REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2004

BEFORE
THE HON'BLE RAJES KUMAR, J.

Trade Tax Revision No. 41 (Defective) of 2004
And
Trade Tax Revision No. 42 (Defective) of 2004

Bikaner Assam Roadlines India Ltd, Ghaziabad. ...Applicant
Versus
Commissioner, Trade Tax, U.P. Lucknow. ...Opposite-party

Counsel for the Applicant:
Sri Kunwar Saksena

Counsel for the Respondent:
S.C.

U.P. Trade Tax Act-S. 28-B and S. 15-A (1) (9)-Under S. 28-B there is a rebuttable presumption in case of non surrender of Transit pass, that goods have been sold inside State of U.P.-No evidence adduced to prove that goods have not been inside State of U.P.-Thus presumption of sale of goods inside U.P. can not be held, stand rebutted-Burden has on party taking form 34 and not on revenue- in present case transit form was not surrendered-Hence under S. 28 B, it has been rightly presumed that goods have been sold inside State of U.P. absence of any evidence to contrary-Admittedly, vehicle belongs to applicant and driver was employee of applicant-Therefore, for act of driver, held, applicant liable to Tax-However, penalty reduced from Rs.60,000/- to Rs.10,000/- various liability.

Held: Para 5 & 6

Under section 28-B of the Act, in case of non-surrender of transit pass, the presumption is that the goods have been sold inside the State of U.P. Hon'ble Supreme Court in the case of M/s Sodhi Transport Co. & another Etc. Vs. State of U.P. and another, reported in 1986 UPTC, 721 held that such presumption is rebuttable, which can be rebutted by adducing the evidence by the person, who has obtained the transit pass. In the present case, no evidence has been adduced to prove that the goods have not been sold inside the State of U.P. and, therefore, the presumption of sale inside the State of U.P. can not be held, stand rebutted. To rebut the presumption, burden lies upon the party, who has taken Form-34 and not on the revenue. In the present case it was found that the transit pass has not been surrendered, therefore, under section 28-B of the Act, it has been rightly presumed that the goods have been sold inside the State of U.P in the absence of any evidence to the contrary. Argument of learned counsel for the applicant that the misappropriation of the goods was made by his driver and not by him and no liability of tax can be created against the applicant can not be accepted. Admittedly, vehicle belongs to the applicant and the driver was an employee of the applicant and, therefore, for the act of the driver, the applicant is liable to tax. Therefore, the tax has been rightly assessed against the applicant.

So far as revision no.42 (Defective) of 2004 with regard to penalty is concerned, in my opinion, on the facts and circumstances, the levy of penalty at Rs.60,000/- is excessive. The facts of the case prima-facie does not establishes the involvement of the applicant in misappropriation of the goods but at the same time the applicant can not be absolved from his responsibility for the act done by its employee. On the facts and circumstances, a sum of Rs.10,000/- towards penalty would be reasonable.

Case law discussed:
1986 UPTC 721 (SC)

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

1. These two revisions under section 11 of the U.P. Trade Tax Act (hereinafter

referred to as the "*Act*") are directed against the order of the Tribunal dated 20th September, 2003 both relating to the assessment year, 1988-89.

Revision no.41 (defective) of 2004 relates to assessment proceeding and revision no. 42 (defective) of 2004 relates to penalty proceeding under section 15-A (1) (q) of the Act.

2. Brief facts of the case are that the applicant is a transporter. Vehicle No.DL-1G/2664 belongs to the applicant. It is alleged that the vehicle was driven by the driver, Sri Kamlesh Yadav, son of Chennai Ram Yadav, who was the employee of the applicant. In the vehicle 222 cartoons of parchun goods valuing Rs.3,67,982/- , which were meant for transport from Delhi to Gauhati. The driver of the vehicle obtained transit pass no.2095 dated 21.04.1998 at the entry T.P. Nagar check post in respect of 222 cartons of parchun goods, which was to be surrendered at Tankuhiraj, district Deoria by 30.04.1998 under section 28-B of the Act. The case of the applicant is that when the goods could not reach Gauhati by 26.04.1998 and the applicant had a doubt about the misappropriation of the goods by the driver of the vehicle on 26.04.1998, a first information report was lodged with the Station Officer Sahibabad, district Ghaziabad. The said F.I.R. was lodged against the driver of the vehicle, Sri Kamlesh Yadav, son of Sri Chennai Ram Yadav, resident of village and post Chatai Kala, Tehsil Shahganj, district Jaunpur and his assistant Hardeo Singh, son of Arvind Kumar. Said F.I.R. was registered by the police under section 406 I.P.C. Application and F.I.R are annexed as annexure-2 to the revision. However, on 24.04.1998 the chaukidar of the village Kurari, district Hamirpur found the aforesaid truck standing with fire. He reported to the police station Hamirpur who had sent information to the police station Ghaziabad. Applicant also informed to the police station Sahibabad about the vehicle being standing at Hamirpur. It appears that on 17.06.1998 report was given by the police that on 01.06.1998 vehicle no.DL-1G/2664 was found in the area of police station Kurari, district Hamirpur, in which goods relating to the case was not found and the vehicle was found burnt from the front side. In pursuance of the report, charge sheet has also been filed on 04.03.1998 under section 406 I.P.C., which is annexure-5 to the revision. The vehicle was insured and, therefore, on the information being given to the Insurance Company, survey was conducted by Sri S.K.Gupta, Surveyor and Loss Accessor. Report of the surveyor is annexed as annexure-3 to the revision. A perusal of the report shows that it only reported the loss of vehicle and there is no reference to the goods. On the information being received that alleged Form-34 No.2095 dated 21.04.1998 was not surrendered at the exit check post. Proceeding under section 7 (4) and section 15-A (1) (q) of the Act were initiated and after consideration of the reply of the applicant, a sum of RS.54,375/- was imposed towards tax vide order under section 7(4) a sum of Rs.2,00,000/- had been imposed under section 15-A (1) (q) of the Act towards penalty. Applicant filed two appeals before the Deputy Commissioner, Trade Tax, Ghaziabd. First appellate authority allowed both the appeals in part and reduced the amount of tax to Rs.43,500/- and amount of penalty to Rs.60,000/- Being aggrieved by the order of first appellate authority, applicant as well as

Commissioner of Trade Tax filed appeals before the Trade Tax Tribunal, Ghaziabad, who vide order dated 20.09.2003 rejected all the four appeals.

3. Heard learned counsel fro the parties.

Learned Counsel for the applicant submitted that the facts and circumstances shows that the goods were misappropriated by the driver of the vehicle and no case had been made by the revenue that there was any involvement of the applicant in disposing of the goods and, therefore, for the criminal act of the driver, the applicant should not be subjected to liability of tax under the Act and should also not be subjected to penalty. Learned Standing Counsel submitted that admittedly, the vehicle belongs to the applicant and the driver of the vehicle was the employee of the applicant and, therefore, for the act of the driver, the applicant is liable to tax. He submitted that the order of Tribunal both in respect of the assessment and the penalty is liable to be upheld. Learned Counsel for the applicant submitted that there is no finding that the goods have been sold inside the State of U.P.

4. I have perused the order of the Tribunal and the authorities below.
Section 28-B of the Act reads as follows:

"Transit of goods by road through the State and issue of [authorization for transit of goods]----- When a vehicle coming from any place outside the State and bound for any other place outside the State, and carrying goods referred to in sub-section (1) of Section 28-A, passes through the State, the driver or other person-in-charge of such vehicle shall obtain in the prescribed manner an [authorization for transit of goods] from the officer-in-charge of the First Check Post or barrier after his entry into the State and deliver it to the officer-in-charge of the Last Check Post or barrier before his exit from the state, falling which it shall be presumed that the goods carried thereby have been sold within the State by the owner or person-in-charge of the vehicle:

Provided that where the goods carried by such vehicle are, after their entry into the State, transported outside the State by any other vehicle or conveyance, the onus of proving that goods have actually moved out of the State shall be on the owner or person-in-charge of the vehicle.

Explanation: In a case where a vehicle owned by a person, is hired for transportation of goods by some other person, the hirer of the vehicle shall for the purposes of this section, be deemed to be the owner of the vehicle."

Section 15-A (1) (q) of the Act reads as follows:

"Penalties in certain cases- (1) If the Assessing Authority is satisfied that any dealer or other person-- (q) fails to obtained [authorization for transit of goods] or to deliver the same, as provided in section 28-B or:"

5. A perusal of the order of the first appellate authority and the Tribunal shows that the fact stated by the applicant that the goods have been misappropriated by the driver in respect of which, F.I.R. was lodged and the vehicle was found at district Hamirpur in a burnt stage and have not been disputed. Perusal of the surveyor report and the police report shows that when the vehicle was found in

burnt stage, the goods were not found. No one has reported that the goods were burnt. Even it is not the case of the applicant that the goods were burnt alongwith the vehicle. I do not agree with the submission of the learned counsel for the applicant that in absence of any positive evidence that the goods have been sold inside the State of U.P. and in the absence of any evidence that in the mis-appropriation of goods, there was involvement of the applicant, liability of tax can not be fastened on the applicant. Under section 28-B of the Act, in case of non-surrender of transit pass, the presumption is that the goods have been sold inside the State of U.P. Hon'ble Supreme Court in the case of M/s Sodhi Transport Co. & another Etc. Vs. State of U.P. and another, reported in 1986 UPTC, 721 held that such presumption is rebuttable, which can be rebutted by adducing the evidence by the person, who has obtained the transit pass. In the present case, no evidence has been adduced to prove that the goods have not been sold inside the State of U.P. and, therefore, the presumption of sale inside the State of U.P. can not be held, stand rebutted. To rebut the presumption, burden lies upon the party, who has taken Form-34 and not on the revenue. In the present case it was found that the transit pass has not been surrendered, therefore, under section 28-B of the Act, it has been rightly presumed that the goods have been sold inside the State of U.P in the absence of any evidence to the contrary. Argument of learned counsel for the applicant that the misappropriation of the goods was made by his driver and not by him and no liability of tax can be created against the applicant can not be accepted. Admittedly, vehicle belongs to the applicant and the driver was an employee of the applicant and, therefore, for the act of the driver, the applicant is liable to tax. Therefore, the tax has been rightly assessed against the applicant.

For the reasons stated above, I upheld the order of the Tribunal so far as it relates to the assessment.

Revision No. 41 (Defective) of 2004 is accordingly, dismissed.

6. So far as revision no.42 (Defective) of 2004 with regard to penalty is concerned, in my opinion, on the facts and circumstances, the levy of penalty at Rs.60,000/- is excessive. The facts of the case prima-facie does not establishes the involvement of the applicant in misappropriation of the goods but at the same time the applicant can not be absolved from his responsibility for the act done by its employee. On the facts and circumstances, a sum of Rs.10,000/- towards penalty would be reasonable.

7. In the result, revision no. 41 (Defective) of 2004 is dismissed and revision no.42 (Defective) of 2004 is allowed in part and order of the Tribunal is modified to the extent reducing the amount of penalty from Rs.60,000/- to Rs.10,000/-.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2004

BEFORE
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No.6070 of 2001

Shyam Singh ...Petitioner
Versus
Allahabad Bank & another...Respondents

Counsel for the Petitioner:
Sri Ram Sheel Sharma

Counsel for the Respondents:
Sri Himanshu Tewari

Dying in Harness Rules, 1974-Claim for Compassionate appointment by petitioner on death of his mother-Claim rejected by Bank authorities-Writ against-Bank directed to frame a uniform policy and provide all necessary guidelines for consideration of appropriate authority by fixing amount under different heads for calculating minimum to be fixed for refusing compassionate appointment on ground of financial condition of family of deceased employee-Leaving at sole discretion of authority to fix such an amount would result into discrimination and arbitrations in giving appointment on compassionate basis-Hence impugned order by Bank authorities set aside.

Held: Para 8 & 9

Considering the facts and circumstances of the case and also the law laid down as stated above, the Bank has to frame a clear policy and provide all the necessary guide lines for consideration of concerned appropriate authority by fixing the amount under different heads for calculating the minimum to be fixed for refusing compassionate appointment on the ground of financial condition of family of deceased employee. It cannot be left at the sole discretion of the concerned authority to fix such an amount resulting into discrimination and arbitrariness in giving appointment on compassionate basis. There has to be a uniform policy.

In the circumstances, the order passed by the respondent Bank is set aside and the matter is sent back for consideration of the Bank for fixing the scales under different heads and thereafter circulate a uniform policy to be adopted throughout the institution. In case the scaling so fixed entitles the petitioner for consideration, his case may be considered and if he is excluded under the scales fixed, he may be intimated accordingly. Such decision should be taken at the earliest and in any case within a period of four months from the date of production of certified copy of this order.

Case law discussed:
JT 2004 (6) SC 418
2002 (2) LBESR 530 (All)
2002 (1) LBESR 73 (All) (LB)
2000 (2) LBESR 622 (All)
199 (2) LBESR 492 (All)
2003 (1) LBESR 435 (All)
2003 (2) UPLBEC 1172
2004 (3) UPLBEC 2244 (DB)

(Delivered by Hon'ble Vikram Nath, J.)

1. This petition has been filed for quashing of the order dated 19.4.2000 and 8.5.2001 passed by the respondents and for further direction to the respondents to provide appointment to the petitioner under dying in harness rule as class IV employees.

I have heard Sri Ram Sheel Sharma, learned counsel for the petitioner and Sri Himanshu Tiwari learned counsel representing the respondents bank.

2. The facts giving rise to this petition are that the mother of the petitioner was appointed as Class IV employee on 12.6.76. After completing about 8 years she was regularized on the post of IVth class employee on 9.4.84 and she died in harness on 19.1.98. The petitioner after taking no objection from the other heirs of Smt. Gulab Devi applied for being giving appointment on compassionate basis. The said request of the petitioner for appointment on compassionate ground was declined vide order dated 19.4.2000 which is filed as

Annexure-9 to the petition. The present petition was filed for quashing the order-dated 19.4.2000 and for direction to give appointment on compassionate basis. This Court vide order dated 19.2.2001 while issuing notices to the respondents also granted liberty to the petitioner to make a fresh representation to the respondents no.2 and directed him to pass speaking order on the said representation disclosing the ground on which the application of the petitioner had been rejected. The respondent no.2 by order dated 8.5.2001 passed speaking order, which was subsequently challenged by means of amendment. Reasons given in the said order dated 8.5.2001 are as follows:

(i) the source of sustenance has been taken into consideration.
(ii) The deceased had left 8 children out of which 5 sons were employed, three remained two sons and one daughter;
(iii) The monthly source of income was estimated to be Rs.3900/-, which was thought sufficient for sustenance of three unemployed members.
(iv) Five elder brothers were also expected to take care of the remaining three unemployed children.

The said order has been challenged by the petitioner on the ground that materials facts have-not been taken into consideration and that the petitioner was still entitled to be given compassionate appointment.

3. Counter affidavit and rejoinder affidavit have been exchanged. Sri Himanshu Tiwari learned counsel representing the respondent Bank has also placed on record the circular issued by the Indian Bank Association and the scheme for giving appointment on compassionate grounds to the heirs of the officers and employees of the Bank who died in harness. The circular dated 23.8.96 has been issued by Indian Bank Association to all the Public Sector Banks Clause IV of the said circular gives the heading of financial condition of the family, the same is quoted here under:

Financial Condition of the Family

The Hon'ble Supreme Court has observed that dependant's of an employee dying in harness can be considered for compassionate appointment provided the family is without any means of livelihood. Therefore, the rules may provide for taking into account the following to determine the financial condition of the family:-

a) Family Pension
b) Gratuity amount received
c) Employee's/ employer's contribution to provident Fund
d) Any compensation paid by the bank or its welfare Fund
e) Proceeds of LIC Policy and other investments of the deceased employee
f) Income for family from other sources
g) Employment of other family members
h) Size of the family and liabilities, if any etc.

Public sector banks may amend the present policy of compassionate appointment of dependants of deceased employees and dependants of retired employees on medical grounds, keeping in view the judgment of the Hon'ble Supreme Court."

4. The above clause provides that the necessary rules will take into account the said factors to determine the financial condition. On query being made as to what scales of minimum earning of family

of the deceased had been decided in the rules which will determine whether the dependant is within the limit or not, the counsel for the respondent bank stated that there was no such scaling provided and the rules are silent on this aspect. This would mean that it was left exclusively at the discretion of the concerned authority to determine whether the financial condition made the dependent eligible or not for giving appointment on compassionate grounds.

5. Learned counsel for the petitioner has relied upon several decision of Allahabad High Court reported in **2002(2)LBESR 530(Alld) DhIraj Kumar Dixit Versus The General Manager(Personal)UCO Bank Calcutta & others, 2002(1) LBESR 73 (All)(L.B.) RamPiyarey Versus State Bank of India & others, 2000(2) LBESR 622 (All) Smt.Jagat Ram Versus Executive Engineer Construction Division & others, 199(2) LBESR 492(All) Smt. Saroj Devi Vs. State of U.P., 2003(1) LBESR 935(All) Smt.Padma Pathak Versus Managing Director, Pubjab National Bank and another, 2003(2) UPLBEC 1172 Rahul Tandon Vs. Regional Manager, Allahabad Bankl, Regional Office, Allahabad and others.** The aforesaid decisions have been cited for the purpose that family pension; and payment of post death benefits cannot form the grounds for refusal to give appointment on compassionate basis.

6. The consideration of the financial condition has to be based upon a uniform policy to be adopted throughout the Institution. Learned counsel for the petitioner has also relied upon the decision of Division Bench of this Court reported in **2004 (3) UPLBEC 2244 (DB) Chief General Manager, State Bank of India, Lucknowand others Vs. Durgesh Kumar Tiwari** wherein it has been held that the family pension having been substantially reduced the decision of the Bank for non granting compassionate appointment was set aside and direction of the Single Judge issued to grant appointment on compassionate basis was upheld by the Division Bench..

7. Counsel for the respondent Bank has placed reliance upon the judgment of Supreme Court reported in **J.T.2004(6) S.C. 418 Punjab National Bank and others Vs. Ashwini Kumar Taneja.** As per the facts mentioned in the said case learned single Judge of Rajsasthan High Court had allowed the request for appointment on the compassionate ground over ruling the decision of the Bank refusing compassionate appointment as no financial hardship was caused to the family due to the fact that retirement benefits had been paid to the family. The Division Bench of Rajasthan High Court up held the decision of learned single Judge. The Supreme Court held that the financial condition of the family can be a valid ground for not granting appointment on compassionate basis. It set aside the judgment of Single Judge as well as the Division Bench and allowed the appeal of the Bank. However, it permitted that the case of the respondents to be considered sympathetically under any other scheme or policy in accordance with law.

8. Considering the facts and circumstances of the case and also the law laid down as stated above, the Bank has to frame a clear policy and provide all the necessary guide lines for consideration of concerned appropriate authority by fixing the amount under different heads for

calculating the minimum to be fixed for refusing compassionate appointment on the ground of financial condition of family of deceased employee. It cannot be left at the sole discretion of the concerned authority to fix such an amount resulting into discrimination and arbitrariness in giving appointment on compassionate basis. There has to be a uniform policy.

9. In the circumstances, the order passed by the respondent Bank is set aside and the matter is sent back for consideration of the Bank for fixing the scales under different heads and thereafter circulate a uniform policy to be adopted throughout the institution. In case the scaling so fixed entitles the petitioner for consideration, his case may be considered and if he is excluded under the scales fixed, he may be intimated accordingly. Such decision should be taken at the earliest and in any case within a period of four months from the date of production of certified copy of this order.

Accordingly, the writ petition is allowed with the aforesaid directions.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2004

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petitio.45709 of 2004

Suraj Prasad Tewari ...Petitioner
Versus
Zila Commandant Home Guards, Hamirpur and others ...Respondents

Counsel for the Petitioner:
Sri R.R. Shivahare

Counsel for the Respondent:
S.C.

Constitution of India-Articles 14,16,21, & 311-Applicability-Home Guards Act, 1963-J. 10 Explanation-cancellation of petitioner's assignment as Company Commander by Divisional Commandant Home Guards-Petitioners plea that impugned order violative of Articles 14,16,21 and 311-Since no opportunity of hearing given to petitioner before passing of order-Held, a Home Guard shall not be deemed to be a 'holder of a Civil Post merily by reason of his enrolment as home guard'-Writ petition dismissed.

Held: Para 2 & 3

The learned Standing Counsel has placed reliance on the explanation of Section 10 of U.P. Home Guards Act 1963 and 2003 Educational and Services Cases Vol. IV 1964 in which the Division Bench of this Court while considering the similar question regarding explanation of Section 10 has held that a home guard shall not be deemed to be a "holder of a civil post merely by reason of his enrolment as home guard" The Division Bench of this Court has also considered the earlier judgment cited by the petitoner and has come to the conclusion that as he is not holding a civil post, therefore, he does not come in the definition as provided. It has also considered that Article 311 of the Constitution while deciding the controversy whether in spite of the fact the consideration of Section 10, the explanation that clearly stated that the home hard shall not be deemed to a holder of civil post. The Division Bench has also considered the judgment of Writ petition no. 29824 of 1992 and held that in the said judgment, the aforesaid point was not for adjudication.

I have heard the learned counsel for the petitioner and the learned Standing Counsel and after hearing both the

parties I am of opinion that the controversy involved in the present writ petition is fully covered by the judgment of the Division Bench of this Court delivered in Writ Petition No. 23570 of 1987, Riasat Ali Vs. State of U.P. and others.

Case law discussed:
1998 Vol. III AWC 1623
1986 UPLBEC 1130
2003 E & SC Vol. IV 1964 (DB) (All)
W.P. 29824 of 1992
W.P. No. 23570 of 1987 (All)(DB)

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

1. The petitioner is aggrieved by the order dated 15.10.2004, Annexure-1 to the writ petition by which his assignment as a Company Commander has been cancelled by the Divisional Commandant Home Guards, Jhansi. The petitioner contends that the aforesaid order is violative of Articles 14,16,21 and 311of the Constitution of India and before passing the aforesaid order no opportunity of hearing or show cause has been given to the petitioner. The petitoner has placed reliance on a single Judge judgment of this Court in the case of **Suraj Tiwari Vs. Zila Commissioner Home Guard, Hamirpur and others** reported in 1998 Vol. III A.W.C. 1623. It has been stated that while deciding the aforesaid case, the Hon'ble single Judge has adopted the reasoning of the earlier judgment delivered in the case of **Vibhuti Narain Singh Vs. State and others** reported in 1986 UPLBEC 1130. Various other grounds have been raised on behalf of the petitoner that though the petitoer was being paid honorarium, yet he was entitled for show cause notice and opportunity of hearing and as such in the absence of it, the order passed by the respondent is illegal and is liable to be quashed.

2. The learned Standing Counsel has placed reliance on the explanation of Section 10 of U.P. Home Guards Act 1963 and 2003 Educational and Services Cases Vol. IV 1964 in which the Division Bench of this Court while considering the similar question regarding explanation of Section 10 has held that a home guard shall not be deemed to be a "holder of a civil post merely by reason of his enrolment as home guard" The Division Bench of this Court has also considered the earlier judgment cited by the petitoner and has come to the conclusion that as he is not holding a civil post, therefore, he does not come in the definition as provided. It has also considered that Article 311 of the Constitution while deciding the controversy whether in spite of the fact the consideration of Section 10, the explanation that clearly stated that the home hard shall not be deemed to a holder of civil post. The Division Bench has also considered the judgment of Writ petition no. 29824 of 1992 and held that in the said judgment, the aforesaid point was not for adjudication.

3. I have heard the learned counsel for the petitoner and the learned Standing Counsel and after hearing both the parties I am of opinion that the controversy involved in the present writ petition is fully covered by the judgment of the Division Bench of this Court delivered in Writ Petition No. 23570 of 1987, Riasat Ali Vs. State of U.P. and others.

In view of the aforesaid facts the petition is dismissed. There shall be no order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2005

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

Civil Misc. Writ Petition No.1887 of 2005

Shyam Kunwar and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri R.K. Shukla

Counsel for the Respondents:
Sri S.R. Jalil
Sri Anuj Kumar
S.C.

Constitution of India Article 226-Fisheries Rights-grant of lease earlier the lease granted for Rs.700/- per year basis-Deputy District Magistrate submitted report that the current rate as offered by the petitioner about Rs. 2000/- is most appropriate-while at the intervention of court make offer of Rs. 25000/- per year-without issuing the notices to the Private party direction issued that if the petitioner deposits Rs. 25000 for one year the authorities shall put auction and settled the same on the basis highest bid-if no higher amount offered only then lease can be sifted with the petitioner for remaining period of 5 years at the rate of Rs.25,000/- per year basis.

Held: Para 7

Accordingly, it is directed that within six weeks from today petitioners shall deposit Rs.25,000/- before Deputy Collector concerned as first year's rent from 1.4.2005 till 31.3.2006. On such deposit being made Deputy Collector shall within one month invite respondent no.4–Chhotkun, son of Ramat as well as any other person who may be interested in taking the lease of the pond in dispute to offer higher amount i.e. more than Rs.25,000/- per year. For inviting other interested persons such procedure may be adopted by the Deputy Collector as he considers appropriate. If no person offers higher amount then ten years' fisheries lease in favour of petitioners effective from 1.4.2005 shall be executed on yearly rent of Rs.25,000/- payable every year in advance and recoverable like arrears of land revenue in case of default. However, if respondent no.4 Chhotkun or any other person offers higher amount then auction must take place in between those persons and the petitioners in the office of Deputy Collector and lease shall be settled in favour of the highest bidder with similar terms in respect of payment of rent.

Case law discussed:
AIR 1985 SC 1147
2004 (96) RD 645
1995 ACJ 1066
1997 RC 656
1999 ACJ-312
2002 ACJ 1148
2004 RD 645 (FB)

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

1. Fisheries lease in respect of a pond comprised in plot no.290 area 1.137 hectares situate in village Surhurpur, Tappa-Haveli, Pargana and Tehsil Mohammdabad Gohna, District Mau was granted by Deputy Collector in favour of respondent no.4–Chhotkun for only Rs.2,000/- per year and that also without any advertisement or auction. There are several authorities of this Court (op.cit) to the effect that fisheries lease shall be granted only and only through auction, and that auction cannot be confined to members of any particular caste, society or group of professionals (Machhuva Samudai). In the aforesaid authorities it has also been held that fisheries lease

cannot be renewed and after expiry of fisheries lease fresh auction/re-auction shall take place. Like the present case I have found that in several cases fisheries leases are being settled without any auction and just on the recommendation of Naib Tehsildar/Tehsildar or resolution of Gaon sabha and that also for highly inadequate rents. In several such matters where two parties were claiming for grant of fisheries lease I settled the matter by auction in open court in between the contesting parties drawing inspiration from the authority of the Supreme Court reported in ***Ram & Shyam Company Vs. state of Haryana, A.I.R. 1985 S.C. 1147***. In several such auctions parties offered quite handsome amount. I therefore, held in Babban Ram V. State 2004 (2) R.D. 675 that normally fisheries lease should be settled at the rent of Rs.10,000/- per hectare per year. However, on the basis of experience gained in subsequent auctions I found that even the said rent was on the lower side. In several cases parties offered in between Rs.25,000/- to Rs.50,000/- per year rent. In few cases rent offered was around Rs.1 lac per hectare per year. In pursuance of my order dated 17.1.2005 passed in this writ petition Deputy Collector concerned has filed his affidavit stating therein that as earlier lease was granted for Rs.700/- per year hence Rs.2,000/- appeared to be appropriate to him and that he was also not aware of the Full Bench authority of this Court reported in ***Feru Vs. State of U.P. [2004 (96) R.D. 645].*** The court refrains from making any comment on this blissful ignorance.

2. Facts of the instant case are that ten years' fisheries lease in respect of pond in dispute was granted in favour of petitioner's father in the year 1994 on 28.3.1994 for Rs.700 per year even though lease deed (copy of which is Annexure-3 to the writ petition) was executed on 30.7.1996 but the period of lease was from 1.4.1995 to 31.3.2005. It has further been stated that Land Management Committee on 4.7.2004 passed a resolution for grant of fisheries lease for ten years in favour of Chhotkun, respondent no.4. Initially on the said resolution a report was submitted that as the period of lease in favour of petitioners' father was to expire on 31.3.2005 hence before that period no fresh lease could be granted. However, Tehsildar on 25.10.2004 submitted another report to the effect that lease in favour of petitioners' father was granted by order dated 28.3.1994 hence it expired on 28.3.2004, therefore resolution of Gaon Sabha shall be accepted. Said report was given by Tehsildar on 25.10.2004 which was accepted by Deputy Collector/S.D.O. by order dated 19.11.2004 which is Annexure-6 to the writ petition. The said order is under challenge in the instant writ petition.

3. In the following authorities it has been held that fisheries lease shall be settled through open auction and after expiry of period of lease, re-auction shall take place and initial lease shall not be renewed:

1. Ashok Kumar Vs. State 1995 Allahabad Civil Journal 1066
2. Abdul Gaffar Vs. State of U.P. and others, 1997 R.D. 656
3. Panchoo Vs. Collector, 1999 Allahabad Civil Journal 312
4. Ram Bharosey Lal Vs. State of U.P.2002 Alld, Civil Journal 1148
5. Feru Vs. State of U.P. 2004 R.D. 645 (Full Bench)

4. It is a matter of grave concern that inspite of the aforesaid judgments Deputy Collectors are settling fisheries pattas without auction on highly inadequate premiums which is some times almost no premium as in the instant case.

5. On enquiry from court learned counsel for the petitioners stated that petitioners were ready to take fresh lease of the pond in dispute at the rate of Rs.25,000/- per year effective from 1.4.2005.

6. As the earlier lease in favour of the petitioners' father was granted from 1.4.1995 till 31.3.2005 hence fresh lease can be granted only with effect from 1.4.2005. Even though order for grant of lease was passed in the year 1994 however, as lease deed itself mentioned that it was for the period from 1.4.1995 till 31.3.2005 hence there was no question of granting fresh lease effective before 31.3.2005 on the ground that there was some error in respect of period in the lease deed.

7. Accordingly, it is directed that within six weeks from today petitioners shall deposit Rs.25,000/- before Deputy Collector concerned as first year's rent from 1.4.2005 till 31.3.2006. On such deposit being made Deputy Collector shall within one month invite respondent no.4 Chhotkun, son of Ramat as well as any other person who may be interested in taking the lease of the pond in dispute to offer higher amount i.e. more than Rs.25,000/- per year. For inviting other interested persons such procedure may be adopted by the Deputy Collector as he considers appropriate. If no person offers higher amount then ten years' fisheries lease in favour of petitioners effective from 1.4.2005 shall be executed on yearly rent of Rs.25,000/- payable every year in advance and recoverable like arrears of land revenue in case of default. However, if respondent no.4 Chhotkun or any other person offers higher amount then auction must take place in between those persons and the petitioners in the office of Deputy Collector and lease shall be settled in favour of the highest bidder with similar terms in respect of payment of rent. This order is being passed without issuing notice or hearing respondent no.4 Chhotkun as his interest has sufficiently been safeguarded in the order. However, if respondent no.4 feels aggrieved by this order he is at liberty to apply for its recall.

8. As the period of initial lease in favour of petitioners' father is to continue till 31.3.2005 hence till then respondent no.4 shall not make any interference in petitioners' right of using pond in dispute for fisheries purposes. Deputy Collector shall conclude the proceedings for grant of fresh lease as directed above before 31.3.2005.

9. In Babban Ram Vs. State 2004 R.D. 675 I had directed that fisheries lease shall normally be granted at the rate of Rs.10,000/- per hectare per year however, as stated above the said amount has been found to be on the lower side. Accordingly, it is directed that in future all the Deputy Collectors shall make efforts to grant fisheries lease for Rs.20,000/- per hectare per year unless there are special reasons for granting the same for lesser amount in which eventuality reasons must be given while granting the lease. If at the time of auction Deputy Collectors take special interest then rent may easily be enhanced. In several cases the court has found that

on the mere suggestion of the court parties agree to enhance the rent by several times.

Writ petition disposed of accordingly.

10. Shri S.R. Jalil, learned standing counsel is directed to send copies of this judgment to Chief Secretary, Revenue Secretary and all the Collectors of the Districts of Uttar Pradesh for perusal and communication to Deputy Collectors.

Let a copy of this order be given free of cost to Shri S.R. Jalil, learned standing counsel.

Petition Disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.42319 of 2003

Dr. Ganshyam Das Arora and another
...Petitioners
Versus
Roop Kishore Chandak and others
...Respondents

Counsel for the Petitioners:

Counsel for the Respondents:
Sri H.M. Srivastava
S.C.

Constitution of India-Article 226-Exercise of power under U.P. Act 13 of 1972-Ss. 21 (1) (a) and 22-Application for release findings as to bonafide requirement as well as comparative hardship affirmed by appellate authority-Writ Petition-held, findings recorded by Prescribed Authorities and affirmed by appellate authority on question of bonafide need as well as comparative hardship, need no interference under Article 226, as writ Court is not a Court of appeal.

Held: Para 7

Applying the guidelines and tests as laid down by the Apex Court in the aforesaid case I do not find this case to be a fit case, particularly in view of the fact that the findings recorded by the prescribed authority and affirmed by the appellate authority on the question of bona fide requirement as well as comparative hardship, for interference under Article 226 of the Constitution of India. This writ petition, therefore, has no force and deserves to be dismissed.

Case law followed:
(2003) 6 SCC 575

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

1. This writ petition under Article 226 of the Constitution of India is filed by the tenant challenging the orders passed by the prescribed authority as well as appellate authority whereby both the authorities have allowed the application filed by the landlord under Section 21 (1) (a) of U.P. Act No.13 of 1972 (hereinafter referred to as the Act) for release of the accommodation in question in favour of the landlord.

2. The respondent-landlord filed application under Section 21 (1) (a) of the Act on the ground that the son of the landlord has grown up and has passed his M.Com examination. He wants to start his own business in the shop in dispute. Therefore, to establish his son the landlord bona fide requires the shop in question and the need of the landlord is more pressing as compared to that of the tenant inasmuch as the tenants are

carrying on business of brick kiln. It was, therefore, prayed for that the shop in question be released in favour of the landlord. It is also alleged by the landlord that when the landlord requested the tenant to vacate the premises they demanded *Pagri* (premium) for vacating the same.

The aforesaid application was contested by the tenant on the ground that the landlord, in fact, wanted to enhance the rent to which the tenant has not agreed, therefore, this application has been filed for mala fide intention. The tenant has further taken up the case that in fact the son of the landlord for whose need the application was filed is employed in a private firm at Delhi and is drawing salary of Rs.10,000/- per month, whereas in the shop in question the son of the tenant is carrying on his practice of Dentist and is earning his livelihood. In case the shop in question is released in favour of the landlord the tenant is to vacate it and will suffer a loss.

3. Before the prescribed authority both the parties have adduced their respective evidence. After considering the case set up by both, landlord and tenant, and on the basis of evidence on the record the prescribed authority has arrived at a conclusion that the need of the landlord is bona fide and more pressing as compared to that of the tenant. Thus the prescribed authority released the shop in question in favour of the landlord.

4. Aggrieved thereby the tenant preferred an appeal as contemplated under Section 22 of the Act. The appellate authority affirmed the findings recorded by the prescribed authority. Thus this writ petition challenging the order passed by the prescribed authority as well as the appellate authority.

5. Learned counsel for the petitioner has argued before me that the prescribed authority as well as the appellate authority have committed error which is manifest error of law inasmuch as they have come to the conclusion that the son of the landlord, for whose need the release of the shop was prayed for, was in fact employed in a private firm at Delhi but still the shop in question was released. Thus the findings arrived at by the prescribed authority and affirmed by the appellate authority on both the questions, namely, bona fide requirement as well as comparative hardship deserve to be quashed and the application filed by the landlord deserves to be set aside and application under Section 21 (1)(a) of the Act deserves to be rejected. The prescribed authority aw well as the appellate authority have considered this aspect of the argument and have recorded a finding that it has been categorically stated that the son of the landlord for the time being had joined the job which is the job of a private company so that he may not sit idle and as soon as the shop was release he would start his own business. This finding of the prescribed authority has been affirmed by the appellate authority along with the finding recorded by the prescribed authority on the question of bona fide requirement of the landlord as well as comparative hardship. Learned counsel for the petitioner cited one sentence or the other from the judgment here and there and tried to press that the findings arrived by the prescribed authority and affirmed by the appellate authority deserve to be quashed.

6. This is settled law that this Court in exercise of power under Article 226 of the Constitution of India will not sit in appeal over the findings arrived at by the prescribed authority and affirmed by the appellate authority. The Apex Court in a recent judgment reported in ***(2003) 6 SCC 675, Surya Dev Rai v. Ram Chander Rai***, sub-paras (5), (6), (7) and (8) are reproduced below, clearly held the scope of interference by this Court under Article 226 of the Constitution of India:-

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self evident i.e. which can be perceived or demonstrated without involving into any lengthy or completed argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasioned. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the-pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character."

7. Applying the guidelines and tests as laid down by the Apex Court in the aforesaid case I do not find this case to be a fit case, particularly in view of the fact that the findings recorded by the prescribed authority and affirmed by the appellate authority on the question of bona fide requirement as well as comparative hardship, for interference under Article 226 of the Constitution of India. This writ petition, therefore, has no force and deserves to be dismissed.

8. Lastly it is submitted by the learned counsel for the petitioner that since the petitioner's son is carrying on his profession of Dentist in the shop in

question, he may be allowed some time to vacate the shop in question. In the facts and circumstances of the case it would be in the interest of justice that the petitioner is granted time till 30th June 2005 to vacate the shop in question provided:

1. the petitioner furnishes undertaking before the prescribed authority within a period of three weeks from today that he will hand over peaceful vacant possession of the shop in question to the landlord on or before 30th June 2005;
2. the petitioner undertakes to deposit the entire arrears of rent/damages calculated at the rate of rent within same period of three weeks from today, if not already paid, by either depositing the same before the prescribed authority or paying the same to the landlord-respondent and keeps on depositing the future rent/damages by first week of the succeeding month in the manner prescribed above as and when it falls due so long as the tenant remains in possession of the shop or till 30th June 2005 whichever is earlier. The amount if deposited before the prescribed authority by the petitioner-tenant, the same shall be permitted to withdraw by the landlord.

In the event of default of any of the conditions mentioned above, it will be open to the landlord to get the order of release executed against the petitioner through process of law.

In view of what has been stated above the writ petition is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2004

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.35499 of 2001

Lalit Kumar Srivastava ...Petitioner
Versus
State of U.P.and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri R.C. Shukla
Sri Ajay Shankar
Sri V.K. Singh

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

Dying in Harness Rules, 1974-G.O. dated 4.9.2000-Compassionate appointment-Claims for-Petitioner applied for appointment under Dying in Harness Rules on Class III post on death of his father -Appointment given on Class IV post in Junior High School-on 2.8.81 Subsequent appointment of two other persons on class III posts under Dying in Harness Rules-Writ petition-plea of discrimination-Director of Basic Education, (Chairman of the Board) directed to enquiry into matter-In case it is found that on date of petitioner's application, there was any vacancy in class III post, he may be offered appointment against Class III post on principle of 'first come first serve'-In case vacancies occurred subsequent to appointment of petitioner on class IV post and he has made application for class III post and has not moved his claim is required to be considered for appointment on class III post even though he was appointed on class IV post-Director of Basic Education ordered to pass reason and speaking order-Further, Govt. directed to constitute

monitoring cell at regional level and Head office level to supervise and ensure proper and effective implementation of Govt. Order dated 4.9.2000 in respect of appointment under Dying in Harness Rules-Constitution of India-Article 14 and 16 (1).

Held: Para 15

After due enquiry if it is found that on the date of offer of appointment to the petitioner i.e. on 2.8.1999 any vacancy against class-III post in the district was available, it was required to be offered to the petitioner on the basis of principle of "first come first serve" and in case there exists no such vacancy in class-III post in the district and the petitioner has moved his revised application for class-IV post to the appointing authority, only in that event of the matter the appointing authority could have offered appointment to the petitioner against class-IV post and not otherwise in accordance with class (5) of paragraph 3 of the Government order dated 4.9.2000. If it is found that on the date of appointment of petitioner any vacancy against class-III post in the district was not available in that event of the matter he ought to have been asked either to wait for occurrence of such vacancy or revise his application for class-IV post. The offer of appointment to the petitioner against class-IV post and acceptance by him without following the aforesaid procedure is of no legal consequence and cannot be taken to be any way impediment in accepting the claim of the petitioner against class-III post.

Case law discussed:

AIR 1989 SC 1976
AIR 1998 SC 2230
(1994) 4 SCC 138
2002 SCC (L & S) 1115
2001 (1) ESC 419

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

1. On 29.10.2004 Sri Ashok Khare learned Senior Advocate for the petitioner and Sri R.K.Tripathi Advocate for respondents no.2 and 3 have been heard at length and on conclusion of hearing, the judgment was reserved.

2. The brief facts of the case are that the father of the petitioner late Hira Sri Lal Srivastava, while working as head master in the Primary School Gauspur, Hathgaon, District Fatehpur run by the Uttar Pradesh Basic Education Board, died in harness on 9.6.1999 leaving behind him his wife, four sons and one daughter. After his death, his uneducated widow demanded the service for the petitioner, who is her second eldest son, on any class-III post under Dying in Harness Rules applicable to the employees (teaching and non-teaching) of Uttar Pradesh Basic Education Board. According to the case of the petitioner, he is duly qualified to be appointed as a teacher or clerk in the establishment of the respondents, but he was offered only class-IV post in the Junior High School, Amilispal, Hathgaon, District Fatehpur, as he was told that no vacancy exists in class-III post and his class-IV post will be changed on availability of vacancy in class-III post in future. Accordingly he joined on class-IV post as offered to him vide order dated 2.8.1999 passed by the District Basic Education Officer, Fatehpur. According to the petitioner, shortly thereafter on 24.4.2000 the District Basic Education Officer, Fatehpur has appointed Sri Pawan Kumar Uttam and Smt.Sweta as class-III employees in the office of Deputy Basic Education Officer, Fatehpur in the pay scale of Rs.3050/- 4590/- under Dying in Harness Rules. They have also qualification of Intermediate. The petitioner has also filed the letter of appointment issued to Sri Pawan Kumar Uttam and Smt. Sweta as Annexure-2 of the writ petition. Feeling

aggrieved against the aforesaid action of the District Basic Education Officer, the petitioner has approached the Secretary Basic Education, Government of Uttar Pradesh as well as the Minister of the concerned department of education by moving applications before them. The aforesaid applications have also been filed by the petitioner as Annexures-3 and 4 of the writ petition. On the application of the petitioner it appears that some endorsement has been made to the District Basic Education Officer by the concerned Minister of the Government of Uttar Pradesh indicating therein that the petitioner may be adjusted against class-III post. In support of his claim petitioner has also filed Government Order dated 4.9.2000 issued under Section 13(1) of Uttar Pradesh Basic Education Act, 1972 (U.P.Act No.34 of 1972) herein after referred to as Act-1972, as Annexure-5 of the writ petition. Finding no favour with the concerned District Basic Education Officer, Fatehpur, the petitioner has filed the instant writ petition seeking the relief to the effect that a writ, order of direction in the nature of mandamus may be issued commanding the respondents to appoint/promoted the petitioner on the post of un-trained teacher or clerk at the earliest as per provisions of Dying in Harness Rules and further a relief has been sought for in the nature of writ, order or direction to the effect that respondent no.3 may be directed to comply with the order of departmental Minister/Secretary of Govt. of U.P..

3. Dr. Chandra Pal, the then working as District Basic Education Officer, Fatehpur has filed counter affidavit on behalf of respondents no.2 and 3 in the writ petition and has come forward, inter alia, with the case that the petitioner has been offered appointment on class-IV post on compassionate ground in the institution in question and in pursuant thereof he has joined the post without any objection and since then he is continuously working on the aforesaid post and is being paid his salary month to month. It is further averred in the counter affidavit that there was no assurance by any of the officers/ District Basic Education Officer for changing his class-IV post in class-III post on account of availability of vacancy in class-III post in future. The Minister and Secretary of the department concerned have only directed for doing the needful in accordance with the provisions of law. Therefore, the petitioner can have no cause of complaint to maintain the instant writ petition before this Court for the reliefs claimed in it.

4. For better appreciation of the case of respondents, the averments contained in paragraphs 8 and 9 of the counter affidavit are quoted herein below:-

"8. That the contents of paragraphs no.6 and 7 of the writ petition has already been reply in the proceeding paragraphs of this affidavit, as such they are denied accordingly. However, in reply it is hereby submitted that the petitioner was never assured for changing his appointment from class-iv to class-iii cadre, as such the averment in this respect made in para under reply is wholly falls and baseless. So far as the letters of Hon'ble Minister and Secretary Basic Education and concern, it is made clear that a direction and recommendation has been made to District Basic Education Officer for doing the needful in the interest of justice.

9. That the contents of para no.8 of the writ petition are not admitted as stated

being misconceived and misleading before this Hon'ble Court. In reply it is hereby submitted that in the Government order dated 4.9.2000 it has never been provided that in case once a person appointed in class-iv post due to non availability of any class-iii post, in future on the availability of the class-iii post the said person can again to be posted from class-iv to class-iii cadre towards the compassionate appointment. Since the petitioner is already working and obtaining salary from the date of his initial appointment i.e. 2.8.99 on class-iv post, as such the petitioner cannot claim again to avail the benefit of Dying in Harness Rules. The allegation against the respondent no.3 regarding malafide and violation of constitutional provision is wholly baseless and the petitioner has made the same in para under reply just to make out his case in the instant writ petition. Rest of the averment made in para under reply being contrary to the facts hence they are denied."

5. The thrust of the submission of the counsel for the petitioner is that in view of the Government Order dated 4.9.2000, which has been made applicable with effect from 8.1.1999 having regard to the educational qualification as Intermediate, it was obligatory on the part of the respondents to offer a compassionate appointment to the petitioner on class-III post and not on class-IV post. In any case, shortly after the appointment of the petitioner on 2.8.1999, the other persons, namely, Sri Pawan Kumar Uttam and Smt. Sweta, who have also identical educational qualification as Intermediate, have been offered appointment on class-III post vide letter of appointment dated 24.4.2000, Therefore, the petitioner has been grossly discriminated in the matter of employment in utter violation of the provisions of Article 16(1) of the Constitution of India. Sri Khare has further contended that since in the counter affidavit filed by the District Basic Education Officer, Fatehpur, there is no averment at all specifically denying the fact that at the time of offer of appointment to the petitioner there exists no vacancy in the establishment of respondents against class-III post and the vacancies, which were offered to Sri Pawan Kumar Uttam and Smt. Sweta, have been occurred later on after appointment of the petitioner. Therefore it is established that the petitioner has been grossly discriminated in the matter of employment In any event of the matter while considering the claim of the petitioner, the relevant provisions of Government Order dated 4.9.2000 have not been adhered to. In support of his contentions the learned counsel for the petitioner has placed reliance upon the decision of Apex Court rendered in ***Surya Kant Kadam Versus State of Karnataka and others, reported in 2002 Supreme Court Cases (L & S) 1115*** and a decision of this Court rendered in ***Sudhakar Srivastava Vs. Deputy Director of Education (Secondary) 9TH Region, Faizabad and others, reported in 2001(1) Education and Services Cases 419.***

6. Before dealing with the rival contentions of the parties, it is necessary to examine the aims, object and purpose of the scheme underlying in Dying in Harness Rules for grant of compassionate appointment. The issue of grant of compassionate appointment under Dying in Harness Rules is not ***res-integra***. The Apex Court and this Court have considered the issue from time to time

and provided sufficient guidance for giving employment under Dying in Harness Rules. In the case of ***Smt.Sushma Gosain and others Vs. Union of India and others, reported in AIR 1989 Supreme Court 1976***, in paragraph 9 of the report it was observed that:-

"9. We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant."

7. In the case of ***Director of Education (Secondary) and another Vs. Pushpendra Kumar and others, reported in AIR 1998 Supreme Court, 2230***, while taking note of the earlier decision of the Apex Court rendered in the case of ***Umesh Kumar Nagpal V. State of Haryana, reported in 1994(4) SCC 138*** in paragraph 8 of the judgment it was observed that-

8. The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependents of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot sub-sume the main provision to which it is an exception and thereby nullity the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the; post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependent of a deceased employee. In ***Umesh Kumar Nagpal V. State of Haryana, 1994 (4) S.C.C.138: (1994 AIR SCW 2305)*** this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the Court was considering the question whether

appointment on compassionate grounds could be made against posts higher than posts in Classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual and manual categories. It was observed at page 2308 of AIR SCW:-

"The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations and the change in status and affairs of the family engendered by the erstwhile employment which are suddenly upturned."

9. While superseding the earlier Government Order on the subject, Government of Uttar Pradesh has issued an order under clause (1) of Section 13 of the Act-1972, on 4.9.2000, wherein a complete scheme has been provided for making appointment under Dying in Harness Rules to the dependent of deceased teaching and non-teaching employees of Uttar Pradesh Basic Education Board, herein after referred to as the Board. This scheme has statutory sanction and statutory force to be enforceable in the court of law. The Government Order has retrospective operation with effect from 8.1.1999. For better appreciation of the provision underlying in Dying in Harness Scheme contained in the aforesaid Government Order, it is necessary to re-produce the same in toto:-

संख्या -५१६३/१ ५-५-२०००-४००(२२२)/९६
प्रेषक,
श्री एन.रविशंकर,
सचिव,
उत्तर प्रदेश शासन।

सेवा में,
शिक्षा निदेशक (बे०) एवं अध्यक्ष,
उत्तर प्रदेश बेसिक शिक्षा परिषद,
लखनऊ।

शिक्षा अनुभाग-३ लखनऊः दिनांक ०४ सितम्बर २०००

विषयः उत्तर प्रदेश बेसिक शिक्षा परिषद के अन्तर्गत सेवारत शिक्षको/शिक्षणेत्तर कर्मचारियों की सेवाकाल में मृत्यु हो जाने की स्थिति में उनके आश्रितों के सेवायोजन के सम्बन्ध में।

महोदय,

उपर्युक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि शासनादेश संख्या १०९५/१५-५-९५-३०/९२ दिनांक ०२ फरवरी १९९६ के अन्तर्गत उत्तर प्रदेश बेसिक शिक्षा परिषद के अधीन सेवारत शिक्षकों/शिक्षणेत्तर कर्मचारियों की सेवाकाल में मृत्यु हो जाने पर उनके एक आश्रित को परिषद के अधीन सेवायोजन के सम्बन्ध में व्यवस्था की गयी थी। मा० उच्च न्यायालय इलाहाबाद में योजित रिट याचिका संख्या-४१५६४/१९९७ संजीव कुमार दूबे बनाम जिला विद्यालय निरीक्षक इटावा व अन्य में मा० न्या० द्वारा पारित आदेश अदनांक २७-४-९८ की अनुशीलन में जारी शासन के आदेश संख्या १६३४/१५-११-९८-१४९६ (८)/७७ दिनांक ०८, जनवरी द्वारा मृतक आश्रित सेवायोजन के सम्बन्ध में निर्गत सभी शासनादेश अतिक्रमित हो जाने के फलस्वरूप बेसिक शिक्षा परिषद के अधीन सेवाओं में मृतक आश्रित सेवायोजन की व्यवस्था उक्त तिथि से बाधित रही है।

२. इस बीच मा० उच्च न्यायालय के उपर्युक्त निर्णय दिनांक २७.४.९८ के विरूद्ध संजीव कुमार दूबे द्वारा दायर अपील संख्या-५२६/९८ में मा० उच्च न्यायालय की दो सदस्यीय न्यायपीठ ने अपने आदेश दिनांक ०१, फरवरी २००० द्वारा मा० उच्च न्यायालय के पूर्ववर्ती निर्णय दिनांक २७.४.९८ कोनिरस्त कर दिया है। मा० उच्च न्यायालय की दो सदस्यीय पीठ द्वारा प्रश्नगत मामला सम्बन्धित पीठ को मा० न्यायालय

की संविक्षाओं के आलोक में पुनर्विचार हेतु सन्दर्भित किया गया है।

३. उक्त के अनुक्रम में शासन द्वारा मा० न्यायालय की संविक्षाओ की भावना व प्राथमिक शिक्षा की गुणवत्ता बनाये रखने की आवश्यकता को अनुभव करते हुए सम्यक विचारोपरान्त उ०प्र० बेसिक शिक्षा परिषदीय शिक्षकों/शिक्षणेत्तर कर्मचारियों की सेवाकाल में मृत्यु हो जाने पर उनके परिवार के एक आश्रित को निम्न लिखित शर्तो एवं प्रतिबन्धों के अधीन सेवायोजन का अवसर प्रदान किये जाने का निर्णय लिया गया है :

(१) उ०प्र० सेवाकाल में मृत सरकारी सेवकों के आश्रितो की भर्ती (पाँचवा संशोधन) नियमावली, १९९९ के प्राविधानों के अनुसार ही बेसिक शिक्षा परिषद की सेवा के शिक्षक/शिक्षणेत्तर कर्मचारियों की सेवाकाल में मृत्यु हो जाने पर मृतक कर्मचारी का पति या पत्नी (केन्द्रीय सरकार या किसी राज्य सरकार के स्वामित्वाधीन या उनके द्वारा नियंत्रित किसी नियम के अधीन पहले से सेवायोजित न हो तो उनके कुटुम्ब के ऐसे एक सदस्य को जो, केन्द्रीय सरकार या राज्य सरकार या केन्द्रीय सरकार या राज्य सरकार के स्वामित्वाधीन या उनके द्वारा नियंत्रित किसी निगम के अधीन पहले से सेवायोजित न हो। इस सम्बन्ध में मृतक आश्रित आवेदनकर्ता से शपथ पत्र प्राप्त करने के उपरान्त ही उसके सेवायोजन पर विचार किया जायेगा।

(२) उत्तर प्रदेश बेसिक शिक्षा परिषद के शिक्षकों/शिक्षणेत्तर कर्मचारियों के ऐसे मृतक आश्रित जो बेरोजगार हो और नियमों के अन्तर्गत निर्धारित न्यूनतम शैक्षिक एवं प्रशिक्षण योग्यता रखते हों तथा अन्य प्रकार से परिषद की सेवा हेतु अर्ह हों, को परिषदीय विद्यालयों के सहायक अध्यापक/अध्यापिका के पद पर अथवा परिषद के अधीन शिक्षणेत्तर तृतीय श्रेणी के सबसे नीचे के पद पर अथवा चतुर्थ श्रेणी के पद पर विहित योग्यता/प्रशिक्षण योग्यता के आधार पर सेवायोजन हेतु आवेदन करने पर भर्ती के सामान्य नियमों/ प्रक्रिया को शिथिल करते हुए परिषदीय सेवा में उर्पयुक्त सेवायोजन पर विचार किया जायेगा।

(३) समय-समय पर यथा संशोधित उत्तर प्रदेश बेसिक शिक्षा (अध्यापक) सेवा नियमावली १९८१ के अनुसार अर्ह मृतक आश्रित को सहायक अध्यापक/अध्यापिका के पद पर आवेदन करने के दिनांक से यथा सम्भव तीन माह के अन्दर सेवायोजन कीह सुविधा जनपद स्तर पर रिक्त पद अथवा पद रिक्त न होने के स्थिति में अधिसंख्य पद के विरूद्ध प्रदान की जायेगी।

(४) ऐसे मृतक आश्रित जो सेवायोजन हेतु आवेदन पत्र प्रस्तुत करने की तिथि को सहायक अध्यापक के पद हेतु सेवा नियमों मे विहित शैक्षिक अर्हता रखते हों परन्तु प्रशिक्षण अर्हता नहीं रखते/पूरी करते, को अप्रशिक्षित अध्यापक के रूप में सेवायोजन हेतु आवेदन करने पर यथा सम्भव तीन माह के अन्दर सेवायोजन की सुविधा प्रदान की जायेगी। ऐसे मृतक आश्रित को सेवायोजन के बाद सम्बन्धित जनपद के जिला शिक्षा एवं प्रशिक्षण संस्थान में प्रारम्भ होने वाले बेसिक अध्यापक प्रमाण पत्र(बी.टी.सी.) प्रशिक्षण पाठ्यक्रम के आगामी पहले बैच में सहायक अध्यापक/अध्यापिका के पद पर नियमित नियुक्ति प्रदान करने के लिए उनको बी.टी.सी. प्रशिक्षण पाठ्यक्रम सफलतापूर्वक पूर्ण करना अनिवार्य होगा। प्रशिक्षण अवधि में उन्हें अप्रशिक्षित अध्यापक के रूप में नियत वेतन, जैसा कि शासन द्वारा समय समय पर निर्धारित किया गया हो, देय होगा। बेसिक अध्यापक प्रशिक्षण पाठ्यक्रम में उत्तीर्ण होने के बाद ही प्राथमिक विद्यालय में सहायक अध्यापक के पद पर नियमित नियुक्ति प्रदन की जायेगी।

नियुक्ति प्राधिकारी एवं ज़िला शिक्षा एवं प्रशिक्षण संस्थान का यह दायित्व होगा मिक वह प्रशिक्षित अध्यापक के रूप में सेवायोजित मृतक आश्रित अभ्यर्थियों के सेवारत प्रशिक्षण की व्यवस्था उनके सेवायोजन के बाद प्रारम्भ होने वाले पहले प्रशिक्षण सत्र में सुनिश्चित करेंगे।

ऐसे मृतक आश्रित का जो उपर्युक्त सेवारत प्रशिक्षण को निर्धारित अवधि में सफलतापूर्वक पूर्ण करने में असफल रहते हैं के लिए यह विकल्प उपलब्ध रहेगा कि वह चतुर्थ श्रेणी के पद के सापेक्ष नियुक्ति हेतु आवेदन करें अथवा प्रशिक्षण उत्तीर्ण करने तक अप्रशिक्षित अध्यापक के रूप में नियत वेतन पर बने रहें। किन्तु प्रतिबन्ध यह है कि ऐसे सेवारत बी.टी.सी. प्रशिक्षणार्थियों को सामान्य बी.टी.सी. पाठ्यक्रम के प्रशिक्षणार्थियों की भांति ही बी.टी.सी. पाठ्यक्रम की अनुपूरक परीक्षा हेतु विहित नियमों के अनुसार अवसर अनुमन्य होंगे। किन्तु यदि अभ्यर्थी तब भी बी.टी.सी. की अंतिम परीक्षा उततीर्ण करने में विफल रहते हैं तो ऐसे अभ्यर्थियों के लिए चतुर्थ श्रेणी के पद के सापेक्ष्य नियमित नियुक्ति के अतिरिक्त कोई विकल्प शेष नहीं रहेगा। अतः ऐसे अभ्यर्थी जो बी.टी.सी. परीक्षा में अंतिम रूप से विफल रहते हैं, को सहायक अध्यापक पद के लिए अभ्यर्थन स्वतः निरस्त समझा जायेगा और बी.टी.सी. परीक्षा में अंतिम रूप से विफल होने के माह के अंतिम कार्य दिवस से अप्रशिक्षित अध्यापके के रूप में भी उनकी नियुक्ति स्वतः समाप्त समझी जायेगी। किन्तु ऐसे अभ्यर्थी यदि चतुर्थ श्रेणी के रिक्त/अधिसंख्य पद के सापेक्ष्य सेवायोजन की प्रार्थना करते हैं, तो उस पर विचार किया जा सकेगा।

(५) ऐसे मृतक आश्रित जो सम्बन्धित कर्मचारी की मृत्यु के दिनांक को मृतक आश्रित के रूप में सेवायोजन के लिए न्यूनतम शैक्षिक अर्हता इण्टरमीडिएट अथवा उससे अधिक रखते हों और बेसिक शिक्षा परिषद के अधीन अधिनस्थ स्तरो पर लिपिक के संवर्ग के सबसे नीचे के पद पर सेवायोजन के लिए अन्यथा अर्ह हों, को सम्बन्धित जनपद में लिपिक के रिक्त पद के सापेक्ष्य सम्वर्ग में सबसे नीचे के पद पर सेवायोजन प्रदान किया जायेगा।

जनपद में रिक्त लिपिक के पद पर मृतक आश्रित के रूप में सेवायोजन के लिए प्राप्त समस्त आवेदन पत्रों को प्रथम आगत प्रथम प्रदत्त के आधार पर पंजीकृत किया जायेगा तथा विभाग में रिक्त होने वाले पदों के सापेक्ष्य प्रथम आगत प्रथम प्रदत्त के नियम का पालन सुनिश्चित करते हुए सेवायोजन प्रदान किया जायेगा। नियुक्ति प्राधिकारी तदनुसार मृतक अभ्यर्थियों की सूची को प्रत्येक माह के प्रारम्भ में अपने

कार्यालय के सूचना पटल पर प्रदर्शित करेंगे और प्रत्येक माह होने वाली रिक्ति के सापेक्ष्य सेवायेजित मृतक आश्रित का नाम प्रदर्शित करते हुए उक्त सूची कार्यालय के सूचना पटल पर प्रदर्शित करते हुए उक्त सूची को तद्नुसार संशोधित कर अगले माही के प्रारम्भ में अद्यावधिक संशोशित सूची कार्यालय के सूचना पटल पर प्रदर्शित करते रहेंगे। तृतीय श्रेणी के रिक्त पद के सापेक्ष्य मृतक आश्रित सेवायोजन के लिए प्रत्येक अभ्यर्थी के नाम नियुक्ति प्राधिकारी के कार्यालय में पंजीकृत होने की तिथि से पॉच वर्ष की अवधि पूरी होने के माह के अंतिम कार्यदिवस तक यदि प्रथम आगत प्रथम प्रदत्त के सिद्धान्त के अनुसार सेवायोजन हेतु श्रेणी तीन की रिक्ति उपलब्ध नहीं होती तो सम्बन्धित अभ्यर्थी का नाम पंजीकृत अभ्यर्थियों की सूची से निकाल दिया जायेगा और उस स्थिति में सम्बन्धित अभ्यर्थी उक्त सुविधा पाने के लिए पात्र नहीं रह जायेंगे, किन्तु इस अवधि से पूर्व यदि श्रेणी चार के रिक्त पद/अधिसंख्य पद के सापेक्ष्य सेवायोजन हेतु अपना संशोधित आवेदन पत्र नियुक्ति प्राधिकारी के कार्यालय में पंजीकृत करा लें, तो उस पर विचार किया जायेगा।

मृतक आश्रित परिवार की कठिन परिस्थितियों को दृष्टिगत रखते हुए यदि कोई अभ्यर्थी लिपिक सम्वर्ग के पद की रिक्ति के सापेक्ष्य सेवायोजन में सम्भावित विलम्ब को दृष्टिगत रखते हुए यदि तत्काल सेवयोजन की आवश्यकता अनुभव करता हो तो नियुक्ति प्राधिकारी के लिए ऐसे अभ्यर्थियों के सम्बन्ध में चतुर्थ श्रेणी में रिक्त या अधिसंख्य पदों के सापेक्ष्य मृतक आश्रित के पुनरीक्षित आवेदन पत्र प्रस्तुत करने पर सेवायोजन करने का अधिकार होगा। यहॉ यह स्पष्ट किया जाता है कि एक बार मृतक आश्रित के रूप में प्रदत्त सेवायोजन की सुविधा पर पुर्नविचार का कोई अवसर नहीं रहेगा।

(६) ऐसे मृतक आश्रित जिनकी न्यूनतम शैक्षिक योग्यता जूनियर हाई स्कूल है, को बेसिक शिक्षा परिषद के जनपद स्तरीय कार्यालय में रिक्त पद अथवा परिषदीय विद्यालयों में चतुर्थ श्रेणी के रिक्त या अधिसंख्य पद पर सेवायोजन की सुविधा प्रदान की जायेगी। जनपद स्तरीय कार्यालय के सम्बन्ध में अधिसंख्य पद के विरूद्ध मृतक आश्रित सेवायोजन अनुमन्य नहीं होगा।

(७) अधिसंख्य पद भविष्य में रिक्त होने वाले पदों के सापेक्ष्य समय-समय पर समयोजित किये जायेंगे। नियुक्ति प्राधिकारी जनपद को इकाई मानते हुए रिक्त/अधिसंख्य पदों के विरूद्ध मृतक आश्रितों को सेवायोजित करेंगे। जनपद के कार्यालयों में किसी भी अधिसंख्य पद के विरूद्ध नियुक्तियां नहीं की जायेंगी। अधिसंख्य पद के पदधारी द्वारा की गयी सेवा की गणना वेतन निर्धारण और सेवानिवृत्ति लाभों के लिए की जायेगी।

(८) मृतक आश्रित द्वारा सम्बन्धित कर्मचारी के मृत्यु के दिनांक सं पॉच वर्ष के भीतर सेवायोजन के लिए आवेदन प्रस्तुत किया जा सकता है। परन्तु जहॉ राज्य सरकार को यह समाधान हो जाये कि सेवायोजन के लिए आवेदन करने के लिए नियत समय सीमा से किसी विशिष्ट मामले में अनुचित कठिनाई होती है वहॉ वह अपेक्षाओं को जिन्हें वह मामले में न्याय संगत और साम्यपूर्ण रीति से कार्यवाही करने के लिए आवश्यक समझे, अभिमुक्त या शिथिल कर सकती है। नियमों में इस आशय की अभिमुक्ति/शिथिलीकरण के सम्बन्ध में प्रस्ताव सम्बन्धित नियुक्ति प्राधिकारी द्वारा शिक्षा निदेशक (बे०) के माध्यम से शासन को प्रेषित किये जायेंगे।

(९) उत्तर प्रदेश सेवाकाल में मृत सरकारी सेवकों के आश्रितों की भर्ती से सम्बन्धित समय-समय पर परसंशोधित नियमावली की व्यवस्थाओं के अधीन उत्तर प्रदेश बेसिक शिक्षा परिषद के कम्रचारियों के मृतक आश्रित का तात्पर्य मृतक शिक्षक/शिक्षणेत्तर कर्मचारी के पुत्र, अविविाहित अथवा विधवा पुत्री, पत्नी अथवा पति से होगा।

(१०) मृतक आश्रित के रूप में सेवायोजन के लिए न्यूनतम आयु सीमा जैसा कि सम्बन्धित सेवा सम्वर्ग के सेवा नियमों मे विहित है, होगी।

४. श्री राज्यपाल उत्तर प्रदेश बेसिक शिक्षा अधिनियम, १९७२ (उत्तर प्रदेश अधिनियम संख्या-३४, सन् १९७२) की धारा-१३ की उपधारा (१) के अन्तर्गत यह आदेश देते हैं कि उपयुक्त निर्णय के अनुसार कार्यवाही सुनिश्चित की जाय।

(५) यह आदेश दिनांक ०८.०१.१९९९ से प्रभावी माना जायेगा।

(६) यह आदेश वितत विभाग के आशासकीय संख्या आई०एफ०ए०-२-१४९०/दस/२००० दिनांक २९.०८.२००० में प्राप्त उनकी सहमति से निर्गत किये जा रहें है।

भवदीय
ह०/-
(एन.रविशंकर)
सचिव

संख्या ५१९३ (१)/१५-५-२०००-२०० (२२२) ९९, तददिनांक प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

१. निदेशक, एस०सी०ई०आर०टी० लखनऊ।
२. सचिव, उत्तर प्रदेश बेसिक शिक्षा परिषद, इलाहाबाद।
३. समसत जिला बेसिक शिक्षा अधिकारी उ०प्र०।

आज्ञा से
ह०/-
(दिनेश चन्द्र कनौजिया)
विशेष सचिव।''

10. A scrutiny of the aforesaid Government Order dated 4.9.2000 reveals that in case of death of any teaching or non-teaching employee of the Board during the course of service, one member of deceased employee will be considered for grant of compassionate appointment in terms and conditions as laid down in the

aforesaid Government Order. The details of terms and conditions have been elaborately mentioned. In clause (1) of paragraph 3 of the aforesaid Government Order it is stated that compassionate appointment to the dependent of deceased employee of the Board may be given according to the Dying in Harness Rules applicable to the Government employees. In clause (2) of paragraph 3 of the Government Order the posts upon which compassionate appointment may be offered, are enumerated which, inter alia, provides that compassionate appointment may be given on the post of Assistant Teacher in the primary school and on the lowest post in class-III service or class-IV post having regard to the educational qualification and experience, by relaxing the rules of recruitment. In clause (3) of paragraph 3 it has been specifically mentioned that compassionate appointment on the post of Assistant Teacher may be given to the dependent of deceased employee against any vacant post at district level or in absence of vacancy on supernumerary post provided the candidate is eligible for appointment on the post of teacher under Uttar Pradesh Basic Education Teachers Services Rules, 1981 as amended from time to time. In clause (4) of paragraph 3 of the aforesaid Government Order specific provision has been made for appointment to the dependent of deceased employee on the post of Assistant Teacher, who is untrained, but have academic qualification according to the service rules.

