ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.11.2002

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 37859 of 2002

Basant Lal ...Petitioner
Versus
The Chairman, Nagar Palika Parishad, Jaunpur and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Singh
Sri Vinay Singh

Counsel for the Respondents:
Sri Shashi Nandan
Sri M.J.B. Rana
Sri P.C. Srivastava

U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules 1974- widow belonging to Muslim Community - claimed herself to be divorced wife of Hindu's husband- whether entitled to claim appointment ? - whether the divorce was made under Hindu Marriage Act- without deciding this question none can be appointed- direction issued accordingly.

(Delivered by Hon'ble S.N. Srivastava, J.)

1. By way of this petition petitioner prayed for quashing the order dated 29.8.2002, annexure -5 to the writ petition, passed by Opp. Party no. 2 appointing Opp. Party no. 3 on compassionate ground on death of late Prem Lal and further prayed to direct Opp. Party nos. 1 and 2 to appoint the petitioner as Class IV employee on compassionate ground under Dying in Harness Rules in place of his father.

2. Sri Prakash Chandra Srivastava filed counter affidavit on behalf on Nagar Palika Parishad, Jaunpur. He made statement before this Court that U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 has been adopted by the Nagar Palika Parishad, Jaunpur and the appointment under the Dying in Harness is governed by the same.

3. Learned counsel for the petitioner urged that his father Prem Lal died in harness and he being the son and one of the dependent is entitled to be considered for appointment under the Dying in Harness Rules. He further urged that Smt. Sundari Devi mother of the petitioner is still alive and Opp. Party no., who is claiming herself to be widow of Prem Lal father of the petitioner cannot be recognized in law as widow. Opp. Party no. 2 erred in law in passing orders for appointment in favour of Opp. Party no. 3 treating her widow and dependent of Prem Lal without considering claim of the petitioner and his other brothers.

4. In reply Sri Prakash Chandra Srivastava learned counsel appearing for Nagar Palika Parishad, Jaunpur urged that Prem Lal son of Bakreedu Lal was Muslim. He married smt. Chanda Devi after divorcing his first wife Smt. Sundari Devi Nagar Palika Parishad rightly passed orders for appointment of Smt. Chanda Devi the widow of Prem Lal. The order appointing Opp. Party no. 3 was rightly passed by Opp. Party no. 2 in accordance with law on the basis of the service records of Nagar Palika Parishad.

5. Sri J.B. Rana, learned counsel appearing for Opp. Party no. 3 supported the arguments made by Sri P.C.

Srivastava and urged that she was the only dependent on the date of death of Prem Lal and was entitled to be appointed under the Dying in Harness Rules.

I heard learned counsel for the parties and considered their respective arguments.

6. Whether petitioner and Opp. Party no. 3 are heirs and dependents of Prem Lal depends on the question whether the father of petitioner Prem Lal was Hindu and died as Hindu as pleaded by his son petitioner from the first wife Smt. Sundari Devi or was Muslim as pleaded by Nagar Palika Parishad, Jaunpur through affidavit of Sri Hatim Hasan, Lipik, Nagar Palika Parishad, Jaunpur supported by Opp. Party no. 3.

7. In paragraph 3 of the writ petition petitioner has stated that father of the petitioner died on 29.6.2002 due to heart failure leaving his widow Smt. Sundari Devi, three sons Gopal, Basant Lal and Santosh and one married daughter Sunita. Petitioner has filed a Death Certificate dated 1.7.2000 of his father as Annexure-2 to the writ petition. This certificate issued by Nagar Palika Parishad mentioned Prem Lal as Hindu (Hela).

8. Paragraph -3 of the writ petition has been replied in Paragraph 5 of the counter affidavit. The only pleading made in counter affidavit was that Smt. Chanda Devi was married on 3.5.1993 and a registered will was executed by petitioner in favour of Smt. Chanda Devi on 30.12.2000. It was also stated that first wife was divorced. Annexure-2 to the writ petition which mentions Prem Lal as Hindu (Hela- Scheduled Caste) has not been denied by any of the Opp. Parties.

9. It is not disputed that Gopal, Basant Lal and Santosh are sons and Sunita is daughter of Prem Lal from his first wife. From the perusal of Annexure CA-2 to the counter affidavit i.e. Will which mentions names of son and daughter of Prem Lal from Chanda Devi as Saheb Lal and Sanno Devi.

10. In rejoinder affidavit filed by petitioner Annexure-RA-1 is F.R. Form, No. 13 containing thumb impression of Prem Lal duly signed by Swasthya Nagar Adhikari, Nagar Palika Parishad, Jaunpur on 24.8.1977. This document mentions Prem Lal as Hela. Annexure -RA-3 certificate issued by the Tehsildar, Jaunpur in favour of Basant Lal son of Prem Lal also mentions Prem Lal as Hela (Hindu). This certificate was issued under the Scheduled Caste Order 1950 and amended by the Uttar Pradesh Scheduled Caste and Scheduled Tribe Order , 1967.

11. There is no material on record that the marriage of Prem Lal with Chanda Devi has taken place according to Muslim Law and any burial has taken place.

12. Considering the facts of the matter. I believe the case of petitioner that Prem Lal was Hindu. He died as Hindu and all his sons and daughters are Hindu. There is neither any material nor pleading to show that he ever accepted Muslim religion and became Muslim during his life time. The pleading and materials on record clearly established that case set up by Nagar Palika Parishad, Jaunpur and Opp. Party no. 3 that Prem Lal was Muslim is falsified.

13. Now the question arises to be considered whether Chanda Devi was

legally wedded wife of Prem Lal. She could be recognized as legally wedded wife and dependent in law only. if it is proved that Smt. Sundari Devi was divorced by Prem Lal. The appointing authority was required to take evidence and decide whether Smt. Sundari Devi was divorced in accordance with Hindu Law and thereafter Chanda Devi was married which it failed to do.

14. Under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974, family has been defined.

15. Undisputedly petitioner being son of Prem Lal is family member. If Chanda Devi proves before appointing authority that Smt. Sundari Devi was divorced before her marriage she could be name as member of the family Prem Lal. Under Section 16 of the Hindu Marriage Act even if second marriage is void sons and daughters of Prem Lal from second wife would be legitimate heirs.

"Section-16 of the Hindu Marriage Act being quoted below:-

"16. Legitimacy of children of void and void able marriages :-

(1) Notwithstanding that a marriage is nuil and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

16. The Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 makes it clear that in case an application shall contain all the details and if more than one member of the family of the deceased seeks employment the Head of the office shall decide about the suitability of the persons for giving appointment.

Rule 6 and 7 of the said Rules are being quoted below:-

"6. Contents of application for employment- an application for appointment under these rules shall be addressed to the appointing authority in respect of the post for which appointment is sought but it shall be sent to the Head of Office where the deceased Government servant was serving prior to his death. The application shall , inter alia contain the following information;

(a) the date of the death of the deceased Government servant; the department in which he was working and the post which he was holding prior to his death.
(b) Names, age and other details pertaining to all the members of the family of the deceased, particularly about their marriage, employment and income;
(c) Details of the financial condition of the family ; and
(d) The educational and other qualifications, if any, of the applicant.

"7. Procedure when more than one member of the family seeks employment- If more than one member of the family of the deceased Government servant seeks employment under these rules, the Head of Office shall decide about the suitability of the person for giving employment. The

decision will be taken keeping in view also the overall interest of the welfare of the entire family, particularly the widow and the minor members thereof."

17. The Application filed by Opp. Party no. 3 does not contain name of petitioner and other heirs/dependents of Prem Lal . They were also entitled to be considered by the appointing authority before passing the order in favour of Opp. Party no. 3 as required under Rule 7 of the Dying in Harness Rules and only after considering the claim of all the heirs/dependents Opp. Party no. 2 could have passed the orders.

18. The order passed by Opp. Party no. 2 without applying its mind to the relevant Rules and without considering the claim of other heirs/dependents of Prem Lal is vitiated in law and liable to be quashed.

19. Now Opp. Party no. 2 is directed to consider the case of petitioner and other heirs/dependents of Prem Lal who claim appointment and decide the question of appointment under Dying in Harness Rules amongst the children from first wife or second wife. In case Opp. Party no. 3 satisfies appointing authority that she was married after divorce in accordance with law from Smt. Sundari Devi first wife of Prem Lal she may also be considered alongwith other heirs/dependents. Appointing authority is required to decide the question whether Smt. Sundari Devi was divorced according to the Hindu Marriage Act and her marriage ceased to exist before remarriage as claimed by Chanda Devi.

20. In view of the above, the writ petition succeeds and is allowed. The impugned order dated 29.8.2002 is quashed.

21. Appointing authority shall now consider the case of all application of the heirs/dependents of late Prem Lal who are applicants for employment under Rule 7 of the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 and pass appropriate orders considering observations of this Court in the body of the judgment within a period of three months from the date of production of certified copy of this order.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2nd DEC., 2002.

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

Civil Misc. Writ Petition No. 22919 of 2001

Reevan Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi
Sri Shashi Nandan

Counsel for the Respondents:
Sri S.F.A. Naqvi
Sri M.D. Misra
Sri S.M. Abbas Naqvi
S.C.

U.P. Government Servant Seniority determination Rules- 1991- Rule-9- Selection for the post of Deputy Jailor held and finalised in the year 1989, Subsequent Selection in the year 1990- are held- illegal- directions issued accordingly.

Held - Para 15

In A.P. Public Service Commission Versus B. Sarat Chandra and others (1990)2 SCC 699, the Supreme Court held that the word ' selection does not mean only the final act of selecting candidates with preparation of the list for appointment. The Supreme Court further observed that it would be unreasonable to construe the word selection only as the factum of preparation of the select list.

Case law discussed:

1991 (2) SCC-669, 1993 suppl. (2) SCC-734, 1998 (5) SCC-246

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

1. This writ petition has been filed for a mandamus directing the respondent nos. 1 and 2 to consider the name of the petitioner for promotion as Jail Superintendent on the basis of his seniority in accordance with Rule 5 of the U.P. Government Servant Seniority Rules, 1991.

Heard learned counsel for the parties.

2. An impleadment application has also been filed in this case on behalf of Bhim Sen Mukund and Rajendra Kumar and we have allowed the same and they are treated as respondent nos. 3 and 4. We have heard Sri S.F.A. Naqvi on behalf of newly impleaded respondent nos. 3 and 4.

3. The petitioner was appointed as a Deputy Jailor in 1994 after being selected and recommended by the U.P. Public Service Commission. The post of Deputy Jailor is a Group C (Non Gazetted) post whose appointing authority is the Director General (Prisons). The Service conditions of the posts of Deputy Jailor are governed by the "Uttar Pradesh Jail Executive Subordinate (Non Gazetted) Service Rules 1980" copy of which is annexure 1 to the petition. It is alleged in para 4 that on 26.12.1987 the U.P. Public Service Commission made an advertisement for the Combined Lower Subordinate Service Examination in which besides the other posts, 114 posts of Deputy Jailors were also advertised. The admit card for the preliminary examination, which was scheduled to be held on 24.9.89, was issued to the candidates. Copy of one such cards is Annexure 2. The preliminary examination was held in 1989 and the main examination in 1991. In para 6 of the writ petition it is stated that the process of selection which began in 1987 for the posts advertised could be completed only in the year 1993 when a list of successful candidate was published in different news papers on 27.7.1993. Thus the selection process took about six years to complete. A true copy of the select list/merit list is Annexure 4. The petitioner was declared as successful candidate and his name is in the select list. After completion of the selection process the petitioner's name was recommended for appointment as Deputy Jailor and he was issued appointment letter dated 26.4.1994 vide Annexure 5.

4. The U.P. Legislature passed an Act called U.P. Subordinate Service Selection Commission Act 1988 in order to establish a Subordinate Services Selection Board (Commission) for certain categories of subordinate services and for matters connected therewith and incidental thereto. By govt. notification dated 25.11.89 the Group C posts to which the aforesaid Act applied, were specified therein and it was made clear that the vacancies which were already referred to the U.P. Public Service Commission before the issuance of the

notification, were specifically kept outside the purview of the said notification and the appointments to such vacancies had to be made on the basis of the recommendation of the Commission.

5. In para 10 of the writ petition it is alleged that the earlier selection process by which 114 posts of Deputy Jailor were advertised and which was being conducted by the U.P. Public Service Commission could not be completed expeditiously, and instead the newly established commission without waiting for the result of the earlier selection process started a fresh selection process and advertised sixty posts of Deputy Jailors by advertisement dated 27.10.90 Annexure 6. This subsequent selection process was completed in a haste in 1991 in a very short span of time without due observance of the selection process and the selection process were completed on that basis and the select list was declared in Nov. 1991 and appointments were immediately made on the basis of the select list. A true copy of one of the appointment letters made on the basis of the subsequent selection is Annexure 7.

6. On 29.8.95 a tentative seniority list of Deputy Jailors was notified by the then Inspector General (Prisons) and objections, if any, were called for from the concerned officers. A true copy of the said tentative seniority list dated 29.8.95 is Annexure 8. In that list names of the candidates appointed on the basis of the results of the earlier selection process were placed below the candidates who were appointed on the basis of the result of the subsequent selection. It is also alleged that the service conditions of the posts of Deputy Jailor are governed by the U.P. Jail Executive Subordinate (Non Gazetted) Service Rules 1980. Rule 22 of the said Rules provides for the determination of the seniority. Proviso 1 to the aforesaid rule specifically provides that the interse seniority of the persons directly recruited in the service would be determined on the basis of their time of selection. The Deputy Jailors who were selected in the earlier selection process which began in 1987 represented against the said tentative seniority list and filed objection to the same. A true copy of the representation dated 29.9.95 is Annexure 9 to this writ petition. However no heed was paid to that objection and final seniority list was published on 23.3.96 vide Annexure 10. In this list also the petitioner and other Deputy Jailors like him was selected in the selection process which commenced in 1987 have been shown junior to persons appointed on the basis of the subsequent selection. Many representations were made against this list but to no avail.

7. Rule 5 of the U.P. Subordinate Service Seniority Rules 1991 states as follows:

"Seniority where appointments by direct recruitment only- Where according to the service rules appointments are to be made only by Direct recruitment the seniority inters of persons appointed on the result of any one selection, shall be same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be;

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.

Explanation- where in the same year separate selection for regular and emergency recruitment are made the selection for regular recruitment shall be deemed to be the previous selection.

8. Learned counsel for the petitioner submitted that in view of the proviso to Rule 5 the petitioner and other Deputy Jailors selected in the selection which began in 1987 should have been treated senior to those selected in the selection which commenced in 1990. We agree with this submission. In our opinion the correct interpretation of the proviso to Rule 5 of the U.P. Govt. Servant Rules 1991 is that persons like the petitioner who were selected in the selection process which commenced in 1987 should be treated as senior to those selected in the selection process which commenced in 1990.

The controversy in the present case is as to what meaning should be given to the words ' appointed on the result of a subsequent selection in then proviso to Rule 5.

It may be noted from the language used in the proviso to Rule 5 that a distinction has been made between appointment and selection. The words 'appointed on the result of a subsequent selection' clearly indicate that for the purpose of the proviso appointment is different from selection. Hence even if persons selected on the basis of the selection which commenced in 1990 were given appointment before giving appointment to the petitioner and others similarly situate the latter will be senior to the former because proviso to Rule 5 treats selection different from appointment. Had that not been so the language of the proviso would have been different ?

9. There is no dispute that the process of selection of the petitioner and others similarly situate had begun in 1987 whereas selection in which the newly amended respondent nos. 3 and 4 and others situated similar to them had begun in 1990. Thus the selection process of the petitioner and others similarly situate had begun three years prior to the beginning of the selection of the respondent nos. 3 and 4 and others similarly situate. It was no fault of the petitioner and others similarly situate that their selection was prolonged for as much as six years, whereas the selection of respondent nos. 3 and 4 others similarly situate was completed in just one year.

10. A counter affidavit has been filed on behalf of respondent nos. 1 and 2 we have perused the same. The factual averments in the writ petition have not been denied in the counter affidavit.

Counter affidavit has also been filed on behalf of respondent nos. 3 and 4 and we have perused the same. In para 2 of the said counter affidavit it is stated that the appointment of the petitioner is by the U.P. Public Service Commission whereas that of the respondent nos. 3 and 4 is by U.P. Subordinate Service Selection Commission. Reliance have been placed on Rule 22 of the U.P. Jail Executive Subordinate (Gazetted) Service Rules, 1980.

"Rule 22 Seniority- Seniority in any category of posts in the service shall be determined from the date of substantive appointment and if two or more persons are appointed together, from the order in

which their names are arranged in the appointment orders, provided that

1. Interse seniority of persons directly appointed to the service shall be the same as determined at the time of selection.
2. Interse seniority of persons appointed to the post of Deputy Jailor by probation shall be the same as it was in the substantive post held by them at the time of promotion.'

In para 9 of the counter affidavit it is stated that the issuance of the advertisement does not give any right to claim seniority from that date . The respondent nos. 3 and 4 were appointed Deputy Jailors in 1991 and were confirmed as Deputy Jailor on 22.6.97 and promoted as Jailor on 26.7.99 as stated in para 29 of the writ petition whereas the respondent no. 3 and 4 were promoted earlier. In para 14 of counter affidavit it is stated that similar petition being Civil Misc. Writ Petition No. 13138 of 2000 was dismissed by this Hon'ble Court on 15.3.2000 on the ground of alternative remedy before U.P. Public Service Tribunal vide Annexure CA 5. In our opinion this is not a fit case to remand the matter before the Tribunal as it is better that this controversy is resolved finally by this Hon'ble Court. It is settled law that alternative remedy is not an absolute bar to a writ petition vide AIR 1985 SC 1147."

11. In our opinion on a correct interpretation of the proviso to Rule 5 of the U.P. Govt. Servant 1991, this writ petition deserves to be allowed. We are also of the opinion that the U.P. Govt. Servant Service 1991 being later in time to the U.P. Jail Executive Subordinate (Non Gazetted) Service Rules, 1980 will prevail over the latter if there is any conflict between the two rules. The U.P. Govt. Servants Rules 1991 govern U.P. Govt. Servants in the matter relating to the seniority, and hence they will also apply to all government servants including the parties in this petition.

12. Rule 3 of the U.P. Govt. Servant Seniority Rules, 1991 states: " These rules shall have effect notwithstanding anything to the contrary contained in any other service rules made here to before."

13. Thus rule 3 of the 1991 Rules makes it clear that they will override anything to the contrary in the U.P. Jail Executive Subordinate (Non-Gazette) Service Rules, 1980.

14. The question which arises in this case is whether the selection of the petitioner and others similarly situate was a previous selection while that of respondent nos. 3 and 4 and others similarly situate was subsequent selection. In the present case the proviso to Rule 5 of the 1991 Rules makes it clear that appointment is not to be treated as part of the selection because the words used in the proviso are 'appointed on the result of a subsequent selection'. The petitioner and others similarly situate were appointed against the vacancy which existed in 1987 while the selection of respondent nos. 3 and 4 and others similarly situate by the U.P. Subordinate Selection Commission were made against vacancies which existed in 1990. In our opinion the petitioner and others similarly situate should not suffer for no fault of theirs.

15. In A.P. Public Service Commission Versus B. Sarat Chandra and others (1990) 2 SCC 669, the Supreme

Court held that the word 'selection' does not mean only the final act of selecting candidates with preparation of the list for appointment. The Supreme Court further observed that it would be unreasonable to construe the word selection only as the factum of preparation of the select list.

16. In Dr. A.R. Sircar Versus State of U.P. and others 1993 Supp. (2) SCC 734 the appellant was given appointment only on October 31, 1989. The Supreme Court held that this appointment related to the vacancy of 1982-83. Hence the appointment must relate to that vacancy.

17. In Surendra Narain Singh and others Versus State of Bihar and others 1998 (5) SCC 246 it was held that candidates recruited against earlier vacancies rank senior to those recruited against later vacancy.

18. For reasons given above this writ petition is allowed. A mandamus is issued to the respondent nos. 1 and 2 to treat the petitioner and others similarly situate who were selected in selection which had begun in 1987 as senior to those who were selected in the selection which commenced from 1990. The seniority list will be corrected accordingly.

19. Although all persons who will be covered by this judgment were not present before us but respondents no. 3 and 4 are present and we have heard them. They will be deemed to represent others also like them who were selected in the selection process, which commenced in 1990.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.12.2002

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

Civil Misc. Writ Petition No. 27578 of 2002

Dr. Radhey Shyam Sharma ...Petitioner
Versus
The Director (Higher Education) U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Singh
Sri R.K. Gautam

Counsel for the Respondents:
Sri H.R. Misra
Sri Aditya Kumar Singh
S.C.
Sri Pushpendra Singh

Constitution of India, Article 226- Service Law Petitioner being senior most lecturer - working as officiating Principal- continuously worked till the impugned order dated 1.7.2002 by which the respondent no. 4 was directed to take charge from Petitioner- Respondent no. 4 can not be appointed against the vacancy about which he never applied- order passed by the Director, Higher Education held illegal- direction issued accordingly

Held- Para 6 and 9

Since he had never applied against advertisement no. 25 but he had applied only against advertisement no. 23 in which the post of Principal Sarawati Mahavidyalaya, Hathras was not mentioned.

The writ petition is, therefore, allowed. The impugned order dated 1.7.2002 (Annexure 6 to the writ petition) and the consequential order dated 5.7.2002

(Annexure 7 to the writ petition) are hereby quashed. The petitioner is permitted to work as Officiating Principal of Saraswati Mahaviyalaya Hathras until a valid selection is made by the U.P. Higher Education Service Commission.

Case law discussed:

1998 (3) SCC -45
2001 (2) UPLBEC 1345

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

1. This writ petition has been filed against the impugned order of the Director (Higher Education) U.P. dated 1.7.2002 Annexure 6 to the writ petition and consequential orders dated 5.7.2002 Annexure 7. The petitioner has also prayed for a mandamus directing the respondents not to interfere with his functioning as officiating Principal of Sarsawati Mahavidaya, Hathras, which is a Post -graduate Degree College affiliated to Dr. Bhim Rao Ambedkar University, Agra.

2. We have heard counsel for the parties. By the impugned order Annexure 6 to the petition the Director (Higher Education) has directed that respondent no. 4 Satya Prakash Singh Chauhan be appointed as Principal of the aforesaid college.

3. A vacancy on the post of Principal of the above college occurred on the superannuation of the earlier Principal Sri R. Mohan on 30.6.1998. The petitioner being the senior most teacher in the college was appointed as officiating Principal in accordance with the relevant statutes and was working as such till the passing of the impugned order i.e. for more than 4 years (except for a short period from 9.7.2001 to 11.8.2001 when Dr. Shree Ram Verma was the Principal).

4. It appears that respondent no. 4 had applied against advertisement no. 23 issued by the U.P. Higher Education Service Commission and was selected by the Commission against that advertisement. In the counter affidavit of the respondent no. 4 it has been stated in paragraph 7 that by an order of the Director dated 23.3.2000 ;the said respondent no. 4 was recommended for appointment as Principal of D.V. Post Graduate College, Orai, district Jalaun, vide Annexure CA-2 but for the reasons given in paragraphs 8 to 11 of the counter affidavit he could not join. Thereafter the Director passed an order dated 4.7.2000 recommending the name of respondent no. 4 for appointment as Principal of Agrasen College, Sikandarbad, Bulandshahr vide Annexure CA-5, but he did not join there also as stated in paragraph 13 of the counter affidavit. Thereafter the Director passed two orders dated 15.7.2000 recommending that the petitioner be appointed as Principal of Chitragupta Mahavidyalya, Mainpuri, vide Annexure CA-6 and CA-7, but the committee of management of that college did not issue a letter of appointment to the respondent no. 4 and did not permit him to join. The posts of Principal in the aforesaid 3 colleges had been advertised in advertisement no. 23, but the post of Principal of Saraswati Mahavidyalaya, with which we are concerned in the present case, was not advertised in advertisement no. 23.

5. As stated in paragraph 7 of the petition advertisement no. 25 dated 12.8.1998 was issued by the Commission in which the post of Principal of Saraswati Mahavidyalaya, Hathras was advertised and the respondent no. 4 had been appointed against the said post by

the impugned order which is under challenge in this petition.

6. In our opinion this writ petition deserves to be allowed on the short point that respondent no. 4 was illegally appointed as Principal of Saraswati Mahaviyalaya, Hathras since he had never applied against advertisement no. 25 but he had applied only against advertisement no. 23 in which the post of Principal Saraswati Mahavidyalaya, Hathras was not mentioned.

7. It has been held by the Supreme Court in Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others (1998) 3 SCC 45, vide paragraph 12, that a person cannot be appointed against a vacancy to which he had not even applied. It has nowhere been alleged by respondent no. 4 in his counter affidavit that he applied against advertisement no. 25. When respondent no. 4 had not even applied for the post of Principal of Saraswati Mahavidyalaya, Hathras, we fail to understand how he can be appointed on that post. In our opinion a person can be appointed as Principal of a college for which he has applied. Since the respondent no. 4 never applied against advertisement no. 25, his appointment as Principal of Saraswati Mahavidyalaya was , in our opinion, wholly illegal.

8. Learned counsel for respondent no.4 has invited our attention to Section 13 (4) of the U.P. Higher Education Service Commission Act, 1980 and has placed reliance on the Division Bench decision of the Court in N.C. Yadav Vs. Director of Education, 2001 (2) UPLBEC 1345. In our opinion this decision is wholly distinguishable since the petitioner in N.C. Yadav's case had applied against the advertisement in which the college in question was mentioned, whereas in the present case the petitioner did not apply against advertisement no. 25.

9. The writ petition is, therefore, allowed. The impugned order dated 1.7.2002 (Annexure 6 to the writ petition) and the consequential order dated 6.7.2002 (Annexure 7 to the writ petition) are hereby quashed. The petitioner is permitted to work as officiating Principal of Saraswati Mahavidyalaya Hathras until a valid selection is made by the U.P. Higher Education Service Commission.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.12.2002

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

Civil Revision No. 346 of 1998

Dilip Kumar Bajaj ...Revisionist
Versus
Pradeep Kumar Bajaj ...Respondents

Counsel for the Revisionist:
Sri P. Sahai
Sri Pankaj Naqvi
Sri Pankaj Mittal

Counsel for the Respondent:
Sri Krishna Mohan
Sri R.P. Sinha
Sri Rajesh Kumar Agarwal

Code of Civil Procedure- Section 115- trust was a private trust and therefore, the provisions of Indian Trust Act, 1982 does not apply to the present trust and application under section 34 of the Act was not maintainable- these facts were not considered in detail by the learned District Judge while granting permission to sell the properties. Accordingly, the

order of the District Judge cannot be maintained and the matter should be sent back for reconsideration. (Held in para 12)

The revision is, therefore, allowed and the impugned order dated 9.7.1998 of the District Judge, Mirzapur is quashed.

Case law Referred:
AIR 1953 All 449, 1997 (4) SCC 102
AIR 1975 All, 255

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

1. This is a revision under Section 115 CPC against the judgment and order dated 9.7.1998 passed by District Judge, Mirzapur in Misc. Case no. 8 of 1998 by which he granted permission to sell certain properties of the trust to the respondent.

2. The trust was made by late Jamuna Das regarding his properties. He constructed a temple of Dwarika Nathji also known as Dwarikadhish Ji in district Mirzapur, a dharmashala in Brindaban and other properties at Kanpur and Calcutta. The trust was created regarding all the above properties by registered will dated 3.2.1914. According to the terms of the will Jamuna Das was to remain as trustee throughout his life, and thereafter his only son Seth Rameshwar Das Bajaj became trustee. Seth Rameshwar Das Bajaj also died on 12.3.1937. Thereafter his son, Dwarika Prasad Bajaj, the father of the parties became the trustee. Both parties are sons of Dwarika Prasad Bajaj. The respondent claimed that there was registered will of Dwarika Prasad Bajaj dated 22.10.1994 by which he was appointed managing trustee of the trust. He shown the need to sell certain properties of the trust and moved an application u/s 34 for permission to sell few properties. The learned District Judge considered the mater in detail and by the impugned order allowed the application in part and granted permission to sell certain properties, and rejected the same in part. Aggrieved by it, the present revision has been preferred.

3. I have heard Sri Pankaj Naqvi, learned counsel for the revisionist and Sri Krishna Murari, learned counsel for the respondent.

4. The first argument of the learned counsel for the revisionist is that trust was a private trust and therefore, the provisions of Indian Trust Act, 1982 does not apply to the present trust and application under section 34 of the Act was not maintainable. The learned counsel has taken me through the trust deed, which have been created by will dated 3.2.1914 of late Jamuna Das Bajaj. In the will he has mentioned that he had already given certain properties to Sri Dwarika Nath Ji and so that no body may interfere in the property given to Dwarika Nath Ji, he is executing the will. According to the will after his death his son Rameshwar Das Bajaj was to become the trustee and thereafter, his heirs. In the will he has referred to the temple as his own Thakurji and no outsider has been appointed in the trust to look after.

5. It has, therefore, been argued that the contents of the will show that trust is private trust and the provisions of section 34 of Indian Trust Act does not apply.

6. Learned counsel has also referred to Section 1 of the Indian Trust Act which provide that nothing herein contained affects the rules of Mohammedan law as to Waqf or the mutual relations of the members of an undivided family as

determined by any customary or personal law, **or applies to public or private religious or charitable endowments** (emphasis given). Therefore, it appears that trust in question is private trust and therefore, the provisions of 34 of Indian Trust Act does not apply. If it is so, the permission as granted under Section 34 appears to be without jurisdiction. This aspect of the matter was not at all considered by the court below.

7. Learned counsel in support of the arguments has referred to the decision reported in the case of **Lalta Prasad Vs. Brahmaanand and others, AIR 1953, 449**, which is Division Bench decision of this court. It was held that Indian Trust Act has no application to public or private religious or charitable endowment.

8. The next argument of the learned counsel for the revisionist is that the respondent can not be sole trustee. It is contended that according to will of Seth Jamuna Das Bajaj by which the trust was created on 3.2.1914 till his death he remained sole trustee and after his death his son Rameshwar Das Bajaj was became trustee and thereafter his son Dwarika Prasad Bajaj became the trustee. It has been argued that after the death of Dwarika Prasad Bajaj all his heirs, according to the Hindu Law will became the trustee and also according to the will. The respondent claimed that he was appointed as sole trustee by registered will dated 22.10.1994 by Dwarika Prasad Bajaj. It has been argued that line of succession can not be changed in case of trust, and in support of the argument, learned counsel has referred to the decision of the Apex Court in the case of **Rambir Das and another vs. Kalyan Das and another, 1997 (4) SCC;102**. It was held that succession to the shebaitship would be either as given by the founder or in its absence , in the line of intestate succession.

