ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.9.2003

BEFORE
THE HON'BLE S.S. KULSHRESTHA, J.

Criminal Misc. Application No. 7930 of 2003

Chandan Mitra and others ...Petitioners
Versus
State of U.P. and others ...Opposite Party

Counsel for the Applicants:
Sri Satish Trivedi
Sri Imran Ullah

Counsel for the Respondents:
A.G.A.

Cr.P.C. Section 482-Quashing of complaint-aggrieved person-complainant being member of Ram Chandra Mission-filed complaint against the accused for publishing an article amounts of defamation-whether such complainant is an aggrieved party? Held' Yes'. The complaints are not barred by Sec. 199 I.P.C.

Held: Para 8

Where the complainant has reasons to feel hurt on account of defamation which is a matter to be determined by the court depending upon the facts of each case. The allegations made against "Shri Ram Chandra Mission" would certainly cause imputations on each member of the said Mission and hence they can legitimately feel a pinch of it. In the present case the complainants are appearing to be aggrieved persons and so they have every right to bring the complaints. These all the complaints are not barred by Section 199 IPC. In this regard it may also be mentioned that where prima facie case is made out disclosing the ingredients of the offence, the powers of the High Court under Section 482 of the Code are limited as was observed by the Apex Court in the case of Medchi Chemicals & Pharma (P) Ltd. vs. Biological E. Ltd., (2000) 3 SCC 269.

Case referred to:
1973 All Crl cases 1
(2000) 3 SCC 269
1992 supp. 1 SCC 335:
1992 Cr. LJ 527 (SC)
AIR 2003 (SC) 1069
2001 SCC (Crl.) 1254

(Delivered by Hon'ble S.S. Kulshrestha, J.)

1. All the three applications purporting to be under Section 482 of the Code of Criminal Procedure (the Code) have been brought by Sri Chandan Mitra, the Editor of The Pioneer CMYK Printech Ltd. along with Sri Jitendra Verma and Sri Deepak Mukherji, who are associated with the said newspaper in either capacity. In these applications common questions of law and facts are involved and so they are taken together for disposal.

2. Criminal Misc. Application No.7930 of 2003 relates to the quashing the proceedings of complaint case No.3199 of 2002, Satish Chandan vs. Jitendra Verma under Section 500 IPC, Criminal Misc. Application No.7931 of 2003 to the quashing the proceedings of complaint case No.3200 of 2002, Dr. Krishna vs. Jitendra Verma under section 500 IPC and Criminal Misc. Application No.7932 of 2003 to the quashing the proceedings of complaint case No.3198 of 2002, Dr. Uma vs. Jitendra Verma under Section 500 IPC. It has been averred that applicant No.1 is the Editor of the daily newspaper The Pioneer published by CMYK Printech Ltd., the applicant No.2 is the Reporter/Author of the alleged defamatory news article and the applicant No.3 is the Publisher of the said

newspaper. They are professionals and highly skilled persons and associated with the newspaper industry, which is known for its integrity and long standing. Smt. Pragya Prabhati Mishra, the O.P. No.1 who at her own gave the statement which was published in the Sunday Pioneer (English) edition on 2.12.2001. Her husband was also present when her statement was recorded. He has also been arraigned as O.P. No.2. At the behest of such statement made by Smt. Pragya Prabhati Mishra that news article was published with the titled "Original sin". That article is the exact reproduction of the statement and the allegations made by O.P. No.1 regarding the agony she suffered in her life, wherein she was posed to grow up on incest with full support of her family which was part of known religious cult known as "Sahaj Margi", which according to her is part of "Shri Ram Chandra Mission". The said news item made the disclosure of the events which happened in the life of Smt. Pragya Prabhati Mishra due to her being part of the said cult. It has further been mentioned that even a bare perusal of the news item would not exhibit anything defamatory qua the O.P. No.2. In the above backdrop separate complaints, under section 500 IPC were brought in the court of learned Addl. Chief Judicial Magistrate-II, Saharanpur wherein all the three applicants were made accused. In all these complaints it has also been alleged that the persons arraigned as the accused had the reason to believe that the news article dated 2.12.2001 published in the newspaper would be defamatory and impute the reputation of the complainant and the Mission and so they are responsible for the loss of reputation of the complainant and the Mission. That article is said to be false, baseless and scandalous. To the contrary "Shri Ram Chandra Mission" is totally a spiritual institution involved in search of truth through meditation and Sahaj Marg. The accused have conspired against the pious institution by making such defamatory publication. The persons who were associated with the said institution have started changing their views in respect of said Mission as well as of the complainants and they have also started saying that the complainants were associated with the institution which is involved in immoral and anti-social activities. The trial court after taking into consideration the allegations made in the complaints and also the statements of the witnesses recorded under sections 200 and 202 of the Code found a prima facie case under section 500 IPC and took the cognizance. Simultaneously summons were also issued against the accused applicants.

3. At this stage these proceedings have been challenged on the ground that the complainant would not come within the category of' 'person aggrieved by the offence' and so all these complaints are barred by Section 199 of the Code. This section is mandatory in nature and the bringing of complaint by third persons would not be maintainable. In as much no personal allegations were made by the accused applicants against the complainants. Such defamation if construed to be in respect of any association or collection of persons, an individual can not maintain the complaint saying that he was defamed. There was no intention on the part of the accused applicants to have hurt the reputation of the complainants. Further several such complaints in other parts of the country, the reference of which has been given in

the petition, have been filed wherein the proceedings have been stayed by the respective High Courts,

4. From the perusal of the above three complaints it is clear that the complainants are the members of Shri Ram Chandra Mission, which is registered under the Societies Registration Act and totally a spiritual institution involved in search of truth through system of meditation and system of Sahaj Marg. The Pioneer in its English Edition on 2.12.2001 published an article under the caption "Rite or wrong? ORIGINAL SIN", which is said to be totally false, baseless, derogatory and with a view to defame the institution in a well planned conspiracy. It is further said that the news item contained highly defamatory imputations against the said institution. Some passages of the said news item, which are appearing to be defamatory, may be extracted herein under:

This is a story that defies all grades of imagination, of right, of wrong of possibilities and situations. It is a story of woman who has grown up on incest with the full support of her family, who has serviced an 80 years old guru at the tender age of all, who has slept with her father and brother before the very eyes of her mother and sisters, Who has borne the children of her father and then passed them off as her husband's off springs. This is also the story of a woman who, at 35, has risen above the opiated existence of sex, sleaze and incest only to save her daughter from the same fate that she lived through. As the bizarre case awaits its second hearing after being reopened on a year's persistence by a hounded family, JITENDRA VERMA recounts the story which details life's unholy twists and turns.

Back in the Pooja room, the family was ready for the ritual. Their guru's pooja hung proudly on the wall and the family was in full attendance – Pragya's grand father, father, mother, brother and two sisters – all without a stitch of clothing on their stark naked bodies. "Hey nath, tu hi ek maatra dhyey hain, hamari ekshahyen, hamari winti mein bandhak hain….

The nude poojas, she recalls, were followed by group sex in which all family members had intercourse with each other. "My grandfather had it with my mother and my brother was with my sisters and father and vice verse, "she tells you rather stoically. For your benefit her husband adds that the expressionlessness is the result of years of being doped by the family which, he explains, is part of the closed religious cult known as the sahajmargi. In short, sahajmargi is an atheist cult which does not believe in any kind of familial ties., "its only religion being open sex".

There are no brothers, sisters, father or mother. All human beings are same. I was told again and again. She says."……
Brainwashed with this potent logic day in and they out, Pragya and scores of other girls, including her two sisters and five cousins were donated to the ashram. Pragya still remembers the day of initiation when she was taken to a separate room in the ashram by 30-year-old abhyasani (disciple) Brij Bala, Thakur. "She gave me some white tablets to consume and smeared my private parts with some kind of paste, "says Pragya, then, she was taken to guru Ranchander's

room where she was disrobed and initiated into a system which proved to be her nemesis. The Guru sex with me and I was later told that I had been married to the great man. "Says pragya…….

5. There is no denial from the side of the accused applicants for making the publication of the aforesaid news item but they have given much emphasis that it was on the basis of the statement made by Smt. Pragya Prabhati Mishra. The news item extracted above and also the allegations made in the complaints are prima facie libelous and defamatory. Prima facie offence is made out against the accused applicants disclosing the ingredients of the offence under section 500 IPC.

6. It is next urged that the aforesaid article at the most could affect the reputation of Sri Ram Chandra Ji Maharaj of Shahjahanpur or "Shri Ram Chandra Mission" but it would not in any way affect to any individual in view of explanation (2) to Section 499 IPC. In that regard it may be mentioned that the complainants are the members of Shri Ram Chandra Mission. The explanation (2) in Section 499 IPC reads as under:

"Explanation 2.- It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such."

7. The aforesaid institution is registered under the Societies Registration Act and the complainants are the members of the association. They have the locus-standi to bring these complaints. This can also be answered with reference to section 199 IPC, which reads as under:

199. Prosecution for defamation. – (1) No court shall take cognizance of an offence under Chapter XXI of the Indian Penal Code (45 of 1860) except upon a complaint made by some person aggrieved by the offence."

8. The expression 'by some person aggrieved' in Section 199 definitely indicates that the complainant need not necessarily be the defamed person himself. These words have a wider connotation than the words 'person defamed', which is made clear by the use of the word 'same' before the person aggrieved. If on the allegations made the reputation of the entire family is at stake, his close relations are directly or indirectly affected thereby, will be covered by the expression 'aggrieved person', as was held in the case of Abdul Hkim vs. State of U.P., 1973 All. Crl. Cases 1. Members of "Shri Ram Chandra Mission" are like the members of one spiritual body. Where the complainant has reasons to feel hurt on account of defamation which is a matter to be determined by the court depending upon the facts of each case. The allegations made against "Shri Ram Chandra Mission" would certainly cause imputations on each member of the said Mission and hence they can legitimately feel a pinch of it. In the present case the complainants are appearing to be aggrieved persons and so they have every right to bring the complaints. These all the complaints are not barred by Section 199 IPC. In this regard it may also be mentioned that where prima facie case is made out disclosing the ingredients of the offence, the powers of the High Court under Section 482 of the Code are limited as was observed by the Apex Court in the case of Medchi Chemicals & Pharma (P)

Ltd. vs. Biological E. Ltd., (2000) 3 SCC 269 may be extracted:

Exercise of jurisdiction under the inherent power as envisaged in Section 482 of the Code to have the complaint or the charge-sheet quashed is an exception rather than a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. With the lodgment of first information report the ball is set to roll and thenceforth the law takes its own course and the investigation ensures in accordance with the provisions of law. The jurisdiction as such is rather limited and restricted and its undue expansion is neither practice able nor warranted. In the event, however, the court on a perusal of the complaint comes to a conclusion that the allegations leveled in the complaint or charge-sheet on the face of it do not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under the law. To exercise powers under Section 482 of the Code, the complaint in its entirety will have to be examined on the basis of the allegation made in the complaint and the High Court at that stage has no authority or jurisdiction to go into the matter or examine its correctness. Whatever appears on the face of the complaint shall be taken into consideration without any critical examination of the same. But the offence ought to appear ex facie on the complaint. The truth or falsity of the allegations would not be gone into by the Court at this earliest stage. Whether or not the allegations in the complaint were true is to be decided on the basis of the evidence led at the trial. So the question is: Can it be said that the allegations in the complaint do not make out any case against the accused nor do they disclose the ingredients of an offence alleged against the accused or the allegations are patently absurd and inherently improbable so that no prudent person can ever reach to such a conclusion that there is sufficient ground for proceeding against the accused.

Reliance may also be placed on the cases of State of Haryana v. Ch. Bhajan Lal [1992 Supp 1 SCC 335: 1992 Cr LJ 527 (SC)] and Ajay Mitra vs. State of UP [AIR 2003, (SC) Page 1069].

9. It has next been contended that the accused applicants are associated with the publication of the daily newspaper and so their personal attendance in the court would cause enormous hardship to them. Their personal attendance is desired to be dispensed with. Reliance has also been placed on the case of Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd. and others, 2001 SCC (Crl.) 1254. After taking cognizance of the offence since the accused applicants have been summoned and so in the given circumstances they are directed to appear before the court concerned where their bail application shall be considered and disposed of expeditiously preferably on the same day. Till to the recording of the statements under section 313 of the Code their personal attendance shall remain exempted provided they give an undertaking in the court that their presence be noted through counsel.

With the aforesaid directions, the application is accordingly disposed of.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.12.2003

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

Civil Misc. Revision No. 702 of 2003

Gauri Shankar Gupta ...Applicant
Versus
Anita Mishra and another ...Respondents

Counsel for the Revisionist:
Sri S.N. Dubey

Counsel for the Respondents:
Sri S.K. Gupta

Provincial Small Causes Courts Act, Section 25-UP Urban Buildings & Regulation of letting, Rent and Eviction) Act 1972, Section 3 (a)-necessary party-suit for ejectment and arrears of rent-sub tenant being son of the Chief tenant-moved impleadment-rejection thereof-held not proper generally sub tenant is not necessary party but after death of tenant in non residential building-all the hair must be impleaded as necessary party.

Held- Para 4 and 6

It is settled law that the sub tenant is not a necessary party to a suit for eviction filed against the chief tenant and decree for eviction passed against chief tenant is binding upon sub tenant. However, even in the case of sub tenant, it has been held by the Supreme Court that in case, he applies for impleadment during the pendency of a suit for ejectment and on the objection of the landlord his application is rejected then he cannot be evicted under decree of eviction against the chief tenant (vide AIR 2002 SC 804).

Accordingly, the revision is allowed. The impugned order is set aside and revisionist Gauri Shankar Gupta is directed to be impleaded as defendant no.2 in the SCC Suit No. 42 of 2001, pending before the Additional District Judge, Court No.2, Kanpur Nagar.

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

1. This revision u/s 25 PSCC Act, has been filed by Gauri Shankar Gupta, whose impleadment application in SCC Suit No. 42 of 2001 has been rejected by Additional District Judge, Court No. 2, Kanpur Nagar, through order dated 24.7.2003 impugned in the instant revision. The suit has been filed by the plaintiff/ respondent no. 1, Anita Mishra, against the respondent no. 2, Azad Kumar. True copy of the plaint is annexure 1 to the affidavit, filed in support of stay application. In para 4 of the plaint, it is stated that previously Ram Autar, father of defendant (i.e. Azad Kumar) was the tenant of the shop in dispute and after his death. Azad opted for tenancy and signed the counter foils of receipts and he alone made payment of rent. In para 2 of the plaint it has been stated that the shop in dispute is new construction, hence provisions of U.P. Act No. 13 of 1972 do not have any application and assuming it to be within the ambit of the said Act, a clear case of default has been made out. Relief for eviction and recovery of arrear of rent etc. has been sought through the said plaint. Revisionist Gauri Shankar Gupta applied for impleadment on the ground that he was also son of Ram Autar, father of the defendant, hence he also inherited the tenancy and was necessary or at least proper party to the suit.

2. In the plaint no date of construction has been given hence from bare reading of the plaint, it is not clear

whether U.P. Act No. 13 of 1972 applied to the shop in dispute on the date of filing of the suit or not. In the plaint it has not been pleaded that heirs of Ram Autar other than defendant Azad Kumar expressly surrender their tenancy.

3. Under the general law after the death of the tenant all his heirs inherit the tenancy. Even under U.P. Act No. 13 of 1972, in case of non residential building all the heirs of the tenant inherit the tenancy by virtue of definition of tenant given **u/s 3 (a) of the Act**. Even though the Supreme Court in **AIR 1995 SC 676 and AIR 2001 SC 2251** has held that after the death of the tenant all his heirs inherit the tenancy jointly and decree passed against one or some of them is binding on non impleaded joint tenants also, however, this doctrine can not be pressed in to service when during the pendency of the suit a person claiming to be the joint tenant applies for impleadment. In AIR 2001 SC 2251 (supra) itself an earlier authority of three Hon'ble Judges reported in AIR 1990 SC 2053 has been referred to in which a decree for eviction was set-aside on the application of non-impleaded joint tenant.

4. It is settled law that the sub tenant is not a necessary party to a suit for eviction filed against the chief tenant and decree for eviction passed against chief tenant is binding upon sub tenant. However, even in the case of sub tenant, it has been held by the Supreme Court that in case, he applies for impleadment during the pendency of a suit for ejectment and on the objection of the landlord his application is rejected then he cannot be evicted under decree of eviction against the chief tenant (vide AIR 2002 SC 804).

5. Learned counsel for the landlord respondent has argued that late Ram Autar left behind several heirs and it would be very difficult to implead all of them. It has further been argued that one more heir of late Ram Aautar has also applied for impleadment. According to the learned counsel the entire exercise is meant to delay the disposal of the suit. In my opinion for this situation landlord himself is responsible. Ordinarily after the death of the tenant particularly in case of tenancy of non-residential building, all his heirs must be impleaded as tenant in ejectment suit.

6. Accordingly, the revision is allowed. The impugned order is set aside and revisionist Gauri Shankar Gupta is directed to be impleaded as defendant no.2 in the SCC Suit No. 42 of 2001, pending before the Additional District Judge, Court No.2, Kanpur Nagar.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No.52755 of 2002

Shiva Ji Singh and others ...Petitioners
Versus
High Court of Judicature at Allahabad Through its Registrar General and another ...Respondents

Counsel for the Petitioners:
Sri Shashi Nandan
Sri L.R. Khan

Counsel for the Respondents:
Sri Sudhir Agarwal
Sri A.P. Sahi
Sri A.K. Singh

Sri G.K. Singh
Sri K.R. Sirohi
S.C.

U.P. Regularisation of Adhoc appointments (on Posts outside the preview of Public Service Commission) Rule 1979-Rule-3 (1) -read with Constitution of India-Article 14 & 16-Regularisation fixing of cut of date-appointment should be prior to 30.6.98 and must continuous in service on 20.12.01-whether is discriminatory for these adhoc appointee appointed after the cut of date, but have completed 3 years service?-held-'No'.

Held: Para 11
It is true that some of the persons may have been appointed after 30th June, 1998 and are eligible and have completed three years of service before the date of notification of the third amendment to the Rules but that by itself does not give them a right to be considered for regularisation in the present case, as against the persons who were appointed on ad hoc basis before 30.6.1998. In the present case all the ad hoc appointments were made after 30.6.1998 and thus there is no discrimination inter se between ad hoc appointees in the Judgeship at Chandauli.
1975 SCC (1) 305
2000 (2) ESC-889
AIR 1990 SC-1300
1997 (1) SCC- 104
1997 (5) SC 368
2001 (1) ESC-7
1997 (1) ESC-655
LOPNO 6219 (55) 93 decided on 8.10.93
1989 (2) UPLBEC-144
AIR 1986 SC 210
AIR 1983 SC 130
1986 (10) SCC 536

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

1. Heard Sri Sashi Nandan assisted by Sri L.R. Khan for petitioners in both the above writ petitions and Sri Sudhir Agarwal for respondents. I have also heard Sri A.P. Sahi appearing for Sri Ashok Kumar Singh (newly impleaded respondent no.3) in writ petition no.52753 of 2002.

2. Petitioners, in both the writ petitions, are working as ad hoc Class III employees, in the Judgeship of the newly created district of Chandauli. They have prayed for writ of certiorari for quashing order dated 31.10.2002 passed by District Judge, Chandauli terminating their ad hoc services with effect from 1.11.2002, and for a direction in the nature of mandamus to the respondents to regularise their services on the post of clerks and stenographers and to allow them to continue and to make payment of salary month to month. In writ petition no. 26618 of 2002 petitioner Rajesh Kumar Srivastava has also challenged an order of District Judge dated 18.5.2002 by which his representation for regularisation was rejected. A prayer has also been made to quash part of U.P. Regularisation of Ad hoc Appointments (on posts outside the purview of the U.P. Public Service Commission) Rules 1979 as amended in 2001, which prescribes 30.6.1998 as cut off date for regularisation of services, after completion of three years. By amendment application in the second writ petition, petitioner has also prayed to quash the orders dated 31.10.2002, as aforesaid and order dated 11.11.2002 passed by Judgeship of Chandauli requesting Registrar General of High Court to allow him to continue 20 ad hoc appointees of Class III posts and 6 ad hoc Stenographers until regular selection takes place.

The fact giving rise to these petitions

are stated as below;

A new Revenue District by the name of Chandauli was carved out of Varanasi in the year 1998. A Sessions Devision for this newly created district of Chandauli notified nine Courts including the Court of District Judge, Additional District Judge, Chief Judicial Magistrate, Additional Chief Judicial Magistrate, Civil Judge Senior Division and Civil Judge junior Division. In order to provide these Courts clerical staff and stenographers, until regular appointments are made under U.P. Subordinate Staff Courts ministerial Establishment Rules 1947 as replaced by Recruitment of Ministerial Staff to the Subordinate Offices Rules of 1950; the High Court gave permission to the Officer on Special Duty, Chandauli by D.O. letter No.17760 dated October 16, 1998 to appoint ad hoc appointees for a period of three months. In pursuance thereafter Sri Rajesh Kumar Srivastava petitioner in writ petition no.26618 of 2002 was appointed as typist on ad hoc basis on 17.10.1998 for a period of three months. Petitioners' Shiva Ji Singh & others in writ petition No. 52755 of 2002 were appointed as clerks and stenographers on ad hoc basis initially for a period of three months between 14.7.1999 and 15.9.1999. The High Court granted permission to extend their period from time to time. Whereas petitioner No.1 to 12 in writ petition No. 52755 of 2002 were appointed as clerks, petitioners No.13 and 14 were appointed as stenographers. Steps were taken for making appointments on regular basis under the aforesaid Rules of 1950 by issuing advertisement in newspapers on 30.6.1999. A regular selection was held but appointment could not be made. This court vide report of Registrar General of High Court dated 19.3.2001 found that the regular selections advertised on 1.10.2001 suffered from certain irregularities. The report were accepted by Hon'ble the then Chief Justice on 21.4.2001. Fresh advertisements were issued for direct recruitment on the post on the aforesaid Rules of 1950 on 1.10.2001 for which written examinations were held on 13.4.2002. In view of the progress of process of regular selections, this Court vide letter No.1590/7 B-104/Admin. (D) dated 29.10.2002 directed that the services of ad hoc employees may not be extended beyond 31.10.2002. Consequently District Judge Chandauli by his letter dated 31.10.2002 terminated the services of all ad hoc Class III clerks and stenographers with effect from 1.11.2002. It appears that District Judge Chandauli found that in view of the existing vacancies for which regular appointment was not made, it was necessary in the interest of work to continue the ad hoc employees for some more time and thus he made a request to this Court on 11.11.2002 to permit him to extend the services of at least 20 Class 3 employees and 6 stenographers. It is at this stage that the above two writ petitions were filed and that an interim orders was made in the first writ petition, not to disturb the functioning of petitioners on their respective posts up-to 27.1.2003. It was made clear that the interim order will not confer any rights of regularisation to petitioners.

4. One Sri Nagrendra Kumar Srivastava, a candidate for direct recruitment filed writ petition No. 9514 of 2003 challenging the process of selection by advertisement on the ground that it was contrary to Rules 6 (2) of the Rules of 1947 as substituted by Rules 1950. It

was alleged that the written examination required candidates to appear for two papers in English whereas only one paper of English of 50 marks was provided under the Rules. The selection was stayed by this Court on 28.2.2003. However, the interim order has been vacated on 9.7.2003, and it has been made open to the District Judge Chandauli to declare result of the examination and to make appointments.

5. In the aforesaid backdrop petitioners have insisted that this Court may decide their rights to be regularised under U.P. Regularisation of Ad hoc Appointments (on posts outside the purview of U.P. Public Service Commission) Rules, 1979, as amended by its, amendment by notification dated 20.12.2001. Sri Shashi Nandan appearing for petitioners submits that petitioners are eligible to be appointed as Class III employees and Stenographers, and were appointed on the dates given as above and that each of petitioners had completed three years of continuous service on or before 30.10.2002. Each of them is, therefore, entitled to be regularised under the aforesaid Rules of 1979, as amended by its third amendment. He submits that this Court by its Circular Letter No.70/Admin.(D) dated 24th December, 1992 has accepted the applicability of the aforesaid Rules of 1979 for regularisation of ad hoc employees of subordinate courts. After the third amendment of the Rules this Court has accepted the applicability of the said amendment and the right of regularisation of ad hoc employees under the aforesaid amended rules introducing cut of date as 30.6.1998 and the circular letter No.18/VIII B-114/Admin (D) dated 8.5.2002 has been issued by which the notification dated 20.12.2002 notifying third amendment to the rules had been adopted by the High Court.

6. It is submitted that although petitioners were appointed after the cut of date i.e. 30.6.1998, they are entitled to be regularised as they had completed three years of continuous service on 20.11.2001 when the third amendment to the rules of 1979 came into force. He has also challenged the cut of date given in the rules on the ground that it is grossly arbitrary, and has no statable purpose to achieve. Relying **upon B. Brabhakar Rao Vs. State of Andhra Pradesh AIR (1986) SC 210** (paragraph 18); **D.S. Nakara Vs Union of India AIR (1983) SC 130** and **University Grants Commission Vs Smt Sadhana Chaudhari (1996) 10 SCC 536** it was submitted that the normally choice of date should be accepted unless it is very wide of the original mark. In the present case it is submitted that the Rules of 1979 were amended on three occasions. The Rules of 1979 were initially notified on 14.5.1979 providing the cut of date in Rule 4 as January 1st, 1977. Since some appointees appointed after 1.1.77 had not completed three years of service on 14.5.1979, sub Rule 3 provided that a person who had completed or as a case may be after he has completed three years of service shall be considered for regular appointment. By the First Amendment, Rule 9 was inserted on 22.3.1984 and the cut of date was amended as 1.5.1983. There was a gap one year and forty days and thus the period of completing three years of continuous service for regularisation was made. The Rule was amended for second time on 7.8.1989 by inserting Rule 10 providing cut of date as 1.10.1986. There was a gap of about two years three

months and seven days, the Rule provided for three years period of service. The third amendment in the rules of 2001 came into force on 20.12.2001 amending Rule 4 (1) by providing a cut of date as June 30, 1998 with a gap of more than three years. Sub Rule (3) of Rule 4 provides that such persons who have completed, or as case may be, after he has completed three years of service shall be considered for regular appointment. According to Sri Shashi Nandan, all the persons who were appointed on or before 30th June, 1998 have rendered more than three years of service on the date of enforcement of the amended Rules and thus there was no justification for providing an event in Sub Rule (3) which contemplates completion of three years of service. In order to harmonize Sub Rule (1) and (3) and in order to avoid ambiguity and arbitrariness, Sub Rule (1) should be read in isolation and thus all the persons who had completed three years of service on 20.12.2001 or thereafter must be given the benefit of regularisation. He further points out that Sub Rule (3) provides for two distinct classes of persons who are entitled to be considered for regularisation name (1) persons appointed on ad hoc basis on or before June 30, 1998 and continuing on 20.12.2001, and have completed three years of services on 20.12.2001 and (2) persons in service on 20.12.2001 but not completing three years of service. It is submitted that cut of date is not applicable to the second category of persons. With the aforesaid suggested interpretation it is submitted that firstly cut of date is not relevant for purpose of regularisation of petitioners' services, and in the alternative it must be held to be arbitrary vague and with no purpose to achieve, and thus it must be declared to be ultra virus of Article 14 and 16 of Constitution of India. Lastly he submits that cut of date is not something which is so sacrocent that it cannot be scrutinized by the Court. He submits that a choice of the date is wholly unreasonable, whimsical, burdensome and capricious and relies upon the Division Bench judgement of this Court in **Jai Kushun Vs. State of U.P. (1989) 2 UP LBEC** (page 144). The submission is that the cut off date has no reasonable nexus with the purpose to achieve and these employees appointed after the cut of date and fulfilling the requisite qualifications of three years of continuous services can not be deprived of the benefit of regularisation. Sri Sashi Nandan has also relied upon Division Bench judgement of this Court **in Arvind Kumar Yadav Vs State of U.P.** in writ petition No.6219 (SS) of 1993 decided on 8.10.1993 holding the cut of date of 1st October, 1996 be ultra virus.

7. Sri Sudhir Agarwal appearing for both District Judge Chandauli and the High Court denies petitioner's claim to be regularised. He submits that Sessions Division of Chandauli was created in the year 1998 and in order to ensure proper functioning of the Courts in the Judgeship at Chandauli, the Officer on Special Duty and thereafter the District Judge was required to appoint eligible persons as ad hoc employees only for a fixed period of three months by way of interim arrangment. Petitioners were not appointed by adopting any process of selection. Their appointments was extended from time to time. They were clearly informed that their appointment is purely ad hoc till regular selections. The selections in pursuance of the advertisement made on 30.6.1999 were found to suffer from various irregularities

and was cancelled by the High Court on 13.4.2001. Fresh advertisements have been issued on 1.10.2002 in pursuance of which the selections are in progress. Written examinations have been held. The result of stenographer have been declared in which two petitioners have been selected as stenographer. He submits that petitioners' services were rightly terminated as regular selection was in progress. None of petitioners were appointed on or before 30.6.1998, and thus they are not entitled to be regularised under the rules of 1979, as amended by third amendment, which has been adopted by this Court by its Circular Letter dated 8.5.2002. The judgment in Arvind Kumar Yadav case (Supra) was expressly over ruled by Division Bench judgement of this Court **in Subedar Singh Vs. D.G. Mirzapur (1997) 1 E.S.C. 655** and that Subedar Singh's case has been approved by Hon'ble Supreme Court **in Subedar Singh's case Vs. District Judge Mirzapur reported in 2001 (1) ESC 7**. He also relies upon a Single Judge judgement of this Court in Sita Ram Vs State of U.P. 2003 ALJ 1249 where the validity cut of date as 1.5.1983 as amended on 22.3.1984 was held to be valid. In this decision the Court relied upon the judgement in **D.C. Bhatia Vs. Union of India (1995) 1 SCC 104; State of Haryana Vs Rai Chandra Jain (1997) 5 SCC 167,** and **State of Bihar Vs Ram Jee Prasad (1996) 3 SCC 368**. Sri Agarwal submits that fixing a cut of date is a matter of executive policy of the State. It is for the legislature to decide and to classify the date. If there is some indication between object sought to be achieved and the classification, the legislature cannot be said to have acted in improper exercise of its powers. The classification may result in some hardship but a statutory discretion can not be set aside. The Court can only consider whether classification has been done on rationale basis and cannot question the validity on the ground of lack of legislative wisdom. It is for petitioners to show that there was no object sought to be achieved and that the cut of date is so wide off, the mark of such objective that it can be held to be arbitrary. Sri Sudhir Agarwal has tried to explain the basis and reason of fixing the cut of dates. He submits that executive policy of beginning of recruitment year from 1st January when the 1979 Rules were made, was changed and now the recruitment years begins from 1st July each year and thus the cut of date was fixed on 30thJune, 1998. He has co related these dates which certain amendment in the Rules for promotion made by U.P. Public Service Commission with which we are not much concerned. In the present case he submits that petitioners appointed on ad hoc basis, took the appointment on specific condition that their appointments are subject to regular selections. Even if they have completed three years of service, no benefit of consideration for regularisation can be given to them unless they are covered by the statutory rules. In Subedar Singh's case (supra) the Supreme Court has expressly laid down that appointments dehors the rules do not confer any right upon petitioners except those who are protected by statutory rules.

8. The judgement of this Court in Arvind Kumar Yadav's case (supra) was over ruled by Division Bench in Subedar Singh Vs. District Judge Mirzapur (Supra). It was held that all the ad hoc employees do not form one class. Those who have rendered services for long are a clause (class) different from those who

have not rendered for service for such longer period to make them eligible for regularisation. In paragarph 20 this court held that the cut of date, 1.10.1986, under the 1979 Rules as amended by second amendment Rules 1989, is valid and the decisions in Arvind Kumar Yadav's case did not lay down correct law. This Division Bench decision has been approved by the Supreme Court. Apparently petitioners were appointed after the cut of date i.e. 30.6.1998. The only question to be considered by this Court is whether the cut of date is arbitrary and provides unfair, discrimination between two recognizable and distinct groups of persons, without any object to be achieved, and is thus violative of Article 14 and 16 of Constitution of India. The second question is to be examined is whether Sub Rule (3) & (4) can be interpreted in a manner to create a category of persons, who may not have been appointed on or before 30.6.1998, but are entitled to be regularised under the said Rules on the basis that they have completed three years of continuous service on the date of enforcement of the Rules i.e. 20.12.2001.

9. The legal position with regard to fixing a cut of date for giving certain benefits in service has been considered in **State of Bihar Vs. Ram Jee Prasad AIR (1990) SC 1300**. In this case an advertisement was published by State of Bihar on 29.12.1987 inviting applications for appointments to various posts of teacher in medical colleges and medical colleges & hospitals. For the post of Assistant Professor, the Officer who had worked as resident for three years were considered eligible. The date of receipt of application was fixed as 31.1.1998. This date was challenged on the ground that it deprived those persons who have not completed three years by that time for making application and consideration for the post. The Supreme Court held that earlier past practice was to fix the last date of receipt of the applications, a month or half month after the date of actual publication of the advertisement. In continuation with the past practice, the State Government had fixed the date. It was held that choice of date cannot be dubbed as arbitrary even if any particular reason is not forthcoming for the same, unless it is shown to be capricious and whimsical or for wide of the reasonable mark. The choice of date for advertising the post depends upon special factors i.e. the number of vacancies in different disciplines, the need to fill up the post and availability of candidates. Mainly because the respondents or some others will qualify by shifting the date is no reason for dubbing the earher date as arbitrary or irrational. **In Manju Bala Vs. Union of India 2000 (2) ESC 889**, a full bench of Delhi High Court considered the challenge of cut of date for eligibility for appointment on the post of assistant teachers and nursery teachers in Municipal Corporation of Delhi. It was held that any of the suggested dates are prone to some criticism. The Delhi High Court relied upon **Union of India Vs. Permeswarn Match Works (1975) 1 SCC 305** where the principle that cut of date is valid unless is so capricious or whimsical so as to be wholly unreasonable was accepted. The burden that the cut of date is capricious, whimsical and wide off the mark is therefore upon the petitioners who allege it to be so. In order to appreciate the submission the dates of the notifications and the cut of date of the Rules and its amendments is set out as below:

Date of Notification	Cut of Date
1. 14.5.1979 Rule 4	1.1.1977
2. 22.3.1984 Rule 9 (1st amendment)	1.5.1983
3. 7.8.1989 Rule 10 (2nd amendment)	1.10.1986
4. 20.12.2001 Rule 4 (3rd amendment)	30.6.1998

10. The gaps between the notification and the cut of date are not relevant for the purpose of considering the submission of petitioners as in every case it was necessary that a person should have completed three years of continuous service or completes three years of service. Subsequent to the date of notification in each case there were person appointed on adhoc basis and working before the cut of dates and that the qualifying services of three years was necessary for consideration for regularisation. The seniority of a person has to be determined from the date of when he was appointed and this date of appointment in the Rule 7 is not the date of actual appointment, but the date on which the substantive vacancies became available to him for appointment. The consideration for regular appointment is to be made after person fulfils the eligibility and after his selection by the selection committee from amongst the list prepared by the selection committee from when a permanent or temporary vacancy as the case may becomes available for such appointments. There may be difference between the date when a person is to be considered for regular appointment and the date with effect from which he may be appointed in such vacancies. The fixation of cut of date therefore has no relevance to the date of appointment, to be given by selection committee.

11. The submission that the cut of date is arbitrary only on the ground that there was a gap of more than three years between the notification of the third amendment and the cut of date cannot be accepted. The fact that some of the persons may have been appointed after 30th June, 1998 and have completed three years of continuous service cannot be a ground to keep such person in separate classes for the purpose of consideration of regularisation. The three conditions must be satisfied namely that the person was eligible to be regularly appointed on the date of such ad hoc appointment; has completed three years of service and was appointed on adhoc basis on or before the cut of date provided in the Rules. He should be in continuous service on the date of commencement of the Rules. If any of these three conditions is not fulfilled the person is not entitled to be considered for regularisation. In almost all the service rules in the State of U.P., the recruitment year begins from 1st July and thus fixing cut of date to be 30th June, 1998 i.e. prior to the recruitment year 1999-2000 appears to be a valid criteria. No suggestion has been made that this date was fixed to benefit a person or a class of persons and that the date was taken out of hat, or had any other purpose to achieve. It is true that some of the persons may have been appointed after 30th June, 1998 and are eligible and have completed three years of service before the date of notification of the third amendment to the Rules but that by itself does not give them a right to be considered for regularisation in the present case, as against the persons who were appointed on ad hoc basis before 30.6.1998. In the present case all the ad hoc appointments were made after 30.6.1998 and thus there is no

discrimination inter se between ad hoc appointees in the Judgeship at Chandauli.

12. Rule (4) cannot be interpreted in a manner as suggested by the counsel for petitioners. It does not create two classes of persons. It creates only one class of person who possess requisite qualifications for regular appointments at the time of ad hoc appointments; was directly appointed on ad hoc basis on or before 30.6.1998, and is continuing in service as such on 20th December, 2001, and has completed three years of service. His appointment has to be given with effect from the date when a permanent or temporary post becomes available. Thus only one class of person has been visualized for consideration for regularisation and i.e. a person who fulfills all three conditions given in Rule 4.

13. All petitioners were appointed without following any procedure of appointment, and without inviting applications from the open market and all of them were aware of the fact that their ad hoc appointment is only for a period of three months and in any case until the regular selections. Each of them got opportunity to apply in regular selections. Petitioners' appointment were, therefore, made in a particular exigencies of service for specific periods and that with express condition that it will be terminated on regular appointment. They cannot, therefore, invoke equity in law only on the ground that they have completed three years of service.

14. For the aforesaid reasons, I do not find any merit in both the writ petitions. The cut of date provided in the Rules is held to be valid. All the petitioners were appointed subsequent to this date and thus they are not entitled to be considered for regularisation. Both the writ petitions are consequently dismissed with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.12.2003

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

Civil Misc. Writ Petition No.49640 of 2003

Smt. Ribha Devi and others ...Petitioner
Versus
Rent Control & Eviction Officer, Varanasi and another ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri M.S. Haq
Sri T. Haq
S.C.

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act 1972, Section 16 (b)-title dispute-can not be determined in mutation proceedings by, municipal corporation-nor in proceedings u/s 16 of Act No. 13 of 1972-even the orders passed by RC & EO is subject to decision of regular suit.

Held- Para 3

In my opinion the validity of the gift/gift deed alleged to have been made by Raj Nath in favour of Pyare Lal and Ram Dulare can be determined neither in mutation proceedings before municipal corporation nor in proceedings under Section 16 of U.P. Act No.13 of 1972. If the gift is valid then sale deeds obtained by respondent no.2 are also valid otherwise not. The dispute in between petitioners and respondent no.2 is a pure

and simple dispute of title for which proper remedy is regular civil suit before the civil court. Even orders passed by Rent Control and Eviction Officer under Section 16 of the Act is subject to decision of regular civil suit on question of title. In this regard reference may be made to A.I.R. 1991 S.C. Page 884.

Case law discussed:

AIR 1991 SC page 884

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

1. Dispute of title in between petitioners and respondent no2. is sought to be resolved in release proceedings under Section 16 of U.P. Act No. 13 of 1972. Admittedly, late Raj nath was owner of the house of which the property in dispute is a portion. The four petitioners are his daughters. Respondent no.2 has purchased the entire house from Pyare Lal and Ram Dulare who are nephews of late Raj nath. Pyare Lal and Ram Dulare claimed that Raj Nath had gifted the house in dispute to them in the year 1952. Dispute regarding the said gift deed had arisen in between Raj Nath and his nephews during the life time of Raj Nath. The parties litigated before municipal corporation authorities in mutation proceedings. However, said proceedings and orders passed therein are not at all relevant for deciding the question of title. Pyare Lal sold northern portion of the house to respondent no.2 through sale deed dated 24.2.1987 and his brother Ram Dulare sold southern portion to respondent no.2 through sale deed dated 20.9.1996. Regarding northern portion, respondent no.2 filed release application under Section 16 (b) of the Act against some of the petitioners. A lot of litigation took place in between the petitioners and respondent no.2 regarding release application of northern portion. The matter came to this Court several time in the form of writ petitions numbered as W.P. No.26025 of 1997, 7956 of 2000, 54678 of 1999 and 7932 of 2001.Against the decision of the last writ petition a SLP was also filed before the Supreme Court which was dismissed. Details of these proceedings regarding northern portion have been given in paragraphs 13 to 20 of the writ petition. In the aforesaid proceedings the northern portion was released in favour of respondent no.2.

2. Thereafter respondent no.2 filed similar release application regarding southern portion which she had purchased from Ram Dulare through sale deed dated 20.9.1996. In these proceedings which was registered as case no.116 of 2001 on the file of R.C.&E.O./A.D.M. (Civil Supplies), Varanasi vacancy has been declared through order dated 16.10.2003, annexed as Annexure-17 and impugned in the instant writ petition.

3. In my opinion the validity of the gift/gift deed alleged to have been made by Raj Nath in favour of Pyare Lal and Ram Dulare can be determined neither in mutation proceedings before municipal corporation nor in proceedings under Section 16 of U.P. Act No.13 of 1972. If the gift is valid then sale deeds obtained by respondent no.2 are also valid otherwise not. The dispute in between petitioners and respondent no.2 is a pure and simple dispute of title for which proper remedy is regular civil suit before the civil court. Even orders passed by Rent Control and Eviction Officer under Section 16 of the Act is subject to decision of regular civil suit on question of title. In this regard reference may be made to A.I.R. 1991 S.C. Page 884.

4. Accordingly, writ petition is dismissed. However, petitioners may file regular civil suit before civil court seeking declaration of their title alongwith ancillary reliefs including application for temporary injunction. If such a suit is filed the same must be decided on merit and on the basis of evidence adduced therein without taking into consideration findings recorded in the impugned order.

In-fact for such a suit no permission by the Court is necessary.

5. For a period of four months further proceedings in pursuance of impugned order dated 16.10.2003 declaring vacancy passed by R.C.&E.O./A.D.M. (Civil Supplies), Varanasi in case no.116 of 2001 shall remain stayed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Masc. Writ Petition No.40389 of 1999

M/s Soni Photostat Centre ...Petitioner
Versus
Basudev Gupta and another ...Respondents

Counsel for the Petitioner:
Sri M.B. Saxena

Counsel for the Respondents:
Sri U.N. Sharma
Sri R.S. Prasad
Sri Aditya Kumar Yadav
S.C.

Constitution of India Article 226-New plea- not raised before Tribunal-whether can be raised for first time-in writ petition?-plea that petitioner is not an industry-is a pure question of law-hence, can be raised.

Held: Para 20

The question whether the establishment of the petitioner comes within the definition of industry or not, is a pure question of law and can be raised in the writ petition as it goes to the very root of jurisdiction of the labour court.

Case law discussed:
AIR 1978 SC 548
2002 (94) FLR 622
1996 FLR
1979 (39) FLR 70
2002 Vol. 1 UPLBEC 319

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

Heard the counsel for the parties and perused the record.

2. The petitioner has filed the present writ petition challenging the impugned award dated 26.3.1999 passed by labour court in Adjudication Case No.8 of 1998, Annexure-9 to the writ petition treating respondent no.1 with continuity in service and back wages from the date of his termination dated 1.6.1995.

3. The brief facts of the case as they appear from record are that the petitioner has a Photostat machine installed in a room of 12 x 8 feet. The shop was registered with the Director of Industries having its Registration No.SSI-53612. There are two electrostat machines in the shop. One of the machines is used for job work and another is used for display to secure orders for sale of the electrostat machine on commission. It is alleged that the workman required an experience certificate for applying for job else where and the same was given to him on 8.12.1990 by the proprietor of the shop.

Thereafter the workman worked in the petitioner's establishment as helper till 10.12.1990. The petitioner alleges that after taking experience certificate, he left the job himself for better prospects.

4. Respondent no.1 raised an industrial dispute before the Regional Conciliation Officer, Varanasi. On conciliation proceedings having failed, the following reference was made by the State Government in exercise of powers under Section 4-K of the U.P.Industrial Disputes Act, 1947:-

"KIYA SEWAYOJKON DWARA APNE SHRAMIK BASUDEV GUPTA PUTRA SHRI BACHNU GUPTA KEE SEWAYEN DINANK 1.6.1995 SE SAMAPT KIYA JANA UCHIT TATHA/ ATHWA VAIDHANIK HAI? YADI NAHE TO SAMBANDHIT SHRAMIK KIYA HITLABH PANE KA ADHIKARI HAI."

5. The contention of the counsel for the petitioner is that the proprietor himself carries on the business as the establishment is not a big enough to employ more than one person as helper. He engaged respondent no.1 as electrostat operator/ helper in July 1981 who worked in his establishment till 10.12.1990. After getting the experience certificate, he left petitioner's employment for better prospects. Thereafter one Rajesh Kumar worked with the petitioner as helper till October, 1998. Subsequently one Surendra Kumar worked as helper till 1.9.1999 and left the job when he got employment in Jal Nigam and thereafter Chandra Kant Misra was working as helper.

6. Before the labour court the case of respondent no.1 was that he was working in petitioner's establishment since July, 1981 as electrostat machine operator and was getting salary of Rs.950/- per month. His salary was stopped since 1993 due to financial problems faced by the petitioner but he continued to work as electrostat operator till 1995 without getting any salary from the petitioner and did not raise any objection.

7. The counsel for the respondent no.1 has further drawn the attention of the Court to the evidence of the employer wherein it has been stated that the petitioner had neither filed the registration certificate before the labour court nor the attendance register of the workman was maintained by him and the petitioner has also not filed any receipt regarding payment of wages to the workman.

8. Counsel for the petitioner has argued that the petitioner has a very small shop for his livelihood and the same does not come within the purview of an industry and the whole case set up by the answering respondent before the labour court is incorrect and unbelievable. He has relied upon para 111 of the decision of the Hon'ble Supreme Court in **Bangalore Water Supply and Sewerage Board Vs. Rajappa and others, AIR 1978 Supreme Court 548,** which is as under:-

"A single lawyer, a rural medical practitioner or urban doctor **with a little assistant and/or menial servant may ply a profession but may not be said to run an industry**. That is not because the employee does not make a contribution nor because the profession is too high to

be classified as a trade or industry with its commercial connotations but **because there is nothing like organized labour in such employment. The image of industry or even quasi industry is one of a plurality of workmen, not an isolated or single little assistant or attendant. The latter category is more or less like personal avocation for livelihood taking some paid or part time from another.** The whole purpose of the Industrial Disputes Act is to focus on resolution of industrial disputes and regulation of industrial relations **and not to meddle with every little carpenter in a village or blacksmith in a town who sits with his son or assistant to work for the customers who trek in. The ordinary spectacle of a cobbler and his assistant or a cycle repair with a helper, we come across in the pavements of cities and towns, repels the idea of industry and industrial dispute. For this reason, which applies all along the line, to small professions, petty handicraft men, domestic servants and the like, the solicitor or doctor or rural engineer, even like the butcher, the baker and the candle stick maker, with an assistant or without, does not fall within the definition of industry.**"

9. The labour court by the impugned award held that the petitioner was a shop keeper and his establishment was duly registered with the Director of Industries. He had neither produced the attendance register as required to be maintained under Section 32 read with Rule 18 (1) (a) of the U.P. Dookan Aur Vanijya Adhisthan Adhiniyam, 1962 nor produced Rajesh Kumar who had worked as helper with the petitioner to show that he was working in petitioner's establishment after the respondent-workman had left the job. The labour court further held that the burden of proof is on the petitioner to establish that the workman had left the job himself and as no evidence had been filed by the petitioner regarding closure of the establishment. The workman was granted the relief of reinstatement and continuity of service with full back wages.

