and 4.1.88 in respect of the two respondent writ petitioners which was challenged by way of an amendment application. He submitted that U.P. State Spinning Company Ltd. is a State Government undertaking and is fully controlled by the State Government, thus it comes within the definition of the word 'State' within the meaning of Article 12 of the Constitution of India and any arbitrary action of the appellant U.P. State Spinning Mills Company Ltd. can be challenged before this Court under Article 226 of the Constitution of India. He further submitted that the appellant had acted arbitrarily in terminating the service of the respondents writ petitioners without even considering their reply. It is not in

dispute that the show cause notice was served upon the respondent writ petitioner no. 1 on 25.11.1987. The show cause notice was issued on 21.11.87 which is alleged to have been refused by the respondent writ petitioners and was again sent on 23.11.87 by registered post. The respondent writ petitioner no. 1 had given his reply by registered post on 26.11.1987 which was received by the appellant on 2.12.1987 i.e. within 5 days instead of waiting for a reasonable period the appellant for the reason best known to them hastily passed an order terminating the services on 1.12.87 which itself speaks of the arbitrary and high handedness action.

7. The writ petition remained pending for about 9 years and about 15 years have lapsed now and if this Court relegates the respondent writ petitioners to raise Industrial disputes, it will be causing huge irreparable injury. He thus submitted that this Court should decide the controversy on merits. In support of his plea he relied upon a decision of a Division Bench of this Court in the case of Pradeep Kumar Singh Vs. U.P. State Sugar Corporation and another reported in 2001 (3) UPLBEC 2571 wherein this Court had held that where an order has been passed in gross violation of principle of natural justice and the Employer falls within ambit of 'State' within the meaning of Article 12 and the writ petition was pending for 5 years it should not have been dismissed on the ground of alternative remedy of raising a dispute before the Labour Court. He further submitted that appellant being a State is expected to act in a reasonable manner and not arbitrarily and if the action of the State is unreasonable or arbitrary, it is violative of Article 14 of the Constitution of India and therefore the aggrieved person in the present case the respondent writ petitioners are well within their right to invoke the jurisdiction of this Court under Article 226 of the Constitution of India.

8. Having heard the learned counsel for the parties we find that the appellant U.P. State Spinning Company Ltd. is a State Government undertaking and is fully controlled by the State of U.P. It thus falls within the term 'State' within the meaning of Article 12 of the Constitution of India. Thus any of its action which is arbitrary and unreasonable can be challenged by an aggrieved person by invoking jurisdiction under Article 226 of the Constitution of India. In the present case the writ petition was filed in the year 1987 and remained pending for 9 long years. Counter affidavits and rejoinder affidavits had been exchanged between the parties. Therefore, after such a long gap relegating respondent writ petitioners to raise an industrial dispute and dismissing the writ petition on the ground of alternative remedy would not be just and proper. In this connection reference may be made to the two decisions of the Hon'ble Supreme Court namely Lala Hridaya Narayan Vs. Income Tax Officer AIR 1971 S.C. page 33 and Dr. Bal Krishna Agrawal Vs. State of U.P. and others 1995 A.L.J. 454 which have been followed by us in the case of Pradeep Kumar Singh (supra). So far as the question that the respondent writ petitioner are workmen and can raise an industrial dispute under the Industrial Disputes Act is concerned, all the decisions relied upon by Shri V.B. Singh have been considered by us in the case of Pradeep Kumar Singh (supra) and it has been held that alternative remedy is not a

bar where a writ petition has been filed alleging violation of principle of natural justice. It is not necessary to refer and to discuss the various decisions relied upon by Shri V.B. Singh, learned Senior Counsel in regard to raising the plea of alternative remedy. Thus the preliminary objection raised by Shri V.B. Singh, learned Senior Counsel cannot be sustained.

9. So far as the question that a second show cause notice is not required or the copy of the enquiry report is not to be given or before the Labour Court the Employer has a right to adduce evidence to prove the charges where the domestic enquiry is held to be improper is concerned, suffice is to mention here that the learned Single Judge has simply set aside the order of termination on the ground that the same have been passed in a hasty manner without even considering the reply which was sent by the respondent writ petitioners no.1 by registered post on 26.11.87 immediately the next day of receiving the show cause notice. The Court has not prohibited the Employer from considering the reply and passing an order afresh in accordance with law. So far as the respondent writ petitioners no.2 is concerned we find that there is no material on record to show that he was given any opportunity or any show cause notice, but straight away the order of termination has been passed and published in the news paper. The entire action in passing the order of termination was taken in a haste and in an arbitrary manner. The appellant being a State is expected to act in a just and reasonable manner. Since we have held that the impugned order of termination has been passed in gross violation of the principles of natural justice and in a hasty manner and the writ petition was maintainable, it is not necessary to refer to the various decisions cited by Sri V.B. Singh regarding the necessity of giving second show cause notice and the right of the employer to adduce evidence before the Labour Court to justify the punishment.

In view of the foregoing discussions, we do not find any merit in this Special Appeal and it is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 23, 2002

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

Special Appeal No. 404 of 2002

State of U.P. and others ...Applicants
Versus
Anant Kumar Tiwari and others ...Respondents

Counsel for the Appellants:
Sri R.N.Singh
Sri A.P. Shahi
Sri P.S. Baghel
Sri M.D. Singh Shekhar
Sri K.R. Singh
Sri Ashok Mehta
Sri U.N. Pandey

Counsel for the Respondent:
Sri Shailendra

Constitution of India, Article 226- Appointment of Special B.T.C. Teacher- candidate being B. Ed./LT applied- persuent to advertisement providing preparation of list on state leval- subsequently during election process- by amended G.O. prescribed mode of preparation of selected list – on District wise- after declaration of result validity

of selection challenged – preliminary objection- in absence of selected candidate the writ petition liable to dismissed- held objection can not sustained- according to own statement of the Chief Standing Counsel- No appointment letter has been issued- secondly- non selected candidate- challenging the validity of subsequent G.O. by which the list has been prepared District wise- and not the mode of selection- writ petition held maintainable.

Held- para 24 and 28

However, we are of the view that even though they were not made a party in the writ petitions, but we have given some of the selected candidates leave to appeal against the order passed by the learned Single Judge and we have heard them at length. Thus, we are not inclined to non-suit the writ petitioners-respondents and instead looking to the importance of the matter proceeded to decide on merits.

In the present case as already mentioned hereinbefore the criteria for preparation of merit list was earlier fixed as State level, which was subsequently, changed to the District level much after the last date of submitting the applications form. The respondent writ petitioners are aggrieved by the change of preparation of the merit list from State level to District level. Thus, it cannot be said that the respondent writ petitioners were made aware about the preparation of merit list at District level upto the last date of submitting their applications form.

Case law discussed:

AIR 1982 SC 1555
AIR 1985 SC-167
1994 (6) SCC-320
1995 SCC-319,
1998 (2) SCC-32
JT 2001 (5) SC –42
JT 2001
AIR 1984 SC –251
JT 2002 (2) SC-191

Constitution of India, Article 15 (3), 16 (2)- Appointment of Special BTC Teacher- 50% vacancy reserved for women, 50% for male candidate- including 50% for science candidate and 50% for art candidates – ca not be held arbitrary.

Held- para 42

We are of the view that the reservation made by the State Government for 50% female candidates for imparting special B.T.C. training cannot be said to be illegal or arbitrary. These females candidates are to be selected against their respective categories and thus, the reservation is only horizontal and not vertical. The provisions for selecting 50% candidate against their respective categories is permissible in view of the provisions made under Article 15 (3) of the Constitution of India. Taking into consideration the need of Arts and Science subject, the provisions made for 50% Art candidates and 50% science candidates cannot be said to be arbitrary.

Case law discussed.

AIR 1995 SC-1948
1995 (5) SCC-173
1996 (9) SCC-466
1992 (suppl) (3) SCC-217

Constitution of India, Article 15 (i) 16 (2)- Recruitment of Special BTC teacher- action of Government ;change of mode of preparation of merit list- from statewise to District wise – whether can be said arbitrary. Held ' Yes'.

Held para 58

Applying the principles laid down by the Apex Court in the aforementioned cases to the present case, we find that restricting the selection and preparation of merit list at the District level are not at all be justified and it amounts to discrimination. In the present case taking into consideration the exigencies the State Government had decided to prepare the merit list at the State level

and for restoring it to District level the reasons advanced by the State Government are irrelevant. Thus, the action of the State in restoring the preparation of merit list from State level to District level is arbitrary and is violative of Article 15 (1) and 16 (2) of the Constitution of India.

U.P.Basic Education (Teachers) Service Rules 1981 rule 8 read with National Council of Teachers Education 1993 Required qualification- special B.T.C. teacher- whether can the B.Ed. CP Ed be treated equivalent to B.T.C. ? held 'No' No declearation has been made by the Government.

Held- para 70

The recognition of Special B.T.C. training course as equivalent qualification the course having been not recognized/approved by the National Council of Teacher Education could not have been done by the State Government. Thus, the Government order recognizing special B.T.C. training course as equivalent qualification is contrary to the provisions of the Act, the Rules and also the 1993 Act.

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

1. Special Appeal No. 404 of 2002 has been filed by the State of U.P. through Secretary, Education, U.P. Government, Lucknow, Director, State Council of Educational Research and Training Lucknow and the Director, Basic Education, U.P. while the special appeal no. 365 of 2002, has been filed by District Basic Teachers Kalyan Samiti and three others after obtaining leave to appeal and the remaining special appeals have been filed by the selected candidates after obtaining leave to appeal against the judgment and order of the learned Single Judge dated 21.3.2002 passed in Civil Misc. Writ Petition No. 37124 of 2001, Anant Kumar Tiwari and others v. State of U.P. and others and other connected writ petitions, whereby the learned single Judge had allowed all the writ petitions and had quashed the Government orders dated 3.8.2001, the advertisement dated 14.8.2001. Government order dated 3.12.2001 and the process of selection, pursuant thereto at whatever stage it had reached before passing of the interim order dated 9.11.2001 and 3.12.2001. The learned Single Judge has held that the Government order dated 3.8.2001 and the proportion of selection in pursuance thereto at whatever stage it has reached is perrse, arbitrary, discriminatory and violative of Articles 14,15,16 and 21 of the Constitution of India, apart from the same being contrary to the U.P. Basic Education Act 1972 and U.P. Basic Education (Teachers) Service Rules 1981 and cannot be upheld.

2. We have heard the learned Advocate General, Sri R.N. Singh, learned Senior Counsel assisted by Sri A.P. Shahi, Sri P.S. Baghel and Sri M.D. Singh Shekhar for the appellants and Sri Shailendra, learned counsel appearing for the respondent- writ petitioners.

3. Briefly stated the facts giving rise to the present special appeals are as follows :

4. In the primary schools run by the U.P. Basic Education Board (hereinafter referred to as the Board) in the State of U.P. for the last several years there had been a shortage of teachers, as a result of which the State Government was finding it difficult to fulfil its obligations as mandated by Article 45 of the Constitution of India to provide free and

compulsory education for all children until they complete the age of 14 years. It appears that in the State of U.P., the State Government runs a training college in each district, which is at present about 70 in number, where the persons are given training in teaching and on successful completion thereof are awarded Basic Teacher's Certificate (hereinafter referred to as B.T.C.). As per the statement made by the learned Advocate General, in each of the training college, the intake is of only 100 persons in a year. Thus, only about 5000 to 6000 qualified B.T.C. teachers are available for being appointed as assistant teachers to teach students in primary school run by the Board in the State of U.P. Whereas the total requirement of teachers at present is more than 50,000. To fulfill its constitutional obligations the State Government took a policy decision to impart two month's special training to those persons, who have done their B.Ed./L.T. The decision taken by the State Government, which was accorded permission by the Government manifested itself in the Government Order dated 3.8.2001. It mentions that the Governor has been pleased to accord permission for the appointment of 20,000 B.Ed./L.T. qualified and selected candidates on the vacant posts of assistant teachers in the primary schools run by the Board after they complete two months special B.T.C. Training and are found successful in the examination. The detailed procedure for making of application and selection was also prescribed by the aforementioned Government Order. It provided for determination of vacancies district wise and the candidates concerned will be eligible to make an application only against the vacancies available in their home districts. A candidate shall apply only for the home district and if he makes an application for two and more district, such application shall be rejected. No certificate was to be produced at the time of verification. No written examination was to be conducted for the selection. The criterion for the selection was the quality point marks obtained in the various examinations passed by the candidates to be determined in the manner given in the said Government Order. It also provided that the selection will be made on the basis of the district wise merit list prepared on the basis of the total quality point marks. The reservation was provided inaccordance with the reservation policy of the State Government. However, it was provided that care shall be taken that 50% candidates of the prescribed limit are selected from the Science group and 50% from the Arts group and besides it 50% males and 50% females will be selected in the respective categories against the prescribed number. The maximum and minimum age was fixed at 35 and 18 years as on 1st July of the year following the year of notification of vacancy with the relaxation of five years in the case of Schedule Caste, Schedule Tribe, Backward classes and the dependant of freedom fighters and three years in the case of ex-serviceman in the upper age limit. The selected candidates were required to undergo a two months special B.T.C. training after which they have to appear in an examination. The selected candidates will be eligible for the appointment only after passing of the examination. The candidates, who have completed special B.T.C. successfully, shall be treated at par with B.T.C. general trained and shall be treated as eligible for appointment to the vacant posts of assistant teachers in primary schools. The

said Government Order also provided for appointment of the trained applicants by making provision that who had successfully completed the training course shall be given appointment in the concerned district and in the primary schools against the limit of sanctioned post, which are located in far flung areas and where they are actually needed. The aforesaid Government Order was subsequently modified by another Government order dated 20.8.2001, whereby the candidates having C.P.Ed., D.P.Ed., and B.P.Ed. Training as regular students from the Universities, College and Training College recognised and run by the State Government, were also made eligible to put up application for special B.T.C. training besides B.Ed./ L.T. candidates and the maximum age limit for special B.T.C. training was substituted by 40 years retaining the relaxation of age of 5 years and 3 years. By the Government order dated 2.8.2001, the last date of receipt of application was also changed and instead of 15.9.2001, the last date was fixed as 29.9.2001.

It appears that on re-consideration, the State Government decided to prepare a merit list at the State level. Accordingly, a Government Order dated 14.9.2001 was issued by which it was provided that a merit list of all the applications received will be prepared on the basis of quality point of the educational and other qualifications in accordance with the provisions given in the Government Order at the State level, which was to be prepared in proportion to the total vacancies for training. The list was to be arranged district wise in conformity with the vacancies available in the district and a provision of reservation as per the rules was to be ensured. The candidates on the merit list were to be allotted in order of merit the candidate of home district, another post of the division wherein home district is located and nearest district to the home district division to the candidates where the vacancy is available. However, on 31.10.2001, the State Government issued another Government Order by which the earlier Government Order dated 14.9.2001, was amended and once again the merit list of all the applications received was to be prepared on the basis of quality point marks and other qualifications in accordance with the provisions given in the Government Orders at the district level. The advertisement inviting applications for special B.T.C. training was published in the daily newspaper. The relevant portion of the advertisement reads as follows:

"PRADESH MEIN SANCHALIT VISHVAVIDYALON, MAHAVIDYALAYON TATHA RAJYA SARKAR DWARA SANCHALIT MAHAVIDYALAYON SE SANSTHAGAT PRASHKISHIT B.ED./L.T. ABHARATHION SE UTTAR PRADESH BASIC SHIKSHA PARISHAD DWARA SANCHALIT GRAMIN KSHETRA KE PRATHMIK VIDYALAYON MAIN SAHAYAK ADHYAPAKO KE PADON PAR NIUKTI KE LIYE VISHISHT B.T.C. PRASHIKSHAN HETU ABHYARTHION SE AAWEDAN PARTA AMANTRIT KIYE JATE HAIN."

5. A corrigendum was also issued and published in the newspaper of 22.9.2001, regarding preparation of list State wise and the extension of the last date of the application. According to the respondent-writ petitioners, they had

applied on the basis of the corrigendum, which provided for preparation of merit list State wise. However, with the change in criteria of preparation of merit list from State wise to district wise pursuant to the Government order dated 31.1.2001, their names did not find place in the merit list of their home district and therefore, being aggrieved have approached this Court by invoking the jurisdiction under Article 226 of the Constitution of India.

6. Before the learned Single Judge, the grounds of challenge was two fold-firstly, the preparation of merit list district wise was arbitrary and violative of Articles 14,15,16 and 21 of the Constitution of India. It was also contrary to the provisions of the U.P. Basic Education Act, 1972 (hereinafter referred to as the Act) and the U.P. Basic Education (Teacher) Service Rules 1981 (hereinafter referred to as the Rules). Secondly, the reservation to the extent of making selection of 50% males and 50% females against the prescribed number and 50% candidate from the Science group and 50% from the Arts group is arbitrary and violative of Articles 14,15,16 and 21 of the Constitution of India. The respondents writ petitioners also raised the plea of arbitrariness in preparation of merit list giving specific instances wherein non qualified persons have been included in the merit list and even though in some of the districts there was no vacancy, some vacancies have been transferred from adjoining district to accommodate the favoured persons. The State respondents on the other hand vehemently opposed the plea of discriminations or violation of any of the provisions of the Constitution and submitted before the learned Single Judge that the respondent-writ petitioners, who have participated and remained unsuccessful cannot challenge the impugned advertisement and the selection by filing the present writ petition, the Government has taken a policy decision of recruitment and appointment of such persons, who possessed the qualifications as mentioned in the advertisement, which cannot be open to challenge being the policy decision, the successful candidates have not been impleaded and the writ petitions are liable to be thrown away on this ground alone and lastly that the State Government has also taken policy decision by issuing the Government order dated 3.8.2001 and the advertisement is in discharge of the State obligation under Article 45 of the Constitution and cannot be challenged.

7. The learned Single Judge has held that the argument that the petitioners have taken their chance and thereafter, when they have failed in the written test, they challenged the selection and therefore, they should not be allowed to challenge the selection, is not tenable in view of the specific circumstances of the fact that the petitioners have challenged the impugned advertisement, selection and the appointment pursuant there to on the ground of violation of their rights including the rights conferred on them in chapter-III under Articles 14,15,16 and 21 of the Constitution of India.

8. So far as the plea of the policy decision taken by the State Government is concerned, the learned Single Judge had found that for appointment of assistant teachers in primary schools, the State Legislature has already enacted the U.P. Basic Education Act 1972 and has also framed U.P. Basic Education (Teachers) Service Rules 1981 and all appointments

are to be governed under the aforesaid two statutory enactments and the Government Orders is contrary to the provisions of the Act as well as the Rules. So far as the plea regarding successful candidates having not been impleaded and the writ petitions are liable to be thrown away on this ground alone is concerned the learned Single Judge has found that before the Court, the Chief Standing Counsel on behalf of the State Government had made a categorical statement that no one has been declared selected and no single person has been appointed in pursuance of the impugned process of selection and only the result has been declared and even the list has not been supplied to the district concerned the selectees need not be impleaded as no appointment letters have been issued. The learned Single Judge has further found that the reservation of 50% to Arts and 50% to Science group or 50% males and 50% females cannot be said to belong to backward classes of citizen so as to entitle them for reservation under Articles 14,15,16 and 21 of the Constitution of India. This reservation available in accordance with the provisions of U.P. Public services (Reservation for SC/ST and other Backward Classes) Act 1994 and is also contrary to the provisions of the Constitution of India.

