ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2005

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

Civil Misc. Writ petition No. 7809 of 1996

Abdul Rahman ...Petitioner
Versus
Vth Additional District Judge and others ...Respondents

Counsel for the Petitioner:
Sri Dhurya Narayana
Sri Bala Krishna Narayana

Counsel for the Respondents:
Sri A.K. Dwivedi
Sri A.I. Naqvi
Sri A.K. Tiwari
S.C.

Indian Limitation Act-1963-S-134-readwith Code of Civil Procedure-Order 21 rule 95-Application for delivery of possession by the auction purchaser-objection raised regarding limitation-rejected on the ground earlier application about sale certificate-the same objection of limitation has been rejected-held-illegal-application under Order 21 rule 95 for possession is entirely different cause of action-petitioner can not be deprived from raising objection including the limitation.

Held: Para 6

It is not denied that earlier the application was filed with respect to issuance of sale certificate and not possession. The functional facts in disposing off the application under Order XXI Rule 95 are different and the petitioner was well within his right to have raised the objection of limitation which was clearly applicable and he cannot be estopped by any principle including that of res judicata. In any event, making an application under Order XXI Rule 95 was fresh cause of auction and the petitioner cannot be deprived of raising his objections including on the ground of limitation.

Case law discussed:
AIR 1932 Cal.-75
AIR 1979 Alld.-411
AIR 1953 Nag.-215
AIR 1987 SC-1443

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

1. Pleadings are complete and the counsel for the parties agree that the petition may finally be disposed off under the Rules of the Court.

Heard counsel for the parties.

2. This writ petition is directed against the orders dated 4.5.1991 and 5.1.1996 whereby objection of the petitioner against the delivery of possession of the disputed house has been rejected by both the courts below.

3. Father of the respondent no. 3 filed a money suit no. 285 of 1959 for recovery of sum of Rs.400/-, which was decreed. An execution application was filed by him which was registered as execution case no. 186 of 1963 wherein the disputed house was sold in a court auction on 29.3.1964 and was purchased by the decree holder himself. The sale was made absolute on 21.4.1964. After his death, the respondent no. 3 filed suit no. 225 of 1983 for permanent injunction to restrain the petitioner from interfering in the possession of the disputed house wherein the petitioner allegedly resided. The suit was dismissed vide judgment and order dated 9.2.1988. After dismissal of the suit, the respondent no. 3 filed an application dated 17.3.1988 under Order XXI Rule 94 for issuance of a sale

certificate on the basis of the aforesaid auction sale dated 19.3.1964. The petitioner filed objections against the said application on several grounds including that of limitation. Both the courts below rejected the objections of the petitioner and allowed the application of the respondent no. 3 vide orders dated 8.12.1989 and 27.3.1990. Thereafter, the respondent no. 3 made an application under Order XXI Rule 95 for delivery of possession. The petitioner again filed his objection inter-alia stating that the application was hopelessly barred by time as the application was not made within a period of one year as prescribed under Article 134 of the Limitation Act. Both the courts below have rejected the objection holding that limitation would run from the date of delivery of sale certificate and thus the application was within time. The court also held that the petitioner was estopped from raising question of limitation again in proceedings under Order XXI Rule 95 since the same objection has already been rejected while disposing off his application under Order XXI Rule 94.

4. Learned counsel for the petitioner has urged that sine quo non to the filing of an application under Order XXI Rule 95 was only that the sale should have become absolute and the limitation would not run from the date the sale certificate is issued. In support of his contention he has relied upon a decision of this Court in the case **Sukh Lal Vs. Ghasi Ram [AIR 1979 Allahabad 411]** and a Division Bench in the case of **Babu Lal Vs. Annapurnabai [AIR 1953 Nagpur 215].** For the proposition that in the facts of the case Article 134 and not Article 136 would apply. He has relied upon the ratio of the Apex Court in the Case of **Ganpat Singh Vs. Kailash Shankar [AIR 1987 SC 1443].**

5. Before the Court deals with the arguments, it would be appropriate to examine Rule 95 of Order 21 which is quoted below.

"95. Delivery of property in occupancy of judgment-debtor- *Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under Rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same."*

It would be also relevant to quote Article 134.

Art. 134. For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year	When the sale becomes absolute.

6. A joint reading of the two provisions shows that on the application being made by the auction purchaser within a period of one year from the date the sale is made absolute, the court shall order delivery of possession of the said immovable property under a title created by the auction sale. A Single Judge of our

Court in the case of Sukh Lal and the Division Bench of Nagpur in Babu Lal (Supra) have unequivocally held that limitation is to be computed from the date on which the sale has become absolute and not from the date the sale certificate is issued. This view is also supported by a Division Bench of the Calcutta High Court in the case of **Smt. Anarjan Bibi Vs. Chandramani [AIR 1932 Calcutta 75]** where it held, after examining the order XXI Rule 94 that..... *"the only effect of that is that no order can be made until the certificate has been issued, and not that an application under either rule should on that account be delayed. Besides on the sale becoming absolute it is more or less within the power of the auction purchaser to get the sale certificate as soon as he wants, because the intention of the legislature as expressed in the wording of Order XXI Rule 94, is to issue the certificate with all convenient speed.....*' In the present case, there is absolutely no reason given by the respondent no. 3 why no effort was made for obtaining the sale certificate within a reasonable time. It is not denied that the sale had become absolute on 21.4.1964 and father of the petitioner died in 1976 i.e. more than a decade after the sale had become absolute. Even respondentno.3 applied for obtaining sale certificate only on 17.3.1988 i.e. about a quarter of century after the actual auction sale. The contention of the learned counsel for the respondent that once bar of limitation had been pleaded and decided against the petitioner in the execution proceedings, he cannot be allowed to again raise the bar of the limitation in the execution proceedings, is without any merit. It is not denied that earlier the application was filed with respect to issuance of sale certificate and not possession. The functional facts in disposing off the application under Order XXI Rule 95 are different and the petitioner was well within his right to have raised the objection of limitation which was clearly applicable and he cannot be estopped by any principle including that of res judicata. In any event, making an application under Order XXI Rule 95 was fresh cause of auction and the petitioner cannot be deprived of raising his objections including on the ground of limitation.

For the reason given above this petition succeeds and is allowed and the impugned orders dated 4.5.1991 and 5.1.1996 are hereby quashed. No order as to cost.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Re-Civil Misc. Recall Application No. 195804 of 2005

In

Civil Misc. Writ Petition No. 59635 of 2005

Ashok Kumar Chaturvedi ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Rishi Kant Rai

Counsel for the Respondents:
Sri K.C. Sinha
Sri Anil Kumar Mehrotra
Sri Santosh Kumar Pandey
Sri B.S. Yadav

High Court Rules 1952-Chapter V, Rule-12-Practice of Procedure Tied up cases

recall application-grant of interim order or the order issuing Notices-can not be treated as tied up with particular Bench-the practice which has been Specifically prohibited by clean provisions of the rule-can not be allowed in the garb of recall-application-proper course to file stay vacation Application-held-recall application rejected with liberty to file stay vacation application or any other made as per provision of law recall application not maintainable.

Held: Para 10

If such a procedure of filing application to recall exparte interim orders is permitted to be adopted by the respondents, then in every case the respondents can file such applications, instead of filing an application for vacation of the stay order, and in all such cases the matter would get tied up to that Bench which had initially heard the matter and had granted the exparte interim order. This would frustrate the provisions of Rule 14 of Chapter V of the Rules of the Court which specifically provides that a case shall not be deemed to be tied up to the Bench merely directing issue of notice to the respondents or granting an exparte interim order.

Case law discussed:

Spl. Appeal No.555/04 decided on 12.7.04
AIR 2000 SC-1168
AIR 1996 SC-2592
1994 (2) E cases 498

(Delivered by Hon'ble Vineet Saran, J)

1. This writ petition was filed with the prayer for quashing the subsequent transfer order passed in the case of the petitioner. After issuing notices to the respondents, this Court passed an interim order dated 8.9.2005, which reads as under:

"Issue notice to the respondents fixing a date immediately after six weeks.

The petitioner as well as the respondent no. 5 are both the Account Clerks working in Nehru Yuva Kendra Sangathan, which is a Government of India undertaking. On their own request the respondent no.5 was transferred from Ghazipur to Lucknow whereas the petitioner was transferred from Mau to Ghazipur by order dated 13.7.2005 passed by the Zonal Director, Nehru Yuva Kendra Sangathan, Lucknow, respondent no.3. In pursuance of the aforesaid order the petitioner was relieved from Mau on 15.7.2005 and he went to Ghazipur to join on 16.7.2005. However, although the respondent no. 5 had been relieved from Ghazipur but the petitioner was not permitted to join there. Meanwhile the respondent no. 3 passed a fresh order dated 16.8.2005 stating that the transfer of respondent no.5 shall remain stayed till April 2006 and by another order dated 28/29.8.2005 the petitioner was attached to Nehru Yuva Kendra Sangathan, Gorakhpur until further orders. The submission of the petitioner is that since the transfer of the petitioner as well as respondent no.5 had both been made on their own request and the respondent no.5 having been already relieved from Ghazipur, the petitioner ought to have been permitted to join at Ghazipur on 16.7.2005. It has further been contended that the impugned orders dated 16.8.2005 and 28/29.8.2005 have been passed for extraneous consideration and on the influence of respondent no.5 and the petitioner who was working at Mau has consequently been attached to Gorakhpur for indefinite period instead of being permitted to join at Ghazipur in pursuance of initial transfer order dated 13.7.2005. Considering the aforesaid

facts and circumstances of this case, the operation of the impugned orders dated 16.8.2005 and 28/29.8.2005 passed by the respondent no.3 shall remain stayed and the petitioner shall be permitted to join in the office of Nehru yuva Kendra Sangathan, Ghazipur as already directed by initial order dated 13.7.2005."

2. Respondent no. 5 has filed this recall application under Chapter XXII of the Rules of the Court, 1952 read with Section 151 of the Code of Civil Procedure, with the prayer for recalling the interim order dated 8.9.2005 passed by me. The said application is supported by an affidavit of respondent no. 5. No counter affidavit to the averments made in the writ petition has been filed. Because a recall application has been filed, this matter haws been listed before me as a tied up matter.

3. The preliminary question which requires consideration is as to whether a recall application in such a case would be maintainable or not, as the option open to the applicant-respondent no. 5 was to file an application for vacating the exparte stay order, alongwith a counter affidavit.

4. Sri A.K. Mehrotra, learned counsel appearing for the applicant-respondent no. 5 has submitted that since by the interim order dated 8.9.2005 final relief had been granted, the same would amount to be a judgment and therefore the party aggrieved by such an order would have an option of either filing a recall application or stay vacation application or challenging the said order in special appeal. In support of his submission he has relied upon a Division Bench decision of this Court dated 12.7.2004 rendered in Special Appeal No. (555) of 2004, **State of U.P. Vs. Smt. Meera Sankhwar**. In the alternative, it has also been submitted that since the order has been obtained by fraud, as material information was concealed by the petitioner at the time of filing of the writ petition, this Court has jurisdiction to recall the order passed by it.

5. Having heard learned counsel for the applicant-respondent no. 5 and considering the provisions of law, in my view, in the facts and circumstances of this case, the recall application filed by the applicant-respondent no. 5 would not be maintainable and the proper course for him, available under law, would be to file an application for vacation of the stay order alongwith a counter affidavit.

6. The decision in the case of State of U.P. Vs. Smt. Meera Sankhwar (supra) would not apply to the facts of this case. In the said case an appeal had been filed challenging the interim order passed by the learned Single Judge and since the Court was of the opinion that the interim order passed actually amounted to grant of final relief, it was held that the special appeal against such an interim order would be maintainable.

7. Rule 12 of Chapter V of the Rules of Court, 1952 provides for filing of an application for review of a judgment. Rule 13 provides for filing subsequent application on the same subject matter. Rule 14 relates to tied up cases. In all such cases any application filed would be heard by the same Judge who had passed the earlier order. The present application filed by the applicant-respondent no. 5 cannot be treated as a review application. Rule 14, which relates to tied up cases, reads as under:

*"**14. Tied up cases**.- (1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. **A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench."***

8. In the present case notice was issued to the respondents and the interim order had been granted. The order had not attained finality, which could only be after any such order had been passed after hearing counsel for both the sides. Even assuming (without expressing any opinion) that any final relief had been granted by the aforesaid ex-parte interim order, the same may have trappings of final judgment or order for the purposes of filing a special appeal, but the procedure of filing an application for recall cannot be permitted especially when the other procedure of getting the said ex-parte stay order vacated is provided by filing an application alongwith a counter affidavit. By filing a recall application under Section 151 the case gets tied up to this Bench, which is neither proper nor permissible under the Rules of Court.

9. The other submission of the applicant-respondent no. 5 that since the said ex-parte interim order has been obtained by fraud and by not disclosing the material information in the writ petition and hence the application for recall can be filed by the respondents, also does not have force. The decisions in the cases of **R.K. Parasher Vs. Dinesh Kumar** AIR 2000 S.C. 1168; **Indian Bank Vs. M/s Satyam Fibres (India) Pvt. Ltd**. AIR 1996 S.C. 2592; **Vidyottama Gupta Vs. Km. Nirmala Gupta** 1994 (2) Education & Service Cases 498 as have been relied upon by the learned counsel for the applicant-respondent no. 5 do not help him. All the said cases relate to filing of a recall or review application where the final orders had been passed by the Court.

10. It is true that in case if final order has been passed by a Court and subsequently it was found that fraud had been played upon the Court or that a party had not disclosed any material information which had subsequently come to the knowledge of the other party, an application for recall or review of the said order can be filed in which case application has to be heard by the same Bench which had passed the earlier order. Such is not the position in the present case. Here since exparte interim order had been passed by this Court, the proper course available for the applicant would be to file an application for vacation of the stay order, supported by a counter affidavit giving detailed reply to the contents of the writ petition. If such a procedure of filing application to recall exparte interim orders is permitted to be adopted by the respondents, then in every case the respondents can file such applications, instead of filing an application for vacation of the stay order, and in all such cases the matter would get tied up to that Bench which had initially heard the matter and had granted the exparte interim order. This would frustrate the provisions of Rule 14 of Chapter V of the Rules of the Court which specifically provides that a case shall not be deemed to be tied up to the Bench merely directing issue of notice to the respondents or granting an exparte interim order.

11. Thus, this application filed with the prayer for recall of the exparte interim order dated 8.9.2005 is being rejected on the aforesaid grounds, without expressing any opinion on the merits of the case. The applicant-respondent no. 5 shall be at liberty to file an application for vacation of the aforesaid exparte interim order alongwith a counter affidavit giving detailed reply to the averments made in the writ petition. Application Rejected.

ORIGINAL GURISDICATION
CIVIL SIDE
DATED: ALLAHABAD 25.10.2005

BEFORE
THE HON'BLE TARUN AGARWAL, J.

Civil Misc. Writ Petition No.47465 of 2002

No.2788858 (P) Ex. Babu Ram ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri Rajesh Yadav

Counsel for the Respondents:
Sri S.K. Tripathi,
ADDL.S.C.
Sri B.N. Singh
S.S.C.

Army Pension Regulations-Regulation-173-Disability Pension-Petitioner enrolled in army service on 26.8.91 hospitalised on 14.11.91-remained under treatment upto 10.6.92-suffering from adjustment reaction with depressive mood-309-petitioner remained out of service due to personality disorder-claim for disability pension rejected medical report indicates no past history of mental illness disease attributed to and was aggrivated due to harassment and maltreatment in training center-held-denial of pension not only erroneous but also arbitrary and against the pension rules.

Held-Para 14 and 16

An analysis of the psychiatry report clearly indicates that the onset of the petitioner's problem and the disease was attributable to and was aggravated by the military service. Even if, the petitioner was suffering from the disease prior to his enrolment in the service, the disease was aggravated due to the harassment and maltreatment of the petitioner by others in the training centre.

In view of the aforesaid, the action of the respondents in not granting the disability pension is not only erroneous, but is also arbitrary and is against the Pension Rules. Pension is no longer a bounty and is a right of the individual under Article 21 and 41 of the Constitution of India.

Case law discussed:
1997(1) ESC-477
2002(2) UPLBEC-1734
2001(1) UPLBEC-2010
1998(1) UPLBEC-708
1996(2) UPLBEC-761

(Delivered by Hon'ble Tarum Agrawal, J.)

1. The petitioner was enrolled in the Army on 26.8.1991 and was sent for training in the Maratha Light Infantry Cerntr, Belgaum. At the time of his enrolment, the petitioner was medically checked and was found fit and was govern an "A" medical category.

2. Within two months of his joining, the petitioner was admitted in the hospital on 14.11.1991 and remained under treatment unto 10.6.1992, where his disease was diagnosed as an "ADJUSTMENT REACTION WITH DEPRESSIVE MOOK-309". As a result

of this diagnosis, a medical report dated 10.6.1992 was issued invaliding the petitioner out of service on the ground of "personality disorder". The petitioner thereafter moved an application claiming Disability Pension which was rejected by an order dated 1.9.1993 on the ground that the disability which the petitioner has suffered during his service in the Army was not attributable to the Military Service and, therefore, disability pension was neither admissible nor payable under the Rules. It transpires that the petitioner preferred an appeal, which remained pending, and eventually, the petitioner filed writ petition No.2961 of 2001 which was disposed of by an order dated 22.1.2002 directing the appellate authority to decide the appeal within three months. Based on the aforesaid direction, the appellate authority by its order dated 1.8.2001 rejected the appeal of the petitioner. Consequently, the present writ petition has been filed praying for the quashing of the orders dated 19.11.1993 and 1.8.2003 and further praying for a writ of mandamus commanding the respondents to pay the disability person with interest.

3. Heard Sri Rajesh Yadav, the learned counsel for the petitioner and Sri S.K.Tripathi, the learned counsel for the respondents.

Disability Pension is payable to a person, who had been invalidated on account of a disability which occasioned on account of an injury or an illness. The grant of a disability pension is, therefore, not dependant upon any length of service. Disability Pension is payable under paragraph No. 173 of the Pension Regulation which reads as follows:

"Unless otherwise specifically provided a disability pension may be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service and is assessed at 20 percent or over.

The question whether a disability is attributable to or aggravated by military service shall be determined under the rules in Appendix-II".

4. The aforesaid provision contemplated that an invalidation form the military service should be on account of a disability which is attributable to or aggravated by military service and is assessed at 20 percent or more. The question, whether a disability was attributable to or aggravated by military service, would be determined under the rules in Appendix-II. The entitlement Rules, under Appends-II provides the basis for awarding a disability pension. Rule 1 contemplated that any invalidation from the service is a necessary condition for the grant of a disability pension. Rule 2 (a) provides that a disablement would be accepted as due to a military service provided id is certified that the disablement was attributable to the military service or existed before of arose during the military service and had been aggravated by the military service. Rule 3 indicated that the disability must have a causal connection with the military service. Rule 4 lays down that in deciding the issue of entitlement, all direct or indirect evidence would be taken into account and the benefit of reasonable doubt would given to the claimant.

5. From the aforesaid, it is clear that an employee who suffers from a particular disease may be invalidated from the

service and it the said disease was aggravated after entering the service which has resulted in his discharge from the service due to that disability; it would entitle him to claim a disability pension. These rules clearly indicates that even a disease which was contracted prior to the entry into the service can be made a basis to claim disability pension provided it is proved that the disease was aggravated after the entry into the service. In other words, military service should be the contributing factor to aggravate the disability.

6. The petitioner claims disability under Rules 7 which reads as under:-

"(a) Cases, in which it is established that conditions of military service did not determine or contribute to the onset of the disease but influenced the subsequent course of the disease, will fall for acceptance on the basis of aggravation.
(b) A disease which has let to an individual's discharge or death will ordinarily be deemed to have arisen in service if no note of it was made at the time of the individual's acceptance for military service. However, if medical opinion holds, for reasons to be stated, that the disease could not have been detected on medical examination prior to acceptance for service the disease will not be deemed to have arisen during service.
(c) If a disease is accepted as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstance of duty in military service.
(d) In considering whether a particular disease is due to military service, it is necessary to relate the established facts, in the etiology of the disease and of its normal development; to the effect and conditions of service e.g. exposure, stress, climate, etc may have had on its manifestation. Regard must also be had to the time factor.(Also see Annexure I).
(e) Common diseases known to be affected by stress ad strain. This should be decided with due reference to the nature of the duties and individual has had to perform in military service. It may be that in some cases the individual has been engaged on sedentary duties when they will normally not qualify"

7. Clause (b) of the Rule 7 indicates that is no note of a disease was made at the time of the employees' enrolment in the military service, a disease shall be deemed to have arisen which in service. However, this assessment is displace only if the medical opinion, for the reasons to be recorded in writing, holds otherwise that the illness could not be detected at the time of the enrolment in the service.

8. From the aforesaid, it is clear, that an employee who has been invalidated from the services is entitled to a disability pension, even if he was suffering from the disease prior to his enrolment in the service and that he said disease was aggravated due to stress and strain while in employment. If a note to the disease was not made at the time of a person's enrolment in the military service, the said diseases would be deemed to have arisen in course of the employment. However, this presumption can be dispensed with, if the medical doctors opine, that the disease could not be deleted on the medical examination at the time o the enrolment of the employee. The Rules further indicates that whether a particular disease is due to the military service or not it would be necessary to relate the

established facts in the axiology of the disease and of its normal development to the effect that the condition of service such as exposure, stress climate etc. may have had on its manifestation ad in this regard the time facto is also an essential element.

9. In the light lot the aforesaid provisions, the learned counsel for the petitioner submitted that since no note of the said disease was made by the respondents at the time of the enrolment of the petitioner in the service, therefore, the invalidation lot the petitioner on the ground that the disease which had occurred was not attributable to the military service and therefore, the petitioners was entitled to a disability pension under Regulation 173 read with the Rule 7 of Appendix II of the said Regulation. FON the other hand, the leaned counsel for the respondents submitted that the petitioner was invalidated on account of a constitutional disorder and that the said disease was not attributable to the military service. Further, personality disorder was detected at the initial state of his enrolment itself and therefore, the condition of service did not attribute too the manifestation of this disease. The learned counsel for the respondents submitted tat even if the diseased was accepted to have arisen in service, or cannot be established that the condition of military service determine or attributed to the onset of the disease and that the stress and strain had led to the manifestation of the disease since the disease was detected at he initial stage of training.

10. In support of the submission, the petitioner has relied upon the decision in Ram Niwas vs. Union of India, 1997(1) E.S.C.477, Ex. Gnr. Dharam Vir Singh vs. Union of India and others, 2002 (2) UPLBEC 1734 Mahaveer Singh Rawat vs. Union of India and others, 2001(1) UPLBEC 262 Inder Jang vs. Union of India and others, 1999(3) UPLBEC 2010, Yashpal Singh Mehra vs. Union of India and others, 1998(1) UPLBEC 708, Anil Kumar Mishra vs. Union of India, 1996 (2) UPLBEC 761, in which it was held that the disease was attributable to the military service coupled with the fact that no note of the said disease was made at the time of enrolment and, therefore, the imployee was entitled to a disability pension under Rule 7(2) of Appendix II of the said Regulations.

11. In the light of the aforesaid judgments, it is necessary to consider the facts of the present case which eventually led to the discharge of the petitioner from the service. The petitioner was enrolled in the Army at young age. At the time of his enrolment, he was found to be medically fit and was not found to suffering from any illness or disease. The enrolment of the petitioner was done after a through and intensive medical examination. According to the petitioner, during his training he was badly treated by his senior an was physically and mentally tortured in the training central. The petitioner has alleged that he was strapped and hung upside down and that he was harassed, man –handled and beaten by his seniors, The persistent ragging of the petitioner while undergoing training led him to a mental breakdown resulting in his hospitalisation and eventually discharge from the service, From a perusal of the psychiatric report, it is class the an attempt has been made to diagnose the reason for his maladjustment in the army environment, but no effort had been made

by the Army Authorities to locate and address the reasons for subjecting the petitioner to such a harassment.