10. The Hon'ble Supreme Court in **Range Forest Officer Vs. S.T. Handimani, 2002 (94) FLR 622,** held as under:-

"The Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in a year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any court or Tribunal to come to the conclusion that as workman had, in fact, worked for 240 days in a year. No proof of receipt or salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

11. He further relied upon the decision of this Court in **Meritec India Ltd. Vs. State of U.P. and others, 1996 FLR.** This Court has held as under:-

"Section 5-C (1) of the Act provides that subject to any rules that may be made

in this behalf, a Labour Court shall follow such procedure as it may think fit. It is, therefore, clear that the discretion of the Court is not absolute. It is circumscribed by Rules, if any. We have, therefore, to look to the U.P.Industrial Disputes Rules of 1957. Rule 12 provide that where the State Government refers an industrial dispute for adjudication to a Labour Court within two weeks of the date of receipt of the order of reference, the workmen and the employers involved in the dispute shall file before the Labour Court a statement of the demands relating to the issues as are included in the order of reference. Sub-rule (8) provides that the written statement filed by the Union of the workman shall state the grounds upon which the claim of the concerned workmen is based and the written statement shall be accompanied by an affidavit in which the statement contained in the written statement should be sworn to. Sub-rule (9) states that if the statement accompanied by the affidavit of the Union or the workman is not repudiated by the employer, the Labour Court shall presume the contents of the affidavit to be true and make an award accepting the case stated in the written statement.

From a combined reading of Section 5-C (1) and the aforementioned sub-rules of Rule 12 it is apparent that it is imperative upon a workman to file an affidavit in support of his written statement. This affidavit constitutes the preliminary evidence. If the employer does not caré to controvert the averments made in the affidavit nothing further need be proved or done by the workman. The Labour Court is duty bound to accept the averments contained in the affidavit and give its decision or award accepting the averments made in the affidavit as correct. These provisions indicate that the burden of proving the case referred to the Labour Court for adjudication by the State Government lies on the workman. The distinction between a burden to proof and the onus of proof is well known. It is trite that the burden of proof never shits. It is the onus which keeps on shifting from stage to stage. The Labour Court patently erred in holding that keeping in view the terms of the reference made by the State Government the burden of proof lay upon the employer.

The matter can be looked at from another angle, which party will fall if the evidence is not led before the labour court in proceedings in a reference made to it for adjudication by the State Government? The obvious answer is that the workman will fail. Here the reference was made by the State Government at the instance of the workman and for the benefit of the workman. In the absence of any evidence led by or on behalf of the workman the reference is bound to be answered by the court against the workman. In such a situation it is not necessary for the employers to lead any evidence at all. This matter was dealt with by the Apex Court in ***Shankar Chaudhary Vs. Britannnia Biscuits Co. Ltd***.. In paragraph 30 the Court held that the Labour Court or the Industrial Tribunal have all the trappings of a court. In paragraph 31 it held that any party appearing before a Labour Court or Industrial Tribunal must make a claim or demur the claim of the other side and when there is a burden upon it to prove or establish the fact so as to invite a decision in its favour, it has to lead evidence. The obligation to lead evidence to establish an allegation made by a party is on the party making the allegation. The test would be,

who would fail if no evidence is led. It must seek an opportunity to lead evidence."

12. Similar view has been taken by the Apex Court in **V.K. Raj Industries Vs. Labour Court and others, 1979(39) FLR 70** to the effect as under:-

"The proceedings before the Industrial Court are judicial in nature even though the Indian Evidence Act does not apply to the proceedings but the principle underlying the said Act is applicable to the proceeding before the Industrial Court. In a judicial proceeding, if no evidence is produced the party challenging the validity of the order must fail. It is well settled that if a party challenges the legality of an order, the burden lies upon him to prove illegality of the order and if no evidence is produced the party invoking jurisdiction of the court must fail. Whenever, a workman raises a dispute challenging the validity of the termination of service it is imperative for him to file written statement before the Industrial Court setting out grounds on which the order is challenged and he must also produce evidence to prove his case. If the workman fails to appear or to file written statement or produce evidence the dispute referred to by the State Government cannot be answered in favour of the workman and he would not be entitled to any relief."

13. From the aforesaid settled position of law, it emerges that the burden of proof is on the workman or on the person, who raises the dispute and not upon the employer and that the onus will be shifted on the employer only when the burden of proof is being discharged by the workman and if burden is not discharged by him, his case must fail.

14. In the instant case the workman has not filed any documentary evidence nor has filed any application for summoning Rajesh Kumar or the attendance register from the employer. The petitioner could not lead any negative evidence to prove that after taking the experience certificate, respondent no.1 had himself left the job to get employment elsewhere. How attendance register of an employee can be maintained, if he is not in job? How could he produce Rajesh Kumar, who had left the job in the year 1988? The employer had candidly admitted that he had not maintained the attendance register, then how he was expected to produce the attendance register.

15. The labour court has committed an error on the face of record in shifting the burden of proof on the petitioner. The petitioner had filed documents, such as certificate of Director of Industries, Certificate issued by the Sales-Tax, Balance for the year 1993-94, Income Return and day-book for the relevant year. Since Rajesh Kumar had already left the job, his where about was not known, otherwise he could have called him to give evidence. The contention of the petitioner has force.

16. The contention of the respondent is that the labour court held that the employer deliberately retained the attendance register as required to maintain under Section 32 read with Rule 18 (1)(a) of Dookan Aur Vanijya Adhisthan Adhiniyam, 1962, that the employer-petitioner has failed to establish that the workman has not performed his duties

and prior to termination of service of the workman that no notice or opportunity or any retrenchment compensation has been awarded and as such the termination order is legal and accordingly is misconceived.

17. The establishment does not employ organized labour and is rendering service. The sale of Photostat machines is done by the proprietor himself with the help of a helper/assistant. There is no evidence plurality of employee i.e. that two or more persons are employed. A small shop is not required under the Industries Act, 1951is not required to maintain the attendance register having only an employee.

18. In the instant case, the employer was not duty bound to maintain attendance register and other documents in view of the provisions of the Establishment Act. There was no mandatory requirement to maintain all the documents. From the entries made in the documents submitted by the petitioner such as day-book and the balance-sheet, the labour court could have easily seen whether the respondent-workman abandoned employment after taking the experience certificate or that he had been working in petitioner's establishment, as claimed by him. The very small shops and commercial establishments are exempted under the Shops and Commercial Establishment Act. From the facts of the case, it is evident that the work was done by the proprietor himself with the helper. There is no evidence on record that the establishment of the petitioner is big and a number of employees are employed in the shop. The labour court has not looked into the facts stated above and the adverse inference drawn by him is misconceived.

19. In the end the counsel for the respondents has relied upon a Division Bench of this Court in Rakesh Kumar Vs. U.P. State Public Service Tribunal and others, 2002 Vol. 1 UPLBEC 319 and has submitted that the plea that the petitioner is not a industry, was not raised before the Tribunal, it is not open to raise a new plea for the first time in the writ petition.

20. The question whether the establishment of the petitioner comes within the definition of industry or not, is a pure question of law and can be raised in the writ petition as it goes to the very root of jurisdiction of the labour court.

21. The findings of the labour court that the petitioner is an industry and the order of termination of respondent is illegal and ordered for reinstatement with back wages, is illegal and perverse and is liable to be set aside, as such the relief of reinstatement of the respondent-workman could not have been granted.

22. For the reasons stated above, the writ petition is allowed and the impugned order dated 26.3.1999 is set aside. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 39331 of 2003

R.P.N. Tewari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Manoj Misra

Counsel for the Respondents:
S.C.

Constitution of India, Article-227
Practice of procedure–considering the validity of suspension order–court taken suo moto notice–about the hardship in availing the alternative namely–likewise central administrative tribunal–additional Bench of state service tribunal should be established at Allahabad also-strong recommendation, given to govt. for prompt and positive action in this regard.

Held: Para 2

There are highly competent and learned counsels at Allahabad who have good knowledge of service law and the services of such counsels will be available to the litigants if a Bench of the Tribunal is opened at Allahabad. Allahabad has been a seat of legal learning and this legal learning should be available to the litigants of the State.

Case Law discussed:
W.P. No. 37315 of 03 decided on 27.08.2003
AIR 2002 S.C. 2225

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

1. The petitioner is U.P. Government servant who is challenging a suspension order. In view of our judgment in Civil Misc. Writ Petition No. 37315 of 2003 U.P.E.S.I. Medical Services Association vs. State of U.P. Decided on 27/08/2003 which has followed the judgment of the Supreme Court in *Secretary, Minor Irrigation and Rural Engineering Service, U.P. and others vs. Sahngoo Ram Arya and another AIR 2002 SC 2225 (vide paragraph 12)* this petition is dismissed on the ground of alternative remedy before the U.P. Public Service Tribunal.

2. However, we are of the opinion that a Bench of the U.P. Public Service Tribunal should be created as soon as possible at Allahabad also. At present there is only one Bench which sits at Lucknow and this is creating great hardship to the litigants who have to come to Lucknow from far places. There are highly competent and learned counsels at Allahabad who have good knowledge of service law and the services of such counsels will be available to the litigants if a Bench of the Tribunal is opened at Allahabad. Allahabad has been a seat of legal learning and this legal learning should be available to the litigants of the State.

3. It may be mentioned that the Central Administrative Tribunal has seats both at Allahabad and Lucknow and hence in our opinion the U.P. Public Service Tribunal should also have seats both at Lucknow and Allahabad and the litigants of U.P. Should have the choice to file their petitions either at Allahabad or at Lucknow.

4. The Chairman of the Tribunal should have also power to transfer the petitions from Lucknow to Allahabad and vice versa.

5. We, therefore, strongly recommend to the U.P. Government to set up a Bench of the Tribunal at Allahabad as soon as possible.

6. Let the Registrar General of this Court send a copy of this judgment forthwith to the Chief Secretary and Principal Law Secretary U.P. and also to

the Chairman, U.P. Public Service Tribunal Hon'ble Mr. Justice D.R. Choudhary.

7. A copy of this order be given to the learned Standing Counsel free of charge within three days and he shall also send a copy of this judgment to the above authorities.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 3296 of 2003

Ram Bihari Yadav ...Petitioner
Versus
Managing Director, U.P. State Handloom Corp. Ltd. and another ...Respondents

Counsel for the Petitioner:
Sri Pradeep Chandra

Counsel for the Respondents:
Sri V.K. Birla

Constitution of India Article 226 Under U.P. State Handloom Corporation Ltd. (Officers & Staff) service Rules, Chapter VIII, Rule 63-A-Termination-on purported ground of continuous absence without leave good and acceptable cause shown by employee–Rule 63-A not attracted.

Held: Para 9

Petitioner's services, as such, could not have been dismissed on the purported ground of his continuous absence. It is not a case where the petitioner was not responding to the show cause notice or was not reporting without any cause. Petitioner's services, as such, could not be terminated without initiating and concluding a disciplinary enquiry.

Case Law Discussed:
1990 (2) SCC 404

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

1. Heard Sri Pradeep Chandra for petitioner and Sri Vivek Birla for respondents.

Brief facts, giving rise to this writ petition, are, that petitioner was appointed an Attendant on daily wages in the office of General Manager Cantt, U.P. State Handloom Corporation Ltd. G.T. Road, Kanpur on 15th October, 1987. His services were extended from time to time. On 12th January, 1990, he was appointed on probation for a period of one year and was thereafter confirmed. Petitioner was thereafter transferred to Bahraich on 29th January, 1990. He also received the benefit of Annual increments. The Joint Director of U.P. State Handloom Corporation, Kanpur issued a show cause notice to petitioner on 13.08.2002 for explaining his absence since 07.08.2002. It has been explained in para 16 of the writ petition that he submitted the joining report on 17.08.2002 alongwith an application for medical leave. On 07.09.2002, he was again asked to explain his absence since 07.08.2002. Petitioner submitted an explanation on 09.09.2002 stating that on account of his illness, he was not been able to join. On 27.09.2002, a notice was given to him by registered post for explanation of his absence from duties upto 27.09.2002. On 30.09.2002, petitioner submitted his explanation to the Director of Management, U.P. State Handloom corporation, Kanpur in writing, that he submitted his joining report on 11.09.2002, which was not accepted by dealing official Shri Ram Kumar Shukla,

on the ground that he should first resume his duties at the residence of Managing Director otherwise he be treated absent from duties.

2. By the impugned order dated 20.11.2002, the Managing Director, U.P. State Handloom Corporation Ltd., Kanpur terminated the lien of his service with effect from 09.09.2002, in exercise of his powers under Chapter VIII Rule 63-A of U.P. State Handloom Corporation Limited (Officers and Staff) Service Rules, on the ground of his continuous absence without leave.

3. Shri Pradeep Chandra, counsel for petitioner, submits that petitioner was on medical leave upto 11.09.2002 and that when he requested for joining on that day, he was not allowed to join until he reports for work at the residence of Managing Director. Petitioner is a confirmed employee and he could not be detailed for domestic duties. He requested for being taken on the strength at the office, but his request was refused by Sri Ram Kumar Shukla and under the circumstances his lien in service could not have been terminated under Rule 63-A of the Service Rules. Counsel for petitioner further submits that in the impugned order, the Managing Director referred to petitioner's application dated 11.09.2002 but accepted an incorrect report of Sri Ram Kumar Shukla, and submits that the petitioner was not allowed to join. It is submitted that the respondents have not only acted arbitrarily and unreasonably but have also acted in violation of Service Rules.

4. Sri Vivek Kumar Birla, on the other hand, submits the petitioner was absent from duties without any information since 07.08.2002. He was warned on a number of occasions to join the duties but he did not choose to join and in the circumstance, the Corporation was not left with any option except to terminate the service of petitioner under Rule 63-A of the Service Rules. He states that although the petitioner moved an application for joining but he was not physically present to join the duties and continued to be absent without leave.

5. A perusal of impugned order shows that initially petitioner was absent without applying for leave. The respondents, however, did not deny the fact that petitioner had made an application on11.09.2002 for joining. Sri Ram Kumar Shukla reported that petitioner did not physically present himself for duties. The report of Sri Ram Kumar Shukla was accepted without giving any opportunity to the petitioner or calling for his explanation. It is apparent from these documents and averments in writ petition that petitioner did not like to serve as domestic employee at the residence of Managing Director and that Sri Ram Kumar Shukla, the person concerned, refused to accept his joining report until he reports for duty at Managing Director's residence.

6. Rule 63-A in Chapter VIII of the Service Rules in quoted below:

"*If any employee remains absent from his duty without information or prior approval of his absence or over stays after expiry of the leave period originally sanctioned or subsequently extended, thereby in time, he will lose lien on his appointment if he does not report for work within 15 days form the date of the beginning of such unauthorized absence.*

However, lien may be restored at any time subject to discretion of the management after submission of satisfactory explanation to the management by the employee concerned."

7. A similar rule, as aforesaid, came up for consideration by Apex Court in **Hindustan Paper Corporation v. Purendu Chakraobarty and others** ((1996) II SCC. 404). It was held by Supreme Court in the said decision that rule must be read and given effect to, subject to the compliance of the principles of natural justice and thus it cannot be said that the rule is arbitrary or unreasonable or violative of Articles 14 and 16 of the Constitution of India. Before taking action under the said clause, an opportunity should be given to the employee to show cause against the action proposed and if the cause shown by the employee is good and acceptable, it follows that no action in terms of the said clause will be taken. In that sense, it cannot be said that the said clause is either unreasonable or violative of Article 16 of the Constitution of India.

8. Any procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rule, or orders affecting the civil right or result in civil consequence would have to answer the requirement of Article 14. It must be right, just and fair and not arbitrary, fanciful or oppressive. The principles of natural justice require that a person must be informed of the allegations against him. He must be given full opportunity to submit his explanation and that the authority concerned must cause an enquiry and arrive at a just decision. In all the circumstances, miscarriage of justice must be avoided.

9. Taking the aforesaid decision into consideration, I find that initially by letter dated 07.09.2002, the Managing Director relieved the petitioner from petty job of the corporation and directing him to report in the office of U.P. State Handloom and also issued a warning that if he does not submit his explanation for unauthorized absence, disciplinary proceedings be taken against him. Thereafter by letter dated 27.09.2002, the Managing Director issued a notice to the petitioner informing him that he has failed to report to his duty at the directed place and petitioner was further required to join his duty in the Camp Office of Managing Director forthwith otherwise his services would be terminated under chapter VIII Rule 63-A of the service Rules. The Managing Director has taken into account the office letter dated 11.09.2002, in which Sri Ram Kumar Shukla, reported that petitioner reported but on being detailed to work at M.D.'s residence, absented himself. This clearly infers that the petitioner was willing to work but was not allowed to join until he reported to work at a particular place. These facts would go to show that petitioner's services were not terminated on account of his absence without information of failing to report for work. The petitioner was willing to join but was not prepared to work at a particular place. The question whether petitioner could have been required to join at M.D.'s residence is entirely a different matter and may have called for a disciplinary enquiry. Rule 63-A of the Service Rules was not attracted at all. Petitioner's services, as such, could not have been dismissed on the purported

ground of his continuous absence. It is not a case where the petitioner was not responding to the show cause notice or was not reporting without any cause. Petitioner's services, as such, could not be terminated without initiating and concluding a disciplinary enquiry.

10. For the aforesaid reasons, the writ petitions succeeds and is allowed. The impugned order dated 20.11.2002 (annexure-7 to the writ petitioner) passed by the Managing Director is set aside. Petitioner shall be reinstated in service with all consequential benefits. It will be open to the respondents to take disciplinary action against the petitioner in accordance with Service Rules.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.9.2003

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Revision No. 290 of 2003

Vipul Agarwala ...Petitioner
Versus
M/s Atul Kanodia and Company ...Respondents

Counsel for the Revisionist:
Sri Shashi Nandan
Sri Ashutosh Srivastava
Sri A.K. Mehrotra

Counsel for the Respondent:
Sri S.K. Gupta

Code of Civil Procedure 1908, Secs. 51, 115-C.P.C. order XXI Rule 11-A, 40, 41- Execution by detention reasons for passing such order-whether to be stated in applications and affidavits under Rule 11-A- Held, it is enough to state the grounds broadly-all reasons to be stated only under Rule 41 and under Rule 40.

Held- Para 3 and 4

If all the material on which the court is to pass an order for civil detention is to be stated in the application and affidavit contemplated in Rule 11-A the provision of Rule 41 would be virtually redundant- a view which but for compelling reasons can not be taken. Interpreted in this light I am of the view that at the stage of the application and affidavit under Rule 11-A it is enough to state broadly the grounds on which execution by detention is sought. These grounds can be supplemented and supported by material which may become available by execution of the judgement debtor or from his affidavit under Rule 41 or from the evidence led by the parties under Rule 40. While interpreting these provisions it has to be borne in mind that after the decree the judgement debtor may try to camouflage his assets and properties and it may only be after the curtain is removed by examining him or looking into the books of his business that the assets in his possession become visible. That apart till date no order of detention has been passed.

It may also be taken note of that as yet final order for the arrest and detention of the applicant in civil prison has not been passed. It is only at that stage after the examination under Rule 41 or evidence under Rule 40 that reasons are required to be recorded at the stage of ordering execution by detention. The revision has no merit. Dismissed.

Case Law discussed:
AIR 1964 Alld. 378
AIR 1981 Del. 114

(Delivered by Hon'ble Janardan Sahai, J.)

1. An award of the Arbitrator Tribunal under the Arbitration and Conciliation Act, 1996 was given against

the applicant on 17.11.1999 for a sum of Rs. 28 lacs Objections of the applicant under section 34 of the Act against the award were dismissed on 16.1.2003. The appeal against that order was also dismissed on 7.3.2003. The decree was then put into execution. By the impugned order the District Judge, Kanpur Nagar has ordered for the oral examination of the petitioner under Order 21 Rule 41 C.P.C. to disclose what assets and means he has to satisfy the decree.

2. I have heard Sri Shashi Nandan, learned counsel for the applicant and Sri S.K. Gupta, learned counsel for the respondents.

It is submitted by Sri Shashi Nandan that the execution application filed by the respondents was defective in as much as the details of the properties of the judgement debtor were not given therein nor the reasons for requiring the arrest and detention of the applicant were disclosed and no affidavit as required under Order 21 Rule 11-A C.P.C. was filed. It appears that originally a warrant of arrest was issued against the applicant but the applicant of himself appeared before the executing court and as such the warrant was withdrawn. Objections being raised by the applicant that the execution application did not meet the requirement of law, affidavit was filed by the judgement debtor on 17.4.2003. Sri Shashi Nandan submits that the grounds why the arrest and detention of the applicant is required have not been disclosed even in the affidavit subsequently filed. Sri Shashi Nandan also placed before me the finding of the executing court that the execution application did not contain the reasons for requiring the arrest of the applicant. Reference has been made by the executing court in its order to the affidavit of the decree holder in which it has been observed with reference to it that the provisions of Order 21 Rule 11-A C.P.C. have been complied with. I have seen the affidavit filed by the respondent. It is stated therein that the applicant is carrying on business and has the means to pay the money. In view of this averment it can not be said that no ground for requiring the arrest and detention of the judgment debtor was given in the affidavit.

3. Sri Shashi Nandan submitted that the scheme of the provisions indicates that a finding that the judgment debtor has the means to pay has to be recorded at the stage before issuance of warrant of arrest or notice. The submission does not appear to be correct. Section 51 Civil Procedure Code provides that execution by detention in the civil prison shall not be ordered except after giving opportunity to the judgement debtor and for reasons to be recorded. The section only requires that opportunity be given and reasons recorded before ordering detention. As yet no detention has been ordered. The warrant of arrest, which has since been withdrawn was issued to secure the presence of the petitioner in court. The requirement of Section 51 is met even if reasons are given by the court at a stage after the examination of the judgement debtor under Order 21 Rule 41 Civil Procedure Code has been made. The provisions under Order 21 Rule 41 provide for two contingencies. While Sub Rule 1 provides that the judgment debtor can be called upon to give his statement before the court as regard to assets owned by him Sub Rule 2 leaves it open to the court to require the judgment debtor if the decree has remained unsatisfied for more

than 30 days to file an affidavit indicating therein the assets that he possesses. This sub Rule 2 has been added by the Civil Procedure Amendment Act No. 104 of 1976. The intention of the Legislature made clear by this provision is that if the assets of the judgment debtor are not clearly known to the decree holder and the decree is not satisfied examination of the judgment debtor or his affidavit may be required so that the assets can be ascertained. Sri Shashi Nandan relied upon a decision of this Court in AIR 1964 Allahabad Page 378 Kahhaiya Lal Vs. Mahabir Prasad Jain in which it has been held that the burden to prove that the judgement debtor had assets lies upon the decree holder. The decision is distinguishable. What was held in that case was in the context of an order of detention which had to meet the requirement of Clause (b) of the proviso of Section 5 which postulates a finding that the judgment debtor has the means to pay. The scope of order 21 Rule 41 Civil Procedure Code did not fall for consideration in that case. That apart that decision was given at a point of time when the provisions under sub Rule 2 of Order 21 Rule 41 Civil Procedure Code had not been inserted in the Civil Procedure Code. Rule 11-A of Order 21 Civil Procedure Code is a procedural provision meant only to focus the attention of the parties to enable them to place the material upon which the court can decide whether execution by detention be ordered under Section 51 Civil Procedure Code. The stage of Rule 11-A is obviously earlier in point of time to the stage of Rule 40 and 41 of Order 21. If all the material on which the court is to pass an order for civil detention is to be stated in the application and affidavit contemplated in Rule 11-A the provision of Rule 41 would be virtually redundant- a view which but for compelling reasons can not be taken. Interpreted in this light I am of the view that at the stage of the application and affidavit under Rule 11-A it is enough to state broadly the grounds on which execution by detention is sought. These grounds can be supplemented and supported by material which may become available by execution of the judgement debtor or from his affidavit under Rule 41 or from the evidence led by the parties under Rule 40. While interpreting these provisions it has to be borne in mind that after the decree the judgement debtor may try to camouflage his assets and properties and it may only be after the curtain is removed by examining him or looking into the books of his business that the assets in his possession become visible. That apart till date no order of detention has been passed.

4. Lastly, it was submitted relying upon a decision in AIR 1981 Delhi Page 114 Radhika Narain Vs. Chandra Devi that the court can not enter into a roaming and fishing enquiry for examining the judgement debtor under Order 21 Rule 41. This decision is entirely distinguishable. The question involved in that case was of territorial jurisdiction of the court to which the decree was transferred for execution. It was held that it was necessary for the decree holder to aver facts, which confer jurisdiction on the transferee court to execute the decree and if such facts were controverted to embark upon an enquiry on the question of jurisdiction. In the present case no question of territorial jurisdiction. In the present case no question of territorial jurisdiction is involved. It may also be taken note of that as yet final order for the

arrest and detention of the applicant in civil prison has not been passed. It is only at that stage after the examination under Rule 41 or evidence under Rule 40 that reasons are required to be recorded at the stage of ordering execution by detention. The revision has no merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.9.2003

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

Civil Misc. Writ Petition No. 27709 of 1999

Km. Kusum Rani and others ...Petitioners
Versus
District Inspector of Schools-II, Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri Prakash Padia

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act 1921 Section 16 E- Termination of service Assistant Teachers in Primary section attached to Intermediate- appointed without following the procedure of law- even the advertisement not disclosed the vacancy under servati on quota- opportunity of hearing not required- joining without valid appointment- approval by the authority-held- redundant.

Held: Para 16

The petitioners appointments per se was illegal, therefore, principle of natural justice cannot be said to be given and the petitioners cannot unnecessarily be afforded opportunity of hearing before passing the said impugned orders. The said appointments in question are in contravention to the norms and are not made by the approval of D.I.O.S. or the irregularities for defiance of reservation policy goes to the very root for instance no vacancies/posts were available and if vacancies/posts were existing then the authorities overlooked to observe norms of reservation policy, in these circumstances, the selections lack legal foundation and no legal rights accrued to the petitioners in view of the (State of Punjab Vs. Jagdip Singh) AIR 1964 SC 521 Para-8.

Case laws discussed:
1998 JT Vol 6 page 464
1991 SC 309
1999 UPLBEC (3) 1691
AIR 1978 SC 851
1979 (2) SCR 953
AIR 1964 SC 521

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

1. All these writ petitions are taken up together.

By way of writ petitions no. 27709 of 1999 and 30563 of 1999 order dated 31.12.98 passed by District Inspector of Schools, Allahabad and subsequent order dated 15.5.99 have been challenged. Further prayer has been made seeking writ of mandamus restraining the respondents from interfering in the working of the petitioners as Assistant Teachers and for payment of salary month by month along with arrears from the date of their initial appointment. Still further prayer has been made to grant approval by the District Inspector of Schools in favour of the petitioners as a primary teacher in the institution. Km. Preeti Singh by way of writ petition no. 14570 of 1999 has prayed to quash the selection which took place on 17th December, 1998 in pursuance of the advertisement published in local news papers 'Rashtriya Sahara' on 16th October, 1998 and in 'Amar Ujala' on 17th of October, 1998 to

the post of Assistant Teachers in the primary section attached to Arya Kanya Inter College, Muthiganj, Allahabad (In short called as 'College' hereinafter) and further prayer has been made to restrain the petitioners in the above two writ petitions from functioning as Assistant Teachers in the primary section of the college and further direction has been made for making fresh appointment by observing the provisions of **U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 that is Act No. 4 of 1994** (In short called as 'Reservation Act, 1994' hereinafter) which came into force on 11.12.93.

2. The facts necessary for adjudication of the writ petitions are that Arya Kanya Inter College, Muthiganj, Allahabad is under grants-in-aid list of the State Government and the teachers of the said college are being paid salary through the State funds under the U.P. High Schools and Intermediate Colleges (payment of salaries of teachers and other employees) Act, 1971. The said college runs classes from Ist to XII where primary section is also run within one campus under the same management and one Principal is heading the college including the primary section from Ist to V and from VI to XII and the terms and conditions in respect of payment are governed by U.P. Intermediate Education Act, 1921 and the regulations framed thereunder.

3. According to the petitioners for appointment of Assistant Teacher in the Primary Section in the said college a letter was written by Management of the said College on 12.6.98 to the Director of Schools seeking permission whereby the permission dated 29.9.98 was granted by the District Inspector of Schools (D.I.O.S.) to the management of the said college. In pursuance thereto the vacancies were advertised in widely circulated news papers namely 'Rashtriya Sahara' on 16.10.98 and in 'Amar Ujala' on 17.10.98. In reference thereto 108 persons applied, out of which 102 persons were called for interview and out of which 75 persons appeared and interviewed and the selection took place on 17thDecember, 1998 where the petitioners of the two writ petitions no. 27709/99 and 30563/99 were found eligible and were recommended as LT.C. Teacher B.T.C. Grade. In reference to the recommendation of the Selection Committee, the Management Committee of the said College resolved and issued appointment letters from 28.12.98 on wards in favour of the writ petitioners where it was specifically mentioned that the appointment in question was only to be effective from the date of approval by the District Inspector of Schools. However in pursuance to the appointment letters issued in favour of the petitioners when writ petitioners met the Principal of the college, they were informed by the Principal and the Manager that some quarries have been made by the District Inspector of Schools by letter dated 31.12.98 in respect of the following points:

(I) To indicate about the creation of posts of alleged teachers in Primary section of the College.
(II) Number of sections in primary section and the permission for their creation.
(III) List and details of the joining dates and the date of retirement of lady teachers working in primary section

from 1975 (Service Books as evidence are to be enclosed)

(IV) To disclose the names of Assistant lady teachers receiving salary after the grant no. 71 was made applicable to the college to give detail about those lady teachers working in primary section of the said college, their date of appointment who were given C.T. grade scale by the Regional Girls Inspector of School IV Division by her order dated 16th August, 1994.

4. The District Inspector of Schools by letter dated 31.12.98 has also indicated to the Manager of the said College to furnish information on the above points and had restrained the appointment of any Assistant Teachers in the primary section of the said college.

5. It appears that in response to the above queries the Manager of the college wrote letter dated12.3.99 to the D.I.O.S., however without further waiting the decision of the D.I.O.S., the petitioners were issued appointment letters on 20th March, 1999 and on 22nd March, 1999 and the relevant papers were sent by the Management of the College to the D.I.O.S. to grant permission for appointment and for financial approval. Thereafter by letter dated 5.4.99 and 15.4.99 certain more queries were made by D.I.O.S. from the Management of the college in respect of the said appointments in question and on 15th May, 1999 the D.I.O.S by the impugned order has indicated that the permission earlier granted for making payment of Assistant Teacher in primary section of the said college is recalled in view of the analysis made on the material supplied by the Management and keeping in view that when selection and appointment was restrained earlier and in the light of non-observance of the reservation policy in the said appointments. The orders dated 31.12.98 and 15.5.99 passed by the D.I.O.S. are the impugned orders in the two writ petitions.

6. It appears that when the petitioners filed the writ petitions this court on 12.7.99 had been pleased to stay the operation of the order dated 15.5.99 and subsequently by order dated 8.12.2000 have extended the operation of the order dated 12.7.99.

7. Counter affidavit has been filed. The specific stand taken by the District Inspector of Schools is that the earlier permission granted on 29.9.98 for making appointment on the post of Assistant Teacher in the primary section of the said college was with an indication and observance that the Management is authorised to make appointment of teachers in the primary section and the Management was permitted to make appointment obviously in observance of the reservation policy. The basic advertisement was defective as it did not observe the reservation policy and the information before the said appointments were under scrutiny and keeping in view of the deficiencies in the information, further information on 31.12.1998 were demanded by the D.I.O.S. In those circumstances, the impugned order dated 15.5.99 was passed. It has further been pointed out on behalf of the respondents that 14 posts in the college were filled up and there was no vacancy for making appointments to the post of assistant teachers and eight vacancies were shown to have been fallen vacant whereby by virtue of retirement of 8 teachers from the

said college from 30th June, 1992 to 30th June, 1998 and by virtue of non-creation and sanction of the post by the appointing authority, no college availing the benefit of grants-in-aid of the State Government could make appointment to the post of assistant teacher and if appointment were made in absence of the vacancies and posts the same was illegal. According to the respondents the two advertisements neither indicate the number of vacancies to be filled up nor has mentioned anything about the observance of reservation policy i.e. 'Act 1994' which is applicable in the educational institution owned by the State Government or those institutions receiving grants-in-aid and Section 2 (c) (IV) applies to all the educational institutions owned and controlled by the State Government or which received grants-in-aid by the State Government including the Universities and Section 4 of the 'Act 1994' indicates the responsibilities, accountabilities and powers for complying the provisions of 'Act 1994' by entrusting the responsibility over the appointing authority or any of the officer of the State or the Institution concerned to be responsible for ensuring the compliance of provisions of that and Section 5 deals with the penalty for defiance of the provisions of the said 'Act 1994' and by virtue of section 6, the power has been given to call for records and take such action as it may be necessary. As contended on behalf of the D.I.O.S. all the 14 posts in the said college were filled up and the said advertisements were illegal for want of vacancies and sanction of posts and the Management being fully aware of these facts still proceeded with the advertisements and despite the restrained order passed by the D.I.O.S. the said appointments were made as per the conditions indicated in the order dated 28.12.98 and onwards the said alleged appointments were not effective without the permission and approval of the D.I.O.S. as such the said appointments in question are not valid, in these circumstances, the question of giving actual appointment did not arise.

8. It has been submitted on behalf of the petitioners that the petitioners were duly appointed by the Management after adopting full procedure and in terms of the appointments letters the petitioners have joined duties and were working, as such without notice or opportunity of hearing or in derogation to the principles of natural justice, their appointments cannot be cancelled. In support of the stand the reliance has been placed on behalf of the petitioners on following cases:

(i) 1998 J.T.(Vol. 6) page 464 (Para 9 and 13) Basudeo Tiwari Vs. Sido Kanhu University.
(ii) 1991 S.C. 309, Shrawan Kumar Jha Vs. Ram Sewak.
(iii) 1999 U.P.L.B.E.C. (Vol. I) 537 Pancham Ram and others Vs. Chief Engineer, U.P. Jal Nigam & others.
(iv) 1990 UPLBEC (3) 1691 (Para 4) Dinesh Vs. D.I.O.S., Mau

9. When these cases are analysed, I find that in these cases the appointments were already given against the existing vacancies and posts and at subsequent stage specifically before cancellation of the appointments of the writ petitioners the question of consideration for giving opportunity of hearing before cancellation of such appointments arose for consideration. Here the vacancy was not available and the Management was

supposed to observe the reservation policy and despite the management been restrained by the D.I.O.S. even if appointments were made then joining and working by petitioner has no value in the eyes of law. When the conditions for the appointments itself indicate that it could only be effective after the approval of the D.I.O.S., therefore, in the present facts and circumstances of the case, the question of appointments and joining has no relevance and effect. From this point of view the cases referred is not applicable in the present cases. According to the petitioners new grounds cannot be taken by the respondents in the counter affidavit which are not stated in the appointment orders in view of the *A.I.R. 1978 S.C. 851 (Para 8) Mohinder Singh Gill Vs. The Chief Election Commissioner.* The contention of the petitioners is also incorrect as the legal ground could be raised even at the hearing stage, more so here the basic issue of non-observance of the reservation policy has been ignored and the permission of the D.I.O.S. to proceed for the selection does not mean that the management was to make recruitment's even in absence of vacancies and posts, to follow the procedure at his sweet and free will without observing the provisions of reservation and the law applicable for the recruitment.

10. It has been contended on behalf of the petitioners that there is no requirement under U.P. Intermediate Education Act, 1921 for taking approval for appointment of teachers in Primary Section in an Intermediate College unless there is disagreement between the selection committee and the Committee of Management under Section 16 (E) (8) but in the present case committee of management duly accepted the recommendation of the Selection Committee. Thus condition contained in various appointment orders, (Annexures 5 to 8 to the writ petition) that the approval of the D.I.O.S. should be taken is totally irrelevant and redundant and there does not exist any provisions in law seeking his approval. In this respect the petitioners have placed reliance on the judgement in **1984 UPLBEC page 46 Amresh Chandra Dwivedi Vs. D.I.O.S., Varanasi.**

11. It has further been contended on behalf of the petitioners that in the present case, appointments were cancelled by the D.I.O.S. who has no jurisdiction and that too without giving any notice or opportunity. Thus the impugned order is liable to be set aside being violative of principles of natural justice and being nullity i.e. totally without jurisdiction.

12. It has further been contended on behalf of the petitioners that appointments made by the committee of management can only be cancelled by the Director as provided under Section 16-E (10) of the U.P. Intermediate Education Act, 1921. He can cancel the appointments only after giving due notice and opportunity to the petitioners.

13. Section 16-E (8) of the U.P. Intermediate Education Act, 1921 provides as below:

"**Section 16-E (8)-** *Applicability and Scope of - Sub-section (8) of Section 16-E provides for referring the matter to the District Inspector of Schools in a case where the Committee of Management does not agree with the recommendations of the Selection Committee. Thus, it is clear that if the Committee of*

Management agrees with the Selection of the Selection Committee it need not refer the matter to the District Inspector of Schools. There is no provision either under the Act or under the regulations requiring the Committee of Management to refer the question of appointment to the District Inspector of Schools for obtaining his approval, where the Committee Management agrees with the recommendations of the Selection Committee."

14. Here in respect of Section 16-E (8) there was no question of disagreeing by the Committee of Management with the recommendation of selection committee and as both have erred to proceed in the said selection by making appointment to the posts of assistant teachers in the said college in absence of vacancies and by deliberately disobeying the provisions of the reservation policy and the issue of any dispute or cancellation of the alleged said appointments to be dealt by the Director of Education could only arise in the case of appointments having been made regarding teachers in an institution as provided under Section 16-E (10) of the 'Act 1921. In the present cases the said teachers without the permission of the D.I.O.S. have been issued appointment orders, in absence of vacancies, and posts in derogation to the reservation policy, thus the appointments could not be said to be legally made, as such Section 16-E (10) is not attracted and the decision of this court D.B. delivered in Amresh Chandra Dwivedi (Supra) shall be not applicable as at the relevant time U.P. Act No. 4 of 1994 was not mandatory and was not applicable and the reservation policy was not to be observed such a great extent.

15. According to the petitioner, Km. Preeti Singh she holds only Diploma in C. P. Ed. which is not like the L.T. or B.Ed and she was not eligible, however this issue of the claim of Km. Preeti Singh only could be considered by the Director of Education in reference to Section 16-E (10) of the Act of 1921. According to the respondents the petitioner Km. Preeti Singh appeared before the Selection Committee which did not find her eligible, suitable and qualified to the post as she was not selected, now after rejection she cannot challenge the process of selection in view of (1979) 2 SCR 953 (Swaran Lata Vs. Union of India).

16. In the facts and circumstances of the present cases whether Km. Preeti Singh could be considered even if the Selection Committee did not observe the reservation policy. The answer is no but if in the said selection the Committee of Management was to support the selection and was to be held responsible for non observance of provision of Act no. 4 of 1994 and selections are declared non est and then, petitioners appointments and their joining to the said college are of no relevance. The petitioners appointments per se was illegal, therefore, principle of natural justice cannot be said to be given and the petitioners cannot unnecessarily be afforded opportunity of hearing before passing the said impugned orders. The said appointments in question are in contravention to the norms and are not made by the approval of D.I.O.S. or the irregularities for defiance of reservation policy goes to the very root for instance no vacancies/posts were available and if vacancies/posts were existing then the authorities overlooked to observe norms of reservation policy, in these circumstances, the selections lack legal

foundation and no legal rights accrued to the petitioners in view of the (State of Punjab Vs. Jagdip Singh) AIR 1964 SC 521 para-8.

17. I have heard learned counsel for the parties. I find that in absence of the vacancies and posts, the petitioners appointment were made despite the restrictions imposed by the D.I.O.S. and the appointments and said selection were made without observing the provisions of the reservation policy as indicated above and the issuance of the appointment orders and allowing the petitioners to join the post without any valid appointments and approval of competent authorities are redundant, as such the petitioners are not entitled to any relief, therefore, I do not find any impropriety and illegality in the said impugned order dated 31.12.98 and 15.5.94 of the D.I.O.S., therefore, these writ petitions are dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.9.2003

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

Civil Misc. Writ Petition No. 20611 of 1988

Sri Salim Ahmad Khan ...Petitioner
Versus
XIIth A.D.J., Agra ...Respondents

Counsel for the Petitioner:
Sri S.O.P. Agarwal

Counsel for the Respondents:
S.C.

U.P. Urban Building (Regulation of letting, rent and eviction) Act 1972, Section 21-Enamy Property Act 1968, Section 9-whether house in dispute vested in Custodian Emery Property Act-Tehsildar had no authority to determine this question.

Held- Para 3

There is no evidence that the property was ever declared to be enemy property or that it ever vested in custodian enemy property. If one party asserts that the property is enemy property and the other party disputes the said fact then naturally it must be decided by some authority under Enemy Property Act 1968 that the property vested in Custodian Enemy Property. The only thing brought on record by tenant/petitioner was a notice and a report of the Tehsildar dated 27.6.1983. In that notice Tehsildar stated that Rahim Baksha was a Pakistani National. Neither under Enemy Property Act nor under any other Provision of law Tehsildar is authorized to decide the nationality of a person and the fact that a particular property belongs to that person. In the notice Tehsildar did not mention that any authority under Enemy Property Act had declared the said facts.

Case laws discussed:
AIR 1982 Cal. 542
AIR 1989 Cal. 139

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

1. This writ petition has been filed by the tenant against whom release application (P.A. Case No. 41 of 1984 on the file of Prescribed Authority/ Additional Civil Judge-I, Agra) filed by landlord/ respondent No. 3 under section 21 of U.P. Act No. 13 of 1972 is pending. Before filing written statement/ reply to the release application tenant/ petitioner filed application numbered as 24-Ga. In the said application tenant stated that house in dispute initially belonged to Sri Rahim Baksha whose entire family migrated to Pakistan in 1948-49 and obtained the citizenship of Pakistan. Only

Rahim Baksha remained in India and died in the year 1952 and that after the death of Rahim Baksha, his father continued to receive rent from the tenant till 1967 and that in 1967 father of Rahim Baksha intimated the tenant that he had purchased the house in dispute on 28.11.1962 from the legal representative of Rahim Baksha. It was further stated that the sale deed was sham as it was not executed by legal representative of Rahim Baksha and that after the death of Rahim Baksha his property i.e. the house in dispute vested in Union of India as it became enemy property. It was also stated in the said application that Tehsildar wrote a letter to him to deposit the rent in the name of Union of India. In the application it was pleaded that in view of section 9 of Enemy Property Act, 1968 U.P. Act No. 13 of 1972 was not applicable to the house in dispute and custodian enemy property was necessary party. The Prescribed Authority by order dated 30.1.1986 rejected the application of the tenant /petitioner against which he filed appeal being Misc. Appeal No. 27 of 1986. The appeal has been dismissed by XII-Addl. District Judge, Agra by judgment and order dated 20.9.1988. This writ petition is directed against the aforesaid judgment and order.

2. Learned counsel for the petitioner has cited two authorities of the Calcutta High Court reported in AIR 1982 Calcutta 542 and AIR 1989 Calcutta 139. As far as the authority of 1982 is concerned, it was reversed partly in 1984 (1) Calcutta law journal 359. As far as 1989 authority is concerned it has been held in para 23 thereof that unless it is decided that a particular property is an enemy property and it vested in the custodian, the custodian of the Enemy Property can not take over the possession. Para 23 is quoted below;

"Let it be made clear that without deciding whether a particular property is an enemy property or not or whether that property vested in the custodian under the Enemy Property Act has been transferred before or after the commencement of the Act to evade or defeat the vesting of the property, the Custodian of the Enemy Property can not take over the possession of the property arbitrarily, and the possession of the property if taken over as such shall be unlawful, and legal consequences will follow."

3. In the instant case there is no evidence that the property was ever declared to be enemy property or that it ever vested in custodian enemy property. If one party asserts that the property is enemy property and the other party disputes the said fact then naturally it must be decided by some authority under Enemy Property Act 1968 that the property vested in Custodian Enemy Property. The only thing brought on record by tenant/petitioner was a notice and a report of the Tehsildar dated 27.6.1983. In that notice Tehsildar stated that Rahim Baksha was a Pakistani National. Neither under Enemy Property Act nor under any other Provision of law Tehsildar is authorized to decide the nationality of a person and the fact that a particular property belongs to that person. In the notice Tehsildar did not mention that any authority under Enemy Property Act had declared the said facts. Annexure-2 is report by Naib Tehsildar to Tehsildar dated 18.4.1984. If Tehsildar has no authority to determine the said fact

the Naib Tehsildar can also not determine the same.

4. Accordingly both the orders passed by Prescribed Authority as well as District Judge are upheld even though on different grounds and writ petition is dismissed.

5. As release application is pending since 1984 hence it is directed that Prescribed Authority must decide the said case within six months from production of certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2003

BEFORE
THE HON'BLE S.K. AGARWAL, J.
THE HON'BLE GHANSHYAM DASS, J.

Habeas Corpus Petition No. 20304 of 2003

Mohd. Anees alias Guddu ...Petitioner (In Jail)

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Bajpai
Sri U.N. Sharma

Counsel for the Respondents:
Sri B.N. Singh, S.S.C.
Sri J. Lal, A.S.C.
Sri K.S. Yadav
Sri A.K. Tripathi, A.G.A.

Constitution of India-Article 226-National Security Act-Section 8 & 14-Detention order state government forwarded the representation to Central Govt.-Central Government returned without considering the same-Directed to State Government for its determination under Section 8 of the Act-Contention raised-whether central Govt. failed to discharge its obligation under Section 14 of the Act.

Held: conduct of Central Government resulted into miscarriage of Justice-it was in cumbent upon the Government of India to consider the representation and to decide under section 14 of the Act-Petition Allowed-Detention order quashed.

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

1. We have heard Sri Anil Kumar Bajpai, learned counsel for the petitioner, on behalf of the State Sri A.K. Tripathi, learned A.G.A. and Sri K.S. Yadav, learned counsel for the Union of India.

2. The sole question that was raised before us by the petitioner in this petition for our consideration is that the representation, duly forwarded by the Government of Uttar Pradesh with a covering letter, was returned by the Central Government without considering the same to the State Government for its determination under Section 8 of National Security Act (hereinafter referred to as 'Act'). The representation was also sent to the Central Government by the District Magistrate, Allahabad. The contention, therefore, is that the central government had failed to discharge its obligation as enjoined upon it by Section 14 of the Act. We have applied ourselves appropriately to the issue at hand. In our opinion the contention has sufficient force. The detenue had supplied 7 copies of his representation to the Superintendent of Jail as accepted by him in his counter affidavit in paragraph 6. A copy of the representation is annexed alongwith the petition as annexure–2. The representation was handed over to the Superintendent on 12.9.2002. According

to this paragraph it was addressed to the President of India, Secretary (Home), Central Government, New Delhi, Governor of the State, Chairman, Advisory Board, Chief Minister and the District Magistrate, Allahabad. At Serial. No. 2 at the foot of the representation there is a mention of this fact. It is clear that the petitioner had the intention to address one of his representation to the Secretary (Home Affairs), Government of India. The District Magistrate in his counter affidavit in paragraph 5 had also admitted this fact that he had forwarded the representation of the detenue to the Central Government on the same day i.e. 13.9.2002 through speed post. In the counter affidavit filed by Sri C.P. Singh, Dy. Secretary (Home & Confidential), Government of U.P., Lucknow in paragraph 3 it has been alleged that the representation of the petitioner was forwarded to the central government by a letter dated 24.9.2002. The Ministry of Home Affairs, New Delhi, vide its letter dated 25.9.2002 promptly returned the said representation to the State Government with a remark that 'the representation of the petitioner was not addressed to the Central Government and so the representation be disposed of by the State in accordance with the provision of Section 8 of the Act.' From paragraph 5 of the counter affidavit of this officer, it is further made available to us that this representation forwarded to the central government was received by the Secretary, Ministry of Home Affairs, New Delhi on 10.9.2002 i.e. within 7 days from the date of approval by the State Government as required under Section 3 (5) of the said Act.

3. In view of abovesaid facts and circumstances and the fact that the representation endorsed by the petitioner clearly indicated his desire for his representation to be considered by the central government as well. It is clearly explicit from Sl. No. 2 at page 32 of the representation as appended to this writ petition. From these facts it is clearly over-flowing that the authority who directed the return of the representation to the State Government for its decision under Section 8 of the Act had completely shut his eyes to this part of the representation. Had any application of mind being made by the authority concerned at the central government's end, probably this unholy mistake may not have occurred. This shows total lapse of application of mind on the part of the official at the Ministry of Home, Government of India who entertained the same. The abovesaid conduct that has resulted into miscarriage of justice so far as the petitioner is concerned. It was incumbent upon the government of India to consider the representation forwarded by any detenue or by the state government on his behalf and decide the same as required under Section 14 of the Act. Thus, the legal obligation was not discharged by the central government in the case of this detenue. There is no averment in the Union Home Ministry's counter affidavit whether the representation forwarded to it by the District Magistrate was disposed of or not. This is yet another anomaly.