9. The learned Single Judge further held that changing the preparation of merit list from Statewise to Districtwise is arbitrary and illegal and contrary to the Constitutional provision and law declared by this Court.

Rival Submissions

The learned Advocate General challenged the judgment and order of the learned Single Judge on the following grounds:

1. The writ petitions as filed by the petitioners was not maintainable as the selected candidates had not been impleaded.

2. All the writ petitioners participated in the selection proceedings and only after being unsuccessful, they have approached this Court by filing the present writ petitions. They are estopped from challenging the advertisement and the selection process held pursuant thereto.

3. Special B.T.C. training has been recognised as a training course by the State Government as equivalent qualification to B.T.C. under Rule 8 (2) of the Rules.

4. The reservation provided for females to the extent of 50% does not violate any constitutional provision-likewise, providing reservation 50% for Arts group and 50% for science group candidates also does not violate any of the Constitutional provision as the overall Limit of reservation does not exceed the permissible limit of 50% and the aforesaid reservation are only in their respective categories.

5. The plea of promissory estoppel is not available to the writ petitioners.

6. The State Government is well within its right to prepare merit list at the District level for the special reasons that teaching in Basic Primary Schools has to be made in the local dialect and the persons belonging to that district alone are well versed in the local dialect .

7. The State is making selection of the candidates to whom special B.T.C. training is to be imparted and is not making any appointment on the post of assistant teachers. Only those candidates, who are selected for special B.T.C. training and after successful completion of the training and clearing the examinations, would be eligible for being considered for appointment on the post of Assistant Teachers. Thus, the provisions of the Act or the Rules do not come into play at this stage.

10. Sri R.N. Singh, learned Senior counsel appearing for the appellants in Special Appeal No. 365 of 2002, adopted the submissions made by the learned Advocate General. He, however, submitted that the reservation provided to the females and for Arts and Science groups are horizontal reservations, which is permissible. Sri P.S. Baghel, learned counsel appearing for the appellants in Special Appeal No. 381 of 2002 in addition to the submissions already made by the learned Advocate General and Sri R.N. Singh, submitted that under Article 350-A of the Constitution of India, State and every local authority within the State is under legal obligation to provide adequate facility for instruction in the mother tongue at the primary stage of education to the children belonging to linguistic minority groups.

11. Sri M.D. Singh Shekhar, learned counsel appearing for the appellants in Special Appeal No. 420 of 2002, while adopting the arguments already advanced before us submitted that the appellants had already been selected for training and infact, had also gone for training. Thus, they were necessary parties to be impleaded in the writ petition in the absence of which no writ could have been issued effecting their interest.

12. Sri Shailendra, learned counsel appearing for the respondents, however, submitted as follows:

1. The writ petition filed by the petitioners was maintainable, as there was no necessity of impleading the selected candidates in view of the statement given by the learned Chief Standing Counsel before the learned Single Judge, that no one is declared selected and appointment of any single person has not been made in pursuance of the impugned process of selection and further that only the result has been declared and even the list has not been supplied to the district concerned.

2. The writ petitioners had approached this Court only when the criteria for preparation of the merit list was changed from State level to District level. The petitioners' name would have found place in the merit list if it was prepared in accordance with the Government order dated 14.9.2001 and only when the said Government order was amended vide Government order dated 31.10.2001 directing preparation of merit list at the district level that the cause of action arose to the petitioner. Thus, the plea that the petitioners had participated in the selection and only after being unsuccessful they have challenged and are thus, estopped from challenging the advertisement and the selection process is misconceived.

3. The recognition granted by the State Government to the special B.T.C. course as equivalent to B.T.C. is in violation of the provisions of National Council of Teachers Education Act 1993, as power to recognize a training course solely vests with the National Council of Teachers

Education. Since special B.T.C. course has not been recognised by the National Council of Teachers Education, the said course cannot be treated as equivalent to B.T.C. course by the State Government.

4. The entire process of selection is contrary to the provisions of the Basic Education Act, 1972 and the U.P. Basic Education (Teachers) Service Rules 1981.

5. The reservation of 50% for females. 50% for males as also 50% for Arts Group and 50% for science group are arbitrary and violative of Article 15 and 16 of the Constitution of India.

6. The preparation of merit list district wise is arbitrary ;and violative of Article 15 and 16 of the Constitution of India.

7. On the basis of the rival submissions made before us, the following issues arise for determination :

i) whether in the absence of the selected candidates having been impleaded by the writ petitioners, the writ petitions are maintainable.

ii) Whether the writ petitioners having applied for special B.T.C. training jcourse and having failed to get their name in the merit list are estopped from challenging the advertisement and the selection made pursuant thereto.

iii) Whether the plea of promissory estoppel is available to the writ petitioners.

iv) Whether the reservation of 50% females and 50% males and 50% for Arts Group and 50% for science group in addition to the reservation policy of the State Government already in force is contrary to the provisions of Articles 14, 15 and 16 of the Constitution of India.

v.) whether the State Government can prepare merit list at the District level instead of State level and the same is violative of Articles 15 and 16 of the Constitution of India.

vi) Whether the provisions of Article 350-A of the Constitution of India are attracted in the present case.

vii) Whether the selection of candidates for special B.T.C. training is contrary to the provisions of the Basic Education Act, 1972 and U.P. Basic Education (Teachers) Service Rules 1981.

Point No. 1

13. For determination of this point it is necessary to mention that the State Government for the first time took a decision on 3.8.2001 to appoint 20,000/- B.Ed./L.T. qualified and selected candidates on the vacant post of assistant teachers in the primary school run by the State Government after they complete two months' special B.T.C. training and are found successful in the examination. The selection was to be made on the basis of district wise merit list on 20.8.2001, the field for selecting candidates was extended to graduates having G.P.Ed. D.P. Ed.; and B.P. Ed. Training besides B.Ed./L.T. candidates. On 14.9.2001, the State Government decided to prepare a merit list at the State level instead of district wise merit list. The advertisement was published in the daily newspaper (Danik Jagran) on 14.6.2001 and the corrigendum was published on 22.9.2001. The State Government changed its decision regarding preparation of merit list at the State level and reverted to the earlier position of preparing the merit list at the district level on 31.10.2001. In the leading writ petition being Civil Misc. Writ Petition No. 37124 of 2001, Anant Kumar Tiwari and others v. State of U.P. and others, it has come on record that Sri Ashok Mehta, the learned Chief Standing Council on behalf of the State respondents had made a statement at the Bar that only

the result has been declared and even the list has not been supplied to the district concerned as there is already interim orders of this Court passed on 9.11.2001.

14. The result of the selected candidates was published on 3.11.2001. The counselling was to take place from 19.11.2001 to 22.11.2001. It may be mentioned here that the list of selected candidates was published on the basis of the applications made by them and the verification of the documents/certificates were to be made in the counselling scheduled for 19.11.2001 to 22.11.2001 and only thereafter the final select list would have been drawn. In these circumstances, particularly, in view of the statement made by the learned Chief Standing Counsel at the Bar referred to above, there was no question of impleading any of the alleged selected candidates. It is well settled by the Hon'ble Supreme Court that mere selection or placement of the name in the select list does not confer any right of appointment. (See: I.J. Diwakar v. Government of Andhra Pradesh, A.I.R. 1982 SC 155 and Shankarsan Das v. Union of India AIR 1991 SC-1612).

15. The learned Advocate General has relied upon the following decisions in support of his submission that the selected candidates had to be made party in the writ petition and in their absence no writ can be issued, which adversely effects them :

1. Prabodh Verma and others v. Dal Chand and others AIR 1985 SC-167.

2. Sukhpal Singh and others vs. Punjab State Agriculture Marketing Board and others 1994 (6) SCC-320.

3. Aliji Momonji & Company v. Lalji Mavji and others 1995 (5) SCC –379.

4. Arun Tewari and others V. Zila Mansavi Shikshak Sangh and others 1998 (2) SCC-332.

5. All India SC & ST employees Association and Another vs. Arthur Jeen and others JT 2001 (5) SC-42.

16. In the case of Prabodh Verma, the Hon'ble Supreme Court was considering the question of absorption of reserve pool teachers pursuant to the Ordinance promulgated by the Government of U.P. namely, U.P. High School and Intermediate Colleges (Reserve pool teachers) Ordinance 1978, which provided for filling up of substantive vacancy in the post of a teacher for an institution recognised by the Board of High school and Intermediate Education U.P. by offering the same to a teacher whose name is entered in the register of reserve pool teachers maintained by the District Inspector of Schools. Pursuant to the Ordinance some of the reserve pool teachers were appointed in the substantive vacancy. The validity of the Ordinance was challenged by some of the applicants for the vacant posts and also the association.

17. In this background the Hon'ble Supreme Court has held as follows: -

"The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties- not

even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their; absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties.'

18. Here in the present case the selection list, which was published on 3.11.2001 was to be given effect to only after the counselling scheduled to be held between 19/21.11.2001 after verification of the testimonials/ certificates/documents mentioned in the application. Thus, till such time the counselling was not done, no right had accured to the candidates whose names found place in the select list.

19. In the case of Sukhpal Singh and others (supra), the Hon'ble Supreme Court has held that subsequent to the cancellation of the appointment of the appellants, on a regular advertisement, candidates were selected, appointments were made and the posts have been filled up and have been functioning. They were not before the Court nor they were sought to be impleaded in the High Court. Therefore, any order that may be passed would have adverse effect of unsettling their appointment without they being impleaded and; without opportunity of hearing being given to them. In the present case, admittedly, in view of the categorical statement made by the learned Chief Standing Counsel, the persons whose name appeared in the select list have neither have been intimated nor. They have been issued letter for counseling, when the writ petitions were filed. Thus, the question of impleading the selected candidates does not arise at this stage.

20. In the case of Aliji Momonji & Company (supra), the Hon'ble Supreme Court had held that in the event of building being demolished, the right, title and interest of the land lord would directly be effected and the landlord would be a proper party, though , no relief has been sought for against the land lord. As already held earlier, the selected candidates had not yet perfected any right so as to be impleaded as a necessary party.

21. In the case of Arun Tewari and others (supra), the Hon'ble Supreme Court has found that the appointment letter were issued to the selected candidates in most districts before these were challenged before the Tribunal and these assistant teachers have been appointed initially for the period of probation of two years. All the applicants, who have challenged the provisions of recruitment of assistant teachers under the operation Blackboard Scheme before the tribunal did not possess the requisite qualification for being selected under the said scheme as assistant teachers and their names did not figure amongst the list

forwarded by the District Employment Exchanges. They did not make the selected/appointed candidates, who were directly effected by the outcome of their applications before the tribunal as party respondents. The Hon'ble Supreme Court had held that the High Court ought not to have decided the writ petitions under Article 226 of the Constitution of India without the persons who would be widely effected by the judgment being before it; as respondents or as at least some of them before it as a respondent in a representative capacity.

22. In the case of All India SC & ST employees association and another (supra), the Hon'ble Supreme Court has held as follows :

"Although the candidates included in the panel showing their provisional selection do not vested right to appointment, they will be surely interested in protecting and defending the select list. It is the admitted position that before the Tribunal the successful candidates whose names were included in the panel of selection were not made parties. The arguments of the learned counsel that since the names and particulars of the successful candidates included in the panel were not given, they could not be made parties has no force. The applicants before the Tribunal could have made efforts to get the particulars; at least they ought to have impleaded some of the successful candidates may be in a representative capacity, if the large number of candidates were there and if there was any difficulty in service of notices on them, they could have taken appropriate steps to serve them by any one of the modes permissible in law with the leave of the Tribunal. This Court in Prabodh Verma and others v. State of Uttar Pradesh and others 1984 (4) SCC-251) has held that in writ petitions filed against the State questioning the validity of recruitment of a large number of persons in service could not be proceeded with to hear and take decision adverse to those affected persons without getting them or their representative impleaded as parties. In para 50 of the said judgment, summarizing the conclusions this Court in regard to impleading of respondents has stated that –

"A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and if; the petitioners refused to so join them, the High Court ought to dismiss the petition for non-joinder of necessary parties."

23. Sri Shailendra, learned counsel for the respondent- writ petitioners has relied upon a decision of the Hon'ble Supreme Court in the case of Union of India and others v. Chakradhar reported in JT 2002 (2) SC-191 wherein Hon'ble Supreme Court had 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 cases it will neither be possible nor necessary to issue individual show cause notices to each selectee and the only way out would be to cancel the whole selection. In the present case there is no

serious challenge to the selection on the ground of any mischief having been played. The only grievance is that instead of preparing the merit list at the State level it being prepared at the district level. Thus, no assistance can be derived from the decision of the Hon'ble Supreme Court in the case of Union of India v. O. Chakradhar (supra).

24. In the present case we find that the learned Chief Standing Counsel on behalf of the state respondents made a statement at the Bar that no person has been selected or appointed and only the result has been declared. At best we can treat it to be a case of provisional selection and thus, all such persons whose names appear in the selection list ought to have been made a party or at least some of them in a representative capacity should have been made a party in view of the principles laid down by the Apex Court in the case of All India SC and ST employees association (supra), However, we are of the view that even though they were not made a party in the writ petitions, but we have given some of the selected candidates leave to appeal against the order passed by the learned Single Judge and we have heard them at length. Thus, we are not inclined to non-suit the writ petitioners- respondents and instead looking to the importance of the matter proceeded to decide on merits.

Point No. 2

25. It is not in dispute that the respondent- writ petitioners have applied for being selected for imparting special B,.T.C. Training from their home districts. In view of the Government Order dated 14.9.2001, directing for preparation of a merit list at the State level and the corrigendum published in the daily newspaper on 21.9.2001, the petitioner's name would have figured in the merit list prepared at the State level and on this believe they have applied. The subsequent change in the criteria for preparation of the list from State level to District level by the Government order dated 31.10.2001 gave the writ petitioners a cause of action to be aggrived. It is not the case that if the criteria would not have been changed the respondents writ petitioners would have been unsuccessful. The change in the criteria for preparing the merit list from State level to District level much after the last date of submitting the applications, which was 29.9.2001, has resulted in making the respondent writ petitioners unsuccessful. Thus the principle that after taking a chance in the interview selection and being unsuccessful a person is estopped from challenging the advertisement/ selection is not applicable to the facts of the present case.

26. The writ petitioners respondents are primarily aggrieved by the Government Order dated 31.10.2001 issued by; the State Government by which the merit list was to be prepared at the district level by amending the Government Order dated 14.9.2001 in which merit list was to be prepared at the State level, even though , in the writ petition, the petitioners have challenged the advertisement dated 14.8.2001 and the Government order dated 3.8.2001 also. The two decisions relied upon by the Advocate General in the case of Union of India and others v. N. Chandrashekharan and others 1993 (3) SCC-594 and Inder Sen Mittal v. Housing Board Haryana and others 2002 (3) SCC-175 are not applicable to the facts of the present case.

27. In the case of Union of India and others v. Chandra Shekharan and others (supra), the Hon'ble Supreme Court has held as follows :

"It is not in dispute that all the candidates were made aware of the procedure for promotion before they set for the written test and before they appeared before the Departmental Promotion Committee. Therefore, they cannot turn around and contend later when they found they were not selected by challenging that procedure and contending that the marks prescribed for interview and confidential reports are disproportionately high and that the authorities can not fix a minimum to be secured either at interview or in the assessment or confidential report.'

28. In the present case as already mentioned hereinbefore the criteria for preparation of merit list was earlier fixed as State level, which was subsequently, changed to the District level much after the last date of submitting the applications form. The respondent writ petitioners are aggrieved by the change of preparation of the merit list from State level to District level. Thus, it cannot be said that the respondent writ petitioners were made aware about the preparation of merit list at District level upto the last date of submitting their applications form.

29. In the case of Inder Sen Mittal vs. Housing Board, Haryana and others (supra), the Hon'ble Supreme Court has held as follows :

"In case the ground of attack flows from agreement between the parties which would undoubtedly be a lawful agreement, and the same is raised at the initial stage, the Court may set it right at the initial stage or even subsequently in case the party objecting has not participated in the proceedings and taking a chance therein cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of reference, arbitration proceedings and (1) or award inasmuch as right of such a party to take objection is defeated.

30. Where ground is based upon breach of mandatory provision of law, a party cannot be estopped from raising the same in his objection to the award even after the participated in the arbitration proceedings in view of the well-settled maxim that there is no estoppel against statute.

31. If, however, basis for ground of attack is violation of such a provision of law which is not mandatory but directory and raised at the initial stage, the illegality, in appropriate case, may be set right, but in such an eventuality if a party participated in the proceedings without any protest, he would be precluded from raising the point in the objection after making of the award.'

32. Applying the principles laid down by the Hon'ble supreme Court in the aforesaid case, we find that the respondent- writ petitioners had only to make an application before the concerned authorities for selection of special B.T.C. training course. At the time of making the application the provision was of preparation of merit list at the State level and not at the District level. The criteria for preparation of merit list was changed only on 31.10.2001. The petitioners had no occasion to protest, since the criteria

was changed by the State Government unilatereally. If the fundamental right as guaranteed in Chapter III of the Constitution is being violated, the respondent- writ petitioners can approach this Court under Article 226 of the Constitution of India. It is well settled that there cannot be any estoppel against or waiver of fundamental rights. Thus, the case would be covered under clause 3 of the judgment of the Hon'ble Supreme Court in the case of Inder Sen (supra). In the case of P.B. Reddy V. State of Mysore AIR 1969 SC 655 the Hon'ble Supreme Court has held that a person can challenge the validity of a Rule under which a licence has been granted to him and there is no question of estoppel. Thus, we are of the considered view that the respondent-writ petitioners are not estopped from challenging the advertisement and selection made pursuant thereto.

Point No. 3.

33. The respondents writ petitioners have raised a plea of promissory estoppel in support of their case that they have applied for the special B.T.C. training for appointment of assistant teachers in primary schools run by the Board on the basis of the Government order dated 14.9.2001 and the corrigendum issued on 22.9.2001, which provided for preparation of merit list at State level and the State Government is estopped from changing the criteria for preparation of merit list from State level to District level.

34. Sri Shailendra, Learned counsel for the respondents- writ petitioners relied upon the famous decision of the Hon'ble Supreme Court in the case of Moti Lal Padampat Mills Co. Ltd. v. State of U.P. and others AIR 1979 SC-621 and other cases, The learned Advocate General on the other hand submitted that there is no question of there being any promissory estoppel, as the respondents- writ petitioners have not altered their position on any assurance given by the State. They have applied pursuant to the advertisement and it is always open to the State to change or modify any of the conditions mentioned in the advertisement. The plea of promissory estoppel can be invoked only where the State gives out a promise to do certain things or to provide any concession on the basis of which a persons acts and alter his position to his detriment. In the present case the respondents- writ petitioners have failed to establish that they have altered their position to their detriment by applying pursuant to the advertisement. Thus, the plea of promissory estoppel cannot be invoked.