11. Clause (5) of paragraph 3 of the aforesaid Government Order specifically deals with the cases of dependents of deceased employees, who possess Intermediate qualification or above that and have applied for class-III post in clerical cadre. They may be given employment at the lowest post in clerical cadre against vacant posts. In the aforesaid paragraph the further provision has been made to the effect that for providing employment against the vacant posts in clerical cadre at district level, all the applications have to be registered on the basis of the principle of "first come first serve" and the appointing authorities are required to publish the list of dependents of deceased employee at the notice board of their office and further after appointment against vacant posts in every month, the aforesaid list has to be modified for next coming month and the same shall also be placed and published at the notice board of their office. If no vacancy in class-III post occurs within five years and the candidates applied for appointment against class-III posts, could not be given appointment in class-III post in the aforesaid period of five years. In that event of the matter, their names from the aforesaid list shall be deleted and such candidates shall not be eligible for seeking appointment against class-III post, but before the expiry of the aforesaid period of five years, if such candidates place their revised/amended applications for appointment against class-IV posts and get them registered in the office of appointing authority, the same can be considered. It is further provided that in case if any dependent of deceased employee having regard to the financial scarcity and poverty of his family, could not be in a position to wait much time for appointment against class-III post and seeks immediate employment and makes revised/ amended application for appointment against class-IV post either against available vacancy or against any supernumerary post, then the appointing

authority can make appointment either against any vacancy of class-IV post or against any supernumerary post and once such appointment is made, the same cannot be re-opened.

12. Before applying the provisions of the aforesaid G.O. another question arises for consideration is that since the Government Order dated 4.9.2000 came into being subsequent to the appointment of the petitioner, though it has retrospective effect with effect from 8.1.1999, what would be the legal effect of the aforesaid Government Order in the facts and circumstances of the case. In this regard it is to be noted that the Government order dated 4.9.2000 has been made applicable with effect from 8.1.1999 as indicated in paragraph 5 of the Government Order, meaning thereby this Court has to assume the things by way of legal fiction from the date when the Government Order has become operative on 8.1.1999 and the right and obligation of the parties have to be decided keeping the view in mind the aforesaid date for the purpose of commencement of the aforesaid Government Order. Besides this, in the aforesaid Government Order there is no indication at all to the effect that the appointment already made prior to issuance of the aforesaid Government Order will not be affected on account of operation of the Government Order having its retrospective effect. In absence of any indication in the Government Order itself since it is beneficial piece of legislation, therefore a liberal construction has to be given in favour of the beneficiary of the Government Order. By viewing the matter from this angle the necessary consequence which flows from the aforesaid Government Order is that having regard to the educational qualification of the petitioner as Intermediate, the appointing authority is required to consider the claim of petitioner for grant of compassionate appointment against class-III post.

13. It is necessary to mention here that the petitioner has sought relief of mandamus either for appointment on the post of untrained teacher or on the post of clerk under Dying in Harness Rules. Therefore, it is necessary to examine as to whether he could have been considered for compassionate appointment as untrained teacher. Since under the aforesaid Government Order in order to claim employment under Dying in Harness Rules in teaching staff on the post of Assistant Teacher in the primary school run by the Board, the candidate is required to satisfy the eligibility criteria to be appointed as teacher under Uttar Pradesh Basic Education Teachers Services Rules, 1981. Rule 8 of the aforesaid Rules prescribes the academic qualification for appointment on the post of Assistant Teacher, a candidate must have Bachelor degree from a University established by law in India or a degree recognized by the Government as equivalent thereto together with training qualification like BTC, HTC, JTC, CT or any other training course recognized by the State Government as equivalent thereto. Although under the Government Order a provision has been made to appoint untrained teacher and permit the appointee to complete training course during the course of employment, but since the petitioner is lacking essential academic qualification of Bachelor degree, therefore, his claim cannot be considered for appointment on the post of Assistant Teacher even as an untrained teacher, that is why it appears that the learned counsel for the petitioner did not

press the aforesaid relief claimed in the writ petition.

14. Although the petitioner has mentioned in the writ petition that the departmental Minister has directed the District Basic Education Officer, Fatehpur to appoint him in clerical cadre and endorsement to the said effect has been made on the application of the petitioner. In this regard it would be sufficient to say that unless the Government issue any order in conformity with the provisions of Article 166 of the Constitution of India, the same has no legal effect and consequence. Therefore, the alleged noting and endorsement by the departmental Minister on the application of the petitioner for his appointment against class-III post is of no legal consequence. It is well settled law that the noting on the office file either by the departmental authority or by the Minister does not confer any right in whose favour it is made, that is why it appears that the learned counsel for the petitioner did not press the issue in his argument.

15. Now the question for consideration is that as to whether any vacancy against class-III post in the establishment of respondents no.2 and 3 was existing at the time of offer of appointment to the petitioner on class-IV post. In this regard the submission of the learned counsel for the petitioner is that in the counter affidavit filed on behalf of respondents no.2 and 3 there is no specific denial that there exists no vacancy against class-III post on the date of offer of appointment to the petitioner against class-IV post, but simultaneously I found no material on record to establish that there exists any vacancy in class-III post in the establishment of respondents no.2 and 3 either on the date of application of the petitioner or on the date of offer of appointment made to him against class-IV post. Therefore, this question requires further probe in the matter for all fairness is to be done by some authority higher to the appointing authority. After due enquiry if it is found that on the date of offer of appointment to the petitioner i.e. on 2.8.1999 any vacancy against class-III post in the district was available, it was required to be offered to the petitioner on the basis of principle of "first come first serve" and in case there exists no such vacancy in class-III post in the district and the petitioner has moved his revised application for class-IV post to the appointing authority, only in that event of the matter the appointing authority could have offered appointment to the petitioner against class-IV post and not otherwise in accordance with class (5) of paragraph 3 of the Government order dated 4.9.2000. If it is found that on the date of appointment of petitioner any vacancy against class-III post in the district was not available in that event of the matter he ought to have been asked either to wait for occurrence of such vacancy or revise his application for class-IV post. The offer of appointment to the petitioner against class-IV post and acceptance by him without following the aforesaid procedure is of no legal consequence and cannot be taken to be any way impediment in accepting the claim of the petitioner against class-III post. It is also necessary to make it clear that right to be considered for compassionate appointment may not be understood in the terms of any statutory or vested right in the legal parlance, rather it should be construed and meant in the terms of Dying in Harness Rules applicable to the Government employees inasmuch as the

provisions contained in the Government Order in question. Therefore, it is dependent upon the terms and conditions laid down for compassionate appointment under Dying in Harness Rules applicable to the Government employees inasmuch as the scheme underlying in the Government Order in question applicable to the dependents of deceased employees of the Board.

16. Now the next question arises for consideration as to whether the petitioner has been discriminated in the matter of consideration for employment vis-à-vis to other persons mentioned in the writ petition. In this regard the counsel of the petitioner has contended that Sri Pawan Kumar Uttam and Smt. Sweta, who have also identical academic qualification to the petitioner as intermediate, have been offered appointment against class-III post on 24.4.2000, but the petitioner has been discriminated in the matter of employment. In this regard it is to be noted, as indicated in the earlier part of the judgment that in case the provisions of clause (5) of paragraph 3 of the Government Order dated 4.9.2000 is implemented and the principle of "first come first serve" is applied, the position would be otherwise. In this regard it is to be seen that as to when the petitioner has moved application. If it is found that the petitioner has moved his application prior in time than that of Sri Pawan Kumar Uttam and Smt. Sweta, he would have offered appointment first on occurrence of vacancy in class-III post in the district. In case the applications of Sri Pawan Kumar Uttam and Smt. Sweta are found earlier in point of time, they could be dealt with in accordance with the provisions of the aforesaid Government Order. In order to decide this question, further probe is needed by the authority as indicated in the earlier part of the judgment and for that purpose he is also required to give an opportunity of hearing to the petitioner as well as Sri Pawan Kumar Uttam and Smt. Sweta in the time framed to be indicated hereinafter. In support of his contention learned counsel for the petitioner Sri Ashok Khare has relied upon a decision of the Apex Court rendered in Surya Kant Kadam (Supra). The facts and circumstances of the instant case are different and distinguishable from the facts of the aforesaid case. In the aforesaid case on the death of his father, the appellant was given a compassionate appointment as Second Division Assistant/Clerk, even though he had applied for the post of Sub-Inspector of Excise and did possess the necessary qualification for the said post. Respondents no.3 and 4 whose father also died while in service were appointed similarly as Second Division Assistant/ Clerk on 9.1.1978 and 19.12.1979 respectively. Those respondents no.3 and 4 while continuing as Second Division Assistant/ Clerk were later on promoted/appointed as Sub-Inspector of Excise on 3.10.1987 and 27.4.1988. The appellant, who had been earlier appointed on compassionate ground as Second Division Assistant/Clerk and was entitled to be considered for appointment as Sub-Inspector of Excise was not considered when respondents no.3 and 4 were appointed as Sub-Inspector of Excise. Therefore, in the aforesaid context the Apex Court has held that the appellant of the aforesaid case has been discriminated in the matter of employment, but in the case in hand from the materials available on record there is nothing to establish at this stage that the petitioner as well as Sri Pawan Kumar Uttam and Smt. Sweta has

simultaneously applied under Dying in Harness Rules against class-III post or they have applied later on and vacancies against class-III post were already existing in the district. Therefore, it cannot be said at all at this stage that the petitioner has been met any discriminatory treatment vis-à-vis to Sri Pawan Kumar Uttam and Smt. Sweta unless the aforesaid facts are probed by the authority to be indicated herein after in this judgment in the time framed to be indicated in it.

17. Learned counsel for the petitioner has also placed reliance upon another decision of this Court rendered in the case of Sudhakar Srivastava (Supra). The aforesaid case is also distinguishable on the facts, as the aforesaid case relates to the case of compassionate appointment on the post of Assistant Teacher in LT Grade in Govt. aided privately managed Secondary School, wherein different scheme of Dying in Harness Rules underlying in Regulations 101 to 106 and 107 framed under Chapter-III of the U.P.Intermediate Education Act, 1921 was under consideration. Here in the case in hand different scheme of Dying in Harness Rules underlying in the Government Order dated 4.9.2000 is under consideration. Therefore, the aforesaid case cited by the learned counsel for the petitioner can be of no assistance to the petitioner.

18. Now the next question arises for consideration that which relief can be granted to the petitioner in this writ petition. In this regard, as observed in the preceding part of the judgment, it is pertinent to mention here that now a days rampant corruption in the public life has become a national malady. Therefore, I am of the considered view that the Director of Basic Education, who is chairman of the Board, have power and jurisdiction to supervise and superintendence over the affairs of administration, may be directed to enquire into the matter by summoning the record from the office of District Basic Education Officer, Fatehpur in respect of the application moved by the petitioner as well as by Sri Pawan Kumar Uttam and Smt. Sweta and probe the existence of vacancies against class-III post in the district concerned and applications moved against such vacancies under Dying ;in Harness Rules in the district and the registration of such application from the office of District Basic Education Officer, Fatehpur and decide the controversy by affording an opportunity of hearing to the petitioner as well as Sri Pawan Kumar Uttam and Smt. Sweta within a period of three months . In case if it is found that on the date of application of the petitioner, there was any vacancy in class-III post in the district, he may be offered appointment against class-III post on the principle of "first come first serve". In case the vacancies have occurred later on after appointment of the petitioner against class-IV post and he has made application for appointment against class-III post and has not moved another revised application for appointment against class-IV post, his claim is required to be considered for appointment against class-III post on the principle of "first come first serve" inspite of the fact that he has been appointed against class-IV post. If it is found that any vacancy in class-III post was not existing in the district concern at the time of appointment of petitioner on class-IV post and on account of possible delay in occurrence of vacancy in class-III post, he could not have waited for occurrence of

such vacancy due to his pressing need of employment having regard to financial stringency and poverty of his family, he eventuality alone his appointment on class-IV post need not to be re-opened and not otherwise. While probing of the vacancies against class-III post in the district, the Director of Basic Education is required to state the manner of occurrence of vacancies also as to how and when the vacancies have occurred and as to whether they have been occurred on account of death/ retirement or otherwise and the date of occurrence of vacancies is required to be mentioned in the order. It is made further clear that the appointment on supernumerary post can only be made on class-IV post and on the post of Assistant Teacher in the primary school run by the Board. There can be no claim for compassionate appointment on supernumerary post in class-III. It is also made clear that while deciding the controversy, Director Basic Education is expected to pass reasoned and speaking order.

19. Before parting with the judgment, I must appreciate the transparent policy of the Government in respect of appointment under Dying in Harness Rules contained in the Government Order dated 4.9.2000. To my mind the aforesaid transparent policy of the Government cannot be properly and effectively implemented on account of rampant corruption in the public life and other sort of favouritism, nepotism and so many other factors, which determines the functioning of Government/public functionaries in day to day working unless some monitoring cell is constituted at regional level and at head office level by the Government whereunder the regional Officer at regional level and the Chairman has submitted his revised application for appointment on class-IV post in that

of the Board/ Director of Basic Education at head office level may be held responsible for proper and effective implementation of the aforesaid Government Order. Therefore, I direct that within three months the Government may take steps to constitute monitoring cell at regional level and at head office level to supervise and ensure proper and effective implementation of the Government Order dated 4.9.2000 in respect of appointment under Dying in Harness Rules underlying in the aforesaid Government Order. The Registrar General, High Court is directed to communicate the copy of this judgment to the Secretary of Basic Education, Government of Uttar Pradesh as well as the Chief Secretary of Government of Uttar Pradesh for its compliance and necessary action.

20. The petitioner is directed to move an application alongwith certified copy of this judgment before the Director of Basic Education Uttar Pradesh within 15 days from today who is directed to pass appropriate order in the light of observations and directions made in the body of the judgment within three months.

21. With the aforesaid observations and directions this writ petition is disposed of finally. The parties shall bear their own costs. Petition disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2004

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No.40590 of 1997

Beche Lal ...Petitioner

Versus

Commissioner, Bareilly and others ...Opposite Parties

Counsel for the Petitioner:
Sri M.D. Misra

Counsel for the Opposite Parties:
Sri R.K. Awasthi
S.C.

U.P. Panchayat Raj Act, 1947-S.11-U.P. Panchayat Raj Rules, 1947-Rr. 31, 32, 33 and 35-A-Cancellation of petitioner's licence by Commissioner for distribution of Sugar and Kerosene on technical ground-held, meeting of Gaon Sabha was contend in accordance with S. 11 of P.R. Acts, validity of which was duly endorsed by Khand Vikas Adhikari-petitioner was functioning-till appeal was dismissed by Commissioner merely on technical ground-Commissioner failed to apply its mined to question that licence of petitioner could not be cancelled merely on ground that technical procedure laid down in G.O. had not been complied with, though Gaon Sabha passed proposal as per Rr. 31,32,33 and 35-A of Rules read with S. 11 of P.R. Act-

Held: Para 8 & 9

I have looked into the record of the case and find that the meeting of the Gaon Sabha was convened in accordance with the provisions of Section 11 of the Panchayat Raj Act, the validity of which was duly endorsed by the concerned Khand Vikas Adhikari and the petitioner who had been granted the licence by the concerned authority was functioning till the appeal was dismissed by the Commissioner merely on technical ground without any basis. The Commissioner failed to apply its mind to the question that the licence of the petitioner could not be cancelled merely on the ground that the technical procedure laid down in the Government Order had not been complied with though the Gaon Sabha had passed the proposal in accordance with the provisions of Rules 31,32,33 & 35-A of the Rules read with Section 11 of the Act.

In view of the above said facts and circumstances of the case and observations made hereinabove, the impugned order dated 8.4.1997 (annexure-4 to the writ petition) and the order of the Commissioner dated 5.11.1997 (annexure-7 to the writ petition) are hereby quashed. The case is remanded back to the authority concerned to proceed and dispose off the same afresh in accordance with law under the terms and conditions laid down in Uttar Pradesh Panchayat Raj Act, 1947 and the rules and Government Order dated 3.7.1990, preferably within a period of two months from the date a certified copy of this order is placed before it.

(Delivered by Hon'ble V.C. Misra, J.)

1. Heard Shri M.D. Misra, learned counsel for the petitioner, and Shri R.K. Awasthi, learned standing counsel on behalf of respondents no.1 & 2. No one has put in appearance on behalf of respondent no.3 inspite of notice having been served upon it.

2. This writ petition has been filed challenging the order-dated 5.11.1997 (annexure-7 to the writ petition) passed by the respondent no.1-Commissioner Bareilly division, Bareilly in appeal No.71 of 1997. The opposite party no.3 was granted a licence under the U.P. Scheduled Commodities Dealers (Licencing and Restriction of Hoarding) Order, 1989 (hereinafter referred to as the Control Order) for the purposes of distribution of sugar and kerosene on fair

price shop to the members of Gaon Sabha, the allegation was made against respondent no.3 for not distributing the sugar and kerosene properly to the residents of the Gaon Sabha and was selling the scheduled commodities in black market after charging excessive price for the same. Looking into the difficulties of the people due to the said allegations, a meeting of the Gaon Sabha was convened in accordance with the provisions of Section 11 of the U.P. Panchayat Raj Act, 1947. In the said meeting dated 24.6.1995 a resolution was passed that the extending licence of the licensee Bhogarj may be cancelled and in his place a licence may be granted to Beche Lal-petitioner. The concerned Khand Vikas Adhikari endorsed the said resolution and recommended the cancellation of the licence of Bhograj and granted a licence in favour of the petitioner. In pursuance of the aforesaid recommendation the licence of Bhograj-respondent no.3 and Ram Pal was cancelled vide order dated 7/8.9.1995 and granted licence to Beche Lal and Ram Murti.

3. Being aggrieved, Bhograj and Ram Pal filed a writ petition before this Court, which was dismissed with the observations that the petitioners could file an appeal before the Commissioner and in pursuance of the same, both the persons filed Appeal Nos.11 and 12 of 1995. The Commissioner vide its Judgment and Order dated 13.2.1997 allowed both the appeals separately in part and remanded the case to the Sub Divisional Officer, Bareilly, on the technical ground that the Sub Divisional Officer while cancelling the licence of the opposite party no.3 failed to give any show cause notice to it. On the remand of the case, the Sub Divisional Officer, Bareilly vide its order dated 8.4.1997 cancelled the licence of the opposite party no.3 on the ground that resolution dated 24.6.1995 seeking cancellation of the licence of opposite party no.3 and grant of licence to the petitioner did not bear the signature of the Secretary and the Observer and violated the provisions of the Government Order No.F-3967/29 dated 3.7.1990. The petitioner filed an appeal before the Commissioner and obtained an interim stay order on 1.5.1997. In pursuance of the stay granted by the Commissioner, the petitioner continued lifting the quota of the goods. Ultimately, vide order-dated 5.11.1997 the Commissioner dismissed the appeal of the petitioner merely on the technical ground contained in the Government Order.

4. Being aggrieved, the petitioner has filed the present writ petition on the ground inter alia that the authorities had failed to consider the method and procedure for convening the meeting of the Gaon Sabha as laid down under Section 11 of the Act and Rules 31,32,33 & 35-A of the Rules, as alleged, the Government Order cannot supercede the statutory provision in the Act.

5. Learned counsel for the petitioner has submitted that the impugned order dated 5.11.1997 (annexure-7 to the writ petition) has been passed on the basis of Government Order No.F3967/29 dated 3.7.1990 wherein the Gaon Sabha has been authorized to convene and open meeting and seek the opinion of the members of the village community and thereafter on its basis proposed the name of the incumbent. As per Clauses 5 & 5 (1) of the Government Order to ascertain as to whether the meeting was held in

open or not, the Gram Panchayat Adhikari along with a high ranking officer as an observer shall remain present in the meeting, and it shall be the duty of the observer to make available the so passed proposal of the Gaon Sabha to the Sub Divisional Officer. This procedure was admittedly not followed.

6. Learned counsel for the petitioner has submitted that in case the procedure aforesaid as laid down in the Government Order, is not complied with as such and the proposal has been passed in accordance with the provisions of Rules 31,32,33 and 35-A of the Panchayat Raj Rules and Section 11 of the U.P. Panchayat Raj Act, 1947, then under the said circumstances the licence of the petitioner could not be cancelled.

7. Learned counsel for the respondents has submitted that the Government Order is absolutely valid as per Article 162 of the Constitution of India and the same has not been challenged. The Government Order framed exercising the powers under Article 162 read with Article 243-G of the Constitution of India is regarding the public distribution system, which finds place at serial no.28 in the 11th Schedule. Learned counsel for the respondents has further referred to Sections 95-A and 96-A of the U.P. Panchayat Raj Act wherein the State government may delegate any of its powers under this Act to any officer or authority subordinate to it, under such condition as it may deem fit to impose. Learned counsel for the respondents in rebuttal has stressed that the authorities below have failed to consider the fact that the Government Order has been issued to ensure the genuineness of the meeting and the resolution passed and as such contemplates endorsement of the higher authorities, in the present case. The block development authority has already endorsed the meeting and recommended the matter to the Sub Divisional Officer.

8. I have looked into the record of the case and find that the meeting of the Gaon Sabha was convened in accordance with the provisions of Section 11 of the Panchayat Raj Act, the validity of which was duly endorsed by the concerned Khand Vikas Adhikari and the petitioner who had been granted the licence by the concerned authority was functioning till the appeal was dismissed by the Commissioner merely on technical ground without any basis. The Commissioner failed to apply its mind to the question that the licence of the petitioner could not be cancelled merely on the ground that the technical procedure laid down in the Government Order had not been complied with though the Gaon Sabha had passed the proposal in accordance with the provisions of Rules 31,32,33 & 35-A of the Rules read with Section 11 of the Act.

9. In view of the above said facts and circumstances of the case and observations made hereinabove, the impugned order dated 8.4.1997 (annexure-4 to the writ petition) and the order of the Commissioner dated 5.11.1997 (annexure-7 to the writ petition) are hereby quashed. The case is remanded back to the authority concerned to proceed and dispose off the same afresh in accordance with law under the terms and conditions laid down in Uttar Pradesh Panchayat Raj Act, 1947 and the rules and Government Order dated 3.7.1990, preferably within a period of

two months from the date a certified copy of this order is placed before it.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2004

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.

Special Appeal (D) NO. 248 of 2003

State of U.P. and others ...Appellant
Versus
Sunil Kumar ...Respondent

Counsel for the Appellants:
S.C.

Counsel for the Respondent:
Sri Vinod Sinha

Constitution of India Article 226-Selection of petition-under reserve quota of S.T.-belonging to the cost of 'Meena' in State of Rajasthan-but not in Uttar Pradesh-appointment cancelled-No Cause notice required-benefit of reservation-can not be claimed.

Held: Para 12 & 15

Thus, in view of the aforesaid observations of the Hon'ble Supreme Court, it has to be held that the petitioner-appellant cannot claim the benefit of reservation as a Scheduled Tribe on the sole basis that Meena caste had been declared as a Scheduled Tribe in the State of Rajasthan.

In view of the law laid down by the Supreme Court, no other conclusion is possible and, therefore, in our opinion, the order impugned in the writ petition cannot be quashed solely on the ground that the principles of natural justice have not been complied with.
Case law discussed:

The Writ petition is allowed. No order as to costs.

Petition allowed.

JT 2000 (9) SC-502
AIR 1981 SC- 136
AIR 1970 SC-679
1990 (3) SCC-130
1994 (5) SCC-244
AIR 2000 SC 525
J.T. 1994 (4) SC-423
2003 (1) UPLBEC-349

(Delivered by Hon'ble Dr. B.S. Chauhan, J.)

1. This special appeal has been filed against the judgment and order dated 07.10.2002 of a learned Judge, by which the petition filed by the respondent has been allowed only on the ground that he had not been given an opportunity of hearing before cancelling his appointment/training on the post of Constable.

2. The facts and circumstances giving rise to this case are that the appellants issued an advertisement advertising 5225 vacancies of Constables in Civil Police. The petitioner-respondent applied in pursuance of the same. His candidature was considered and he was selected. However, he was not sent for training on the ground that he was not eligible to be selected in the reserved category of Scheduled Tribes for the reason that he belonged to the Meena community which is a Scheduled Tribe in the State of Rajasthan but not in State of Uttar Pradesh. Feeling aggrieved, he filed the writ petition which has been allowed by the learned Single Judge only on the ground that no show cause notice was given to him before cancelling his candidature. Hence, this special appeal.

3. Undoubtedly, in the instant case, petitioner had not been given any notice or opportunity of hearing before passing the order of cancellation of appointment/training. In S.L. Kapoor Vs. Jagmohan & Ors., AIR 1981 SC 136, the Hon'ble Supreme Court has observed that where on admitted or undisputed facts, only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue the writ to compel the observance of the principles of natural justice as it would amount to issuing a futile writ.

4. The Hon'ble Supreme Court in the case of Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan etc., JT 2000 (9) SC 502, also considered this aspect and held that if no other conclusion was possible on admitted or indisputable facts, then it was not necessary to quash the order passed in violation of the principles of natural justice.

5. Similarly, in State of U.P. Vs. Om Prakash Gupta, AIR 1970 SC 679, the Hon'ble Supreme Court has observed that the Courts have to see whether non-observance of any of the principles enshrined in statutory rules or principles of natural justice have resulted in deflecting the course of justice. Thus, it can be held that even if in a given case there has been some deviation from the principles of natural justice but the same has not resulted in grave injustice or has not prejudiced the cause of the delinquent, the Court may decline to interfere.

6. The basic fact therefore which is required to be considered is whether the petitioner-respondent was eligible to be considered in the reserved category for the post of Constable in Civil Police and whether the show cause notice was required to be given. This is because in a given case, like this, we have to consider whether it was possible for the respondent to submit a reply that merely because his caste was included as a Scheduled Tribe in Rajasthan but not in the State of Uttar Pradesh, he could still claim the benefit of reservation in the State of Uttar Pradesh. In our view, it was this issue which was required to be examined.

7. Shri Vinod Sinha, learned counsel appearing for the respondent submitted that he is desirous that the issue may be resolved by this Court as it would not be possible for the authority concerned to decide the same. With the consent of the learned counsel for the parties, we proceeded with the hearing of the case on merit only on that issue.

8. A Constitution Bench of the Hon'ble Supreme Court in Marri Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College & Ors., (1990) 3 SCC 130, considered the case of admission of students in a Medical College in Maharastra on the basis of the Scheduled Caste Certificate issued by the State of Andhra Praesh. The Hon'ble Apex Court rejected the contention observing that a person in one State may be Scheduled Caste/Scheduled Tribe but he may not be entitled for the benefit in another State. Similarly, in Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra & Anr. Vs. Union of India, (1994) 5 SCC 244, the Hon'ble Supreme Court examined the issue as to whether the benefit and privilege to the Scheduled Castes and Scheduled Tribes in State of Maharashtra was also available to the persons belonging to other States and the

Court held that it is for the State Government to choose whether to give the benefit of reservation or not for the reason that the State Government is competent enough to restrict the benefit of reservation to the persons belonging to the reserved category provided they belong to the said State and may not extend the same to the candidates belonging to other States for many reasons. The aforesaid judgment clearly holds that a person belonging to reserved category in State "A" may not be able to claim the benefit in State "B" unless State "B" also so provides. Reservation depends on a large number of considerations including the social and financial status of a particular community, which may be restricted to a particular part of the State or even to a particular part of a District and a person belonging to the same community in a part of a District or a part of the State, may be denied the said rights in the other parts. Therefore, whether the reservation is to be provided or not, fall within the exclusive domain of the State and no one else has any right to so claim.

9. In Union of India & Ors. Vs. Dudh Nath Prasad, AIR 2000 SC 525, the Hon'ble Supreme Court held that if a candidate belonging to a particular community has migrated at a very early age to another State where his community has been put under reserved category, he may be entitled for the benefit of the reservation policy.

10. Shri Vinod Sinha, learned counsel for the appellant placed strong reliance upon a Division Bench judgment of this Court rendered on 24th April, 2004 in Writ Petition No. 22271 of 2000, Sunil Kumar Vs. Life Insurance Corporation & Ors., in support of his submissions that the petitioner-appellant was entitled to the benefit of a Schedule Tribe even though the Meena Community had been declared a Schedule Tribe in the State of Rajasthan and not in the State of Uttar Pradesh. A perusal of the aforesaid Division Bench judgment indicates that it had placed reliance upon another Division Bench judgment of this Court in the case of Sanjay Kumar Singh Vs. State of U.P. Anr., (2000) 1 UPLBEC 729.

11. We, however, find that the aforesaid decision in the case of Sanjay Kumar Singh (supra) has been set aside by the Hon'ble Supreme Court in the case of U.P. Public Service Commission, Allahabad Vs. Sanjay Kumar Singh, (2003) 7 SCC 657 and, therefore, it is not open to the petitioner-appellant to take the benefit of the decision given in the case of Sunil Kumar (supra). The Hon'ble Supreme Court in the said case considered whether it was open to the respondents to claim the benefit of reservation in public service in the State of Uttar Pradesh as a member of Scheduled Tribe though "Naga" was not specified Scheduled Tribe in the State of U.P. and observed as follows:-

"It may be noted that the reservation in favour of Scheduled Tribes to the extent of 2% is provided for by the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994. There is no particular definition of "Scheduled Tribe' in the Act. However, the term "Scheduled Tribe' can only be understood in accordance with the provisions of Article 342 read with the notifications issued thereunder as interpreted by this Court.....

The contention of the appellants should therefore be accepted and the appellant cannot be treated as a Scheduled Tribe candidate so as to qualify himself to claim reservation against the vacancy reserved for Scheduled Tribe in public services in the State of U.P. The view of the High Court cannot be sustained as it goes counter to the pronouncements of this Court. Hence it is set aside and the appeals are allowed without cost. However, in the peculiar circumstances of the case, the ends of justice would be met if the appellants are directed to consider the case of the respondent in general category and if in comparison with the general category candidates selected, the respondent had secured higher marks/grading, he should be offered appointment to an appropriate post against one of the existing vacancies."

12. Thus, in view of the aforesaid observations of the Hon'ble Supreme Court, it has to be held that the petitioner-appellant cannot claim the benefit of reservation as a Scheduled Tribe on the sole basis that Meena caste had been declared as a Scheduled Tribe in the State of Rajasthan.

13. Reference may also be made to a decision of the Supreme Court in the case of State of Maharastra & anr. Vs. Union of India & Anr., JT 1994 (4) SC 423, in which it was held as follows:-

"It must also be realized that the language of clause (1) of both the Articles 341 and 342 is quite plain and unambiguous. It clearly states that the President may specify the castes or tribes, as the case may be, in relation to each State or Union Territory for the purposes of the Constitution. It must also be realized that before specifying the castes or tribes under either of the two Articles the President is, in the case of a State, obliged to consult Governor of that State. Therefore, when a class is specified by the President after consulting the Governor of State A, it is difficult to understand how that specification made "in relation to that State' can be treated as specification in relation to any other State whose Governor the President has not consulted."

14. The aforesaid judgment was followed by a Division Bench of this Court in the case of Satpal Meena & Ors. Vs. State of U.P. Public Service Commission & Ors., (2003) 1 UPLBEC 349, which related to Meena Caste and it was sought to be contended, as in the present case, that since the said caste was considered as a Scheduled Tribe in Rajasthan, it should also be considered as a Scheduled Tribe in the State of U.P. This plea was rejected by the Court.

15. In view of the law laid down by the Supreme Court, no other conclusion is possible and, therefore, in our opinion, the order impugned in the writ petition cannot be quashed solely on the ground that the principles of natural justice have not been complied with.

16. In view of the above, the special appeal deserves to be allowed and the order impugned is liable to be set aside.

17. The special appeal is, therefore, allowed and the judgment and order dated 7th October, 2004 of the learned Judge of this Court is set aside. However, as directed by the Hon'ble Supreme Court in

the case of Sanjay Kumar Singh (supra) the appellants are directed to consider the case of the respondent in General Category and if in comparison with the against one of the existing vacancies, if any. The parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2004

BEFORE
THE HON'BLE VIKRAM NATH, J.

Writ Petition No. 8573 of 1984

Sri Kripa Shankar & another ...Petitioners
Versus
The Vth Addl. District Judge and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri S.K. Singh
Sri M.N. Singh

Counsel for the Respondents:
Sri R.K. Misra
Sri Neeraj Agarwal
Sri Vipin Saxena
C.S.C.

U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972-S. 21 (1)(a) Constitution of India, Article 226-Scope-Release application by landlord-Allowed by Prescribed Authority-findings affirmed in appeal- Writ by Tenant-Release application filed 28 years ago-No attempt made by tenant to find out alternative accommodation-Held, no justification for tenant for continuing in premises in findings of fact and do not call for any interference by Writ Court-No perversity or material illegality in findings shown by petitioner-Writ dismissed.

General category candidates selected, the respondent had secured higher marks/grading, he should be offered appointment to an appropriate post **Held: Paras 8 & 10**

The tenant has to establish that he has not been able to find out another accommodation. In the present case the tenant has not been able to show that he made efforts for finding out alternative accomodation but has not been able to find out any other accommodation for living in future. In any case the release application was filed in the year 1976 and almost 28 years have passed. The tenant has not been able to find out another alternative accommodation. There can be no justification for the tenant for continuing in the premises in dispute. The comparison of hardship likely to be suffered by the tenant loses its importance after a certain period and specially after 28 years.

I have considered the rival submissions made by the parties. The findings recorded by the Prescribed Authority and the Appellate Court are based upon the material available on record. These are findings of fact and do not call for any interference by this Court. The petitioner has not been able to show any perversity or material illegality in the findings of the Courts below. The petition has no force and is, accordingly, dismissed.

Case law discussed:
1980 ARC 134
1980 ARC 140
1978 ARC 536
1978 ARC 355

(Delivered by Hon'ble Vikram Nath, J.)

1. This writ petition has been filed by the tenant against the judgment and orders dated 09.02.1984 and 07.11.1977 passed by the respondent nos. 1 and 2 respectively, whereby the application for release of the accommodation in dispute,

filed by the respondent landlord under Section 21 (1)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (in short the Act) has been allowed and the appeal of the tenant against the same has also been dismissed.

2. The dispute relates to house situated in Mohalla Misrana, Katra, Kasba Etah, District Etah. Sri Karori Lal Varshney was the owner and landlord of the said building and the petitioners were tenants in the same. The landlord filed application for release in the year 1976 on the ground that he has got a big family consisting of himself, his wife, four sons and two daughters. Two sons were married and the other four children were also of marriageable age. They were all living with him and were suffering great hardship due to paucity of accommodation. The premises in dispute were bonafide required by them for his own use and for the use of his children. It was also alleged that the tenant has got his own house in mohalla Marhera Darwaza and could easily shift there.

The application was contested by the tenant petitioners on the ground that the landlord has several other buildings in different localities and can easily shift there, it was further alleged that he could have easily made arrangements for living of all the children in the other accomodation available with him.

3. Both the parties led evidence in support of their cases. The Prescribed Authority vide judgment dated 07.11.1977 held that the need set up by the landlord was bona fide and after comparing the hardship likely to be faced by the landlord and tenant held that the landlord would suffer greater hardship in case the premises in dispute were not released. On these findings the release application was allowed. Against the said judgment the tenant filed an appeal under Section 22 of the Act, which was also dismissed by judgment dated 27.01.1979 and the finding recorded by the Prescribed Authority were confirmed. Aggrieved by the same the tenant filed writ petition before this Court, which was registered as CMWP No. 1329 of 1979, Kripa Shankar vs. VIIth Additional District Judge. The said writ petition was allowed by this Court vide judgment dated 12.02.1982 and the matter was remanded to the Appellate Court for reconsideration on the question of comparative hardship between the tenant and the landlord. The relevant part of the judgment of this Court containing the direction is being reproduced below:-

"Thus it is clear that the appellate court did not proceed with the case in a satisfactory manner and did not take into consideration the guide-lines laid down in Rule 16 of the Rules framed under U.P. Act No. 13 of 1972 for residential accommodation which was obligatory on him and without considering the comparative needs and the hardships to be suffered by the parties in the light of facts established and the guide lines provided in the relevant Rules decided the matter as such the order passed by the appellate court affirming the order passed by the Prescribed Authority deserves to be quashed."

4. Subsequently, the Appellate Authority, after considering the material on record in the light of the judgment of this Court, again held that on the question of comparative hardship the landlord will face greater hardship if the application is

rejected and, accordingly dismissed the appeal vide judgment dated 09.02.1984. Against the said judgment the present writ petition has been filed.

5. I have heard Sri V.K. Singh, learned counsel for the petitioners and Sri R.K. Mishra, Advocate holding brief of Sri Neeraj Agarwal, learned counsel representing the respondents.

6. The contention raised by the learned counsel for the petitioners is that the landlord has other accommodation available with him which can be occupied by him for use of his family members and the tenant will face greater hardship as he has no alternative accommodation available with him. Learned counsel for the petitioner has also relied upon the following four judgments of this Court in support of his contention:-

1. ***1980 Allahabad Rent Cases page 134, Sri Ramesh Ji Nigam & others vs. The District Judge, Kanpur & others.***
2. ***1980 Allahabad Rent Cases page 140, Indu Bhushan Dass vs. The First Additional District Judge, Allahabad.***
3. ***1978 Allahabad Rent Cases page 536, Smt. Ram Kali Devi & others vs. Sri Jagat Ram Arora & others.***
4. ***1978 Allahabad Rent Cases page 355, Than Singh vs. District Judge, Aligarh & others.***

The judgements relied upon by the learned counsel for the petitioner do not help as they are distinguishable on facts. The judgements referred to and relied upon by the petitioner deal with different situations in each case. These judgements are 25 years old and are based upon the particular facts of each case. In the present case, writ petition has been pending since last 20 years. There cannot be any parity or comparison with cases decided 25 years back. In any case question of comparative assessment of the likely hardship of the tenant and the landlord has lost its importance after 28 years.

7. On the other hand, learned counsel for the respondents has contended that firstly, the landlord did not have any other suitable accommodation available where he is living. The accomodation alleged by the tenant is not in the same locality where the premises in dispute is situate. It is in different locality. Further the landlord cannot be compelled to live in particular accommodation at the dictates and instructions of the tenant.

8. The tenant has to establish that he has not been able to find out another accommodation. In the present case the tenant has not been able to show that he made efforts for finding out alternative accomodation but has not been able to find out any other accommodation for living in future. In any case the release application was filed in the year 1976 and almost 28 years have passed. The tenant has not been able to find out another alternative accommodation. There can be no justification for the tenant for continuing in the premises in dispute. The comparison of hardship likely to be suffered by the tenant loses its importance after a certain period and specially after 28 years.

9. It is further contended by the learned counsel for the respondent that the tenant is enjoying the premises at the monthly rent of Rs. 1.44paise. There can

be no greater injustice to the owner / landlord that he is being deprived of reasonable rent and also the use of his property. It is because of this nominal rent that the tenant still wants to continue to occupy the premises in dispute and hold on to it.

10. I have considered the rival submissions made by the parties. The findings recorded by the Prescribed Authority and the Appellate Court are based upon the material available on record. These are findings of fact and do not call for any interference by this Court. The petitioner has not been able to show any perversity or material illegality in the findings of the Courts below. The petition has no force and is, accordingly, dismissed.

11. Learned counsel for the petitioner has prayed for 6 months time to vacate the premises. Counsel for respondents has agreed for the same. Subject to undertaking being filed by the petitioner.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2004

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No.12814 of 1999

State of U.P. ...Petitioner
Versus
Presiding Officer, Labour Court, Varanasi and another ...Respondents

Counsel for the Petitioner:
Sri R.K. Awasthi
S.C.

Counsel for the Respondents:
Sri Devendra Pratap Singh
S.C.

Constitution of India, Article 226-Labour Court award-validity challenged-finding of facts regarded on the basis of record-do not suffer any illegality, pervisity or manifest error apparent on the face of record-can not be interfered under Article 226 of the Constitution.

Held: Para 5 & 6

The labour Court after hearing the parties and looking into the record held that the petitioner-employer had since accepted the fact that prior to the termination of the services of the workman-respondent no.2 no notice whatsoever was sent nor any retrenchment compensation was paid in compliance of the provisions of Section 6-N of the Industrial Disputes Act the termination of the services of the workman-respondent no.2 was wrong, bad and illegal.

The petitioner has not been able to demonstrate before this Court that the findings of fact recorded in the impugned award suffers from any illegality, perversity or any manifest error apparent on the face of the record. More so, the said findings of fact, arrived at by the respondent on the basis of which the impugned award has been passed, being based on relevant material on record, is not open to challenge before this Court while exercising its special and extra ordinary jurisdiction under Article 226 of the Constitution of India.

(Delivered by Hon'ble V.C. Misra, J.)

Heard Sri R.K. Awasthi learned standing counsel on behalf of the petitioner and Sri D.P. Singh learned counsel for the workman-respondent no.2.

1. The present writ petition is directed against the award passed by the Presiding Officer, Labour Court dated 28.5.1997, which was published on notice service, i.e., 1.9.1989 till date of reinstatement. It was further directed that other benefit for which the workman was entitled from time to time shall also be paid to him.

2. The facts of the case in brief are that the workman-respondent no.2 had been working with the petitioner since 1.7.1986. His services were terminated with effect from 1.9.1989. An industrial dispute was raised and Adjudication Case No.203/1992 was registered before the labour Court-respondent no.1. The workman filed his written statement stating therein that he has been working since 1.7.1986 till 31.8.1989 as a muster roll employee continuously but without any reason his services were terminated with effect from 1.9.1989 without giving any retrenchment allowance hence, the termination order in utter violation of Section 6-N of the U.P. Industrial Disputes Act (hereinafter referred to as the Act). Learned counsel for the petitioner has submitted that juniors to workman are working in the department and even some of them have been regularized and also by making fresh appointments, the employer is taking work but the workman has been wrongly deprived of work while the duty discharged by him was of a permanent nature hence, he should be reinstated.

On behalf of the petitioner, a written statement (annexure-3 to the writ petition) was also filed before respondentno.1, denying the allegations made by the workman. It has been averred that the department of the petitioner is not an board on 27.10.1997 by which the workman was reinstated along with continuity in service with minimum pay scale from the date of termination of Industry and no industrial dispute arose between the petitioner and the respondent-workman was not engaged against any regular post but in fact he was working as daily wage work charge employee for specific work and after completion of work, his engagement has come to an end automatically. The petitioner-employer raised a preliminary issue to the extent that it did not fall under the definition of Industry and therefore, the Act was not applicable. However, after hearing the parties, the labour Court proceeded with the matter treating the petitioner as an industry.

3. Documentary evidence was filed on behalf of the parties and oral evidence was led, the respondent no.1-workman required the petitioner to file certain documents such as the attendance register, pay register, payment bills of work-charge employee and other documents which were admittedly not produced before the Labour Court except for some of the payment bills. Respondent no.2-workman filed experience certificate which had been challenged by the petitioner as having forged signature, though in the case P.W. Case 34/1991 filed by the workman under the provisions of Payment of Wages Act the concerned Executive Engineer on behalf of the petitioner had accepted that the workman-respondent no.2 had worked till 31.8.1989, and the Chief Senior Assistant, had confirmed the signature and admitted the authenticity of the said experience certificate.

4. In this writ petition an interim order dated 2.4.1999 has been passed by this Court wherein the petitioner was directed to comply with the provisions of Section 17-B of the Industrial Disputes Act which admittedly they have not complied with. However, they have deposited the same amount towards back wages and have filed the Photostat copies of the certificate regarding deposits made before the labour Court.

5. The labour Court after hearing the parties and looking into the record held that the petitioner-employer had since accepted the fact that prior to the termination of the services of the workman-respondent no.2 no notice whatsoever was sent nor any retrenchment compensation was paid in compliance of the provisions of Section 6-N of the Industrial Disputes Act the termination of the services of the workman-respondent no.2 was wrong, bad and illegal.

6. I have looked into the record of the case and find that, after thorough examination and critical scrutiny of the pleadings and relevant material and evidence available on record the respondent no.1 has passed a well reasoned award dated 25.5.1997 (annexure-1 to the writ petition) on the basis of the findings of fact arrived at by it. The petitioner has not been able to demonstrate before this Court that the findings of fact recorded in the impugned award suffers from any illegality, perversity or any manifest error apparent on the face of the record. More so, the said findings of fact, arrived at by the respondent on the basis of which the impugned award has been passed, being based on relevant material on record, is not open to challenge before this Court while exercising its special and extra ordinary jurisdiction under Article 226 of the Constitution of India.

7. Under the above said facts and circumstances of the case, I do not find that any illegality has been committed by the respondent no.1 in passing the impugned award-dated 25.5.1997 (annexure-1 to the writ petition). However, looking into the facts and circumstances of the case and also since, there is no averment made by the workman that he was not gainfully employed anywhere else nor there is any such finding to this effect that the workman-respondent no.2 was not gainfully employed at any other place during the period he was not permitted to work he shall not be entitled to full back wages. The impugned award-dated 25.5.1997 (annexure-1 to the writ petition) is modified to the extent that 50% of the back wages shall be payable to the workman-respondent no.2 from the date of the termination till the date of the passing of the award.

With the above said observations the writ petition is dismissed. No order as to costs.

Petition dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2004

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE K.N. OJHA, J.

Civil Misc. Writ Petition No. 851 of 1995

Sunil Kumar Jain ...Petitioner
Versus

The Income Tax Officer Ward 3 (4), Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Agrawal
Sri Shalabh Singh
Sri S. Chopra
Sri G. Krishna
Sri A.N. Mahajan
S.C.

Counsel for the Respondents:
Sri Bharat Ji Agrawal
Sri Ashok Kumar

Case law discussed:
(1961) 43 ITR 287 (SC)
(1976) 103 ITR 579 (P&H)
(1980) 122 ITR 105 (P&H)
(1992) 195 ITR 582 (Kant.)
(1986) 161 ITR 505 (SC)
(1994) 207 ITR 55 (Kant)
(1998) 234 ITR 249 (All)
(2001) 247 ITR 271 (SC)
(2000) 247 ITR 436 (All)
(2003) 259 ITR 19 (SC)
(2003) 264 ITR 472 (All)
(2003) 264 ITR 566 (SC)
(2004) 266 ITR 553 (P&H)
(2004) 267 ITR 200 (Bom)
(1996) 222 ITR 831 (Guj)
187 CTR 462 (Uttaranchal)
187 CRT 557 (Delhi)
(2004) 266 ITR 597 (All)
(1963) 47 ITR 472 (All)
(1969) 73 ITR 226 (All)
(1972) 84 ITR 616 (Delhi)
(1986) 158 ITR 174 (Delhi)
(1960) 38 ITR 301 (Cal)
(1968) 69 ITR 461 (All)
(1961) 41 ITR 191 SC
(1975) 98 ITR 486 (Pat)
(1965) 57 ITR 637 (SC)
(1981) 130 ITR 1 (SC)
(1967) 63 ITR 219 (SC)
(1967) 63 ITR 638 (SC)
(1970) 77 ITR 268 (SC)
(1968) 70 ITR 79 (SC)
(1976) 103 ITR 437 (SC)
(1974) 97 ITR 239 (SC)
(1973) 31 STC 293 (SC)
(1994) 3 SCC 2999
(1973) 88 ITR 439 (SC)
(1971) 82 ITR 147 (SC)
AIR 1954 SC 207
AIR 1955 SC 425
AIR 1957 SC 882
AIR 1958 SC 86
AIR 1966 SC 1089
(2003) 2 SCC 107

Income Tax Act, 1961-Ss. 147 and 148- Search and seizure- Notices under S. 148 to petitioners-Writ against-held, according to claim made by petitioners amount in question belonged to 's' who bequeathed same to them-Not withstanding fact that said amount has been assessed to tax in hands of 'P', he took stand that seized amount did not belong to him and instead belonged to 'S'-thus it is not clear as to in whose hands said amount is to be assessed-Hence, I.T.O. was, held, justified in taking proceedings under S. 147 for assessing amounts in question at hands of petitioners according to claims made by petitioners-Writ petition dismissed.

Held: Para 40

Applying the principle laid down in the aforesaid cases to the facts of the present case, we find that according to the claim made by the petitioners the amount in question belonged to Smt. Shyama Devi who had bequeathed the same to them. Notwithstanding the fact that the said amount has been assessed to tax in the hands of Prem Chandra Jain, he has taken a stand that the amount does not belong to him and instead belonged to Smt. Shyama Devi. Therefore, it is not clear as to in whose hands the amount in question has to be assessed. Thus, the Income Tax Officer was justified in taking proceedings under Section 147 of the Act for assessing the aforesaid amounts at the hands of the petitioners according to the claim made by the petitioners.

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

1. Civil Misc. Writ Petition No. 851 of 1995 has been filed by Sunil Kumar Jain whereas Civil Misc. Writ Petition No. 852 of 1995 has been filed by Suresh Chandra Jain, Hindu Undivided Family seeking a writ, order or direction in the nature of certiorari quashing separate notice dated 31st March, 1995 issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act) by the Income Tax Officer, Ward 3(4), Kanpur- respondent no.1 for the Assessment Year 1986-87 and other consequential reliefs.

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

3. According to the petitioner in Civil Misc. Writ Petition No. 851 of 1995 he is carrying on business of Electronic goods on small scale basis under the name and style of Anu Electronics and is being assessed to tax by the Income tax Officer ward 3(4), Kanpur-respondent no.1 since the Assessment Year 1981-82. The grand father of the petitioner late Darbari Lal was the Karta of the Hindu Undivided Family which owned certained moveable and immoveable properties in Jasrana town, district Mainpuri (now in the district of Firozabad). After the death of Sri Darbari Lal, Suresh Chandra Jain, the father of the present petitioner, became the Karta of the Hindu Undivided Family. Suresh Chandra Jain, the Karta, has filed Writ Petition No. 852 of 1985. It is alleged by the petitioners that on 6th June, 1995 the Income Tax Department conducted a search at the residential and business premises of one Sri Prem Chandra Jain, Mohalla Baniyat, Jasrana, district Mainpuri (now district Ferozabad). During the course of search the Officers of the Income Tax Department forcibly entered the residential premises of Suresh Chandra Jain without there being any warrant under Section 132 (1) of the Act. It may be mentioned here that the house of Suresh Chandra Jain is adjacent to the house of Prem Chandra Jain. The search party broke open the locks and entered the premises. Smt. Shyama Devi, the mother of Suresh Chandra Jain had gone to Kanpur for treatment since Suresh Chandra Jain was residing at Kanpur as he was in service there. In the house there was a steel safe belonging to Smt. Shyama Devi which was locked. The officers of the search party with the help of gas cutter cut open the safe and took away the sum of Rs. 2,19,000/- and pawned articles valued at Rs. 10,506/- kept therein on the ground that it belonged to Prem Kumar Jain. In the course of search Prem Chandra Jain gave his statement stating therein that the cash and pawned articles found from the safe of Smt. Shyama Devi did not belong to him, it either belong to Smt. Shyama Devi or to her son and he had nothing to do with the same. According to the petitioners there have been a family partition in the year 1937 between their forefathers and of Prem Chandra Jain and thereafter they are residing separately. Vide letter dated 12th August, 1985, the petitioners prayed for return of the pawned articles. It may be mentioned here that the petitioners claim that Smt. Shyama Devi had executed a will and this fact had been corroborated by the writer and the witness. However, the Income Tax Officer while passing the order under Section 132(5) of the Act on 1st October, 1985 had held that the cash and pawned articles belonged to Prem Chandra Jain

and was his undisclosed income. An objection against the said order had been filed under Section 132(5) of the Act by the petitioners.