4. It is needless to remind that any obligation enjoined by any law has to be discharged in true manner as prescribed. There must not be adhered an approach or attitude which may give an exposure to cursoriness or wreaklessness of the authority or the government. Such an

approach or attitude is to be seriously deprecated.

5. In view of the abovesaid facts and circumstances, in our opinion, this petition deserves to be allowed. The petition is accordingly allowed and his continued detention under the said Act is hereby quashed. The petitioner shall be released forthwith, if he is not otherwise detained in any other offence.

6. A copy of this order shall be sent immediately to the Secretary (Internal Security Home Affairs), State of U.P. and also to Union of India.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2003

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

Civil Misc. Writ Petition No. 19604 of 1989

Dhaneshwar and others ...Petitioners
Versus
Deputy Director of Consolidation, Deoria and others ...Respondents

Counsel for the Petitioners:
Sri R.S. Misra

Counsel for the Respondents:
S.C.

Consolidation of India Art. 226 Read with U.P.C.H. Act 1962 Sec. 9(9) (2) Compromise whether the writ Court can decide the petition on the basis of Compromise Held No. Parties to approach before the consolidation authorities along with certified copy of compromise application after due verification. The effective line order can be passed only by the writ court detail guidalines issued in is regard.

Held: Para 6

Now the question is that as Apex Court and this court has ruled that dispute between the parties can be decided on the basis of compromise in the writ petition, if, Parties intended to settle their dispute then what course is to be adopted. On a careful consideration of all the practical aspects by taking precaution to rule out any wrong in the exercise, this Court Is of the view that following procedure should be adopted for giving effect to the intention of the parties for settling their disputes

Case Law:
2002 (93) R.D. 468
J.T. 2001 (6) S.C. 173
2002 (93) R.D. 430

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

1. This writ petition has been filed by the petitioners against the orders passed by the Consolidation Authorities in a proceeding under section 9-A (2) of U.P.C.H. Act.

2. At the time of hearing of the writ petitioner, Learned counsel appearing -for both parties, submitted before this Court that the parties have filed a compromise and therefore, the writ petition may be decided In terms of compromise.

3. In view of the aforesaid, the Court has to examine that what order is to be passed on the prayer as made by learned counsel for the parties.

4. Learned counsel for the parties, on the strength of the decision given by this Court in the case of **Surendra Nath Raid Vs. Prahlad Singh 2002 (93) RD.468** and also the decision given by the Apex Court in the case of ***Salika Businessmen's Association Vs. Howrah Municipal Corporation JT 2001 (6) SC***

173 submitted that the writ petition can be decided in terms of compromise. It is pointed out that if the Court do not intend to pass final orders in terms of compromise then the matter may be remitted to the Deputy Director of Consolidation for deciding the dispute in terms of compromise as has been opined by this Court in the case of **Laljee Vs. Deputy Director of Consolidation reported in 2002 (93) RD 430**.

5. In view of the aforesaid submission, keeping in mind the decision referred above, this Court has to examine that what will be the better course for dealing with the matter which may be in accordance with the wishes of the parties and also in the ends of justice but at the same time by ruling out chances of any fraud or malpractice while getting the matter finalised on the basis of compromise from this Court. In this respect, this Court can take note of various happenings as has taken in the past and even happening in present also that sometime either of the party, with a malafide intention gets Vakalatnama of another counsel filed through whom, compromise is filed and the matter is got decided in ignorance to one of the party concerned and thereafter as and when concerned party approaches this Court by moving application that he has never consented to the compromise and he has not signed the compromise then as the controversy could not be adjudicated without getting evidence of hand writing expert without taking evidence in this respect, a peculiar situation arises. Upon the move by aggrieved party two situation arises whether this Court is to examine the factual aspects or the party be relegated to approach the Civil Court for getting the fraud investigated. If this situation happens then the party who is complaining about the fraud is to suffer irreparable harassment besides lot of complications, multiplicity of proceedings and wastage of time of the Court and money of the litigant. In the cases relied by learned counsel for the parties, these aspects appears to have not been noticed. In view of the aforesaid, to rule out any chance of malpractice, passing of final order by this Court deciding the claim of the parties on the basis of the compromise, may not be in the ends of justice. At this stage, the submission for sending the compromise which is filed by the parties to the Court below for verification as has been observed by this Court in the case of Laljee Vs. Deputy Director-of Consolidation (Supra), also not to be accepted as that also may take quite long time besides lengthy exercise of sending of the documents to the court below and thereafter, after recording a finding to remit all the papers to this Court and then formality of passing orders by this Court. As even after passing a formal order by this Court, directing the decision of the claim of the parties on the basis of the compromise it is not end of the matter, as it has to be given effect by the consolidation authorities and thus the exercise of sending the papers to the authority and requiring him to send the same after verification may also not be a complete exercise.

6. Now the question is that as Apex Court and this court has ruled that dispute between the parties can be decided on the basis of compromise in the writ petition, if, Parties intended to settle their dispute then what course is to be adopted. On a careful consideration of all the practical aspects by taking precaution to rule out any wrong in the exercise, this Court Is of

the view that following procedure should be adopted for giving effect to the intention of the parties for settling their disputes;

i) On filing compromise before this Court, a direction is to be given to the parties to file fresh compromise in terms of the compromise filed before this Court, before the concerned authority and writ petition may be directed to be listed after a reasonable time.

ii) Concerned authority is to be directed to entertain the Compromise if it is filed along with certified copy of order of this Court.

iii) Upon filing the compromise before the concerned authority pursuant to the directions of this Court, appropriate steps for getting it verified in accordance with law is to be taken by the authority, preferably within a period of two months from the date of receipt of copy of compromise along with application.

iv) On getting the compromise verified, the authority concerned will be required to pass a formal order in writing that the compromise has been verified and that the parties have agreed to settle their dispute in terms of compromise.

v) After the order is passed by the concerned authority, it will be for either of the parties to move an application before this Court along with certified copy of the order of the said authority with the request for passing a formal order, disposing of the writ petition, giving liberty to the parties to move application before the concerned authority to give effect to the compromise which has been arrived at before him, which had been duly verified and accepted.

7. In the light of the aforesaid process, this Court feels that chances of any malpractice in getting any party defrauded will be saved and the intention of the parties to get their rights settled byway of compromise will also be achieved. On examination of the decision as has been referred by learned counsel, it is clear that these various aspects could not be noticed which may not necessarily arise in each case, but even if it arises in some of the case, It may be harassment rather harsh for the party who is to come before this Court with the charge of fraud on him and therefore, to rule out the chance of fraud and the chances of this Court being party in the suffering of any party, disposal of the matter in the light of the aforesaid process will be in the ends of justice

8. For the reasons recorded above by giving liberty to the parties to do the needful in terms of the orders of this Court, this writ petition is directed to be listed immediately after two months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.9.2003

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 19367 0f 2003

Gajendra Singh and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri A.K. Singh

Sri Ghanshyam Dwivedi
Sri Ramendra Ashthana

Counsel for the Respondents:
S.C.

U.P. (Outside the Purview of U.P. Public Service Commission) Procedure for Direct Recruitment to Group C Posts, Rules 2001, Rr. 6A, 6 (6) (c)- Appointment on post of Junior clerk in Govt. Press-knowledge of typing not required- petitioner an similarly situated candidates qualified written examination- candidature not considered for making false disclosures about knowledge of typing-held, not amount to disqualification.

Held: Para 19

In the facts and circumstances of the case, all the writ petitions are allowed. It is held that the respondents have illegally and arbitrarily refused to consider petitioners for the post of Assistant Clerk in Government Press advertised vide advertisement dated 30.8.2001 published in Dainik Jagran, Allahabad. All the petitioners and similarly situate candidates, are entitled to be considered for the post of junior clerks irrespective of the fact whether they disclosed that they had knowledge of typing. All appointments made out of select list are quashed. Respondents are directed to rearrange the select list in accordance with Rules 2001, as well as directions issued in this judgement, and to prepare a fresh select list and to offer appointment strictly in accordance with law.

Case law discussed:

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

1. Heard Sri Ashok Khare, Senior Advocate, assisted by Sri A.K. Singh in writ petition nos. 19367 of 2003, 19045 of 2003 and 18791 of 2003, Sri Ghanshyam Dwivedi in writ petition No. 20213 of 2003 and Sri Ramendra Ashthana in writ petition No. 20150 of 2003, and learned Standing Counsel for respondents in the above writ petition.

2. The facts giving rise to these writ petitions are stated as below:

In writ petition nos. 19367 of 2003, 19045 of 2003 and 18791 of 2003, petitioners applied in pursuance of advertisement in newspaper 'Dainik Jagran' dated 30.8.2001 for appointment to Group-C posts under U.P. (Outside the Purview of Public Service Commission) Procedure for Direct Recruitment to Group 'C' Posts Rules, 2001. All the petitioners applied for 54 advertised vacancies of Junior Clerks; 14 for typists and 8 of Apprentice Clerks in the Government Press, Allahabad for which appointing authority is the Joint Director, Government Press, Allahabad. Whereas the minimum qualification for the posts of Junior Clerks was provided to be Intermediate, and for the posts of Typists, the minimum qualification prescribed was Intermediate with proficiency in typing 25 words per minute in Hindi. The advertisement was published under the authority of Chief Development Officer/Chairman District Selection Committee (Group-C), Allahabad. In writ petition No. 18791 of 2003, petitioners 1,2,5 and 6 belong to general category, petitioner nos. 3 and 4 belongs to other backward class, and petitioner no. 5 claims reservation as dependent of Freedom Fighter. In writ petition No. 19045 of 2003 also both petitioners belong to general category and in writ petition No. 19367 of 2003, both petitioners belong to general category. All the petitioners applied for all the three

posts and in column 7 (b) of the application form they disclosed that they are proficient in typing.

3. A written examination was held on 7.10.2001. The result was published on 25.11.2001. All the petitioners qualified in the written examination. A writ petition No,. 32799 of 2001 between Ashok Kumar Vs. State of U.P. was filed challenging the constitution of selection committee for filling up the posts in Government Press in which interim order was passed on 9.10.2001, restraining the respondents to proceed with selections. Subsequently by order dated 3.1.2002 it was clarified that the stay order dated 9.10.2001 was limited for the posts of typist in Government Press and did not operate with regard to other posts. All the petitioners were called for appearing in type test which was scheduled to be held on 5/6.12.2001. In the communication calling petitioners for type test, it was clarified that the candidates who will appear in typing/Stenography test, will nevertheless be included for consideration for the post in which the knowledge of typist was not necessary and will be considered on their merit position. Petitioner No. 3 and 4 in writ petition No. 19045 of 2003 appeared in type test. The remaining petitioners in this writ petition did not appear. The petitioners in both the writ petitions No. 19045 of 2003 and No. 19367 of 2003 did not participate in type test.

4. The entire selection process was stopped on account of a Radiogram of 21.2.2001, issued by the Government Order dated 29.4.2002, in pursuance of the undertaking given on behalf of State Government and thereafter under the order of the Apex Court in Writ Petition No. 488 of 2001, between Akhil Bharat Varshiya Chhatra Yuva Berojgar Front Vs. State of U.P. and others. Thereafter by U.P. Act No. 1 of 2002, the amendments providing for reservations to most backward classes were deleted. A number of writ petitions were filed before this Court for concluding the selection process. In writ petition No. 31852 of 2002 between Ajit Kumar Singh Vs. State of U.P. while allowing writ petitions on 4.10.2002 a direction was issued to complete the selection process. A Special Appeal against the said judgment was filed before the Supreme Court on 7.2.2003 which was withdrawn for availing remedy of Special Appeal. A Special Appeal No. 120 of 2003 filed thereafter is still pending. In pursuance of the statement given in contempt petition No. 502 of 2003 the State Government issued a Radiogram dated 5.4..2003 for completing the selection process. Even though the selections for 54 posts of Junior Clerks in Government Press was stopped, the result was declared for 52 posts. When these writ petitions were filed, the Court noticed that there are 8 petitioners in writ petition No. 18791 of 2003, and 19045 of 2003, and a direction was issued that the eight candidates who stand at bottom, of the select list shall not be offered appointment. It was made clear that the Court is not interfering in the selection process. Learned Standing Counsel requested for time to file counter affidavit, which was extended on 7.5.2003, 22.5.2003 and thereafter on 7.8.2003. Since it is a matter arising out of Allahabad, this Court took strong exception for further extension of time and imposed cost of Rs.5,000/- to adjourn the case which was deposited on 13.8.2003. At this stage it is pertinent to state that on 22.5.2003 when all these

matters were taken up Sri H.P. Upadhyay, Additional Standing Counsel prayed for further time for filing counter affidavit. On a request made by counsel for petitioner to stay the appointment, following order was passed by this Court on 22.5.2003:

"*Inspite of time granted no counter affidavit has been filed. Sri H.P. Upadhyay, Additional Standing Counsel prays for and is granted three weeks further time to file counter affidavit. List all these connected cases on 15.7.2003.*

Sri Upadhyay states that on account of modernization of the Government Press and in order to accommodate retrenched employees the department is considering the number of appointments to be made and that no appointment shall be made until the next date of hearing. In view of the aforesaid statement, no interim order is required to be passed in these matters. List on 15.7.2003."

5. It appears that inspite of the aforesaid assurance given to this Court, respondents offered appointment to the candidates out of the select list, leaving only 8 posts. Since these appointment letters were issued against an assurance given by the respondents to this Court, and were made during the pendency of the writ petition, the Court did not consider it proper to implead all the appointees to decide the rights of petitioners, and has proceeded to decide the case in absence of these appointees.

6. Counter affidavits have been filed. All the counsels agreed that no rejoinder affidavits are required to be submitted, and have addressed the court on merits. With the consent of all the parties under the Rules of the Court these writ petitions are being decided at this stage.

7. These selections are regulated by the U.P. (Outside the Purview of U.P. Public Service Commission) Procedure for Direct Recruitment to Group-C Posts, Rules, 2001 (in short Rules, 2001). Rule 6-A provides that a examination will be held for selection for 150 marks and the select list of the candidates shall be prepared in accordance with the procedure provided under sub rule (9)(b) & (c). Sub Rule (a) provides that an objective, written test of one paper consisting of general Hindi, general knowledge and general studies will be taken. 90% marks of the total number of marks will be given to the candidates except for those posts in which typing or stenography and typing is the essential condition for appointments and in other case candidates will be given 70% of the marks in the written examination. Where any physical standards have been provided for the posts, the candidates shall be subject to the physical test after the written examination, from amongst the candidates who fulfilled minimum physical standards. Sub Rule (c) provides that those posts for which typing, stenography and typing is essential condition, the selected candidates shall be required to appear in type test, or stenography and type test as the case may be and 20% of the marks obtained in such type test shall be given to the candidates who have achieved minimum speed. The ratio of candidates to be called for type test or stenography and type test shall be 4/1, provide in these selection every candidate applied for all the vacancies. At the time of application the candidate will be required to give only first

preference to the vacancies, to be addressed to the Chairman of the Selection Committee. After the declaration of result the candidates can give their preferences to the Chairman of the Selection Committee.

8. In the counter affidavit of Sri Bhav Nath, Chairman District Selection Committee/Chief Development Officer, Allahabad, it is stated that the selections were held under the aforesaid rules. The categories of posts available in group-C in which typist, stenographers and the posts for which knowledge of typing is not required were clubbed together. Apart from the Application form, a column was also provided in the answer books requiring the candidates to state whether they know typing/ shorthand. Those candidates who gave the aforesaid information, were, according to preference given by them in the application, were classified and were required to appear in the typing/stenography test. All the petitioners disclosed in their application forms as well as in answer books that they knew typing. The requisite number of candidates were called for typing test. The petitioners appeared in type test and did not succeed. The rest of them did not appear. As against 42 posts of Junior Clerks, out of the select list, 19 candidates have been given appointments. Since the petitioners had disclosed that they were proficient in typing and they either did not appear and failed in type test, were not included in the select list.

9. Sri Ashok Khare appearing for all the petitioners submit that there were two categories of posts. Whereas the post of Junior Clerks did not require proficiency in typing, the post of stenographer required knowledge of typing and stenography. The petitioners were given option to apply for all the posts. They also gave information in both the application and the answer book that they were proficient in typing, but some of the petitioners did not chose to appear in type test. Petitioners 3 and 4 in writ petition No. 18791 of 2003 appeared, but did not qualify. They, however, were not disentitled to be considered for the post of Junior Clerk for which typing was not the essential qualification. He submits that both under the rules, namely, rules 6 (c) and 8, as well as in the call letter for type test, it was clearly mentioned that those who did not appear in type test ,or did not qualify will not be made illegible to be considered for the post of Junior Clerk, and that the selection for Junior Clerk shall be made according to merit position in the examination. The respondents, therefore, acted arbitrarily in excluding the petitioners for consideration only for the post of Junior Clerk, on the ground that they either failed or did not appear in type test. He further submits that respondents have committed contempt of the orders of this Court and assurances given to this Court in giving 19 appointments. They have shown disrespect to the Court and that the Chairman of Selection Committee and the Joint Director of the Government are guilty of contempt. He also submits that action should be taken against Chairman of Selection Committee who has deliberately and purposely acted against the rules.

10. In writ petition No. 18791 of 2003, Petitioner No.5 belongs to category of dependent of freedom fighter and in No. 20213 of 2003, petitioner claims to be candidate seeking reservation for

physically handicapped candidates. Petitioner, it is alleged, is physically disabled in the right leg, limb by 50% and is entitled to be considered for a quota of physically handicapped candidate suffering from disability provided under U.P. Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Serviceman) Act, 1993 as amended in 1997. They submits that the reservation has been provided under the aforesaid Act in all government service and that the State Government has also notified the posts of clerks for reservation for physically handicapped. The petitioner should have been considered under the said quota.

11. In the counter affidavit of Sri Bhav Nath, Chairman, District Selection Committee/Chief Development Officer, Allahabad, it is stated in paragraph 3 that after the amendment on the reservation Act the reservation for certain categories including dependents of Freedom Fighters/Physically Handicapped/Women has been given up and in paragraph 5 it has been stated that under the Government Order dated 12.4.2003 physically handicapped have not been given quota in the select list.

12. In writ petition No. 20150 of 2003, the writ petition as for petitioner no. 2 has been dismissed with liberty to file fresh writ petition. It is, therefore, confined only to Anil Kumar Roy, petitioner no. 1 who is in the same category as petitioners in the first three writ petitions and had applied for all the posts. He did appear for type test and had been deprived for being considered from the post of Junior Clerk only on the ground that he had mentioned in the application and answer book that he was proficient in typing. Sri Ramendra Asthana appearing for petitioner submits that the eligibility condition cannot be changed during recruitment process. He has relied upon the Judgment of Supreme Court in **Gopal Krishna Rathi Vs. M.A.A. Beg and others** (1999(1) SCC 544 and **State of Madhya Pradesh Vs. Raghubir Singh Yadav** (1994(3),UPLBEC 1849). In this case also a counter affidavit of Sri Bhav Nath, it has been disclosed that petitioner did not have knowledge of typing and since he did not qualify in type test he was taken out of the selection process. In paragraph 19, it has been stated that in Government Press, the number of vacancies were reduced from 54 to 42, and thus select list of only 42 candidates was declared.

13. The selections in the present case were held under Rules of 2001, notified on 20.8.2001. The advertisement dated 29.8.2001 published by Chief Development Officer/Chairman, District Selection Committee (Group-C), at Sl. No. 19, for Allahabad invited applications for 54 posts of Junior Clerks, 14 posts of Typist and 8 posts of Apprentice Clerk for Printing and Stationary, Allahabad. The Appointing Authority for these posts is Joint Director, Government Press, Allahabad. The eligibility for the post of Junior Clerk is Intermediate. The column of special eligibility/other condition in front of Junior Clerk was left blank. The post of Clerks, however, required minimum qualification as intermediate, and knowledge of typing with a speed of 25 words per minute as special eligibility/condition. For Apprentice Clerk same qualification was required as in the case of typist. All the petitioners applied for all the three categories of posts, and

disclosed in their application form that they were proficient in Hindi typing. The Rules, 2001 provided in rule 6 (6) that the examination of selection shall constitute 150 marks and the select list shall be prepared in a manner that 90% of the marks shall be determined on the basis of objective type written examination in General Hindi, General knowledge and General Studies. Except those applicants who are required to be selected on a post for which the typing or stenography and typing is essential condition of eligibility, and in such cases 75% marks shall be provided for written examination. A proviso to Rule 6 provides that where any standard of physical ability are provided as essential condition of recruitment, the written examination shall be held only after such candidates are subjected to all the prescribed minimum standard of physical ability. Rule 6 (6)(c) provided that those posts for which typing and stenography and knowledge in typing is essential condition, the candidates shall be subjected to type or stenography and type as the case may be, test for typing. 20% of the marks shall be given to those candidates who are efficient in typing with minimum speed. The number of candidates to be called for type or stenography test shall be 4/1 and for this purpose a select list shall be prepared separately taking into account the rules for reservation. Sub rule 8 provides that in these selections every candidates should be at liberty to apply for all the vacancies for which the selection is being made by the selection committee. At the time of application, the applicants will be required to give their first preference in the application form which shall be addressed to selection committee. After the declaration of result the successful candidates shall give their preference to other posts as well. The application form required the applicants to disclose whether they have knowledge of typing, in column 7 (ka), and whether they have knowledge of stenography and typing in column 7 (kha). In the answer sheet of objective test also, a special column was provided to give information by marking in affirmative whether the candidate knows typing or shorthand and typing as the case may be. Petitioners were declared successful in the written test. Some of the petitioners, as detailed above, appeared in the type test. All of them have not been selected on the ground that they had disclosed in their application form as well as examination test paper form that they are proficient in typing, but they either failed or did not appear in the type test. All the petitioners were, therefore, not considered for the post of Junior Clerks for which a knowledge of typing was not required. In the counter affidavit of Sri Bhav Nath, Chairman, District Selection Committee/Chief Development Officer, Allahabad, it is stated that petitioners gave false information in their form, and in the answer book that they had knowledge of typing. Only those candidates who had given this information were allowed to appear in the type test. Those who have not filled up these columns were considered for the post of Junior Clerks.

14. The question to be considered in these writ petitions is whether a candidates who applied for all the three categories of posts and disclosed in his application form as well as examination/test paper form that he had knowledge of typing as essential qualification for being considered for the post of Junior Clerk for which the knowledge of typing was not required. A

answer to this question can be easily found in Rule 6 (6) and (8) of the Rules of 2001. Rule 6 (8) clearly gives an option to the candidates to apply for all categories of posts by giving their first preference in his application form. His other preference is required to be given only after the examination was declared. Sub Rule 6 provided for break up of percentage of marks out of 150 marks and those who appeared for the post in which the knowledge of typing or stenography and typing was required. The fact that the petitioners filled up column 7 (ka) and the examination/test paper by giving information that they had knowledge of typing, were not disqualify from consideration for the post of Assistant Clerk on the basis of the marks secured by them in the written examination. Interviews are not provided under the rules. The selection is based only upon the result of the written examination and type test or stenography and type test as the case may be, for particular post. 10% marks is provided for retrenched employees in accordance with Rule 6(6) (kha). A plain reading of rule 6 of the Rules, 2001 shows that those candidates who disclosed that they had knowledge of typing and thereafter either failed or did not appear in the type test could not be disqualified for the post of Assistant Clerk. There was no difficulty in preparing the list for the post of Assistant Clerk and typist on the basis of marks obtained by them in the written examination. The respondents, therefore, committed gross error in refusing to consider petitioners for the post of Assistant Clerks on the basis of their merit in the written objective examination. In the counter affidavit it has already been submitted that some of the candidates did not give preference for the post/department/office and that thus all of them were allowed to appear in the examination.

15. The objection taken in the counter affidavit cannot be sustained. The District Selection Committee acted arbitrary and in violation of the rules, in preparing the list. The Court does not find that the task of preparing list was so difficult, which disqualified petitioners to be considered for the post of Assistant Clerks. A matter of convenience in preparing select list can not be a ground for considering petitioners for junior clerks in which typing was not a special condition. In the written test taken under statutory rules, the respondents could not ignore the candidature or disqualify those who were eligible for the post to which they had applied.

16. The stand taken by the Chairman, District Selection Committee with regard to reservation of physically handicapped, dependents of freedom fighters and women is in ignorance of law. Reservation of freedom fighters, physically handicapped, and ex-serviceman as horizontal reservation (inter-locking reservation) is provided in each category of vertical reservation, provided under U.P. Public (Reservation for Physically Handicapped) Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended in 1997 which is still in force.

17. By a Government Order dated 7th May, 1999, the State Government has identified those posts for which reservation is to be provided for physically handicapped persons under section 32 of the Act. In Group-C posts item no. 46 relates to Junior Clerks for

which in case the physical requirements, and categories of disabilities are provided, in which O.L., i.e. one leg affected, is included. With this reservation applicable to the post of Assistant Clerk, the petitioner Sri Neeraj Kumar Pandey who claims to be physically handicapped could not have been denied consideration for horizontal reservation in his own category. Annexure-4 is certificate issued to him by Orthopedic Surgeon and counter-signed by the Chief Medical Officer which shows that he has disability on right lower limb by fifty percent (PPRP).

18. Interim orders were passed by this Court not to give appointment to the last eight selected candidates. The vacancies were reduced from 54 to 42 for the junior clerks and it is stated that last eight candidates have not been given appointment. The Court is thus left to decide the validity of appointment of 36 junior clerks out of the select list prepared by the District Selection Committee. This Court did not grant interim order as the matter related to Allahabad itself and it was expected that the counter affidavit may be filed on 7.8.2003. Inspite of a statement given by Sri H.P. Upadhyay, learned Additional Chief Standing Counsel, on 22.5.2002 no appointment were to be made until next date of hearing, but still the appointment letters were issued. The respondents have, therefore, breached the assurance given by learned Additional Chief Standing Counsel to this Court. The matter was subjudice, and almost all the affected persons had knowledge of the proceedings. The appointment letters were, therefore, illegally issued and cannot defeat petitioners right on the ground that the selected persons have not been impleaded.

19. In the facts and circumstances of the case, all the writ petitions are allowed. It is held that the respondents have illegally and arbitrarily refused to consider petitioners for the post of Assistant Clerk in Government Press advertised vide advertisement dated 30.8.2001 published in Dainik Jagran, Allahabad. All the petitioners and similarly situate candidates, are entitled to be considered for the post of junior clerks irrespective of the fact whether they disclosed that they had knowledge of typing. All appointments made out of select list are quashed. Respondents are directed to rearrange the select list in accordance with Rules 2001, as well as directions issued in this judgement, and to prepare a fresh select list and to offer appointment strictly in accordance with law. In writ petition Nos. 18791 of 2003 and No. 20213 of 2002, petitioners is held entitled to be considered for reservation as dependent of freedom fighter and physically handicapped post for the post of Assistant clerk and shall be considered accordingly. The costs are quantified at Rs. 5,000/- to be paid by the respondents.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 1900 of 1994

Amar Nath ...Petitioner
Versus
District Inspector of Schools, Deoria and another ...Respondents

Counsel for the Petitioner:
Sri S.N. Shukla

Counsel for the Respondents:
Sri R.C. Dwivedi
Sri K.M. Shahi
S.C.

Constitution of India-Article 226-Service law-appointment-Asstt. Clerks appointed by Management without advertisement-financial approval denied-Vacancy fall under promotion quota-D.I.O.S. rightly denied the approval-Direct appointment must under promotion quota not proper.

Held- Para 8

Writ petition filed by the petitioner claiming appointment on direct recruitment for a post under promotion quota was not maintainable as the vacancy in question was to be filled-up by way of promotion the District Inspector of Schools has not accorded approval to the appointment of the petitioner and he is not entitled to the salary from the District Inspector of Schools.

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

1. Heard Sri S.N. Shukla, learned counsel for the petitioner at length.

2. The petitioner was appointed as an Assistant Clerk in Lala Karam Chand Thapar Inter College, Deoria by the Committee of Management vide resolution-dated 26.11.92, which has been appended as Annexure-1 to the writ petition. He submits that there was no advertisement issued by the respondents for the appointment of the petitioner on the post in question. Vide Annexure-2 the D.I.O.S. had made certain queries regarding sanctioned strength of the post of Clerk in the college in question. According to the D.I.O.S. the appointment of the petitioner was not in accordance with law and he did not accord financial approval to his appointment.

3. The contention of the petitioner is that vide Annexure-8 the D.I.O.S. had granted approval to the appointment of one Bhatrendu Sharma but this letter is silent about the petitioner. He also contends that there is no provision for making appointment on the post of Class III and class IV posts in Intermediate College. The standing counsel submits that the Committee of Management has passed the resolution without any authority of law for filling up the vacancy and that the vacancy has to be filled up by way of 50% promotion amongst the senior most class IV employee. It is contended by the learned Standing counsel that the petitioner has no claim for payment of salary and it can not be released in his favour as the appointment of the petitioner was neither in accordance with law nor financial sanction was granted to him by the D.I.O.S.

4. Learned counsel for the petitioner was given an opportunity to file an affidavit annexing therewith copy of the advertisement for the post in question. The petitioner has not filed copy of the advertisement. Referring to annexure 1 to the Writ Petition, it is submitted that in meeting dated 26.11.92 it was resolved that Petitioner may be appointed in place of Gorakh Nath Verma and approval for financial sanction may be taken from District Inspector of Schools. This resolution is signed only by Sri B.L. Rai alleged to be Chairman but it does not show who were the members of the committee of management who had

attended meeting dated 26.11.92 and other person except B.L. Rai is signatory of said resolution. Annexure-2 is the appointment letter of the petitioner dated 27.11.92 said to have been issued in pursuance of resolution by the Committee of Management dated 26.11.92, appointing the petitioner on the post of Assistant Clerk on ad-hoc basis. According to the letter dated 1.12.1992 annexure 3 to the petition it appears that the petitioner joined as Assistant Clerk and by letter dated 21.12.1992 (Annexure 4 to the writ petition) the Manager had requested the District Inspector of Schools for grant of financial approval to the appointment of petitioner, Amar Nath.

5. The counsel for the petitioner submits that annexure-5 is the representation filed by the petitioner before the District Inspector of Schools Deoria in which he has requested the District Inspector of Schools to accord financial approval to the appointment of the petitioner.

6. A perusal of letter dated 9.2.1993 and Annexure no.7 to the writ petition sent by District Inspector of Schools, Deoria to the manager of the institution shows that a query was made by the District Inspector of Schools from the management of the college as to how the appointment of the petitioner had been made as there was no post of clerk vacant for being filled up by direct recruitment on the date of the resolution. Letter dated 9.2.1993 is as under:

"आपके पत्रांक ३७८६/९२-९३ दिनाँक २१.१२.९२ तथा पत्रांक ३७८७/९२-९३ द्वारा सं० कर्णिक पदों पर की गयी तदर्थ नियुक्तियों पर वित्तीय सहमति निम्न आपत्तियों के कारण दिया जाना सम्भव नहीं है कृपया आपत्तियों का निराकरण करें ताकि निस्तारण किया जा सके ।

१. आपके विद्यालय में प्रस्ताव तिथि को स० लिपिक का पद रिक्त नहीं है फिर किस प्रकार से श्री अमर नाथ एवं श्री भरतेन्द्र जी शर्मा की नियुक्ति की गयी ।

२. शिक्षणेत्तर कर्मचारियों के भविष्य में लेने वाली रिक्ति पर ५०% कोटे के अर्न्तगत चतुर्थ वर्गीय कर्मचारियों के प्रोन्नति पर विचार किया जाना चाहिए था जो नहीं किया गया है ।

अतः भविष्य में होने वाली रिक्तियों पर रिक्ति तिथि के पश्चात उपर्युक्त बिन्दुओं पर विचार करते हुए प्रकरण प्रेषित करें।

भवदीय
महेन्द्र सिंह
जिला विद्यालय निरीक्षक, देवरिया ।"

7. By Annexure 8 to the writ petition the financial sanction was given to the appointment of Bhartendu Ji Sharma.

8. From the counter affidavit filed on behalf of the District Inspector of Schools it appears that the petitioner could not have been granted financial sanction due to reason that the vacancy on which he was claiming appointment as direct recruitment was to be filled-up by way of promotion from eligible class IV employees. Attention of the Court has also been drawn to paragraph 3 of the counter affidavit by the Standing Counsel in which it has been stated that one Sri Kuber Chauhan has already filed writ petition No. 28083 of 1995 and the writ petition filed by the petitioner claiming appointment on direct recruitment for a post under promotion quota was not maintainable as the vacancy in question was to be filled-up by way of promotion the District Inspector of Schools has not accorded approval to the appointment of the petitioner and he is not entitled to the salary from the District Inspector of Schools.

9. Admittedly appointment of the petitioner having been made by the worked since 1992 cannot be left in a lurch without payment. It appeals to reason and justice that one who has appointed him should pay his salary. The committee of management had appointed the petitioner it is responsible for payment of salary to him. It is also been apparent from the resolution dated 26.11.1992 (Annexure no.1 to the writ petition) and letter of appointment dated 27.11.1992 (Annexure no.2 to the writ petition) that payment of salary of the petitioner by District Inspector of Schools was subject to approval of financial sanction by the District Inspector of School, which has not accorded by him from the record.

10. It appears that the petitioner's appointment was fraudulent and dehors the rules. Such appointment can not give any right to the petitioner to claim salary from the District Inspector of Schools. At best the petitioner can claim salary from the committee of management which had appointed him.

11. In view of facts and circumstances of the case the writ petition has no force and it is liable to be dismissed.

12. For the reasons stated above, it is not a fit case for interference by this Court under article 226 of the Constitution of India. The writ petition fails and is dismissed. It is however, provided that the petitioner may claim his salary for the period he had worked from the Committee of Management of the institution.

No order as costs.

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committee of management and having

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 5.8.2003

BEFORE
THE HON'BLE U.S. TRIPATHI, J.
THE HON'BLE D.P. GUPTA, J.

Criminal Appeal No. 1850 of 1981

Lokendar and others ...Appellants (In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.S. Chaturvedi
Sri Sanjai Srivastava
Sri S.K. Chaturvedi
Sri S.S. Chauhan
Sri Lalji Sahai Srivastava

Counsel for the Opposite Party:
Sri Mohan Chandra
Sri Ghanshyam Joshi
A.G.A.

Indian Panel Code 1860-circumstantial evidence- Section 302, 148, 149 & 147-13 accused convicted and sentenced-against judgment/order appeal filed-prosecution contended spear and fire arms injury-Medical Report denied such injury-Enemity and parti bandi provided-No independent witness–no evidence adduced in defence-conviction can not sustain-appeal allowed.

Held- para 33 and 34

After careful scrutiny of the evidence of the eye-witnesses we find that the prosecution has proved involvement of the appellants Jagdish, Pyare, Hakim, Nathi, Govind, Radhey Shyam and Salig Ram in the murder of the deceased in prosecution of common object of their unlawful assembly.

From above discussion, we find that the conviction recorded and sentences awarded by the trial court against the appellants, Lokendra, Charan Singh, Ramesh, Shyam Singh, Ram Babu and Bachchu Singh cannot be upheld.

(Delivered by Hon'ble D. P. Gupta, J.)

1. By the judgement and order dated 19th August, 1981, IXth Additional Sessions Judge, Agra, in Sessions Trial No. 232 of 1980: State Vs. Lokendra and 12 others, under Sections 302, 148, 149 and 147 IPC, PS Donki, district Agra, convicted and sentenced the accused appellants Jagdish, Nathi, Govind and Radheyshyam, each to undergo one year's RI for offence punishable under Section 147 IPC and accused appellants Lokendra, Charan Singh, Ramesh, Shyam Singh, Ram Babu, Bachchu Singh, Salig Ram, Pyare Lal and Hakim Singh, each to undergo two years' RI for offence punishable under Section 148. All the 13 accused-appellants were further convicted and sentenced to undergo imprisonment for life for offence punishable under Section 302 read with Section 149 IPC. All the sentences so awarded were to run concurrently.

2. The facts giving rise to this appeal can be narrated in brief as under:

3. PW 6 Mahabir Singh and his brother deceased Rajvir Singh and all the accused appellants were residents of the village Gurha, P.S. Donki, District Agra. In the year 1963 one Devi Singh of village Gurha was murdered. In that murder case Bhanwar Singh, father of the deceased Rajvir Singh and PW 6 Mahaveer Singh along with Sarnam Singh, Mohar Singh, Sobaran Singh and Diwan Singh were the accused. Bhanwar Singh had absconded and could not be tried. The remaining four persons i.e. Sarnam Singh, Mohar Singh, Sobaran Singh and Diwan Singh were convicted and sentenced to different terms of imprisonment in the year 1966-67. The appeals of Sarnam Singh and Mohar Singh were allowed by the High Court. The conviction of Diwan Singh and Sobaran Singh were maintained and they came out of the jail in the year 1975 after undergoing their sentences. Sarnam Singh was the brother of Harnam Singh, and both were sons of Mohar Singh. Diwan Singh is PW 7 in the present case. Sobaran Singh was the real brother of Diwan Singh. Rajvir Singh, deceased, was the real nephew of Diwan Singh and Sobaran Singh. Accused-appellants were also inter-related. The accused-appellant Salig Ram and Lokender were the brothers and sons of Roshan Singh. Bhagwan Singh, father of appellant Ramesh, Joti Ram, father of appellant Govind, Pyarelal appellant, brother of appellant Hakim were the witnesses in Devi Singh's murder case against Mohar Singh, Sobaran Singh, Sarnam Singh, Diwan Singh and Bhanwar Singh, the father of the deceased. All the accused belonged to one group.

4. In the murder case of Devi Singh, Bhanwar Singh, the father of the deceased Rajvir Singh was declared an absconder and his agricultural land was auctioned which was purchased by the accused-appellant Salig Ram and his father Roshan Singh. There was some dispute about the crop of this land between Roshan Singh and his sons Salig Ram and Lokender, on the one hand, and Rajvir, deceased, and his family members, on the other. Prior to the occurrence of this case,

this agricultural land was given on *'batai'* to deceased Rajvir and his brother PW 6 Mahabir Singh. The crop sown by the deceased and his brother was forcibly harvested by Roshan Singh about a fortnight from before the date of occurrence. Further, on 30.10.1979 Rajvir Singh, deceased, his brother, Mahabir Singh (PW 6), Harnam Singh (PW 2) and one Suresh were beaten by the accused-appellants Lokender, Bachchu Singh, Charan Singh, Shyam Singh, Nathi, Hakim, Ram Babu, Radhey Shyam and Roshan Singh, father of the accused appellant Lokendera and Salig Ram. A report of this incident was lodged with the police of PS Donki, District Agra.

5. On 11.2.1980 at about 2.30 p.m. Rajvir Singh, deceased, was going back to his house from his field after collecting some green fodder. When he reached in front of house of Roshan Singh, all the thirteen accused-appellants, named above, surrounded him. The accused-appellant Salig Ram was carrying a country-made pistol. Pyare and Hakim were armed with '*pharsa'*. Nathi, Jagdish, Govind and Radhey Shyam were armed with *lathis'*. The rest of the appellants, namely, Lokendera, Charan Singh, Ramesh, Shyam Singh, Ram Babu and Bachchu Singh were armed with spears. Salig Ram exhorted his companions to kill the deceased Rajvir Singh and fired. Thereupon, the remaining 12 appellants started beating the deceased with their respective weapons. Hue and cry attracted the attention of PW 2 Harnam Singh, PW 6 Mahabir Singh, Pw 7 Diwan Singh, Jaswant Singh and Sarnam Singh who were sitting at the Chabutara of PW 2 Harnam Singh, at a distance of 40 to 50 steps from the place of occurrence. These witnesses rushed towards the place of occurrence and saw the entire incident. Accused-appellants left the place of occurrence after inflicting injuries on the person of Rajvir.

6. The condition of Rajvir was serious. He was immediately taken on a charpai to the police station Donki, which was at a distance of 2 kms from the place of occurrence. A written report, Ext. Ka-3, was lodged by PW 6, Mahabir Singh. A case at Crime No. 23 of 1980 was registered under Sections 147, 148, 149, 307 IPC against the appellants on 11.2.1980 at 4 p.m. by Head Constable Ram Dayal (PW 9). The injured was conscious and was capable of giving statement. The Investigating Officer, SI Sobaran Sinbgh (PW 11) who was present at the police station, immediately took up the investigation and recorded the statement of the injured, copy of which is Ext. Ka-13. The condition of the injured further deteriorated. So, he was sent to Fatehabad Hospital, which was about 8 miles from the police station. On 11.2.1980 at 4.50 p.m. PW 1 Dr. G. S. Katara examined the injuries of Rajvir and he found the following injuries on his person:-

(i) Incised wound about 1--" x 1/2" x bone deep on left fore arm above the wrist joint.

(ii) Incised wound about 3/4" x 1/2" x skin deep on right leg medially about 4" below the right knee joint.

(iii) Incised wound about 3/4" x 1/2" x skin deep on right leg medially about 4" below the right knee joint. Both injuries no. 2 and 3 were in front.

(iv) Incised wound about 3/4" x 1/2" x skin deep on the front side of left leg.

(v) Contusion 1---- " x 2" with swelling on the front side of left knee joint.

(vi) Lacerated wound about 1" x 1/2" x bone deep on left hand thumb.
(vii) Contusion about 4" x 2" with swelling on left thigh laterally.
(viii) Contusion about 2" x 1" with swelling on left wrist joint anteriorly (in front).
(ix) Contusion about 2" x 1" with swelling on the back of left forearm.
(x) Lacerated wound about 1" x 1/2" x skin deep on right hand thumb between thumb and index finger.
(xi) Contusion 2" x 1" with swelling on right thigh front.
(xii) Lacerated would about 2" x 1/2" skin deep on right forearm medially.
(xiii) Contusion x" x 1" with swelling on the back of right hand.
(xvi) Lacerated wound about 3/4" x 1/2" x skin deep on right leg front about 12" below the knee joint.
(xv) Contusion about 3" x 2" with swelling on right ankle joint medially.
(xvi) Contusion 3" x 2" with swelling on right ankle joint laterally.
(xvii) Contusion 3/4" x 1/2" with swelling on left hand back.
(xviii) Lacerated wound about 3/4" x 1/2" x bone deep on the back of left elbow joint.
(xix) Contusion about 2" x 1" with swelling on right hand posteriorly.
(xx) Lacerated wound about 3/4" x 1/2" x skin deep on left hand index finger anteriorly.
(xxi) Lacerated wound about 3/4" x 1/2" x skin deep on left hand middle finger anteriorly.
(xxii) Lacerated wound about 3/4" x 1/2" x skin deep on left hand ring finger anteriorly.
(xxiii) Lacerated wound about 3/4" x 1/2" x skin deep on left hand little finger.
(xxiv) Lacerated wound about 1" x 1/2" x skin deep on right hand ring finger.
(xxv) Lacerated wound about 3/4" x 1/2" x skin deep on right hand little finger.
(xxvi) Lacerated wound about 3/4" x 1/2" x skin deep on right hand index finger.
(xxvii)Lacerated wound about 1" x 1/2" x skin deep on right hand palm.

7. The injuries were described as fresh. Injuries Nos. 1, 2, 3 and 4 were of some sharp edged weapon and the remaining were of blunt weapon. Rajvir complained of pain in the abdominal region but no mark of injury was found there by the doctor. X-ray of abdomen and renal area was advised.

8. Rajvir succumbed to his injuries at about 11.50 p.m. in the same night in Fatehabad PHC. His body was sent to the District Hospital for post-mortem examination, which was conducted by Dr. L.N. Sharma (PW 5) on 12.2.1980 at about 3.30 p.m. The age of the deceased was about 22 years. He found the following ante-mortem injuries on the body of the deceased:

1. Stitched wound on all the fingers of the left hand, except little finger in the area of 1/2" x 2".
2. Stitched wound one and a half inch in length on the backside of the left forearm.
3. Stitched wound 1/2" in length on back of left hand.
4. Abrasion 1" x 1/2" on back of left elbow.
5. Stitched wound on all the fingers of left hand measuring 1/4" to 3/4".
6. Stitched wound on the left thigh in the front side.
7. Stitched wound 1" in left chest below injury no. 6.
8. Abrasion 1/2" x 1/2" just below injury no. 7.

9. Stitched wound 1/2" in length on the front side of the left leg.
10. Abrasion 1" x 1/2" on the left patela front side.

9. On internal examination the doctor found fracture of left patela bone and left index finger. Both chambers of the heart were empty. Whole body was pale in colour. Stomach contained four ounce watery fluid. Large and small intestines were empty. In the opinion of the doctor, death was caused due to shock and hemorrhage, as a result of ante-mortem injuries. All the injuries taken together were sufficient to cause death.

10. PW 11, Sobaran Singh, Sub-Inspector, Investigating Officer, recorded the statement of eye-witnesses and the injured Rajvir. He visited the place of occurrence and prepared the site-plan, which is exhibit Ka-4 and took simple and blood-stained earth from the place of occurrence. After the death of Rajvir injured, the case was converted under Section 302 IPC. Thereafter, investigation was taken up by PW 10, B. K. Tewari, Station Officer, P.S. Donki. He sent blood-stained earth and the clothes for chemical examination. The report of the chemical examiner and serologist are Exts Ka-16 and Ka-17, respectively. Blood-stained earth and clothes were found having human blood. After completing the investigation, charge-sheet was submitted against the appellants.

11. In the trial court, the prosecution examined Dr. G.S. Katara (PW 1), and the eye-witnesses Harnam Singh (PW 2), Mahaveer Singh (PW 6) and Diwan Singh (PW 7), and Constable Virendra Sharma (PW 3), who took the dead body in sealed condition with necessary papers for post-mortem, PW 4 constable Mahesh Chand, who took the injured Rajvir to PHC, Fatehabad, for medical examination with necessary papers, PW 5, Dr. Laxmi Narain Sharma, who conducted the post-mortem examination and submitted his report, PW 8 Gurdip Singh Sarna, who prepared the inquest report, on getting information about the death of the injured, Rajvir. PW 9, Head Constable Ram Dayal, who prepared chick report, Ext. Ka-7. On the basis of the written report of Mahavir, Ext. Ka-3, he made an entry in the GD, a true copy of which is Ext. Ka-8. PW 10 B.K. Tewari, who was the second Investigating Officer of this case and conducted the investigation from 12.2.1980 and submitted the charge-sheet. PW 11 Sobaran Singh, the first Investigating Officer of the case. Affidavit of Constable Behari Singh was filed, who took the sealed bundles containing sample of simple and blood-stained earth and clothes for chemical examination to Agra.

12. The accused appellants denied their participation and involvement in the crime. They stated that Bhanwar Singh, father of the deceased Rajvir, had been absconding after committing the murder of Devi Singh. The friends of the said Devi Singh were inimical with Bhanwar Singh and finding an opportunity they might have killed Rajvir Singh. They further stated that they have been roped in this case due to enmity.

13. No evidence in defence was adduced by the appellants.

14. After analysing the evidence of the prosecution, trial court found all the appellants guilty of the offences with which they were with charged and

convicted and sentenced them as mentioned above.

15. We have heard Sri G.S. Chaturvedi, Senior Counsel, and Sri Sanjai Srivastava, learned counsel for the appellants, learned AGA for the State and Sri Ghanshyam Joshi, learned counsel for the complainant, and have perused the entire on record.

16. It was contended on behalf of the appellants that there was no injury caused by the spears and fire-arms. There is no evidence of the involvement of the appellants, Lokendra, Charan Singh, Ramesh, Shyam Singh, Ram Babu, Bachchu Singh, who were assigned spears and Salig Ram, who was assigned country-made pistol. Further, it was contended that the incised wound injuries recorded by the doctor as injury nos. 1 to 4 could not be caused by 'pharsa' assigned to the appellants, Harnam Singh and Hakim Singh. Thus, there was no evidence against the appellants 1 to 6, 8, 9 and 13 regarding their involvement in the said crime. It was further argued that there was no injury on the vital part of the body of the deceased. No injury was sufficient in the ordinary course of nature to cause death and at the most the offence falls under Section 325 IPC. It was further contended that there was enmity between the parties. The witnesses were highly inimical, partisan and interested, and, therefore, their evidence could not be relied upon. Further it was contended that the investigation was not fair and was tainted. Lastly, it was contended that due to enmity the appellants were roped in the case.