Point No. 4.

35. According to the learned Advocate General, the State is under constitutional obligation to provide free education to the children upto the age of 14 years. In the State of U.P. there are large number of girls, who require education. It has been found that the girls, who are below 10 years of age or are in their early teens, fell more comfortable and are responding to guidance by females. The population ratio of girls and boys is about 50% each. Taking into consideration the psychological aspect it was though proper that 50% males and 50% females be selected against the prescribed number. It was further found that in Senior Basic Schools there is great scarcity of the science teachers and there is no direct recruitment of assistant teachers therein. All the posts of assistant

teachers in Senior Basic Schools are filled up by promotion from the assistant teachers of junior basic schools (primary schools). As there is a scarcity of the science teacher, it was thought necessary that there must be sufficient number of trained science teachers available to be appointed and for that very purpose a reasonable number of science and arts qualified teachers are sought to be trained. Accordingly, 50% for science group and 50% for arts group was provided for special B.T.C. training course so that the arts group and science group is equally placed by the Government and in fact, it is not a reservation. The learned Advocate General relied upon the decision of the Hon'ble Supreme Court in the case of Government of Andhra Pradesh v. P.B. Vijay AIR 1995 SC-1948. In the aforesaid case, the Hon'ble Supreme Court was considering the provision of Rule 2 A of the Andhra Pradesh State and Subordinate Service rules framed under the provisions of Article 309 of the Constitution of India. Rules 22-A which was under consideration before the Hon'ble Supreme Court is reproduced below :

"22-A Notwithstanding anything contained in these Rules or special or Adhoc Rules–

1) In the matter of direct recruitment to posts for which women are better suited than men, preference shall be given to women (G.O. Nos. 472, G.O. dated 11.10.1986) :

Provided that such absolute preference to women shall not result in total exclusion of men in any category of posts.

2) In the matter of direct recruitment to posts for which women and men are equally suited, other things being equal, preference shall be given to women and they shall be selected to an extent of at least 50% of the posts in each category of O.C.P. C.S.C. and S.T. quota.

3) In the matter of direct recruitment to posts which are reserved exclusively for being filled by women only.'

36. The validity of sub Rule (2) of Rule 2-A was challenged on the ground of violation of Article 14 or 16 (4) of the Constitution of India. The Hon'ble supreme Court held that by virtue of Article 15 (3) of the Constitution of India, the State is permitted to make special provision for women, but the same should be within reasonable limits, which have been broadly fixed at 50% at the maximum. The Hon'ble supreme Court held as follows:

"Article 16 (2) provides that no citizen shall, on ground only of religion, race, caste, sex, descent, place of birth, residence or any of them, be negligible for, or discriminated against in respect of any employment or office under the State. The ambit of Article 16 (2) is more limited in scope than Article 15 (1) because it is confined to employment or office under the State. Article 15 (1), on the other hand covers the entire range of State activities. At the sametime, the prohibited ground of discrimination under Article 16 (2) are somewhat widder than those under Article 15 (2) because Article 16 (2) prohibits discrimination on the additional ground of descent and residence apart from religion, reace, caste, sex and place of birth. For our purposes , however, both Article 15 (1) and 16 (2)

contain prohibition of discrimination of the ground of sex.

37. The respondent before us has submitted that if Article 16 (2) is read with Article 15 (2) it is clear that reservation of appointments or posts in favour of any back ward class of citizen which, in opinion of the State, is not adequately represented in the services under the State is expressly permitted. But there is no such express provision in relation to reservation of appointments or posts in favour of women under Article 16. Therefore, the respondent contends that the State cannot make any reservation in favour of women in relation to appointment or posts under the State. According to the respondent this would amount to discrimination on the ground of sex in public employment or appointment to posts under the State and would violate Article 16 (2).

38. This argument ignores Article 15 (3). The inter relation between Articles 14, 15 and 16 has been considered in a number of cases of by this Court. Article 15 deals with every kind to state action in relation to the citizens of this country. Every sphere of activity of the State is controlled by Article 15 (1). There is, therefore, no reason to exclude from the ambit of Article 15 (1) employment under the State. At the same time Article 15 (3) permits special provisions for women. Both Articles 15 (1) and 15 (3) go together. In addition to Article 15 (1) Article 16 (1), however, places certain additional prohibitions in respect of a specific area of State activity viz. employment under the State. There are in addition to the ground of prohibition enumerated under Article 15 (1), which are also included under Article 16 (2). There are, however, certain specific provisions in connection with employment under the State or Union territory by parliamentary legislation, while Article 16 (4) permits reservation of posts in favour of backward classes. Article 16 (5), permits a law; which may require a person to profess a particular religion or may require him to belong to a particular religion or may require him to belong to a particular religious denomination, if he is the incumbent of an office in connection with the affairs of the religious or denom national institution. Therefore, the prohibition against discrimination on the grounds set out in Article 16 (2) in respect of any employment or office under the State is qualified by clauses 3,4 and 5 of Article 16. Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16- the former being a more general provision and the latter, a more specific provision. Since Article 16 does not touch upon any special provision for women being made by the State, it cannot in any manner derogate from the power conferred upon the State in this connection under Article 15 (3). This power conferred by Article 15 (3) is wide enough to cover the entire range of State activity including employment under the State.

39. The insertion of clause (3) of article 15 in relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio economic backwardness of women and to empower them in a manner that would bring about

effective equality between men and women that Article 15 (3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women. To say that under Article 15 (3), job opportunities for women cannot be created would be to cut at the very root of the underlying inspiration behind this Article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15 (3). This power conferred under Article 15 (3), is not whittle down in any manner by Article 16.

40. The Hon'ble Supreme Court in the case of Government of Andhra Pradesh v. P.B. Vijay Kumar and another (supra) had also held that efficiency, competence and merit are not synonymous and that it is undeniable that the nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes. What is required is an opportunity, which has let to social backwardness, not merely amongst what are commonly considered as the backward classes, but also amongst women. Reservation, therefore, is one of the constitutionally recognized methods of overcoming this type of backwardness. Such reservation is permissible under Article 15 (3).

41. Sri R.N. Singh, learned senior counsel submitted that the reservation provided for females candidates and male candidates as also for arts and science group are horizontal reservation to meet the special situations as is prevailing in the State. He submitted that these persons are to be accommodated within their respective category and the over all reservation would not exceed the permissible maximum .limit of 50% relying upon the decision of Hon'ble Supreme Court in the case Anil Kumar Gupta and others v. State of U.P. and others 1995 (5) SCC-173 and S. Sathyapriya and others v. State of Andhra Pradesh and others 1996 (9) SCC-466 wherein the Hon'ble Supreme Court has held that the reservation for special categories under Article 15 (1) must be adjusted against their respective vertical social reservation quota under Article 15 (4).

42. Sri Sailendra, learned counsel for the respondent- writ petitions, however, relied upon the decision of the Hon'ble Supreme Court in the case of Indra Sawhney and others v. Union of India and others 1992 (suppl.) (3) SCC-217 and submitted that 50% reservation for woman and 50% to science and arts groups cannot be said by any stretch of imagination belonging to socially and or educationally backward classes of citizens so as to entitle them for reservation under Article 15 or 16 of the Constitution of India. According to him this reservation is over and above to the reservation available in accordance with provisions of U.P. Public Service (Reservation in SC/ST and other Backward Classes Act 1994. Article 15 (1) of the Constitution of India provides that the State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth, or any of them. Similar provision has been made under Article 16 (2) of the Constitution of India, which prohibits discrimination in respect of any employment or office under the State on additional two grounds also, namely, descent and residence. However, Article

15 (3) of the Constitution permit the State to make any special provision for women and children notwithstanding the prohibition contained in the said article. Looking into the need of female teachers to teach and the number of girls, who are below the age of ten years or are in their early teens in the primary school i.e. from class I to Vth, we are of the view that the reservation made by the State Government for 50% female candidates for imparting special B.T.C. training cannot be said to be illegal or arbitrary. These females candidates are to be selected against their respective categories and thus, the reservation is only horizontal and not vertical. The provisions for selecting 50% candidate against their respective categories is permissible in view of the provisions made under Article 15 (3) of the Constitution of India. Taking into consideration the need of Arts and Science subject, the provisions made for 50% Art candidates and 50% science candidates cannot be said to be arbitrary.

Point No. 5

43. The learned Advocate General submitted that the cadre of assistant teachers in primary schools run by the Board, as mentioned in 1981 service Rules, is a local cadre. The training in District Institute of Educational Training is a district-based training of teachers education of district level. It is to feed provide teachers duly trained for primary education in its localities. The very purpose of District Institute is to establish an Institute at District level so that sufficient number of local teachers are available to provide primary education in the vicinity. The very purpose is to localise the primary education and the area is also localised. After training, in case any candidate applies for appointment in any junior basic school, the application is to be moved to the District Basic Education Officer of the district and the selection committee is also comprised of the district level education officers. The very purpose of the present special training is to have primary teacher of the district available to teach in primary schools for remote areas of the district. Moreover, all the educational experts are uniformly of the opinion that pupils should begin their schooling through the medium of their mother tongue and there is great reason of thinking behind this. Where the tender minds of the children are subject to an alien medium, the learning process becomes unnatural and inflicts a cruel strain on the children, which makes the entire transaction mechanical. Besides, the educational process becomes artificial and torturuous . The basic knowledge can easily be garnered through the month tongue. It should be endeavor of every state to promote the regional language of that state and that is why the Government order dated 2.8.2001 provided for a district level selection of the candidates for being given training in special B.T.C. training course of 2001. In the advertisement issued on 14.8.2001, the last date of submission of the applications form was 15.9.2001 and when it was found that in some districts the number of forms received were less than the vacancies in existence in the particular districts, it was decided that instead of preparing a district wise merit list it would be prepared State wise and an order amending the earlier Government order was issued on 14.9.2001 to that effect. The last date for submission of applications was extended to 29.9.2001.

Thereafter, it was found that there was sufficient number of applications received from different district and thus, it was again decided to prepare the merit list district wise and accordingly an order was issued on 31.10.2001 restoring the earlier policy decision of preparing the merit list district wise. The learned Advocate General submitted that in view of the aforesaid facts and the prevailing situation the decision to make selection on the basis of merit list prepared at the district level is justified. Also relied upon a decision of Hon'ble Supreme Court in the case of English Medium Students Parents Association v. State of Karnataka and others 1994 (1) SCC –550 and Arun Tewari v. Zila Mansavi Shikshak Sangh and others reported in 1998(2) SCC-332.

44. Sri Sailendra, learned counsel for the respondents- writ petitioners, however, submitted that the advertisement published on 14.8.2001 invited applications for selecting candidates for special B.T.C. training for appointment as assistant teachers in primary schools in rural areas run by the U.P. Public Shiksha Parishad (Board). According to him, only those persons, who have been selected for special B.T.C. training, would be eligible for being appointed as assistant teachers in the primary schools in rural areas run by the Board. Thus, in effect acquiring a special B.T.C. training certificate or undergoing the special B.T.C. training is the sole criteria for consideration of appointment as assistant teachers in the primary school. It is a step in aid or a pre qualification for getting appointment as assistant teachers in primary schools. He further submitted that under section 4 of the U.P. Basic Education Act, 1972, it is the function of the Board to organize, coordinate and control the imparting of basic education and teachers training in the State and to conduct the basic training certificate examination and such other examination as the State Government may from time to time by general or special order assign to it. According to him, even though under Rule 4 of 1981 Service Rules a separate cadre of service of each local area has been provided, but it does not restrict the cadre to consist of persons belonging to the local area, as a candidate. Any person, who is citizen of India can apply for being recruited as assistant teacher of junior basic school under Rule 5 read with Rule 7 of the said Rules. Thus, he submitted that restricting the selection of candidates for special B.T.C. training course, a pre qualification for appointment of assistant teachers, by preparation of merit list at the District level is contrary to the provisions of the 1981 Service Rules. It is also violative of Article 15 (1) and 16 (2) of the Constitution of India, as the discrimination is being practiced by the State on the basis of place of birth/residence. He further submitted that the switch over to the policy of preparing merit list at District level from the State level vide Government order dated 31.10.2001 is wholly arbitrary and unconstitutional.

45. Sri Sailendra, learned counsel for the respondents writ petitioners relied upon a decision of the Hon'ble Supreme Court in the case of Govind A. Mane and others v. State of Maharastra and others reported in 2000 UPLBEC-1608, wherein the Hon'ble Supreme Court had held that district wise distribution of seats in the absence of nexus between such distribution and the object sought to be achieved would be violative of Article 14 of the Constitution of India.

46. In the case of B.Ed. Berojgar Sangh district Sonbhadra and others v. State of U.P. and others reported in 1997 (3) UPLBEC-1774, this Court has held that there is no justification for consideration of district wise in respect of appointments of teachers in Junior Basic Schools in the State.

47. It is not in dispute that in the advertisement, which was published in the newspapers, applications were invited for selection of candidates for giving special B.T.C. training for appointment on the post of assistant teachers in primary schools run by the Board in rural areas. Thus, having the special B.T.C. training is a pre qualification for getting appointment as assistant teacher. Under 1981 Service Rules, Rule 4 provides separate cadre of service for each local area. The recruitment of assistant teachers under Rule 5 is not confined to the residence of that local area only. In fact, under Rule 7 of 1981 rules any citizen of India can be a candidate for recruitment to the said post. Thus, the procedure, which has to be followed by the State Government for making selection of candidates for imparting special B.T.C. training for appointment on the post of assistant masters in the primary schools should be inconformity with the provisions of 1981 Service Rules, which does not confine its limit to the candidates of the home district or of a local area alone. If all the vacancies of assistant teachers in the primary schools of various local areas have been clubbed together and advertised on account of expediency and convenience, it was appropriate that the merit list at the State level be prepared and the allocation be done according to the criteria set out in the Government order dated 14.9.2001. In the Government order dated 14.9.2001, the Government has fixed the following criteria for allotment of seat to the candidates.

48. A merit list of all the applications received will be prepared on the basis of quality points of the Educational and other qualifications in accordance with the provisions given in the Government orders mentioned above at the State level, which will be prepared in proportion to the total vacancies for training. The above list will be arranged district wise, inconformity with the vacancies available in the district and a provision of reservation as per the rules will be ensured. The candidates on the merit list shall be allotted as per the following, in order of merit :

a) Home district of the candidates
b) Another district of the Division, wherein Home District is located.
c) Nearest Division to the Home district division of the candidate where the vacancy is available.

49. The plea taken by the learned Advocate General that the students ought to be taught in the local dialct which differs from region to region in the State of U.P. is misconceived, inasmuch, as by restricting the prospective applicants of the home district to apply in that district only presumably by virtue of birth alone in that district does not serve the purpose, as that person may have studied elsewhere and may have forgotten the dialect of the home district. Further Article 15 (1) and Article 16 (2) of the Constitution puts a complete prohibition upon the State from discriminating persons on the basis of birth and place of residence in the matter of employment within the State. In the case of English Medium Students Parents

Association (supra), the Hon'ble Supreme Court had held that:-

"All educational experts are uniformly of the opinion that pupils should begin their schooling through the medium of their mother tongue. There is great reason and justice behind this. Where the tender minds of the children are subject to an alien medium the learning process becomes unnatural. If inflicts a cruel strain on the children which makes the entire transaction mechanical. Besides, the educational process becomes artificial and torturous. The basis knowledge can easily be garnered through the mother tongue. The introduction of a foreign language tends to threaten to atrophy the development of mother tongue. When the pupil comes of age and reaches the Vth standard level, the second language is required to take it as a second language. At the secondary stage the three-language formula is introduced. However, in cases of non-kannada speaking students grace marks upto 15 are awarded. Certainly, it can not be contended that a student studying in a school from Karnataka need not know the regional language. It should be endeavour of every state to promote the regional language of the State. In fact, the Government of Karnataka has done commendably well in passing this Government order. Therefore, to contend that the imposition of study of Kannada throws an undue burden on the students is untenable. Again to quota Mahatma Gandhi :

"The medium of instruction should be altered at once and at any cost, the provincial language being given their rightful place. I would prefer temporary chaos in higher education to the criminal waste that is daily accumulating."

50. As rightly contended by the learned Advocate-General where the State by means of the impugned Government order desires to bring about academic discipline as a regulatory measure it is a mater of policy. The State knows how best to implement the language policy. It is not for the Court to interfere.

Here it is not the case that a different regional language is to be taught to the students in different local areas. The subject in the course is same throughout the State. The medium of teaching is also the same. Only the dialect differs which too has been taken care of by providing allocation of seats in the home district to the candidates under the Government order dated 14.9.2001 out of the merit list prepared at the State level. In the case of Arun Tiwari (supra), the facts were that the assistant teachers in Madhya Pradesh are governed by the Madhya Pradesh Non-Gazetted Class-III Education Service (Non-Collegiate Service) Recruitment and Promotion Rules, 1973, which provided for direct recruitment by competitive examination followed by an interview. During the Eight Plan period i.e. from 1992 to 1997 the Central Government sponsored a scheme known as operation Blackboard Scheme. Under this scheme the Government of India gave financial clearance to the State of Madhya Pradesh to implement this scheme by appointing Additional Teachers in all primary /middle ;schools which had only one teacher in order to improve the standards of education. In order to implement the scheme the State of Madhya Pradesh decided to fill in about 7000 to 11,000 posts of Assistant Teachers in such

schools. The recruitment rules of 1973 were amended on 10.5.1993 by adding proviso, which empowers the State Government to prescribe the criteria and procedure for selection of candidates in any circumstances. The State Government provided that selection of Arts teachers in 1993 will be made by committee instead of junior service selection Board by inviting applications from employment exchange and making selection district wise. Certain persons, who did not even possess the prescribed qualification, challenged the selection process. The Hon'ble Supreme Court held as follows:

"The next contention relates to inviting applications from employment exchange instead of by advertisement. This procedure has been restored to looking to the requirements of a time-bound scheme. The original applicants contended that if the posts had been advertised, many others like them could have applied. The original applicants, who so complain, however, do not possess the requisite qualifications for the post. As far as we can see from the record, nobody who had the requisite qualifications has complained that he was prevented from applying because advertisement was not issued. What is more important, in the special circumstances requiring a speedier process of selection and appointment, applications were invited through employment exchanges for 1993 only. In this context, the special procedure adopted is not unfair. The State has relied upon the case of Union of India v. N. Hargopal where Government instruction enjoining that the field of choice should, in the first instance, be restricted to candidates sponsored by the employment exchanges, was upheld as not offending Articles 14 and 16 of the Constitution. In the case of Delhi Development Horticulture Employees "Union V. Delhi Admn.(SCC at p. 111), this Court approved of recruitment through employment exchanges as a method of preventing malpractices. But in the subsequent and more recent case of Excise Supdt. V. K.P.N. Visweshara Rao this Court has distinguished Union of India vs. Hargopal on the basis of special facts of that case. It has observed that the better course for the State would be to invite the applications from employment exchanges as well as to advertise and also give wide publicity through TV, Radio, etc. The Court had to consider whether persons who had applied directly and not through employment exchange should be considered. This Court upheld their claim for consideration.