12. The psychiatric report indicates that the petitioner had no past history of any mental or physical illness. The examination of his mental state of mind indicated that he was passively co-operative and observed normal military manners and was clean and coherent and that there were no psychotic features and that sensorism was clear and that his insight and judgment was intact and that initial examination did not show depression. However, subsequent interviews revealed that he had a deep resentment towards his seniors, who allegedly harassed the petitioner. The report further indicated that the onset of the petitioner's problem was during the training period when he felt himself to be a misfit and was ill treated by his superiors, which let to a depressive mood and strong demodulations for the service. The report clearly indicates that the petitioner did not have a past history of a mental illness and that the stress of basic military training ad maladjustment to the service environment appears to have contributed to the onset of the psychiatric illness.

13. The entire report concentrates on the petitioner's adjustment in the military environment and, brought into the forefront, his maladjustment in the military service. But the cause which let to this depressive mood behavior and his adjustment in the military environment has not been considered. The petitioner alleged that he was harassed, tortured and hung upside down by his superiors in the training centre. This fact has not been considered by the authorities and has been ignored completely. The allegations made by the petitioner appears to be correct. The physical examination of the petitioner. As per the medical report, indicates that he had contusions over the neck (around), over the forearms (near wrist) and around the ankles. The contusions on the forearms and the ankles indicates that the petitioner was tied and hung. The petitioner cannot tie his arms and ankles and then hang himself. Consequently, some else had tied his hands and ankles and thereafter hanged the petitioner.

14. An analysis of the psychiatry report clearly indicates that the onset of the petitioner's problem and the disease was attributable to and was aggravated by the military service. Even if, the petitioner was suffering from the disease prior to his enrolment in the service, the disease was aggravated due to the harassment and maltreatment of the petitioner by others in the training centre.

15. Apart from the aforesaid, it is clear that at the time of the enrolment of the petitioner in the Army Service he was not found to be suffering from any ailment and no note of this disease was made by the Medical Board. Therefore, under Rule 7, if no note was made regarding a particular illness at the time of the enrolment of an employee a particular illness at the time of the enrolment of an employee in the military service, the judgments cited by the learned counsel for the petitioners are squarely applicable.

16. In view of the aforesaid, the action of the respondents in not granting the disability pension is not only erroneous, but is also arbitrary and is against the Pension Rules. Pension is no

longer a bounty and is a right of the individual under Article 21 and 41 of the Constitution of India.

17. In view of the aforesaid, the writ petition is allowed. The impugn3ed orders dated 19.11.1993 and 1.8.2002 are set aside and the respondents are directed to pay disability pension to the petitioner within three months form the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 22457 of 2004

Bhanwar Pal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rashtrapati Khare

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

Constitution of India, Art. 226-Servise law-deduction from gratuity and pension-petitioner worked on the basis of interim order-by impugned order made to compulsory retired-after dismissal of writ petition-Appellate Court direct to calculate the retirement benefit from the date of retirement-Consequently-the authorities deducted the excess amount of the salary from the some payable to the petitioner towards gratuity and pension-held the period under which petitioner worked on the basis of interim order-be treated the extension of service-petitioner entitled to retain salary-the deducted amount be refunded to petitioner within 3 months-failing which 12% interest would be paid.

Held: Para-5 and 6

The direction of the Court, did not allow the respondents to deduct the salary, which the petitioner had received on the basis of an interim order. In my view, the petitioner was justified to receive the salary because he had worked and performed is duty during that period. In my view, this period, should be treated as an extension of service and, therefore, the petitioner would be entitled to retain his salary. The authority while rejecting the representation of the petitioner had also referred the matter to the State Government for its opinion. The State Government, By an order dated 04.04.2005 informed the Police Department, that the salary which the petitioner had received, pursuant to the interim order, could not be deducted from his retirement benefits. In view of the categorical stand taken by the State Government, it is no longer open to the Police Department to deduct any amount from the retirement benefits for which the petitioner was entitled.

Consequently, the writ petition is allowed in respect of the relief as modified above and a mandamus is issued to the respondents not to deduct any amount from the gratuity or from the pension, in relation to the salary, which the petitioner had received, pursuant to the interim order passed in Writ Petition No.13578 of 1990. The amount so deducted shall be refunded to the petitioner within three months without any payment of interest from the date of production of a certified copy of this order, failing which, interest would be paid at the rate of 12%per annum. It is made clear, that the other relief's, which the petitioner has claimed, in the writ petition, has not been pressed by the petitioner.

Case law discussed:
1995 ALJ 1603-distinguished.

(Delivered by Hon'ble Tarun Agarwal, J.)

1. Heard Sri.R.P.Khare, the learned counsel for the petitioner and Sri V.K.Rai, the learned standing counsel appearing for the respondents.

2. Briefly stated, the facts giving rise to the present writ petition is that the petitioner was working as a Sub Inspector and on account of three adverse entries, was compulsorily retired from the service on 14.05.1990. The petitioner filed Civil Misc. Writ Petition No.13578 of 1990 and, initially an interim order was passed staying the operation of the order of retirement. By another order dated 16.12.1991, this court directed that the petitioner was entitled to his salary during the pendency of the writ petition. Eventually, the writ petition was dismissed on merit by a judgment dated 16.02.2001, even though, in the meanwhile, the petitioner had retired on 30.11.1997 upon reaching the age of superannuation at 58 years. The petitioner, upon the dismissal of the writ petition, filed a Special Appeal No.186 of 2001 which was also dismissed and, the judgment of the learned Single Judge was affirmed. The Division Bench, while dismissing the appeal, passed the following order:

"However, it is made clear that the retiral benefits whatever is admissible according to law on the basis of compulsory retirement should be made available to the appellant/petitioner as early as possible preferably within three months from the date of communication of this order."

3. Based on the aforesaid direction, the retirement benefits were calculated and certain deductions were made from his retirement benefits namely, from his gratuity and certain amount was also deducted from his pension. Since the entire amount towards retirement benefits was not paid, the petitioner filed a Contempt Petition No.731 of 2003 in which an order dated 13.02.2004 was passed directing the petitioner to make a representation which would be decided by the authority concerned. This representation, was rejected by an order dated 13.05.2004. Consequently, the present writ petition was filed not only for the quashing of the order dated 13.05.2004, but for the payment of the revised pay scale, arrears from 1990 to 1992, etc. The petitioner also prayed that the action of the respondents in deducting the amount paid to him towards the salary pursuant to the intenm order granted by this court from the gratuity and from the pension was illegal and was liable to be quashed. The petitioner further prayed that a mandamus be issued to the respondents directing them to refund the amount alongwith the interest.

4. The learned counsel for the petitioner has, however, confirned his relief only with regard to the illegal deductions made by the respondents and has given up the other reliefs.

5. Admittedly, the petitioner was paid his salary pursuant to the interirn order. There is no controversy with regard to the fact that the petitioner had performed his work and attended his duty. Since the petitioner has performed his duty, in that situation, the petitioner is entitled for his salary. The petitioner's writ petition was dismissed and the order

of compulsory retirement was affirmed. The Division Bench of this Court in Special Appeal categorically issued a direction to the respondents to calculate the retirement benefits, on the basis of the order of compulsory retirement. The period, which the petitioner had worked, on the basis of the interim order, was not to be calculated for the purpose of calculating the retirement benefits. The direction of the Court, did not allow the respondents to deduct the salary, which the petitioner had received on the basis of an interim order. In my view, the petitioner was justified to receive the salary because he had worked and performed is duty during that period. In my view, this period, should be treated as an extension of service and, therefore, the petitioner would be entitled to retain his salary. The authority while rejecting the representation of the petitioner had also referred the matter to the State Government for its opinion. The State Government, By an order dated 04.04.2005 informed the Police Department, that the salary which the petitioner had received, pursuant to the interim order, could not be deducted from his retirement benefits. In view of the categorical stand taken by the State Government, it is no longer open to the Police Department to deduct any amount from the retirement benefits for which the petitioner was entitled.

6. Consequently, the writ petition is allowed in respect of the relief as modified above and a mandamus is issued to the respondents not to deduct any amount from the gratuity or from the pension, in relation to the salary, which the petitioner had received, pursuant to the interim order passed in Writ Petition No.13578 of 1990. The amount so deducted shall be refunded to the petitioner within three months without any payment of interest from the date of production of a certified copy of this order, failing which, interest would be paid at the rate of 12 % per annum. It is made clear, that the other reliefs, which the petitioner has claimed, in the writ petition, has not been pressed by the petitioner.

7. In view of the aforesaid stand taken by the State Government, the judgment cited by the standing counsel in the case of State of U.P. vs. Harendra Kumar, 1995 ALJ 1603 has no relevance to the present facts and circumstances of the case. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.6671 of 2005

Fakhruddin Ali ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Devesh Pandey
Sri Syed wajid Ali

Counsel for the Respondents:
S.C.

Constitution of India Art. 226- appointment-petitioner finally selected on the Post of Police Constable-required to file affidavit about his character and antecedent-petitioner in affidavit disclosed the pendancy of Criminal case-matter sent for verification of character to the District Magistrate-who also reported about non involvement of any

other Criminal case-except the aforesaid one not send on training-held-petitioner yet not convicted-can not be denied the appointment on the basis of the pendancy of Criminal case.

Held: Para 3

In my view, the approach adopted by the respondents is incorrect. Denying the petitioner an appointment on the basis of assumption and presumption is violative of Article 14 and 16 of the Constitution of India. The petitioner has a fundamental right of being given an appointment on the basis of his selection and he cannot be denied an appointment merely on the basis that he has been named in the first information report. The petitioner has not yet been convicted nor the District Magistrate had certified that his antecedents are of such a nature that he could not be given an appointment, therefore the petitioner could not be denied an appointment letter merely on the basis of the pendency of a case in a criminal Court.

Case law discussed:

1996 SCC-605
2003 (3) UPLBEC-2193

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

1. Heard Sri Syed wajid Ali, the learned counsel for the petitioner and the learned standing counsel appearing for the respondents.

2. The petitioner applied for the post of Constable. The select list was published on 23.10.2004 in which the petitioner's name was found at serial no.195. Based on this selection, the petitioner was medically examined and was found fit. The petitioner was required to submit an affidavit with regard to his character and antecedent. In this affidavit, the petitioner indicated that a criminal case No.460 of 2003, under Sections 147, 323, 504, 506, 342, 307, 427 I.P.C. was pending. Based on this affidavit, the matter was sent to the District Magistrate concerned for verification of his character and antecedents. The District Magistrate by an order dated 31.5.2005 certified his character as good and further submitted that he was not involved in any other case except in Case Crime No.460 of 2003. Inspite of this certification issued by the District Magistrate, the petitioner was not given an appointment nor was he sent for training. Consequently, the petitioner has filed the present writ petition praying that a writ of mandamus be issued to the respondent no.2 to appoint the petitioner on the post of a Constable and further direct the respondents to send the petitioner for training.

3. The respondents in their counter affidavit have stated that the petitioner's integrity cannot be certified on account of the fact that a criminal case was pending against him and, therefore, he could not be appointed. In my view, the approach adopted by the respondents is incorrect. Denying the petitioner an appointment on the basis of assumption and presumption is violative of Article 14 and 16 of the Constitution of India. The petitioner has a fundamental right of being given an appointment on the basis of his selection and he cannot be denied an appointment merely on the basis that he has been named in the first information report. The petitioner has not yet been convicted nor the District Magistrate had certified that his antecedents are of such a nature that he could not be given an appointment, therefore the petitioner could not be denied an appointment letter merely on the basis of the pendency of a case in a criminal Court.

4. In **Delhi Administration, through its Chief Secretary and others v. Sushil Kumar, 1996 SCC 605 [Labour and Service 492]**, the Supreme Court held that the verification of the character and antecedents is one of the most important criteria to test whether the selected candidate was suitable to a post or not. In the present case, the District Magistrate has certified that the petitioner has a good character except for his involvement in the criminal case. In my opinion, the respondents could not deny an appointment on the post of Constable merely because of the pendency of the criminal trial.

5. In **Sanjay Kumar v. State of U.P. and others [2003] 3 UPLBEC 2193**, this Court held that lodging of an F.I.R. alone was not sufficient for an incumbent to be denied an appointment on the post of a Government office. This judgment squarely applies to the present facts and circumstances of the case.

6. In view of the aforesaid, the petitioner is entitled to the relief claimed. The writ petition is allowed and a mandamus is issued to respondent no.2 to call the petitioner and give him a provisional appointment and send him for training within two weeks from the date of production of a certified copy of this order. It is made clear that the appointment of the petitioner would be subject to the result of the criminal trial. It is open to the respondents to make another verification with regard to the antecedents of the petitioner's character after the judgement given by the trial Court. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 66925 of 2005

Gauri Shankar ...Petitioner
Versus
Sita Ram and another ...Respondents

Counsel for the Petitioner:
Sri Shiv Murti Yadav

Counsel for the Respondents:
S.C.

Code of Civil Procedure-Section-115- as amended by U.P. Act No. 14 of 2003-Scope of Revision-whether deciding amendment application amounts to deciding the proceeding finally? Held-'yes' revision-maintainable.

Held: Para 5

In view of what has been stated above, it is clear that deciding an application for amendment is deciding the proceedings finally, therefore I am not in agreement with the submission made by learned counsel for the petitioner that revision is not maintainable. My aforesaid view is supported by the decision of the Apex Court reported in 2003 (3) A.W.C., 2198 (SC)-Shiv Shakti Co-operative Housing Society, Nagpur Vs. Swaraj Developers and others. In view of the law laid down by the apex Court in the case of Shiv Shakti (supra), this writ petition has no force and is accordingly dismissed.

Case law discussed:
2002 (8) ACJ 119-distinguished
2003 (3) AWC-SC 2198 relied on

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

1. Heard learned counsel for the petitioner.

The petitioner aggrieved by the order passed by the revisional Court dated 28th September, 2005, whereby the revisional Court allowed the revision filed by the respondent and set aside the order dated 27th September, 2004, passed by the trial Court, approached this Court by means of present writ petition under Article 226 of the Constitution of India.

2. The brief facts of the present case are that during the pendency of suit, the petitioner-plaintiff filed an application seeking amendment in the plaint, which was allowed by the trial Court vide order dated 27th September, 2004. Aggrieved by the order passed by the trial Court, the respondent-defendant preferred a revision before the revisional Court under Section 115 of the Code of Civil Procedure. The revisional Court vide order impugned in the present writ petition allowed the revision filed by the respondent observing that by the amendment since the plaintiff has completely changed the original case and set up new pleadings, which has changed the nature of the case, therefore the trial Court was in error in allowing the amendment application filed by the petitioner-plaintiff. The revisional Court thus rejected the application filed by the plaintiff-petitioner.

3. Leaned counsel appearing on behalf of the petitioner-plaintiff submitted before this Court that in fact the revision filed by the respondent is not maintainable and so far as the view taken by the trial Court that by the amendment the nature of the case will not be changed and the respondent-defendant has got an opportunity to object the same by filing written statement. In support of his contention, learned counsel for the petitioner has relied upon a decision of the Apex Court reported in **2002 (1) A.C.J., 119 - Prem Bakshi and others Vs. Dharam Dev and others**, wherein the Apex Court has ruled that "amendment allowed by sub-ordinate court could not be said to have finally decided, it would not come under Clause (a) of sub-section (1) of Section 115 of the Code of Civil Procedure." The Apex Court further held that *"amendment in the plaint would not amount failure of justice, therefore interference by High Court under Section 115 of the Code of Civil Procedure is erroneous."*

4. In view of the provisions of Section 115 of the Code of Civil Procedure, as amended in the State of U.P. by U.P. Act No. 14 of 2003, Section 115 is substituted by a new section i.e. sub-section (3). Sub-section (3) of the U.P. Act No. 14 of 2003 is reproduced below:-

"115. Revision.

(1) .....

(2) .....

(3) The superior Court shall not, under this section, vary or reverse any order made except where,-----

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made."

5. In view of what has been stated above, it is clear that deciding an application for amendment is deciding the proceedings finally, therefore I am not in agreement with the submission made by learned counsel for the petitioner that revision is not maintainable. My aforesaid view is supported by the decision of the Apex Court reported in **2003 (3) A.W.C., 2198 (SC) - Shiv Shakti Co-operative Housing Society, Nagpur Vs. Swaraj Developers and others.** In view of the law laid down by the apex Court in the case of **Shiv Shakti** (supra), this writ petition has no force and is accordingly dismissed. Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2005

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

Second Appeal No.2585 of 1974

Janki Smt. and another ...Appellants
Versus
Murari Lal and others ...Respondents

Counsel for the Appellants:
Sri V.K.S. Chaudhary
Sri N.P. Singh
Km. Nand Prabha Shukla

Counsel for the Respondents:
Sri K.N. Upadhyay
Sri M.C. Singh
Sri Mithlesh Kumar Tiwari
Sri Indra Shekhar Tripathi
Sri S.K. Upadhyay

U.P.Z.A. & L.R. Act-1951-Section 168-A-read with U.P.Z.A. & L.R. (Amendment) Act 2004-Section 9 read with subsequent amendment Act No. 13 of 2005-Section 4-by Sale deed dated 15-1-1969-transfer of fragments deemed to have been violdable-provided not enter in Revenue record in favour of State-Transferees may get validated such transfer after depositing such fee-within the period as notified by government.

Held: Para 6

In terms of the above said amendments in the present case, the sale deed dated 15.1.1969 executed by Smt. Ganga Devi in favour of Amar Singh and Murari Lal being void under Section 168-A as it stood before the commencement of the Act 2004, was deemed to have been voidable in terms of Section 11 of the special provisions and further amended by Act No.27 of 2004 by which Section 11 has also been omitted as it stood and has been replaced by Section 4 of U. P. Act No.13 of 2004, in terms of which the alleged sale deed dated 15.1.1969 alleged to have become void stands voidable in the case of transfer of such fragment, provided, it has not been entered in the revenue records in favour of the State Government, on the date of the commencement of the U.P. Act No.27 of 2004 or U.P. Act No.13 of 2005 as the case may be and such transferees may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government. In view of the above said findings, the first question is decided accordingly.

(B) Specific Relief Act 1963 S-16 (c) Suit for Specific performance-No allegation-regarding willingness-suit can not succeed-any deposition or piece of evidence without pleading can not be looked into-held suit not maintainable.

Held: Para 8

I have examined various paragraphs of the plaint and fail to find any such specific averments regarding willingness to perform the contract in any of the paragraphs. The lower appellate Court has completely ignored the requirements of Section 16 (c) of the Specific Relief

Act and as such in absence of the mandatory requirements of Section 16 (c) of the Specific Relief Act regarding necessary averments in the plaint and the proof of the same regarding his "willingness" to perform his part of contract, neither any such deposition has been made the suit cannot succeed. In case such deposition would have been made even then in absence of such averments in the plaintiff's suit, it could not be taken into account as it is the plaint allegations, which are to be proved by means of evidence. It is well established rule that no amount of evidence can be looked into unless there is a pleading to that effect. The plaintiffs have failed to make out any cause of action with regards to the specific performance of the alleged contract, the specific performance of contract could not be enforced in favour of the plaintiffs and the suit thus being not maintainable, ought to have been dismissed on this count itself, even though the defendants failed to take any objection. The appellate Court grossly erred in law in decreeing the suit. The question no.2 is decided in affirmative.

Case law discussed:

AIR 1978 Alld.-463
AIR 1974 Alld.-294
1969 (II) SCC-539

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

Heard Shri V.K.S. Chaudhary Senior Advocate assisted by Shri N.P. Singh learned counsel for the appellants-defendants and Shri Mithlesh Kumar Tiwari and Shri Kharak Singh learned counsel for the respondents.

1. This second appeal arises out of the judgment and decree dated 24.8.1974 passed by the District Judge, Bulandshashr in Civil Appeal No.314 of 1971 Murari Lal and others Vs. Smt. Janki and others arising out of Original Suit No.191 of 1969 between Murari Lal and others Vs. Smt. Ganga Devi and others, and also challenging the findings dated 24.3.1982 passed by the District Judge in the lower appellate Court.

2. The case of the appellant in brief is that Khazan Singh (husband of Smt. Ganga Devi defendant no.1), Chiranji defendant no.2 and Fatte (husband of Smt. Janki defendant no.3) were 3 real brothers. The dispute between Smt. Ganga Devi and Chiranji and Fatte (deceased) substituted by her legal heir Smt. Janki, arose on the allegation that Smt. Ganga Devi had remarried and lost all rights and title in the land in accordance with the provisions of Section 172 of U.P. Zamindari Abolition and Land Reforms Act No.1 of 1951 (hereinafter referred to in short as the Act) although it was held by the revenue Court that though she was living with another person but no case of remarriage could be proved and she continued to be the tenure holder. Due to the dispute during consolidation proceedings in the area between the above said three co-tenure holders, the proposed Chaks of three branches were numbered as 89-A, 89-B and 89-C at one place. Plot no.89-C (in question) was proposed for Smt. Ganga Devi, which consisted of two parts, one the Bhumidhari portion of 4-14-13 bighas and another Sirdhari portion as 2-18-11 Bighas, total being 7-15-4 bighas. Smt. Ganga Devi allegedly deposited ten times rent for the Sirdhari plots of area 2-18-11 part of the plot no.89-C on 15.1.1969 and accordingly became Bhumidhar of the entire plot no.89-C consisting of total area of 7-15-4 bighas. On same date, i.e., 15.1.1969 Smt. Ganga Devi allegedly sold her part of plot no.89-C admeasuring 2-18-11 bighas in favour of Murari Lal plaintiff no.1 and Amar Singh plaintiff

no.2 both sons of one Ganga Sahai who was the Pairokar of Smt. Ganga Devi. On 15.1.1969, Smt. Ganga Devi also sold an area of 0-13-19 in favour of one Dulli alleged to be the servant of Ganga Sahai in separate plot no.765. It is alleged that on 12.3.1969 Smt. Ganga Devi entered into an agreement to sell, part of the agricultural land situated in plots nos.89-C and 725-C in favour of Murari Lal and others (sons of Ganga Sahai) for Rs.9,000/-. This execution of unregistered agreement was disputed by the appellants-defendants alleged to have been forged and not duly executed by her in accordance with law. It has also been alleged that she leased out her rest of the land to Ganga Sahai. On 2.6.1969, Smt. Ganga Devi admittedly sold her entire plots to Chiranji and Fatte (husband of Smt. Janki Devi-appellant-defendant).

3. Murari Lal and others (sons of Ganga Sahai) respondents-plaintiffs on 31.10.1969 filed an Original Suit No.191 of 1969 in the Court of Civil Judge for specific performance of contract regarding land admeasuring 4-14-13 bighas part of agricultural plot no.89-C and 0-8-0 of plot no.725. In para-7 of the plaint, it has been stated that Smt. Ganga Devi-defendant no.1 had entered into a written agreement dated 12.3.1969 for sale of the said land and have received a sum of Rs.5,100/- in advance and only an amount of Rs.3,900/- remained in balance. In Para-9 of the plaint it has been stated that the plaintiff is ready to pay the balance amount of Rs.3,900/- and has always been ready and the sale deed may be executed on the basis of the said agreement. In para-10 it has been stated that the cause of action arose on 12.3.1969 the date of execution of the agreement of sale by defendant no.1 in favour of plaintiffs and thereafter on 2.6.1969 the date of the execution of sale deed by the defendant no.1 in favour of defendants no.2 and 3. In the written statement filed by defendants no.2 and 3, in paragraphs 4,5 and 6 objections were raised in terms with the provisions of Section 168-A of the U.P. Zamindari Abolition and Land Reforms Act, which reads as under: -

"168-A. Transfer of fragments.- (1) Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure-holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred.