17. Learned AGA supported the findings and the judgement of the trial court and contended that as there was 'partibandi' in the village, no independent witness could be available. Dr. Laxmi Narain Sharma, PW 5, had stated that the cumulative effect of the injuries was sufficient to cause death of the deceased.

18. The time, date and place of occurrence and cause of death were not seriously disputed by the appellants. PW 2 Harnam Singh, PW 6 Mahabir Singh and PW 7 Diwan Singh were the eye-witnesses. They stated that near the house of Roshan Singh on the 'kachcha' road, Rajvir was beaten by the appellants. It was about 2.30 p.m. on 11.2.1980. Rajvir was taken on a cot to police station which was at a distance of about 2 miles. There at 4 p.m. on the basis of the written report given by PW 6 Mahavir, who was the real brother of the deceased Rajvir, PW 9 Head Constable Ram Dayal recorded the chick report and made entry in the General Diary. PW 11 SI Sobaran Singh, the investigating officer of the case, reached on the spot and he took sample of simple and blood-stained earth from the 'kachcha' road near the house of Roshan Singh. PW 10 V.K. Tewari, the second investigating officer, sent the clothes of the deceased and sample of simple and blood-stained earth for chemical examination. As per the report of the chemical examiner and serologist, sample of earth and clothes contained human blood.

19. As per the statement of PW 5 Dr. Laxmi Narain Sharma, the cause of death of Rajvir was due to shock and hemorrhage caused by the ante-mortem injuries received by the deceased. PW 1 Dr. Ghanshyam Katara, who examined the injured (deceased) on 11.2.1980 at 4.50 p.m. stated that the injuries on the person of deceased could be caused on

11.2.1980 at about 2.30 p.m. by lathi and 'pharsa'. He stated that Rajvir died in the hospital on 11.2.1980 at about 11.50 p.m.

20. In the cross-examination of these witnesses nothing could be extracted by defence which could affect their veracity on the above aspects. Thus, from the evidence on record it stood proved beyond doubt that on 11.2.1980 at about 2.30 p.m. in village Gurha, P.S. Donki, District Agra, near the house of Roshan Singh on 'kachcha rasta' Rajvir Singh got injuries by lathies and weapons like pharsa and he died of the said injuries at about 11.50 p.m.

21. PW 6 Mahavir Singh stated that the occurrence took place at about 2.30 p.m. and he prepared the FIR and took the injured Rajvir on a cot immediately to the police station at 4 p.m. where the FIR was handed over. This was corroborated by PW 9 Ram Dayal, Head Constable, who recorded the chick report on the basis of written report given by PW 6 Mahabir Singh and made entry in the General Diary the same day at 4 p.m. The condition of the injured was deteriorating. He was sent for treatment and medical examination with PW 4 Constable Mahesh Chandra to the Fatehabad Primary Health Center, by Dr. G.S. Katara, PW 1, for examination at 4.50 p.m. Nothing could be brought in cross-examination of the witness which would indicate that chick FIR was not recorded at the police station on 11.2.1980 at 4 p.m. From the statements of the aforesaid witnesses, it stood proved that the chick FIR was recorded at the police station at 4 p.m. on 11.2.1980. Thus, the FIR was prompt.

22. In the FIR, there was mention that due to old enmity this crime was committed by the appellants. In the FIR, the nature of enmity was not disclosed. PW 2 Harnam Singh, PW 7 Diwan Singh and to some extent PW 6 Mahavir Singh, had given the details of the enmity. In 1963, one Devi Singh was murdered. In that murder case, Sarnam Singh, brother of PW 2 Harnam Singh and their father Mohar Singh, PW 7 Diwan Singh, Sobaran Singh and Bhanwar Singh, the father of PW 6 Mahavir Singh and the deceased Rajvir Singh were the accused. Against them, Bhagwan Singh, Pyare and Jyoti gave evidence and Bhanwar Singh, father of PW 6 Mahavir Singh and the deceased Rajvir Singh absconded and could not be brought to trial till today. Sarnam Singh, Mohar Singh, Sobaran Singh and Diwan Singh were convicted but on appeal Sanram Singh and Mohar Singh were acquitted while conviction of PW 7 Diwan Singh and Sobaran Singh were maintained and they came out of the jail in the year 1975 after serving out the sentences. PW 7 Diwan Singh was the real brother of Bhanwar Singh. The deceased Rajvir Singh and PW 6 Mahavir singh were the real nephews of PW 7 Diwan Singh.

23. The other enmity which was disclosed by the witness in their statement was that Bhanwar Singh, the father of PW 6 Mahavir singh and the deceased Rajvir Singh was absconding in the Devi Singh's murder case. His land was auctioned and that land was purchased by Roshan Lal. The land was given on 'batai' to PW 6 Mahavir Singh and the deceased Rajvir Singh. When crop was ready for harvesting, Roshan Lal and Lokendra, Salig Ram took forcible possession of the crop and did not pay a single paise to the

deceased Rajvir Singh and PW 6 Mahavir Singh. The another enmity, which was disclosed by these witnesses, was that on 30.10.1979 Lokendra, Bachchu Singh, Charan Singh, Shyam Singh, Natthi, Hakim, Ram Babu, Radhey, Shyam and Roshan committed 'marpeet' with PW 6 Mahavir, deceased Rajvir, Suresh and PW 2 Harnam Singh. The report of the incident was lodged at police station Donki, district Agra. A cross-case regarding this incident was also filed by the appellants. The appellant Lokendra and Salig Ram are the sons of Roshan. Appellant Charan Singh and Jagdish are the sons of Hisabi. Kanchan Singh is the real brother of Roshan and appellant Bachchu Singh is the son of Kanchan Singh. Appellant Shyam Singh, Charan Singh and Natthi belonged to the family of Roshan. The rest of the appellants belongs to their party. Thus, all the appellants were having enmity and 'partibandi' against the witnesses and the deceased Rajvir of the present case. Thus, there was enmity between the parties and in these circumstances, the argument of the learned counsel for the appellant has some weight that witness PW 2 Harnam Singh, PW 6 Mahavir Singh and PW 7 Diwan Singh could not be said to be independent witnesses and they were highly interested and partisan ones. It is well-settled proposition that enmity cuts both ways. This may be a motive to commit the crime and also a motive for false implication. Therefore, in these circumstances, when witnesses are highly interested and partisan a duty is cast upon the court to scrutinise the evidence of such witnesses very cautiously and with greater care.

24. Now we have to see whether the appellants were involved in the murder of Rajvir. For that, we have to analyse very carefully the statement of PW 2 Harnam Singh, PW 6 Mahavir Singh and PW 7 Diwan Singh, who were the eye-witnesses of the occurrence.

25. The house of Diwan Singh and Mahavir singh were in the north-eastern corner of the village while the place of occurrence was in the south-western corner of the village. The distance between them was about 200 yards. As per the FIR, deceased Rajvir went from his house to the fields for taking green fodder ('rijka') for the cattle. At the Chabutara of the house of Harnam Singh, PW 2 Harnam Singh himself, Sarnam Singh, his brother and PW 7 Diwan Singh and Jaswant Singh were sitting and were talking to each other. It was about 2.30 p.m. They heard the sound of a gunfire. They rushed towards the house of Roshan Singh and saw the appellants causing injuries on the deceased by their respective weapons on the exhortation of Salig Ram who also fired. The 'Chabutara' of Pw 2 Harnam singh was about 50 steps away from the 'kachcha rasta' where this occurrence took place and there was no obstruction in between. It was admitted by PW 7 Diwan Singh, PW 2 Harnam Singh and PW 6 Mahavir Singh that the houses of Sarnam Singh, Kishan Lal, Radhey Shyam, Charan Singh were there. Besides, there were 'nohra' of Kanchan Singh, Shiv Singh, Eidan Singh, Roshan Singh and Shyam Singh. PW 2 Harnam Singh and PW 6 Mahavir Singh, PW 7 Diwan Singh had supported the prosecution case on all the material points. PW 6 Mahavir Singh had given evasive reply regarding the murder case of Devi Singh, which took place in the year 1963. Age of this witness in 1963 would have been 7 or 8 years. It appears

that due to this fact PW 6 Mahavir Singh did not give straight replies to the questions of the defence. PW 7 Diwan Singh replied all questions put to him on behalf of the defence regarding the murder of Diwan Singh and other enmities. PW 2 Harnam Singh also replied all the questions regarding the murder case of Devi Singh. They did not hide anything. Harnam Singh admitted that against him the case under Section 324 IPC was pending. Harnam Singh, was ASI in Bharatpur and he retired from service in the year 1977. A suggestion was given to this witness that he fabricated a case under Section 363 IPC against Salig Ram, Hakim Singh and one Raghuvir when he was ASI and on complaint he was suspended and was compulsorily retired. In support of this suggestion, no evidence, oral or documentary, was given by the appellants. Thus, the attempt made on behalf of the appellants to show that even this witness was highly interested to get Salig Ram and Hakim Singh falsely implicated had failed. PW 7 Diwan Singh, was convicted in that murder case of Devi Singh. Diwan Singh is the uncle of the deceased Rajvir and PW 6 Mahavir. In the cross-examination, of the witness, nothing could be brought on record, which could show that he was not present on the spot or he did not see the occurrence. Certain statements given by this witness to the investigating officer under Section 161 Cr.P.C. were confronted. We have considered those contradictions and on marshalling it we find that those were not improvements made by the witness. The variation regarding the place from where the witnesses saw the incident is not material as the spot position, which had been given by the witness had not been challenged. The distance of the house of PW 2 Harnam Singh from the spot and the existence of *Chabutara* had not been challenged. The fact that from the *Chabutara* the place of occurrence was visible had also not been challenged. The presence of witnesses was also natural. PW 2, Harnam Singh, had stated that as usual these witnesses were sitting on the *Chabutara*. It was but natural as they belonged to one group. PW 7, Diwan Singh, had stated that in the village generally most of the people used to take their meals in the day before going to their fields. After taking meals, they were sitting at the *Chabutara* of Harnam singh and they were talking about the problems relating to diesel and other things. Thus, these witnesses had given the reason for their sitting at the *Chabutara*. These witnesses stated that they heard the sound of fire and exhortation made by Salig Ram, and also the cry of Rajvir Singh while they were sitting on the *Chabutara.* They rushed to the place of occurrence and by the time they reached to the spot, all the appellants were beating. It was argued that it was not clarified whether these witnesses saw exhortation and firing by Salig Ram and also the appellants causing injuries by their respective weapons to Rajvir from the *Chabutara* or on reaching the place of occurrence. At one time, these witnesses had said that they saw the incident from the *Chabutara*. At other time they said that they saw it when they reached the place of occurrence. We have carefully examined and analysed the statements of these three witnesses. Absolutely, there is no variation or difference in their statements. As we had already discussed above, there was no obstruction between the place of occurrence and the *Chabutara* and the distance was only about 50 steps. Therefore, both the statements taken

together will show that on hearing the sound of fire and cry they started witnessing the occurrence from the *Chabutara* itself and in the process of running towards the place of occurrence, they continued to see the occurrence.

26. The number of injuries on the persons of the deceased were very relevant. There were as many as 27 injuries on the person of the deceased. All the injuries were below the neck portion. This clearly indicates that when the deceased was attacked he tried to save himself by taking blows on his hands, arms and he tried to save his head. PW 6, Mahavir Singh, had stated that they rushed from the *Chabutara* shouting that they were coming. This is the reason why the appellants had to run away in haste and could not cause the injuries on the vital parts. The duration of occurrence was very short.

27. The question is whether all the 13 appellants were involved or not in the crime. PW 1, Dr. G.S. Katara, stated that there was no injury of spear on the person of deceased. If the spear was used as a lathi, then, blunt injuries could be caused, but if spear was used as a spear from the edged side, then the injuries, which were found on the person of the injured, could not be caused. As far as the injuries no. 1 to 4, were concerned, PW 1 had stated that out of these four injuries, injury nos. 2 and 4 were superficial, but all the four injuries could be caused by *pharsa.*

28. As we have detailed above, there was enmity between the parties. The possibility of room for exaggeration cannot be ruled out in the light of the evidence on the record. There was no injury caused by the spears. All the witnesses had said that all the appellants were causing injuries by their respective weapons i.e. lathi, pharsa and ballam. It was a day-light occurrence. If the ballam was used as a lathi, it could have been explained by witnesses. None of the witnesses had stated that ballam was used as a lathi. If we take the statement of PW 2 Harnam Singh, to be true that all the appellants were attacking the deceased with full force, certainly some injuries from ballam must have been caused. Therefore, if we view the statements of these three witnesses, that will show that due to enmity this probability could not be ruled out that the names of some of the appellants would have been wrongly added as assailants. Therefore, after careful scrutiny of the statements of these three witnesses, we find that the involvement of the appellants Lokendra, Charan Singh, Ramesh, Shyam Singh, Ram Babu and Bachchu Singh, who were shown to be armed with spears, is doubtful.

29. As far as the involvement of the appellant Salig Ram is concerned, it was argued that no pellets or cartridge was found on the site. It was stated by the witnesses that Salig Ram fired from the country-made pistol from a distance of about 2 yards, and on the exhortation of Salig Ram, the other appellants started beating Rajvir. We have given our careful consideration. In k*achcha* rasta recovery of pellets was impossible. It was not the case of the prosecution or there is no evidence on record that the second cartridge was loaded or fired. Therefore, if no empty cartridge was found, it will not show that Salig Ram was not involved. It is true that there is no injury caused by fire-arm. The case of Salig Ram differs from other appellants whose

involvement is found doubtful by us and benefit of doubt has been extended to them. The attention of the witnesses was attracted on hearing the exhortation and fire made by Salig Ram and cries of the deceased Rajvir. No other appellants shouted or exhorted. The presence and involvement of Salig Ram cannot be doubted.

30. In this case it was argued that investigation was not fair and was tainted. It was argued that the statement of injured Rajvir was said to have been recorded by the investigating officer at the police station on 11.2.1980 when the FIR was lodged at 4 p.m. The statement, which is very detailed one, containing minute details of the occurrence, could not be given by the deceased.

31. Therefore, such a detailed statement could not have been given by such serious injured witnesses at the police station at about 4 p.m. and this goes to show that the statement might have been prepared by investigating officer in detail at some later stage and it cannot be relied on as a dying declaration.

32. The evidence of the doctor was that the cumulative effect of the injuries was sufficient to cause death in the ordinary course of nature. Therefore, the argument that this could be a case under Section 325 IPC has no substance. If all the injuries are viewed collectively in the light of the statement of PW 5, it is clear that they were sufficient in the ordinary course of nature to cause death. The mere fact that the injuries were not caused on vital parts of the body and no injury was individually sufficient in the ordinary course of nature to cause death, would not exclude the application of clause (3) of Section 300 IPC. Therefore, the argument that the offence falls Section 325 IPC and not under Section 302 IPC has no substance.

33. After careful scrutiny of the evidence of the eye-witnesses we find that the prosecution has proved involvement of the appellants Jagdish, Pyare, Hakim, Nathi, Govind, Radhey Shyam and Salig Ram in the murder of the deceased in prosecution of common object of their unlawful assembly.

34. From above discussion, we find that the conviction recorded and sentences awarded by the trial court against the appellants, Lokendra, Charan Singh, Ramesh, Shyam Singh, Ram Babu and Bachchu Singh cannot be upheld.

35. In the result, the appeal is partly allowed. The appeal of Jagdish, Pyare, Hakim, Nathi, Govind, Radhey Shyam and Salig Ram is dismissed and the conviction and sentences awarded by the trial court against them are confirmed. They are on bail. Their bail bonds are cancelled. They shall surrender before the CJM concerned to serve out the sentence. Learned CJM shall issue a warrant of arrest and will sent them to jail to serve out the sentences.

36. The appeal of Lokendra, Charan Singh, Ramesh, Shyam Singh, Ram Babu and Bachchu Singh is allowed. Their conviction and sentences are set aside. They are on bail. They need not surrender. Their bail bonds are cancelled and surety discharged.

37. Office is directed to send a copy of this judgement and order to the CJM concerned for compliance and for

submitting the compliance report to the Court within one month of the receipt of the copy this judgement and order.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.09.2003

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

Criminal Misc. Application No. 1722 of 2003

Virendra Pawar ...Applicant
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Chandra Kesh Misra
Sri Daya Shankar Misra

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code 1973, Section 482-Abuse of the process of the court criminal proceedings-quashing of-separate trial for other accused-on the same evidence-resulted acquittal-hardly any chance for conviction of present applicant-held, no jurisdiction to continue the trail.

Held: Para 10

The above authorities are fully applicable on the fact of the present case as on the same evidence, the main accused and other co-accused have been found to be not guilty and acquitted for the charge. There is hardly any chance for conviction in respect of the present applicant. There would be no use permitting the present proceedings to continue.

(Delivered by Hon'ble K.N. Sinha, J.)

1. The present application under Section 482 Cr.P.C, has been filed for quashing of the proceeding of Criminal Case No. 3205/9 of 1999, under Sections 302/34 I.P.C, Police Station Kotwali, District Muzaffarnagar.

2. The brief facts giving rise to this application, are that the informant Sri Virendra Kumar lodged the report on 23.11.1998 at police station Kotwali, District Muzaffarnagar, which was registered as Case Crime No. 481 of 1998, under Section 302/34 I.P.C against the applicant and others. The F.I.R is annexure-1 to this application. A chargesheet was filed against the applicant and three others. The case of the applicant was separated and the case of remaining accused namely, Sunil Pratap Sharma alias Toni, Upendra Singh and Raj Kumar alias Mintoo alias Karan Singh were committed to the court of session. Their trials proceeded and no witness supported the case, with the result, the session trial ended in acquittal. The judgement of session trial is annexure- 7 to the application.

3. The case of the present applicant was separated and remained pending in the court of Judicial Magistrate who has issued warrant against the applicant.

4. The present application has been filed on the ground that none of the witnesses supported the case against the other accused and the trial ended in acquittal. There was no justification for proceeding against the applicant, as the result would be the same.

5. I have heard the learned counsel for the applicant, learned A.G.A and also perused the judgement, F.I.R, chargesheet and evidence recorded in the trial of other

co-accused in Session Trial No. 1285 of 1999 and S.T No. 560 of 1999.

6. According to the F.I.R., the applicant and three others descended from a Maruti Car at Ahuja Centre Tourist Hotel and one of them, namely, Rajkumar alias Mintoo called Mr. Kuldeep. As Mr. Kuldeep came near the car, Rajkumar alias Pintoo fired on him, who died on spot. The Patrol party of police also reached and head constable Rajpal Singh, constable Shrikrishna and Pyare Lal also came on the spot. During the course of trial informants Virendra Kumar P.W-1, Nitin Kumar PW-2, Prahalad P.W-3, constable driver Harpal Singh, constable Shrikrishna and constable Suresh Giri, were examined. None of the witnesses of fact, supported the case, which resulted in acquittal.

7. Learned counsel for the applicant has submitted that according to chargesheet, only those witnesses, who have been examined, are the witnesses against the applicant as well. They have not supported the participation of the main assailant and also the present applicant. Thus there would be no justification for permitting the trial to continue.

8. Learned counsel for the applicant has relied upon a judgement in the case of **B.S. Joshi and others Vs. State of Haryana and another**, reported in Judgment Today 2003 (3) SC 277,in which, it has been held that High Court, in exercise of its inherent powers, can quash criminal proceedings of F.I.R. or complaint and section 320 of the Code does not limit or affect the powers under section 482 of the Code.

9. In this very authority, a reference was made to **Madhavrao Jiwajirao Scindia and others, Vs. Sambhajirao Chandrajirao Angre and others**, reported in **Judgment Today 1988(1) SC 279**, in which it has been held that while exercising inherent power of quashing under section 482 Cr.P.C., it is for the High Court to take into consideration any special features, which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the court, chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a case, also quash the proceedings.

10. The above authorities are fully applicable on the fact of the present case as on the same evidence, the main accused and other co-accused have been found to be not guilty and acquitted for the charge. There is hardly any chance for conviction in respect of the present applicant. There would be no use permitting the present proceedings to continue.

11. Consequently, the application is allowed and the proceedings of Case No. 3205/9 of 1999, State Vs. Virendra Pawar, under Section 302/34 is hereby quashed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.10.2003

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

Civil Misc. Writ Petition No.14829 of 2000

Jang Bahadur Singh ...Petitioner
Versus
U.P. Public Service Tribunal, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri N.L. Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Service Law-departmental proceedings-should not normally be interfered-grounds of interference–identified.

Held- Paras 8 and 12

In the light of the aforesaid observation of the Supreme Court, it is quite obvious that the High Court has no power to appreciate the evidence and reach its own contra conclusions. The interference of the Court under Article 226 of the Constitution of India is possible only if it is found that the proceedings against the delinquent have been held in a manner inconsistent with the Rules of natural justice or in violation of statutory Rules prescribing the mode of inquiry or where the conclusions or findings recorded by the authority is based on no evidence.

It is a settled view enunciated in several Judgments of the Supreme Court that in departmental proceedings, insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the disciplinary or appellate authority is either impermissible or such that it shocks the conscience of the Court, it should not normally be interfered with or substituted by its own opinion and either impose some other punishment or penalty or direct the authority to impose a particular nature or category of punishment of its choice. This view finds formation in the case law of *The Regional Manager & Disciplinary Authority, State Bank of India, Hyderabad and another Vs. S. Mohammad Gaffar reported in J.T. 2002 (6) S.C., page 157.*

Case law discussed:
AIR 1994 SC 215
1999 (f) Service Law Reporter 528
1996 (i)SSC page 82 (All)
JT 1995 (8) SC 65
JT 2002 (6) SC 157

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. The petitioner, a constable in Civil Police, has challenged the impugned orders dated 22.5.1992 (Annexure-17) and 31.8.1992 (Annexure-18), passed by respondents no. 4 & 3 (Senior Superintendent of Police, Agra and Deputy Inspector General of Police, Agra Range respectively) and also the Judgment and Order dated 17.1.2000 (Annexure-19) passed by respondent no.1, U.P. Public Service Tribunal Under Article 226 of the Constitution of India and has prayed for issuance of a writ in the nature of certiorari to quash the same.

2. In short facts of the case disclosed in the petition are that the petitioner in the year 1987 was transferred from district Allahabad to district Agra. While posted at Agra, he took ten day's casual leaver on 5.7.1990 to come to his village in district Varanasi to see his ailing wife. He had to report back on duty at Agra on 17.7.1990, but he made request for extension of leave and could join the duties at the Police Lines, Agra on

22.8.1990. Thereafter on 18.9.1990, he applied and took casual leave of 14 days with effect from 19.9.1990 for coming to his village to see his ailing mother. As disclosed in para-6 of the petition, the petitioner on this occasion also extended his leave on account of his own illness and could join his duties at Agra only on 1.9.1991 after about ten months. Thereafter on 14.1.1992, he took earned leave of seven days and came to his village home where he stayed till the date when his services were dismissed by the impugned order after the disciplinary inquiry, passed by respondent no.4, Senior Superintendent of Police, Agra. It is stated in para-7 of the petition that after he came to his village on seven days earned leave, he sustained fracture of his leg bone and that made him confined to bed. Meanwhile, he received charge sheet dated 25.1.1992. In the disciplinary inquiry under Section 7 of the Police Act, he was asked to explain those charges which pertained to his unauthorised absence from duty for 36 days, i.e., from 16.7.1990 to 22.8.1990 and 324 days, i.e., from 4.10.1990 to 1.9.1991. The petitioner has further contended that he could not submit his reply to the charge sheet on account of his confinement to bed and he had been seeking time to submit the same through different request letters sent to the Inquiry Officer, respondent no.5. Meanwhile, he received letters dated 9.2.1992, 18.2.1992 and 13.3.1992 (Annexures-7, 9 & 11) from the Inquiry Officer reminding him to submit his explanation and to present his defence at the inquiry, which, in case of his failure, could proceed ex parte. He thereafter received a show cause notice dated 16.4.1992 (Annexure-13) from respondent no.4 directing him to show cause within eight days before the punishing authority (Senior Superintendent of Police, Agra). To this show cause also, as stated in para 17 of the petition, the petitioner by sending a letter expressed his inability to appear and explain on account of his illness. Thereafter on 30.5.1992, the petitioner received his order of dismissal dated 22.5.1992 (Annexure 17). After receipt of this dismissal order, the petitioner filed appeal which was also dismissed by the impugned order dated 31.8.1992 (Annexure 18) of respondent no. 3, Deputy Inspector General of Police, Agra Range.

3. It is contended that the petitioner could not attend to the inquiry instituted against him on account of his illness and he was deprived of opportunity of making his defence before the Inquiry Officer. There is violation of principle of natural justice committed by respondent no. 4. The punishment of dismissal from service is extremely disproportionate to the misconduct with which the delinquent was charged. While dealing with the claim petition of the delinquent, the respondent no. 1, U.P. Public Service Tribunal did not consider all these points and the claim petition was dismissed.

4. The aforesaid petition has been contested and counter affidavit has been filed on behalf of respondent nos. 2 to 5. It is contended in the counter affidavit that the impugned orders including the judgment of the Tribunal have been passed on justified grounds and they do not call for any interference. The petitioner had not sustained such injury, which could make him so serious as to call for his complete confinement to bed for such a long period. The entire efforts of the petitioner have been towards

avoiding the disciplinary proceedings. He was given sufficient opportunity and was afforded every possible occasion to present his defence and meet the inquiry, but he deliberately avoided and did not participate. The whole conduct of inquiry and findings recorded against him by Inquiry Officer and the consequent order of the punishment passed by the punishing authority are fully justified.

5. In reply to the counter affidavit, the petitioner also filed rejoinder affidavit. While reiterating the contentions made in the petition, it has been again disputed by the petitioner that he deliberately avoided participation in the disciplinary proceedings.

6. We have heard the learned counsel for the parties at length and have also perused the records of the case.

Learned counsel for the petitioner has contended that the disciplinary inquiry proceedings under Section 7 of the Police Act against the petitioner have been done behind his back and, therefore, there is complete violation of principle of natural justice as no opportunity to meet the charges have been afforded to the delinquent. In this context, it is noticeable that the petitioner himself admits the service of charge sheet upon him and has stated in the petition that he could not go to attend to the inquiry in spite of the reminders of the Inquiry Officer (Annexure-7, 9 & 11) which had been received by him through special messenger asking him to appear before the Inquiry Officer to submit his reply/defence and to cross examine the witnesses who were to be produced from the side of prosecution. In this context the excuses which have been taken by the petitioner in the petition are that he could not go to attend to the proceedings of inquiry because of his illness and consequent confinement to bed. In the impugned report of inquiry as well as in the punishment order, it is not mentioned that any justification or excuse was ever advanced by the petitioner to the Inquiry Officer for his absence or for not submitting his explanation to the charges served upon him. The appellate order passed by the Deputy Inspector General of Police, Agra Range (Annexure-18) shows that the petitioner, if at all, was ill and confined to his bed it was incumbent upon him under the provision of Police Regulation that he should have attended the local police hospital of the district and he should have sent the information of his illness and the ongoing treatment through the Superintendent of Police of that district to the Senior Superintendent of Police, Agra. It is also clear from the said appellate order that no document was made available by the petitioner to the office of Senior Superintendent of Police, respondent no.4 about the cause of his non appearance before the inquiry proceedings, which had to be ultimately concluded in absentia. It was in the back ground of aforesaid facts that the Tribunal vide its impugned judgment dated 17.1.2000 (Annexure-11) has recorded the findings that the petitioner failed to submit any medical certificate during entire proceedings of inquiry to show that he was actually down with fracture of his leg at his village home/hospital and he was thus deprived of presenting his defence before the Inquiry Officer or before the punishing authority.

7. Since the impugned order of punishment and that of the appellate authority have recorded factual findings

about the absence of the petitioner at the inquiry leading the Inquiry Officer to conclude it ex parte, we are constrained to hold that acting in writ jurisdiction, it would not be proper to reverse those factual findings recorded by the departmental authorities or the Tribunal. In this context the case law of ***Union of India and another Vs. B.C. Chaturvedi, J.T., 1995 (8) S.C. page 65*** has been relied upon from the side of the respondents. The Apex Court has laid down the following principles :-

"Judicial review is not an appeal from a decision but a review of the matter in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re-appreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal."

8. In the light of the aforesaid observation of the Supreme Court, it is quite obvious that the High Court has no power to appreciate the evidence and reach its own contra conclusions. The interference of the Court under Article 226 of the Constitution of India is possible only if it is found that the proceedings against the delinquent have been held in a manner inconsistent with the Rules of natural justice or in violation of statutory Rules prescribing the mode of inquiry or where the conclusions or findings recorded by the authority is based on no evidence.

9. In the present case, the proceedings of the inquiry and final pronouncement of the award of punishment if have been made ex parte, the reasons for the same recorded in those impugned orders and findings cannot be further scrutinized on facts by us. Therefore, the contention of the petitioner that he was not afforded opportunity to present his defence in the inquiry and present his explanation before the punishing authority, has absolutely no strength.

10. The learned counsel for the petitioner relying upon the case law of ***Union of India and others Vs. Giriraj Sharma A.I.R. 1994 S.C. page 215, Chiranji Lal Vs. The Presiding Officer, Industrial Tribunal-cum-Labour Court, Gurgaon 1999 (7) Services Law Reporter page 528 and Messrs Jai Maakali Aluminum Metal Works, Agra Vs. Sri Tilak Raj and others reported in 1996 (1) E. S. C. page 82 (All.)*** has contended that the punishment of dismissal awarded to the petitioner was shockingly disproportionate and the authorities were not justified in awarding such punishment. This Court under Article 226 of the Constitution of India, would be fully justified in interfering the quantum of punishment.

11. As we have seen the charges for which the petitioner has been tried, he being a member of disciplined force, is said to have unauthorisedly absented from duty on two occasions. Once from 16.7.1990 to 22.8.1990 for 36 days and then on a subsequent occasion from 4.10.1990 to 1.9.1991 for 324 days. These charges are said to have been fully established against the petitioner. As a member of police force, the petitioner is supposed to maintain the standards of discipline and if he does not stick to the strict discipline and absents himself without obtaining prior sanction from the authorities, it would definitely constitute a misconduct of grievous in nature warranting his dismissal from service. The misconduct has not a precise definition of its own. Its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of duty. Such misconduct may involve improper or wrong behaviour, forbidden act, a transgression of established and definite rule of action or code of conduct. The police service is obviously a disciplined service and it requires to maintain strict standard of such discipline. Laxity in this behalf erodes established norms of the service causing serious effects in the maintenance of law and order.

12. It is a settled view enunciated in several Judgments of the Supreme Court that in departmental proceedings, insofar as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the disciplinary or appellate authority is either impermissible or such that it shocks the conscience of the Court, it should not normally be interfered with or substituted by its own opinion and either impose some other punishment or penalty or direct the authority to impose a particular nature or category of punishment of its choice. This view finds formation in the case law of ***The Regional Manager & Disciplinary Authority, State Bank of India, Hyderabad and another Vs. S. Mohammad Gaffar reported in J.T. 2002 (6) S.C., page 157.***

13. In B.C. Chaturvedi's case (supra) also the Hon'ble Apex Court in its majority view has held as below: -

"A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

14. Since the long unjustified absence of the petitioner from duty on two occasions as detailed above, have been found by the disciplinary authorities as misconduct of very grave nature, we, while sitting in writ jurisdiction do not feel inclined to interfere with the quantum of punishment awarded to him in the present matter.

15. In the aforesaid view of the matter, the impugned orders of the disciplinary authorities (Annexures-17 & 18) and the Judgment of respondent no.1 (Annexure-19) confirming the inquiry report and consequent award of punishment against the petitioner, do not warrant any interference in the present writ petition, which must fail for want of merits.

The petition is hereby dismissed with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.9.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No.1059 of 1987

M/s Raebareli Flour Mills Pvt. Ltd.
...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri Bharatji Agarwal

Counsel for the Respondents:
S.C.

U.P. Trade Tax, Section 4 A-petitioner a company-claiming exemption of sales tax-given to new units- on basis of a G.O.-whether trial production amounts to actual date of production- held, no.

Held- Para 10 & 11

In para-14 of the counter affidavit, it is stated that application under Section 4-A was rejected because the petitioner was not found to be a new unit as defined in the relevant definition in Section 4-A. Among the condition of eligibility for exemption was the condition that the unit started production on or after 1.10.1982. It is alleged that since the production was started before 1.10.1982, the petitioner was not eligible

for sales tax exemption and accordingly his application was rejected.

It has been held by the Supreme Court in Janta Machine Tools Vs. State of U.P. and others 1989 suppl. (1) S.C.C. 281, that the trial production does not amount to the date of actual production under the Government Order dated 30th September, 1982.

Case law discussed:
1998 Suppl. (i) SCC 281
2003 UPTC 354

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

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

This writ petition has been filed against the impugned order dated 16.9.1987 passed by the respondent No.2, Annexure-5 to the writ petition. The petitioner has also prayed for a mandamus restraining the respondents to restrain from realizing any sales tax from the petitioner or requiring the petitioner to deposit any sales tax for the assessment years 1983-84 to 1988-89.

2. The petitioner is a company registered under the Indian Companies Act, 1956 which carries on the business of manufacture and sale of Aata, Maida, Suji and Bran. The State Government vide its Order dated 30.9.1982 under S.4A of the U.P. Trade Tax Act granted the exemption from payment of sales tax to the new units, which were to be established in Uttar Pradesh. The petitioner has alleged that its unit is covered under Clause (2) of the Notification dated 30.9.1982 for which the petitioner was granted an Industrial licence by the Central Government.

3. It is alleged in para-8 of the petition that the petitioner purchased new machineries, the value of which was about Rs.40 lacs. Apart from it, the petitioner had made huge investment of more than Rs. Six lacs towards land and building for starting the new unit. Petitioner has been granted registration by the Director of Industries, Bulandshahar vide registration certificate dated 29.9.1984, Annexure-1 to the petition.

4. In this certificate of registration, it is mentioned that the date of start of actual production in the flourmill off the petitioner was with effect from 9.1.1983.

5. The petitioner made an application for exemption under Section 4-A of the U.P. Trade Tax Act, vide Annexure-2 to the petition. The Petitioner also applied for registration under the Factories Act and got a certificate dated 3.2.1983 vide Annexure-4 to the writ petition.

6. It is alleged in para-15 of the petition that the General Manager, District Industries Centre, Bulandshahar recommended grant of eligibility certificate to the petitioner. However, that application was rejected on 23.3.1987. Against that order, the petitioner filed a review application, which too has been rejected by order dated 16.9.1987, vide Annexure-5 to the petition.

7. A perusal of Annexure-5 shows that respondent no.2 has rejected the application under Section 4-A of the Act on the ground that the petitioner made purchases of raw materials on 31.5.1982 and hence the date of starting the production shall be taken as 31.5.1982.

8. It is alleged in para-22 of the petition that respondent no.2 has rejected the application for exemption overlooking the registration certificate issued by the Director of Industries in which the date of starting production has been mentioned as 9.1.1983. In para 24it is alleged that the assessing authority also observed in the assessment order for assessment year 1981-82 that production in the petitioner's unit was started in January, 1983 vide Annexure-6 to the petition.

9. Counter affidavit has been filed and we have perused the same. In para-10, it is stated that the unit started its trial production on 31.5.1982.

10. In para-14 of the counter affidavit, it is stated that application under Section 4-A was rejected because the petitioner was not found to be a new unit as defined in the relevant definition in Section 4-A. Among the condition of eligibility for exemption was the condition that the unit started production on or after 1.10.1982. It is alleged that since the production was started before 1.10.1982, the petitioner was not eligible for sales tax exemption and accordingly his application was rejected.

11. It has been held by the Supreme Court in ***Janta Machine Tools Vs. State of U.P. and others 1989 suppl. (1) S.C.C. 281,*** that the trial production does not amount to the date of actual production under the Government Order dated 30th September, 1982.

12. The facts of the case are covered by the Division Bench decision of this Court in ***Magnum Papers Pvt. Ltd. Vs. State of U.P. and others, 2003 U.P.T.C. 354 (vide Paragraphs 10 & 11).***

13. Following the aforesaid decision, the writ petition is allowed. The impugned order dated 16.9.1987 is quashed and the Divisional Level Committee, Meerut is directed to grant eligibility certificate under Section 4-A to the petitioner as prayed for forthwith. Till grant of eligibility certificate the assessment proceedings for the assessment years 1983-84 to 1988-89 shall remain stayed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.9.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No.38686 of 2003

Vijay Shanker Singh ...Petitioner
Versus
Civil Judge (Senior Division), Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 227-writ of mandamus-seeking direction for expeditious disposal of civil suit-10,000 to 15000 cases pending before the concerned court-held-such direction cannot be issued-suitable remedy to ameliorate the situation-by enhancing the strength of judges.

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

The petitioner has prayed for expeditious disposal of a suit. It is not proper for us to give any such direction in

the matter, is that would be interfering with the powers of the District Judge.

It may be mentioned that the High Court has laid down a norm, that every Judge of the subordinate Court should have at one time 300 cases pending against him. But on inquiry, we have come to know that many Judges have got 40 or 50 times or more cases pending before them. Thus, for instance, we are informed that the Chief Metropolitan Magistrate, Kanpur has in his Court alone about 30,000 cases pending, the Chief Judicial Magistrate, Allahabad has alone in his Court about 23,000 cases pending and that is also the position in the Court of the Chief Judicial Magistrate, NOIDA. A large numbers of Judges have 10,000/- or 15,000 cases pending before them. It is not possible for human being to carry such a load. Judges are not supermen, and in every case they have to apply their mind to the facts and law, which takes some time. It is for the concerned authorities to take action in the matter and provide suitable remedies to ameliorate the situation e.g. by appointing more Judges.

We, therefore, dismiss this petition but we recommend to the concerned authorities to take up the matter in all seriousness before the situation goes totally out of control. Let the Registrar General of this Court send copies of the judgement forthwith to the Chief Secretary and Law Secretary, U.P.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.8.2003

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

Civil Misc. Writ petition No.12380 of 1986

Dr. Brij Lata Arora & another ...Petitioner
Versus
Regional Inspectress of Girls Schools, I Region, Meerut & others ...Respondents

Counsel for the Petitioner:
Sri A.K. Sharma

Counsel for the Respondents:
S.C.

U.P. Secondary Education Service Commission Act, Section 18-First Removal of Difficulties Order-adhoc appointment as lecturers by committee of Management-duly approved by D.I.O.S.-subsequently protected by interim order-but later became invalid in view of Full Bench authority of Radha Raizada case-petitioner continued in service for more than 10 years-even the appointment being regular-entitled for regularisation and consequential benefits-on equaitable consideration.

Held- Para 8 and 9

The net result therefore is that initial appointments of the petitioners were in accordance with law and protected by interim orders but became invalid since inception, by virtue of the aforesaid full bench authority of Radha Raizada. It is unfortunate that even after the decision of Radha Raizada petitions could not be heard for about nine years. The appointment cannot be termed as fraudulent, arbitrary or completely against the rules when made as per the view of this court prevalent at the relevant time.

In my view, it is a fit case in which equitable consideration must prevail upon strict legalities. It has been held in A.I.R 1991 S.C 295 (also referred to in A.I.R 2001 S.C 102) that even though appointments were not proper however; appointees were entitled to be treated as regularly appointment on humanitarian ground.

Case law relied upon:

1994 UPLBEC 1551
AIR 1991 SC 295

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

1. First writ petition has been filed by Dr. Brij Lata and Smt. Gargi. Second writ petition has been filed by Kumari Poornima Rajvanshi . third writ petition has been filed by all the three lady teachers.

2. In the first writ petition stay order was passed on 8.8.1986 *"till further orders of the court the services of the petitioners shall not be deemed to have come to an end only because 30th June 1986 has intervened they shall continue"* and in the second petition on 23.8.1986 *"till further orders of the court services of the petitioner shall not be deemed to have come to an end only because 30th June 1986 has intervened she shall continue"*. By virtue of the aforesaid stay orders which are still continuing all the three aforesaid lady teachers claim to be working in institution in question.

3. The main question to be decided in these writ petitions is as to whether services of the petitioners should be dispensed with on the basis of the law laid down by the full bench of this court reported in Radha Raizada (1994 UPLBEC 1551) after more than 17 years or they must be spared this ordeal on equitable grounds due to continuance in service, by virtue of interim order of this court which was perfectly in accordance with the view of this court taken in several authorities which were good law at that time but over ruled in the year 1994 by full bench authority of Radha Raizada (Supra). Prior to the full bench authority of this court of Radha Raizada (Supra), the view of this court was that section 18 and first removal of difficulty Order of U.P. Secondary Education Service Commission Act (Commission Act in short), two different modes of ad hoc appointment of teachers in recognized High Schools and Intermediate colleges were provided and that section 18 of the Commission Act was de hors the first removal of difficulty orders. According to the said view, management after intimating a substantive vacancy to commission and on the failure of the commission to recommend the name of duly selected teacher was entitled and authorized to select on its own without intervention of D.I.O.S. a teacher on the said substantive vacancy on ad hoc basis and that such appointment was to remain in operation until a duly selected candidate from the commission joined. In Adarsh Kanya Inter college Garh Mukteshwar District Ghaziabad (as it was at the relevant time) (here in after referred to as the college) all the three petitioners were granted ad hoc appointment as Lecturers by the committee of management of the college on 10.8.1984/25.6.1985, 25.6.1985 and 10.8.1984/26.6.1985 respectively. R.I.G.S approved the appointment of all the three petitioners by orders dated 15.11.1984; 3.2.1986 and 13.2.1986. However, in the latter two orders it was directed that appointment should remain valid only until 30.6.1986.

4. It is stated in Para 26 of the third writ petition that in May 1995 advertisement was published by the commission inviting application for making regular selection/appointment against several posts of Lecturers including the post held by the petitioner. Through the said writ petition prayer was made for quashing the said advertisement and for other reliefs. This court by order dated 20.2.1996 passed the following interim order *" In the meanwhile the process of selection for appointment on the posts in question shall go on and appointment will also be made but the same shall not be given effect to and shall be subject to the result of this petition"*. There is no material in the file, which may suggest that any person was selected or appointed on the posts held by the petitioners. Through amendment in the earlier two writ petitions which was allowed it was prayed that respondents be commanded to consider the case of the petitioners for regularization under section 33-A of the Commission Act and for granting selection grade. Through amendment it has been stated that the committee of management resolved to grant selection grade to the petitioners which was approved by D.I.O.S. and Accounts Officer and petitioners were given selection grade however D.I.O.S. by order dated 26.7.2002 directed that excess amount paid to the petitioner shall be recovered from them, in view of the fact that petitioners were continuing in service on the basis of interim order passed by High Court and their service had not been regularized. The said order has also been sought to be quashed.

5. In none of the aforesaid writ petitions counter affidavit has been filed by the state authorities. In one of the writ petitions i.e. Writ Petition No. 12380 of 1986 Principal filed counter affidavit in Aug-September 1986 (sworn on 23.8.1986) stating therein that petitioners were not working and that stay orders having been passed after petitioners ceased to be employees of the institution did not have the effect of reviving their services. In the rejoinder affidavit the said assertion is denied. In February 1987 application for payment of salary in the first two writ petitions was filed stating in the affidavit filed in support thereof that even though petitioners were working under interim order however they were not paid their salary.

6. Supplementary affidavit by the Principal (second supplementary affidavit) was also filed in April 1987 reiterating same facts which were stated in the earlier counter affidavit and further asserting that in view of stay order, letters were issued by the Principal to the teachers to join but they did not join. There is nothing on the record in any of the writ petitions to show that from which date petitioners started getting salary under U.P. payment of salaries Act, 1971. Through amendment in the year 2002 which has been allowed on 25.11.2002, Paras 5 to 14 of the affidavit filed in support of amendment application have been added as Paras 13 to 22 of the writ petition. In para 5 of the aforesaid affidavit it has been stated, "petitioners are being paid their salary regularly". After the aforesaid two counter affidavits, there is no affidavit of the Principal showing the state of affair with regard to joining of the petitioner and payment of salary to them. In para 8 of the affidavit filed in support of amendment application it has been stated that committee of management through its resolution dated

7.3.1998 recommended that as the petitioners had been in service for more than ten years hence, they were entitled for selection grade. A resolution to that effect was sent to the D.I.O.S through letter dated 16.3.1998 by committee of management which according to para 9 of the said affidavit was approved by D.I.O.S and petitioners were given selection grade which was stopped by order of D.I.O.S dated 26.7.2002 and through the said order recovery of excess amount paid to the petitioner with effect from 1.1.1996 was directed to be recovered. In the order-dated 26.7.2002, D.I.O.S has observed that petitioners are working by virtue of stay orders of the High Court.

7. From the above facts it appears that if not immediately after passing of the interim order then at least since after sometime from the said date petitioners are working and getting salary under U.P. Payment of Salaries Act, 1971.

8. It cannot be denied that petitioner's appointment was not in accordance with first removal of difficulties order framed under U.P. Secondary Education Service Commission Act (herein after referred to as the Commission). None of the procedure prescribed under the said order was followed. As held in full bench authority of this court reported in Radha Raizada versus Committee of Management 1994 UPLBEC 1551, management could make ad hoc appointment under section 18 of the Commission Act (as it stood at the relevant time) only after their selection in accordance with first removal of difficulties order and under section 18 of the Act, management had no power to select and appoint ad hoc teachers de hors first removal of difficulties order. However, it is also correct that prior to the said full bench authority, there were several decisions of this court holding otherwise i.e. recognizing power of committee of management under section 18 of the Act to independently select and appoint ad hoc teachers. It was in view of such authorities that stay orders were granted to the petitioners in the first two writ petitions and by virtue of those stay orders which were perfectly in accordance with the view of this court expressed in several authorities at that time, petitioners are working and getting salary under U.P. Payment of Salaries Act, 1971 for more than ten years. It is true that judgment of the court does not lay down the law; it only interprets the law, which is always retrospective unless expressly made prospective. The net result therefore is that initial appointments of the petitioners were in accordance with law and protected by interim orders but became invalid since inception, by virtue of the aforesaid full bench authority of Radha Raizada. It is unfortunate that even after the decision of Radha Raizada petitions could not be heard for about nine years. The appointment cannot be termed as fraudulent, arbitrary or completely against the rules when made as per the view of this court prevalent at the relevant time.

9. In my view, it is a fit case in which equitable consideration must prevail upon strict legalities. It has been held in A.I.R 1991 S.C 295 (also referred to in A.I.R 2001 S.C 102) that even though appointments were not proper however; appointees were entitled to be treated as regularly appointment on humanitarian ground.

10. In para 12 of the said judgment it has been held *"Having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, we can not, however, refuse to recognize the consequence that involves on uprooting the appellants."* Para 13 of the said authority is quoted below:-

"There is good sense in the plea put forward for the appellants. The human problem stands at the outset in these cases and it is that problem that motivated us in allowing the review petitions. It may be recalled that the appellants are in service for the past 10 years. They are either graduates or double graduates or post graduates as against the minimum qualification of S.S.L.C required for Second Division Clerks in which cadre they were originally recruited. Some of them seem to have earned higher qualification by hard work during their service. Some of them in the normal course have been promoted to higher cadre. They are now overaged for entry into any other service. It seems that most of them cannot get the benefit of age relaxation under Rule 6 of the Karnataka Civil Services (General Recruitment) Rules, 1977. One could only imagine their untold miseries and of their family if they are left at the midstream. Indeed, it would be an act of cruelty at this stage to ask them to appear for written test and viva voce to be conducted by the Public Service Commission for fresh selection (See Lila Dhar v. State of Rajasthan (1982) I S.C.R 320 at 326: (A.I.R 1981 SC 1777 at p.1780))."

11. In view of the above, I hold that the petitioners are entitled to be considered for regularization and consequential benefits, if regularized, in accordance with the relevant provisions of Commission Act, as amended from time to time. Salary already deducted in pursuance of order of D.I.O.S dated 26.7.2002, shall not be refundable to the petitioners. Appropriate orders with regard to regularization by competent authority/body must be passed within six months from the production of certified copy of this order.

Accordingly writ petition is allowed as aforesaid.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 20464 of 1996

Santosh Kumar Jain & another ...Petitioners
Versus
State of U.P. through Collector, Aligarh and another ...Respondents

Counsel for the Petitioners:
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S.C.