51. There are different methods of inviting applications. The method adopted in the exigencies of the situation in the present case cannot be labeled as unfair, particularly when, at the relevant time, the two earlier decisions of this Court were in vogue".

52. The Apex Court in the case of Kailash Chand Sharma v. State of Rajsthan and others JT 2002 (5) SC-591 had held that the award of bonus marks to the residents of the district and the residents of the rural areas of the district amounts to impermissible discrimination and there is no rational basis for such preferential treatment. In paragraphs 14 and 15 of the reports, the Apex Court has held as follows :

"Before proceeding further we should steer clear of a misconception that surfaced in the course of arguments advanced on behalf of the State and some

of the parties. Based on the decisions which countenanced geographical classification for certain weighty reasons such as socio economic backwardness' of the area for the purpose of admission to professional colleges, it has been suggested that residence within a district or rural area of that district could be a valid basis for classification for the purpose of public employment as well. We have no doubt that such a sweeping argument which has the overtones of parochialism is liable to be rejected on the plain terms of Article 16 (2) and in the light of Article 16 (3). An argument of this nature files in the face of the peremptory language of Article 16 (2) and ;runs counter to our constitutional ethos founded on unity and integrity of the nation. Attempts to prefer candidates of a local area in the State were nipped in the bud by this Court since long past. We would like to reiterate that residence by itself- be it be ;within a stage region, district or less area within a district cannot be a ground to accord preferential treatment or reservation, save as provided in Article 16 (3). It is not possible to compartmentalize the state into district with a view to offer employment to the residents of that district on a preferential basis . At this juncture it is appropriate to undertake a brief analysis of Article 16".

53. Article 16, which under clause (1) guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State reinforces that guarantee by prohibiting under clause (2) discrimination on the ground only of religion, race, caste, sex, desent, place of birth, residence or any of them. Be it noted that in the allied Article- Article 15, the word 'residence' is omitted from the opening clause prohibiting discrimination on specified grounds. Clauses (3) and (4) of Article 16 dilutes the rigour of clauses (2) by conferring an enabling power on the parliament to make a law prescribing the residential requirement within the State in regard to a class or classes of employment or appointment in the office under the State and (ii) by enabling the State to make a provision for the reservation of appointments or posts in favour of any backward class of citizens which is not adequately represented in the services under the State. The newly introduced clauses (4-A) and (4-B), apart from clause (5) of article 16 are the other provisions by which the embargo laid down in Article 16 (2) in somewhat absolute terms is lifted to meet certain specific situations with a view to promote the overall objective underlying the Article. Here, we should make note of two things firstly, discrimination only on the ground of residence (for place of birth) in so far as public employment is concerned is prohibited secondly, Parliament is empowered to make the law prescribing residential requirement within a State or union territory, as the case may be, in relation to a class or classes of employment. That means, in the absence of parliamentary law, even the prescription of requirement as to residence within the state is a taboo. Coming to the first aspect, it must be noticed that the prohibitory mandate under Article 16 (2) is not attracted if the alleged discrimination is on grounds not merely related to residence, but the factum of residence is only taken into account in addition to other relevant factors. This effect, is the import of the expression 'only'.

54. In paragraph 24, 25 and 32 the Apex Court further held as follows:

"Before examining the further pleas in support of the impugned action taken by the State it would be apposite to refer to the decision in State of Maharashtra v. Raj Kumar, on which reliance has been placed by the High Court and reference has been made in the course of arguments before us. In that case a rule was made by the state of Maharasthra that a candidate in order to be treated as a rural candidate must have passed SCC examination which is held from a village or a town having only C type municipality. The object of the rule, as point out by this Court, was to appoint candidates having full knowledge of rural life and its problems so that they would be more suitable for working as officers in rural areas. The rule was struck down on the ground that there was no nexus between classification made and the object sought to be achieved because as the rule stands any person who may not have lived in a village at 11 can appear for SCC examination from a village an yet become eligible for selection'. The rule was held to be violative of Article 14 and 16. Another point discussed by the Court about the propriety to giving bonus marks for the rural candidates and the Court held thus:

"The rules also provide that viva-voce board would put relevant questions to judge the suitability of candidate for (sic) in rural areas and to test whether or not they have sufficient knowledge of rural problems, and this no doubt amounts to a sufficient safeguard to ascertain the ability of the candidate regarding his knowledge about the affairs of the village. In such a situation there was absolutely no occasion for making an express provision for giving weightage, which would virtually convert merit into demerit and demerit into merit and would be perse violative of article 14 of the Constitution as being an impermissible classification . The rule of weightage as applied in this case is mainly unreasonable and wholly arbitrary and cannot be sustained.

"25. This decision is not a direct authority for the proposition that a citizen cannot be preferred for employment under the State on the ground that he or she hails from rural area. However, what has been laid down in regard to the first point assumes some relevance in the cases on hand. The criterion for identifying a rural candidate was held to be irrelevant , as it had no nexus with the object sought to be achieved. In the present case, the position is much worse as the impugned circular does not spell out any criteria or indicia to determine whether an applicant is a rural candidate."

32. The justifiability of the plea stemming from the premise that uplifting the rural people is an affirmative action to improve their lot can be tested from the concrete situation which confront us in the present cases. We are here concerned with the selections to the posts of teachers of primary schools, the minimum qualification being SCC coupled with basic training course in teaching. Can the Court proceed on the assumption that the candidates residing in the town areas with their education in the schools or colleges located in the towns or its peripheral areas stand on a higher pedestral than the candidates who had studied in the rural area schools or colleges ? Is the latter comparatively a disadvantaged and economically weaker segment when

compared to the former ? We do not think so. The aspirants for the teachers jobs in primary schools but they from rural area or town area do not generally belong to affluent class or poor background. By and large, in the pursuit of education, they suffer and share the same handicaps as their fellow citizens in rural areas. It cannot be said that the applicants from non-rural areas have access to best of the schools and colleges which the well to do class may have. Further, without any data, it is not possible to presume that the schools and colleges located in the town small or big and their peripheral areas are much better qualitatively, that is to say, from the point of view of teaching standards or infrastructure facilities so as to give an edge to the town candidates over the rural candidates."

55. The Apex Court also repelled the plea regarding local dialect and resident of rural area with the following observations:

"Shri Rajeev Dhawan appearing for the selected candidates who have filed.SLP C No. 10780 of 2001, did his best to support the impugned circular mainly on the second ground, namely, better familiarity with the local dialect. The learned counsel contends that when the teachers are being recruited to serve in gram Panchayat areas falling within the concerned panchayat samiti, those hailing from the particular district and the rural areas of that district are better suited to teach the students within that district and the panchayat areas comprised therein. He submits that the local candidates can get themselves better assimilated into the local environment and will be in a better position to interact with the students at primary level. Stress is laid on the fact that though the language/mother tongue is the same, the dialect varies from district to district and even within the district. By facilitating selection of local candidate to serve the panchayat run schools, the State has not introduced any discrimination on the ground of residence but acted in furtherence of the goal to impart education. Such candidates will be more effective as primary school teachers and more suitable for the job. It is, therefore, contended that the classification is grounded on considerations having nexus with the object sought to be achieved and is not merely related to residence. We find it we feel that undue accent is being laid on the dialect theory without factual foundation. The assertion that dilect and nuisances of the spoken language varies from district to district is not based upon empirical study or survey conducted by the State. Not even specific particulars are given in this regard. The stand in the counter affidavit (extracted supra) is that each zone has its distinct language. If that is correct the zila parishad should have mentioned in the notification that the candidates should know particular language to become eligible for consideration. We are inclined to think that reference has been made in the counter to language , instead of dialect rather inadvertently. As seen from the previous sentence, the words dialect and language are used as inter changeable expressions, without perhaps understanding the distinction between the two. We therefore, taken it that what is meant to be conveyed in the counter is that each zone has a distinct dealect or vernacular and there are local candidates of the district (who) would be in a better position to teach and interact with the students. In such a case, the state government should have identified the

zones in which vernacular distinilarities exist and the speech and dialect vary. That could only be done on the basis of scientific study and collection of relevant data. It is nobody's case that such an exercise was done. In any case, if these differences exist zone-wise or region-wise, there could possibly be no justification for giving weightage to the candidates on the basis of residence in a district. The candidates belonging to that zone, irrespective of the fact whether they belong to x, y or z district of the zone could very well be familiar with the a different dialect peculiar to the zone. The argument further breaks down, if tested from the stand point of award of bonus marks to the rural candidates. Can it be said reasonably that candidates who have settled down in the town will not be familiar with the dialect of the district ? Can we reasonably proceed on the assumption that rural are a candidates are more familiar with the dialect of the district rather than the town area candidates of the same district? The answer to both the questions in our view cannot be in the negative. To prefer the educated people residing in villages over those residing in towns- big or small of the same district, on the mere supposition that the former (rural) candidates will be able to teach the rural students better would only amount to creating an artificial distinction having no legitimate connection to the object sought to be achieved. It would then be a case of discrimination based primary on residence which is prescribed by Article 16 (2)."

56. "38. One more serious infirmity in the impugned circular is that it does not spell out any criteria or indici for determining whether the applicant is a resident of rural area. Everything is left held with the potential of giving rise to varying interpretations thereby defeating the apparent objective of the rule. On matters such as duration of residence, place of schooling etc. there are bound to be controversies. The authorities, who are competent to issue residential certificates are left to apply the criteria according to their thinking which can by no means be uniform. The decision in the State of Maharastra vs. Raj Kumar is illustrative of the problem created by vague or irrelevant criteria. In that case a rule was made by the state of Maharastra that a candidate will be considered a rural candidate if he had passed SSC examination held from a village or a town having only "c" type municipality. The object of the rule, as noticed by ;this Court, was to appoint candidates having full knowledge of rural life so that they would be more suitable for working as officers in rural areas. The rule was struck down on the ground that there was no nexus between classification made and the object sought to be achieved because' as the rule stands, any person who may not have lived in a village at all can appear for SSC examination from village and yet become eligible for selection'. The rule has been held to be violative of Article 14 and 16. When no guidance at all is discernible from the impugned circular as to the identification of their residence of the applicants especially having regard to the indefinite nature of the concept of residence, the provision giving the benefit of bonus marks to the rural residents will fell foul of Article 14.

57. The aforementioned decision has been subsequently followed by the Apex Court in the case of Harshendra Chaubissa and others v. State of Rajasthan and others JT 2002 (6) SC-553,

In paragraph 12 of the report, the Apex Court has held as follows:

"12. The second ground urged by the State is equally irrelevant and untenable. Most of the reasons given by us in the judgment just delivered in teachers' cases will held good to reject this plea. No factual det ails nor material has been placed before us to substantiate that the spoken language and dialect varies from district to district. It will not be reasonable to assume that an educated person belonging to a contiguous district or districts will not be able to effectively communicate with the people of the district in which he is appointed or that he would be unfamiliar with the living conditions and culture of that district. He cannot be regarded as an alien in a district other than his native district. If any classification has to be done in this regard, it should be based on a scientific study but not one some broad generalization. If any particular region or area has some peculiar culture or linguistic features warranting a differential treatment, for the purpose of deploying personnel therein, that could only be done after conducting a survey and identifying such regions or districts. That is the minimum, which needs to be done. There is no factual nor rational basis to treat each district as a separate unit for the purpose of offering public employment. Above all, it is wrong to assume that the candidates belonging to rural areas than the candidates living in nearby towns. The criteria of merit cannot be allowed to be disputed by taking resort to such artificial differentiation and irrelevant assumptions. On the material placed before us, we have no hesitation in holding that the addition to bonus marks to the applicants belonging to the same district and the rural areas of that district would amount to discrimination, which falls foul of Articles 14 and 16.

58. Applying the principles laid down by the Apex Court in the aforementioned cases to the present case, we find that restricting the selection and preparation of merit list at the District level are not at all be justified and it amounts to discrimination. In the present case taking into consideration the exigencies the State Government had decided to prepare the merit list at the State level and for restoring it to District level the reasons advanced by the State Government are irrelevant. Thus, the action of the State in restoring the preparation of merit list from State level to District level is arbitrary and is violative of Article 15 (1) and 16 (2) of the Constitution of India.

Point No. 6

Article 350-A of the Constitution of India provides as follows:

"It shall be the endeavour of every State and of every local authority with the State to provide adequate facilities for instruction in the mother tongue at the primary stage of education to children belonging to linguistic minority groups. And the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.

59. Thus, from a reading of Article 350-A of the Constitution of India, it is clear that it enjoins the State and every local authority within the State to make efforts, to provide adequate facilities for

instructions in the mother tongue at the primary stage of education to children belonging to linguistic minorities. This provision is applicable only for education to children belonging to linguistic minorities. It is not the case of appellants nor it has been suggested by Mr. P.S. Baghel, learned counsel , who pressed into aid the provision of Article 350-A of the Constitution that by the impugned advertisement facilities for education is being provided to the linguistic minorities. The local dialect of some of the children cannot be said to be the mother longue of a linguistic minority. In the State of U.P. the mother tongue is Hindi language and of linguistic minorities either it could be Urdu (for Muslims), English for Christians) and Gurmukhi for Sikhs). Thus, no advantage of benefit can be derived from Article 350-A of the Constitution of India.

Point No. 7.

60. All the primary schools in the State of U.P. are governed by the provisions of U.P. Basic Education Act 1972. Section 3 of the Act provides for constitution of a Board i.e. the U.P. Board of Basic Education, Section 4 of the Act , prescribes the function of the Board. It provides that it should be the function of the Board to organize coordinate and control the imparting of basic education and Teachers training in the State to raise its standard and to co relate with system of education as a whole in the State. Section 13 of the Act gives the power of control to the State Government. Sub Section (1) of section 13 provides that the Board shall carry out such direction, as may be issued to it from time to time by the State Government for the efficient administration of the Act. Section 19 of the Act. Empowers the state government to make rules for carry out the purposes of the Act. The State Government has been empowered to make rules for the recruitment and the conditions of service of persons appointed to the post of officers, teachers and other employees. The state government has framed U.P. Basic Education (Teachers) Service Rules 1981 (hereinafter referred to as the 1981 Service Rules). Section 4 of the 1981 Services Rules provides for the strength of the service. It reads as follows :

"4. Strength of the service (1) There shall be separate cadres of service under these rules for each local area.

(2) The strength of the cadre of the teaching staff pertaining to a local area and the number of the posts in the cadre shall be such as may be determined by the Board from time to time with the previous approval of the State Government.

Provided that the appointing authority may leave unfilled or the Board may hold in abeyance any post or class of posts without thereby entitling any person to compensation.

Provided further that the Board may, with the previous approval of the State Government, create from time to time such number of temporary posts as it may deem fit.

Rule 5 provides for the source of recruitment. It reads as follows :

"5. Source of recruitment - The mode of recruitment to the various categories of posts mentioned below shall be as follows:

(a)	(i)	Mistress of Nursery Schools	By direct recruitment as Schools provided in Rules.
14 & 15.			
(b)	(ii)	Assistant Masters and Assistant Mistresses of Junior Basic Schools	
(b)	(i)	Headmistresses of Nursery Schools	By promotion as provided in Rule 18
	(ii)	Headmasters and Headmistresses of Junior Basic Schools	By promotion as provided in Rule 18.
	(iii)	Assistant Masters of Senior Basic Schools	By promotion as provided in Rule 18;
	(iv)	Assistant Mistresses senior Basic Schools	By promotion as provided in Rule 18;
	(v)	Headmasters of Senior Basic Schools	By promotion as provided in Rule 18
	(vi)	Head Mistresses of Senior Basic Schools	By promotion as provided in Rule 18;

Rule 7 deals with nationality. It reads as follows ;

"7. Nationality- A candidate for recruitment to a post mentioned in Rule 5 must be :
(a) a citizen of India, or
(b) a Tibetan refugee who came over to India before January 1, 1962 with the intention of permanently settling in India, or
(c) a person of Indian origin who has migrated from Pakistan, Burma, Ceylon and West African countries of Kenya, Uganda and the United Republic of Tanzania (formerly Tanganyika and Zenzibar) with the intention of permanently settling in India.

Provided that a candidate belonging to category (b) or (c) above must be a person in whose favour a certificate of eligibility has been issued by the State Government.

Rule 8 deal with academic qualifications. The relevant portion of Rule 8, which relates to assistant master and assistant mistress of junior Basic Schools is reproduced below:

"8. Academic qualifications (1) The essential qualifications of candidates for appointment to a post referred to in clause (a) of rule 5 shall be as shown below against each:

Post	**Academic qualifications**
(i) Mistress of Nursery Schools	Certificate of Teaching (Nursery) from a recognized training institution in Uttar Pradesh or any other training qualification recognized by Government as equivalent thereto.
(ii) Assistant Master and Assistant	A Bachelor's Degree from a University established by law in India or a

Mistress of Junior Basic Schools	Degree recognized by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate, Hindustani Teachers' Certificate ,Junior Teacher's certificate, Certificate of Teaching or any other training course recognized by the Government as equivalent thereto. Provided that the essential qualification for a candidate who has passed the required training course shall be the same which was prescribed for admission to the said training course. (2) The essential qualification of candidates for appointment to a post referred to in sub clause (iii) and (iv) of clause (h) of Rule 5 for teaching science. Mathematics, craft or any language other than Hindi and Urdu shall be as follows (i) A Bachlor's degree from a University established by law in India or a degree recognized by the Government as equivalent thereto with science, mathematics, craft or particular language, as the case may be , as one of the subjects and (ii) Training qualification consisting of a Basic teacher's certificate, Hindustani Teachers' Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training course
	recognized by the Government as equivalent thereto.

61. Rule 14 provides for determination of vacancies and preparation of list. It reads as follows:

"14. Determination of vacancies and preparation of list.

(1) In respect of appointment, by direct recruitment to the post of Mistress of Nursery Schools and Assistant Master or Assistant Mistress of Junior Basic Schools under clause (b) of Rule 5, the appointing authority shall determine the number of vacancies as also the number of vacancies reserved for candidate belonging to Scheduled Castes, Scheduled Tribes, Backward Classes, dependents of freedom fighters and other categories under Rule 9 and notify the vacancies to the Employment Exchange and in at least two newspapers having adequate circulation in the State as well as in the concerned district inviting applications from candidates possessing prescribed training qualification from the district concerned.

(2) The appointing authority shall scrutinize the applications received in pursuance of the advertisement and the names of candidates received from the Employment Exchange and prepare a list of such persons as appear to possess the prescribed academic qualifications and be eligible for appointment.

(3) The Regional Assistant Director of Education (Basic) may, on the application of a candidate, and for reasons to be recorded, direct that his name be included at the bottom of the list prepared under sub rule (2).