(2) The transfer of any land contrary to the provisions of Sub-section (1) shall be void.

(3) When a bhumidhar has made any transfer in contravention of the provisions of Sub-section (1) the provisions of Section 167 shall mutatis mutandis apply."

The Additional Civil Judge vide order dated 22.9.1971, dismissed the Original Suit No.191 of 1969 filed by Murari Lal and others for specific performance of contract. The District Judge vide its order dated 24.8.1974 passed in Civil Appeal No.314 of 1971 allowed the appeal of Murari Lal and others with costs, holding, inter-alia, that the contesting defendants-respondents

(now appellants) had full knowledge of the agreement to sell before the execution of the sale deed dated 2.6.1969 in their favour and, therefore, were not bonafide purchasers for value without notice and were thus not entitled to any protection under Section 41 of the Transfer of Property Act wrongly held by the lower Court which had no application to the present case of specific performance of contract and the agreement to sell could be specifically enforced against all the defendants. It decreed the Original Suit No.191 of 1969 of Murari Lal and others for specific performance of contract. Two months' time was granted to the defendants to execute the sale deed in terms of the said agreement. Since, the appellate Court had not decided the effect of Section 168-A of the U.P. Zamindari Abolition of Land Reforms Act raised by the defendants nos.2 and 3 and also dealt with in the Judgment passed by the lower appellate Court. This Court (Hon'ble K.M. Dayal, J.), vide order dated 30th of July 1981 framed the following issue and remitted to the lower appellate Court for decision:-

"Whether the sale deed dated 15.3.1969 (corrected as 15.1.1969) executed by Smt. Ganga Devi in favour of Dulli and Amar Singh was valid in view of Section 168-A of the U.P.Z.A. & L.R. Act, if so its effect?"

The lower appellate Court allowed the parties to adduce necessary evidence in respect with the referred issue, the plaintiffs did not lead any evidence, however the defendants filed papers and led their evidence and recalled one Chiranji Lal defendant no.2 for re-examination. The lower appellate Court after hearing the parties vide its order dated 24.3.1982 decided the issue in affirmative assigning its reason, and submitted the same before this Court. The appellants filed their objections to the above said findings of the lower appellate Court and while challenging the same raised three further grounds.

An Original Suit No.277 of 1969 was filed on dated 26.6.1969 in the Court of Munsif by Ganga Sahai father of plaintiffs against Chiranji and others for injunction restraining the defendants from interfering with his alleged possession as sub tenant over the alleged leased out portion of the plot no.84-C in his favour. The Original Suit No.277 of 1969 was dismissed by the Court of Munsif vide order-dated 22.5.1972. Thereafter vide order dated 18.1.1973, the District Judge also dismissed the appeal of Ganga Sahai holding inter-alia, that the transfer of Ganga Sahai and Dulli was void being hit by Section 168-A of the Act. The Sub Divisional Magistrate in the proceedings under Section 145 Cr. P.C. at the instance of Amar Singh son of Murari Lal-respondents Vide order-dated 22.12.1969 upheld the possession of Chiranji and Fatte and directed Murari Lal and others not to disturb the possession of Chiranji and Fatte. The matter came up before this Court and vide order dated 15.11.1972 it held Chiranji and Fatte to be in possession of the land in question under Section 145 Cr. P.C. and confirmed the orders of the lower Courts.

4. Learned counsel for the appellants has also submitted that the alleged contract of sale executed by Smt. Ganga Devi is a forged and fabricated document as per the statement of one Laxmi Kant attesting witness and also on the face of the record, as there is irregular spacing of

the typed contents and specially the last line having been typed without any spacing since the alleged thumb of Smt. Ganga Devi existed on the said blank paper on which the alleged contract of sale has been typed out, though after the thumb impression, there was still ample of space left at the bottom of the page and the finding by the learned District Judge that it was so done to confine the deed to a single sheet is contrary to what is apparent on the face of the document and without any evidence. It is based on mere surmises and conjectures, and more so, this document does not contain the name of the deed writer and typist and has not been signed by the witness at the margin which is customary, but signed at the bottom of the document. It has also been submitted that Ganga Sahai father of the plaintiffs-respondents was doing pairvi on her behalf before the Consolidation Court, and he appears to have procured her thumb impression on blank papers and that her written statement in another case was inadmissible as evidence, as such, against the defendant-appellant since neither she was examined nor she entered in the witness box nor any affidavit was filed by her. She never came to the Court and even the said written statement was filed through her counsel. He has referred to Section 18 of the Evidence Act, which refers that the statement made by the persons referred to therein, are admissions, if they are made during the continuance of the interest of the persons making the statement. Her statement contained in the written statement was made after she had sold and parted with her whole property and had no proprietary interest left therein, thus, her statement made after parting her proprietary interest was not admissible against the defendant-appellant and the learned lower appellate court has grossly erred in relying upon the same. No compelling reasons existed for the lower appellate court to upset the judgment and decree of the trial Court with regard to the defendant being bonafide purchaser for value without notice of the contract. In fact, contract did not exist at that time and the suit was filed only after Smt. Ganga Devi had sold the property in favour of the appellants. Learned counsel for the appellants has further stressed that the Consolidation of Holding Rules are not applicable in the present case.

The learned counsel for the appellants has further submitted that at the time when the appeal had been filed in 1974 the necessary amendments in Section 100 of the Code of Civil Procedure had not been made and therefore, no substantial question was required to be framed by the Court while admitting the appeal, more so, in terms of the saving clause Section 97 (2) clause (m) in the Central Act 104 of 1976. However, in my view the following substantial questions of law arise from the pleadings for consideration by this Court:-

(1) Whether by sale deed dated 15.1.1969 of a part of Plot no.89-C by Smt. Ganga Devi in favour of Amar Singh and Murari Lal which was of a transfer of a fragment in a consolidation area was thus void in terms of the provisions of Section 168-A of the Principal Act, and thus rendering the decree for specific performance of contract of sale and transfer of the other remaining fragment of Plot No.89-C as illegal?

(2) Whether in the absence of the averments made in the plaint that the plaintiff had been and was still "ready and willing" to perform the essential terms of the alleged agreement which was to be performed by him in terms of clause (c) of Section 16 of the Specific Relief Act, 1963 and Form-48 given in Appendix 'A' of the Order 48 Rule 3 of the Code of Civil Procedure, the plaint ought to have been dismissed?

Learned counsel for the respondents has submitted that no substantial question of law arises from the pleadings of the case and, therefore, in terms of the decisions delivered by this Court in the case of Deena Nath Vs. Sreedhar Dayal Pathak and another reported in 2003 (2) AWC, page 1002, the appeal deserves to be dismissed.

5. Heard learned counsel for the parties at length and looked into the record of the case and find that, it is not disputed that plot no.89-C (in question) falling in the share of Smt. Ganga Devi consisted of two parts, one bhumidhari and the other sirdhari portion. After deposit of the ten times of the rent for the sirdhari plot, she became bhumidhar of entire plot no.89-C consisting of total area of 7-15-4 bighas on 15.1.1969 she sold a part of the plot in favour of Murari Lal and Amar Singh, plaintiffs no.1 and 2. The sale deed dated 15.1.1969 executed by Smt. Ganga Devi transferring a part of plot No.89-C in a consolidation area admeasuring 2-18-11 in favour of Murari Lal and Amar Singh being a fragment of the total area of the Bhumidhari land admeasuring 7-15-4 bighas was barred under the provisions of Section 168-A (I) of the Principal Act which had an over-ridding effect and the said transfer through the alleged sale deed dated 15.1.1969 stood void in terms of the provisions of Sub clause (2) of Section 168-A of the Principal Act on the date of the alleged transfer. However, the Court also finds that the Act No.1 of 1951 has been subsequently amended by U.P. Act No.27 of 2004. It received the assent of the Governor on 20.8.2004 and was published in the U.P. Gazette on 23.8.2004. One of the objects and reasons for amendment was with a view to safeguard the interest of tenure holders by "omitting the provision relating to restriction of transfer of fragments to avoid its adverse effect."

Section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2004 reads as under:-

4. Omission of Section 168-A.- Section 168-A of the principal Act shall be omitted.

Section 11 of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2004 reads as under:-

11. Special Provisions- It is hereby declared that any transfer of a fragment which had become void under Section 168-A as it stood before the commencement of this Act shall be deemed to have been voidable (sic) and any person may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government:

Provided that the above provisions shall cease to be in force after expiry of

one year from the date of commencement of this Act.

However, again a subsequent amendment Act (U.P. Act No.13 of 2005), which received the assent of the Governor on March 24, 2005 and published in U.P. gazette on 29th March 2005 was brought in effect.

Section 4 of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2005 reads as under:-

4. Special provision –

(1) It is hereby declared that any transfer of such fragment as had become void under Section 168-A as it stood before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2004 (U.P. Act No.27 of 2004) and had not been entered in revenue records in favour of State Government shall be deemed to have been voidable and any person may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government :

Provided that the provisions of this sub section shall cease to be in force after expiry of one year from the date of commencement of this Act.

(2) Section 11 of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 2004 (U.P. Act No.27 of 2004) shall be omitted.

6. In terms of the above said amendments in the present case, the sale deed dated 15.1.1969 executed by Smt. Ganga Devi in favour of Amar Singh and Murari Lal being void under Section 168-A as it stood before the commencement of the Act 2004, was deemed to have been voidable in terms of Section 11 of the special provisions and further amended by Act No.27 of 2004 by which Section 11 has also been omitted as it stood and has been replaced by Section 4 of U. P. Act No.13 of 2004, in terms of which the alleged sale deed dated 15.1.1969 alleged to have become void stands voidable in the case of transfer of such fragment, provided, it has not been entered in the revenue records in favour of the State Government, on the date of the commencement of the U.P. Act No.27 of 2004 or U.P. Act No.13 of 2005 as the case may be and such transferees may get such transfer validated by depositing such fee and within such time and in such manner as may be notified by the State Government. In view of the above said findings, the first question is decided accordingly.

7. On the second question this Court finds from the record of the case that the important ingredient in the plaint regarding plaintiff's 'willingness' to perform the essential terms of contract in terms of the provisions of Section 16 (c) of the Specific Relief Act, 1963 and also as prescribed in the form given in appendix 'A' Forms 47 and 48, in terms of Order 48 Rule 3 of the Code of Civil Procedure is missing. The relevant part of Section 16 (c) of Specific Relief Act is quoted below:-

16. Personal bars to relief.-Specific performance of a contract cannot be enforced in favour of a person –

(a) .....
(b) .....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation-For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

In this respect law is settled. There are catena of decisions including Mahmood Khan and another Vs. Ayub Khan and others reported in AIR 1978 (Alld.) page 463 and Rajendra Prasad Vs. Raj Deo reported in AIR 1974 (Alld.) page 294. It has been held in the case of Ouseph Verghese Vs. Joseph Aley and others reported in (1969) Vol.2 SCC page- 539. The relevant portion of para-9 of the said Judgment is quoted below:-

".....The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in Pt. Prem Rai Vs. The DLF Housing and Construction (Private Limited) and another, (Civil Appeal No.37/66, decided on 4.4.1968) that it is well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable."

8. I have examined various paragraphs of the plaint and fail to find any such specific averments regarding willingness to perform the contract in any of the paragraphs. The lower appellate Court has completely ignored the requirements of Section 16 (c) of the Specific Relief Act and as such in absence of the mandatory requirements of Section 16 (c) of the Specific Relief Act regarding necessary averments in the plaint and the proof of the same regarding his "willingness" to perform his part of contract, neither any such deposition has been made the suit cannot succeed. In case such deposition would have been made even then in absence of such averments in the plaintiff's suit, it could not be taken into account as it is the plaint allegations, which are to be proved by means of evidence. It is well established rule that no amount of evidence can be looked into unless there is a pleading to that effect. The plaintiffs have failed to make out any cause of action with regards

to the specific performance of the alleged contract, the specific performance of contract could not be enforced in favour of the plaintiffs and the suit thus being not maintainable, ought to have been dismissed on this count itself, even though the defendants failed to take any objection. The appellate Court grossly erred in law in decreeing the suit. The question no.2 is decided in affirmative.

Under the above said facts and circumstances of the case, the Judgment and decree dated 24.8.1974 passed by the District Judge, Bulandshahar in Civil Appeal No.314 of 1971 Murari Lal and others Vs. Smt. Janki and others is set aside and the Judgment and decree dated 22.9.1971 of the trial Court passed in Original Suit No.191 of 1969 between Murari Lal and others Vs. Smt. Ganga Devi and others is upheld. Appeal is allowed. No order as to costs.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2005

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 22242 of 2002

Kailash and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri Sharad Malviya
Sri R.K. Vidhyarthi
Sri G.K. Singh
Sri V.K. Singh

Counsel for the Respondents:
S.C.

U.P. Urban Land (Ceiling & Regulation) Act-1976-S-10 (5), 10 (6)- readwith Urban Land (Ceiling and Regulation) repeal Act 199-Section 3 and 4-Possession of surplus land-service of Notice u/s 10 (5) to the co-sharer of land-order-held-not proper service-actual physical possession-special officer categorically speaks that no actual Physical possession taken by state-dispite of opportunity no contrary material brought before the Court-mere mutation of name does not confer, any title-land cannot be vested with state-nor utilized held-land is free from any requisition or acquision.

Held: Para 5,7,8 & 9

The law under Section 10 (5) of the Act is crystal clear that notice in writing is to be given to surrender or deliver the possession and if any body refuses or fails to comply, the authority may take possession of the vacant land under Section 10 (6) of the Act. From the record we find that only a notice under Sub-section 5 was received by one "Bachchan Lal". According to the petitioners he has no authority to receive the notice. Even if a co-sharer can not affect the right of the others in receiving such notice. In any event notice under the principal Act upon one "Bachchan Lal" can not help the cause of the respondents at present.

The obvious inference is that when vesting of land is lifted by the evaporation of law and the land under vesting has not been utilised for any purpose save and except putting sign board, if any, to show that it was earlier vested under the Principal Act, can not be held by the State.

Hence, as per the interpretation of this Court in this matter as well as in the earlier occasion and having discussion on

the similar point by another Division Bench of this Court as also by the Supreme Court either expressly or impliedly, we do not find any other reason other than to allow the writ petition safely.

Therefore, we declare that the land in question is free from any requisition or acquisition under the Ceiling Act, as aforesaid, and the petitioners are entitled to have lawful possession of the land in question.

Case law discussed:
2000 (6) SCC-325
2005 (III) SCC-832

Present:
(Hon'ble Mr. Justice Amitava Lala and
Hon'ble Mr. Justice Sanjay Misra)

Appearance:

For the Petitioners :	Sri R.N. Singh, Sr. Advocate. Sri G.K. Singh & Sri V.K. Singh.
For the Respondents:	Standing Counsel.

Amitava Lala, J.--- The impugned land of the writ petitioners is, according to the respondent authority, surplus in nature and had been taken by the authority as per Sections 10 (5) and 10 (6) of the Urban Land (Ceiling & Regulation) Act, 1976. Such Act was repealed by virtue of the Urban Land (Ceiling and Regulation) Repeal Act, 1999. State of Uttar Pradesh adopted the repealing Act of the Central Government. Therefore, the repealing Act is applicable in the State with full force.

2. The bone of contention of the petitioners' argument is that the authority had not taken the actual physical possession of the land in question, therefore, the possession can not be kept by the State Authority after the repealing Act being enforced in the State. The writ petition was filed after the repealing Act came into force.

3. Therefore, the moot point is whether the words actual physical possession are contemplated under the prevailing law or not.

According to us, there is no such bearing under the law leaving aside the word possession. But we are constrained due to evaporation of earlier law. Therefore, the point has to be rationally thought for the necessity. Doubtful words are to be interpreted according to context following the **maxim** *noscitur a sociis*. If the word 'possession' in the existing law does not only include actual physical possession, what other type of possession can include? Obviously it is symbolic possession. But symbolic possession is byproduct of principal Act which will be effective at the time of vesting by applying deeming provision now has been repealed. Symbolic possession stands with the support of law wherein physical possession stands with the support of fact. When law evaporates, symbolic possession automatically evaporates. But physical possession remains to get it tested. Therefore, if subsequent Act supports existence of such possession, it has to be construed as physical possession but not symbolic possession. Court will only test with whom such actual physical possession lies. If the actual physical possession of the State is such that it is impossible to return back such possession, obviously no order can be passed in such case although law is little tilted in favour of the land holders. Legislature has made the provisions very clear under Sections 3

and 4 of the Repealing Act. The relevant sections of the Repealing Act are quoted hereunder:

*"**3. Savings**.--(1) The repeal of the principal Act shall not affect—*

(a) the vesting of any vacant land under sub-section (3) of Sec. 10, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Sec. 20 or any action taken thereunder, notwithstanding any judgment of any Court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) of Sec. 20.

(2) Where--

(a) any land is deemed to have vested in the State Government under sub-section (3) of Sec. 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land,

then such land shall not be restored unless the amount paid, if any, has been refunded to the State Government."

***"4. Abatement of legal proceedings.--** All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any Court, Tribunal or any authority shall abate:*

Provided that this section shall not apply to the proceedings relating to Secs. 11, 12, 13 and 14 of the principal Act insofar as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority."

4. Composite reading of the aforesaid two sections gives indication of mind. Under Section 10 (3) of the Urban Land (Ceiling & Regulation) Act, 1976, vesting shall be declared by notification etc. Under Section 10 (5) notice will be issued to surrender or deliver the possession subject to such vesting. Under Section 10 (6) if any person refuses or fails to comply with an order made under sub-section (5), the authority may take possession. Therefore, when both vesting and possession are available then alone the original Act can be applicable. In other words such possession can be made only as an incident of vesting. Under the repealing Act practical difficulty has been considered by the legislature and that practical difficulty is none other than the actual physical possession it occurs subject to vesting but even if law is lifted but possession can not be given back physically. The last part of sub-section (2) under Section 3 of the repealing Act is in respect of restoration of the land even when the amount can be paid back to the State Government. Payment of amount, if

any, will come only when the possession has been taken. The legislature has extended the scope even to the extent provided possession can be given back. The proviso to Section 4 of the repealing Act does not allow one to take advantage of abatement of legal proceedings when Section 11 onwards takes effect. Such situation is available only when land has been acquired and payment is existed. It was held by the Supreme Court in **2000 (6) SCC 325 (Pt. Madan Swaroop Shrotiya Public Charitable Trust Vs. State of U.P. and others)** that when nothing on record to indicate that State had taken possession over the surplus land, the proceedings have to be abated under Section 4 of the Repeal Act, 1999. In totality enquiry and determination of actual physical possession and payment or refund money thereof are the necessary requirement for consideration under the Repeal Act. It has argued on the strength of **(2005) 3 SCC 632 (Kishan Lal Vs. State of M.P. and others)** that when both vesting and possession are made applicable then the original Act will be made applicable but not the repealing Act, otherwise repealing Act will be applicable. Supreme Court held that there are some other provisions in the said section (Section 3 of the said Repeal Act) which are relevant in deciding the question as to whether the repeal shall affect such vesting. In an unreported judgement when State wanted a clarification in this regard in **Civil Misc. Writ Petition No. 47369 of 2000 (State of U.P. Through the Competent Authority and another Vs. Hari Ram and others)** one of our Division Bench held as follows:

".....an illegal act is not recognized in law and has to be ignored unless specifically required under statute to be reckoned with. Secondly, possession of surplus land, on notice given under section 10 (5) of the Act is to be surrendered by the landowner voluntarily in pursuance to said notice. If the landowner does not surrender possession in pursuance to the aforesaid notice, 'the Act' contemplates taking possession by force and coercing the landowner under section 10 (6) of the Act. If possession is taken in an extraordinary manner (process not recognized in law) i.e. without resorting to the provisions contemplated under section 10 (5) or Section 10 (6) of the Act, then possession will be irrelevant and of no consequence so far as the applicability of the Repeal Act is concerned. The Repeal Act shall have no effect on the Principal Act if possession of surplus land was not taken as contemplated in the Principal Act. Repeal Act, clearly talks possession being taken under section 10 (5) or 10 (6) of the Act. It is a statutory obligation on the Competent Authority or State to take possession as permitted in law. It is to be appreciated that in case possession is purported to be taken under section 10 (6) of the Act, still Court is required to examine whether 'taking of such possession' is valid or invalidated on any of the considerations in law. If Court finds that one or more grounds exist which show that the process of possession, though claimed under section 10 (5) or 10 (6) of the Act is unlawful or vitiated in law, then such possession will have no recognition in law and it will have to be ignored and treated as of no legal consequence. The possession envisaged under section 3 of the Repeal Act is de facto and not de jure only."

5. Even thereafter we wanted to verify the truth of actual physical possession and appointed a member of the bar as Special Officer to visit the spot and place a report before the Court under sealed cover. Such report categorically speaks that no actual physical possession has been taken by the State. A fake defence has been taken by the State that at the time of inspection no one was present on behalf of the State. But we find from the earlier order of the Court that in presence of all the parties when the order was passed, it was made clear that no further notice will be given but all will be present at the time of making inspection of the spot by the Special Officer. Under the order dated 18th July, 2005 date and time were fixed by this Court. After opening the sealed cover and going through the report we have directed to circulate the report to give further opportunity to the parties to take appropriate step including exception to the report but State has not made any application taking exception to the report. They have relied upon their own record to establish the cause under Section 10 (5) of the Urban Land (Ceiling and Regulation) Act, 1976. The law under Section 10 (5) of the Act is crystal clear that notice in writing is to be given to surrender or deliver the possession and if any body refuses or fails to comply, the authority may take possession of the vacant land under Section 10 (6) of the Act. From the record we find that only a notice under Sub- section 5 was received by one "Bachchan Lal". According to the petitioners he has no authority to receive the notice. Even if a co-sharer can not affect the right of the others in receiving such notice. In any event notice under the principal Act upon one "Bachchan Lal" can not help the cause of the respondents at present.

6. The respondents further wanted to say that the land has been mutated in their name, therefore, the same can not be said to be land of the petitioners. We are all aware that mutation can not give the title. Therefore, mere mutation can not help the State for saying that the land is their actual physical possession. Even the Division Bench of our High Court in the earlier unreported judgement held as follows:

"Mere 'mutation' of entry in favour of State/other persons in revenue records, is irrelevant/ inconsequential so far as the applicability of section 3 of Repeal Act is concerned."

Therefore, such point is also tested.

7. Learned Standing Counsel lastly contended that it is impossible for the State to keep actual physical possession of all the lands in question, which were previously vested by virtue of the surplus land under the Principal Act. The answer is hidden in such submission. The obvious inference is that when vesting of land is lifted by the evaporation of law and the land under vesting has not been utilised for any purpose save and except putting sign board, if any, to show that it was earlier vested under the Principal Act, can not be held by the State.

8. Hence, as per the interpretation of this Court in this matter as well as in the earlier occasion and having discussion on the similar point by another Division Bench of this Court as also by the Supreme Court either expressly or impliedly, we do not find any other reason

other than to allow the writ petition safely.

9. Therefore, we declare that the land in question is free from any requisition or acquisition under the Ceiling Act, as aforesaid, and the petitioners are entitled to have lawful possession of the land in question.

Thus, the writ petition stands disposed of.

However, no order is passed as to costs.

I agree.

(Justice Sanjay Misra)

Petition disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2005

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

Criminal Misc. Application No. 6058 of 2005

Kalamuddin Khan ...Applicant
Versus
State of U.P. and another ...Opposite parties

Counsel for the Applicant:
Sri.P.C. Srivastava

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

Code of Criminal Procedure-Section 482-Quashing of Criminal Proceeding-informant and the prosecution witness-not supporting the prosecution case-if put to the trail same evidence would be repeated after wasting the precious time of court-held proceeding liable to quashed.