U.P. urban planning & Development Act 1973–S-28–A–Notice for demand of compounding charges–challenged by petitioner who raised the lock factory for commercial purpose–while the land was acquired for residential purpose–callussion between Aligarh Development Authority and the petitioner proved–Court/taking service notice–emposed fine of Rs.100000/- to be received on arrear of land revenue and to vaate the land within 15 days.

Held: Para 21 & 22

The land in question is earmarked in the Master Plan of Aligarh for residential purpose, and hence its allotment for a factory was wholly illegal and collusive. This case reveals totally fraud and collusion on the part of the petitioners.

Since total fraud has been committed by the petitioners in illegally occupying the land of the Aligarh Development Authority, we impose a fine of Rs.1,00,000/-(one lac) on the petitioners for having committed gross illegality. The petitioners shall pay the said amount to the Aligarh Development Authority within two months from today failing which it will be realized by the D.M. as arrears of land revenue and then paid to the respondent no. 2. Petitioners must vacate the land in dispute forthwith failing which they will be evicted by Police force.

Case Law:

2002 (1) UPLBEC –444
2000 (7) SCC–22
1999 (6) SCC– 464 AND 532
AIR 1974 SC–2177

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

1. This writ petition was initially filed for a mandamus restraining respondent no. 1 from demolishing the construction over the plot nos. 2339 and 2340 at Pala Road, Pargana and tahsil koli, District Aligarh and from dispossessing the petitioners. The petitioners also prayed for a writ of mandamus directing the respondent no. 2, Aligarh Development Authority (ADA) to issue a letter of allotment to the petitioner in respect of the said land as per the approval of the Vice Chairman dated 20.9.1995. By a subsequent amendment the petitioners have also prayed for a writ of certiorari for quashing the order of respondent no. 4 dated 23.10.2001 as published in the Newspapaer (Dainik Jagran) dated 1.11.2001 vide (Annexure–18 to the petition)

Heard learned counsel for the parties.

2. The petitioners have alleged that they purchased the aforesaid plots by means of a registered sale-deed dated 19.9.1991 from one Onkar Prasad Garg. A true copy of the sale-deed is Annexure-I to the petition. The petitioners have alleged in para 4 that before purchasing the land they made an enquiry in order to satisfy themselves about the ownership of Onkar Prasad Garg.

3. It is alleged in para 5 of the petition that after obtaining the sale-deed the petitioners took steps to get deep pits filled and made constructions by investing more than Rs. 5 lacs. It is alleged that petitioners have erected full fledged factory on the said plots in the name and style of M/s Alka Locks Factory and which covers an area of 622.33 Sq. meters of land. The remaining land measuring 1365.67 Sq. meters is still vacant over which the petitioners propose to make residential houses for themselves and their employees.

4. It is alleged in para 6 of the petition that sometime in 1995 the

petitioners were informed by some persons that the land which they have purchased have been acquired by the Aligarh Development Authority (ADA) and thereafter the petitioners made enquiries and came to know that the aforesaid plots had been acquired by the respondent no. 2, A.D.A. in 1985. It is alleged that Sri Onkar Prasad Garg played fraud on the petitioners and concealed the fact that the land had been acquired by the Aligarh Development Authority. The petitioners bonafide purchased the plots for valuable consideration and invested huge money thereon. In the meantime the respondent no. 2 got a survey conducted and found the factory existing on the site, and threatened to demolish the same. Hence the petitioners wrote a letter dated 19.8.1995 to the respondent no. 2, Aligarh Development Authority praying that the land be allotted to them for residential purposes of the staffs and management of the company and that they are ready to pay the market value. The petitioners also enclosed a cheque of Rs. 5 lacs in favour of respondent no. 2 as earnest money. A true copy of the letter dated 19.8.1995 is Annexure-2 to the petition.

5. It is alleged in paragraphs 9 to 13 that the Secretary, Aligarh Development Authority called for a report from the Assistant Engineer/Assistant Town Planner, Balram Singh, who got the site inspected and submitted his report. In that report it was stated if the factory is demolished and the land is reallotted then about 40% of the land would be utilized in constrcting road, park etc. and the Aligarh Development Authority would be able sell only 60% of the total area. However, if the land is allotted to the petitioners then the Aligarh Development Authority would be making huge profits. Hence recommendation was made in view of the allotment in favour of the petitioners. True copy of the report is Annexure-3 to the petition. Thereupon the Secretary, Aligarh Development Authority made a recommendation to the Vice Chairman to accept the proposal for allotting the land to the petitioners in terms of the report of Sri Balram Singh, vide Annexure-5. True copy of the endorsement made by the Vice Chairman is Annexure-6 to the petition. The Vice Chairman made a noting on the file on 20.9.1995 that he agreed with the proposal to allot the land in favour of the petitioners and the aforesaid resolution be placed for approval of the Board. A true copy of the endorsement dated 20.9.1995 by the Vice Chairman is Annexure-9 to the petition. In the meantime it is alleged that the respondent no. 2 encashed Rs. 5 lacs sent by the petitioners.

6. In para 24 it is stated that on 5.6.1996 the Executive Engineer, Aligarh Development Authority came to the factory premises and informed the petitioners he had been directed to get the factory demolished. The petitioners contacted the Secretary, Aligarh Development Authority who told them that the Commissioner, Agra Division Agra who was also the Chairman of the Aligarh Development Authority directed for demolition of the factory premises.

7. It is alleged that a large number of workers are working in the factory and valuable machinery worth more than Rs.50 lacs alongwith raw material is lying there. Since there was imminent threat of demolition, this writ petition was filed. By an amendment application which has been allowed the petitioners have prayed for

quashing of the order dated 23.10.2001 vide Annexure-18 to the petition.

8. By the amendment the petitioners have mentioned that they made an application dated 20.12.2000 to settle the matter, but they received a letter dated 9.4.2001 from the Secretary, Aligarh Development Authority stating that petitioners should pay sum of Rs.1,04,03,204.00/- as compounding fee and then the allotment will be done in their favour vide Annexure-16 to the petition. It is alleged in 35 (c) that this demand is wholly arbitrary and it does not reveal how the above figure has been reached. The petitioners have seen an order dated 23.10.2001 published in Dainik Jagran dated 1.11.2001 under Section 28-A of the U.P. Urban Planning and Development Act, 1973 stating that the petitioners have made illegal constructions on the land of the Aligarh Development Authority and have constructed a Lock factory there and the same should be sealed forthwith. Aggrieved this petition has been filed.

A counter affidavit has been filed by the Aligarh Development Authority and we have perused the same.

9. In paragraph 4 of the same it is stated that the plots in question were acquired by the Aligarh Development Authority vide notification under Sections 4 and 6 of the Land Acquisition Act, copies of which are Annexures CA-I and 2. In pursuance of these notifications the land in question was transferred to the Aligarh Development Authority on 23.11.1985. Photostat copy of the document showing delivery of possession to the Aligarh Development Authority on 23.11.1985 is Annexure – CA 3. The owner of the land Sri Onkar Prasad Garg filed a Writ Petition No. 5784 of 1983 in this Court challenging the acquisition proceedings. However, that writ petition was dismissed by this Court on 17.7.1985 vide Annexure CA-4. The compensation has also been paid to Sri Onkar Prasad Garg and he had been told that there was no title left with him which could be sold to the petitioners.

10. It is alleged in para 6 of the counter affidavit that the entire exercise appeared to be a fraudulent act done by the petitioners in connivance with the earlier owner. In para 7 of the counter affidavit it is alleged that the petitioners knowingly constructed a factory over the land which had already vested in the Aligarh Development Authority without seeking its permission. There are about 800 residential houses of the Aligarh Development Authority besides other private residential houses in the vicinity of the petitioners' factory. Similar writ petition of Hari Singh being writ petition number 23595 of 1995 and Ratnakar Arya being writ petition number 19491 of 1995 were dismissed by this Court on 30.8.1995 vide Annexure-CA 6 to the counter affidavit.

11. It is alleged in para 8 that the sum of Rs. 5 lacs has been refunded to the petitioners by cheque dated 2.7.1996. In the para 9 it is stated that the allotment of the plots was never approved by the Board. On the contrary, the matter was placed before the Board in its meeting held on 30.3.1996. It was resolved therein that grave irregularities had been committed in dealing with the land on which Alka Factory was built. The said land had been acquired for residential purpose, and hence construction and

continuance of the factory could not have been permitted. It was also stated in the resolution that acceptance of Rs. 5 lacs for converting the land use from residential land to factory purpose was a grave irregularity, and this was done by the then Secretary, A.D.A. without approval of the Vice Chairman. Hence the money was ordered to be returned and an enquiry ordered, and demolition proceedings were also ordered. A true copy of the resolution of the Board dated 30.3.1996 is Annexure-CA 7 to the counter affidavit.

12. The relevant resolution is the second last one in Annexure-CA-7, which reads as follows:-

"प्राधिकरण की भूमि पर अवैध रूप से बनी अलका फैक्ट्री को भूमि आवंटन के संबंध में।"
विकास प्राधिकरण द्वारा प्रस्तुत किए गए प्रस्ताव को सचिव अलीगढ विकास प्राधिकरण द्वारा पढकर सुनाया गया। इस संबंध में अध्यक्ष/आयुक्त महोदय द्वारा निर्देश दिये गये कि विकास प्राधिकरण द्वारा अभीतक जो कार्यवाही इस मामले में की गई है, उसमें घोर अनियमितितायें की गई हैं तथा अनुउत्तरदायित्वपूर्ण कार्य किए गए हैं। यह भूमि भवनों/भूखण्डों हेतु आवासीय उद्देश्य से अधिग्रहीत की गयी थी। अतः इसमें फैक्ट्री का निर्माण नियमानुकूल नहीं है। फैक्ट्री बनाने में काफी समय लगता है। फैक्ट्री के निर्माण प्रारम्भ होने के समय से पूर्ण होने तक विकास प्राधिकरण के संबंधित अधिकारियों/कर्मचारियों द्वारा क्या प्रवर्तन की कार्यवाही की गई। इसका सम्पूर्ण जांच की जाय तथा उत्तरदायित्व निर्धारित किये जायं एवं उनके विरूद्ध अनुशासनात्मक कार्यवाही की जाय। भू-उपयोग के विपरीत औद्योगिक उपयोग के लिए भूमि आवंटन हेतु संबंधित फैक्ट्री से रू० ०५ लाख प्राधिकरण में जमा करा लेना गम्भीर अनियमितता है। इस संबंध में यह बताया या कि तत्कालीन सचिव अलीगढ विकास प्राधिकरण श्री अनिल कुमार द्वारा उक्त धनराशि संबंधित फैक्ट्री से जमा कराई गयी और सम्भवतः उपाध्यक्ष, अलीगढ विकास प्राधिकरण से स्वीकृत नहीं ली गई। अतः उपाध्यक्ष, अलीगढ विकास प्राधिकरण संबंधित पत्रावली का परीक्षण करें। इसमें जांच कर उत्तरदायित्व निर्धारित करते हुए एक सप्ताह में जांच आख्या अध्यक्ष/आयुक्त महोदय को प्रस्तुत करें। संबंधित फैक्ट्री द्वारा इस संबंध में जमा कराई गयी धनराशि तत्काल वापस कर दी जाय तथा अनाधिकृत निर्माण के ध्वस्तीकरण की कार्यवाही नियमानुसार अमल में लाई जाय। उपाध्यक्ष अलीगढ विकास प्राधिकरण जांच आख्या एक सप्ताह में तथा अनुपालन आख्या १५ दिन में अध्यक्ष/आयुक्त महोदय को प्रस्तुत करें।

13. In para 10 it is alleged that the land in question is reserved for residential purpose in the master plan of Aligarh vide Annexure-CA 8. Hence neither the erstwhile owner has any right to sell the land in question nor can the residential area land be allotted for the factory.

We have also perused the rejoinder affidavit.

14. It is evident from the facts that the petitioners have committed total fraud in connivance with Onkar Prasad Garg, the previous owner. The land had already been acquired by the Aligarh Development Authority in 1985 but illegally the petitioners took possession of the same and built their factory. The petitioners have no right to do so. In the counter affidavit it has specifically been stated that the Board of Aligarh Development Authority resolved not to allow a factory to run on the said land which was for residential use vide Annexure-CA-7. It appears that the petitioners in connivance with the then Secretary, A.D.A. and some other officials illegally got the residential land allotted for setting up a factory, which was wholly illegal.

15. In R.K. Mittal v. State of U.P. 2002 (1) UPLBEC 444 a division bench of this Court held that residential land cannot be allotted for commercial or industrial purpose.

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

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

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

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

The Court observed (In paragraph 73):

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

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

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

21. The land in question is earmarked in the Master Plan of Aligarh for residential purpose, and hence its

allotment for a factory was wholly illegal and collusive. This case reveals totally fraud and collusion on the part of the petitioners. The petitioners encroached illegally upon the land of the Aligarh Development Authority and in collusion with some officials of A.D.A. the petitioners have no right to do the same.

22. Since total fraud has been committed by the petitioners in illegally occupying the land of the Aligarh Development Authority, we impose a fine of Rs.1,00,000/- (one lac) on the petitioners for having committed gross illegality. The petitioners shall pay the said amount to the Aligarh Development Authority within two months from today failing which it will be realized by the D.M. as arrears of land revenue and then paid to the respondent no. 2. Petitioners must vacate the land in dispute forthwith failing which they will be evicted by Police force.

23. For the reasons given above, this writ petition is dismissed and the interim order is vacated.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD OCTOBER 10, 2003

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

Civil Misc. Writ Petition No. 10026 of 1987

Smt. Prakashwati ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Ajit Kumar
Sri S.N. Lal
Counsel for the Respondents :
S.C.

U.P. Secondary Education Services Selection Boards Act, 1982 as amended by U.P. Act 19 of 1985- Sections 21-A to 21-D-Appointment of Petitioner as Assistant Teacher (BTC) by manager-approval by R.I.G.S.-Termination-held, since there was no reserve candidate and regard being had that 1982 Act-cannot be invoked for appointment of BTC Teacher and also in view of fact that it has not been successfully established that petitioner's appointment suffered from any illegality-permeating her selection and appointment, apparent on face of record, termination-cannot sustained.

Held- Para 5

In view of the fact that there was no reserve pool candidate and upon regard being had that U.P. Secondary Education Services Selection Boards Act, 1982 cannot be invoked in aid for application to appointment of B.T.C. Grade teacher and also in view of the fact that it has not been successfully established that the appointment of petitioner suffered from any illegality permeating her selection and appointment apparent on the fact of record, In converge to the conclusion that the impugned orders cannot be sustained in law and are liable to be quashed.

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

1. Petitioner in the instance case was appointed as Assistant Teacher (BTC) in Shri Krishak Kanya Uchhtar Madhyamic Vidyaleya Bahanpur district Aligarh by means of the order dated 25.2.1986 issued under the authority of Manager. Subsequently, the matter was referred for approval to the Regional Inspectress of Girls Schools and according to the averments made in the writ petition, the approval was accorded and the petitioner

was paid salary for the period between salary was withheld thereafter and the matter was again referred to the Regional Inspectress of Girls Schools for approval which was declined by means of an order dated 24.2.1987. Consequently, the services of the petitioner were also terminated. In the above backdrop, the present petition has been preferred for twin reliefs of quashing the impugned order dated 24.2.1987 passed by the Regional Inspectress of Girls School and the order dated 13.3.1987 passed by the Committee of Management thereby terminating the services of the petitioner.

2. It would appear from the perusal of the record that the only ground which prevailed with the Regional Inspectress of Girls School in declining approval was the provision contained in the U.P. Act no. 19 of 1985 from which the aforesaid authority drew inference that the petitioner could not be appointed on substantive post.

3. The learned counsel for the petitioner canvassed that by the U.P. Act no. 19 of 1985, amendment came to be incorporated in U.P. Secondary Education Services Selection Boards Act, 1982 by insertion of Sections 21 A to 21 D and as a consequence of this amendment, appointment by U.P. Secondary Education Services Selection Boards Act, 1982 were put on hold till assimilation of all the Reserve Pool Teachers is complete. It is further canvassed that the order does not spell out that any reserve pool teacher in B.T.C. grade was ever appointed or any list of such teachers had been prepared or that they were queuing up for being given regular appointment in terms of the amendment incorporated by U.P. Act no. 19 of 1985. He lastly canvassed that the 25.2.1986 and 20.5.1986. The payment of order passed by the Regional Inspectress of Girls Schools suffered from the vice of arbitrainess and cannot be sustained in law inasmuch as it was passed in oblivion of the fact that the petitioner was a regularly appointed B.T.C. teacher who was entitled to salary and refusal to lend approval to her appointment was misconceived and consequent termination of her services which was passed without application of mind, cannot be sustained in law. Per contra, learned Standing Counsel did not press into service any argument of substance and made a thread bare submission that the order was rightly passed in accordance with law.

4. It brooks no dispute that the petitioner was appointed as B.T.C. grade teacher and it has not been repudiated that she was appointed through the means of regular selection by the Committee of Management after following due procedure. There was no reserve pool teacher awaiting their assimilation in B.T.C. grade consequent upon amendment in U.P. Secondary Education Services Selection Boards Act, 1982 by means of U.P. Act No. 19 of 1985. I have scanned the relevant provisions of the U.P. Secondary Education Services Selection Boards Act, 1982 on consideration of which, it is manifestly clear that the aforesaid Act has its application to the appointment of Principal/Head Master/Lecturer and L.T. Grade Teachers and it does not operate in relation to appointment in B.T.C. grade.

5. The learned Standing Counsel argued that even if it be assumed that there was no reserve pool teacher, the post being vacant could be filled in by proper selection. In vindication of his argument

that the selection made was illegal, the learned Standing Counsel has not adverted attention to any documentary evidence to shore up his contention. On the contrary it would transpire from perusal of the impugned order refusing approval that refusal was actuated by Ordiance 2212 of 1985 and in quintessence, it follows from the said order that refusal had its basis in the provisions of U.P. Act no. 19 of 1985 and the Regional Inspectress did not record any other reason in relation to the validity of the selection of the petitioner. In view of the fact that there was no reserve pool candidate and upon regard being had that U.P. Secondary Education Services Selection Boards Act, 1982 cannot be invoked in aid for application to appointment of B.T.C. Grade teacher and also in view of the fact that it has not been successfully established that the appointment of petitioner suffered from any illegality permeating her selection and appointment apparent on the fact of record, In converge to the conclusion that the impugned orders cannot be sustained in law and are liable to be quashed.

6. As a result of foregoing discussion, the petition succeeds and is allowed. The impugned orders dated 24.2.1987 and 13.3.1987 passed by respondents 2 and 3 respectively are quashed and it is in consequence observed that the petitioner shall be deemed to be regularly appointed B.T.C. grade teacher. It needs hardly be said that the Regional Inspectress of Girls School/District Inspector of Schools concerned shall pass appropriate orders to accord financial approval in relation to the appointment of the petitioner and she shall be paid salary from the date of her initial appointment upto the period she actually worked, in accordance with law.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 26.08.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 16596 of 1999

Vishun Dayal ...Petitioner
Versus
District Registrar, Mainpur ...Respondent

Counsel for the Petitioner:
Sri Govind Krishna

Counsel for the Respondent:
S.C.

Constitution of India, Article 16-
A. Service Law–Appointment–on adhoc basis or as daily wager–without following procedure prescribed by law held violation of article 13 and 16 of Constitution–such practice highly depreciated by such appointments–made on extraneous consideration to oust the meritorious candidates–cant not be regularized.

Held: Para 9

Adhoc appointment or on daily wages, without following the procedure also violates the Article 14 and 16 of the Constitution as such appointment are made on extraneous consideration, which oust the meritorious and the eligible candidates. The amounts to back door entry and the courts have deprecated such practice.

B. Service Law-Regularisation–petitioner appinted temporarily–under particular scheme–has no enforceable right for regularization.

Held: Para 7

no enforceable right in a Court for regularization of his appointment. No vested right is created temporary appointment.

Case Law discussed:

AIR 1990 SC 2228
1993 (2) SCC 213
AIR 1995 SC 962
AIR 1994 SC 1654
1995(1) SCC 138
1995 (Suppl) 4 SCC 706
1996 (7) SCC 118
1997 (6) SCC 574

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

1. Heard counsel for the parties and perused the record.

2. Counsel for the petitioner urges that petitioner was engaged in the office of Sub-Registrar, Karawali Distt. Mainpuri as waterman since 08.08.1991. Subsequently a Vacant post of Class IV employee (Peon) arose on account of the death of one peon namely Punni Lal, who expired on 04.12.1993. The petitioner alleged that on the death of Punni Lal, though the respondents have appointed other person also he was permitted to discharge duties of Class IV employee but he has not been paid salary, as admissible to such employee.

3. Aggrieved the petitioner filed Civil Misc. Writ Petition No. 3372 of 1998, in which this court passed following order on 23.10.1998.

"Heard the petitioner as prayed for regularsiation. This petition is disposed of with direction to the authorities/concerned to decide petitioner's representation he may make within two months in accordance with law. S/d M. Katju"

It is settled law that an employee appointed under a particular scheme has

4. The Petitioner thereafter submitted representation dated 10/12/1998 and respondents have rejected the same vide order dated 27/02/1999. The petitioner has prayed for quashing the order dated 27/02/1999. Annexure-9 to the Writ Petition and also for issue of writ in the nature of mandamus directing respondents to regularize his services.

5. The petitioner placed reliance on following passage in case of **Jackob M Puthuparambil Vs. Kerala Water Authority and others AIR 1990 SC 2228:-**

"If the Rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualification for the job as obtaining on the date of their employment must be allowed to continue on their jobs and their services should be regularized. It is unfair and unreasonable to remove people who have been rendering service since sometime as such removal has serious consequences. The family of the employee, which has settled down, and accommodated its needs to the emoluments received by the breadwinner, will face economic ruination if the job is suddenly taken away. Besides, the precious period of early life devoted in the service of the establishment will be wholly wasted and the incumbent may be rendered age barred for securing a job elsewhere. It is indeed unfair to use him, generate hope and a feeling of security in him, and attune his family to live within his earnings and then suddenly to throw him out of job. Such behavior would be

an affront to the concept of job security and would run counter to the constitutional philosophy, particularly the concept of job security and would run counter to the constitutional philosophy, particularly the concept of right to work in Art. 41 of the constitution. Therefore, if we interpret Rule 9 (1) (i) consistently, which it is permissible to do without doing violence to the said rule, it follows that employees who are serving on the establishment for long spells and have the requisite qualifications for the job should not be thrown out but their services should be regularized as far as possible. Since works belonging to this batch have worked on their posts for reasonably long spells they are entitled to regularization in services"

6. However, where an appointment made by the State is without competence or without following the procedure prescribed by law, the incumbent cannot claim any right. In such cases the contract of services is not enforceable in law. Any Adhoc appointment made by the authority be regularized according to rules, provided that the incumbent has eligibility qualification of the posts. If the incumbent has continued for long, the vacancy should be filled up on permanent basis in accordance with law and the person working on adhoc basis may also be considered in accordance with rules for regularization. The employer must fill up those posts by a permanent appointment in accordance with the Rules rather than allow such adhoc basis may also be considered in accordance with rules for regularization. The employer must fill up those post by a permanent appointment in accordance with the rules rather than allow such adhoc appointments to continue for years together.

7. It is settled law that an employee appointed under a particular scheme has no enforceable right in a Court for regularization of his appointment. No vested right is created temporary appointment.

8. The Practice of making appointment without advertising the vacancies or calling the names from the Employment Exchange violates the fundamental right of the eligible persons.

9. Adhoc appointment or on daily wages, without following the procedure also violates the Article 14 and 16 of the Constitution as such appointment are made on extraneous consideration, which oust the meritorious and the eligible candidates. The amounts to back door entry and the courts have deprecated such practice.

10. **In Dr. M.A. Haque and others Vs. Union of India and others, 1993 (II) SCC 213** the Supreme Court observed:

We cannot lose sight of the fact that the recruitment rules made under Article 309 of the constitution have to be followed strictly and not in breach. If disregards of the rules and by passing of the Public Service Commissions are permitted, it will open a back door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provision requiring recruitment to the services through the Public Service Commission. It appears that since this court has in some cases permitted regularization of the irregularly recruited employees, some governments and

authorities have been increasingly resorted to irregular recruitment., The result had been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidates dictated by various considerations are being recruited as a matter of course.

11. **In Dr. Arundhati A Pargaonkar Vs. State of Maharashtra AIR 1995 SC 962**, it has been held that:

Nor the claim of the appellant, that she having worked as Lecturer without breaks for 9 years on the date the advertisement was issue. She should be deemed to have been regularized appears to be well founded. Eligibility and continuous working for howsoeverlong period should not be permitted to over reach the law. Requirement of rules of selection cannot be substituted by humane consideration. Law must take its course.

12. The Apex Court deprecated the practice of making the appointment beyond the rules and rejected the claim on several occasions. The question has also been considered in the following judgments viz; ***Smt. Ravindre Sharma and another Vs. State of Punjab and others, 1995 (1) SCC 138, Smt. Harpal Kaur Chahal Vs. Director Punjab Instructions, 1995 (Suppl) 4 SCC 706; State of Madhya Pradesh Vs. Shyama Pardhi 1996 (7) SCC 118, State of Rajasthan Vs. Hitendra Kumar Bhatt, 1997 (6) SCC 574 etc.***

13. **In State of U.P. and others Vs. U.P. State Law Officers Association and others, AIR 1994 SC 1654**, it has been observed as under:

This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back door have to go by the same door. The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not necessarily vested with public sanctity. There is, therefore, no public interest involved in saving all appointment irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them.

14. It is not in dispute that services of the petitioner were temporary and adhoc and his services have been terminated as far back in 1998. The counsel for the petitioner heavily relied upon the judgment given by Division Bench of this court in Special Appeal No. 532 of 1997, in which order was passed on 28/07/1997 for regularization of services of employees in accordance with Govt. order dated 09/01/1985. The petitioner contends that he is fully eligible and liable to be regularized. Service of the petitioner have already been terminated, as such prayer for regularization cannot be granted. In so far as quashing the termination order is concerned, learned counsel for the petitioner has failed to point out any illegality or infirmity in the order impugned.

15. For reasons stated above, it is not a fit case for interference under Art. 226 of the Constitution. The Writ petition fails and is dismissed and there is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc.Writ Petition No. 1073 of 2003

Banda Tent House Association ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Siddharth Srivastava
Sri Shashi Nandan

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act-Section 3 F and Constitution of India Article 366 Clause 29 A-Petitioner a Tent House-business relating supply of chair, tent, pillows, bed sheets etc. in different parties-whether liable to pay Trade Tax U/S 3 F read with Article 366 clause 29 A of the Constitution?-Held 'yes'.

Held- Para 8

Thus section 3 F is clearly within the ambit of Clause 29 A of Article 366 of the Constitution and hence where there is a transfer of a right of use of any goods for cash or deferred payment or other valuable consideration it is deemed to be a sale within the meaning of the U.P. Trade Tax Act. Thus section 3 F and clause 29 A of Article 366 of the Constitution have introduced a legal fiction. Legal fiction are well known in law and there can be no objection to the same.

Case law discussed:
(2002) 3 SCC 314
2003 UPTC 404

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

1. This writ petition has been filed with a prayer for a mandamus directing the respondent Trade Tax authorities not to take any action against the petitioner and its members under the provisions of the U.P. Trade Tax Act as they are not dealers covered by the Act.

2. Since the question involved in this case is a purely legal one we did not deem it necessary to call for a counter affidavit and hence after hearing learned counsel for the petitioner and learned standing counsel we reserve judgement.

3. In paragraph 3 of the petition it is alleged that the petitioner is a Association of members involved in the activity of giving articles such as chairs, tents, pillows, bed sheet, crockery etc. to other persons and other members of the Association for the use of specific purposes, but the effective control always remains with the Tent House owner or owner of the other articles and the person using the same is not free to use it for any purpose than the one for which it is given e.g. Marriage, birthday party etc. It is alleged in paragraph 4 of the petition that all the above articles given for use always remain in the custody of the owner through its agents who have effective control of the articles. The owner charges hire charges from the users for the same. By means of this petition the petitioner has challenged the validity of the decision taken by the respondents for imposing Trade Tax from the members of the

petitioner Association under section 3 F of the U.P. Trade Tax Act.

executed between the parties as that is the normal practice in the Trade. The members of the petitioner Association carry on the above activities but they received notice dated 5.8.2003 issued by the respondent no.3 the Assistant Commissioner of Trade Tax, Banda copy of which is Annexure-1 to the writ petition. In this notice it is mentioned that the members of the petitioner Association are carrying on the business without registration and hence they were called upon to get themselves registered by 8.8.2003 and file the relevant documents otherwise action will be taken against them.

5. It is alleged in paragraph 15 of the writ petition that before receiving notice dated 5.8.2003 no notice or demand regarding tax liabilities was issued against the members of the petitioner Association . On enquiry the petitioner learnt that on 19.5.2003 a circular has been issued by the respondent no.2, the Commissioner of Trade Tax, U.P. Copy of which is Annexure-2 to the petition. This circular formulated a compounding scheme under section 7 D of the Act. The petitioner received a letter dated 23.8.2003 from the office of respondent no.3 requiring it to get registered and get the benefits of the compounding schemes vide Annexure-3 to the writ petition. It is alleged in paragraph 20 of the petition that the Tent House and other owners give different articles for use for hire for specific purposes, but the effective control always remains with the Tent House or other owner over all the aforesaid articles, and the person using the same is not free to

4. It is alleged in paragraph 6 of the writ petition that no written contract is

use them for any purpose other than that for which it was given.

The user is also not free to take away the articles out of the place specified for this purpose e.g. house, marriage hall etc. It is alleged that there is no transfer of right to use such goods and hence there is no taxable event. It is alleged that petitioners' members cannot be treated as dealers and hence no Trade Tax can be imposed on its members.

6. It may be mentioned that by the Constitution (46th Amendment)Act 1982 Clause 29 A was inserted in Article 366 of the Constitution which states:-

"29-A "tax on the sale or purchase of goods" includes-

(a) a tax on the transfer, otherwise than in pursuance of a contract, a property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract;

(c) a tax on the delivery of goods on hire purchase or any system of payment of instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specific period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of good by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxication), where such supply or service, is for cash, deferred payment or other valuable consideration;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

7. Section 3 F was inserted in the U.P. Trade Tax Act by the U.P. Act No. 31 of 1995 which reads as follows:-

"Section 3 F. Tax on the right of use any goods or goods involved in the execution of work contract -(1) Notwithstanding anything contained in Section 3-A or Section 3-AAA or Section 3-D but subject to the provisions of Sections 14 and 15 of the Central Sales Tax Act, 1956 every dealer shall, for each assessment year, pay a tax on the net turnover of :-

(a) transfer of the right to use any goods for any purpose (whether or not for a specific period) for cash, deferred payment or other valuable consideration; or

(b) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) at such rate not exceeding (twenty per cent) as the State Government may, by notification, declare and different rates may be declared for different goods or different classes of dealers."

8. Thus section 3 F is clearly within the ambit of Clause 29 A of Article 366 of the Constitution and hence where there is a transfer of a right of use of any goods for cash or deferred payment or other valuable consideration it is deemed to be a sale within the meaning of the U.P. Trade Tax Act. Thus section 3 F and clause 29 A of Article 366 of the Constitution have introduced a legal fiction. Legal fiction are well known in law and there can be no objection to the same. However, learned counsel for the petitioner has relied on the decision of the Supreme Court in **State of A.P. And Another v. Rashtriya Ispat Nigam Ltd. (2002) 3 SCC 314** and has contended that in view of the aforesaid decision the transactions of the petitioners members do not involve transfer of the right to use the goods since effective control of the goods even while they were being used by the hirer was with the petitioners' members and the hirer were not free to use the goods for a purpose other than the one for which it was given to him.

9. On the other hand, learned standing counsel has relied on the decision of the Supreme Court in **State of U.P. v. Union of India 2003 UPTC 404**. This decision has referred to the decision in **State of A.P. v. Rashtriya Ispat Nigam Ltd.** and it has not been passed in ignorance of that decision hence we have to be guided by the latest decision of the Supreme Court i.e. **State of U.P. v. Union of India** (supra). In that decision in paragraph 30 it has been observed :-

"Thus the Supreme Court has clearly held in the above case that handing over

possession is not a sine qua non of completing the transfer of the right to use any goods."

Government of India supplied telephone connections to subscribers and collected rental on the same. The question was whether the department of Tele-communication is a dealer and hence liable to pay Trade Tax. The Supreme Court held that the supply of telephone connection satisfied requirement of the transfer of the right to use for consideration. The Tele-Phone and all other accessories giving access to the telephone exchange are goods, and hence the requirement of Section 3 F are satisfied and the department of Tele-communication is a dealer and is liable to pay tax under the Act.

11. It has been clearly held in the above decision that the fact that the goods remain within the ultimate control of the owner is irrelevant for deciding whether there was a transfer of use, hence we have to hold against the petitioner as we are bound by the aforesaid decision of the Supreme Court in **State of U.P. v. Union of India** (supra).

12. For the reasons given above this petition is **dismissed.**

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 18145 of 1996

Mukhtar Ahsan ...Petitioner
Versus

10. In the above case of **State of U.P. v. Union of India** the facts were that the Department of Tele-communication,

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.P. Agrawal
Seema Singh
Mahima Mauria

Counsel for the Respondents:
S.C.

Constitution of India Article 226-Service Law-reversion-order passed after full fledged Disciplinary enquiries-against sub Registrar–who without proper enquiry under section 379 of the stamp Manual-imposed stamp duty on the valuation of Rs.4,23,000/- while the A.D.M. Finance found the valuation more than 39 lacs-even in absence of the allegation of corruption-the inference of extraneous consideration can be drawn-the order of reversion from Asstt. Inspector General to the post of Registrar-held proper.

Held- Para 18

In the present case even though there may not be any specific allegation of corruption against the petitioner, in our opinion he certainly acted in a manner causing serious loss to the Government exchequer by the manner he disposed of the stamp cases. As found by the enquiry officer the petitioner disposed of the stamp cases in utter violation of the provisions of the Stamp Act and Stamp Manual. From this a reasonable inference can be drawn that he passed such orders for extraneous considerations.

Case law discussed:
2001 (91) FLR 105
2001 (91) FLR 409
AIR 1979 SC-1022

(B) Constitution of India Article 226-Bonafide mistake and deliberate

mistake-difference between the two explained-petitioner without spot inspetition-ignoring the report of A.D.M. Finance-relied the valuation of House as 60 years old-while it was 28 years old-caused great revenue loss-amount to deliberate mistake-whether the exemption from disciplinary action can be granted? Held 'No'

Held- Para 16

Learned counsel for the petitioner submitted that the orders passed by the petitioner were quasi judicial order and hence if any one is aggrieved against the same he could file a revision under Section 56 of the Stamp Act but no disciplinary proceeding can be taken against the petitioner for passing such quasi judicial order. We do not agree. It is well established by a catena of decision of the Supreme Court that disciplinary proceedings can be initiated even for passing a judicial or quasi judicial order vide Union of India vs. K.K. Dhawan AIR 1993 SC 1478, S. Govinda Menon vs. Union of India AIR 1967 SC 1274.

Case law discussed:
AIR 1993 SC 1478
1994 (3) SCC-357
AIR 1992 SC-1233
AIR 1997 SC-3571
2003 (2) UPLBEC 1456
1999 SC-1999

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

1. This writ petition has been filed against the impugned order dated 31.1.1996 Annexure 14 to the writ petition by which the petitioner after an enquiry has been reverted from the post of Assistant Inspector General (Registration) to the post of Registrar.

Heard learned counsel for the parties.

2. The petitioner is a class II officer in the employment of the State Government. He joined the service as Sub-Registrar from 13.2.1970 on probation and he was confirmed on 13.2.1972. He was promoted as Assistant Inspector General (Registration) on 3.8.1991 and was posted at Bulandshahr. It is alleged in paragraph 2 of the writ petition that the respondents 3 and 4 had some grudge against the petitioner and hence a preliminary enquiry was conducted in connection with the letter dated 16.3.1994 written by the Inspector General (Registration) to the petitioner vide Annexure 1 to the writ petition. By this letter the petitioner was asked to explain why the record of the order dated 18.10.1992 was not sent to the A.D.M. (Finance) and the details about the document no.1608/93. Thereafter by letter dated 4.6.1994 Annexure 2 to the writ petition the petitioner was informed that an enquiry was being instituted against the petitioner on various charges and the petitioner was placed under suspension vide order dated 24.5.1994 Annexure 3 to the writ petition. The petitioner was also served a charge sheet vide Annexure 5 to the writ petition.

3. A perusal of the said charge sheet shows that the allegations against the petitioner are that the petitioner has grossly undervalued certain property at Rs.5,42,633/- although the A.D.M. (Finance) reported that the value of the property was about Rs.15 lacs. The allegation was that the petitioner had not considered the evidence of the witnesses under Rules 347, 348 and 349 of the Stamp Rules and merely relied on the exparte version of the witnesses and thus there was huge loss to the revenue. It was

alleged that this was done deliberately by the petitioner for gaining some benefit.

4. Similarly charge no. 2 was regarding some other orders passed by the petitioner in which he has grossly undervalued the valuable property. The petitioner had valued the properties for a total of Rs.4,23,000/- while their value would be over Rs.39 lacs. The other allegations are also similar and relate to gross under valuation.

5. The petitioner submitted an explanation vide Annexure 6 to the writ petition and also filed a supplementary reply vide Annexure 7 to the writ petition. Thereafter an enquiry was held.

6. It is alleged in paragraph 6 of the writ petition that the enquiry was not conducted in a fair and proper manner and the petitioner was not given opportunity to produce his witnesses. The petitioner also applied for change of the enquiry officer. However, the petitioner was informed that the enquiry has been completed on 24.2.1995 and a report has been sent to the State Government. With this order dated 27.6.1995 vide Annexure 9 to the writ petition copy of the enquiry report was also annexed. The report also mentions the proposed punishment vide Annexure 10 to the writ petition. True copy of the enquiry report is Annexure 11 to the writ petition. Finally the impugned order dated 31..1.1996 was passed reverting the petitioner and withholding his integrity certificate of 1993-94 vide Annexure 14 to the writ petition. Aggrieved this writ petition has been filed in this Court.

7. A counter affidavit has been filed and we have perused the same. In paragraph 5 it is denied that the petitioner was not supplied copies of the material papers mentioned in the charge sheet. In paragraph 6 it is denied that the enquiry was not conducted in a proper and fair manner. It is also denied that the petitioner was not given opportunity to produce his witness or to cross examine Babu Lal A.D.M. (Finance). In fact the enquiry report which is Annexure 11 to the writ petition makes it clear that the petitioner had cross examined Babu Lal on 22.1.1994. The petitioner was also heard personally in the enquiry. In paragraph 7 it is stated that after giving reasonable opportunity of hearing to the petitioner the enquiry was completed on 24.2.1995. Hence his letter dated 26.2.1995 praying for change of the enquiry officer had no meaning. It is also stated that the petitioner should have approached the U.P. Public Service Tribunal as an alternative remedy.

8. As regards the allegation against the respondents 3 and 4, they have been denied as stated in paragraph 15 to 18 of the counter affidavit and the comments of these officers are Annexures C.A. 1 and C.A. 2 to the counter affidavit.

9. In paragraph 19 it is stated that even a judicial officer has to act honestly and conscientiously. He cannot be pardoned if he conducted proceedings with ulterior motive causing huge loss to the State. A perusal of the enquiry report Annexure 11 to the writ petition shows that the petitioner decided cases in clear violation of Section 27 of the Indian Stamp Act and rules 347, 348 and 349 of the Stamp Manual. These rules give guidelines regarding the way in which the proceedings of stamp cases should be conducted. The object of these rules is to

ensure that all efforts are made for determining the real market value of the property. Under Rule 349 it is the duty of the officer concerned to thoroughly examine and analyse all the relevant evidence so as to reach a genuine and valid conclusion of the correct value of the property. A perusal of the enquiry report shows that the findings are that the petitioner did not conduct the proceedings in this manner. In paragraph 20 it is stated that an officer is expected to be honest and sincere.

Various other averments have been made but it is not necessary for us to go into the same.

10. The findings of the enquiry officer are findings of fact and we cannot go into the same in writ jurisdiction as it is not a court of first appeal.

11. Learned counsel for the petitioner submitted that the petitioner was only acting in his judicial capacity and if he has passed a wrong order then that was subject to appeal/ revision under Section 56 of the Stamp Act. Learned counsel has relied on the decision of the Supreme Court in P.C. Joshi vs. State of U.P. 2001 (91) FLR 105 in which the Supreme Court observed:

"If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly."

12. The petitioner has also relied on a Division Bench decision of this Court in Vijendra Pal Singh vs. State of U.P. 2001 (91) FLR 409 where the above decision of the Supreme Court has been followed. The petitioner has also relied on the decision of the Supreme Court in Union of India vs. J. Ahmed AIR 1979 SC 1022 where the Supreme Court observed that lack of efficiency and failure to attain the highest standards of administrative ability while holding a high post would not themselves constitute misconduct.

13. In our opinion the aforesaid decision of the Supreme Court are wholly distinguishable. If it were a case of bonafide error then of course it would not be a misconduct on the part of a judicial officer to pass such an order. Judges like other human beings, can also make mistakes. As Lord Denning has said "The Judge has not been born who has never made a mistake." However, there is difference between a bona fide mistake and deliberate mistake for extraneous considerations. A copy of the enquiry report, Annexure 11 to the writ petition, shows that it was not a bona fide mistake committed by the petitioner but a deliberate one. As regards charge no. 1 the finding of the enquiry officer is that the petitioner did not make the enquiries as contemplated by rule 379 of the Stamp Manual and instead he relied on the exparte evidence of a party due to which there was a heavy loss to the revenue. The petitioner never made spot inspection in respect of this property as he made in the case of other properties. The petitioner did not issue any notice to the registering officer and hence the officer could not know that the case has been transferred to the petitioner. The petitioner did not also take into consideration the report of the

A.D.M. (Finance) which was based on the spot inspection and he did not himself make any spot inspection. The petitioner relied on the valuation of a house which was 60 years old, whereas the house in question was 28 years old, and hence the exemplar was not relevant.

14. Similarly as regards charge no. 2 it has been found that the petitioner grossly violated rules 347, 248 and 349 of the Stamp Rules in making his valuation and thus grossly undervalued the property in question. The enquiry officer has considered this charge which deals with four cases in great detail and has found that the petitioner caused a loss of Rs.5,07,630/- to the revenue. The petitioner did not give opportunity of hearing to the registration officer . It was observed by the enquiry officer that when the petitioner did not find the paper showing the correct market value it was his duty under Section 47 (3) to hold an enquiry for the correct valuation under that provision. He should have issued notice to the relevant parties under rule 37 and should have held proceedings only 30 days thereafter, but he held proceeding on 9.6.1993 itself and same day held spot inspection which should have been held after 30 days after giving notice. Thus Section 47 (3) and rule 43 were clearly violated. Rule 38 was also violated and no opportunity of hearing was given to the registering officer. Only one day after receiving certain papers in an exparte manner the petitioner passed the order dated 10.6.1993. He also violated rule 49. The report of the A.D.M. (Finance) shows that in the khasra and khatauni it was shown that the property in question was recorded in the name of Agarwal Cold Storage and Ram Kishan Das and Shanti Lal, registered firm. According to the khasra the cold storage is recorded as abadi and old parti and no crops have been sown there. It was never mentioned that agriculture was done on the said plot. Thus there was clear violation of Section 27, 47 (3) and Rule 347, 348, and 349 of the Rules causing heavy loss to the revenue.

15. Charge no. 3 against the petitioner was that by his order dated 12.2.1993 he has shown the market value of certain properties at Rs. One lac per bigha, whereas it was really between Rs.3.50 lacs to Rs. 4 lacs per bighas. Thus the petitioner has caused a loss of Rs.97937.50 to the revenue. Similarly on charge no. 4 also the petitioner has been found guilty by the enquiry officer. This charge was that by his order dated 18.10.1992 the petitioner has undervalued the property and caused loss of Rs.46400/- to the revenue.

16. Learned counsel for the petitioner submitted that the orders passed by the petitioner were quasi judicial order and hence if any one is aggrieved against the same he could file a revision under Section 56 of the Stamp Act but no disciplinary proceeding can be taken against the petitioner for passing such quasi judicial order. We do not agree. It is well established by a catena of decision of the Supreme Court that disciplinary proceedings can be initiated even for passing a judicial or quasi judicial order vide Union of India vs. K.K. Dhawan AIR 1993 SC 1478, S. Govinda Menon vs. Union of India AIR 1967 SC 1274; Union of India vs. Upendra Singh, (1994) 3 SCC 357; Union of India vs. A.N. Saxena AIR 1992 SC 1233; Government of Tamil Nadu vs. K.N. Ramamurthy, AIR 1997

SC 3571; Hari Singh vs. Governor, U.P. 2003 (2) UPLBEC1456 etc.

17. In State Bank of India vs. T.J. Paul, AIR 1999 SC 1994 the Supreme Court held that even when mala fide and corrupt practice is not alleged against the employee he may be held guilty of misconduct if he acts in a manner which jeopardises the interest of the employer. In that case the allegation was that the respondent granted a bank loan negligently and the bank suffered a serious loss. The Supreme Court held that even if this was not a case of insubordination or disobedience of orders of the superior officer it was an act prejudicial to the bank and there was gross negligence which involved serious loss to the bank, and hence it is a case of misconduct.

18. In the present case even though there may not be any specific allegation of corruption against the petitioner, in our opinion he certainly acted in a manner causing serious loss to the Government exchequer by the manner he disposed of the stamp cases. As found by the enquiry officer the petitioner disposed of the stamp cases in utter violation of the provisions of the Stamp Act and Stamp Manual. From this a reasonable inference can be drawn that he passed such orders for extraneous considerations.

The findings recorded by the enquiry officer are findings of fact and we cannot interfere with them in writ jurisdiction.

The petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.9.2003

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

Criminal Misc. Application No. 2284 of 2001

Manoj Kumar Verma & others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri Haider Zaidi
Counsel for the Opposite Parties:
Dhamendra Singhal
A.G.A.

Code of Criminal Procedure, S. 482- summoning order-prayer for quashing of-process issued on a complaint-based on actual occurrence-and not as a counter blast.–supported by two witnesses- held, evidence on record sufficient to make out a prima facie case- cannot be interfered.

Held- Para 6

On the facts of the present case, there is a report to Senior Superintendent of Police and the complainant has examined herself and the two witnesses. In her statement, she has supported the allegations set forth in the complaint. The contention of the complainant was also supported by two witnesses, who had witnessed the occurrence. The evidence available on the record is sufficient to make out a prima facie case against the applicants.

Case law discussed:
AIR 2001 SC 2960
1976 (13) ACC 224 SC

(Delivered by Hon'ble K.N. Sinha, J.)

1. By means of present application under Section 482 Cr.P.C., the applicants have prayed for quashing of the order dated 13.12.2000 in Criminal Case no. 879 of 2000.

2. The brief facts giving rise to the present application, are that the applicant no. 1 was married to opposite party no. 2 on 12.11.1997. Immediately after the marriage, the opposite party no. 2 started insisting to live separately from the family 7thJuly, 1999, the father of the opposite party no. 2 alongwith other family members came to Kanpur and asked applicant no. 1 to send the opposite party no. 2 to Aligarh. The applicant no. 1 asked them to stay at Kanpur for a day or two, when he comes back after bringing her mother who had gone out of city. When the applicant no. 1 returned back, he found that the respondent no. 1 has left the house alongwith jewelry and cash etc. The applicant no. 1 filed a report at police station Naubasta, District Kanpur and when the police did not take any action then applicant no. 1 moved an application to Senior Superintendent of Police, Kanpur. The Senior Superintendent of Police, Kanpur ordered an inquiry into the matter and when the opposite party no. 2 came to know about the inquiry report, she lodged complaint on 31.10.2000 and the learned Additional Chief Judicial Magistrate, IV, Aligarh summoned the applicants by his order dated 13.12.2000. This complaint was lodged after about one and half years of the alleged incident and as a counter blast of the application moved by the applicant no. 1 to the Senior Superintendent of Police. The opposite party no. 2 filed a counter affidavit in the court denying the allegations in the affidavit. Further stating that no inquiry was made by the Kanpur Police and the report dated 30.10.2000 may be in collusion with the husband of the answering respondent. The complaint is based on the actual occurrence and it is not a counter blast to the alleged members. As the applicant no. 1 has to look after the other family members hence he did not yield to the demand of opposite party no. 1 it resulted in continuous tension between husband and wife. On

application to the Senior Superintendent of Police by applicant no. 1.