4. The proceedings under Section 148 has been initiated against Prem Chandra Jain under Section 147 of the Act for the Assessment Year 1986-87 and the cash amount of Rs. 2,19,000/- and the pawned articles valued at Rs. 10,506/- has been assessed as belonging to Prem Chandra Jain. However, in the appeal preferred by Prem Chandra Jain, the Commissioner of Income Tax (Appeals) vide order dated 5th December, 1994 had set aside the assessment on the ground that it was barred by limitation against which the Department preferred an appeal before the Tribunal. The Tribunal vide order dated 27th February, 2004 had allowed the appeal filed by the Department and remanded the matter to the Commissioner of Income Tax (Appeals) for deciding the appeal afresh in accordance with law. Thereafter the Income Tax Officer Ward 3 (4), Kanpur, respondent no.1 had issued notice under Section 148 of the Act for the Assessment Year 1986-87 to both the petitioners. In compliance to the notice the petitioners filed their return under protest and had requested that the reason for issuing notice under Section 148 of the Act be communicated to them in writing. The Income Tax Officer Ward 3(4), Kanpur, respondent no.1 had communicated the common reasons which are as follows:

"However, keeping in view the contents made in the alleged 'Will' dated 2.6.85, wherein Smt. Shyama Devi had bequethed the above assets to his grand son Sri Sunil Kumar Jain, has not been considered as genuine in the assessment order in the case of Sri Prem Chand Jain, HUF. In the interest of revenue the explained cash and jewellery, as mentioned above are to be assessed in the hands of Sri Sunil Kumar Jain in his individual capacity on pretective basis as precautionary measure in the Assessment Year 1986-87.

In view of the above facts it is found that the source of acquiaition of cash and jewellery amounting to Rs. 2,19,000/- and Rs. 10,506/- respectively have not been satisfactorily explained either by Sri Suresh Chand Jain HUF or Sri Sunil Kumar Jain, therefore, I have reasons to believe that income chargeable to tax amounting to Rs. 2,19,000/- and Rs. 10,506/- has escaped assessment in the hands of Sri Suresh Chand Jain (HUF) and Sri Sunil Kumar Jain for the Assessment Year 1986-87. Therefore, it is a fit case for taking action u/s 147."

The notices dated 31st March, 1995 are under challenge in both the writ petitions.

5. We have heard Sri Shalabh Singh, learned counsel assisted by Sri R.S. Agrawal, learned counsel for the petitioners and Sri A.N.Mahajan, learned standing counsel for the respondent.

6. The learned counsel for the petitioner submitted that the notices under Section 148 of the Act are wholly illegal and without jurisdiction as they have been issued on a change of opinion and there was no basis or justification nor any material before the respondent no.1 to form a belief that the income had escaped assessment to tax. He further submitted that from the reasons recorded by the respondent no.1 it is absolutely clear that he had not come to a definite conclusion

that the income of the petitioner had escaped assessment to tax and in whose hands it has to be assessed and that too on the protective basis and, therefore, the entire proceedings are liable to be quashed. In support of the aforesaid pleas he had relied upon the following decisions:

1. **Lalji Haridas vs. Income Tax Officer and another** [(1961) 43 ITR 287 (SC)]
2. **Jagmohan Mahajan and another vs. Commissioner of Income Tax, Punjab, and others** [(1976) 103 ITR 579 (Punjab & Haryana)]
3. **Smt. Sita Devi vs. Commissioner of Income Tax, Patiala, and others** [(1980) 122 ITR 105(Punjab & Haryana)]
4. **Nenmal Shankarlal Parmer vs. Assistant Commissioner of Income Tax, (Investigation)** [(1992) 195 ITR 582 (Karnataka)
5. **Commissioner of Income Tax, Haryana, Himachal Pradesh and Delhi and others vs. Tarsem Kumar and another** [(1986) 161 ITR 505 (SC)]
6. **Southern Herbals Ltd. vs. Director of Income Tax (Investigation) and others** [(1994) 207 ITR 55 (Karnataka)]
7. **Commissioner of Income Tax, vs. Smt. Durgawati Singh** [(1998) 234 ITR 249 (Alld.)]
8. **Comunidado of Chicalim vs. Income Tax Officer and others** [(2001) 247 ITR 271 (SC)]
9. **Foramer vs. Commissioner of Income Tax, and others** [(2001) 247 ITR 436 (Alld.)]
10. **GKN Driveshafts (India) Ltd. vs. Income Tax Officer and others** [(2003) 259 ITR 19 (SC)]
11. **Smt. Kavita Agarwal and another vs. Director of Income Tax (Investigation) and others [(2003) 264 ITR 472 (Alld.)]**
12. **Commissioner of Income Tax, and others vs. Foramer France** [(2003) 264 ITR 566 (SC)]
13. **V.K. Packaging Industries vs. Tax Recovery Officer and others** [(2004) 266 ITR 283 (Alld.)]
14. **Naresh Kumar Kohli vs. Commissioner of Income Tax, and others** [(2004) 266 ITR 553 (P&H)]
15. **Ajanta Pharma Ltd. vs. Assistant Commissioner of Income Tax and others** [(2004) 267 ITR 200(Bom.)]
16. **Banyan and Berry vs. Commissioner of Income Tax**, [(1996) 222 ITR 831 (Guj)]
17. **Oil and Natural Gas Corporation Ltd. vs. Deputy Commissioner of Income Tax and others** [187 CTR 462 (Uttaranchal)]
18. **AMS Jewellers vs. Commissioner of Income Tax, and another** [187 CRT 557 (Delhi)]
19. **Dr. Anita Sahai vs. Director of Income Tax (Investigation)** (2004) 266 ITR 597 (Alld.)

7. The learned standing counsel, however, submitted that even though the Department has taken a stand that the amount of Rs.2,19,000/- and the pawned articles worth Rs.10,506/- belongs to Prem Chandra Jain but as the petitioners have claimed that the said amount belongs to them, the respondent no.1 was well within his jurisdiction to form a belief that the income has escaped assessment and initiated proceedings under Section 147 of the Act as it is always open to the Income Tax Officer to assess the income in the right hands notwithstanding the fact that the same amount has been assessed in the

hands of another person. He further submitted that the petitioners have already filed objection in response to the notice under section 148 of the Act and had also been supplied reason for reopening the assessment and, therefore, they should contest the matter before the authorities and the writ petition is not maintainable. In support of his aforesaid pleas he has relied upon the following decisions:

1. **Lalji Haridas vs. Income Tax Officer and another** [(1961) 43 ITR 287 (SC)]
2. **S. Gyani Ram and Co. vs. Income Tax Officer, A.Ward, Firozabad** [(1963) 47 ITR 472 (Alld.)]
3. **Sidh Gopal Gajanand and others vs. Income Tax Officer, Central Circle (III), Kanpur and others** [(1969) 73 ITR 226 (Alld.)]
4. **R. Dalmia vs. Union of India and others** [(1972) 84 ITR 616 (Delhi)
5. **Sohan Singh vs. Commissioner of Income Tax, Delhi** [(1986) 158 ITR 174 (Delhi)]
6. **GKN Driveshafts (India) Ltd. vs. Income Tax Officer and others** [(2003) 259 ITR 19 (SC)]

8. Having heard the learned counsel for the parties, we find that in the present case the notice under Section 148 of the Act and the reasons which have been recorded for initiating proceedings for reassessment has been challenged on the ground that from the material on record the Income Tax Officer could not have formed any belief that any part of the income has escaped assessment to tax which is the prerequisite condition for assuming the jurisdiction of the Assessing Authority to initiate proceedings under section 147/148 of the Act.

9. Under Section 147 of the Act the proceedings for the assessment can be initiated only if the Assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. The question whether the Assessing Officer had reasons to believe is not a question of limitation only but is a question of jurisdiction, a vital thing, which can always be investigated by the Court in an application under Article 226 of the Constitution as held in **Daulatram Rawatmal v. ITO** (1960) 38 ITR 301 (Cal); **Jamna Lal Kabra v. ITO**, (1968) 69 ITR 461(All); **Calcutta Discount Co.Ltd. v. ITO**, (1961) 41 ITR 191 (SC); **C.M. Rajgharia v. ITO**, (1975) 98 ITR 486, (Pat). and **Madhya Pradesh Industries Ltd. v. Income Tax Officer**, (1965) 57 ITR 637 (SC).

10. The words "has reason to believe" are stronger than the words "is satisfied". The belief entertained by the Assessing Officer must not be arbitrary or irrational. It must be reasonable or, in other words, it must be based on reasons which are relevant and material as held by the Apex Court in **Ganga Saran & Sons P. Ltd. v. ITO**, (1981) 130 ITR 1 (SC).

11. The expression "reason to believe" in Section 147 does not mean purely subjective satisfaction on the part of the Assessing Officer. The belief must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Assessing Officer in starting proceedings under Section 147

is open to challenge in a Court of law as held in **S. Narayanappa v. Commissioner of Income Tax**, (1967) 63 ITR 219(SC); **Kantamani Venkata Narayana & Sons v. Addl. ITO**, (1967) 63 ITR 638 (SC); **Madhya Pradesh Industries Ltd. v. ITO**, (1970) 77 ITR 268 (SC); **Sowdagar Ahmed Khan v. ITO**, (1968) 70 ITR 79 (SC), **ITO v. Lakhmani Mewal Das**, (1976) 103 ITR 437 (SC); **ITO v. Nawab Mir Barkat Ali Khan Bahadur**, (1974) 97 ITR 239(SC); **CST v. Bhagwan Industries (P) Ltd.**, (1973) 31 STC 293(SC) and **State of Punjab v. Balbir Singh**, (1994) 3 SCC 2999.

12. The formation of the required opinion and belief by the Assessing Officer is a condition precedent. Without such formation, he will not have jurisdiction to initiate proceedings under Section 147. The fulfillment of this condition is not a mere formality but it is mandatory. The failure to fulfil that condition would vitiate the entire proceedings as held by the Apex Court in the case of **Johrilal v. CIT**, (1973) 88 ITR 439 (SC) and **Sheo Nath Singh v. AAC**, (1971) 82 ITR 147 (SC). The reasons for the formation of the belief must have rational connection with or relevant bearing on the formation of belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of his belief that there has been escapement of income of the assessee from assessment in the particular year. It is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of income of the assessee from assessment as held by the Hon'ble Supreme Court in the Case of **I.TO v. Lakhmani Mewal Das** (1976) 103 ITR 437. If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Assessing officer could not have reason to belief. In such a case, the notice issued by him would be liable to be struck down as invalid as held in the case of **Ganga Saran & Sons P. Ltd v. ITO**, (1981) 130 ITR 1(SC).

13. In the case of GKN Driveshafts (India) Ltd. (supra) the Apex Court has held as follows:

"When a notice under section 148 of the Income-tax Act, 1961, is issued, the proper course of action for the notice is to file the return and, if he so desires, to seek reasons for issuing the notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order.

On receiving notices under section 148 the appellant filed the returns. The appellant also received notices under section 143(2) calling for further information on certain points in connection with the returns. Thereupon the appellant filed writ petitions challenging the notices. The High Court dismissed the writ petitions holding that the petitions were premature and the appellant could raise its objections to the notices by filing reply to the notices before the Assessing Officer (see e.g. [2002] 257 ITR 702). The appellant preferred appeals and the Supreme Court

dismissed the appeals, observing that since the reasons for reopening of assessments under section 148 had been disclosed in respect of five assessment years, the Assessing Officer had to dispose of the objections, if filed, by passing a speaking order before proceeding with the assessments for those years"

14. The Constitution Benches of the Hon'ble Supreme Court, in **K.S. Rashid and Sons v. Income tax Investigation Commission and others**, A.I.R. 1954 SC 207; **Sangram Singh v. Election Tribunal, Kotah and others**, A.I.R. 1955 SC 425; **Union of India v. T.R. Varma**, A.I.R. 1957 SC 882; **State of U.P. and others v. Mohammad Nooh**, A.I.R. 1958 SC 86 and **M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras**, A.I.R. 1966 SC 1089 has held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision could not be adopted.

15. In **Harbans Lal Sahnia v. Indian Oil Corporation Ltd.**, (2003) 2 S.C.C. 107, the Hon'ble Supreme Court has held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders of proceedings are wholly without jurisdiction or the vires of an Act is challenged.

16. As held by the Apex Court in the case of **Calcutta Discount Co. and Madhya Pradesh Industries Ltd**. (supra), this Court under Article 226 is entitled to go into the relevancy of the reasons as also to scrutinize as to whether there was reasonable belief or not.

17. In the case of **Comunidado of Chicalim** (supra) the Apex Court had held that when an assessee challenges a notice to reopen an assessment under Section 147 of the Act on the ground that no reasons under Section 148 had been recorded or disclosed, the Court must call for and examine the reason, and, in fact, ordinarily, the reasons are set out by the respondents to the writ petitioner in their counter.

18. In the case of **Foramer** (supra) this Court has held that notice under Section 147 should not be given on mere change of opinion and if notice under Section 148 was without jurisdiction the petitioner should not be relegated to the alternative remedy and the writ petition was maintainable, which has been upheld by the Apex Court in the civil appeal filed by the Department reported in (2003) 264 ITR 566 (SC).

19. In the case of **Ajanta Pharma Ltd.** (Supra) the Bombay High Court has held that **GKN Driveshafts (India) Ltd.** (supra) nowhere lays down that the party

is totally debarred from approaching the High Court under Article 226 of the Constitution of India when the exercise of power by the authority under Section 148 of the Act, ex facie appears to be without jurisdiction. Undoubtedly, whether such an exercise is with or without jurisdiction will have to be revealed from the notice and reasons on the face thereof. At the same time, it is also well settled, and **Calcutta Discourt Co. Ltd.** (supra) is very clear on the point, that mere availability of alternative relief can be no bar for exercise of writ jurisdiction when the authorities seek to assume jurisdiction which they do not possess or act in totally arbitrary manner. The decision in **GKN Driveshafts (India) Ltd.** (supra) reminds the assessee that when a notice under Section 148 of the Act is issued the proper course of action is to file a reply with his objections including those in relation to the obsence of jurisdiction. However, it does not lay down that when such an objection is in relation to the absence of jurisdiction and the same is revealed ex facie or apparent on the fact of a notice or reasons in support thereof, the assessee has compulsorily to invite an order from the Assessing Officer in relation to the absence of jurisdiction.

20. This Court in Civil Misc. Writ Petition No. 257 of 2004 (**Indra Prastha Chemicals Pvt. Ltd. and others vs. Commissioner of Income Tax and others**) decided on 16.8.2004 has repelled the similar arguments raised by the department.

21. Thus, it is well settled that the 'reason to believe' under Section 147 must be held in good faith and should have a rational connection and relevant bearing on the formation of the belief and should not be extraneous or irrelevant. Further this Court in proceedings under Article 226 of the Constitution of India can scrutinize the reasons recorded by the Assessing Officer for initiating the proceedings under Section 147/148 of the Act. The sufficiency of the material cannot be gone into but relevancy certainly be gone into.

Thus, the writ petition under Article 226 is maintainable.

22. Going to the merits of the case, we find that it is not in dispute that the cash amount of Rs. 2,19,000/- and the pawned articles valued at Rs. 10,506/- has been claimed by the petitioners as belonging to them. Merely because it has been taxed at the hands of Sri Prem Chandra Jain will not preclude the Income Tax Officer from assessing the same at the hands of the right person. From the reason recorded for reopening of the assessment which has been reproduced above it will be seen that the basis for initiating proceedings is the claim made by the petitioners on the basis of the alleged will executed by Smt. Shyama Devi, thus it cannot be said that there was no relevant material for taking proceedings under Section 147 of the Act.

23. In the case of **Jagmohan Mahajan** (supra) the Punjab and Haryana High Court has held that search and seizure cannot be conducted on the basis of the blank search warrant sent and issued by the Commissioner.

24. In the case of **Smt. Sita Devi** (supra) the Punjab and Haryana High Court has held that provisions of Section 131 (1)(b)(iii) of the Act envisages that the search of the premises had to be a valid and authorised search in that there

must be a legal and valid search warrant for searching the premises of the persons who, on information, are believed to reside therein or occupy the same and it is not necessary that the person against whom the warrant is issued should be in exclusive possession of specified portions and proceeding was, therefore, valid.

25. In the case of **Tarsem Kumar** (supra) the Apex Court has held that on a construction of Section 132 of the Act and the context in which the words "search", "possession", and "seizure" had been used in the section and the rules, there could not be any order in respect of goods or money or papers which were in the custody of another Government Department under legal authority.

26. In the case of **Nenmal Shankarlal Parmer** (supra) the Karnataka High Court has held that where there was no reference at all in the warrant of authorisation that any valuable article or thing was in the possession of the petitioner in his individual capacity as a necessary consequence, the mere mention of residential premises did not enable the Department to effect seizure either of gold, jewellery or other articles or documents belonging to the partner from such premises and, therefore, the order of assessment passed under Section 132(5) of the Act was not valid and liable to be quashed.

27. In the case of **Southern Herbals Ltd.** (supra) the Karnataka High Court has held that it is not for the Court to examine the sufficiency of the material leading to the belief of the authority that search shall have to be conducted: the Court has to see that the belief was reasonable, in the sense, it was formed on the basis of relevant material (information): the Court cannot substitute its own opinion as to the reasonableness of the belief. The Court has to examine to see whether the belief is an irrational or blind belief, formed out of prejudice or the result of relying on wild gossip or baseless rumours, etc.

28. In the case of **Naresh Kumar Kohli** (supra) the Punjab and Haryana High Court has held that sub-section (3) of Section 132B of the Act clearly indicates that the seized assets or proceeds thereof which remain after the liabilities referred to in Clause (i) of Sub-section (1) have been discharged, have to be forthwith made over or paid to the persons from whose custody the assets were seized.

29. In the case of **A.M.S.Jewellers** (supra) the Delhi High Court had only directed the settlement commission to decide the application for return of jewellery which is not the case here.

30. In the case of **Dr. Mrs. Anita Sahai** (supra) this Court has held that before taking any action under Section 132 of the Act the condition precedent is information in the possession of the Director of Income Tax which gives him reason to believe that a person is in possession of some article, jewellery, bullion or money which represents wholly or partly his income which was not disclosed or would not be disclosed. If the aforesaid condition is missing the Commissioner or Director of Investigation will have no jurisdiction to issue the warrant of authorisation under Section 132(1) of the Act. Search and seizure cannot be a fishing expedition. Before search is authorised the Director

must on the relevant material have reason to believe that the assessee has not or would not disclose his income. The reason to believe must exist and must be taken into consideration bys the Director/ Commissioner at the time of issuing the warrant of authorisation. If the reason to believe comes into existence later, i.e., after issuance of the warrant of authorisation, then the warrant of authorisation and entire search and seizure will be illegal even if the material on the basis of which the Director formed his opinion that there was reason to believe existed prior to the issuance of warrant of authorisation. In the case of **Smt. Kavita Agarwal** (supra) this Court has taken the similar view.

31. Even though in the writ petition a prayer for releasing the seized articles has been made, it may be mentioned that the seizure was effected on 6th June, 1985 and as the matter stands today it has been held to be the belonging of Prem Chandra Jain so long as it is not held that the seized articles belonged to the petitioners, it cannot be returned to them. It is another thing that after assessment of individual case of Prem Chandra Jain is taken as satisfied, seized money and pawned articles, after its return to Prem Chandra Jain, can be claimed by the petitioners from the said Prem Chandra Jain. All the aforesaid decisions cited by the learned counsel for the petitioner relate to search, validity of search and seizure, which is not in issue in the present writ petitions.

32. In the case of **Lalji Haridas** (supra) the Apex Court has held that in cases where it appears to the Income Tax authorities that certain income has been received during the relevant year but it is not clear who has received that income; and, prima facie, it appears that the income may have been received by A or by B or by both together, it would be open to the Income Tax Authorities to determine the question who is responsible to pay tax by taking assessment proceedings both against A and B.

33. In the case of **S. Gyani Ram and Co.** (supra) this Court has held that mere fact that a particular income has been assessed in the hands of a particular person as his income will not prevent the Income Tax Officer from coming to the conclusion on fresh materials that that income is the income of another person and taking proceedings under Section 34 of the Act for reassessment against the latter on the ground that this income had escaped assessment in his assessment.

34. In the case of **Sidh Gopal Gajanand** (supra) this Court has held that the validity of notice under section 34 of the Indian Income Tax Act, 1922 cannot be impugned on the ground that the assessment proceeding was already pending in respect of the same income against another entity and where it appears that the income may have been received either by A or by B or by both together, it would be open to the Income Tax authorities to determine the said question by taking appropriate proceedings against both A and B.

35. In the case of **R. Dalmia** (supra) the Delhi High Court has held that where the items of escaped income in respect of which the assessment is proposed is specific but the question as to whether the income, if earned, was earned by one person singly or by him along with others is a matter of inquiry, if the Income Tax Officer has reason to believe that it could

have been earned either by one person singly or by him along with others there is nothing to prevent him from initiating proceedings against the concerned assessees in both capacities. In such a case where it appears to the Income Tax Officer, that certain income had been received during a particular year but it is not clear who has received that income it is open to the Income Tax Officer to start proceedings against al the persons individually or collectively to ascertain the correct position. In the case of **Sohan Singh** (supra) the Delhi High Court has taken the similar view.

36. In the case of **Smt. Durgawati Singh** (supra) this Court has held that it is settled that when there is a doubt as to which person amongst the two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. It is also equally true that while a protective assessment is permissible, it is not open to the Income Tax Appellate Authorities constituted under the Act to make a protective order. The law does not permit assessment of the same income successively in different hands. The tax can only be levied and collected and collected in the hands of the person who has really earned the income and is liable to pay tax thereon.

37. In the case of **Banyan and Berry** (supra) the Apex Court has held that where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to making a protective assessment in the case of one and a regular assessment does not affect the validity of the other assessment inasmuch as if ultimately one of the entities is really found to be liable to assessment, then the assessment in the hands of the entity alone remains the effective assessment and the other becomes infructuous. The levy is enforceable only under one assessment and not under both.

38. In the case of **Oil and Natural Gas Corporation Ltd.** (Supra) the Uttaranchal High Court has held that the assessee having disclosed all facts about borrowings and investments in public sector undertakings and the fact that there was no cautious consideration of the pointed facts at the time of assessment could not be a ground for reopening of assessment by virtue of proviso to Section 147 of the Act.

39. In the case of **V.K. Packaging Industries** (supra) this Court has observed that before parting with the case we would like to state that we cannot appreciate this practice of the Income Tax Department of hurriedly passing assessment orders shortly before the limitation period is about to expire and justifying this practice by saying that there was shortage of time and hence it was impossible to verify the facts properly, and hence the additions were being made. It is common knowledge that when the limitation for making as assessment is about to expire (usually on 31st March) there is a sudden rush and scramble to complete the assessments. If this practice is countenanced the citizens of the country will be put to great harassment as exorbitant demands can be made against them merely by saying that there was shortage of time and hence additions were being made for this reason without verifying the facts correctly. It is the duty of the Department to make a

correct assessment and not to make an excessive assessment merely on the ground of shortage of time. No doubt the Department has to assess and collect the correct tax, but for this purpose it should devise and set up a rational scheme in accordance with law. It should certainly not make assessment hurriedly merely by saying that there is shortage of time (as often happens), thus putting the citizens to great harassment.

40. Applying the principle laid down in the aforesaid cases to the facts of the present case, we find that according to the claim made by the petitioners the amount in question belonged to Smt. Shyama Devi who had bequeathed the same to them. Notwithstanding the fact that the said amount has been assessed to tax in the hands of Prem Chandra Jain, he has taken a stand that the amount does not belong to him and instead belonged to Smt. Shyama Devi. Therefore, it is not clear as to in whose hands the amount in question has to be assessed. Thus, the Income Tax Officer was justified in taking proceedings under Section 147 of the Act for assessing the aforesaid amounts at the hands of the petitioners according to the claim made by the petitioners.

41. In view of the foregoing discussions, we do not find any merit in both the writ petitions which are hereby dismissed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2004

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ petition No.21191 of 2004

Ganesh Narain Shukla ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri L.M. Singh

Counsel for the Respondents:
S.C.

U.P. Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991-R.8-Petitioner appointed as Constable (Civil Police)-On complaint that petitioner was acting in collusion with Criminal, dismissal order passed without any enquiry or without affording any opportunity of hearing to petitioner-Writ against-In present case from perusal of order of dismissal, it appears that disciplinary authority-respondent no. 2 did not record any reasons that it is not possible to hold an enquiry-since said reason is lacking in order of dismissal against petitioner, petitioner, held, entitled to relief-Impugned order of dismissal quashed.

Held: Para 7

In the present case, from the perusal of the order of dismissal, it appears the disciplinary authority respondent no.2 has not recorded any reason that it is not possible to hold an enquiry. As the said reason is lacking in the order of dismissal against the petitioner, the petitioner is entitled for relief.

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

1. By means of the present writ petition, the petitioner has challenged the order dated 28.5.2004 passed by respondent No.2 by which the services of the petitioner have been dismissed. The case of the petitioner is that he was appointed as Constable (Civil Police) on

3.12.1987 and since then he has been working on the said post in the different police station of District Kanpur Nagar. There is no complaint whatsoever against appears that some inimical person in the locality made complaint against the petitioner in which it has been alleged that the petitioner is in acting in collusion with one Dilip Chaurasia who is said to be a criminal. The respondent no.2 without any enquiry in the complaint made against the petitioner, passed an order dismissing the services of the petitioner without any notice of show cause or after giving an opportunity of hearing to the petitioner. The petitioner has annexed the dismissal order dated 28.5.2004 as Annexure 1 to the writ petition. It has been submitted on behalf of the petitioner that the order of dismissal dated 28.5.2004 is contrary to law as the petitioner is a permanent employee in the police department and the services of the petitioner cannot be dismissed without holding any enquiry or without any show cause and the order can be passed only after giving due opportunity to the petitioner. It has also been argued on behalf of the petitioner that it is well settled principle of law that an employee who is subjected to a complaint should be given an opportunity to show cause to submit his explanation for the purposes of the complaint. As before passing the order of dismissal, no opportunity or hearing has been given, therefore, the order of dismissal is bad in law and is in clear violation of principle of natural justice. It has also been stated that order of dismissal is absolutely vague and without any evidence in support thereof.

2. Learned Standing Counsel was granted time to file counter affidavit. Counter and rejoinder affidavit have been the petitioner and the petitioner's conduct was found satisfactory. The petitioner is presently posted as constable at police station Gwaltoli District Kanpur Nagar. It exchange and with the consent of the parties the writ petition is being disposed of finally.

3. After hearing counsel for the parties and after perusal of the record, it appears before passing the order of dismissal petitioner has not been issued any show cause notice. The case of the petitioner has been controverted by way of the counter affidavit filed on behalf of the respondents. The only averment made in para 8 of the affidavit is that some enquiry was made against the petitioner on the basis of the complaint and said enquiry, report has been filed as Annexure C.A.1 to the counter affidavit. From the perusal of the counter affidavit, it is clear that a show cause notice or opportunity has not been given to the petitioner. It has been stated on behalf of the respondents that according to the provisions of the U.P. Officers of Subordinate Rank (Punishment and Appeal), Rules, 1991, Rule 8 provides that the services of the police personnel can be dismissed without any enquiry. Rule 8 is quoted below:-

8. <u>Dismissal and removal</u> – *(1) No police Officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.*

(2) No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules:

Provided that this rule shall not apply-

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or
(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

(3) All orders of dismissal and removal of head Constables or Constables shall be passed by the Superintendent of Police. Cases in which the Superintendent of Police recommends dismissal or removal of a Sub-Inspector or an Inspector shall be forwarded to the Deputy Inspector-General concerned for orders.
(4) (a) *The punishment for intentionally or negligently allowing a person in police custody or judicial custody to escane shall be dismissal unless the punishing authority for reasons to be recorded in writing awards a lesser punishment.*
(b) Every officer convicted by the court for an offence involving moral turpitude shall be dismissed unless the punishing authority for reasons to be recorded in writing considers it otherwise.

4. The petitioner has filed the rejoinder affidavit and has stated the fact that there is no dispute to this effect that there is a rule and under Rule 8 (2) Sub-clause (C), the respondent No.2 has got power to dismiss the services of the police employee but Clause 8 (4) (b) clearly states that if such order is passed under the aforesaid Rule, the punishing authority has to record a reason in writing that the holding of such enquiry is not possible in the security of the State.

5. I have considered the argument of the parties and perused the record as well as Rule 8 of the Rules mentioned above.

The aforesaid provision under the Rules of 1991 is similar to the Article 311 of the Constitution of India. Article 311 is being quoted below:-

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State - *(1) No person who is a member of a civil service of the Union or an all-India service or civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.*

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

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

Provided further that this clause shall not apply -)
(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

6. From the perusal of Article 311 (2) (b), of the Constitution of India the authority has been given power to dismiss or remove a person or to reduce in rank if he is satisfied that it is not reasonable and practicable to hold such enquiry but reasons are to be recorded.

7. In the present case, from the perusal of the order of dismissal, it appears the disciplinary authority respondent no.2 has not recorded any reason that it is not possible to hold an enquiry. As the said reason is lacking in the order of dismissal against the petitioner, the petitioner is entitled for relief.

8. In view of above, the order passed by the respondent no.2 dated May 20, 2004 Annexure 1 is liable to be quashed. In the result, the petition is allowed. The order dated 20.05.2004 passed by respondent no.2 is quashed and the petitioner will be reinstated in service and will be paid his salary. It would however be open to the respondents to hold an enquiry and pass the appropriate orders according to law after giving an opportunity of hearing to the petitioner.

writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the

No order as to costs.

Petition allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2004

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Contempt Petition No. 1487 of 2001

Phuleshwar ...Applicant
Versus
Smt. Maya Niranjan and another
...Opposite Party

Counsel for the Applicant:
Sri K.J. Khare
S.C.

Counsel for the Opposite Party:
Sri S.B. Singh
Sri R.P. Tripathi
Sri Ashutosh Tripathi
Sri C.B. Yadav, C.S.C.-II
Sri Sudhir Agrawal, A.G.A.

Contempt of Courts Act, 1971-S. 12-Punishment under Order by Writ Court for reinstatement and payment of current salary and arrears of salary for ten years treating petitioner's date of birth as 13.7.1944-Deliberate disobedience of order by DIOS-II for 4 years-Contempt petition by petitioner, a permanent employee of aided School-Held, examining conduct of contemnor DIOS-II in leave no room for doubt that she deliberately embased upon a course to create hurdles in execution of order with reprehensive defiance- Plea that since order has been complied with now,

Court should drop proceedings for contempt-From proceedings it is apparent that contemnor was the officer who set cat among pigeons which resulted in willful defiance and non compliance of order for four and half years, though it was to be complied within two months-No explanation by contemnor why at least currant salary was not released or any effort was made by her even though she held office released on any effort was made by her even though she held office for eight months from date of order-Hence she was held guilty of contempt-Sentence of two months simple imprisonment and fine of Rs.2000/- passed.

Held: Para 24

Examining the conduct of Smt. Maya Niranjan from any angle leaves no room of doubt that she consciously and deliberately embarked upon a course to create hurdles in the execution of the order with reprehensive defiance. The main thrust of the argument has remained that since the order has been complied with now, the court should drop the proceedings. From the facts examined hereinabove, and also in the connected Contempt Petition No.522 of 2001 it is apparent that Smt. Maya Niranjan was the Officer who set the cat among the pigeons which resulted in willful defiance and non-compliance of the order for four and a half years, though it was to be complied within two months. There is no explanation by Smt. Maya Niranjan why at least the current salary was not released or any effort in that direction was made by her even though she held the office for eight months from the date of the order. In my opinion, on these facts there is no other option for the court except to hold her guilty.

Case law discussed:

2002 (47) ALR 378
2002 (48) ALR 121 (SC)
AIR 2004 SC (Ist Supp.) 942
(1995) 2 SCC 584
AIR 1995 SC 2320
AIR 1976 SC 1967
AIR 1984 SC 1374

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

1. Heard Shri Krishnaji Khare counsel for the applicant and Shri C.B. Yadav, learned Chief Standing Counsel-II for the opposite party no. 1.

2. At the first blush, this case appeared to be an exercise in futility and I was about to discharge the notices because the executor of the judgment, Smt. Maya Niranjan, had already been transferred from the post and the order and judgment of the court had been complied by her successor, though after more than four years when it was to be complied within two months. It appeared to be yet another case of stagnant officialdom relying upon the procedural delays, which mars the working of nearly every department of the Government. But the counsel for the applicant, a reasonable man, begged couple of minutes, otherwise, he said, he would be failing in his duty to the courts and the society. With some reluctance, I agreed.

3. He started with some brief facts and took me to certain paragraphs of the writ judgment and couple of paragraphs of counter affidavit and its annexures. And he stopped. I could not. We together read the judgment, the petition and the counter with its annexures. He was right. Though it was agonizing reading, but it brought forth the defiant and "care two hoots" attitude of Smt. Maya Niranjan. A sense of helplessness slowly crept in, but soon gave way to the duty that I owe to the institution and the society.

Smt. Maya Niranjan is a veterant of contempt matters. She has about 60 matters pending against her before this court. It spans her entire career.

4. The applicant was appointed as a Farrash, on a fixed salary, in a duly recognized and aided Intermediate College on 27.10.1959. He was given permanent appointment as a peon with effect from 1.8.1973. The date of birth of the applicant was recorded in the Service Book as 13.7.1944 and it remained unchallenged for more than two decades. However, he was restrained from functioning as such by the College Authorities with effect from 13.7.1994, treating his date of birth as 13.7.1934. Aggrieved, he represented his cause before the District Inspector of Schools II, who, after due enquiry and opportunity to the Management, held by his order dated 29.11.1994, after examining the school leaving certificate, Managers Returns etc., that his date of birth was 13.7.1944, therefore, the applicant was to retire in July, 2004. This order was never set aside by any Superior Officer of the Education Department. Nevertheless, the Management preferred a writ petition no. 2022 of 1995 against the aforesaid order wherein an interim order, staying the operation of the order dated 29.11.1994, was passed. Both the parties exchanged their pleadings. During pendency of the writ petition, the opposite party no. 1 directed the Associate District Inspector of Schools, vide her order dated 22.1.2000, to enquire into the correctness of the date of birth of the applicant recorded in the Service Book. The Associate District Inspector of Schools, without any opportunity to the applicant, finalized the enquiry and submitted a report dated 4.2.2000 to the opposite party no.1, holding that the date of birth of the applicant was 1934. The aforesaid enquiry report was filed in the pending writ petition through a supplementary affidavit on 11.2.2000. A Learned Single Judge of this court, after hearing the parties and after considering the enquiry report in detail, rejected the enquiry report and dismissed the writ petition vide order and judgment dated 21.2.2000 with the following directions: -

"For the reasons given above, the writ petition fails and is accordingly dismissed. The applicant and opposite party no. 3 are directed to reinstate the opposite party no. 4 in service and pay his entire arrears of salary within a period of two months from the date a certified copy of this order is produced before the opposite party no. 3."

5. In the writ petition the opposite party no. 1, was impleaded as opposite party no. 3 whilst the applicant was impleaded as opposite party no. 4.

The certified copy of the judgment of this court was served on Smt. Maya Niranjan through a covering letter dated 28.3.2000 which was admittedly received by her on 30.3.2000. The order of the learned Single Judge was never challenged by any of the Educational Authorities, including Smt. Maya Niranjan, before any competent court of law. However, the Management filed a Special Appeal no. 295 of 2000, but no interim order was granted in the Special Appeal, which was subsequently also dismissed vide order dated 9.4.2000 by a Division Bench of this court by a reasoned order.

6. The applicant filed a contempt petition no. 522 of 2001 impleading the immediate successor in office of Smt. Maya Niranjan when his current salary and so also the arrears were not paid within time. Notices were issued on that contempt petition on 26.2.2001 when a counter affidavit was filed by Smt. Shantwana Tiwari in that contempt petition on 15.5.2001, whereafter the applicant came to know that his salary has not been paid in view of the fact that the matter has been referred to the State Government.

7. The present contempt petition, was thereafter filed on 22.5.2001 and notices were issued to Smt. Maya Niranjan on 23.5.2001. Subsequently, vide order dated 31.1.2003, both the contempt petitions were connected.

8. The allegation in the present contempt petition is that in spite of service of the order of the learned Single Judge and the Division Bench, the order of the courts were being defied by Smt. Maya Niranjan and instead of complying with the same she was questioning the very correctness and legality of the judgment in her letter dated 9.5.2000 before the Director of Education (Secondary) wherein she had reiterated the enquiry report submitted on her direction and had sought directions for further action. It is further alleged that this exercise was once again repeated in her letter dated 26.9.2000 stating that complying with the orders and judgments of this court would unnecessarily burden the State Exchequer with the salary of ten years on forged date of birth of the applicant.

9. Upon being noticed, Smt. Maya Niranjan filed her counter affidavit along with a discharge application dated 6.8.2001. In the counter affidavit, she has stated that she relinquished charge of the Office of District Inspector of Schools II on 3.10.2000 but she admitted that the enquiry report was submitted on her orders and had been considered by the court in its judgment. She has further admitted that she had written the letter dated 9.5.2000 but she explains that it was only to bring the entire facts and controversy in the notice of the government and had sought directions for complying with the order of this court. She has also admitted authoring the letter dated 26.9.2000 stating that it was only a reminder seeking direction for compliance of the courts order and since no directions and instructions were received, she could not make the payment before she relinquished charge on 3.10.2000. In paragraph 14 she admits that District Inspector of Schools II alone is the Competent Authority to pay salary to the applicant in compliance of this courts order.

After hearing the counsel for the applicant and Smt. Maya Niranjan, this court found a triable case against Smt. Maya Niranjan, and as such, in the presence of her counsel, framed the following charge on 11.8.2004: -

"You, Smt. Maya Niranjan, the then District Inspector of Schools II, show cause why you should not be tried and punished under Section 12 of the Contempt of Courts Act for willful and deliberate violation and defiance of the order and judgment dated 21.2.2000 as affirmed in the Special Appeal."

10. In pursuance of the said show cause, Smt. Maya Niranjan has filed her reply to the charges along with a discharge application dated 18.8.2004. In her reply she has reiterated the contents of the earlier counter affidavit, the contents of which have already been noted above. Apart from it, she has stated that the letter dated 9.5.2000 was only a paper transaction between her and the Director of Education and there was no intention of deliberate disobedience and it was only to seek permission for filing Special Leave Petition and for the release of fund. She has further stated that she was not competent to release the current or arrears of salary to the applicant and, therefore, she had sought permission from the appropriate Authority for the release of fund. Further, she says that the government finally granted sanction on 22.5.2001 for compliance of the courts order but as she had already demitted office on 3.10.2000 she could not release the salary and arrears. She has again reiterated that the date of birth of the applicant was 13.7.1934 because if it was 13.7.1944, his age on the date of appointment of the applicant could only be fifteen years and three months and as such the applicant was disqualified to get a government job. She has stated that as the dispute related to salary of ten years, which was to be paid from the State Exchequer, she was unable to take appropriate decision without seeking prior approval and sanction of the government. She has also stated that in view of Government Orders dated 19.12.2000 and 19.1.1984 and also a circular of the Director of Education dated 21.4.1993 as the financial burden was much beyond her powers, she had to refer it to the Director of Education. After the arguments had been heard and the court invited the counsel for the opposite party to address it on the question of sentence, the matter was got adjourned whereafter Sri Sudhir Agarwal, learned Additional Advocate-General raised an absolutely new argument that the District Inspector of Schools II was not competent to release the salary as this power vested only with District Inspector of Schools. Finally, she has stated that now the order of the writ court has been complied and this court should show its judicial grace and end the matter.

11. Before I deal with the arguments, it appears appropriate to examine the attending facts and circumstances.

12. Though the applicant was appointed on a fixed salary as Farrash in 1959, he was given a regular appointment as a Peon in 1973 when his Service Book was prepared and the date of birth was recorded therein as 13.7.1944. This date of birth remained unchallenged for two decades. However, the management, while granting selection grade to the applicant, changed the date of birth to 13th July, 1934 and it held that the applicant would retire on 31.7.1994. The applicant represented his case before the District Inspector of Schools II and also to the Regional Deputy Director of Education, who vide order dated 17.8.1994 directed the District Inspector of Schools II to enquire into the cause and take a decision. The District Inspector of Schools II, after giving opportunity to the Management and after relying upon the Government Order dated 2.5.1974 held that the date of birth of the applicant was 13.7.1944 and set aside the order of the Management and asked it to continue the applicant in service vide its order dated 29.11.1994.

This order was challenged by the Management in the writ petition, wherein the aforesaid order and judgment was passed. Before the learned Single Judge, specific argument was raised that if the date of birth of the applicant was taken to be as 13.7.1944, he would have been only 15 years of age when appointed in 1959, but the same was turned down by the learned Single Judge. The specific allegation with regard to mention of the date of birth in the Manager's Return of 1969-70 was also considered and rejected. Report of the enquiry conducted during pendency of the writ petition was also considered and rejected. These are the main facts which have to be considered while considering the defence set up by the opposite party.

It would also be necessary to note the findings and strictures recorded by the learned Judge while dismissing the writ petition.

The learned writ Judge, while considering the Inquiry report and the conduct of Smt. Maya Niranjan during pendency of the writ petition had recorded the following indicting strictures against her:-

"I am not issuing any notice to the petitioner and the District Inspector of Schools as the learned counsel for the respondent is more anxious for early disposal of the writ petition. He is not interested in any action against the petitioner or the District Inspector of Schools. But I consider it necessary, after closely examining the material, to record my strong disapproval of the crude and undesirable manner in which the petitioner and the present District Inspector of School/ Deputy Director of Education have attempted to over reach this court."

Further, while considering the holding of enquiry and reaching a different result, the court held:-

"The petitioner or the District Inspector of Schools could not render the proceedings infructuous by this impermissible method. To that extent the learned counsel for the respondent is fully justified in urging that they deliberately have attempted to interference with course of justice."

Further, it went on to hold:-

"In any case, it was most unsatisfactory manner of attempting to nullify the effect of earlier order passed by the District Inspector of Schools."

13. On the basis of the reply filed by Smt. Maya Niranjan, it is urged that since Smt. Maya Niranjan did not have the power to sanction the release of salary and arrears of the applicant, she had no other option but to refer it to the Director of Education.

From a perusal of the two affidavits filed by Smt. Maya Niranjan, it is apparent that she has taken a conflicting stand as to the authority which is competent to pay the salary and arrears in compliance of this court's order. In the counter affidavit filed along with the discharge application 6.8.2001, in paragraph 14 Smt. Maya Niranjan has stated as follows: -

"In this regard it is further relevant to state that Smt. Santevna Tiwari (who has now been promoted) has also handed over the charge of office of District Inspector of Schools II, Alld and at present Smt. Ferhana Siddiqui is posted

as District Inspector of Schools II, Alld who alone is Competent Authority to pay the salary and arrears to the applicant in compliance of the orders of this Hon'ble court."

14. In pursuance of this statement, Smt. Maya Niranjan cannot be heard saying that she did not have the Authority or power to comply with the courts order. In effect she says that when she was holding the post of District Inspector of Schools II, she was not competent, but when Smt. Ferhana Siddiqui was holding it, she was competent. It would be worthwhile to examine the statute on this point.

Payment of salary to Teachers and Employees of aided and recognized Intermediate Colleges is governed by U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (hereinafter referred to as the 'Act'). Section 3 of the Act has fixed the time within which salary of Teachers and Employees of aided institutions has to be paid and that too without any deduction. Under Section 5 of the Act the responsibility for payment of salary to employees is laid upon the Inspector. The liability for payment of salary, under section 10, is with the State Government. The Government has framed Rules under 16 of the Act namely U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Rules, 1993. Under Rule 6 the salary bill is to be submitted by the 20th of the month to the Inspector, which has to be verified by the Account Officer. The over all responsibility for payment of salary has been placed upon the Inspector under Rule 18 of the Rules.

15. Thus, under the Act and the Rules, the liability for payment of salary, including arrears of salary, as mentioned in Rule 8, lies with the Inspector. In my opinion, this argument of the learned counsel for opposite party no.1 has no merit as under the Act and the Rules, she was obliged to pay the current and arrears of salary.

It has then been urged that without the release of grant by the State Government or the Director, she could not have released the arrears or the current salary.

16. The Institution was an aided Institution as mentioned in Section 2 (b) of the Act and the maintenance grant, as mentioned in clause (c) of Section 2 had already been approved for payment of salary to the employees of the institution. It is not denied that the Institution was receiving maintenance grant from the State. It is also not disputed that the applicant was a permanent employee in the Institution and prior to 13.7.1994 his salary was being paid by the District Inspector of Schools II from the grant already released by the State Government. It is nobody's case that the grant from which the salary of the applicant was being paid was at any point of time withdrawn by the State Government or the Director. Thus, there was no occasion for Smt. Maya Niranjan to have asked the Director or the State Government for release of grant.

17. The learned counsel has further urged that in view of the Government Orders, as already noted above, Smt. Maya Niranjan could not have released the salary without approval of the Director and that is why she had to write

letters to the Director seeking approval for release of salary to the applicant. Assuming the argument to be correct, let us examine whether she sought approval of the Director.

In the letter dated 9.5.2000 addressed to the Director, there is no prayer for release of grant or for seeking approval for payment. In fact, in the said letter she has stated that:-

"Special Appeal kharij ho jane se Shri Puleshwar paricharak ko bina kaam ke Dinak 1.8.1994 se Shasan/Vibhag ko vetan dena padega jisese shaskiya dhan ka durupyog hoga."

and then she goes on to request as follows: -

"Chunki Prakaran dus varsh tak fargi janam tithi badha lane se sambandhit hai jisese shasan par unaavashyak vyay bhar badhega! Aisi istithi mein prakaran ke sambandh main aavashyak nirnaya lekar aavashyak karyawahi ke liye is karyalaya ko nirdesh dene ka kasht karein taki aap ke nirdesh ke anupalan mein aavashyak karyawahi ki ja sake!"

Again she wrote a letter dated 26.9.2000 where she reiterates that:-

"Ukt ke sambandh mein aapko avgat karaya ja chuka hai ki prakaran dus varsh tak fargi janam tithi badhakar lene se unaavashyak shaskiya vyay bhar badhne se sambandhit hai"

and in the prayer part she states :-

"atteh aapse anurodh hai ki ukte prakaran mein yathashighra aavashyak karyawahi/nirdesh dene ki kripa karein, jisese prakaran ke sambandh mein agrattar karyawahi ke ja sake!"

18. It is apparent from a perusal of the said two letters and the prayer quoted hereinabove, that there is absolutely no demand for release of grant or approval for release of salary of the applicant. It could also not be, because, as noted above, under the Act and the Rules the entire responsibility for payment of salary, including arrears, lay with Smt. Maya Niranjan. In fact, by the said two letters the applicant was goading the Director to defy and violate the order and judgment of this court. Even the two government orders and the Circular, on which she has strenuously placed reliance, cannot be a valid defence. The Government order dated 19th January, 1984relates to certain sanctions of 1982 to 1983. Its perusal shows that it relates to new claims made for the first time and does not relate to release of arrears or current salary in the facts of this case. The Government order dated 19th December, 2000 cannot be passed into service on the facts of this case, as the writ judgment in this case was delivered on 21.2.2000 and its directions were to be carried out within two months. The circular dated 21.4.1993 basically relates to exparte orders, however, it stipulates that where the order has to be complied forthwith, the grant may be sought after following the due procedure of law. It is admitted to Smt. Niranjan that the procedure is to get the salary bills from the management and after getting it verified from the Accounts Officer, the superior Authority may be approached for release of grant. But she did not follow this procedure or in fact did not make any effort to obtain the bills from the management. Nevertheless, the circular basically deals with those cases where a new demand is raised for the first time. In any view, none of the Government orders or the circular can over ride the powers of the statute. None of the aforesaid three documents prohibited Smt. Niranjan from exercising

her powers under the Statute on the directions of the court.

19. Assuming that she could not release the arrears of salary, but there is absolutely no reason given in her reply as to why atleast the current salary was not released within the time specified by the court, in spite of the fact that the management had reinstated the applicant on 30.7.2000 and the bills for the current salary was served in her office by the Principal through letters dated 26.8.2000 and 30.9.2000. These averments in the counter affidavit of the Principal has not been denied. A faint submission has been made that there was no direction of the writ court for payment of current salary. It is preposterous. There was clear direction for reinstatement, which was done by the management. Does it mean that he was to work without salary? The Apex Court in *Lakshman Prasad Agarwal v. Syed Mohammad Kareem* 2002 (47) A.L.R. 378 has aptly said, not only the letter but even the spirit of the order has to be seen. Even Section 3 of the Act says the salary has to be paid by the month even if there was no such direction.

Therefore, this argument of learned counsel for the applicant is also without any basis.

20. It is also alleged that she has sought permission to file the Special Leave Petition but that is only an averment and is not supported by any documents at all on the record. During arguments the court had specifically asked her counsel Sri Yadav, who after consulting Smt. Maya Niranjan, admitted that she never sought permission to file Special Leave Petition.

21. From the aforesaid fact, it would be clear that Smt. Maya Niranjan was holding the charge of District Inspector of Schools II, when the hearing in the aforesaid writ petition was going on and she was the authority who directed holding of the parallel enquiry with regard to the date of birth of the applicant. In the reply to the charges she has reiterated that in case the date of birth of the applicant was taken to be 1944, his initial appointment would have been illegal as the applicant would only have been 15 years old. This very argument was considered by the learned Single Judge but was rejected holding that the applicant was given a fresh regular appointment as a Peon in 1973 and which had remained unchallenged for about two decades and there was nothing on record to establish that the applicant was instrumental in alleged altering of his date of birth. The learned Judge found that in the Manager's Return in 1970-71 and onwards his date of birth has remained unchanged as 1944. The learned Judge has also taken into account the School leaving certificate which matched the date of birth as entered in the Service Book. However, in spite of these findings, Smt. Maya Niranjan is adamant in questioning the correctness of the judgment without challenging the same. As already noted above, she never approached the Director or the State Government for filing a Special Leave Petition against the judgment. She is also adamant in stating that date of birth which has been upheld by this court was forged, even though the finding is categorically otherwise.

22. The Apex Court in *Lakshman Prasad Agarwal* (supra) has propounded that while considering the question of disobedience or otherwise of an order not

only the letter of the order but also its sprit has to be considered by the court.

Further, in *Anil Ratan Sarkar and others v. Hirakh Ghosh* 2002 (48) A.L.R. 121, the Apex Court while dealing with a case where there was a clear direction, it held :

"The Contempt of Courts Act, 1971 has been introduced in the Statute Book for the purpose of securing the feeling of confidence of the people in general and for due and proper administration of justice in the country……"

It has further observed :
"……The Government is not a machinery for oppression and ours being a welfare State as a matter of fact be opposed thereto. It is the peoples welfare that the State is primarily concerned with and avoidance of compliance with a specific order of the court cannot be termed to be a proper working for a State body in terms of the wishes and aspiration of founding Father of our Constitution."

23. The Apex Court in the case of *Bank of Baroda v. Sadruddin Hasan Daya* A.I.R. 2004 S.C. (First Supplementary) 942, while considering the nature and power of contempt has held to the following effect:

"Contempt proceedings serve a dual purpose of vindication of the public interest by punishment of a contemptuous conduct and coercion to compel the contemnor to do what the law requires of him."

In the same case the court went on to hold that :

"One who played fraud on the court, he obstructs the course of justice and brings the judicial institution into disrepute."

In this very judgment, the Apex Court has reiterated the ratio laid down by it in re: Vinay Chandra Mishra (1995) 2 S.C.C. 584, has held :

"At the same time, the court should act with seriousness and severity where justice is jeopardized by a grossly contemptuous act of a party. If the judiciary is to perform its duties and functions effectively and true to the sprit with which they are sacredly entrusted, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very cornerstone of our Constitutional scheme will give way and with it will disappear the rule of law……"

In the midst of the hearing, which has taken place over several dates, the learned Additional Advocate-General appeared and sought time to argue, even though the arguments had nearly finished, in all fairness he was also given an opportunity. He has raised a new argument that the District Inspector of Schools II, did not have any financial powers and thus Smt. Maya Niranjan could not have complied with the order even with regard to current salary bills of August and September, 2000, inasmuch as, she had relinquished charge of the post of District Inspector of Schools II in August itself and only exercised administrative powers. It has also submitted by him that the Principal of the Institution had mischievously submitted the salary bills to her, though normally the salary bill has to go to the District Inspector of Schools, Allahabad and has relied upon a letter dated 30th October, 1998. To a pointed question as to by which Government Order the post of

District Inspector of Schools II was created he could not point to any document on record. As has been noted earlier the case of Smt. Maya Niranjan throughout was that the District Inspector of Schools II, was the competent authority to release the salary and now she has sworn another affidavit denying that. Learned counsel for the Principal has urged that the direction of the learned Single Judge and the Division Bench was to the District Inspector of Schools II, Allahabad and thus she had no other option but to send the salary bill to her. He has further submitted that during the pendency of this case Smt. Maya Niranjan has got her payment of salary stopped to pressurize her further. It is not denied by the learned Additional Advocate-General that the salary of the Principal of the institution has been stopped. Either of the two affidavits are false and in that case this court would pass another order for sending the matter to the concerned competent court for trying her for filing a false affidavit to her knowledge. In my opinion, the stand taken by the learned Additional Advocate-General is not supported by any documentary evidence on the record. Even assuming that she had only administrative powers, even then as there was direction of the writ court she should have taken prompt action when the bills were presented to her and in that case there was no necessity for her to have written the two letters mentioned above. Thus, there is no escape from the conclusion that Smt. Maya Niranjan with malafide attitude and defiance was creating hurdles in the compliance of the writ order.

24. Examining the conduct of Smt. Maya Niranjan from any angle leaves no room of doubt that she consciously and deliberately embarked upon a course to create hurdles in the execution of the order with reprehensive defiance. The main thrust of the argument has remained that since the order has been complied with now, the court should drop the proceedings. From the facts examined hereinabove, and also in the connected Contempt Petition No.522 of 2001 it is apparent that Smt. Maya Niranjan was the Officer who set the cat among the pigeons which resulted in willful defiance and non-compliance of the order for four and a half years, though it was to be complied within two months. There is no explanation by Smt. Maya Niranjan why at least the current salary was not released or any effort in that direction was made by her even though she held the office for eight months from the date of the order. In my opinion, on these facts there is no other option for the court except to hold her guilty.

25. Learned counsel for the applicant has urged that Smt. Maya Niranjan is a habitual offender and in several cases she has taken a defiant stand and large number of contempt petitions are pending against her. The court requested the counsel for Mrs. Maya Niranjan to file affidavit stating that she remembers about four contempt petitions which are pending, the details of which have been given in the affidavit. The court sent for those files and examined two of them. She has further said that she has sent letters to various officers to enquire about the details of others.

26. However, on the insistence of the counsel for the applicant, the court requested the Registry to supply information as to how many contempt petitions are pending against Smt. Maya

Niranjan. The Registry has submitted a list of at least 67 Contempt petitions which are pending against Smt. Maya Niranjan. Just to refresh her memory, it was shown to her. It spans her career.

27. During the course of hearing, when confronted with the number of contempt case filed against Smt. Niranjan, Sri Yadav explained to the court that throughout her career of 14 years, except for a couple of months she has remained posted at Allahabad in one or the other capacity, and since there is easy access for the teachers and employees of recognized institutions to the Allahabad High Court, the number of contempt cases are high. This would be casting aspersion on the Judges of this Court. Do Judges of this Court issue notices on contempt petition without application of mind or for mere asking ? I am sure, Sri Yadav of his own could not have said it, but was only offering the explanation given by Smt. Niranjan.

28. There is yet another facet which is noticeable. She has remained glued to Allahabad for the 14 years i.e. her entire career except for couple of months. She is quite regularly holding two posts at a time. From the writ proceedings it is clear that she was posted as District Inspector of Schools and also holding charge of Deputy Director Region. Again as Deputy Director of the Region she is holding the charge of Joint Director (Finance). She has to have some magic in her, to have weathered not only the change in so many governments, but to be landing with two pies in both hands, whoever rules at Lucknow.

These facts, though are staring at the court, but to draw any conclusions, may be presumptive, so better lay them where they are.

29. An apology has been given by Smt. Maya Niranjan but the same is conditional and does not appear to be genuine. A apology should be an act of real contrition or repentance. The apology lacks both. The Apex Court in *(Dr.) K.L. Saha v. Harishanker* (A.I.R. 1995 S.C. 2320) has held that there is no rule that the court is bound to accept even an unconditional apology. It has further went on to hold in *K.A. Mohammad v. Parsanand* (A.I.R. 1976 S.C. 454) and *Arun Kshettrapal v. High Court* (A.I.R. 1976 S.C. 1967) that the right to punish is not lost by acceptance of apology.

On all these facts, in my opinion, the apology is neither genuine, nor any repentance is shown. She has been in contempt in several other cases, spanning her entire career which reflects at her attitude towards court orders. The apology cannot be accepted.

30. It is settled law that fine is the rule and sentence is only in rare cases. The fact that even though Smt. Maya Niranjan was fresh from the indicting strictures passed against her by the writ court with regard to her conduct during hearing of the writ petition, has had no effect on her and she reiterates before the Director and the State Government that the enquiry ordered by her shows that the date of birth was incorrectly recorded and she spurs them into defying the order. In *Jaikwal v. State of U.P.* (A.I.R. 1984 S.C. 1374). Justice Thakkar very aptly observed:

"We are sorry to say, we cannot subscribe to the 'slap-say-sorry and

forget'; school of thought in the administration of contempt jurisdiction."

31. Considering her conduct and also taking into account that her career spanning more than a decade is marred the flame may engulf the entire lot. In my opinion, the court would be failing in its duty by merely imposing fine and if no deterrent punishment is awarded the very faith of the people in efficacy of the courts order would be shaken and it would send down a wrong message that defiance, even after stricture, costs only apology or fine. The court is conscious that Smt. Maya Niranjan is a young officer having put in only about more than a decade of service but her conduct is such that brooks no apathy as the public interest in due administration of justice and upholding the dignity of the courts, is more sacred than the career of an individual.

32. For the reasons given hereinabove, Smt. Maya Niranjan, opposite party no.1 is hereby sentenced to two months simple imprisonment and a fine of Rs.2000/- payable within four weeks from today to the Registrar General of this court. In case of default, she would further undergo one month's imprisonment.

Smt. Maya Niranjan, who is present in court should be taken in custody by the Court Officer of this court and sent to Jail through the Chief Judicial Magistrate, Allahabad forthwith to serve out the sentence.

With regard to filing of false affidavit, the court would pass a separate order. Application Allowed.

with more than sixty contempt cases and considering the fact that the State is the largest litigant and if in such cases the recalcitrant officers are handled with kid gloves it would act as spark to tinder and

Let a copy of this order be sent to the Chief Secretary, Government of Uttar Pradesh, Secretary, Education (Secondary), U.P., Lucknow with the hope that they would administratively deal with Smt. Maya Niranjan.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2004.

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Writ Petition No. 6160 of 2002

Neeraj Tyagi ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Santosh Tripathi
Sri Dharmendra Pratap Singh
Sri sanjay Goswamy

Counsel for the Respondents:
Sri Ashok Nath Tripathi
Sri B.K. Tripathi
Sri N.K. Sharma
A.G.A.
S.C.

Code of Criminal Procedure-Section 482 –Protest Petition–final report in offence under section 498-A, 323 I.P.C. ¾ Dowry Prohibition Act submitted- On Protest application without holding any Re-investigation simply on the basis of protest application as well as on final report –held– illegal without reinvestigation on without treating the protest application as complaint

impugned order passed by the Court, below can not sustain.

Held: Para 5

It also appears that the learned Chief Judicial Magistrate, Ghaziabad has not considered the investigation done by the Investigating Officer. In such circumstance, the learned Chief Judicial Magistrate, Ghaziabad was under obligation to send the matter for reinvestigation or to proceed further as a complaint case, as such the impugned order dated 30.5.1995 is illegal which is liable to be setaside. The order dated 10.9.2002 passed by learned Sessions Judge, Ghaziabad in Criminal Revision No. 445 of 2002 is also illegal order because he has also not considered the settled legal position. As such the order dated 10.9.2002 is also liable to be setaside. Therefore, the impugned order dated 30.5.1996 passed by learned Chief Judicial Magistrate, Ghaziabad and order dated 10.9.2002 passed by learned Sessions Judge, Ghaziabad in Criminal Revision No. 445 of 2002 are setaside.

(Delivered by Hon'ble Ravindra Singh. J.)