Held: Para 6

In the present case, the informant and the eye witness have not supported the prosecution case nor named the applicant as assailant. If he is put to the trial the same evidence would be repeated and after wasting the precious time of the trial court, the result would be the acquittal.

Case law discussed:
1965 (2) ACC-955

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

1. Heard learned counsel for the applicant and learned A.G.A.

The brief facts, giving rise of the present application, are that a F.I.R. was lodged by one Sripat Rai on 30.10.2001.On 30.10.2001,at about 6.30 pm., his son Uma Kant Rai was coming along with Lal Chandra an when they reached near village Bahadurpur,two person appeared and fired shot on Uma Kant Rai.The assailants were not know hence non was named in the F.I.R. during investigation, statement of witnesses were recorded and name of applicant came therein. According of the investigating officers, the involvement of the applicant was under section 120B Indian Penal Code and offence under section 302 Indian Penal Code was made out against non applicant Dudh Nath Yadav and Kanhai Yadav.The charges sheet was submitted. The case against Dudh Nath Yadav and Bhola Singh was committed to the session court. The session trial no.613 of 202 proceeded in the court of Sessions Judge, Azamgarh. Sri.Pat Rai, who is said to be the informant of the case, did not support the prosecution case and was declared hostile. The eye witness Lal Chandra also did not support the case and was declared hostile. According to

prosecution story, deceased was going along with Lal Chandra. Only Lal Chandra can be the eye vitness at the time of occurrence. As there was no evidence, the trail of co-accused ended in acquittal. The case of the applicant was separated by order dated 14.11.2002.

2. Learned counsel for the applicant has submitted that there is no chance of conviction of the applicant if the trail proceeds, as the main accused who was said to be accused under section 302 Indian Penal Code, has been acquitted.

3. I have perused the judgment recorded by the Sessions Judge; Azamgarh.Sri.Pat Rai (PW-1) was the father of the deceased, who lodged the report. He has not stated anything about the accused or the applicant. The name of the applicant has appeared for the criminal conspiracy. The informant did not say anything even in his own statement. As stated above, Lal Chandra was named in F.I.R. as eye witness and he also did not support the case.

4. Learned counsel for the applicant has submitted that in the given circumstances, the principle of stare decisis is applicable and conviction of present applicant cannot be procured. The judgment of his Court reported in 2005(51) ACC(955) Pradeep @ Bhondu @ Bantoo vs. State of U.P. has been relied upon in which reliance was placed on Diwan Singh vs. State reported in 1965 (2) ACC 188. In the case of Diwan Singh (supra), it has been held:

> "If two persons are prosecuted thought separately, under the same charge for offences having been committed in the same transaction and on the basis of the same evidence, and if one of them is acquitted for whatever may be the reason and the other is convicted, then it will create an, anomalous position in law and is likely to shake the confidence of the people in the administration of justice."

5. It is settled view that this Court in exercise of power under section 432 of the Code of Criminal Procedure may quash the proceedings of the trial taking into account the principle of stare decisis. Whenever, there is no prospect of the case ending in conviction, the valuable time of the Court should not be wasted for holding trial only for the purpose of completing the procedure to pronounce the conclusion on a future date. In such matters, it is always advisable to terminate the proceedings at the stage of discharge.

6. In the present case, the informant and the eye witness have not supported the prosecution case nor named the applicant as assailant. If he is put to the trial the same evidence would be repeated and after wasting the precious time of the trial court, the result would be the acquittal.

7. Consequently, the application under Section 482 Cr.P.C. is allowed. The proceedings of Case No. 1776 of 2003 State vs. Kalamuddin, arising out of case crime no.204/2001 under section 302/120-B Indian Penal Code, police station Gambhirpur, district Azamgarh is hereby quashed. The applicant, if on bond, need not surrender and the surety bond/personal bond shall stand discharged. Application Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2005

BEFORE
THE HON'BLE M.K. MITTAL, J.

Criminal Misc. Application No. 11861 of 2005

Kamal Krishna ...Applicant
Versus
State of U.P. and others ...Opposite Parties

Counsel for the Applicant:
Sri Mayank Agrawal

Counsel for the Opposite Parties:
AG.A.

Code of Criminal Procedure-482- Summoning Order by Magistrate after enquiry u/s200 and 202 Cr.P.C. after being satisfied about sufficient evidence to proceed against the accused person- no required to evaluate the evidence- interference by session judge on the basis of contradictions in statement on difference in measurement of injury- held- un warranted.

Held: Para 8

In view of this legal position it is clear that after the inquiry as contemplated under Sections 200 and 202 Cr.P.C. if the Magistrate is satisfied that there is sufficient evidence to proceed against the accused, he may issue summon or warrant as the case may be and at that stage the court is not required to evaluate the evidence as if it was finally deciding the case.

Case law discussed:
1973 (10) ACC 181 SC
1964 (1) SCR 639
1976 (13) ACC-225 (SC)
2002 (44) ACC-168
2004(1) SCC-338

(Delivered by Hon'ble M. K. Mittal, J.)

1. The application has been filed by the applicant under Section 482 Cr.P.C. with the prayer to quash the order dated 8.7.2005 passed by Addl. Sessions Judge, Court No.5, Saharanpur in Criminal Revision No. 16 of 2005 and with a further prayer to stay the operation of the impugned order.

2. I have heard learned counsel for the applicant, learned A.G.A and perused the record.

Brief facts of the case are that Komal Krishna, the applicant filed a complaint against Tajendra, Ashwani and Surendra Kumar under Sections 307, 504, 506 and 452 IPC alleging that he was married to Seema Rani daughter of accused Surendra Kumar. Ashwani is son of Surendra Kumar and Tajendra is their friend. After the marriage, the complainant came to know that accused Tajendra had been visiting his Sasural and had established relations with Smt. Seema Rani. The family members of Seema Rani also wanted to marry her with Tajendra. But at that time, Tajendra was not doing any work and therefore she was married with accused as he was having a good post in the Railway department. The complainant also came to know that even after the marriage Tajendra used to visit his wife during his absence. He objected but his wife did not mend her ways and it became bone of contention between them. When the complainant complained about this act of his wife to the accused, Ashwani and Surendra Kumar, they reprimanded the complainant.

3. After about one year of the marriage, when the complainant came to

his house from his duty he found Tajendra and his wife in objectionable position and he turned Tajendra out of his house and asked him never to come to his house. He also stated hat he would lodge a report against Tejendra. At this Tajendra threatened to teach him a lesson. In the circumstances, he was compelled to file a divorce suit on 11.5.2004.

4. On 16.1.2005 at about 4 p.m., when he was at his room all the three accused came there and abused him and said that they had been searching him for a long time and now he had been found. The complainant said that he was taking divorce and had no concern with them. At this the accused Surendra said that he would take divorce only when he remained alive. Thereafter Tajendra attacked with Palkati, Surendra with lathi and Ashwani fired at him with Tamancha. However he bent down and avoided the shot but received injuries from Palkati and Danda. He was also medically examined and thereafter he filed a complaint.

5. Learned Magistrate examined the complainant under Section 200 Cr.P.C. and also recorded the evidence of the witnesses under Section 202 Cr.P.C. and thereafter finding that a prima facie case was made out against the accused persons, directed to summon them vide order dated 20.4.2005. Against the summoning order accused persons filed a criminal revision no. 16 of 2005 which has been allowed by the impugned order dated 8.7.2005. Learned Addl. Sessions Judge remanded the case with the direction that learned Magistrate shall decide the matter again in light of the observations made by him as the complainant had not been able to corroborate the incident in the evidence given by him. Learned Sessions Judge as mainly remanded the case on the ground that there is contradiction in the statement of the complainant as he gave the date of incident as 16.5.2005 whereas in the complaint the date was mentioned as 16.1.2005; that learned Magistrate did not enquire from the complainant his house number; that there is material contradiction as in the statement of Medical Officer the measurement of the injury no. 1 has been given as 2.5 cm X 2.5 cm whereas in the injury report the measurement has been mentioned as 2.5 cm X .5 cm; that the complainant has stated in his statement that after the incident Ashwani and Manish came and on seeing them the accused ran away whereas witnesses Manish and Ashwani have stated that the accused caused injuries in their presence with Palkati and Danda and the fire was also made in their presence.

6. Learned counsel for the applicant has contended that learned Sessions Judge has erred in setting aside the summoning order on the inconsistencies as mentioned above. According to him the first and third inconsistency were clerical mistakes and the contradiction as noted in the statement of the witnesses could not be seen at this stage as at the stage of Section 204 Cr.P.C., the evidence is not to be meticulously examined and the correctness and the nature of contradiction can be assessed at the time of the trial only. He has further contended that at this stage only a prima facie case has to be seen and the statement of the complainant as well as the witnesses as supported by medical evidence show that there was prima facie case against the accused persons.

7. It is settled legal position that at the stage of Section 200, 202 and 204 Cr.P.C. a prima facie case has to be seen and not whether the evidence as adduced is to result in conviction of the accused persons. In the case of **Nirmaljit Singh Hoon Vs. State of West Bengal and another 1973(10) ACC 181 SC**, while considering the scheme of Section 200, 203 Cr.P.C., it has been held that the Section does not say that a regular trial of adjudging truth or otherwise of the person complained against should take place at that stage, for, such a person can be called upon to answer the accusation made against him only when a process has been issued and he is on trial. Section 203 consists of two parts. The first part lays down the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgement no sufficient ground for proceeding, he may dismiss the complaint. In the case of **Chandra Deo Singh Vs. Prakash Chandra Bose 1964 (1) SCR 639**, the Hon'ble Supreme Court held that at the stage of enquiry under Section 202 the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction. Again in the case of **Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and others 1976 (13) ACC 225 S.C.**, while considering the scope of enquiry under Section 202 Cr.P.C., Hon'ble Supreme Court has held that it is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (a) on the materials placed by the complainant before the Court; (b) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; (c)for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In that case it has been held also by way of illustration that the order of Magistrate issuing process can be quashed where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused. In a recent case of **S.W. Palanitkar and others Vs. State of Bihar and another 2002 (44) ACC 168**, the Hon'ble Supreme Court has held that at the stage of Sections 200 and 203, seraching sufficient ground to convict not necessary.

8. In view of this legal position it is clear that after the inquiry as contemplated under Sections 200 and 202 Cr.P.C. if the Magistrate is satisfied that there is sufficient evidence to proceed against the accused, he may issue summon or warrant as the case may be and at that stage the court is not required to evaluate the evidence as if it was finally deciding the case. In the instant case, the contradictions as mentioned by the learned Sessions Judge in the date of incident is not material at all because the statement of the complainant was recorded on 14.2.2005 and therefore the date of incident could not have been 16.5.2005, a day that was yet to come at that time. It was clearly a clerical mistake and could not be a ground to set aside the summoning order. Similarly the difference in the measurement of the injury is also a clerical mistake and if in the injury report the dimensions were given as 2.5 cm X .5 cm that should have been read as such and the learned

Sessions Judge has erred in finding a contradiction on that basis also. Similarly if the learned Magistrate did not ask the house number of the complainant, the prosecution case cannot be thrown out on this ground. Again the contradiction as referred in the statement of the complainant and the two witnesses is also not material at this stage. Therefore there was no ground to interfere in the impugned order and learned Sessions Judge has erred in remanding the case.

9. Learned counsel for the applicant has also raised the point that in the case of **Adalat Prasad Vs. Roop Lal Zindal and others 2004 (1) SCC 338**, the Hon'ble Supreme Court has held that if a person is aggrieved by the summoning order, the only remedy he has, is to file an application under Section 482 Cr.P.C. and therefore learned Sessions Judge had no jurisdiction to hear the revision against that order as such. This contention has also force.

10. Thus, I come to the conclusion that learned Sessions Judge has erred in setting aside the summoning order as passed by learned Magistrate in remanding the case and the application is to be allowed and the impugned order is to be set aside.

11. Application under Section 482 Cr.P.C. is allowed. The impugned order dated 8.7.2005 is set aside and the summoning order dated 20.4.2005 passed by learned Judicial Magistrate Court no. 24, Saharanpur is restored.

Application Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2005

BEFORE
THE HON'BLE AJOY NATH RAY, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 1100 of 2005

Kiran Devi Smt. and another ...Appellants
Versus
M/s. Kesarwani Zarda Bhandar and others ...Respondents

Counsel for the Appellants:
Sri Anand Kumar Sinha

Counsel for the Opposite Parties:
Sri U.C. Kesarwani
S.C.

U.P. Industrial Dispute Act-1947-Section 6-C-readwith Industrial Dispute Act 1947-Section 19 (3)-Period of operation of in an Award-No inconsistency between the central Act and the U.P. Act-whether the lapse of the period of one year kill the award? Held-'No' it remain binding as contract between employer and employee-period of one year-as mentioned in Section 6-C-practically has no importance.

Held: Para 19, 20

We need not consider here whether sub-section (6) of Section 19 of the Central Act is also applicable in Uttar Pradesh, there being, as argued, no inconsistency between it and the provisions of the U.P. Act of 1947. We now merely observe here that the lapse of one year does not kill the award even though it might not remain ' in operation' after that period. The case of South Indian Bank Ltd. Versus R. Chacko reported at A.I.R. 1964 Supreme Court 1522 and the case of L.I.C. Versus D.J. Bahadur reported in (1981) 1 S.C.C. 315 make it amply clear that even after the operational period of

one year the award remains binding between the parties.

There are clear indications in these cases that even after the period of one year the award would remain as binding as a contract between the employer and the employees. We may respectfully opine that such award after the operational period of one year would remain binding as a contract with the seal of the labour authority imprinted upon it. On the basis of such imprinting the award can be enforced even outside the period of its operation even though the State Government has not yet extended such period of operation.

(B) Constitution of India-Art. 226-Practice of Procedure-the question not raised nor argued-can not be discussed as a sort of Surprise to the parties.
Held: Para 22
On this simple basis we are of clear but respectful opinion that the Hon'ble Judge has erred on the second point also in allowing the writ petition. We have to put it on record that the point of lapse of one year was not taken in the writ petition nor was it argued in the court below; it was found in the judgment only and it came as a sort of surprise to the parties but the respondent has not given up this point and made submissions in support of this also; but those submissions we have no hesitation in turning down. As such the appeal is allowed and the impugned order is set aside. The writ petition is dismissed.
Case law discussed:
1979 Lab. I.C. 477
AIR 1965 SC-1488
1995 L.J. 2757=1965 (51) FLR
1990 (2) UPLBEC-879
AIR 1964 SC-1522
1981 SCC (1) 315

(Delivered by Hon'ble Ajoy Nath Ray, C.J.)

1. This is an appeal preferred by the workmen who were respondents to the writ petition which succeeded in the court below. The writ petition was filed by the employer Company.

2. The facts are short and simple. The appellants were terminated by the employer in 1995 and an industrial dispute being raised, the appellants succeeded in obtaining an industrial award in their favour dated 29th September, 1999 published on 31st October, 2000 to the effect that they would be reinstated in service and until such reinstatement they would be paid arrears of wages as per the Minimum Wages Act.

3. Reinstatement did not follow forthwith, as such an application was made under Section 6-H (1) of the U.P. Industrial Disputes Act, 1947 for payment of arrears of wages as per award. A recovery certificate was issued on 24th of November, 2001 and substantial payments were received by the workmen in December, 2002. It should be mentioned that the writ petition had been filed by the employer challenging the award published on 31st October, 2000 but the same was dismissed on the 5th of March, 2002.

4. Although some payments of arrears of wages were received in December, 2002, the appellants still not being reinstated, they filed a second application under the said Section 6-H (1), this time claiming arrears of wages for the period from January 2001 to July 2002. The workmen were again successful in the sense that a recovery certificate dated 26.2.2004 was again issued in their favour as well as a favourable order dated 30th April, 2004 passed by the Additional Labour Commissioner.

5. These two instruments were challenged in the writ petition and by an order dated the 8th of August, 2005 the Hon'ble Single Judge disposing of the writ petition, has set aside and quashed these two instruments standing in favour of the appellants.

6. On 12th January, 2003 the appellants have been reinstated in service and therefore, the question of payment of arrears of wages will probably come to an end with this litigation. In the impugned order the Hon'ble Single Judge has found in favour of the employer on the following two grounds:-

(i) His Lordship has opined that the award having been implemented and recovery in pursuance thereof having once been satisfied as is admitted by the parties under Section 6-H (1) of the U.P. Industrial Disputes Act, no subsequent application could lie for execution of the award again under Section 6-H (1) for disputed claims; and

(ii) That under the provisions of Section 6-C of the U.P. Industrial Disputes Act, 1947, the period of operation of the award came to an end on expiry of one year from the date when it became enforceable and as such an application for enforcement made after such period of one year, could not in any event succeed.

7. So far as the first point is concerned, we have no hesitation in our mind that the successive applications under Section 6-H (1) of the U.P. Act will lie provided the award permits such applications to be made from time to time. The provisions of Section 6-H (1) and 6-H (2) of the U.P. Industrial Disputes Act, 1947 are set out below:-

"6-H. Recovery of money due from an employer,___ (1) *Where any money is due to a workman from an employer under the provisions of Sections 6J to 6R or under a settlement or award, or under an award given by an adjudicator or the State Industrial Tribunal appointed or constituted under this Act, before the commencement of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, the workman may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the money due to him, and if the State Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same as if it were an arrear of land revenue.*

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section (1)."

8. Before the Additional Labour Commissioner the parties had raised the disputed fact as to whether it was the employer who was in default in not offering employment and back wages to the employees or whether it was the employees who did not join the service in

spite of the employer being willing to take them in service pursuant to the award. The dispute before the labour authority has gone in favour of the appellants-employees. It was opined that no intimation had been duly sent to the employees and thus they could not join the service. On these disputed facts, the writ court cannot enter once again and sit in appeal; as such, after such findings of fact as between the parties, the second award for arrears of wages could not be set aside because there were disputed facts. These were not disputed facts before the writ court but these were disputed facts on which a decision had already once been given after both the parties had been duly heard.

9. It was also urged very straneously before us that the second application for arrears of wages could not be maintained under Section 6-H (1) but that, if at all, such application could not be maintained under Section 6-H (2). An Allahabad case of **M/s Hindustan Aluminium Corporation Limited, Mirzapur Versus Murari Singh and others** reported in 1979 Lab. I. C. 477 was relied upon. In that case the award did not grant arrears of wages at all. Under these circumstances a sum of Rs.19560.48 was computed as the same payable for the period during which the employee was "unjustifiably kept out of employment" (see end of the paragraph 3 of the judgment). Under these facts it was found that the application under Section 6-H (2) was a proper application.

10. Reliance was also placed on the case of **Kays Construction Co. (P.) Ltd. Versus State of Uttar Pradesh** a five Judge decision of the Supreme Court reported at 1965 Labour Judgement 2757 =A.I.R. 1965 S.C. 1488 alternatively reported at 1965 (11) F.L.R.328.

It was explained by Justice Hidayatullah as his Lordship then was, in that case, that sub-section (2) of Section 6-H referred to cases where some benefit had to be computed in terms of money and that computation had not already come in the award itself. His Lordship gave an instance of the award giving entitlement of free quarters to the workers which the employer did not abide by. In such a case the benefits which had not been extended, would have to put in terms of money and this may require an exercise which is different from a mere arithmetical calculation.

11. If these principles are applied to our case, we find that the second application was correctly made under section 6-H (1) because the payment of wages was to be made on the basis of Minimum Wages Act and such payment would have to be made until the effect of reinstatement actually occurred. For finding out the amount of money due one would require information only on two counts, namely, the minimum wages prescribed under the Minimum Wages Act and the number of months for which the to be reinstated employee had not been paid such minimum wages. With these two simple bits of the information the recovery could be ordered under Section 6-H (1) on a mere arithmetical computation. Any question of assessment, any question of turning into money value what was not itself already computed in figures, never arose. It was all along, so to speak, like a liquidated claim in the civil court, and it was, never, so to speak, like a situation of assessing unliquidated damages by a civil court.

12. The appellants gave to us the case of **Executive Engineer, Electricity Distribution Division-1, U.P. State Electricity Board, Mathura Versus Kailash Chandra Gautam and others** reported in (1990)(2) UPLBEC 879. That was also a claim for arrears of wages and Section 6-H (1) was found to be applicable.

13. On these bases we are of the respectful opinion that the first point on which the learned Single Judge allowed the writ petition is not sustainable. Regarding the application of the workmen being made after the period of one year, the industrial law in this regard, although well settled, needs to be stated by us in brief so that in future these simple matters might be dealt with simply.

14. Under Section 6-C of the U.P. Industrial Disputes Act an award is stated to remain in operation in the first instance for a period of one year. The said Section 6-C is set out below:-

"6-C. Award of Labour Court or Tribunal or arbitration and its operation,____ *An award shall in the first instance remain in operation for a period of one year or such shorter period as may be specified therein:*

Provided that the State Government may extend the period of operation of an award from time to time, if it thinks fit:

Provided further that where the State Government whether of its own motion or on the application of any party bound by the award, considers that since the award was made there has been a material change in the circumstances on which it was based, the State Government may, after such enquiry as it may think fit, shorten the period of operation of the award."

15. Under Section 6-A of the said Act it is provided that an award shall become enforceable on the expiry of thirty days from the date of its publication.

16. We have this position before us, therefore, that an industrial award becomes enforceable on the expiry of thirty days after its publication but it remains in operation for a period of one year only.

17. It is a serious and than an elementary mistake to conclude from this that after a period of one year the enforceability of the award lapses and that it cannot be enforced any more under Section 6-H (1) of 6-H (2) unless the State Government extends the period of operation of the award under Section 6-C.

18. The period of operation of an award is mentioned in the Industrial Disputes Act, 1947 i.e. the Central Act in Section 19. The said section is not set out in full but Section 19 (3) and Section 19(6) are set out below:-

" 19. Period of operation of settlements and awards,____

(1) .....
(2) .....
(3) An award shall, subject to the provisions of this section, remain in operation for a period of one year (from the date on which the award becomes enforceable under Section 17-A).
(4).....….
(5).....

(6) Notwithstanding the expiry of the period of operation under sub-section (3), the award shall continue to be binding on the parties until a period of two months has elapsed from the date on which notice is given by any party bound by the award to the other party or parties intimating its intention to terminate the award."

19. It has been held in numerous cases that even after lapse of one year and even after the service of notice by the employer seeking to treat an award as at an end, the award does not really came to an end. We need not consider here whether sub-section (6) of Section 19 of the Central Act is also applicable in Uttar Pradesh, there being, as argued, no inconsistency between it and the provisions of the U.P. Act of 1947. We now merely observe here that the lapse of one year does not kill the award even though it might not remain ' in operation' after that period. The case of **South Indian Bank Ltd. Versus R. Chacko reported at A.I.R. 1964** Supreme Court 1522 and the case of **L.I.C. Versus D.J. Bahadur reported in (1981) 1 S.C.C. 315** make it amply clear that even after the operational period of one year the award remains binding between the parties.

20. There are clear indications in these cases that even after the period of one year the award would remain as binding as a contract between the employer and the employees. We may respectfully opine that such award after the operational period of one year would remain binding as a contract with the seal of the labour authority imprinted upon it. On the basis of such imprinting the award can be enforced even outside the period of its operation even though the State Government has not yet extended such period of operation. No doubt in every case, the award itself must be looked into and it has to be seen whether it is in its forms executible on the date it is sought to be executed. All that we lay down is that the period of one year mentioned in Section 6-C above, is a matter of practically no importance when the question of enforceability of the award is raised. One should always bear in mind that whether the award is in operation or not is a question totally different from whether the award is still enforceable or not. If one makes a reference to Section 23 (c) of the Central Act, 1947 or to Section 6S.(1) (f) and 6S (2) (f) of the U.P. Act 1947 one will see immediately that during the operational period of an award industrial actions are ruled out on the very same points which are covered by the award. This is the region where the operational nature of the award is of an importance.