9. The other decision on this point is **Brindaban vs. Ram Lakhan Lalji and Mohadeoji and others, AIR 1975 All,. 255**, which is Division Bench decision of this Court . It was held that :

"When a property has been dedicated by a donor and he has thereby divested himself of all interests in the property, the rule of succession to the office of shebait assumes considerable Importance in the case of trusts, and, if the line of succession has been laid down by the donor at the time of the dedication, the same can not be changed by the donor in the absence of any reservation of power to himself of changing the line of succession. A shebait cannot also alter the line of succession to the office of Shebait laid down by the founder. "

10. Even if the deed creating the trust on 3.2.1914 is silent after the death of Dwarika Prasad Bajaj, all the heirs according to Hindu Law of Dwarika Prasad Bajaj, will manage the trust property and Dwarika Prasad Bajaj has no right to execute the registered will on 22.10.1994 making the respondent as sole trustee. Therefore, the application of respondent for permission to sell the property was also not maintainable. This aspect of the matter was also not considered.

11. It appears that these facts were not considered in detail by the learned District Judge while granting permission to sell the properties. Accordingly, the

order of the District Judge can not be maintained and the matter should be sent back for reconsideration.

12. The revision is therefore, allowed and the impugned order dated 9.7.1998 of the District Judge, Mirzapur is quashed. The District Judge, Mirzapur is directed to reconsider the matter in the light of the observations made above after opportunity to the parties to produce fresh evidence.

13. In the circumstances, the parties shall bear their own costs of this revision.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.12.2002

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

Civil Revision No. 443 of 2001

Narendra Kumar Jain ...Revisionist
Versus
Sunil Kumar Chaurasia ...Oppo. Party

Counsel for the Revisionist:
Sri B.B. Paul
Sri Vimlesh Srivastava

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

Code of Civil Procedure 1908- section 115- section 25 of Provincial Small Cause Court Act- the trial court has shown more lienoncy than was necessary in granting adjournments in favour of the revisionist. Therefore, the argument that there was no fair trial and proper opportunity was not given cannot be accepted.

Held - in para 11

There is absolutely no ground to remand the case to provide further opportunity to the revisionist to produce evidence.

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

1. The opposite party filed the suit for eviction and recovery of arrears of rent against the revisionist. The dispute is regarding house no. 24-E, Bank Road, Katra, Allahabad.

2. In brief, it was alleged that the opposite party is the owner and the land lord of the house in which the revisionist was tenant and the rate of rent was Rs.1500/- per month. The house was constructed in the year 1975 and thereafter it was given on rent and, therefore, U.P. Act No. XIII of 1972 does not apply, that the rent was not paid since July 1996, that the tenancy has been terminated by the registered notice dated 24.8.1998 which was served on 31.8.1998. Hence the suit was filed.

3. The revisionist filed the written statement claiming ownership of the house. He denied the tenancy.

4. The trial court framed necessary issues. The opposite party absented and, therefore, suit proceeded in his absence and was decreed on the basis of the evidence adduced by the opposite party. No evidence of the revisionist was recorded. Against the decree, the present revision has been preferred under section 25 of the Provincial Small Causes Court Act.

5. I have heard Sri Vimlesh Srivastava, learned counsel for the revisionist and Sri A.K. Gupta, learned counsel for the opposite party.

6. The first argument of the learned counsel for the revisionist is that there was no fair trial of the case and no opportunity to produce evidence was given to the revisionist. Therefore, the decree has to be set aside. It has been argued that the case was fixed for evidence on 28.2.2001. On that date, an application for adjournment was moved by the revisionist on the ground of illness of his counsel which was allowed subject to payment of Rs.300/- as costs and 29.3.2001 was fixed in the case, that again on the date, application for adjournment was moved by the revisionist for the reason that the file has been misplaced from the counsel due to white wash at his house. This application for adjournment was allowed on payment of Rs.600/- as costs and 16.4.2001 was fixed for evidence. On that date, the case was adjourned to 30.4.2001 as the presiding officer was on leave on 16.4.2001. The revisionist again moved an application for adjournment for the reason that the father of the counsel died on 18.4.2001. This application for adjournment was allowed on payment of Rs.1200/- as costs and 3.5.2001 was fixed for evidence, that on 3.5.2001 the revisionist moved an application that he want to apply for transfer of the case before the District Judge, that application was rejected. The evidence of the opposite party was already recorded in the case. His argument was heard and 14.5.2001 was fixed for judgment.

7. In the meantime, the revisionist moved an application for transfer before the District Judge on 9.5.2001. It was taken up on 11.5.2001. Unfortunately, on that date, the counsel for the revisionist became late and, therefore, it was rejected for default.

8. It has also been argued that thereafter the request was made by the counsel to the District Judge to reconsider the matter and the learned District Judge on his request called for the file of the case. Thereafter the file remained with the District Judge and subsequently, it was sent to the trial court. The trial court on receipt of the file decreed the suit by judgment dated 24.5.2001.

9. On the basis of these facts, it has been argued that application for adjournments were moved for sufficient reasons on the personal grounds of counsel, that the applications for adjournments had to be moved for unavoidable reasons. Inspite of that penal costs were imposed and sufficient time was not granted; that therefore, there was no fair trial and the matter should be sent back for re-hearing.

10. Opposing the request, Sri A.K. Gupta, learned counsel for the opposite party argued that the suit was filed on 25.10.1998. On every date fixed in the case, the revisionist moved application for adjournment. He took adjournments as detailed in paragraph 7 of the counter affidavit. It has not been denied that after taking as many as 18 adjournments, the written statement was filed under compulsion as the court ordered that no further time shall be allowed. The revisionist again started taking adjournment and the statement of opposite party was recorded on 15.11.2000. However, he was not cross-examined and the revisionist started taking adjournments again on every date. Several dates were fixed for cross-examination and ultimately on 30.4.2001 the statement of P.W. 2 Mohan Lal was written. Thereafter, the revisionist took

more than 12 adjournments and neither cross-examined the witness adduced by the opposite party nor produced his evidence. Therefore, the evidence was closed and the court proceeded under Order 17 Rule 2 C.P.C.

11. After considering the facts of the case, I am of the opinion that the trial court granted more than necessary adjournments to the revisionist. Therefore, it cannot be accepted that there was no fair trial. On the other hand, it appears that the trial court has shown more licency than was necessary in granting adjournments in favour of the revisionist. Therefore, the argument that there was no fair trial and proper opportunity was not given cannot be accepted and there is absolutely no ground to remand the case to provide further opportunity to the revisionist to produce evidence.

12. Now coming to the merits of the case, the first argument of the learned counsel for the revisionist is that he is real owner of the house. It is contended that the land was purchased by the revisionist, but the sale deed was got executed in the name of the opposite party in the circumstances explained by him in the written statement; that the house was also got constructed by him. Site plan was also got sanctioned by him and on the front of the house Jain Bhawan; has been written. That all these facts shows that he is the real owner of the house.

13. Regarding it, the first argument of Sri A.K. Gupta, learned counsel for the opposite party is that plea of benami is not open to the revisionist. According to Section 4 of the Benami Transactions (Prohibition) Act, 1988. Clause (1) of Section 4 deals with the suits and clause (2) with the defence in the suits. It reads as under :

"(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be real owner of such property."

14. In view of this section, the defence that the opposite party is benami of the house and revisionist is real owner is not open to the opposite party. Learned counsel could not show as to how this case is covered under the exception given in clause (3) to the above section.

15. Secondly, it has been argued that no document was filed in the court below in support of the defence. There is no document to show that the sale consideration was paid by the revisionist or he got sanctioned the site plan or he has spent money on the constructions. As against this, there is statement of opposite party and Mohan Lal P.W. 2 which is unrebutted.

16. Accordingly, I find that it cannot be accepted that the revisionist is the real owner of the house and the opposite party is only benamidar.

17. Lastly, it has been argued by Sri Vimlesh Srivastava, learned counsel for the revisionist that there is no evidence that the house was ever given on rent, that there is no rent deed and no rent receipt has been produced. There is no entry in the Nagar Nigam that the revisionist is in possession of the house as tenant. This

argument of the learned counsel cannot be accepted. There is unrebutted statement of the opposite party and Sri Mohan Lal. Their statements have not been challenged in the cross-examination and no evidence was produced in rebuttal. The notice of the opposite party was not replied.

Therefore, the learned trial court rightly believed the unrebutted evidence of the opposite party.

18. I do not find any ground to interfere in the judgment and decree of the trial court.

19. The revision fails and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.12.2002

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

Civil Misc. Writ Petition No. 27582 of 2002

Kumar Gandrva and others ...Petitioners
Versus
The Principal, Madan Mohan Malviya Engineering College, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri H.R. Misra

Counsel for the Respondents:
Sri Rakesh Upadhyaya
Sri Neeraj Tiwari

Constitution of India, Article 226 - Education of B. Ech - Ist year- not permitted to appear in examination on the pretext- shortage of attendance than 60%- pursuant to interim order- permitted to appear in IInd semester- direction issued to declare the result - circular dated 30.5.2002 not brought to the knowledge of the college concern- in similar circumstances other student less then 60% attendance- already permitted to appear in further examination but debarring petitioner- held- arbitrary.

Held- Para 15

Court at the time of initial hearing of the matter has permitted the petitioners to appear in their respective examinations of IInd semester and now on examination of the fact it is a clear case in which it can be safely said that the respondents have acted in an arbitrary and discriminatory manner, the petitioners are entitled to get relief from this Court so prayed in this petition. At the same time it will be also the concern of the Vice Chancellor, U.P. Technical University who has issued the circular dated 30.5.2002 reference of which has come in the preceding paragraphs to again issue circular to the concerned institution under its control to do the needful in furtherance to earlier instructions which is clearly bonafide, pious and in the best interest of the students at large who are the future of our society.

Case law discussed:
1987 UPLBEC-517,
JT 2000 (10) SC -216,
AIR 1995 SC-705
W.P.No. 8426 /02 decided on 25.2.2002

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

1. The prayer in this petition is for issuance of writ in the nature of mandamus commanding the respondents to permit the petitioners to appear in the examination of II Semester of B. Tech. Ist year which has already commenced and further to permit the petitioners to appear in the examinations of those subjects/papers of the aforesaid Semester in which they could not appear. There is

another prayer for issuance of writ in the nature of certiorari quashing the notice dated 7.7.2002 (annexure no. 1 to the writ petition) so far as it relates to the petitioners.

2. As the pleading between the parties is complete, as prayed matter has been heard and is being decided on merits.

3. Pleading as has been set forth in the writ petition, counter affidavit, rejoinder affidavit, supplementary affidavit and supplementary counter affidavits have been examined.

4. Heard Sri H.R. Mishra, learned Advocate who appeared for the petitioners, Sri Ramesh Upadhyaya, learned Advocate who appeared for the respondents 1/2 Sri Neeraj Tiwari, learned Advocate who appeared for the respondent no. 3.

5. The question which emerges on the pleadings and during submission of the counsel for the parties which requires attention of the Court is that whether in the facts of the present case the respondents 1/2 in debarring the petitioners from appearing in the examination in question has taken correct decision? The facts of the present case runs in very norrow campass and for the purpose of adjudication they can be summarized thus. All the petitioners happen to be regular students of B. Tech. Ist year (II Semester) in Madan Mohan Malviya Engineering College, Gorakhpur (hereinafter referred to as the college). It appears that petitioners were required to secure at least 60% attendance for being permitted to appear in the examination and as the petitioners lacked, the impugned exercise by the respondents 1/2 came into existence making the petitioners aggrieved to approach this Court.

6. Learned counsel for the petitioners submits that action on the part of the respondents in debarring the petitioners from appearing in the II semester examination besides illegal, unjust is also arbitrary and discriminatory. It is pointed out that the respondents 1/2 were required to take precaution and to ensure the required percentage of attendance, and they were required to intimate the students in the end of the month and also to make a query about the reasons of their absence and in the event the student do not take care, the parents were required to be informed. It is argued that inspite of the circular/letters issued by the Vice Chancellor of the U.P. Technical University, as no such steps were undertaken, the action on the part of the respondents in debarring the petitioner is not justified.

7. Learned counsel further submits that even otherwise also the respondents in the similar set of facts have permitted several students similarly situated, to appear in their respective examination whose attendance was less than 60% cannot be permitted to act in the discriminatory manner by debarring the petitioners.

8. Learned counsel who appeared for the respondents 1 and 2 in response to the aforesaid submission submits that as the petitioners have not secured the required attendance , they cannot claim as a matter of right permission to appear in the examination and the action on the part of the respondents being in conformity

with the Rules in this respect, petitioners are not entitled to get any relief. It is further argued that the information which is to be given to the petitioners or to their parents in respect to the shortage of their attendance as argued by the learned counsel on the basis of circular issued by the U.P. Technical University cannot give strength to their claim as the said circular has no statutory force. Learned counsel further submits that only two students were permitted to appear in their respective examinations although they could not secure required percentage of attendance but it was on undertaking given by them, that in the event they do not improve in the subsequent semester they will not be permitted to continue.

9. Learned counsel who appeared for the respondent no. 3 submits that so far the respondent no. 3 is concerned it has no major role in the matter as it is on receipt of the list of the students they just release/issue admit cards to the college and it is to be issued by the college to the students after verifying their required attendance and other formalities subject to which the admit card is to be issued to students. Learned counsel submits that so for the issuance of circular by the Vice Chancellor of the Technical University, as argued by the learned counsel for the petitioners, is concerned, that appears to have been issued in the interest and welfare of the students at large and although that have no statutory force, as the Vice Chancellor has issued the same in the interest of discipline that should have been taken care of, although the petitioners cannot insist for any relief in the event the respondents 1/2 have not adhered to the instructions so contained in the said circular. Learned counsel for the respondent no. 3 further submits that on the facts of the present case, petitioners are not entitled to get any relief and the petitioners cannot compel the authorities to condone shortage in attendance and even on the plea of discrimination , no relief is to be given o them. In support of his submission learned counsel has placed reliance upon the decisions as has been reported in 1987 UPLBEC 517 (**Parvez Ahmad and others vs. Aligarh Muslim University, Aligarh and others**) JT 2000 (10) SC 216 **(Regional Engineering College, Hamirpur and another vs. Ashutosh Pandey)** and AIR 1995 SC 705 **(Chandigarh Administration and another vs. Jagjit Singh and another)**, Learned counsel has further placed reliance on the decisions given in **Civil Misc. Writ Petition No. 8426 of 2002 Ankur Sharma Vs. The Examination Controller and another**; decided on 25.2.2002, Civil Misc. Writ Petition No. 21110 of 2002 Abu Rehan vs. Aligarh Muslim University, Aligarh and others decided on 8.8.2002 and **Civil Misc. Writ Petition No. 14253 of 2002 Pushpendra Singh vs. Aligarh Muslim University, Aligarh and others** decided on 5.7.2002.

10. In view of the aforesaid submission as has come on the record there appears to be dispute about the fact that the petitioners could not secure the required percentage of attendance. Now the question is that whether this Court is to condone the shortage in attendance or even to give a direction to the concerned authority to do the same. The question appears to have been settled as is clear from several decisions as has been placed by the learned counsel who appears on behalf of the respondent no. 3. It has been held by the learned Single Judge of this Court in the case of Ankur Sharma (supra) that in the event due to shortage of

attendance University or the college refused to allow the student to appear in the examination such decision should not be interfered with by the court, on idealistic, sentimental suggestions made by the counsel. Observation in this respect as is contained in this respect in the aforesaid decision is quoted as under :-

"If due to shortage of attendance the University and college refused to allow these students to appear in the examination due to shortage of their attendance, then such decision should not be interfered with by this Court on Idealistic sentimental suggestions made by the learned counsel for the petitioners during the course of his argument."

11. In another decision given by this Court in the case of **Pushpendra Singh** (supra) the same view has been taken. Observation as has been made in the aforesaid judgment is hereby quoted :

"the extent to which general condonation of shortage of attendance would be granted is a matter essentially of the Academic Counsel to decide upon various factors. In the writ petition there is no averment, which may indicate that the decision of the Academic Counsel fixing the ceiling of general condonation of shortage attendance was arbitrary.

12. Following the decision as has been given in the case of Pushpendra Singh (supra) this Court in another writ petition filed by Abu Rehan (supra) has taken the same view. In another decision as has been given by the Division Bench of our own court in the case of Parvez Ahmad (supra) it has been laid down that rule of prudence requires that Court should hesitate to dislodge decisions of the academic body. The Apex court in the decision given in the case of Regional Engineering College, Hamirpur and another (supra) has also ruled that the principal has no power to condone shortage of attendance and in another decision of the Apex court as given in the case of Chandigarh Administration and another Vs. Jagajit Singh and another (supra) it has been laid down that even on the ground of discrimination petitioner cannot be entitled to get the relief.

13. On a scrutiny and analysis of the aforesaid cases as has been referred by the learned counsel who appears for the respondent no. 3 there appears to be distinction in so far as the facts of the present case are concerned which is being discussed hereinafter and thus in the light of the distinction which is being drown, any hurdle may not come in the way of the petitioners. In view of the various decisions, reference of which has been given above, it appears that the Apex Court as well as this Court has approved the decision of the academic bodies in the matter of condonation of shortage of attendance and has given preference to their views but at the same time the court should not feel that the decisions so taken by the concerned authorities in any manner is arbitrary and discriminatory and thus in the event the interference is required that should not be only on the basis of idealistic and sentimental suggestions. It is thus clear, on the examination of the facts of all the cases referred above that in the event the action of the concerned authorities if is found arbitrary or discriminatory the court can always take note of and can issue appropriate orders. Various observations laying down the guidelines on the subject as are contained in the judgments referred

above, for arriving at this conclusion and for taking this view in this judgment will be useful to be quoted here in sequence :

"then such decision should not be interfered with by this court on idealistic, sentimental suggestions made by the learned counsel for the petitioner during the course of his argument." (Civil Misc. Writ Petition No. 8426 of 2002).

"On the facts and circumstances, it cannot be said that the exercise by the respondents is arbitrary and discriminatory in any manner." (Civil Misc. Writ Petition No. 21110 of 2002).

"In the present case the petitioner neither pleaded nor proved such discrimination." (Civil Misc. Writ Petition No. 14253 of 2002).

"In the instant case the petitioner failed to establish that they have been discriminated by the respondents and that the treatment meted out to them in the matter of conditions is not uniform." (1987 UPLBEC 517).

"In the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of the case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ petition compelling the respondent- authority to repeat the illegality or to pass another warranted order." (AIR 1995 SC 705).

14. After referring to the aforesaid quotations, to support the view that the court may interfere in the matter, in the event it is found that discrimination is a conscious one and not by mere oversight, reference can be made to the decision by Division Bench of our own Court in the case of Khalid Ahansar Haq and another vs. Aligarh Muslim University and another (1995 UPLBEC 1514) in which it has been held that if the University permit a candidate having shortage of attendance to appear in the examination, debarring others who fell in the some category is discriminatory and those students were allowed to appear in the examination. In another decision as has been given by this court in the case of Parvez Ahmad (supra) the Division Bench in para 19 and 20 has observed as thus :

"19. In our view, discrimination envisaged under Article 14 of the Constitution is conscious discrimination and a discrimination arising out of over sight is no discrimination.

20. It was said by the Supreme Court in State of Orisa vs. Durga Charan Das AIR 1966 SC 1547, that it could not be contended that because a mistake was committed in one case, the same should be allowed to continue in other cases."

15. In view of the aforesaid , on examination of the facts of the present case there appears to be no dispute about the fact that two students namely Abhishek Srivastava of the second year Computer Science and Gaurav Anand Srivastava of the Ist year Computer Science whose attendance was less than 60% were allowed to appear in their respective examinations. This aspect has been clearly pleaded on behalf of the petitioner in para 5 and 6 of the supplementary affidavit which in fact stands admitted in the reply which is contained in paragraphs 3 and 4 of the supplementary counter affidavit dated 13.10.2002 sweard by Sri Ausaf Ahmad, Legal Assistant of the college. The

respondents have taken stand that the aforesaid students were permitted to appear in the examination after taking undertaking that they will improve in the next semester. In view of the above it is clear that permission to other students to appear in examination, having less than 60% attendance is neither by oversight or by way of mistake, rather that was a conscious act. In view of the aforesaid, it appears that the present case is covered by the clear exceptions in which interference can be made and is well within the limit of the jurisdiction/discretion of this Court as provided under Article 226 of the Constitution. There is another aspect of the matter from which also controversy can be viewed. The counsel who appears for the U.P. Technical University has clearly admitted and in fact counsel appearing for the respondent 1 and 2 also admits that a circular has been issued by the Vice Chancellor by which all the colleges were commanded to ensure the proper attendance of the students for which a guideline was provided to the effect that students in the event of shortage of required attendance are to be called upon to explain and thereafter if they do not improve even the parents were required to be informed in this respect. Copy of the aforesaid circular dated 30.5.2002 has been annexed as annexure no. 1 to the supplementary affidavit filed by the petitioners clearly indicates that the aforesaid circular was issued after having good deliberations with the concerned authorities of the college/institutions who are under the control of the Technical University which clearly means that it has been issued in their full knowledge and with their concurrence. Although for the sake of argument it may be accepted that the aforesaid circular has not statutory force but at the same time none of the respondents have taken any plea before this Court that the aforesaid Circular has not been issued with due deliberation or the same is not in their knowledge and thus in the event the aforesaid circular takes care of the interest of the students and in fact it was issued as a matter of caution, related to the discipline and also with an intention to improve the merit of the students, the respondents 1/2 and all the other colleges/institutes were required take its care. Although petitioners may not be permitted to take any plea of their lapses but at the same time as this Court at the time of initial hearing of the matter has permitted the petitioners to appear in their respective examinations of IInd Semester and now on examination of the fact it is a clear case in which it can be safely said that the respondents have acted in on arbitrary and discriminatory manner, the petitioners are entitled to get relief from this Court so prayed in this petition. At the same time it will be also the concern of the Vice Chancellor, U.P. Technical University who has issued the circular dated 30.5.2002 reference of which has come in the preceding paragraphs to again issue circular to the concerned institution under its control to do the needful in furtherance to earlier instructions which is clearly bonafide, pious and is in the best interest of the students at large who are the future of our society.

16. For the reasons stated above, this writ petition succeeds and is allowed. The impugned notice dated 7.7.2002 (annexure no. 1 to the writ petition) so far as it relates to the petitioners is hereby quashed and as the petitioners have already appeared in their B. Tech. Ist year (II semester examination) the result of the

petitioners shall also be declared forthwith so that they may be entitled to join/attend the next semester and to proceed with their studies in accordance with law. So far papers in which the petitioners could not appear the respondents 1/2 will do the needful in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5 DECEMBER, 2002

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

First Appeal From Order No. 660 of 2002

Rama Shanker Pandey ...Appellant
Versus
Ram Raj and others ...Respondents

Counsel for the Appellant:
Sri Bharat Ji Agarwal
Sri S.D. Singh

Counsel for the Respondents:

Motor Vehicles Act 1988- Section 173 (3)- Appeal filed without depositing the amount as per provisions of new Act- pleas taken by the appellant about the date of cause of action as well as the pre condition of deposit is under 173 of the new Act while the Appeal has been filed under section 110-B- can not be sustained-

Held- para 6

In view of this decision of the Apex Court which is directly on the point, the argument of the learned counsel cannot be accepted and it is also not necessary for me to consider in detail the law laid down in the above referred case.

Case law discussed:
1933 Suppl (2) SCC-724
1987 (3) SCC-516
AIR 1955 SC-84
AIR 1953 SC-21

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

1. This appeal has been preferred against the award given by the Motor Accident claims Tribunal Chitrakoot. The stamp reporter has reported that the amount as required under the proviso of Section 173 (3) as condition precedent for admission of the appeal, has not been deposited. The deposit is pre-condition for the admission of the appeal.

2. I have heard Sri Bharatji Agarwal, learned Sr. Advocate assisted by Sri S.D. Singh for the appellant.

3. It has been argued that the accident in this case took place on 15.1.1984 when the old Motor Vehicles Act (herein after referred to as the Act) was in force. That the new Act was enforced from 1.7.1989 and thereafter the application for compensation was moved. It has been argued that right to claim compensation accrued under the old act and the same has been protected under Section 6 of the General Clauses Act. It has therefore been argued that the claim petition shall be considered to have filed under Section 110-A of Motor Vehicles Act, 1939. That the proceedings also took place under the said Section and therefore the appellant has right to appeal under Section 110-D of the said Act. That the appeal has not been filed under Section 173 of the new Act of 1988 and therefore, the proviso to Section 173 of the new Act does not apply.

4. The learned counsel in support of the argument has referred to Section 6 of the General Clauses Act and has argued that the right has accrued which is

protected under clause 6 (e) after the repeal of 1988 Act. The learned counsel in support of the argument has also referred to the following decisions-

(1) M/s P.V. Mohammad Barmay Sons Vs. Director of Enforcement 1933 Supp (2) Supreme Court Cases Page 724,

(2) Commissioner of Income Tax, U.P. Vs. M/s Shah Sadiq and sons (1987)3 Supreme Court Cases Page 516,

(3) State of Punjab vs. Mohan Singh Pratap Singh, AIR 1955 SC page 84 AND

(4) M/s Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and others AIR 1953 Sup, Court Page 221

5. I have considered the decision of all these cases, in which the rights which accrued under the repealed Act have been protected under Section 6 (e) of General Clauses Act were considered by the Apex Court in various cases. However, none of these case is regarding the rights accrued under the old Motor Vehicles Act, 1988, after its repeal. There is direct decision of the Apex Court in the case of Motor Vehicles Act which is otherwise. I may refer to the decision of Apex Court in Vinod Gurudas Raikar Vs. National Insurance Co. Ltd. and others, AIR 1991 Supreme Court page 2156. It was held in this case as under :

"Where the accident took place when the old Motor Vehicles Act was in force, however, the claim petition was filed after the repeal of the old Act and the new Act came into force, the case would be covered by the new Act and delay for a longer period than six months could not be condoned. In such a case, Cl. (e) of Sec. 6 of General Clauses Act is not attracted because by the enactment of the new law the remedy of the claimant has not been affected at all. His right to claim compensation by filing the claim within the same period of limitation has been preserved. And there was no application for condonation of delay in a proceeding pending at the time of repeal so as to allow him to claim any privilege available under the old Act.

Though the claimant earlier could file an application even more than six months after the expiry of the period of limitations, but this cannot be treated to be a right which the appellant had acquired. The claim to compensation which the claimant was; entitled to by reason of the accident was certainly enforceable as a right.

It cannot be said in such a case that the present case must be considered as one where an accrued right has been affected, because the option to move an application for condonation of delay belatedly filed should be treated as a right.

There is a vital difference between an application claiming compensation and a prayer to condone the delay in filing such an application. Liberty to apply for a right is not in itself an accrued right or privilege. Moreover, claimant's right to claim compensation was not affected at all by the substitution of one Act with another. Since the period of limitation remained the same there was no question of the claimant being taken by surprise. So far the question of condonation of six months delay was concerned, there was no change in the position under the new Act."

6. In view of this decision of the Apex Court which is directly on the point, the argument of the learned counsel cannot be accepted and it is also not necessary for me to consider in detail the law laid down in the above referred case.

7. The objections of the appellant are accordingly rejected. The appellant is liable to deposit the amount as required by the proviso of Section 173 of the Act.

Accordingly, list this appeal as and when the amount is deposited.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5 DECEMBER, 2002

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

Second Appeal No. 1217 of 2001

Mazhar Alam Khan ...Appellant
Versus
Union of India and others ...Respondents

Counsel for the Appellant:
Sri M. Islam
Sri Anil Kumar Sharma

Counsel for the Respondents:
Srik Jagan Nath Singh

Code of Civil Procedure- Section 100- Appellant working as Rakshak" after displinary proceeding removed from service- confirmed by appellate authority- challenged before civil court- Trial court decreed the suit first Appellate Court interfered with the findings of fact- held - dismissal order passed by the Assistant Security officer, while the appointing authority is the Chief Security officer- held - Delegate can not delegate- in absence of any authority regarding delegation of power- order passed by the A.C.O. is illegal. Therefore, the contention that the power was not according to the law as the same could not be delegated.

Accordingly, the order of Assistant Security Officer dated 22.5.1985 removing the appellant from service is without jurisdiction and is void. The order of dismissal of appeal is therefore also illegal.

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

1. This is an appeal under Section 100 of C.P.C. against the judgment and decree of the Appellate Court dated 18.3.1993 passed in Civil Appeal No. 78 of 1991.

2. I have heard Sri Anil Kumar Sharma, learned counsel for the appellant and Sri Jagan Nath Singh for the respondents.

3. There is no dispute regarding the facts of the case which may briefly be narrated as follows .

4. The appellant was working as 'Rakashak' Railway Protection force. Disciplinary proceedings were started against him and after competition of enquiry he was removed from the service by Assistant Security officer. The appellant preferred an appeal against that order before the Commandant Railway Protection Force, which has also been dismissed. Therefore, the appellant filed a suit for declaration that the order of removal dated 29.9.1986 are illegal and void and that he be treated in service and is also entitled to the salary and the other benefits of service. The respondents contested the suit and alleged that the appellant was rightly dismissed from the service. The trial court framed necessary

issues and decreed the suit and held that the order of dismissal dated 22.5.1985 as well as the order of the appellate court dated 25.9.1986 are illegal and he shall be deemed to be in service and is entitled to pay and other benefits. Against that judgment and decree the respondents preferred an appeal which has been allowed by the impugned judgment dated 18.3.1993 and the suit of the appellant has been dismissed.

5. The only point argued before me in this appeal is that the appointing authority of the appellant is Chief Security Officer, respondent no. 3 but the order of removal has been passed by Assistant Security officer. That therefore, the order is without jurisdiction. Therefore, the following substantial question of law arises for decision in this appeal.

"Whether the order of Assistant Security Officer removing the appellant from service is without jurisdiction?"

6. The learned counsel in support of his argument has referred to Section 6 of the Railway Protection Force Act which provides regarding appointment of Members of the Force. It provides that power of appointment rests with Inspector General, Additional Inspector General or Deputy Inspector General.

7. Reference has also been made to the Schedule III of the Act which is regarding the disciplinary authorities and their powers. According to the schedule the power of dismissal and removal has been given to the Director General, Chief Security Commissioner, Additional/ Deputy Chief Security Commissioner/ Principal R.P.F. Academy, Divisional Security Commissioner/ Security Commissioner/ Commanding Officer/ Senior Security Commissioner. Clause VII further provides that Deputy/Assistant Security Commissioner/ Assistant Commandant of R.S.P.F. had no power of dismissal or removal.

8. The learned counsel for the respondent has not challenged these rules and it has been argued that the power was delegated to Assistant Security Officer. However, no order of delegation of power has been produced on record. No provision of law has been shown under which the power can be delegated. Therefore, the contention that the power was delegated cannot be accepted. In any case if it was delegated it was not according to the law as the same could not be delegated.