(4) The names of candidates in ;the list prepared under sub rule (2) shall then be arranged in such manner that the candidates who have passed the required training course earlier in point of time shall be placed higher than those; who have passed the said training course later and the candidates who have passed the training course in particular year shall be arranged in accordance with the quality points specified in the appendix.

(5) No person shall be eligible for appointment unless his or her name is included in the list prepared under sub rule (2).

(6) The list prepared under sub rule (2) and arranged in accordance with sub rule 4 shall be forwarded by the appointing authority to the Selection Committee.

62. Rule 16 deals with constitution of Selection Committee. It reads as follows :

"16. Constitution of Selection Committee for selection of candidates for appointment to any post under these rules, there shall be constituted a Selection Committee comprising-
(a) Principal, District Institute and Training--Chairman

(b) District Basic Education Officer--Member-Secretary

(c) Principal, Government Girls Intermediate College at the District Headquarters--Member

(d) District Non-Formal Education Officer--Member

(e) One Specialist in Hindi, Urdu or other languages, as the case may be nominated by District Magistrate--Member

Rule 17- provides for the procedure for direct recruitment to a post for teaching subjects other than language. It reads as follows :

"17-A. Procedure for direct recruitment to a post for teaching subjects other than language (1) The Selection Committee shall consider the candidates for selection on the basis for the list referred to in sub rule (5) of Rule 14 or sub rule (2) of Rule 15, as the case may be, prepared a list of selected candidates in the order in which their names appear in the said list. If two or more candidates have equal quality points, the name of the candidate who is senior in age shall be placed higher in the list. The Selection Committee shall forward the list to the appointing authority.

(2) The list prepare under sub rule (1) shall remain vali for one year form the date of its preparation.

(3) Where the number of selected candidates is more than the number of vacanciesk and all the selected candidates do not get appointments under sub rule (1) or Rule 19, the District Basic Education Officer shall forward the list of such selected candidates as have not been able to get appointment due to non-availability of vacancies, along with their applications and other particulars to the Regional Assistant Director of Education (Basic), for the purpose of utilizing the list in a district within his region where sufficient number of selected candidates

are not available to fill the vacancies in such district.

(4) On receiving the list referred in sub rule (3), the Regional Assistant Director of Education (Basic) shall forward the list alongwith the applications and the particulars of the select, candidates, to a District Basic Education Officer within is region, where sufficient number of candidates are not available to fill the vacancies. In so forwarding the list, the Regional Assistant Director of Education (Basic) shall take into account the options given by select candidates is regard to his posting in districts.

(5) On receiving the list referred to in sub rule (4), the District Basic Education Officer shall place the list alongwith applications on other particulars of the candidates, before the Selection Committee constituted under Rule 16.

(6) The Selection Committee shall consider the candidates mentioned in the list referred to in sub rule (4) and prepare a list of selected candidates in accordance with sub rule (1) and include their names at the bottom in the list prepared under sub rule (1) and forward the entire list to the appointing authority.

(7) Where the list forwarded to the Region Assistant Director of Education (Basic) under sub rule 3 cannot be utilized in his region due to non availability of vacancies the Regional Assistant Director of education (Basic) shall forward the list to the Secretary of the Board who shall thereafter forward the list to a district Basic Education Officer in whose district sufficient number of candidates are not available to fill the vacancies. In so forwarding the list, the Secretary of the Board shall take into account the options given by selected candidates in regard to their positions in districts.

(8) On receiving the list referred to in sub rule (7), the District Basic Education Officer shall place the list alongwith applications and other particulars of the candidates, before the Selection Committee constituted under Rule 16.

(9) The Selection Committee shall consider the candidates mentioned in the list referred to in sub rule 7 and prepare a list of selected candidates in accordance with sub rule 1 and include their names at the bottom in the list prepared under sub rule 1 and forward the entire list to the appointing authority."

63. Rule 19 deals with appointment. It reads as under:

"19. Appointment (1) the appointing authority shall make appointment to any post referred to in Rule 5 by taking the names of the candidates in the order in which they stand in the list prepared under Rule 17 or 17-A or 18, as the case may be.

(2) The appointing authority may make appointments in the temporary and officiating vacancies also from the lists referred to in sub rule 1.

(3) No appointment shall be made except with the recommendation of the Selection Committee, and, in the case of direct recruitment except on production of residence certificate issued by the Teshildar."

64. From a reading of the provisions of the Act and 1981 Services Rules

reproduced above, it is clear that it is the Board, which has to control the imparting of basic education and teachers training in the State. Further, under 1981 Service Rule, the separate cadre of assistant teachers for each local area has been provided. The academic qualifications prescribed for appointment of assistant masters an assistant mistress of Junior Basic Schools is a Bachelor degree from University established by law in India or a degree recongnised by the Government as equivalent thereto together with the training qualification consisting of Basic Teacher's Certificate. Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training course recognised by the Government as equivalent thereto. There is no restriction for a person who is an Indian citizen from applying to the post of assistant teacher provided, he possesses the academic qualifications prescribed under the Rule 8. The selection committee constituted under rule 16 of the rules primarily consists of persons from the district in respect of which the selection is to be made, but does not restrict the making of an application from a person, who is not ordinarily resident of that district. It is open to all persons, who are citizens of India . It is not in dispute that the present advertisementk has been made for inviting applications from eligible candidates for undergoing special B.T.C. training for appointment on the post of assistant teachers in junior Basic schools run by the Board. It is a step in aid for making persons eligible for appointment on the post of assistant teachers in accordance with the Act and the Rules. However, the appointment of assistant teachers is being restricted to only those persons, who have successfully completed special B.T.C. training. The Special B.T.C. training has been recognized by the State Government as equivalent training course for the purposes of academic qualification for appointment on the post of assistant teachers and assistant mistress in junior basic schools. It may be mentioned here that the Parliament has enacted the National Council for Teachers Education Act, 1993, (hereinafter referred tok ask the 1993 Act) which provides for recognition of teachers education institutions. Section 14 of the 1993 Act, provides for recognition of institution offering course or training in education. Section 15 provides for permission for a new course or training by recognised institution. It reads as follows :

"15. Permission for a new course or training by recognised institution (1) Where any recognised institution intends to start any new course or training in teacher education it may make an application to seek permission therefore to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid alongwith the application under sub section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub section 1, and after obtaining from the recognized institution such other particulars as may be considered necessary, the Regional Committee shall -

(a) If it is satisfied that such recognised institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper conduct of the new course or

training in teachers education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulation; or

(b) It is of the opinion that such institution does not fulfil the requirements laid down in sub clause (a) pass an order refusing permission to such institution, for reasons to be recorded in writing;

Provided that before passing an order refusing permission under sub- clause (b), the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

(4) Every order granting or refusing permission to a recognized institution for a new course or training in teacher education under sub section (3), shall be published in the Official Gazette and communicated in writing or appropriate action to such recognised institution and to the concerned examining body, the local authority the State Government and the Central Government.

Under Section 12 of the 1993 Act, functions of the council has been provided. Clause (e) of Section 12 provides for lying down norms for specific category of courses or training in teacher education including the minimum eligibility criteria for admission thereof and the method of selection of candidates duration of the course, course contents and mode of curriculum.

65. Section14 provides for affiliating body to grant affiliation after recognition or permission by the council. It reads as follows:

"16. Affiliating body to grant affiliation after recognition or permission by the council- Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day.

(a) grant affiliation, whether provisional or otherwise, to any institution or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognized institution,

Unless the institution concerned has obtained recognition from the Regional Committee concerned, under section 14 or permission for a course training under Section 15."

66. Section 32 empowers the council to make regulations. Clause (d) (ii) of sub section (2) or Section 32 empowers the council to make regulation for lying down the norms, guidelines and standard in respect of the specified category of courses or training in teacher education under Clause (e) of section 12. The special B.T.C. training has been recognized by the State Government as an equivalent training course for the purposes of academic qualification for assistant masters and assistant mistress of Junior Basic Schools. However, no material has been placed before the Court that the special B.T.C. training course has also been recognized by the National Council of Teachers Education established under Section 3 (1) of 1993 Act, as a teachers training course. Section 16 of the 1993 Act, prohibits the examining body for holding any examination whether provisional or otherwise for a course of training

conducted by a recognized institution concerned which has not obtained permission for the said course or training under Section 15 of the1993 Act. A Division Bench of this Court in the case of Upendra Rai V. State of U.P. and others reported in 2000 (2) UPLBEC-1430 has held that the National Council for Teachers Education Act 1993 overrides the law enacted by the State Legislature to the extent that the law is repugnant to that Act. This Court has held as follows:

"We have bestowed our thoughtful consideration to the submissions across the bar. So far as the National Council for Teacher Education Act 1993 is concerned , it was enacted as stated supra, to provide for the establishment of a national council of Teachers Education with a view to accomplishing planned and coordinated development for teachers education system throughout the country and regulation and proper maintenance of norms and standards in that teachers education system and therefore, in case, any provision in the U.P. Basic Education Act 1972 or rule made thereunder is found to be in conflict with any provision embodied in the aforestated Central Act., the same will have to be discounted to the extent of inconsistency in view of the provisions contained in Article 254 of the Constitution of India, clause (1) of which provides that if any provision of law made by the Legislature of State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact or to any provision in an existing law with respect to one of the matters enumerated in the concurrent list, then, subject to the provisions of sub clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be the existing law, shall prevail and the law made by the Legislature of the State shall to the extent of the repugnancy, be void,. Clause (2) of Article 254 visulises that where a law made by the Legislature of a state with respect to one of the matters enumerated in the Concurrent list contains any provision repugnant to the provison of an earlier law made by Parliament or an existing law with respect to that matter, then , the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State provided that nothing in this clause shall prevent Parliament from enacting at anytime any law with respect to the same matter including a law adding to, amending, varying or dealing with the law so made by the Legislature of the State.

67. The question that begs consideration is whether any provision contained in the U.P. Basic Education Act, 1972, or the U.P Basic Education (Teacher) Service Rules, 1981 is reougnant to any provision contained in the Central Act. The teacher education as defined in Section 2 (1) of the Central Act means programmes of education, research or training of persons for equipping them to teach at primary , primary secondary and senior secondary stages in schools and includes non formal education, part time education, adult education and correspondence education. Section 12 of the Central Act enumerates the functions of the National Council for teacher education as established under sub section (1) of Section 3 of the Act. The functions enumerated in Section 12 inter alia, include (a) lying down guidelines in respect of minimum qualification for a

person employed a teacher in schools or in recognized institutions, (b) lying down norms for any specified category of courses or trainings in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum, and (c) formulation of schemes for various levels of teacher education and identify recognized institutions and set up new institutions for teacher development programme. Section 14 of the Act enjoins upon every institution offering or intending to offer course or training teacher education to make an application to the Regional Committee concerned for grant of recognition. Section 15 requires prior permission of the Regional Committee as a condition precedent to starting any, new course or training in teacher education by any recognized institution and according to Section 16 which has an overriding effect, as the expressions 'notwithstanding' anything contained in any other law for the time being in force' suggests no examining body shall, on or after the appointed day, grant affiliation, whether provisional or otherwise, to any institution or hold examination, whether provisional or otherwise, for a course or training conducted by a recognized institution unless the institution concerned has obtained recognition from the Regional Committee concerned, under Section 14 of the permission or a course or training under section 15, section 17 provides for withdrawal of recognition in the event of contravention of the provisions of the Act. Clause (4) of Section 17 visualises that if an institution offers any course or training in teacher education after the coming into force of the order withdrawing recognition or where an institution offering course or training in teacher education immediately before the appointed day fails or neglects to obtain recognition or permission under this Act, the qualification in teacher education obtained pursuant to such course of training or after undertaking a course or training in such institution, shall not be treated as a valid qualification for purposes of employment under the Central Government or 'any state government'. This necessarily implies that qualification in teacher education obtained from an institution duly recognized under the provisions of the Act, would be treated as valid qualifications for purposes of appointment in Schools, and Colleges or other educational body aided by the Central Government or any other State Government, Regard being had to the purpose and object sought to be achieved by the Act as also the provisions thereunder as discussed above, we are persuaded to the view that the person having obtained the qualification in teacher education from a recognized institution would be qualified for being considered in any school, college or other educational body aided by the Central Government or any State Government. The appellant in the instant case, has obtained diploma in education from Zila Shiksha and Prakashikshan Sansthan (DIET), Jabalpur an institution recognized under the provisions of the Act as would be evident from the certificate filed as Annexure 4 to the said petition. The impugned circular and the advertisement in so far as it has the effect of including the candidates having teacher qualification obtained from an institution recognized under the provisions of NCTE Act are void in view of Article 254 of the Constitution. The appellant, in our

opinion, was equipped with the requisite qualification for being considered for appointment as Assistant Teacher in Junior Basic School."

68. In the case of Union of India and others v. Shah Goverdhan Kabra Teacher College JT 2002 (8) SC-269 the Hon'ble Supreme Court has held that the National Council of Teachers Education is an expert body created under the provisions of the National Council of Teacher Education Act 1993 and the Parliament has cast upon such expert body the duty to maintain the standards of education particularly in relation to the Teachers education. Education is the backbone of every democracy and any deterioration in the standard of teaching in B.Ed. course would ultimately provide sub standard prospective teachers, who would be teaching in schools and colleges throughout the country and on whose efficiency the future of the country depends. Inasmuch as the teacher himself has received a sub standard education it is difficult to expect from him a higher standard of teaching to the students of the schools or other institution.

69. It may be mentioned here that the State Government had been recognizing other teachers training courses as equivalent teachers training course for the purpose of academic qualification prescribed under the rule 8 of 1981 Service Rules for appointment of assistant masters and assistant mistress in Junior Basic Schools. It had earlier issued a Government order dated 7.9.1994 by which it had declared the qualification of B.Ed or L.T. as equivalent qualification within the meaning of rule 8 when sufficient candidates with B.T.C. qualifications were not available for appointment in Junior Basic Schools in Uttara Khand run by the Board. The special B.T.C. training course whose duration is two months has not been recognized/approved by the National Council of Teacher Education under the 1993 Act.

70. Thus, it cannot be said to be a recognized teachers training course. The State Government, therefore, could not have declared or treated it as an equivalent qualification for the purposes of appointment of assistant masters and assistant mistress for Junior Basic Schools. The idea for filling up the 20,000 vacant posts of assistant masters in the State for providing education upto Class V is laudable object, but at the same time it has to be ensured that the appointment should be made of the persons, who hold valid and recognized teacher training course certificate. The special B.T.C. training course has not been recognized by the National Council of Teachers Education under the 1993 Act. However, the course of B.Ed. L.T. and other degrees such as B.Ed., B.P.Ed. and D.P.Ed. are recognized courses by the National Council of Teacher Education under the 1993 Act, but the same has not been declared by the State Government as equivalent for the purposes of making appointment on the post of assistant masters/assistant mistresses in Junior Basic Schools run by the Board, as it has been done in the year 1993. It is always open to the State Government, to declare only such courses, which have been recognized by the National Council of Teacher Education as equivalent qualification for appointment on the post of assistant teachers/assistant mistress in Junior Basic Schools and to provide two months special practical training for

teaching in primary schools. Thus, the recognition of Special B.T.C. training course as equivalent qualification the course having been not recognized/approved by the National Council of Teacher Education could not have been done by the State Government. Thus, the Government order recognizing special B.T.C. training course as equivalent qualification is contrary to the provisions of the Act, the Rules and also the 1993 Act.

71. An application has been filed by the learned Advocate General on behalf of the State of U.P. and other State respondents alongwith a supplementary affidavit of Km. Bhawana Shiksharthi, affirmed on 22.9.2002 in which it has been stated that when the selection for training for special B.T.C. Course was finalized, the Uttar Pradesh Public Services (Reservation of Schedule Caste, Schedule Tribes and other Backward Candidates) (Amendment) Act 2001, was in force. The validity of this Act, was challenged before the Hon'ble Supreme Court in writ petition no 488 of 2001 (Akhil Bhartiya Yuva Berojgar Sangh v. State of U.P. and others) wherein the Hon'ble Supreme Court had passed an interim order on 21.1.2002 restraining the State Government from issuing any further executive orders in pursuance of the Amendment Act of 2001. The consequence of the above order of the Hon'ble Supreme Court was that the State Government was prohibited from issuing any orders on the basis of the selection held in pursuance of the Amendment Act 2001. During the pendency of these appeals an Ordinance was issued namely, Uttar Pradesh Public Services (Reservation for Schedule Caste, Schedule Tribes and other backward candidates) (Amendment) Ordinance 2002, which had been subsequently, replaced by an Act being U.P. Act No. 1 of 2002 by which the provisions of U.P. Act no. 4 of 1994 as it previously stood before the Amendment Act of 2001 had been restored.

72. The contention of the learned Advocate General is that since the amendment Act of 2001 has been replaced by Act No. 1 of 2002 and the position of reservation as it stood prior to the amendment Act of 2001 has been restored and a fresh select list has to be prepared for the reserved category candidates.

73. It is not necessary for us to go into the aforesaid question, as we have already held that the preparation of merit list District wise is not justified.

74. In view of the foregoing discussions, we do not find any infirmity in the judgment and order passed by the learned Single Judge except that the reservation of 50% provided for females and 50% for Art and Science group respectively has been validily made. Thus, all the special appeals are partly allowed. The Government order dated 3.8.2001 in so far as it declares the special B.T.C. training course to be equivalent qualifications is quashed. The Government order dated 31.10.2001 in so far as it provides preparation of merit list at the District level is also quashed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23 NOVEMBER, 2002

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

Special Appeal No. 14 of 2002

Bal Krishan Tripathi ...Appellant
Versus
U.P.S.R.T.C. and another ...Opp. Parties

Counsel for the Appellant:
Sri V.K. Barman
Sri Pankaj Barman

Counsel for the Respondents:
Sri Samir Sharma

U.P. State Road Transport Corporation Employees (other than officer) Service Regulation 1981- Regulation 37- read with Industrial Employment (Standing Order) Act 1946- Section 13-B Age of Superannuation- state govt. employees- under deputation brought under corporation- at the time of absorption the retirement age of state govt. employees 58 years- after absorption w.e.f. 12.11.91 employee of Corporation working under Central workshop made to retire at the age of 58 years- the Apex court in case of UPSRTC and others Vs. Bashir Ahmad held- the pensionary benefits be given on the basis of the age of 58 years- held- retirement at the age of 58 proper.
Held- Para 9 and 13

Having heard the learned counsel for the parties we find that it is not in dispute that when the appellant writ petitioner was in State Government service the age of retirement was 58 years. The State Government vide Notification dated 5.7.1972 had only assured that the service conditions of those employees who are absorbed in the Corporation shall not be altered to their detriment. The Certified Standing Orders did provide the age of retirement of 60 years but subsequently when the Regulation was enforced, the age of retirement as provided in Regulation 37 to be 58 years shall be applicable. The Standing Orders lost its efficacy with the enforcement of the Regulation under Section 13-B of the Industrial Employment (Standing Orders) Act. Thus the petitioner has rightly been retired on attaining the age of 58 years.