21. When enforceability of an award becomes an issue in an application under Section 6-H of the U.P. Act, 1947 one has no concern with the operational nature of the award. Then quasi judicial functions are performed, and recovery certificates are issued and orders passed in same manner as those are passed by the executing courts in ordinary civil courts of law. These are different aspects than the aspects of industrial action like strike or lock out. It would be a complete confusion to treat the operational nature or period of an award as having any bearing on its enforceability or executability.

22. On this simple basis we are of clear but respectful opinion that the Hon'ble Judge has erred on the second

point also in allowing the writ petition. We have to put it on record that the point of lapse of one year was not taken in the writ petition nor was it argued in the court below; it was found in the judgment only and it came as a sort of surprise to the parties but the respondent has not given up this point and made submissions in support of this also; but those submissions we have no hesitation in turning down. As such the appeal is allowed and the impugned order is set aside. The writ petition is dismissed. Appeal Allowed.

ORIGINAL JURISDICATION
CIVIL SIDE
DATED: ALLAHABAD 30.8.2005

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE DP SINGH, J.

Civil Misc. Writ Petition No. 28103 of 2000

M.K Gandhi and others ...Petitioners
Versus
Director of Education (Secondary) U.P. Lucknow and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri Rama Nand Panday

Counsel for the Respondents:
Sri K.C. Singh, S.S.C.
Sri A.D. Singh, ADDl. S.C.
Sri S.C. Budhwas
Sri V.B. Singh
Sri Ajit Kumar Singh
Sri H.N. Panday
Sri U.P. Singh S.C.

Constitution of India, Art-12 –state-whether the Delhi Public School is within if meaning of the state? Held-'No'-Board initiated by the resolution Central Government-controlled by the secretary, Ministry of Human Resources Department-entrusted with the educational standard not only national but out side the country-almost all the members are either government servant or the representative of the bodies held-D.P.S. is within the meaning of state.

Held-Para 76 (a),(b) and (c)

(a) The DPS School is not the State within the meaning of Article 12 of the Constitution.
(b) The Central Board of Secondary Education, (The Board) is the State within the meaning of Article 12 of the Constitution.
(c) In case service conditions have not been framed, then Chapter VII of the affiliation bye-law relating to service condition shall be deemed to have been adopted by the School.

Constitution of India Art-226–Bye laws framed by board have statutory force-but the affiliated school-if acts contrary to conditions contained in bye law-breech of contract-party may fill Civil Suit-writ held not maintainable.

Held-Para 31,35 and 76(d)

There is nothing in the constitution of the Board to suggest that the affiliation bye-laws have statutory force. The service conditions are in the bye laws. They are adopted between the parties through the agreement and are binding as a contract. Neither the bye-laws nor the agreement are statutory. If there is ay breach of the service conditions then it is the breach of the contract and the parties may file suit or the Board may impose penalty prescribed under the bye-laws but this does not mean that the bye laws or the agreement have statutory force.

The DPS School is merely affiliated to the Board and the terms of the bye laws are merely a contract between the school ad

the petitioners: the Minhas case is not applicable.

The service rules and the agreement-whether framed by a school and agreed between the parties by an agreement or deemed to be adopted by them and agreement to be in the same format as Appendix-III of the affiliation bye-laws as held in this case-are merely private contract between the schools and the teachers. They do not have statutory force. The writ petition is not maintainable against the School to enforce them.

Case law discussed:

1995(5) SCC-75
1983(4) SCC-691
2002(8) SCC-481
1986(3) SCC-156

(Delivered by Hon'ble Yatindra Singh J.)

1. This writ petition examines the scope and extent of protection available to the teachers teaching in the schools affiliated to the Central Board of Secondary Education, (the Board).

THE FACTS

2. The petitioners were appointed as teachers in the Delhi Public School, Site No. 3. Merit Road, Ghazi bad (the DPS School). The detail regarding their appointment and confirmation are follows:

(a) The petitioner-1 was appointed for 89 days as a post graduate teacher in physics on 13.7.1987. Subsequently, he was appointed as a trained graduate teacher on probation for one year on 29.3.1988. There is no date regarding his confirmation but it is alleged in paragraph 15 of the writ petition that he was confirmed. This allegation is not specifically denied in the counter affidavit and we hold that he was a confirmed teacher. Later on, he was promoted as a post graduate teacher in physics on 30th June 1990.

(b) The petitioner-2 was appointed as a post Graduate Teacher in Commerce on 7.3.1987 on probation of one year. His service was confirmed on 5.4.1988 with effect from 1.4.1988.

(c). The petitioner-3 was appointed as a Trained Graduate Teacher on probation of one year on 29.3.1988. His services were confirmed on 1.9.1989.with effect from 8.7.1989. Letter on he was promoted as a post graduate teacher in Mathematics on 30th June 1990.

(d) The petitioner-4 was appointed as a physical education teacher on probation for one year on 1.7.1991. In paragraph 22 of the writ petition I is alleged that the petitioner-4 had successfully completed his period of probation and was confirmed. This allegation is not specifically denied in the counter affidavit and we hold that he was a confirmed teacher.

3. The DPS School without conducting any inquiry or affording any opportunity to the petitioners terminated their services by separate but similar orders of 16.5.2000.the petitioners filed representations dated 6.6.2000.before the DPS School and the board. When no action was taken on their representation, they filed the present writ petition. The board has filed supplementary counter affidavit indicating that the secretary of the board has sought explanation from the DPS School in this regard and the principal in his explanation has submitted that:

- The services of the petitioners have been dispensed with in accordance with terms of their appointment.
- They have been given there months salary In lieu of the notice.
- The management has not acted in malaise manner
- The case of the petitioners is pending before this court and further proceeding of the case will be intimated to the board.

The counsel for the board has informed us that no further action has been taken due to the tendency of the writ petition

4. This case up for hearing before a single Judge. He noted the difference of opinion between the two division bench judgments of our court (see Endnote-1) and referred the case to the larger bench to resolve the difference.

5. The case was listed before us earlier and we after hearing the counsel for the parties framed some specific points there wasn't specific pleadings regarding these points and we granted time to the parties to file affidavits. The counsel were required to serve copies of affidavits on each other so that if the need be they may be replied the affidavits were exchanged and when the case was taken up next we thought appropriate that the Union government should also clarity its stand The union lf India was also imp leaded as a parley and was granted time to clarify its stand the required affidavit was filed by the union of India the board was again granted time to file affidavit claying some points this affidavit has also come on the record.

POINTS FOR DETERMINATION

6. We have counsel for the parties .the following the point arise for determination in this case.

(i) Whether the DPS School is a state within the meaning f Article 12 of the constitution.

(ii) Whether the board is a state within the meaning Article 12 of the constitution of India.

(iii) Whether the Affiliation bye laws have statutory force.

(iv) In case the answer to the second question is in negative then whether the affiliation bye-laws are still binding on the schools affiliated to the board

(v) Whether the Committee of management of the School while dealing with the service matters of its employees or the teachers is performing public duty

(vi) Whether a writ petition is maintainable against a privately managed school for violation of the service rules

(vii) Whether a writ petition is maintainable against the board for non observance of its bye-laws.

(viii) Whether the petitioners are entitled to any relief.

The points-all to V were framed by us earlier however we have substituted the word board in place of the word 'CBSE'.

POINT-I & II DPS SCHOOL-NOT STATE BOARD-STATE:

7. The counsel for the parties have cited numerous decisions (see Endnote 2) laying down the guidelines to find out when a body can be the state within the meaning of Article 12 of chemical

Biology 2002 (5) ESC 286 has summarized the principles as follow:

'The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of it must ex-hypothesis, be considered to a state within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article .12. On the other hand, when the control is merely regulator whether under stated or otherwise, it would not serve to make the body a State.'

In light of these principles, let's consider whether the DPS School and the Board are the State within the meaning of Article 12 or not.

DPS School–Not State

8. The DPS School is managed by a private committee of management. There is neither any pleading nor any averment that it is a State within the meaning of Article 12 of the Constitution. There is also no pleading that it receives any financial aid from the government or a body that is State within the meaning of Article 12 of the Constitution. During arguments a statement was made at the bar that the DPS School does not receive any financial aid or grant–in–aid from any government agency. There is no government control. The DPS School is not a State within the meaning of the Article of the Article 12 to the Constitution.

Board–State

9. The government of India passed a resolution on 1.7.1929 for establishing an organization to supervise and regulate High School and Intermediate Education in Rajputana, Central. India and Gwalior. In order to give it a concrete shape, the government issued a notification on 11.11.1929; it was published in the official gazette on 16.11.1929 .In pursuance of the aforesaid notification, a society in the name of 'The Board of High School and Intermediate Education for Rajputana (including Mewara) Central India and Gwalior, Ajmer' was formed. It was registered on 2.1.1935 under the Societies Registration Act, 1860. The name of the society was changed to 'The Central Board of Secondary Education, Ajmer' and this change was also registered on 14th November 1961 under the Rajasthan Societies Registration Act, 1958.

10. The constitution of the Board was revised. The revised constitution was adopted by the Board in its meeting held on 11th February 1961 and was ratified on 2nd March 1961. It was published in the official gazette on 27th February 1962. Clause 4 of the Constitution states that the Educational Advisor of Government of India shall continue to be the Controlling Authority of the Board. However, it is admitted case that now the Secretary, Human Resource Department; Government of India is ex-officio Controlling Authority of the Board.

11. Clause 6 of the Constitution (see Appendix-1) explains the composition of the Board. It includes the Chairman and the Vice Chairman (clause 6 (i) and 6 (ii). They along with the secretary of the Board are the officers of the Board. They

are not elected but are appointed by the controlling authority. The representatives mentioned in clause 6 (iii) to (xi) and (xvii) are the representatives of different bodies. They are either government servants or representatives of the government departments or the representative of the bodies that are State within the meaning of Article 12 of the Constitution. Clause 6 (xviii) and (xix) include persons from different professions, eminent educationalists, and teachers of the institution recognized by the Board however they are not nominated by the professional bodies or the educations institutions but are nominated by the Controlling Authority. It is correct that the persons mentioned in clause 6(xii) to Claude 6 (xv) are the Head Master or the teachers. They are neither representative of the bodies that are State within the meaning of Article 12 to the Constitution nor are they appointed by the controlling authority, but their number is in minority.

12. The constitution of the Board indicates the there is deep and pervasive control to the Government of India through the Controlling Authority. The details of the clauses indicating the same are as follows:

(a) The controlling authority may terminate membership of any member appointed or nominated in case his continuance in the office is not in the interest of the Board. (Clause 8 (4))

(b) The recognition of any institution can not be withdrawn without prior approval of the controlling authority explanation Note to Claude 9 (iv).

(c) The Controlling Authority has right to communicate his views to the Board regarding any matter with which the Board has concern and in case the Board does not take action on the same, it may issue direction and the Board is required to comply with the directions. He can also take immediate action without previously consulting the Board. He can also suspend the Board if it defaults in the performance of duties and has right to appoint an administrator (clause 10).

(d) The Chairman, Vice- chairman and Secretary are the officers of the Board and are appointed by the Controlling Authority clause 12 (1) and 13 (1).

(e) The Board has power to make regulations but they do not take effect unless sanctioned by the Controlling authority proviso to clause 16 (2).

(f) The Controlling Authority has right to classify documents as a secret and in that event the auditor has o accept the certificate issued by the Chairman regarding the facts stated in those documents. In the place of the documents proviso to clause 19 (2).

(g) The Board can not amend the constitution without approval by the Controlling Authority clause 21.

13. The respondents in their affidavits state that the Chairman (who is employee of the Board) is paid by the Board, however the other representatives are paid by their respective departments from where they come but they draw allowances from the Board for the meeting. They have also filed brochures and annual reports issued by the Board. These documents indicate body;

- The Board is self financing body;
- It does not receive any financial assistance from the government;
- It raises sufficient funds through examination fees.

The fact that the Board does not receive any financial aid from the government is

not conclusive factor to determine whether it is State within the meaning of Article 12 or not: other factors also have to be looked into. It is cumulative effect that is to be determined.

14. Clause 1 of the constitution states that the object of the Board is to conduct examination at the secondary stage of examination and such other examination as it considers fit subject to the approval of the Controlling Authority or as it may be called upon by the Government of India. The services of the Board to examine the candidates can be availed by any educational institution in or outside India.

15. Clause 9 of the constitution of the board (see Appendix-1) deals with its [power and function it includes power to:
(a) Conduct examinations
(b) Grant diplomas/certificates.
(c) Prescribe courses of instruction for examination
(d) Admit candidates.
(e) Recognize institution for the purpose of its examinations
(f) Adopt measures to promote physical and moral well being of the student.
(g) Supervise health and discipline of the student
(h) Take such step as are necessary to promoter the standards educating
(i) Make regulation for prescribing the text book
(j) Advise the Administration of Union Territories as to the courses of instruction and syllabi of middle School education

16. Education at every level is fundamental and is matter of public importance the country's future depends upon the same. Clause 9 of the constitution indicates that the board has empowered with functions relating to secondary education and deals with issues of public importance.

17. The last paragraph of clause 9 states that educational institutions recognized by the board of higher secondary education Delhi shall be deemed as institutions recognized the board of higher secondary education Delhi was merged the central board on 1.7.1962. In shows that the board has taken over the functions of the board of higher secondary education Delhi this board which was merged was constituted by union territory of Delhi and was state within the meaning of article 12 of the constitution

18. The year 2003 was a platinum jubilee year of the board the annual report of the year 2003 is on the record of the case it states that only 309 schools were recognized by the board in the year 1962 and 6679 schools were recognized by the year 2003 the includes 855 Kendriya Vidyalay 1698 government schools 417 Jawahar navoday vidyalay and 3799 independent schools throughout the territory of India apart from it, it also includes 103 schools in 19 other countries throughout Asia west Africa and fussier

19. The union of India has clarified its stand by means of an affidavit of Under Secretary in the ministry of human resources development in this affidavit it has been stated that

- The government of India has established the board to supervise and regulate high school and intermediate (secondary) education (paragraph4 of the affidavit)

- the ministry of human resources development has full power and control over the board (paragraph13 of the affidavit).

20. Considering,

(i) The board was started by the resolution of the resolution of the central government; and

(ii) The control exercised by the government through the controlling authority namely the secretary in the ministry of human resource department; and

(iii) The board has been entrusted with the educational standard not only at the national level but has been permitted to affiliate institutions outside the country; and

(iv) The educational standards are fundamental and relate to public policy; and

(v) The composition of the board where almost all the members are either government servants or representative of the bodies that are state within the meaning of article 12 or are nominated by the government through the controlling authority and

(vi) The board took over function of board of higher secondary Education of Delhi a board of union territory of Delhi and state within the meaning of Article 12 of the constitution;

We hold that the Board is a State within the meaning of Article 12 of the Constitution.

POINT –III: BYE LAWS ARE NOT STATUTORY

Service Rules Required to be framed: Bye laws–Adopted as Service Rules

21. Regulations may be framed by the Board under clause 16 of its constitution. They take effect only after sanction of the controlling authority. Clause 18 of the constitution empowers the Board and the Committee to make by-laws. These bye-laws have to be constitution with the resolution as well as to the regulations. The Board has framed 'Affiliation bye–law they lay down conditions under which affiliation or recognition is granted to any institution.

22. Bye 3 of Chapter 11 of the Affiliation bye–law is titled as 'Norms for Affiliation. It sub clause (3) (I) state that the school seeking provisional affiliation with the board must have formal recognition of the State/UP Government and the application should be forwarded either by the State Government or there should be no objection certificate (NOC) from the State Government. The State of U.P. has also issued guidelines on 30th November 1991 for granting NOC to the School. These guidelines clearly stipulate that the school shall frame Service Rules for the teachers and the employees.

23. The DPS School has not framed any service rules but has obtained the NOC. There has been laxity on the part of State Government in granting NOC to the DPS School. The NOC could not be granted without there being service rules. The States Government ought to have seen that the service rules are framed.

24. Bye law no. 10 in Chapter II is titled 'Staff and Service Conditions' This mandated that there has to be well defined service condition and agreement between the parties in the format given in Appendix-III to the affiliation bye-laws.

25. Chapter VII of the affiliation bye laws are titled as 'SERVICE RULES FOR EMPLOYEES' bye law no. 24 in this chapter provides that each school affiliated with the Board shall frame service rules for its employees which will be as per Education Act of the State, in case the State Act makes adoption of the provision obligatory, otherwise as per Service rules mentioned in the bye-laws. Under bye-law 24 (2) every school is to enter into an agreement with its employee in the format mentioned in the Education Act of the State if that Act makes the form obligatory' otherwise in accordance with Appendix- III mentioned in the bye-laws.

26. In our State, UP Intermediate Education Act, 1921 is the relevant Act: it does not make its adoption obligatory on the schools affiliated to the Board. There is also nothing in the U.P. Intermediate Education Act, 1921 which makes any contract to be entered into between the employees and the school affiliated with the Board: it merely provides the service conditions and the contract for the employees/teachers in the schools recognized under the U.P. Intermediate Education Act, 1921. In view of this, the DPS School is required to frame the service rules according to the bye laws in Chapter VII and enter into service contract in format Appendix-III to the affiliation bye-laws. Yet neither service rules have been framed by the DPS School nor is agreement in the same format as the Appendix-III to the affiliation bye laws.

27. There has been laxity on the part of the Board too. Affiliation could not have been granted unless there were service rules and agreement in the same format as Appendix-III to the affiliation bye-laws. The Board at least out to have ensured that the DPS School frames Service rules and enters info agreement in the correct format. What will be the position in absence of the service rules and agreement in format appendix -III to affiliation bye-laws?

- Should the DPS School be permitted to take advantage of its own default?
- Can the service rules mentioned in the affiliation bye-laws be deemed to be adopted as service rules by the DPS School?
- Can the agreement between the parties deemed to be in the same format as in Appendix-III to the affiliation bye-laws?

28. The DPS school was granted NOC by the state government on the understanding that it has or shall frame service rules and enter into agreement with its employees and teachers. It was affiliated by the board on the understanding that it shall frame service rules on the same lines as chapter VII of the affiliation bye-laws and into agreement with the teachers in the same format as Appendix III too the affiliation bye-laws in case the DPS the school has neither framed service rules nor has entered into agreement in the correct format than it can not take advantage of its own default in our opinion in absence of any service rules or the agreement in the correct format the bye-laws in chapter VII will be deemed to be adopted as service rules by the DPS school and the agreement between the parties shall also be deemed to be in the same format as Appendix-III to the affiliation bye-laws Are the bye-laws and the agreement statutory? In this connection let's consider

Rajasthan state Road Transport Corporation vs. Krishna Kant; 1995 (5) SCC 75 (The Rajasthan corporation case).

The Rajasthan Corporation Case

29. There is a Central Act known as industrial Employment (Standing Orders) Act, 1946. It requires industrial establishment to frame Standing Orders. It also prescribes model Standing Orders. In absence of any certified order model standing orders are applicable till the certified orders are made and published. An employee of the Rajasthan State Road Transport Corporation was dismissed. He filed a civil suit challenging his termination his suit was decreed up to the High Court. The case was taken to the Supreme Court the question was regarding the nature of the Standing orders and whether the Civil court had jurisdiction. The Supreme Court after considering the question held that the standing orders can not be elevated to the statutory of statutory provision. The court held as follows:

"The certified Standing Orders are not in the nature of delegated/ subordinate legislation. It is true that the Act makes it obligatory upon the employer (of an industrial establishment to which the Act applies or is made applicable) to submit draft Standing Orders providing for the several matters prescribed in the Schedule to the Act and it also provides the procedure- inter alias, the certifying officer has to examine their fairness and reasonable-for framed by the employer- the employer may be a private corporation a firm or an individual ad not necessarily a statutory Corporation-which are approved/certified by the prescribed statutory authority after hearing the workmen concerned. The Act does not say that on such certification the Standing Orders acquire statutory effect or become part of the statute. It can certainly not be suggested that by virtue of certification, they get metamorphosed into delegated/Subordinate legislation. Though these Standing Orders are undoubtedly binging upon both the employer and the employees and constitute the conditions of service of the employees. It appears difficult to say on principle that they have statutory force, indeed, if it is held that certified Standing Orders constitute statutory provisions or have statutory force a writ petition would also lie for their enforcement just as tin the case of violation of the Rules made under the proviso to Article 309 of the Constitution. Neither a suit would be necessary nor a reference under industrial disputer Act. We do not think the certified Standing Order4s can be elevated to that status. It is one thing to say that they are statutorily imposed conditions of service and an altogether different thing to say that they constitute statutory provisions themselves.

30. The status of the bye-laws framed by the board is on much lower footing. In the Rajasthan Corporation case, the Standing Orders were framed by the government under a statute: here the bye-laws are not framed by the Government but by the Board and that too, not under a statute.

31. There is nothing in the constitution of the Board to suggest that the affiliation bye-laws have statutory force. The service conditions are in the bye laws. They are adopted between the parties through the agreement and are binding as a contract. Neither the bye-laws nor the agreement are statutory. If

there is ay breach of the service conditions then it is the breach of the contract and the parties may file suit or the Board may impose penalty prescribed under the bye-laws but this does not mean that the bye laws or the agreement have statutory force.

The Minhas Case

32. The counsel for the petitioners cited BS Minhas Vs. Indian Statistical Institute: 1983 (4) SCC 582 (the Minhas case) and submitted that the bye-laws have statutory force. We are afraid; the facts of the Minhas case are different than the facts here: It is not applicable.

33. The Indian Statistical Institute (ISI) is a society registered under the Societies Registration Act. It has made bye-laws. The ISI made an appointment contrary to its bye-laws and this appointment was challenged in the Minhas case. The Supreme Court held that the ISI is the State within the meaning of Article 12 of the Constition and the bye-laws are binding upon the ISI.

34. The bye-laws of a body that is State within the meaning of Article 12 of the Constitution are binging upon it in view of Article 14 of the Constitution. The bye-laws framed by the Board are binding upon it. In case the Board acts contrary to it or takes no action for breach of its bye-laws then a writ petition is maintainable against the Board but this does not mean that the bye laws are statutory so far as schools affiliated to the Board are concerned.

35. In this case, the facts are entirely different. Here the service of any employee of the Board is not being terminated. Any employee of the Board is not seeking enforcement of the bye-laws. Here the petitioners-who are the employees of a private school that is not a State within the meaning of Article 12 of the constitution-are seeking its enforcement. The DPS School is merely affiliated to the Board and the terms of the bye laws are merely a contract between the school ad the petitioners: the Minhas case is not applicable.

POINT-IV To VI: WRIT AGAINST THE SCHOOL- NOT MAINTAINABLE

36. Is a writ petition maintainable for,

- Violation of the bye-laws that do not have statutory force?
- Enforcement of a private contract between the school and the teacher?

We are afraid: our answer has to be in the negative. The full bench of our court in Aley Ahmad Abidi vs. District Inspector of Schools: AIR 1977 Allahabad 539 (The Aley Abidi Case) has held that;

'The Committee of Management of an Intermediate College is not a statutory body. Nevertheless, a Writ Petition filed against it is maintainable if such petition is for enforcement of performance of any legal obligations or duties imposed on such committee by a statute.'

37. The committee of management of the DPS School is recognized by the Board but it is neither a statutory body nor a State within the meaning of Article 12. The legal obligation or duty on the DPS School is neither imposed by any statue nor by any statutory provision. It has been imposed by the affiliation bye- laws and agreement which is a contract between the parties and non statutory. In view of this

the writ petition is not maintainable against the DPS School for violation of the affiliation bye-laws.