9. Accordingly, the order of Assistant Security Officer dated 22.5.1985 removing the appellant from service is without jurisdiction and is void. The order of dismissal of appeal is therefore also illegal.

10. This appeal is therefore, allowed and judgment of the first appellate court dated 25.9.1986 is quashed and that of the trial court is restored. The parties shall bear their own costs of this appeal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2002

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Contempt Petition No. 4194 of 2000

Saifuddin Ahmad ...Appellant
Versus
Kalpnath Ram, District Inspector of Schools, Sonbhadra and others ...Opposite Parties

Counsel for the Petitioner:
Sri Yogesh Agarwal

Counsel for the Respondents:
Sri K.C. Vishwakarma

Contempt of Court Act- Section 12 willful disobedience - applicant being B.T.C. Teacher- permitted to take class VI to VIII by the corporation- the institution run and managed by the State Corporation- service regulated by U.P. Cement Corporation Ltd. Employees service Rule 1977- writ petition allowed without impleading the proper authorities- applicant was permitted to take higher classes under staffing patterns without approval of D.I.O.S.- Liability of payment of salary cannot be suddled upon educational authorities- No willful disobedience disclosed- Notices discharged.

Held- para 10

The college is being run by an autonomous body and was exempted from the Payment of Salaries Act, 1971. The order in the writ petition is binding only on the respondents who were impleaded in the writ petition. The corporation has been wound up and is under liquidation. It has complied with the order by permitting petitioner and allowing him to take classes VI, VII and VIII. The responsibility of payment of salary is of the corporation. The a educational authorities cannot be compelled to pay the salary to petitioner as the approval was not taken before petitioner was allowed to take higher classes and that staffing pattern was not approved by them. The petitioner was teaching under a contract with the corporation and thus the liability of payment salary cannot be saddled upon educational authorities.

Case law discussed:
2001 (1) ESC-583
1990 (2) UPLBEC- 1221
AIR 1970 SC-1767

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

1. This contempt petition has been filed by petitioner informing this court that order dated 5.2.1998 passed in writ petition no. 20178 of 1989 quashing the impugned order dated 19.9.1989 and directing that the petitioner shall be regularised as teacher of Classes VI, VII and VIII with all consequential benefits.

2. It is alleged in the contempt petition that petitioner is a Teacher in Intermediate College known as U.P. State Cement Corporation Ltd. Dala Cement Factory, Dala, district Sonbhadra . He has been working and taking the classes VI to X in the college for several years but was being treated as Teacher, belonging to Basic sections of the college and was absorbed in C.T. Grade which was converted into L.T. Grade from 1989. A writ petition was filed by him which was allowed with the aforesaid directions.

3. Petitioner served a copy of order alongwith representations dated 26.3.1999 and 20.8.1999 but no action was taken. He is still being paid the salary permissible to basic section inspite of

service of order upon the respondents which amounts to willful contempt of the order passed by this Court.

4. Notices were issued on 23.11.2000 directing the petitioner to delete the name of Sri J.P. Rai, Joint Director of Education, Mirzapur Region, Mirzapur , who according to the Court, was unnecessarily impleaded as a party in the matter. Notices were issued on 6.8.2002 directing Sri Kalp Nath Rai, District Inspector of Schools, Sonbhadra to be present on 16.8.2002 to explain his position and for framing of charges.

5. A counter affidavit of Sri Kalp Nath Ram, District Inspector of Schools, Sonbhadra has been filed stating that Cement Factory Inter College is established and running after recognition of Intermediate Education Board UP Cement Corporation Dala, district Sonbhadra and the services of its employees are regulated by U.P. Cement Corporation Limited employee Service 1977 and the payment is being made under Wage Board Niyamawali. The institution is exempted from Section 13 of Payment of salary Act and that only " Anuraaksha Anudan' is given upto the High School for payment of salary. Petitioner was appointed as a Urdu Teacher in Primary School. Dala which have a different status to the Intermediate Education and the respondents are not responsible for any internal compromise between the Corporation and its employee. The District Inspector of Schools, Sonbhadra gave a statement to the court that the subject matter has to be referred to the Director of Education.

6. Sri Yogesh Agarwal, learned counsel appearing for petitioner, submits that the institution is receiving the maintenance grant and has relied upon a statement of salary, filed in civil misc. writ petition no. 18174 of 2000. The record of the writ petition was summoned in which petitioner's name was found place at serial no. 35 but has been scored out by the Manager of the college from the salary bill. According to the learned counsel for petitioner, the order of this court has not been complied with and that the petitioner has been discriminated as against other teachers of secondary education in the same school.

7. On 24.4.2002, the Court found the U.P. Cement Corporation has been wound up in December, 1998 and the proceedings for sale/rehabilitation of the entire assets of the company is pending in special appeal in this Court. The official liquidator, representing the company (in liquidation) informed that Company court has passed a detailed order on 6.2.2002 directing that the Cement Factory Inter College Ghanar be also considered on priority to be brought in the grant-in-aid list. Under the circumstances, the court awaited the response from the Secretary of Education and adjourned the matter to be listed in the 2nd week of July, 2002 on 16.8.2002, the court find that the matter with regard to the payment of salary of teachers required consideration at the secretary level. Once again, Sri Kalp Nath Ram appeared in court on 24.9.2002 in person and informed the court that the orders have not been complied with as the matter has been referred to the Education Secretary (Madhyamik) U.P. Lucknow. Since considerable delay has been caused, the Court directed that the notices be issued to the Education Secretary (Madhyamik), U.P. to be present in court alongwith the record of the case on

21.10.2002. On the next date, a short adjournment was sought and today, i.e. 12.1.2002, when the matter was taken up, Sri Mukul Singhal, Education Secretary (Madhyamik) U.P. appeared in person before the Court.

8. Sri Mukul Singhal Education Secretary (Madhyamik) U.P. informed the Court that the State is not liable for payment of salary but it only provides assistance to the colleges in secondary education. The college was being run by the U.P. State Cement Corporation. The staffing pattern and condition of service was regulated by the Corporation. He informs that petitioner had not impleaded the educational authorities in the writ petition and thus full and correct facts have not been disclosed to the Court. In the writ petition the parties impleaded included the officers and employees of U.P. State Cement Corporation with its unit at Dala, district Sonbhadra and the Principal of the College. Petitioner may have been allowed to take classes by the management of Corporation but such action do not have any approval of the authorities of education department. The state has not taken any liability with regard to the payment of petitioner's salary. The corporation may have given the liberty for taking classes of VI, VII and VIII for which the department cannot be held responsible. According to him, the State Government is not liable to pay the salary of petitioner and that if there is liability, it is of the management of Corporation which was an autonomous body.

9. Sri Yogesh Agarwal, learned counsel for petitioner submits that the petitioner must be paid the salary on the principles of equal work. Petitioner was allowed to work in higher classes since 1982. The permission was granted. The educational authorities were fully aware of the petitioner's work and that maintenance grant includes the salary of teachers. Petitioner is being discriminated and that the State administration cannot shirk its responsibility for ensuring to provide the resources for payment of salary. It is for the administration to find out the ways and means for securing the funds for the purpose. He has relied upon decision of Supreme Court in Chandigarh Administration and others vs. Mrs. Rajni Vali and others, 2001 ESC 583 for the above proposition and has also relied upon the judgment of this Court reported in 1990 UPLBEC (12) 1221 and the judgment of Supreme Court in AIR 1970 SC 1767 for the proposition that the Court can execute its order in contempt jurisdiction.

10. The disobedience of order can be punished under Sections 11/12 of the Contempt of the Court Act, 1972 if it is knowingly and will fully disobeyed. Petitioner did not care to implead the educational authorities in the writ petition and thus full facts could not be brought to the notice of the Court. The college is being run by an autonomous body and was exempted from ;the Payment of Salaries Act, 1971. The order in the writ petition is binding only on the respondents who were impleaded in the writ petition. The corporation has been wound up and is under liquidation. It has complied with the order by permitting petitioner and allowing him to take classes VI, VII and VIII. The responsibility of payment of salary is of the corporation. The educational authorities cannot be compelled to pay the salary to petitioner as the approval was

not taken before petitioner was allowed to take higher classes and that staffing pattern was not approved by them. The petitioner was teaching under a contract with the corporation and thus the liability of payment of salary cannot be saddled upon educational authorities.

11. In the facts and circumstances of the case, I cannot hold the respondents guilty of wilfully and knowingly disobeying the orders of the Court. The contempt petition is accordingly dismissed and notices issued are discharged.

The record of writ petition be detached and be listed separately.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9TH DECEMBER, 2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 7646 of 1998

Smt. Hasina Bibi and others ...Petitioners
Versus
VIth Additional District Judge, Allahabad and others ...Respondents

Counsel for the petitioners:
Sri M. Islam

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

Code of Civil Procedure Order 21- rule 2- Execution of Compromise Decree- execution court directed for compliance of terms of compromise - revisional court instead of remanding the case- set-a-side the order passed by the Trail court on the pretext after compromise new tenancy has been created- hence no question of execution of compromise decree- various legal aspect discussed.

Held- para 6

Be that as it may, in view of the rival contentions, the decision of the revisional court deserves to be set aside on the ground that the Court below should consider the relevant contentions and the law referred to above and thereafter record a findings, which has not been done in the order impugned in the present writ petition while allowing the revision and dismissing the objection. There is yet another reason that the revisional court while exercising the revisional power for setting aside the finding recorded by the trial court should have remanded the matter to the trial court, which has not been done. For this reason alone, the order impugned in the present petition deserves to be set aside and is hereby set aside.

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

1. By means of present writ petition under Article 226 of the Constitution of India petitioners, who were the opposite parties before the revisional court, have challenged the order passed by the revisional court dated 13.11.1997, copy of which has been annexed as Annexure -4 to the writ petition, whereby the revisional court has allowed the revision filed by the revisionist permitting the execution of the compromise decree, which has been arrived at between the parties during the pendency of the revision before the revisional court.

2. The facts leading to the filing of present writ petition are that petitioners-land lord filed suit no. 642 of 1977 for arrears of rent and ejectment against the respondent no. 3 (defendant in the suit). The aforesaid suit was decreed for arrears

of rent and ejectment on 22.9.1982 by the Small Causes Court. Aggrieved by the aforesaid decree dated 22.9.1982 before the revisional court under Section 25 of the Provincial Small Causes Courts Act, which was pending before the revisional court when a compromised have arrived at between the parties and the revision was dismissed by VII Additional District Judge, Allahabad vide order dated 24.5.1990, the land lord decree holder filed an application for execution of the compromise decree wherein it has been agreed upon that defendant respondent no. 3 shall not be liable for ejectment. The respondent no. 3 filed objection against the compromise decree and its execution, which was rejected by the executing court under Section 47 of Code of Civil Procedure vide its order dated 5.2.1994. Thereafter respondent no. 3 filed civil revision no. 67 of 1994 against the order dated 5.2.1994 stating therein that this decree being a compromise decree and has been given effect to and thus has become un-executable. The revisional court allowed the revision filed by the judgment debtor vide its order dated 13.11.1997 and held that the rejection of the objection by the executing court is not inconsonance with the law. The revisional court has held that in view of the compromise decree, which has resulted into compromise decree created a new tenancy and therefore the compromise decree has exhausted and is no more open for execution and after setting aside the order passed by the trial court allowed the revision.

3. Sri M. Islam, learned counsel appearing on behalf of the petitioners has challenged the order passed by the revisional court dated 13.11.1997 on the ground that it is clear from the perusal of the compromise decree that had it is clear that in case the defendant defaults in complying with the condition of the compromise decree passed which was a special matter of the revision before the revisional court before whom the said compromise was arrived at, will be open and available for execution, therefore the view taken by the revisional court in allowing the revision suffers from manifest error of law. On the contrary, learned counsel appearing on behalf of the contesting respondents relied upon a decision of this court reported in **1973 Allahabad, 40 M/s Chitra Talkies Versus Durga Dass Mehta**. The relevant paragraphs 7 and 8 of the aforesaid judgment which has relied upon by learned counsel for the petitioners are quoted below.

"7. I am inclined to agree with the contention of the learned counsel for the judgment debtor respondent that the new contract of tenancy entered into between the decree holder and the judgment debtor by which a fresh tenancy in the cinema building was created in the latter's favour with effect from 1.8.1965 was not an adjustment of the decree in execution. My initial reaction was that the provisions of Rule 2 , Order XXI of the C.P. Code were applicable only to a decree of any kind under which money was payable and the decree in execution in the instant case being one for the delivery of possession , those provisions were not attracted to it. This view of mine found support from a decision of the Madras High Court in the case of Narayanaswami Naidu vs. Rangaswami Naidu AIR 1926 Mad 749. But my attention was drawn to the Division Bench decision of our Court in Sri Ram Vs. Lekhraj AIR 1952 All 814, in which

the Madras view was dissented from and it was held that provisions of Order XXI, Rule 2applied to all kinds of decree or decrees under which money way payable.

8. The basic question, therefore, that remains to be considered is whether the creation of a new tenancy in favour of the judgment-debtor was an adjustment of the decree in execution. The decree in execution in the instant case was for delivery of possession by eviction of the judgment debtor. The process of execution is nothing but an assistance given by the Court to the decree holder varying from case to case depending on the nature of the decree. The judgment debtor in the instant case in execution through the assistance of the officers of the Court was liable to be dispossessed physically. Once the judgment debtor was dispossessed through the process of the court full satisfaction would be accorded to the decree holder and the decree will stand fully satisfied. The adjustment contemplated under Rule 2 of Order XXI CP Code is the satisfaction of the decree-wholly or in part. As pointed out above under the decree in execution in the instant case satisfaction could only be accorded to the decree holder by dispossession of the judgment debtor that is his physical removal from the cinema building by the assistance of the officers of the Court the judgment debtor vacates either at his own initiative or at the initiative of the decree holder then that would amount to according satisfaction to the decree holder outside the Court, that is, without the assistance of the machinery of the Court. It would then be an adjustment within the meaning of Rule 2 of Order XXI of the decree in execution. Viewed in this light. I fail to understand how the decree in the instant case can be said to have been adjusted when there has been no vacating of the possession of the cinema building by the judgment debtor at all and his right to remain in possession is recognized by the decree holder on the basis of a fresh contract of lease. What that decree holder in fact has done is saying to the judgment debtor that " I do not want you to vacate the premises and with effect from 1.8.1965 I recognize your occupation as a tenant under the contract of lease. In doing so I do not think that the decree holder could be said to have intending to accord satisfaction to the decree in execution when under some arrangement arrived at between the decree holder and the judgment debtor new rights are crated by entering into afresh contract quite inconsistent with the rights determined under the decree in execution. The right which was determined under the decree in execution was that the tenancy had stood legally terminated and the decree holder as land lord was entitled to the delivery of vacant possession by the judgment debtor. In the arrangement arrived at between the decree holder firm and the judgment debtor to the decree holders but on the other hand a situation to the contrary came into existence, namely, as a lessor the decree holder was to put in possession the judgment debtor who had become a new tenant. It does not make any material difference, to my mind, that the judgment debtor was in occupation from before. Under the arrangement between the decree holder and the judgment debtor by which a new tenancy was created in favour of the latter, the decree in execution was not being adjusted in the sense as explained by me above. On the other hand an arrangement a new between the parties on contractual basis, quite foreign to the rights determined by the decree in

execution, was arrived at between the parties. I may illustrate my point. A decree for possession is obtained by the owner of a land against a trespasser. The owner puts that decree in execution but pending the execution the owner decree holder sells the land on which the trespass was committed to the judgment debtor and a sale deed is executed and duly registered evidencing the transaction. The decree holder owner admits to have sold the property. The judgement- debtor does not apply to the Court, neither the decree-holder brings it to the notice of the Court that a sale of the property in suit had taken place by which the said property stands transferred to the judgment- debtor. The question is can the owner decree holder still in execution through the assistance of the Court dispossess the judgment debtor? The obvious answer is in the negative. If such transactions were to amount to adjustment of the executing Court, then much difficulty will arise. I do not think the authorities cited by the learned counsel for the decree holder appellant lay down any such wide proposition of law that in no case a transaction which makes a decree ineffective entered into between the decree holder and the judgment debtor can be set up as a bar to the execution unless it has been got certified under Rule 2 of Order XXI CP Code. Indeed faced with such a situation in the case of AIR 1952 All 814 (supra) relied on by the learned counsel for the appellant the learned Judges observed as follows :-

"Order 21, Rule 2 of the Civil P.C. is a counter part of Order 23, Rule 3 in the execution proceedings. The provisions of Order 23, Rule 3, Civil P.C. can be extended to the execution proceedings. It is manifestly unjust that after the parties have arrived at an arrangement or the adjustment of a decree and one of them has even performed a part of the agreement the Court should not give recognition to such an agreement and allow and party to resile from it. "

4. In reply Sri M. Islam, learned counsel appearing on behalf of the petitioners has relied upon a decision reported in ***AIR 1978 Supreme Court Smt. Nai Bahu Versus Lala Ramnarayan and others***. Paragraphs 14 and 15 are relevant for the purposes of present controversy which are reproduced below :

"14. It is true that a decree for eviction of a tenant cannot be passed solely on the basis of a compromise between the parties (see K.K. Cha Vs. R.M. Seshadri (1973) 3 SCR 691 (AIR 1973 SC 1311). The Court is to be satisfied whether a statutory ground for eviction has been pleaded which the tenant has admitted by the compromise . Thus dispensing with further proof, on account of the compromise, the court is to be satisfied about compliance with the statutory requirement on the totality of fact of a particular case bearing in mind the entire circumstances from the stage of pleadings up to the stage when the compromise is effected.

15. When a compromise decree in challenged as a nullity in the course of its execution the executing court can examine relevant materials to find out whether statutory grounds for eviction existed in law. If the pleadings and other materials on the record make out a prima facie case about the existence of statutory grounds for eviction a compromise decree cannot be held to be invalid and the

executing court will have to give effect to it."

5. Learned counsel for the contesting respondent relied upon a decision reported in ***1985 Allahabad Law Journal, 108 Rashid Ahmad Versus The Munsif Muzaffarnagar and others***. The Division Bench of this court in paragraphs 10and 13, which has been relied upon by learned counsel for the contesting respondent, has held as under :

"10. The last contention of the petitioner was that the effect of compromise was that anew tenancy had been created and, therefore, a decree for eviction of the tenant in the present suit could not be passed. This contention on the facts of the present case is untenable. Reference was made to a decision of this Court in Shri Gandhi Ashram Meerut V. Ram Gupta 1983 All. L.J. 300. In that case a compromise decree had been passed in a suit for eviction prior to the commencement of U.P. Act No. 13 of 1972 and that decree provided for enhancement of rent. It also provided that the tenancy shall commence on the first of each calendar month and the accommodation shall stand vacated after the stipulated period. The decree, however, did not provide that either in case of default of payment of rent or on non delivery of possession after the stipulated period, the decree holder shall be entitled to execute the decree. The decree was sought to be executed after the commencement of U.P. Act No. 13 of 1972. It was held on interpretation of the terms of the decree that the decree created a new tenancy and the action taken for eviction of the tenant stood exhausted. Therefore, the eviction of the defendant could not be made by execution of the decree in face of the new tenancy. The terms of the compromise decree passed in the present case are radically different. Here the compromise recites that if rent at the enhanced rate was not paid within the stipulated time, a decree for eviction would be deemed to have been passed. This unmistakably reflects the intention of the decree holder not to create a fresh tenancy. This was the crucial test according to Supreme Court in Konchada Ramamurty Subudhi (dead by his legal representatives) V. Gopinath Naik AIR 1968 SC 919 for determining whether on the terms of the compromise it was possible to impute to the decree holder an intention to create a fresh tenancy. In that case in a suit for ejectment the compromise decree was passed by the appellate court enabling the decree holder by its terms to execute the decree after the judgment debtor failed to pay 'rent' for any three consecutive months. The Court held that the compromise deed did not create a lease, likewise in Smt. Kalloo Vs. Dhaka Devi 1982 All RC 415 (AIR 1982 SC 813) a compromise took place in the course of execution of the decree for eviction which, inter alia recited that the judgment debtor had already vacated half of the shop and was granted time till December 31, 1972 for vacating and delivering possession of the other half of the shop. Interpreting these terms it was held by the Supreme Court that the intention of the parties was not to create a fresh lease in respect of the half of the shop but to help the judgment debtor to find out not in a hurry alternative accommodation for his shop so that his established business was not ruined.

13. The position therefore which emerges is that the parties should be relegated to the position which, they held prior to the filing of the compromise and the status

quo ante be restored. The finding of fact recorded in the case is that the conditions of S. 20 (4) of U.P. Act No. 13 of 1972 were not fulfilled, the arrears of rent from 1.8.1975 to 22.1.1976 (the date of the compromise) were never paid, the petitioner had committed default in payment of rent and had committed default in payment of rent and had made himself liable for eviction. Hence in our opinion the decree for eviction and arrears of rent was rightly passed against the petitioner it was a valid and executable decree and the objections raised by the petitioner in execution were rightly dismissed. The impugned order is not vitiated by any error law."

6. Be that as it may, in view of the rival contentions, the decision of the revisional court deserves to be set aside on the ground that the Court below should consider the relevant contentions and the law referred to above and thereafter record a finding, which has not been done in the order impugned in the present writ petition while allowing the revision and dismissing the objection. There is yet another reason that the revisional court while exercising the revisional power for setting aside the finding recorded by the trial court should have remanded the matter to the trial court, which has not been done. For this reason alone, the order impugned in the present petition deserves to be set aside and is hereby set aside.

7. In view of what has been stated above, this writ petition deserves to be allowed and is hereby allowed. The order dated 13.11.1997, Annexure 4 to the writ petition is set aside. The order passed by the revisional court is modified that the matter is remanded back to the trial court with a direction to decide the matter in the light of the observations made above. However, the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.11.2002

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 17739 of 1991

Surajpal Sharma ...Petitioner
Versus
Deputy General Manager (Western Zone) U.P.S.R.T.C. and another ...Respondents

Counsel for the Petitioner:
Sri S.C. Shukla

Counsel for the Respondent:
Sri D.K.S. Rathor

Constitution of India, Article 226- Alternative Remedy- where the disputed question of facts, involve no specific pleading about efficacious- alternative remedy- petitioner a conductor - undisputedly is within the meaning of workman- court declined to interfere.

Held para 7 and 8

It is undisputed that the petitioner is a workman as defined under Section 2 (z) of the U.P. industrial Disputes Act and proper forum for adjudication of dispute is labour court under the provisions of the aforesaid Act.

This Court will not exercise its powers under Article 226 of the Constitution of India and adjudicate upon a controversy which requires findings of facts by appraisal of orai and documentary evidence. In these circumstances, it would be proper to relegate the petitioner to the alternative and

efficacious remedy available to him before the labour court.

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

1. Heard the learned counsel for the parties.

2. By means of the present writ petition, the petitioner has challenged the orders dated 16.3.1990 passed by respondent no. 2, Annexure V to the writ petition and 29.1.1991 passed by respondent no. 1, Annexure VI to the writ petition.

3. The petitioner was appointed as Conductor on 1.5.1965 and later on his services were merged in U.P.S.R.T.C.

4. The disciplinary proceedings were initiated against the petitioner and he was placed under suspension vide order 16.12.1988. He was charge sheeted vide order dated 21.12.1988 on the grounds that he was found guilty of not depositing Government money of Rs.1001/-in time for remaining absent from duty with effect from 3.12.1988 to 10.12.1988 without informing the Roadways Station Incharge as well as misappropriated the fair realized from eight passengers, which not only resulted into financial loss to the Corporation but tarnished the image of the corporation also.

5. The petitioner submitted his explanation on 10.5.1988 denying the charges leveled against him. Departmental enquiry was conducted and report was submitted by the Inquiry Officer against the petitioner. The petitioner no. 2 vide order dated 16.3.1990 removed the petitioner from service. The petitioner preferred an appeal but the same was dismissed by respondent no. 1 vide order dated 29.1.1991.

6. Counter and rejoinder affidavits have been exchanged between the parties. I have also gone through the records.

7. It is undisputed that the petitioner is a workman as defined under Section 2 (z) of the U.P. Industrial Disputes Act and proper forum for adjudication of dispute is labour court under the provisions of the aforesaid Act.

8. This court will not exercise its power under Article 226 of the Constitution of India and adjudicate upon a controversy which requires findings of fact by appraisal of oral and documentary evidence. In these circumstances, it would be proper to relegate the petitioner to the alternative and efficacious remedy available to him before the labour court.

In Chandrama Singh Vs. Managing Director , U.P. Cooperative Union, Lucknow and others, 1991 UPLBEC 898, the Full Bench of this Court in paraas 9 and 13 of the judgment has held :

"9. ……..Where a complete machinery/remedy for obtaining relief is provided in statute and such machinery and remedy fully covers the grievance of the petitioner then, unless extraordinary exceptional circumstances exist or the machinery- remedy does not cover the grievance of the petitioner or the machinery or remedy is demonstrated and proved by the petitioner to be inadequate or inefficacious, the petitioner has to be relegated to the alternative remedy and the Court should not entertain the writ petition under Article 226 of the

Constitution of India for redressal of grievance of the petitioner."

13. The decisions of the Hon'ble Supreme Court of India and this Court noted above, lead to an irresistible conclusion that the High Court must not allow its extraordinary jurisdiction under Article 226 of the Constitution of India to be invoked if the petitioner has got an alternative remedy and proved to be inadequate or inefficacious or if it is not established from the material on record that there exist exceptional or extraordinary circumstances to deviate from the well settled normal rule of relegating the petitioner to alternative remedy and permit him to by pass the alternative remedy. The hurdle of alternative remedy cannot be allowed to be skipped over lightly on a casual and bald statement in the petition that there is no other equally efficacious or adequate alternative remedy than to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. The petitioner must furnish material facts and particulars to sustain such a plea.

In the case of **Scooters India and others vs. Vijay E.V. Elder, 1998 SCC L-S) 1611**, the Hon'ble Supreme Court in para 2 of the judgment has held:

"2. ….there was no occasion for the High Court to entertain the writ petition directly for adjudication of an industrial dispute involving the adjudication of disputed questions of facts for which remedy under the industrial laws are available to the workman."

The decisions of the Apex Court are binding on all Courts under Article 141 of the Constitution. The U.P. Industrial Disputes Act, 1947 and Rules framed thereunder are adequate for settlement of any industrial dispute under the first, second or third schedule. The Act and Rules are complete Code for settlement and adjudication of disputes and provide a forum before the labour Court/Industrial Tribunal for arriving at findings of fact by taking into consideration the evidence, oral and documentary adduced before it.

The Jurisdiction of the High Court under Article 226 of the Constitution of India cannot be permitted to be diluted on the ground of pendency of the writ petition for quite a long time and the High Court may exercise its powers in such cases in rare of rarest cases. The counsels not only must advise their clients about availability of alternative remedy, but should plead in the writ petition as to why that remedy is not efficacious and in rare circumstances the jurisdiction of this Court under Article 226 of the Constitution is being invoked without first availing the alternative remedy.

In this view of the matter, the writ petition is dismissed on the ground of alternative remedy. No order as to costs.

It is, however, directed that if the petitioner raises an industrial dispute before the concerned Regional Conciliation Officer/Deputy Labour Commissioner within a month from today, the said authority will try to amicably settle the dispute. In case no settlement is arrived at the matter shall be immediately referred by the competent authority to the labour court or industrial tribunal for adjudication, as the case may be. The reference so made, shall be decided by the court in the manner

prescribed and time limits provided in Rule 12 of the U.P. Industrial Disputes Rules, 1957 for filing written statements, rejoinders documents etc. If necessary, the proceedings may be held on day to day basis under Rule 12 (4) of the Rules and the case may be decided preferably within a period of six months from the date of receipt of reference.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.12.2002

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

Writ Petition No. 36233 of 1991

Gaon Sabha through its Pradhan and others ...Petitioners
Versus
Dy. Director of Consolidation and another ...Respondents

Counsel for the Petitioners:
Sri D.K. Singh
Sri Sabhapati Tiwari
Sri Manoj Kumar

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

U.P. Consolidation of Holdings Act 1961- Section 11- Right to appeal- whether can be exercised by such person even who was not party before the Consolidation officer held- "No"

Held- Para 8

A reading of the aforesaid statutory provision reveals that an appeal can be filed only by a party to the proceedings. It is well settled in law that right of appeal, revision or review are the statutory rights. They are conferred by the Statutes and unless conferred, they can not be availed by any person and no authority can entertain an appeal, revision or review unless the said authority is authorized by the Statute to entertain the same. The Deputy Director of Consolidation was, thus, right in holding that the aforesaid petitioners were not the party to the proceedings and they had no right to file an appeal.

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

1. Heard learned counsel for the petitioners.

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 26.11.1991 passed by the Deputy Director of Consolidation allowing the revision filed by the respondents no. 2 under Section 48 of the U.P. Consolidation of Holdings Act, for short "the Act".

3. The relevant facts of the case giving rise to the present petition, in brief, are that the respondent no. 2, Jagdamba filed an objection under Section 9-A of the Act claiming Bhumidhari rights in the land comprising in Plot No. 261 measuring 1 bigha 6 biswas. The Consolidation Officer allowed his objection vide order dated 26.04.1977. The petitioners thereafter challenged the validity of the said order and filed an appeal before the Settlement Officer Consolidation. The Settlement Officer, Consolidation allowed the appeal by his judgment and order dated 23.08.1988. The respondent no. 2 thereafter filed a revision under Section 48 of the Act before the Deputy Director of Consolidation. The Deputy Director of Consolidation has allowed the revision by

the impugned order dated 26.11.1991, hence the present petition.

4. Learned counsel for the petitioners vehemently urged that the order passed by the Deputy Director of Consolidation is illegal and, therefore, is liable to be set aside.

5. On the other hand, learned Standing Counsel supported the validity of the impugned order. It was submitted that the view taken by the Deputy Director of Consolidation is legally correct. The petitioners were not party to the proceedings, therefore, they had no right to file the appeal. The Deputy Director of Consolidation did not commit any error of law in allowing the revision and setting aside the order passed by the Settlement Officer Consolidation.

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

7. It is not disputed that the Consolidation Officer decided the case in favour of respondent no. 2 and it is also apparent that the appeal was filed by the petitioners no. 2 to 11, in which the Gaon Sabha was not the party. The petitioners no. 2 to 11 were admittedly not party to the proceedings nor they were authorized by the Gaon Sabha to file the appeal. Section 11 of the Act under which the appeal was filed, provides as under:-

(Only relevant quoted)

"11.**Appeal--**(1) Any party to the proceedings under Section 9-A, aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under that section, may, within 21 days of the order, file an appeal before the Settlement Officer, Consolidation, who shall after affording opportunity of being heard to the parties concerned, give his decision thereon which, except as otherwise provided by or under this Act, shall be final and not be questioned in any court of law."