3. I have heard learned counsel for the parties and the learned A.G.A. The complaint was filed about the fifteen months prior to the date of occurrence, as stated in paragraph 5 of the complaint and also in respect of an occurrence about one and quarter months prior to the filing of the complaint. The respondent no. 2 Smt. Shashi examined herself under Section 200 Cr.P.C. and also examined witnesses Phool Singh and Kali Charan, the father of respondent no. 2, under section 202 Cr.P.C. on the basis of this statement, order dated 13.12.2000 was passed summoning the applicants as accused. Section 204 of the Code of Criminal Procedure lays down that if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding….'. It simply means that the Magistrate has to see if there is sufficient ground to proceed or not. In ***AIR 2001, SC page 2960 S.N. Palnikar and others Vs. State of Bihar and another*** the term 'sufficient ground' has been explained to mean the satisfaction that a prima facie case is made out against the accused and no sufficient ground for the purposes of conviction.

4. Thus the court has to see whether prima facie case against the accused is made out or not. This inquiry is only for the limited purpose for ascertaining of truth or falsity.

5. The Apex Court in **Smt. Nagawwa Versus Veeranna Shivalingappa Nonjalagi and others, reported in 1976 (13) ACC 224 SC** has laid down the principle that the enquiry under section 202 Cr.P.C. is limited only to ascertainment of truth or falsehood of the allegations made in the complaint- Firstly, on the material placed by the complainant and secondly, for limited purpose of finding out whether a prima facie case for issuing of process is made out or not.

6. On the facts of the present case, there is a report to Senior Superintendent of Police and the complainant has examined herself and the two witnesses. In her statement, she has supported the allegations set forth in the complaint. The contention of the complainant was also supported by two witnesses, who had witnessed the occurrence. The evidence available on the record is sufficient to make out a prima facie case against the applicants.

7. Consequently, I find no merit in the application and it is hereby dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.9.2003

BEFORE
THE HON'BLE R.C. DEEPAK, J.

Criminal Revision No. 2715 of 2003

Prashant Tomar ...Applicant
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri Krishna Capoor
Sri Jagdev Singh

Counsel for the Opposite Parties:
Sri Vivek Kumar Singh
Sri Ajay Kumar Singh
A.G.A.

Criminal Procedure Code-Criminal revision-against the order passed under section 437/439 refusing bail-such orders do not decide any question of law or question of law and facts- revision held- not maintainable.

Held- Para 4

The orders under section 437/439 Cr.P.C. are not revisable orders. No revision under the Cr.P.C. lies. They are by nature interlocutory orders. These orders do not decide any question of law or mixed question of law or facts or any issue in any proceeding under the Cr.P.C. These orders simply refer to bail, such application can be made at any stage, during investigation, during commitment proceeding or any time during trial, however, they do not decide any fact in issue in any inguiry or trial, therefore, these orders can not be put even in the category of an interlocutory orders. In this view of matter no revision is permissible to any accused under the law.

(Delivered by Hon'ble R.C. Deepak, J.)

1. This is a criminal revision against the order dated 17.6.2003 passed by the CJM Baghpat in Criminal Misc. Bail Application of Prashant Tomar (Revisionist) in Case Crime No. 39 of 2003, under section 302/34, 120 I.P.C.BPS GRP Baraut, district Baghpat and the order of learned Sessions Judge dated 25.7.2003 rejecting his bail application no. 381 of 2003.

2. The facts which emerge from the record are that Prashant Tomar is an accused in case crime no. 39 of 2003,

Under section 302/34, 120 B IPC, P.S. G.R.P. Baraut, district Baghpat. He is below 18 years alleged to be juvenile. He moved an application for bail before the C.J.M. The C.J.M. rejected his bail application. He also filed an application application was also dismissed as withdrawn for filing the present revision.

3. I have heard Sri Krishana Capoor, learned counsel assisted by Sri Jagdev Singh, learned counsel for the revisionist, Sri V.K. Singh, learned counsel for the O.P. No. 2, learned Additional Government Advocate and perused the entire record.

4. The orders under section 437/439 Cr.P.C. are not revisable orders. No revision under the Cr.P.C. lies. They are by nature interlocutory orders. These orders do not decide any question of law or mixed question of law or facts or any issue in any proceeding under the Cr.P.C. These orders simply refer to bail, such application can be made at any stage, during investigation, during commitment proceeding or any time during trial, however, they do not decide any fact in issue in any inguiry or trial, therefore, these orders can not be put even in the category of an interlocutory orders. In this view of matter no revision is permissible to any accused under the law.

5. The Juvenile Justice (Care and Protection of Children) Act 2000 provides for an appeal if the prayer of a delinquent is refused by the Board or the competent authority, though it is that even after 2 and ½ years since the enforcement of the aforesaid Act the government of this State has not constituted a Board, hence the applicant certainly is denied of his right to move such Board for determination of his for bail before the Sessions Judge concerned but the same was also rejected. The above named accused presented a Criminal Misc. Bail Application No. 13919 of 2003, under section 439 Cr.P.C. before Hon'ble Court and the said bail juvenile status yet this court however, can not take upon itself the obligation of Board. Under the Code of Criminal Procedure a person can be treated a minor if he is 16 years or below this is provided under section 437 Cr.P.C. The added benefits to the applicant in the circumstance of the raised age by 2 years of the juvenile justice (Care and Protection of Children Act 2000) is in the circumstance enumerated above is not available to him due to non constitution of Board. In view of the matter since the revision is not maintenance I am not entitled to grant any benefit under the said Act to the applicant. He has a remedy by way of bail under section 439 Cr.P.C. in this Court. He had earlier filed a bail application in this Hon'ble Court but got the same dismissed as withdrawn just to file the present revision. The advice in my opinion was wholly ill-conceived.

6. The remedy is still open to the applicant under section 439 Cr.P.C. the revision is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.9.2003

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

Civil Misc. Writ Petition No. 33984 of 2003

Mohd. Atique Ansari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.N. Singh

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

U.P. Cooperative Societies (Employees Service) Regulations 1975-Reg. 85–Service Law-Reversion-Charges of embezzlement–preliminary enquiry-charges proved- Disciplinary enquiry-petitioner afforded full opportunity of hearing and active participation during enquiry petitioner shown indulgence of personal hearing-no perversity or infirmity in enquiry detected contention that Reg. 85 was not complied with cannot be accepted impugned order recieved consideration and approval of U.P. Cooperative Societies institutional Board- held proper.

Held- Para 7

The finding recorded by the enquiry officer is borne out from the record. The last contention that provisions of Regulations 85 of the U.P. Cooperative Societies (Employees Service) Regulations, 1975 were not complied with does not commend to me for acceptance in view of the fact that the impugned order received consideration and approval of the U.P. Cooperative Societies Institutional Board Lucknow.

Cases referred:
2003 ALJ 812 (SC)
(1996) 9 SCC 69

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

1. Impugned herein is the order dated 25.4.2003 by which the petitioner was reverted from the post of Senior Assistant/Junior Branch Manager (Category II) to the post of Clerk/Cashier Category III followed by deduction of Rs.4000/- per month from his salary.

2. The facts forming background to the present petition are that the petitioners alongwith others misappropriated a sum of Rs.2,09000/-. The defalcation intruded upon the notice of the Bank as a result of complaint made by one Adhyaksh Lal Jeevan. A fact-finding preliminary enquiry was set afoot by the Bank appointing one Sri J.S. Chauhan Senior Manager (Vikas) as the enquiry officer by means of the order dated 6.7.2001 requiring him to scrutinize the record and submit his report by 9.8.2001. In the report submitted by Sri J.S. Chauhan, the petitioner was imputed with being privy to embezzlement to the tune of Rs.2,09,000/- alongwith others and in relation to embezzlement to the extent of Rs.6000/-, the report pointed accusing finger at the petitioner stating that he embezzled the said amount individually to the exclusion of others. It transpires from the record that the modus operandi adopted by the petitioner and others in defalcation of the amount was by scoring and altering the amount in the cheques submitted to the Bank (details of date and amount enumerated in the enquiry report). As a sequel to this report, the petitioner was suspended from service in contemplation of disciplinary enquiry by means of the order-dated 16.8.2001. One Sri P.S. Valyan Section officer was appointed as enquiry officer. As many as 14 charges were listed against the petitioner in the charge-sheet all revolving round financial irregularities. The enquiry was taken to finality vide enquiry report dated 5.6.2002 and all the charges were brought home to the petitioner. The said report was then placed before the Managing Committee for consideration on 5.6.2002. The Managing Committee again met on 16.11.2002 in which the matter again received consideration and

after hearing the petitioner, it was consensually decided to enjoin the petitioner to deposit Rs.47500/- in lump sum and the remaining amount be recovered in 12 equal instalments from the salary of the petitioner followed by decision that the petitioner be reverted consequence of the aforesaid decision, a show cause dated 2.12.02 notice was served to the petitioner to which he submitted his reply on 20.12.2002 with accompanying receipt in token of deposit of Rs.47500/-. In his reply, the petitioner sought indulgence that the remaining amount of Rs.52000/- be adjusted against the bonus amount, arrears of suspension allowance and other claims due to him and further that he may be reinstated in the service. In the self-same representation, the petitioner ventilated his grievance that one Har Sumran Lal, the then Branch Manager had been similarly insinuated of committing embezzlement but he was not proceeded against till his death and was rather let off without any disciplinary enquiry and the embezzled amount which he was ascribed to have embezzled, was adjusted against the claims due to him and he was shown undue indulgence as compared to the petitioner, by taking one of his sons in the service of Bank. It is in this background that the petitioner has challenged the validity of the impugned order.

3. I have heard learned counsel for the petitioner and Sri B.P. Singh, learned counsel representing the Bank authorities. The learned counsel for the petitioner began his submission stating that the impugned order has been passed in breach of the principles of natural justice. He further canvassed that the finding recorded by the enquiry officer was not warranted by the facts and evidence on record and as such there is element of perversity permeating the entire finding. He further canvassed that the disciplinary authority erred in toeing the decision taken by the Managing Committee and as such the order of the disciplinary authority suffers from the vice of non-application of mind.

4. It is not disputed that the petitioner required copies of certain documents by means of letter dated 8.2.2002 and subsequent letter dated 7.3.2002, It is eloquent from the record that the petitioner was formally apprised that most of the documents copies of which were sought for by the petitioner had already been supplied to him along with the charge-sheet and for the remaining documents, he was called upon to approach the Ramnagar Branch of the Bank and inspect the required records. It would be explicit from the letter-dated 14.3.2002 that the petitioner rummaged through day book, cash book etc. but delayed filing his reply. The reply ultimately came to be filed on 20.4.2002 by the petitioner. From a close scrutiny of the reply, it does not appear that it contained any grouse of his being denied opportunity of hearing, or inspection of any of the documents, it is ex-facie implicit from a perusal of the various papers on record that the petitioner never complained that he was denied active participation in the enquiry or that he was stymied in adducing of evidence which he wanted to adduce in aid of his defence. It

would rather appear that the petitioner submitted himself to the decision of the Managing Committee on the condition that he should be taken back in service. It is not refuted that he was not called upon or heard by the Managing Committee or he was denied opportunity of hearing in the course of enquiry. From a perusal of letter dated 12th Sept 2002 issued by Secretary/General Manager, it would crystallize that the petitioner was afforded opportunity of personal hearing as well and as a sequel, he appeared and submitted himself to the condition of depositing a sum of Rs.47500/- in cash and the remaining amount he sought to be deducted every month in 12 instalments from his salary. In the fact-situation, the order passed by the disciplinary authority appears to have been passed in the conspectus of consideration of entire facts and circumstances and also taking into reckoning the fact that the petitioner had acquiesced willingly to the decision of the Managing Committee on condition of his being taken back in service. It also appears from the record that he also acquiesced to the decision of his being reduced in rank. There is nothing on the record to indicate that the petitioner was constrained or pressurized into agreeing or acquiescing to the decision of the Managing Committee or even if it be assumed that the Bank took advantage of his demoralized state, no such constraints were pressed into service in his reply by the petitioner and the only grievance articulated by the petitioner was that his request for adjusting the remaining amount of Rs.52000/- against claims which might accrue to him in the post reinstatement stage, was not nodded in approval. In the circumstances, there is nothing in evidence to shore up the submission pressed into service on behalf of the petitioner at this stage that he was denied opportunity of hearing or was not allowed participation in the enquiry or there was any arbitrary approach or attitude in reaching the decision by the disciplinary authority.

5. The main relief claimed in the petition is the relief of quashment of the impugned order. It is settled view that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court implying that it was in defiance of logic or moral standards. As a matter of fact, the judicial review is confined to the defects and deficiency or infirmity in the decision making process and not the decision. In this connection, analogy may be drawn from a similar case dealt with by Hon. Apex Court in C.M.D. United Commercial Bank v. P.C. Kakkar 2003 All. L.J. 812. In this case, the Apex Court was concerned with the question of quantum of punishment. In that case, one of the points highlighted was that in a similar situation, lesser punishment was imposed on one M.L.Keshwani though the allegations against him were of much serious nature. In para 14 of the said decision the Apex Court gave expression to the following observations.

"A Bank officer is required to exercise higher standards of honesty and integrity. He deals with money of the depositors and the customers. Every officer/employee of the Bank is required to take all possible steps to protect the interests of the Bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a Bank officer.

Good conduct and discipline are inseparable from the functioning of every officer/employee of the Bank."

6. The Apex Court placed credence on Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik 1996 (9) SCC 69 and observed that it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a Bank is dependent upon each of its officers and officers acting and operating within their allotted sphere, acting beyond one's authority is by itself a breach of discipline and is a misconduct. Reverting to the instant case, as stated supra, as many as 15 charges have been listed against the petitioner and all the charges pertain to financial irregularities and embezzlements. It is apparent from the record that modus operandi adopted by the petitioner was to do scoring, additions and alterations in the cheques submitted to the Bank and the amount embezzled at the time of detection aggregated to a hefty amount of Rs.2,09000/- out of which the petitioner was imputed to have appropriated to his use a sum of Rs.99500/-. The petitioner was granted personal hearing and it is borne out from the record that he acquiesced to the decision and the punishment proposed by the Managing Committee. He also did not demur to charges which were established in the enquiry and his grievance revolved round the fact that the indulgence sought by me was denied. The grounds urged in vindication of the relief claimed in this petition appear to have been pressed into service here in this petition and therefore, the grounds canvassed for quashing of the impugned order are spurious and cannot be acted upon for interference with the impugned order. The underlying object in filing the present petition appears to be to assail the aspect of punishment awarded to the petitioner and the flimsy grounds have been set up as the causative factor for challenge. In the circumstances, the charges were of very serious nature and were not shocking to the conscience of the Court so as to warrant interference with the impugned order or on the aspect of punishment dealt out to the petitioner in the instant case. The Bank has already treated the matter with utmost leniency and it no more calls for further benignancy having regard to serious delinquency of the petitioner.

7. As regards the submission that enquiry ordered, suffers from the taint of perversity, it should be noticed that initially preliminary enquiry was ordered which pointed accusing fingers at the petitioner and others. Consequently, disciplinary enquiry was ordered. The learned counsel for the petitioner has not been able to bring home the fact that the petitioner was not afforded opportunity of hearing or was denied participation. It would rather appear that the petitioner actively participated in the enquiry and the reply submitted to the charge sheet is eloquent of his participation in the enquiry. It also transpires from letter dated 12th Sept 2002 that the petitioner was shown indulgence of personal hearing as well. By this reckoning, it leads to irresistible conclusion that the enquiry report does not wear the taint of any infirmity nor is there any element of perversity pervading the finding recorded by the enquiry officer. The finding recorded by the enquiry officer is borne out from the record. The last contention that provisions of Regulations 85 of the

U.P. Cooperative Societies (Employees Service) Regulations, 1975 were not complied with does not commend to me for acceptance in view of the fact that the impugned order received consideration and approval of the U.P. Cooperative Societies Institutional Board Lucknow.

8. As a result of foregoing discussion, the petition fails and is accordingly dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 34957 of 2003

Smt. Mithlesh Jain ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Dilip Gupta
Sunita Agarwal

Counsel for the Respondents:
Sri Pankaj Mittal
S.C.

Constitution of India-Article 226-Civil Law-whether commercial activities should permitted in residential area? Held-'No'

Held- Para 5

In the present petition it has been stated in paragraphs 5 and 6 that in the residential area a shopping complex is being constructed and other commercial activities are proposed. In our opinion this is clearly illegal. We, therefore, direct that no commercial or industrial activity will be allowed to be carried on in the area earmarked for residential purpose in the Master Plan of Agra or of in any other city in U.P. If commercial and industrial activities are being carried on in any city in U.P. in the areas earmarked for residential purposes in the Master Plan of that city such activity must immediately be stopped by the authorities.

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

1. Standing Counsel and Sri Pankaj Mittal may file counter affidavit within three weeks.

2. Issue notice to respondent no. 4 returnable at an early date.

3. The point raised in this writ petition is of great importance throughout the State of U.P. and perhaps in many other States as well. The grievance of the petitioner is that commercial activities are being permitted in the residential area of Agra.

4. We have had occasion to deal with such kind of complaint in earlier petition which came up before us. For example in R.K. Mittal vs. State of U.P. and others 2002 (1) UPLBEC 444 we have held that no commercial and industrial activity can be carried out in the areas earmarked for residential purpose in the NOIDA Master Plan. We are informed that in a large number of cities e.g. Lucknow, Agra, Kanpur etc. commercial and industrial activities are being carried on in the areas earmarked for residential purposes in the Master Plan of that city. In our opinion this is wholly illegal. The rules have to be followed,

otherwise the rule of law will collapse in the country. If there are rules they must be obeyed, otherwise the rule should be scrapped. We have held in R.K. Mittal vs. State of U.P. (Supra) that there is a widespread malady which has infected our society, namely, that the people who are having money and power think that they are above the law. This notion is totally destructive of the Rule of the Law and can no longer be tolerated by this Court. Everyone is under the Law.

5. In the present petition it has been stated in paragraphs 5 and 6 that in the residential area a shopping complex is being constructed and other commercial activities are proposed. In our opinion this is clearly illegal. We, therefore, direct that no commercial or industrial activity will be allowed to be carried on in the area earmarked for residential purpose in the Master Plan of Agra or of in any other city in U.P. If commercial and industrial activities are being carried on in any city in U.P. in the areas earmarked for residential purposes in the Master Plan of that city such activity must immediately be stopped by the authorities.

6. Although this petition was only regarding Agra city we have decided to extend its scope suo motu to other cities in U.P. because we are informed that similar illegalities are being committed there too.

7. Let a copy of this order be sent by the Registrar General of this Court to the Chief Secretary, U.P. forthwith who will ensure compliance of this order. Learned Standing Counsel shall also send a copy of this order to the Chief Secretary, U.P.

8. Let a copy of this order be given to the learned Standing Counsel today free of charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.9.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 46904 of 2000

Vijay Kumar ...Petitioner
Versus
Zonal Manager (N) Food Corporation of India and others ...Respondents

Counsel for the Petitioner:
Sri A.B. Singh

Counsel for the Respondents:
Sri N.P. Singh

Constitution of India- Article 226- Appointment-on compassionate ground- cannot be claimed as a matter of right- purely at discretion of the authorities- benefit of compassionate appointment extended to those-who taken compulsory retirement prior to age of 55 years-petitioner taken retirement prior one month from the age of supernuation-such appointment cannot be made.

Held- Para 4 and 7

The representation of the petitioner for giving appointment to his son on compassionate ground was rejected by the impugned order dated 1.6.2000 on the ground that his father has retired on medical ground on attaining the age of 56 years and 1 months and his son was not eligible for grant of compassionate appointment. The grant of compassionate appointment can be

considered only if the employee applied for retirement before completion of 55 years of age.

The appointment on compassionate ground cannot be claimed as a matter of right. It is purely at discretion of the competent authority taking into account the circumstances and conditions of the family of the retired person. The rejection of the claim of the petitioner does not suffer from any illegality or infirmity.

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

Heard counsel for the parties and perused the record.

1. This petition has been filed challenging the validity and correctness of the impugned order dated 1.6.2000 passed by Senior Regional Manager, Food Corporation of India Limited, Regional Office, Lucknow, the respondent no. 2.

2. The facts of the case are that the father of the petitioner Darab Singh was in employment of Respondent as Dusting Operator. He moved an application dated 24.11.1997 for medical check up, as he was not able to work. The application was forwarded by respondent no. 4 to the Chief Medical Superintendent, District hospital Agra after complete medical checkup he was declared medically unfit for service on 29.11.1997. A representation was thereafter made by Darab Singh for giving him premature retirement on health/medical grounds. The application was forwarded by District Manager, Food Corporation of India Limited, Agra, respondent no. 3 on 2.12.1997 for giving premature retirement to Darab Singh w.e.f. 29.11.1997. Another representation was also moved on 12.6.1998 before the Regional Manager with request to retire the applicant Darab Singh on medical grounds and further to consider the appointment of his son the petitioner, on compassionate grounds. The order dated 18.8.1998 was passed by respondent no. 3, retiring the father of the petitioner on medical ground under regulation 22 (3 & 4) of Regulation, 1971.

3. In so far as the claim of the petitioner on compassionate ground was concerned, it was forwarded by the Assistant Manager along with documents to the District Manager, Food Corporation of India, Agra on 1.9.1998. Reminder dated 5.11.1998 and 1.5.2000 were submitted and a representation was also made before respondent no. 1 on 3.2.2000 by the father of the petitioner.

4. The representation of the petitioner for giving appointment to his son on compassionate ground was rejected by the impugned order dated 1.6.2000 on the ground that his father has retired on medical ground on attaining the age of 56 years and 1 months and his son was not eligible for grant of compassionate appointment. The grant of compassionate appointment can be considered only if the employee applied for retirement before completion of 55 years of age. The letter dated 1.6.2000 is as under: -

'To

The Sr. Regional Manager Food Corporation of India, regional Office, UP, Lucknow.

Subject: Appointment on compassionate grounds in r/o Sri Vijay Kumar S/o Shri

Darab Singh, Ex-D/o retired on 29.11.1997 on medical grounds.

Sir,
this regard it is to inform you that the official retired on medical grounds at the age of 56 years and 11 months and hence his son Sri Vijay Kumar is not eligible for compassionate appointment in the FCI. The compassionate appointment in case of voluntary retirement on medical grounds is allowed only if the employee sought retirement before completion of 55 years of age.

The official may be informed accordingly.

Yours Faithfully,

Sd/ S.K. Binda
Assistant Manager (Eix)
For Deputy Manager (E.I.)

5. It is contended by the counsel for the petitioner that one Sri Rampreet had retired on medical ground and his son Sri Bechan Yadav was given appointment as handling labour by the respondent on compassionate ground. The offer of appointment dated 10.1.2000 to Benchan Yadav has been filed an annexure 9 to the writ petition.

6. The Standing Counsel submits in rebuttal that the petitioner's father sought retirement after attaining the age of 56 years and 11 months at the time when he was at the verge of the retirement. He further submitted that the retirement of an employee who was retired on medical ground is discretionary matter and is subject to availability of vacancies of posts as envisaged in Food Corporation of India, Staff Regulation 1971 framed under

Please refer to your office letter no. Estt./1 (12)/501/98 /Agras/ 225 dated 1.5.2000 on the subject cited above. In

the Food Corporation Act 1964. It is stated that Benchan Yadav is handling labour in the department and such cases are dealt with separately on model standing instructions as per National Industrial Tribunal (NITA) and not by the said staff regulations, 1971.

7. The appointment on compassionate ground cannot be claimed as a matter of right. It is purely at discretion of the competent authority taking into account the circumstances and conditions of the family of the retired person. The rejection of the claim of the petitioner does not suffer from any illegality or infirmity. The recommendation of the authorities have no sanctity of law and the competent authority is not bound by any recommendation. The claim of the petitioner for appointment on compassionate ground is devoid of merits and is not based on any legal rights. There is no breach of statutory provisions in this regard has been pointed out by the counsel for the petitioner.

8. The petitioner had sought appointment for his son one month prior to his retirement. He had played his innings and the discretion of the authority cannot be converted into a legal right for appointment of his son for another full innings. The authorities had their discretion in the matter which they have used judiciously while rejecting the claim of the petitioner for appointment of his son.

9. For the aforesaid reasons, the writ petition is fails and is dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.8.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 42980 of 2000

Sachchidanand Sahkari Awas Samiti Ltd. ...Petitioner
Versus
Greater Noida Industrial Development Authority and others ...Respondents

Counsel for the Petitioner:
Sri Rajendra Dobhal
Sri Shesh Kumar
Sri Tarun Agarwal
Sri A.K. Gupta
Sri I.N. Singh
Sri K.M. Misra

Counsel for the Respondents:
Sri Shashi Nandan
S.C.

Constitution of India-Article 226- Memorandum of agreement between Private Society and the Development authority of grater Noida-whether can be enforced in writ jurisdiction. Held- Yes

Held- Para 19

In our opinion this writ petition deserves to be allowed. The respondents cannot be allowed to resile from the Memorandum of Understanding executed on 22.3.1994, Annexure-2 to the petition. This Memorandum itself states that it is an agreement between Greater Noida and the petitioner society. In our opinion the Memorandum of Understanding amounts to a contract between the parties as there is offer, acceptance and consideration. As regards a contract between two private parties no doubt writ is not the

appropriate remedy for its enforcement but the position is different when one of the parties is the Government or an instrumentality of the State. Where one of the parties to a contract is the Government or an instrumentality of the State then Article 14 of the Constitution will apply.

Case law discussed:

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

1. Heard learned counsel for the parties.

2. The petitioner is a registered housing cooperative society registered under the U.P. Cooperative Societies Act, 1965 having 275 members. Between 27.11.1990 to 17.12.1991 the petitioner society purchased land in Village Suthiana, Jalpura in Pargana and Tehsil Dadri, District Ghaziabad (now Gautam Budh Nagar) for residential purposes of approached the respondents regarding its prayer for permission and approval of lay out plan submitted by it. The respondents informed the petitioner that if it gives its land to the respondents, the respondents will allot 40% of the total land to the members of the society after charging Rs. 640 p/sqm. as development charges. The society agreed to this and thereafter on 22.3.1994 a Memorandum of Understanding was executed between the petitioner and the respondents vide **Annexure-2** to the petition.

5. It is alleged in para 7 of the petition that before execution of the Memorandum of Understanding the respondents asked the petitioner to fulfill all the formalities, and the petitioner fulfilled the same to the entire satisfaction of the respondents including submission of documents regarding the land and after its members from the residents of the said area, and thereafter the land purchased by the society was mutated in its name.

3. On 28.1.1991 the State Government under Section 2 (d) read with Section 3 of the U.P. Industrial Area Development Act, 1976, has notified the area mentioned in the schedule to the Act as Greater Noida. True copy of the notification is Annexure–I to the petition. Since the land purchased by the petitioner was in the Greater Noida area, the petitioner submitted a layout plan for approval and necessary permission to Greater Noida vide its letter dated 27.8.1991 but the said letter was neither replied nor the lay out plan was approved by the respondents.

4. In para 6 of the petition it is alleged that thereafter the society having been fully satisfied, the respondents executed the aforesaid Memorandum of Understanding with the petitioner society on 22.3.1994.

6. According to the Memorandum of Understanding, 10% initial development charges was to be paid by each member of the society through the society to the respondents, and accordingly 243 members submitted 10% development charges to the respondents through the society. The total amount submitted through the society towards 10% development charges to the respondents was Rs.99,55,834/-. After receiving the same the respondents issued allotment letters to 157 members of the petitioner but the other members are yet to be issued allotment letters. A true copy of the list of the members of the petitioner society who

have been allotted plots vide letter dated 11.12.1995 is **Annexure-3** to the petition.

7. According to the Memorandum of Understanding, the society handed over the physical possession of its land to the representative of the respondents on 25.4.1996. On 27.7.1996 the respondents issued a show cause notice to the petitioner stating that the society has not transferred its land according to the Memorandum of Understanding and the petitioner was asked to show cause why the Memorandum of Understanding be not treated as cancelled. A true copy of the notice dated 27.7.1996 is **Annexure-4** to the petition. The petitioner sent a reply dated 16.9.1996 to the said show cause notice stating that it had performed its part and was ready to discharge its obligation and therefore, there is no question of cancelling the Memorandum of Understanding. A true copy of the reply is **Annexure-5** to the petition.

8. It is alleged in para 13 of the petition that the petitioner thereafter approached the respondents several times and requested them to hand over the physical possession of plots allotted to the members of the petitioner society but the respondents paid no heed. Suddenly the impugned order daed 12.6.2000 (**Annexure 6** to the petition) was passed stating that the petitioner had been allotted 18,604 sq.m. residential land out of the society land 3.06 acres land had been acquired before creation of Greater Noida, but the said land is situated on western side of Hindon river and the said land is under consideration to be notified for Noida at government level, and hence the said land is no longer useful for Greater Noida. It was also stated in the impugned order that besides the aforesaid land, 8.91 acre of the petitioner's land had been purchased after creation of Greater Noida and the Board had not given its permission for exchange of the said land. It was stated that the members who have been allotted .06 acres of land, which was purchased before creation of Greater Noida, will have to deposit the price of land fixed by Greater Noida with 18% interest. The other members may take their money back along with 6% simple interest vide **Annexure-6** to the petition.

9. After receiving the order dated 12.6.2000 the petitioner made a representation on 22.6.2000 stating that the action of the respondents is not only illegal and unjustified but unworthy of a reputed authority like Greater Noida. True copy of the representation is **Annexure-7** to the writ petition.

10. It is alleged in para 16 of the petition that the impugned order dated 12.6.2000 was passed without giving any show cause notice or opportunity of hearing to the petitioner. It is alleged in para 17 that the respondents made an offer for exchange of land and a Memorandum of Understanding dated 22.3.1994 has been executed between the petitioner and the respondents, and the petitioner had completed all the formalities regarding transfer of the land in favour of the respondents hence the respondents cannot resile from its promise. The petitioner had already handed over the plots, and after such allotment the respondent cannot be permitted to return the amount with 6% interest. It is alleged that members of the petitioners are logically entitled to get the plots allotted to them in Sector 36 of Greater Noida, but the respondents is illegally and arbitrarily not giving

physical possession to the members of the petitioner.

11. A counter affidavit has been filed by the Greater Noida, and we have perused the same.

12. It is stated in para 3 of the counter affidavit that the petition is not maintainable as the petitioner is seeking to enforce a contractual right. In para 6 it is stated that on 29.7.1992 a meeting of the Board of Greater Noida was held and a decision was taken that only those cooperative societies which were registered prior to 28.1.1991 and which had purchased the land within the notified area of Greater Noida before that date would be entitled to allotment of 40% of the said land. Another resolution was passed on 20.2.1993 vide **Annexure-1.** A decision had been taken to exchange the plots which had been purchased by the cooperative housing societies prior to 28.1.1991. Thereafter the resolution dated 15.5.1993 was passed for such exchange on deposit of development charges at the rate of Rs. 640/- per square meter vide **Annexure-2.**

13. In para 9 of the Counter Affidavit it is stated that the notice dated 27.7.1996 was rightly issued as transfer of the land had not been effected by the society in favour of the respondents. It is also denied that physical possession of the land was handed over to the respondents. Since the petitioner had not executed any sale deed in favour of the respondents the question of handing over physical possession of any plot to the members of the society did not arise. In para 12 it is stated that a policy decision had been taken that only those plots which have been purchased by the society prior to 28.1.1991 would be entitled to the benefit of exchange and such benefit will not be available for transactions, which took place after 28.1.1991. As regards the area of 3.06 acres situated towards west of the Hindon river, steps have already been taken for notifying the same for Noida and the matter is pending for consideration before the State Government.

14. In para 15 it is stated that a Memorandum of Understanding is merely an agreement and there is no concluded contract between the parties. If the petitioner is aggrieved by any action it should approach the Civil Court for remedy.

15. In para 16 it is stated that only those societies which have been registered prior to 28.11.1991 and who have purchased the land prior to that date would be entitled to the benefit of exchange and allotment of plots. Since a major area had been purchased by the petitioner subsequent to the aforesaid date, it cannot claim any right on the basis of the Memorandum of Understanding. In para 18 it is stated that since the petitioner has not transferred the plot in favour of the respondent no. 1 by execution of a sale deed, no right whatsoever has accrued in its favour. Hence the impugned order is valid.

16. A rejoinder Affidavit has also been filed.

17. In para 5 it is stated that the public notice issued by Greater Noida advertising the exchange scheme only stated that societies registered prior to 28.1.1991 would be eligible for the same. The petitioner society, having been

registered prior to 28.1.1991 was thus fully eligible. A perusal of Annexure–CA 2 clearly shows that some societies were short listed after perusal of all relevant documents and the petitioner society was also short listed for the exchange scheme after verification and examination of the registration certificate, the sale deed etc. Some members were allotted land and the respondents have accepted 10% development charges from the petitioner society after verification of the relevant documents. The respondents had full knowledge that certain land belonging to the petitioner society was situated on western side of Hindon river. It is alleged that evidently the requirement of land for purchase by the society prior to 28.1.1991 had been waived by the respondents or had been withdrawn at the time of public notice published in 1994 in "Rashtriya Sahara" or the same was not a necessary condition for allotment.

18. At any event, the Memorandum of Understanding dated 22.3.1994 does not mention that the land should have been purchased by the society prior to 28.1.1991. In para 9 of the Rejoinder Affidavit it is stated that there was no such condition in the Memorandum of Understanding that the land should have been purchased prior to 28.1.1991. It is alleged that the land was surrendered by the society under the exchange scheme. In its reply dated 16.9.1996 (Annexure-5 to the petition) the petitioner has clearly stated in paragraph 3 and 6 that land was handed over by the society to Greater Noida and a certificate in this regard was issued by the Patwari concerned at the relevant time. The said land was free from all encumbrances. In para 6 of the said letter dated 16.9.1996 it is stated that after signing of Memorandum of Understanding dated 22.3.1994 with the society and physically taking over the said land Greater Noida has erected its sign boards on these lands stating that this land belongs to Greater Noida.

19. In our opinion this writ petition deserves to be allowed. The respondents cannot be allowed to resile from the Memorandum of Understanding executed on 22.3.1994, **Annexure-2** to the petition. This Memorandum itself states that it is an agreement between Greater Noida and the petitioner society. In our opinion the Memorandum of Understanding amounts to a contract between the parties as there is offer, acceptance and consideration. As regards a contract between two private parties no doubt writ is not the appropriate remedy for its enforcement but the position is different when one of the parties is the Government or an instrumentality of the State. Where one of the parties to a contract is the Government or an instrumentality of the State then Article 14 of the Constitution will apply vide *Shrilekha Vidyarthi v. State of U.P. AIR 1991 SC 537*. In *Shrilikha Vidyarthi's* case (supra) the Supreme Court observed (vide para 22) :-

"There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter

that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot direst the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions."

20. We may now consider what precisely has been mentioned in the Memorandum of Understanding dated 22.3.1994 copy of which is **Annexure-2** to the petition.

21. Right at the beginning of this Memorandum of Understanding it is mentioned that the society owns land measuring 11.975 acres in Village Suthiana, Pargana and Tehsil Dadri, District Ghaziabad and it has offered to exchange its land with the developed plots of Greater Noida to which Greater Noida has agreed. Thereafter the terms of the agreements have been mentioned.

22. The very first paragraph of the Memorandum states that Greater Noida shall allot 40% land as residential plots to the society in various sizes of plots in lieu of the total land, which is to be transferred to Greater Noida subject to payment of development charges. The manner of payment is then mentioned.

23. Clause 7 of the Memorandum states that the society shall hand over the vacant possession of its land detailed in Annexure-1 free from all encumbrances. Possession shall be delivered to Greater Noida before possession of the developed plots is delivered to the society or its members, Clause 8 states that during the period possession of the land remains with the society and has not been taken over by Greater Noida, there will be no financial liability on Greater Noida in respect of the land of the society. Clause 11 states that the society has to furnish a list of members, legally enrolled within 30 days to the Greater Noida. It has also to furnish details regarding various sizes of plots required for its members.

24. Clause 16 of the memorandum states that the development of the sector for allotment of plots to the members of the society shall be started soon after the society deposits 10% of the development charges. The development shall be completed within 36 months from the date of such deposit. Clause 17 states that possession of the developed plots shall be delivered to the members after execution of the lease deed. Members shall be asked to execute lease deed after 3 years from the signing of the memorandum of standing. Clause 20 states that the allotment of plots will be given to the members on a lease of 90 years and the lease rent shall be payable in lump sum @ 10% of the premium of the plots calculated @ Rs. 850/- per sqm.

25. When we compare these terms and conditions in the Memorandum of Understanding dated 22.3.1994 with the stand taken by the respondents in its Counter Affidavit, we find several inconsistencies between the two. There is nothing in the Memorandum of Understanding which states that only those cooperative societies which were registered prior to 28.1.1991 or only those plots which have been purchased by the society prior to 28.1.1991 will be entitled to the benefit of the exchange. These are absolutely new terms which are not contained in the Memorandum of Understanding, and hence we are of the opinion that they are clearly illegal. Hence in our opinion the decisions of the board of Greater Noida on 29.7.1992 and 20.2.1993 (vide Annexure CA-1 to the Counter Affidavit) are clearly illegal.

26. It was not expected of Greater Noida, which is a Statutory body and an instrumentality of the State to resile from the Memorandum of Understanding dated 22.3.1994 which was a solemn instrument executed between it and the petitioner. The petitioner handed over possession of its land to the Greater Noida and it was wholly unfair on the part of the Greater Noida to now go back on its promise. The petitioner not only transferred possession of its land but also paid 10% development charges, and some of its members had been allotted plots by Greater Noida. This Memorandum of Understanding has been actually acted upon, and Greater Noida cannot now be permitted to resile from it and back out of its solemn undertaking. The principles of promissory estoppel, legitimate expectation, and fair play in state action are applicable to Greater Noida.

27. A division Bench judgement of this Court in Kendriya Karmchari Sehkari Grih Nirman Samiti Ltd. v. New Okhla Industrial Development Authority Noida, Writ Petition No. 39842 of 2001 decided on 5.8.2003, has dealt with these principles in great detail and has considered a catena of Supreme Court decisions in this connection, and hence we are not referring to the same again. Hence Greater Noida is bound by these principles and has to fulfil its solemn obligations under the Memorandum of Understanding, copy of which is **Annexure-2** to the petition.

28. In *Ramana S. Shetty vs. I.A. Authority of India AIR 1979 SC 1628* the Supreme Court observed (vide para 10) :-

"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Vitarelli v. Seaton (1959) 359 US 535 : 3L ED2D 1012* where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged .... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed ..... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

This Court accepted the rule as valid and applicable in India in A.S. Ahluwalia v. State of Punjab (1975) 3 SCR 82 : (AIR 1975 SC 98) and in subsequent decision given in Sukhdev v. Bhagatram, (1975) 3 SCR 619: (AIR 1975 SC 1331), Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanating from Article 14, does not rest merely on that Article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States constitutional but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law."

30. As regards the statement in the impugned letter dated 12.6.2000 that 3.06 acres land of the petitioner which lay west of Hindon River was being considered by the State Government for notifying it for Noida, there is nothing on the record to show that the said land was notified for Noida or there is any such move. It is a bald averment without any basis, and hence has to be ignored.

31. For the reasons given above, this writ petition is **allowed.** The impugned order is quashed and a mandamus is issued to the respondents to give physical possession over the plots which have been allotted to some of the members of the petitioner, and to issue allotment letters to the rest of the members of the petitioner as per the Memorandum of Understanding.

29. As is evident from paragraphs 3 and 6 of the letter dated 16.9.1996 from the president of the petitioner society to the General Manager (Estate), Greater Noida, (**Annexure-5** to the writ petition), the petitioner had handed over possession of its land to the respondent and a certificate in this regard was issued by the Patwari, and Greater Noida has erected sign boards on the said land stating that the land belongs to Greater Noida. Hence we are of the opinion that the petitioner handed over possession of its land to Greater Noida.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.9.2003

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 7306 of 2003

Ajay Yadav ...Petitioner
Versus
Cantonment Board & another...Respondents

Counsel for the Petitioner:
Sri M.M. Sahai

Counsel for the Respondents:
Sri Shakti Dhar Dubey

Constitution of India, Article 226-Termination of Assistant Teachers-in Primary School-run by cantonment

Board-appointment on the basis of 2 years probation-termination order-on the ground those facing disciplinary proceeding-reinstated but no such condition found place in appointment letter-direction issued for regular absorbtion on existing or in future vacancy.

Held- Para 20

It is true that the petitioner is probationer and due to unforeseen event his services can be terminated. But there is other side also. Admittedly the services of the petitioner are not unsatisfactory. He has not come from back door and is qualified. He came with legitimate expectation to service in employment of the Board. As stated above 3 posts are available for such employees. It is, therefore, just and proper that the petitioner be absorbed against the posts which are available or which may become available in near future say one year.

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

1. These writ petitions are based on same facts and same questions of law are involved in all these writ petitions. Since in Writ Petition No. 7306 of 2003, detailed reply of the respondents covering the other two connected writ petitions has been filed by way of counter affidavit, therefore this writ petition is taken to be the leadiong case.

2. The admitted facts in the above noted writ petitions are that the Cantonment Board, Varanasi runs one Junior High School, one Boys Primary School, and one Girls Primary School. The total strength of the teachers in all the three schools is 18 as under :

(i) **Junior High School**
Head Master 1
Assistant Teacher 3

(ii) **Boys Primary School**
Head Master 1
Assistant Teacher 8

(iii) **Girls Primary School**
Head Master 1
Assistant Teacher 4

3. Sri Uma Shanker Ram, Head Master and Sri G.K.Sharma, Assistant Teacher in Junior High School retired on 2.6.2001 and 31.5.2001 respectively. One of the vacancies of Head Masters was filled up by promotion of Ms. Vibha Srivastava. The resultant vacancies of two posts of Assistant Teachers in Junior High School were filled up by promotion of Sri Raj Bahadur Yadav and Sri Rajesh Singh Kushwaha. Due to above promotions two vacancies of Assistant Teachers were caused in the Boys Primary School while one vacancy of Assistant Teacher was already existing in the Boys Primary School.

4. It appears that due to disciplinary proceedings Sri M. Prasad and Sri H.N. Pathak, Assistant Teacher in Primary School were compulsorily retired from service on 17.7.2001. The above mentioned five vacancies were to be filled up by direct recruitment for which an advertisement was published in 'Dainik Jagran' dated 18.7.2001 by the Cantonment Board inviting applications for appointment of Assistant Teachers. Out of the three vacancies, two were reserved for general category candidates and one was reserved for backward candidate. Interview was fixed for 8.8.2001. One of the terms and conditions of the advertisement was mentioned that it is subject to "vacancies" laying down the

terms and conditions of appointment of the Assistant Teachers.

5. Pursuant to the advertisement the petitioner being qualified applied for the post of Assistant Teacher in the school run by the Cantonment Board and was selected. Vide letter dated 19.8.2001 the petitioner was informed that he has been selected with certain terms and conditions enumerated in the letter. Condition nos. 3 and 4 are relevant. They were as under :

3. आपकी नियुक्ति दो वर्ष की परीविक्षा अवधि पर होगी।

4. आपका कार्य असंतोषजनक पाये जाने पर या अन्य किसी कारणवश बिना किसी पूर्व सूचना बताये समाप्त किया जा सकता है।

6. The contention of the petitioner is that he did not give his willingness and acceptance to the terms and conditions enumerated in the aforesaid letter of offer dated 19.8.2001 but the appointing authority appointed the petitioner on probation for a period of two years. The copy of the said letter shows that the petitioner was appointed as Assistant Teacher on probation of two years and that his services shall be governed by the Cantonment Funds Service Rules, 1937 (hereinafter referred to as the CFS Rules) as amended from time to time. The petitioner joined his services and continued to work till his services were terminated by the Cantonment Executive Officer, Varanasi under order dated 19.12.2002 with immediate effect, which states that in pursuance of Cantonment Board resolution nos. 19, 20 and 21 dated 18.12.2002 in consonance with condition no. 4 of office letter dated 9.8.2001 the temporary services of the petitioner as an Assistant Teacher, Cantt. Board Boys Primary School are terminated.

7. It appears that the two teachers who had been compulsorily retired filed appeal which were allowed and they were ordered to be reinstated. Consequently the Cantt. Board passed resolution for terminating the services of the petitioner with effect from 19.12.2002 (A/N) who was still working as probationer. The resolution nos. 19,20 and 21 referred to in the order of termination by the Executive Officer Cantt. Board are as under:-

19. The Board considered the Dte. DE, Ministry of Defexzce, Central Command, Lucknow letter no. PC 9878/GKS/LC 6 dated 12-12-2002 order dated 11.12.2002 of the G.O.C. –in Chief the appellate authority in the above case, the Board unanimously resolved that Sri G.K. Sharma be reinstated in service as Assistant Teacher Junior High School, Cantt. Board, Varanasi with immediate effect.

20. The Board Considered the Dte. DE, Ministry of Defexce, Central Command, Lucknow letter No. PC 9878/MP/LC6 dated 12.12.2002 order dated 11.12.2002 of the G.O.C. –in-Chief, Central Command Lucknow on the appeal against the penalty of compulsory retirement of Sri M.Prasad. As per orders of the G.O.C.-in-Chief the appellate authority in the above case, the Board unanimously resolved that Sri M. Prasad be reinstated in service as Assistant Teacher Primary School, Cantt. Board, Varanasi with immediate effect.

21. The Board considered the Dte. DE, Ministry of Defenxce, Central Command, Lucknow letter No. PC 9878/HNP/LC 6 dated 12.12.2002 order dated 11.12.2002 of the GOC-in-Chief, Central Command Lucknow on the appeal against the penalty of compulsory retirement of Sri H.N. Pathak. As per orders of the G.O.C.

in Chief the appellate authority in the above case, the Board unanimously resolved that Sri H.N. Pathak be reinstated in service as Assistant Teacher :Primary School, Cantt. Board, Varanasi with immediate effect.

8. In view of Resolution No. 19, 20, & 21 the Board further resolved:-

Consequent upon the reinstatement of the above three Teachers as per the orders of Appellate Authority, Sri Raj Bahadur Yadav who was promoted to the post of Assistant Teacher Junior High School filling vacancy arising upon the compulsory retirement of Sri G.K. Sharma, Assistant Teacher Junior High School be reverted to his earlier post i.e. Assistant Teacher Primary School.

Earlier the resultant vacancies due to the promotion of Sri Raj Bahadur Yadav from Assistant Teacher Primary School to Assistant Teacher Junior High School and compulsory retirement of Sri H.N. Pathak and Sri M. Prasad, Assistant Teachers Primary School have been filed up through direct recruitment working as Assistant Teachers Primary School as below:

	Date of Appointment
1. Sri Abhijeet Kumar	11.7.2001
2. Sri Surendra Kumar Tiwari	11.7.2001
3. Shri Ajay Yadav	10.8.2001

The Board unanimously resolved to terminate the services of Sri Abhijeet Kumar, Sri Surendra Kumar Tiwari and Sri Ajay Yadav as above in consonance with condition no. 4 as mentioned in letter dated 9.7.2001 in case of employees at Sl. No. 1 and 2 and letter dated 9.8.2001 in case of employee at Sl. No. 3.

9. The contention of the petitioner is that a perusal of the impugned order dated 19.12.2002 and resolutions nos. 19,20 and 21 demonstrates that the respondents have terminated the services of the petitioner treating him to be temporary/part time Assistant Teacher, whereas neither in the advertisement dated 18.7.2001 inviting applications for appointment of Assistant teachers nor in the appointment letter there is any whisper about the fact that the appointment of the petitioner is on temporary basis. It is submitted that the reason given for termination of services of the petitioner that the appointment of the petitioner is liable to be terminated in view of condition no. 4 of office letter dated 9.8.2001 is incorrect, wrong and illegal for the reasons (1) condition no. 4 will not apply in view of the fact that the petitioner at no point of time has given his willingness to accept the conditions imposed vide letter dated 9.8.2001 and (2) the impugned order of termination does not disclose any reason for terminating the services of the petitioner.

10. It is admitted to the respondents that three vacancies of Assistant Teachers at the Primary School were filled up through direct recruitment pursuant to the advertisement dated 18.7.2001 on probation of two years.