38. The counsel for the petitioners submit that:

- The AleyAbidi case is no longer good law.
- Education upto age of 14 years is a fundamental right under Article 21-A of the Constitution.
- The writ jurisdiction has been expanded and a writ petition is maintainable against the School as they perform public functions.
- Unaided recognized institution are discharging function as the instrumentality of the state and have to be governed by the principles of fair play.
- A writ petition – rather than the suit –is the right remedy.

39. The counsel for the petitioners also placed reliance of the following decisions:

(i) K.K- Krishnamacharyalu vs. Venkateshwari College of Engineering: (1997) 3 SCC 571 (the Krishnamacharyaly case.)
(ii) Anadi Mukta Sadgura Trust vs. UR Rudani: () 2 SCC 691 (the Anadi Trust case.)
(iii) TMA Pai Foundation vs. State of Karnataka: 2002 (8) SCC 481 (the Pai Foundation case.)
(iv) Central Island Water Transport Corporation Vs. BN Ganguli; AIR 1986 SC 1571= 1986 (3) SCC 156 (the Central Corporation Case.)

Let's consider whether the aforesaid cases,

- Overrule the AleyAbidi case or not; and
- Are applicable to the facts of this case.

Article 21- A

40. Education is necessary and is fundamental in progress of civilization; It is the education that makes the life different than the mere animal existence: If there is no education then no nation can progress. It is for this reason that:

- The Supreme Court while interpreting constitutional provision in Uni Krishnan vs. State of AP 1993 (1) SCC 645 (the Uni Krishnan case) held that the children below the age of 14 year had a fundamental right to free education. This part of the UniKrishnan case was upheld in the PaiFaoundation case; and
- Article 21-A was inserted by the Constitution 86th Amendment Act as a fundamental right though this Article is yet to be enforced.

41. Article 21-A provides that State shall provide free and compulsory education to all children of the age of six to fourteen years I such manner as the State may, by law, determine. The fundamental right mandates a duty on the State of provide does not mandate that unaided schools will become State within the meaning of Article 12 of the constitution or writ petition against them is maintainable for enforcement of a non-statutory contract.

The Krishnamacharyalu Case

42. In the Krishnamacharyalu case the question was whether the petitioners, who were lab assistants, were entitled to pay scale on par with the government employees or not.

43. In this case, the government issued the instructions for grant of pay scale equivalent to the government employees. The Supreme Court held that these instruction had statutory force. This case related to the payment of salary and not for specific performance of contract of personal service. It is in light of these facts that the writ petition was held to b maintainable. So were the facts in the AnadiTrust case.

The AnadiTrust Case

44. In the Anandi Trust case there was dispute between the teachers and the management regarding pay scales. This dispute was referred to the chancellor. The Chancellor gave an award which was in favour of the teachers. This award was accepted by the State Government. The management refused to pay the higher pay scale and closed down the school. The teachers then, filed a writ petition of the salary of the period taught by them and post retirement benefit for the period that they had worked. This writ petition was not for the specific performance of his contract of service: it was for payment of salary for services already rendered. There was already a statutory order in favour of the teachers. It is in this light that the Supreme Court held that the writ petition to be maintainable. This is clear from the following observations of the Supreme Court:

'There is no plea for specific performance of contractual service. The respondents are not seeking declaration that they be continued in service. They are not asking for mandamus to put them back into the college. The are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of mandamus?'

45. It is correct that in this case, the Supreme Court also observed that:

'If the fights are purely of a private character no mandamus can issue, If the Management of the college is purely a private body with no public duty Mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy Mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as government Aid. Public money paid as government aid plays a major role in the control, Maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting Education to students. They are subject to the rules and regulations of the Affiliating University,. Their activities are closely supervised by the University Authorities. Employment is such institutions, therefore is not devoid of any public Character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be vending on the management. The service conditions of the academic staff are, therefore, not purely of private Character. It has super-added protection by University decisions creating a legal Right-duty relationship between the staff and the management. When there is Existence of this relationship mandamus cannot be refused to the aggrieved party.'

46. However, the aforesaid observations in the AnandTrust case are general ad are made in the light of the fact that there statutory rules, regulations and statutory order in favour of the petitioner. In the case here, there is no government

or statutory rule/regulation/order as was in the Krishnamacharyalu case or the AnadiTrust case. The observations in these cases have to be confined to the facts of these cases and are not applicable here.

The Pai Foundation Case.

47. The Pai Foundation case started on the question relating to scope and right of the minorities to establish and administer educational institutions under article 29 (2) and 30 (1) of the Constitution of India. The case was referred to eleven judges' bench and eleven questions were framed. Some of the questions were answered by the eleven judges' bench and some were left to be decided by the regular bench. None of the question related to;

- Whether the unaided schools are State within the meaning of Article 12 of the Constitution: or
- Whether the contract of service between the private managed school and the teachers are statutory: or
- Whether a writ petition is maintainable for enforcement of contract of personal service.

This case is not relevant for deciding the question that is before us.

48. It is correct that the service conditions have to be fair: was have already held that in absence of service rules chapter VII of the affiliation bye-laws shall be deemed to be adopted by the parties and the agreement shall be deemed to be in the same format as Appendix-III to the affiliation bye-laws. Nevertheless this does not mean that service rules are statutory or the writ petition is maintainable for enforcement of contract of service.

The Central Corporation case

49. In the Central Corporation case two questions were involved.

- Firstly, whether Central Inland Water Transport Corporation-a government company- is a State within the meaning of Article 12 of the constitution or not. It was held it is 'State' within the meaning of Article 12 of the Constitution: and
- Secondly, whether Rule 9 (i) which permitted the termination of service of even a confirmed employee after three months notice was void under section 23 of the Indian contract Act and article 14 of the constitution. The court held that the rule 9 (i) was arbitrary unreasonable and violative of Article 14 of the Constitution.

50. The writ petition in the Central Corporation case was against a body that was State within the meaning of Article 12 of the constitution of violation of Article14: It is in this light the Supreme Court held that writ petition was efficacious remedy. In the case here neither the services have been terminated the body that is a stable within the meaning of Article 12 nor has any rule (or bye-law) been challenged. It is correct that in the Central Corporation case there is observation that reinstatement can not be decreed in a suit and only a writ petition is the appropriate remedy. However, this observation is merely casual one: this point was not involved in the Central Corporation case an nothing turns upon it.

51. The rights and obligations are determined under statute law or by common law. Article 226 merely provides a remedy for enforcement of these rights. It does not confer any fight itself-except, perhaps, the right to move the court. Indeed MC Seetalvad in his Hamyln law lectures the Common Law in India, (at page207) remarks.

'Having included a Bill of Rights in the Constitution the Constitution makers had necessarily to provide remedies for the enforcement of these rights they also envisaged a welfare state with its inevitable accompaniment of a mass of parliamentary and subordinate legislation which would involve constant interference with the normal activities of the citizen. It was therefore essential to provide procedures and remedies which would enable the citizen to approach the courts and obtain speedy and effective redress against interference with his fundamental rights or an unconstitutional enactment or unwarranted administrative action. These remedies are to be found in article 226 and article 32 of the Constitution. Under article 226 the High Courts have jurisdiction throughout the territories subordinate to them to issue to any person or authority, including in appropriate cases any Government "directions, orders writs, including writs in the nature of habeas corpus mandamus, purpose, quo warrant and certiorari or any of them." Not only for the enforcement of the fundamental rights but also "for any other purpose." Almost in identical words a similar jurisdiction has been conferred by article 32 on the Supreme Court of India but this jurisdiction is restricted to cases of invasion of fundamental rights.'

52. In case the suit for reinstatement is not maintainable then a writ petition is also not maintainable. Nevertheless, we would like to clarify that in certain circumstances, the writ is more efficacious or may be only remedy: especially when,

- Validity of any statutory Act / rules / bye-laws is challenged; or
- Fundamental rights are breached; or
- Finality is attached to the orders making them immune from purview of the Civil Courts.

In the Central Corporation case validity of a rule was challenged; it is for this reasons the Supreme Court held that the writ is more efficacious remedy. This case is not an authority for the proposition that for reinstatement only writ is maintainable.

53. More than hundred years ago Lord Halsbury in Quinn vs. Leatham (1901AC495=1900-1903All England Reports1) had said,

'[E]very judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. ... [A] case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it such a mode of reasoning assumes that the law is necessarily a logical code whereas every lawyer must acknowledge that law is not always logical at all'.

54. The Krishnamacharyalu case, or the Anadi Trust case or the Pai Foundation case, or the Central

Corporation cases are not authority for the proposition that:

- The privately managed schools are State within the meaning of Article 12 of the Constitution; or
- In absence of any statutory obligation, a writ petition or a suit is maintainable for specific performance of a contract of personal service.

The AleyAbidi case is still good law. Does it mean that the petitioners are not entitled to any relief from this court and their writ petition is liable to be dismissed?

POINT-VI; WRIT AGAINST THE BOARD-MAINTAINABLE

55. The Board is the State with in the meaning of Article 12 of the Constitution. The service rules prescribed by the affiliation bye laws may,

- not have statutory force; or
- be a private contract between the petitioners and the DPS School,

Yet the affiliation bye-laws are binding upon the Board. The Board can neither act contrary to it nor can it ignore them. Chapter V of the bye-law prescribes the grounds on which affiliation of a school may be withdrawn. These grounds include,

- Disregard of rules and conditions of affiliation even after receiving warning letters;
- Absence of approved terms of condition of service or frequent dismissal of teachers from service.

56. Apart from the grounds, mentioned in Chapter V of the Affiliation bye laws, the Board can always dis-affiliate any school if that school does not follow the bye laws; after all the Board has framed the bye-laws to be followed and not merely as a show piece. It was about half a century ago that Justice Franfuter in Vitarelli v. Seaton: (1959) 359 US 535 at pp 546 remarked:

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

57. A writ petition is maintainable against the Board- if the Board fail to take any action- to disaffiliate a school in cased where the school aces contrary to the bye-laws. Of course, a distinction has to be made between mandatory and directory bye laws. And even in the case of mandatory one, the disaffiliation has to be done with caution: it may affect the future of the students studying in school. We with to clarify here that 'Service rules for Employment' in Chapter VII are for good administration and are mandatory. Their non-observance will result into disaffiliation of course after opportunity to the school.

Deacons for Termination- Petitioners 1 to3

58. The DPS School has not framed any Service Rules. In such an event, the bye-laws in Chapter VII of the affiliation bye-laws shall be deemed to be adopted by the schools as service rules and agreement shall be deemed to be the same format as Appendix-III to the affiliation bye-laws (See Point-III subheading 'Service Rules Required to be Framed: Bye-laws-Adopted as Service Rules')

59. Bye-laws 44 to 47 in Chapter VII provide for penalties and procedure for imposing them. They provide a detailed procedure as to when as employee/teacher can be removed for misconduct. Bye-laws no. 49 is titled as 'Disciplinary Committee' and provides for an appeal against the order of the disciplinary authority. Bye laws in chapter-VII and Appendix-III to the affiliation bye-laws clarify that the teachers/employees can be removed,

- Only for the misconduct after completing inquiry conducted by the school: or
- In case of abolition of the post, after giving three month notice or salary of three months in lieu thereof.

Let's consider if the service of the petitioners-1 to 3 has been terminated for misconduct or on abolition of the post.

60. The termination orders are similarly worded. They state that:

- The services of petitioners are no longer required.
- Their services are being terminated in terms of the appointment.
- They are being paid three months salary I lieu of the notice.

61. The petitioners in different paragraphs of the writ petition have alleged that their work and conduct was good and their services have been terminated without any reason, opportunity, and inquiry. They have also alleged that it is wrongly mentioned that the services are not required as the posts on which the petitioners 1 to 3 were working have been advertised in Hindustan Time on 30th May 2000.

62. The DPS School has filed a counter affidavit. It is not disputed that:

- No opportunity was afforded.
- No inquiry as contemplated under the bye laws was held.
- The posts over with the petitioner 1 to 3 were working has been advertised and appointments over the same has been made.

63. In paragraph 32 of the counter affidavit, the reasons for terminating the services of petitioners 1 to 3 have indicated as follows;

- The functioning of petitioners 1 to 3 was not up to the mark.
- They have acted contrary to the interest of the institution.
- They were only interested earning money from private tuition.

64. It is clear from the aforesaid facts that the services of the petitioners 1 to 3 have been terminated for misconduct and not for any abolition of any post or for the reason that their services were not required. The DPS School was requited to conduct an inquiry before imposing any penalty.

Reasons for Termination-Petitioner 4

65. The case of the petitioner no. 4 is different. In paragraph 31 of the counter

affidavit, it has been allege ha the post of PT teacher was abolished in the year 2000 due to reduction of PT education periods and the work of the physical educations is carried by two teachers. It is further alleged that the petitioner no. 4 was the junior most amongst the three PT teachers, hence his services were terminated.

66. The contents of paragraph 31 of the counter affidavit have been replied in paragraphs 18 and 28 f the rejoinder affidavit. In these paragraphs it is alleged that:

- It is wrong to say that the post f physical teacher has been abolished or the service of petitioner-4 has been dispensed with on account of abolition of the post.
- The number of sections in class 6 to 10 has increased and as such it is wrong to say that the post has been abolished.

67. In case of petitioners-1 to 3 there has been advertisement for recruitment so the teachers over the posts on which they were teaching but neither there has been any advertisement nor any teacher has been appointed over the post over which petitioner -4 was employed. At the time of hearing of this case, we inquired from the counsel whether any teacher has been appointed on the post of PT or not. The statement at the bar was that no PT teacher has been appointed. The question, 'whether the service of the petitioner's no. 4 has been dispensed with due to abolition to the post or for misconduct' is a disputed question of fact.

POINT--VIII: RELIFS--FURTHER ACTION

68. The services of petitioners 1ot 3 have been terminated for misconduct without conducting any inquiry and opportunity. It is contrary to the bye laws as deemed to be adopted as service rules by the DPS School. The affiliation of the DPS School is liable to be withdrawn. The Board has not taken any action on the representation filed by the petitioners on the ground that the case is pending an was awaiting its decision. We are deciding the case; the Board should now take action.

69. In respect of petitioners 1 to 3 the Board may give notice to the DPS School asking them to show cause as to why their affiliation may not be withdrawn. Unless the DPS School agrees to hold an inquiry and take appropriate legal action in accordance with the bye-laws, their affiliation may be withdrawn. In case the DPS School undertakes o complete the inquiry in terms to the bye-laws then the Board may,

- Permit the DPS School to complete the inquiry, preferably within six months;
- Extend the time to complete the inquiry if circumstances so require;
- The Board may also permit the DPS School to treat the petitioners 1to 3 on suspension from the time their services were terminated till enquiry is completed.

The aggrieved party after the order shall have right to file appeal and shall have right to challenge or seek remedy before the Civil Courts.

70. There is some dispute whether service of petition no. 4 was terminated on the ground of abolition of post or on the ground of abolition of post or on the ground of misconduct. The Board may examine whether his services were terminated on the ground f abolition of post or on misconduct after affording opportunity to the DPS School. In case the Board is satisfied that his services were terminated on accou8nt of abolition of post then any further action may not be taken. The petitioner no. 4 may be permitted to seek his remedy before the Civil Court. In case the Board is satisfied that the service of petitioner-4 was terminated due to misconduct hen similar action as proposed for petitioners 1 to 3 may be taken.

71. In view of our finding on other points, it was not necessary on our part to decide whether there had been any breach of bye laws or not; we could have left it reason for doing so.

72. In this case, the affidavits had been exchanged and the case was listed for final hearing. More that four years had passed since filing of the writ petition and the question of breach of bye-laws was argued before us. For petitioners-1 to 3 there was also no factual dispute; for petitioner-4, there is some factual dispute and we are leaving it to be decided by the Board or the Civil Court. In case we had left the dispute of petitioner-1 to 3 also to be decided by the Board then we couldn't have indicated the procedure to be followed. This would have delayed the final decision and would have defeated the ends of justice. It is for this reason we decided it.

A CAVEAT

73. The DPS school neither framed the service riles nor took any disciplinary proceeding. The Board did to take any action n the complaint of the petitioner; it failed to perform its duty: it is for this reason that we are issuing directions to the Board. Had the DPS school framed the service rules and taken disciplinary proceeding then we would have left the parties to agitate their rights in the civil court.

74. In case of complaint, the Board should perform its duty after opportunity ot the parties. In case it is satisfied that the proceeding under the service rules has been taken then the parties may be left to agitate their rights in the civil court otherwise the Board may proceed in the same way as we have indicated. In dealing with the complaint, the Board is not required to pass detailed order as a court of law does but the information to the party should indicate that the Board has applied its mind to the complaint.

SOME SUGGESTIONS

75. There has been laxity on the part of the State government in granting NOC and on the part of the Board in granting affiliation (See point-iii sub heading 'Service Rules Required to be Framed: Bye-laws –Adopted as Service Rules'). It is possible that similar laxity may be there in respect of other schools. In this light, we will like to make the following suggestions:

(i) The State government and the Board may be careful in future. They may not grant NOC and affiliation as casually as has been done in this case.

(ii) They may ensure that the school-where NOC and the affiliation has

already been granted-frame service rules and enter into agreement with the teachers in the correct format: failing which their NOC may be cancelled and affiliation may be withdrawn.

(iii) The board may intimate to the school affiliated to it or should specifically amend the bye laws the intimation to the school or the amendment may be to the effect that:

(a) the chapter VII of the affiliation bye laws shall be deemed to be the service rules till the service rules are framed by the school and

(b) The agreement between the school and the teacher employees (where state /UT Act does not prescribe any particular format) shall be deemed to be in the same format as Appendix – III to the affiliation bye laws.

(iv) the Board may amend bye – laws specifically providing that the school shall be Liable to be disaffiliated in cases of violation of affiliation bye laws.

CONCLUSIONS

76. Our Conclusion are as follows:

(a) The DPS School is not the State within the meaning of Article 12 of the Constitution.

(b) The Central Board of Secondary Education, (The Board) is the State within the meaning of Article 12 of the Constitution.

(c) In case service conditions have not been framed, then Chapter VII of the affiliation bye-law relating to service condition shall be deemed to have been adopted by the School: and The agreement between the parties- unless any other format is prescribed by the State/UP Act- shall be deemed to be in the same format as Appendix-III to the affiliation bye laws.

(d) The service rules and the agreement- whether framed by a school and agreed between the parties by an agreement or deemed to be adopted by them and agreement to be in the same format as Appendix-III of the affiliation bye-laws as held in this case- are merely private contract between the schools and the teachers. They do not have statutory force. The writ petition is not maintainable against the School to enforce them.

(e) In case any school does not follow the service rules framed by it or the bye-laws deemed to be adopted as held in this case then the school has to pay penalty for violating the same namely withdrawal of its affiliation,

(f) The Board is bound to follow its bye laws and in case of nay violation it has to take action under its bye-laws to disaffiliate the school. A writ petition is maintainable against the Board in case it fails to perform its duty.

(g) In the present case, there has been violation of the bye-laws deemed to be adopted as service conditions by the DPS School. The Board has failed to perform its duty by not taking any action on the complaint filed by the petitioners. The board should take action under the affiliation bye-laws against the DPS School.

DIRECTIONS

77. In view of our conclusions the writ petition is partly allowed an the following directions are issued:

Petitioner-1 to 3

(a) The Board may issue a show cause notice to the DPS school to show cause as to why it may not be disaffiliated for terminating the services of the petitioners 1 to 3 contrary to the bye-laws.

(b) It may disaffiliate the DPS school unless the DPS school undertakes to conduct the inquiry in accordance with the affiliation, bye laws and pass appropriate orders afresh on the basis of the inquiry.

(c) In case the DPS school undertakes to conduct the inquiry then the Board may,

- give reasonable time (six months) to the DPS school for completing the enquiry;
- extend the time, it the need be;
- permit the DPS School to treat petitioners 1to3 under suspension from the date of termination of service till the completion to the inquiry.

For Petitioner-4

(d) The Board may issue notice to DPS school to show causes whether the services of the petitioner-4 had been terminated for misconduct or for abolition of the post. In case the Board is prima facie satisfied that the service of petitioner-4 was terminated for abolition of the post, then is may not do anything further and leave the petitioner-4 to seek appropriate remedy before the Civil Court. In case of the Board comes to a conclusion that the services of the petitioner-4 had been terminated for misconduct then it may proceed in the similar way as we have indicated in the case of petitioner-1 to 3.

Endnote-1: The difference is between the judgment of Special Appeal No. 757 of 2001, Sandeep Chauhan and others v. State of U.P. and others decided on 11.7.2001 and Special Appeal No. 175 of 2004, Army School Kunraghat, Gorakhpur v. Smt. Shilpi Paul, decided on 16.8.2004.

Endnote-2: The following decisions were cited for the proposition whether the Board is State or not within the meaning of Article 12.

(i) Raman vs. IA Authority of India: AIR 1879 SC 1628
(ii) Rajasthan SEB vs. Mohan Lal: AIR SC 1857
(iii) Ajay Hasia vs. Khalid Mujib: AIR 1981 SC 487
(iv) Pradeep Kumar Biswas vs. India Institute of Chemical Biology: 2002 (5) SCC 111
(v) General Manager, Kisan Sahkari Chini Mills Ltd. vs. Satrughan Nishad: 2003 (8) SCC 639.
(vi) Zee Telefils Ltd. vs. Union of India: 2005 (4) SCC 649.
(vii) WP (S) No. 1415 of 1996 Mrs. Asha Khosla
(viii) WP No. 23130 of 2004 Ashok Kumar Upadhya decided on 24.9.2003.
(ix) Ashok Kumar Chatwala Kaur vs.CBSE:1998 (1) UPLBEC 370.
(x) Mrs. Harband Kaur Committee of Management: 1992 LIC 2070.

Appendix-1

Clause 6 and 9 relating to composition, powers and functions of the Board are as

Composition of the Board: The Board shall consist of the following namely.

(i) Chairman
(ii) Vice Chairman
(iii) One Representative each of the Education Departments of the Union Territories excepting Delhi which to avail the services of the Board.
(iv) One representative each of the Territorial Councils of the Union Territories other than Delhi, Subject in their availing of the service of the Board.
(v) Three representatives of the Education Department of Delhi Administration, one of whom shall be an Assistant Director of Education (Women).
(vi) One representative each of the Education Department of the Delhi Municipal Corporation and New Delhi Municipal Committee.
(vii) One representative of the Ministry of Scientific Research and Cultural affairs conversant with problems of Technical Education.
(viii) A representative of the Ministry of Health conversant with problem of medical education and of health education in school.
(ix) A representative each of such other Ministries and Department of the Government of India as may be decided by the controlling Authority.
(x) Two representative of the University of Delhi to be elected by its Academic Council.
(xi) Three representative of the Inter University, Board.
(xii) Two Headmasters of public school to be nominated by the Indian Public School conference.
(xiii) Two representative each of the special category of schools designated as such by the Controlling Authority who may also prescribe the method of nomination or selection.
(xiv) One Headmaster/Principal of High and Higher Secondary Schools (other than the special schools) recognized by the Board and located in the various states (other that the Union Territories) to be elected from among themselves.
(xv) Three Principal of Higher Secondary schools in Delhi to be elected from among themselves by the Principal of Higher Secondary schools recognized by the Board at least one of who should be the Principal of a Girls schools.
(xvi) One Headmaster/Principal of a High/Higher secondary school from each of the Union Territories (excepting Delhi) availing the services of the Board, to be nominated by the respective Administration.
(xvii) Head of the Central Institute of Education, Delhi (ex-officio.)
(xviii) One person each to represent the following professional bodies to be appointed by the Controlling Authority:
Engineering
Agriculture
Medicine
Industry & Commerce
Fine Arts
Home Science

(xix) Not more that four persons to be nominated by the Controlling Authority from amongst eminent educationalists or teachers of the Institutions recognized by the Board whose service it may be considered necessary or desirable to secure for

the Board, keeping in view the composition of the Board.