We are in respectful agreement with the aforesaid decision. Moreover we find that the Hon'ble Supreme Court in the case of UPSRTC and another Vs. Bashir Ahmad in Civil Appeal No. 3933 of 1991 decided on 5.10.1997 had held that the pensionery benefits to the employees must be calculated on the basis that the age of retirement is 58 years. Thus the contention that the appellant writ petitioner was entitled to continue till he attains the age of 60 years is not justified. The reliance placed by Shri V.K. Barman upon the decision of the learned Single Judge of this Court in the case of Chandra Kumar Shukla and the dismissal of the Special Leave Petition by the Apex Court would be of no assistance as the Division Bench of this Court in the case of Lalta Prasad and Sabhapati Singh (supra) have held that those State Government Employees who have been absorbed in the service of the Corporation are also liable to be retired at the age of 58 years and the Apex Court while dismissing the Special Appeal in the case of Chandra Kumar Shukla has not decided any thing on merits.

Case law discussed:
1991(2) UPLBEC-1095
AIR 1991 SC-310
AIR 1989 SC-374
AIR 1991SC 276

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

1. The present Special Appeal has been filed against the judgment and order

dated 18.12.2001 passed by the learned Single Judge wherein the writ petition filed by the appellant writ petitioner has been dismissed.

Briefly stated the facts giving rise to the present Special Appeal are as follows:

2. The appellant writ petitioner was an employee of U.P. Government Roadways. On 1st June, 1972 U.P. State Road Transport Corporation- hereinafter referred as the Corporation was formed. The State Government vide Notification dated 5.7.1972 gave an assurance to all the employees of U.P. Government Roadways that those employees who have gone on deputation to the Corporation and they are absorbed their service conditions would not be changed. In August, 1982 the appellant writ petitioner was absorbed in the Corporation. The appellant writ petitioner has been made to retire on 31.12.2001 on attaining the age of 58 years. According to the appellant writ petitioner in the year 1972, the Certified Standing Orders of the Corporation provided the age of superannuation as 60 years and therefore he is entitled to continue in service till he complete a 60 years of age.

3. Before the learned Single Judge the appellant writ petitioner has relied upon the judgment passed in Civil Misc. Writ Petition No. 2755 of 1996 D.P. Malviya and others decided on 29.8.1996 wherein this Court had been pleased to issue a direction that the order is subject to the decision of the Special Leave Petition pending in the Apex Court or till the petitioner attained the age of 60 years whichever is earlier.

4. The learned Single Judge found that the Special Leave Petition has been decided against the petitioner and the petitioner has failed to demonstrate that he has a right to continue till the age of 60 years. The learned Single Judge further held that there is no reason for entertaining the writ petition under Article 226 of the Constitution of India because of the fact that the petitioner has an alternative remedy by way of filing an appeal before the appellate authority contemplated under the provisions of the relevant Service Rules. Accordingly the writ petition was dismissed.

5. We have heard Shri V.K. Barman, learned Senior counsel assisted by Shri Pankaj Barman on behalf of the appellant writ petitioner and Shri Samir Sharma, learned counsel appearing for the respondents.

6. According to Sri V.K. Barman, learned Senior counsel appearing for the appellant writ petitioners, despite the Notification under Section 13-B of the Industrial Employment (Standing Orders) Act 1946 issued on 12.4.1991 notifying the Regulations framed by the Corporation, the age of retirement of 60 years fixed under the Certified Standing Order's in December, 1972 which continued even in August, 1982, cannot be altered in view of the assurance held out by the State Government in the Notification dated 5.7.1972. He relied upon the decision of this Court in the case of U.P. State Road Transport Corporation and other Vs. Chandra Kumar Shukla and others (C.M. Writ Petition No. 3203 of 1991 decided on 11.2.1998) and the order passed by the Hon'ble Supreme Court dated 17.8.1998 dismissing the Special Leave Petition. He further relied upon the

decision of the Hon'ble Supreme Court in case of S.P. Dubey Vs. M.P.S.R.T.C. and another A.I.R. 1991 S.C. 276 and has submitted that when the Notification has been issued by the State Government specifically stating that the existing staff would not be adversely affected with regard to the service condition and at the time of absorption the age of retirement was 60 years the same cannot be changed.

7. Sri Samir Sharma, learned counsel appearing for the respondent Corporation, however, submitted that undisputedly the age of retirement of the petitioner at the time when he was sent on deputation in the year 1972 as also when he was absorbed in the Corporation in August 1982 was 58 years as was applicable to the State Government employees and up till such time he was absorbed, he continued to be a Government employee. The Certified Standing Orders no doubt provided the age of retirement to be 60 years but after enforcement of the Regulation by issuing a notification on 12.4.1991 under section 13-B of the Industrial Employment (Standing Orders) Act, 1946, the Regulation which provided for the age of retirement of the employees of the Corporation at 58 years came into existence and shall govern the service condition of all its employees including the appellant writ petitioner. He submitted that the Regulations which provided the age of retirement at 58 years does not in any way alter the service condition of the appellant writ petitioner which was available to him in the Government service as the age of retirement is the same i.e. 58 years. He submitted that the decision in the case of Chandra Kumar Shukla (supra) and the dismissal of the Special Leave Petition by the Hon'ble Supreme Court would be of no assistance to the appellant writ petitioner as subsequently this Court in the case of Bachai Lal Vs. UPSRTC Allahabad and others (1991) 2 UPLBEC 1095 had held that the age of retirement of the employees of the U.P. Government Roadways who have been absorbed in the service of the Corporation would be 58 years in view of Regulation 37 of the U.P. State Road Transport Corporation Employees (other than Officer) Service Regulation 1981. This Court had considered the decision of the Hon'ble Supreme Court in the case of S.P. Dubey relied upon by the learned counsel for the appellant petitioner and had further held that the said decision is not applicable. In fact the decision of the Hon'ble Supreme Court in the case of S.K. Siddiqui Vs. M.P.S.R.T.C. (A.I.R. 1991 SC 310) is applicable.

8. He further submitted that the aforesaid decision of the learned Single Judge had been affirmed by the Division Bench in Special Appeal No. 91 of 1991 decided on 14.12.1992. He also relied upon the Division Bench decision in C.M. Writ Petition No. 26243 of 1991 Sabhapati Singh Vs. UPSRTC and another decided on 26.3.1993 wherein the same view has been held. He also relied upon the decision of the Hon'ble Supreme Court dated 15.10.1997 in Civil Appeal No. 3933 of 1991 U.P.S.R.T.C. and another Vs. Bashir Ahmad wherein the Hon'ble Supreme Court had held that pensionery benefit of the employees of the Corporation must be calculated on the basis that the age of retirement is 58 years.

9. Having heard the learned counsel for the parties we find that it is not in

dispute that when the appellant writ petitioner was in State Government service the age of retirement was 58 years. The State Government vide Notification dated 5.7.1972 had only assured that the service conditions of those employees who are absorbed in the Corporation shall not be altered to their detriment. The Certified Standing Orders did provide the age of retirement of 60 years but subsequently when the Regulation was enforced, the age of retirement as provided in Regulation 37 to be 58 years shall be applicable. The Standing Orders lost its efficacy with the enforcement of the Regulation under Section 13-B of the Industrial Employment (Standing Orders) Act. Thus the petitioner has rightly been retired on attaining the age of 58 years.

10. In the case of S.P. Dubey (supra) Hon'ble Supreme Court was considering the case where the company was taken over by the State Government in which the age of retirement was 60 years. In this background the Apex Court held that the age of retirement of the employees of the erstwhile company would be 60 years and not 58 years. This is not the position here. In the present case the age of retirement of the State Government employee during the relevant time was 58 years and at the time of absorption also it was 58 years. This Court in the case of Bachai Lal has held that the decision of the Hon'ble Supreme Court in S.P. Dubey would not be applicable. In Bachai Lal case this Court has held as follows:

"16. On the creation of the Corporation all the employees of the erstwhile U.P. Government Roadways were sent on deputation with the Corporation with a specific condition that their service conditions including retirement benefits would not be changed. This was done vide G.O. dated 5.7.1972. The result was, that the employees of the U.P. Government Roadways who were retiring at the age of 58 years would retire at the same age even after the formation of the Corporation. This was approved by the Supreme Court in the case reported in AIR 1989 SC 374, Hari Shanker Gaur vs. D.D.C. and a Division Bench decision of this Court in Writ Petition No. 3273 of 1982, M.S.A. vs. State of U.P.

17. Such a situation was considered by the Supreme Court in the case reported in AIR 1991 SC 276, S.P. Dubey v. M.P. State Road Transport Corporation. Dubey had, joined the services as a junior clerk in a company known as Central Provinces Transport Service Ltd. In the year 1947. He worked there from 1947 to 30.8.1955. Admittedly the age of superannuation of the employees of the Company was 60 years.

18. The Company was taken over by the State Government on 31.8.1955. While doing so it was specifically mentioned that the existing staff of the company would not be adversely effected with regard to their condition of service.

19. There is no dispute that on the date of taking over according to the Government rules the age of retirement was 58 years but since the Government has given an assurance to the employees of the Company that their service condition will not be changed prejudicially to their existing right, the Supreme Court took the view that on the date when the Company was taken over the government has assured the employees that they will retire at the age

of 60 years, the Corporation could not frame regulations contrary to the directions issued by the State Government.

20. In the instant matter when the petitioners joined service, they were the employees of the State Government working in the Roadways Department. Even under Fundamental Rule 56 their age of retirement was 58 years and the same has been retired under the regulations. Therefore, the decision of S.P. Dubey's case is of no assistance to the petitioner.

21. The controversy involved in the present bunch of cases was exactly similar to one raised in the case of S.K. Siddiqui v. M.P. State Road Transport Corporation, reported in AIR 1991 SC 310. In that case S.K Siddiqui had joined the service in the Transport Department of Madhya Pradesh Government in September, 1960. The age of retirement was 58 years. The Corporation was established in June, 1962. He became an employee of the Corporation. According to the regulations he was to retire on 30.6.1987 on attaining the age of 58 years. He claimed the age of superannuation as 60 years. The Supreme Court considering the earlier judgment in the case of S.P. Dubey (supra) held:-

"We have held that all those employees who joined service with the Company are entitled to continue in service till they attain the age of 60 years. The petitioner does not belonging to that category of employee. He joined service with the State of Madhya Pradesh in September, 1960 when the age of superannuation was 58 years and had continued to be the same till he retired. His case is therefore, distinguishable from that of S.P. Dubey's case. The writ petition is, therefore, dismissed without any order as to costs.

22. In this case also when the petitioners joined the service, their age of retirement was 58 years and under Regulation 37 also they are being retired at the age of 58 years. This decision of the Supreme Court squarely covers the present bunch of cases.

23. Though the Corporation came into existence on 1.6.1972 but the Corporation exercising its power under Section 45 (2) (C) of the Road Transport Corporation Act, 1950 framed regulations known as "Uttar Pradesh State Road Transport Corporation Employees (other than Officers) Service Regulations, 1981" (hereinafter referred to as the Regulations" with the previous sanction of the State Government superseding all existing rules or orders on the subject (emphasis supplied). This regulation was published in the U.P. Gazette vide notification No. 3517/XXX-2-1981 on 19.6.1981.

24. There is no dispute that the Road Transport Corporation Act is a special Act dealing with the establishment and working of the Road Transport Corporation throughout the country. The regulations, framed under the provisions of the said Act, laying down the terms and conditions of the service for its employees, is a special law and it would prevail over the general law contained in the Model Standing Orders or Certified Standing Orders framed for the industrial establishment.

25. The promise made by the Government on 5.7.1972 vide notification

No. 3414/302-170-N-77 giving assurance to the employees of the Corporation that the service condition would not be changed, has been given effect to while framing the regulations. The said regulations have made no change in the age of retirement. It remained the same which was prior to its formation.

26. The final picture which emerges now is that prior to the formation of the Corporation the age of retirement of the employees of Group 'C' was 58 years. The same has been retained under the regulations."

11. The aforesaid decision of Bachai Lal case has been affirmed in Special Appeal No. 91 of 1991 Lalta Prasad Vs. UPSRTC and others decided on 14.12.1992. The decision given in the case of Lalta Prasad (supra) has been followed subsequently by another Division Bench in Writ Petition No. 26243 of 1991 Sabhapati Singh Vs. UPSRTC and another decided on 26.3.1993.

12. The Division Bench of this Court in the case of Sabhapati Singh has held as follows:

"The object of regulation 83 and proviso to new regulation 4 as well as the G.O. dated 5.7.1972 is the same namely, that the conditions of service of the government servants, who were working in U.P. Government Roadways will not be inferior to the conditions before their absorption in the service of the Corporation. Regulation 83 has restated what was contained in the Government Order dated 5.7.1972 and the same thing was reiterated again in the proviso to the new Regulation 4. As is clear from the note appended to Regulation 2, the government servants working on deputation will be governed by Rules and Regulations of their parent department. Service conditions of these deputations, before their absorption in the service of the Corporation, will as such be governed by the service rules, which are applicable to the government servants, according to which, as held by division Bench of this court in the Special Appeal of Lalta Prasad (supra) the age of retirement was 58 years on 1.6.1972 as well as on the date of their absorption in 1982. The effect of these provisions is that the government employees, who were working on deputation in the service of the Corporation, could have been retired upto the date of their absorption at the age of 58 years. After their absorption, it is not open to the corporation to frame any rule or regulation to retire them at the age of lower than 58 years. With effect from the date of absorption in 1982 all the Government servants, who were working on deputation, became the employees of the Corporation and the Standing Orders of the Central Workshop, which were amended in 1978 fixing the age of retirement at 60 years, became applicable to them like any other employees of the Corporation. After the date of absorption, as such, like other employees of the corporation they could be retired at the age of 60 years only. However, on 12.4.1991 the regulations, which provide for retirement at the age of 58 years, were notified under Section 13-B of the Industrial Employment (Standing Orders) Act, 1946. In view of the above position, with effect from 12.4.1991 the employees of the corporation working in the Central workshop can be retired at the age of 58 years. This submission of the learned

counsel, as such, is devoid of merit and cannot be accepted."

13. We are in respectful agreement with the aforesaid decision. Moreover we find that the Hon'ble Supreme Court in the case of UPSRTC and another Vs. Bashir Ahmad in Civil Appeal No. 3933 of 1991 decided on 5.10.1997 had held that the pensionery benefits to the employees must be calculated on the basis that the age of retirement is 58 years. Thus the contention that the appellant writ petitioner was entitled to continue till he attains the age of 60 years is not justified. The reliance placed by Shri V.K. Barman upon the decision of the learned Single Judge of this Court in the case of Chandra Kumar Shukla and the dismissal of the Special Leave Petition by the Apex Court would be of no assistance as the Division Bench of this Court in the case of Lalta Prasad and Sabhapati Singh (supra) have held that those State Government Employees who have been absorbed in the service of the Corporation are also liable to be retired at the age of 58 years and the Apex Court while dismissing the Special Appeal in the case of Chandra Kumar Shukla has not decided any thing on merits.

In view of the foregoing discussions there is no merit in the Special Appeal and is dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2002

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

Special Appeal No. 386 of 1998

Ram Asis Chaudhary and another
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Ashok Khare
Sri R.N. Singh
Sri R.G. Padia
Sri S.P. Shukla

Counsel for the Respondents:
Sri Sabhajeet Yadav
Sri A.K. Gupta
Sri S.K. Lal
Sri Anand Kumar
S.C.

Constitution of India Article 226- Service Law- appointment-at the time of initial appointment at the age of 15 to 17 years- illegal plea about possessing working experience for long spell of time-not available.

Held- Para 10

The appointment of the appellants- writ petitioners was void all initio. The decision relied upon by the learned Advocate for the writ petitioners that if the appellants- writ petitioners have been working for long years and have acquired the qualifications subsequently, would not be applicable in the present case. In as much as, at the time of initial appointment they were not major and there was no provision for relaxing the age.

Case law discussed:

J.T.1993 (4) SC-143
1998 (2) UPLBEC-1237
J.T. 1995 (8) SC-533
1990 (3) SCC-655
AIR 1919 P.C.-129

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

1. All these three special appeals have been filed against the judgment and order dated 1st May, 1998 passed by learned single Judge in Civil Misc. Writ Petition No. 33694 of 1997 whereby the learned single Judge had dismissed the writ petition.

2. Special Appeal No.386 of 1998 has been filed by Ram Ashish Chaudhary and Siya Ram Yadav, whereas Special Appeal No. 389 of 1998 has been filed by Ram Sewak Warun and Ram Charan Verma and Special Appeal No.456 of 1998 has been filed by Krishna Chandra Chaudhary against the aforementioned judgment.

3. Briefly stated the facts giving rise to those present Special Appeals are as follows:

4. All the appellants-writ petitioners claimed to have been appointed as teachers in the months of July and August, 1977 in Sri Ram Janki Inter College, Girdharpur, Kungai, District Siddharthnagar (hereinafter referred to as the "Institution") which was at the relevant time, a Junior High School. The Institution was upgraded as High School and thereafter as Intermediate College in November, 1989. It was brought on grant-in-aid in the year 1996. It appears that the District Basic Education Officer granted approval to the appointment of the appellants-writ petitioners some time in the months of January and February, 1984. After its up gradation as High School, the teachers of the Institution including the appellants-writ petitioners were absorbed as teachers of the High School. When the Institution was upgraded to an Intermediate College, the District Inspector of Schools passed an order dated 11.9.1991 absorbing all the teachers working in the Institution, including the appellants-writ petitioners. By an order dated 27.3.1997, the Joint Director of Education granted financial sanction to the teachers and employees of the Institution including the appellants-writ petitioners. It appears that the Committee of Management filed Civil Misc. Writ Petition No.9942 of 1997 which was disposed of by this Court vide judgment and order dated 20th March, 1997 directing the Director of Education to decide the representation of the Committee of Management within a specified time. The present appellants-writ petitioners filed Special Appeal No. 193 of 1997 which was disposed of vide judgment and order dated 8th April, 1997 with certain directions regarding payment of salary to the appellants. Pursuant to the said directions given by this Court, the Director of Education passed an order on 7.7.1997 holding that the appellants-writ petitioners were not entitled for payment of salary. Feeling aggrieved the appellants-writ petitioners jointly challenged the order dated 7.7.1997 by filing Civil Misc. Writ Petition No. 33694 of 1997 which was dismissed by the learned single Judge vide judgment and order dated 1st May,1998. The judgment and order dated 1st May, 1998 is under challenge in these special appeals.

5. We have heard Sri R.N. Singh and Dr. R.G. Padia, learned Senior Advocates for the appellants-writ

petitioners and Sri Sabhajeet Yadav, learned Standing Counsel & Sri A.K. Gupta, learned Advocate for the Respondents.