8. A reading of the aforesaid statutory provision reveals that an appeal can be filed only by a party to the proceedings. It is well settled in law that right of appeal, revision or review are the statutory rights. They are conferred by the Statutes and unless conferred, they can not be availed by any person and no authority can entertain an appeal, revision or review unless the said authority is authorized by the Statute to entertain the same. The Deputy Director of Consolidation was, thus, right in holding that the aforesaid petitioners were not the party to the proceedings and they had no right to file an appeal. The appeal filed by them was legally not maintainable. He was, thus, justified in allowing the revision and setting aside the order passed by the Settlement Officer Consolidation. I do not find any illegality or infirmity in the impugned order passed by the Deputy Director of Consolidation.

9. The writ petition fails and is hereby dismissed but without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.12.2002

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 51091 of 2002

Sheela Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vivek Dubey

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- scope of mandamus- petitioner seeking direction- for enforcement of the direction for appointment issued by the Energy Minister- Petitioner neither has enforceable right nor legal right- mandamus cannot be issued.

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

1. Petitioner by means of this writ petition, sought for a writ of mandamus commanding the respondent No. 2 to consider the representation of the petitioner dated 3.8.2002 addressed to Ram Veer Upadhyaya, Energy Minister, U.P. Government pursuant to the direction dated 13.10.2002 issued by the said minister. The said Minister issued a direction to appoint the petitioner on a particular post. Needless to say that this will be an appointment contrary to the rules. Petitioner has sought for a writ of mandamus. A mandamus can only be issued if the petitioner has an enforceable right and respondents are under legal obligation. None of the two ingredients are there for issuance of mandamus.

2. In this view of the matter, no relief can be granted to the petitioner. The petition is dismissed being devoid of any merit.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD :10.12.2002

BEFORE
THE HON'BLE SUNIL AMBWANI, J

Civil Misc. Writ Petition No. 21978 of 2002

Smt. Veena Agarwal ...Petitioner
Versus
Additional District Judge, Court NO.2 Moradabad and others ...Respondents

Counsel for the Petitioner:
Sri Prakash Krishna
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri S.P. Shukla,
Sri R.K. Khanna,
Sri S.P. Srivastava

Code of Civil Procedure :- Order 10 rule 2 Election Petition filed on allegations of corrupt practices and in counting in has settlement denied the allegations regarding irregularities and corrupt practices - application under order 7 rule 11 C.P.C. to reject the plaint thrown rejected held rejection order proper the election petitioner has right of challenge on all grounds can not be threes on technical grounds.

Held (Para 11)

A misplaced anxiety of the election petitioner to press her claim and expediency of recount, will not take away, abridge or destroyed the effect of pleadings giving her cause of action to

file and purpose the election petition. A statement given under Order 10 Rule 2 has to be read as a whole. A part of it cannot be torn out of context to be used against her.

Case law discussed.

AIR 1962 111, AIR 1983 Alld-450m 2001 (W) ALR 527, 1983 UPLBEC-672, AIR 1997 SC-1926, AIR 1954 SC-686, AIR 1995 Bomby. 227, AIR 1987 SC-1577

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

1. Petitioner Smt. Veena Agarwal has been elected to the post of Nagar Pramukh, Nagar Nigam Moradabad City. The polling counting and declaration took place on 20.11.2000, 25.11.2000 and 26.11.2000 respectively. By an Election Petition No. 14 of 2000, Smt. Asma Aslam, respondent no. 2 has challenged the election under section 61 of the U.P. Nagar Nigam Adhiniyam. 1959, as amended by U.P. Act No.12 of 2000 26 of 1995 ,8 of 1998, 17 of 1999 and 7 of 2000. for declaring of elections dated 26.11.2000 as illegal and void . The election has been challenged on the ground of corrupt practice adopted by petitioner in the election, irregularities in procedure of counting, and exercise of undue influence by senior political leaders, as well as illegality in counting and illegal exclusion of the polling agents of petitioner. Various other allegations have also been made with regard to counting and declaration of result, Upon service of notice, petitioner filed an application under sections 63,71,72 and 78 of Municipal Corporation Act, 1959 order 7 Rule 11 C.P.C. Order 6 Rule 5, C.P.C. and Section 115 C.P.C. (39-ga) and that by application dated 18.01.2001 petitioner prayed that she may be permitted to file her written statement , if required after the disposal of the aforesaid application (39-ga), and if the first two prayers are rejected, the alternative prayer be allowed. An objection was filed by election petitioner on 24.02.2001.

2. On 6.02.2002, election petitioner respondent no.2 filed an application (67-ga) stating that she is prepared to record her statement under Order 10 Rule 2,C.P.C. for which a date may be fixed . On 19.02.2002, she gave a statement under Order 10 Rule 2 and signed the same. The statement is quoted as below:.

"मिले मत पत्रों की गणना से गड़बड़ी हुई है । वास्तव में मुझे जो मत मिले है, उन्हें गणना में कम दर्शाये गये हैं । पुर्नगणना होने पर मैं विजयी होउँगी । चुनाव याचिका पेपर नं० ३ /ग देती हूँ । केवल सही मतगणना पर पूरा केश आधारित रखती हूँ । गणना में किस प्रकार हेराफेरी की, किसने की, इस बिन्दु को प्रेस नहीं करती हूँ।

पढ़कर तस्दीक करती हूँ ।

ह० /- अस्पष्ट आसमा अस्लम "

3. On the same day an application was filed by petitioner regarding statement under Order 10 of Rule 2, C.P.C. suggesting the following questions to be put to elucidate the matter in controversy:

(1) In what manner and what were the illegalities or irregularities committed in counting the votes?

(2) If any illegalities were committed, who committed them?

(3) How many ballot papers were illegally counted?

4. In view of the afore quoted statement, the Court found that there is no

necessity of asking the election petitioner to answer these questions and disposed of the application accordingly. On 06.03.2002, counsel for petitioner made an application to reject the petition on the ground that election petitioners statement under order 10 Rule 2 has destroyed her allegation made by her in her petition, with regard to corrupt practices in paragraphs 4 to 7 of the election petition and that in the circumstance, there is no need to file written statement Application 70-C. 70-D were also filed on 25.2.2002 to reject the election petition under Section 69 of the U.P., Municipal Corporation Act, 1959 read with order 7 Rule 11 C.P.C. By the impugned order, the Election Tribunal/Additional District & session Judge(Court No.2), Moradabad had rejected application under Order 7 Rule 11, C.P.C. and has directed petitioner to file written statement .He has also rejected applications for deleting paragraphs 4 to 17 and has observed that the issues will be framed only after filing written statement.

5. I have heard Sri Prakash Krishna for petitioner and Sri S.P. Shukla for contesting respondent no. 2.

6. Counsel for petitioner submits that the statement of election petitioner under order 10 rule 2 made by her voluntarily on her own application has taken away the effect of allegations of corrupt practice, made in paragraphs to 17 of the election petition, and that she has not pressed these allegations upon which rest of allegation to challenge the election do not survive. He submits that application under order 7 rule 11 can be decided even before written statement is filed if the election petition does not discloses cause of action, and lacks material particulars with regard to allegation of corrupt practice. According to him, nothing survives to decide election petition and that the order of recount cannot be made after the election petitioner voluntarily made a statement not to press the allegations of manipulations in the election which includes corrupt practice.

7. Counsel for respondents, on the other hand states that the purpose of statement under Order 10 rule2 is only to ascertain the issues which may be decided in the suit. At the first hearing of the suit, the Court with a view to elucidate the matters in controversy in the suit can examine orally the parties appearing in person or present in court or may require any person able to answer any material questions relating to the suit, by whom any party appearing in person or present in court, or is pleaded is accompanied. The statement under order 10 rule 2 cannot destroy the allegations in the plaint and on that basis the plaint cannot be rejected.

8. He submits that petitioner had disclosed material particulars with regard to corrupt practices, in the plaint and that unless a written statement was filed, the provisions of order 6 rule 5 and order 7 rule 11 C.P.C. cannot be pressed into service.

9. The effect of statement under order 10 rule 2 C.P.C. has been considered by this Court in **Amrita Devi Vs. Sripat Rai, AIR 1962 Allahabad 111**, where the trial court trying auction for infringement of copyright found that the plaintiffs counsel made a statement under order 10 rule2, C.P.C. that the book styled Nirmala was written by author

Prem Chandji while he was in the employment or R. Saigal of the Chand Press, Allahabad, under a contract of service. Admission made by a party under order 10 rule 2 ,C.P.C. was held to be conclusive against him. A party cannot be allowed to deviate from his pleadings. The plaintiffs, it was held, could not therefore be allowed to adduce evidence in support of the alleged assignment of copy right by Sri Prem Chandji, In **Smt. Kaniz Fatima Shah Naim Ashraf, AIR 1983 Alld.450** a Division Bench of this Court held that it is primary duty of the Court under Civil Procedure Code to see that proper issues, necessary for decision of the case, are framed. Even if the parties fail to point out relevant issues to be framed in the case or render no assistance to court in the matter of framing issues, it would not absolve the court from discharging primary dusty cast on it for framing proper issues on all the material points arising out of the pleadings. If the plaintiff in his statement under order 10 rule 2 of the court has specifically given up a plea it cannot be shut down from being placed and pressed during the course of trial or in appeal, if it relates to a crucial and material question of fact or law . The matter was remanded with the direction to the court below to proceed and to frame issues which arose out of the pleading of the parties and the statement recorded under order 10 rule 2 of the code. In **Rasheed Ahmad Vs. Smt. Kariman Khatoon, 2001 (45) ALR 527** it was held that the statements under order 10 rule 2 are for clarification of pleadings. The value of statements under order 10 rule 2 cannot be set at naught by any subsequent tutored statement given in evidence. In **Ram Pal Singh Vs. Additional District Judge, Meerut and others, 1983 UPLBEC 672**, this court found that where election petitioner gave up all other please but continued his case to counting of the votes, the order of recount was illegal. There is consistency of view in decided cases about the stage in which the application under order 7 rule 11 can be filed. In **Samara Singh Vs. Kedar Nath and others, AIR 1997 SC 1926, Jamuna Prasad Mukhariya Vs. Lachhi Ram and others, AIR 1954 SC 686; Mohan Rawale Vs. Damodar Taryaba, 1994 ACJ 570(SC) and P.R. Sukeshwala and another Vs. Dr. Devadatta Vs. Kerkar AIR 1995 Bombay 227**, it has been held that the trial court is always free to entertain an application under Order 7 rule 11, CPC even before the defendant files written statement, if the plaint does not disclose cause of action, or right of defendant to challenge the maintainability of the suit, irrespective of his rights to contest the same on its merits. The defendant is bound to file written statement only when an application under Order 7 rule 11 is not allowed by the trial court, In **Dhartipakar Madan Lal Agarwal Vs. Shri Rajiv Gandhi AIR, 1987 SC,1577** it was held that where election petitioner does not disclose any cause of action, it is liable to be struck off under Order 6 Rule 16 CPC as the court is empowered at any stage of the proceedings to strike out or delete pleadings which are unnecessary, scandalous, frivolous or vexatious. If after striking out pleadings, the court found that no trial issues remain to be considered, it has power to reject the election petition under Order 6 Rule 17.

10. In the present case, the Court has to find out effect of the statement of election petitioner under order 10 rule 2, CPC recorded on her request on 19.02.2002. In case the entire statement is

taken into account, as quoted above, it is found that the petitioner in the first sentence stressed the fact that there were irregularities in counting the votes. In the second sentence, she stated that, in fact, the number of votes polled in her favour have been shown to be less in the counting, and in case of recounting, she would be declared winner. Thereafter she stated that she is presenting paper (3ga) which is the election petition. After this statement, she proceeded to state that the entire foundation of her case is correct counting of votes, and that she does not want to press the point of manipulation in counting and the persons who committed it. The cumulative effect of her entire statement is that she pressed the election petition and claimed that actual number of votes polled in her favour have both been reflected in the counting. She has founded her entire claim of correct counting of votes and not with regard to manipulation in the counting and the persons who did it. It cannot be said that by this statement, she has given up the pleas of corrupt practices in the election,. The last part of her statement may have been given in an anxiety of recounting without specifying the particulars or allegations and naming the persons. The statement, however, cannot be taken to mean that she has given up the pleas in the election petition with regard to corrupt practices. A close reading of the election petition shows that material particulars have been given , both with regard to booth capturing, procedure in counting, manipulations made during process of counting of votes in favour of the winning candidate. These material particulars are still to be proved by evidence to be adduced by her .

11. Without expressing any opinion, whether the statement given by her does or does not entitle her for recount of votes, it cannot be said that the statement destroys or takes away the effect of allegations or irregularities made in her statement. A misplaced anxiety of the election petitioner to press her claim and expediency of recount, will not take away, abridge or destroy the effect of pleadings giving her cause of action to file, and pursue the election petition. A statement given under order 10 Rule 2 has to be read as a whole. A part of it cannot be torn out of content to be used against her. The petitioner may have a right to file an application under Order 7 Rule 11, CPC. before filing a written statement, but that her statement under Order 10 Rule 2 CPC could not have been taken into account to make the entire pleadings in election petition ineffective. The petitioner has a right to challenge the same on all grounds available to her, and that her challenge cannot be thrown on technical grounds, before she is given an opportunity to substantiate the same on record.

In the facts and circumstances of the case, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6th JANUARY, 2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE YATINDRA SINGH, J.

Civil Misc. Writ Petition No. 2989 of 2002

Gavendra Pal Singh and others
...Petitioners
Versus
Commissioner, U.P. Excise and others
...Respondents

U.P. Excise (Settlement of Licences for Retail Sale of country liquors) Rules

2002- Lifting of minimum guaranteed quantity of country liquor- Petitioner aggrieved with minimum prescribed quota- approached to High Court- claiming arbitraries by fixing licnece fee on minimum quota- held- proper- Petitioner made offer with their eye wide open going through the terms and conditions- court declined *to interfere*.
Held- para 10
The Petitioners voluntarily entered into the contract after knowing about the terms and conditions and hence they cannot now challenge the same as held in Hari Shanker's case (supra).
1996 (5) SCC 740
1994 Supp. SCC-8
AIR 1971 SC-517
AIR 1976 SC-2237
AIR 1975 SC-1121
AIR 1975 SC-2008
JT 2001 (iii) SC-100

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

1. This writ petition has been filed for a mandamus directing the respondents not to compel the petitioners to lift the minimum guaranteed quantity of the country liquor from the month of December, 2002 to 31.3.2003 and to charge licence fee only on the amount of quantity which is lifted for sale by the petitioners for these months.

We have heard learned counsel for the parties.

2. The petitioners are licencees for retail sale of country liquor under the U.P. Excise (Settlement of licences for Retail Sale of country liquor) Rules, 2002 in district Aligarh. Copies of their licneses have been annexed as Annexure-1 to the writ petition. These licenses have been granted for the period from 1.4.2002 to 31.3.2003.

3. In paragraph 12 of the writ petition the petitioners have given various reasons for not lifting the minimum guaranteed quantity of country liquor. It is alleged in paragraph 13 and 14 of the writ petition that the fixation of minimum guaranteed quantity and the licence fee for the same is arbitrary and illegal.

4. The respondents have filed a counter affidavit. In paragraph 3 (b) of the same it is mentioned that in pursuance of the advertisement dated 18.3.2002 for settlement of retail country liquor shops in district Aligarh the petitioners voluntarily made offers with their eyes wide open and looking into the terms and conditions of the licence and minimum guaranteed quantity etc. and their offers were accepted by the respondents resulting in a concluded contract. The petitioners started running the shops in question in terms of the licence/contract but now they want to withdraw from their contractual obligations.

5. In paragraph 3 C of the counter affidavit it is stated that the annual minimum guaranteed quantity is defined as the quantity of country liquor as fixed by the licensing authority in accordance with the general or specific instructions issued by the Excise Commissioner and guaranteed by the licencee to be lifted by him for his retail shop during an excise year for the purpose of retail sale. In paragraph 3 (d) of the counter affidavit it is stated that the minimum guaranteed quantity as fixed by the Excise Commissioner has been taken to be the basis for calculation of the licence fee which is the consideration for parting with the exclusive privilege in favour of the petitioners.

6. The respondents have relied on the decisions of the Supreme Court in **State of Orissa and others v. Narain Prasad (1996) 5 SCC 740**. **They have also relied on the decision in State of UP v. Sheopat Rai 1994 supp. (1) SCC 8** where it was held that the licnece fee or fixed fee can not partake the character of either regulatory fee or compensatory fee. In paragraph 5 of the counter affidavit it is stated that the minimum guaranteed quantity has been fixed by the Excise Commissioner on the basis of the report submitted by the Excise Authorities concerned in response to the letter dated 15.2.2002 . A copy of the said letter has been annexed as Annexure CA-1 to the counter affidavit. It is stated that the Excise Commissioner, U.P. has got power under Section 41 C for prescribing the scale of fee or manner of fixing the fee payable for any licence, permit or pass including any consideration for grant of any exclusive or other privilege.

7. Learned counsel for the petitioners have relied on the Supreme Court decisions in **Bimal Chandra Banerjee v. State of Madhya Pradesh AIR 1971 SC 517 and Excise Commissioner UP Allahabad v. Ram Kumar etc. AIR 1976 SC 2237**. It was held in these decisions that even if the minimum quantity of liquor has not been lifted no excise duty can be charged and the legal provisions which permits it would be invalid. However, these decisions have been considered and distinguished by the Supreme Court in **State of Orissa and others v. Narain Prasad and others (supra).**

8. In paragraph 19 of the aforesaid decisions it was held that in **Bimal Chandra Banerjee's case (supra), Ram Kumar's case (supra)** the decisions approached the question from the point of view of levy of excise duty, but no argument appears to have been put forward that the State is merely seeking to recover the consideration for grant of exclusive privilege/licence as per the terms and conditions of, and as undertaken in, the agreement. In paragraph 33 of the same decision it was observed ' A review of the decided cases of this court on the subject indicates a clear shift in the way this matter has been looked at. Initially, the matter was looked at from the point of view of the levy of excise duty. But then a different viewpoint emerged with the Constitution Bench decision in **Har Shanker vs. Dy. Excise Commissioner AIR 1975 SC 1121** which was carried forward in **Paana Lal v. State of Rajasthan AIR 1975 SC 2008** and other decisions which approached the matter from the point of view of grant of privilege.'

9. In **Solomon Antony and others vs. State of Karela and others JT 2001 (3)SC 100** a similar view was taken by the Supreme Court and it was held that the kist amounts have to be paid by the contractors as the contractors with their eye wide open have accepted the terms of payment of consideration of the kist.

10. The petitioners voluntarily entered into the contract after knowing about the terms and conditions and hence they cannot now challenge the same as held in Hari Shanker's case (supra).

11. There is no merit in this petition and it is dismissed. Interim order if any is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2002

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

Civil Misc. Writ Petition No. 18926 of 1998

Harihar Man Singh ...Petitioners
Versus
The Chairman, U.P. State Electricity Board U.P. and another ...Oppo. Parties

Counsel for the Petitioner:
Sri S.N. Verma

Counsel for the Respondents:
Sri Sudhir Agarwal

Constitution of India, Article 226- Mode of charging electric tariff-- Tube well operators in rural areas- connection given for agriculture purpose by charging as per schedule L.M.V. 5- w.e.f. 16.7.94 the Board started charging as per LMV 6- despite of offer given by the board they continued with rural feeder- can not be permitted to challenge on the ground of duration of supply hours- However if such representation made - counsel for board assured to decide the same in accordance with law.

Held- para 7

The petitioners have admittedly entered into agreements for supply of electricity and the respondents are charging them as per the agreed terms and rates. They were given an option for change from urban feeder to rural feeder, which they did not avail and are continuing to get their power supplies from the urban feeders. Having opted for the same, they cannot now complain that they be charged at the rate schedule as for those getting supplies from rural feeders.

(Delivered by Hon'ble Vineet Saran, J.)

1. This is a bunch of writ petitions involving common questions of fact and law and hence they are being decided by a common judgment. In most of the writ petitions counter and rejoinder affidavits have been exchanged. The writ petition no. 18926 of 1998 (Harihar Man Singh v. Chairman, UPSEB and others) is being taken up as the leading petition.

2. We have heard learned counsel for the petitioners as well as Sri Sudhir Agarwal for the respondent U.P. State Electricity Board (supra).

3. It is the case of the petitioners that they operate their tube well pumps in semi urban and rural areas and for that purpose they have taken electricity connections from the respondent UPSEB. It is the contention of the petitioners that since they are running the tube well pumps for agricultural purposes i.e. for irrigating their agricultural fields, rate schedule applicable to them should be the schedule for private tube well pumps in rural areas, as given in schedule LMV-5. The petitioners contend that w.e.f. 16.7.1994, the respondent U.P. State Electricity Board has started charging the petitioners under rate schedule of LMV-6 which is for those getting electricity supplies from non rural urban feeders.

4. By means of this writ petition, the petitioners have challenged the electricity bills issued to them on the basis of the revised traffic rates placing them in LMV-6 category. The main grounds of challenge are that prior to the change in schedule of rates, the petitioners were never given any opportunity of hearing. It has been contended by the learned

counsel for the petitioners that the change in rate schedule is causing undue hardship to the petitioners, who are all farmers and such action of the respondent -UPSEB is hit by the doctrine of legitimate expectation.

5. On behalf of U.P. State Electricity Board, it has been submitted that the rate schedule for LMV-5 is for those who get power supply from the rural feeder and LMV-6 is for those who get supply from Urban feeder. Private tube well operators getting supply from the urban feeder are mainly those who are near the urban areas or within the Municipal areas or Town areas, whereas those who are connected with rural feeders are normally in the backward and rural areas. The distinction between the two is that the supply through the urban feeder is more regular and is even upto twenty two to twenty four hours per day, whereas the supply through the rural feeder is irregular and at odd times, may be only for a few hours in a day. It has been submitted that thus the differences in rate schedule for the two classes of consumers is a reasonable classification. It has further ban submitted. That in any case, all the consumers have been given an option to take supply either from the rural feeder or from the urban feeder, for which the letters had been issued to the consumers. One such letter has been filed as Annexure CA-4 with the counter affidavit of the respondent, U.P. State Electricity Board in the present writ petition. It has thus been contended by the respondents that the petitioners who are voluntarily availing the facility of power supply from urban feeder, cannot claim that they be charged at the rates applicable to those getting supply from the rural feeder. Learned counsel has submitted that the rate schedule is fixed under the provisions of the Indian Electricity Act and it is a well settled principle that the doctrine of legitimate expectation cannot be claimed against the provisions of a statute.

6. It has further been submitted that the petitioners have not challenged the revised traffic rate schedule as applicable from 16.7.1994 but have only challenged the bills raised by the respondent for consumption of electricity which have been filed as Annexure to the writ petition. It has also been submitted that the traffic has again been modified w.e.f. 23.6.1999 and now within the rate schedule of LMV-5, two categories have been made for consumers operating pumping sets. The classifications are similar in nature, inasmuch as pumping set operators taking supply from rural feeders and urban feeders have been classified separately within the rate scheduled of LMV-5 itself. The same is also not under challenge before us.

7. Having heard learned counsel for the parties, we are of the view that the submission of the learned counsel for the petitioners, that the change in rate schedule is hit by the doctrine of legitimate expectation, is not well founded. The petitioners have admittedly entered into agreements for supply of electricity and the respondents are charging them as per the agreed terms and rates. They were given an option for change from urban feeder to rural feeder, which they did not availed and are continuing to get their power supplies from the urban feeders. Having opted for the same they cannot now complain that they be charged at the rate schedule as for those getting supplies from rural feeders.

8. We thus find that the writ petitions are devoid of merit and are accordingly dismissed. However, the respondents have themselves stated in the counter affidavit as well as their counsel has made a statement at the Bar that in case the petitioners so desire and apply to the respondent-UPSEB for being supplied electricity through the rural feeder for which charges are lesser, their applications for such change of feeder shall be considered. We thus direct that in case if the petitioners file such applications before the respondent-UPSEB, they shall consider the same in accordance with law and pass appropriate orders expeditiously, preferably within three months from the date of filing such application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2002

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

Civil Misc. Writ Petition No. 52746 of 2002

Praveen Kumar Gupta ...Petitioner
Versus
District Magistrate/Collector, Allahabad and others ...Respondents

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

Counsel for the Respondents:
Sri Anurag Khanna
S.C.

U.P. Zamindari Abolition & Land Reforms Act-section 281-a person cannot be arrested and detained again in recovery proceedings relating the same arrear – if the arrears are different, the prohibition from detention will not apply. (Held in para).

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

Heard Sri A.K. Mishra, counsel for the petitioner, Sri Anurag Khanna appearing for respondent no. 3 and learned standing counsel. By this writ petition the petitioner has prayed for a writ of mandamus directing the respondents not to arrest the petitioner in pursuance of the recovery proceedings initiated against him by citation No. 072219 dated 30th October,2002.

The facts giving rise to this writ petition briefly stated are;

Petitioner is one of the Directors of Private Limited Company namely Allahabad Fertilizer Sales Private Limited. A loan of Rs.73,00,000/- was taken from the respondent no. 3 by the aforesaid Company. The Company failed to repay the loan as a consequence of which proceedings for recovery was initiated against the Directors citation dated 14th October, 1997 for an amount of Rs.1,46,40,165.98 was issued against which writ petition No. 42659 of 1997 was filed. The writ petition was finally decided on 24th April;,1998 by which Directors were permitted to sell off its Company and its assets. However, the Directors were unable to sell the Company and repay the loan. Another citation dated 19.7.1999 for an amount Rs.1,87,32,191.30 was issued in pursuance of which petitioner was arrested by the revenue authority on 10th August,1999 and was detained in custody till 25th October,1999. Another citation dated 13.6.2001 was issued for an amount of Rs. 4,29,09,935.31. Petitioner filed

writ petition no. 22948 of 2001 against the citation dated 13.6.2001 in which an interim order was passed by this Court on 20th June,2001 staying the arrest of the petitioner till 10th September,2001. It has been stated in paragraph 12 of the writ petition that although the aforesaid writ petition is still pending but the same has become infructuous as a fresh citation has been issued by the respondent on 10th October 2002 being citation No. 072219 for an amount of Rs.4,29,09,935.31. The said citation dated 30th October,2002 has been challenged by the petitioner by means of this writ petition.

Sri A.K. Mishra, counsel for the petitioner submitted that the petitioner having been already detained in civil prison from 10.8.1999 to 25.10.1999, he cannot be again arrested on the basis of citation dated 30.10.2002. The counsel for the petitioner contended that maximum period prescribed under Section 281 of the U.P. Zamindari Abolition & Land Reforms Acr,1950 is fifteen days hence detention beyond the aforesaid 15 days is not permissible. In support of this submission Mishra placed reliance of Division Bench judgement of this Court reported in 1969 A.L.J. page 257(**Sangam Lal Gupta Vs. Sales Tax Officer and others**) and 1977 A.W.C. page 711 (**Rasul Bux Vs. State of U.P. and others**). Sri Mishra has also placed reliance on apex Court judgement in A.I.R.1953 Supreme Court 95 (**The Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers Union**). Sri Anurag Khanna appearing for the respondent no. 3 refuting the submission of counsel for the petitioner, contended that the maximum period of detention prescribed under Section 281 of the U.P. Zamindari Abolition & Land Reforms Act is not applicable when the arrest is for different arrears. The contention is that if the arrears sought to be recovered are different there is no prohibition in again detaining the petitioner for realization of different arrears. He submitted that the Division Bench of this Court in **Sangam Lal Gupta's case** (supra) has laid down the aforesaid proposition when the recovery is for the same arrears. Sri Khanna submitted that the petitioner was arrested on 10th August,1999 and detained till 25th October,1999 in pursuance of the citation dated 19.7.1999 for an amount of Rs.1,87,32,191.30 whereas the citation which has been challenged in the present writ petition is dated 30th October, 2002 and is for an amount of Rs.4,29,09,935.31 plus collection charges. The submission is that since the citation now challenged in the present writ petition is for different amount there is no prohibition is detaining the petitioner under Section 281.

We have heard counsel for the parties and perused the record. From the facts brought on the record it is clear that the petitioner was earlier detained in civil prison from 10.8.1999 to 25.10.1999 for recovery of an amount of Rs.1,87,32,191.00 in pursuance of the citation dated 19.7.1999. By the present writ petition petitioner is challenging the recovery proceedings for charges for which citation has been issued on 30th October, 2002. Thus it is clear that the earlier citation dated 19th July,1999 was for different arrears and the citation which has now been issued is for a very huge amount of Rs. 4,29,09,935.00. The Division bench's judgement cited by the counsel for the petitioner in **Sangam Lal Gupta Vs. Sales Tax officer and others case** (supra) was pertaining to realization of arrears of sales tax. The Division

Bench in the aforesaid case has laid down that if a person has been detained in custody for maximum period of fifteen days, he cannot be arrested and detained again in recovery proceedings relating to the same arrears of land revenue. Following was held in the aforesaid case:-

"But in our opinion, the total period for which he may be detained in custody in respect of the same arrear cannot exceed fifteen days. Section 148 declares that a defaulter may be detained in custody for fifteen days unless the arrear and the costs of arrest and detention, are paid before the expiry of that period. There is nothing in the provision from which we can infer that the defaulter may be detained in custody for repeated periods of fifteen days until the arrear is paid up, If that inference was possible, we would have to hold that the detaining authority is entitled, so long as it believes that the process of detention would result in the payment of the arrear, so detain the defaulter in custody almost indefinetly provided the successive periods of detention did not exceed fifteen days at a time. A construction such as this would result in serious encroachment upon the liberty of the citizen, and we are not prepared to accept that so unlimited an arbitrary power was intended to be conferred upon the detaining authority, specially when the power to detain has been conferred under rule 47, even upon a Tahsildar and when the only reason for detention is the possibility of the payment of an arrear of land revenue. In our judgment, the period of fifteen days prescribed by Section 148 is the maximum period for which a defaulter may be detained in custody in respect of any arrear. If he has been detained in custody for that period he cannot be arrested and detained again in a recovery proceeding relating to the same arrear of land revenue.

In the above case it has been clearly laid down that a person cannot be arrested and detained again in recovery proceedings relating to same arrear. The observation of the Division Bench, underlined by us, clearly shows that aforesaid proposition was laid down when the subsequent recovery is for the same arrear. The natural corollary of the provision would be that if the arrears are different, the prohibition from detention will not apply. Thus the aforesaid judgement of the Division Bench is clearly distinguishable and not applicable in the facts of the present case since in the present case the subsequent recovery which is impugned in the present writ petition, is for different arrears.

The next Division Bench's judgment in **Rasul Bux's case** (supra) relied by the counsel for the petitioner follows the Division Bench's Judgement of this Court in **Sangam Lal Gupta Vs. Sales Tax Officer and others' case** (supra). However, paragraph 2 of the aforesaid judgement also lays down the same proposition. The prohibition is of arrest for recovery of same amount. In paragraph 2 of the Division Bench lays down;

"……The only bar is that if the petitioner has already been under arrest for 15 days, he cannot be arrested again for the recovery of the same amount."