11. Sri Brij Bhushan Pandey, aggrieved by the order approached this Court by way of filing writ petition no. 30648 of 2002 which is pending and the Court has declined to grant any interim order.

12. In the case of Sri H.N. Pathak he was also issued a show cause notice and was compulsorily retired. He also preferred an appeal under Section 14 of

the CFS Rules and by order dated 11.12.2002 the GOC-in-C set aside the order dated 17.7.2001 with a direction to reinstate Sri H.N. Pathak. He also filed writ petition no. 38496 of 2001 which is said to be pending in this Court. The directions are not statutory and are mere executive instructions. It is internal administrative procedure which is not provided in rules.

13. It is worth mentioning that Sri Uma Shanker Ram, Head Master, Junior High School has already retired having completed the age of superannuation on 31.7.2002 and another teacher Km. Shilpi Ghose who was appointed alongwith S/Sri Surendra Kumar Tiwari and Abhijeet Kumar (who have obtained stay orders respectively in writ petition nos. 1239 of 2003 and 7313 of 2003) has already left the service inasmuch as she got employment elsewhere. Thus three posts have become vacant.

14. The four Assistant Teachers, namely, Brij Bhushan Pandey,Abhijeet Kumar, Surendra Kumar Tiwari and Ajay Yadav who were selected after due procedure and selection and are working though kept on probation for a period of two years. Before completion of probationary period, as a result of reinstatement of some teachers, their services have been terminated.

15. The counsel for the respondents contends that it is in this background that the advertisement dated 18.7.2001 was published and further it was specifically mentioned in the advertisement as condition no. 1 that the vacancies are subject to change or subject to vacancies. In the appointment letter also it was specifically stated as condition no. 4 that the services of the petitioner could be terminated at any time and without any information and reason and these conditions were accepted by him as mentioned in his letter dated 9.8.2001 as well as in his joining report dated 22.8.2001.

"महोदय,

विनम्र निवेदन है कि उक्त पत्र के अनुपालन में प्रार्थी दिनांक १०.०८.२००१ को विद्यालय समय से उपस्थित होकर ६.५० ए.एम. कार्यभार ग्रहण कर लिया है।

आप की सभी शर्तें मुझे स्वीकार हैं।

अतः सूचनार्थ श्रीमान् जी की सेवा में सादर प्रेषित है।

प्रार्थी

ह० संजय यादव

२२.०८.२००१"

16. He further submits that the four teachers were aware of the facts when they joined service in pursuance of the advertisement and selection that they have been appointed due to resultant vacancies of four compulsory retired teachers against whom disciplinary proceedings were taken. As a result of appeals of the four compulsorily retired teachers having been allowed by GOC-in-C, the services of the newly recruited teachers will automatically be terminated. It is also submitted that the Cantonment Executive Officer was required to obtain permission of the Directorate, Central Command, Lucknow before making four appointments but no such permission was at all obtained before appointing four teachers. The Director General, Defence Estates, Government of India, Ministry of Defence, R.K. Puram, New Delhi issued letter no. 9/5/c/DE/88-89 dated 3rd July, 1989 to all the Directors, D.E. intimating them that no post should be filled without prior approval. In the same way, the Principal Director, Defence Estates, Central Command, Lucknow sent letter no. 82562/Rulings/LC6 dated 5th January

1998 to all the Cantt. Executive Officers in the Central Command including Varanasi to the effect that prior clearance from the Directorate for filling up the vacancies should be obtained. The Principal Director again repeated the same circular through letter no. 17838/XVI/LC6 dated 22nd October, 2001 to the effect that no vacant post whether direct recruit or promotion post will be filled up without prior approval of the Directorate, Central Command.
It is submitted that since

(1) The petitioner was probationer and as such his services could have been terminated at any point of time during probation.

(2) The petitioner had accepted the conditions contained in the letter of appointment dated 9.8.2001. According to condition no. 4 read with rule 8 of the CFS Rules his services could be terminated at any point of time.

(3) Since the GOC –in-C had allowed the appeal of some of the teachers (who are not connected with the dispute) it became necessary to terminate the services of the newly appointed teachers.

17. He submits that the action of terminating the services of the newly recruited teachers cannot be challenged in the changed circumstances particularly when they were only probationers and had no right to hold the post. Even if his work was not unsatisfactory there is justification to accept the contention of the respondents that the services of the petitioner could not be continued.

18. The counsel for the petitioner submitted that neither the advertisement nor the appointment letter bears any such condition that the petitioner is being appointed in place of certain teacher against whom disciplinary proceedings are pending. From the perusal of the notice inviting applications and from the conditions of the appointing letter it is evidently clear that the candidates who had applied for the post of Assistant Teacher were given to understand that the post was temporary and their services could be terminated in case the appeals of certain teachers are allowed. The petitioner was not appointed against the post of a particular teacher who had been compulsory retired in pursuance of the resolution of the Cantt. Board hence the termination is not invalid.

19. Sri Dube has insisted on following conditions contained in the appointment letter-
(1) on his work being found unsatisfactory
(2) for any other reason without any prior notice and without giving any reason

20. It is true that the petitioner is probationer and due to unforeseen event his services can be terminated. But there is other side also. Admittedly the services of the petitioner are not unsatisfactory. He has not come from back door and is qualified. He came with legitimate expectation to service in employment of the Board. As stated above 3 posts are available for such employees. It is, therefore, just and proper that the petitioner be absorbed against the posts which are available or which may become available in near future say one year.

21. For the reasons stated above the writ petition is disposed of with the above directions. The respondent Board is directed to reconsider the matter in the above light. No order as to costs. This judgment will also decide the connected writ petition nos. 1239 of 2003, Abhijeet Kumar vs. Cantt. Board and another and 7313 of 2003,Surendra Kumar vs. Cantt. Board and another.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2003

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 691 of 1988

State of U.P. and others ...Petitioner
Versus
Uttar Pradesh Madhyamik Shiksha Parishad and others ...Opposite Party

Counsel for the Petitioner:
S.C.
Counsel for the Respondents:
Sri Banarsi Das

Constitution of India–Article 226 Regularisation
Service Law–daily wager–regularisation–have to face a regular selection in accordance with the rules they cannot be regularized without selection, non can get regular pay scale

Held- Para 43

For getting regular appointment and regular pay scale respondents 2 to 34 have to face a regular selection in accordance with the rules and they cannot be regularised without such selection in accordance with the rules, nor can they get the regular pay scale.

<u>Constitution of India–Article 141</u>–Precedent–Binding–effect
Mere direction of the Supreme Court to regularize an employee without laying down any principle of law, held no binding precedent.

Held- Para 44

No doubt in certain decisions the Courts have given direction for regularising daily wagers or casual/temporary employees but in our opinion such directions do not amount to a precedent vide *Indian Council of Agricultural Research vs. Raja Balwant Singh College, 2003(1) ESC 424*, *Delhi Administration vs. Manoharlal, AIR 2002 SC 3088*, etc. What is a binding precedent is a principle of law which has been laid down in a decision of the Court, and a mere direction without laying down any principle of law is not a precedent. A case is an authority for what it actually decides vide Goodyear India Ltd. vs. State of Haryana, AIR 1990 SC 781, Sreenivasa General Traders vs. State of A.P., AIR 1983 SC 1246 (para 29), Union of India vs. Dhanwanti Devi, (1996) 6 SCC 44 (paragraphs 9 and 10), M/s Amar Nath Om Prakash vs. State of Punjab and others, AIR 1985 SC 218, etc. Everything in a decision is not a precedent vide State of Punjab vs. Baldeo Singh 1999 SCC (Crl) 1080.

<u>Constitution of India–Article 39 (d)</u>
Respondents–appointed when there was heavier load of work e.g. during the examination time, without undergoing any selection in accordance with the rules–cannot claim party in pay scale with the regularly selected employees.

Held- Para 46

The regular clerks were appointed after facing a selection which was held after advertising the posts and after following the rules. The daily wagers were not appointed in that manner at all. In fact the respondents appear to be purely ad

hoc appointees appointed when there was heavier load of work e.g. during the examination time, but without undergoing any selection in accordance with the rules. Hence they cannot claim parity with the regularly selected employees.

Case Law:

AIR 1992 SC 1203
1997(3) AWC 1476
1999 (1) UPLBEC 388
JT 1994(1) SC 574
2003(6) SCC 123
1988(3) SCC 91
1989(1) SCC 121
1995(5) SCC 210
1996 (11) SCC 77
2003(1) SCC 250
2002(2) UPLBEC 1680
JT 1997(4) SC 515
1995 (Supp.)(3) SCC 613
1996(10) SCC 56
AIR 1995 SC 1889
1997 SCC 633
JT 1997(3) 569
AIR 1996 SC 1188
2003(1) ESC 424
AIR 2002 SC 3088
AIR 1990 SC 781
AIR 1983 SC 1246 (Para-29)
1996(6) SCC 44 (Para-9 and 10)
AIR 1985 SC 218
1999 SCC (Cri) 1080

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

1. This writ petition has been filed against the impugned order dated 15.06.1987 vide *Annexure-1* to the writ petition.

2. The Petitioner no. 3, Board of High School and Intermediate Education, U.P. is statutory body established under the U.P. Intermediate Education Act, 1921 as amended from time to time. Its Headquarters is at Allahabad. It is an examining body that holds Board of High School and Intermediate Examinations every year. As stated in paragraph 3 of the petition, these examinations are one of the biggest examinations conducted in the world. About 20 lacs students appear in the examinations conducted by the Board.

3. It is alleged in Para 4 of the petition that to take care of the handling of the examinations a large number of daily wage causal workers and labourers are engaged by the Board from time to time. These persons are engaged according to the exigencies of work in the office of the Board. These causal daily wage workers and labourers are employed at the rate prevailing from time to time, fixed by the Government. In the years 1975 to 1978 the workers were paid Rs.5/- per day, during the years 1979 to 1983 they were paid Rs.7/- per day, from 1983 to 1985 they were paid Rs.10/- per day, from 24.03.1985 to 11.12.1985 at Rs.15/- per day.

4. It is alleged in Para 6 of the petition that the respondents 2 to 34, who were the petitioners before the U.P. Public Service Tribunal, were engaged along with other persons by the Board to discharge various manual duties and function at its head office at Allahabad. It may be mentioned that the respondents were causal daily wage employees, and their services were never regularized nor were they ever absorbed in the cadre of the Board's Office. They were only doing manual work and were not engaged to ministerial, clerical or official work as performed by the clerks or officials of the Board. They were merely assisting the clerks by carrying files, documents and papers. Some times they acted as messengers. Their job was not done independently. They were manual workers and labourers employed for specific purposes.

5. It is alleged in Para 8 of the petition that there was another category of nominal roll writers, which was only a nomenclature used for the sake of convenience. These nominal roll writers were in fact engaged to assist the Board officials in reading and writing the documents, paper, rolls, marks-sheets etc. They were getting honoraria in the shape of daily conveyance allowance, but no regular pay-scale was given to them. Thus no regular pay-scale was given to any of the respondents.

6. In Para 10 of the petition it is alleged that the respondents voluntarily and of their own free will accepted this arrangement. There were no service rules in the Board by which the services of such persons could be regularized, and the respondents have no right to the posts. It is also stated that the posts of the regular establishment of the Board are filled in through direct recruitment after formal notification and formal selection by a Selection Committee. No such advertisement, publication or selection was held for appointing the respondents.

7. In Para 11 of the petition it is stated that the State Government vide G.O. dated 14/11/1979 banned the recruitment of nominal roll writers vide *Annexure-2*. In Para 12 it is stated that in the year 1972 the first Regional Office of the Board was established in Meerut, and thereafter Regional Offices were established at Varanasi and Bareilly in the years 1978 and 1981 respectively. In 1986 the State Government constituted a Task Force of an eight member Committee which recommended establishment of another Regional Office at Allahabad, vide *Annexure-3* to the petition. Since there were four Regional Office, the work load at the Head Office, Allahabad decreased due to the de-centralization of the work load. As no work was left for the respondents 2 to 34 in the head office of the petitioner Board at Allahabad, it could have terminated the services of these respondents but taking a lenient and sympathetic view, it gave them opportunity to work as daily wage workers at the Regional Office, but they were not interested in leaving Allahabad.

8. It is stated in Para 15 of the petition that by G.O. dated 28/02/1986 the Government sanctioned 138 posts for clerks, and by another G.O. dated 31/10/1986, 109 temporary posts were created of assistant, vide Annexures 4 and 5 to the petition.

9. The respondents filed a claim petition before the U.P. Public Service Tribunal claiming that they be treated as regularized clerks against the newly sanctioned posts, 247 in number, sanction by the State Government vide G.O., copies of which are Annexures 4 and 5. They also claimed the same salary as regular staff on the basis of the principle of 'equal pay for equal work' The Tribunal after hearing the parties allowed the petitioners claim. Hence this writ petition.

10. It is alleged in Para 22 of the petition that the respondents 2 to 34 were not members of the regular cadre or establishment of the Board's Office. They were only daily wage employees discharging manual duties. Their duties, functions and responsibilities were altogether different from those of the regular ministerial clerks and staff of the office of the Board. For example, some respondents were just carrying documents

and papers from one section to another or carrying typewriters, files. Examination copies, roll numbers etc. from one room to another in the premises of the Board's Office. A clerk in the Board's office discharges ministerial functions like typing, writing, making notes on the files, considering documents, recording opinion and preparing brief for the senior officers. Respondents 2 to 34 were not doing this work, they were only causal labourers doing manual work.

11. It is alleged in Para 24 of the petition that in fact the Tribunal in the impugned order has taken a short cut and disposed off the matter in a summary manner. It is alleged that the Board will have to incur very heavy expenses in paying the regular salaries directed to be paid by the Tribunal. The Board had in fact retained the respondents 2 to 34 taking a lenient view in the matter and offered them service at the Regional Office but they refused. It is alleged that for recruitment and promotion there has to be a selection and test which was not done in the case of the respondents. According to the rules, the post has to be first advertised, and then a candidate has to undergo a formal selection test-interview, typing test and other tests to get appointment. Grant of regularization to the respondents in the manner done by the Tribunal would discriminate against others who are excluded from getting such appointments.

12. Two supplementary affidavits have also been filed by the petitioners and we have perused the same.

13. In the first supplementary affidavit it is stated in Para 3 that originally 247 posts were sanctioned but those were not for the Head Office at Allahabad alone but also for all the three Regional Offices of the Board i.e. at Meerut, Varanasi and Bareilly. Of these 247 posts, 3 posts were of Assistant Secretaries (Gazetted Posts), 4 posts of Assistant Secretaries (Ministerial), 5 posts of Superintendent, Grade-I, 20 posts of Superintendent Grade-II, 100 posts of Senior Assistant, 35 posts of Senior Clerks and 80 posts of Junior Clerks. So far as the three posts of the Assistant Secretaries (Gazetted) are concerned, they were filled by transfer of Officers from the Education Department. Except the Junior Clerks, the other posts were to be filled by promotion from the lower ranks. 80 posts of Junior Clerks were to be filled up by fresh recruitment. Before the aforesaid 247 posts were sanctioned there were 48 persons who were working as paid Apprentice, and 95 persons were working as Nominal Roll Writers. They were all accommodated against these posts except 19 persons. After the aforesaid accommodations, the persons available with the Board for being given regular appointment as Junior Clerks were 19 Nominal Roll Writers who had already been working from before, and 99 persons selected through the District Selection Committee. Thus the Board has given appointments to 154 person on regular basis so far. Now there are 81 posts lying vacant to be filled in by the Board, and after this there are still 19 paid Apprentices who have not yet been given regular appointments, and besides these 19 there are 82 selected candidates whose selection has been made by the respective District Selection Committee. Thus 101 persons have to be accommodated first before the respondents 2 to 34 can be considered.

14. It is mentioned in Para 6 of the petition that 82 of the selected candidates had filed writ petitions in this court in which directions had been given to the Board to pay salary to them. In Para 7 it is stated that the Board is finding it difficult to regularize the services of the petitioners. They can be accommodated only as Class-IV employees, provided some additional posts of Class-IV employees are sanctioned by the Government or regular posts of Class-IV employees fall vacant.

15. In para 9 of the supplementary affidavit it is stated that none of the petitioners have ever worked as Clerks. They have only been assisting the clerks in discharging the duties assigned to them from time to time by the Officers of the Board.

16. In para 5 of the second supplementary affidavit it is stated that while appointing the respondents as daily wage labourers their educational qualification were not considered. The procedure for recruitment of class III employees is that they have to face a duly constituted departmental selection Committee, whereas the daily wage labourers (respondents 2 to 34) were engaged without facing a selection and without following the regular procedure. The daily wagers were never entrusted to do the job of clerks. The daily wagers were never entrusted to do the job of clerks. The clerks have to maintain important registers and other records, but this responsibility is not entrusted to the daily wage labourers. The daily wage labourers are not entitled or required to handle important and confidential records of the Board such as tabulation registers etc. They are not allowed to enter the confidential section.

17. A counter affidavit has been filed on behalf of the respondents and we have perused the same. It is alleged in paragraph 4 (a) of the counter affidavit that in the absence of requisite number of clerical posts daily rated workers were appointed by the Board on regular and not on casual basis in anticipation that their services would be regularized as regular clerks. It is alleged that these employees are doing the work of class III employees (clerical duties). The respondents 2 to 34 are also performing clerical duties and they were appointed in anticipation of regularization of their services. In paragraph 8 (b) it is stated that prior to 1975 due to inadequate number of sanctioned clerical staff in the Board Office to cope with the increased work the Board recruited educated persons as nominal roll writers for working temporarily in the office of the Board on a nominal payment of conveyance charges to do similar work as was being done by the regular clerks. After several years some of nominal roll writers were appointed as regular clerks at intervals. Later on an audit objection was raised against the recruitment to these nominal roll writers and hence the state Government banned the recruitment of such nominal roll writers.

18. In paragraph 8 (e) it is stated that the nominal roll writers have been absorbed as regular clerks in the office of the Board. In paragraph 10 (d) it is stated that during the last ten years or more the daily rated workers were absorbed against regular vacancies according to their seniority and no other procedure was followed. In paragraph 13 (g) it is denied

that no work was left for the respondents 2 to 34 in the headquarter of the Board at Allahabad. In paragraph 25 (a) it is stated that the respondents 2 to 34 are continuously performing the work of routine clerical work of regular nature and they cannot be treated as casual employee. They can at most be called temporary employees on daily wages who are continuously performing clerical work in the office of the Board since a very long time.

19. A rejoinder affidavit has been filed and we have perused the same. It is reiterated in paragraph 6 of the same that the daily wage workers are engaged only for doing manual work. Some daily wagers are employed as class IV employees in the Board but not as clerk. To be appointed as a clerk one has to be duly appointed after regular selection in accordance with the legal procedure and fulfilling the requisite formalities. The respondents 2 to 4 were never appointed in that manner and hence they cannot claim status of class III employees. In paragraph 10 it is denied that the respondents 2 to 4 were employed to do clerical work and they have been doing only manual work.

20. There is no dispute that the respondents 2 to 4 were appointed on a purely temporary basis as daily wage employees. The Tribunal has observed that the petitioners (respondents 2 to 4 in this writ petition) are doing the same work as class III employees. Some of them were appointed as nominal roll writers and were given only conveyance charges. They were initially appointed for four months during heavy load of work. In 1979 the Government abolished the system of appointment of nominal roll writers and directed the Board to employ regular employees.

21. The Tribunal has only relied on the paper which is annexed as Annexure 5 to the claim petition before the Tribunal and on the basis of that it has observed that the petitioner (respondents 2 to 4) to this writ petition) are doing clerical work as they are taking dictation, preparing ledger, helping in the checking of eligibility of examiners, etc. In our opinion this at best means that sometimes respondents 2 to 4 were also given some clerical work in addition to do their manual work as additional work. Merely because respondents 2 to 4 were doing some work at some time as clerk, this does not mean that they are regular class III employees. In fact they were never regularly appointed as class-III employees after following the legal procedure for making such appointment. For making such appointment the post has to be advertised, selection has to be held in accordance with the rules and then only regular appointment can be done. There is no dispute that this procedure was not followed. In our opinion the Tribunal has recorded its finding that the claimants (respondents 2 to 34 in this petition) were doing the same work as clerks in a cursory and perfunctory manner, without properly considering the version of the Board, and relying on just one document (Annexure 5 to the claim petition). In our opinion this is not the proper way to record such a finding. No doubt in a writ petition this Court does not ordinarily interfere with findings of fact, but in exceptional cases it can interfere if it is of the opinion that the finding was reached in a slipshod and summary manner without properly considering the entire

evidence and version of the parties, as has happened in this case.

22. As regards the principle of equal pay for equal work, which has been adopted by the Tribunal, we are of the opinion that that principle has no application in this case and was wrongly applied by the Tribunal.

23. In our opinion the principle of equal pay for equal work has a limited application, as is evident from the recent trend of decisions of the Supreme Court. In particular it cannot apply when the qualifications and the mode and procedure of regular appointment have not been followed.

In Secretary, Finance Department vs. West Bengal Registration Service Association AIR 1992 SC 1203 it was observed:

"It is well settled that equation of posts and determination of pay scales is the primary function of the executive and not the judiciary and, therefore, ordinarily Courts will not enter upon the task of job evaluation which is generally left to expert bodies."

In Dr. Bajrang Bahadur Singh vs. State of U.P. 1997 (3) AWC 1476 a Division Bench of this Court observed:

"From the conspectus of views taken in the aforementioned decided cases, the position is clear that to substantiate a claim of higher scale of pay /salary on the basis of the principle of equal pay for equal work the petitioner will have to establish that they are equally placed in all respects with the person or persons whose scale of pay/ salary they claim. They must allege and prove that the mode of recruitment, eligibility qualifications prescribed, the nature of duties, responsibilities discharged and the service rules if any applicable to the two posts are similar. They cannot succeed in the case merely by showing that they have been discharging the same duties which are being discharged by persons holding the other class of posts."

24. The above decision have been approved by a Full Bench of this Court in *Ajai Kumar Jaitly vs. State of U.P. (1999) 1 UPLBEC 388.*

25. In *Shyam Babu Verma vs. Union of India JT 1994(1) SC 574* it has been held that the nature of work may be more or less the same but the scale of pay may vary based on academic qualification or experience which justifies classification.

26. In State of Haryana vs. Tilak Raj and others (2003) 6 SCC 123 the Supreme Court pointed out that the principle of equal pay for equal work is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organisations or even in the same organisation.

27. In Federation of All India Customs and Central Excise Stenographers vs. Union of India (1988)3 SCC 91 the Supreme Court explained the principle of equal pay for equal work by holding that differentiation in pay scales among government servants holding the same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. The same amount of

physical work may entail different quality of work, some more sensitive, some requiring more tact, some less etc. The judgement of the administrative authorities concerning responsibility which attach to the posts and the degree of reliability expected of an incumbent would be a value judgment of the authorities concerned which if arrived at bona fide, reasonably and rationally, was not open to interference by the Court.

28. In *State of U.P. vs. J.P. Chaurasia (1989) 1 SCC 121* it was pointed out that the principle of equal pay for equal work requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job requires may differ from job to job. It must be left to be evaluated and determined by an expert body. The same view was expressed in *Ghaziabad Development Authority vs. Vikram Chaudhary (1995) 5 SCC 210.*

In *State of Haryana vs. Jasmer Singh (1996) 11 SCC 77* the Supreme Court observed that daily rated workmen cannot be equated with regular employees for the purpose of wages nor can they claim the minimum pay scale of the regular employees. The High Court therefore was not right in directing that the respondents should be paid same salary and allowance as are being paid to the regular employees holding similar posts from the date when the respondents were employed.

29. In *State of Orissa vs. Balram Sahu 2003(1) SCC 250* the Supreme Court reiterated the principle laid down in the case of State of Haryana vs. Jasmer Singh (Supra).

30. In *State of Haryana vs. Tilak Raj (Supra)* the Supreme Court (in paragraph 11 of its decision) observed that a scale of pay is attached to a definite post and in case of a daily wager, he holds no post. Hence he cannot be compared with the regular and permanent staff for any or all purposes including a claim for equal pay and equal allowances. Equal pay for equal work is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scale and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula.

31. In *State Bank of India vs. M.R. Ganesh Babu (2002) 2 UPLBEC 1680* the Supreme Court observed that the principle of equal pay for equal work must depend upon the nature of work done and it cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. The functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgement by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgement is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination.

32. In *State of Tamil Nadu vs. M.R. Alagappan JT 1997 (4) SC 515* the Supreme Court observed that the Deputy Agricultural Officers cannot be given the same pay scale as the Agricultural

Officers although they may be substantially discharging the same type of duties and their place of work may be interchangeable. The Deputy Agricultural Officers are recruited by promotion from the lower category of Assistant Agricultural Officers. They remain non-gazetted employees in the subordinate service while the Agricultural Officers are directly recruited to a gazetted service. The qualifications are different, and though substantially they carry out the same type of work and duties, the important assignment are exclusively entrusted to Agricultural Officers.

33. In the present case also even if it is assumed that the respondents 2 to 34 are carrying out substantially the same duties as the regular employees but it appears that important assignments and confidential work (as stated in the writ petition) are entrusted to the regular ministerial staff only. Hence the principle of equal pay for equal work will not be applicable.

34. In Chandigarh Administration vs. Anita Sood 1995 (Supp) 3 SCC 613 the Supreme Court observed that even though the lecturers may be teaching the same subject as Professor the quality and standard of teaching by a professor is bound to be of a much higher standard than that of a lecturer, and hence a lecturer cannot claim the same pay scale as of Professor. Similarly Teaching Assistant is a different class of teacher as compared to a lecturer.

35. In *State of West Bengal vs. Manirujjaman Mullik and others (1996) 10 SCC 56* the Supreme Court observed that where the method of appointment, the source of recruitment, etc. are different the principle of equal pay for equal work will not apply.

36. In *State of West Bengal vs. D.K. Mukherjee AIR 1995 SC 1889* it was observed by the Supreme Court that even though the duties performed by the Inspectors in two grades may be the same no fault can be found with the classification, since the classification in the cadre on the ground of selection based on merit is permissible.

37. In the present case also the respondents 2 to 34 cannot claim the same pay scale as regular clerks because the latter had been appointed after being selected on merit, whereas the former were appointed without any selection.

38. In *State of U.P. vs. J.P. Chaurasia 1989(1) SCC 121* the Supreme Court observed that the principle of equal pay for equal work has no mechanical application in every case of similar work. In service matters merit and experience could be the proper basis for classification.

39. In *State of Haryana vs. Surender Kumar (1997) SCC 633* the Supreme Court observed that the respondents were appointed on contract basis on daily wages and hence they cannot have any right to a post as such until they are duly selected and appointed. Merely because they are able to manage to have the posts interchanged, they cannot become entitled to the same pay scale which the regular clerks are holding by claiming that they are discharging their duties as regular employees. The very object of selection is to test the eligibility and then to make selection in accordance with the rules. Since the respondents recruitments were

not made in accordance with the rules they cannot claim equal pay.

40. The ratio of the above decision is also applicable to the present case as the respondents 2 to 34 in the present case were not regularly appointed after selection in accordance with the rules.

41. In *Union of India vs. P.V. Hariharan JT 1997 (3) 569* the Supreme Court observed that the Tribunal are often interfering with pay scales without proper reason and without being conscious of the fact that fixation of pay is not their function. It is the function of the Government which normally acts on the recommendation of a Pay Commission. Change of pay scale of a category has a cascading effect. Several other categories similarly situated, as well as those situated above and below will put forward their claims on the basis of such change. The Tribunal should realise that interfering with the prescribed pay scales is a serious matter. The Pay Commission goes into the problem at great depth and it is the proper authority to decide upon the issue. Very often the doctrine of equal pay for equal work is also being misunderstood and misapplied freely revising and enhancing the pay scales across the board.

42. In State of U.P. vs. Ramashyraya Yadav AIR 1996 SC 1188 the Supreme Court observed that the employees appointed to temporary posts are not entitled to pay scale equivalent to the regular employees.

43. Having noted the above decisions we are of the opinion that the Tribunal was not justified in giving the direction which it has given in the impugned order. The respondents 2 to 4 were only daily wagers and hence in view of the decisions referred to above they could not claim the same pay scale as regular class III employees nor other benefits admissible to other regular employees. For getting regular appointment and regular pay scale respondents 2 to 34 have to face a regular selection in accordance with the rules and they cannot be regularised without such selection in accordance with the rules, nor can they get the regular pay scale.

44. No doubt in certain decisions the Courts have given direction for regularising daily wagers or casual/temporary employees but in our opinion such directions do not amount to a precedent vide *Indian Council of Agricultural Research vs. Raja Balwant Singh College, 2003(1) ESC 424*, *Delhi Administration vs. Manoharlal, AIR 2002 SC 3088*, etc. What is a binding precedent is a principle of law which has been laid down in a decision of the Court, and a mere direction without laying down any principle of law is not a precedent. A case is an authority for what it actually decides vide Goodyear India Ltd. vs. State of Haryana, AIR 1990 SC 781, Sreenivasa General Traders vs. State of A.P., AIR 1983 SC 1246 (para 29), Union of India vs. Dhanwanti Devi, (1996) 6 SCC 44 (paragraphs 9 and 10), M/s Amar Nath Om Prakash vs. State of Punjab and others, AIR 1985 SC 218, etc. Everything in a decision is not a precedent vide State of Punjab vs. Baldeo Singh 1999 SCC (Crl) 1080.

45. Hence a mere direction of the Supreme Court to regularise an employee without laying down any principle of law will not amount to a binding precedent.

46. The regular clerks were appointed after facing a selection which was held after advertising the posts and after following the rules. The daily wagers were not appointed in that manner at all. In fact the respondents appear to be purely ad hoc appointees appointed when there was heavier load of work e.g. during the examination time, but without undergoing any selection in accordance with the rules. Hence they cannot claim parity with the regularly selected employees.

47. In view of the above we are of the opinion that the impugned judgement of the Tribunal dated 15.6.1987 cannot be sustained and it is hereby quashed. The petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2003

BEFORE
THE HON'BLE ANJANI KUMAR, J.

demonstrate either the malafides or breach of any statutory provision, which might affect the petitioner's statutory right, which can be enforced by means of this writ petition under Article 226 of the Constitution of India.

Case Law discussed-
C.M.W.P. No. 6090 of 1992
CMWP No. 4112 of 1992

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

1. The petitioner, committee of management, has approached this Court by means of present writ petition under Article 226 of the Constitution of India with the following prayers:-

"(a) issue a writ, order or direction in the nature of Mandamus commanding the respondents to sanction grant-in-aid to the petitioner Institution with effect from 1.3.1991 and pay arrears of salary of teachers and other employees of the Institution under U.P. Act No. 6 of 1978 with effect from 1.3.1991.

(b) issue any other and further suitable writ, order or direction that this Hon'ble Court may deem fit and proper in the circumstances of the case.

(c) Allow this writ petition with cost in favour of the petitioner."

2. A perusal of the relief prayed for by the petitioner clearly demonstrate that petitioner's institution claims sanction for grants-in-aid for the institution with effect from 1st March, 1991.

Civil Misc. Writ Petition No. 21214 of 1996

Committee of Management ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Amit Saxena
Sri P.N. Saxena

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Educational Institution–grant–in-aid to Junior High School by State Government- claimed by committee of Management- but failed to produce statutory provisions in its support cannot claim, as of right–even though institution is recongnised one.

Held- Para 3

In this view of the matter, in my opinion, the petitioner has miserably failed to

3. Heard Sri P.N. Saksena, learned counsel appearing on behalf of the petitioner and the learned Standing Counsel for the Respondents.

Learned counsel appearing on behalf of the petitioner argued that in view of the decisions appended along with the supplementary affidavit passed in writ petition no. 6090 of 1992 (Committee of Management, Sarvodaya Madhyamik Vidyalaya, Sawaipur Dharna Buzurg, District Kanpur Dehat, through its Manager Versus The State of UP and others), decided on 25th November, 1992 and the writ petition no. 4112 of 1992 (Committee of Management, Ashok Vidya mandir Junior High School, Rastpur, district Kanpur Dehat Versus State of U.P. through Secretary Department of Education (Basic), Secretariate, Lucknow and others), decided on 2nd February, 1993, the petitioner's institution is also entitled for the grant of the grants-in-aid. Learned counsel for the petitioner though relied upon the provision of U.P. Act No. 6 of 1978, but according to my reading no provision of U.P. Act No. 6 of 1978 provides that an institution is, in law, entitled to receive the grants-in-aid from the State Government. The State Government from time to time has issued Government orders prescribing the standard and norms of allowing g rants-in-aid to the recognised institution, but learned counsel for the petitioner has not referred to, nor brought to my notice any statutory provisions under which the petitioner can claim, as of right, the grants-in-aid. In this view of the matter, in my opinion, the petitioner has no right, much less statutory right for which a mandamus has been sought for, nor there is any corresponding statutory duty cast upon the State Government that it must provide grants-in-aid to the institution even though the same may be a recognised institution. So far as two judgements referred to above, relied upon by learned counsel appearing on behalf of the petitioner, though the facts of the aforesaid two judgements, do not apply to the facts of the present case. In this view of the matter, in my opinion, the petitioner has miserably failed to demonstrate either the malafides or breach of any statutory provision, which might affect the petitioner's statutory right, which can be enforced by means of this writ petition under Article 226 of the Constitution of India.

4. For the reasons stated above, this writ petition has no force and is accordingly dismissed. The interim order, if any, stands vacated. However, on the facts and circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.9.2003

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE D.P. GUPTA, J.

Civil Misc. Writ Petition No. 43597 of 2003

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

Counsel for the Petitioner:
Sri V.P. Srivastava
Sri Divyesh Singh

Counsel for the Respondents:
S.C.

Explosives Act, 1884-Explosive Rules, 1983-R, 165-Renewal of licence for fire arms-direction by D.M. to shift place of business outside from residential area of city-show cause notice-cancellation of licence-No attempt made by licencees to shift their business of fire works outside thickly populated area to safer place-public interest higher than individual interest-Public interest is supreme-Held, Courts should not come to rescne of such an individual, if public interest demands for a particular action petition dismissed.

Held-Para 17

Undoubtedly, in the instant case the petitioner is being asked for the last 3 years to shift his business outside the thickly populated area and the order is being passed in the larger public interest and it is settled legal proposition that the public interest is much higher than the interest of the individual. We fail to understand how the petitioner has not yet made an appropriate arrangement for shifting his business outside the thickly populated area. There is nothing on record to show that during the last 3 years, any attempt has been made by the petitioner to shift his business outside the densely populated area.

Case discussed:

1995 (i) Civil & Revenue Cases 732
AIR 1992 SC 96
AIR 1994 SC 1
AIR 1940 PC 167
AIR 1953 SC 333
AIR 1955 SC 661
AIR 1998 SC 1057
AIR 1999 SC 1195
AIR 1999 SC 1271
(1999) 8 SCC 744

(Delivered by Hon'ble B.S. Chauhan, J.)

1. This writ petition has been filed for quashing order dated 12.9.2003 (Annx-17), by which the District Magistrate, Ghaziabad has issued a direction to the petitioner to shift his premises for carrying on the business of the fireworks out of the residential area, otherwise his license shall be deemed not to have been renewed and further to issue a direction to the respondents not to interfere with his business inside the city.

2. Facts and circumstances giving rise to this case are that petitioner is a licence holder for fireworks and it was valid only upto 31st March 2003. In June 2000, need was felt that the licence under the provisions of the Explosive Act, 1884, should be shifted outside the residential/congested area and they should not be permitted to have their business within the densely populated area for the purpose of security and in larger public interest. Show cause notice was issued to the petitioner along with other similarly situated persons and after giving an opportunity of hearing to him vide order dated 21.6.2000, (Annx. 1), the licence of the petitioner was cancelled.

3. However, it was made clear that within a period of 5 days, the license holders should clear off their stock and after shifting their business outside the congested area, then they will be entitled to apply for the license afresh . Being aggrieved and dissatisfied, some of the licensees approached the appellate court i.e. Divisional Commissioner, Meerut and the matter was disposed of vide order dated 13.11.2000, issuing a direction that in case licensees are willing to shift their business outside the congested area, they may be entitled for having a fresh license, but to examine their grievances, it was directed to have a committee of officers including the City Magistrate, Police Officers and Fire Officer, and to examine

as to whether it was in public interest to permit them to have their business on the places outside the residential area and then to consider their application for license.

4. A similar order was passed in another connected appeal on 6th July, 2001, however, on 12.11.2001, the appeal was considered by the Divisional Commissioner, imposing certain conditions including the condition that the licensees shall shift out of the congested area. The issue was again considered by the District Collector in respect of 23 licensees, it was held that under certain circumstances the order of the Divisional Commissioner, that the licence of the licensees are being renewed only upto 31.3.2002, and it pointed out that there will be committee of officials consisting of the Additional City Magistrate, Circle Officer, Police Station Ghaziabad and Fire Officers and they were directed to submit a report.

5. The Divisional Commissioner again passed an order dated 8.8.2003 directing the District Collector to decide the applications for renewal within a period of 30 days, on the basis of the report submitted by the committee and in case no order is passed, the licenses shall be deemed to be automatically renewed. In pursuance of the order, the impugned order dated 12/15.9.2003, has been passed by the District Magistrate directing the petitioner and others not to run the business in the congested area which is thickly populated and in case they are willing to shift outside the city, applications for their renewal shall be considered, otherwise it will be deemed to have been rejected. Hence this petition.

6. Learned counsel for the petitioner Sri V.P. Srivastava, has submitted that the petitioner cannot be asked to close his business at the festival times i.e. Dussehra and Diwali, which is the most conducive period for the business and more so, it is difficult for the petitioner to get an alternative accommodation outside the thickly populated area within such a short period. The order is neither rejecting the application for renewal nor renewing the application and the Act does not envisage for passing such an order, therefore the order is liable to be quashed.

7. On the contrary, the learned standing Counsel has submitted that the order is appellable before the Divisional Commissioner. Petitioner has earlier approached several authorities several times, and no explanation can be made in this regard. Petition has been filed without exhausting the statutory remedies. Petitioner is being asked for the last 3 years to shift his business outside the thickly populated area. Order is being passed in the larger public interest, therefore, this Court should not grant any indulgence whatsoever.

8. We have considered the rival submissions made by the learned counsel for the parties and perused the record. It is not a case of utter surprise, but shocking that the statutory authorities are not passing the order having strict adherence to the statutory requirement. The Appellate Authority had earlier passed the order that in case certain action is not taken by the Licensing Authority, the license would be deemed to have been renewed automatically.

9. Similarly in the impugned order, the licensing authority has passed the

order that in case the petitioner does not shift his business outside the thickly populated area his application for renewal of license shall be deemed to have been rejected.

10. It is settled legal proposition of law that unless that statute provides for a deeming clause, the Court should be very slow in accepting such a contention, as laid down by a Constitution Bench of the Allahabad High Court in Rana Pratap Singh vs. State of U.P., 1995 (1) Civil & Revenue Cases 732. The court held that had the intention fiction/deeming sanction/refusal, specific in the Act or the Rules. In absence of any statutory provision/rule, it should not be construed as to provide for a fiction in such an eventuality.

11. More so, creating a fiction by Judicial interpretation may amount to legislation a field exclusively within the domain of the legislature. (vide State of Jammu & Kashmir Vs. Triloki Nath Khosa, AIR 1994 SC 1, and Ajaib Singh Vs. Sirhind Coop. Marketing-cum-Processing Service Society Ltd. (1999) 6 SCC 82.

In Union of India Vs. Deoki Nandan Agarwal, AIR 1992 SC 96, the Hon'ble Apex Court observed as under :

"It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe that legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Court."

12. Even if the Statute provides for a legal fiction/deeming provision, it must be limited to the purposes indicated by the context and cannot be given a larger effect. (Vide Radhakissen Chamria & ors. Vs. Durga Prosad Chamria & Anr. AIR 1940 PC 167, State of Travancore-Cochin Vs. S.V. Cashewnut factory Quilon, AIR 1953 SC 333 and Bengal Immuity Co. Ltd. Vs. State of Bihar & ors. AIR 1995 SC 661). In Modi Cement Ltd. Vs. Kuchil Kumar Nandi, AIR 1998 SC 1057, the Hon'ble Apex Court explained the distinction between the deeming provision and presumption and held that the distinction was well discernible.

13. Similar view has been taken by the Hon'ble Apex Court in **State of Kerala & ors. Vs. Dr. S.G. Sarvothama Prabhu, AIR 1999 SC 1195**, Commissioner of Income Tax Vs. Mysodet (P) Ltd., AIR 1999 SC 1271, and Garden Silk Mills Ltd. & Anr. Vs. Union of India and ors. (1999) 8 SCC 744.

14. Rule 165 of the Explosive Rules 1983, provides that if an application for renewal has been filed within time and it is not being disposed of by the licensing authority, the license shall be deemed to be in force until such date as the licensing authority renews the license or until an intimation that the renewal of the license is refused and is communicated to the applicant. The rules provide for a fiction only for the transitory period, but neither the Explosive Act nor the rules framed there under envisage deemed cancellation or deemed renewal of a license, thus the authorities have been passing the order without complying with the requirement of the statutory provisions which cannot be held to be a sign of good governance.

15. The Divisional Commissioner i.e. Appellate Authority in his order dated 12th Nov. 2001, had imposed large number of conditions and one of them contained in Clause 5 has been that the application of the licenses for a renewal shall be considered only if they shift from the present premises to a safer place and close their business in the existing premises.

16. The said order had never been challenged by any of the licensees and attained finality. We fail to understand as on what basis the petitioner can claim any relief at subsequent stage and how he can be permitted to agitate the issue that the said condition was not binding upon him.

17. Undoubtedly, in the instant case the petitioner is being asked for the last 3 years to shift his business outside the thickly populated area and the order is being passed in the larger public interest and it is settled legal proposition that the public interest is much higher than the interest of the individual. We fail to understand how the petitioner has not yet made an appropriate arrangement for shifting his business outside the thickly populated area. There is nothing on record to show that during the last 3 years, any attempt has been made by the petitioner to shift his business outside the densely populated area.

18. Undoubtedly, orders are being passed time and again only in larger public interest and the public interest is the supreme law and Court's should not come to rescue such an individual, if the public interest demands for a particular action on the part of the statutory authority.

Thus, in view of the above, we are of the considered opinion that the impugned order does not require any interference by this Court.

19. Needless to say, that if petitioner makes an alternative arrangement and shifts his businesses outside the densely populated area and satisfies the licensing authority that he would fulfill all the conditions for grant of license and his application shall be considered for renewal strictly in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.10.2003.

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.4028 of 1999

Lochan Prasad ...Petitioner
Versus
Executive Engineer Public Works Department ...Respondent

Counsel for the Petitioner:
Sri Bhoopendra Nath Singh

Counsel for the Respondents:
S.C.

U.P. industrial Disputes act 1947, sections 2 (s), 6-N-daily wager not appointed against any post not entitled for regularisation–even if has continuously worked for 240 days in previous year–he entitled to retrenchment compensation, with interest, but can not for regularisation.

Held- Para 11

The petitioner was engaged on daily wage and was not appointed against any post, he has no right to be regularized in service as he failed to prove before the

Labour Court that he was appointed against a sanctioned post in substantive vacancy. Engagement for 240 days from time to time on daily wage would not attract the provision of Section 6-N of the U.P. Industrial dispute Act unless it could established that he had continuously worked for 240 days in previous year counting backward from the date of termination of service and even in that eventuality he would have only been entitled to retrenchment compensation with interest.

Case Laws discussed:-

1992(4)SCC 99
1997(4)SCC 391
1978(2)SCC 213
2002(2)SCC 622
1998(78) FLR 143
1997(77) FLR25 (SC)

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

Heard counsel for the parties and perused the record.

2. This writ petition has been filed challenging the validity and correctness of the award in adjudication case no.3 of 1994 passed by the Labour Court, Varanasi.

3. The petitioner claims that he was appointed as "beldar" against a permanent post on daily wages w.e.f. 26.3.1991 and had worked under the Executive Engineer P.W.D. Rashtriya Nirman Khand Jyoti Chauraha, Bareilly continuosly for more than 240 days in a year that he was denied duty by the respondent orally w.e.f. 26.1.1993 without complying with the provisions of section 6N of the Industrial Dispute Act 1947.

4. The petitioner raised an industrial dispute before the Regional Conciliation Officer, Bareilly alleging illegal termination of service which was registered as C.P.Case No. 133b of 1983. When the efforts for settlement of dispute by the Regional Conciliation Officer failed, the following matter of dispute was referred to the Labour Court Varanasi vide G.O. dated 31.12.1993. The reference of the labour Court is as under:-

"क्या सेवायोजकों द्वारा उनके कर्मचारी श्री लोचन प्रसाद पुत्र श्री सुन्दर लाल अस्थाई दैनिक भोगी बेलदार को दिनाँक २६.०५.१९९३ से सेवा से पृथक किया जाना उचित व वैधानिक है।"

5. The Labour Court relying upon the law laid down by the Apex Court in **Bombay Telecom Canteen Employees Association versus Union of India 1997(77) FLR 25 SCC,** held that Public Work Department is not an industry and that the petitioner was a daily wager employee as such he does not fall within the ambit of definition of workman in Section 2 (s) under the Industrial Dispute Act 1947. It further held that the petitioner had himself stopped coming to work and had abandoned his services their being no termination by any over act of the employer and that disengagement of a daily wager is not retrenchment within the meaning of section 2(s) of the aforesaid Act.

6. In so far as the question whether the P.W.D. is an industry or not is concerned it is now firmly settled by a catena of judgments of the Apex Court that Public Works Department is an industry. Reference in this regard may be had to Division Bench judgement of the Apex Court **in Executive Engineer, CPWD, Indore Versus Madhukar Purshottam Kolharkar and another, (2002) 2 SCC 622.** Relying upon the decision in **Bangalore Water Supply and Sewerage Board Versus A.Rajappa (1978) 2 SCC 213** the Apex Court held

that the central Public Works Department an industry and further that there was no substance to the argument to the contrary.

7. In so far as the contention of the petitioner that he was a daily wager and not an workman under Section 2 (s) of the Industrial Dispute Act 1947, the Labour Court has given a finding of fact based on the evidence of the workman that the workman had not been given any appointment letter and was engaged at the site in exigency of work as daily wager. The appointments in the department are regulated by rules. Neither any averments nor any material had been brought on record by the petitioner that he was appointed against a post in accordance with rules. On the contrary it is evident from the pleadings of the workman that he was engaged on daily wages on day-to-day basis. He was a temporary employee and his disengagement from service cannot be construed as retrenchment as defined in Section 2(s) of the U.P. Industrial dispute Act 1947 as per law laid down by the Apex Court in **Himanshu Kumar Vidyarthi and others Versus State of Bihar 1997(4) SCC 391.**

2. (s) "Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action, but does not include-

(i) Voluntary retirement of the workman or
(ii) Retirement of the workmen on reaching the age of superannuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf;

8. The workman had himself stopped coming to work and there was no act of "termination by the employer" of the services of the workman, the key to phrase to bring the termination for any reason what so ever within the ambit of the word "Retrenchment" as defined in the Act is that there has to be an act of the employer in termination of the services of the workman. The termination brought about by the workman himself like abandonment, refusal to work etc. would not fall within the ambit of the definition of "Retrenchment". Applying the keywords it is evident that in the instant case the workman was not retrenched by the employer and it is not a case of retrenchment. Disengagement of a daily wager also does not fall within the ambit of retrenchment even though such daily wager may have worked for 240 days in a year. I am strengthened in my view by the judgement of Apex Court in **Himanshu Kumar Vidyarthi and Others Versus State of Bihar and others (Supra)** in which it has been held that:-

"*Every department of the Government cannot be treated to be industry. When the appointments are regulating by the statutory rules, the concept of industry to that extent stands excluded. The petitioners were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Their disengagement from service cannot be construed to be as retrenchment under the Industrial Disputes Act. The concept of retrenchment therefore cannot be stretched to such an extent as to cover these employees. Since the petitioners are only daily wage employees and have no*

right to the posts, their disengagement is not arbitrary."