6. Sri R.N. Singh, learned Senior counsel submitted that the District Basic Education Officer had approved the list of teachers including the present appellants-writ petitioners vide order dated 6th February, 1984 which is still in existence and has not been cancelled or revoked so far. He further submitted that after the Institution was up graded to the High School and thereafter to the Intermediate College, the District Inspector of School vide order dated 11th September, 1991 had absorbed all the teachers working in the Institution including the appellants-writ petitioners which order is still in existence and has not yet been cancelled or revoked. Thus, it is not open to question the appointment of the appellants-writ petitioners. He further submitted that initial defect in the appointment of the appellants-writ petitioners, if any, stood cured by subsequent orders passed by the District Basic Education Officer and District Inspector of Schools. According to him, when the appellants-writ petitioners were appointed in the year 1977, there was no Rule governing the service conditions of teachers and employees working in the Junior High Schools and for the first time the Rules were framed in February, 1978. His further submission was that even after coming into force of 1978 Rules, the question of their appointments were considered by the District Basic Education Officer who granted approval vide order dated 6th February, 1984. Further, when the Institution was brought under grant-in aid list, the District Inspector of Schools had also approved the absorption of the teachers and employees including the appellants-writ petitioners vide order dated 11th September, 1991. Thus, the appellants-writ petitioners get the status of teachers of High School from 11th September, 1991 on which date, admittedly, they were major and fully qualified. He further submitted that if it is held that they are not entitled for payment of salary after such a long period, it would be too harsh as they have been working on their respective posts for the last more than 23 years. He relied upon the decision of the Hon'ble Supreme Court in ***Dr. M.S. Mudhol and another Vs. Shri S.D. Halegkar and others*** (JT 1993 (4) S.C. 143) wherein it has been held that where there is nothing on record to show that the person has projected his qualifications other than what he possessed, the selection committee, for some reason or the other, had thought it fit to choose him for the post, it would be inequitous to make him suffer for the same now. He also relied upon a Division Bench decision of this Court rendered in the case of ***Gaya Prasad Srivastava Vs. High Court of Judicature at Allahabad and others*** (1998) 2UPLBEC 1237), wherein it has been held that the competent authority while appointing some one initially must have taken into consideration in the normal course of human business the exigencies of service to employ him at 16 years of age or so, otherwise by act and conduct the age is deemed to have been relaxed. He further submitted that even if the order of appointment, which has been approved by District Basic Education Officer and District Inspector of Schools, is said to be illegal or void, it requires cancellation and till such time it is not cancelled, full effect is to be given. He relied upon a decision of the Hon'ble

Supreme Court in ***State of Kerala vs. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and others*** **(JT 1995 (8) S.C. 533)**, wherein it has been held that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such orders will, in fact, be effective inter partes until it is successfully challenged in higher forum. Mere use of the word "void" is not determinative of its legal impact. The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise.

7. Dr. R.G. Padia, learned Senior Advocate has adopted the arguments of Sri R.N. Singh, learned Senior Counsel.

8. Sri Sabhajeet Yadav, learned Standing counsel submitted that it is not in dispute that on the date when the appellants-writ petitioners were appointed, they were about 14 to 17 years age. Thus, they could not have been appointed as Assistant Teachers for teaching the students in the Institution in Junior High School. Their appointments were made in July, 1977 and August, 1977, which appears to be ante dated orders, as *the* ***Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978****,* (hereinafter referred to as the 1978 Rules) were enforced on 13th February, 1978 which prescribe for minimum qualification and also the age limit. Thus, he submitted that subsequent approval of the District Basic Education Officer and District Inspector of Schools would not be of any assistance to the appellants-writ petitioners. He further submitted that if a person, on the date of his appointment, did not possess minimum qualification and also the minimum age, as prescribed under the 1978 Rules, the appointment even if made, would be of no consequence.

9. Learned Standing Counsel relied upon a decision of the Supreme Court rendered in ***District Collector & Chairman, Vizianagaram Social Welfare Residential School Society Vizianagaram and another Vs. M. Tripura Sundari Devi (1990)*** **3 S.C.C. 655)** wherein it has been held that even if an unqualified person has been appointed, by mistake, it amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. He further submitted that if by fraudulent act the appellants- writ petitioners have been able to obtain appointment that would not justify their claim for getting salary from the State exchequer.

10. Having heard learned counsel for the parties we find that it is not in dispute that all the appellants- writ petitioners, when they were appointed in the month of July and August, 1977, were in between the age of 14 to 17 years. The Institution was a private institution. The service Rules were enforced on 13 February, 1978 which provided the minimum qualifications and the minimum age limit and also for constitution of a selection committee. The Institution remained unaided till 1996 i.e. for a period of more than 17 years from the date of appointment of the appellant- writ

petitioner. The District Basic Education Officer has approved the appointment of the appellants- writ petitioners without going into the question whether they has to were major or not on the date of appointment. Likewise , the District Inspector of Schools also did not go into the question about the minimum qualifications required at the time of appointment. Thus, no advantage can be derived from the order of District Basic Education Officer and District Inspector of Schools that they had approved their absorption. It may be mentioned here that at the time of appointment Ram Sewak Warun and Siya Ram Yadav were Intermediate, whereas Ram Charan verma and Krishna Chandra Chaudhary were High School and Ram Ashish Chaudhary was only Junior High School i.e. Class VIII. It may also be mentioned here that they were all in between the age of 14 to 17 years. It may be mentioned that the appointment on the post of teacher is a contract between the Committee of Management and the person so appointed. Any contract can be entered into only by a contracting party who is major and no contract can be entered into by a minor. However, any person can act on behalf of the minor. A contract entered into by a minor is a void contract in terms of Section 11 of the Indian Contract Act, 1872. In **Ma Hnit and others Vs. Hashim Ebrahim Metev and another (A.I.R. 1919 Privy Council, 129)**, it has been held that a contract by minor is void and not merely viodable. Thus the appointment of the appellants- writ petitioners was void all initio. The decision relied upon by the learned Advocate for the writ petitioners that if the appellants- writ petitioners have been working for long years and have acquired the qualifications subsequently, would not be applicable in the present case. In as much as, at the time of initial appointment they were not major and there was no provision for relaxing the age.

11. On the facts and in the circumstances of the case, in our view, the learned Single Judge has rightly held that the appointment of the writ petitioners was illegally made.

12. In view of the foregoing discussions, we do not find any merit in these special appeals. The Special Appeals fail and are dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2002

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

Civil Misc. Writ Petition No. 187 of 2000

M/s Gurcharan Industrial works
...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri S.D. Dube

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

Central Excise and Salt Act 1944 read with - Central Excise and Custom Laws (Amendment) Act 1977- 11-B- Refund of amount- claim for Refund- small scale industry - exempted from excise duty- Petitioner under ignorance deposited the excise duty- application for refund made on 24.2.97 - after the enforcement of Act No. 40 of 1991- Rejection of claim held - proper.

Held- Para 18

The principles laid down by the Hon'ble Supreme Court in the case of Mafat Lal Industries Limited and Jain Spinners Limited (supra), we are of the view that the provisions of Section 11-B (2) has to be taken into consideration while granting the refund pursuant to the orders passed by this Court in the petitioner's own Writ Petition No. 358 of 1987 and it is not correct to say that the matter relating to refund had attained the finality as the Special Leave Petition was filed beyond time by 115 days which delay was not condoned by Hon'ble Supreme Court , as the actual refund of the amount had not been made by the authorities and the application for refund in the prescribed proforma was only made on 24.2.1997 i.e. after coming into force of Act No. 40 of 1991 substituting new Section 11-B in the Act.

Case law discussed:

(1997) 5SCC-536
2000 (120) ELT 291 (SC)
1992 (61) ELT 321
1998 (98) ELT 583
JT 1995 (i) SC-471

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

1. By means of the present writ petition, filed under Article 226 of the Constitution of India, the petitioner M/s Gurcharan Industrial Works, seeks a writ, order or direction in the nature of certiorari quashing the orders dated 27.1.1999 and order dated 19.11.1999, said to have been dispatched vide registered letter no. 5803 dated 22.11.1999, contained in annexure no. 7 and 9 to the writ petition.

2. The petitioner has also sought a writ order or direction in the nature of mandamus commanding the respondents to refund the amount of Rs.4,74,330 alongwith interest at the rate of 18% per annum from December, 1987 till the date of payment.

3. Briefly stated the facts giving rise to the present writ petition are that the petitioner claims to be a manufacturer of Rice Mill Plant and its part which fall under the tariff item no. 68 as it was existing during the relevant time under the provisions of the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act). It has been registered as a small scale industry and was initially exempted from the payment of excise duty on its clearances. However, the petitioner paid excise duty under mistake and on discovery of the mistake, it filed an application for refund under Section 11-B of the Act as it then stood. The refund application was rejected by the Assistant Collector, Central Excise. The appeal filed by the petitioner was also dismissed by the Collector (Appeals) Central Excise. Thereafter, the petitioner approached this Court by filing Civil Misc. Writ Petition No. 358 (Tax) of 1987 wherein it had challenged both the orders passed by the Assistant Collector as well as Collector (Appeals). This Court vide judgment and order dated 9.12.1987 allowed the writ petition. The operative portion of the said judgment is reproduced below:

"In the result, this petition succeeds and is allowed. A direction is issued to the opposite parties to refund the duty collected during 1983-84 and 1984-65 on clearance for home consumption after deducting the amount already paid."

4. It may be mentioned here that this Court had considered the question of unjust enrichment and had negative the plea. However, the Court did not grant the claim of interest on refund illegally

disallowed by the authorities. The Central Government filed Special Leave Petition No. 7561 of 1988 against the judgment and order dated 9.12.1987 passed by this court in the aforementioned writ petition before the Hon. Supreme Court. The Hon. Supreme Court vide order dated 8.5.1995 dismissed the Special Leave petition as there was no satisfactory explanation of delay of 115 days. Thereafter the petitioner made an application on 24.2.1997 for refund of the sum of Rs.4,74,330/-. The Assistant Collector, Central Excise, respondent no. 2 issued notice on 10.12.1997 calling upon the petitioner to show cause as to why the amount of refund should not be credited to the Consumer Welfare Fund under Section 11-B of the Act. The petitioner submitted its reply. The Assistant Commissioner, vide order dated 17.1.1999, rejected the claim of the petitioner on the ground that a sum of Rs.1,74,330/- pertaining to the period 10.10.1984 to 4.3.1985 was time barred as the same was not under dispute in legal proceedings. As regards the refund of claim of Rs. 3 lacs, since the petitioner had failed to furnish any satisfactory evidence that they had not passed on the incidence of duty to any other person, the same was liable to be credited to the Consumer Welfare Fund. The petitioner challenged the aforesaid order in appeal before the Commissioner (Appeals) who vide order dated 9.11.1999 had rejected the appeal. Both these orders are under challenge in the present writ petition.

We have heard Sri S.D. Dubey, learned counsel for the petitioner and Sri S.P. Kesarwani learned standing counsel for the respondents.

5. Since, counter affidavit and rejoinder affidavit have been exchanged inter-se parties, with the consent of the learned counsel for the parties, the writ petition is finally decided at the admission stage itself in accordance with the Rules of the Court.

6. The learned counsel for the petitioner submitted that the Central Excise and Customs Laws (Amendment) Act, 1991 (Act No. 40 of 1991) came into force w.e.f. 20.9.1991, whereby Section 11-B of the Act was substituted by a new Section, whereas in the present case, the refund had been allowed by this Court vide judgment and order dated 9.12.1987 passed in civil misc. writ petition no. 358 (Tax) of 1987 and when the Government of India filed Special Leave Petition No. 7561 of 1988, before the Hon. Supreme Court which was barred by 115 days in the year 1988 itself, the result was that the judgment and order dated 9.12.1987 became final before coming into force of the Act No. 40 of 1991. Thus, the respondent no. 2 and 3 have wrongly rejected the claim of refund by applying the provisions of Section 11-B of the Act. He relied upon the decision of Constitution Bench of Hon. Supreme Court in the case of Mafatlal Industries Limited and others vs. Union of India and others reported in (1997) 5 SCC 536, where it has been held that where the refund proceedings have finally terminated in the sense that the appeal period has also expired before the commencement of 1991 (Amendment) that cannot be reopened and /or governed by Section-11 B(3) (as amended by the 1991 Amendment Act), reserving the powers of the Appellate Authority to condone the delay in proper cases. Thus, he submitted that the petitioner is entitled

for refund and two orders passed by the respondent, are liable to be set aside. He further submitted that the petitioner is also entitled for interest from the date of decision of this Court i.e. from 9.12.1987 till the date of its actual payment as the respondents have illegally retained the amount despite the direction given by this Court. According to him, it is not open to the respondents to raise the question of unjust enrichment for defeating the claim of refund as in the earlier proceedings, this plea was specifically repelled by this Court.

7. Sri S.P. Kesherwani learned standing counsel, however, submitted that out of claim of Rs.4,74,330/- made by the petitioner, a sum of Rs.1,74,330/- was not subject matter of consideration before this Court in Civil Misc. Writ Petition matter of claim. Thus, the Authorities have rightly rejected the claim in respect of Rs.1,74,330/- as having become barred by time. So far as the claim for refund of Rs. 3 lacs is concerned, he submitted that in view of Section 11-B of the Act, which was substituted by Act No. 40 of 1991, it was obligatory on the part of the petitioner to prove/establish by satisfactory evidence that it had not passed on burden of duty to the consumer/purchaser and, in the absence of satisfactory evidence being filed and proved , the said amount has rightly been directed to be credited to the Consumer Welfare Fund. He further submitted that against the order dated 19.11.1999 passed by the Commissioner (Appeals) the petitioner has a right of filing an appeal before the Custom, Excise and Gold Control (Appellate) Tribunal, and therefore, the writ petition should not be entertained. He relied upon the decision of Hon. Supreme Court in the case of Union of India vs. Ingersoll Rand (India) Limited, 2000 (120) ELT 291 (SC).

8. According to him, since the petitioner has failed to produce any material either before the Authorities or before this Court that it had not passed burden of excise duty on the consumer/purchaser, in view of specific provision in Section 11-B (2) of the Act, the amount of refund so determined shall be credited to the fund. However, the amount instead of being credited to the Fund, is to be paid to the applicant only if the condition of clause (d) of the proviso is satisfied. According to him, in view of sub section 3 of section 11-B of the Act. Notwithstanding any thing contrary contained in the judgement of this court, the refund was to be made only as provided in sub section (2) of Section 11-B of the Act. Thus, the provisions of Section 11-B (2) are to be complied with. He relied upon the decision of Hon. Supreme Court in the case of Union of India vs. Raj Industries Limited (supra). He also relied upon the decision of Hon. Supreme Court in the case of Union of India vs. Jain Spinner Limited 1992(61) ELT 321 and Porcelain Electrical Manufacturing Co. Ltd. Vs. Collector of Central Excise, New Delhi 1998 (98) ELT 583.

9. In reply, Sri Dube submitted that the alternative remedy is not on absolute bar where a pure question of law is involved. He relied upon the decision of Hon. Supreme Court in the case of Dr. Bal Krishna Agarwal Vs. State of Uttar Pradesh and Ors. J.T. 1995 (1) SC 471wherein, the Hon. Supreme Court has held that 'since the quesdtion that is raised involves a pure question of law and even if the matter is referred to the Chancellor

under Section 58 of the Act, it is bound to be agitated in the Court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non suited the appellant on the ground of availability of an alternative remedy.'

10. Having heard the learned counsel for the parties, we find that this Court vide judgment and order dated 19.12.1987 had directed the opposite parties to refund the duty collected during the year 1983-84, 1984-85 on clearance for home consumption after deducting the amount already paid. The Special Leave Petition filed by the Government of India had been dismissed on the ground that the delay had not been explained. What is the effect of Section 11-B as substituted by the Act No. 40 of 1991 on 10.9.1991 is only a pure question of law. Even if the petitioner is relegated to the remedy of appeal before the Tribunal, the matter would still be agitated by the aggrieved party before this Court. Thus, in view of the law laid down by the Hon. Supreme Court in the case of Dr. Bal Krishna Agarwal (supra), it will not be proper for us to direct the petitioner to avail alternative remedy of filing an appeal.

For resolving the issue raised in the present petition, it is necessary to quote the provisions of Section 11-B of the Act which are as follows :

11. "11-B . Claim for refund of duty (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such from and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12-A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty had not been passed on by him any other person.

12. Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub section (2) substituted by that Act.

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund.

Provided that the amount of duty of excise as determined by the Assistant Commissioner of Central Excise under the foregoing provisions of this sub section shall, instead of being credited to the fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the

manufacture of goods which are exported out of India,
(b) unspent advance deposits lying in balance in the applicant's account current maintained with the commissioner of Central Excise,
(c) refund of credit of duty paid on excisable goods used as imputs in accordance with the rules made, or any notification issued, under this Act;
(d) the duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;
(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;
(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the official Gazette, specify;

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other persons.

(3) Notwithstanding anything to the contrary contained in any judgment decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act, or the rules made there under or any other law for the time being in force, no refund shall be made except as provided in sub section (2).

Explanation - For the purposes of this section, ……
(B) 'relevant date' means-
(f) in any other case, the date of payment of duty "

13. From reading the aforesaid section, it is seen that any person who is claiming refund of any duty of excise has to make an application before the expiry of six months from the relevant date to the Assistant Commissioner of Central Excise in such a form and manner as may be prescribed . The limitation of six months will not apply where any duty has been paid under protest. Sub section 2 provides that the Assistant Commissioner of Central Excise, if satisfied that whole or any part of duty of excise paid by the applicant is refundable, he may make an order accordingly and amount so determined shall be credited to the Fund. However, the proviso to sub section 2 empowers the Assistant Commissioner, Central Excise instead of crediting the amount to the fund, to pay to the applicant on fulfillment of any one of the conditions mentioned in sub clause (a) to (f) of the said proviso. Clause (d) provides that if the duty of excise paid by the manufacturer, had not been passed on to any other person. Sub section 3 of Section 11-B provides that notwithstanding any thing to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub section (2).

14. Thus, from a conjoint reading of the various provisions of Section 11-B of the Act, it is clear that any amount of excise duty which is found refundable has to be credited by the authorities to the Fund. But if the duty of excise paid by the manufacturer had not been passed on to any other person instead of crediting. The said amount to the fund, can be paid to the

person concerned. These provisions are applicable notwithstanding any thing to the contrary contained in any judgment, decree, order or direction of the Appellate Authority or any Court. This Court vide judgment and order dated 9.12.1987 had directed the opposite parties to refund the duty collected during the year 1983-84, 1984-85. The application for refund was made by the petitioner on 8.2.1988. However, the duty was not refunded. The matter remained pending. After the Special Leave Petition was dismissed by the Hon. Supreme Court on 8.5.1995, the petitioner made an application in the proper form on 24.2.1997 claiming refund. The said application was processed under Section 11-B of the Act. The petitioner did not give any evidence to show that he had not passed on the incidence of duty to any other persons as required under Clause (d) of the proviso to sub section 2 of Section 11-B of the Act and, therefore, the claim has been rejected and the amount of refund has been credited to the Consumer Welfare Fund. The reliance placed by the learned counsel for the petitioner to paragraph 108 (XI) of the decision of Hon. Supreme Court in the case of Mafatlal Industries Limited (supra) wherein the Hon. Supreme Court has held as follows:

"(xi) Section 11-B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India v. Jain Spinners and Union of India vs.; ITC has been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated- in the sense that the appeal period has also expired- before the commencement of the 1991 (Amendment) Act (19-9-1991), they cannot be reopened and /or governed by Section 11-B(3) (as amended by the 1991(Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us."

is misplaced, in as much, in the present case, the refund proceeding had not been finally terminated as no refund of the amount was actually given to the petitioner. The Hon. Supreme Court in the case of Mafatlal Industries Limited has held that Section 11-B would not apply to a case where the duty may have been refunded to the petitioner/plaintiff meaning thereby, where the refund proceeding has been finally terminated in the sense that the appeal period has also expired before commencement of the 1991 (Amendment) Act and they cannot be reopened and or governed by Section 11-B (3).