In view of the aforesaid the judgement of the Division Bench of this Court in **Sangam Lal Gupta Vs. Sales Tax Officer and others' case** (supra) and

Rasul Bux's case (supra) are not applicable in the facts of the present case.

The view which we are taking in the present case is further reinforced from provisions of Section 14 of the U.P. General Clauses Act,1904. Section 14 provides that whereby any U.P. Act any power is conferred then that power may be exercised from time to time as occasion requires. Section 14 of the U.P. General Clauses Act is quoted below :-

"14. Powers conferred on the State Government to be exercisable from time to time: *Where, by any (Uttar Pradesh) Act, any power is conferred..(xxx), then that power may be exercised from time to time as occasion requires."*

The power given under section 281 of U.P. Zamindari Abolition & Land Reforms Act, 1950 can be exercised from time to time. Section 279,280 and 281 of U.P. Zamindari Abolition & Land Reforms Act uses the word "an arrears of land revenue". The words "An arrears of land revenue" refer to a particular arrears. The words "and arrears of land revenue" thus has to be confined to a particular arrears, if different arrears of land revenue are all treated "an arrears of land revenue", it will lead to unworkable and inequitable result, for example if a person takes two loans from two different agencies for which he gives different securities and commits default in payment of both the arrears and if he is detained for recovery in recovery proceedings with regard to one loan, there cannot be any prohibition for his detention with regard to recovery proceedings of another loan. Thus the words "an arrears of land revenue" have to be read as a particular amount of arrears of land revenue. Sri Mishra relied on the case of **The Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers' Union** (supra) for the submission that Section 14 of the U.P. General Clauses Act,1904 are not attracted in the present case. In the above case the apex Court was considering the power of the State Government given under Sections 3,4 and 6 of the Industrial Dispute Act 1947, It was contended that Section 6(1) as it stood then provides that the adjudicator was, within such times, as may be specified submit its award to the State Government. It was contended that the State Government had power of extension of time under section 6 of the U.P. Industrial Dispute Act,1947 read with Section 14 of the U.P. General Clauses Act,1904. The apex court held in paragraph 5 of the aforesaid case :-

"5. Learned counsel for the respondents refers us to the provisions of S. 14 of the U.P. General Clauses Act, 1904 which provides that where by any Uttar Pradesh Act any power is conferred on the State Government then that power may be exercised from time to time as occasion requires. Sections 3 and 4 of U.P. Industrial Dispute Act, 1947 certainly confer power on the State Government to refer disputes to an adjudicator for decision and S. 6(1) may be read as empowering the State government to specify the time within which the adjudicator to whom an industrial dispute is referred for adjudication is to submit this award. The combined effect of S. 14 of the U.P. General Clauses Act and S. 6(1) of The U.P. Industrial Dispute Act,1947 it is to contended, is that the adjudicator is enjoined to submit his report "within such time as may from time to time be specified" and that this being the

position, the principles laid down in the English decisions referred to above must be held to be applicable to the present case.

We are unable to accept this line of reasoning. Under S. 14 of the U.P. General Clauses Act the State Government may exercise the power conferred on it by Sub-section 3,4 and 6 that is to say it can from time to time make orders referring disputes to an adjudicator and, whenever such an order of reference is made to specify the time within which the award is to be made. This power to specify the time does not and indeed cannot include a power to extend the time already specified in an earlier order. The legislative practice, as evidenced by the provisions of the different statutes referred to above is to expressly confer the power of extension of time, if and when the Legislature thinks fit to do so. There is no question of any inherent power of the Court and much less of the Executive Government in this behalf. Section 14 of the U.P. General Clauses Act does not in terms, or by necessary implication, give any such power of extension of time of the State Government and, therefore, the respondents can derive no support from that Section."

From aforesaid it is clear that the apex Court in the aforesaid case was considering the question whether the State Government will have power to extend the time for an award. The aforesaid judgement has no application in the facts of the present case. In the present case there is no question regarding any extension of time of detention. The question in the present case is the exercise of power of detention under Section 281 of the U.P. Zamindari Abolition & Land Reforms Act. The reliance placed by the counsel for the petitioner on the aforesaid case is clearly misplaced.

In view of what has been said above we are of the view that there is no prohibition in resorting the power of detention under Section 281 of the U.P. Zamindari Abolition & Land Reforms Act in the present case since it is for different arrears and for different citation. The petitioner has not made out any case for issue of writ of mandamus.

The writ petition lacks merit and is dismissed summarily.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.12.2002

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE YATINDRA SINGH, J.

Income Tax Appeal No. 3 of 2001

Shyam Biri Works Pvt. Ltd. ...Appellant
Versus
Commissioner of Income Tax (Central), Kanpur ...Respondent

Counsel for the Appellant:
Sri R.P. Agrawal

Counsel for the Respondent:
Sri A.N. Mahajan

Income Tax Act 1963- S-273 (2) (a)- Assessing officer initiated proceeding for penalty- without recording the finding regarding satisfactions whether can such order be set aside on this grounds? Held- "No".

Held- Para 5

a similar provision requiring the reason or satisfaction. Hence it has to be inferred that Parliament never intended that before initiating penalty proceedings and issuing notice under section 273 the Assessing Officer must record his reasons in writing for doing so. Had that been so there would have been a specific mention about it in section 273 of the Act. We are, therefore, of the opinion that although the Assessing Officer must have satisfaction as required under section 273 of the Act, it is not necessary for him to record that satisfaction in writing before initiating penalty proceedings under section 273 of the Act. We are fortified in the view, we are taking by the decision of the Calcutta High Court in Becker Gray & Co. Ltd. Vs. ITO, (1978) 112 ITR 503. For the reasons given above this appeal has no merit and it is dismissed. No orders as to cost.

Case law discussed:
(2000) 246 I.T.R. 568
(1978) 112 I.F.R. 503

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

1. Heard Sri R.P. Agrawal, learned counsel for the appellant and Sri A.N. Mahajan for the department.

2. This appeal under section 260-A of the Income Act has been filed against the impugned order of the Income Tax Appellate Tribunal dated 31.8.2000. The case relates to penalty under section 273 (2)(a) of the Act for allegedly furnishing false estimate of advance tax.

3. Only one point has been pressed by the learned counsel for the appellant. He submitted that before issuing notice for initiating penalty proceedings under section 273 (2) (a) of the Act the Assessing Officer has not recorded his satisfaction. Learned counsel has relied on the decision of the Delhi High Court in CIT Vs. Ram Commercial Enterprises Limited, (2000) 246 ITR 568.

4. In the aforesaid decision the Delhi High Court has observed that "it is the Assessing Authority who has to form his own opinion and record his satisfaction before initiating the penalty proceedings."

5. With profound respect to the Delhi High Court decision, we are unable to agree. It may be noted that whenever the Assessing Officer has to record his satisfaction under the Income Tax Act, it is specifically mentioned e.g. in 148 (2) of the Act which states that "the Assessing Officer before issuing any notice under this section will record the reason for doing so". Section 273 does not have a similar provision requiring the reason or satisfaction. Hence it has to be inferred that Parliament never intended that before initiating penalty proceedings and issuing notice under section 273 the Assessing Officer must record his reasons in writing for doing so. Had that been so there would have been a specific mention about it in section 273 of the Act. We are, therefore, of the opinion that although the Assessing Officer must have satisfaction as required under section 273 of the Act, it is not necessary for him to record that satisfaction in writing before initiating penalty proceedings under section 273 of the Act. We are fortified in the view, we are taking by the decision of the Calcutta High Court in Becker Gray & Co. Ltd. Vs. ITO, (1978) 112 ITR 503. For the reasons given above this appeal has no merit and it is dismissed. No orders as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2002

BEFORE
THE HON'BLE G.P. MATHUR, A.C.J.
THE HON'BLE Y.R. TRIPATHI, J.

Special Appeal No. 1038 of 2001

Rajesh Sharma ...Appellant
Versus
Advocate General U.P. High Court ...Respondents

Counsel for the Appellant:
Sri Rajesh Sharma
Sri P.C. Srivastava
Sri S.C. Tiwari

Counsel for the Respondents:
Sri Vinod Mishra, S.C.

Constitution of India, Act 226 Writ Petition – Ad hoc appointee challenged the action of state law officer or remaining them from service undoubtly the salary being given from the fund of govt. – in absence of State Government – No positive direction can be issued.

Held – Para 7 & 10

It would also be pertinent to point out that any direction of this court in writ petition can not be enforced or implemented in absence of the State of Uttar Pradesh as a party to the writ petition. A person removed from the State law Officers Establishment has right to appeal to the State Government, and, therefore, the Advocate General being the appointing authority is not the final authority in the matter of removal or dismissal of the employees of State Law Officers Establishment and the State Government has the power to reverse his orders in appeal. Besides, it is the State Government which allocates the budget from which the employees of the State Law Officers Establishment draw their salaries and other allowances. Therefore, no effective direction could be made and order passed in the writ petition in absence of State of Uttar Pradesh.

True, the Apex Court in various cases has expressed its concern over increasing disregard and by passing of statutory rules in recruitment proceedings and this case also appears to one of such cases but we are constrained to observe that the petitioner having neither impleaded necessary and proper parties nor having come up with correct facts squarely to blame himself. To our mind, therefore it was not a fit case for exercise of extra-ordinary writ jurisdiction under Article 226 of the Constitution.

(Delivered by Hon'ble Y.R. Tripathi, J.)

1. These special appeals raising common questions of law and facts arise out of the judgment and order dated 20th August,2001 passed by learned Single Judge of this court in Civil Misc. Writ Petition No. 17432 of 1999 Rajesh Sharma Versus Advocate General U.P. and others, whereby he having partly allowed the writ petition has set aside the selection of Shri K.K. Shastri, respondent no.2 to the writ petition, on the post of Routine Grade clerk/Typist in the State Law Officers Establishment and has given a direction that the vacancy caused as a consequence of setting aside selection of Shri K.K. Shastri be filled from the next candidate in the merit list and if the next in the merit list is not available or does not choose to take appointment, then from next to next in the merit list.

2. Skeleton facts necessary to get hand of the real controversy as also to appreciate the discussions hereinafter are that there were certain vacancies of routine grade clerks/typist in the state law officers establishment against which

certain appointments were made by the Advocate General on adhoc basis by way of stop gap arrangement . This arrangement was questioned in writ petition no 42506 of 1993 Shiv Pratap and another vs. State of U.P. and others on the ground of malafide, bias and arbitrariness praying, in substance, for issuance of directions to the respondents to the writ petition to remove the adhoc appointees and fill up the vacancies by permanent appointments in accordance with law. This court while finally disposing of that writ petition rejected the relief of removal of adhoc appointees holding it as stop gap arrangement to cope with the pressure of work in Advocate General office but directed regular appointments to be made after sanction of the strength of the establishment by the state government in light of suggestions made by the Advocate General after giving equal opportunities to all concerned. It appear that subsequent to the disposal of writ petition no. 42506 of 1993, in the year 1996 some steps for selection and appointment to fill up the vacancies in State Law officers Establishment were initiated and call letters for interview were issued to certain candidates which came up in controversy again before this court in writ petition no. 37504 of 1996 Narain Dutt Tripathi Vs. State of U.P. & others. The Advocate General, Uttar Pradesh in the aforesaid writ petition gave an undertaking to follow the procedure prescribed under law. In view of the said undertaking of the Advocate General, U.P. the writ petition was disposed of with certain directions as to the manner of advertisement of vacancies ignoring the call letters already issued. It was also made clear by this court in the said writ petition that the candidates to whom call letters had been issued could have right to make applications, if they so choose, in response to the advertisement.

3. As it transpires from the perusal of the record, twenty posts of Routine Grade clerks/typists, four to be filled from amongst candidates of Scheduled castes/tribes, six from the candidates belonging to other backward classes of citizens and ten from general classes, were advertised inviting applications from candidates fulfilling the requisite qualifications. In response to the advertisement as many as 3107 candidates including the petitioner and respondent no. 2 to the writ petition and 7 others, who were already working as adhoc appointees in the office of State Law Officers Establishment, made their applications and appeared at the written test held on 30.08.1998 and the petitioner and 110 other candidates, in all, including the candidates belonging to Schedules Castes/Tribes and other backward classes of citizens were declared successful at the written examination and were called for type test and interview scheduled to be held on 24th and 25th October, 1998. The roll nos. of respondent no. 2 Sri K.K. Shastri and Shri Kailash Nath Prajapati who were working in the State Law Officers Establishment as adhoc appointees did not figure in the declared list of successful candidates at the written examination. They were, however, called for test and interview and on the basis of marks obtained by each candidate, a select list of twenty candidates, according to their merit, ten from amongst general candidates, four from amongst candidates belonging to other backward classes was prepared to fill up twenty existing vacancies of R.G.C.'s/typists and the candidates so selected were given appointments. The petitioner having

failed to find place in the final select list of twenty candidates challenged the selection and appointment of respondent no. 2 Sri K.K. Shastri on grounds, interalia of bias, discrimination, arbitrariness, foul play etc. and prayed for inclusion of name in the select list and consequently for his being appointed in the vacancy created as a consequence of setting aside the appointment of Shri Shastri. It is worth mentioning that the petitioner is down in merit to fifteen other candidates who neither did figure in the select list nor could be appointed.

4. The respondents contested the writ petition by filing their counter affidavits denying allegations of malafide, foul play discrimination and arbitrariness and claiming fair selection of candidates on merits in accordance with law and the rules. The learned Single Judge, however, on appraisal of materials before him found the selection of Shri K.K. Shastri illegal and violative of Article 16 of the Constitution and passed the impugned judgment and order. The petitioner dissatisfied from the direction of the learned Single Judge to fill up the vacancy created as a consequence of setting aside the appointments of Shri Shastri from candidate next in merit and the respondents aggrieved from the finding of Shri Shastri's appointment being declared illegal and violative of Article 16 of the Constitution have come up in these special appeals.

5. We have heard the learned counsel for the parties in extenso and have gone through the records.

6. It is undisputed that the persons employed as R.G.C's/typists in the State Law Officers Establishment work in connection with the affairs of the State and hold civil posts within the meaning of Article 311 of The Constitution. Such incumbents are paid their salaries from the budget passed by the State legislature and allocated by the State Government. The constitutional position of Advocate General hardly has any relevance so far as the status of such employees is concerned. The State Legislature, therefore, under Article 309 of the Constitution has the power to regulate the recruitment and conditions of service of person appointed to the State Law Officers Establishment and in absence of any law made by State legislature, the Governor of the State or such other person as he may authorize has the power to make rules regulating the recruitment and conditions of service of such persons and any rules so made have the effect subject to any law made by the State Legislature. In the writ petition in question, it would appear, that the correct facts were not brought to the notice of the court evidently because the State of Uttar Pradesh having ultimate administrative control over State Law Officers Establishment and being necessary party was not impleaded. During the course of arguments our attention was drawn towards Karmic Anubhag-2, Notification No. 20/1/19/TC-97 dated June 9,1998 published in the U.P. Gazette, Extra Part (4) Section (Ka) dated 9th June,1998 whereby Uttar Pradesh Procedure for Direct Recruitment for Group 'C' post (Outside the purview of the Uttar Pradesh Public Service Commission) Rules, 1998 have been notified. These rules according to the Gazette Notification came into force at once. Rule (2) of these rules provides that these rules shall have effect notwithstanding anything to the contrary contained in any other rules or orders. Sub-Rule (3) of Rule 1 of these Rules

excludes from its operation certain posts and departments mentioned therein. It is not disputed that the posts of R.G.C.'s/typists fall within group 'C'. This being the position, the aforesaid Rules appears to have been applicable to the recruitment of RG.C's /Typist in the State Law Officers Establishment and had the effect of law, but none of the parties to the writ petition referred to the said Rules and instead, a reference was made about the applicability of The United Provinces Legal Remembrance's and law officers Establishment Rules, 1942 which were pre- constitution Rules and even if they were applicable to the recruitment of R.G.C.'s/typists in State Law Officers Establishment at any point of time stood superceded by Rule(2) of the Uttar Pradesh Procedure for Direct Recruitment for Group 'C' posts (Outside the purview of the Uttar Pradesh Public Service Commission) Rules, 1998, which provides for those rules having overriding effect. The said Rules of 1998 having been published in Uttar Pradesh Extra Ordinary Gazette can be taken judicial notice of and they having come into force on 9th of June,1998 were applicable to the disputed selection of R.G.C.'s/typists.

7. It would also be pertinent to point out that any direction of this court in writ petition can not be enforced or implemented in absence of the State of Uttar Pradesh as a party to the writ petition. A person removed from the State law officers Establishment has right to appeal to the State Government, and, therefore, the Advocate General being the appointing authority is not the final authority in the matter of removal or dismissal of the employees of State Law Officers Establishment and the State Government has the power to reverse his orders in appeal. Besides, it is the State Government which allocates the budgets from which the employees of the State Law Officers Establishment draw their salaries and other allowances. Therefore, no effective direction could be made and order passed in the writ petition in absence of State of Uttar Pradesh, which is a necessary party. In the writ petition Nos. 43506 of 1993 and 3754 of 1996 filed earlier the State of U.P. had been arrayed as one of the respondents and a direction had also been made to it by this court to sanction the strength of ministerial staff in the State Law Officers establishment in the light of suggestions of Advocate General.

8. It would then next be found that Article 226 confers an extra-ordinary jurisdiction on the High Courts, to be resorted to only when exceptional circumstances warrant it. The grant of writ under article 226 of the Constitution is purely discretionary and can seldom be claimed as of right. The provisions contained under Article 226 are for advancement of ex debito Justitiae and can be invoked only on equitable considerations. In the writ petition in question the petitioner had challenged the select list on the ground of bias, discrimination, malafides etc. and had originally sought the relief for declaring the selection of respondent no. 2 and one Shri Kailash Nath Prajapati in whose cases discrimination had allegedly been made, bad in law, but during the proceedings the name of Shri Kailash Nath Prajapati, whose case almost stands on the same footing as that of the respondent no. 2, was deleted from the array of respondents. Thus even if the petitioner succeeded in proving illegality in the selection and appointment for

respondent no. 2 that infirmity cannot be done away with by declaring the selection and appointment of only respondent no. 2 as illegal as even after such a declaration the said illegality will exist in the case of selection and appointment of other candidates. The relief under Article 226 of the Constitution being discretionary could be granted for removing the illegality, if any, and not for perpetuating it. In this case even after declaring the selection and appointment of respondent no. 2, as illegal some other candidates having been selected and appointed in the same manner will still continue in service because of their not being made parties. The grant of relief to the petitioner thus will shake public faith in dispensation of justice and also impair the credibility of judicial system in the country. There is, therefore, no justification for setting aside the selection of respondent no. 2 only when some similarly selected and appointed candidates shall still continue on their posts.

9. It is also worth while to point out that the petitioner's name appears at 26th position in the merit list of the candidates. Fifteen candidates thus stand higher in position to the petitioner. Even after declaring the selection and appointment of respondent no. 2 as illegal, it would be quite unjust, unfair and improper to make a direction for his appointment as a consequence of vacancy created by setting aside the selection and appointment of respondent no. 2. The candidates holding positions above the petitioner in the merit list have not been made parties and no order can legally be passed against them either in the writ petition or in the appeals in their absence.

10. True, the Apex Court in various cases has expressed its concern over increasing disregard and by-passing of statutory rules in recruitment proceedings and this case also appears to be one of such cases but we are constrained to observe that the petitioner having neither impleaded necessary and proper parties nor having come up with correct facts has squarely to blame himself. To our mind, therefore it was not a fit case for exercise of extra-ordinary writ jurisdiction under Article 226 of the Constitution.

For the reasons stated above, we find that the impugned order passed by the learned Single Judge in Writ petition No. 17432 of 1999 cannot be sustained and has to be set aside.

We, accordingly, find force in the Special Appeal Nos. 1054 of 2001 and 1100 of 2001 and setting aside the order impugned in these Special Appeals dismiss the writ petition No. 17432 of 1999. The Special Appeal No. 1038 of 2001 being devoid of merit is, hereby, dismissed.

In view of the facts and circumstances of the case, we make no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2002

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

Civil Misc. Writ Petition No. 8094 of 2001

Rahman Siddiqui ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vishnu Gupta
Sri R.O.V.S. Chauhan
Sri P.C. Srivastava
Sri V.K. Barman
Sri Pankaj Barman

Counsel for the Respondents:
Sri U.K. Uniyal
Sri S.D. Kautilya
Sri B.B. Paul
S.C.

Land Acquisition Act 1894 Section 3 (b)- writ petition at the instance of the present petitioner Rehman Siddique is not maintainable as neither he is owner of the land, which had been acquired nor he is a person interested within the meaning of section 3(b) of the Act (Held in para)

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

This petition under Article 226 of the Constitution has been filed praying that the order dated 1.2.2001 of Collector, Allahabad and the award dated 5.2.2001 of Special Land Acquisition Officer be quashed. A further prayer has been made that a writ of mandamus be issued commanding the Special Land Acquisition Officer to pay compensation on the basis of award dated 11.10.2000.

Some land situate in villages Shaha alias Peepal Gawn, Jhalwa, Harwara, Deoghat, Pargana Chail District Allahabad was acquired for a public purpose namely for establishment of residential colony under a planned development scheme by the Allahabad Development Authority (hereinafter referred to as the Authority). The notification under section 4 (1) of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) was published in U.P. Gazette on 23.2.1991 and the notification under section 6 of the Act was published in the Gazette on 31.12..1991. It was recited in both the notifications that the Government was satisfied that the case was one of urgency and accordingly a direction was issued under section 17 (1) of the Act to the Collector, Allahabad to take possession of the land mentioned in the schedule appended to the notifications though no award under section 11 had been made. In view of the fact that section 17 of the Act was made applicable, the landholders were paid 80% of the estimated amount of compensation before taking possession as provided in sub-section (3-A of Section 17 of the Act. It appears that the award was not made promptly and accordingly a direction was issued on 1.5.2000 in writ petition no. 17406 of 1994 to make an award within three months. Thereafter, the Special Land Acquisition Officer made an award on 11.10.2000. The Allahabad Development Authority was thereafter asked to make payment of compensation to the landholders. Thereafter the Secretary of the Allahabad Development Authority moved an application before the Collector, Allahabad on 10.1.2001 for setting aside and canceling the award dated 11.10.2000 as the same had been made without issuing any notice and without giving any opportunity of hearing to the Development Authority. The Collector, Allahabad by his order dated 1.2.2001 set aside the award dated 11.10.2000 on the ground that before making the award the Special Land Acquisition Officer had not given any notice to Allahabad Development Authority and had not afforded any opportunity of hearing to it. Subsequent thereto, the Special Land

Acquisition Officer made a fresh award after hearing the parties on 5.2.2001.

Sri P.C. Srivastava learned counsel for the petitioner has submitted that the impugned order dated 1.2.2001 was passed by the Collector, Allahabad without giving any opportunity of hearing to the petitioner and therefore the same is illegal and is liable to be set aside. Learned counsel has further submitted that the second award made on 5.2.2001 is also liable to be set aside as two awards cannot be made for the same land and the tenure-holders are entitled to be paid compensation in accordance with the earlier award dated 11.10.2000. Learned counsel has also urged that notice had in fact been given to the Allahabad Development Authority before making the award dated 11.10.2000 by the Special Land Acquisition Officer and the Collector has erred in holding that the said award was made without giving any opportunity to it and therefore the order dated 1.2.2001 cannot be sustained in law.

In the counter affidavit filed on behalf of Allahabad Development Authority (sworn by Sri R.K. Pandey on 13.3.2001), it is specifically averred in para 10 and 11 that the award dated 11.10.2000 was made ex parte against the Allahabad Development Authority and it was on this ground that an application was moved before the Collector, Allahabad on 10.1.2001 for setting aside the ex parte award dated 11.10.2000 made by the Special Land Acquisition. No material has been placed on record to show that before making the award, any notice was ever issued to the Allahabad Development Authority or any opportunity of hearing was given to it. From the averments made in the affidavits filed by the parties, we are satisfied that the award dated 11.10.2000 was made without giving any opportunity of hearing to the Allahabad Development Authority.

Sub-section (2) of Section 50 of the Act provides that in any proceeding held before the Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the purpose of determining the amount of compensation. Section 3 (aa) of the Act defines "local authority" and it includes a town planning authority (by whatever name called) set up under any law for the time being in force). The Allahabad Development Authority has been constituted in accordance with the provisions of U.P. Urban Planning and Development Act and therefore it is a 'local authority' within the meaning of Section 3 (aa) of the Act. The Allahabad Development Authority was consequently entitled to appear and adduce evidence before the Collector before making of the award. The Collector in the impugned order dated 1.2.2001 has held that as the opportunity of hearing was not given to the Allahabad Development Authority before making the award dated 11.10.2000, there was violation of section 50(2) of the Act and consequently the award was liable to be set aside. In our opinion, the view taken by the Collector is perfectly correct and cannot be faulted on any ground.

The ambit and scope of sub-section (2) of Section 50 of the Act was examined by a Constitution bench in U.P. Awas Evam Vikas Parishad versus Gyan Devi and another AIR 1995 SC 724 and it was held as under :

"1. Section 50 (2) of the L.A. Act confer on a local authority for whom land is being acquired a right to appear in the acquisition proceedings before the Collector and the reference Court and adduce evidence for the purpose of determining the amount of compensation.

2. The said right carries with it the right to be given adequate notice by the Collector as well as the reference Court before whom acquisition proceedings are pending of the date on which the matter of determination of compensation will be taken up.

3. That proviso to Section 50(2) only precludes a local authority from seeking a reference but it does not deprive the local authority which feels aggrieved by the determining of the amount of compensation by the Collector or by the reference Court to invoke the remedy under Article 226 of the Constitution as well as the remedies available under the L.A. Act.

4. In the event of denial of the right conferred by Section 50(2) on account of failure of the Collector to serve notice of the acquisition proceedings the local authority can invoke the jurisdiction of the High Court under Article 226 of the Constitution.

5. Even when notice has been served on the local authority the remedy under Article 226 of the Constitution would be available to the local authority on grounds on which judicial review is permissible under Article 226.

6. ……."

In *M/s Neyvely Lignite Corpn. Ltd., versus Special Tahsildar (Land Acquisition), Neyvely and others (AIR 1995 SC 1004)* a three Judge bench held as follows:

"The beneficiary, i.e. Local authority or company, a co-operative society registered under the relevant Satee Law or statutory authority is a person interested to determine just and proper compensation for the acquired land and is an aggrieved person. The beneficiary has the right to be heard by the Collector or the Court. If the compensation is enhanced it is entitled to canvass its correctness by filing an appeal or defend the award of the Collector. If it is not made a party, it is entitled to seek leave of the Court and file the appeal against the enhanced award and decree of the Civil Court under section 26 or of the judgment and decree under section 54 or is entitled to file writ petition under Article 226 and assail its legality or correctness……."

In view of these authoritative pronouncements, there can be no manner of doubt that the Allahabad Development Authority had a right to appear before the Collector and adduce evidence and in event of denial of such a right conferred by section 50(2) on account of failure of Special Land Acquisition Officer to serve a notice, it could approach the Collector for setting aside the award which was made ex parte against it. The Collector was, therefore perfectly right in entertaining the application moved by the Allahabad Development Authority on 10.1.2001 and in setting aside the award dated 11.10.2000 as the same had been made ex parte and without giving any opportunity of hearing to it. The challenge of the petitioner to the order dated

1.2.2001 of the Collector has, therefore absolutely no merit and has to be rejected.

By way of an amendment application, the petitioner has also sought quashing of the award dated 5.2.2001 and a direction to the respondents to grant him compensation, as per judicial determination dated 31.5.2002 in LAR No. 10 of 2001 (Jagpat Versus State of U.P.).

It is well settled that the award of the Collector made under section 11 of the Act is nothing more than an offer of compensation made by the Government to the claimant whose property is acquired. (See *Raja Harish Chancre versus Dy. Land Acquisition Officer, AIR 1961 SC 1500, DR. G.H. Grant versus State of Bihar*, AIR 1966 SC 237, *Periyar and Paree Kanni Rubbers versus State of Kerala*, AIR 1990 SC 2192.) Section 18 of the Act confers right upon a person interested who has not accepted the award to move an application to the Collector for making a reference to the Court if he feels aggrieved by the amount of compensation awarded to him. Since the Act itself provides a complete machinery to a person interested for enhancement of compensation by asking the Collector to make a reference to the court, the award made by the Special Land Acquisition Officer on 5.2.2001 cannot be quashed at the instance of a person interested in a writ petition under Article 226 of the Constitution.

Sri B.B. Paul learned counsel for the Allahabad Development Authority has submitted that the writ petition at the instance of the present petitioner Rehman Siddique is not maintainable as neither he is owner of the land, which had been acquired nor he is a person interested within the meaning of section 3 (b) of the Act. Sri Paul has submitted that after the award was made on 5.2.2001, notices under section 12 of the Act were given to all those persons whose names were recorded over the acquired land. Learned counsel has submitted the recorded tenure holders of the acquired land having not challenged the order of the Collector dated 1.2.2001 and also the award dated 5.2.2001 of the special land acquisition Officer, the writ petition is not maintainable. In Para 3 of the supplementary counter affidavit, (sworn by Sri D.C. Misra on 9.9.2002), it is averred that the petitioner Rehman Siddique claims that he has got a power of attorney from the recorded tenure holders whose land had been acquired but the said power of attorney has not been filed so that the true picture may not be revealed. When confronted with this statement made in the supplementary affidavit, Sri P.C. Srivastava learned counsel for the petitioner has asserted that the petitioner has got a power of attorney in his favour from the recorded tenure holders. However the said power of attorney was not produced before us. It certainly appears that the petitioner is not one of the recorded tenure holders whose land may have been acquired. For the purpose of deciding the present writ petition, we do not want to examine the question whether the petitioner has a valid power of attorney in his favour, which may entitle him to contest the matter on behalf of those persons who were owners of the land and whose land had been acquired. This question shall be examined when the petitioner Rehman Siddique initiates any other legal proceeding either for receiving the balance amount of compensation or

takes any other step in accordance with law for enhancement of the compensation.

Sri Srivastava has referred to *Gram Seva Mandal Versus Collector, Wardha and others,* (AIR 1975 SC 73) in support of his submission that writ petition at the instance of the present petitioner Rehman Siddiqui is maintainable. In our opinion, the authority cited is clearly distinguishable on facts. Learned counsel has also referred to a judgment of this court in Agra Development Authority versus special land Acquisition Officer (2000(2) AWC 1065). This decision can be of no assistance to the petitioner, as on the material placed before the Court, it was held that the development authority had full knowledge of the pendency of proceedings for determination of compensation.