1. Heard Sri Santosh Tripathi, learned counsel for the petitioner, learned A.G.A and Sri A.N.Tripathi, learned counsel for the respondent no.2.

2. This writ petition has been filed against order dated 30.5.1996, passed by learned Chief Judicial Magistrate, Ghaziabad, by which the final report submitted by the Investigating Officer was rejected and the petitioner ahad been summoned to face trial for the offence punishable under Sections 498-A, 323 I.P.C. And ¾ Dowry Prohibition Act and the order dated 10.9.2002 passed by learned Sessions Judge, Ghaziabad in Criminal Revision No.445 of 2002, whereby the revision filed by the petitioner was dismissed.

It is contended by the learned counsel for the petitioner in which the final report was submitted by the Investigating Officer. Thereafter, respondent no.2 field a protest petition in the court of learned Chief Judicial Magistrate, Ghaziabad and filed affidavit of the witnesses. Learned Chief Judicial Magistrate, Ghaziabad relying upon the afidavits filed by the respondent no.2 had relied upon the protest petition of petitioner and affidavits filed by the witnesses and had taken cognizance against petitioner while rejecting the final report.

3. It is contended that from the perusal of the impugned order dated 30.5.1996, it is clear that the learned Magistrate had ignored the material collected by the Investigating Officer during investigation, as such he had not taken into account the investigation done by the Investigating Officer. It is contended that if the learned Magistrate was not satisfied with the investigation done by the Investigating Officer, the matter could have been sent for reinvestigation or if the learned Magistrate was relying upon the protest petition and the affidavits filed by the witnesses, the protest petition could have been treated as complaint case and the procedure prescribed for complaint case could have been followed. The learned Magistrate neither sent the matter for reinvestigation nor he treated this protest writ petition as complaint and not followed the procedure prescribed for a complaint case, as such the impugned

order is illegal which is liable to be setaside.

4. This contention is opposed by learned A.G.A. and Sri A.N. Tripathi, learned counsel for the respondent no. 2 by submitting that there is sufficient

5. From the perusal of the record as well as the impugned order dated 30.5.1996, passed by learned Chief Judicial Magistrate, Gaziabad, it appears that the learned Chief Judicial Magistrate, Ghaziabad had considered only protest petition, final report and the affidavit filed by respondent no. 2 and had taken cognizance against the petitioner and rejected the final report. It also appears that the learned Chief Judicial Magistrate, Ghaziabad has not considered the investigation done by the Investigating Officer. In such circumstance, the learned Chief Judicial Magistrate, Ghaziabad was under obligation to send the matter for reinvestigation or to proceed further as a complaint case, as such the impugned order dated 30.5.1995 is illegal which is liable to be setaside. The order dated 10.9.2002 passed by learned Sessions Judge, Ghaziabad in Criminal Revision No. 445 of 2002 is also illegal order because he has also not considered the settled legal position. As such the order dated 10.9.2002 is also liable to be setaside. Therefore, the impugned order dated 30.5.1996 passed by learned Chief Judicial Magistrate, Ghaziabad and order dated 10.9.2002 passed by learned Sessions Judge, Ghaziabad in Criminal Revision No. 445 of 2002 are setaside.

6. Considering all the facts and circumstances of the case learned Chief Judicial Magistrate, Ghaziabad is directed to pass a fresh order on police report in accordance with the provisions of the law within a period of two months from today.

material present on the record to show that the petitioner has committed the alleged offence and after considering all the facts and circumstances of the case, the learned Chief Judicial Magistrate, Ghaziabad has summoned the petitioner to face trial by rejecting the final report.

With this observation, this writ petition is finally disposed of.

Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2004

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 46983 of 2004

Amit Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Deepak Jaiswal
Sri R.L. Singh

Counsel for the Respondents:
C.S.C.

Dying in Harness Rules, 1974- Compassionate appointment-Petitioner accepted appointment on class IV post- Thus his claim for appointment under Dying in Harness Rules stood exhausted- Therefore, held, relief of his adjustment on class III post after already having availed benefit of compassionate appointment cannot be granted.

Held: Para 5

The Government Order dated 28.5.2004 would also not help the petitioner. It only provides that compassionate appointment should not be given on a higher post than the one on which the deceased employee was working. The same cannot be interpreted to mean that such an appointment should necessarily be made on a post equivalent to the one on which the deceased employee was working. Since the same only provides that such appointment cannot be given on a higher post, it would not mean that the dependent cannot be given appointment on a lower post. In the present case the petitioner was offered appointment on a class IV post and on his acceptance of the same, his claim for appointment under the Dying in Harness Rules stood exhausted. In the absence of any provision for re-considering his claim for appointment on a higher post when it falls vacant, in my view, the relief for adjustment on a class III post after already having once availed the benefit of appointment on compassionate ground, cannot now be granted.

Case law discussed:
(1994) 6 SCC 560
2000 (3) UPLBEC 2522

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

1. The father of the petitioner was Senior clerk (a Class III post) in Nagar Panchayat, Phoolpur, Azamgarh. He died in harness on 20.7.1998. The petitioner thereafter applied for appointment on compassionate ground under the Dying in Harness Rules, 1974. By an order dated 13.12.1999 the petitioner was given appointment on a class IV post as Peon in Nagar Panchayat Phoolpur, Azamgarh. The petitioner now claims that since he is qualified for being appointed on a class III post, which was not vacant at the time when he was given appointment on compassionate ground in the year 1999 and has now fallen vacant on 10.12.2003, he should be adjusted on such class III post. In support of his contention he relies on a Government Order dated 28.5.2004 wherein in Paragraph 3 it has been stated that the dependents of the employee who die in harness should not be appointed on a higher post than that on which the deceased employee was working. According to the petitioner the dependent of an employee thus ought to be given employment on such post on which the deceased employee was working if he has the requisite qualifications for appointment on such post. He thus contends that since the petitioner has the requisite qualification for appointment on

a class III post, he should be adjusted on such post which has now fallen vacant.

2. Having heard learned counsel for the petitioner as well as learned Standing counsel appearing for the State-Respondents and considering the facts and circumstances of this case, I do not find that the petitioner is entitled to the reliefs claimed in this writ petition.

3. The appointment on compassionate ground is given to tide away the sudden financial crisis which is suffered by the family members on account of death of the sole bread earner. Once such appointment has already been offered to, and accepted by, the dependent of such deceased employee, the purpose of giving such appointment on compassionate ground is achieved. Appointment on compassionate ground cannot be treated as an alternate source of claim adjustment on a class III post when it later falls vacant. The law does not provide for a person to be given the benefit of compassionate appointment more than once. As such no mandamus can be issued to the respondent authorities directing them to provide employment to the petitioner on a class III post when it falls vacant after four years of the petitioner having already availed the benefit of appointment under the Dying in Harness Rules. He would be entitled to promotion on such post, in accordance with law, or else if the post is to be filled up by direct recruitment, he can compete with other candidates and seek such appointment if he is otherwise found eligible and entitled for such appointment.

5. The Government Order dated 28.5.2004 would also not help the petitioner. It only provides that recruitment or employment. Such appointment is provided for a specific purpose which is to give immediate financial relief to the family members of the deceased employee.

4. Following the decision of the Apex court in **State of Rajasthan vs. Umrao Singh** 1994 (6) S.C.C. 560 a Division Bench of this Court in the case of **Dinesh Chandra Sharma vs. District Inspector of Schools, Meerut** 2000(3) UPLBEC 2522 has held that no person is entitled to claim the benefit of Dying in Harness Rules more than once. In the present case, admittedly there was no class III post vacant at the time when appointment had been given to the petitioner on a class IV post. The petitioner having once accepted such appointment on compassionate ground, cannot now after more than four years

compassionate appointment should not be given on a higher post than the one on which the deceased employee was working. The same cannot be interpreted to mean that such an appointment should necessarily be made on a post equivalent to the one on which the deceased employee was working. Since the same only provides that such appointment cannot be given on a higher post, it would not mean that the dependent cannot be given appointment on a lower post. In the present case the petitioner was offered appointment on a class IV post and on his acceptance of the same, his claim for appointment under the Dying in Harness Rules stood exhausted. In the absence of any provision for re-considering his claim for appointment on a higher post when it falls vacant, in my view, the relief for adjustment on a class III post after already having once availed the benefit of

appointment on compassionate ground, cannot now be granted.

The writ petition is, accordingly, dismissed. No order as to cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2004

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 6104 of 2003

Ram Singh ...Petitioner
Versus
U.P. State Road Transport Corporation and others ...Respondents

Counsel for the Petitioner:
Sri O.N. Tripathi
Sri A.K. Verma

Counsel for the Respondents:
Sri M.P.S. Niranjan
Sri C.P. Tripathi
Sri Sameer Sharma
S.C.

Constitution of India, Article 226-Writ Petition to quash impugned order passed by Managing Director of Corporation denying petitioner relief of inclusion of period during which he worked as work charge employee for purposes of payment of pension-held, petitioner having opted for Employees Provident Fund Scheme and having accepted the amount under said scheme, cannot after more than two decodes, be permitted to switch over to pension scheme.

Held: Para 6

In the case of V.K. Ramamurthy vs. Union of India (1997) 1 UPLBEC 439 the Apex Court has held that once an employee has opted for the Employees Provident Fund Scheme and has withdrawn the entire amount, then such employee cannot be permitted to switch over to the pension scheme. The ratio of the said decision would squarely apply to the facts of this case. The petitioner herein having opted for the Employees Provident Fund Scheme and having accepted the amount under the said scheme, cannot now, specially in this case after more than two decades, be permitted to switch over to the pension scheme. The offer of refund of the amount already paid under the Employees Provident Fund Scheme also cannot be accepted.

Case law discussed:
(1997) 1 U.P.L.B.E.C. 439 (SC)

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

1. I have heard Sri O.N.Tripathi, learned counsel for the petitioner as well as Sri Sameer Sharma, learned counsel appearing on behalf of the Respondents and have perused the record. Counter and rejoinder affidavits have been exchanged and with the consent of the learned counsel for the parties this writ petition has been heard and is being finally disposed of at this stage.

2. It is the admitted case that the petitioner retired from service in the year 1979. It was for the first time in the year 2001 he filed an application to the respondent-authorities for inclusion of the period during which he worked as a work-charge employee for the purposes of payment of pension. Thereafter he approached this Court by filing Civil Misc. Writ petition No. 27784 of 2002 which was disposed of by this court on 23.7.2002 with a direction to the Respondent-Corporation to decide his representation dated 8.11.2001, in accordance with law. By the impugned

order dated 30.11.2002 the representation of the petitioner has been disposed of by the Managing director of the Corporation and the petitioner has been denied the relief of inclusion of the period during which he worked as work-charge employee for the purposes of payment of pension.

3. This writ petition has now been filed with a prayer to quash the order dated 30.11.2001 passed by Managing Director, U.P. State Road Transport Corporation, Lucknow, Respondent no.2, and also for a direction to the respondents to compute the period of work-charge i.e. from 1.10.1947 to 31.3.1961 for the purposes of preparation of the pension of the petitioner and make payment of arrears along with interest to the petitioner.

the pension scheme. During the period when the petitioner worked as work-charge employee under the State Transport Department, he had opted for the Employees Provident Fund Scheme and had also received the provident fund for the said period. The said factual position is not denied by the learned counsel for the petitioner. He has only submitted that his client is prepared to refund the entire amount of provident fund which has been paid to him for the period 1.10.1947 to 31.3.1961 and he should be granted pension and the arrears along with interest after including the said period of 1.10.1947 to 31.3.1961 for the said purposes.

6. In the case of **V.K. Ramamurthy vs. Union of India** (1997) 1 UPLBEC 439 the Apex Court has held that once an employee has opted for the Employees

4. Sri Tripathi, learned counsel for the petitioner, has not been able to point out any legal ground on the basis of which he claims that the said period should be included for the purposes of payment of pension to the petitioner. He merely relies on the decision of the Labour Court in the case of Jwala Dutt Tripathi where a direction had been issued to the Respondent-Corporation to include the period during which said Jwala Dutt Tripathi worked as work-charge employee for the purposes of payment of pension.

5. Sri Sameer Sharma, learned counsel appearing on behalf of the Respondents, submitted that the Corporation has only one scheme which is Employees Provident Fund Scheme. However, before the Corporation came into existence, the State Transport Department had two schemes, namely, Employees Provident Fund Scheme and Provident Fund Scheme and has withdrawn the entire amount, then such employee cannot be permitted to switch over to the pension scheme. The ratio of the said decision would squarely apply to the facts of this case. The petitioner herein having opted for the Employees Provident Fund Scheme and having accepted the amount under the said scheme, cannot now, specially in this case after more than two decades, be permitted to switch over to the pension scheme. The offer of refund of the amount already paid under the Employees Provident Fund Scheme also cannot be accepted.

7. For the foregoing reasons the petitioner is not entitled to any relief. This writ petition is, accordingly, dismissed. No order as to cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2004

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 25950 of 2003

Govind Narayan Shukla ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri M.P. Singh

Counsel for the Respondents:
Sri Ashok Kumar Srivastava
S.C.

U.P. Cooperation Societies Employees' Service Regulation, 1975-Reg. 84 (1) (c) to (g), 87-Dismissal-Appointment of petitioner as clerk in District Cooperation Federation in 1972-In 2002 he was instructed to run Wheat Purchase Centre-on certain irregularities being found, order of dismissal passed by Incharge Secretary-Writ against-held, admittedly, order of dismissal from service was passed under Regs. 84(1) (e) to (g)-as such in absence of prior concurrence of Board, held, no such order could have been passed under Reg. 87 of 1975 Regulations-Since impugned order was passed in violation of Regulations, same was liable to be set aside.

Held: Para 4

Before going into the grounds raised which are based on factual controversies, I shall first consider this case on its legal aspects. In the writ petition a clear assertion has been made that before passing of the impugned order of dismissal the respondent-authorities had not obtained the prior concurrence of the Board. There is no specific denial of this assertion in the counter affidavit. Admittedly the order of dismissal from service has been passed under Regulation 84 (1) (e) to (g) and as such in the absence of the prior concurrence of the Board no such order could have been passed as provided under Regulation 87 of 1975 Regulations. Thus, this writ petition deserves to be allowed only on this ground as the order has been passed in violation of the provisions of the Regulations.

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

1. The petitioner was appointed as a Clerk in the District Cooperative Federation Ltd., Kanpur Nagar in the year 1972. Thereafter in the year 2002 he was instructed to run Wheat Purchase Centre at Rampur in Kanpur Nagar. On certain irregularities having been found in the working of the petitioner, the respondent No. 5, Sushil Kumar Tiwari, who was the Incharge Secretary of the District Cooperative Federation Ltd., Kanpur Nagar, passed order of dismissal of the petitioner on 20.5.2003. Aggrieved by the said order the petitioner has filed this writ petition for quashing the dismissal order dated 20.5.2003 as well as for a direction to the respondents to treat the petitioner in service and pay him his salary month by month and also arrears of salary with effect from 1.1.1993.

2. I have heard Sri M.P.Gupta, learned counsel appearing for the petitioner and Sri Ashok Kumar Srivastava, learned counsel appearing for the contesting respondent-District Cooperative Federation and have perused the record.

3. The main grounds raised by the learned counsel for the petitioner

challenging the impugned order can be summarized as under:-

(i) the impugned order has been passed by respondent No. 5 as Incharge Secretary of the Federation. The Respondent no.5 having been appointed as Incharge Secretary on 28.2.2002, as per Rule 127 of the U.P. Cooperative Societies Rules, 1968 read with Regulation 5 of the U.P. Cooperative Societies Employees' Service Regulations, 1975, on expiry of the period of six months, i.e. on 28.8.2002, the said respondent No. 5 ceased to remain as Incharge Secretary and thus the impugned order passed by him on 20.5.2003 was without jurisdiction.

(ii) the respondent No. 6 not being an employee of the Federation (as he was an Advocate) was not competent to be appointed as enquiry officer. Further, in view of the fact that the petitioner had raised objections regarding his impartiality in conducting the enquiry, he ought to have been changed. As such the entire enquiry proceedings, on the basis of which the impugned order has been passed, was bad in law.

(iii) the Committee of Management of the District Cooperative Federation Ltd. was the appointing authority of the petitioner and as such it was only by the resolution of the Committee of Management that the petitioner could have been dismissed from service and not by the order of the Incharge Secretary; and

(iv) under Regulation 87 of the Regulations of 1975, prior concurrence of respondent No. 2 U.P. Cooperative Institutional Service Board ought to have been obtained before passing of the dismissal order and in the absence of the same, the impugned order is liable to be set aside.

4. Before going into the grounds raised which are based on factual controversies, I shall first consider this case on its legal aspects. In the writ petition a clear assertion has been made that before passing of the impugned order of dismissal the respondent-authorities had not obtained the prior concurrence of the Board. There is no specific denial of this assertion in the counter affidavit. Admittedly the order of dismissal from service has been passed under Regulation 84 (1) (e) to (g) and as such in the absence of the prior concurrence of the Board no such order could have been passed as provided under Regulation 87 of 1975 Regulations. Thus, this writ petition deserves to be allowed only on this ground as the order has been passed in violation of the provisions of the Regulations.

5. There is an assertion in the writ petition that there was no resolution by the Committee of Management before passing of the impugned order. In the counter affidavit, although there is denial of this fact but no resolution of the Committee of Management has been filed. Sri Ashok Kumar Srivastava, learned counsel appearing for the contesting respondent has stated that such resolution had been passed on 17.5.2003 but due to inadvertence could not be placed on record alongwith the counter affidavit. Be that as it may, since I have already held that the impugned order could not have been passed without prior concurrence of the Board, which had not been obtained in the present case, I am not inclined to go into this question of fact as to whether the resolution of the

Committee of Management had been actually passed or not. This writ petition deserves to be allowed only on the aforesaid ground itself that prior concurrence of the Board had not been obtained before the passing of the dismissal order.

6. In view of the statement made by Sri Ashok Kumar Srivastava, learned counsel for the contesting respondent that since the writ petition is being allowed on technical ground, the respondent-authorities may be permitted to initiate de novo proceeding against the petitioner and fresh enquiry may be permitted to be conducted in accordance with law on the basis of which suitable order may be passed, I am not inclined to go into the question as to whether the Enquiry Officer was properly appointed or not.

7. This writ petition is, accordingly, allowed. The impugned order dated 20.5.2003 is quashed. The petitioner shall be entitled to all consequential benefits. He shall be reinstated in service and be paid his salary alongwith arrears of salary to which he may be found entitled to under law.

8. Having regard to the facts and circumstances of this case, if the Respondent-Federation is so advised, it shall be open to them to take suitable action in accordance with law only after conducting fresh enquiry as per the applicable Rules and Regulations, in which the petitioner shall be permitted to participate, and the Federation may pass appropriate fresh orders on the basis of the said enquiry report.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 8060 of 1999

Navin Chandra ...Petitioner
Versus
Basic Shiksha Adhikari, Etah and others. ...Respondents

Counsel for the Petitioner:
Sri L.N. Misra
Sri Anil Bhushan

Counsel for the Respondents:
Sri Anupam Shukla
Sri P.K. Sharma
S.C.

U.P. Junior High School (Payment of Salary to Teachers and other Employees Act, 1978-Appoint of petitioner Assistant Teacher on vacancy caused by removal of Smt. Sudha Yadav-Salary withheld on objection by Accounts officer-matter referred to D.E. (Basic)-Rejection of petitioner's claim for payment of salary by Director of Education (Basic) on ground that under High Courts order one Ram Prakash was entitled to be adjusted against vacancy caused one termination of services of Smt. Sudha Yadav-Writ against-held, impugned orders passed by D.E. (Basic) and Basic Shiksha Adhikari are illegal as they are based on misconception of fact that Sri Ram Prakash was liable to adjusted against vacancy caused due to removal of Smt. Susha Yadav-held, said vacancy is a independent vacancy-It has nothing to do with payment of salary to Sri Ram Prakash, nor right of petitioner can be defected on ground that Ram Prakash should be adjusted against vacancy caused on removal of Sudha Yadav-impugned order quashed.

Held: Para 7

In view of the above the order passed by the Director of Education (Basic) dated 29.12.1998 and the order dated 01.01.1999 passed by the Basic Shiksha Adhikari are illegal inasmuch as they are based on misconception of fact that Sri Ram Prakash was liable to be adjusted against the vacancy which has been caused due to removal of Srimati Sudha Yadav. It is held that the vacancy which has been caused due to removal of Srimati Sudha Yadav is an independent vacancy which has nothing to do with the payment of salary to Sri Ram Prakash nor the right of the petitioner can be defeated on the ground that Ram Prakash should be adjusted against the vacancy caused due to removal of Srimati Sudha Yadav.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri Anil Bhushan on behalf of the petitioner, Standing Counsel on behalf of respondents 1, 3 and 4, Sri Anupam Shukla and Pramod Kumar Sharma on behalf of respondent no. 2.

2. The institution by the name of Junior High School, Rustamgarh, district Etah, is a recognized institution under the provisions of the Basic Education Act and is also on the grant-in-aid list of the State. The provisions of the U.P. Junior High School (Payment of Salary to Teachers and other Employees) Act, 1978 are fully applicable to the said institution. The said institution was taken on the grant-in-aid list of the State on 02.11.1985 w.e.f. 1984 and at the relevant time one post of Principal, 5 posts of teachers, clerk and class IV employees were duly sanctioned for the said institution. According to the petitioner the services of one Srimati Sudha Yadav who was working as Assistant Teacher in the institution and was being paid salary under the grant-in-aid upto the year 1996, were terminated by the Committee of Management the resolution whereof was approved by the Zila Basic Shiksha Adhikari by order dated 22.11.1996. In the vacancy so caused the management applied for permission to make fresh appointment, after the permission was granted necessary advertisement was made and a selection committee was constituted. The petitioner applied for the said post in pursuance of the said advertisement. The selection committee found the petitioner to be most suitable and accordingly recommended the petitioner for appointment. Relevant papers for approval of the Zila Basic Shiksha Adhikari were forwarded by the Committee of Management. The Zila Basic Shiksha Adhikari vide order dated 06.02.1997 approved the said selection and granted permission for appointment of the petitioner. The Committee of Management issued appointment letter dated 07.02.1997 in favour of the petitioner. In pursuance of the said appointment letter the petitioner joined on 08.02.1997 and since then is continuously working in the institution as Assistant Teacher. The salary bill submitted by the management of the institution in respect of the petitioner was not cleared and an objection was raised by the Accounts Officer, respondent no. 4. The matter as such was referred to the Director of Education (Basic). The Director of Education (Basic) vide order dated 19.12.1998 turned down the claim of the petitioner for payment of salary on the ground that under the orders of this Court one Sri Ram Prakash was entitled to be adjusted against the vacancy which has been caused due to termination of services

of Srimati Yadav in view of the fact that there were only 5 sanctioned posts of Assistant Teacher and if payment of salary is made to the petitioner it may amount to sanction of an additional post of Assistant Teacher. In compliance of the aforesaid order the Basic Shiksha Adhikari refused to grant permission for payment of salary to the petitioner vide letter dated 01.01.1999 with the remark that the vacancy which has been caused due to resignation of Srimati Sudha Yadav is to be adjusted by the appointment of Sri Ram Prakash. It is against the aforesaid order that the present writ petition has been filed.

3. It is contended on behalf of the petitioner that Sri Ram Prakash had filed Writ Petition No. 14467 of 1996 with the allegation that he was appointed as Assistant Teacher in the institution in the year 1987. When the institution was taken on the grant-in-aid list his name was wrongly left out from being included as valid teacher for the purposes of payment of salary under the U.P. Junior High School (Payment of Salary to Teachers and other Employees) Act, 1978. The writ petition filed by Sri Ram Prakash was allowed by means of judgment and order dated 25.08.1997and it was held that Sri Ram Prakash is entitled to payment of salary from 1984 till date as well as future salary also. The operative portion of the order passed by this Court in the said writ petition is as under:--

"In the result this petition succeeds and is allowed. Opposite party no. 2 is directed to pay salary of petitioner from 1984 till date and continue paying the same."

4. In this back ground it is submitted that admittedly Sri Ram Prakash was paid salary under the orders of this Court with effect from 1984 i.e. from the date the institution was taken on the grant-in-aid list and further during this period Srimati Sudha Yadav was also permitted to work as Assistant Teacher and was also paid her salary under the grant-in-aid. It is, therefore, submitted that continuance of Sri Ram Prakash as Assistant Teacher and payment of salary to him under the orders of this Court has nothing to do with the vacancy which has been caused due to removal of Srimati Sudha Yadav. According to the petitioner the orders passed by the Director of Education (Basic) and the Basic Shiksha Adhikari dated 29.12.1998 and 01.01.1999 respectively are based on misconception of fact in so far as they direct adjustment of Ram Prakash against the vacancy caused by the removal of Srimati Sudha Yadav. Reference may also be had to the fact that one Sri Dharam Pal Singh whose name was included in the list of teachers entitled for payment of salary after the institution was brought on the grant-in-aid list has left the institution and, therefore, adjustment, if any, of Ram Prakash could be made against the vacancy caused due to Sri Dharam Pal having left the institution.

5. On behalf of the State it is submitted that the orders passed by the Director of Education (Basic) dated 29.12.1998 and that passed by the Basic Shiksha Adhikari in compliance thereof dated 01.01.1999 have been issued in compliance of the judgment and order dated 25.08.1997 passed in the writ petition filed by Ram Prakash referred to above. There is no illegality in the said

orders and the writ petition is liable to be dismissed.

6. I have heard learned counsel for the parties and gone through the record. It is an undisputed fact that the claim set up by Ram Prakash for payment of salary under the grant-in-aid was based on his right to be included in the list of teachers entitled for payment of salary under the U.P. Junior High School (Payment of Salary to Teachers and other Employees) Act, 1978, after the institution was brought on the grant-in-aid list. The said claim of Sri Ram Prakash has been upheld by this Court vide judgment and order dated 25.08.1997 passed in Writ Petition No. 14467 of 1996. The question of adjustment of Sri Ram Prakash in such circumstances against the vacancy which was caused due to resignation of Srimati Sudha Yadav is totally uncalled for and cannot be the basis for refusing salary to the petitioner. Payment of salary to 5 Prakash in the aforesaid writ petition. In the opinion of the Court the payment of salary to Sri Ram Prakash in such circumstances is not at all dependent upon the post which has fallen vacant due to removal of Srimati Sudha Yadav and further there is no occasion for adjustment of Sri Ram Prakash against the vacancy which has been caused due to removal of Smt. Sudha Yadav.

7. In view of the above the order passed by the Director of Education (Basic) dated 29.12.1998 and the order dated 01.01.1999 passed by the Basic Shiksha Adhikari are illegal inasmuch as they are based on misconception of fact that Sri Ram Prakash was liable to be adjusted against the vacancy which has been caused due to removal of Srimati Sudha Yadav. It is held that the vacancy teachers was being made without including the name of Sri Ram Prakash when the institution was taken on grant-in-aid which was a cause for Sri Ram Prakash to approach this Court by means of writ petition referred to above. Therefore, if this Court has upheld the claim of Sri Ram Prakash for being included in the list of teachers entitled for payment of salary from the grant-in-aid fund, it necessarily means that the respondents were obliged under law to sanction one more post of Assistant Teacher for payment of salary to Sri Ram Prakash as at the relevant time Sudha Yadav with other teachers was already on the list of approved teachers entitled for salary under grant-in-aid. It is not in dispute between the parties that Srimati Sudha Yadav has continued as Assistant Teacher in her independent right upto the year 1996 and her continuance was against the post which was not dependent in any manner on the claim set up by Ram which has been caused due to removal of Srimati Sudha Yadav is an independent vacancy which has nothing to do with the payment of salary to Sri Ram Prakash nor the right of the petitioner can be defeated on the ground that Ram Prakash should be adjusted against the vacancy caused due to removal of Srimati Sudha Yadav.

8. In view of the aforesaid the writ petition is allowed. The order passed by the Director of Education (Basic) dated 29.12.1998 and the order dated 01.01.1999 passed by the Basic Shiksha Adhikari are quashed. The Zila Basic Shiksha Adhikari is directed to re-consider the claim of the petitioner for payment of salary strictly in accordance with the observations made hereinabove, within a period of one month from the

date a certified copy of this order is filed before him.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2004

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 48967 of 2004

M/s U.P. State Road Transport Corporation ...Petitioner
Versus
Ram Prakash and others ...Respondents

Counsel for the Petitioner:
Sri Samir Sharma

Counsel for the Respondents:
S.C.

Payment of Gratuity Act, 1972-S. 7 (7) read with Limitation Act, 1963-Ss. 29 (2) and 5-Delay of two years and one month in filing appeal against order passed for payment of gratuity-Dismissal-Writ Petition-held, S. 29(2) of Limitation Act read with S. 7 (7) of payment of Gratuity Act makes clear that extension under S. 5 of Limitation Act is permissible only for a period of sixty days-Extension beyond 60 days impliedly excluded-by virtue of S. 29 (2) of Limitation Act readwith S. 7 (7) of Gratuity Act, Appellate Authority has no power to extend Limitation beyond sixty days.

Held: Para 7

By a conjoint reading of Section 29(2) of the Limitation Act read with Section 7(7) of the Act, it is clear that extension as contemplated under Section 5 of the Limitation Act is permissible only for a period of sixty days. The extension of the limitation beyond sixty days has to be read as excluded by necessary implication. By virtue of Section 29(2) of the Limitation Act read with Section 7(7) of the Act it has to be learn that there is no power with the appellate authority to extend the limitation beyond sixty days.

Case law discussed:
AIR 1991 SC 2156

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

Heard counsel for the petitioner.

1. These two writ petitions raise similar questions and are being decided by this common order. It is sufficient to note facts of Writ Petition No. 48967 of 2004 for disposal of both the writ petitions.

2. By the writ petition prayer has been made for quashing the orders dated 18th October, 2001 passed by Controlling Authority.

3. On an application filed by the respondents under the Payment of Gratuity Act, 1972 (hereinafter referred to as the Act), an order was passed by the Controlling Authority on 18th October, 2001. Against the said order an appeal was filed by the petitioner on 17th December, 2003 i.e., after two years and one month. The appellate authority has dismissed the appeal on the ground that according to Section 7(7) of the Act, the appellate authority has no jurisdiction to condone the delay of more than 120 days.

4. Learned counsel for the petitioner contended that Section 5 of the Limitation Act will be applicable and the appellate authority will have jurisdiction to condone the delay in filing the appeal even beyond 120 days by aid of Section 5 of the Limitation Act.

5. I have considered the submissions and perused the record.

Section 7 (7) of the Act provides appeal against an order passed under sub-section (4) within sixty days from the date of receipt of the order. Section 7 (7) is extracted below:-

*"**7. Determination of the amount of gratuity.**-(1)*
……
……
(7) Any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf.
Provided that the appropriate Government or the appellate authority, as the case may be, may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.
[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount.]"

The first proviso to sub-section (7) of Section 7 of the Act provides that if the appellate authority is satisfied that the appellant was prevented by sufficient cause from preferring appeal within the said period of sixty days, he can extend the said period by a further period of sixty days. From a perusal of the said provision, it is thus clear that power to condone the delay is only for a further

period of sixty days. Sub-section (7) of Section 7 of the Act, thus, provides that provision does not empower condonation of delay beyond 60 days. In the present case appeal was filed beyond more than two years and according to provisions of sub-section (7) of Section 7 first proviso, the appellate authority does not have power to condone the delay beyond sixty days.

6. Learned counsel for the petitioner has submitted that with the aid of Section 5 of the Limitation Act, the appellate authority can condone the delay. Section 5 of the Limitation Act provides for extension of prescribed period in certain cases. Section 5 of the Limitation Act provides that appeal may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period. Section 29 of the Limitation Act which is relevant for the purpose is extracted below:-

*"**29. Savings**.-(1) Nothing in this Act shall affect Section 25 of the Indian Contract Act, 1872.*

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only insofar as, and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of "easement" in Section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882, may for the time being extend."

7. Section 29(2) of the Limitation Act provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 shall apply only insofar as, and to the extent to which they are not expressly excluded by such special or local law. By a conjoint reading of Section 29 (2) of the Limitation Act read with Section 7 (7) of the Act, it is clear that extension as contemplated under Section 5 of the Limitation Act is permissible only for a period of sixty days. The extension of the limitation beyond sixty days has to be read as excluded by necessary implication. By virtue of Section 29 (2) of the Limitation Act read with Section 7 (7) of the Act it has to be learn that there is no power with the appellate authority to extend the limitation beyond sixty days. The apex Court in AIR 1991 S.C. 2156; ***Vinod Gurudas Raikar Vs. National Insurance Co. Limited and others*** had occasion to consider the provisions of Section 217 and 166 of Motor Vehicle Act, 1988. The limitation as prescribed

was six months from the date of accident. Section 166(3) of Motor Vehicle Act, as enacted, provided:-

*"**166. Application for compensation**-(1) ....*
.....
.....
(3). No application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident:
Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months but not later than twelve months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

8. In the case before the apex Court accident took place on 22.1.1989. The Motor Vehicle Act, 1988 came into force with effect from 1st July, 1989. The period of limitation for filing a claim petition both under the old Act and the new Act being six months, expired on 22.7.1989. The claim petition was filed belatedly on 15.3.1990 with a prayer for condonation of delay. The apex Court considering the provisions of Section 166(3) of Motor Vehicle Act held that the limitation has to be governed by the new law and condonation being permissible only for a maximum period of one years, the application could not have been entertained for condonation after one year from the date of accident. The order of the Claims Tribunal dismissing the application as barred by time was upheld by the apex Court. The apex Court in the said judgment held that question of condonation of delay must be governed by new law. The provisions of Section 166(3) of Motor Vehicle Act which was considered by the apex Court in the said judgment is almost similar to provisions of Section 7(7) of the Act which is under consideration in the present case. The judgment of the apex Court as mentioned above, fully supports the view which is being taken in this case.

9. In view of foregoing discussions, it is clear that the appeal filed by the petitioner was rightly dismissed by the appellate authority. No grounds have been made out to interfere with the impugned orders.

The writ petitions lack merit and are summarily rejected.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 32167 of 2004

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

Counsel for the Petitioner:
Sri S.M. Mishra

Counsel for the Respondents:
Smt. Sunita Agrawal

Deen Dayal Upadhyaya Gorakhpur University Rules for Admission to B.Ed. Course-Entrance Examination for B. Ed. Course-claim of 15% weightage marks for admission by petitioner on basis of N.S.S. Certificates signed issued by principal of Institution and counter signed by Project officer-refusal of admission by University on ground that petitioner not entitled to any weightage marks-Admittedly petitioner had not put

in 240 hours of service of NSS-Therefore, she does not fulfill essential qualification for grant of any weightage marks-Further, under Clause providing for weightage marks, there is a specific endorsement that certificate must be issued by University and Counter signed by Vice Chancellor-petitioner, held, not entitled to an weightage marks.

Held: Para 6 & 7

From the conditions so reproduced, it is apparently clear that a candidate who has completed 240 hours of service with attendance in two special camps of N.S.S. alone is entitled to 15 weightage marks. A candidate having rendered 240 hours of service with attendance in one special camp of N.S.S. is entitled to 10 weightage marks while a candidate with service of 240 hours only is entitled to 5 weightage marks. It is clear from the aforesaid provisions that before any weightage can be awarded by a candidate it is mandatory that he must have completed at least 240 hours of service in N.S.S. The number of marks may vary having regard to the number of special camps attended by the candidate but the requirement of 240 hours service is a condition precedent for any weightage marks being awarded in all the three categories. From the certificate which has been enclosed by the petitioner it is apparent that the petitioner has been certified to have put in 120 hours of service in Rashtriya Sewa Yojana (NSS). In view of the aforesaid it is admitted position that the petitioner has not put in 240 hours of service in NSS and therefore she does not fulfill the essential qualifications for grant of any weightage marks. Further the certificate which has been enclosed by the petitioner along with the application form has admittedly been signed/issued by the Principal of the institution and counter signed by the Project Officer. Under the clause providing for weightage marks there is a specific endorsement that the certificate must be issued by the University and counter signed by the Vice Chancellor. The certificate produced by the petitioner does not satisfy the requirement of the aforesaid clause also.

In view of the above there is no illegality or infirmity in the action of the University refusing admission to the petitioner in B.Ed. course. The writ petition is accordingly dismissed. No order as to costs.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri S. K. Mishra Advocate on behalf of the petitioner, Srimati Sunita Agarwal Advocate on behalf of respondent no. 1 and Standing Counsel on behalf of respondent no. 1.

2. Purnima Singh, the petitioner, claims to have appeared in the Entrance Examinations conducted by the Deen Dayal Upadhyaya Gorakhpur University, Gorakhpur for admission to B.Ed. course for the academic session 2004-05. The result of the said examination was declared on 212.07.2004. The petitioner having cleared the entrance examination was issued a call letter for councilling and for that purpose she was required to appear at University Campus on 03.08.2004. On 03.08.2004 the Head of B. Ed. Department refused admission to the petitioner in B. Ed. course on the ground that the certificates of Rashtriya Sewa Yojana (National Service Scheme) (hereinafter referred to as N.S.S.) enclosed by her for the purposes of claiming weightage of 15 marks because of her having worked for more than 240 hours under the National Service Scheme with at least two special camps, was factually incorrect and therefore she is not entitled to 15 weightage marks which have been wrongly awarded to her. It was also pointed out that the N.S.S. certificate

enclosed by the petitioner was not counter signed by the Vice Chancellor of the University nor it has been issued by the University. Feeling aggrieved by the aforesaid action of the respondents the petitioner has filed the present writ petition for a writ of mandamus directing the respondents to admit the petitioner in B.Ed. course.

3. A counter affidavit has been filed on behalf of the University. Along with the counter affidavit the application form submitted by the petitioner has been enclosed whereunder she has claimed 15 weightage marks because of her being possessed of the certificate of N.S.S. The respondents have also brought on record copy of the rules for admission which were enclosed as part of the application form and circulated to all the students concerned, on the basis whereof it is contended that the petitioner is not entitled to any weightage marks and therefore it is asserted that the petitioner has rightly been refused admission in B.Ed. course.

4. For the purposes of appreciating the controversy raised in the writ petition following facts are retrial. It is an undisputed fact that in the application form the petitioner had claimed 15 weightage marks because of her being possessed of N.S.S. certificate. A copy of the N.S.S. certificate enclosed by the petitioner along with her application form and relied upon by the petitioner has been filed as annexure-6 to the writ petition, which reads as follows:--

प्रमाण-पत्र

प्रमाणित किया जाता है कि पूर्णिमा सिंह पुत्री श्री रणविजय प्रताप सिंह ने इस महाविधालय से राष्ट्रीय सेवा योजना की द्वितीय इकाई में वर्ष २००१.२००२ एंव २००२.२००३ में भाग लिया। इनका कार्य १२० घण्टें तक हुआ। दस दिवसीय विशेप शिविर दस दिनों तक काम किया।

हस्ताक्षर
प्राचार्य
दीनानाथ पाण्डेय राजकीय महिला स्नातकोत्तर महाविधालय,देवरिया।

कार्यक्रम अधिकारी रा० से० योजना

मोहर
प्राचार्य
दीनानाथ पाण्डेय राजकीय महिला स्नातकोत्तर महाविधालय,देवरिया।

5. For the purposes of determining as to whether in view of the said certificate the petitioner is entitled to 15 weightage marks as claimed by her or not reference may be had to the relevant clauses of the rules applicable for admission to B.Ed. course as notified by the University, copy whereof has been enclosed as annexure CA-2 to the counter affidavit filed by the University, the relevant portions whereof are as follows:--

राष्ट्रीय सेवा योजना के अन्तर्गत २४० घण्टे की सेवा एंव दो या दो से अधिक विशेप शिविर में भार लेने वाले अभ्यर्थी को १५ अंक

या

राष्ट्रीय सेवा योजना के अन्तर्गत २४० घण्टे की सेवा एंव एक विशेप शिविर में भार लेने वाले अभ्यर्थी को १० अंक

या

राष्ट्रीय सेवा योजना के अन्तर्गत २४० घण्टे की सेवा करने वाले अभ्यर्थी को ५ अंक

राष्ट्रीय सेवा योजना का प्रमाण-पत्र विश्वविधालय द्वारा प्रदत्त एंव कुलपति द्वारा प्रतिहस्ताक्षरित होने पर ही मान्य होगा।

6. The applicability of the aforesaid conditions has not been disputed on behalf of the petitioner. From the conditions so reproduced, it is apparently clear that a candidate who has completed 240 hours of service with attendance in two special camps of N.S.S. alone is entitled to 15 weightage marks. A candidate having rendered 240 hours of service with attendance in one special

camp of N.S.S. is entitled to 10 weightage marks while a candidate with service of 240 hours only is entitled to 5 weightage marks. It is clear from the aforesaid provisions that before any weightage can be awarded by a candidate it is mandatory that he must have completed at least 240 hours of service in N.S.S. The number of marks may vary having regard to the number of special camps attended by the candidate but the requirement of 240 hours service is a condition precedent for any weightage marks being awarded in all the three categories. From the certificate which has been enclosed by the petitioner it is apparent that the petitioner has been certified to have put in 120 hours of service in Rashtriya Sewa Yojana (NSS). In view of the aforesaid it is admitted position that the petitioner has not put in 240 hours of service in NSS and therefore she does not fulfill the essential qualifications for grant of any weightage marks. Further the certificate which has been enclosed by the petitioner along with the application form has admittedly been signed/issued by the Principal of the institution and counter signed by the Project Officer. Under the clause providing for weightage marks there is a specific endorsement that the certificate must be issued by the University and counter signed by the Vice Chancellor. The certificate produced by the petitioner does not satisfy the requirement of the aforesaid clause also.

7. In view of the above there is no illegality or infirmity in the action of the University refusing admission to the petitioner in B.Ed. course. The writ petition is accordingly dismissed. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2004

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

Civil Misc. Writ Petition No. 52002 of 2002

Mritunjay Mishra ...Petitioner

Versus

Chief General Manager State Bank of India and another ...Respondents

Counsel for the Petitioner:
Sri M.S. Khan

Counsel for the Respondents:
Sri Vipin Sinha

Dying in Harness Rules-Compassionate appointment-request for, by eldest son of deceased employee-Rejection by Bank Authorities by cryptic order-Validity-Income of family of deceased not correctly assessed by Bank authorities-Deceased left behind five school going children-Four daughters to be married-liabilities not taken into account while assessing income-non application of mind-Impugned order not sustainable-benefit of employment by way of compassionate appointment under Dying in Harness Rules, held, should flow liberally unless there be clinching endorse demonstrate that family of deceased had sufficient means to fall back upon-Scheme for compassionate appointment a beneficial legislation-Nationalized Bank an in stementality of State, expected to behave as a model employer-No reasons assigned for conclusion that fiscal condition of family would enobbe family to meet crises-Decision by authorities held, selective and not objective-Hence impugned order quashed.

Held: Paras 11,12,13 & 14

Upon consideration of the above guidelines, it would crystallise that the Bank has to examine the financial condition of the family of the deceased and only if it is satisfied that but for the provisions of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. As stated supra, the Bank has added up the total of all amount received in lump sum by the family of the deceased employee and converged to assessing monthly income without, at the same time, regard being had to the liabilities and obligations to be discharged after the death of deceased employee. The petitioner clearly disclosed that the family is survived by five school going children the youngest one being 7 years old and that during ailment of the deceased employee, the family had to borrow and incur expenditure to the extent of Rs.2.50 lac which the Bank Authority did not include while computing aggregate income of the family. In my considered view, if the Bank had considered the entire amount received by the Family of the deceased vis-à-vis the liabilities left behind by the deceased employee, the amount which may be distilled as income would be very negligible and would not constitute sufficient means. No reasons, as stated supra, have been recorded and subjective satisfaction recorded by the Bank authorities has no grounding. The Bank authorities have also not reckoned with the aspect of liabilities of marriage of the four daughters and also the aspect of maintenance of family members the youngest being 7 years old, after 20.5.2006 when the pension would stand reduced to a paltry sum of Rs.565/-. In the circumstances, the impugned orders cannot be sustained being one having been passed sans consideration of pivotal aspects bearing on the sustenance of the family members. According to own showing of the Bank, the family had no immoveable property or any source of income, which could be said to be of permanent character and perennial nature. The amount disclosed in the impugned order is of dissipating character inasmuch as the same cannot be said to be perennial source of income. The eldest daughter aged 19 years is said to be receiving education in B.A and by all reckoning, she can be said to be of marriageable age and may be required to be married off in a year or two. Even if it be assumed that a cumulative amount of Rs. 2.50 lacs may be required to be incurred in the marriage of one daughter, a net amount of Rs. 10 lac is required to be married off four daughters and by this reckoning also, the income on that count cannot be said to be income of permanent character. Having regard to the above calculation and computation, it would appear that only source of income for the family is by way of pension and too for a period of five years which by no stretch of imagination can be said to be adequate or sufficient. In my considered view, the order impugned here falls short of compliance on the own showing of the Bank, with the guideline (c) as delineated in Anenxure 8 to the writ petition.

In this view of the matter, I am of the view that the income has not been correctly assessed by the Bank and therefore, impugned order cannot be sustained. I would not forbear from articulating that benefit of employment by way of compassionate appointment under dying in harness Rules should flow liberally unless there be clinching evidence to demonstrate that the family of the deceased had sufficient means to fall back upon. The scheme for appointment on compassionate ground is a scheme in the nature of beneficial legislation to those on whom the destiny has inflicted the unkindest cut and it would not be proper to inflict further cut on the family bedeviled by misfortune.

I would also like to observe that it is a sad commentary that the family of an employee who has devoted his best years in the service of Bank, has been left in lurch without care and concern by the employer as to how surviving school

going children would receive education from scantiness of means. The employer, in the instant case, is a Nationalized Bank, an instrumentality of State and therefore, it is expected to behave as a model employer also taking into consideration that right to education is a right enshrined under Article 41 of the Constitution of India and in case for want of sufficient means, the right to education of any of the children left behind by the deceased is affected, it would be seen to be infringing upon the goals cherished in the Constitution of India.

It would also appear from a perusal of impugned order turning down the request for compassionate appointment that it is a one liner order with no reasons assigned for conclusion that the fiscal condition of the family was such which could enable the family to meet the crisis. Besides, it would appear that the satisfaction arrived at is by all means subjective and not objective inasmuch as there is no indicia of analysis of reasons warranting conclusion that the family with the lump sum would be able to tide over the crisis occasioned by the death of the only earning member. In this regard, it may be noticed that the basic principle of Constitution makes it imperative for administrative authorities clothed with the duty to decide something on consideration of policy or scheme, to act judicially in order to guard against arbitrariness. It has been reiterated in a number of decisions that a clear application of mind must be discernible in the order. Thus, it would not be difficult to hold that the satisfaction is subjective and not objective.

Case law discussed:

JT 2004 (6) SC 418
JT 1994 (3) SC 525
JT1989 (3) SC 570
1991 Supp. (2) SCC 689
(1995) 6 SCC 476
JT 1998 (4) SC 155

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

1. Sri Uma Shanker Mishra, a regular employee of state Bank of India, Balia City Branch, having died in harness on 19.5.2001, the widow represented the matter to the Bank authorities for compassionate appointment of her son, namely, the petitioner on the ground that the deceased was survived by two sons and four unmarried daughters, all school going and the family of the deceased was ill-equipped to fend for itself. The petitioner being the eldest son and also being equipped with necessary qualifications of having passed his B.Sc examination from V.B.S. Purvanchal University Jaunpur, was put forth for compassionate appointment by means of representation dated 25.5.2001. The representation travelled though haltingly upto the end of respondent no.1 who was then holding the office of Chief General Manager, Local Headquarter Hazratganj Lucknow where the matter was considered and the request for compassionate appointment was ultimately turned down by a cryptic order the substance of which is that considering the cumulative/aggregate amount which the family had received in the wake of the death of deceased employee complete with pension, the financial condition of the family cannot be termed as penurious and request/proposal for compassionate appointment was accordingly rejected by the competent authority. It is in the above backdrop that the present petition has been preferred for the relief of a writ of certiorari for quashing the impugned order dated 26.8.2002 and also for a writ of mandamus directing the respondent no.1 to offer appointment to the petitioner under dying in harness Rules on compassionate grounds.

2. The learned counsel appearing for the petitioner took us through the impugned order and canvassed that the authorities concerned have not reckoned with the liabilities left behind by the deceased employee in passing the impugned order and also that the impugned order bristled with error in computation of income of the family. He further submitted that at the time of death, the deceased employee was drawing an aggregate salary of Rs.18072/- and after his death, a meagre amount of Rs.3415/- has been fixed as pension payable to the family that too for a period upto 20.5.2006. He further submitted that the amount sanctioned to the family as pension is payable only for five years and thereafter, it would stand slashed to a paltry amount of Rs. 565/- only. The learned counsel also drew attention of the Court to the facet that the deceased is survived by six children out of whom four are school going unmarried daughters and the youngest male child in the family is Ashutosh aged about 7 years and that the competent authority has not reckoned with the aspect how the family would be able to fend for itself after 20.5.2006. **Per contra**, the learned counsel for the respondents contended that the details enumerated in the impugned order are self-explanatory and reveal that family of the deceased employee had received enough amount which constituted sufficient means. According to the learned counsel, the Bank has assessed the cumulative income of deceased family from all sources to the extent of Rs. 10,051.00 per month after taking into reckoning each and every aspect, which by no means could be said to be insufficient or inadequate to keep the pot of the family boiling.

3. The learned counsel for the respondents laid much emphasis on a recent decision of the Apex Court in **Punjab National Bank and others v. Ashwini Kumar Taneja**[1] to prop up his submissions and contended that a similar question was involved and the Apex Court discountenanced the view taken by the Single Judge and thereafter by Division Bench of the High Court. This decision has been cited by the learned counsel as a sheet anchor of his arguments. I have been taken through this decision. It would appear from a perusal of the said decision that learned Single Judge of High Court directed the Bank accordingly holding that the receipt of retiral benefit cannot be made a ground for rejecting the request for compassionate employment. The Division Bench also endorsed the said decision of the learned Single Judge. The Apex Court held that financial condition of the family is a factor to be considered in the matter of employment on compassionate grounds as provided in the scheme of the Bank. There is no quarrel with the contention that financial condition of the family has to be reckoned with but the moot point is whether the manner in which the Bank has made assessment of the income of the deceased family from all sources, could be said to be justifiable, sound and valid one.

4. The ratio that flows from the said decision is that the retiral benefits payable/paid to the family of the deceased cannot be eschewed from consideration in assessing the fiscal condition of the family. The question now that survives for consideration whether considering the liabilities of the family, the income is

[1] JT 2004 (6) SC 418

adequate and comes within the periphery of the expression 'sufficient means' and (2) whether the assessment of income by the Bank was correctly made?

5. In connection with the first question, I feel called to scan the liabilities surviving the deceased employee. According to the learned counsel for the petitioner, the deceased employee was survived by six children consisting of petitioner, the eldest son, four daughters and thereafter one male child aged about 7 years and his widow. In para 11 to the writ petition, details of children have been enumerated according to which Km. Chandrakala Mishra is studying in Intermediate standard, Km. Shashikala Mishra is studying in High School. Besides the above, the third daughter namely, Km. Purnima aged about 15 years, Km. Arti Mishra aged about 13 years are also school going receiving their education in respective educational institutions. The youngest child namely, Ashutosh aged about 7 years is also stated to be receiving education. In the present set up, when school/college education is a costlier affair, it would be no exaggeration to say that it would be a difficult task for the widow of the deceased to meet the expenses to be incurred on imparting education to at least five college/school going children besides amount being spent on fooding and maintenance of the entire family. The learned counsel approximated expenditure at Rs. 800/- per month, which may be incurred on a child towards education including expenses on the count of purchase of books, School/college dresses, and day-to-day expenses besides transportation charges etc. At a time when prices of each and every item are rising high and there is inflation all round, a cumulative expenditure approximating to a sum of Rs.4000/- per month cannot be said to be abnormally high on the count of education of at least five school/college going children.

6. Yet another aspect which may be considered is that at the time of his death, the deceased employee was getting a salary to the extent of 18,070/- per month and in the aftermath of his death, there would be a net depletion in the income of the family to the extent of Rs.8000/- even if the income as assessed by the Bank in impugned order is posited to be correct. From a perusal of Anenxure 7 to the writ petition which is a letter addressed to the widow of deceased employee by the Bank dated 23.11.2001, it is revealed that the pension payable to the deceased family has been pegged at Rs. 3415/- + Rs.3063/- as D.A. total Rs.6070/- which is payable to the widow for the period between 20.5.2001 to 19.5.2006 and thereafter it is further revealed, the pension would stand reduced to a sum of Rs. 565/- per month. Taking into reckoning the age of the children, the youngest being 7 years old and also reckoning with the facts that four of the daughters still remain to be married off, I am of the view that the total amount assessed by the Bank as income of the family has been over-stated and cannot, by any stretch, be said to be sufficient to sustain the family comprising seven members.

7. In connection with the above, a kindred question also comes in the forefront for consideration as to what are the objects underlying compassionate appointment. This aspect need not be stretched beyond a point inasmuch as this question has received attention of the

various High Courts as well as the Apex Court in several decisions. The quintessence of what has been consistently held that the objects underlying compassionate appointment is to enable the family to get over sudden financial crisis. In **Umesh Kumar Nagpal v. State of Haryana and others**[2], it has been observed by the Apex Court that the appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of employee while in service leaving his family without any means of livelihood. It was further observed that in such cases the objects is to enable the family to get over sudden financial crisis but such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. It would be eloquent from the above decision that stress has been laid on 'livelihood'. In another decision in **Smt. Sushma Gosain and Ors. v. Union of India and others**[3], it has been held that the purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family and such appointment should be provided immediately to redeem the family in distress. Again in **Phoolwati v. Union of India and Ors**[4], **Union of India and Ors. v. Bhagwan Singh**[5] and in **Director of Education (Secondary and Anr. v. Pushpendra Kumar and others**[6], the Apex Court held on the lines that out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependents of the deceased who may be eligible for appointment. Again stress has been laid upon livelihood.

8. In the light of the above decisions, I feel called to delve into the aspect whether the family of deceased employee had sufficient means to keep the pot boiling. It is worth noticing that the Bank has assessed income of the family to the extent of Rs. 10,070/- per month taking into reckoning the amount paid to the family as gratuity and other retiral-cum-death benefits at the same time. According to the own showing of the Bank, there is no immovable property left behind by the deceased family to sustain the Family and the only means of livelihood are the lump-sum payment made by the Bank and the monthly pension as fixed. It would also appear that the Bank has assessed monthly income on the basis of lump sum payment on the count of provident fund, gratuity, leave encashment etc. without considering that the amount received by the family in the wake of the death of the deceased employee. It would also appear that the Bank had not set apart the amount equal to liabilities left behind by the deceased employee i.e. marrying off four daughters and also that the pension fixed at Rs. 6,070/- payable to the family only upto 19.5.2006 would stand slashed to a sum of Rs. 565/-.

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[2] JT 1994 (3) SC 525
[3] JT 1989 (3) SC 570
[4] 1991 Supp. (2) SCC 689
[5] 1995 (6) SCC 476
[6] JT 1998 (4) SC 155

9. 'Livelihood' according to dictionary meaning has been defined to mean means of subsistence. Likewise income means a regular payment or a payment expected to be regular. According to the ordinary meaning what is received is of the character of income of whether it is merely a casual receipt or mere windfall. According to dictionary meaning, income is whatever is received as gain e.g. wages or salary, receipts from business, dividends from investment etc. What transpires from the above is that it should be of regular character. As stated supra, the income of the family as assessed by the Bank consists of pension and the interest from the lump-sum amount received by the family in the aftermath of the death of deceased employee which in my opinion, cannot be said to be of regular character taking into reckoning that the liabilities left behind the deceased i.e. marrying off four daughters and also taking into account that the income in the form of pension would stand slashed to Rs.565/- in the year 2006 have been eschewed from consideration by the Bank authorities while computing the income of the family in entirety. The Bank authority has also not taken into account the amount borrowed from relatives and friends for administration of treatment of the deceased employee. By this reckoning, the income of the family cannot be characterized as regular income, which is likely to suffer depletion after a certain period leaving the family again in lurch and penurious fiscal position. No doubt, as held by the Apex Court, the post-retiral/post-death benefits which the family had received from the Bank have to be included to consider the financial condition of the family but at the same time, the Bank has to take into reckoning the liabilities left by the deceased employee and after deducting average amount towards liabilities what is left has to be taken into reckoning to constitute income of the family. This having not been done, the impugned order passed by the Bank is not sustainable, as the same has been passed without determining amount towards liabilities and without making necessary deduction therefrom.

10. The Court is pained to notice that in almost every case of this nature the Bank authorities seem to be passing identical orders initially giving details of the amount received by the family of the deceased employee without any discussion of reasons whether income assessed by the Bank is of the character of regular payment after meeting all the liabilities left by the deceased employee. It is also being noticed that the Bank authorities, as a rule, eschew from consideration the liabilities to be met by the family of the deceased employee and proceed on priori consideration to compute the income without regard being had to the objects underlying compassionate appointment. No doubt, payments being received by the family of deceased are factors to be considered but the same have to be considered objectively and not subjectively as done in the instant case by the Bank authorities. It has become a common practice with the State Bank authorities to enumerate details of income and thereafter, in fewer words to state reasons on thread-bare lines and therefore, to obtain approval of the competent authority thereon. In the instant case, after stating details of amount, the Bank compressed their reasons in still fewer lines which were forwarded for approval to the competent authority and the competent authority marked his

approval without anything being added. The reasons in the form of recommendations as contained in Annexure C.A. 1 to the Counter affidavit are quoted below.

"In view of the Central Office guidelines/Supreme Court judgment vis-à-vis the above financial position of the family, we observe that indigent circumstances do not exist in the family. We, therefore, recommend that request of Smt. Ramawati Mishra for compassionate appointment of her son, Mritunjai Mishra in the Bank may please be declined. We shall advise the Deputy General Manager, State Bank of India, Zonal office, Varanasi to advice Smt. Mishra suitably and treat the matter as closed."

11. In letter addressed to the widow of the deceased employee dated 26.8.2002, the Branch Manager while communicating that the request for compassionate appointment has been rejected by the competent authority, has also spelt out the guidelines extracted from various decisions of the Apex Court for consideration of compassionate appointment. The guidelines as recounted in its letter, may be excerpted below.

a) The object of granting compassionate appointment is
(i) to enable the family to tide over the sudden crisis caused by the death of the sole breadwinner, and
(ii) to relieve the family of the financial destitution and to help it get over the emergency.
b) Mere death of an employee in harness does not entitle his family to such source of livelihood
c) The Government or public authority has to examine the financial condition of the family of the deceased and only if it is satisfied that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.
d) The only ground which can justify compassionate appointments is the penurious condition of the deceased's family. Offering employment irrespective of the financial condition of the family is legally impermissible."

Upon consideration of the above guidelines, it would crystallise that the Bank has to examine the financial condition of the family of the deceased and only if it is satisfied that but for the provisions of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. As stated supra, the Bank has added up the total of all amount received in lump sum by the family of the deceased employee and converged to assessing monthly income without, at the same time, regard being had to the liabilities and obligations to be discharged after the death of deceased employee. The petitioner clearly disclosed that the family is survived by five school going children the youngest one being 7 years old and that during ailment of the deceased employee, the family had to borrow and incur expenditure to the extent of Rs.2.50 lac which the Bank Authority did not include while computing aggregate income of the family. In my considered view, if the Bank had considered the entire amount received by the Family of the deceased vis-à-vis the liabilities left behind by the deceased employee, the amount which may be distilled as income would be very negligible and would not constitute sufficient means. No reasons,

as stated supra, have been recorded and subjective satisfaction recorded by the Bank authorities has no grounding. The Bank authorities have also not reckoned with the aspect of liabilities of marriage of the four daughters and also the aspect of maintenance of family members the youngest being 7 years old, after 20.5.2006 when the pension would stand reduced to a paltry sum of Rs.565/-. In the circumstances, the impugned orders cannot be sustained being one having been passed sans consideration of pivotal aspects bearing on the sustenance of the family members. According to own showing of the Bank, the family had no immoveable property or any source of income, which could be said to be of permanent character and perennial nature. The amount disclosed in the impugned order is of dissipating character inasmuch as the same cannot be said to be perennial source of income. The eldest daughter aged 19 years is said to be receiving education in B.A and by all reckoning, she can be said to be of marriageable age and may be required to be married off in a year or two. Even if it be assumed that a cumulative amount of Rs. 2.50 lacs may be required to be incurred in the marriage of one daughter, a net amount of Rs. 10 lac is required to be married off four daughters and by this reckoning also, the income on that count cannot be said to be income of permanent character. Having regard to the above calculation and computation, it would appear that only source of income for the family is by way of pension and too for a period of five years which by no stretch of imagination can be said to be adequate or sufficient. In my considered view, the order impugned here falls short of compliance on the own showing of the Bank, with the guideline (c) as delineated in Anenxure 8 to the writ petition.