9. In **Delhi Development Horticulture Employees Union Versus Delhi Administration 1992 (4) SCC 99 Para 23,** it was emphasized by the Apex Court as to how judicial sympathy with such workman engaged in daily wages employed in project scheme or programme of the State Government could boomrang leading to pernicious consequences. The concern of the Apex Court in ordering indiscriminate regularization of daily wages by the Courts is reflected thus:-

"The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the employment exchanges for years. Not all those who gain such back-door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases, which come to the courts, are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employed although the works are time bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardized on both count."

10. After appreciation of evidence and pleadings of the parties the Labour Court has given a finding of fact that workman was a daily wager not appointed against any post. This fact was also admitted by the workman in his evidence and that he was not given any appointment letter and it was proved by the Labour Court from exhibit W-1 that he had himself not gone on duty. The petitioner was thereafter not a workman.

" मैने दोनों पक्षों के विद्वान प्रतिनिधियों को सुना है दाखिल अभिलेखों एवं साक्ष्यों का बखूबी अवलोकन किया है।

उपरोक्त दाखिल किये गये कागजात एवं ई०डब्लू०.१ नरपत सिंह के बयान से ये बात स्पष्ट है कि दिनाँक २६.०३.१९९१ से २५.०१.१९९३ तक संबंधित श्रमिक दैनिक वेतन भोगी कर्मचारी के रूप में बहैसियत बेलदान काम कर रहा था एवं उसकी सेवायें दिनाँ २६.०१.१९९३ से समाप्त हो गई उसे कोई नियुक्ति पत्र नहीं दिया गया था। इस बात को श्रमिक ने भी अपने मौखिक बयान में स्वीकार किया है उसने इस बात को स्वीकार किया है कि महोन में एक बार पूरे महीने का भुगतान उसे कर दिया जाता था। उसके इस बयान से तथा ई०डब्लू-१ के बयान एवं दाखिल किये गये अभिलेख दिनाँक २०.०९.१९९३ तथा उसके साथ संलग्न लिस्ट तथा श्रमिक की ओर से दाखिल किया गया अभिलेख प्रदर्श डब्लू-१ से सिद्ध है एवे उसमें लिखा हुआ है ि कवह अस्थाई दैनिक वेतन भोगी वेलदार था। प्रदर्श डब्लू-१ एवं ई०डब्लू०-१ के बयान से ये बात सिद्ध है कि वह स्वतः कार्य पर नही आया तथा कार्य हेतु इनके स्थान आवश्यकतानुसार दूसरे श्रमिक को रखना पडा। अतः ये बात सिद्ध पाई जाती है कि २५.०१.१९९३ के बाद संबंधित श्रमिक स्वयं कार्य पर नहीं आया।

चूंकि जैसा कि पैरा १ मे लिखा जा चुका है कि संबंधित श्रमिक लोचन प्रसाद दैनिक वेतन भोगी कर्मचारी था तथा उसकी कोई नियुक्त नहीं की गई थी तथा वैसे ही जैसे लेबर रखे जाते हैं उस को रख लिया जाता है। इसलिये संबंधित श्रमिक लोचन प्रसाद आई०डी०एक्ट में दी गई श्रमिक की परिभाषा में नहीं आता है। इसलिये उसकी सेवा किसी भी समय बिना नोटिस के समाप्त की जा सकती थी धारा ६-एन के अनुसार उसे कोई अनुतोष पाने का अधिकार नहीं है। इन परिसिथतियों में लोचन प्रसाद के बयान से उसे कोई मदद नहीं मिलती है।"

11. Applying the principles laid down in the case of **Banglore Water Supply and Sewerage Board (supra)** and considering the ratio laid down in **General Manager Telecom Versus S. Sriniwashan Rao and others 1998 (78) FLR page 143 and Executive engineer CPWD, Indore Versus Madhukar Purshottam Kotharkan (supra)** the finding of the Labour Court that P.W.D. is not industry is quashed. In so far as the findings of the Labour Court that termination of services of the petitioner is not retrenchment as he had himself not come to work is not liable to be disturbed under Article 226 of the Constitution of India. The petitioner was engaged on daily wage and was not appointed against any post, he has no right to be regularized in service as he failed to prove before the Labour Court that he was appointed against a sanctioned post in substantive vacancy. Engagement for 240 days from time to time on daily wage would not attract the provision of Section 6-N of the U.P. Industrial dispute Act unless it could be established that he had continuously worked for 240 days in previous year counting backward from the date of termination of service and even in that eventuality he would have only been entitled to retrenchment compensation with interest.

12. For the reasons stated above, the writ petition is allowed in part. The finding of the Labour Court that Public works Department is not an industry is quashed. Other findings particularly that termination of the petitioner does not fall within the ambit of the definition of "Retrenchment" is upheld. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2003.

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil misc. Writ Petition No. 27788 of 2003

Smt. Krishna Devi ...Petitioner
Versus
District Magistrate, Ghaziabad and others ...Respondents

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

Counsel for the Respondents:
Sri Vishnu Sahai
Sri B. Dayal
S.C.

U.P. Panchayat Raj Act 1997, See 95 (1) (g)- U.P. Panchayat Raj (Removal of Pradhan, Uppradhan and members Enquiry) Rules 1997 the two enquries under first Provision and Second proviso of the Act- distinction between explained

Held- Para 9

The first proviso introduced in the year 1994 clearly makes a distinction between the two enquiries conducted under the first proviso and the second proviso and if this interpretation is not followed, both the proviso cannot be reconciled, as held by the Division Bench

in the case of Moti Lal verses District Magistrate, Lalitpur and another, reported in 2003 (94) R.D. 327. The first proviso is only for the purposes of arriving at the conclusion "prima facie" as to whether it is necessary to exercise the power contemplated under the second proviso or not, whereas the second proviso contemplated regular enquiry before the order of removal is passed against the Pradhan. The powers of first proviso is like emergency provision, which will be subject to any order that may be passed after enquiry in accordance with second proviso, read with 1997 Rule. By exercise of power under the first proviso, none of the rights of Pradhan affected as the suspension of financial and administrative power is only temporary in nature which will always be subject to final orders after an enquiry in accordance with the Scheme of second proviso, read with 1997 Rules.

Case leaves discussed:

2003(94)RD312
1999(1)LBESR918(Alld)
2003(94)RD327

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

1. The petitioner, who is Gram Pradhan of concerned Gram Panchyat has

2. Heard learned counsel appearing on behalf of the parties.

The facts leading to the filing of present writ petition are that the petitioner, who was elected as Pradhan of concerned Gram Panchayat in July, 2000, was issued a show cause notice dated 24th April, 2002 by the District Magistrate, Ghaziabad under Section 95 (1) (g) of U.P. Panchayat Raj Act, 1947, as amended in the year 1994, whereby the petitioner was asked to show cause as to why the petitioner be not restrained from exercising financial and administrative power and a committee be not appointed as contemplated under the aforesaid provision. The petitioner submitted reply to the aforesaid show cause notice, as alleged by the petitioner. Thereupon the District Magistrate has passed an order dated 19th June, 2003, Annexure-'6' to the writ petition, restraining the petitioner from exercising financial and administrative power as Pradhan of Gram Panchyat concerned. The petitioner has challenged the order dated 19th June, 2003 passed by the District Magistrate, Ghaziabad before this Court by means of writ petition no. 27788 of 2003. This Court vide its order dated 4th July, 2003 passed the following interim order, which reads thus:

challenged the order passed by the District Magistrate, Ghaziabad, dated 19th June, 2003, Annexure-6 to the writ petition, whereby the District Magistrate restrained the petitioner from exercising financial and administrative powers and appointment of a Committee of three members of the Gram Panchayat in exercise of powers under the proviso of Section 95 (1) (g) of U.P. Panchayat Raj Act, 1947, reproduced below, which shall here-in-after referred to as first proviso.

"[Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a committee consisting of three members of Gram Panchayat appointed by the State Government]"

"Learned Standing Counsel may file a counter affidavit within one month. Learned counsel for the caveator may also file counter affidavit in the same period. Rejoinder Affidavit may be filed within two weeks thereafter. List thereafter, in the meantime, operation of the impugned order dated 19.6.2003 will remain stayed till further orders.

Sd/-
S. Harkauli,
4.7.2003."

3. Learned counsel appearing on behalf of the petitioner stated that in spite of the order being served on the Respondent, the Block Development Officer issued a direction directing the petitioner that she will not make any payment and she will make payment only after the work is verified through the Executive Engineer, Rural Engineering service

4. Learned counsel appearing on behalf of the petitioner takes note of the provision of Section 95 (1) (g) for the purposes of adjudication of the controversy, which reads thus:

"**95. Inspection**--- (1) The State Government May---

(g) remove a Pradhan, Up-pradhan or member of a Gram Panchayat, or a joint committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he----

(i) absents himself without sufficient cause from more than there consecutive meetings of sittings,
(ii) refused to act or becomes incapable of acting for any reason whatsoever or if he is accused or charged for an offence involving moral turpitude,
(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Actor rules made there under or his continuance as such is not desirable in public interest, or
(iii-a) has taken the benefit or reservation under sub-section (2) of Section 11-A or sub-section (5) of Section 12, as the case may be, on the basis or a false declaration subscribed by him stating that he is a member of the Schedule Castes, the Scheduled tribes or the Backward Classes, as the case may be;]
(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchyat takes active part in politics, or
(v) suffers from any of the disqualifications mentioned in clauses (a) to (m) of Section 5-A:

5. Learned counsel for the petitioner submitted that is would be clear from the history of the aforesaid provision that the proviso, which is now termed as first proviso, has been introduced in the year 1994, whereas the second proviso was already on the Statute book. The proviso introduced in the year 1994, which is referred to as "first proviso", reads thus:-

[Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative power and function, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a committee consisting of three members of Gram Panchyat appointed by the State Government.]"

6. Learned counsel for the petitioner has submitted that in view of the provision of U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997, the petitioner is entitled for an opportunity in accordance with 1997 Rules, referred to above , before passing of the impugned order and further since the enquiry relied upon by the District Magistrate in passing the impugned order, whereby the Gram Pradhan has been restrained from exercising her financial and administrative powers has not been conducted in accordance with the provisions of Rules 1997, therefore the order impugned deserves to be quashed, as the same is contrary to the proviso of Section 95 (1) (g) of the Act, which shall be referred to as "second proviso".

The Second proviso is reproduced below:-

"Provided that-----

(i) no action shall be taken under clause (f), clause (g) except after giving to be body of person concerned a reasonable

conducted in accordance with the proviso of 1997 Rules.

9. A bare reading of 1997 Rules clearly demonstrate that the enquiry conducted under the 1997 Rules is to be followed only if the case of the proceeding is removal of the Pradhan as contemplated under Section 95 (1) (g) of the Act. The first proviso introduced in the year 1994 clearly makes a distinction between the two enquiries conducted under the first proviso and the second proviso and if this interpretation is not followed, both the proviso cannot be reconciled, as held by the Division Bench

opportunity of showing cause against the action proposed.
(ii) ********"

7. Learned counsel for the opposite side have relied upon a Division Bench decision, reported in **2003 (94) R.D., 312 Smt. Rajbiri Devi Versus State of U.P. and Others**, read with 1997 Rules and submitted that from the nature of the power as contemplated under the first proviso clearly demonstrate that the said power is only by way of interlocutory measure pending enquiry in the guilt of the Pradhan in proceedings of removal of Pradhan. The aforesaid controversy has been dealt with in the case of **Smt. Sandhya Gupta Versus District Magistrate & others, reported in 1999(1) L.B.E.S.R., 918 (All).**

8. Learned counsel for the petitioner emphasized relying on Smt. Sandhya Gupta's case (supra) that the scheme of 1997 Rules, read with second proviso clearly demonstrate that whatever enquiry is to be conducted against the Pradhan be it for the purposes of the first proviso or for the purposes of second proviso is to be in the case of **Moti Lal verses District Magistrate, Lalitpur and another, reported in 2003 (94) R.D. 327.** The first proviso is only for the purposes of arriving at the conclusion "prima facie" as to whether it is necessary to exercise the power contemplated under the second proviso or not, whereas the second proviso contemplated regular enquiry before the order of removal is passed against the Pradhan. The powers of first proviso is like emergency provision, which will be subject to any order that may be passed after enquiry in accordance with second proviso, read with 1997 Rule. By exercise of power under the first

proviso, none of the rights of Pradhan affected as the suspension of financial and administrative power is only temporary in nature which will always be subject to final orders after an enquiry in accordance with the Scheme of second proviso, read with 1997 Rules.

10. In this view of the matter, none of the argument advanced on behalf of learned counsel for the petitioner can be sustained and I am in full agreement with the judgment of Division Bench, referred to above.

For the reasons stated above, this writ petitioner has no force and is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2003

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

Civil Misc. Writ Petition No. 6866 of 1995

Suresh Kumar Singh ...Petitioner
Versus
The State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri A.N. Sinha
Sri S.S. Chauhan
Sri K.N. Yadav

Counsel for the Respondents:
Sri Shiv Kumar Singh
Sri B.N. Singh
Sri S.P. Sinha
Sri S.K. Srivastava
Sri Pushpendra Singh
S.C.

U.P. Civil Service (Executive Branch) Rules 1982, Rule 14 (4) read with Collection of Amin Service Rules 1974– Service Law–Life of Select list–whether is select list valid only for a period of one year–held, in absence of any special provisions-yes

Held- Para 10

So far as the question as to whether the select list continues to remain valid for a period after one year is concerned, it may be mentioned here that , in the absence of any specific provision, the select list is treated valid for a period of one year.

Case Laws Discussed:
CMWP No. 24584 of 1989
CMWP No. 25598 of 1994
CMWP No. 1247 of 1992
1996 (2) UPLBEC 1249
SA No. 229 of 1992

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

1. By means of the present writ petition filed under Articles 226 of the Constitution of India, the petitioner, Suresh Kuamr Singh seeks a writ, order or direction in the nature of certiorari quashing the order dated 16.12.1994 passed by the Controller Of Exams, U.P. Public Service Commission, Allahabad respondent no. 3 filed as annexure 2 to the writ petition as also the appointment of Sri Biodhan, respondent no 4 He further seeks a writ, order or direction in the nature of certiorari quashing the decision taken by the respondent no. 3 to give placement to Sri Biodhan, respondent no.4 above the petitioner in the select list and to recommend the name of the petitioner for appointment on the post of Naib Tahsildar in the select list of 1979 batch by creationing a supernumerary post. Further a writ, order or direction in the nature of mandamus is

sought directing the respondent no. 2 (Secretary, revenue Services, Lucknow) to appoint the petitioner after he receives the recommendation from respondent no. 3 on the post of Naib Tahisldar retrospectively and fix his pay notionally from the date his junior Sri Biodhan respondent no. 4 was appointed as Naib Tahsildar.

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

According to the petitioner he had appeared in the written examination as well as interview conducted by the U.P. Public Service Commission, Allahabad in the combined lower subordinate services competitive examination 1979. In the notification no. A-10-EIV/78-79, at serial no. 20 , the total number of 185 posts of Naib Tahisldar were to be filled up out of which 28 were reserved for being filled up from amongst the candidate belonging to the backward class. The petitioner was allotted roll no. 40686. He gave his first preference for the post of Naib Tahsildar and the second preference for the post of entertainment tax inspector. He qualified in the written test. He was called for the interview, he scored 253 marks in the written test and 56 marks in the interview i.e. 309 marks. Sri Biodhan, respondent no. 4 obtained 252 marks in the written test and 57 marks in the interview i.e total of 309 marks. However, the petitioner was placed just below the respondent no. 4 by the U.P. Public Service Commission, Allahabad.

3. The petitioner made a representation on 15th June. 1984 before the chairman, U.P. Public Service Commission, Allahabad ,respondent no. 3, pointing out the anomaly and requesting for correcting the select list and placing him above the respondent no. 4 It may be mentioned here that respondent no. 4 had been posted as Naib Tahsilar in the 1979 batch of selected candidates. He sent a reminder on 23rd June, 1994. when his representation was not decided, he approached this court by filing Civil Misc. Writ Petition No. 2213 of 199. However, after the representation was decided on 16th December 1994, the aforesaid writ petition was dismissed.

4. I have heard Sri Ashok Khare, learned senior counsel for the petitioner and the learned counsel appearing for the respondents.

Learned counsel for the petitioner submitted that the petitioner had obtained more marks in the written test than that was obtained by the respondent no. 4 and the aggregate of total marks of the petitioner and respondent no. 4 in the written test and viva voce (interview) being same, i.e. 309, the petitioner ought to have been placed above the respondent no.4. The action of the U.P. Public service commission, Allahabad in placing the petitioner below the respondent no.4 is wholly illegal and contrary to law. He submitted that the U.P. Subordinate Revenue Executive Service (Naib Tahsildar) Rules 1944, (hereinafter referred to as the rules of 1944) governed the selection and appointment of Naib Tahsildar. There is no provision empowering the U.P. Public Service Commission, Allahabad to place a person who has obtained higher marks in the interview and where the aggregate is same, above a person who has obtained lesser marks in interview. He submitted that rule 16 of the rules of 1944 provides for determining the seniority in the select list as have shown their suitability for

appointment in the written test. Thus, the marks obtained in the written test has to play the determining role in placing the candidates in order of merit, his submission is that under rule 19 of the rules of 1944 if two or more candidates obtain equal marks in the aggregate, the commission has to arrange then in order of merit in order of their general suitability of the service,. General suitability for the service means by determining the merit according to the marks obtained in the written test. In support thereof, he relied upon a decision of this court in **Civil Misc. Writ Petition No. 24584 of 1989, Vinay Khare v. State of U.P. and others**, decided on 5th September, 1992, wherein this court while interpreting the rule 19 of U.P. Nyayik Sewa Niyamawali, 1951 had considered this very question and had held that the correct interpretation of rule 19 is where two or more candidates have the same total of marks, the candidates having highest mark in the written test should be appointed and not candidates having highest in the oral test. He further submitted that a special appeal no. 229 of 1992 was filed against the aforesaid judgement wherein the division bench of this court did not interfere. He also submitted that the general trend in the state of Uttar Pradesh is where candidates have obtained the same aggregate of marks in the selection emphasis has been given to place those candidate who has obtained higher marks in the written examination, above in order of merit to those who have obtained lesser marks in the written test. He referred to Rule 14(4) of the U.P. Civil Service (Executive Branch) Rules, 1982 and Rule 17 of the Collection Amines Service Rules, 1974. Without prejudice to the above, Sri Ashok Khare further submitted that the petitioner was placed at serial no. 1 in the waiting list and when the State Government called for new names for appointment on the post on Naib Tehsildar, the commission ought to have sent the name of the petitioner. He relied upon the division bench decision of this court in the case of **Neel Kantha Tripathi V. State of U.P. and others, Civil Misc. Writ Petition No. 25598 of 1994**, decided on 5th may, 1995, wherein this court has held if the state government has called for the names subsequently, Government Order dated 29thAugust, 1992 will not apply.

5. Learned counsel for the commission submitted that under rule 19 of the rules of 1944, it has been specifically provided that if two or more candidates obtain equal marks in the aggregate, the commission shall arrange them in order of merit on the basis of their general suitability of the service, it has not been provided at any place that person who has obtained higher marks in the written test where the aggregate of total marks obtained by them are the same, as has been provided in the U.P. Civil Service (Executive Branch) Rules, 1982 and The Collection Amines Rules, 1974. According to him, the decision relied upon by the learned counsel for the petitioner in the case of **Vinay Khare** (supra) has been overruled in the case of **Km. Manju Trivedi V. State Of U.P., Writ Petition No.1247 (SB) of 1992,** decided on 19th January, 1994. He also relied upon a Division Bench decision in the case of **Avinash Narain Padney V. State of U.P. And Others, (1996)2 UPLBEC 1249**. He further submitted that the life of the select list is only one year in terms of the government order and in the absence of any contrary provision the select list had exhausted and the petitioner

is not entitled for his name being sent for appointment.

6. Having heard the learned counsel for the parties, I find that the petitioner and respondent no. 4 have obtained 309 marks in aggregate in the written and interview test held by the U.P. Public Service Commission, Allahabad, while the petitioner had obtained 253 marks in the written test and 56 marks in the interview, the respondents no. Had obtained 252 marks in the written test and 57 marks in the interview. Under the Rules of 1944, the Commission is to prepare the list of candidates for direct recruitment in order of their proficiency as disclosed by the aggregate marks finally awarded to each candidate and where two or more candidates obtained equal marks in the aggregate, the Commission shall arrange the in order of merit on the basis of their suitability for the service. Rule 16 and 19 of the Rules of 1944 are reproduced below:-

"**16. Admission to the viva voce** (1) after the marks obtained by the candidates in the written test have been received m, a consolidated list of the candidates shall be prepared in order of merit and laid before the commission, the list shall show neither the roll number nor the names of the candidates, but shall only give serial number in order of merit, the community to which the candidate belong and the marks obtained by them in the written test. The commission shall summon for interview as many candidates as hove shown their suitability for appointment in the written test having regard to necessity for security the representation of the communities and classes for which reservation has been made and shall award marks up to a maximum of 100 to each such candidate for his suitable for appointment in respect of character, personality and physique, the marks so allotted shall be added to the marks obtained in the written examination.

(2) Except for the purpose indicated above, the marks obtained by the candidates in the written test shall not be disclosed to the members of the commission who conduct viva voce examination until the examination is over and the marks therefore have been finally awarded.

19. Selection of candidates for direct recruitment:- the commission shall prepare a list of the candidates for direct recruitment in order of their proficiency as disclosed by the aggregate marks finally awarded to each candidate. If two or more candidates obtain equal marks in the aggregate the commission shall arrange them in order of merit on the basis of their general suitability for the service. Subject to the provisions of rule 21 and to the allocation of posts to communities and classes, the board shall select the candidates who stand highest in order of merit, provided that they are satisfied that the candidates are duly qualified in other respects.

7. Section C of Appendix C framed under Rule 15 of the Rules of 1944 provides as to how the personality test/viva voce shall be conducted. It includes awarding of marks for general suitability for service also. From a reading of rules 16 and 19 along with section C of Appendix C. It will be seen that while rule 16 refers for summoning the candidates for interview, who have shown their suitability for appointment in the written test, rule 19 specifically provides

for arrangement of merit list where two or more candidates have obtained equal marks in the aggregate, on the basis of their general suitability for the service and section C of Appendix c provides for giving of marks for general suitability for service in the viva. Voce/personality test. Thus the marks obtained in the Viva. Voce/personality test /interview has to be considered for placing a person in the merit list where two or more candidates have obtained equal marks in the aggregate. In this view of the matter, the action of U..P Public Service Commission, Allahabad in placing the petitioner below the respondent no. 4 cannot be said to suffer from any infirmity in law . Reliance placed by Sri Khare on the decision of Vinay Khare (supra) is misplaced as the said decision has subsequently been overruled by a division bench of this court in the case of Km. Manju Trivedi (supra) in the case of Manju Trivedi (supra) this court has held as follows:-

"Rule 19 provides for general suitability to the determinative factor while clause 6 of Appendix E provides the manner of determining suitability of the candidates. There is no reason not to consider the provision of clause (6) in interpreting rule 19. We are, therefore, not in agreement with the view of the leaned single judge. The rule of simpler and shorter interpretation has no application in this case. Whether the written test or interview constitute test of general suitability, is the question to be decided. They cannot be compared for being shorter and simpler. There is no objective test to determine it and in absence of any reason to say that either of them is shorter or simpler, the test appears to be totally inapplicable and artificial."

8. Similar is the position in the present case also. Rule 19 of the U.P. Nyayik Sewa Niyamawali is in pari materia with the Rules of 1944. Thus, in accordance with Rule 19 of the Rules of 1944, the Commission was fully justified in taking the marks obtained in the interview test as the basis of determining the merit of the candidates who have obtained equal marks in the aggregate. The decision of this court in the case **Km. Manju Trivedi** (supra) was subsequently followed in the case of **Avinash Narain Pandey**(supra). So far as the order passed by this court in special appeal no.229 of 1992 against the decision of the learned single judge in the case of **Vinay Khare** is concerned, this court in the case of **Avinash Narain Pandey** has held that special appeal was disposed of without deciding the controversy involved on the basis of the following assumptions:-

"13…

(1) rule, which has prescribed the criteria for selection on the basis of the marks obtained in the interview when two or more candidates have secured equal marks in the aggregate has been amended.

(2) The only person, who is affected by the unamended rule is Vinay Khare, who has already been appointed as Munsif about two years ago; and

(3) The other affected person, namely, Zameer Ahmad and Km. Manju Trivedi have not challenged their non-selection.

All these assumptions were unwarranted being contrary to the reality .This is clear from the following admitted facts:

(1) The commission in its counter-affidavit in the present case has admitted

that there was a proposal to amend the rule, which is still pending before the State Government and the rule has not been amended so far;

(2) Apart from Sri Vinay Khare, Sri Zameer Ahmad and Km.Manju Trivedi were also the affected persons by the same decision of the Commission, which was challenged by Vinay Khare and they have also challenged their non-selection before the Lucknow Bench of this Court by means of two writ petitions nos. 1247 (SB) of 1992 and 1289 (SB) of 1993 and both these writ petitions were allowed by a Division Bench (LKO)on 19.04.1994 holding that in a case where equal marks are secured by two or more candidates, their names are to be placed in the list in order of merit on the basis of their marks obtained by them in the interview. The decision of the learned single judge In Vinaly Khare's case was also overruled by the Bench.

(3) Although judgment of the Division Bench (LKO) in Km. Manju Trivedi's case was delivered on 19.04.1994, but it was not brought to the notice of the Bench hearing the appeal , filed by the Commission against the order of one year. Reliance placed by the learned counsel for the petitioner on the government Order dated 25th March, 1985 is misplaced. In the case of **Neel Kanth Tripathi** (supra) this Court has held that all Government Orders have prospective effect unless otherwise directed. The Government Order No.28/5/1980 Karmik-1 dated 15 July, 1982 had specifically provided that the period of one year is the life of the select list. The U.P. Public Service Commission, Allahabad had sent its recommendation on 27th july, 1982 and the life of the select list stood exhausted after one year.

of the learned Single judge in Vinaly Khare'case, although the appeal was decided on 14.07.1994. Judgment of the Special Appeal Bench was thus given in ignorance of the decisions of the Division Bench in Km. Manju Trivedi's case.

9. No benefit can be taken from Rule 14 (4) of the Uttar Pradesh Civil Service (Executive Branch) Rules, 1982 and Rule 17 of the Collection Amins Service Rules, 1974 as, in the present case, there is no such provision in Rule 19 of the Rules of 1944. The State Government has not amended the Rule 19 of the Rules of 1944 in the light of the aforementioned Rules. Till such time it is not modified, merit list is to be prepared on the basis of marks obtained in the interview wherein general suitability of the service is seen.

10. So far as the question as to whether the select list continues to remain valid for a period after one year is concerned, it may be mentioned here that , in the absence of any specific provision, the select list is treated valid for a period

11. In view of the foregoing discussions, I do not find any merit in this petition. It is dismissed. However , the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2004

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE V.N. SINGH, J.

First Appeal No. 1256 of 2003

New Okhla Industrial Development Authority ...Appellant

Versus
Pooran Singh and others ...Respondents

Counsel for the Appellant:
Sri Anurag Khanna

Counsel for the Respondents:

(A) Code of Civil Procedure 1 Section 2 (1)-readwith Order 22 words and Phrases-Legal Representative-a person who representates the estate of deceased-who steps in to the shoes of Original deceased party-the term legal representative held very wide-as used-
Held- Para 7, 10 & 12

The Definition of the term 'Legal Representative' contained in 2 (11) of the Code of Civil Procedure, is unequivocal. 'Legal Representative' is a person who in law represents the 'estate' of the deceased person.

According to the definition, it includes a person, who in law represents estate of deceased person. Definition in this Court denotes that those class of persons on whom the status of a representative is fastened by reason of death, whose estate they are held to represent (See A.I.R. 1929 Oudh 353-DB).

A 'legal representative' steps into the shoes of an original deceased party, who died during pendency of a proceeding and only represents the estate of the deceased. He is to continue the proceedings as could have done by the deceased, in whose place he is substituted as his 'legal representative'. It is also well settled that legal representative can contest a suit/proceeding only on the basis of 'cause of action', on which suit/proceeding was contested by the deceased party and not beyond it.
Case law discussed:
AIR 1940 Alld. 99
AIR 1949 Alld. 604 D.B.
AIR 1929 Oudh-353-D.B.

(B) General Rule (Civil)-rule 37 readwith Code of Civil Procedure-Order 22 r.3, 4, Order 1 rule 10 (2)-The Party once on record-even if dead-has to continue-the legal representative shall be further made party-after making note to the effect.

Held- Para 14

On the contrary Section 37 General Rules (Civil) read with Order 22 R 3 & R 4 C.P.C. in an un-ambiguous manner provides that when a party dies pendentelite, to make a note to that effect to be added against the name of that deceased party and heirs (Correctly Legal Representatives) of deceased party to be substituted as given therein. Word "Struck Out" has been used in Order 1 Rule 10 (2) C.P.C., but avoided in Order 22 Rule 3 & Rule 4 C.P.C. It shows that party once on record, even if dead, has to continue and a note of the fact is to be made. If Legal Representatives are to be brought on record, they shall be further made party (see Order 22 Rule 3) as provided under Rule 37 General Rules (civil).

(C) Practice Procedure and General Rule (Civil) Rule 37- substitution application with prayer for deletion/striking of or washing off the name of deceased party-held-misconceived, untenable-not approved by law.

Held- Para 17

It, therefore, naturally follows that in an application for substitution of L. Rs. prayer for deletion/striking off/or washing off/to erase/removal of the name of 'deceased party' on record, is misconceived, untenable and not approved in law, prayer to the above effect in the amendment application for substitution of L.Rs. is totally misconceived and cannot be legally allowed. It is not permissible in law to erase the name of original deceased party and to do the contrary is also being uncalled for.

Code of Civil Procedure-Order 5 Rule I Practice & Procedure-Circular-dt.11.1.52- Parties themselves responsible for necessary amendments-in terms of Court Order-duly checked by the office giving reference of the Order passed by the Court-same practice should be followed by High Court also.

Held- Para 20

We are of the opinion that similar instructions to be followed with no exception in the matters pending in High Court. It is to be noted that there is a long standing practice of continue not omitting name of and to the name of 'deceased party' as is evident from the manner parties are described in the cases reported in the Law Journals. For convenience, some instances of such description of parties are given below:-

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

1. When the aforesaid First Appeals were presented before Court, the Bench Secretary pointed out the objection noted by Stamp Reporter, apart from other notings, which read, "Parties not properly described"

Learned counsel for the appellants, Sri Anurag Khanna, Advocate, seeks to challenge the aforesaid objection made by the Stamp Reporter of the Court.

2. Since the aforequoted objection by the Stamp Reporter was not clear, Court sent for the Stamp Reporter Sri Harish Chandra Srivastava, who has appeared before the court and explained the noting. It is submitted by the Stamp Reporter that the objection was made for the reason that the name of the deceased party was not to be shown in the appeal as the said party has died and of the names of the 'Legal Representative,' brought on record, alone are to be mentioned in the array of parties in the memo of appeal irrespective of and not withstanding that name of original party is described with a note 'Since Dead Through Legal Representative'.

3. In aforementioned First Appeal No. 1239 of 2003, We find that trial court while preparing decree omitted to indicate the name of the original deceased party in the description of parties and instead described the legal representatives by showing them as 1//1 and 1/ 2. However, on the folio attached to the 'Decree' there is a stamp with entries filled in the hand-wherein the description of the case-is "LAR 249/96 Khacheru Vs. Sarkar Hoshiarpur" instead of The Collector, Ghaziabad). This shows that the case is still identified by the name of Khacheru,, the deceased party, but in the decree his name has been completely removed/ erased and only L.Rs. are mentioned as 1/ 1 & 1/ 2. The appellants, however, in the Memo of Appeal, on his own, supplied name of the deceased original party, whose 'legal representatives' were brought on record. As per the Stamp Reporter, learned counsel cannot mention the name of original party, who has died, after L.Rs. have been brought on record and mentioned in the array of parties. In all other First Appeals mentioned above, trial court decree contains the name of the party who had died and shown to be represented by the L.Rs . Learned counsel for Appellant described the parties as per the decree. Stamp Reporter, however, made an objection on indicating the name of deceased original party on the pretext (as disclosed in Court) that name of dead person cannot be given in array of parties as no notice can be sent to a dead person.

4. The context of the above, an interesting procedural issue is in contest.

At the first glance, 'issue' may appear simple and innocuous, but in our considered opinion if it is viewed seriously and in depth, it is certainly not. The issue is of multi-dimensional complexities.

5. The Court is thus called upon to decide the question,' whether name of a party, whether plaintiff or defendant, can be deleted/ erased/ washed off removed, in case of death and/ or while substituting legal representatives of such deceased party ?

6. To appreciate aforesaid question, reference be made to the following provisions of the of Civil Procedure, General Rules (Civil) framed by the High Court of Judicature at Allahabad in exercise of powers conferred by Article 227 of the Constitution of India and section 122 of Code of Civil Procedure, with previous approval of Govt. of Uttar Pradesh and Rules of Court, 1952, framed by the High Court of Judicature at Allahabad in exercise of powers conferred under Article 225 of the Constitution of India.

Code of Civil Procedure

Sec. 2(11). "Legal Representative" *means a person who in law represents the estate of a deceased person, and includes any person, who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.*

Section 33. Judgment and decree *– The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.*

Section 50. Legal Representative:- *(1) Where a judgment- debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.*

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the properly of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may of its own motion or on the application of the decree –holder compel such legal representative to produce such accounts as it thinks fit.

Section 52. Enforcement of decree against legal representative (1) Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

Order I Rule 10

10. Suit in name of wrong plaintiff- *(1)……*

(2) Court may strike out or add parties- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may be appear to the Court tobe just, order that the name of any party

improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3)……..

Order VII

Particulars to be contained in plaint- The plaint shall contain the following particulars:-
(a)the name of the Court in which the suit is brought;
(b)the name, description and place of residence of the plaintiff;
©the name, description and place of residence of the defendant, so far as they can be ascertained.
(d)Where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
(e)the facts constituting the cause of action and when it arose;
the facts showing that the Court has jurisdiction;
(f)the relief which the plaintiff claims;
(g)where the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so allowed or relinquished; and
(h)a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court fees , so far as the case admits.

Order XX

"Rule 21. (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular, or in English, if the Court so orders. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be pasted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six workings days form the date of such notice, peruse the draft decree or order and may sign it or may file within the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defects not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly, what is the error, defect or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put u[p the objection together with the record before the Judge who pronounced the judgment or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or altercation directed by the Judge shall be

made. Every such correction or altercation in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the Judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree, he shall make an autograph note stating the date on which the decree was signed.

Order XXII

Rule 2. Procedure where one of several plaintiffs or defendants dies and right to sue survives: -Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiffs or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Rule 3. Procedure in case of death of one of several plaintiffs or of sole plaintiff:- (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf , shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2)……..

Rule 4. Procedure in case of death of one of several defendants or of sole defendant: (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2)……..

(3)……..

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant, who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as it if has been pronounced before death took place.

General Rules (Civil)

"Rule 37. How to make amendment in pleadings-- (i) An application for amendment made under Order I rule 10, Order VI Rule 17 or Order XXII of code shall also contain a prayer for all consequential amendments. The presiding officer shall reject the application if it is not in accordance with law or these rules.

(ii) When a party dies pendente lite a note to that effect shall be added against the name of the party and necessary consequential amendment in the body of

the petition or pleading shall also be made as prayed for.

(iii) When the heirs of a deceased party are substituted for him, they shall be entered and numbered as follows.

If the serial number of the deceased party was say "3" his heirs will be numbered as 3/1,3/2,3/3 and so on.

If the party numbered as 3/1 as dies, his heirs will be numbered as 3/1/1,3/1/2,3/1/3 and so on.

Rule 90. Mode of recording Judgment:- *Judgment shall be on foolscap paper one quarter page being left blank. To each judgment shall be pre-fixed a heading specifying the number of the case the names of all the parties.*

……"

Rule 95. Decree to contain addressed filed by the parties*.- Every decree or formal order must contain the names and addresses of the parties, as given in the plaint as also the addressed filed subsequently. The words, 'non-contesting', shall also be written in a bracket against the name of such defendant as has not appeared or has not filed a written statement or after having filed written statement has failed to appear and contest the suit at the hearing, as referred to in Order V Rule 4-A and Order XXII Rule (4)(4).*

Rule 96. Decree to be self contained*--- Every decree and order as defined in Section 2 of the Code shall be drawn up in such a manner that in order to the understanding and execution thereof, it may not be made part of the decree or order.*

Prescribed form of decrees—In all cases in which the form of a decree, has been prescribed or indicated by statute, the decree shall be prepared as far as possible, in the form so prescribed"

Appendix A of First Schedule, attached to the Code of Civil Procedure contains prescribed form and for drawing a decree and it must contain 'title' which means full particular of the parties, parentage and addresses as given in the plaint followed in the judgment

Rules of the Court, 1952 (Framed by Allahabad High Court)

Chapter VII

Rule 6. Preparation of decree or formal order:- *After a suit or a proceeding in the nature of a suit or an appeal from a decree has been heard and decided, a decree shall follow the judgment. In other cases, unless otherwise ordered a formal order shall follow the order finally disposing of the case or any order by which costs have been awarded.*

Rule 8. Contents of decree or formal order --- (1) The decree or formal order shall be drawn up in the language of the court and shall bear date of the day on which the judgment or order upon which it is founded was delivered.

{ provided that Hindi may be used in place of English, on optional basis, in any judgment, decree or order to be passed by the Court. Such judgment, decree or order shall be accompanied by an authorized English translation thereof }

(2) It shall contain the nature, number and year of the case, the names and descriptions of the parties, the names of their Advocates and a clear specification of the relief granted or other adjudication made.

(3) It shall state the amount of costs incurred in the case and by whom and in what proportions such cost and costs in the courts below, if any, are to be paid.

Rule 9. Notice of decree or formal order for objection:- As soon as the decree or formal order has been drawn up the Registrar shall cause to be exhibited on the notice board a notice stating that the decree or formal order has been drawn up. The notice shall further state that any party to it or his Advocate may on or before a date to be specified in the notice persue the same and sign it or file with the Registrar an objection thereto on the ground that there is a clerical error or omission in the decree or formal order or that it is not in accordance with the judgment or order upon which it is founded. Such objection, if any, shall state clearly what the alleged clerical error or omission is or in what respect the decree or formal order is not in accordance with the judgment or order. It shall be signed and dated by the party or the Advocate filing it.

***Rule 10. Procedure of objection**.- Where an objection is filed under the next preceding Rule the Registrar shall after giving notice to the parties concerned decide such objection with liberty to adjourn any matter to the judge by whom such judgment or order was delivered in Chambers. If such Judge is not available the matter shall be put up before such Judge as the chief Justice may nominate.*

Chapter X

Rule 2. Appeal against legal representative of deceased party—Where a person has died after the date of an appealable decree or order to which he was party, any other party to the decree or order, who wishes to appeal therefrom may enter the name of the legal representative of the person who has died, in the memorandum of appeal as a respondent if that person would ,if alive, have been a necessary or proper party to appeal. The appellant shall also present alongwith his memorandum of appeal an application for leave to make such legal representative a respondent to the appeal. The application shall state such facts as may be necessary to support it and shall be accompanied by an affidavit.

Provided that no such application shall be required if such legal representative has already been made a party to any proceedings under the decree or order subsequent to the date on which it was passed. In such case a note to that effect shall be made in the memorandum of appeal.

Chapter XI

***Rule 3 Office report.-** No memorandum of appeal or objections under Rule 22 or 26 of Order XLI of the Code and no application for revision shall be presented unless it bears an office report specifying-*

(a) in case of memorandum of appeal or objections, or an application for revision, that it is within time or, if beyond time, the period by which it is beyond time:
(b) whether the case is or is not such as may be heard by a Judge sitting alone;
(c) whether it is accompanied by the necessary papers, if any ;
(d) whether any court fee is payable or not;
(e) where court –fee is payable, whether the court- fee paid is sufficient and in case

it is deficient, the extent of such deficiency; and
(f) whether it is drawn up in accordance with these Rules, or other law and if not, in what manner it is defective.

Rule 7. Defective application or memorandum of appeal or objection. If the Bench before which a motion is made for the admission of an application or a memorandum of appeal or objections finds that the application or the memorandum of appeal or objections as the case may be or the affidavit or other paper accompanying it, is not in order, or that such application or memorandum of appeal or objections is not accompanied by the necessary papers, the Bench may either return it or may, subject to the provisions of these Rules or any other law, receive it, granting time for the removal of the defect. A motion for its admission may be made again after the removal of such defect:
Provided that nothing contained in this Rule shall have the effect of extending the period of limitation.

Rule 13. Defective memorandum of appeals or objections filed under Rule 12. (1) If any defect in the memorandum of appeal, or objection or an application for revision is pointed out in the office repot, the Deputy Registrar shall immediately cause a notice of the defect to be served on the Advocate of the appellant or objector, or applicant as the case may be, requiring him to remove the defect or to file an objection within seven days of receipt of notice.
(2) The objection if any, filed under sub-rule (1) shall, alongwith the report, be listed immediately for orders before the Registrar. If the Registrar allows the objection, he shall proceed to deal with such appeal or objection or application as if it had been reported to be in order, and if he rejects it, the defect shall be removed within seven days from the day of rejection.
(3) If the defect is not removed within the time specified in sub- rule (1) and (2) or such further time as may be allowed by the Registrar, the memorandum or application shall be listed for rejection before the Court and shall be rejected unless the Court for a sufficient cause supported by an affidavit grants further time for its removal. On expiry of the further time without the defect removed, the Court shall reject the memorandum.
Provided that no order passed under the provisions of this rule shall be deemed to extend the period of limitation."

7. The Definition of the term 'Legal Representative' contained in 2(11) of the Code of Civil Procedure, is unequivocal. 'Legal Representative' is a person who is in law represents the 'estate' of the deceased person.

8. Legal representative is added only to decide the rights and liabilities of original party and not of 'legal representatives' themselves. Legal Representative cannot assert his own individual or hostile title in suit (See A.I.R. 1940 Allahabad, 99).

9. Order XXII Code of Civil Procedure does not contemplates the removal of the name of deceased party and no such expression like deletion/ striking of removal etc. has been used.

Definition of the term 'Legal Representative' contained in section 2(11) of Code of Civil Procedure is very wide (See A.I.R. 1949 Allahabad 604 –D.B.)

10. According to the definition, it includes a person, who in law represents estate of deceased person. Definition in this Court denotes that those class of persons on whom the status of a representative is fastened by reason of death, whose estate they are held to represent (See A.I.R. 1929 Oudh 353-DB)

11. It is rights and liabilities of the original party that have to be considered and not those of legal representative. All that legal representatives can take up suit at the stage it was left, when original party (so represented by him) died and to continue it likewise that defendant is entitled to raise against a legal representative, any defence other than those, which he could raise against deceased plaintiff.

12. A 'legal representative' steps into the shoes of an original deceased party, who died during pendency of a proceeding and only represents the estate of the deceased. He is to continue the proceedings as could have done by the deceased, in whose place he is substituted as his 'legal representative'. It is also well settled that legal representative can contest a suit/proceeding only on the basis of 'cause of action', on which suit /proceeding was contested by the deceased party and not beyond it.

13. A bare perusal of the above quoted statutory provisions upon which we could lay our stand shows that when a party dies, name of deceased party is to be struck off/ deleted/ removed /erased.

14. On the contrary Section 37 General Rules (Civil) read with Order 22 R 3 & R 4 C.P.C. in an un-ambiguous manner provides that when a party dies pendentelite, to make a note to that effect to be added against the name of that deceased party and heirs (correctly Legal Representatives) of deceased party to be substituted as given therein. Word "Struck Out" has been used in Order 1 Rule 10 (2) C.P.C., but avoided in Order 22 Rule 3 & Rule 4 C.P.C. It shows that party once on record, even if dead, has to continue and a note of the fact is to be made. If Legal Representatives are to be brought on record, they shall be further made party (see Order 22 Rule 3) as provided under Rule 37 General Rules (Civil).

15. The aforequoted provisions also show that judgment should contain full particulars of the parties and decree has to follow the judgment. In case name of a deceased party (originally impleaded) is washed off while substituting L.Rs, it is likely to mislead as it shall not be possible in future to ascertain extent of rights to be determined with respect to the estate of a deceased party. It may be reiterated that when a person dies, right of substitution is not on the basis of succession, but a person, who is competent to represent the estate of a deceased party and has no interest adverse to the deceased's estate will be permitted to be substituted as his legal representative.

16. To ensure to keep the record straight and to avoid misconception and/ or ambiguity in future, Statutory provisions specifically provide that when a party to a suit/ proceeding dies, a note be made to that effect against said party and 'legal representatives' be brought on record as per Rule 37, General Rules (civil) and Allahabad High Court Rules.

17. It, therefore, naturally follows that in an application for substitution of L. Rs. prayer for deletion/ striking off/or washing off/ to erase/ removal of the name of 'deceased party' on record, is misconceived, untenable and not approved in law, prayer to the above effect in the amendment application for substitution of L.Rs. is totally misconceived and cannot be legally allowed. It is not permissible in law to erase the name of original deceased party and to do the contrary is also being uncalled for.

18. Once party is impleaded and/or brought on record, proceedings started must be concluded with their names and continue till perpetuity. In the matter of death of any such party, in case of substitution of legal representative "on an application made in that behalf, Court shall cause legal representative of the deceased, plaintiff/defendant to be made a party to proceed with the suit." and if L.Rs are not be substituted, then a note shall be made against a party of his death, but in no case name of deceased party shall be deleted or removed or struck off.

19. At this juncture, though not directly involved, this Court desire to advert to the practice prevailing in the Court, e.g. an application for substitution being allowed-requisite note/amendment in array of parties (particularly in writ petitions) is done by the Registry. Such practice cannot be approved. C.L. No. 6/VII-e- 148 dated 11th January, 1952. issued to sub- ordinate Courts reads-

"Circular letters of the High Court of Judicature at Allahabad 1990 Edition, particular page no. 342 published by Institute of Judicial Training and Research, U.P. Lucknow, provided under Rule 18 of Order VI of the Code of Civil Procedure, 1908 , parties are themselves responsible for making necessary amendments in the pleadings within the time allowed by the Court. It is not part of the duty of the office of the Court to make necessary amendments in the pleadings. Parties should themselves make amendment in terms of the Court order or get them made by their counsel under their signature. After amendments have been made, they should be checked by the official concerned, who should thereafter record a note on the pleadings including the name of the persons by whom the amendments were made and the fact that they were made under the Order of the courts giving a reference to the application on which such orders were passed and date of such orders."

20. We are of the opinion that similar instructions to be followed with no exception in the matters pending in High Court. It is to be noted that there is a long standing practice of continue not omitting name of and to the name of 'deceased party' as is evident from the manner parties are described in the cases reported in the Law Journals. For convenience, some instances of such description of parties are given below:-

(1) A.I.R. 1966 S.C. 1908 Viswambhar Roy Deceased by L.R. appellant Vs. Girindra Taimar Paul (deceased by Legal Representative-- Respondents.
(2) 1995 (Suppl 3) S.C.C. 179 Basavan Jaggu Dhobi Vs. Sukhnandan Ram Das Chaudhary (dead) the L.R.s & Ors.
(3) 1995 (Suppl 4) S.C.C. 534 Sundra Naick Vdiyar (Dead by L.R.S. & Another Vs. Rama Swami Ayyar (Dead) by L.R.s.

(4) J.T. 2003 (Suppl. 1) S.C. 428 Illaichi Dar (Dead) by L.Rs. & Ors. Vs. Joint Society to the Protection of Orphas India & Ors.

21. We, therefore, order accordingly. Objection/s by Stamp Reporter contrary to the above are over-ruled with directions to the Stamp Reporter to submit fresh report in accordance with law as per observations made above and further in the matters where 'Decree' of Court below is not drawn in accordance with law as explained above, the concerned party should get it corrected.

22. We, therefore, direct all concerned to prepare 'decree' in accordance with law containing full description of parties keeping aforequoted relevant provisions in mind.

23. If 'decree' prepared by the court below is not in accordance with law, Stamp Reporter must make objection to that effect also under Chapter XI Rule 7 Rules of Courts, 1952.

24. A copy of this order shall be sent to the Registrar General within two weeks. The Registrar General shall take necessary steps for issuance of Circular letter to all the subordinate Courts and Registry of this Court for information and strict compliance in the light of the directions/ observations made above.