(xx) Not more than three persons to be cooped by the Board in consideration of their expert knowledge of subject of study included in the courses prescribed by the Board.

9. Powers and Functions of the Board – The Board shall have the following powers.

i. To conduct examinations and grant diplomas/certificates to persons who after pursuing a course o study in an institution admitted to the privileges of recognition by the Board or having fulfilled such: conditions as may be laid down by the Board, have passed the examination of the Board.

ii. To prescribe courses of instruction a for examination conducted by; the Board provided that the Board might prescribe different courses of instruction for different classes of institutions.

iii. To admit candidates to the examinations conducted by it and prescribe the condition for such examinations.

iv. To recognize institutions for the purpose of its examinations provide that the Board shall not accord recognized to any institution, without the concurrence of the State Government of the State Government concerned if such institution is in receipt of a regular maintenance grant in aid from the State Government.

Explanatory Note- It shall be within the powers of the Board to withdraw recognition if is satisfied after inspection carried out under clause (vi) that the standards of managements and instruction in an institution justify withdrawal, provided that in case of a Government institution, applying for recognition the recognition shall not be withheld or is case institution is already recognized the recognition shall not be withdrawn, without prior approval of controlling Authority.

v. To demand and receive such fees as may be prescribed by the Regulation.

vi. To cause an inspection to be made by such person or persons as the Board may nominate or recognized institutions or institutions applying for recognition.

vii. To adopt measures to promote the physical and moral well being of students of recognized institutors and supervise their residence, health and discipline.

viii. To organza and provide lectures, demonstrations education exhibitions and take such other measures as are necessary to promote the standards secondary of education.

ix. To institute and award scholarships, medals and prizes under conditions that be prescribed and to accept endowments for the same subject to such conditions as the board may deem fit.

x. To make regulations for prescribing textbooks or other books of study and to arrange for publication of such textbooks.

xi. To make regulations for imposing penalties for misconduct of students, teachers, examiners and examinees.

xii. To prescribe qualifications for the appointment of teachers in the

institutions recognized by the Board.

xiii. To submit Government of India its view on any matter with which it is concerned or which the Govt. of India or any state Government or educational organization may refer to for its advice.

xiv. To advise the Administration of Union Territories as to the courses of instruction and syllabi of middle school education with a view to securing coordination between middle school education and secondary education.

xv. To acquire properties, both movable and immovable and invest the surplus funds of the Board in Government securities or in banks approved by the controlling Authority.

To do all such or other things as may be necessary in order to further the object of the Board as a body constituted for regulating and maintaining the standard of secondary education.

The educational institutions recognized by the Board of Higher Secondary Education Delhi shall be deemed as institution recognized by the Board.*

*(that Board was merged with the central Board on 1.7.1962.)

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.46607 of 2005

Madhan Mohan Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Srivastava

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

U.P. Collection Amin Rules 1974 Section-19-A-Suspension of collection Amin-passed by S.D.O.-challenged on the ground of jurisdiction-appointing authority of the petitioner was District Magistrate-can not be suspended by S.D.O.-now after amendment as per Rule 19-A-the S.D.O. is the appointing authority-held-S.D.O. is empowered to place under suspension to a collection Amin even initially appointed by collector.
Held: Para 15
In my opinion, the judgement of the Supreme Court in the State of Orissa Vs. Shiva Parashad Das [supra] is squarely applicable to the present facts of the case. Consequently, I hold that the Sub Divisional Officer had the power to suspend a collection amin, even though the collection amin was initially appointed by the Collector.
Case law discussed:
AIR 1985 SC-701
AIR 1964 SC-787

(Delivered Hon'ble Tarun Agarwala, J.

1. The petitioner was appointed by the Collector as a "Collection Amin"

under the U.P. Collection Amin Rules 1974. The petitioner has now been suspended by an order dated 10.6.2005 issued by the Sub Divisional Magistrate, Fatehpur, which has been challenged in the present writ petition.

2. Heard Sri A.K. Srivastava, the learned counsel for the petitioner and Sri Suresh Singh, the learned counsel for the respondents.

3. The contention of the learned counsel for the petitioner is that the appointing authority of the petitioner is the Collector and that he alone was empowered to suspend the petitioner and that the Sub Divisional Magistrate had no power to suspend him.

4. On the other hand, the learned Standing Counsel submitted that the Sub Divisional Magistrate has now been authorised under the Rules to suspend a Collection Amin.

In order to appreciate the contentions raised by the rival parties, it would be appropriate to consider a few provisions of the Act.

Rule 20 of the Rules of 1974 states as under:

"20. Appointment- (1) Appointments to the ordinary grade of the Service shall be made by the Collector from the list of directly selected candidates under rule 17, the list of candidates selected from Seasonal Collection Amins under rule 17-A and the list of promoted candidates under rule 18, as the case may be, in the same order in which the names appear in the list. While making appointments it shall be ensured that subject to availability of suitable candidates selected from Seasonal Collection Amins and promoted from the permanent collection peons appointments shall be made in the same order as provided in Appendix-C.

(2) If more than one orders of appointment are issued in respect of any one selection a combined order shall also be issued, mentioning the names of the persons in order of priority as determined in the selection or as the case may be, as it stood in the cadre from which they are promoted. If the appointment are made both by direct recruitment and by promotion, names shall be arranged in accordance with the cyclic order referred to in sub-rule (1)."

5. From the aforesaid, it is clear that the appointing authority is the Collector. However, Rule 19-A stipulates as under:

"19-A. Appointing Authority-- Subject to the provisions of Article 311 of the Constitution, the Sub-Divisional Officer shall be the appointing authority:

Provided that in respect of the persons appointed by the Collector in accordance with the Rules in force for the time being, he shall be the appointing authority for the purpose of Article 311 of the Constitution:

Provided further that, if so authorised by the Government, the Collector may also exercise the powers of appointing authority in cases where the appointment has been made by the Sub Divisional Officer or by any other subordinate authority."

6. From the aforesaid, it is clear that the Sub Divisional Officer has now been made the appointing authority. The proviso indicates that where a person had

been appointed earlier by the Collector, he would remain the appointing authority for the purpose of Article 311 of the Constitution.

7. The learned counsel for the petitioner submitted that in view of the proviso to Rule 19-A of the Rules, the Collector alone had the power to suspend him and that the Sub Divisional Officer had no authority to suspend him.

8. The question is, what is the meaning of the words " he shall be the appointing authority for the purpose of Article 311 of the Constitution."

Article 311 of the Constitution of India reads as under:

"311. Dismissal, removal or reduction in rank of person 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 a 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 or 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 removes 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 inquiry ; or

(c) where the President or the Governor, as the case may be, is satisfied that in the 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 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 ro reduce him in rank shall be final."

9. From the aforesaid, it is clear that a Government servant shall not be dismissed or removed by an authority subordinate to that by which he was appointed.

10. In **State of Orissa and others Vs. Shiva Parashad Das**, AIR 1985 SC 701a Forester was suspended by a District Forest Officer. He filed a writ petition before the Orissa High Court, challenging the suspension on the ground that the same was passed in contravention to Article 311 [1] of the Constitution of India. The High Court quashed the

suspension order holding that since the Forester was appointed by the Conservator of Forest, he could not be suspended by the District Forest Officer who was an authority subordinate to the Conservator of Forest. The Supreme Court reversed the judgement of the High Court holding-

"An order of suspension passed against a Government servant pending disciplinary enquiry is neither one of dismissal nor of removal from service within Art. 311 of the Constitution."

The Supreme Court further held-

"Clause (1) of Art. 311 will get attracted only when a person who is a member of Civil Service of the Union or an All India Service or a Civil Service of a State or one who holds a civil post under the Union or a State is 'dismissed' or 'removed' from service. The provisions of the said clause have no application whatever to a situation where a Government servant has been merely placed under suspension pending departmental enquiry since such action does not constitute either dismissal or removal from service."

11. In view of the aforesaid, Clause-[1] of Art. 311 of the Constitution is attracted where a person is dismissed or removed from service by the authority. Clause [1] of Art. 311 of the Constitution is not attracted when a person is suspended as suspension is neither a dismissal or a removal.

12. The learned counsel for the petitioner placed reliance upon a decision of the Supreme Court in **R.P. Kapoor Vs. Union of India, AIR 1964 SC 787** in which it has been held that the appointing authority also has the power to suspend an employee. The Supreme Court held –

"On general principles therefore the authority entitled to appoint a public servant would be entitled to suspend him pending a departmental enquiry into his conduct."

13. The Supreme Court propounded this principle taking into consideration Section 16 of the General Clauses Act which contemplated that where any Central Act or Regulation gives power of appointment, such power also includes the power to suspend or dismiss unless a different intention appears.

14. In view of the aforesaid, it is clear that the appointing authority also has the power to suspend an employee. But in the present case, the proviso to Rule 19-A, a different intention has been given with regards to the power to be exercised by the Collector. Initially, the appointing authority was the Collector, but now after the amendment, the appointing authority of a Collection Amin is the Sub Divisional Officer. Under the proviso, it has been made clear, that for the purpose of Article 311 of the Constitution, the Collector who had been the appointing authority earlier, prior to the amendment, would remain the authority for the purpose of Article 311 of the Constitution, i.e., the Collector would still exercise the power of removal or dismissal. For all other purposes, the Sub Divisional Officer, was competent to pass the order, including that of suspension.

15. In my opinion, the judgement of the Supreme Court in the State of Orissa Vs. Shiva Parashad Das [supra] is

squarely applicable to the present facts of the case. Consequently, I hold that the Sub Divisional Officer had the power to suspend a collection amin, even though the collection amin was initially appointed by the Collector.

16. In view of the aforesaid, I do not find any error in the suspension order. The writ petition fails and is dismissed. In the circumstances of the case, I direct the authority concerned to complete the enquiry proceedings and pass a final order within four months from the date of the receipt of a certified copy of the order. Parties to bear their own cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.10.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 57635 of 2005

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

Counsel for the Petitioner:
Sri Ravi Kiran Jain
Sri K.M. Asthana

Counsel for the Respondents:
Sri K.R. Sirohi
Sri Amit Sthalekar

Constitution of India, Art. 226-Service Law-Rights to get appointment-after the existence of new distt. Baghpat, 10 posts of clerks and 4 posts of Stenographers created-the District Judge selected 73 persons against vacancy 10 posts-appointment made to all of item by Transfer to other District-administrator Judge holding appointments of the candidates from sl. No. 11 to 71 as illegal as were made against non existing posts-recommendation for their removal-after show cause notice-termination Order passed-held-appointment beyond notified sanctioned strength-void-ab intio-illegal humanitarian approach not to be adopted.

Held: Para 22

In my view, the judgment cited by the learned counsel for the petitioners is distinguishable and, in any case, such directions cannot be issued by this Court under Article 226 of the Constitution of India. The decision in the case of H.C. Puttaswamy (supra) was passed by the Supreme Court while exercising the powers under Article 141 of the Constitution of India. Such powers cannot be exercised by the High Court under Article 226 of the Constitution. The High Court can only pass such orders and directions which are within the four corners of the provisions of the Act or the Rules. In the present case, the petitioners were appointed beyond the notified sanctioned strength. The petitioners appointment was void ab initio. After the appointment of 10 persons, the select list came to an end and could not be used any further. Consequently, the appointment of the petitioner being illegal, from the very inception, cannot be permitted to continue. In my opinion, no humanitarian approach can be adopted. Since the appointments of the petitioners were illegal, such illegality cannot be allowed to continue. The law must take its course.

Case law discussed:
J.T. 1996 (5) SC-219
1994 (2) UPLBEC-1400
AIR 1995 SC-1371
AIR 1988 SC-1531
AIR 2004 SC-2317
AIR 1986 SC-1043
1991 Supp. (2) SCC-421
1995 (Supp.) (4) SCC 706
2005 (4) SCC-209

(Delivered by Tarun Agarwala, J.)

1. On 15.6.1999 a new judgeship of Baghpat was carved out from district Meerut. New posts were created in the judgeship of Baghpat and, on 23.12.1999, an advertisement was issued inviting applications for 10 posts of clerks and four posts of stenographers. The advertisement also indicated that the number of posts may increase or decrease. Pursuant to the aforesaid advertisement, the petitioner's applied and sat in the examination in which they qualified. On 5th April, 2000, a select list of 73 persons was issued by the District Judge. Petitioner Nos.1 to 7 were at Sl.Nos.11 to 18 of the select list. Petitioner Nos.8 to 20 were at Sl.Nos.21 to 42 of the select list and petitioner Nos.30 to 35 were at Sl.Nos.45 to 47 and 49 to 51 of the select list. The petitioners were given an appointment as a clerk on a temporary basis on various dates between 6.4.2000 and 3.1.2001. The said appointments were made within one year of the issuance of the select list. On 4.4.2001, the District Judge extended the life of the select list for one more year and candidates appearing from Sl. Nos.52-A to Sl.No.71 were also appointed as clerks on various dates.

2. On 5.4.2003, the High Court issued a letter to the District Judge asking for an explanation as to how the life of the select list was extended after the expiry of one year and on what basis the appointments were given from the select list after the expiry of the period of the select list. It further transpires that the Administrative Judge of the judgeship of Baghpat submitted a report dated 28.7.2003 holding that the appointments of the candidates from Sl.Nos.11 to Sl.No.71 were illegal and that these appointments were made on non-existing posts and recommended the removal of these candidates and directed the District Judge to take action as per his report. Based on the aforesaid report of the Administrative Judge, the District Judge by an order dated 22.11.2003 terminated the services of 15 clerks. By another order dated 28.2.2005, the District Judge terminated the services of 4 clerks.

3. These 19 clerks whose services were terminated, as stated aforesaid, were those persons who were appointed after the select list was extended by the District Judge. Against the order dated 27.9.2003, 15 clerks filed Writ Petition No.52654 of 2003 and an interim order was passed allowing these 15 clerks to continue in the service during the pendency of the writ petition. Against the order dated 28.2.2005, the remaining 4 clerks filed Writ Petition No.34546 of 2005 in which an interim order dated 28.2.2005 was passed staying the order of dismissal. It further transpires that a Special Appeal No.702 of 2005 was filed against the interim order dated 28.2.2005. The appellate court, while hearing the appeal against the interim order, called for the record of both the writ petitions and decided the same on merits. The appellate court by a judgement dated 31.5.2005, while allowing the Special Appeal, also allowed both the writ petitions and quashed the order of termination and remanded the matter back to the District Judge to pass fresh orders in accordance with the observations and directions given in the judgement. The appellate court while setting aside the order of termination, issued the following directions:-

"(a) The decision in respect of the respondent- petitioners shall be taken by a speaking and reasoned order as per directions contained hereinabove by the District Judge, Baghpat.

(b) The District Judge shall withdraw all such similar termination orders in respect of such Class-III employees whose appointments were pursuant to the selections dated 5.4.2000, including those which are under challenge in various writ petitions before the High Court, and thereafter shall proceed to take a decision in the matter afresh after giving opportunity to the concerned employees in the same way as in the case of the respondents herein. This exercise shall be completed within one month and compliance report shall be submitted immediately thereafter.

4. While passing the aforesaid directions, the appellate court further held-

"In view of the above, we are of the considered opinion that as only ten vacancies had been advertised, there could be no justification for the authority concerned to fill up more than ten vacancies as it included the then existing as well as vacancies likely to occur in the course of the year. Once ten vacancies had been filled up, the selection process stood exhausted, and the authority concerned become functus officio. Any appointment made by him beyond that number, is without jurisdiction, therefore a nullity, inexecutable and un-enforceable in law.

In such an eventuality after issuing appointment letters to ten candidates, the select list/ waiting list stood exhausted and could not have been used as perennial source for appointment against any other vacancy. There can be no controversy to the settled legal proposition that even if a successful candidate joins the post and resigns or dies or stands transferred, his vacancy stands exhausted merely by his joining and the post could not be filled up from the waiting list as the statutory rules do not provide for such a course.

In the instant case, the candidates appointed against those vacancies had been transferred to different judgeships and vacancies were created time and again artificially and the select list which could not have been for more than 20 names, had been used as a reservoir by the statutory authority for making illegal appointments. The Court being the custodian of law cannot close its eyes where the facts are so startling that it shocks the conscience of the Court. However, we restrain ourselves to hold that appointments could have been made on extraneous considerations only for the reason that the then District Judge is not a party by name before us. We are told that though the officer has retired but he is facing Departmental Enquiry on such charges."

The Court further held-

"On the basis of the aforesaid provisions and the Circular, referred to hereinabove, it is explicit that the select list, which was prepared on 5th April, 2000 was in flagrant violation of the Rules, referred to above. The then District Judge has proceeded to prepare the list in an absolute arbitrary and whimsical fashion which list could not have included, by any means, more than 20 names. The first step of derailment of the process of selection seals the fate of all such candidates who are claiming themselves to have been appointed under the said list in excess of first twenty names and leave no room for doubt that the select list was prepared with some oblique and ulterior motive.

The petitioners are admittedly much below the 20 candidates in the merit list dated 5.4.2000 and as such they could not have been included in the list prepared by the District Judge. Their very inclusion is invalid. The same is the position with regard to such other candidates who stand on a similar footing. The District Judge proceeded to place 52 persons in the select list in excess of 20 names, including that of the petitioners, and subsequently appointed them which appointments are also invalid, as they are from the same invalid list. We, therefore, hold that the preparation of the select list in excess of 20 names was absolutely illegal and contrary to the Rules applicable. The question of preparing the select of more than 20 or filling up the vacancies against more than 10 posts is in contravention of Articles 14 and 16 of the Constitution of India."

5. Based on the aforesaid directions and observations of the appellate court, the District Judge issued a show cause notice dated 14.6.2005 to the petitioners to show cause why their services should not be terminated as their appointments were made beyond the notified vacancies. The said show cause notice was challenged by a number of the petitioners in Writ Petition No.46867 of 2005. This Court by a judgement dated 7.7.2005 dismissed the writ petition as premature and directed the petitioners to file a reply to the show cause notice which would be considered and decided by the authority. It transpires that the petitioner filed the reply and, eventually by the impugned order dated 1.8.2005, the services of the petitioners were terminated. The petitioners have again filed the present writ petition challenging their order of termination.

6. The impugned order of termination indicates that 10 posts of clerks were advertised and that only 10 posts could be filled up which were filled up from the candidates from Sl.Nos.1 to 10 of the select list and upon the filling up of the 10 posts, the select list came to an end and that no further appointment could have been made from the said select list. The District Judge further held that the select list could not become a perennial source of appointment. Since the petitioners were appointed on non-existing posts and beyond the notified 10 vacancies, their initial appointment was illegal and, therefore the District Judge by the impugned order terminated their services.

Heard Sri Ravi Kiran Jain, the learned Senior Counsel assisted by Sri K.M. Asthana, the learned counsel for the petitioner and Sri Amit Sthaleker, the learned counsel appearing for the respondents.

7. The learned counsel for the petitioner submitted that the recruitment process was not confined to the recruitment of 10 posts of clerks inasmuch as, the advertisement indicated that the number of posts were likely to increase or decrease. Since the number of posts had increased during the course of the selection process, consequently, the District Judge had rightly appointed the petitioners from the select list. The learned counsel submitted that the appointments of the petitioners was made against the vacancies existing in the judgeship of Baghpat. In support of this contention, the learned counsel for the petitioner has relied upon a decision in **Prem Singh and others vs. Haryana State Electricity Board and others**, JT 1996 (5) SC 219, and in the case of **Rakesh Kumar Trivedi vs. High Court of Judicature at Allahabad and another**, (1994) 2 UPLBEC 1400, in which it was held that since the advertisement itself indicated that there may be a variation in the number of vacancies, hence it was within the powers of the authority to recalculate the vacancies which occurred between the date of the advertisement till the date of the final selection.

8. On the other hand, Sri Amit Sthaleker, the learned counsel for the respondents contended that the judgeship of Baghpat was created in the year 1999 itself and new posts were sanctioned which were 10 in number. The question of increase or decrease in the number of vacancies, thus, could not arise and, at best, the number of posts could have increased or decreased. In the present case, no further posts were created or sanctioned during the selection process and, therefore, only 10 posts were required to be filled up and thereafter no further appointments could be made.

9. In the case of **Prem Shanker Singh** (supra), the Supreme Court held that the selection process by way of requisition and advertisement could be started for the clear vacancies and also for the anticipated vacancies but not for future vacancies. The Supreme Court further held:-

> "The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of more posts than advertised is challenged the Court may not, while exercising its extra-ordinary jurisdiction, invalidate the excess appointments and may mould the relie in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case."

and further held-

> "However, the appointments which were made against future vacancies- in this case on posts

which were newly created- must be regarded as invalid."

10. In the case of **Rakesh Kumar Trivedi** (supra), a Division Bench of this Court held that since the advertisement itself indicated that there could be a variation in the number of vacancies, consequently making appointments in excess of the vacancies advertised was valid.

11. In my opinion, the judgments cited by the learned counsel for the petitioners are distinguishable and are also not applicable to the present facts of the case.

In **R.K. Sabharwal and others vs. State of Punjab and others**, A.I.R. 1995 SC 1371, the Supreme Court held as under:-

"The expression "posts" and "vacancies" often used in the executive instructions providing for reservations, are rather problematical. The word "post" means as appointment, job, office or employment. A position to which a person is appointed. "Vacancy" means an unoccupied post or office. The plain meaning of the two expressions make it clear that there must be a 'post' in existence to enable the 'vacancy' to occur. The cadre-strength is always measured by the number of posts comprising the cadre. Right to be considered for appointment can only be claimed in respect of a post in a cadre."

12. Admittedly, only 10 posts for the appointment of clerks was sanctioned which was advertised. Therefore, only 10 persons could be appointed on the post of clerks. Since no further posts were available, no further appointments could be made over and above the notified posts. The contention of the petitioners that since the advertisement indicated that the posts could be increased, the appointments so issued were perfectly valid, is patently misconceived. No foundation has been laid by the petitioners in the writ petition to the effect that more posts were created beyond the 10 notified posts during the selection process or that vacancies occurred during that period. The fact that there existed only 10 posts of clerk is clear from the report of the Administrative Judge, who had clearly indicated that after the creation of the Judgeship of Baghpat, only 10 posts of clerk were sanctioned in the scale of Rs.3050-4590 and, therefore, only 10 persons could have been appointed.

13. The Division Bench in the Special Appeal has also held that only 10 posts could be filled up. Consequently, the submission of the learned counsel for the petitioner that the posts were created in which the petitioners were appointed is patently misconceived. In my opinion, the petitioners were appointed on non-existing posts over and above the notified vacancies. At this stage, I may point out that the Administrative Judge in his report submitted that the clerks appointed in excess of the sanctioned 10 posts were working against the vacant posts in the pay scale of Rs.4000-7000 and in the pay scale of Rs.4500-7000/- and further artificial vacancies were created by transfering the newly appointed clerks to another judgeship or promoting an employee to the next higher grade. The Administrative Judge in his report has also indicated that the appointments of all the persons in excess of the 10 posts was illegal and that the District Judge had

committed financial irregularities in making such appointments. I am in complete agreement with the report of the Administrative Judge. Consequently, in my opinion, only 10 posts could have been filled up and no further appointments could have been made thereafter from the select list.