For reasons mentioned above, we find no merit in the writ petition, which is hereby dismissed with cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.12.2002

BEFORE
THE HON'BLE S.P.SRIVASTAVA J.
THE HON'BLE M.P. SINGH,J.

Special Appeal No. 1278 of 2002.

M/S P.G.T. Components Private Ltd. and others ...Appellants
Versus
The Assistant Provident Fund Commissioner & another ...Respondents

Counsel for the Appellants:
Sri K.S. Ojha
Sri Chandra Kumar Rai

Counsel for the Respondents:
Sri G.L. Tripathi

Employees Provident funds and Misc. Provisions Act 1952- Whether the provident fund Commissioner at the time of deciding the Controversy act as Tribunal or a Court held – at the most it can be treated as tribunal.

High Court Rules – chapter 8 R. 5 Special Appeal - order passed by learned Single Judge entertaining writ Petition against the order Passed by the Provident Fund Commissioner- Special Appeal held not maintainable

Held Para 6

In the aforesaid view of the matter the appeal is clearly not maintainable. The preliminary objection is sustainable in law.

(Delivered by Hon'ble S.P. Srivastava. J.)

1. Heard the learned counsel for the appellants as well as the learned counsel representing the respondent authorities.

2. A preliminary objection has been raised by the learned counsel for the respondents challenging the maintainability of this appeal asserting that the order, which was the subject matter of the writ petition disposed of by the learned Single Judge vide the impugned order dated 26.10.2002, was an order passed by a Tribunal, therefore, as provided in Chapter VIII Rule-5 of the Rules of the Court, no special appeal could lie against such an order.

3. A perusal of the various provisions of the Employees Provident Fund and Misc. Provisions Act, 1952 indicates that under the Scheme of the Act the Provident Fund Commissioner while

discharging its duties under the Act has not been vested with any trappings of the court. At the most he can be taken to be a Tribunal. The learned counsel for the appellant has not been able to point out any such feature which may lead to an inference that while discharging the duties under the Act the Provident Fund Commissioner can be taken to be a Court.

4. It may further be noticed at this stage that a Division Bench of this Court in its decision in the case of The India Thermit Corporation Ltd. Vs Regional Provident Fund Commissioner and others, Special Appeal No. 567 of 1994 decided on 23.3.1994 following the earlier decision of another Division Bench in writ petition No. 3503 of 1981, in the case of The India Thermit Corporation Ltd. Vs Regional provident Fund Corporation, U.P. decided on 5.11.1981 had observed that the Regional Provident Fund Commissioner functions as a Tribunal while discharging the duties under the provisions of the said Act.

5. Learned counsel for the appellants has not been able to demonstrate that the status of a Provident Fund Commissioner while discharging the duties envisaged under the Provident Fund Act is that of a Tribunal and not of a Court..

6. In the aforesaid view of the matter the appeal is clearly not maintainable. The preliminary objection is sustainable in law.

7. However, even on merits, a perusal of the memo of appeal specially ground no. 2 makes it apparent that the appellants are not disputing the applicability of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. In fact, as noticed by the learned Single Judge in the impugned order, the petitioners did not challenge the applicability of the Act to their establishment since they themselves have been claiming that they were depositing the Provident Fund earlier.

8. In the aforesaid view of the matter the learned Single Judge did not find fault with that part of the order passed by the learned Provident Fund Commissioner so far as it closed the proceedings regarding applicability of the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 to the establishment of the present appellants. So far as the other part of the order of the Commissioner is concerned, the learned Single Judge has left it open to the petitioners – appellants to raise all submissions including bringing on the record the documentary evidence before the concerned authority. Therefore, while determining the extent of liability the concerned authority will have to take into consideration the evidence and the materials brought on record by the present appellants in support of its defence raised in opposition to the notice in question.

9. Taking into consideration the facts and circumstances as brought on record including the fact that the interest of the present appellants has been amply protected, we are not inclined to interfere in the discretion exercised by the learned Single Judge.

This Special Appeal, consequently, fails and is dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.01.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 285 of 2003

R.R. Pandey ...Petitioner
Versus
Managing Director, U.P. Jal Nigam and another ...Respondents

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

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

Constitution of India, Art. 226 - Suspension Order – Validity Challenged ground that no opportunity given before passing the order - No Particular of charges given in suspension Order – held – suspension is no punishment – opportunity not required – Similarly the Substance of Charges are already there – if established the dismissal order can be passed – held – writ petition liable to dismissed – direction for conclusion of enquiry within 3 months given.

Held – para 8

The charges mentioned in the impugned order are serious enough in the event of their being established to warrant major penalty. It may be mentioned that suspension itself is not a punishment. There are situations that call for immediate action against a Government servant or a servant of some other body. In view of the seriousness of the mis-conduct or the circumstances. Immediate action may be required It is not therefore, necessary to give opportunity of hearing or detailed reasons in the suspension order as a suspension order is not a quasi judicial order at all. A suspension order is an administrative order and hence the rules of natural justice need not be complied with before passing a suspension order. The rules of natural justice have to be complied with only when a penalty is being imposed e.g. dismissal of service or reduction of salary, but as stated above a suspension order is not a penalty.

Case law discussed:
1995 ACJ- 604

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

1. Heard learned counsel for the petitioner and learned Standing counsel.

2. The petitioner is challenging the impugned suspension order dated 9.12.2002.

3. The petitioner was Executive Engineer in the service of U.P. Jal Nigam and he has been suspended by the impugned order.

4. Learned counsel for the petitioner has submitted that the suspension order is illegal because it does not mention the charges. In our opinion a suspension order is not a charge sheet and hence it is not necessary to mention the charges in detail in the suspension order. The detailed charges can be given subsequently by a charge sheet.

5. Learned counsel for the petitioner has relied on the Division Bench decision of this Court in ***Mitthan Lal Sharma vs. District Assistant Registrar, Cooperative society, U.P. and others 1995 A C J 604***. It was held in that decision that there should be some indication in the suspension order of the nature of the mis-

conduct proposed to be charged. In the present impugned order it has been mentioned that the petitioner has committed various irregularities e.g. irregularity in expenditure of money, irregularities in the construction of hand-pump and platform, misuse of his post etc. In our opinion this gives sufficient indication of the nature of the charges and the detailed charges will be given in the charge sheet which should be given as soon as possible.

6. Learned counsel for the petitioner has then relied on the First Proviso to Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rule 1999 which states "Provided that suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of their being established may ordinarily warrant major penalty"

7. We have already observed above that there is indication of the nature of charges against the petitioner in the suspension order. We have also observed that detailed charges need not be mentioned in the suspension order, as the suspension order is not a substitute for a charge sheet.

8. The charges mentioned in the impugned order are serious enough in the event of their being established to warrant major penalty. It may be mentioned that suspension itself is not a punishment. There are situations that call for immediate action against a Government servant or a servant of some other body . In view of the seriousness of the mis-conduct or the circumstances, immediate action may be required It is not therefore, necessary to give opportunity of hearing or detailed reasons in the suspension order as a suspension order is not a quasi judicial order at all. A suspension order is an administrative order and hence the rules of natural justice need not be complied with before passing a suspension order. The rules of natural justice have to be complied with only when a penalty is being imposed e.g. dismissal of service or reduction of salary, but as stated above a suspension order is not a penalty.

9. Thus there is no force in this writ petition. It is dismissed.

10. We however direct that the enquiry against the petitioner shall be completed preferably within three months from the date of production of a certified copy of this order before the authority concerned in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 5193 of 2002

Dr. Seema Kundra ...Petitioner
Versus
The State of U.P. & others...Respondents

Counsel for the Petitioner:
Sri Shree Ram Gupta

Counsel for the Respondents:
S.C.

Constitution of India, Act. 226- Employees working on Deputation has no night to put claim on the post of

deputation reversion to parent post held proper

Held – Para 4

In our opinion the petitioner has no lien or right to hold the post in the State Ayurvedic College, Varanasi as she was only attached to that college and hence she was purely on deputation there. It is settled law that a deputationist has no right to hold the post to which he or she is sent on deputation, vide JT 2000(6) 574, J.T. 1999 (7) S.C. 44,etc.

Case law discussed:
JT. 2000 (6) 574
JT 1999 (7) SC-44

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

1. Heard learned counsel for the petitioner.

2. The petitioner has prayed for a mandamus directing the respondents not to relieve the petitioner from her present place of posting at State Ayurvedic College and Hospital Atarra.

3. It appears that petitioner was appointed by order dated 16.6.88 as Medical Officer, at Government Ayurvedic Hospital Talbeahat Lalitpur. In the year 1990 the petitioner was attached with State Ayurvedic College, Varanasi and was deputed for teaching job vide Annexure-2 and 3 to the writ petition. It is alleged in paragraph 6 of the petition that since then the petitioner is doing teaching job in the college

4. In our opinion the petitioner has no lien or right to hold the post in the State Ayurvedic College, Varanasi as she was only attached to that college and hence she was purely on deputation there. It is settled law that a deputationist has no right to hold the post to which he or she is sent on deputation, vide JT 2000(6) 574, J.T. 1999 (7) S.C. 44, etc.

5. It appears that the State Government by means of order dated 22.10.2002 directed the Director, Ayurvedic and Unani Services, U.P. to detach all the Medical Officers and place them on their original place of posting vide Annexure-10 to the writ petition. The petitioner has only a lien on her original place of posting and not the place where she was attached.

6. Thus we find no illegality in the impugned order. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2003

BEFORE
THE HON'BLE S. N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 12730 of 2001

Riyazuddin ...Petitioner
Versus
Commissioner, Milk Dairy Development and others ...Respondents

Counsel for the petitioner:
Sri A.K.Roy
Sri Deepak Verma

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

U.P. Cooperative Societies Employees Services Regulation 1975- regulation – 84 (f) Petition working as Mechanic – Notice issued to show Cause about actual date of Birth- petitioner submitted his reply - Considering the explanation without intimation about

any enquiry officer – dismissal order passed -utter violation of Principle of National Justice-termination order quashed.

Held – para 7

Concededly, neither any intimation was given to the petitioner in relation to appointment of enquiry officer nor copy of the enquiry report was supplied to the petitioner. It would also appear that the petitioner was also not supplied copy of the another certificate collected by the enquiry officer from the same institution. It also brooks no dispute that any charge sheet was served to the petitioner or any disciplinary proceeding as contemplated under the rules was ever initiated against him. All this leaves an unbridgeable hiatus and constitutes flagrant violation of the provisions of the Regulation 84 (I) (f) and (iv) (a) as well as 85 of the Service Regulations, 1975. This also points to clear violation of principles of natural justice while conducting proceedings and passing the impugned order of dismissal on ground of alleged misconduct. In the course of submission, learned counsel for the petitioner also submitted that the petitioner had submitted reply to the notice which the authorities declined to acknowledge as a result of which, he took recourse to submitting the reply by registered post which was received by the authorities on 19th Nov 2001. In the enquiry, the petitioner had demanded opportunity of hearing and the impugned order preceded the reply and it was passed without considering the explanation submitted by the petitioner. In this regard, section 103 (I) and (II) may be referred to. This section deals with the nature of offences and penalties therefore. The impugned order too calls in aid the provisions of section 103 and therefore, by this reckoning, regulation 84 of the Service Regulation will come into play and will on all fours apply to the facts of the present case. Once regulation 84 comes into play, it becomes imperative for the authorities to have embarked upon regular departmental proceedings consistent with the provisions of regulation 84 of the Service Regulation 1975 and this having not been done, the entire edifice constructed by the authorities falls to the ground.

Case law discussed:
1967 SC 1269
1981 SC 1481

(Delivered by Hon'ble S.N. Srivastava, J.)

1. By way of present petition, the petitioner has canvassed the validity of order dated 17th March 2001 passed by respondent no.3 thereby dismissing the petitioner from the post of mechanic.

2. Necessary facts as are relevant for just adjudication of the controversy involved in this petition may be set out. The petitioner entered the service of the respondents in the year 1966 having been appointed on the post of Mechanic. In the year 1996, he was called upon to produce documents furnishing details of date of birth and educational qualifications by means of letter dated 2.11.1996 and in compliance, the petitioner submitted certificate issued by Chief Medical Officer Bareilly dated 18.11.96 as also the Transfer Certificate containing details of his having passed 5th standard and indicating his date of birth as being 15.10.46. In the certificate issued by Chief Medical Officer Bareilly, he was opined to be 50 years of age on 18.11.96. From a cumulative reading of both the certificates, it transpires that on 18.11.96, the age of the petitioner was about 50 years. It is also evident from the record that an enquiry was set afoot and enquiry officer was appointed vide letter/order dated 22nd Jan 2001 to delve into the issue pertaining to the petitioner's date of birth.

It would also appear from the record that the very next day, the enquiry officer submitted his report the quintessence of which is that the actual date of birth of the petitioner was 20th Jan. 1942 and the Transfer Certificate was forged one. As a consequence of enquiry report, a notice dated 23.01.2001 was served to the petitioner to submit his explanation within 3 days prescribing therein the consequences that if he failed to submit his explanation, proceedings would follow as the conduct of the petitioner was one punishable under section 10. (1) and (2) of the U.P. Co-operative Societies Act and Regulation 84 (f) of the U.P. Co-operative Societies Employees' Service Regulations, 1975 (hereinafter referred to as Service Regulations). It would further transpire from the record that explanation as demanded was not submitted within time and as a sequel thereto, the Transfer Certificate submitted by the petitioner was presumed to be forged one resulting in dismissal of the service of the petitioner.

3. Learned counsel for the petitioner canvassed that from the perusal of the order it is explicit that taking in aid the provisions contained in Regulations 84 (f) of the U.P. Co-operative Societies Employees' Service Regulations 1975 the respondents had passed order of dismissal. He further submitted that no enquiry was made and entire exercise was conducted exparte and behind the back of the petitioner in antagonism of the principles of natural justice. The learned counsel further pointed out that it was essential for the authorities to serve charge-sheet as required under Regulation 85 of the Service Regulations followed by regular departmental proceeding before passing order of dismissal. The submission further proceeds that the petitioner has no knowledge about the enquiry and further that enquiry report was also not supplied to him which ex-facie formed the basis of the order of dismissal and as such the entire exercise and consequent impugned order are vitiated in law. The learned counsel further canvassed that as the dismissal order had the indicia of a punishment order under Regulation 84 (f) the authorities should have followed the procedure prescribed of disciplinary proceeding as contemplated under section 85 of the Service Regulations.

4. Sri R.G. Padia, learned counsel representing the respondents, in opposition, contended that though it is indicated in the order that the order has been passed under Regulation 84 (f) of the Service Regulations but in effect, the dispute pertained to change of date of birth for which notice was given to the petitioner and it was the only requirement and the explanation having not been submitted within the time required, impugned order was passed after due consideration of the materials on record. He further contended that no regular disciplinary proceeding as mandated by Regulation 85 of the Service Regulations, was warranted in the facts and circumstances of the case, Reliance has been placed on decisions of the Apex Court in **State of Orisa vs. Miss Binapani Dei**[1] **and Sarjoo Prasad vs. General Manager**[2] to enforce his contention that only notice was necessary which was served to the petitioner.

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[1] 1967 SC 1269
[2] 1981 SC 1481

5. Having considered the argument in all its ramifications, I think it necessary to have acquaintance with the provisions of Regulation 84 (I) of the Service Regulations which are excerpted below:

"84 Penalties. –(I) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under Section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by any one of the following penalties-
(a) Censure,
(b) Withholding of increments,
(c) Fine on an employee of Category IV (Peon, Chaukidar etc),
(d) Recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the co-operative society by the employee's conduct,
(e) Reduction in rank or grade held substantively by the employee,
(f) Removal from service, or
(g) Dismissal from Service……"

Clause (IV) (a) of Regulation 84 being relevant may also be abstracted below:

"(iv) (a) The charge-sheeted employee shall be awarded punishment by the appropriate authority according to the seriousness of the offence:

Provided that no penalty under sub-clauses (e), (f) or (g) of clause (I) shall be imposed without recourse to disciplinary proceedings."

It would thus crystallize from perusal of the provisions contained in Regulation 84 (f) and (g) and the proviso to Regulation 84-(iv) (a) that no punishment could be imposed without recourse to the regular disciplinary proceedings. Regulation 85 deals with the disciplinary proceeding and lays down procedure. Regulation 85 (I) and (IV) being relevant are quoted below.

"85 (i) The disciplinary proceedings against an employee shall be conducted by the Inquiring Officer referred to in clause (iv) below with due observance of the Principles of natural justice for which it shall be necessary that-

(a) The employee shall be served with a charge –sheet containing specific charges and mention of evidence in support of each charge and he shall be required to submit explanation in respect of the charges within reasonable time which shall not be less than fifteen days.

(b) Such an employee shall also be given an opportunity to produce at his own cost or to cross examine witnesses in his defence and shall also be given an opportunity of being heard in person, if he so desires;

(c) If no explanation in respect of charge-sheet is received or the explanation submitted is unsatisfactory, the competent authority may award him appropriate punishment considered necessary.

X X X X

(iv) The Inquiring officer shall be appointed by the appointing authority or by an officer of the society authorised for the purpose by the appointing authority:

Provided that the officer at whose instance disciplinary action was started shall not be appointed as an inquiring officer nor shall the inquiring officer be the appellate authority."

6. The argument of the learned counsel for the Opp. Parties that in fact

the matter pertained to change of date of birth which did not involve or entail full fledged departmental proceeding, does not commend to me for acceptance. Yet another reason which pricks hole into the argument of Dr. Padia is the fact that the enquiry officer was appointed by letter dated 22.1.2001 who conducted the enquiry and submitted his report the very next day. Besides, I have searched the entire record and there is nothing on the record suggestive of the fact that petitioner was ever intimated about appointment of the enquiry officer. The fact that enquiry report was not supplied to the petitioner has not been repudiated in the counter affidavit. In fact, enquiry report furnished foundation for passing the impugned order of dismissal and non-supply of the enquiry report leaves a gaping hole in the fairness of the enquiry and observance of procedure prescribed for such enquiry. It would further appear that disciplinary authority has observed in the order that the certificate furnished by the petitioner was forged one and this observation had its basis in the enquiry report itself. In the above perspective, the argument of Dr. Padia that it was an enquiry pertaining to change of date of birth, has no cutting edge and falls to the ground. Rather, in fact it was an enquiry to find out whether document filed by the petitioner was forged one. Submitting a forged document no doubt constitutes misconduct. It is noticeable that the background of the impugned order is the exparte enquiry conducted by the enquiry officer which according to the order constituted misconduct and warranted consequent dismissal of the petitioner from service.

7. Concededly, Neither any intimation was given to the petitioner in relation to appointment of enquiry officer nor copy of the enquiry report was supplied to the petitioner. It would also appear that the petitioner was also not supplied copy of the another certificate collected by the enquiry officer from the same institution. It also brooks no dispute that any charge sheet was served to the petitioner or any disciplinary proceeding as contemplated under the rules was ever initiated against him. All this leaves an unbridgeable hiatus and constitutes flagrant violation of the provisions of the Regulation 84 (I) (f) and (iv) (a) as well as 85 of the Service Regulations, 1975. This also points to clear violation of principles of natural justice while conducting proceedings and passing the impugned order of dismissal on ground of alleged misconduct. In the course of submission, learned counsel for the petitioner also submitted that the petitioner had submitted reply to the notice which the authorities declined to acknowledge as a result of which, he took recourse to submitting the reply by registered post which was received by the authorities on 19th Nov. 2001. In the enquiry, the petitioner had demanded opportunity of hearing and the impugned order preceded the reply and it was passed without considering the explanation submitted by the petitioner. In this regard, section 103 (I) and (II) may be referred to. This section deals with the nature of offences and penalties therefore. The impugned order too calls in aid the provisions of section 103 and therefore, by this reckoning, regulation 84 of the Service Regulation will come into play and will on all fours apply to the facts of the present case. Once regulation 84 comes into play, it becomes imperative for the authorities to have embarked upon regular departmental proceedings

consistent with the provisions of regulation 84 of the Service Regulation 1975 and this having not been done, the entire edifice constructed by the authorities falls to the ground.

8. The case framed against the petitioner bristles with many infirmities and one of the noticeable infirmities coming to the fore is that entire exercise resulting in the dismissal of the petitioner was conducted behind the back of the petitioner and without furnishing relevant documents or materials forming basis of the imputation of alleged misconduct resulting from submitting forged Transfer Certificate by the Petitioner and this arbitrary exercise leaves irremovable taint permeating the impugned order and thus, the impugned order is vitiated in law on the unvarnished and simple ground of violation of natural justice alone. It is anybody's guess that had the petitioner been supplied with the T.C. collected by the enquiry officer, he, in the facts and circumstances of the case, could have endeavored to shed sufficient light to indicate about the certificate collected by the enquiry officer. To sum up, all these rights including the right of reasonable opportunity to defend himself as envisaged in the statute have been denied to the petitioner and by this reckoning, the impugned order cannot be sustained in law. The petitioner has also claimed opportunity to defend herself in reply.

9. As a result of foregoing discussion, the petition succeeds and is allowed. As a necessary consequence, the impugned order is hereby quashed attended with the observation that the disciplinary authority will embark upon departmental proceedings de novo as contemplated under rule 84 (1) (f) and (iv) (a) as well as 85 of the Service Regulations, 1975 and take the same to some conclusion after affording due opportunity of hearing in accordance with Rules within a period of three months which period will commence to run from the date of production of a certified copy of this order. The consequential benefits shall abide by the final outcome of the enquiry.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 712 of 2003

Smt. Gangotri Devi ...Petitioner
Versus
The State Election Commission and others ...Respondents

Counsel for the Petitioner:
Sri V.C. Misra
Sri Vivek Mishra

Counsel for the Respondents:
Sri P.N. Rai
Sri R.C. Dwivedi
Sri O.P. Singh
S.C.

Constitution of India, Act 226 Election of Zila Parishad Adhyaksha- cannot be challenged in Writ Petition once the election started the only remedy remain to file election petition.

Case Law discussed:
1996 (6) SCC. –303
2000 (8) SCC. –216
2001 (8) SCC. –509

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

Heard the petitioner in person. Sri P.N. Rai has appeared for the respondent no.s 1 and 2.

The petitioner has prayed for a writ of certiorari to quash the election for the post of Adyaksha, Zila Panchayat, Kushi Nagar. It is settled law that once election process has started this Court cannot interfere, and the remedy of the petitioner is to file an election petition after the election result has been declared vide Anugrah Narain Singh vs. State of U.P. 1996 (6) S.C.C. 303, Election Commission vs. Ashok Kumar 2000 (8) S.C.C.216, Shri Sant Sadguru Janardam Swami Sahkari Dugdha Utpadak Sanstha vs State of Maharashtra 2001 (8) S.C. 509 etc. Under Rule 33 of the U.P. Zila Panchayat Election of Adyaksha and Upadyaksha and Settlement of Election Disputes Rules, 1994 the petitioner can file an election petition which, if filed, will be disposed off expeditiously in accordance with law. The petition is therefore dismissed. The interim order if any is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition no. 571 of 2003

Bhola Prasad Nishad ...Petitioner
Versus
District Magistrate, Deoria and others ...Respondents

Counsel for the Petitioner:
Sri Ajay K. Misra
Sri Ashwani K. Misra

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Petitioner lease holder for 1998 to 2001 for excavate the sand- after the expiry of term petitioner can not claim to excavate the whole area of which the licence granted- only refund of the proportionate amount can be made.

Held- Para 3

In our opinion when the period of a lease has expired the lessee cannot claim extension of the period of the lease on the ground that he was not permitted to operate the lease for the whole or part of the lease period vide Jata Shankar Pandey Vs. Collector, Writ Petition No. 13638 of 1993 decided on 5.10.1993 by a division bench of this Court. In these circumstances the petitioner can only file an application claiming for refund of the lease amount or proportionate lease amount, as the case may be.

Case Law discussed:
WP 13638/1993 decided on 5.10.1993

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

1. Heard learned counsel for the parties.

2. The petitioner was granted a lease from 1998 to 2001. It is alleged in para 5 of the writ petition that the petitioner was not allowed to excavate the sand for the period of the lease. The petitioner made several representations to the District Magistrate, copies of which are Annexure 3 to the writ petition, but to no avail. The petitioner filed an appeal but that has been rejected stating that the appeal was not against any order vide Annexure 5 to the writ petition.

3. In our opinion when the period of a lease has expired the lessee cannot claim extension of the period of the lease on the ground that he was not permitted to operate the lease for the whole or part of the lease period vide Jata Shankar Pandey Vs. Collector, Writ Petition No. 13638 of 1993 decided on 5.10.1993 by a division bench of this Court. In these circumstances the petitioner can only file an application claiming for refund of the lease amount or proportionate lease amount, as the case may be.

4. However, if the petitioner makes such an application the same will be decided by the authority concerned preferably within two months thereafter in accordance with law.

The writ petition is disposed off accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 14TH, 2003.

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ petition no. 51124 of 2002

Mohar Singh ...Petitioner
Versus
Joint commissioner (SIB) and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh

Counsel for the Respondent:
S.C.

Constitution of India Art 311(2) reversion from higher post to his original post-petitioner worked on higher post on deputation No applicability of Art 311 (2) re- version held valid
Held-para 4
In view of what has been stated above, since the petitioner was admittedly on deputation in Trade Tax Department and no punishment has been awarded to the petitioner, the petitioner has been simply repatriated to his parent department, the same order does not cast stigma on the petitioner or is an order of punitive in nature. Therefore, the contention of the learned counsel for the petitioner, that the respondents who are constitutionally mandate to comply with the provisions of Article 311 (2) of the Constitution of India which, admittedly, has not been complied with in the present case, is not applicable. Therefore, the argument advanced on behalf of learned counsel for the petitioner deserves to be rejected and is hereby rejected.

Case law discussed:
AIR 1971 SC 998

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

1. By means of this writ petition under Article 226 of the Constitution of India, the petitioner, Mohar Singh has challenged the order dated 22nd November, 2002 passed by the respondent no. 1, a copy whereof has been annexed as annexure 5 to the writ petition, whereby the petitioner has been repatriated to his parent department from Trade Tax Department where he was working on deputation.

2. Heard learned counsel for the petitioner and perused the impugned order dated 22nd November, 2002.

3. Learned counsel for the petitioner has stated that recital in the order that after consideration, the joint commissioner, trade tax, Lucknow has decided to repatriate the aforesaid two

employees, including the petitioner from the trade tax impartment. Learned counsel for the petitioner has relied upon the decision reported in ***AIR 1971 Supreme Court-998- K.H. Phandnis vs. State of Maharashtra***, wherein the apex court has held that reversion from temporary officiating post without compliance of provisions of Article 311 (2) of the Constitution of India even in the case of reversion from temporary post to substantive post, amounts to violation of Article 311 (2) of the Constitution of India and in that case in the absence of regular enquiry having been done, as in the present case, the impugned order deserves to be set aside. The facts of the case narrated above and the facts of the present case are different though, the learned counsel for the petitioner referring to paragraph 3 of the aforesaid judgement has stated that since the petitioner was not selected to the post on which he was sent on deputation and was working on deputation which was higher post i.e. substantive post, therefore, the impugned order repatriating the petitioner to his parent department to his substantive post has been held by the apex court in the facts and circumstance of the case to be a case of reversion which could not have been done except after compliance of provisions of Article 311(2) of the Constitution of India. In the present case in the narration of facts, as stated in the writ petition, the petitioner who was working on the same post to which he was appointed in his parent department in substantive capacity. Thus the present case cannot be said to be a case of reversion. It is a case of repatriating simplicitor and, therefore, the law laid down by the apex Court relied upon by the learned counsel for the petitioner do not apply to the present case.

4. In view of what has been stated above, since the petitioner was admittedly on deputation in Trade Tax Department and no punishment has been awarded to the petitioner, the petitioner has been simply repatriated to his parent department, the same order does not cast stigma on the petitioner or is an order of punitive in nature. Therefore, the contention of the learned counsel for the petitioner, that the respondents who are constitutionally mandate to comply with the provisions of Article 311 (2) of the Constitution of India which, admittedly, has not been complied with in the present case, is not applicable. Therefore, the argument advanced on behalf of learned counsel for the petitioner deserves to be rejected and is hereby rejected.

5. In view of what has been said above, this writ petition deserves to be dismissed and is hereby dismissed. However, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.1.2003

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

Civil Misc. Writ Petition No. 54380 of 2002

Dharmendra Dhish Dubey ...Petitioner
Versus
Chairman, Rani Laxmi Bai Kshetria Gramin Bank and others ...Respondents

Counsel for the Petitioner:
Sri Indra Mani Tripathi

Counsel for the Respondents:
Sri Nripendra Mishra

Sri K.L. Grover

Constitutions of India Act 226 Writ petition against notice to show cause- enquiry officer has already submitted his report- instead of submitting the reply - rushed up to High Court- petitioner already participate in enquiry preceding- court declined to interfere.

Held para 7

In view of the aforesaid, this court is of the considered view that as the petitioner has already participated in the disciplinary proceedings and now the enquiry officer has already submitted his report, challenge to the show cause notice in respect to the proposed punishment is not to be entertained at this stage and thus writ petition deserves dismissal.

Case law discussed:
AIR 1940SC 1308
1992(1) SLR 38
1991 (4) SLR 647
1992 (2) SLR 715

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

1. Heard learned counsel for the petitioner and Sri Nripendra Mishra, Advocate appearing for the respondents.

2. Challenge before this court is the show cause notice dated 20.11.2002 (annexure no. 23 to the writ petition) by which the petitioner has been intimated about the proposed punishment and he has been called upon to place his version either by appearing in person or through his representative.

3. Ground as has been taken in writ petition and as argued by the learned counsel for the petitioner against show cause notice appears to be several i.e. (i) delay in starting proceedings which leads violation of the principles of natural justice; (ii) charge sheet was issued under the old regulations but the impugned show cause notice has been issued under the new regulation; (iii) proceedings against the petitioner are malafides (iv) the charges against the petitioner are frivolous and they are not proved; and (v) other employees facing same charges have been exonerated and they have been finally reinstated. In support of the submission that in the event the disciplinary proceedings have been started after much delay that is vitiated on that ground itself, reliance has been placed on decision given in the case of **State of Madhya Pradesh Vs Bani Singh and another reported in AIR 1990 S.C. 1308, Subhash Chandra Basu vs. Bank of Baroda and others reported in 1992 (1) SLR 38, Binayak Datta vs. State of West Bengal and others reported in 1991 (4) SLR 647** and a decision given in the case of **Arun Kumar Basu Vs. Union of India and another** reported in 1992 (2) SLR 715.

4. Sri Nripendra Mishra, learned Advocate who appeared for the respondents at the very outset raises a preliminary objection and submits for dismissal of the writ petition on the ground (i) that writ petition has been filed against only show cause notice and the petitioner has a remedy to file reply and it is only after the final decision if it goes against the petitioner he can take up the matter to this Court; (ii) even if the decision goes against the petitioner, he has an alternative remedy of approaching higher forum under para 47 of the relevant regulation of employees service regulation and thus he submits that no interference is required. Otherwise also he submits that as acceptance of the contention of the petitioner is dependent

on examination of various factual aspects which at this state may not be proper for this Court to go into and thus on this ground as well writ petitioner is not entitled to get any relief at this stage.