12. Coming to the next question, it is noticeable that an amount of Rs. 2.5 lacs stated to have been received from outsiders by the deceased employee has not been taken into reckoning on the ground that the same was not verifiable. It brooks no dispute that the deceased employee was ailing and was hospitalized for treatment at Mata Anand Mai Hospital Varanasi. The Bank authorities reckoned out of consideration the sum of Rs.2.50 lac on mere ground that the said amount was not verifiable. Besides, it would also appear, the external liability has been disclosed in the letter of the widow of deceased employee dated 25.6.2002 (Anenxure 5 to the writ petition). From a perusal of the contents of aforestated letter, it would transpire that it has been clearly stated in para 1 that a sum of Rs. 1,50,000/- had been incurred towards the treatment of the deceased which payment was repaid after receipt of gratuity and provident fund. In para 2 of the letter, it has been stated that a sum of Rs.40,000/- was expended in performing last rites of the deceased employee which amount was repaid after receipt of provident/Gratuity fund. In para 3 it has been stated that a sum of Rs.60,000/- was borrowed from various relatives which were spent on maintaining family after the death of deceased employee and the said amount was repaid after receipt of gratuity/provident fund. It is further stated that the aforesaid amount was required as payment of pension and fund etc. had been delayed by seven months. In my firm opinion, the expenses enumerated above are normal expenses and the same cannot be disputed and should not have been eschewed from consideration. In

reply to para 8 of the writ petition, the deponent of the counter affidavit has not denied the averments. The impugned order does state external liabilities but the same seems to be have been ignored as not verifiable. There is no denying that the deceased employee was ailing and after protracted ailment, he breathed his last. The expenses incurred on last rites can also not be disputed and delay of seven months in fixing pension and payment of funds would naturally entail borrowing, which has been done by the family of the deceased in the case. In the cumulative circumstances, the same cannot be eschewed from consideration merely on the ground that the same were not verifiable. In this view of the matter, I am of the view that the income has not been correctly assessed by the Bank and therefore, impugned order cannot be sustained. I would not forbear from articulating that benefit of employment by way of compassionate appointment under dying in harness Rules should flow liberally unless there be clinching evidence to demonstrate that the family of the deceased had sufficient means to fall back upon. The scheme for appointment on compassionate ground is a scheme in the nature of beneficial legislation to those on whom the destiny has inflicted the unkindest cut and it would not be proper to inflict further cut on the family bedeviled by misfortune.

13. I would also like to observe that it is a sad commentary that the family of an employee who has devoted his best years in the service of Bank, has been left in lurch without care and concern by the employer as to how surviving school going children would receive education from scantiness of means. The employer, in the instant case, is a Nationalized Bank, an instrumentality of State and therefore, it is expected to behave as a model employer also taking into consideration that right to education is a right enshrined under Article 41 of the Constitution of India and in case for want of sufficient means, the right to education of any of the children left behind by the deceased is affected, it would be seen to be infringing upon the goals cherished in the Constitution of India.

14. It would also appear from a perusal of impugned order turning down the request for compassionate appointment that it is a one liner order with no reasons assigned for conclusion that the fiscal condition of the family was such which could enable the family to meet the crisis. Besides, it would appear that the satisfaction arrived at is by all means subjective and not objective inasmuch as there is no indicia of analysis of reasons warranting conclusion that the family with the lump sum would be able to tide over the crisis occasioned by the death of the only earning member. In this regard, it may be noticed that the basic principle of Constitution makes it imperative for administrative authorities clothed with the duty to decide something on consideration of policy or scheme, to act judicially in order to guard against arbitrariness. It has been reiterated in a number of decisions that a clear application of mind must be discernible in the order. Thus, it would not be difficult to hold that the satisfaction is subjective and not objective.

15. In the result, the petition succeeds and is allowed and in consequence, the impugned order dated 30.7.2002 (Annexure C.A. 1 to the counter affidavit) and the communication

letter dated 26.8.2002 (Anenxure 8 to the writ petition) are quashed. Before parting, I feel called to observe that the Bank authorities will assess the income taking into consideration the observations made by this Court in the body of this Judgment and would pass appropriate speaking orders on objective consideration for compassionate appointment of the petitioner after taking into reckoning the liabilities of the family also within one month from the date of receipt of a certified copy of this judgment.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.112004

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE V.S. BAJPAI, J.

Civil Misc. Writ Petition No. 45215 of 2004

Dr. Birendra Singh ...Petitioner
Versus
Director of Education, Higher and others ...Respondents

Counsel for the Petitioner:
Sri P.S. Baghel

Counsel for the Respondents:
Sri U.N. Sharma
Sri Rohit Pandey
Sri N.L. Tripathi
Sri D.N. Tripathi
Ms. Sunita Agrawal
Sri O.N. Tripathi
S.C.

Deen Dayal Upadhyaya Gorakhpur University Statutes-Statute 13.20-Whether Senior most teacher in officiated degree College is entitled to continue as officiating principal under all circumstances or can he be relieved of charge on ground that an enquiry contemplated against him regarding his conduct as officiating principal-Impugned order voided, however, held, senior most teacher cannot be deprived of officiating principal merely on protect of an enquiry-Committee of Management has stated that enquiry would be completed in 3 months-Hence direction issued to complete enquiry within 3 months and decision may be taken in accordance with finding-In case enquiry is not completed within 3 months, petitioner would be given back charge of officiating principal-However, inquiry may still continue.

Held: Para 14 & 15

We have not voided the impugned order however the senior most teacher can not be deprived of officiating principal merely on the pretext of an inquiry. The committee of management has mentioned that the inquiry would be completed in three months. In view of this, we dispose of the petition with direction that the inquiry be completed in three months and a decision may be taken in accordance with the finding. In case the inquiry is not completed in three months then the petitioner would be given back the charge of the officiating principal however, the inquiry in that event may still continue.

Our conclusions are as follows:
a) For the first three months, there is discretion with the committee of management to appoint any teacher as the officiating principal but after three months there is no discretion: the senior most teacher has to be appointed as the officiating principal.
b) There is nothing in the Statute 13.20 that mandates that even if an inquiry is initiated against the officiating principal, then he has to be continued as such an officiating principal may be relieved during inquiry if his continuance is not in the interest of the institution.
c) Opportunity of hearing is necessary only in the case of removal and not in

the case where the officiating principal is relieved during pendency of an inquiry.
d) The inquiry is being conducted against the petitioner for his conduct as the officiating principal and not on his conduct as a teacher. In these circumstances, the action of the management to relieve the petitioner from the post of the officiating principal rather than to suspend him can not be faulted.
e) The senior most teacher can not be deprived of acting as the officiating principal merely on the pretext of an inquiry.

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

1. This writ petition deals with the interpretation of statute 13.20 of Deen Dayal Upadhyaya University, Gorakhpur (the University). The question is whether the senior most teacher in an affiliated degree college is entitled to continue as officiating principal under all circumstances or can he be relieved of the charge on the ground that an inquiry is contemplated against him regarding his conduct as the officiating principal.

The Facts

2. The permanent Principal of Hira Lal Ram Niwas Post Graduate College, Khalilabad district Sant Kabir Nagar (the College) retired and a vacancy arose on 30.6.2003. This College is affiliated to the University. Sri TN Upadhya is the senior most teacher in the College. Sri Upadhya did not accept the post of officiating principal of the College. The petitioner is the second senior most in the College and he was appointed as officiating principal on 1.7.2003. He is working since then. There are some complaints against the petitioner regarding his working as the officiating principal. In this regard an inquiry committee was constituted on 14.10.2004 by the Committee of management to give its report within three months. In view of the inquiry, the petitioner was relieved as officiating principal and in his place Dr. Arjun Ram Tripathi was appointed as the officiating principal. Hence the present writ petition.

Submissions of the Petitioner

3. We have heard counsel for the parties. Counter and rejoinder affidavits have been exchanged and with the consent of the parties, the writ petition is being finally decided at this stage. The counsel for the petitioner has raised following submissions before us:

I. The use of the word 'shall' in the Statute 13.20 shows that it is mandatory and the petitioner is entitled to continue even if any inquiry is initiated against him.
II. The petitioner has filed the writ petition no. 26937 of 2004 claiming salary of the principal. The committee of management has filed a counter affidavit in this writ petition. There is neither any allegation of mismanagement in the counter affidavit in WP 26937 of 2004 nor in the certificate dated 14.1.2004 given by the committee of management. The inquiry is malafide and purposive.
III. The petitioner may be suspended but cannot be relieved as the officiating Principal.
IV. The impugned order is null and void as no opportunity has been afforded to the petitioner.

1st Submission: Shall Mandatory - but the Officiating Principal can be relieved

4. Statute 13.20 of the University is as follows:

'When the office of the Principal of an affiliated college falls vacant, the management may appoint any teacher to officiate as Principal for a period of three months or until the appointment of a regular principal, whichever is earlier. If on or before the expiry of the period of three months any regular principal is not appointed, or such a principal does not assume office, the senior most teacher in the college shall officiate as principal of such college until a regular principal is appointed.'

5. The aforesaid Statute governs appointment of the officiating principal in absence of appointment of the permanent principal. It contemplates two different periods: the appointment for the first three months and the period thereafter. It gives discretion to the committee of management to appoint any teacher to officiate as the principal for the period of three months. In case the vacancy continues after that period, then the senior most teacher is to officiate as principal of the College. The Statute uses 'may' for appointment for the first three months and 'shall' for subsequent appointment. The use of two different words explains the intention. For the first three months, there is discretion with the committee of management but after three months there is no discretion: the senior most teacher has to be appointed. This was also so held in a division bench decision of our court reported in AP Singh vs. State of U.P. & others 2001(1) UPLBEC 638. But, is the person officiating a post, entitled to officiate in any circumstance? Even a permanent principal can be suspended. Does the officiating principal become more permanent than the permanent appointment?

6. There are complaints against the petitioner. They are indicated in sub-paragraphs of paragraph 10 of the counter affidavit. They are indicated in Endnote-2. These sub-paragraphs are denied in the rejoinder affidavit. But the correctness of these complaints is not to be judged in this writ petition but is to be seen first by the inquiry committee. The Committee of Management has submitted that no inquiry can be conducted against the petitioner if he continues as the principal of the College. It is in view of this that they have relieved the petitioner from charge of officiating principal till completion of the inquiry. Considering the complaints against the petitioner, it can not be said that this submission is unfounded. The petitioner has been relieved till pendency of the inquiry; this does not mean that the petitioner has been removed as the principal. This order is akin to suspension and not to removal. There is nothing in the Statute 13.20 that mandates that even if an inquiry is initiated against the officiating principal, then he has to be continued.

7. The counsel for the petitioner cited Dr. Vijay Laxmi Agarwal vs. VC MJP Rohilkhand University and others (the VijayLaxmi case) and submitted that the impugned order is illegal as no opportunity was afforded. However this case partly supports the respondents and is distinguishable on facts.

8. Our court in the VijayLaxmi case after considering the other decisions held,

'While ordinarily the senior most teacher should be appointed Principal of a

Degree College, till regular selection, in exceptional circumstances where it would not be in the interest of the institution to appoint the senior -most teacher, he can be superseded and the next after him in seniority can be appointed.'

9. The aforesaid enunciation of law shows that even senior most teacher may be ignored in case it is in the interest of the College. Here, an inquiry has been initiated against the petitioner; it is not in the interest of the institution to continue the petitioner as officiating principal during pendency of these proceedings.

2nd Submission: Inquiry - Not Malafide

10. The writ petition no. 26937 of 2004 is for a direction to the State Government to give salary of principal to the petitioner. It does not relate to the work and conduct of the petitioner. In case nothing is mentioned regarding any complaint against the petitioner in the counter affidavit filed by the committee of management then no adverse inference can be drawn. So far as the certificate dated 14.1.2004 is concerned suffice to say it was given nine months ago. This does not mean that even today there is no complaint against the petitioner.

11. In the present case the committee of management has appointed the petitioner for the first three months where there was discretion to appoint any one as an officiating principal. They have continued with him for more than a year. There is nothing on the record to suggest that action is malafide. The order can not be faulted on the ground of malafides.

3rd Submission: Opportunity before Relieving during Inquiry - Not Necessary

12. It is correct that in the VijayLaxmi case our court further held that opportunity is necessary and in this case no opportunity was given to the petitioner before the impugned order was passed. However the facts of the VijayLaxmi case are different; it was the case of removal. This is not a case of removal. It merely takes the charge of officiating principal from the petitioner during the pendency of the inquiry against the petitioner. It is temporary; during the inquiry proceeding; and is akin to suspension. In case the petitioner is discharged in the inquiry then he has to be continued as officiating principal again.

4th Submission: Suspension - Not Necessary

13. The counsel for the petitioner submitted that in case there is any inquiry against the petitioner then he can be suspended, but he can not be asked to handover the charge. The petitioner is not holding any substantive post. He was merely officiating as principal. The inquiry is being conducted for his conduct as the officiating principal and not on his conduct as a teacher. In these circumstances, the action of the management to relieve the petitioner from the post of officiating principal rather than to suspend him can not be faulted.

14. We have not voided the impugned order however the senior most teacher can not be deprived of officiating principal merely on the pretext of an inquiry. The committee of management has mentioned that the inquiry would be

completed in three months. In view of this, we dispose of the petition with direction that the inquiry be completed in three months and a decision may be taken in accordance with the finding. In case the inquiry is not completed in three months then the petitioner would be given back the charge of the officiating principal however, the inquiry in that event may still continue.

CONCLUSIONS

15. Our conclusions are as follows:

a) For the first three months, there is discretion with the committee of management to appoint any teacher as the officiating principal but after three months there is no discretion: the senior most teacher has to be appointed as the officiating principal.

b) There is nothing in the Statute 13.20 that mandates that even if an inquiry is initiated against the officiating principal, then he has to be continued as such an officiating principal may be relieved during inquiry if his continuance is not in the interest of the institution.

c) Opportunity of hearing is necessary only in the case of removal and not in the case where the officiating principal is relieved during pendency of an inquiry.

d) The inquiry is being conducted against the petitioner for his conduct as the officiating principal and not on his conduct as a teacher. In these circumstances, the action of the management to relieve the petitioner from the post of the officiating principal rather than to suspend him can not be faulted.

e) The senior most teacher can not be deprived of acting as the officiating principal merely on the pretext of an inquiry.

16. In view of our conclusions, we dispose off the writ petition with observations and directions mentioned in paragraph 14 of this judgement.

Endnote 1: Sri PS Babbel appeared for the petitioner. Sri UN Sharma, Sr. Advocate, Sri Rohit Pandey, Ms. Sunita Agrawal, Sri NL Tripathi, Sri DN Tripahti and the standing counsel appeared for the respondents.

Endnote 2: The complaints against the petitioner as indicated in paragraph 10 of the counter affidavit are as follows:

i. The petitioner is guilty of committing financial irregularity by paying salary of Dr. Vinod Kumar Singh, lecturer (His Son) and Dr. Shivendra Bahadur Singh, lecturer from the account of Self Finance Salary Fund while they are appointed under the Additional Teaching Arrangement (ATT), which is a government aided scheme, to make their services permanent on the self finance scheme.

ii. A letter dated 4.10.2004 was given to the petitioner by the Secretary, Committee of Management asking the petitioner that some of the papers were bearing the seal of principal and some were bearing the seal of the officiating principal and it was directed that office should ensure that all the papers must bear the seal of officiating principal and not of the principal.

iii. Inspite of the clear direction of the committee of management the petitioner kept on issuing the cheques

under the seal of principal and thereby committed disobedience of the orders. A letter dated 9.10.2004 was given by the accountant of the college to the Secretary, Committee of Management informing that the officiating principal has passed an order that all the bills-voucher and the cheque book would be sealed in the name of principal from today.

iv. A reply was called from the petitioner by the committee of management by its letter dated 11.10.2004 that, being an officiating principal, why he has issued the cheques under the seal of principal of the College.

v. The petitioner was also found guilty of misconduct of direct correspondence with the Director Higher Education, University and State Government without informing the committee of management and the records of the correspondence was called by the committee of management, but same was not made available by the petitioner.

vi. The petitioner has also not followed the order dated 1.10.2004 of the committee of management of removing the two security guards namely Sri Badri Nath Tiwari and Sri Rajendra Singh from the security arrangement and allowed them to continue in service which is clearly evident from the attendance register of the College.

vii. That in order to cover his irregularities and misconducts the petitioner is not making available to the management all the relevant papers and audit reports of the college. A letter dated 30.9.2004 was given to the petitioner to this effect by the committee of management.

viii. On 11.10.2004 a surprise inspection was made by the Secretary, Committee of Management and it was found that a number of irregularities being conducted in the college which is clear evidence of disregard of the utmost object and purpose of the College.

ix. There are several incidents of disobedience of the orders and of misconduct of the petitioner as officiating principal and on calling for the explanation, he abstained from his accountability.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2004

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

Civil Misc. Writ Petition No. 2299 of 2002

Nathunee and others ...Petitioners
Versus
Deputy Director of Consolidation, Ghazipur and another ...Respondents

Counsel for the Petitioners:
Sri P.N. Kushwaha
Sri Triveni Shanker

Counsel for the Respondents:
Sri H.L. Pandey
Sri Awadhesh Narain Srivastava
S.C.

U.P. Consolidation of Holdings Act-Ss. 19 and 20-Allotment of chaks-Consolidation of Officer made adjustments after making spot inspection-Confirmation of

order of C.O. by Appellate Authority-Revision before DDC allowed writ petition-When lower authorities decided claim of parties after making spot inspection, held, it will be mandatory for Revisional Court to makes spot inspection while updating arrangement made by Court below-Hence case remanded.

Held: Para 6

Although making of spot inspection by Revisional court in each and every case, in allotment of chak proceedings may not be said to be mandatory but, in view of the observation as made above, specially in respect to the cases where equity has to be balanced, in the light of the spot situation and specially when lower authorities have decided the claim of the parties after making spot inspection, it will be mandatory for the Revisional court to make spot inspection while upsetting the arrangement made by the court below. In respect to various factual aspects as pleaded by the petitioner in his objection before the Consolidation Officer and as stated before this Court, it appears to be in the ends of justice that Revisional court may be called upon to make spot inspection, keeping in mind the stand of the respondents and then decide the matter after giving adequate opportunity of hearing to the parties, in accordance with law. Needless to say that decision by Revisional court will be his independent exercise being uninfluenced by any observation or finding so recorded by the lower courts as the Revisional court is the last court of fact, empowered to deal with the matter on the question of facts and law as well. Thus, it is for the Revisional court now to take up the matter pursuant to the command of this Court and to decide the claim of parties as observed above, without allowing any unwarranted adjournment to them unless it is required for very compelling reason, preferably within a period of four months from the date of receipt of a certified copy of this order from either of the parties. It is made clear that this Court has not expressed any opinion either way in relation to the merits of claim of the parties.

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

1. Challenge in this petition is the order of Deputy Director of Consolidation dated 9.1.2004 by which revision filed by the opposite party has been allowed and necessary changes has been made in the chaks of the parties.

2. As the pleadings are complete, on the request of learned counsel for the parties, matter has been heard and is being finally decided.

3. In the light of the submission as advanced by learned counsel for the parties, the Court has dealt with the matter.

4. Proceedings are under section 20 of UPCH Act which is in respect to allotment of land/plot in the respective chaks of the chak holders.

5. It is not to be repeated again and again that in the allotment of chak proceedings, both parties can never be satisfied. Unless the claim of both parties is accepted they can not claim to be satisfied. This may not be possible rather, it is impossible. Every chak holder wants best quality of land near Abadi, minimum number of chaks, near roadside etc. and thus both sides cannot be adjusted in the light of their claim. In fact in the allotment of chak proceedings, no party suffers in terms of either reduction of area or valuation as certain amount of variation is permitted under section 19 of UPCH Act. In these proceedings, parties are to

be allotted compact chak as the land possessed by them are spread at various places and therefore, concern of the consolidation authorities has to be to consolidate the land of the tenure holders which is spread at various places and therefore, concern of the consolidation authorities has to be to consolidate the land of the tenure holders which is spread and to allot minimum number of chaks considering it to be more practicable, keeping in mind the agricultural facilities i.e. source of irrigation etc. Needless to say that if the grievance of the parties is in respect to enhancement/reduction of aria, increase in number of chaks and no allotment of chak on largest part of holding and near source of irrigation or any other ground of like nature then truth and correctness in rival claim has to be examined looking into CH Form 23 and if required by making spot inspection. Changes as made in these proceedings are barred from fresh scrutiny in view of Section 49 of UPCH Act. Thus, it is for the court to test the claim of parties on the aforesaid frame. Besides norms as provided in Section 19 of UPCH Act, the court has to balance equity between parties. A chak holder may be having small holding and other may be a big tenure holder. The Courts will have to give practical and human approach to the matter. It is not to be reminded that in the villages there are small number of persons who are having big holding and better source of agriculture which consists of modern techniques in various respects. The majority consists of holders of small land and therefore, if they are not allowed chaks considering their convenience that will cause great hardship to them for which, there cannot be any cure after close of consolidation process. In view of aforesaid, this Court need not to issue any strict guideline or cannot lay down a particular procedure/process to handle the situation but of course, this can be observed that it has to be the concern of all the consolidation authorities right from the stage of Assistant Consolidation Officer up to the Deputy Director of Consolidation to keep in mind equitable aspect and comparative hardship besides the norms as provided in Section 19 of UPCH Act as that is to reflect on the future growth of a family. In the past also this Court has opined for giving consideration to the allotment of chak matters in the aforesaid manner but now again time has come to give caution to all the consolidation authorities not to pass orders in these proceedings, without application of mind, without assigning any proper reason and without considering comparative hardship if is to be faced by the parties on a particular change as that will not be in accordance with the spirit of this process for which, law is made.

6. So far case in hand is concerned, on the submission of learned counsel, pleading and the judgments as placed on record, it appears that Consolidation Officer made adjustment after making spot inspection, as stated in his order, (although there is a dispute from the side of respondents mainly for the reasons that the order of the Consolidation Officer is said to be without any notice/opportunity to them). Be as it may, the matter went to the Revisional court at the instance of present opposite party, on conformation of the order of Consolidation Officer, by appellate authority. Learned counsel for the respondents submits that prayer for spot inspection was made on behalf of revisionist for adjusting the chaks. Admittedly, the order of Revisional court

do not indicate that he has made spot inspection. On a perusal of the judgment of the Deputy Director of Consolidation, it appears that after hearing counsel for parties and on perusal of records, he proceeded to record findings in respect to factual aspects i.e. particular portion of land is of good quality and is adjacent to abadi. The finding recorded by the Deputy Director of Consolidation is under serious challenge from the side of petitioners. The claim of rival parties is dependent on acceptance/rejection of their contention about position of the spot and therefore, this Court cannot be in a position to record any finding by accepting/rejecting the claim of either of the party. In view of aforesaid, and keeping in mind the request which is said to have been made by the revisionist and as the Consolidation Officer has referred to spot inspection, it appears that it was obligatory on the part of Revisional court to have made spot inspection to record finding in respect to spot situation, for the purpose of accepting/repelling claim of either of the parties. Although making of spot inspection by Revisional court in each and every case, in allotment of chak proceedings may not be said to be mandatory but, in view of the observation as made above, specially in respect to the cases where equity has to be balanced, in the light of the spot situation and specially when lower authorities have decided the claim of the parties after making spot inspection, it will be mandatory for the Revisional court to make spot inspection while upsetting the arrangement made by the court below. In respect to various factual aspects as pleaded by the petitioner in his objection before the Consolidation Officer and as stated before this Court, it appears to be in the ends of justice that Revisional court may be called upon to make spot inspection, keeping in mind the stand of the respondents and then decide the matter after giving adequate opportunity of hearing to the parties, in accordance with law. Needless to say that decision by Revisional court will be his independent exercise being uninfluenced by any observation or finding so recorded by the lower courts as the Revisional court is the last court of fact, empowered to deal with the matter on the question of facts and law as well. Thus, it is for the Revisional court now to take up the matter pursuant to the command of this Court and to decide the claim of parties as observed above, without allowing any unwarranted adjournment to them unless it is required for very compelling reason, preferably within a period of four months from the date of receipt of a certified copy of this order from either of the parties. It is made clear that this Court has not expressed any opinion either way in relation to the merits of claim of the parties.

7. For the reasons recorded above, this petition succeeds and is allowed. The impugned judgment of the Deputy Director of Consolidation dated 9.1.2002 (annexure 4) to the writ petition is hereby quashed and the matter is remitted back to the concerned Revisional court to do the needful, in the light of the observation as made above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 1.12.2004

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 18703 of 1999

Lala Yadav ...Petitioner
Versus
Secretary Madhyamiak Shiksha Parishad, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Srivastava

Counsel for the Respondent:
S.C.

Intermediate Education Act 1921-Chapt. III Regulation 7 (as amended 1983)- Correction of Date of Birth- in High School Certificate – the dat e of birth as recorded in Primary School was 5.7.63-in Transfer Certificate wrongly recorded as 1.1.59- according the same mistake continued in High School certificate also- Petitioner got appointed as accountant in UPSRTC and in service book also date of birth recorded 1.1.59- passed High School Examination in the year 1978- representation made 1989- cannot be changed- legal aspect explained.

Held- Para 10 & 11

If there was any mistake in the date of birth entered into his service book the petitioner ought to have moved an application at the very initial stage immediately when the mistake came to his knowledge in 1978 or when he had first signed his service book after the same was prepared. The assertion of the petitioner that he moved the representation immediately on coming to know about his incorrect date of birth is falsified from the records.

The present case is squarely covered by the aforesaid decision. In this view of the matter, no writ of mandamus can be issued to the educational authorities to correct the date of birth of the petitioner and hence the prayer of the petitioner cannot be granted.

Case law discussed:
1994(24) ALR 173

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

Heard counsel for the parties and perused the record.

1. The controversy involved in this writ petition is as to what is the correct date of birth of the petitioner.

2. This petition has been filed for a direction to the respondents to correct the date of birth of the petitioner in all the documents and certificate issued by the educational and other authorities.

3. According to the petitioner, 1.1.1959, an incorrect date of his birth, has been recorded in all the documents including his service book and certificates issued by the educational authorities. He claims that his correct date of birth is 5.7.1963.

4. It appears that the petitioner was appointed on the post of Accountant in the U.P. State Road Transport Corporation. The date of birth recorded in the service book of the petitioner is 1.1.1959 on the basis of his High School Certificate. The petitioner moved an application to the Secretary Board of High School and Intermediate Education, U.P., Allahabad for correction of his date of birth as 5.7.1963 but the same is still pending decision, hence this writ petition.

5. The facts of the case, in brevity, are that the petitioner alleges that he had taken his primary education from the Prathamik Vidyalaya Munari, Chaubepur as is apparent from the transfer certificate (Annexure 1 to the writ petition) issued by the Head Master of the Primary School Munari, Chaubepur and counter signed by the Basic Shiksha Adhikari, Varanasi on 3.11.1998. According to the transfer certificate the petitioner alleges to have studied at the Prathamik Vidayalaya Munari, Chaubepur up to V Class and his date of birth is 5.7.1963. The petitioner further alleges to have submitted his original transfer certificate to the Principal Veer Lorik Intermediate College, Dhureshwari Dham, Gosaipur Mohan, Varanasi at the time of taking admission in Class VI.

6. The counsel for the petitioner submits that after the education of the petitioner up to Class VIII in the Veer Lorik Intermediate College, the Principal issued the transfer certificate (Annexure 2 to the writ petition) mentioning the date of birth of the petitioner as 1.1.1959 arbitrarily and against the record on the basis that the petitioner had taken education up to VII class at home and had not studied in any school up to Class VII before taking admission in the said College. The counsel for the petitioner further submits that the petitioner had submitted his original transfer certificate issued by the Principal of the Veer Lorik Intermediate College at the time of admission in Class IX in Subhash Intermediate College, Chaubepur. He passed High School Examination as a regular student in the year 1978 from the Board of High School and Intermediate Education, U.P., Allahabad. In the High School certificate issued by the Board of High School and Intermediate Education, UP, Allahabad the date of birth of the petitioner was mentioned as 1.1.1959 on the basis of Class VIII certificate. The counsel for the petitioner submits that as soon as the petitioner came to know that an incorrect date of birth has been recorded in his High School certificate he moved a representation to the Principal of the Veer Lorik Intermediate College for correction of his date of birth as 5.7.1963 on the basis of the transfer certificate issued by the Headmaster of Prathamik Vidyalaya Munari, Chaubepur but to no avail.

7. In paragraph 3 (B) of the Counter affidavit it has been averred that for the first time the petitioner has made the representation for correction of his date of birth on 29/30.9.1984 to the Principal of the Veer Lorik Intermediate College followed by representations dated 10.4.1989, 12.10.1989 and 18.10.1990 and the representation dated 15.4.1989 to the Regional Manager, UP State Road Transport Corporation, Faizabad Zone, Faizabad while he was issued High School examination. In paragraph 3 (c) it is further stated that if there is any mistake in the High School certificate, the same may be got corrected within two years of the issuance of the High School certificate under Regulation 7 (chapter III) of the Regulations (as amended in the year 1983) framed under the U.P. Intermediate Education Act, 1921. The petitioner made such a representation on 27.11.1998, which is highly time barred.

8. The counsel for the respondents in support of his contentions has relied upon decision of this court rendered in ***Rajendra Prasad Singh Vs. State of U.P. & another***, 1994 (24) ALR 173 wherein it

has been held that it is the candidate who has to declare his date of birth in examination form and the Board cannot examine its correctness. It is further held that the Board is required to make correction in the High School certificate if there is any omission or error on the part of the Board but the Board has no jurisdiction to inquire as to what is the correct date of birth even if an incorrect date of birth is given by the examinee in his examination form.

9. Admittedly the petitioner came to know about the fact of incorrect recoding of his date of birth in the transfer certificate on 30.6.1976 issued by the Principal of the Veer Lorik Intermediate College. It is also apparent that the petitioner had filled in the signed his date of birth as 1.1.1959 in the examination form of High School before appearing in the examination. This date is also given in the High School certificate, a photostat copy of which is annexed as Annexure 3 to the writ petition. It is admitted fact that the date of birth of the petitioner as 1.1.1959 is recorded in his service book on the basis of High School certificate. It is further apparent from Annexure 2 to the writ petition that the petitioner had not studied in any school up to Class VII and had taken admission direct in Class VIII in Veer Lorik Intermediate College after taking education at home up to Class VII.

10. The transfer certificate alleged to have been issued by the Headmaster of a primary school is not an incorrigible document. In the transfer certificate issued by Principal of the Veer Lorik Intermediate College and in the High School certificate as well as in the Service Book of the petitioner of date of birth of the petitioner is recorded as 1.1.1959. It is settled law that in case of dispute about the date of birth, the date of birth as recorded in the Service Book should be taken as the authenticated date of birth as this date of birth is recorded on the basis of High School certificate. If there was any mistake in the date of birth entered into his service book the petitioner ought to have moved an application at the very initial stage immediately when the mistake came to his knowledge in 1978 or when he had first signed his service book after the same was prepared. The assertion of the petitioner that he moved the representation immediately on coming to know about his incorrect date of birth is falsified from the records.

11. The present case is squarely covered by the aforesaid decision. In this view of the matter, no writ of mandamus can be issued to the educational authorities to correct the date of birth of the petitioner and hence the prayer of the petitioner cannot be granted.

12. For the reasons stated above, this is not a case for interference under Article 226 of the Constitution. The writ petition is accordingly dismissed. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2004

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Application No. 191754 of 2004.
In
Civil Misc. Writ Petition No. 44673 of 2004

Track Parts of India Mazdoor Sabha ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.P. Agrawal
Miss Bushra Maryam
Anita Singh

Counsel for the Respondents:
Sri S.M.A. Kazmi
Sri K.R. Sirohi
S.C.

Court fee Act 1870-Section 5-Whether the order passed by Taxing Officer under Section 5 of the Act is final on subject to judicial review under Article 226 of the Constitution of India?-held-order became final only for the purposes of court fee, but subject to judicial review under Article 226 of the Constitution.

Held: Para 19 & 21

In view of the law laid down by the apex Court, as noted above, the order of Taxing Officer is not immune from judicial review of this Court under Article 226 of the Constitution. The order of Taxing Officer is final only for the purposes of the Court Fees Act. The Full Bench of this Court in Smt. Gindori Bibi's case (supra) has also taken the view that opinion formed by Taxing Officer with regard to importance of the question is subject to writ of certiorari.

From what has been said above, it is clear that order of the Taxing Officer is subject to scrutiny by this Court under Article 226 of the Constitution and there cannot be any fetter in exercise of jurisdiction by this Court under Article 226 of the Constitution while considering the order of Taxing Officer. The jurisdiction of this Court shall not confine only to issue a writ directing the Taxing Officer to refer the question under Section 5 of the Court Fees Act. It is true that this Court while exercising jurisdiction under Article 226 of the Constitution can always issue direction to the Taxing Officer to make a reference under Section 5 of the Court Fees Act but apart from that the Court can always set-aside the order and pass any appropriate order in the ends of justice including an order setting aside the report of the Stamp Reporter as well as the order of the Taxing Officer and making a declaration with regard to sufficiency of the Court fee.

Case law discussed:
AIR 1981 SC 298
AIR 1987 SC 716
AIR 1964 SC 743
AIR 1977 Alld. 490
AIR 1998 Alld. 396
AIR 1977 Alld. 122
1997 (2) ACT 1496
AIR 1966 SC 249
AIR 1977 SC 237
AIR 1997 (3) SCC 261
2003 (6) SCC 675
1994 CRC (i) 16

(B) Court Fee Act 1870, Section 5-Court fee-Petition filed by the sectary of Tax part of India Mazdoor Sangh-challenging the order passed by the Deputy Labour Commissioner-being Regd. Trade Union-entitled to expose the right of its member-Petition files by the petitioner held-maintainable-hence Single Court fee sufficient.

Held: Para 23, 24 & 25

In the present case there is only one petitioner i.e. registered Trade Union. The petitioner being one, the writ

petition is maintainable at the instance of the Trade Union. The judgment in Mota Singh's case (supra) is not attracted simply because there are not more than one petitioner in the present case.

When the application was filed by the Union itself before the Deputy Labour Commissioner which is apparent from the impugned order itself, the writ petition is maintainable on behalf of the petitioner-union and only one set of court fee is liable to be paid in accordance with the proposition as laid down in Answer-1 of the Full Bench judgment in paragraph 45.

Only one set of court fee was payable in the present case in view of the proposition laid down by the Full Bench in Umesh Chand Vinod Kumar's case (supra) since the petitioner which is registered trade union is entitled to espouse the case of its member and the order which was challenged was the order passed on the applications of the petitioner itself. The applications filed by the petitioner before the Deputy Labour Commissioner were annexed to the writ petition as Annexures-1, 2 and 3. There is a specific averment in the writ petition, in paragraph 2, that petitioner-Trade Union had right to sponsor the case of all the members before the Deputy Labour Commissioner under the provisions of the U.P. Industrial Disputes Act, 1947 and the rules and regulations framed therein. The judgment of the apex Court in Akhil Bhartiya Soshit Karamchari (Railway) Sangh's case (supra) do support the contention of counsel for the petitioner that writ petition filed by petitioner-union is fully maintainable.

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

1. This is an application filed by the petitioner praying for setting aside the report of Stamp Reporter dated 5th October, 2004 and the order of the Taxing Officer dated 12th October, 2004 upholding the deficiency in the stamp amounting to Rs.16,065/-.

2. Heard Sri K.P. Agarwal, learned Senior Advocate appearing for the petitioner, Sri S.M.A. Kazmi, learned Chief Standing Counsel appearing for the State and Sri K.R. Sirohi, learned counsel appearing for respondent No.4.

3. The writ petition has been filed by Track Parts of India Mazdoor Sabha, which is a registered trade union under the Trade Union Act, 1926, praying for a mandamus commanding respondent No.3 to pay the workman the money that they had claimed in their applications filed under the Uttar Pradesh Industrial Peace (Timely Payment of Wages) Act, 1978 which was rejected by the Deputy Labour Commissioner vide order dated 23rd September, 2003. It has further been prayed that a writ be issued for quashing the order dated 23rd September, 2003 passed by Deputy Labour Commissioner, Kanpur Region, Kanpur (Annexures 10, 11 and 12) and direction be issued for issuing recovery certificate in respect of the wages of the workmen for the period January, 2003 to June, 2003.

4. The Stamp Reporter vide his report dated 5th October, 2004 reported deficiency of stamp amounting to Rs.16,065/- in the writ petition. The writ petition has been filed paying stamp duty of Rs.100/- only. Against the report of the Stamp Reporter, the petitioner filed an objection before the Taxing Officer. The objection filed by the petitioner against the report of the Stamp Reporter has been rejected by the Taxing Officer vide its order dated 12th October, 2004. The

Taxing Officer while rejecting the objection gave following reasons:-

"The contention of the learned counsel for the petitioner is that a single set of Court fees is payable. In my opinion, every member of the petitioner has a separate and individual cause of action. Hence a single set of Court fees is not payable as directed by Hon'ble Supreme Court in the case of Mota Singh Vs. State of Haryana, AIR 1981 Supreme Court 484.

The petitioner to make good the deficiency of Court fees."

5. Learned counsel for the petitioner, challenging the aforesaid order of Taxing Officer, contended that the view of Taxing Officer that every member of the petitioner's Trade Union is liable to pay separate court fee for entertainment of the writ petition is erroneous and is not in accordance with law laid down by the Full Bench of this Court in AIR 1984 Alld. 46; **Umesh Chand Vinod Kumar and others Vs. Krishi Utpadan Mandi Samiti and another**, AIR 1981 S.C. 298; **Akhil Bhartiya Soshit Karamchari (Railway) Sangh Vs. Union of India and others**, AIR 1987 S.C. 716; **A.N. Pathak and others Vs. Secretary to the Government, Ministry of Defence** and another.

6. Learned counsel for the petitioner submitted that the order of Taxing Officer has been passed in exercise of jurisdiction conferred on Taxing Officer by Section 5 of the Court Fees Act, 1870. The contention is that decision of the Taxing Officer being not in accordance with law, this Court in exercise of its jurisdiction under Article 226 of the Constitution may quash the report, hold the Court fees already paid in the writ petition as sufficient and entertain the writ petition. Learned counsel for the petitioner further contended that this Court has also jurisdiction to determine the question of payment of court fees, which is incidental to giving relief to the petitioner as claimed in the writ petition. Reliance has also been placed by counsel for the petitioner on AIR 1964 S.C. 743; **Central Bank of India Ltd. Vs. P.S. Rajagopalan** etc.

7. Learned Chief Standing Counsel, Sri S.M.A. Kazmi, appearing for the State, has submitted that the question regarding payment of court fees in the writ petition is to be determined by the Taxing Officer and in case his order is being contested, at best, direction can be issued to the Taxing Officer to refer the question of any general importance to the Judge nominated by Hon'ble the Chief Justice under Section 5 of the Court Fees Act. Sri Kazmi contended that although the order of the Taxing Officer is subject to jurisdiction of this Court under Article 226 of the Constitution but the jurisdiction by this Court can be exercised only to the extent of directing the Taxing Officer to refer any question of general importance to the Judge nominated under Section 5 of the Court Fees Act. Reliance was placed by Sri Kazmi on Full Bench judgment of this Court in AIR 1973 Alld. 490; **Smt. Gindori Bibi Vs. The Taxing Officer and others**, AIR 1998 Allahabad 396; **Sushmakar Dubey Vs. Taxing Officer and others**, AIR 1977 Alld. 122; **Om Prakash and another Vs. State of U.P. and another** and 1997 (2) Alld. Civil Journal 1496; **Shyam Singh and others Vs. Meerut Mandal Vikas Nigam and others.** Sri Kazmi has also

placed reliance on the Full Bench judgment of this Court in **Umesh Chand Vinod Kumar's** case (supra) and contended that according to principles laid down by the Full Bench each member of the petitioner-Union is liable to pay court fee and Taxing Officer has rightly placed reliance on the judgment of the apex Court in **Mota Singh's** case (supra).

Sri K.R. Sirohi, learned counsel appearing for the High Court has adopted the arguments of Sri Kazmi in support of his submission.

I have considered the submissions of both the parties and perused the record.

8. From the facts of the present case and submission made by counsel for the parties, following questions arise for decision in the present case:-

(i) Whether the order of Taxing Officer passed under Section 5 of the Court Fees Act, 1870 can be challenged only by a reference before the Judge nominated by Hon'ble the Chief Justice or judicial review of the said order is also permissible by this Court under Article 226 of the Constitution of India?

(ii) Even if the order of Taxing Officer is subject to judicial review by this Court under Article 226 of the Constitution, judicial review by this Court shall confine only to the question as to whether the Taxing Officer has erred in forming his opinion as to whether the question is one of the general importance which require reference to the Judge nominated under Section 5 of the Court Fees Act?

(iii) Whether the present writ petition filed by Track Parts of India Mazdoor Sabha, which is a registered trade union, can be entertained only when each workman who is member of the trade union for whose benefit the application was made before the Deputy Labour Commissioner, pays separate court fees?

9. The first and second questions being interrelated are being considered together.

Section 5 of the Court Fees Act provides:-

"5. Procedure in case of difference as to necessity or amount of fee- When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf."

10. Section 5 of the Court Fees Act lays down that decision of the Taxing Officer, in the event of any difference between the report of the stamp reporter and the petitioner or his counsel arises, shall be final. The section further provides that there is only one exception regarding finality of the order of Taxing Officer, i.e., except when the question is, in the opinion of Taxing Officer, one of general importance, in which case he shall refer it

to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf. The order of Taxing Officer, thus, is final except when he makes a reference to the Judge nominated by the Chief Justice when he is satisfied that the question which has arisen in the case is of general importance. In the present case, no reference has been made by the Taxing Officer to the Judge nominated by Hon'ble the Chief Justice. The order of the Taxing Officer, thus, is final under Section 5 of the Court Fees Act. The opinion which has to be formed by the Taxing Officer as to whether the question is one of general importance although is subjective opinion but while forming the said opinion the Taxing Officer has to act judicially. In case while forming the opinion the Taxing Officer disregard any statutory provision governing the field or his opinion is contrary to law laid down by this Court and the apex Court, the said opinion can be put to scrutiny. The Full Bench of this court in **Smt. Gindori Bibi's** case (supra) while analysing the provisions of Section 5 of the Court Fees Act made following observations in paragraph 13:-

*"**13**. .....Once a question is referred to the Taxing Officer on a difference arising between the Stamp Reporter and the suitor, it is the duty of the former to render a decision thereon irrespective of the fact whether the question was of ordinary importance or of general importance. The Taxing Officer is under a duty to render his decision on merits. Having done that the Taxing Officer has to consider whether the question is one of general importance and once he is of opinion that the question is one of general importance, then the decision rendered by him on merits will not be final and he will be under a duty to refer the question for the final decision of the Taxing Judge. Thus the procedural scheme under the section is that the Taxing Judge will get the jurisdiction to render a final decision on the question of the Court-fee only when the Taxing Officer refers the question."*

11. The Full Bench in **Smt. Gindori Bibi's** case (supra) also laid down that there is nothing in the scheme of Section 5 preventing a suitor to invite by application the Taxing Officer to form an opinion as to the importance of the question. In the present case, the petitioner is not praying for a direction to the Taxing Officer to form an opinion with regard to importance of question involved in the case. The prayer of the petitioner is that order be quashed and it be held that Court fee already paid is sufficient. The Full Bench in Smt. Gindori Bibi's case (supra) laid down following in paragraph 16:-

***"16.** The Taxing Officer has to perform a judicial function under Section 5. In forming an opinion as to the importance of the question he is under a duty to act judicially and not arbitrarily. We think any opinion rendered by him on the importance of the question may be amenable to a writ of certiorari if in forming his opinion the Taxing Officer proceeded arbitrarily and against established judicial principles. It is not open to the Taxing Officer to decline at his sweet will forming of an opinion on the importance of the question ....."*

12. The question which arises for consideration is as to whether the order of Taxing Officer passed under Section 5 of

the Court Fees Act is final and only subject to decision by Judge nominated by Hon'ble the Chief Justice under Section 5 of Court Fees Act on a reference made by Taxing Officer or such decision can be subject to judicial review by this Court under Article 226 of the Constitution. From the scheme of the Court Fees Act, it is clear that for the purposes of the Act the order of Taxing Officer is final. The only exception provided under Section 5, on which finality of the order of Taxing Officer is put in jeopardy, is when a reference is made by the Taxing Officer after forming an opinion that question is of general importance and in that case decision given on the reference of Taxing Officer by the Judge nominated under Section 5 is final. Now taking a situation when after order of the Taxing Officer no reference is made by the Taxing Officer to the Judge nominated under Section 5 whether the order of the Taxing Officer is final and cannot be even challenged in proceeding under Article 226 of the Constitution, is question for consideration. At this stage, it is relevant to note the Division Bench judgment of this Court in **Shyam Singh's** case (supra) where this Court observed that the order of Taxing Officer was final and could not be questioned either in the Court or by filing special appeal. The relevant observations were made in paragraph 10 of the judgment which is extracted below:-

***"10**. In the present case, the taxing officer by his order dated 19th January, 1993, rejected the objection of the appellants and upheld the report of the office showing deficiency of Rs.1785 in the writ petition in terms of Section 5. This order of the Taxing Officer was final and could not be questioned either in the Court or by filing Special appeal. The question has been examined by learned Single Judge and he also agreed with the report of the Taxing Officer. However, in our opinion, as the decision of the Taxing Officer was final it could not be subjected to scrutiny of the Court. Since incidentally in this case the learned Judge has not reversed the order of the taxing Officer and the learned Judge has simply upheld the same, no order is required to be passed by this Bench in this behalf. The legal position about the maintainability of the special appeal against the decision of the Taxing Officer or Taxing Judge under Section 5 of the Act arose for consideration before the Division Bench of this Court in case of Om Prakash and another v. State of U.P. and another, A.I.R. 1977, All. 122 (D.B). The Division Bench has held that the decision of the Taxing Officer or the Taxing Judge under Section 5 of the Court Fees Act shall be final and conclusive for all purposes and the decision shall not be open to revision or appeal. The Division Bench has placed reliance in the judgment of the Full Bench of this court in **Balkaran Rai v. Gobind Nath Tiwary** (1890) I.L.R. 12 All 129, **Kunwar Karan Singh v. Gopal Rai** (1910) I.L.R. 32 All. 59, **Lurkhur Chaube v. Ram Bhajan Chaube**, (1903) All.W.C. 214 and **Sathappa Chettiar v. Ramanathan Chettiar** (A.I.R. 1958 SC 245)."*

13. The above judgment was rendered by Division Bench of this Court in special appeal filed against order of learned single Judge in a writ petition in which legality of the order of Taxing Officer was challenged. The Division Bench ultimately found the special appeal not maintainable and made following observations in paragraph 13:-

*"**13.** For the reasons stated above, in our opinion, this special appeal is not legally maintainable and is liable to be dismissed as such. In the circumstances, it is not necessary for us to examine other questions raised by learned counsel for the parties on merits of the appeal. The appeal is, accordingly, dismissed as not maintainable."*

14. From above observations made by the Division Bench of this Court in **Shyam Singh's** case (supra), it appears that Division Bench took the view that order of the Taxing Officer being final under Section 5 of the Court Fees Act could not have been challenged in the Court or by means of special appeal. The observations of the Division Bench in the said judgment have to be read in context of finality of the order of the Taxing Officer under Section 5 of the Court Fees Act. The observations made by the Division Bench cannot be read as denying challenge of the order of Taxing Officer under Article 226 of the Constitution since even in the Full Bench of this Court in **Smt. Gindori Bibi's** case (supra) while considering Section 5 of the Court Fees Act, the Full Bench itself had laid down in paragraph 16, "..... We think any opinion rendered by him on the importance of the question may be amenable to a writ of certiorari if in forming his opinion the Taxing Officer proceeded arbitrary and against established judicial principles.....". The order of the Taxing Officer rendered on difference between the Stamp Reporter and the petitioner or forming an opinion with regard to importance of the question is an order under Section 5 and when the opinion formed by the Taxing Officer with regard to importance of the question is amenable to writ of certiorari why cannot the order of Taxing Officer passed in exercise of jurisdiction under Section 5 of the Court Fees Act can also be subject to writ of certiorari in which order he has not formed any opinion with regard to importance of the question. There is one more aspect, which needs to be noted. According to scheme of Section 5 of the Court Fees Act, the reference by Taxing Officer to a Judge nominated by Hon'ble the Chief Justice is permissible when in the opinion of Taxing Officer the question is one of general importance. The statutory provisions, thus, contemplate reference to a Judge under Section 5 only when the question is of general importance and if the question is not of general importance, the reference cannot be made under Section 5 and the order of taxing Officer in that event is final. Where decision of Taxing Officer in a case which does not involve any question of general importance but it prejudicially effects the petitioner of a case is not subject to any judicial scrutiny is a question which is to be answered. The finality of the order of Taxing Officer under Section 5 of the Court Fees Act is finality for the purposes of the said Act. Finality attached to any order in a statute is finality to that order qua that statute and jurisdiction of this court under Article 226 of the Constitution to have judicial review of the said order passed under any Statute which is final for that Statute is not excluded. The right of judicial review given under Article 226 of the Constitution cannot be whittled down by attaching finality to any order under any Statute. The right of judicial review of any decision by this Court under Article 226 of the Constitution cannot be curtailed by any statute be enacted by Parliament or State Legislature.

15. A Constitution Bench of the apex Court in AIR 1966 SC 249; **Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon** had occasion to consider the provisions of Section 84 (3) of the Municipalities Act which provided that no objection shall be taken to any valuation, assessment, or levy, nor shall the liability of any person to be assessed or taxed be question, in any other manner or by any other authority than is provided in this Act. The apex Court held that the said provisions does not effect the remedy provided under Article 226 of the Constitution to a citizen. Following was observed in paragraph 30:-

"..... ..... Under Art. 226 the Constitution has provided a remedy to a citizen to obtain redress in respect of a tax levied or collected under an invalid law. This remedy will not be affected by any provision like S.67 of the Indian Income-tax Act or like S. 84 (3) of the Municipalities Act."

16. Similarly the apex Court had occasion to consider Section 9(1) of Industrial Disputes Act, 1947 in AIR 1977 SC 237; ***The State of Haryana Vs. The Haryana Co-operative Transport Ltd. and others***. Section 9(1) of Industrial Disputes Act, 1947 provided that no order of the appropriate Government or of the Central Government appointing any person as the Chairman or any other member of a Board or Court or as the presiding officer of a Labour Court, Tribunal or National Tribunal shall be called in question in any manner. Considering the above provisions, the apex Court observed in paragraph 14:-

"..... But it is impossible to construe the provisions as in derogation of the remedies provided by Arts. 226 and 227 of the Constitution. The rights conferred by those articles cannot be permitted to be taken away by a broad and general provision in the nature of Sec. 9(1) of the Act ....."

17. A seven Judge Bench in (1997) 3 S.C.C. 261; **L. Chandra Kumar Vs. Union of India and others** considered the provisions of Article 323-A and 323-B of the Constitution, which provided for making of appropriate law by the parliament excluding the jurisdiction of all Courts except the jurisdiction of the Supreme Court under Article 136 of the Constitution, thus by constitutional amendment the right of judicial review under Article 226 of the Constitution was taken away. The seven Judge Bench in the said judgment has held that power of judicial review conferred on the High Court under Article 226/227 of the Constitution cannot be excluded. The provisions of Clause 2(d) of Article 323-A and Clause 3 (d) of Article 323-B of the Constitution to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution were struck down and provisions of Section 28 of the Administrative Tribunal Act which excluded the jurisdiction of the High Court was also held to be unconstitutional. The apex Court laid down following in paragraph 99 of the said judgment:-

"99. *In view of the reasoning adopted by us, we hold that clause 2(d) of Article 323-A and clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses*

in all other legislations enacted under the aegis of Article 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. ....."

18. A recent judgment of the apex Court in (2003) 6 S.C.C. 675; Surya Dev Rai Vs. Ram Chander Rai and others had considered the scope of Article 226/227 of the Constitution. The apex Court has laid down in the said judgment that the jurisdiction conferred to the High Courts under Article 226 of the Constitution cannot be taken away by any legislative enactment or by judicial pronouncement. The apex Court while endorsing the view of the Division Bench of Delhi High Court, held following in paragraph 29 of the said judgment:-

"29. *The Constitution Bench in L. Chandra Kumar v. Union of India dealt with the nature of power of judicial review conferred by Article 226 of the Constitution and the power of superintendence conferred by Article 227. It was held that the jurisdiction conferred on the Supreme Court under Article 32 of the Constitution and on the High Courts under Articles 226 and 226 of the Constitution is a part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tampered with much less taken away even by constitutional amendment, not to speak of a parliamentary legislation. A recent Division Bench decision by the Delhi High Court (Dalveer Bhandari and H.R. Malhotra, JJ.) in Govind v. State (Govt. of NCT of Delhi) makes an in-depth survey of decided cases including almost all the leading decisions by this Court and holds:*

"74. The powers of the High Court under Article 226 cannot be whittled down, nullified, curtailed, abrogated, diluted or taken either by amendment of the Constitution. The power of juridical review is an inherent part of the basic structure and it cannot be abrogated without affecting the basic structure of the Constitution."

The essence of constitutional and legal principles, relevant to the issue at hand, has been correctly summed up by the Division Bench of the High Court and we record our approval of the same."

19. In view of the law laid down by the apex Court, as noted above, the order of Taxing Officer is not immune from judicial review of this Court under Article 226 of the Constitution. The order of Taxing Officer is final only for the purposes of the Court Fees Act. The Full Bench of this Court **in Smt. Gindori Bibi's** case (supra) has also taken the view that opinion formed by Taxing Officer with regard to importance of the question is subject to writ of certiorari. A Division Bench of this Court in (1994) 1 CRC 16; **Saroja Nand Jha and others Vs. M/s Hari Fertilizers and another** while exercising the jurisdiction under Article 226 of the Constitution has set-aside the report of the Taxation Officer. The judgment of Division Bench of this Court in **Sushmakar Dubey's** case (supra) also entertained a writ petition

challenging the order of Taxing Officer which writ petition was ultimately allowed. In that case, however, the Division Bench issued a direction to Taxing Officer to refer the matter to Taxing Judge for opinion. However, the Division Bench after referring to the judgment of Smt. Gindori Bibi's case (supra) of this Court made following observations in paragraph 13:-

"13. In view of the aforesaid dictum of the Full Bench the question of the matter being of general importance alone can be examined by the writ Court in the event of a contrary finding having been recorded by the Taxing Officer or in the event of his having not deciding the said issue."

20. The Division Bench in the said case, thus, took the view that writ Court can only examine the question as to whether the matter is of general importance or not. The said observation of the Division Bench has been made relying on dictum of Full Bench in **Smt. Gindori Bibi's** case (supra). It is relevant to note the facts of **Smt. Gindori Bibi's** case (supra) and the law laid down by this Court in the said judgment. A first appeal was filed in this Court by **Smt. Gindori Bibi** in which Stamp Reporter reported deficiency. Objection was raised to the Stamp Reporter's report. The Taxing Officer rejected the objection of the appellant and upheld the report of the Stamp Report. An application was made by the appellant before the Taxing Officer praying that Taxing Officer be pleased to refer the case for final decision to the Chief Justice or any Hon'ble Judge to be appointed by the Chief Justice under Section 5 of the Court Fees Act. The Taxing Officer rejected the application taking view that Taxing Officer has no reason to make any reference to the Court, as prayed. Thereafter writ petition was filed by Smt. Gindori Bibi questioning the report of the Stamp Report and the order of the Taxing Officer. A prayer was also made for directing the Taxing Officer to refer the question of deficiency in the Court fee to the court under Section 5 of the Court Fees Act. The observation made by the Full Bench in paragraph 16 of the said judgment is to the effect that any opinion rendered by Taxing Officer on the importance of the question may be amenable to the writ of certiorari if in forming his opinion the Taxing Officer proceeded arbitrarily and against established judicial principles. The Full Bench was neither called upon to express any opinion as to the limit of the jurisdiction of this Court under Article 226 of the Constitution while considering the order of taxing Officer nor the Full Bench observed that exercise of writ jurisdiction under Article 226 of the Constitution shall be limited alone to examine the opinion of the Taxing Officer regarding general importance of the question. The observation of the Division Bench in **Sushmakar Dubey's** case (supra) in paragraph 13, as noted above, thus is not based on any such ratio laid down in the Full Bench. No fetter can be put on the exercise of writ jurisdiction by this Court under Article 226 of the Constitution by any legislative enactment or by any judicial pronouncement as laid down by the apex Court in **Surya Dev Rai's** case (supra).

21. From what has been said above, it is clear that order of the Taxing Officer is subject to scrutiny by this Court under Article 226 of the Constitution and there cannot be any fetter in exercise of

jurisdiction by this Court under Article 226 of the Constitution while considering the order of Taxing Officer. The jurisdiction of this Court shall not confine only to issue a writ directing the Taxing Officer to refer the question under Section 5 of the Court Fees Act. It is true that this Court while exercising jurisdiction under Article 226 of the Constitution can always issue direction to the Taxing Officer to make a reference under Section 5 of the Court Fees Act but apart from that the Court can always set-aside the order and pass any appropriate order in the ends of justice including an order setting aside the report of the Stamp Reporter as well as the order of the Taxing Officer and making a declaration with regard to sufficiency of the Court fee.

22. Now the question remains as to whether in the writ petition filed by the petitioner Court fee was liable to be paid by all the workmen who are member of the Trade Union or not. The Taxing Officer has placed reliance on judgment of Mota Singh's case (supra) while upholding the report of the stamp reporter. In Mota Singh's case (supra) independent truck operators filed writ petition challenging the tax imposed on each of the truck owner. The facts and reason given for holding that each truck owner was liable to pay separate court fee was given in paragraph 1 of the judgment, which is quoted below:-

"1. *We have carefully gone through the office report prepared pursuant to the directions given by us. We are prima facie satisfied that the petitioners have not paid court-fees legally payable and that the petitioners have so modeled the title clause of the petitions as may indicate that the payment of the legally payable court fee could be evaded. Having regard to the nature of these cases where every owner of a truck plying his truck for transport of goods has a liability to pay tax impugned in the petition, each one has his own independent cause of action. A firm as understood under the Partnership Act or a Company as understood under the Indian companies Act, if it is entitled in law to commence action either in the firm name or in the Company's name, can do so by filing a petition for the benefit of the company or the partnership and in such a case court fee would be payable depending upon the legal status of the petitioner. But it is too much to expect that different truck owners having no relation with each other either as partners or any other legally subsisting jural relationship of association of persons would be liable to pay only one set of court-fee simply, because they have joined as petitioners in one petition. Each one has his own cause of action arising out of the liability to pay tax individually and the petition of each one would be a separate and independent petition and each such person would be liable to pay legally payable court-fee on his petition. It would be a travesty of law if one were to hold that as each one uses high way, he has common cause of action with the rest of truck pliers."*

23. In the present case there is only one petitioner i.e. registered Trade Union. The petitioner being one, the writ petition is maintainable at the instance of the Trade Union. The judgment in **Mota Singh's** case (supra) is not attracted simply because there are not more than one petitioner in the present case.