15. As we have found that even though this court had directed for the refund of the amount of duty to the petitioner as far back in the year 1987, the petitioner had made an application in the prescribed proforma only on 24.2.1997 and, therefore, in view of provisions of Section 11-B (3) of the Act, the claim of refund has to be processed in accordance with the provisions of Section 11-B of the Act.

16. In the case of Jain Spinners Limited (supra) the Hon. Supreme Court has found that refund was allowed by the Assistant Collector as result of the approval of the classification list as filed by the assessee provisionally.

Subsequently, on receipt of a test report from the Deputy Chief Chemist, the department took the view that the refund had been erroneously granted and sought to recover it by issuance of a notice. The Assistant Collector confirmed the demand for payment of the duty amount, which had been erroneously refunded. The assessee questioned the order of the Assistant Collector through a writ petition before the High Court and also by filing an appeal before the Collector of Central Excise (Appeals). The High Court issued an interim stay in favour of the assessee against the demand confirmed by the Assistant Collector's order subject to the assessee depositing the amount of the demand in the Court. The respondent (Union of India) was permitted to withdraw the amount by an interim order of the Court on February 19, 1986 subject to the condition that it would pay interest at bank rate and refund the amount alongwith interest within two months of the decision of the writ petition if the petitioner ultimately succeeded. The appeal filed by the assessee before the appellate authority, however, succeeded and consequential relief was ordered, 'if otherwise admissible'. The assessee, thereupon, filed an application before the Assistant Collector for refund of the duty plus interest as per the conditions contained in the interim order of the High Court. The assessee also filed an application before the High Court stating that in view of the appellate order, the writ petition no longer survived and sought a direction to the respondents to pay the amount alongwith interest. The High Court allowed the application of the assessee on September 19, 1991 and directed the Union of India to refund the amount due to the assessee. On September 20, 1991, Act 40 of 1991 came into force, prohibiting the grant of refund except in accordance with the provisions of sub section (2) of Section 11-B. The Union of India filed an application stating that whether it was the High Court's order of February 19, 1986 or September 19, 1991, it was the duty of the Assistant Collector to satisfy himself that no part of the duty in respect of which refund was claimed was recovered by the assessee from any other person before making an order of refund. The Union of India sought two months time to consider the claim for refund in accordance with the amended provisions of Section 11-B. The application was rejected by the ;High Court in view of the order dated September 19, 1991 which had been passed prior to the coming into force of the Amendment Act with effect from September 20, 1991. In November 1991, the assessee filed a contempt petition alleging failure on the part of the officers of the Union of India to comply with the High Court's order granting refund to the assessee. When the petition came up for hearing on March 18, 1992, the counsel for the respondent submitted that the question regarding the applicability of the amended provisions was under consideration of the Government and he sought time. On April 13, 1992, the Assistant Collector passed an exhaustive order holding that since the assessee had passed on the incidence of duty to others, it was not entitled to receive the refund. The High Court at the time of hearing of the contempt petition, on April 20, 1992, was apprised of the order of the Assistant Collector, but it held that the decision of the Assistant Collector was not a decision of the Government and directed the Union of India to deposit the entire amount of refund with bank interest on or before April 24, 1992. It was in this

background, that the Union of India filed an appeal before Apex Court against the order dated April 20, 1992 passed by the High Court to give effect to its earlier order dated February 19, 1986. The Apex Court held that the High Court's order of February 19, 1986 under which alone the refund was claimed could not be an exception to the provisions of Section 11-B (3) of the Act, and that the High Court could not have made any order, after September 20, 1991 directing the payment of refund contrary to the amended provisions of Section 11-B 2) of the Act. The Court expressed the view that Section 11-B of the Act, as amended, would apply to all cases which were pending notwithstanding any order or decree or judgment of a court or tribunal or the provisions of any other law for the time being in force. The Apex Court inter alia held as follows:

"The only question before us is whether the impugned order dated April 20, 1992 of the High Court which is passed to give effect to its earlier order of February 19,.1986, is valid or not. Since, we are of the view that the order of February 19, 1986 attracts the provisions of sub section (3) of Section 11-B of the Act which has come into force on September 20, 1991 the respondents are not entitled to take advantage of the said order unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to others."

In the case of Union of India vs. Raj Industries (supra), the Hon. Supreme Court has held as follows :

17. "It is well settled that where a claim for refund of any duty or tax paid arises for consideration of the authorities apart from the merits of the claim and even if on merits it is found to be a justified claim, the principles of unjust enrichment has also to be kept in view before directing the refund."

18. Applying the principles laid down by the Hon. Supreme Court in the case of Mafat Lal Industries Limited and Jain spinners Limited (supra), we are of the view that the provisions of Section 11-B (2) has to be taken into consideration while granting the refund pursuant to the orders passed by this Court in the petitioner's own Writ Petition No. 358 of 1987 and it is not correct to say that the matter relating to refund had attained the finality as the Special Leave Petition was filed beyond time by 115 days which delay was not condoned by Hon. Supreme Court, as the actual refund of the amount had not been made by the authorities and the application for refund in the prescribed proforma was only made on 24.2.1997 i.e. after coming into force of Act No. 40 of 1991 substituting new Section 11-B in the Act.

19. In view of the foregoing discussions, we do not find any illegality in the impugned orders challenged by the petitioners in this writ petition. The writ petition fails and is dismissed.

However, the parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2002

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

Special Appeal No. 495 of 1996

Director Mandi Parishad, Lucknow and others ...Appellants
Versus
Sohan Lal and another ...Respondents

Counsel for the Appellants:
Sri B.D. Madhyan
Sri Satish Madhyan

Counsel for the Respondents:
Sri R.K. Ojha
Sri A.K. Tiwari
S.C.

Constitution of India, Article 226- Appointment- Land acquired for Mandi Samiti- adequate compensation alongwith 12% interest apart from 30% solatiam for distress also provided- No promise for giving appointment at initial stage of acquisition- in absence of statutory provision- appointment can not be claimed as a matter of right.

Held- Para 13

It has also not been asserted nor argued before this Court that at the time of acquisition of the land any assurance or promise was made to the respondent no. 1 or his father to provide job to one of his family members. Therefore, in the absence of any statutory provisions or any promise, the petitioner-respondent no. 1 cannot claim appointment as a matter of right nor the appellant can make such appointment without following the procedure provided in the Regulation.

Case law discussed.
AIR 1967 SC-1753

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This is a Special Appeal under the Rules of the Court arising out of the order of the learned Single Judge dated 17.5.1996 in Writ Petition No. 23803 of 1994 whereby the learned Single Judge held that the respondents- appellants are under duty to give employment to the members of such families whose land is acquired, irrespective of the fact whether post is available or not and allowed the writ petition and directed the respondents-appellants to give employment to the pettoner- respondent no. 1 within two weeks from the date certified copy of the order is served upon them.

2. It appears that the land bearing Plot No. 421 having an area of one bigha belonging to the father of the petitioner-respondent no. 1 was acquired in the year 1988. His father, therefore, made a representation on 10.8.1988 (Annexure-8 to the writ petition) before the Deputy Director (Administration), Rajya Krishi Utpadan Mandi Parishad, Allahabad (appellant no. 3) stating that his agricultural land has been acquired for the construction of Krishi Utpadan Mandi Samiti, Ajhuaha in the district of Allahabad and after that acquisition he has no means for his livelihood and as such one person of his family should be given appointment in the Krishi Utpadan Mandi Samiti Ajhuaha in terms of the G.O. dated 15.6.1985 (Annexure No. 2 to the writ petition). He filed another representation on 11.4.1994 addressed to the Director, Rajya Krishi Utpadan Mandi Parishad, Lucknow making a request to give appointment to his son, Sohan Lal petitioner-respondent no. 1 against a suitable post in the Krishi Utpadan Mandi Samiti, Ajhuaha in the district of

Allahabad. Thereafter, he moved several representation, the last being 11.4.1994 (Annexure No. 9 to the writ petition) and when no action was taken the aforesaid writ petition was filed claiming therein that in view of G.O. dated 15.6.1985 the writ petitioner is entitled to be given appointment. The appellants who were the respondents no. 1,2,3 and 5 filed counter affidavit and contested the writ petition on the ground inter alia that only a portion of land, i.e. one bigha, of the petitioners ' father has been acquired, and the major portion, i.e. about two and half acres of land is still available for cultivation with the petitioner's family. It has further been asserted in the counter affidavit that the petitioner- respondent no. 1 is of 37 years of age, thus over age and , therefore, cannot be appointed in view of the U.P. Agriculture Produce Market Committee (Centralised) services Regulations, 1984 (for short the Regulation). Besides that he is not unemployed and is engaged in truck business and cultivation and, therefore, his claim is not covered by the aforesaid G.O. dated 15.6.1985.

3. It appears from the record of the writ petition that when it was taken up on 28.7.1994, learned counsel for the respondents were granted six weeks' time to file counter affidavit and one week thereafter for rejoinder affidavit and the writ petition was ordered to be listed after expiry of the aforesaid period. By an interim order the petitioner was given opportunity to file representation before the respondent no. 1 within a period of one week and in the event of filing of such representation the respondent no. 1 (Director) was directed to dispose of the same in accordance with law by a reasoned order within ten days from the date of filing of the representation along with the certified copy of that order. Pursuant to the aforesaid order the petitioner- respondent no. 1 had filed the representation before the Director which was rejected vide order dated 1.9.1994, a copy whereof is enclosed as Annexure No. 3 to the counter affidavit, on the ground inter alia , that the G.O. dated 15.6.1985 is applicable only where the land is acquired for the establishment of any industrial unit and if on account of such acquisition the whole family is uprooted in that event one member of the family may be given employment in the industrial unit established on the land acquired for that purpose. It has also been found by the Director that the petitioner-respondent no. 1 has crossed the age prescribed in the Regulation for appointment and the petitioner's family is still in possession of two bighas 17 biswas and 11 biswansi agriculture land and therefore, he is not entitled to get appointment under the aforesaid G.O. It has also been found by the Director that no post is available for appointment in the Krishi Utapadan Mandi Samiti, Ajhuaha in the district of Allahabad, hence he rejected the representation of the petitioner. The learned Single Judge was of the view that the grounds taken in the order of rejection of representation have no substance, as the land retained by the family is not at all sufficient for the survival of the petitioner's family. The learned Single Judge was further of the view that if no post is available the respondents are under duty to give employment to the members of such family whose land is acquired irrespective of the fact that the post is available or not.

4. Sri B.D. Madhyan, learned counsel appearing on behalf of the appellant vehemently argued that the

appointments in Mandi Samiti are governed by the statutory regulation. It is submitted that the regulation does not envisage appointment on compassionate ground, on account of acquisition of land and the Government order upon which the petitioners- respondents have placed reliance can not over ride the statutory provisions, even if for argument's sake it is assumed but not admitted that the Government order in question is applicable in the facts of the case in that event the benefit is to be extended only to those land holders whose entire land have been acquired. Whereas, admittedly, in the case in hand a portion of the holding of the respondent's father has been acquired and as such he is not covered by the said Government order. It is further submitted that the petitioner- respondent is guilty of laches and negligence inasmuch as he filed the writ petition claiming appointment after lapse of seven years from the date of acquisition of land, which disentitles him to get relief under the extraordinary jurisdiction of this Court under Article 226 of the Constitution. It is also submitted that there is no post available and there is already surplus staff due to which the appellant was compelled to terminate the services of more than one thousand employees.

5. On the other hand, learned counsel appearing on behalf of the respondents strenuously sought to argue that the mandi samiti being instrumentality of the State, all the Government orders are applicable and binding on it. He further submitted that the Government order clearly provides that one person of the uprooted family is entitled to be appointed if the whole or part of the land is acquired and, therefore, the learned Single Judge has rightly allowed the writ petition.

6. It is general rule that appointments in the public services should be made by inviting applications through open advertisement and strictly on merit so that every citizen should get equal opportunity in the matter of appointment. This rule should be adhered to in the matter of any public employment or appointment. Neither the State Government or its instrumentality nor any public authority can deviate from this common rule of appointment and if any other procedure or mode is adopted, it would be violative of Articles 14 and 16 of the Constitution of India which ensures and guarantees equal opportunity to all citizens in the matter of appointment to any office or of any other employment under the State. However, some exceptions to the general rule for public employment or appointment is also recognized which is commonly known as appointment on compassionate ground which is evolved purely on humanitarian ground and in the interest of justice, rule is made to meet certain contingencies and to give appointment to a dependant of an employee dying-in-harness and leaving his family in penury and without any means of livelihood.

7. In the case in hand, the appointment is claimed on the basis of Government orders dated 15.6.1985, 12.5.1988, 29.6.1988 and 31.7.1988 copies whereof are enclosed as Annexure 2 to the writ petition. A close reading of these Government orders clearly shows that only preference is to be given to a family member of the displaced person whose land is acquired for the purpose of setting up industry or an industrial unit or

for project of the State. Therefore, where the land is acquired for establishing an industry in that event members of the displaced family should be given preference in the matter of appointment in that industry or institution, which is set up on the acquired land, provided other things being equal. It does not provide that if no post is available in that event a post shall be created for giving such appointment

8. In the counter affidavit the stand of the respondent- appellant is that only a portion of the land of the petitioners' father is acquired and the major portion is still with the petitioners' family thus, the Government order in question does not apply in the case of the petitioner. It has also been stated in the counter affidavit that the petitioner has crossed the maximum age limit prescribed in the service regulation and, therefore, he is over age and cannot be appointed. This averment has not been denied in the rejoinder affidavit that the petitioner has not crossed the age limit prescribed for appointment and, therefore, admittedly, the petitioner was over age at the time of filing of the writ petition.

9. The Government order dated 15.6.1985 upon which heavy reliance has been placed by Mr. R.K. Ojha, learned counsel for the petitioner- respondent no. 1 is also of no help for the reason that admittedly the Government order is not issued under any statutory provision and as such it has not statutory force. It is merely administrative instructions laying down guidelines to provide appointment to a member of displaced family and such instructions not having any statutory force cannot be enforced by issuing mandamus. The non- observance of such instruction/ Government orders does not confer any right to a person to approach the Court for its enforcement.

10. It is settled legal position that the Government order not issued under any statutory provision or under any provision of the Constitution, are merely in the nature of administrative instructions for the guidance of the department and are issued under the executive power of the State provided under Article 162 of the Constitution, which does not confer any power on the State Government to frame rules but it only indicates the scope of the executive power of the State under which the State Government can give administrative instructions. In order to find out as to whether such instructions or Government orders have the force of statutory rules, it has to be seen that it has been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefor., Learned counsel for the respondent no. 1 could not show us any statutory provision or constitutional provision under which the Government order dated 15.6.1985 has been issued by the State Government and, therefore, at best , it could be said to have been issued in exercise of the power under Article 162 of the Constitution. It is well settled legal position that any instruction issued by the State Government in exercise of its power under Article 162 of the Constitution, which does not confer any rule making power are mere administrative instructions and are not statutory rules and breach of such executive instruction or dis-obedience thereof did not confer any right on a person like the petitioner-respondent no.1 to knock the door of this Court invoking jurisdiction under Articles

226/227 of the Constitution for the relief, on the ground of breach of that instructions or guidelines. Reference may be made to the judgment of the Apex Court rendered in the case of G.J. Fernandez versus State of Mysore, AIR 1967 Supreme Court 1753. The position, however, would be different if the State Government or its authority acts arbitrary or discriminatory while applying such guidelines between individuals in that event it becomes violative of Article 14 of the Constitution of India and thus such action being discriminatory, arbitrary or mala fide can be interfered with under the writ jurisdiction of this Court.

11. The State Government has framed U.P. Agricultural Produce Market Committees (Centralised) Services Regulations, 1984 (hereinafter referred to as Regulation) which governs the appointment of employees of market committee. Part III of the Regulation provides that the recruitment may be made either from open market by direct recruitment or by promotion. It further lays down the manner and procedure, such as constitution of selection committee, determination of vacancies, advertisement in one or two leading newspapers inviting applications from eligible candidates and also to notify the vacancy to the employment exchange thereafter to prepare the list according to the merit of the candidates following the reservation policy.

12. There is no provision under the regulation to offer appointment to a member of the displaced family whose land has been acquired for the construction of the market committee. Therefore, the Government order relied on by the petitioner- respondent no. 1 cannot override the provisions of the statutory rules governing appointments in the market committee.

13. Land Acquisition Act is self contained Act and provides the procedure to be followed for acquisition as well as for assessment of valuation and payment of fair and just compensation as per market value whose land is acquired. In addition to that market value of the land interest @ 12% is also paid from the date of publication of the Notification. Besides that a sum of 30% on such market value is also paid as solatium for distress and for inconvenience or difficulties caused to the person on account of compulsory acquisition of the land. Therefore, a person whose land is acquired , not only gets adequate compensation as per market value of the land but also gets interest on this amount of compensation @ 12% from the date of notification under section 4 of the Act as well as an amount of solatium, which is 30% of the amount of compensation. Admittedly, the father of the petitioner- respondent no. 1 has received the amount of compensation for the land in question as per market value of the land alongwith interest and solatium. Neither the Land Acquisition Act under the provisions of which the land of the petitioner's father is acquired nor the regulation provides that in the event of acquisition of the land one of the family member of the land holder shall be given employment in addition to the amount of compensation. It has also not been asserted nor argued before this Court that at the time of acquisition of the land any assurance or promise was made to the respondent no. 1 or his father to provide job to one of his family members. Therefore, in the absence of any statutory provisions or any promise, the petitioner-

respondent no. 1 cannot claim appointment as a matter of right nor the appellant can make such appointment without following the procedure provided in the Regulation.

14. We are of the view that the learned Single Judge erred in issuing the mandamus commanding the appellants to provide employment to the writ petitioner- respondent no. 1 and the writ petition has no merit and should have been dismissed in limine.

15. In view of the discussions made above, this appeal succeeds and is hereby allowed. The order of the learned Single Judge dated 17.5.1996 is set -aside and writ petition is dismissed but without costs.