5. Having heard the arguments from both sides as indicated above the matter has been considered.

6. The question which requires consideration in this petition is that whether on the facts of present case challenge to the show cause notice about proposed punishment is to be permitted and the writ petition is to be entertained. The facts as has come on record demonstrated that the petitioner was placed under suspension on 4.2.1999 and it is thereafter the disciplinary proceedings proceeded by serving charge sheet on the petitioner on 10.4.1999 and on conclusion of the enquiry, the enquiry officer submitted its report on 10.7.2001 and thereafter the disciplinary authority having considered the report of the enquiry officer has issued the impugned show cause notice against which the petitioner has come up in this writ petition. In view of the aforesaid, it is quite clear that the disciplinary proceedings proceeded without any intervention and that has now been completed and the report by enquiry officer has already come and now it is just a final decision in respect to the punishment if it is so to be given to the petitioner is to be taken by the disciplinary authority. It is not the stage where the petitioner has come against the very initiation of the disciplinary proceedings i.e. at the stage of issuance of the charge sheet, on the ground of delay in starting the disciplinary proceedings and thus this court is of the view that the cases which has been referred by the learned counsel for the petitioner being related to very start of the disciplinary proceedings can have no application to the facts of the present case. In the event petitioner has permitted enquiry to go on and same proceeded for more than 2-3 years, which includes the submission of the reply on behalf of the petitioner to the charge sheet, adducing of the evidence from either of the sides and then the submission of the enquiry officer's report, he cannot be permitted to challenge show cause notice against proposed punishment at this stage. So far the ground as has been argued by the learned counsel for the petitioner, in respect to the merits of the prove or disapprove of various kinds of charges and the proceedings being malafide, charges being frivolous, suffice it to say that at all these aspects required adjudication of various factual contentions it will not be proper for this court to go into at this stage. The submission of the learned counsel for the petitioner that other similarly situated employees have been exonerated is also dependent on examination of the factual aspect inasmuch as verifying the nature of the charges against those employees, evidence in support thereof and thus it is the first job of the disciplinary authority to examine all these pleas which requires examination of record and facts which have been raised by the petitioner before this court, and only then this court may examine, the correctness of reasoning, finding and conclusion, so arrived by competent authority. There also appears to be another reason for declining to intervene in the matter. Pursuant to the show cause notice, the petitioner was required to appear personally in support of his reply or through his representative on 9.12.2002. as he could not appear on

that date, he moved application on 18.12.2002 for giving another date to appear and to place his version upon which the disciplinary authority taking a reasonable view in the matter has allowed petitioner to appear himself and to bring his representative on 8.1.2003 and thus the petitioner has already joined the proceedings pursuant to the show cause notice. In view of the aforesaid filing of the writ petition at this stage by the petitioner appears to be totally misconceived and it appears that petitioner has unnecessarily rushed to this court at a premature stage. As all objections whether factual or legal which have been taken by the petitioner before this court can always be raised by him before the disciplinary authority, who will be in a better position, to go into and to take appropriate decision in the matter in accordance with law either way, which this court cannot anticipate like the petitioner, and thus no examination on merits in respect to the various grounds is required at this stage.

7. In view of the aforesaid, this court is of the considered view that as the petitioner has already participated in the disciplinary proceedings and now the enquiry officer has already submitted his report, challenge to the show cause notice in respect to the proposed punishment is not to be entertained at this stage and thus writ petition deserves dismissal.

8. Accordingly writ petition fails and it is dismissed at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition no. 12 of 2003(Tax)

Gokul Prasad Rai and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri H.P. Dube

Counsel for the Respondents:
S.C.

U.P. Motor vehicles taxation (Amendment) Ordinance 2002 ordinance no. 19 of 2002 Validity of the enhance amount of Taxation challenged- provisions of new ordinance are on the same footing as Act of the legislature vide Art 213 (2) of the Constitution held Governor is competent to promulgate the ordinance under Entries No. 56 and 57 of list II of the 7th schedule of the constitution - petition dismissed.

Held para 4-5

In H.C. Misra Vs State of U.P. C.M. Writ Petition No. 1025 of 2001 (tax) decided on 10.9.2002 the imposition of additional tax has been upheld. In H.C. Misra's case (Supra) it was observed by the Division Bench:

"As a matter of fact 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."

We are in respectful agreement with the aforesaid division Bench decision. There is legislative competence in the Governor

of the State to promulgate the impugned Ordinance under Entries 56 and 57 of List II of the Seventh Schedule to the Constitution.

Case law discussed:

2000 AL J 2627

W.P. no. 1025 of 2001 decided on 10.9.2002

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

1. The petitioners have challenged the constitutional validity of U.P. Motor Vehicles Taxation (Amendment) Ordinance 2002 (U.P. Ordinance no. 19 of 2002)

We have heard the learned counsel for the parties.

2. Copy of the impugned Ordinance is Annexure 5 to the writ petition and we have carefully perused the same.

3. It may be stated that an Ordinance is on the same legal footing as an Act of the legislature vide Article 213 (2) of the Constitution Hence unless it is shown that it is violative of some provision of the Constitution, it cannot be struck down. Learned Counsel for the petitioner has not been able to satisfy us that the impugned ordinance violated any provision of the Constitution. There is a presumption in favour of constitutional validity of an Act.

4. In H.C. Misra Vs State of U.P. C.M. Writ Petition No. 1025 of 2001 (tax) decided on 10.9.2002 the imposition of additional tax has been upheld. In H.C. Misra's case (Supra) it was observed by the Division Bench:

"As a matter of fact 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."

5. We are in respectful agreement with the aforesaid division Bench decision. There is legislative competence in the Governor of the State to promulgate the impugned Ordinance under Entries 56 and 57 of List II of the Seventh Schedule to the Constitution.

6. We find no unconstitutionality in the impugned Ordinance. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 14TH, 2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 52065 of 2002

Santosh Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri M.K. Rai

Counsel for the Respondents:
S.C.

U.P. recruitment of dependants of Government Servants Dying in Harness Rules 1974 Rule 5 (1) (3) - Compassionate appointment claimed after five years after attaining the age of majority the was already there the purpose of compassionate appointment to provide immediate relief to the family of deceased employee- but not as a right of reservation held- authorities rightly rejected the claim- warrant no interference.

Case law discussed:
W.P. 6560 of 2000 decided on 26.3.01
AIR 2000 SC-2782

(Delivered by Hon'ble Anjani Kumar J.)

1. The petitioner, Santosh Kumar, approached this Court prior to the filing of the present writ petition by means of Civil Misc. Writ Petition 51615 of 2000, Santosh Kumar Vs. State of U.P. and others, which has been finally disposed of by this Court vide order dated 5th December, 2000, a copy of which has been annexed as Annexure 6 to the writ petition, wherein direction has been issued by this Court directing the respondent to decide the petitioner's representation regarding appointment under the U.P. Recruitment of Dependants of Government Servants dying in Harness Rules, 1974.

2. Learned counsel for the petitioner had filed the earlier writ petition relying upon the decision reported in (2000) 1U.P.L.B.E.C.-415 **Pushpendra Singh vs. Regional Manager U.P. State Road Transport Corporation Aligarh and another**; and **(2000) 2 UPLBEC-196, Manoj Kumar saxena Vs. District Magistrate Bareilly and others**. This Court disposed of the aforesaid writ petition with the following direction:

"The writ petition is finally disposed of with the direction that the concerned departmental authorities shall decide the pending application of the petitioner for appointment and shall pass appropriate speaking order on the pending application of the petitioner under the Rules aforesaid taking into consideration the decisions aforesaid. A copy of the decisions aforesaid shall be supplied by the petitioner's counsel along with a certified copy of this order to the concerned respondent.

It is made clear that this court has not judged or viewed the controversy on merits and the respondent concerned shall be at liberty to take his own view in the matter."

3. The facts leading to the filing of the aforesaid writ petition are that the petitioner's father was employed as Cook with the respondents, who died due to illness on 16th November, 1989 while he was in service leaving behind his widow and five minor children including the petitioner. At the time of death of the petitioner's father, the age of the petitioner was 13 years and he was minor. On attaining the age of majority, he applied for appointment as class iv employee under the U.P. Recruitment of Dependants of Government Servants dying in Harness Rules, 1974 on 31st December, 1994 i.e. after more than five years after the death of his father. It is this application, which according to the petitioner's allegations in the earlier writ petition, remain pending, which, as stated, was directed to be decided by this court in the earlier Civil Misc. Writ Petition No. 51615 of 2000.

4. The respondents have now decided the aforesaid application of the petitioner by the order dated 19th February, 2002 which is an order passed by the Joint Secretary of the Government of Uttar Pradesh, whereby the petitioner's application for appointment under the Dying-in-Harness Rules was rejected on the ground that according to Rule 5 (1)(3) of U.P. Recruitment of Dependants of Govt. Servants Dying in Harness Rules,

the application for appointment must be made within a period of five years from the date of death of the concerned employee, though according to the aforesaid Rules, power of relaxation is also there, but the petitioner's application was rejected as the same was filed beyond the period of five years from the date of death of his father and no case has been made out for relaxation and, therefore, the application of the petitioner was rejected.

5. This direction, as stated above, was passed by the Joint Secretary addressed to the Deputy Inspector General of Police (Establishment), U.P., Allahabad and the Commandant 34 P.A.C. Battalion, Varanasi and the consequential order was passed by the Commandant, 4 P.A.C. Battalion, Varanasi on 5th October, 2002 rejecting the petitioner's application for appointment under the Dying-in-Harness Rules.

6. Learned Standing Counsel has relied upon the decision of the learned single Judge of this Court passed in *Civil Misc. Writ Petition 6560 of 2000 decided on 26th March, 2001, Paravti Devi W/o late Sri Nandu Ram Vs State of U.P. and others*, which petition was filed by the wife of the deceased employee, which was ultimately dismissed by this Court as not pressed in view of the statement made by the learned counsel for the petitioner at Bar. Learned Standing Counsel has further relied upon the decision reported in *A.I.R. 2000, Supreme Court –2782, Sanjay Kumar Vs. State of Bihar and others*. Paragraph 3 of the said judgment of the apex Court is relevant which is being quoted below:

"We are unable to agree with the submissions of the learned senior counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who has left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in Director of Education V. Pushpendra Kumar Supra. It is also significant to notice that on the date when the first application was made by the petitioner on 2.6.88, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there is some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

7. In view of what has been said by the apex Court with regard to appointment under U.P. Recruitment of Dependants of Govt. Servants Dying in Harness Rules and in view of the reasons given in the impugned order rejecting the petitioner's application, for compassionate appointment, the order impugned in the present writ petition does not warrant any interference by this Court in exercise of its power under Article 226 of the Constitution of India.

8. This writ petition, therefore, being devoid of merits deserves to be dismissed and is hereby dismissed. There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 934 of 2003

Udai Veer Singh Yadav and others ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri Sudhir Kumar

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

Constitution of India, Act 226 Validity of Certificates issued by Hindi Sahitya Sammelan Prayag held certificate is not recognized after 1967 hence no right can be claimed.

Held- Para 3

In Delhi Pradesh Registered Medical practitioners vs. Director of Health 1997 (11) SCC 687 it was held that the certificate of Hindi Sahitya Sammelan is not recognized after 1967. Hence the petitioners have no right to do medical practice on the basis of the said certificate.
Case law discussed:
1997 (ii) SCC 687

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

1. We have heard learned Counsel for the parties.

2. The petitioner held certificates from Hindi Sahitya Sammelan Prayag, and they claim that they have the right to practice as medical practitioners on the strength of these certificates. They have prayed for a mandamus directing the respondents not to interfere with their peaceful practice as medical practitioners.

3. In Delhi Pradesh Registered Medical practitioners vs. Director of Health 1997 (11) SCC 687 it was held that the certificate of Hindi Sahitya Sammelan is not recognized after 1967. Hence the petitioners have no right to do medical practice on the basis of the said certificate.

4. Following the aforesaid decision of the Supreme Court this petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.1.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 7857 of 2002

Shambhoo Nath Gupta ...Petitioner
Versus
District Asstt. Registrar Cooperative Societies, U.P., Jaunpur and others ...Respondents

Counsel for the Petitioner:
Sri M.P. Gupta

Counsel for the Respondents:
S.C.

Sahkari Sangh Kosh Niyamavali -1982- Rule 18 Age of retirement of the employees of collection branch of cooperative Department- Rule provides- rule applicable to the Govt. Employees shall be applicable under fundamental rule 56 (3) age of retirement provides 60

years held the age of retirement is 60 years.

Held- Para 4

In this view of the matter, the age of the employees governed by the said 1982 Rules shall be treated to be 60 years and the petitioner is entitled to retire only after attaining the age of 60 years.

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

1. Heard learned counsel for the petitioner and learned Standing Counsel who has accepted notice on behalf of respondent Nos. 1 to 5.

2. Petitioner has claimed that the provision of Rule 18 of Sahkari Sangrah Kosh Niymavali, 1982 are applicable to the employees of Collection branch of Cooperative Department regarding retirement. The employees of State Government have been granted benefit of amendment in Fundamental Rule 56 (3).

3. The said Rules provide that such provisions which are not incorporated in the said 1982 Rules, the rules applicable to the State Government employees, shall be applicable. It is argued that the age of retirement has not been provided in the said 1982 Rules. Therefore, the age of retirement as is applicable under Fundamental Rules, is 60 years which provides that a Government servant will retire at the age of 60 years, will be applicable to the employee governed by 1982 Rules. The counter affidavit says that the status of the employees governed by 1982 Rules are not like that of Government Servants. In view of this argument on behalf of learned counsel for the petitioner, the aforesaid stand in the counter affidavit does not come in the way of the petitioner to claim the age of retirement to be 60 years.

4. In this view of the matter, the age of the employees governed by the said 1982 Rules shall be treated to be 60 years and the petitioner is entitled to retire only after attaining the age of 60 years.

5. In view of what has been stated above, the writ petition succeeds and is allowed. The order dated 31.12.2001 retiring the petitioner before the age of 60 years, is quashed. The respondents are directed to allow the petitioner to continue upto 60 years of age.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.1.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE PRAKASH KIRHSNA, J.

Civil Misc. Writ Petition No. 155 of 2003

Ravi Kumar Vashistha ...Petitioner
Versus
The District Magistrate, Bijnor and others ...Respondents

Counsel for the Petitioner:
J.P. Pandey

Counsel for the Respondents:
S.C.

Indian partnership Act- S 25 Recovery proceeding against partnership firm one of the for partners approached before High court disputing his liability as towards entire amount- held -every partner is responsible for entire amount jointly and severally need not interfere with proceeding

Held para 3

Under section 25 of the Indian Partnership Act, 1932 every partner is liable jointly as well as severally for all the acts of the firm done while he is a partner. Hence there is no merit in the submission of the learned counsel for the petitioner.

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

1. The petitioner is challenging the recovery of entertainment tax. Learned counsel for the petitioner submits that the petitioner is only one of the 4 partners of the firm M/s National Cable Network against which recovery has been issued whereas his share is only 48.7%. He prays that only 48.7% of the entertainment tax due should be recovered from the petitioner.

2. Under section 25 of the Indian Partnership Act, 1932 every partner is liable jointly as well as severally for all the acts of the firm done while he is a partner. Hence there is no merit in the submission of the learned counsel for the petitioner.

3. The petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOV. 12, 2002

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

Civil Misc. Writ Petition No. 51288 of 2000

Union of India and others ...Petitioners
Versus
Sri Roshan Lal Madhok and another ...Respondents

Counsel for the Petitioners:
Sri A.K. Gaur
Sri M. Prakash

Counsel for the Respondents:

Constitution of India, Article 226- Petitioner after 7 days leave remained absent for about 19 yrs.- not permitted to join in view of provisions Pra 2014 (2) Indian Railway establishment. Tribunal directed reinstatement alongwith arrear of salary- held not proper- delay deprived the remedy- petitioner employed between 1964-68- retrenched. between 1973-79- reported his duty on 1.3.89- not entitled for any relief.

Held- Para 8

It is alleged in paragraph 12 of the writ petition that the Tribunal has committed an illegality in drawing an adverse inference because the petitioner had not produced the respondent's appointment letter. It is further alleged in paragraph 14 of the writ petition that the Tribunal committed an illegality in granting the benefit of pay etc. The petitioner has alleged in paragraph 15 of the writ petition that no reasonable and plausible explanation was given by the respondent no. 1 for his long absence. The petitioner has further alleged that since the respondent no. 1 has failed to produce any record in this regard he was asked to produce documents relating to his appointment but he failed to do so. Hence it is urged that it was incumbent upon the Tribunal to draw an adverse inference against the respondent no. 1 and the Tribunal committed a serious illegality in not doing so. It is alleged in paragraph 18 of the writ petition that no record of the petitioner is available with the Railways since he was absent after 1972 and filed a petition before the Tribunal only in 1992 after a gap of 20 years. In view of the Railway Boards circular the record of more than ten years are weeded out. It is alleged in paragraph 19 of the writ petition that the observation of the Tribunal that since Rs.962/- was lying with the

railways in Provident Fund account he will be deemed to be in service is wholly erroneous. The petitioner has alleged that in the decision of the Supreme Court in High Court of M.P. Vs. Mahesh Pratap 1995 SCC (L & S) 278 it was held that if a representation is considered by the authority and rejected limitation does not get extended if the claim is already barred by time. This view is affirmed by the Supreme Court in Bhoop Singh Vs. Union of India AIR 1992 S.C. 1414. The Supreme Court held that if the petitioner cannot give good explanation for the delay he loses his right as well as remedy.

Case law discussed:
1995 SCC-(L & S) 278
1995 (Supp. (3) SCC-231
J.T. 1993 (3) SC- 418
1999 (8) SCC-304

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

1. This writ petition has been filed against the impugned order of the Central Administrative Tribunal dated 28.7.2000 Annexure 3 to the writ petition.

We have heard learned counsel for the parties.

2. The respondent no. 1 filed a claim petition before the Tribunal alleging that he was working as Loco Cleaner under Loco Foreman and was granted casual leave for certain urgent work from 26.4.1972 to 2.5.1972 i.e. for seven days with station leave permission. Thereafter he has alleged that he fell ill and remained absent for about seventeen years i.e. from 3.5.1972 to 28.2.1989. The respondent alleged that he became fit on 28.2.1989 and reported for duty before Loco Foreman, Northern Railway, Laksar on 1.3.1989 who directed him to report to Divisional Railway Manager, Moradabad and produce his appointment letter. However, the respondent no. 1 failed to produce his appointment letter. There was no record available with the railway administration about the appointment and working of respondent no. 1 in the railway, nor did the respondent no. 1 file any satisfactory report to the railway that he ever worked in the railway.

3. The petitioner (before the Tribunal) alleged that he was sick and had sent medical certificate showing that he was suffering from Tuberculosis. He further alleged that after a long period he was cured and declared fit on 28.2.1989 and hence reported for work on 1.3.1989. The respondent no. 1 alleged that his date of Birth is 1.10.1938 and he was due for superannuation on 31.10.1996.

4. In his O.A. filed before the Tribunal the respondent no. 1 prayed for quashing of the order of deemed removal dated 2.7.1990 and 4.9.1992 being ultra vires and violative of the principles of natural justice with all consequential benefits of seniority, emoluments and promotion etc. and for continuity of service between 1972 to 1989 and for paying of salary and other emoluments with increments. True copy of his O.A. is Annexure 1 to the writ petition.

5. The petitioner filed a counter affidavit before the Tribunal and raised a preliminary objection regarding the maintainability of the O.A. It was alleged by the petitioner that no leave can be granted/sanctioned if the employee has remained absent for five years or more. In this regard the provisions of Indian Railway Establishment Manual were produced by the petitioner in support of his contention. In the letters dated 2.7.1990 and 4.9.1992 issued by the

petitioner it was clearly mentioned that the respondent no. 1 was deemed to have been removed from service due to long absence. In the counter affidavit filed by the petitioner before the Tribunal the petitioner sought to rectify the error committed in the letter saying that the respondent no. 1 (the petitioner before the Tribunal) was deemed to have resigned from service.

6. In paragraph 10 of the writ petition it is alleged that the respondent no. 1 simply disappeared in May 1972 and did not report duty till 1.3.1989 and hence in view of Section 108 of the Indian Evidence Act he was presumed to have died. True copy of the counter affidavit filed before the Tribunal is Annexure 2 to the writ petition.

7. The Tribunal in the impugned order held that in view of the long absence of the respondent no. 1 he cannot get the benefit of seniority and pay for the period of absence. He was however entitled to pay from 4.9.1992 i.e. the day on which the second impugned order of deemed removal was passed on account of the fact that he filed the O.A. only on 29.9.1992. The Tribunal held that the respondent no. 1 shall be entitled for pay in the scale of Rs.750-940 and he may be given retrial benefits on the basis of this pay. True copy of the impugned order is Annexure 3 to the writ petition.

8. It is alleged in paragraph 12 of the writ petition that the Tribunal has committed an illegality in drawing an adverse inference because the petitioner had not produced the respondent's appointment letter. It is further alleged in paragraph 14 of the writ petition that the Tribunal committed an illegality in granting the benefit of pay etc. The petitioner has alleged in paragraph 15 of the writ petition that no reasonable and plausible explanation was given by the respondent no. 1 for his long absence. The petitioner has further alleged that since the respondent no. 1 has failed to produce any record in this regard he was asked to produce documents relating to his appointment but he failed to do so. Hence it is urged that it was incumbent upon the Tribunal to draw an adverse inference against the respondent no. 1 and the Tribunal committed a serious illegality in not doing so. It is alleged in paragraph 18 of the writ petition that no record of the petitioner is available with the Railways since he was absent after 1972 and filed a petition before the Tribunal only in 1992 after a gap of 20 years. In view of the Railway Boards circular the record of more than ten years are weeded out. It is alleged in paragraph 19 of the writ petition that the observation of the Tribunal that since Rs.962/- was lying with the railways in Provident Fund account he will be deemed to be in service is wholly erroneous. The petitioner has alleged that in the decision of the Supreme Court in High Court of M.P. Vs. Mahesh Pratap 1995 SCC (L & S) 278 it was held that if a representation is considered by the authority and rejected limitation does not get extended if the claim is already barred by time. This view is affirmed by the Supreme Court in Bhoop Singh Vs. Union of India AIR 1992 S.C. 1414. The Supreme Court held that if the petitioner cannot give good explanation for the delay he loses his right as well as remedy.

9. In paragraph 24 of the petition it is alleged that there is not an iota of evidence that the respondent no. 1 was

employed with Railways as Loco cleaner as all the record have been lost by afflux of time.

Counter and rejoinder affidavits have been filed and we have perused the same.

10. In paragraph 6 of the counter affidavit of the respondent no. 1 he has alleged that he had applied for casual leave from 26.4.1972 to 2.5.1972 and was at his home where it was found that he was a patient of tuberculosis. It is alleged in paragraph 7 of the counter affidavit the respondent dispatched the medical certificates through registered post, copies of which are annexed with the O.A. before the Tribunal which are Annexures A-1 to A-5 and also annexed as Annexure- 1 to the counter affidavit before this Court. It is alleged in paragraph 12 that no opportunity of hearing was given to the respondent no. 1 before passing the impugned order deeming him to be removed from service.

11. In paragraph 13 of the counter affidavit the respondent no. 1 has quoted the relevant provision of the Indian Railway Establishment Code which reads as follows:

12. "Where a railway servant does not resume duty after remaining on leave for a continuous period of five years or where a railway servant after the expiry of his leave remains absent from duty, otherwise than on foreign service or on account of suspension for any period which together with the period of leave granted to him exceeds five years, he shall, unless the President, in view of the exceptional circumstances of the case, otherwise determine, be removed from service after following the procedure laid down in the Discipline and Appeals for railway servants."

13. The respondent has relied on paragraph 537 of Indian Railway Medical Manual quoted in paragraph 14 of the counter affidavit.

14. A supplementary affidavit has also been filed by the petitioner and in paragraph 4 of the same it is stated that there is no record of proof that the respondent no. 1 has ever served as Loco Cleaner in the railway. The respondent no. 1 absconded from 1972 to 1989 i.e. for about 17 years. The matter was referred to the D.R.M. Moradabad who asked the respondent no. 1 to show any record that he had ever worked as Loco Cleaner. The respondent no. 1 was asked to submit his appointment letter and other papers about his status in the railway department but he refused to produce the appointment letter or any papers in this regard to show that he was a regular or casual employee and if so for what period. The Railway is having no document as they have been weeded out although a thorough enquiry was held in this connection. The burden of proof was on respondent no. 1 to prove about his appointment, working and status in the railway but he did not discharge his burden. True copy of the railway circular regarding weeding out of the service record after long length of time is Annexure- 1 to the supplementary affidavit.

15. In our view the impugned order of the Tribunal cannot be sustained. There is no denial of the fact that the petitioner was absent for seventeen years although leave had not been granted to him. Since he was absent for more than five years

without leave hence in view of paragraph 2014 (2) of the Indian Railways Establishment Code he was deemed to be removed from service. Moreover, in our opinion the entire burden of proof regarding the appointment of respondent no. 1 and his service and status was on him but he failed to discharge this burden by not producing any record. The railway record has been weeded out as stated by the railway in view of its circular. In the absence of the relevant record and paper we fail to see how the Tribunal could allow the O.A. of the respondent no. 1 since the burden of proof was on him. Merely showing some paper of the Provident Fund account was not sufficient discharge of the burden.

16. The tribunal in paragraph 5 of its order has observed that the procedure for imposing major punishment was not followed before removing the respondent. In our opinion that procedure has not to be followed in this case as this is a case of abandoning the job and not a termination of service in the strict sense. Hence there was no question of giving opportunity of hearing to the respondent no. 1 in this case. An employee simply cannot be absent from work for seventeen years and then suddenly appear and claim that he should be given duty. Tuberculosis is nowadays a curable disease and there is no justification for absenting for seventeen long years. The O.A. was filed in 1992 that is after twenty years after the respondent no. 1 had stopped attending to his duties.

17. In Ratam Chandra Sammanta Vs. Union of India J.T. 1993 (3) SC 418 the facts were that the petitioners were employed between 1964 to 1969 and retrenched between 1973 to 1979. The petitioners approached the Court only after a lapse of fifteen years. The Supreme Court held that the delay deprived the person of remedy as well as the right in case of such long delay.

18. In Secretary to Government of India Vs. Shivram Mahadu 1995 Supp (3) SCC 231 the respondent was discharged from service from 7.10.1986 and he filed a claim petition before the Tribunal only in 1990. The Supreme Court held that the application was clearly barred by time even if it was true that the respondent was suffering from schizophrenia. A similar view was taken by the Supreme Court in Ramesh Chand Sharma Vs. Udham Singh Kamal 1999 (8) SCC 304.

19. In view of the above we allow this petition and set aside the order of the Tribunal dated 28.7.2000 and hold that the Tribunal should have rejected the O.A. of the respondent no. 1 in toto. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 9.12.2002

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE K.S. RAKHRA, J.

Habeas Corpus Petition No. 14813 of 2002

Ranveer Singh alias Guddu Singh ...Petitioner
Versus
Union of India Ministry of Home Affairs and others ...Respondents

Counsel for the Petitioner:
Sri H.N. Singh
Sri B.N. Singh

Counsel for the Respondents:
Sri Ajit Kumar Singh, Addl. S.C.
A.G.A.

National Security Act 1980-section 3 (2) – Detention order- the incident of 1997 in respect of which concerned parties had compounded the offence could not be a ground for detaining the petitioner under the National Security Act (Held in Para 11)

Our conclusion is that the incidents whereupon the impugned detention order is based are not relatable to disturbance of public order. The detention of the petitioner under National Security Act cannot be justified. As such we allow the writ petition and quash the detention order in question.
Case Law Referred:
AIR 1975 SC 730

(Delivered by Hon'ble M.C. Jain, J.)

1. The petitioner has challenged the detention order dated 14.1.2002 passed against him by respondent no. 3 District Magistrate, Mau under Section 3 (2) of the National Security Act, 1980 and his continued detention thereunder.

2. The grounds of detention are contained in Annexure-3 to the writ petition. The first ground is that on 13.4.1995 at about 7.45 P.M. he with his associate Shiv Prasad Singh had fired on one Kamla Kant, though he had escaped unhurt. Crime No 34 of 1995 under section 307 I.P.C. was registered at Police Station Ranipur, District Mau in which chargesheet had been submitted. He had secured bail in that case. That incident disturbed the public order. People ran helter- skelter and an atmosphere of terror and insecurity was created in the area.

3. The second ground is that on 6.6.1997 at about 9.30 P.M. he with his associates Brijeseh Kumar Singh and Sanjay Singh assaulted Hari Lal Singh with lathis and caused injuries to him at the tube well of Dadan Singh in village Ranipur. In respect of this incident, Crime No. 91 of 1997 under sections 323/325/504 I.P.C. was registered at Police Station Ranipur, District Mau. The said incident disturbed the public order. The shops were closed and the people started taking shelter to save their lives.

4. The third ground is that on 5.1.2002 at about 3 P.M. in Ranipur he along with his associate Shiv Prasad Singh assaulted Muvattaer Raza (tenant of Shiv Prasad Singh) at his clinic under his tenancy, though in respect of the tenancy a case was also pending. He was first attacked with rods and thereafter he was shot in his abdomen. While fleeing, each of them fired two shots for scaring away all those nearby, creating an atmosphere of terror. People started shutting down their shops and ran hither and thither to save themselves. The public order was greatly disturbed. The victim being of minority community, communal tension erupted. Crime no. 4 of 2002 under section 307 I.P.C. and crimes no 5 and 6 of 2002 under section 25 arms Act came to be registered with regard to this incident. He and his associate were allegedly arrested after being chased for a short distance and illicit weapons were recovered.

5. Counter and rejoinder affidavits have been exchanged. We have heard Sri H.N. Singh, learned counsel for the petitioner, learned counsel appearing for Union of India – respondent no. 1 and learned A.G.A. for respondents no.2 to 4.

6. It is urged by the learned counsel for the petitioner that the grounds on which the detention order has been passed could, at the best, relate to law and order but not to public order. It has also been urged that the first incident of 1995 was too stale to provide a ground for passing the impugned detention order on 14.1.2002 on the other hand, learned A.G.A. has made reference to Section 5 A of the National Security Act that the grounds of detention are severable. His submission is that the detention order can even be passed on the basis of a single incident. He has also referred to the case of Kamal Pramanik Vs. State of West Bengal (AIR 1975 SC 730) to strengthen his argument that gap between the incidents providing the grounds for passing the impugned detention order is not material. In that case, the detention order had been passed after about a year after happening of the alleged incidents. The detention order was necessitated because Criminal cases could not proceed and the detenue was discharged, he being a dangerous person against whom the witnesses were afraid to depose.