24. The Full Bench of this Court in **Umesh Chand Vinod Kumar's** case

(supra) considers in detail the question of payment of Court fee with regard to petitioners. One of the questions considered by the Full Bench is the question of payment of Court fee when a writ petition is filed by registered association/union for enforcement of rights of its members as distinguished from the enforcement of its own rights. The present case is a case which may fall in Question No.1 as framed by the Full Bench in **Umesh Chand Vinod Kumar's** case (supra). It is necessary to note relevant facts of this writ petition before applying the proposition laid down by this Court in **Umesh Chand Vinod Kumar's** case (supra). Annexures-10, 11 and 12 of the writ petition has been prayed to be quashed. From a perusal of Annexures-10, 11 and 12, it is clear that case was instituted by the petitioner-union. The first line of the order states that present case has been filed by Track Parts of India Mazdoor Sabha. The Deputy Labour Commissioner by the impugned order dated 23rd September, 2003 has taken the view that establishment has since been closed on 16.1.2003, the application for payment of wages under Uttar Pradesh Industrial Peace (Timely Payment of Wages) Act, 1978 is not maintainable. From reading of the orders, Annexures-10, 11 and 12, it is clear that claim under Uttar Pradesh Industrial Peace (Timely Payment of Wages) Act, 1978 was raised by the petitioner itself. A copy of the order has also been endorsed to President/Secretary of the petitioner-union. When the order impugned was passed on the application filed on behalf of the petitioner, the petitioner has right to challenge the said order. There cannot be any dispute that petitioner being registered Union, which union has been registered under the provisions of the Trade Union Act, is entitled to espouse the cause of its members. When the application was filed by the Union itself before the Deputy Labour Commissioner which is apparent from the impugned order itself, the writ petition is maintainable on behalf of the petitioner-union and only one set of court fee is liable to be paid in accordance with the proposition as laid down in Answer-1 of the Full Bench judgment in paragraph 45. Annexure-10 to the writ petition also makes it clear that application was filed before the Deputy Labour Commissioner by the petitioner. The judgment of this Court dated 24.9.2003 in Writ Petition No. 33138 of 2003 (Akhil Bhartiya Safai Mazdoor Congress Vs. Nagar Palika Parishad, Ghaziabad and others), relied by counsel for the petitioner, copy of which has been filed as Annexure-4 to the writ petition, fully supports the contention of the petitioner. In above case also, the writ petition was filed by registered Trade Union praying for quashing the order by which it was held that Safai Mazdoor were drawing house rent allowance higher than the amount to which they were entitled and recovery was directed.

25. Only one set of court fee was payable in the present case in view of the proposition laid down by the Full Bench in **Umesh Chand Vinod Kumar's** case (supra) since the petitioner which is registered trade union is entitled to espouse the case of its member and the order which was challenged was the order passed on the applications of the petitioner itself. The applications filed by the petitioner before the Deputy Labour Commissioner were annexed to the writ petition as Annexures-1, 2 and 3. There is a specific averment in the writ petition, in paragraph 2, that petitioner-Trade Union

had right to sponsor the case of all the members before the Deputy Labour Commissioner under the provisions of the U.P. Industrial Disputes Act, 1947 and the rules and regulations framed therein. The judgment of the apex Court in **Akhil Bhartiya Soshit Karamchari (Railway) Sangh's** case (supra) do support the contention of counsel for the petitioner that writ petition filed by petitioner-union is fully maintainable.

26. In result, the order of the Taxing Officer dated 12th October, 2004 and the report of the Stamp Reporter dated 5th October, 2004 are quashed. The writ petition filed by the petitioner is held maintainable on payment of one set of Court fee.

The application stands allowed accordingly.

Application allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 28.1.2005

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

Civil Misc. Writ Petition No. 1892 of 2005

Harpal and another ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- alternative remedy- Petitioner being recorded tenure holder- on appeal filed by Gaon Sabha as per direction of S.O.C. The C.O. Directed to expunged the name without affording any opportunity of hearing- admittedly the revision under section 48 of the Act as well as in civil suit- interim order continuing in favour of petitioner-writ petition directly cannot be entertained where the statutory alternative remedy provided-on the pertext the respondents with the collusion of the local authorities harassing the petitioner.

Held: Para 5 & 8

Needless to say that question of right and ownership in respect to the land in dispute cannot be directly adjudicated and decided by this Court and the proper forum is the consolidation courts where matter is already pending. Thus as petitioners have already availed the alternative remedy as available to them they cannot claim that this Court should undertake the job of trial court, appellate court and the revisional court to examine the facts and the evidence and to decide the question of title straightaway.

In view of the aforesaid discussion, it is clear that this is not the case where petitioners have no remedy against the order of the Settlement Officer Consolidation rather they having statutory, alternative remedy has already availed the same it is also not the case where the lower courts have not granted interim protection to the petitioners as Deputy Director of Consolidation as well as the civil court has granted full interim protection to the petitioners in respect of their rights. On these facts, this Court is not satisfied that this is a case to entertain the writ petition and by accepting the rights and title of the petitioners grant relief of injunction against the respondents. Claim of the petitioners for adjudication will lead to taking of the evidence and recording of the findings on the question of fact for which this is not the stage to

go into the merits in the petitioners claim.

Case law discussed:

AIR 2003 SC 2120
1995 ALJ 1319

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

1. Heard learned counsel for the petitioners and learned State counsel.

2. Prayer in this petition is for issuance of the writ in the nature of mandamus or prohibition restraining the respondents from evicting the petitioner from the disputed land and pond except in accordance with law. There is further prayer for issuance of writ in the nature of mandamus commanding the respondents from interfering in the possession of the petitioners over the land in dispute. By moving amendment application prayer for quashing the order of the settlement officer consolidation dated 11.4.2001 has been made and another prayer has also been added that the Deputy Director of Consolidation be directed to dispose of the pending revision against the order of the Settlement Officer Consolidation dated 11.4.2001 within a reasonable time.

Argument of the learned counsel for the petitioners can be summarised.

3. Dispute is in respect to plot no. 843 and 837 situated in village Palri Pargana Shikarpur district Muzaffarnagar. Claim of the petitioner is that name of their predecessor was recorded for a long time and admittedly when the present consolidation proceedings started name of petitioners' father was recorded as Assami. It is claimed that several objections came before the Consolidation Officer in respect of the entry over the land in dispute including one by the petitioner's father besides Ramesh Chandra and Gaon Sabha and they are pending. In the meantime matter went to the Settlement Officer Consolidation at the instance of the Gaon Sabha in which it is said that the order was passed by the Settlement Officer Consolidation after calling report from the Consolidation Officer and by order dated 11.4.2001 name of petitioners' father was directed to be expunged. Claim is that as order passed by the appellate authority was without any opportunity to the petitioners' father and without their being any order of the Consolidation Officer, petitioners' father filed revision along with stay application. In the revision filed before the Deputy Director of Consolidation an order directing to maintain status quo regarding the disputed plots was granted. It has also come that petitioners' father filed a civil suit for injunction i.e. original suit no. 158 of 2001 in which an injunction was granted in his favour and his interest was protected. Inspite of the aforesaid grievance as placed before this Court appears to be that respondents in collusion with each other are trying to interfere in the petitioners possession although the order of Settlement Officer Consolidation dated 11.4.2001 is illegal. Although revision is pending before the Deputy Director of Consolidation in which there is interim protection to the petitioners and a civil suit is also pending in which also there is interim stay but petitioners submit that as the respondents are bent upon to harass the petitioners the writ petition should be entertained straightaway as alternative remedy cannot be said to be absolute bar. Submission is that the claim of the petitioners is related to bread and butter and, therefore, this Court is to entertain the writ petition and is to grant relief, as prayed. In support of

the submission that writ petition can be entertained straightaway irrespective of alternative remedy reliance has been placed on decision given in the case of **Harbanslal Sahnia and another Vs. Indian Coil Corporation Ltd. and others** reported in AIR 2003 SC 2120, decision given in the case of **Babu Lal and others Vs. Collector, Varanasi and others** reported in 1995 All. C.J. 1319 and decision given in **Bidi Supply Co. Vs. Union of India and others** reported in AIR 1956 SC 479.

4. In view of the aforesaid matter has been examined.

5. In view of the facts as has come on record, there is no dispute about the fact that against the order of the Settlement Officer Consolidation petitioner has filed revision before the Deputy Director of Consolidation is fully empowered to consider propriety and illegality in any order passed by the subordinate authority. The Deputy Director of Consolidation is conferred with very wide powers as he can examine any factual aspect beside the legal aspect. There is already interim protection given by the revisional court in favour of the petitioners. At the same time in the suit filed from the petitioners side petitioners interest has been adequately protected by grant of injunction. In view of the aforesaid it is clear that it is not a case where the petitioners have not approached to the competent forum rather competent court against the order of the Settlement Officer Consolidation has been already approached. Needless to say that question of right and ownership in respect to the land in dispute cannot be directly adjudicated and decided by this Court and the proper forum is the consolidation courts where matter is already pending. Thus as petitioners have already availed the alternative remedy as available to them they cannot claim that this Court should undertake the job of trial court, appellate court and the revisional court to examine the facts and the evidence and to decide the question of title straightaway.

6. In the decision given by the Apex Court in the case of Harbans Sahnia (supra) against the cancellation of peteroleum dealership writ petition was filed straaightaway and thus as the action was against the natural justice and was based on irrelevant and non existent facts, it was held that writ petition was maintainable. It is the case where petitioners have already challenged the order of the Settlement Officer Consolidation before the Deputy Director of Consolidation which is statutory forum provided under Section 48 of the U.P. C.H. Act and thus decision as referred by the learned counsel has no application to the facts.

7. In the decision given in the case of Babu Lal and another (supra) referred by the learned counsel situation was that there was an order by the concerned authority for demolition of the premises and, therefore, a limited relief was granted by this Court in respect of demolition part and for vindicating rights and title the petitioners were relegated to approach the competent civil court and it was held that this court is not proper forum for deciding the question of ownership and possession of the premises. It was also held in the case of Babu Lal and another (supra) that if the petitioners have already availed an alternative remedy for redressal of their grievance then writ petition is not maintainable. The last decision in the case

of Bidi Supply Co. (supra) as referred by the learned counsel, no decision on the matter in issue can be said to have been given. Reliance as placed on para 25 of the aforesaid decision has nothing to do with the facts of the present case.

8. In view of the aforesaid discussion, it is clear that this is not the case where petitioners have no remedy against the order of the Settlement Officer Consolidation rather they having statutory, alternative remedy has already availed the same it is also not the case where the lower courts have not granted interim protection to the petitioners as Deputy Director of Consolidation as well as the civil court has granted full interim protection to the petitioners in respect of their rights. On these facts, this Court is not satisfied that this is a case to entertain the writ petition and by accepting the rights and title of the petitioners grant relief of injunction against the respondents. Claim of the petitioners for adjudication will lead to taking of the evidence and recording of the findings on the question of fact for which this is not the stage to go into the merits in the petitioners claim.

9. So far the grievance of the petitioners that inspite of there being injunction/stay granted in their favour by the Deputy Director of Consolidation and the civil court, respondents in collusion with each other are creating complication and are trying to interfere in the petitioners possession suffice it to say that the remedy of the petitioners is to approach the learned Collector and the Senior Superintendent of Police of the district by placing before them the stay orders which stands in their favour and it is for them to ensure the strict compliance of those orders. Needless to say that it is the duty of the learned Collector and the Senior Superintendent of Police to get the orders of the court complied in its true sense faithfully. It is the duty of the administration to maintain law and order situation and, therefore, they are bound to take action in the light of the orders of the court on which reliance has been placed by the petitioners. Thus it is for the petitioners to approach the concerned administrative authority along with certified copy of this order, annexing the copy of the interim orders in their favour so that needful may be done by the higher officials.

10. So far the prayer for a direction to decide the revision by the Deputy Director of Consolidation which has been filed against the order of the settlement officer consolidation dated 11.4.2001 is concerned, as the petitioners are complaining in respect to their unwarranted harassment for which they have come to this Court also it will be in the ends of justice to accept that prayer. Otherwise also any pending proceedings before any court has to be disposed of at earliest unless there is any legal impediment. Be as it may, on the facts it will be useful to give a direction to the concerned revisional court to decide the pending revision if it has not already been decided, with all expedition, without allowing any unwarranted adjournment to either of the parties preferably within a period of two months from the date of receipt of the certified copy of this order, after giving adequate opportunity of hearing to all the parties concerned.

11. For the analysis made above, this Court instead of granting any relief straightaway in this petition to quash the

order of the Settlement Officer Consolidation dated 11.4.2001 and to grant any injunction against the respondents, proposes to dispose of the writ petition in the light of the observations as made above.

For the reasons recorded above, writ petition stands disposed of.

Petition disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 7186 of 2004

Abhai Raj Singh ...Petitioner
Versus
Bank of Baroda & another ...Respondents

Counsel for the Petitioner:
Sri S.N. Dubey

Counsel for the Respondents:
Sri V.B. Singh
Sri Vijay Sinha
Sri Saumitra Singh

Constitution of India, Article 226-Service Law-disciplinary proceeding-and the Criminal proceeding for the same set of facts-simultaneously can go on-difference between the two-explained-instant case nothing a whispers as to how the continuance of departmental proceeding would cause prejudice-petition dismissed.

Held: Para 11

In the instant case, even though the criminal action and disciplinary proceedings are grounded upon the same sets of fact, in my view, there is no provision of law empowering the court to stay the departmental proceedings merely because criminal prosecution is pending in the criminal court. In my opinion, the purpose of the two proceedings are quite different. The object of the departmental proceedings is to ascertain whether the delinquent is required to be retained in service or not. On the other hand the object of criminal prosecution is to find out whether the offence in the penal statute has been made out or not. Therefore, the area covered by the two proceedings are not identical. The object in both the proceedings are different. Whereas the departmental proceedings are taken to maintain the discipline and the efficiency in the service, the criminal proceedings are initiated to punish a person for committing an offence violating any public duty. The Supreme Court has clearly stated that where the case is of a grave nature and involves questions of fact and law, in that event it would be advisable for the employer to await the decision of a criminal court. In the present case, there is no complicated questions of fact and law involved, nor any evidence has been led by the petitioner to show as to how he was prejudiced in the continuance of the departmental proceedings. Nothing has been shown by the petitioner as to how the proceedings in a criminal trial would be prejudiced in the event the domestic inquiry was not stayed.

Case law discussed:
AIR 1960 SC 806
AIR 1965 SC-155
AIR 1969 SC-30
AIR 1988 SC-2118
2004 ILR-950

(Delivered by Hon'ble Tarul Agarwala, J.)

1. The petitioner is working as a Head Cashier in Bank of Baroda and is posted in Tanda Shahabad Branch, in District Rampur. It transpires that an account holder in the bank filed a complaint against the petitioner and two

others for committing a fraud in his account. Based on the F.I.R., an investigation was made and a report was submitted to the competent court. The Court took cognizance of the said report and a case was registered as case Crime No. 1402 of 2003 under Section 218, 420, 467, 468, 471 and 409 I.P.C. which is pending in the court of Judicial Magistrate, Rampur. The respondent bank also made an in house inquiry and the disciplinary authority by an order dated 8.10.2003 issued a charge sheet. The petitioner alleges that subject matter of the charge sheet in the domestic inquiry proceedings and that pending before the criminal court is one and the same and further contended that the evidence in both the proceedings would be the same and if the departmental proceedings are allowed to continue, the original documents which are lying in the criminal court could not be produced and that the domestic inquiry would continue without the production of the original documents. The petitioner therefore, prayed that the domestic inquiry proceedings should be stayed till the decision in crime case No. 1402 of 2003, pending in the court of Judicial Magistrate, Rampur.

2. Heard Sri S.N. Dubey, the learned counsel for the petitioner and Sri V.B. Singh, learned Senior Advocate assisted by Sri Vijay Sinha, the learned counsel for the respondent bank.

3. The learned counsel for the petitioner submitted that since the departmental proceedings and the criminal proceedings are based on the same facts and that the documents relied upon would be the same, it would be appropriate that the departmental proceedings be kept in abeyance till the decision of the criminal court. He relied on the principles of "autre fois acquit" and the common law rule embodied in the maxim "*Nemo debet bis vexari"* (a man must not be put twice in peril for the same offence) and the docrine of double jeopardy and submitted that if the departmental proceedings are allowed to continue he would be prejudiced.

4. On the other hand the learned counsel for the respondents submitted that the purpose of the departmental inquiry was merely to help the department to come to a definite conclusion regarding the conduct of the delinquent and to decide what penalty, if any, that could be imposed upon him. Even assuming that the charges which the delinquent had been called upon to meet was in substance the same, nonetheless there was no bar for holding the disciplinary proceedings during the pendency of the criminal trial. The learned counsel further submitted that it was for the disciplinary authority to decide as to whether in a given case it should be keep a domestic inquiry pending till the outcome of the criminal trial or not. The learned counsel submitted that no such application had been made by the delinquent petitioner before the disciplinary authority and that the petitioner approached this Hon'ble Court immediately after the issuance of the charge sheet. Learned counsel for the respondents submitted that no evidence had been led by the petitioner to show as to how he would be prejudiced if the domestic inquiry continues during the pendency of the criminal trial. The learned counsel for the respondents further submitted that it was too early for the petitioner to suggest that the original documents would not be produced before the domestic inquiry and it was not open

to the petitioner to contend that the domestic inquiry would continue without the production of the relevant documents.

It is a well settled principle of law that the degree of proof required in a departmental inquiry is vastly different than the degree of proof required to prove a criminal charge. In the departmental inquiry the finding can be recorded in preponderance of probabilities and it is not necessary that the charge must be proved to the hilt. The departmental proceedings and the criminal proceedings are entirely different in nature. The operate in different fields and they have different objectives. The materials or the evidence in the two proceedings may or may not be the same and, in some cases, at least materials or evidence which would be relevant or open for consideration in the departmental proceeding, may be irrelevant in the criminal proceeding. The Rules relating to the appreciation of the evidence in the two inquiries may also be different. The standard of proof, the mode of enquiry and the rules governing the enquiry and the trial in both the cases are entirely distinct and different.

5. The law is well settled that the inquiry officer can come to a different conclusion than arrived at by a criminal court and that it is immaterial whether the charges were identical or the witnesses were the same, as long as the power exercised by the criminal court and the inquiry under the relevant law and the service law was distinct and separate. There is no bar for holding a disciplinary proceeding during the pendency of the trial though the basis may be one and the same. It is for the disciplinary authority to decide as to whether in a given case it should keep the domestic inquiry pending till the outcome of the criminal trial or not.

6. In **Delhi Cloth and General Mills Ltd. Vs. Kushal Bhan,** *A.I.R. 1960 SC 806,* the Supreme Court held:-

"It is true that very often employers stay enquiries pending the decision of the criminal trial courts and that is fair; but we cannot say that principles of natural justice require that an employer must wait for the decision at least of the criminal trial court before taking action against and employee."

and again held-

"We may, however, add that if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial court, so that the defence of the employee in the criminal case may not be prejudiced."

7. Similar view was reiterated by the Supreme Court in **Tata Oil Mills' Co. Ltd. Vs. The Workmen,** *A.I.R. 1965 SC 155;* **Jang Bahadur Singh vs. Baij Nath Tiwari,** *A.I.R. 1969 SC 30,* **Kusheshwar Dueby vs. M/s Bharat Coking Coal Ltd. and others,** *A.I.R. 1988 SC 2118.*

In Kushewar Dubey's case (supra), the Supreme Court held that there was no legal bar to simultaneous proceedings being taken against an employee even though there may be cases where it may be appropriate to defer the disciplinary proceedings awaiting the disposal of the criminal case. The Supreme Court held that it was neither possible nor advisable

to evolve a hard and fast straight-jacket formula and that in cases where the charge against the employee was of a grave nature and involved complex questions of law and fact, in that event the disciplinary proceedings could be deferred till the decision of the criminal trial.

8. In **Jang Bahadur Singh vs. Baij Nath Tiwari,** *A.I.R. 1969 SC 30,* the legal position was summed up by the Supreme Court as under-

"The issue in the disciplinary proceedings is whether the employee is guilty of the charges on which it is proposed to take action against him. The same issue may arise for decision in a civil or criminal proceeding pending in a court. But the pendency of the court proceeding does not bar the taking of disciplinary action. The power of taking such action is vested in the disciplinary authority. The civil or criminal court has no such power. The initiation and continuation of disciplinary proceedings in good faith is not calculated to obstruct or interfere with the course of justice in the pending court proceeding. The employee is free to move the court for an order restraining the continuance of the disciplinary proceedings. If he obtains a stay order, a willful violation of the order would of course amount to contempt of court. In the absence of a stay order the disciplinary authority is free to exercise its lawful powers."

In **State of Rajasthan vs. B.K. Mena and others,** *1996 (74) FLR 2550 (SC),* the entire case law on this issue was reviewed and the Hon'ble Supreme Court held-

"It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable' 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges. The staying of disciplinary proceedings, it is emphasized, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast rules can be enunciated in that behalf. The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceeding is "that the defence of the employee in the criminal case may not be prejudiced". This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated question of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case. The ground indicated in D.C.M. and Tata Oil Mills is not also an invariable rule. It is only a factor which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending consideration is that the disciplinary enquiry cannot be-and should not be- delayed unduly. So far as criminal cases are concerned, it is well-known that they drag on endlessly where high officials or persons holding high public offices are involved. They get bogged down on one or the other ground. They

hardly ever reach a prompt conclusion. That is the reality inspite of repeated advice and admonitions from this Court and the High Courts. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage, the interests of administration and good Government demand that these proceeding are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanor is enquired into promptly. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of the delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long periods awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest. While it is not possible to enumerate the various factors, for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view the various principles laid down in the decisions referred to above."

9. In **Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. and another**, *1999(82) FLR 627*, the Supreme Court after considering all the judgments held-

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly

delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest.

10. In **State Bank of India and others vs. R.B. Sharma,** 2004 LLR 950, the Supreme Court held-

"It is fairly well-settled position in law that on basic principles proceedings in criminal case and departmental proceedings can go on simultaneously, except where departmental proceedings and criminal case are based on the same set of facts and the evidence in both the proceedings is common.

The purpose of departmental enquiry and of prosecution are two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him or his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what ZX is required to be seen is whether the department enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

11. The law as enunciated by the Supreme Court leaves no scope for doubt that all said and done, there is no bar for simultaneous proceedings being taken against the delinquent in the form of criminal action and also disciplinary proceedings unless the charges are extremely serious and grave requiring the judicial determination in preference to the verdict in the domestic inquiry proceeding. In the instant case, even though the criminal action and disciplinary proceedings are grounded

upon the same sets of fact, in my view, there is no provision of law empowering the court to stay the departmental proceedings merely because criminal prosecution is pending in the criminal court. In my opinion, the purpose of the two proceedings are quite different. The object of the departmental proceedings is to ascertain whether the delinquent is required to be retained in service or not. On the other hand the object of criminal prosecution is to find out whether the offence in the penal statute has been made out or not. Therefore, the area covered by the two proceedings are not identical. The object in both the proceedings are different. Whereas the departmental proceedings are taken to maintain the discipline and the efficiency in the service, the criminal proceedings are initiated to punish a person for committing an offence violating any public duty. The Supreme Court has clearly stated that where the case is of a grave nature and involves questions of fact and law, in that event it would be advisable for the employer to await the decision of a criminal court. In the present case, there is no complicated questions of fact and law involved, nor any evidence has been led by the petitioner to show as to how he was prejudiced in the continuance of the departmental proceedings. Nothing has been shown by the petitioner as to how the proceedings in a criminal trial would be prejudiced in the event the domestic inquiry was not stayed.

12. It may also be stated here that immediately upon the issuance of the charge-sheet, the petitioner approached this Court. The petitioner has not even submitted his explanation and the departmental proceedings has not progressed. It is, therefore, difficult for the High Court to consider whether the matter is of such a complex nature that it would be better to stay the departmental proceedings pending disposal of the criminal case. On the other hand judicial notice can be taken of the fact that criminal cases of this nature takes a long time to conclude. The petitioner has nowhere shown as to how he would be prejudiced if he disclosed his evidence in the departmental proceedings. Further the disciplinary authority is the appropriate authority to consider whether it is worthwhile or not to await the decision of the criminal court. In the present case, the petitioner has not approached the disciplinary authority and came to this court directly.

13. For the reasons stated aforesaid, I do not find it to be a fit case for interference to stay the departmental proceedings. Consequently, in my opinion, there is no merit in the case and is dismissed accordingly. In the circumstances of the case there shall be no order as to cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2004

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No. 35099 of 2001

Ram Babu Gupta ...Petitioner
Versus
Presiding Officer, Labour Court, U.P., Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri S.N. Dubey

Counsel for the Respondents:
Sri V.R. Agrawal
S.C.

Apprenticeship Act 1961-Section 4- Petitioner under unregistered agreement-engaged for the period 22 years-termination after expiry of the period given in agreement-Labour Court recorded specific finding of fact-based on relevant material on record-once apprentice shall always apprentice-unless followed by letter of appointment-non registration of agreement-not fetal-the apprentice can not get the status of workman.

Held: Para 6 & 7

That the expression 'shall' appearing in sub-section (4) of Section 4 of the Apprenticeship Act, 1961 is directory and non-registration of the contract will not change the character of the apprentice and the incumbent will not acquire the status of a workman. Once an incumbent is appointed as an apprentice he will continue to be apprentice unless a formal order of appointment is followed.

In the present case, after thorough examination and critical scrutiny of the pleadings of the parties and the relevant material and the evidence adduced by the parties brought on record, the respondent no. 1- labour court has arrived at a well reasoned award dated 11.9.2000 (Annexure No. 5 to the writ petition). The petitioner has not been able to demonstrate before this Court that the findings of fact recorded in the impugned award suffers from any illegality, perversity or error apparent on the face of the record. More so, the said findings of fact, arrived at by the labour court-respondent no. 1 on the basis of which the impugned award has been passed, being based on relevant material on record, is not open to challenge before this Court while exercising its special and extra ordinary jurisdiction under Article 226 of the Constitution of India.

Case law discussed:
W.P. 19954 of 2000 decided on 26.7.2004
W.P. No. 19 of 1995 decided on 6.2.2001
2004 FLR (102) 347

(Delivered by Hon'ble V.C. Misra, J.)

Sri S.N. Dube, learned counsel for the petitioner, Sri Vivek Ratan, learned counsel for the respondent no. 2 and Learned Standing Counsel for the respondent no. 1 are present. Counter and rejoinder affidavits have been exchanged. On the joint request of learned counsel for the parties, this writ petition is being heard and finally disposed off, at this stage

1. This writ petition has been filed challenging the impugned award dated 11.9.2000 (Annexure No. 5 to the writ petition) passed by the labour court Allahabad- respondent no. 1 against the petitioner holding that the petitioner had not been retrenched and was not entitled to any relief.

2. The facts of the case in brief are that the petitioner was engaged as an Apprentice in Mechanic Maintenance Chemical Plant Trade under the Apprenticeship Act, 1961 for two years with the respondent no. 2- Indian Farmers Fertilizers Cooperative Ltd. Phoolpur, District Allahabad (hereinafter referred to as the IFFCO) on a stipend of Rs.335/- per month subject to the terms and conditions of the contract. The petitioner had accepted the offer and the terms and conditions mentioned in the said contract and thereafter appended his signature on 14.7.1981. On completion of the aforesaid period of two years, as apprentice training, the petitioner was

relieved w.e.f. 13.7.1983, as per the intimation dated 13.7.1983 sent by the respondent no. 2 to the petitioner. The petitioner raised an industrial dispute claiming himself to be a workman, employed by the respondent no. 2, as Assistant Technician. A reference was made to the respondent no. 1 by the State Government Under Section 4-K of the U.P. Industrial Disputes Act, 1947, whereupon adjudication case No. 136 of 1990 was registered.

3. The Presiding Officer of the labour court- respondent no. 1 after hearing both the parties passed the impugned award dated 1.9.2000 (Annexure No. 5 to the writ petition) on the basis of findings of fact to the effect that the petitioner had accepted the appointment letter dated 19.6.1981 and had joined in the IFFCO- respondent no. 2 accordingly on the basis of the terms and the conditions provided thereunder. The workman had also accepted the fact that an agreement in writing had entered into between the workman and the employer though it was subsequent to the joining of the petitioner. The labour court further found that the petitioner was being paid stipend per month as agreed in the contract and if he had been required to work over time, it would not convert him into an workman.

4. Being aggrieved the petitioner has filed this writ petition challenging the impugned award dated 1.9.2000 (Annexure No. 5 to the writ petition) inter alia, on the ground that the agreement had not been registered in accordance with the provisions of Section 4 of the Apprenticeship Act, 1961 and he had been required to work overtime.

5. Learned counsel for the petitioner in support of his contention relied upon the decisions rendered in **M/S Kanpur Electric Supply Company, Kanpur Vs. Presiding Officer, Labour Court-II, Kanpur & others** (Civil Misc. Writ Petition No. 19954 of 2000, decided on 26.7.2004), **U.P. State Electricity Board Vs. The Presiding Officer, Labour Court-I, U.P. Kanpur** (Civil Misc. Writ Petition No. 19 of 1995, decided on 6.2.2001) and **State of Gujarat and another Vs. Chauhan Ramjibhai Karsanbhai** (2004 (102) FLR 347) on the point that it was necessary that the agreement should be registered before being enforceable.

6. Learned counsel appearing on behalf of the respondent no. 2 has relied upon the decision of the apex Court rendered in **U.P. State Electricity Board Vs. Shri Shiv Mohan Singh and another** (JT 2004 (8) S.C. 272), on the points as to whether the requirement of registration of the apprenticeship contract is mandatory or merely directory; whether non registration of the contract renders the apprenticeship void or illegal; whether a person appointed as an apprentice ceases to be an apprentice and becomes a 'workman' when the employer does not register the contract with Apprenticeship Advisor; and whether non registration of the apprenticeship contract results in breach of contract and, therefore, the status of an incumbent is changed from apprentice to that of a workman. The apex Court has categorically held that the expression 'shall' appearing in sub-section (4) of Section 4 of the Apprenticeship Act, 1961 is directory and non-registration of the contract will not change the character of the apprentice and the incumbent will not acquire the status

of a workman. Once an incumbent is appointed as an apprentice he will continue to be apprentice unless a formal order of appointment is followed.

7. I have heard learned counsel for the parties at length and find that the facts of the present case is squarely covered with the facts and the principles laid down in the decision by the apex Court rendered in **U.P. State Electricity Board Vs. Shri Shiv Mohan Singh and another** (Supra) cited by the learned Standing Counsel for respondent no. 2. In the present case, after thorough examination and critical scrutiny of the pleadings of the parties and the relevant material and the evidence adduced by the parties brought on record, the respondent no. 1- labour court has arrived at a well reasoned award dated 11.9.2000 (Annexure No. 5 to the writ petition). The petitioner has not been able to demonstrate before this Court that the findings of fact recorded in the impugned award suffers from any illegality, perversity or error apparent on the face of the record. More so, the said findings of fact, arrived at by the labour court-respondent no. 1 on the basis of which the impugned award has been passed, being based on relevant material on record, is not open to challenge before this Court while exercising its special and extra ordinary jurisdiction under Article 226 of the Constitution of India.

Accordingly, the writ petition fails and is dismissed. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2004

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

Civil Misc. Writ Petition No. 9609 of 2004

Mohan Singh ...Petitioner
Versus
District Judge, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Pandey

Counsel for the Respondents:
Sri P.N. Tripathi
Sri T.N. Tiwari
S.C.

Civil Procedure Code, 1908 (as amended on 2004)-Applicability-Rejection of application for adjournment of evidence on the personnel ground of counsel-sufficient cause shown for adjournment-Rejection illegal.

Held: Para 3 & 4

An amendment in the law of procedure would ordinarily be retrospective but that is only a presumption and where a construction giving retrospectively to a provision is textually inadmissible it would have to be taken that the provision is prospective in operation.

From a perusal of the material on record, it transpires that counsel for the petitioner was busy at home due to personal reason and could not attend the court. It would thus appear that cause was shown which as contained in the application was sufficient for adjourning the case and the trial court wrongly and illegally rejected the same. To cap it all, the function of the court is to advance the cause of justice. In my view, the court should not act with rigidity in such

matter unless it is of the conclusion on valid reason and grounds that non-appearance was with a specific purpose to a design i.e. it was designed to protract the litigation. In the facts and circumstances of the present case, absence of counsel on a particular date unless it was deliberate or with the avowed object of protracting expeditious disposal of the matter should not be treated as default on the part of the litigant himself.

Case law discussed:
2003 ALR 424
AIR 1927 PC 242
AIR 1975 SC 1843

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

Petition in hand has been filed assailing the order dated 25.3.2003 passed by Civil Judge (J.D.) City Varanasi in Suit No.1203 of 1997.

1. It would appear that by means of order dated 20.5.2003, application filed by the petitioner seeking adjournment was rejected and evidence was ordered to be closed. Thereafter, application filed for recall of that order also came to be rejected by means of order dated 1.11.2003. Revision preferred against the said order was also dismissed.

2. I have heard learned counsel for the parties and perused the impugned orders. It would transpire that evidence of the petitioner was closed on the ground that the petitioner was disentitled to adjournment in view of the amended provision. It is evident from the record, that statement of one of the witnesses was recorded and the matter was fixed for cross examination and s ctatements of other witnesses. It would further appear that on the date fixed, counsel for the petitioner had not attended the court on that date and therefore, application for adjournment was moved. In connection with it, learned counsel for the petitioner submitted that the provisions of amended provisions are not intended for application to a suit instituted prior to amendment. In the instant case the suit came to be instituted in the year 1997 while the amendment was brought about with effect from the year 2002 and therefore, proceeds the submission, impugned order of rejection of application for adjournment and closure of evidence of the petitioner was impaired. Per contra, learned counsel for the Opp. parties vehemently lent support to the impugned order arguing that the amended provisions pertain to the matter of procedure and thus would be applicable to the present case.

3. In the perspective of the above controversy, I feel called to say that the matter whether amended provisions would be applicable to a suit instituted prior to the amendment, stands clinched by two decisions of the Court firstly, the decision reported in **Waqf Mausooma Syed Husain v. Dilip Kumar Jain**[1]. The quintessence of the view taken by the Court converging to the conclusion that the amendment would be prospective and not retrospective is that "an amendment in the law of procedure would ordinarily be retrospective but that is only a presumption and where a construction giving retrospectively to a provision is textually inadmissible it would have to be taken that the provision is prospective in operation." Reference in this connection was made to the decision in **Delhi Clothes and General Mill Company**

[1] 2003 ALR 424

Ltd. v. I.T. Commissioner[2] and Jose Decosta v. Basora Sadashiv[3].

4. Yet another aspect is whether on account of non-appearance of the counsel for the petitioner, the petitioner could be held to have committed default. It would appear that default if any was on account of absence of the counsel. In this connection, I feel called to observe that a litigant engages a counsel and entrusts him with the brief and all requisite papers in order to represent him in a judicial court. The question is if counsel absents himself on account of some unforeseen emergency and is not able to represent his client, would it be deemed to be a default on the part of litigant himself. An advocate means one who assists his client with advice and pleading for him. From a perusal of the material on record, it transpires that counsel for the petitioner was busy at home due to personal reason and could not attend the court. It would thus appear that cause was shown which as contained in the application was sufficient for adjourning the case and the trial court wrongly and illegally rejected the same. To cap it all, the function of the court is to advance the cause of justice. In my view, the court should not act with rigidity in such matter unless it is of the conclusion on valid reason and grounds that non-appearance was with a specific purpose to a design i.e. it was designed to protract the litigation. In the facts and circumstances of the present case, absence of counsel on a particular date unless it was deliberate or with the avowed object of protracting expeditious disposal of the matter should not be treated as default on the part of the litigant himself.

[2] AIR 1927 PC 242
[3] AIR 1975 SC 1843

5. In the above perspective, the writ petition is allowed and the impugned orders are quashed. In consequence, the petitioner shall be at liberty to lead evidence at a very early date.

6. At this stage, the learned Counsel for the petitioner urged that the suit itself is very old and it should be ordered to be decided expeditiously. The learned counsel has given undertaking that the petitioner would fully cooperate with the court below in expeditious disposal of the suit. Considering that the suit is very old and the interest of justice of both the parties would be best attained if the suit is ordered to be disposed of expeditiously, it is directed that the trial court shall endeavour to decide the suit expeditiously preferable within a period not exceeding one year. It may however be prescribed that both the parties shall extend full cooperation and would not seek unnecessary adjournment.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2004

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 38029 of 2002

Raj Kumar Gupta ...Petitioner
Versus
Chief of the Army Staff Army Head Quarter and others ...Respondents

Counsel for the Petitioner:
Sri H.P. Mishra

Counsel for the Respondents:
Sri B.N. Singh, S.S.C.
Smt. Aradhana Chauhan

Dying in Harness Rules Central Dying in Harness Scheme-Murder of Petitioner's father in Train decoity, while serving in Defence Security Corp-Petitioner's application for employment registered in Army Head quarter-Petitioner failed to qualify in Army-These being no vacancy in Civil department, petitioner could not be given appointment under Scheme and Rules for compassionate appointment.

Held: Para 14

In the instant case, the petitioner has failed to qualify in the Army and there being no vacancy in the civil department he could not be given appointment under the scheme and the rules for compassionate appointment. The action of the respondents in not appointing the petitioner on compassionate ground can not be said to be illegal or arbitrary.

Case law discussed:
ESC 2003 (Vol. I) 583
ESC 2003 (Vol. III) 1602
Civil and Revenue cases 2003 (Vol. III) 478
UPLBEC 2002 (Vol. III) 2807
JT (1994) 3 SC 525
(1996) 6 SCC 394
ESC 2002 (4) SC 25
(1994) 2 SCC 718
(1996) 4 SCC 560

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

Heard counsel for the parties and perused the record.

1. 6357692-H Late Naik Ram Gopal Gupta father of the petitioner is alleged to have been murdered in a train dacoity on 17.1.97 while he was serving in Defence Security Corp (hereinafter referred to as the DSC). The mother of the petitioner moved an application for providing employment to the petitioner on compassionate ground under the Dying in Harness scheme framed by the Central Government.

2. The petitioner's application was registered in the office of Head Quarter A.S.C. Centre (South) Banglore being Registration No. UP-33 dated 16.6.1998. Pursuant to the registration a letter was sent to the petitioner from the office of HQ ASC Centre (South) Bangalore for completing formalities regarding compassionate appointment under the Dying in Harness Rules.

3. It is alleged that despite completing all the formalities no action was taken by the authority, which compelled the petitioner to approach this Court for redressal of his grievance by means of Civil Misc. Writ Petition No. 42406 of 2001 (Raj Kumar Gupta Vs. Chief of the Army Staff, Army Head Quarter, D.H.Q.P.O. New Delhi and others). The aforesaid writ petition was disposed of vide judgment dated 4.1.2002 with a direction to respondent no. 2 to consider the case of the petitioner for compassionate appointment. Consequently the petitioner appeared for physical test on 1.7.2002 and his candidature was rejected. Having failed to quality in the Army and not being considered allegedly for appointment in a clerical job in the civil department the petitioner has moved this Court by filing aforesaid writ petition for a direction in the nature of mandamus to the respondents to issue appointment letter to him according to his qualification.

4. It is alleged in para 19 of the writ petition that the candidature of the petitioner was refused by the authority in an arbitrary manner. The petitioner claims that even if he had been declared unfit in physical test for appointment in the army he ought to have been considered for appointment in clerical job in civil

department for which he is also eligible being a science graduate and that the action of the respondents not considering him even for the post of clerk in the civil department is illegal without any basis and is not in consonance with letter and spirit of the judgment and direction issued by the Court dated 4.1.2002 in writ petition no. 42402 of 2001 Raj Kumar Gupta (Supra).

5. The petitioner in para 24 of the writ petition has averred that he had been refused appointment on compassionate ground because he had approached this Court. It is further submitted that the petitioner is full entitled to get the relief claimed in this writ petition on the grounds mentioned therein. The counsel for the petitioner has placed reliance on the following case laws:

1. ESC 2003 Vol. I Page 583 Smt. Kanti Srivastava Vs. State Bank of India and others.

2. ESC 2003 Vol. III page 1602 Durgesh Kumar Tiwari Vs. Chief General Manager State Bank of India Lucknow and others

3. Civil and Revenue Cases 2003 Vol. III page 478 Smt. Padma Pathak Vs. Managing Director, Punjab National Bank, New Delhi and others.

4. U.P. Local Bodies and Education Cases 2002 page 2807 Vol. 3 Dhiraj Kumar Dixit Vs. The General Manager (Personnel), UCO Bank, Calcutta and others.

6. The judgments of Smt. Kanti Srivastava Vs. State Bank of India and others (supra) has been stayed by the Division Bench in Special Appeal No. 181 of 2003 vide order dated 25.3.2003 whereas the case of Durgesh Kumar Tiwari Vs. Chief General Manager, State Bank of India, Lucknow and others (Supra) challenged in Special Appeal no. 777 of 2003 has been dismissed by judgment dated 20.7.2004.

7. In **Civil and Revenue Cases 2003 Vol. III page 478 Smt. Padma Pathak Vs. Managing Director, Punjab National Bank, New Delhi and others** it has been held that-

"Appointment-Compassionate ground-Refusal to absorb under scheme for employment of dependent of employees-Dying in Harness-Husband died due to cancer leaving behind minor children's and widow-Rejection of application of application without giving proper reasons will amount to denial of social justice and protection."

8. Similarly in **U.P. Local Bodies and Education Cases 2002 page 2807 Vol. 3 Dhiraj Kumar Dixit Vs. The General Manager (Personnel) UCO Bank, Calcutta and others** while considering the validity of Clauses 7 & 8 of the Scheme for Recruitment of Dependents of Deceased Employee on Compassionate Ground held that:

"Application of the petitioner rejected on ground that monthly income of the family of the deceased was higher than 60% of the last drawn salary of the deceased employee. Respondents also considered retrial benefits, family pension, group insurance and insurance policy for determining the family income of the deceased. Scheme does not permit an appointment on compassionate ground

except in case falling under clause 7 (d), which would not only be rare but would be impossible for any dependent to be eligible. Clauses 7 and 8 are arbitrary and irrational. Respondents directed to consider the representation of the petitioner for compassionate appointment according to his eligibility."

9. Smt. Aradhana Chauhan, counsel appearing for the respondents submits that the object of the scheme for providing appointment on compassionate ground is to enable the penurious family of the deceased employee to tide over the sudden financial crisis and not to provide employment. She has placed reliance upon the averments made in the counter affidavit that the mother of the petitioner has received approximately a sum of Rs.2,81,000.00 as post death benefit. On this basis she contends that no ground exists for providing employment assistance to the dependent of the deceased on compassionate ground as the family was not in indigent circumstances and moreover, the family has survived for more that 5 years, as such there is no emergency or immediate need for compassionate appointment in the instant case.

10. Relying upon the case of **Umesh Kumar Nagpal Vs. State of Haryana and others J.T. (1994) 3 SCC-525** it is urged that offering compassionate appointment as a matter of course irrespective of financial condition of the family deceased person is legally impermissible and it can be granted only within a reasonable period. She vehemently contends that the Central Government has framed scheme providing 5% quota for compassionate appointment to the dependent of the deceased according to the availability of suitable vacancy. She further submits that the death rate of DSC is very high hence all the dependents can not be accommodated under the scheme of compassionate appointment which is limited to the prescribed quota earmarked for this purpose. Her further submission is that in DSC the civilian cadre is limited and evolving a civil post for compassionate ground is very rare; that and the matter of the petitioner had received attention and had been examined at various levels. She further submits that the Government has stipulated a time frame for providing employment assistance and according to the revised procedure, if no vacancy meant for appointment on compassionate grounds within prescribed quota accrues within a period of one year, such cases are not required to be considered for providing employment assistance. Repelling the contention of the petitioner that he has not been offered a civil post at the time of death of his father due to non availability of vacancy on compassionate ground she submits that no person has been given appointment superseding the petitioner and that even at present there is no vacancy within the prescribed quota to provide employment to the petitioner.

11. In **Hidustan Aeronautics Ltd. Vs. A. Radhika Thirumalai (Smt.) (1996) 6 SCC-394** it has been held that in the absence of any vacancy there is no entitlement or vested right which may be taken or exercised by the dependent of the deceased at any time. The Apex Court has again in **Union of India Vs. Joginder Sharma, ESC 2002 (4) SC-25** has held that judicial interference in a discretionary power of the authorities to provide appointment on excess of percentage

reserved for such compassionate appointment already exhausted is not proper.

12. Appointment in public service on compassionate ground has been carved out as an exception to the normal procedure for recruitment. The compassionate appointment is based on humanitarian approach and that the whole object of the scheme is to enable the family to tide over the sudden crisis. In **LIC Vs. Asha Ramchhandra Ambedkar, (1994) 2 SCC-718** the Apex Court has settled the legal position that **an appointment on compassionate ground may be given only in accordance with the relevant Rules and Guide-lines** that have been framed by the authorities for this purpose and no person can claim appointment on compassionate ground dehorse the Rules and the Guide-lines.

13. In the case of **Himanchal Road Transport Corporation Vs. Dinesh Kumar, 1996 (4) SCC-560** it has been held that-

".....In the absence of a vacancy it is not open to the Corporation to appoint a person to any post. It will be a gross abuse of the powers of a public authority to appoint persons when vacancies are not available. If persons are so appointed and paid salaries, it will be a mere misuse of public funds, which is totally unauthorized. Normally, even if the Tribunal finds that a person is qualified to be appointed to a post under the kith and kin policy, the Tribunal should only give a direction to the appropriate authority to consider the case of the particular applicant, in the light of the relevant rules and subject to the availability of the post. It is not open to the Tribunal either to direct the appointment of any person to a post or direct the authorities concerned to create a supernumerary post and then appoint a person to such a post."

14. In the instant case, the petitioner has failed to qualify in the Army and there being no vacancy in the civil department he could not be given appointment under the scheme and the rules for compassionate appointment. The action of the respondents in not appointing the petitioner on compassionate ground can not be said to be illegal or arbitrary.

15. For the reasons stated above and in view of the law laid down by the Apex Court the writ petition is dismissed. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2004

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

Civil Misc. Writ Petition No. 32788 of 1996

Mohd. Yusuf ...Petitioner
Versus
Board of Revenue U.P. at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri M.A. Qadeer

Counsel for the Respondents:
Deoraj
S.C.

Evidence Act, 1872-S. 68-Proof of will-if a person puts his signature to certify that he is a scribble or an identifier or a registering officer, he is not an attesting witness-Record not showing that any of attesting witnesses were either dead or

not available to prove will-No notice was issued to any of attesting witnesses requiring then to prove will in question-Hence writ dismissed.

Held: Para 11

In view of decision of the Apex Court in Abdul Jabbar v. Venkata Sastri (supra), it is amply borne out that if a person puts his signature on the document for some other purpose e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. It is not borne out from the record that any of the attesting witnesses were either dead or were not available to prove the Will nor is there anything on the record to show that any notice was issued to any of the attesting witnesses requiring them to prove the will in question. In the circumstances, the decisions relied upon by the learned counsel for the petitioners are unavailing and the ratio flowing from them cannot be taken aid of to lend cogency to the petitioner's case.

Case law discussed:

2002 (93) RD 915
AIR 1930 Cal 750
AIR 1983 Orissa 24
2002 (93) RD 98
2004 (96) RD 347
AIR 1955 SC 351
AIR 1939 PC 117
AIR 1969 SC 1147

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

1. Petition in hand has been filed assailing the judgment dated 16.7.1996 passed by the Board of Revenue by which it has been held that a Scribe cannot be treated to be attesting witness unless attesting witnesses were dead or were not in a position to be examined.

2. It would appear from the record that one Mohd. Hanif was Bhumidhar of land in suit comprising in plot no. 201, admeasuring 2 Bighas, 7 Biswas. He had three sons who are parties to the present proceedings. Mohd. Yusuf one of the sons instituted a suit under section 229 B of the U.P.Z.A. & L.R. Act claiming himself to be the exclusive Bhumidhar of the land in question on the basis of a Will dated 13.5.1979 which it was alleged was executed by his father Mohd. Hanif in his favour. In the written statement, the other two sons of Mohd. Hanif i.e. the contesting Opp. parties repudiated the plaint allegations and denied exclusive rights as Bhumidhar of the plaintiff over the property in question and claimed 1/3rd share each to all the three brothers. The contesting parties also denied execution of Will and termed it as forged one. The trial court by means of judgment dated 29.6.1993 dismissed the suit on the ground that Will was not proved by attesting witnesses. In appeal, the Commissioner clinched the issue in favour of plaintiff on the ground that though attesting witnesses were not examined but the Scribe proved the Will. In consequence, the suit was decreed in appeal. This decision of the Commissioner led to filing of second appeal by defendant respondents which was allowed by the Board of Revenue recording a finding that there was no explanation in the Will for dis-inheriting the other brothers of the petitioner and further that the Will was not proved by attesting witnesses and a Scribe cannot be treated to be an attesting witnesses unless attesting witnesses were dead or were not in a position to be examined.

3. I have heard learned counsel for the parties and perused the materials on record. The learned counsel for the petitioner premised his submission by canvassing that the Will dated 13.5.1979 was proved by the Scribe and Board of

Revenue erred in law in holding to the contrary. He further submitted that the father of the petitioner was residing in Bombay and he, with his free will and mind, executed the will in favour of the petitioner. Per contra, learned counsel appearing for the Opp. Parties contended that the Will was not proved to have been executed by Mohd. Hanif and all the brothers succeeded the property in question.

4. Before proceeding to scan the respective submissions on the aspect, it would be apt to acquaint myself with the provisions of the relevant Sections. Section 68 of the Evidence Act being germane to the point involved, it is quoted below.

"68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Provided that it shall not be necessary to call an attesting witness in proof the execution of any document not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.)"

5. It would thus crystallise from the provisions of the above section that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

6. The term "attested" has not be defined in the Evidence Act. In Transfer of property Act, the said term has been defined in section 3 and being relevant it is quoted below.

"'attested' in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has been the executant sign or affix his mark to the instrument, or has been some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

7. Similarly, Section 63 of the Indian Succession Act lays down the meaning of attestation as under:

"Section 63 (c): The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person and each of the witnesses shall sign the will in the presence of the testator but it

shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

8. The question that surfaces in the perspective of above discussion, is whether a Scribe of the Will can be said to be an attesting witness who could prove a document required attestation. The self-same question cropped up before Apex Court in a case in Abdul Jabbar v. Venkata Sastri[1]. In para 8 of the said decision, the Apex Court enunciated the point in question in the following manner.

"Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

The Apex Court, regard being had to a decision of the Privy Council reported **in AIR 1939 PC 117** further held that a registering officer cannot be regarded as attesting witness as it is not proved that he signed the document in the presence of executant. A person identifying the witness puts his signatures on document to authenticate the fact that he had identified the executant and the same is not intended that he had put his signatures for the purposes of attesting witnesses. The Apex also placed credence on a decision in Girja Datt v. Gangotri[2] in which it was held that the two persons who had identified testator at the time of registration of document and had appended their signatures at the foot of the endorsement by Sub Registrar were not the attesting witnesses as their signatures were not animo attenstandi. Coming to the present case, it would appear that the attesting witnesses were not examined to prove the Will. There is not an iota of evidence on record to show that the witnesses were dead or were not traceable on the date fixed for evidence. It is borne out from the record that the attesting witnesses were not called by issuing notices to prove Will. The Scribe in his cross-examination, it would appear, has stated that Will was not registered in his presence and he did not go to the office of Sub Registrar at the time of Registration. No doubt, a scribe can be said to be an attesting witness, provided the two attesting witnesses are dead or incapable to give evidence even after being summoned for giving evidence if the test laid down by the Apex court is fully satisfied to the effect that the witnesses should have put his signature animo attestandi i.e. for the purpose of attesting and he has seen executant sign and has received from him a personal acknowledgement of his signatures at the time of registration. This clearly goes to prove that scribe in the present case does not satisfy the requirements laid down by

[1] AIR 1969 SC 1147

[2] AIR 1955 SC 351

the Apex Court and cannot be said to be an attesting witness.

9. Yet another aspect to be taken into reckoning is whether the Will spells out any special reasons for disinheriting other two sons by the father. This aspect was reckoned with and the will was rightly disbelieved by the Board of Revenue. The circumstances in which the Will was scribed and brought into existence do foment doubts whether the Will was at all executed by Mohd. Hanif to the exclusion of the rights of other two sons. No convincing explanation is forthcoming in order to show that the two sons were rightly disinherited by Mohd. Hanif and in the circumstances, the Will was rightly disbelieved. There should be some valid justification on record to show that father nursed any grievance against the remaining two sons whom he actually wanted to disinherit. There being nothing either in the Will or on record, it arouses suspicion that the Will alleged to be executed by Mohd. Hanif was authenticated one.

10. Lastly, I come to grips with the case-laws relied upon by the learned counsel for the Petitioner. The cases relied upon by the learned counsel for the petitioner are Smt. Bhuwan Kumari v. Akbar Ahmad and others[3], Haripada Maity v. Annada Prosad Haldar and others[4], Dhruba Sahu (dead) and after him Nalumoni Sahu and Anr. v. Paramananda Sahu[5], Madhukar D. Shende v. Tarabai Aba Shedage[6] in vindication of his stand that a scribe could be attesting witness if he has signed just after testator. The learned counsel appearing for the Opp. Parties relied upon a decision in Jayarajand Ms. V. Mohana[7] to bring home the point that at least one witness is necessary to prove a document.

11. In view of decision of the Apex Court in **Abdul Jabbar v. Venkata Sastri (supra),** it is amply borne out that if a person puts his signature on the document for some other purpose e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. It is not borne out from the record that any of the attesting witnesses were either dead or were not available to prove the Will nor is there anything on the record to show that any notice was issued to any of the attesting witnesses requiring them to prove the Will in question. In the circumstances, the decisions relied upon by the learned counsel for the petitioners are unavailing and the ratio flowing from them cannot be taken aid of to lend cogency to the petitioner's case.

12. As a result of foregoing discussion, the writ petition being devoid of merit is liable to be dismissed and it is accordingly dismissed.

Petition Dismissed.

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[3] 2002 (93) RD 915
[4] AIR 1930 Cal. 750
[5] AIR 1983 Orissa 24
[6] 2002 (93) RD 98

[7] 2004 (96) RD 347

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2004

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE MUKTESHWAR PRASAD, J.

Criminal Appeal No. 1791 of 1981

Jawahar and others ...Appellants(In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri K. Mohan
Sri R.C. Yadav
Sri Umesh Mohan
Sri O.N. Shukla
Sri S.P. Singh
Sri M.S. Yadav

Counsel for the Respondent:
A.G.A.

Indian Penal Code, Ss. 141, 149 and 302- Constitution under-Legality-Unlawful assembly-Evidence on record that appellants reached scene of incident in a group-They had common object to teach a lession to deceased and his family-Moreover-They used their weapons and take active part in commission of crime-Hence, contention that provisions of S. 149 are not attracted.

Held: Para 40

The explanation to Section 141 provides in clear words that an assembly which is not unlawful when it assembled, may subsequently become unlawful assembly. In the instant case, there is overwhelming evidence of the injured and the eye witnesses that the appellants reached the scene of incident in a group and they had a common object to teach a lesson to Hriday Narain and his family. Moreover, they used their weapons and took active part in commission of the crime. In this view of the matter, it is not possible for us to accept the submission made on behalf of the appellants that provisions of Section 149 I.P.C. are not attracted and A-2 to A-5 (except Jawahar) could not be convicted under Section 302 with the aid of Section 149 I.P.C.

Case law discussed:
2004 SCC (Crl.) 1467
2004 SCC (Crl.) 469
2004 (1) JIC 263 (SC)
1995 SCC (Crl.) 993
1991 SCC (Crl.) 1042
1998 SCC (Crl.) 461
AIR 1965 SC 202
AIR 1979 SC 1230

(Delivered by Hon'ble Mukteshwar Prasad, J.)

1. Five accused Jawahar, Chhakauri, Nankhoo, Ram Nath and Ram Chandra have filed this appeal against the judgment and order dated 7.8.1981 passed by Sri D.C. Srivastava, the then Additional Sessions Judge, Gyanpur, Varanasi whereby he convicted Jawahar under Sections 148, 302 and 323/149 I.P.C. and sentenced him to suffer rigorous imprisonment for a period of one and half years, imprisonment for life and six months rigorous imprisonment respectively there under. The remaining four accused were convicted under Sections 147, 323 and 302/149 I.P.C. and were sentenced to undergo rigorous imprisonment for a period of one year, six months and imprisonment for life respectively. All the sentences of five accused were directed to run concurrently.

2. The relevant facts of the case leading to the trial of the appellants are as under:

Accused Jawahar and Chhakauri are sons of accused Ram Nath. P.W.8, Smt.

Lalti Devi is wife of P.W.6 Lalmani. The parties are residents of village Prkshpur, P.S. Bhadohi.

3. On 26.3.1979 at about 9-00 a.m., Smt. Lalti Devi accompanied by Smt. Vidhya, wife of P.W.4 Chhabinath, had gone to collect grass in the fields for the cattle. Accused Nankhoo, son of Munni Lal, and Jawahar, son of Ram Nath, arrived there, passed indecent remarks and caught hands of Smt. Lalti Devi. She complained to her husband Lalmani in the night at about 9-30 p.m.

4. Next day i.e. on 27.3.1979, Nannkhoo was coming towards house of Lalmani. He lodged protest regarding his behaviour with his wife and slapped him twice. Nankhoo returned home and Lalmani went for weaving of carpet. This incident caused annoyance to Nankhoo, Jawahar and other members of his family.

5. On the same day at about 7-00 p.m., Mithai Lal along with Lalmani, Hriday Narain, Chhabinath and Bajranji were sitting at the door of Hriday Narain and were talking to each other. In the meantime, Jawahar armed with a Ballam and the remaining four accused, named above, having lathies in their hands arrived there. They exhorted each other that all were available at one place and they had a golden chance to kill them and teach a lesson. Accused Jawahar struck his Ballam in the chest of Hriday Narain who sustained grievous injuries and the remaining four accused wielded their lathies and caused injuries to Lalmani and Chhabinath. Thereafter, Mithai Lal and others picked up lathi-danda and female members of the family raised alarm and intervened. Jawahar and others sustained injuries in the course of incident. On the alarm raised, a number of villagers arrived there and saw the incident. Jawahar and others took to their heels. Lalmani and Chhabinath sustained injuries and Hriday Narain succumbed to his injuries on the spot.

6. P.W.7 Mithai Lal got a report of the incident prepared by one Mewa Lal on the spot and affixed his thumb impression. He accompanied by Lalmani and Chhabinath took the dead body of Hriday Narain to P.S. Bhadohi and on the basis of his written report, P.W.3 Som Nath Tiwari registered a case at crime no. 55 and made entry in the G.D. at serial no. 31.

7. After registration of the case, S.I. Sarv Jit Mishra, the then S.O. took up investigation and recorded the statement of Mithai Lal, Chhabinath and Lalmani at the police station.

8. S.I. Kailash Nath Tripathi prepared inquest report and other papers relevant for autopsy. He sent the dead body of Hriday Narain to mortuary along with constables Kashi Nath Ojha and Madan Mohan Singh.

9. Both Lalmani and Chhabinath were sent to Government Hospital, Bhadohi for medical examination of their injuries through constable Surendra Rai.

10. P.W.2 Dr. R.V. Singh, the then Medical Officer of P.H.C, Bhadohi, examined the injuries of Lalmani at 9-30 p.m. on 27.3.1979 and found one lacerated wound over right parietal scalp, 10 cm. above right ear 1 cm. x 0.5 cm. x skin deep fresh, bleeding present.

11. In the opinion of Dr. Singh, injury was caused by hard and blunt object and was simple in nature and fresh.

12. On the same night at 9-48 p.m. Dr. Singh further examined Chhabinath and found one lacerated wound over forehead 6 cm. above nasal root 1 cm. X 0.5 cm. X skin deep, bleeding present.

13. Dr. Singh opined that injury was simple, fresh and was caused by hard and blunt object.

14. P.W.1 Dr. K.N. Pandey conducted post-mortem examination on the dead body of Hriday Narain on 28.3.79 at 2-45 p.m. According to Dr. Pandey, the deceased was about 35 years old and had died about 16 to 20 hours before. Rigor mortis was present in both the limbs. Both eyes were closed.

Dr. Pandey found the following injuries:

(1) Punctured wound 2 cm. x 0.75 cm. x chest cavity deep over front of chest (just over sternum) in between both nipples, direction upwards and downwards. Margin of wound clean cut. Direction of depth of wound of slightly towards right then going inwards.

(2) Incised wound 0.75 cm. x 0.25 cm. x bone deep over medial aspect of right lower leg, 11 cm. below right knee joint. Direction upwards downwards. Margin clean cut.

15. On internal examination, 5th rib was found cut. Left lung was found ruptured. In the opinion of doctor, death of Hriday Narain was caused due to ruptured lung and punctured heart and on account of hemorrhage and shock resulting from the injuries.

The investigating officer collected blood-stained earth from the spot and prepared site-plan on 28.3.79 after inspection. After completing investigation, he submitted charge sheet against all the five assailants, named above.

16. Accused Jawahar was charged under Section 147, 148, 302 and 323/149 I.P.C. on 2.3.81.

Accused Chhakauri, Nankhoo, Ram Nath and Ram Chandra were charged on the same day under Sections 147, 148, 302/149 and 323 of the Penal Code. They pleaded not guilty to the charges framed against them and claimed to be tried.

17. At the trial, in order to establish its case against the accused the prosecution examined P.W.1 Dr. K.N. Pandey, the Medical Officer, who conducted autopsy, P.W.2 Dr. R.V. Singh, who examined the injuries of Lalmani and Chhabinath. He further examined injuries of Ram Nath, Jawahar and Chhakauri (all the three accused) on the same night at 10-10, 10-20 and 10-30 p.m. respectively. P.W.3 H.C. S. B. Tiwari, who proved chik report and made entry in the G.D., P.W.4 Chhabinath, one of the injured, P.W.5 constable K.N. Ojha, who took the dead body to mortuary for post-mortem examination, P.W.6 Lalmani, another injured, P.W.7 Mithai Lal, the informant and one of the eye witnesses, P.W.8 Smt. Lalti Devi, P.W. 9 S.I. K.N. Tripathi who prepared inquest report and relevant papers and P.W.10 S.I. Sarv Jit Mishra I.O. of the case.

18. All the accused facing trial pleaded their false implication in the case on account of enmity and alleged that

Hriday Narain, Lalmani, Chhabinath, Mithai Lal, Jiudhan, Bhuidhan, Bajrangi and Munna armed with lathies arrived at the door of Jawahar and assaulted Jawahar, Ram Nath and Chhakuri and caused injuries to them and they in exercise of their right of private defence used lathies and the female inmates of the house threw 'Faar' of the plough in defence which caused injuries to Hriday Narain. The other accused adopted the statement given by Jawahar.

19. Accused examined D.W.1 Smt. Chameli, wife of Jawahar, and D.W.2 constable Muin Ahmad, who proved chik report (Ex- Ka-4) lodged by Ram Chandra, one of the appellants, at P.S. Bhadohi on the same night at 10-00 p.m. Accused further got proved injury reports of Ram Nath, Jawahar and Chhakauri by Dr. R.V. Singh (P.W.2), which are (Ex-kha-1 to Ex-kha-3) respectively.

20. After close scrutiny of the entire evidence on record led by the parties and considering the submissions made on their behalf, learned Judge found all the five accused guilty and convicted and sentenced them, as noted above.

21. Aggrieved by their conviction and sentence, the accused came up in appeal.

22. We have heard learned counsel for the appellants and learned A.G.A. and have perused the record also.

23. Learned counsel for the appellants has assailed the impugned judgment mainly on the ground that site-plan prepared by the I.O. does not support the prosecution version and has demolished the whole prosecution case. He contended with vehemence that there was, in fact, no motive on the part of the appellants to commit the offences and in any case there was very weak motive. According to him, the possibility of falsely implicating all the appellants in the case cannot be ruled out and out of the five appellants Jawahar, Ram Nath and Chhakauri sustained injuries in the course of incident and they all in exercise of their right of private defence of person caused injuries with lathies and the female members of the family used 'Faar' which caused injuries to Hriday Narain. It was further submitted vehemently that there was no unlawful assembly and as such, the provisions of Section 149 I.P.C. are not attracted and all the appellants could not be convicted with the aid of Section 149 I.P.C.

Learned counsel for the appellants has placed reliance on the following decisions:

1. State of U.P. Vs. Ram Bahadur Singh and others, 2004 Supreme Court Cases (Cri.) 1467.

2. Boya T. Venkateswarlu and Others Vs. State of A.P. , 2004 Supreme Court Cases (Cri) 469.

3. Bhargavan @ others Vs. State of Kerala, [2004 (1) JIC 263 (SC)].

4. Bharwad Jakshibhai Nagjibhai and others Vs. State of Gujarat, 1995 Supreme Court Cases (Cri) 993.

5. Jharu and others Avadh Ram and others Vs. State of Madhya Pradesh, 1991 Supreme Court Cases (Cri) 1042.

6. Sudhir Samanta Vs. State of W.B. and another, 1998 Supreme Court Cases (Cri) 461.

24. On the other hand, learned Additional Government Advocate supported the judgment under appeal and

urged that the trial court rightly concluded that the appellants were the aggressors and took law in their hands and caused death of Hriday Narain and assaulted Lalmani and Chhabinath in the course of same incident. According to him, the appellants had a motive to commit the crime in question and in view of promptness in lodging the F.I.R. at the police station there was no question of falsely implicating any of the appellants in the case instead of real assailants. Consequently, the appeal is liable to be dismissed.

25. Reliance has been placed by the State Counsel on two decisions of the Supreme Court in ***Masalti Vs. State of Uttar Pradesh, A.I.R. 1965 Supreme Court 202*** (a judgment rendered by a Bench of four Judges of the Court) and ***Mannu and others Vs. State of Uttar Pradesh, A.I.R. 1979 Supreme Court 1230.***

26. We have given our anxious consideration to the arguments advanced on behalf of the parties and have perused the decisions relied upon by them.

27. According to the prosecution case, the impugned incident took place at about 7-00 p.m. on 27.3.79 at the door of Hriday Narain, the deceased. On the other hand, A-1 (Jawahar) disclosed in his statement that on the impugned date and time Hriday Narain, Lalmani, Chhabinath, Mithai Lal and others arrived at his door and assaulted him, Ram Nath and Chhakauri and they too wielded their lathies in self-defence. Thus, we find that the appellants came to the Court with a cross version and they also lodged a written report at the police station on the same night at 10-00 p.m. which is Ex-Kha-4 on record. It is, therefore, obvious that incident in question took place on 27.3.79 at about 7-00 p.m.

28. Now we shall scrutinize the evidence with a view to test whether the trial Judge rightly held the appellants as aggressors.

29. As mentioned above, the prosecution examined ten witnesses in all to prove its allegations. Out of which, P.W.1 Dr. K.N. Pandey, P.W.2 Dr. R.V. Singh, P.W.3 H.C. S.B. Tiwari, P.W.5 Constable Kashi Nath Ojha, P.W. 9 S.I. K.N. Tripathi and P.W.10 S.I. Sarva Jit Mishra are formal witnesses. The prosecution mainly relied on the testimony of P.W.4 Chhabinath and P.W.6 Lalmani who were allegedly assaulted and sustained injuries in the course of same incident in which Hriday Narain was done to death. P.W.7 Mithai Lal and P.W.8 Smt. Lalti Devi claimed themselves to be eye witnesses.

30. P.W. 8 Smt. Lalti Devi, wife of Lalmani, testified in clear words that on 26.3.79 she accompanied by Smt. Vidhya went to collect (Scrap) grass to the fields where Nankhoo and Jawahar arrived and passed indecent remarks. They caught her hands and dragged her. She narrated this incident to her husband in the night at about 9-00 p.m. Next day, Nankhoo was questioned by Lalmani about his misconduct towards his wife and lodged protest. Nankhoo became angry whereupon Lalmani slapped him. This incident of slapping to Nankhoo by Lalmani is said to be the motive of the crime. It was, therefore, urged that motive was very weak in this case and prosecution did not come to the Court with clean hands. First of all, it is

noteworthy that Smt. Lalti Devi was cross-examined at length but she stood successful in the test of cross-examination. It is well settled that motive is not a *sine qua non* for commission of a crime. Moreover, where the prosecution case rests on direct evidence of the witnesses the motive looses its significance. In the instant case, there was a motive for the accused to commit the crime and teach a lesson to Lalmani and his family. In my opinion, the slapping to Nankhoo at the hands of Lalmani publicly must have caused annoyance. We, therefore, hold that there was a motive for the appellants to commit the offence.

31. According to the F.I.R. besides the deceased Hriday Narain, Lalmani and Chhabinath were also sitting there where Jawahar pierced his Ballam in the chest of Hriday Narain. Both Lalmani and Chhabinath were also given lathi blows by A-2 to A-4 who were having lathies in their hands. We find from perusal of the injury reports of Chhabinath and Lalmani that both had lacerated wounds over forehead and right parietal scalp. The injuries of both were bleeding at the time of examination by Dr. R.V. Singh who examined them at 9-48 p.m. and 9-38 p.m. on the same night. Keeping in mind the nature and seat of injuries of both the witnesses, we can say it safely that the injuries could not be manufactured or self-suffered only with a view to falsely implicate the appellants/enemies. Besides the medical evidence on record, P.W.4 Chhabinath fully supported the prosecution story and testified that the deceased was his cousin and they all were sitting at the door of Hriday Narain on the impugned date. According to Chhabinath, A-1 (Jawahar) exhorted his associates to kill and teach a lesson as they were present at one place. Accused Jawahar himself struck his Ballam in the chest of Hriday Narain and the remaining accused used their lathies and caused injuries to Chhabinath and Lalmani. P.W.4 Chhabinath and P.W.6 Lalmani picked up lathies and used in their self-defence. The witnesses tried to apprehend Hriday Narain whereupon all the assailants ran away and Hriday Narain succumbed to his injuries. It is noteworthy that the statements of Lalmani and Chhabinath to the effect that they too used lathies and caused injuries to Jawahar and others in the course of the same incident find place in the written report handed over to the police by Mithai Lal.

32. P.W.6 Lalmani corroborated the testimony of Chhabinath on all material points and supported his wife on the point of motive. He testified that his wife narrated the incident to him in the night regarding teasing by Jawahar and Nankhoo and he next day gave two slaps to Nankhoo. He too disclosed in unambiguous words that A-1 pierced his Ballam in the chest of Hriday Narain and the appellants 2 to 4 having lathies assaulted him and Chhabinath and caused injuries. He admitted in very clear words in cross-examination that Ram Nath, Jawahar and Chhakauri had sustained injuries in the course of incident. Both Lalmani and Chhabinath were cross-examined extensively on behalf of the accused but nothing could be elicited in their cross-examinations to disbelieve their testimony. They stated categorically that it were the appellants who arrived at the door of Hriday Narain after forming an unlawful assembly and at the exhortation of Jawahar they committed murder of Hriday Narain and caused injuries to Lalmani and Chhabinath. They

totally denied that they and another attacked upon the appellants. They asserted that no brick batting was done by the female member of the family.

33. P.W.7 Mithai Lal further supported the prosecution story and corroborated the testimony of the injured. P.W.7 Mithai Lal was also cross-examined at length but his testimony was not shaken. There are a few minor discrepancies in the statement of both the injured and Mithai Lal but the discrepancies are not fatal at all as they are not on material points.

34. A perusal of the site-plan shows that Hriday Narain was dragged by the appellants and was left near the house of Jawahar where he died. It was urged that the I.O. found no blood marks between the houses of Hriday Narain and Jawahar. It is noteworthy that the I.O. visited the scene of occurrence on 28.3.79 and after inspection prepared site-plan. It was month of March. Moreover, the villagers must have been using the village pathway throughout the night and day and as such, the I.O. found no blood marks. The I.O. had collected blood-stained earth from the scene of incident and prepared a Fard also. He collected blood-stained earth from places shown at A & B of the site-plan.

35. As pointed out above, the incident in question took place at about 7-00 p.m. in which Hriday Narain was killed on the spot and two persons Lalmani and Chhabinath sustained injuries. The dead body was also taken to the police station by the informant who handed over a written report at P.S. Bhadohi on the same night at 9.10 p.m. at a distance of about six kilometers. Therefore, in view of prompt F.I.R. by the informant there was no time at all for any consultation or deliberation and as such, the possibility of falsely implicating any of the appellants is ruled out.

36. In the instant case, we find no inconsistency between the medical evidence and ocular testimony on record. Moreover, there is no contradiction in the testimony of the injured and the informant who were subjected to lengthy cross-examination.

37. Learned counsel for the appellants further submitted that A-1 (Jawahar) alone could be convicted under Section 302 I.P.C. and other appellants could not be convicted under Section 302 I.P.C. with the help of Section 149 I.P.C. According to him, there was no unlawful assembly and in any case the other appellants did not know the common object of the assembly that Hriday Narain would be killed. He drew our attention to paragraph-16 of the judgment rendered by the Apex Court in ***Bhargavan case (Supra)***. In ***Lalji Vs. State of U.P., 1989 (1) SCC 437***, it was observed that common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case. In ***State of U.P. Vs. Dan Singh and others, JT 1997 (2) SC 149***, it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. The mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149 I.P.C.

38. There is a leading judgment of the Supreme Court rendered by a Bench of four Judges, reported in A.I.R. 1965 SC 202. It was held in ***Masalti's case (Supra)*** that an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141 is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

39. In a recent judgment delivered by the Apex Court on 29.4.2004 in ***Chanda and others Vs. State of U.P. and another, 2004 AIR SCW 2954***, it was held that Section 149 I.P.C. consists of two parts. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149 I.P.C. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts, which fall within the purview of Section 141 I.P.C.

40. We shall now scrutinize the evidence on record with a view to find out whether the appellants were rightly convicted by the court below with the aid of Section 149 I.P.C. in the light of the aforesaid proposition of law enunciated by the Apex Court. According to appellants' learned counsel, there was no unlawful assembly and the appellants did not know the common object of the assembly that Hriday Narain would be killed. In view of the facts of the case and evidence on record led by the prosecution and the law laid down by the Supreme Court, we are not inclined to accept this contention. There is direct and reliable evidence of two injured, the informant and Smt. Lalti Devi also to the effect that all the five accused armed with Ballam and lathies arrived at the door of deceased on the impugned date and they, on the exhortation of Jawahar, committed the crime. The law requires that the number of assailants must be five or more and such assembly of five or more persons becomes unlawful assembly when common object of the person composing that assembly is to commit the offences described in Clause 1st to 5th of Section 141. The explanation to Section 141 provides in clear words that an assembly which is not unlawful when it assembled, may subsequently become unlawful assembly. In the instant case, there is overwhelming evidence of the injured and the eye witnesses that the appellants reached the scene of incident in a group and they had a common object to teach a

lesson to Hriday Narain and his family. Moreover, they used their weapons and took active part in commission of the crime. In this view of the matter, it is not possible for us to accept the submission made on behalf of the appellants that provisions of Section 149 I.P.C. are not attracted and A-2 to A-5 (except Jawahar) could not be convicted under Section 302 with the aid of Section 149 I.P.C.

41. On careful scrutiny of the entire evidence on record, we are also of the view that the prosecution succeeded in bringing home the charges against the appellants and, therefore, the conclusion arrived at by the learned trial court is liable to be upheld. We, therefore, hold that this appeal is devoid of merit and is liable to be dismissed.

42. The appeal fails and is hereby dismissed. The conviction and sentence recorded by the trial Judge are hereby affirmed. The appellants are on bail. Their bail is cancelled. They shall be taken into custody to serve out the sentences passed against them.

43. A copy of this judgment shall be sent to the court concerned for compliance of the order. Compliance report shall be submitted to this Court within two months.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 52466 of 2003

Committee of Management, Janta Vidyalaya Samiti, Sahpau Mathura and another ...Petitioners

Versus

The Deputy Registrar, Firms, Societies and Chits, Agra U.P. & others ...Respondents

Counsel for the Petitioners:
Sri M.K. Tiwari

Counsel for the Respondents:
Sri Ashok Khare
Sri V.K. Agarwal
Sri Sanjay Mishra
Sri Digvijay Singh
S.C.

Societies Registration Act-Ss. 25 (1) and–Dispute with regard to two riwal elections, set up by parties must be referred to Prescribed Authority within one month-order deciding claim by Dy. Registrar-held, without jurisdiction.

Held: Para 25 and 26

In the opinion of the Court in the facts and circumstances of the case it is established that there is a bona fide dispute in respect of the two rival elections of the office bearers of the society and the Deputy Registrar could not have decided the same on his own.

The order passed by the Deputy Registrar, Firms, Societies and Chits, Agra, U.P. is wholly without jurisdiction. The dispute with regard to the two rival elections set up by the parties must necessarily be referred by the Deputy Registrar to the Prescribed Authority within one month from the date a

certified copy of this order is filed before him. It is further provided that the Prescribed Authority shall proceed to decide the dispute so referred at the earliest possible after affording opportunity of hearing of the parties and after permitting the exchange of documents within a period of three months from the date of such reference.

Case Law discussed:

(1999) 2 UPLBEC 77
2003 (3) E & S.C. (All.) 1617
(1995) 2 UPLBEC 1242
(1988) UPLBEC 732
(1970) 1 SCC 613
AIR 1968 SC 1328

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri Mithilesh Kumar Tiwari, learned counsel for the petitioners, Sri Ashok Khare, Senior Advocate, assisted by Sri V.K. Agarwal, learned counsel for the respondent nos. 2,3, and 4 and Learned Standing Counsel for the respondent nos. 1 and 5.

2. Committee of Management of Janta Vidyalaya Samiti, Mahamaya Nagar through its President, Sri Ajant Singh and one Sri Neeraj Yadav have filed this writ petition against the order of the Deputy Registrar, Firms, Chits and Societies, Agra dated 19th November,2003 whereby, after adjudicating upon the rival set of elections, he has proceeded to hold that the elections dated 30th June,2003 are legal and valid and, therefore, has directed that the list of office bearers submitted in pursuance of the aforesaid elections be registered under Section 4 of the Societies Registration Act.

3. It is contended on behalf of the petitioners that the aforesaid order of the Deputy Registrar dated 19th November, 2003 is without jurisdiction inasmuch as there was a *bona fide* dispute between two rival set of office bearers on the basis of two elections; first held on 18th July, 2003 wherein the petitioners, namely, Sri Ajant Singh was elected as President and Sri Neeraj Yadav as Vyavasthapak/Manager (elections of the petitioners). The other set of elections are alleged to have taken place on 30th June, 2003 in which Sri Hari Parasad Yadav was elected as President, Sri Brijesh Kumar as Secretary and Sri Bharat Singh Vyavasthapak/Manager. The said dispute could have been adjudicated upon by the Prescribed Authority under Section 25(1) of the Societies Registration Act and the Deputy Registrar was under legal obligations, to have referred the dispute to the Prescribed Authority under Section 25(1) of the Societies Registration Act. Reliance, in support of the contention have been placed upon the judgments of this Court reported in ***(1999) 2 UPLBEC 77 (Committee of Management Versus Secretary, Arya Kanya Inter College) and 2003(3) Education & Service Cases (Allahabad) 1617 (Sitaram Rai and others Versus Additional Registrar, Firm, Societies and Chits, Gorakhpur Division, Gorakhpur and others).***

4. It is stated that the impugned order proceeds on misconception of fact and law that the finding recorded in Original Suit being Original Suit No. 138 of 1994 would operate as *res judicata* against the petitioners. In paragraph no.3 of the writ petition it has been stated that the impugned order dated 19th November, 2003 has been passed without affording opportunity of hearing to the petitioners.

5. Lastly, it is submitted that even if the alleged elections of the petitioner are not accepted, the Deputy Registrar was

under legal obligations, to record findings, (a) as to whether Sri Bharat Singh was competent to hold fresh elections or not, (b) whether the elections dated 30th June, 2003 set up by Sri Bharat Singh Yadav were held in accordance with the registered bye-laws of the society or not, which has not been done. The order dated 1st November, 2003 was passed in manifest of non-compliance of Section 4 (1) (proviso) of the Societies Registration Act, inasmuch as the list of the office bearers submitted by Sri Bharat Singh Yadav on the basis of the elections dated 30th June, 2003 was not countersigned by the outgoing office bearers.

6. On behalf of the respondents it is contended that the Deputy Registrar under the impugned order has held that Sri Neeraj Yadav is not even a primary member of the society and, consequently, he could not have held any elections and as such there was no *bona fide* dispute of elections, which was required to be adjudicated upon by the Prescribed Authority under Section 25(1) of the Societies Registration Act. The Deputy Registrar is not required to act as post office. In the facts of the present case the Deputy Registrar has rightly held that there was only one set of valid elections and has, therefore, rightly registered the list of office bearers of the society under the impugned order. In support the said contention, respondents have placed reliance upon the judgment reported in ***(1995) 2 UPLBEC 1242 (Committee of Management, Kisan Shiksha Sadan, Banksahi, District Basti and another Versus Assistant Registrar, Firms, Societies and Chits, Gorakhpur Region, Gorakhpur and another)***

7. Respondent submits that the judgment of the Civil Judge, Sadabad, Hathrash (Mahamaya Nagar) dated 26th September, 2003 passed in Civil Suit No. 138 of 1994 with regard to Issue No. 11 would operate as *res judicata*. The same has become final between the parties. The Civil Judge has held that Sri Neeraj Yadav was not even a primary member of the general body nor the Manger of the Committee of Management of the Janta Vidyalaya, Mahamaya Nagar. The said finding recorded by the Civil Judge in respect of Issue no.11, which has become final between the parties, cannot be permitted to be questioned by Sri Neeraj Yadav before the Deputy Registrar, Firms, Societies and Chits, Agra. In reply to paragraph 31 of the writ petition, in Paragraph 25 of the counter affidavit it has been stated that the objections of the petitioners have been rejected after affording opportunity of hearing to the petitioners for valid reasons.

8. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

The relevant facts for decision of the present writ petition are that Janta Vidyalaya Samiti, Mahamaya Nagar is a registered society under the Societies Registration Act. The said society runs and manages a recognized intermediate college in the name and style of Janta Inter College, Sahpau Mahamaya Nagar. Under rule 6 of the bye laws of the society, it is provided that the Managing Committee of the society shall constitute a Committee of Management to look after the affairs of the educational institution. The Vyawashthapak of the society *ex officio* becomes the Manager of the

Committee of Management of the institution.

9. Upto 4th December, 1991 there was no dispute in respect of the Committee of Management or of the institution. Sri Ram Prakash Yadav, who was the Vyawashthapak/Manager, expired on 4th December, 1991. On his death Sri Bharat Singh Yadav set up a claim for the post of Manager of the institution. The claim of Sri Bharat Singh Yadav was turned down by the District Inspector of Schools, Mathura vide order dated 26.12.1991. Feeling aggrieved by the aforesaid order of District Inspector of Schools, Sri Bharat Singh Yadav filed a writ petition before this Court, being Writ Petition No. Nil of 1992, and this Court vide order dated 23rd January, 1992 passed an interim order in his favour. Under order of this Court Sri Bharat Singh Yadav continued to work as Manager of the institution for its remaining term.

10. On 6th February, 1994 fresh elections of the office bearers of the society took place, in which Sri Ajant Singh Yadav (Petitioner no.1) was elected as Prabandhak/President, Sri Sohan Lal was elected as Mantri/Secretary and Sri Jaswant Singh was elected as Vyawashthapak/Manager of the society. The aforesaid elections of the society dated 6th February, 1994 were questioned by Sri Bharat Singh Yadav by way of objections before the Deputy Registrar, Firms, Societies and Chits. The Deputy Registrar, after affording opportunity to the parties concerned, by means of the order dated 18th July, 1994 held that the elections set up by Sri Sohan Lal, claming himself to be elected as Mantri/Secretary, dated 6th February, 1994 were in accordance with the bye-laws of the society, while the elections set up by Sri Bharat Singh Yadav are claimed to have been held in accordance with the approved scheme of administration of the institution. In such circumstances, the Deputy Registrar directed that the list of office bearers elected on 6th February, 1994 be registered, as the elections had taken place in accordance with the registered bye-laws.

11. Feeling aggrieved by the aforesaid order of Deputy Registrar dated 18th July, 1994, respondent no.3 Sri Bharat Singh Yadav filed another writ petition before this Court being Civil Misc. Writ Petition 24437 of 1994, wherein a conditional interim order was granted. Under said interim order of this Court, no restrain was placed on the functioning of the office bearers of the society, the list whereof had already been registered. Accordingly an advertisement was invited by the officer bearers of the society in Hindu Newspapers "Dainik Jagaran" inviting elections of the Committee of Management of the institution.

Election notification so published by the office bearers of the society, was challenged by Sri Bharat Singh by means of a suit being Civil Suit No. 138 of 1994 (Bharat Singh Versus Ajant Singh) before the Court of Munsif, Sadabad, Mathura. In the said suit no interim injunction was granted as a result whereof fresh elections for constituting the Committee of Management of the institution took place on 3rd October, 1994 in which Sri Ajant Singh was elected as Manger. Sri Bharat Singh challenged the aforesaid elections also by way of an amendment in the Civil Suit No. 138 of 1994. During the

pendency of the aforesaid Civil Suit proceedings the term of the elected Committee of Management (three years) has expired. As such fresh elections of the office bearers of the society took place on 20th June, 1997 in which Sri Ajant Singh was again elected as President and Sri Sohan Lal was elected as Secretary. Sri Bharat Singh filed objections to the list of office bearers submitted in pursuance of the aforesaid elections dated 20th June, 1997 before the Deputy Registrar, Firms, Societies and Chits. The objections so filed by Sri Bharat Singh, the Deputy Registrar referred the dispute under Section 25 of the Societies Registration Act to the Paragana Adhikari, Sadabad. During the period of said proceedings, elections of the Committee of Management of the institution also took place on 13th September, 1997 in which Sri Neeraj Yadav was elected as the Manager. Before the reference could be decided, the term of the elected Committee of Management was also expired and the fresh elections of the office bearers of the society took place on 4th June,2000 in which Sri Ajant Singh was again elected as President. Against the aforesaid elections dated 4th June, 2000 objections were again filed by Sri Bharat Singh before the Deputy Registrar, Firms, Societies and Chits. The Deputy Registrar, however, rejected the said objections filed by Sri Bharat Singh and vide order dated 5th May, 2001 directed that the list of office bearers elected on 4th June, 2000 be registered. The term of the Committee of Management elected in the year 2000 was expired in the year 2003 and accordingly, the fresh elections were invited in daily newspaper "Aaj" for 18th July, 2003. The elections were accordingly, held and Sri Ajant Singh was again elected as President, Sri Neeraj Yadav was elected as Vyawashthapak and Sri Ajeet Singh was elected as Mantri. The proceedings in respect of the elections dated 18th July,2003 were forwarded to the Deputy Registrar, Firms, Societies and Chits after being duly countersigned by the outgoing office bearers vide letter dated 21st July,2003. Sri Bharat Singh Yadav instead of filing the objections of the aforesaid elections dated 18th July, 2003 now set up his independent elections dated 30th June, 2003 and forwarded the papers pertaining to the aforesaid elections to the Deputy Registrar, Firms, Societies and Chits for the first time on 1st November, 2003. On the same date the Deputy Registrar without complying with the provisions of Section 4 (1) proviso of the Societies Registration Act registered the list of office bearers submitted by Sri Bharat Singh pertaining to the elections dated 30th June, 2003. Against the said order dated 1st November, 2003 the petitioner moved an application dated 3rd November, 2003 for recall of the said order dated 1st November, 2003. The application so filed by the petitioner has been rejected by the Deputy Registrar by means of the order dated 19th November, 2003. Under the impugned order it has been held that Sri Neeraj Yadav is not even a primary member of the society and, consequently, the elections set up by him cannot be recognized/accepted, therefore, it has been decided to maintain the order dated 1st November, 2003 whereby the list of office bearers submitted by Sri Bharat Singh on the basis of elections dated 30th June, 2003 had been registered.

12. So far as the order dated 1st November, 2003 is concerned, it is established from records that the said

order was passed by the Deputy Registrar without complying with the requirements of Section 4(1) proviso of the Societies Registration Act. The list of office bearers submitted by Sri Bharat Singh on the basis of elections dated 30th June, 2003 was not countersigned by the outgoing office bearers. The Deputy Registrar did not invite objections as contemplated by the proviso to Section 4 (1) of the Act proceeded to register the same on the very date the list was submitted in his office.

13. In the opinion of the Court the procedure adopted by the Deputy Registrar, as such, is patently illegal and order dated 1st November, 2003 cannot be sustained.

14. So far as the order dated 19th November, 2003 is concerned, the jurisdiction of the Deputy Registrar to pass the impugned order is required to be judged on the following issues, namely, (i) whether Sri Neeraj Yadav was *bonafide* member of the general body of the society and therefore, the elections set up by him could not have been held to be a mere transaction; (ii) whether in the facts of the present case there was a *bonafide* dispute with regard to the elections of the office bearers of the society, which are required to be referred under Section 25 (1) of the Societies Registration Act to the Prescribed Authority.

Decision on Issue No. (1)

15. From the order passed by the Deputy Registrar, Firms, Societies and Chits dated 19th November, 2003, it is apparently clear that after reproducing the portion of the order of the Civil Court dated 26th September, 2003, whereby in the Civil Suit No. 138 of 1994 Issue No.11 has been decided no other finding has been recorded by the Deputy Registrar.

16. Thus, the controversy with regard to Sri Neeraj Yadav being a member of the general body of the society revolves around only one question namely, whether the finding recorded in respect of Issue No.11 by the Civil Court in Civil Suit No. 138 of 1994 would operate as *res judicata* or not. For deciding the said issue it is worthwhile to refer the Issue No.11, which reads as follows:

"क्या नीरज यादव जनता इण्टर कालेज के प्रबंधक व शिक्षण संस्था के सदस्य है ?"

17. The finding recorded by the Civil Court in respect of said issue mentioned on page 72 of the writ petition reads as follows:

"पत्रावली पर कोई भी ऐसा साक्ष्य उपलब्ध नहीं है न ही प्रतिवादीगण ने अपने साक्ष्य में इस बात को स्पस्ट किया है कि दावा दायर करते समय नीरज यादव संस्था के सदस्य थे। या प्रबंधक थे चूकि प्रतिवादीगण इस बात को साबित करने में असफल रहा है कि दावा दायर करने कि तिथि के समय नीरज यादव सदस्य थे अतः मेरे विचार में वाद बिन्दु संख्या ११ प्रतिवादीगण के विरूद्ध तथा वादी के हक में सकारात्मक रूप से निर्णित किया जाना सही प्रतीत होता है क्योकि यहा पर यह विवाद नही है कि आज की तारीख में नीरज यादव प्रबंधक या सदस्य है या नहीं। आज की तारीख में तो वह प्रबंधक है।इस बात को डी० डब्लू १ ने अपने साक्ष्य में साबित भी किया है और बल्कि इमप्लाइड रूप से वादीगण ने माना भी हैं लेकिन दावा दायर करने की तिथि में वह न तो सदस्य था न ही प्रबन्धक था, न ही उनके द्वारा कोई सदस्यता की रसीद दाखिल की गयी, न ही कोई साक्ष्य दाखिल किया और न ही उक्त रसीद व साक्ष्य को परीक्षित कराया और न ही साबित कराया उपरोक्त परिस्थितियों को मददे नजर रखते हुए वाद बिन्दू

संख्या ११ वादी के हक में प्रतिवादी के विरूद्ध नकारात्मक रूप से निर्णित किया जाना न्याय संगत प्रतीत होता हैं वाद बिन्दु संख्या ११ वादी के हक में प्रतिवादी के विरूद्ध नकारात्मक रूप से निर्णित किया जाता हैं। "

18. For a finding to operate as *res judicata* having regard to the principles enshrined under Section 11 of the Code of Civil Procedure, it is necessary that the following three conditions must be satisfied, namely, (a) the issue was directly and substantially in considerations under former proceedings, (b) between the same parties or parties litigating under the title, claim under them before a competent Court to try the issue, (c) issue has been heard and finally decided under the former proceedings.

19. So far as the condition (a) is concerned, from the plaint allegations of Civil Suit No. 138 of 1994, it is apparent that the said suit was confined only to the elections of the Committee of Management of the institution. The elections of the Committee of Management are required to take place in accordance with the approved scheme of administration and absolutely no dispute or controversy has been raised in the said suit by Sri Bharat Singh with regard to membership of Sri Neeraj Yadav, so far as the general body of the society is concerned. In Civil Suit No. 138 of 1994 there was no issue with regard to the membership of Sri Neeraj Yadav so far as the general body of the society is concerned. Reference at this stage may also be made upon the Division Bench judgment of this Court reported in ***(1988) 1 UPLBEC 732***, whereunder it has been held that the provisions of the Intermediate Education Act and the Societies Registration Act are not over lapping, therefore, the order challenged in the Civil Suit No. 138 of 1994 has confined to elections of the Committee of Management, which were being held by the office bearers of the society. It cannot be said that on the question of Sri Neeraj Yadav, being a member of the general body of the society, was directly or substantially in issue in the said suit.

20. So far as the condition (b) is concerned, the former proceedings before a court, competent to try the said suit, being Civil Suit No. 138 of 1994 is not in dispute.

21. So far as the condition (c) is concerned, from the findings recorded by the Civil Court in respect of Issue No.11 quoted hereinabove, it cannot be said that the Civil Court has finally decided the issue of membership of Sri Neeraj Yadav vis-à-vis the general body of the society. The finding recorded by the Prescribed Authority is confined to the extent that on the date the said suit was filed, Sri Neeraj Yadav was not a Member/Manager of the Committee of Management of the institution. The date of filing of the said suit is the year 1994. The said finding cannot be held to be binding on the principle of *res judicata* in respect of the elections of the office bearers of the society, which have taken place in the year 2003, or that Sri Neeraj Yadav was not a member of the general body of the society.

22. From the judgment of the Civil Court dated 26th September, 2003, passed in Civil Suit No. 138 of 1994, it is apparently clear that the said suit has been dismissed on the ground that no cause of action has arisen for the plaintiff to file the said suit. Once the said suit itself has

been dismissed on the ground of lack to cause of auction, the Civil Court could not have proceeded to adjudicate upon the issue with regards to the membership of Sri Neeraj Yadav nor any finding recorded thereafter in the facts of the case can be said to operate as *res judicata*. It is accordingly, held that the findings recorded by the Civil Court in respect of Issue No. 11, in Civil Suit No. 138 of 1994, vide judgment and order dated 26th September, 1994 will not operate as *res judicata, s*o far as the membership of Sri Neeraj Yadav of the general body of the society is concerned. The view taken above finds support from the law laid down by the Hon'ble Supreme Court in the judgment reported in ***1970(1) SUPREME COURT CASES 613 (Mathura Prasad Bajoo Jaiswal and others Versus Dossibai N.B. Jeejeebhoy)*** and ***AIR 1968 SC 1328 (Sobhag Singh Versus Jai Singh)***.

Decision on Issue No. (11)

23. From the facts, which have been noticed hereinabove, it is apparently clear that the list of office bearers in which Sri Ajant Singh was elected as President of the society has been registered under Section 4 of the Societies Registration Act since 1994 by the Deputy Registrar. It is further apparent that the elections of the office bearers of the society took place within time after expiry of the term of the earlier Committee of Management in the years 1997 and 2000 thereafter. In the circumstances the elections, which have been set up by the petitioner-office bearers dated 18th July,2003 cannot be said to be held by rank outsider so as to be ignored by the Deputy Registrar.

24. On the other hand Sri Bharat Singh has not pleaded any independent election subsequent to his having been elected as Manger for the remaining term of the Committee of Management in pursuance of the elections, which had taken place in the year 1991. In paragraph 9 to 14 of the counter affidavit filed by Sri Bharat Singh reference has only been made to the elections held by the petitioners dated 6th February, 1994 and 20th July, 1997. There is absolutely no pleadings of Sri Bharat Singh Yadav in respect of his elections having been held nor any list of office bearers submitted in pursuance thereof has been submitted before the Deputy Registrar. It is thus, clear that Sri Bharat Singh has set up the elections for the first time dated 30th June, 2003 after a gap of nearly nine years. There is also a serious dispute as to whether, (a) in the facts of the case fresh elections as set up by Sri Bharat Singh were held or not, (b) as to whether Sri Bharat Singh had competent to hold any fresh elections on 30th June, 2003 or not and (c) further elections, if any, set up by Sri Bharat Singh having been held strictly in accordance with the registered bye-laws of the society or not. From order passed by the Deputy Registrar except for noticing the findings of the Civil Court with regard to the membership of Sri Neeraj Yadav, no other findings whatsoever have been recorded with regard to the legality or otherwise of the elections pleaded by Sri Bharat Singh.

25. In the opinion of the Court in the facts and circumstances of the case it is established that there is a *bona fide* dispute in respect of the two rival elections of the office bearers of the society and the Deputy Registrar could not have decided the same on his own.

The Deputy Registrar was under legal obligations, who has referred the said dispute for adjudication under Section 25 (1) of the Societies Registration Act as has been repeatedly held by this Court in the judgment reported in ***(1999) 2 UPLBEC 77 (Committee of Management Versus Secretary, Arya Kanya Inter College) and 2003(3) Education & Service Cases (Allahabad) 1617 (Sitaram Rai and others Versus Additional Registrar, Firm, Societies and Chits, Gorakhpur Division, Gorakhpur and others).*** The relevant portion of the judgment in the case of Sita Ram Rai reads as follows:

"The election disputes, if any, including validity of members entitled to vote can only be decided under Section 25 (1) by the Prescribed Authority and that any person aggrieved thereafter has a right to approach Civil Court."

26. The order passed by the Deputy Registrar, Firms, Societies and Chits, Agra, U.P. is wholly without jurisdiction. The dispute with regard to the two rival elections set up by the parties must necessarily be referred by the Deputy Registrar to the Prescribed Authority within one month from the date a certified copy of this order is filed before him. It is further provided that the Prescribed Authority shall proceed to decide the dispute so referred at the earliest possible after affording opportunity of hearing of the parties and after permitting the exchange of documents within a period of three months from the date of such reference.

27. In view of the findings recorded hereinabove, it is apparently clear that the impugned order of the Deputy Registrar dated 19th November, 2003 is without jurisdiction and cannot be sustained and is hereby quashed, a writ of mandamus is issued the Deputy Registrar, Firms, Societies and Chits, Agra, U.P. is directed to refer the dispute for adjudication to the Prescribed Authority under Section 25(1) of the Societies Registration Act within one month from the date a certified copy of this order is produced before him.

The present writ petition is, accordingly, allowed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2004

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

Civil Misc. Writ Petition No. 37966 of 1999

Krishna Kumar Gupta ...Petitioner
Versus
A.D.J., Allahabad & others...Respondents

Counsel for the Petitioner:
Sri R.N. Kesari

Counsel for the Respondents:
S.C.

U.P. (Regulation of Letting, Rent and Eviction) Act, 1972-S. 20 (4) Explanation-Deposit under-Date of first hearing-Would be date of filing W.S. by tenant-Till that date no application by tenant for adjustment of deposit made under S. 17 of PSCC Act-Subsequent amendment in W.S. seeking adjustment o entire amount of Rs. 15,000/- may be taken to be a deposit made on date of amendment application on date on which was allowed-both these dates are subsequent to date of filing W.S.-Admission in W.S. that defendant was deposited-Thus by date of filing W.S. i.e.

16.5.1994, complete deposit as required under S.20 (4), had not been made not entitled for any benefit of the statutory petition.

Held: Para 9 & 10

In view of the above authority of the supreme court of Ashok Kumar it is quite clear that 30.11.1993 cannot be held to be the date for first hearing as by that date plaint had not been supplied to the defendant. Applying the said authority it becomes clear that 16.5.1994 was the date of first hearing in the instant case as the said date had been fixed for hearing on 9.5.1994 on which date (9.5.1994) tenant-petitioner had filed written statement.

Accordingly, even though I do not agree with the courts below that 30.11.1993 was the date of first hearing still the writ petition is liable to be dismissed on the ground that 16.5.1994 was the date of first hearing but even on that date complete deposit had not been made.

Case law discussed:

AIR 1989 SC 1070
1982 AWC 701 (DB)
AIR 1993 SC 2525
(1995) 3 SCC 407
AIR 1999 SC 3688
AIR 2002 SC 955
AIR 2002 SC 2520

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

1. The only point involved in this writ petition relates to interpretation of "first hearing" as given in the Explanation to Section 20 (4) of U.P. Rent Control Act (U.P. Act No. 13 of 1972) hereinafter referred to as Act, and its applicability upon the facts of the instant case.

2. The suit giving rise to the instant writ petition was filed by landlady respondent no. 3 against the tenant petitioner on 8.9.1993. The suit was registered as SCC Suit No. 162 of 1993 on the file of JSCC Allahabad (Later on suit was transferred to Additional J.S.C.C.). Prior to filing of the suit tenancy was determined through notice-dated 13.4.1993, served upon the tenant on 28.4.1993. In the notice as well as in the plaint, rent from February 1984 was demanded. Tenant had already deposited the rent from February 1984 till April 1992 u/s 30 of the Act. After filing of the suit summons were issued to the defendant fixing 30.11.1993 as the date of hearing. On 30.11.1993 the presiding officer was on leave however defendant appeared and filed application praying for supply of copy of plaint. Thereafter on 18.12.1993 which was the date fixed on 30.11.1993 by the Reader of the court, defendant did not appear, hence the suit was directed to proceed exparte, and the suit was decreed exparte on 23.3.1994. Petitioner filed an application for restoration on 31.3.1994 and deposited an amount of Rs.15,000/- in compliance of the provisions of Section 17 of PSCC Act on 4.4.1994. On 7.4.1994 the restoration application was allowed and exparte decree dated 23.3.1994 was set aside. Thereafter on 12.4.1994 formal order of restoration of suit on its original number was passed and 9.5.1994 was fixed for filing written statement. On 26.4.1994 tenant filed an application that only an amount of Rs.7,624/- was due against him (Rs.6,000/- as rent at the rate of Rs.250/- per month from May 1992 to April 1994 and Rs. 1,624 as cost of suit), hence out of the amount of Rs.15,000/- deposited by him remaining amount of Rs. 7,376 deposited in excess by him shall be returned to him. Landlord did not oppose the said application, hence it was allowed on 27.4.1994 and tenant was permitted to withdraw the amount of Rs.7,376/-.

However tenant did not actually withdrew the amount. On 9.5.1994 the petitioner filed written statement. On the said date the trial court recorded in the order sheet that both the learned counsel admitted that the said date was date of first hearing. Thereafter it was ordered that "fix 16.5.1994 for hearing". On 16.5.1994 the Reader of the court recorded in the order sheet that Presiding Officer was not available due to promotion and transfer. The Reader fixed 4.7.1994 as the next date. On 4.7.1994 defendant filed an application seeking amendment in the written statement. In para 5 of the said application it was stated that "due to legal complication the defendant has not deposited an amount of Rs.1,100/- as alleged in para 19 of his written statement which needs certain amendments." In the prayer clause of the said amendment application the following amendment was sought to be made. "That in para 19 of the written statement the sentence beginning from the word "***the defendant is depositing (Rs.1,100/-) to Rs.2/- since September 1987 to April 1987***" *be deleted and substituted by the following sentence:*

"The defendant has deposited Rs. 15,000/- in compliance of the provisions of section 17 of the P.S.C.C. Act in Misc. case No. 42 of 1994 arising out of suit No. 162 of 1993, the same should be adjusted in the suit in compliance of the provisions of section 20 (4) of U.P. Act No. 13 of 1972."

The amendment application was allowed on 5.8.1994.

3. The trial court on 23.2.1995 decreed the suit by holding that the date of first hearing was 30.11.1993 i.e. the date fixed in the summons and as by that date the entire amount due till then had not been deposited in terms of Section 20 (4) of the Act, hence suit was liable to be decreed. Against the judgment and decree dated 23.2.1995 tenant petitioner filed revision u/s 25 of PSCC Act being Civil Revision No. 121 of 1995. XIV Additional District Judge, Allahabad through judgment and order dated 23.8.1993 dismissed the revision, hence this writ petition. The revisional court also agreed with the trial court that 30.11.1993 was the date of first hearing.

4. The revisional court observed that on 30.11.1993 Presiding Officer of the Court of Additional JSCC was on leave and Peshkar fixed 18.12.1993 as the next date. On 18.12.1993 without passing any order on the application of the tenant petitioner for supplying copy of plaint, the suit was directed to proceed exparte.

5. The Revisional Court placing reliance upon an authority of the Supreme Court reported in **S.C. Jain Versus A.D.J. AIR 1989 SC 1070,** held that 30.11.1993 was the date of first hearing. In the aforesaid authority of the Supreme Court it has been held that the first date fixed after setting aside of the exparte decree and restoration of the suit is the first date of hearing. In that authority the suit had been decreed exparte in 1975, which was set-aside on 24.3.1977. It appears that after restoration of the suit 30.8.1977 was the date fixed. The tenant deposited incomplete arrears of rent etc. on 30.5.1977. The remaining amount was deposited on 1.10.1977. The Supreme Court held that as complete deposit was not made by 30.8.1977, which was the date of first hearing, hence tenant was not

entitled to the benefit of section 20 (4) of the Act.

6. In my opinion 30.11.1993 cannot be taken to be the date of first hearing as on that date neither written statement had been filed nor Presiding Officer was available. On the said date petitioner had filed application for supply of copy of plaint. If copy of plaint is not supplied to the defendant there arises no question of hearing of the suit, hence on this ground alone 30.11.1993 can not be said to be date of first hearing **(vide Shafiqur Rahman Khan vs. IInd Addl. District Judge, Rampur 1982 A.W.C. 701 (D.B.)** Apart from it if on the date fixed in the summons the tenant prays for and is granted time to file written statement then the said date can not be said to be date of first hearing.

7. Interpretation of the expression "first hearing" as used in explanation under section 20(4) of the Act has engaged attention of the Supreme Court in several authorities including the following:

1. Siraj Ahmad Siddiqui Vs. P.N. Kapoor AIR 1993 S.C. 2525 (three Judges)
2. Advaitanand Vs. J.S.C.C. 1995 (3) S.C.C. 407 (two Judges).
3. Sudarshan Devi Vs. Sushila Devi AIR 1999 S.C. 3688 (two Judges).
4. Mam Chand Pal Vs. Shanti Agarwal AIR 2002 S.C. 955 (two Judges).
5. Ashok Kumar Vs. Rishi Ram AIR 2002 S.C. 2520.

8. Unfortunately in the fifth authority of Ashok Kumar decided on 8.7.2002, the authority of Mam Chand Pal at serial No. 4 decided on 14.2.2002 was not noticed. In the authority of Mam Chand Pal it has been held in para 7 that "in cases where the court itself is not available. It would not be treated as date of first hearing." However, in the authority at serial No. 3 and 5 (Sudarshan Devi and Ashok Kumar) a contrary view has been taken. In Sudarshan Devi's authority in para 32 it has been held that "It is also true that on 12.4.1990 the Presiding Officer was on training but that in our view is not relevant in as much as there is no difficulty in depositing the rent etc. in the manner prescribed."

In Ashok Kumar's authority it was mentioned in para 3 that:

"After service of summons the suit was adjourned to May, 20, 1980 for final disposal. On that day the tenant sought time for filing written statement so the suit was adjourned to July, 25 1980 when time was, however extended for filing written statement and the suit was posted for final disposal on October 10, 1980. The hearing of the suit was not taken up on that date as Presiding Officer was on judicial training but the tenant deposited the entire amount in demand."

Thereafter in para 12 of the said authority it was held,

"On July 25, 1980 time was extended for filing written statement and the suit was again adjourned for final disposal to October 10, 1980. In as much as after giving due opportunity to file written statement, the suit was posted for final disposal on October 10,1980, it was that date which ought to be considered as the date fixed by the court for application of its mind to the facts of this case to identify the controversy between the parties and as such the date of first

hearing of the suit. Admittedly on that date the appellant-tenant deposited all the arrears of rent. Though the suit was again adjourned to December 5, 1980, it would be irrelevant because the date of first hearing of the suit is the date when the court proposes to apply its mind and not the date when it actually applies its mind. It follows that the first hearing of the suit would not change on every adjournment of the suit for final disposal. The effective date of the first hearing of the suit on which the court proposed to apply its mind, on the facts of the case, was October 10, 1980 as stated above."

9. In view of the above authority of the supreme court of Ashok Kumar it is quite clear that 30.11.1993 cannot be held to be the date for first hearing as by that date plaint had not been supplied to the defendant. Applying the said authority it becomes clear that 16.5.1994 was the date of first hearing in the instant case as the said date had been fixed for hearing on 9.5.1994 on which date (9.5.1994) tenant-petitioner had filed written statement. Till 16.5.1994 tenant had not filed any application for adjustment of entire amount of Rs.15,000/- deposited by him under Section 17 P.S.C.C. Act on 4.4.1994. In-fact on 16.5.1994 the amount of Rs.7,376/- out of the aforesaid amount of Rs.15,000/- was not available to the landlord as the court by earlier order dated 27.4.1994 had permitted the defendant to withdraw the said amount of Rs.7,376/-. The subsequent amendment in the written statement seeking adjustment of the entire amount of Rs.15,000/- may be taken to be a deposit made on the date of the amendment application or the date on which amendment application of the tenant was allowed. Both these dates are subsequent to 16.5.1994. In the written statement as filed on 9.5.1994 it was admitted in paragraph-9 that atleast defendant was defaulter to the tune of Rs.1,100/- which he was depositing. In fact the said proposed deposit of Rs.1,100/- was never made. It is therefore, quite clear that on 16.5.1994 complete deposit as required by Section 20 (4) of the Act had not been made.

10. Accordingly, even though I do not agree with the courts below that 30.11.1993 was the date of first hearing still the writ petition is liable to be dismissed on the ground that 16.5.1994 was the date of first hearing but even on that date complete deposit had not been made.

11. Accordingly, writ petition is dismissed.

However, tenant petitioner is granted time till 31.3.2005 to vacate the premises in dispute provided that within one month from today he deposits the entire decreetal amount due till 31.3.2005 after adjusting the amount already deposited and files an undertaking before the trial/ executing court to the effect that on or before 31.3.2005 he will willingly vacate the premises and hand over possession of the same to the landlord. The amount already deposited or to be deposited under this judgment shall at once be paid to the landlord respondent.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.09.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

C. M. Application No. 161701 of 2004
In re:
Civil Misc. Writ Petition No. 36849 of 2004

Km. Kavita Yadav ...Petitioner
Versus
Director General, Medical Education and Training, U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar

Counsel for the Respondents:
Sri Mahendra Pratap
S.C.

Constitution of India-Art. 226-Educational matter-Grant of interim relief-Petitioner appeared in entrance examination for admission to MBBS Course various Medicale Colleges in U.P.-Petitioner a female belonging to OBC category-Notice published by Director General, Medical Education and Training mentioned 15.7.2004 as date for registration and councilling of female candidates from rank 1 to 550-Petitioner's rank 232-Therefore, respondents were not justified in refusing admission to petitioner on ground that she had not appeared for registration and councilling on dates from 10 to 14 July, 2004-direction issued to grant admission to in MBBS course, if any female candidate lower in rank to petitioner has been admitted to MBBS course.

Held: Para 13

In view of the peculiar facts and circumstances as noticed hereinabove it is provided that the respondents shall grant admission to the petitioner in MBBS course if any female candidate lower in rank to the petitioner has been admitted to the said course, by tomorrow i.e. 30th September, 2004. The right of the petitioner to get admission in MBBS course shall not be permitted to be defeated by the respondents on the plea that it is not possible to grant admission to her by tomorrow.

(Delivered by Hon'ble Arun Tandon, J.)

1. On 14.09.2004 this Court granted time upto 23.09.2004 to the counsel appearing for respondents 1 and 2 to file counter affidavit / seek instructions. On 23.09.2004 again the matter was adjourned to 28.09.2004. On 28.09.2004 the matter was directed to be taken up today.

2. Heard Sri Rakesh Kumar on behalf of the petitioner and Sri Mahendra Pratap on behalf of respondents 1 and 2. No counter affidavit has been filed on behalf of respondents 1 and 2. However, Sri Mahendra Pratap has received instructions and on the basis of the instructions so received he has made his submissions for justifying the action of the respondents.

3. This Court is aware that in normal circumstances no interim orders granting provisional admission are to be passed in view of the law laid down by the High Court as well as by the Hon'ble Supreme Court. However, the Court cannot loose sight of the fact that in the facts of the present case if interim orders are not passed the present writ petition is liable to be rendered infructuous, inasmuch as under the guidelines issued by the Medical Council of India following the directions of the Hon'ble Supreme Court

admission to MBBS Course must necessarily come to an end by tomorrow i.e.30th September, 2004, meaning thereby that if no orders are passed in favour of the petitioner and even if she ultimately succeeds in the petition, she would not be able to get admission. In such circumstances this Court is proceeding to consider the application for interim relief (C. M. Application No. 161701 of 2004) for granting provisional admission to the petitioner.

4. It is not in dispute between the parties that the petitioner has appeared in the entrance examination conducted by Chaudhary Charan Singh University for admission to MBBS course in various medical colleges in the State of Uttar Pradesh. It is also not in dispute that the petitioner is a female and belongs to Other Backward Category (for short OBC). According to the merit which was prepared in pursuance of the aforesaid entrance examination the petitioner has secured the following rank:--

1. Over all rank (general) = 808
2. Rank in OBC category = 338
3. Rank in Female category = 232

5. According to the notice published by the Director General, Medical Education and Training, U.P., Lucknow dated 08.07.2004 the candidates who have secured various ranks in pursuance of the aforesaid entrance examination were invited for registration and councilling. It would be worthwhile to refer to the notice so published by the Director General Medical Education and Training, U.P. Lucknow the relevant portion whereof is as follows:-

पंजीकरण तिथि शुल्क रू०२००/	काउन्सिलिंग तिथि एंव समय	श्रेणी/ उप श्रेणी	रैंक
1. 10.07.2004	11.07.2004 10.30 बजे से 1.30 बजे से	अनारक्षित	ओवर आल रैंक 1 से 200 तक 201 से 400 तक
2. 11.07.2004	12.07.2004 10.30 बजे से 1.30 बजे से	अनारक्षित	ओवर आल रैंक 401 से 650 तक 651 से 1000 तक
3. 12.07.2004	13.07.2004 10.30 बजे से 1.30 बजे से	अनारक्षित	ओवर आल रैंक 1001 से 1250 तक 1251 से 1500 तक
4. 13.07.2004	14.07.2004 10.30 बजे से 1.30 बजे से	02 अन्य पिछडा वर्ग	श्रेणी रैंक 1से 350 तक 351 से 700 तक
5. 14.07.2004	15.07.2004 10.30 बजे से 1.30 बजे से	02 अन्य पिछडा वर्ग 04अनुसूचित जनजाति 03अनुसूचित जाति	श्रेणी रैंक 701 से 1000 तक श्रेंणी/रैंक सभी अर्ह अनुसूचित जाति रैंक 1से 450 तक
6. 15.07.2004	16.07.2004 10.30 बजे से 1.30 बजे से	03 अनुसूचित जाति सभी श्रेणियों की उपश्रेणियों के अर्ह अभ्यर्थी (क्षैतिज आरक्षण) 05 स्वतन्त्रता संग्राम सेनानी	ट०जा०रैंक 451 से 1000 तक उपश्रेणी रैंक 1से 100 तक उपश्रेणी रैंक 1से 100 तक उपश्रेणी रैंक 1से

		06युद्ध में शहीद / अपंग के आश्रित 07 विकलांग 08महिला	150 तक सभी श्रेणी की सम्मिलित महिला रैंक 1से 550 तक

6. From the aforesaid notice it is apparently clear that the rank achieved by the petitioner in the aforesaid entrance examination finds mention against the dates mentioned in the first column of the notice i.e. dates 10.07.2004, 11.07.2004 and 12.07.2004 in view of her over all rank, against item no. 4 and 5 i.e. 13.07.2004 and 14.07.2004 on the basis of the rank achieved by the petitioner as OBC candidate and lastly against item no.6, bearing date 15.07.2004 i.e. '08 Mahila' having regard to the rank secured as female candidate. In pursuance of the aforesaid notice the petitioner admittedly appeared for councilling at RALC, Daliganj, Lucknow on 15.07.2004. The petitioner has been refused admission by the respondents on the ground that she was required to get herself registered for councilling on 11th, 12th and 13th July, 2004 having regard to her over all rank and in any case on 14th July, 2004 having regard to the rank achieved by her in OBC category.

7. On behalf of the petitioner it is contended that the stand taken by the respondents is totally misconceived inasmuch as the petitioner falls within the category of female candidates in which she has secured the best rank. According to the petitioner she was advised to appear for registration and councilling on 15th July, 2004 which was the date specifically mentioned in respect of female category of candidates from rank 1 to 550.

8. Counsel for the respondents, however, contended that since the petitioner had not appeared for registration and councilling between 10th to 14th July, 2004 she has lost her right to be considered for registration and councilling on 15th July, 2004. The counsel for the respondents has placed reliance on note no. 3 of the said notice which says that on being allotment of the seats of respective categories councilling for the seats of that category shall be closed.

9. The Court is of the opinion that the petitioner had the option for registration and councilling in pursuance of the notice published by the Director General, Medical Education and Training referred to above, on 15th July, 2004, having regard to the best rank which the petitioner has achieved as female candidate. It cannot be said that she committed any irregularity or any default on the basis whereof the respondents could have refused admission to the petitioner.

10. From the notice which has been published by the Director General Medical Education and Training it is clear that no where it has been provided that female category candidates having regard to their rank in other categories must report for registration and councilling which was to take place between 10th to 14th July, 2004, and that if such female candidates do not report for registration and councilling on the basis of over all rank/OBC rank, they shall not be entitled for admission on the basis of registration and councilling for female candidates

fixed for 15th July, 2004. In the opinion of the Court the notice published by the Director General Medical Education and Training does not in any way intimate that the candidates shall loose their right to be considered as a female candidate on 15th July, 2004 if they do not appear for registration and councilling on the earlier dates mentioned in the notice.

11. The notice specifically mentioned 15th July, 2004 as the date for registration and councilling of female candidates from rank 1 to 550. Therefore, a clear assurance was held out by the Director General of Medical Education and Training that the registration and councilling of female category of candidates would be held on 15th July, 2004 only. Therefore, the respondents were not justified in refusing admission to the petitioner on the ground that she had not appeared for registration and councilling on the dates from 10th to 14th July, 2004.

12. The note 3 relied by the respondents more or less supports the case of the petitioner inasmuch as the seats of female category could not have exhausted prior to 15th July, 2004. It was also legally not permissible to close the registration and councilling of female candidates prior to 15th July, 2004 in view of the notice issued by the Director General Medical Education and Training dated 8th July, 2004 by which all the female candidates were invited for registration and councilling on 15th July, 2004.

13. In view of the peculiar facts and circumstances as noticed hereinabove it is provided that the respondents shall grant admission to the petitioner in MBBS course if any female candidate lower in rank to the petitioner has been admitted to the said course, by tomorrow i.e. 30th September, 2004. The right of the petitioner to get admission in MBBS course shall not be permitted to be defeated by the respondents on the plea that it is not possible to grant admission to her by tomorrow.

14. Sri Mahendra Pratap, counsel for the respondents, prays for and is granted 10 days' time to file counter affidavit. List on 8th October, 2004.

15. A copy of this order be supplied by the office to Sri Mahendra Pratap Advocate, counsel for the respondents, today, to enable him to communicate the said order to the authority concerned.

16. A copy of this order be also supplied to be counsel for the petitioner today on payment of necessary charges.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.9.2004

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

Civil Misc. Writ Petition No. 34908 of 2001

Anil Kumar Prajapati ...Petitioner
Versus
Additional Managing Director, UPSRTC, Lucknow and others ...Respondents

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

Counsel for the Respondents:
Sri Avanish Misra
Sri Samir Sharma

Constitution of India-Article 226-Petitioner applied for post of conductor in UPSRTC-Mentioning only M.A. Degree in Application Form and not LLB degree-Neither he submitted his original Certificate nor photo stat at time of interview-Photostat copy of LLB degree submitted after 10 days to interview-If selection committee allows benefit of certificate and documents submitted at subsequent stage, spirit of selection being conducted on basis of interview shall be frustrated-held, since petitioner did not produce his original degree at time of interview, Non consideration the benefit of LLB–held proper.