7. As regard the incident of 1997, the argument of learned counsel for the petitioner is that he had already been acquitted in that case which had earlier been taken down as a non-cognizable offence, but was later converted, inter alia, under section 325 I.P.C. The parties had come to a compromise and the offence had been compounded as per the provisions of Cr.P.C. The copy of the acquittal order dated 23.3.1999 passed by Chief Judicial Magistrate, Mau on the basis of the compromise of the parties has been filed as Annexure 8 to the writ petition. The submission, therefore, is that the said incident of 1997 could not be taken as a ground for detaining the petitioner under the National Security Act.

8. The grounds of detention, indeed, are severable as provided by section 5 A of National Security Act and it is the established position that a single incident may form the foundation for passing the detention order, provided it is relatable to public order. The question whether a person has only committed breach of law and order or has acted in a manner likely to cause disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. An act by itself is not determinant of its own gravity. In its quality, it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and the public order on the other. It is always a question of degree of the harm and its effect upon the community. An individual act can be a ground of detention only if it leads to disturbance of the current of life of the community so as to amount a disturbance of the public order and not if it affects merely an individual, leaving the even tempo of the life of the society undisturbed.

9. In the present case, there is no material to indicate that by the first incident of 1995, the public order and even tempo of the society was disturbed. So is the case with the third incident of 2002 also. Both the incidents took place because of personal enmity. In the first instance, the petitioner had allegedly opened fire on Kamla Kant, Manager of an Inter College, because he wanted to grab some land of the college. The third incident was also related to personal

grudge that the victim was the tenant of the petitioner whom he wanted to evict. The mere fact that the victim belonged to minority community cannot be taken to mean that the incident kicked up communal tension.

10. We are of the opinion that the incident of 1997 in respect of which concerned parties had compounded the offence could not be a ground for detaining the petitioner under the National Security Act.

11. Our conclusion is that the incidents whereupon the impugned detention order is based are not relatable to disturbance of public order. The detention of the petitioner under National Security Act cannot be justified. As such we allow the writ petition and quash the detention order in question.

12. It is ordered that the detenue shall be released forthwith if not wanted in any other connection.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 2.12.2002

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

Habeas Corpus Writ Petition No.44587 of 2002

Praveen Dubey ...Petitioner (In Jail)
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arun Kumar Shukla

Counsel for the Respondents:
Sri B.N. Singh (S.S.C.)
A.G.A.

National Security Act 1980- Section 3 (2) – Detention Order- The people of the area have been terrorized by the act of the petitioner and his associates and there is terror and panic in the area and the even tempo of life has been disturbed as people are not able to come out of their places and are living under great strain. Hence in our opinion it is a case of breach of public order and not merely law and order. (Held in Para 8)
Case Law Referred:
A.I.R. 1970 S.C. 1228

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

1. This Writ petition has been filed against the impugned detention order dated 24.5.2002 – Annexure 3 to the petition under the National Security Act.

2. Heard Counsel for Parties.

3. In the grounds of detention, which are contained in Annexure-3, it has been stated that the petitioner has an associate, namely, Lala alias Kishan, Who has taken a house at 8 Kusum Vihar, Thana New Agra, on rent. They have made it as a place for criminals to collect and plan murder, dacoity etc. and they have been doing these activities. Petitioner is also indulging in these activities.. The aforesaid Lala alias Kishan took employment under M/s Goyal Consultant and another associate Banwari got employment with Ganpati Sales in October 2001 and November 2001 respectively, so that they could find out the income of those establishments. The petitioner and his associates Sanju, Banwari Lala entered into a criminal conspiracy and they found out that Sanjai Goyal's father had gone for an operation on 21.1.2002 to Madras and his mother

and brother had also gone there. Hence Sanjai Goyal was alone and was looking after both the aforesaid establishments. On 21.1.2002 at about 8.30 P.M. the petitioner and his associate Lala went on a scooter with police signs along with other associates. The petitioner stood at the door of the house as a guard and Lala stood at the door of the bed room. Sanjai Goyal trusting Banwari and Sanjai allowed them to enter the house where they started stealing Rs.37,000/-, a cheque and other papers, to which Sanjai Goyal objected. Sanjay Goyal ran with the bag towards the drawing room so that he could open the door of the drawing room and run away with his money to safety. But that door was closed and Sanjay Goyal could not run away. Sanju shot him in the face. The neighbourers Punit Gautam and Hari Om could not believe that persons who were regularly coming to Sanjay's house could commit such a criminal act. The petitioner and his associates armed with country-made pistols and knives took away the money and papers on a scooter. Sanjay Goyal died due to his injuries. One knife was found on the spot. The petitioner and Lala were arrested at the house at Kusum Vihar and the scooter was also seized and Rs.10,000/- was found on the person of Sanju along with pistol, cartridges and knife and also money and the bag which was looted along with the cheque and papers.

4. This incident caused panic in the locality and people were terrorized and public order was disturbed. Despite posting of police as yet people in Indrapuri are not able to freely go out to daily work and people close their doors after 8.00 P.M. The People are feeling unsafe and have put up gates in their colony and have arranged for Chowkidars. On 22.4.2002 the citizens met the Circle Officer Hari Parvat and told him their anguish and fear. The petitioner and his associates have been giving threats personally and on telephone and people are not able to lead their normal lives.

5. In our opinion on the above facts the impugned detention order was fully justified and was validly passed. We do not agree with the submission of the learned counsel for the petitioner that it is a case of law and order only and not public order. Whether it is a case of law and order only or of public order depends on the facts of each case and no general rule can be laid down in this connection, vide decision of the Division Bench of this Court in Santosh vs. District Magistrate, Writ Petition No. 23645 of 2002 decided today, following the decision of the Supreme Court in Arun Ghosh vs. State of West Bengal, A.I.R. 1970 S.C. 1228. In Arun Ghosh's case the Supreme Court observed:

"The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause disturbance of public order is a question of degree and the extent of the reach of the act upon society. An act by itself is not determinant of its own gravity. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of harm and its affect upon the community."

6. In the present case it appears that the petitioner's associates had taken employment in the service of the family of Sanjay Goyal in order to get

information about their income and habits, and they have committed a heinous crime by killing Sanjay Goyal. The people of the area have been terrorized by the act of the petitioner and his associates and there is terror and panic in the area, and the even tempo of life has been disturbed as people are not able to come out of their places and are living under great strain. Hence in our opinion it is a case of breach of public order and not merely law and order.

7. We see no reason to interfere with the impugned order of detention.

8. In the counter-affidavit filed by the State it has been stated in paragraphs 3 and 4 how representations of the petitioner were dealt with. A perusal of the same shows that there was no delay in deciding these representations.

9. Thus, there is no force in this writ petition and it is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 2.12.2002

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

Habeas Corpus Writ Petition No. 23645 of 2002

Santosh ...Petitioner
Versus
District Magistrate, Agra and others ...Respondents

Counsel for the Petitioner:
Sri L.K. Pandey

Counsel for the Respondents:
Sri Ajit Kumar Singh (Addl.S.C.)
A.G.A.

National Security Act-1980-section 3(2) – Detention order even on the basis of Solitary incident, a valid detention order can be passed – There have been several incidents of rape and molestation of dalit women which adversely effects the public order. (held in para 6)

In our opinion rape of a dalit girl of a tender age does affect public order. We find no merit in this petition and it is dismissed.

Case Law Referred:
AIR 1970 SC 1228
J.T. 1992 (5) SC 163

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

1. This writ petition has been filed against the impugned order of detention dated 15.1.2002 passed under the N.S.A. vide Annexure 1 to the writ petition.

2. We have heard the learned counsel for the parties.

3. The grounds of detention have been annexed as Annexure C.A.I alongwith the counter affidavit of the District Magistrate. A perusal of the same shows that the allegation against the petitioner is that on 25.11.2001 at about 4 P.M. the petitioner took one Km. Shashi aged about 11 years to some bushes and threw her on the ground and raped her, and when she opposed this he tried to kill her. When Km. Shashi shouted several persons came on the spot and the petitioner threatened to kill them. There was bleeding from the vagina of Km. Shashi due to the act of the petitioner. Due to this act the peace of the locality was disturbed and dalits were terrorized and this disturbed the public order.

4. It appears that Km. Shashi was a dalit. There have been several incidents of rape and molestation of dalit women which adversely affects the public order. We do not agree with learned counsel for the petitioner that this is only a case of law and order.

5. In Arun Ghosh vs. State of West Bangal, AIR 1970 SC 1228 the Supreme Court observed:

"The question whether a man has only committed a breach of law and order or has acted in a manner likely to cause disturbance of public order is a question of degree and the extent of the reach of the act upon society. An act by itself is not determinant of its own gravity. Similar acts in different context, affect differently law and order on the one had and public order on the other. It is always a question of degree of harm and its affect upon the community."

6. Learned counsels for the petitioner submitted that it a solitary incident but it is well settled that even on the basis of solitary incident a valid detention order can be passed vide David Patrick Ward vs. Union of India, J.T. 1992 (5) SC 163. In our opinion rape of a dalit girl of a tender age does affect public order. We find no merit in this petition and it is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 2.12.2002

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

Habeas Corpus Writ Petition No. 44364 of 2002

Bhura ...Petitioner (In Jail)
Versus
District Magistrate, Aligarh. and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Sinha

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

National Security Act-1980-Section 3 (2) – Detention order the detaining authority did not inform the petitioner that he has a right to make a representation to the detaining authority- the impugned detention order dated 28.8.2002 is quashed.(held in para 3).

The petitioner has been informed that he can make a representation to the State Government, Central Government and the Advisory Board. However, it has not been stated that the petitioner was informed that he can also make a representation to the detaining authority. This petition is allowed. The impugned detention order dated 28.8.2002 is quashed.

Case Law referred:
2000 (41) SCC 843
J.T. 2000 (41) ACC 704

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

1. This writ petition has been filed against the impugned detention order

dated 28.8.2002 passed under the National Security Act vide Annexcure-1 to the writ petition.

2. Heard learned counsel for the parties.

3. Several arguments have been advanced by the learned counsel for the petitioner but this petition deserves to succeed on the very first ground, namely, that the detaining authority did not inform the petitioner that he has a right to make a representation to the detaining authority. This averment has been made in paragraph 9 and 10 of the writ petition. In paragraph 4 of the counter affidavit it has been stated that the petitioner has been informed that he can make a representation to the State Government, Central Government and the Advisory Board. However, it has not been stated that the petitioner was informed that he can also make a representation to the detaining authority. Hence in view of the Division Bench decisions of this Court in Jai Prakash Shastri vs. Adhikshak, Janpad Karagar 2000 (41) SCC 843 and Vijai Kumar Misra vs. Superintendent, District Jail, 2002 Current Bail Cases 455 which have followed the decision of the Supreme Court in State of Maharashtra vs. Santosh Shastri Acharya J.T. 2000 (41) ACC 704 this petition is allowed. The impugned detention order dated 28.8.2002 is quashed. The petitioner shall be released forthwith unless required in some other criminal or preventive detention case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOV. 12, 2002

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

Civil Misc. Writ Petition No. 22342 of 1999

Sankatha Prasad Singh ...Petitioner
Versus
Regional Administrative Committee and others ...Respondents

Counsel for the Petitioner:
Sri M.P. Gupta

Counsel for the Respondents:
Sri O.P. Singh
Sri S.K. Rai

Constitution of India-Article 226-dismissal order – a bank operates on public confidence and hence the highest degree of discipline and integrity and discipline is required from bank employees as compared to other employees, otherwise the public will lose confidence in the Bank and there may be a run on the bank to withdraw money. Sufficient compliance of natural justice (Held- para 14)

We have perused the appellate order also and find no illegality in the same. The finding of fact has been recorded by both the authorities that the petitioner has embezzled the amount in question by passing farzi resolution which was a serious misconduct. In our opinion sufficient opportunity of hearing was given to the petitioner. As stated above the rules of natural justice are not a straight jacket formula and it all depends on the facts of each case whether the hearing was adequate or not.

Case law referred-
1981 UPLBEC 393
AIR 1973 SC 1260
AIR 2001 SC 24

1994(5) JT 280
2000(3) UPLBEC 193

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

1. This writ petition has been filed against the dismissal order dated 26.6.1994 Annexure 11 to the writ petition and the appellate order dated 11.2.1999 Annexure 16 to the writ petition.

2. We have heard learned counsel for the parties.

3. The petitioner has alleged that he was appointed in the Cooperative department as cadre secretary in 1976 after screening. He has further alleged that his work and conduct has been good. He was posted in various places as mentioned in paragraphs 5,6 and 7 to the writ petition. The present dispute relates to Hallia where the petitioner was posted at Sikta Sadhan Sahkari Samiti Limited, block Hallia, district Mirzapur.

4. The petitioner had opened his personal SB Account in the head quarter branch of District Cooperative Bank Ltd. Mirzapur. The account number 3173 which is still pending in the said head quarter branch. The petitioner opened another S.B. account in Hallia branch of District Cooperative Bank at Mirzapur where the respondent no. 3 was posted as Branch Manager on 2.1.1998. The petitioner deposited a sum of Rs.57,000/- in S.B. account Hallia Branch.

5. It is alleged in paragraph 10 of the petition that the Branch Manager prepared a transfer voucher for head quarter branch of this amount on the same day and delivered the transfer voucher to the petitioner. It is further alleged that in the evening of the same day the Branch Manager visited the society of the petitioner and obtained back the transfer voucher of Rs.57,000/- which was made for head quarter branch of the District Cooperative Bank, Mirzapur and got it and has cancelled the same. It is alleged that in the pass book he corrected the entry mentioning cash deposit of Rs.57,000/- and the credit balance was shown as Rs.1,18,425.27. Photocopy of the passbook of the petitioner bearing A/C number 3173 is Annexure 1 to the writ petition.

6. In paragraph 11 of the writ petition it is alleged that the respondent no. 3 the then Branch Manager, Hallia prepared a transfer voucher and cancelled the same on 2.1.1998 which has been prepared and made for A/c No. 3173 opened at Mirzapur head quarter branch of the Bank. It is alleged that the petitioner managed to obtain a copy of the voucher from District Cooperative Bank, true copy of which is Annexure 2 to the writ petition. In paragraph 12 of the writ petition it is alleged that the District Cooperative Bank entered in the personal ledger of the petitioner by amendment vide Annexure 3 to the writ petition. During the preparation of the balance sheet of the Bank on 30.6.1988 this irregularity was notice against the amount of Rs.57,000/- which was in excess in the deposit side. It is alleged in paragraph 14 of the writ petition that the respondent no. 3 with malafide intention to show the expenditure of Rs.57,000/- again visited the society of the petitioner and he compelled the petitioner to get the resolution prepared by the respondent no. 3 and deliver the same to him. True copy of the said resolution is Annexure 4 to the

writ petition. In paragraph 15 of the writ petition it is alleged that this resolution has not been entered in any proceeding book of the society and it was prepared under duress of the Branch Manager.

7. In paragraph 16 of the writ petition it is alleged that the petitioner has sent a letter dated 5.7.1988 stating that the so-called resolution dated 29.6.1988 be quashed vide Annexure 5. Thereafter the petitioner sent a letter dated 19.2.1992 vide Annexure 6 to the writ petition. Thereafter he sent another letter dated 9.3.1992 stating that he has not done any default vide Annexure 7 to the writ petition.

8. In paragraph 20 of the writ petition it is alleged that a charge sheet dated 16.6.1993 was given to the petitioner making allegation against the petitioner regarding over draft of Rs.57,000/-. True copy of the charge sheet is Annexure 8 to the writ petition. In paragraph 21 of the writ petition it is alleged that the petitioner wrote a letter dated 30.6.1993 demanding the proof of charges vide Annexure 9 to the writ petition. However, when no proof was submitted he sent his reply dated 21.7.1993 vide Annexure 10 to the writ petition. In paragraph 24 of the writ petition it is alleged that an enquiry was held behind the back of the petitioner and witnesses were not examined in his presence nor was he allowed to cross-examine the witnesses and he was not given personal hearing. It is alleged that this was exparte enquiry. The petitioner was served a dismissal order dated 26.6.1994 vide Annexure 11 to the writ petition. Against that order he filed an appeal which has been dismissed on 11.2.1999 vide Annexure 16 to the writ petition. Hence this writ petition.

9. A counter affidavit has been filed on behalf of the respondent no. 2 to 4. In paragraph 6 of the same it is alleged that an amount of Rs.57,000/- was deposited in the bank by the petitioner but the amount related to Sadhan Sahkari Samiti Sikta which has been deposited by the petitioner in his own bank account. In paragraph 7 of the counter affidavit it is alleged that the petitioner in collusion with the Branch Manager of the Bank of Hallia branch was trying to embezzle Rs.57,000/- from Sadhan Sahkari Samiti, Sikta. In paragraph 9 of the counter affidavit it is alleged that the petitioner in collusion with the Branch Manager prepared a false and fabricated resolution and embezzled Rs.57,000/- from the society. In paragraph 12 of the counter affidavit it is stated that the enquiry has been conducted and charge sheet has been issued to the petitioner on 16.6.1993. In paragraph 16 of the counter affidavit it is alleged that the charge sheet was issued and time was given to submit his explanation and the charge of embezzlement was clearly proved.

10. I have also perused the rejoinder affidavit. In paragraph 15 of the same it has been reiterated that no enquiry was conducted against the petitioner and the entire action was done behind the back of the petitioner and he was not allowed to cross examine the witnesses and the alleged enquiry was exparte.

11. In this case the real question is whether the rules of natural justice were complied with or not before passing the impugned dismissal order.

12. It is settled law that the rule of natural justice are not a straight jacket formula. The facts of each case have to be seen in order to determine whether the principles of natural justice have been violated. In the present case there were serious allegations of embezzlement against the petitioner and he was given a charge sheet dated 16.6.1993 vide Annexure 8 to the writ petition. In this reply dated 22.7.1993 Annexure 10 to the writ petition the petitioner denied the charges and stated that he does not want to produce any witness but he wants an opportunity of personal hearing. He further alleged that there was some conspiracy against him.

13. In the impugned dismissal order dated 26.6.1994 Annexure 11 to the writ petition it has been stated that the petitioner did not want to produce any witness but wanted personal hearing, and hence 9.11.1993 was fixed for personal hearing before the committee. However, the petitioner did not appear before the Committee on that date hence the Committee gave another opportunity of personal hearing and fixed 24.12.1993 for the same and on that date the petitioner was heard but he produced no proof in support of his version. It was found that in collusion with the Branch Manager, Hallia the petitioner on 2.1.1988 had got an over-draft of Rs.57,000/- and has embezzled this amount. In order to conceal this embezzlement the petitioner has misused his office as Secretary of the Society and he has got a fictitious resolution of Sikta Saghan Sahkari Samiti passed on 29.6.1988 in his signature and seal of the society and had got the above amount debited in the account of the Samiti and credited to his account. The petitioner was given another show cause notice on 20.1.1994 but he gave no reply to the same. Hence on 28.2.1994 the District Administrative Committee passed a resolution directing him to deposit the said amount failing which he will be dismissed from service and an FIR will be lodged against him. Despite the said resolution the petitioner never deposited the aforesaid amount which he has embezzled. Hence on 26.6.1994 the District Administrative Committee taking a serious notice of this directed realization of the embezzled amount with interest and to lodge an FIR against the petitioner. The petitioner filed an appeal against the said order which was dismissed on 11.2.1999 vide Annexure 16 to the writ petition.

14. We have perused the appellate order also and find no illegality in the same. The finding of fact has been recorded by both the authorities that the petitioner has embezzled the amount in question by passing farzi resolution which was a serious misconduct. In our opinion sufficient opportunity of hearing was given to the petitioner. As stated above the rules of natural justice are not a straight jacket formula and it all depends on the facts of each case whether the hearing was adequate or not, vide Maharashtra State Financial Corporation vs. M/s Suvarna Board Mills, J.T. 1994(5) S.C 280.

15. In Kamal Singh Vs. Chancellor 1981 UPLBEC 393 and Hira Nath vs. Rajendra Medical College A.I.R. 1973 SC 1260 it has been held that the principles of natural justice cannot be applied mechanically without considering the facts of each case. In Kumaun Mandal Vikas Nigam Ltd. Vs. G.S. Pant. AIR 2001 S.C. 24 it was held that the doctrine of natural justice are flexible. In 1994 (5)

JT 280 Maharashtra State Financial Corporation vs. M/s Suvarna Board Mills it was held by the Supreme Court that where a notice was issued calling upon the petitioner to pay the dues failing which possession of his property will be taken, no other show cause notice is required before taking possession. It has been held in several decisions of this Court vide Writ Petition No. 7538 of 2001 Prakash Chandra Bansal vs. General Manage decided on 13.12.2001, writ petition no. 19658 of 2001 K.K. Singh Vs. Gomti Gramin Bank decided on 19.12.2001, Ram Prakash vs. Allahabad Bank 2000(3) UPLBEC 193 etc. that a bank operates on public confidence and hence the highest degree of discipline and integrity is required to be maintained by its employees in order to maintain public confidence in the Bank. Hence greater integrity and discipline is required from bank employees as compared to other employees, otherwise the public will lose confidence in the Bank and there may be a run on the Bank to withdraw money. In the present case we are satisfied that there was sufficient compliance of natural justice.

16. In view of the above we find no merit in this petition and it is dismissed accordingly. Interim order if any is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.12.2002

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 48308 of 2002

Sri Latoori Singh ...Petitioner
Versus
Chairman, Aligarh Gramin Bank, Aligarh ...Respondent

Counsel for the Petitioner:
Sri I.M. Tripathi

Counsel for the Respondent:
Sri Yashwant Verma

Aligarh Gramin Bank (Officer and Employees) Regulation 2000 Reg. 38 Part I- Domestic Enquiry- delinquent employee asked to engaged the defensive representative of an officer not belonging to the Bank in question- held the claim can not be rejected.

Held- Para 10

As a result of the foregoing discussions, I converge to the view that the petitioner has a right to engage Sri R.P. Singh or any officer from Central Bank of India Aligarh or any other Branch to defend and represent him in the enquiry which is already afoot. The petition is allowed in part in terms of the above with no order as to costs.

Case Law discussed
AIR 1983 SC-454
AIR 1983 SC-109
AIR 1991 SC 1221
2001 (a) SCC-540
1999 (i) SCC-626

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Denial of assistance of law assistant to represent and defend the

petitioner in the departmental enquiry has been the causative factor for knocking the door of this Court by means of the present petition. The petition on hand has been instituted for the relief of certiorari quashing the whole enquiry proceedings including charge sheet contained in Annexure 5, 7 and 10 to the writ petition and the second relief, ostensibly as an alternative, is for a writ of mandamus commanding the respondent to allow the petitioner to appoint an independent defence representative (Sri R.P. Singh a Special Officer of Central Bank of India). Besides the above reliefs, the petitioner has also prayed for other ancillary reliefs.

2. The petitioner claims to be a non gazetted officer. The precise indictment against the petitioner as contained in the charge sheet is that he remained posted as Manager at Ladpur Branch and also at Khair Branch of the Bank and while posted as Manager at the aforesaid branches, he leagued with certain borrowers and granted fictitious loan in breach of the norms/guidelines prescribed by the Bank and thereby worked against the interest of the Bank. So far as first relief is concerned , at the very threshold, it is worth observing that since enquiry proceedings are afoot and petitioner, indisputably, has an alternative remedy to represent his case before the enquiry officer or the Disciplinary authority, as the case may be, who alone can entertain the prayer for appropriate reliefs and the prayer for; quashing the disciplinary proceeding and the charge sheet being supererogatory at this stage, cannot be entertained and the petition to this extent is liable to be dismissed.

3. Learned counsel for the petitioner abandoned his contention in relation to first prayer and switched over to second prayer stating that in the departmental enquiry, he made an application attended with the prayer to permit the assistance of a law assistant to represent him before the enquiry officer however accorded permission to engage some colleague employee of the self same bank to represent and defend the petitioner in the enquiry. According to the learned counsel, the petitioner cannot be defended properly with the assistance of a colleague employee of the self same bank inasmuch as the enquiry has commenced at Headquarter and in the presence of senior officers including Chairman of the Bank, it is unlikely that the petitioner may be represented and defended properly by an employee of the Bank. He suggested that the petitioner might be permitted to engage some independent person to defend and represent him in the enquiry and named one R.P. Singh of Central Bank of India. To enforce his aforesaid submissions, the learned counsel called in aid the decisions reported in AIR 1983 SC 454 1983 SC 109 and AIR 1991 SC 1221.

4. In opposition, Sri Yashwant Verma, appearing for the Opposite Parties contended that the right to engage defending representative does not consist in reasonable opportunity to defend and such right is contingent upon the Rules and Regulations governing the disciplinary proceeding. He further contended that Aligarh Gramin Bank (Officers and employees) Service Regulations, 2000 do not envisage any provision to engage any defending representative from other bank and therefore, proceeds the submission, the petitioner's claim to engage Sri R.P. Singh from Central Bank of India to defend and represent him in the enquiry has no

cutting edge and does not lend itself for acceptance. In aid of his contentions, reliance has been placed by the learned counsel on decisions reported in (2001) 9 SCC 540, and (1999) 1 SCC 626.

5. I have heard learned counsel for the parties and considered their respective arguments in all their ramifications. Before examining the contentions of the learned counsel, it is necessary to have an acquaintance with the Aligarh Gramin Bank (officers and employees) Service Regulations 2000 (hereinafter to be abbreviated as Regulations). Proviso to Regulation 38 Part I being germane to the controversy involved in this petition is excerpted below.

" Provided that where it is proposed to impose any of the minor penalties specified in sub clauses (i) to (iii) or clause 1 of this Regulation, the officer concerned shall be informed in writing of the imputations of lapses against him and given an opportunity to submit his written statement of defence within specified period not exceeding 15 days or such extended period as may be granted by the Competent Authority and the defence statement, if any, submitted by the officer shall be taken into consideration by the competent authority before passing orders.

Provided further that no order imposing any of the major penalties specified above shall be made except by an order in writing signed by the Competent Authority and no such order shall be passed without the charge or charges being to formulated in writing and given to the officer and enquiry held so that he shall have reasonable opportunity to answer the charge or charges and defend himself.

6. Proviso to Regulation 38 as excerpted above, crystallizes that no order imposing any of the major penalties specified above shall be made except by an order in writing signed by a competent authority and no such order shall be passed without signed by a competent authority and no such order shall be passed without charge or charges being formulated in writing and given an opportunity to answer the charge or charges and defend himself. Regulation 43 also makes it clear that for the purpose of enquiry, the officer or employee shall not engage ka legal practitioner without prior permission of the competent authority. Upon a cumulative reading of both the regulations, the intendment shielding the intention of the framers of the regulations would appear to be that in appropriate cases engagement of legal practitioners can also be made but it has been hedged in with the condition of prior approval of the competent authority. In the present case, the prayer to engage legal practitioner has been nodded in disapproval by the competent authority. However, the enquiry officer has accorded permission to the petitioner to take assistance of some one from the self same bank to defend and represent him in the enquiry. Learned counsel for the petitioner did not mince words and articulated apprehension that the petitioner could not be defended properly if he employs the services of someone from the self same bank and it would amount to negation of reasonable opportunity of hearing to defend himself if engagement of Sri R.P. Singh from Central Bank of India to represent and defend him is denied to him. He further

submitted that denial of engagement of an officer from other bank is not prohibited under the relevant rules. The argument appears to have substance particularly with due regard to the fact ;that in case engagement of a legal practitioner is not prohibited who can well be compared in parity with a person proposed to be engaged by the petitioner in the instant petition, engagement of an officer from other bank can be implied as being implicit in the regulations.

7. In the light of the above arguments, I now propose to go into the substantiality and ratio decide of the decisions cited in connection with the propositions advanced across the bar, **Board of Trustees Port of Bombay v. Dilipkumar[1], Bhagat Ram v. State of H.P.[2] and J.K. Agarwal v. Haryana Seeds Development Corporation Ltd.[3]** are the sheer anchor of the submissions made by the learned counsel for the petitioner. From a close scrutiny of the decisions afore stated, it is explicitly clear that an employee has no right to representation in the departmental proceedings by any other person or a lawyer unless service rules specifically envisages so. Similar views finds its echo in a decision of the Apex Court in **Indian Overseas Bank v. Indian Overseas Bank Officers' Association and another[4]**. In this case, the question that begged consideration of the Apex Court was whether in a domestic enquiry employee has a right of representation by somebody else ? The apex Court held it not to be an absolute right in the absence of provisions in the relevant rules and regulations or standing orders as stated supra.

8. As discussed above, from a perusal of regulation 43 of the Regulations, intendment is very clear that in appropriate case, employee has a right to be defended through a lawyer and the only restriction operating in the way is prior approval of the competent authority. If the regulation envisages that an officer can be defended through a lawyer also, the view is irresistible that in case the petitioner makes a prayer to engage some officer from a bank other than the respondent bank, which would be an independent person unrestrained by any disciplinary control of the employer, the petitioner will be properly defended and the intention of the framers of the regulations in this regard is too obvious and patent to be ignored that they intended a right to be defended through an independent representative either from the same bank or from the other bank by the expression that 'he shall have reasonable opportunity to answer the charge or charges and defend himself.' In holding that the petition has a right to defend himself through a person belonging to the Bank other than the self same bank, I am swayed and influenced by the consideration as made by the Apex Court in para 5 in the case of **Bhagat Ram v. State of H.P. (supra)** and feel called to observe that the person chosen by the petitioner to defend and represent him belonging to other bank would be fully and equally equipped with the knowledge of banking regulations and would be an effective person to defend the petitioner in the disciplinary proceedings. The vignette of observations made by the Apex Court in **Board of Trustees of the Port of**

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[1] AIR 1983 SC 109
[2] AIR 1983 SC 454
[3] AIR 1991 SC 1221
[4] SCC540

Bombay v. Diliplkumar Raghavendranath Nadkarni (supra) may be excerpted below for edification on the point involved in this case:

"In our view we have reached a stage in our onward march to fair play in action that where in an enquiry before a domestic tribunal the delinquent officer is pitted against a legally trained mind if he seeks permission to appear through a legal practitioner the refusal to grant this request to defend himself and the essential principles of natural justice would be violated."

9. In the above conspectus, I veer round to the view Aligarh Gramin Bank (officers and employees) service regulations 2000 dos not prescribe engagement of any person from a Bank other than the respondent bank.

10. As a result of the foregoing discussion, I converge to the view that the petitioner has a right to engage Sri R.P. Singh or any officer from Central Bank of India Aligarh or any other branch to defend and represent him in the enquiry which is already afoot. The petition is allowed in part in terms of the above with no order as to costs.