Held: Para 9

The petitioner at the time of interview, undisputedly did not disclose that he was in possession of LLB Degree. Neither he submitted his original certificates nor Photostat at the time of interview and a Photostat copy of LLB degree was submitted 20.6.1996 i.e. about 10 days later to the interview. The selection committee incase of finalisation of the selection on the basis of interview could only see the materials which were before the selection committee at the time of interview and not later on. If the selection committee allows the benefit of certificate and documents submitted at subsequent stage, the spirit of the selection being conducted on the basis of interview shall be frustrated. Since the petitioner did not produce his original degree at the time of interview, therefore, the respondents rightly did not consider for awarding benefit to the candidature of the petitioner.

Case law discussed:
1991 (62) FLR 328(SC)

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

Heard Sri Prakash Padia, learned counsel for the petitioner and Sri Shamir Sharma on behalf of the respondents.

1. In this petition, prayer has been made to quash the order dated 6.7.2001 passed by the Chief Manager (Karmik) U.P. State Road Transport Corporation, Head Quarter, Lucknow, whereby in compliance to the order dated 9.4.2001 passed in earlier writ petition no. 13105 of 2000, the representation of the petitioner was considered and rejected.

2. Undisputed facts are that 500 posts of Conductors in U.P. State Road Transport Corporation (in short called as "Corporation' hereinafter) were to be filled up for which an advertisement dated 18/19.1.1995 was published inviting applications from eligible candidates. The candidates were to produce their testimonials, original certificates and papers in respect of their other qualifications for the said selection of Conductors which was to be finalised on the basis of interview only. It appears that about 1100 candidates including 5300 apprentices (i.e. candidates who were in possession of apprentice certificates) and about 5500 candidates from open market applied. The interview was conducted on 10.6.1996. The petitioner had mentioned only as M.A. In his application form and not the LLB degree dated 1.3.1993 which he obtained in reference to the examination of year 1992. The original or photo stat of degree was not produced by the petitioner at the time of interview. It appears the photo stat of same was produced before the concerned authority on 20.6.1996 with the request to acknowledge his LLB degree and to award preferential marks for his additional degree.

3. According to the petitioner he could not produce the original certificate on the date of interview and since photo

stat copy of LLB degree was not being accepted, therefore, on the assurance of the Regional Manager, he had shown his original degree next day i.e. 11.6.1996 to the Regional Manager. Since one Sri Suresh Kumar Pachauri, who was also given benefit of his LLB degree on his production subsequent to the outcome of the interview, therefore, in the similar manner, the petitioner is also entitled to be given the benefit of LLB degree awarding preferential marks.

4. Accordingly, the petitioner in view of the decision of the Division Bench rendered in the case of ***Anuradh Vs. Director, U.P. Rajya Shikshak Anusandhan Evam Prakashan Sansthan, Lucknow and others***, the benefit of N.C.C. Certificate, not given earlier, was subsequently given on production of the same. In view of the decision of the Supreme Court reported in 1991 (62) FLR, 328 ***Sri Shreerampaa V. The Karnataka Public Service Commission and others***, the writ petitioner expected to submit his mark sheet at the time of interview, however, could not be do so, though he was qualified for selection on this basis of total marks, including the marks which he obtained for his additional qualification, therefore, on production of mark sheet at subsequent stage, the writ petitioner was directed to be accommodated against the future vacancies.

5. The authenticity of obtaining LLB degree dated 11.3.1993 in reference to the examination of 1992 and obtaining of MA degree simultaneously at one time from the two different Universities is not permissible. According to the respondents, the petitioner had produced the photo stat of LLB degree, not entitled him to consider his case relegating back the situation of the date of interview i.e. on 10.6.1996.

6. According to the respondents, large number of candidates were to be interviewed on the basis of their testimonials, certificates and degrees produced by them and the marks were awarded by selection committee. The possession of LLB degree of petitioner in absence of non production of the same and same could not be subject matter of interview.

7. According to the respondents, the case of the petitioner is different and distinguishable to the case of Sri Suresh Kumar Pachauri (Supra) and the later one in fact had already submitted his original certificates along with his original application, however, the same was over looked for being considered by selection committee, which subsequently was rightly acknowledged.

8. The facts and circumstances of the case of Anuradha (supra) is different and distinguishable. According to the respondents, the above verdict of Anuradha's case was not having an universal application and shall not protect the case of the petitioner.

9. The petitioner at the time of interview, undisputedly did not disclose that he was in possession of LLB Degree. Neither he submitted his original certificates nor Photostat at the time of interview and a Photostat copy of LLB degree was submitted 20.6.1996 i.e. about 10 days later to the interview. The selection committee incase of finalisation of the selection on the basis of interview could only see the materials which were

before the selection committee at the time of interview and not later on. If the selection committee allows the benefit of certificate and documents submitted at subsequent stage, the spirit of the selection being conducted on the basis of interview shall be frustrated. Since the petitioner did not produce his original degree at the time of interview, therefore, the respondents rightly did not consider for awarding benefit to the candidature of the petitioner.

10. I do not find any illegality and infirmity in the order dated 16.7.2001 passed by the Chief Manager (Karmik) of the Corporation, therefore, the petitioner is not entitled to any relief as prayed for.

The writ petition is accordingly dismissed.

Petition Dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 3467 of 1986

Harish Chandra Agrawal ...Petitioner
Versus
III Additional District Judge, Agra and another ...Respondents

Counsel for the Petitioner:
Sri B.D. Mandhyan
Sri S.C. Mandhyan
Sri Vinod Sinha

Counsel for the Respondents:
Sri B.P. Agarwal
Sri Dinesh Tewari
S.C.

Constitution of India-Art. 226-Writ Jurisdiction-Exercise of Guidelines for interference-Only if findings are perverse.

Held: Para 9

A bare reading of paragraph 38, Sub-para (8) of the aforesaid judgment clearly shows that it clearly prescribes the guidelines for interference by this Court in exercise of power under Article 226 of the Constitution of India. On the question of finding being perverse, it should have considered the entire evidence on record, according to learned counsel for the petitioner, but I do not agree with the contention of learned counsel for the petitioner that the findings arrived at by the appellate authority were either perverse, or suffer from the manifest error or law, so as to warrant any interference by this Court in exercise of power under Article 226 of the Constitution of India.

Case law discussed:
2001 (1) ARC 352
1984 (2) ARC 208
1980 ARC 381
(2003) 6 SCC 675

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

Heard learned counsel appearing on behalf of the parties.

1. The petitioner-tenant aggrieved by the order dated 11th February, 1986, passed by III Additional District Judge, Agra, copy whereof is annexed as Annexure-'IV' to the writ petition, approached this Court by means of present writ petition under Article 226 of the Constitution of India, whereby the appeal filed by the respondent-landlord under Section 22 of the U.P. Act No. 13 of 1972 was allowed by the appellate Court.

2. In short, the facts of the present case are that the contesting respondent-landlord filed an application under Section 21 (1)(a) of the Act, *here-in-after referred to as the 'Act',* for release of the accommodation in question, namely, two shops numbered as 1/7/6 and 1/V/12 on the ground of bonafide requirement of the landlord. The prescribed authority on the basis of the pleadings of the parties and evidence adduced before it arrived at the conclusion that the need of the landlord cannot be said to be bonafide and thus the tilts of the comparative hardship does not arise in favour of the landlord, therefore the application of the landlord was rejected by the prescribed authority vide his order dated 25th September, 1980, copy whereof is annexed as Annexure-'III' to the writ petition.

3. Aggrieved thereby the landlord-contesting respondent preferred an appeal as contemplated under Section 22 of the Act before the appellate authority. The appellate authority by the order impugned in the present writ petition set aside the order passed by the prescribed authority and allowed the application of the landlord, which was rejected by the prescribed authority and appeal was allowed. Thus, this writ petition.

4. Learned counsel appearing on behalf of the petitioner-tenant argued that the order of the prescribed authority is an order, which is not an order of affirmance, therefore the appellate authority should have considered the entire evidence on record and also the subsequent facts, which came into existence during the pendency of the appeal and if the same is taken into account, particularly considering the requirement after the application was filed, namely, opening of a show-room for display and sale of the products of the self factory made of the landlord, which admittedly has been closed down during the pendency of the appeal, the need itself vanished. For this purposes Sri Mandhyan, learned counsel appearing on behalf of the petitioner-tenant relied upon a single Judge decision of this Court reported in **1984 (2) A.R.C., 208 Ranjeet Singh Vs. Ganeshi Lal Gupta and others** and further laid emphasis of another decision of learned single Judge of this Court reported in **1980 A.R.C., 381 Devi Charan Vs. Third Addl. District Judge, Muzaffarnagar and others.** On the strength of the aforesaid decisions, learned counsel for the petitioner further contended that in view of the discussion and the law laid down in the aforesaid two decisions, the appellate authority should have remanded back the matter before the prescribed authority to be decided afresh. Learned counsel for the petitioner tried to assail the findings arrived by the appellate authority by citing instances here and there that the findings arrived at by the appellate authority suffer from such errors, which can be termed as manifest error of law, which need to be corrected by this Court in exercise of power under Article 226 of the Constitution of India.

5. On the other hand, learned counsel appearing on behalf of the contesting respondent-landlord relied upon a recent decision of the apex Court reported in **2001 (1) A.R.C., 352 Gaya Prasad Vs. Pradeep Srivastava.** Paragraphs 10, 15 and 17 of the aforesaid judgement relied upon by learned counsel for the landlord is reproduced below:

"10. We have no doubt that the crucial date for deciding as to the bona

fide of the requirement of the landlord is the date of his application for eviction. The antecedent days may perhaps have utility for him to reach the said crucial date of consideration. If every subsequent development during the post-petition period is to be taken into account for judging the bona fides of the requirement pleaded by the landlord there would perhaps be no end so long as to unfortunate situation in our litigative slow process system subsists. During 23 years after the landlord moved for eviction on the ground that his son needed the building, neither the landlord nor his son is expected to remain idle without doing any work, lest, joining any new assignment or starting any new work would be at the peril of forfeiting his requirement to occupy the building. It is a stark reality that the longer is the life of the litigation the more would be the number of developments sprouting up during the long interregnum. If a young entrepreneur decides to launch a new enterprise and on that ground he or his father seeks eviction of a tenant from the building, the proposed enterprise would not get faded out by subsequent development during the traditional lengthy longevity of the litigation. His need may get dusted, patina might stick on its surface, nonetheless the need would remain intact. All that is needed is to eras the patina and see the gloss. It is pernicious, and we may say, unjust to shut the door before an appellant just on the eve of his reaching the finale, after passing through all the previous levels of the litigation, merely on the ground that certain developments occurred pendente lite. Because the opposite party succeeded in prolonging the matter for such unduly long period**."**

6. The relevant portion of Paragraph 15 of the aforesaid judgment relied upon by learned counsel for the landlord is reproduced below:

"15. The judicial tardiness, for which unfortunately our system has acquired notoriety, causes the lis to creep through the line for long years from the start to the ultimate termini, is a malady afficiting the system. During this long interval many events are bound to take place which might happen in relation to the parties as well as the subject-matter of the lis. If the cause of action is to be submerged in such subsequent events on account of the malady of the system it shatters the confidence of the litigant, despite the impairment already caused**."**

7. The relevant portion of Paragraph 17 of the aforesaid judgment relied upon by learned counsel for the landlord is reproduced below:

"17. Considering all the aforesaid decisions, we are of the definite view that the subsequent events pleaded and highlighted by the appellant are too insufficient to overshadow the bona fide need concurrently found by the fact finding Courts**."**

8. The aforesaid decision is covered with the recent pronouncement of the apex Court in a case reported in **(2003) 6 Supreme Court Cases, 675 Surya Dev Rai Vs. Ram Chander Rai and others.** The relevant paragraph 38 of the aforesaid judgment is reproduced below:

"38. Such like matters frequently arise before the High Courts. We sum up our conclusion in a nut shell, even at the risk of repetition and state the same as hereunder:

(1) Amendment by Act 46 of 1999 with effect from 1.7.2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the Courts subordinate to the High Court, against which remedy of revision has been excluded by C.P.C. Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction – by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction – by over stepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within bounce of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self evident i.e. which can be perceived or demonstrated without involving into any lengthy or completed argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasioned. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the-pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very

moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English Courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in suppression or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case. "

9. A bare reading of paragraph 38, Sub-para (8) of the aforesaid judgment clearly shows that it clearly prescribes the guidelines for interference by this Court in exercise of power under Article 226 of the Constitution of India. On the question of finding being perverse, it should have considered the entire evidence on record, according to learned counsel for the petitioner, but I do not agree with the contention of learned counsel for the petitioner that the findings arrived at by the appellate authority were either perverse, or suffer from the manifest error or law, so as to warrant any interference by this Court in exercise of power under Article 226 of the Constitution of India.

10. In this view of the matter, this writ petition has no force and is liable to be dismissed. Lastly, it is submitted by learned counsel appearing on behalf of the petitioner that since the petitioner is carrying on business from the accommodation in question, he may be granted some reasonable time to vacate the premises in question to the landlord. Considering the facts and circumstances of the case and also in the interest of justice, I direct that the order of eviction against the petitioner-tenant, namely, the order passed by the appellate authority, shall not be executed till 31st December, 2005, provided:

(i) the petitioner-tenant shall furnish an undertaking within three weeks' from today before the prescribed authority to the effect that he will handover peaceful vacant possession of the premises in question to the landlord on or before 31st December, 2005;

(ii) the petitioner-tenant further undertakes to pay the entire arrears of rent and damages, if the same has not already been paid, to the landlord at the rate of the rent within three weeks' from today and continue to pay the rent/damages in first week of each succeeding month, so long

he remains in possession or till 31st December, 2005, whichever is earlier; and

(iii) in the event of default of any of the conditions aforementioned, it will be open to the landlord to execute the order passed by the appellate authority.

11. Except for the modification, referred to above, this writ petition has no force and is accordingly dismissed. The interim order, if any, stands vacated.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2004

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE K.N. OJHA, J.

Civil Misc. Writ Petition (Tax) No.1502 of 2002

Arvind Kumar Gupta ...Petitioner
Versus
Tax Recovery Officer NOIDA and others ...Respondents

Counsel for the Petitioner:
Sri R.P. Agarwal
Sri S.P. Gupta

Counsel for the Respondents:
Sri Bharat Ji Agrawal
Sri Shambhu Chopra

Income Tax Act, Ss. 179, 220 (2)-Applicability-Notice to show cause against issue of warrant of arrest issue on 26.3.2002-wherious order under S. 179 passed on 29.5.2003-Hence notice, held, illegal-order passed under S. 179, held, contrary to law-Hence quashed.

Held: Para 18 & 19

As already mentioned hereinbefore that there was no order under Section 179 of the Act when the notice to show cause as to why the warrant of arrest be not issued to the petitioner was issued. The notice to show cause as to why warrant of arrest be not issued had been issued on 26.3.2002 whereas the order under Section 179 of the act has been passed on 29.5.2003. Thus, the notice dated 26.3.2002 is itself illegal and without jurisdiction and is hereby quashed. Further, it is an admitted case of the Income Tax Department that the petitioner was made a director only on 3rd April, 1993 and the outstanding tax dues of respondent No.3 relates to Assessment Years 1983-84 to 1990-91 and 1992-93 i.e. when the petitioner was not even a director of the respondent No.3, thus, the recourse to Section 179 (1) of the Act could not have been taken at all. Moreover, it is also an admitted position that the respondent No.3 became a deemed public company under the provisions of Section 43-A of the Companies Act, 1956 with effect from 9th February, 1992. Thus, in view of the decision of the Apex Court in the case of M. Rajamoni Amma (supra) the outstanding tax dues of respondent No.3 which relates prior to 9th April, 1992 can not be recovered under Section 179(1) of the Act from the petitioner.

In view of the foregoing discussion, we are of the considered opinion that the order passed under Section 179 of the Act is contrary to the well settled principles discussed above and therefore, cannot be sustained. It is hereby quashed. However, it will be open to the Income Tax Department to recover the outstanding amount of tax from the company or its directors who were there at the relevant time.

Case law discussed:
(1990) 183 ITR 143 (Bom)
(1992) 195 ITR 873 (SC)
(1998) 232 ITR 306 (AP)
(1999) 238 ITR 127 (Guj)
(1988) 172 ITR 1 (Bom)
(2002) 253 ITR 139

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

1. Both these writ petitions have been filed by the same petitioner challenging the proceedings and the order passed under Section 179 of the Income Tax Act, 1961, hereinafter referred to as the Act. While in writ petition No.1502 of 2002, the petitioner has sought a writ, order or direction in the nature of certiorari quashing the notice dated 26.3.2002 issued by the Tax Recovery officer, NOIDA, respondent No.1, filed as Annexure No.1 to the writ petition in respect of the alleged outstanding income tax dues against M/s. Shashank Polyplast Limited (formerly Shashank Polyplast Private Limited), respondent No.3 and other consequential reliefs, in writ petition No.911 of 2003 the petitioner seeks a writ, order or direction in the nature of certiorari quashing the order dated 29th May, 2003 passed by the Assistant Commissioner, Income Tax, Circle NOIDA, respondent No.1, filed as Annexure No.1 to the writ petition and other consequential reliefs.

Briefly stated the facts giving rise to the present writ petitions are as follows:-

2. According to the petitioner, after doing post graduation in Commerce from Gorakhpur University he got a job on 12th February, 1979 in M/s. Prestige Engineering India Private Limited at its factory at NOIDA. It is a sister concern of M/s. Shashank Polyplast Limited, respondent No.3. He worked there upto 31st March, 1992. Thereafter he was transferred to another sister concern of respondent No.3, namely, M/s. Prestige H.M. Poly containers Limited where he served till 30th June, 1997. He left the company on 30.6.1997. The Managing Director of Prestige H.M. Poly containers Limited issued a certificate on 30th June, 1997 stating therein that there was no financial liability against the petitioner. Thereafter he started his own business at NOIDA. According to the petitioner, all the three companies, namely, Prestige Engineering India Private Limited, Prestige H.M. Polycontainers Limited and Shashank Polyplast Limited are being managed by one Sri P.K.Gupta, resident of A-7, Maharani Bagh, New Delhi. He has been Managing Director of M/s. Prestige H.M. Polycontainers Limited. In M/s.Shashank Polyplast Limited, Sri P.K. Gupta has been holding 9994 shares of Rs.100/- each out of total issued and paid up capital of 10000 shares of Rs.100/- each through his proprietorship firm Paribhas Investment & Finance Company. Out of the remaining six shares of Rs.100/- each, four shares is held by Sri Shashank Gupta son of Sri P.K. Gupta, one share is held by Mrs. Gauri Shriya, daughter of Sri P.K. Gupta and the remaining one share is held by Sri Brij Narain Agarwal, an employee of the company. Thus, the petitioner was not even a shareholder in M/s. Shashank Polyplast Limited. The affairs of M/s. Shashank Polyplast Limited were being looked after by Sri P.K. Gupta who was director and major shareholder. As an employee of M/s. Prestige H.M. Polycontainerrs Limited he was asked to sign some forms by Sri P.K. Gupta where in he was made Director of M/s. Shashank Polyplast Limited w.e.f. 3rd April, 1993. However, he was a director just for the namesake and being an employee of a group company he had no option but to sign the required forms pertaining to his appointment in respondent No.3. According to the petitioner, he was neither an employee of the said company

nor had received any remuneration whatsoever from the respondent No.3 in the capacity of a director or otherwise. It is further alleged by the petitioner that M/s. Shashank Polyplast Limited was incorporated on 20th November, 1984 as a private limited company. It became a public limited company under Section 43-A of the Companies Act, 1956 w.e.f. 9th February, 1992. The petitioner had resigned from the directorship of respondent No.3 vide letter dated 20th September, 1997.

3. It appears that there were income tax dues of Rs.70,14,000/- outstanding against respondent No.3. The Tax Recovery Officer, respondent no.1, issued a notice dated 26th March, 2002 calling upon the petitioner to appear before him on 3rd April, 2002 and to show cause as to why the warrant of arrest be not issued against the petitioner for non payment of outstanding dues. The petitioner appeared before the respondent No.1 on the date fixed and explained in great detail that for the first time on 3rd April, 1993 when he became a director from 9th February, 1992 the respondent No.3 had already become a public limited company under Section 43-A of the Companies Act, 1956. He further stated that he was a director for namesake only and had signed the relevant forms regarding his appointment as director on the dictates of the owners. The recovery proceedings should have been initiated against Sri P.K. Gupta who was a de-facto director of the company during all the relevant previous years. According to the petitioner, he was not aware about the steps taken by the Department for recovery of the alleged dues from the company and how the Department has failed to recover the said dues. Moreover, he had never signed or filed income tax return for respondent No.3 nor had ever attended any assessment proceedings. The Tax Recovery Officer appeared to be not satisfied with the explanation given by the petitioner. He did not furnish requisite documents/information sought by the petitioner and issued an order of attachment on 5th April, 2002 under Rule 48 of the II Schedule of the Income Tax Act attaching the residential House No.A-71, Sector 30, NOIDA, which is owned by the petitioner's wife. The notice dated 26th March, 2002 and the consequent recovery proceedings are under challenge in writ petition No.1502 of 2002.

4. While the aforesaid writ petition was pending before this Court, and the interim order was operating wherein the operation of the notice dated 26th March, 2002 and the recovery proceeding pursuant thereto had been stayed, the Assistant Commissioner of Income Tax, Circle NOIDA, sent a show-cause notice on 27th June, 2002 purporting to be under Section179 of the Act requiring the petitioner to show cause as to why a sum of Rs.60,04,614/- said to be due from M/s. Prestige Cops Limited along with interest under Section 220 (2) be not recovered from him. On receipt of the notice the petitioner submitted his reply vide letter dated 24th July, 2002 pointing out that he was never a director of M/s. Prestige Cops Limited and the recovery of dues of Shashank Polyplast Limited has been stayed by this Court. Thereafter the respondent No.1 issued another show cause notice dated 21st January, 2003 again purporting to be under Section 179 of the Act calling upon the petitioner to show cause as to why a sum of Rs.70,13,514/- due from M/s. Shashank Polyplast Private Limited be not

recovered from him along with interest under Section 220 (2) of the Act. The show cause notice was replied by the petitioner vide letter dated 28th March, 2003 giving the same explanation as was given by him to the show cause notice dated 26.3.2002 issued by the Tax Recovery Officer. The Assistant Commissioner of Income Tax, Circle NOIDA, respondent no.1, however, did not accept the explanation given by the petitioner and passed an order on 29th May, 2002 holding the petitioner liable to pay dues of M/s. Shashank Polyplast Pvt. Ltd. as mentioned in the notice, which is under challenge in Civil Misc. Writ Petition No.911 of 2003.

5. We have heard Sri S.P. Gupta, learned Senior Counsel, assisted by Sri R.P. Agarwal, Advocate on behalf of the petitioner and Sri Shambhu Chopra, learned counsel appearing for the respondents.

6. Sri S.P.Gupta, learned Senior Counsel submitted that even if the petitioner is treated to be a Director of M/s. Shashank Polyplast Limited (formerly Shashank Polyplast Pvt. Limited), respondent No.3, the recovery of income tax and other dues outstanding against the respondent No.3 cannot be made from the petitioner as admittedly he became director on 3rd April, 1993 when the said respondent No.3 had already become a public limited company by virtue of the provisions of Section 43-A of the Companies Act, 1956 w.e.f. 9th February, 1992. He, thus, submitted that the notice to show cause dated 26.3.2002 as to why warrant of arrest should not be issued, the attachment order dated 5th April, 2002 attaching the House No.A-71, Sector 30, NOIDA, district Gautam Budh Nagar owned by the petitioner's wife as also the order passed by the Assistant Commissioner of Income Tax, Circle NOIDA dated 29.5.2003 holding the petitioner liable for the dues of respondent No.3 under Section 179 of the Act cannot be sustained and are liable to be quashed. He submitted that from a perusal of the order dated 29.5.2003 passed under Section 179 of the Act it has nowhere been recorded nor any finding has been given that the tax due from a private limited cannot be recovered and, therefore, in its absence the recovery of tax dues under Section 179 of the Act from the petitioner is not permissible under law. He referred to the following decisions:-

1. **Jagdish Jagmohandas Kapadia v. Commissioner of Income Tax and others**, (1990) 183 ITR 143(Bom.).
2. **M. Rajamoni Amma and another v. Deputy Commissioner of Income Tax (Assessment) and others,** (1992) 195 ITR 873 (SC).
3. **K.V. Reddy v. Assistant Commissioner of Income Tax,** (1998) 232 ITR 306(AP)
4. **Bhagwandas J. Patel v. Deputy Commissioner of Income Tax,** (1999) 238 ITR 127 (Guj.)

7. Sri Shambhu Chopra, learned counsel for the respondents, however, submitted that whether the petitioner was director for namesake or otherwise under the provisions of the Companies Act, 1956 or under the provisions of the Act, he would be treated as a Director of respondent No.3 and would be liable for all the consequences which follow under the Act. According to him, as the dues outstanding against respondent No.3 could not be recovered from the company, the authorities have rightly taken the steps

to recover the dues from the petitioner by resorting to the provisions of Section 179 (1) of the Act.

8. Having heard the learned counsel for the parties we find that in paragraph 7 of the Civil Misc. Writ Petition no.1502 of 2002 the petitioner has stated as follows:-

"That M/s. Shashank Polyplast Limited was incorporated on 20-11-1984 as a private limited company. However, the said company became a public company under Section 43-A of the Companies Act, 1956 with effect from 9-2-1992. Thus on the date the petitioner became a director for the company, it was a public company and not a private company. The company has continued to remain a public company since then.

The petitioner is annexing hereto a copy of the duly audited Accounts of the above company for the Financial Year ended 31-3-1996 marked as ANNEXURE –3, which shows that the said company has been a deemed public company."

9. In paragraph 9 of the writ petition the petitioner has stated that he had resigned from the directorship of the respondent No.3 vide letter dated 30th September, 1997. The averments made in paragraph 9 of the writ petition No.1502 of 2002 are reproduced below:-

"That immediately after leaving the employment of M/s. Prestige H. Polycontainers Limited, the petitioner resigned from directorship of Respondent No.3 by his letter dated 30.9.1997, a copy of which was sent by registered post to the Registrar of Companies, Kanpur.

A copy of the above resignation letter is annexed hereto marked as ANNEXURE-4."

10. In the counter affidavit filed by Yogendra Nath Pandey on behalf of the respondents the reply to paragraphs 7 and 9 is contained in paragraphs 8 and 10 of the counter affidavit, which are reproduced below:-

"8. That the content of para 7 of the writ petition are matters of record, and require no specific response at this stage.

10. That the contents of para 9 of the writ petition are denied. The petitioner cannot absolve or exclude himself for the liability of the company upto period ending 31.03.1997(April 1997 to March 1998) by disassociating himself from the Company after 30.09.97 which fact is also not supported by any evidence or documentary proof at all."

11. Thus, the fact that the respondent No.3 became a public company on 9th February, 1992 is not being disputed by the respondents. The present outstanding dues of respondent No.3 which is sought to be recovered from the petitioner under Section 179 of the Act relates to the Assessment Years 1983-84 to 1990-91 and 1992-93. It is for the period prior to induction of the petitioner as director in respondent No.3-company i.e. prior to 3rd April, 1993.

12. Section 179 of the Act under which the petitioner has been saddled with the liability of the outstanding dues of respondent No.3 reads as follows:-

"S.179. **Liability of directors of private company in liquidation-**(1)

Notwithstanding anything contained in the Companies act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(2) Where a private company is converted into a public company and the tax assessed in respect of any income of any previous year during which such company was a private company cannot be recovered, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax due in respect of any income of such private company assessable for any assessment year commencing before the 1st day of April, 1962."

13. In the case of **Union of India v. Manik Dattatreya Lotlikar,** (1988) 172 ITR 1 (Bom) the Bombay High Court has held that Section 179, prior to its amendment, for the first time provided that the directors of a private limited company in liquidation would be liable jointly and severally with the company for payment of arrears of tax and there was no corresponding provision in the Indian Income-tax Act, 1922. This section, foisting liability on the directors of a private limited company, operated only in the cases of a private company in liquidation prior to October 1, 1975, and subsequent to that date, the provisions are extended to all private companies, whether in liquidation or not, and to companies converted into public companies in respect of the period during which they were private companies. Section 179 is a departure from the provisions of the Companies Act, where a director is not personally liable for the company's debts unless the Company Court finds him guilty of misfeasance or of any other wrong. Section 179 imposes a vicarious liability on the directors of private limited companies, even though a private limited company is a separate entity. The liability is co-extensive with the company and the director is liable only in respect of arrears of tax for the assessment year when he was functioning as a director.

14. For invoking the provisions of Section 179 (1) of the Act for thrusting upon the director the vicarious liability, it is a sine qua non that the Assessing Officer must record a finding that the tax due from the company cannot be recovered from the company. In the absence of such a finding, the Assessing Officer has no jurisdiction to invoke section 179(1) of the Act as held by Andhra Pradesh High Court in the case of **K.V. Reddy** (supra), the Gujarat High Court in the case of **Bhagwandas J. Patel** (supra) and the Madras High Court in the case of **C. Rajendran and another v. Income Tax Officer**, (2002) 253 ITR 139.

15. In the case of **M. Rajamoni Amma** (supra) the Apex Court has held that where the company has become deemed public company by virtue of Section 43-A of the Companies Act, 1956

with effect from October 1, 1975 and arrears sought to be recovered relate to Assessment Years 1977-78 to 1982-83 obviously, the company being a public company, the proceedings against the directors for recovery of the tax due from the company cannot be taken, and certainly not proceeded with under Section 179 of the Income Tax Act, 1961.

16. The Apex Court has further held that they need hardly say Article 265 of the Constitution clearly prohibits any attempt to recover taxes except under the authority of law.

17. In the case of Jagdish Jagmohandas Kapadia (supra) the Bombay High Court has held that in the absence of an order under Section 179 of the Act passed legally, it was not open to the Income Tax Officer or the Tax Recovery Officer to issue a demand notice to the petitioner and/or to take further proceedings n pursuance thereto and the demand notice was illegal and without jurisdiction.

18. As already mentioned hereinbefore that there was no order under Section 179 of the Act when the notice to show cause as to why the warrant of arrest be not issued to the petitioner was issued. The notice to show cause as to why warrant of arrest be not issued had been issued on 26.3.2002 whereas the order under Section 179 of the act has been passed on 29.5.2003. Thus, the notice dated 26.3.2002 is itself illegal and without jurisdiction and is hereby quashed. Further, it is an admitted case of the Income Tax Department that the petitioner was made a director only on 3rd April, 1993 and the outstanding tax dues of respondent No.3 relates to Assessment Years 1983-84 to 1990-91 and 1992-93 i.e. when the petitioner was not even a director of the respondent No.3, thus, the recourse to Section179 (1) of the Act could not have been taken at all. Moreover, it is also an admitted position that the respondent No.3 became a deemed public company under the provisions of Section 43-A of the Companies Act, 1956 with effect from 9th February, 1992. Thus, in view of the decision of the Apex Court in the case of **M. Rajamoni Amma** (supra) the outstanding tax dues of respondent No.3 which relates prior to 9th April, 1992 can not be recovered under Section 179(1) of the Act from the petitioner.

19. In view of the foregoing discussion, we are of the considered opinion that the order passed under Section 179 of the Act is contrary to the well settled principles discussed above and therefore, cannot be sustained. It is hereby quashed. However, it will be open to the Income Tax Department to recover the outstanding amount of tax from the company or its directors who were there at the relevant time.

20. In this view of the matter, both the writ petitions succeed and are allowed. However, the parties shall bear their own costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2004

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

Civil Misc. Writ Petition No.10545 of 1998.

Laxman Singh ...Petitioner
Versus
The Director General, Railway Protection Force (RPF), Railway Board, New Delhi and others ...Respondents

Counsel for the Petitioner:
Sri A.B. Singh

Counsel for the Respondents:
Sri Tarun Verma
Sri Anand Kumar
Sri J.S. Pandey
S.C.

Constitution of India-Art. 226-Railway Protection Force Rules, 1987-Rr. 155, 156, 157-Removal from Service-Absence without leave-Disciplinary proceedings-Enquiry-Neither any procedural fault nor any mistake in fact finding by enquiry officer-Petitioner's guilt proceed-Which was rightly affirmed by disciplinary authority-Removal rightly passed unishment not disproportionate-No interference called for.

Held: Para 10

Undisputedly, there is neither any procedural fault nor any mistake in the fact finding arrived at by the inquiry officer, where the guilt against the petitioner was proved, which has rightly been affirmed by the competent authority/disciplinary authority. In the facts and circumstances, the competent/ disciplinary authority has rightly passed the order of removal of the petitioner from service. This Court is unable to make analysis or to draw any inference in respect of mitigating the quantum of punishment on the ground of disproportionality, as there is nothing, which shocks the conscience of the Court, therefore, this Court is not inclined to invoke its extraordinary discretionary jurisdiction under Article 226 of the Constitution to make any interference in the fact finding arrived at by the disciplinary authority.

Case law discussed:
2002 (3) ESC All. 256
(2003) 2 UPLBEC 1496
(1994) 3 UPLBEC 1597
JT 99 (1) SC 319
2001 (4) AWC 2976
2003 (1) ESC Cal 421
2002 (1) ESC All 327
2002 (1) ESC All 361
(2004) 2 UPLBEC 1461
(2004) 2 UPLBEC 1469
AIR 1996 SC 736

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

1. Heard Sri A.B. Singh, learned Counsel for the petitioner, and Sri Tarun Verma, learned Counsel for the respondents.

2. In this petition prayer has been made for quashing the impugned order dated 31.10.1995 passed by the Divisional Security Commissioner, Railway Protection Force, Varanasi terminating the service of the petitioner on the allegations of absence from duty without proper intimation and also for overstaying without sanctioned leave without sufficient cause.

3. It appears that the petitioner was appointed in the Railway Protection Special Force (hereinafter in short called as 'RPSF') on 01.05.1967 and he was transferred to Railway Protection Force (hereinafter in short called as 'R.P.F.') on 05.09.1981. As per his service record, during tenure of his service in R.P.S.F.

and R.P.F. the petitioner was punished on nine occasions. The petitioner was given weekly rest on 16.11.1994 and he was to present on duty on 17.11.1994, however, he absented himself from duty without any authority. The petitioner was informed by ordinary letter followed by registered letter at his residential address indicating him to join the duty, but no reply was received from his side, therefore, after lapse of nine months the Assistant Security Commissioner, R.P.F., Varanasi proceeded against the petitioner under Rule 153 of the Railway Protection Force Rules, 1987. For this purpose, a charge-sheet was issued against the petitioner on 08.08.1995 on the following charges:-

"He was spared to avail one day Rest on 16.11.94and thereafter he was required to pick up duty on 17.11.94 from 16/- hrs. But he failed to report for duty and is over-stayed with effect from17.11.94 without any proper authority."

4. Sri J.P. Mishra, Inspector R.P.F., North Eastern Raily, Allahabad City was appointed as Inquiry Officer. The petitioner was alleged to have absented himself from duty from 17.11.1994 to 30.08.1995 and the petitioner said to have absented for treatment from Assistant Divisional Medical Officer, Deoria Sadar and from the certificate issued by the Assistant Divisional Medical Officer, Deoria it appears that the petitioner was on the sick list from 16.11.1994 to 22.11.1994, but thereafter he did not turn up for further treatment, however, he was discharged from the hospital on 23.11.1994. The medical certificate of private Doctor submitted by the petitioner was not accepted, as there was a hospital in Manduwadih, Varanasi Cantt., however, the petitioner did not get any treatment there instead of he proceeded for Deoria. The petitioner also did not inform about his illness during 48 hours as required under Indian Railway Medical Manual. The inquiry officer fixed the date of inquiry on 20.08.1995, however, due to absence of the petitioner the inquiry could not be conducted, therefore, the same was commenced from 02.09.1995 and after affording opportunity of hearing and after scrutiny of documents, the Inquiry Officer submitted his finding on 25.09.1995 holding the charges against the petitioner as proved. The competent/disciplinary authority after realizing the entire records has observed as under:-

"*i) The Party Charged was spared to avail one day rest on 16.11.94 and was to resume duty on 17.11.94 from 16/- hrs. But he over-stayed from 17.11.94 to 30.8.95.*

ii) He reported back on 31.8.95 Forenoon alongwith RMC for the period from 16.11.94 to 22.11.94, PMC from 23.11.94 to 20.8.95 and again RMC from 21.8.95 to 30.8.95. He was discharged from Sick list with effect from 23.11.94 for non-attendance and apparently thereafter, he reported sick with Private Doctor.

iii) He states that he had been sending intimations about his sick-ness regularly but as per statements of the prosecution witnesses no such intimations appeared to have been received in this office.

iv) Mere sending of intimation does not serve the purpose unless he received an Express intimation of grant of extension. In the extent case, he made presume favourable to him that the extension might have been granted to him. It was not incumbent upon the

administration to send his any effort of intimation and in case intimation was received by him, he should have presumed otherwise that his request was not considered.

v) *In accordance with the provisions of Indian Railway Medical Memo, a Railway servant reporting sick must send certificate within 48/- hours of reporting sick but in the extant case, no sick certification was submitted by the Party charged to his superiors. Since he failed to comply with the provisions of Medical Manual, he is also not entitled to the privileges granted in accordance with the Railway Rules.*

vi) *He has also not explained the circumstances under which he was discharged from the sick list of the Railway Doctor and why he preferred to report sick with the Private Doctor."*

5. In view of the above observations, the competent authority affirmed the findings of the inquiry officer and keeping in view totality of the facts and circumstances the removal order in view of Section 156 (3) of Railway Protection Force Rules, 1987 (hereinafter in short called as the 'Rules') was passed and the period from 17.11.1994 to30.08.1995 was treated as leave without pay.

6. In the counter affidavit endeavourance has been to strengthen the stand in consonance to the findings of the disciplinary authority and inquiry officer.

Futile endeavourance has been made on behalf of petitioner through the rejoinder affidavit to controvert the contents of the counter affidavit and to reiterate the stand taken in the writ petition.

7. It has been argued on behalf of petitioner that in view of the judgments in 2002 (3) E.S.C. Alld. 256 (*Mirza Barkat Ali Vs. Inspector General of Police, Allahabad and others),* (2003) 2 U.P.L.B.E.C. 1496 (*Sant Kumar Upadhyay Vs. State of U.P. and others),* (1994) 3 U.P.L.B.E.C. 1597 (*R.N. Mall Vs. Union of India and another*), J.T. 99 (1) SC 319 (*Syed Zaheer Hussain Vs. Union of India and others),* 2001 (4) A.W.C. 2976 (*L/NK Musafir Yadav Vs. Commandant, 47 Bn., C.R.P.F.Gandhinagar (Gujarat) and another)*, 2003 (1) E.S.C. (Cal.) 421 (*Jadurouth Vs. State of West Bengal and others),* 2002 (1) E.S.C. (All.) 327 (*Sukhbir Singh, Constable No. 2306 Civil Police Vs. S.S.P., Agra and others),*2002 (1) E.S.C. (All.) 361(*Jiya Lal Pandey Vs. Commandant Railway Protection Force, Northern Railway, Lucknow and others),*(2004) 2 U.P.L.B.E.C. 1461 (*Raj Kishore Yadav Vs. U.P. Public Service Tribunal, Indra Bhawan, Lucknow and others)*, (2004) 2 U.P.L.B.E.C. 1469 (*Academy of Business Management Gyan Sthali, Hapur Road, Modi Nagar, Ghaziabad and another Vs. State of U.P. and others)* and also in view of two unreported judgments dated 29.07.1997 passed by this Court in Civil Misc. Writ Petition No. 11850 of 1994 (*Satyendra Singh Vs. Union of India through Chief Security Commissioner, Railway Protection Force, Cuard and another)* and 07.05.1997 passed by this Court in Writ Petition No. 26779 of 1994 (*Jai Kishan Vs. Deputy Inspector General of Police, Meerit Range, Meerut and others*) the punishment awarded by the disciplinary authority is disproportionate

to the charges levelled against the petitioner.

8. In order to analyse the real position, it is necessary to refer the Rules 155, 156 and 157 of the 'Rules' as under:-

*"**155. Determination of punishment.—**In determining the punishment, the character, previous bad record and punishment of party charged shall not be taken into consideration unless in a case where they are made subject matter of a specific charge in the proceeding itself. Offences connoting moral turpitude shall be carefully distinguished from smaller lapses of conduct. It is essential that the punishment shall be inflicted keeping in view the nature of duties expected from the member of the Force and the misconduct by him.*

***156. Imposing of punishment of dismissal, etc.—**Before coming to any lower punishment, the disciplinary authority with a view to ensuring the maintenance of integrity in the Force shall consider the award of punishment of dismissal or removal from service to any member of the Force in the following cases, namely: --*

(a) Dismissal :

(i) conviction by a criminal court;

(ii) serious misconduct or indulging in committing or attempting or abetting an offence against railway property;

(iii) discreditable conduct affecting the image and reputation of the Force;

(iv) neglect of duty resulting in or likely to result in loss to the railway or danger to the lives of persons using the railway;

(v) insolvency or habitual indebtedness; and

(vi) obtaining employment by concealment of his antecedents which would ordinarily have debarred him from such employment.

(b) Removal from service :

(i) any of the misconduct for which he may be dismissed under clause (a) above;

(ii) repeated minor misconducts;

(iii) absence from duty without proper intimation or overstay beyond sanctioned leave without sufficient cause.

***157. Reduction in the rank, grade or in the scale of pay.—**(1) No enrolled member of the Force shall be reduced to a rank lower than to which he was first appointed to the service nor shall he be reduced permanently in the sense that he shall never be eligible for repromotion however meritorious his subsequent service may be.*

(2) When reduction to a lower rank, grade or a lower stage in the scale of pay is ordered, the order shall also specify--

(i) the date from which it will take effect and the period (in terms of years and months) for which the punishment shall be operative;

(ii) the stage in the scale of pay (in terms of rupees) to which the enrolled member of the Force is reduced; and

(iii) the extent (in terms of years and months), if any, to which the punishment referred to at (i) above shall be with or without cumulative effect;

Provided that when the punishment or reduction to a lower stage in the scale of pay is imposed during the currency of reduction in rank, the disciplinary authority shall clearly indicate in the punishment order whether the two punishments shall run concurrently or the

subsequent punishment shall be implemented after the expiry of the first punishment.

(3) Withholding of increment.—In the case of withholding of increment as punishment, the order shall state the period for which the increment is to be withheld and whether it shall have the effect of postponing further increments."

9. It has been submitted on behalf of the respondents that in AIR 1996 SC 736 (State of U.P. and others Vs. Ashok Kumar Singh and another) the delinquent police constable was charge-sheeted for absenting himself from duty without leave on several occasions, the decision and concurrence of the High Court to the findings of Tribunal on the issue of modifying punishment of removal from service of writ petitioner on the ground that it was not commensurate to the gravity of offence was held to be not justified by the Supreme Court and the punishment of removing the writ petitioner was acknowledged to be legally correct.

10. I have heard learned counsels for the parties. Undisputedly, there is neither any procedural fault nor any mistake in the fact finding arrived at by the inquiry officer, where the guilt against the petitioner was proved, which has rightly been affirmed by the competent authority/disciplinary authority. In the facts and circumstances, the competent/ disciplinary authority has rightly passed the order of removal of the petitioner from service. This Court is unable to make analysis or to draw any inference in respect of mitigating the quantum of punishment on the ground of disproportional, as there is nothing, which shocks the conscience of the Court, therefore, this Court is not inclined to invoke its extraordinary discretionary jurisdiction under Article 226 of the Constitution to make any interference in the fact finding arrived at by the disciplinary authority.

11. In view of the above observations, the writ petition is dismissed.

Petiton Dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2001

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

Civil Misc. Writ Petition No. 36070 of 2001

Tribhuwan Dhar Mishra and others
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Lalji Pandey
Sri Vikas Budhwar

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

<u>Constitution of India-Arts. 14 and 226</u>-Discrimination Appointment seasonal Collection Amins-long standing experience and services ignored without any justification-persons not even named in list being juniors to petitioner outers Given appointments-such action of State authorities, to be hostile discrimination-Impugned orders liable to set aside.

Held: Para 18

I find that according to own disclosure of the respondents six vacancies are still available and many of the persons have been given appointment on the strength of the interim order or on compassionate ground or on the closures of other units, whereas, the petitioners' long standing experience and services have been ignored without any justification and also without any justification the persons not even named in the list, enclosed as Annexure-CA-1 to the counter affidavit, being juniors to the petitioners or being outsiders have been given appointment, such action of the respondents is hostile discrimination on the part of the respondents. The appointment of Sri Ganesh Singh also is giving occasion of discrimination vis-à-vis the petitioners. The respondents being State authorities have not acted in all fairness and the way as they are expected to do. Even the records, which were produced before this Court for perusal, were not systematic and are creating doubt/suspicion. The attempt of the respondents are not fair and much could be, desired to be commented upon, however, giving of comment on this occasion is not relevant, only suffice to say that the petitioners have been treated discriminatorily and they have been ignored from being considered for appointment to the post of Seasonal Collection Amins. There is complete non-application of mind on the part of the District Magistrate, Mirzapur and completely on irrelevant points the orders dated 23.08.2001, the impugned in the present writ petition, have been passed, which are not legally sustained, therefore, these are set aside and the writ petition deserves to be allowed. The writ of mandamus is issued to the respondents to consider the case of the petitioners and pass appropriate reasoned and speaking order in respect of giving appointment to the petitioners to the post of Seasonal Collection Amin within a period of two months from the date of production of certified copy of this order.

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

1. Heard Sri Vikas Budhwar along with Sri Lalji Pandey, learned Counsels for the petitioners, and Sri S.P. Singh, learned Standing Counsel for the State respondents.

2. In this petition prayer has been made to quash the order dated 23.08.2001(Annexure-4 to the writ petition) passed by the District Magistrate, Mirzapur in compliance to the order of this Court dated 03.01.2001 passed in Writ Petition No. 29271 of 1999 (*Tribhuwan Dhar Mishra and others Vs. State of U.P. and others*) and also order dated 23.08.2001 (Annexure-5 to the writ petition) passed by the District Magistrate, Mirzapur in compliance to the order of this Court dated 03.01.2001 passed in Writ Petition No. 29259 of 1999 (*Vijay Chand Shukla Vs. State of U.P. and others*), and further prayer has been made for issuance of writ of mandamus commanding the respondents to permit the petitioners to discharge their duties as Collection Amin and to extend the other benefits as being given to the regular Collection Amins. Petitioners have also prayed for issuance of direction restraining the respondents not to fill up the existing 10 vacancies of Collection Amins till the final decision of the present writ petition.

3. It appears that the petitioner nos. 1,2, 3, 4 and 5 were appointed as Seasonal Collection Amin with effect from 15.02.1986, 05.04.1986, 15.02.1986, 18.02.1986 and 28.12.1989 respectively and they had worked satisfactorily as Seasonal Collection Amin. According to the petitioners, a list dated 07.03.1990 was prepared and finalized by the

Tehsildar and Sub Divisional Officer, in which all the petitioners were included and shown as Seasonal Collection Amin in Tehsil Sadar, District Mirzapur, however, for the reasons unknown, the petitioners were disengaged on 31.03.1994, against which they approached to the U.P. Public Services Tribunal, where the learned Tribunal by its order dated 23.03.1999 derived the irrelevant conclusions, against which two separate petitions, namely, Writ Petition No. 29271 of 1999 and Writ Petition No. 29259 of 1999, were preferred, which were clubbed together after exchange of pleadings in reference to the order of this Court (D.B.) dated 21.05.1993 passed in Writ Petition No. 29158 of 1990 (Adya Prasad Vs. U.P. Public Services Tribunal and another), which was also affirmed by the Supreme Court, the above two writ petitions were disposed of on 03.01.2001 with direction to decide the representations of the petitioners by the District Magistrate. In compliance thereto, the representations of the petitioners were considered and illegally and erroneously were rejected on 23.08.2001 by the District Magistrate, Mirzapur. Hence the present writ petition.

4. The main ground for rejection of the representations by the impugned orders is that the petitioners were not putting sufficient number of days of service and whatever vacancy became available was to be fulfilled in view of the provisions of the Uttar Pradesh Public Services (Reservation for Schedule Castes; Schedule Tribes and Other Backward Classes) Act, 1994 (U.P. Act No. 4 of 1994), which came into effect from 11th December, 1993, and the other points for rejection of representations by impugned orders are that more than about 35% of excess vacancies were fulfilled and only 10 vacancies were available and the seniority list of Seasonal Collection Amin was got prepared, out of which three posts from reserved category i.e. one from backward class and two from schedule caste, according to their seniority were fulfilled, however, the petitioners being placed at serial nos. 41, 67, 85, 53 and 101 could not be found suitable for appointment to the post of Seasonal Collection Amin.

5. In paragraphs-9 and 10 of the writ petition it has been indicated on behalf of the petitioners, as under:-

"9. That, here it would be relevant to mention here that various persons who had never performed and discharged their duties as Seasonal Collection Amin, have been extended the benefit of regularization and were given regular charge of collection Amins. The name of these persons are Ashok Kumar Pandey, Jaya Kant Deubey, Ghanshyam Pandey, Sanjeev Pandey, Ganesh Singh, Shyam Dhar Tiwari, Durga Prasad Tewari, Mishri Lal and Kailash Nath."

"10. That, all these persons whose name has been indicated in the preceding paragraphs have been appointed as regular Collection Amins without undertaking any selection process whatsoever and at no point of time any written examination, any interview whatsoever was held before offering appointment to all these incumbents."

6. According to the petitioners, such persons as shown in the paragraph 9 of the writ petition without having worked in

the department and without being reflecting their names in the list, enclosed as C.A.-1 to the counter affidavit, were appointed.

7. In response to this in the counter affidavit sworn by Sri S.P. Vishwakarma, the averments made in the paragraph-9 of the writ petition have not been denied. In respect of one Sri Ganesh Singh, who has been appointed in the year 1990, has been given regular status, whereas, the petitioners were appointed way back in the year 1986, but they have been denied for the same.

8. According to Para-12 of the writ petition, Sri Ganesh Singh, who was initially appointed as Seasonal Collection Amin in the year 1990, has been given regular status. Para-12 of the writ petition reads as under:-

"12. That, one of the incumbents whose name has been referred to in the preceding paragraphs, namely, Ganesh Singh had performed as Seasonal Collection Amin and his appointment as Seasonal Collection Amin was made in the year 1990 i.e. after the appointment of each and every petitioner and the said Ganesh Singh has been extended the benefit of regularization."

9. In response thereto the regularization of Sri Ganesh Singh has not been denied by the respondents in the counter affidavit.

10. Counter affidavit has been filed by Sri S.P. Vishwakarma, Tehsildar, enclosing the seniority list of the candidates of Seasonal Collection Amin, who have worked as Seasonal Collection Amin, upto 1992.

11. Affidavit of Sri Ram Singh Gautam, Tehsildar, Sadar has also been filed as well as the supplementary affidavit by Sri Amrit Abhijit the then District Magistrate, Mirzapur has also been filed.

12. The paragraph-3 of the affidavit of Sri Ram Singh Gautam, which has been filed in compliance to the order of this Court dated 16.09.2003, reveals as under:-

"Before bifurcation of district Mirzapur there were 214 sanctioned post of regular Collection Amins and after creation of district Sonbhadra in the year 1989 out of 214 post, 56 posts of regular Collection Amins was transferred to district Sonbhadra and at present are only 158 sanctioned post of regular Collection Amins in district Mirzapur. It is further stated that in August, 2002 in pursuance of the Govt. Order issued by the State Govt. 19 Grams of district Mirzapur have been included in district Sonbhadra and as such at present there is only 154 sanctioned post of regular Collection Amins in district Mirzapur out of which only 6 posts are lying vacant and out of rest 148 posts, 13 posts have been filled up by direct recruitment and for the last 15 years number of Seasonal Collection Amins have been appointed on regular basis against 74 post on the basis of their eligibility and seniority. Apart from this 32 persons have been appointed as Collection Amins pursuant to the orders passed by the Hon'ble Supreme Court/ Hon'ble High Court and Hon'ble Tribunal from time to time. It is also relevant to mention here that 13 retrenched employees of Agriculture Deptt. And 1 employee of Chal Chitra Nigam, have also been appointed

as Collection Amins against 14 posts much less sanctioned post. Apart from this 3 seasonal Collection Peons have been promoted in accordance with law on the post of Collection Amins. Further 12 persons have also been appointed as Collection Amins under Dying in Harness Rules and in this way at present out of total sanctioned post, number of seasonal Collection Amins have been appointed as Collection Amins on regular basis under more than 35% prescribed quota."

13. In paragraphs-8, 9 and 9 of the affidavit of Sri Ram Singh Gautam it has been indicated as under:-

"8. ....due to suspension of one Shri Kamla Kant working as Collection Amin in Tehsil Sadar, Mirzapur one post of Collection Amin temporarily fell vacant upon which one Jaya Kant Dube was appointed as Collection Amin vide order dated 18.8.1993 by the S.D.M. concerned. After the reinstatement of Shri Kamla Kant, the services of Shri Dubey automatically came to an end, against which he filed a writ petition No. 44450 of 1993, in which an interim stay order was passed on 26.9.1995 and in pursuance thereof, he is still working."

"9. ……..Shri Ghanshyam Pandey was appointed in stop gap arrangement in leave vacancy by the then S.D.M. Marihan vide his order dated 20.8.1990 and thereafter, his services were terminated vide an order dated 30.3.1991, against which he filed a writ petition no. 13942 of 1991 in the Hon'ble Court in which he obtained an interim stay order dated 21.5.1993 and in compliance of which he has been permitted to work. However, prior to this he has also worked in stop gap arrangement as Collection Amins from 20.8.1990 to 30.9.1990, 1.10.1990 to 31.1.1991 and from 7.2.1991 to 30.3.1991."

"9. ……in pursuance of the order passed by this Hon'ble Court dated 24.8.1999 passed in Writ Petition No. 22765 of 1993 filed by one Shri Veer Pratap Singh, the services of Shri Ganesh Singh have been terminated by the then D.M. Mirzapur vide his order dated 12.7.200, against which Shri Ganesh Prasad filed a writ petition No. 31995 of 2000 in which an interim stay order dated 2.8.2000 has been passed by the Hon'ble Court and in pursuance thereof, Ganesh Singh is still working. However, at present Shri Veer Pratap is not working in the Deptt."

15. In paragraphs-4 and 5 of the supplementary counter affidavit filed by Sri Amrit Abhijit, District Magistrate, Mirzapur in has been indicated as under:-

"4…….the persons whose name is mentioned at Sl. No. 154and171,namely, Sri Noor Mohd. As well as Sri Indra Mani Tiwari, are not Seasonal Collection Amin. From the records, it was further revealed that Sri Noor Mohd. Khan who is at Sl. No. 154 and related to Tehsil Marihan, Mirzapur, has been temporarily appointed as Collection Amin vide an order dated 2.7.1993 by the then S.D.M. Marihan. So far as Sri Indra Mani Tiwari whose name is at Sl. No. 171 and is related to Tehsil Sadar, district Mirzapur, has also been temporarily appointed as Collection Amin by means of an order dated 4.1.1993 by the then S.D.M. Sadar. From the records it also transpired that since these two persons are not working as Seasonal Collection Amins rather they have been temporarily appointed as Collection Amin in the year 1993, therefore, their names should not have been mentioned in the

gradation list finalized in the 2001 which is meant for Seasonal Collection Amins but due to inadvertence, names of these two persons namely, Noor Mohd. Khan as well as Indra Mani Tiwari were wrongly mentioned in the gradation list of Seasonal Collection Amins whereas their names should have been mentioned in the list of temporary Collection Amins."

"5……it is relevant to mention here that when the above mistake regarding mentioning the names of Sri Noor Mohd. Khan at Sl. No. 154 as well as name of Sri Indramani Tiwari at Sl. No. 171 in the gradation list of Seasonal Collection Amins, was detected then the deponent on 4.9.2003 passed an order in this regard whereby it has been ordered that since Sri Noor Mohd. Khan as well as Sri Indra Mani Tiwari are not working as Seasonal Collection Amins rather they are working as temporary Collection Amins since 1993 and are getting their salary accordingly and as such their names are deleted from the gradation list of Seasonal Collection Amins so that their names may be mentioned in the gradation/seniority list of Temporary Collection Amins."

16. According to the petitioners, when correspondences have revealed that 10 posts are lying vacant and same could not be fulfilled in time by the general candidates in the light of the provisions of Act No. 4 of 1994, therefore, the stand of the respondents are misleading, as according to the petitioners 9 persons, who are not at all named in the seniority list of Seasonal Collection Amin updated upto the year 1992, could be said to be much juniors, who have not even worked but were given regular appointment as Seasonal Collection Amin and for which no relevant reply has been given in the affidavit of S.P. Vishwakarma. According to the petitioners, it is very strange while giving appointment to the persons named in paragraph-9 of the writ petition how the reservation quota, as indicated in the Act No. 4 of 1994, was not applicable. Since the above Act No. 4 of 1994 came into operation w.e.f. 11th December, 1993, the same was to be equally applicable to the persons named in paragraph-9 of the writ petition, whereas, the petitioners were engaged way back in the year 1986 and large number of vacancies were available, but their cases were not considered for regularisation, therefore, the respondents cannot legally argue that because of Act No. 4 of 1994, which is undisputedly not of retrospective effect, can not apply to the earlier vacancies in view of the decision of the Supreme Court in 1998 (9) SCC 223 (B.L. Gupta Vs. Municipal Corporation of Delhi).

17. According to the petitioners, giving of appointment to the persons, who have subsequently been engaged namely juniors to them, is discriminatory and in total disregard to the provisions of Article 14 of the Constitution.

18. According to the learned Counsel for the petitioners, in paras-3 and 4 of the supplementary counter affidavit of Sri Amrit Abhijit, the District Magistrate, Mirzapur, two persons, namely Noor Mohd. shown at serial no. 154 and Sri Indra Mani Tiwari shown at serial no. 171, are said to be regularized as Collection Amins on temporary capacity, whereas, no post of temporary Collection Amin has been provided as conceived in U.P. Collection Amin Rules, 1974. Further, six following persons were also granted absorption as regular

appointment as Seasonal Collection Amin, namely:-

	Name	Position	From
(i)	Ashok Kumar Pandey	Outsider	06.12.88
(ii)	Sanjeev Kumar Pandey	Junior	13.04.93
(iii)	Ganesh Singh	Junior	26.08.93
(iv)	Ghanshyam Pandey	Junior	30.07.96
(v)	Jaya Kant Dubey	Outsider	---
(vi)	Shyamdhar Tiwari.	Outsider	---

Even as disclosed in the affidavit of Sri Ram Singh Gautam six posts are still in existence. According to the petitioners, different stands in respect of giving appointment to the different persons have been taken by the respondents in different counter affidavits and without any rhyme or reason and without any proper justification the appointment of outsiders have been made and the services of the petitioner have completely been ignored and the interim order dated 21.04.2004 passed by this Court has not been complied with.

18. I have heard learned Counsels for the parties. I find that according to own disclosure of the respondents six vacancies are still available and many of the persons have been given appointment on the strength of the interiom order or on compassionate ground or on the closures of other units, whereas, the petitioners' long standing experience and services have been ignored without any justification and also without any justification the persons not even named in the list, enclosed as Annexure-CA-1 to the counter affidavit, being juniors to the petitioners or being outsiders have been given appointment, such action of the respondents is hostile discrimination on the part of the respondents. The appointment of Sri Ganesh Singh also is giving occasion of discrimination vis-à-vis the petitioners. The respondents being State authorities have not acted in all fairness and the way as they are expected to do. Even the records, which were produced before this Court for perusal, were not systematic and are creating doubt/suspicion. The attempt of the respondents are not fair and much could be, desired to be commented upon, however, giving of comment on this occasion is not relevant, only suffice to say that the petitioners have been treated discriminatorily and they have been ignored from being considered for appointment to the post of Seasonal Collection Amins. There is complete non-application of mind on the part of the District Magistrate, Mirzapur and completely on irrelevant points the orders dated 23.08.2001, the impugned in the present writ petition, have been passed, which are not legally sustained, therefore, these are set aside and the writ petition deserves to be allowed. The writ of mandamus is issued to the respondents to consider the case of the petitioners and pass appropriate reasoned and speaking order in respect of giving appointment to the petitioners to the post of Seasonal Collection Amin within a period of two months from the date of production of certified copy of this order.

19. In view of the above observations/directions, the writ petition is allowed.

No order as to cost.

Petition Allowed.