14. Sri Ravi Kiran Jain, the learned Senior Counsel, for the petitioner, next submitted that the judgement of the Division Bench in Special Appeal was per incurium and was liable to be ignored. The Division Bench while giving the findings and directions, had relied upon certain provisions of **The Subordinate Civil Courts Ministerial Establishment Rules, 1947** which had already been repealed. The learned counsel for the petitioner submitted that the Division Bench proceeded to lay down the law while interpreting Rules 9 to 12 of the Rules of 1947 which had already been repealed. Therefore, the judgment given by the Division Bench, relying upon the provisions of the Rules of 1947, which had already been repealed was, therefore per incurium and, such judgment can be ignored by this Court. The learned counsel for the petitioner further submitted that the petitioners were not parties to that judgment and, therefore, the said judgement was not binding upon the petitioners. In support of this submission, the petitioners have relied upon a decision of the Supreme Court in the case of **A.R. Antulay vs. R.S. Nayak and another**, AIR 1988 SC 1531, in which it was held as under:-

"Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

and further held-

"It is a settled rule that if a decision has been given per incurium the Court can ignore it."

The learned counsel further placed reliance on the meaning given in Law Lexicon which defines "per incurium" as–

"though inadvertence or through want of care; a decision of the Court which is mistaken. A decision of the Court is not a binding precedent if given per incurium, i.e. Without the Courts attention having been drawn to the relevant authorities, or statutes"

The learned counsel also placed reliance on a decision of the Supreme Court in **N. Bhargavan Pillai vs. State of Kerala,** A.I.R. 2004 SC 2317, in which it was held that-

"the view, if any, expressed without analysing the statutory provisions cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incurium."

15. On the other hand, the learned counsel for the respondents submitted that the Division Bench in the Special Appeal had only laid down the law while considering the validity of the select list and, therefore, the said decision was not a nullity nor was it per incurium. The learned counsel submitted that the

judgment of the Division Bench is not inconsistent with the statutory provisions nor was the decision given in ignorance of a statutory provision.

16. In my view, the submission of the learned counsel for the petitioners is devoid of any merit. No doubt the provisions of Rules 9, 10, 11 and 12 of the Rules of 1947 have been repealed upon the promulgation of **The Uttar Pradesh Rules for the Recruitment of Ministerial Staff of the Subordinate Office in Uttar Pradesh, 1950**. However, the entire Rules of 1947 has not been repealed, as held by the Supreme Court in **O.P. Shukla vs. A.K. Shukla**, A.I.R. 1986 SC. 1043 in which it was held that Rules 9 to 12 of the Rules of 1947 were superseded by the Rules of 1950 and that the other provisions of the Rules of 1947 continued to remain in force.

17. Even though the Division Bench in its judgment has adverted to the aforesaid Rules 9 to 12 of the Rules of 1947, the findings on the issues in question was not based on the said Rules. The law laid down is in consequence with the Rules of 1950. The finding of the Division Bench that the vacancy was advertised cannot increase or decrease and that only 10 posts, which were advertised, could only be filled up, was in inconsonance with Rule 4 of the Rules of 1950. Rule 4 of the Rules of 1950 indicates that the probable number of vacancies should be ascertained before filling up the vacancies. The said rule clearly indicates that the posts so advertised could only be filled up. The advertising of the posts indicates the ascertainment of the number of posts or vacancies. Therefore, the usage of words "posts are likely to increase or decrease" becomes redundant or superfluous, as the case may be.

18. Further the decision of the Division Bench that the select list should contain not more than double the number of the vacancies advertised was also in consonance with the circular dated 29.4.1999 issued by the High Court, and which is, also in conformity with Rule 7 of the Rules of 1950. Rule 7 of the Rules of 1950 indicates that a select list should be of such number of candidates which would be sufficient to fill the number of vacancies as ascertained in Rule 4. The circular of the High Court indicates that the select list should contain the number of candidates which should not be more than double the number of the vacancies advertised. Since 10 posts were advertised, the select list could not be more than 20 candidates. In view of the aforesaid, the mere fact that the Division Bench had adverted to certain provisions of the Rules of 1947 which had been superseded, in my opinion, does not make the judgment per incurium nor the said decision of the Division Bench could be said to be inconsistent with the statutory provisions.

19. In my view, the Division Bench while considering the validity of the select list only interpreted the law. It is immaterial whether the petitioners were party to that decision or not. It is settled law that where the Court has laid down the law, the judgment is binding on co-ordinate or subordinate courts howsoever the construction may be unless it falls within the parameters of "per incurium". In my view, the judgment of the Division Bench is binding on the learned Single Judge. The Division Bench has interpreted the law which is binding to all

in relation to those issues. The contention of the learned counsel for the petitioner that the decision of the judgement of the Division Bench was not binding and was void and a nullity in the eyes of law and could be ignored is patently erroneous. In view of the aforesaid, the submission of the learned counsel for the petitioners is devoid of merit and is rejected.

20. The learned counsel for the petitioners lastly submitted that the petitioners had worked continuously since their appointments and having worked continuously for a number of years, a humanitarian approach should be taken and the petitioners should be allowed to continue even though their initial appointment may have been illegal. The learned counsel for the petitioners further submitted that there is a requirement of work in the judgeship of Baghpat and further there are no grievances against any of the petitioners with regard to their performance of work. Further, the petitioners have become over age and that the petitioners would find it difficult to get another job of a similar nature, at this stage. Therefore, a humanitarian approach should be taken by the respondents and, in the given circumstances, the petitioner should be permitted to continue in service. In support of his submission, the learned counsel for the petitioners has relied upon a decision of the Supreme Court in **H.C. Puttaswamy and others vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and others**, 1991 Supp.(2)SCC 421, in which it was held that where the appointment was made against the provisions of the statutory Rules and that the appointees continued to work continuously for a number of years, the Supreme Court while adopting a humanitarian approach, directed their appointments to be regularised.

21. On the other hand, Sri Amit Sthaleker, has placed reliance upon a decision of the Supreme Court in **Harpal Kaur Chahal (Smt.) vs. Director, Punjab Instructions, Punjab and another**, 1995 Supp. (4) SCC 706, in which the appointment was found to be illegal and was set aside even though the incumbent was working for 15 years. Similar view was upheld by the Supreme Court in the case of **Binod Kumar Gupta and others vs. Ram Ashray Mahoto and others**, (2005) 4 SCC 209.

22. In my view, the judgment cited by the learned counsel for the petitioners is distinguishable and, in any case, such directions cannot be issued by this Court under Article 226 of the Constitution of India. The decision in the case of H.C.Puttaswamy (supra) was passed by the Supreme Court while exercising the powers under Article 141 of the Constitution of India. Such powers cannot be exercised by the High Court under Article 226 of the Constitution. The High Court can only pass such orders and directions which are within the four corners of the provisions of the Act or the Rules. In the present case, the petitioners were appointed beyond the notified sanctioned strength. The petitioners appointment was void ab initio. After the appointment of 10 persons, the select list came to an end and could not be used any further. Consequently, the appointment of the petitioner being illegal, from the very inception, cannot be permitted to continue. In my opinion, no humanitarian approach can be adopted. Since the appointments of the petitioners were

illegal, such illegality cannot be allowed to continue. The law must take its course.

23. Consequently, the order passed by the District Judge terminating the services of the petitioner does not suffer from any error of law. In view of the aforesaid, the writ petition is dismissed. However, in the circumstances of the case there shall be no order as to cost.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2005

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 67651 of 2005

Manjeet Singh ...Petitioner
Versus
District Inspector of Schools, Ghazipur and others ...Respondents

Counsel for the Petitioner:
Sri Prakash Padia

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

U.P. Intermediate Education Act 1921-Schedue-II-Prohibited category appointment-petitioner being the grandson of the brother of the principal in concerned institution-appointed on the post of Class IV employee-rejection by DIOS held illegal-petitioner does not fall within 21 categories of prohibition as defined in schedule-approval cannot be denied.

Case law discussed:
2005 (2) ESC-1199

(Delivered by Hon'ble A.P. Sahi, J.)

The petitioner has challenged the order dated 10-10-2005 passed by the District inspector of schools, Ghazipur, rejecting the claim of the petitioner of his appointment on the post of a class-IV employee on the ground the brother of Principal of the institution and, as such, he falls within the prohibited category of relative referred to in the Schedule II appended to the U.P.Intermediate Education Act, 1921.

Since the issue is one of law, therefore, this Court does not find it necessary to invite any counter-affidavit on behalf of the respondents and learned Standing Counsel Sri K.R. Singh has very ably assisted the Court on the aforesaid issue by inviting the attention of the Court to the IInd Schedule referred to herein above. A perusal of the said Schedule indicates that a brother's son is included in the prohibited category. The Schedule clearly defines 27 categories of relations which fall within the prohibited category for the purpose of appointment in an institution. The Schedule as well as the provisions under which the said schedule has been framed clearly indicates that the list is exhaustive and not illustrative. In this view of the matter, no other relative can be said to be included within the prohibited category as defined under the IInd Schedule. The aforesaid position of law stands squarely supported by a recent decision of this Court in the case of G.P. Singh Vs. State of U.P. and others, 2005 (2) ECS 1199. The Impugned order, therefore, proceeds on an erroneous assumption of law inasmuch as admittedly the petitioner is the grand son of the brother and therefore, he does not fall within the prohibited category as

defined in the IInd Schedule referred to herein above.

The impugned order dated 10.10.2005 is quashed. The District Inspector of Schools, Ghaziabad, is directed to forthwith pass appropriate orders in the light of the observations made herein above for approving the appointment of the petitioner in accordance with law as expeditiously as possible preferably within a period of 3 weeks and to extend all such consequential benefits to which he is entitled in accordance with law.

The writ petition is allowed. No order as to cost.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 15504 of 2005

Naresh Agarwal Dr. ...Petitioner
Versus
Union of India and others ...Respondents
connected with
Civil Misc. Writ Petition No. 12060 of 2005
Manvendra Singh ...Petitioner
Versus
Union of India and others ...Respondents
connected with
Civil Misc. Writ Petition No. 24264 of 2005
Malay Shukla and others ...Petitioners
Versus
Union of India and others ...Respondents
connected with
Civil Misc. Writ Petition No. 24271 of 2005
Vivek Kasana and others ...Petitioners
Versus
Union of India and others ..Respondents
connected with
Civil Misc. Writ Petition No. 24274 of 2005
Anuj Gupta and others ...Petitioners
Versus
Union of India and others...Respondents

Counsel for the Petitioner:
Sri Ravi Kant
Sri J.J. Munir

Counsel for the Respondents:
Sri Shashi Nandan, Sri K.C. Sinha, Sri P.N. Rai, Sri Rajeev Dhawan, Sri Vijay Bahadur Sinha, Sri U.P. Singh, Sri V.B. Singh, Sri B.N. Rai, Smt. Sunita Agarwal, Sri Manoj Kumar, Sri Kapil Sibbal, Sri Akhil Sibbal, Kirtika Singh, Sri M.A. Qadeer, Sri S.K. Singh, S.C.

Constitution of India-Art. 29 (2)-read with-Aligarh Muslim University Act-1920-reservation for admission-on the basis of religion only-hit by art. 29(2) of Constitution-held-illegal without jurisdiction.

Held: Para 60

It is declared that no reservation can be provided by the Aligarh Muslim University for admission of students on the basis of religion only and any decision in that regard, being hit by Article 29(2) of the Constitution of India, would be patently illegal and without jurisdiction.

Constitution of India Art.-30- Protection of minority institution-Aligarh Muslim University-not within the meaning of citizen-hence is not minority institution-held-no right to provide reservation based on particular religion-not entitled to protection of Art. 30.

Held: Para 59

Although the Court has reservation with regard to the extent of reservation

provided in respect of Post Graduate Medical Courses by the Aligarh Muslim University (i.e. 50% of the total seats) as well as to the manner in which the said reservation has been implemented i.e. one category of the seats being completely reserved for Muslim students (50% of the total seats required to be filled by open examination to be conducted by the Aligarh Muslim University), both the aforesaid issue are not required to be gone into any further inasmuch as this Court has held that Aligarh Muslim University is not a minority institution, entitled to protection of Article 30 of the Constitution of India and therefore has no right to provide any reservation on the basis of religion. The reservation provided by the Academic Council of the Aligarh Muslim University vide its resolution dated 15th January, 2005 the resolution of the Executive Council dated 19th February, 2005 and the approval granted by the Central Government vide letter dated 25.2.2005 to that extent are hit by Article 29 (2) of the Constitution of India and as such cannot be legally sustained.

Case law discussed:

AIR 1968 SC-662
2003 (4) SCC-399
2003 (5) SCC-298
AIR 1997 SC-3127
1996 J.T. 9 SCC-382
AIR 1993 (1) Suppl. SCC-96
1990 (3) SCC 157
2003 (ii) SCC-146
2002 (8) SCC-481
2003(6) SCC697
1996 SCC 751 (Crl.)
1969 (2) SCC-233
1989 (3) SCC-488
2005 (E.S.C.) SC- 373
2002 (7) SCC-258
AIR 1950 SC-27
AIR 1954 SC-92
AIR 1963 SC-1811
AIR 1965 SC-40
2004 (1) SC-40
2004 (1) SCC-712
1992 (1) SCC-558
2002 (8) SCC-481
1989 (3) SCC-488
1997 (4) SC-606
1996 (9) SCC-548
1969 (2) SCC-283
AIR 1997 SC-3127
2003 (5) SCC-298
2003 (4) SCC-399
2004 (1) SCC-712

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

The Dispute:

1. These five connected writ petitions have been filed by 34 petitioners who have obtained a degree of MBBS and claim a right to be considered for admission to Post Graduate Medical Courses of Aligarh Muslim University. For admission to Post Graduate Medical Courses of Aligarh Muslim University three modes have been determined (a) 25% of the total seats to be filled on the basis of All India Entrance Examination conducted by the All India Institute of Medical Sciences, New Delhi, commonly known as All India Entrance Examination; (b) The remaining 75% of the total seats have been divided to be filled as follows:

(i) 25% of the total seats are required to be filled on the basis of entrance examination conducted by the Aligarh Muslim University in respect of its internal students commonly known as Entrance Examination for Internal Candidates; and

(ii) the remaining 50% of the total seats are to be filled from external as well as internal candidates on the basis of entrance examination to be conducted by the Aligarh Muslim University. These 50% seats which are required to be filled from internal as well as external candidates on the basis of entrance

examination to be conducted by the Aligarh Muslim University have since been reserved under resolution of the Admission Committee/Executive Council of Aligarh Muslim University in respect of Muslim candidates only. The petitioners who are Hindu by caste as such have been deprived of their right to participate in the process of selection for admission to Post Graduate Courses against 50% of the total seats, reserved for admission through entrance examination conducted by the Aligarh Muslim University. This reservation of the entire 50% of the total seats to be filled on the basis of entrance examination conducted by the Aligarh Muslim University, has given rise to the present writ proceedings. The reservation so made by the Aligarh Muslim University in favour of Muslim candidates only on the strength of it being a minority University entitled to the benefit of Article 30 of the Constitution of India is the bone of contention between the parties to these petitions.

2. The petitioners allege that the Hon'ble Supreme Court in the case of **Azeez Basha V. Union of India** reported in AIR 1968 SC 662 has held that Aligarh Muslim University has been created by an Act of Parliament and, is not a minority institution so as to be covered under Article 30 of the Constitution of India. Therefore, the reservation provided in respect of Muslim candidates as aforesaid is wholly without jurisdiction and is even otherwise in violation of Article 29 (2) of the Constitution of India. It is further contended that the amendment made in Sections 2 (L) and 5 (2) (c) of the Aligarh Muslim University Act 1920 vide Act No. 622 of 1981 is ultra vires the Constitution of India, a brazen overruling of the judgment of the Hon'ble Supreme Court in the case of Azeez Basha (Supra) and be declared as such.

3. Since the vires of an Act of Parliament were questioned by means of the present writ petitions this Court on 11.03.2005, while passing an interim order, issued notice to the Attorney General of India. On behalf of the Attorney General written submission have been filed. He has been also represented by Sri Gopal Subramaniam, Senior Advocate, during oral submissions. Sri Ravi Kant, Senior Advocate, had advanced arguments on behalf of the petitioners. Aligarh Muslim University has been represented by Dr. Rajiv Dhawan, Senior Advocate, assisted by Smt. Sunita Agarwal.

4. The Union of India as well as the Aligarh Muslim University have taken a stand that the provisions of the Aligarh Muslim University Act, 1920 which were the basis for the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** referred to above have since been altered vide the amending Act No. 62 of 1981 with specific reference to Sections 2 (l) and 5 (2)(c), therefore, the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra) is no more a good law. Counsel for the respondents submit that the Aligarh Muslim University was an institution founded by the Muslims and it has only been incorporated as a University by the Act of 1920. There has been no change in substance of the original minority character of institution by such incorporation. It is contended that it is always open to the Parliament to change the basis or to remove the defects and the impediments pointed out by the Court and to explain and clarify the ambiguous part of the statute which has

resulted in a declaration of law by the Hon'ble Supreme Court provided such amendments are within the legislative competence of the Parliament. In view of the rival contentions raised by the parties which have been briefly noticed hereinabove the following issues arise for determination by this Court in the present writ petitions:-

1. Whether the Aligarh Muslim University is a minority institution entitled to protection under Article 30 of the Constitution of India and therefore it can provide for reservation of seats for Muslim candidates only. The said issue is to be decided with reference to the following sub-issues:--
(i) Whether the judgment and order of the Hon'ble Supreme Court in the case of **Azeez Basha**, AIR 1968 Supreme Court 662, is no more a good law in view of the change effected in the statutory provisions, vide amending Act 62 of 1981?
Whether the provisions of Act 62 of 1981 especially Section 2 (1) and Section 5 (2) are retrospective in nature and have the effect of declaring Aligarh Muslim University as a minority institution within the meaning of Article 30 of the Constitution?
2. Whether the amended Section 2 (l) and 5 (2) (c) are within the legislative competence of the Parliament and whether the said amendments are a brazen attempt to over rule the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra)?
3. Whether the reservation of the entire 50% seats for Muslims required to be filled on the basis of entrance examination to be conducted by the Aligarh Muslim University from internal as well as external candidates is arbitrary and violative of Article 14 and Article 29 (2) of the Constitution of India?
4. Whether the petitioner have any locus to maintain the present writ petitions, and whether the petitions have become infructuous in view of the subsequent developments?

5. In order to appreciate the aforesaid issues which arise in the present writ petitions it would be worthwhile to record certain basic facts leading to the dispute.

FACTS:

6. Aligarh Muslim University was created by legislative Act No. 21 of 1920 (hereinafter referred to as the Act of 1920. The long title of the said Act read as follows:-

"WHEREAS it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies Registration Act, 1860, which are respectively known as the Muhammadan Anglo Oriental College, Aligarh, and the Muslim University Association, and to transfer to and vest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committee;"
Section 2 (h) of the 1920 Act defines the University as follows:--
"(h) "University" means the Aligarh Muslim University."
Section 5 (2) of the 1920 Act reads as follows:--

"5. The University shall have the following powers of the University:--
(1) .....

(2) To promote Oriental and Islamic study and give instruction in Muslim theology and religion and to impart moral and physical training;"

7. The administration of the University was vested in officers and the Bodies constituted under the Act itself e.g. Academic Council, Executive Council, Chancellor, Pro-Chancellor, Vice-Chancellor, Pro-Chancellor, Honorary Treasurer, Registrar etc. {Reference-Sections- 16 and 22 of the Aligarh Muslim University Act.

8. By Aligarh Muslim University Amending Act No. 52 of 1951 (hereinafter referred to as the 1951 Act) and Aligarh Muslim University Amending Act No. 19 of 1965 (hereinafter referred to as the 1965 Act) certain amendments were made in 1920 Act, whereby Section 9 of the 1920 Act was deleted and Section 8 was amended. Certain amendments were also made in Section 13 with regard to the seat and place of Lord Rector. Section 14 was amended with regard to the powers of the Visiting Board. The substantial change was to the proviso to Section 23 (1) of the 1920 Act, which required all the members of the Court would only be Muslims, was deleted. Thus by the said amendments, Non-Muslims could also become members of the Court. By amending of Act, 1965. Sub-sections (2) and (3) of Section 23 were deleted, as a result whereof the Court no longer remained the supreme governing body and by amendments in Sections 28, 29, 34 and 38 the powers of the Executive Council were correspondingly increased. Changes were also made in the constitution of the Executive Council with a specific declaration that w.e.f. 20th day of May, 1965, every member of the Court and Executive Council shall cease to hold office as a member of the Court or Executive Council, as the case may be. This paved the way for a fresh Court and Executive Council being created. Constitutionality of the said amendments was subject matter of challenge before the Hon'ble Supreme Court in the case of **Azeez Basha** (supra). The said amendments were challenged by the members of the Muslim community basically on the ground that Aligarh Muslim University has been established by a Muslim minority, any legislative amendments incorporated vide Act of 1951 and Act of 1965, which takes away the right of the Muslims to administer the said educational institution would be violative of Article 30 of the Constitution of India. It was, therefore, claimed that the Aligarh Muslim University being a minority University could be administered by the Muslims only.

9. The challenge so made in **Azeez Basha's** case (supra) by the petitioners therein was resisted by the Union of India and a stand was taken that the Aligarh Muslim University has not been established by the Muslims nor they have any right under Article 30 of the Constitution of India to administer the same. The Hon'ble Supreme Court after noticing the various facts and provisions of the 1920 Act, as well as the historical back ground in which the Aligarh Muslim University has been created came to the conclusion that the Aligarh Muslim University has been established by a Legislative Act of Government of India. A Central legislation has brought into existence the Aligarh Muslim University and it was so established. The Hon'ble Supreme Court in no uncertain terms held

that the Aligarh Muslim University has not been established by the Muslims nor they have any right of administration. The amendments under challenge being within the legislative power of the Parliament cannot be questioned on the ground that they are violative of Article 30 of the Constitution of India.

10. Subsequent to the said judgment of the Hon'ble Supreme Court the Parliament enacted the Aligarh Muslim University Amendment Act 1981 (Act No. 62 of 1981) whereby amongst others the long title as well as Section 2 (l) and 5 (2) (c) and Section 23 were substituted. The amended sections are reproduced below:--

"2(l) "University" means ** the educational institution of their choice established by the Muslims of India, which originated as the Muhammadan Anglo-Oriental College, Aligarh and which was subsequently incorporated as the Aligarh Muslim University.

5 (2) (c). to promote especially the educational and cultural advancement of the Muslims of India;

23. **The Court** - (1) The Court shall consist of the Chancellor the Pro-Chancellor, the Vice-Chancellor and the Pro-Vice-Chancellor (if any) for the time being, and such other persons as may be specified in the Statutes.

(2) The Court shall be the supreme governing body, of the University and shall exercise all the powers of the University not otherwise provided for by this Act, the Statutes, the Ordinances and the Regulations and it shall have power to review the acts of executive and the Academic Councils (save where such Councils have acted in accordance with powers conferred on them under this Act, the Statutes or the Ordinances).

(3) Subject to the provisions of this Act, the Court shall exercise the following powers and perform the following duties, namely:-

(a) to make Statutes and to amend or repeal the same;

(b) to consider Ordinances;

(c) to consider and pass resolutions on the annual report, the annual accounts and the financial estimates;

(d) to elect such persons to serve on the authorities of the University and to appoint such officers as may be prescribed by this Act or the Statutes; and

(e) to exercise such other powers and preform such other duties as may be conferred or imposed upon it by this Act or the Statutes."

11. In the light of the amendments as brought about by the Act No. 62 of 1981 the Admission Committee of the Aligarh Muslim University in its meeting held on 10th January, 2005 recommended that the total seats available for Post Graduate Medical Courses be reserved in the manner as follows:--

(a) 25% of the total seats be reserved for internal candidates i.e. institutional quota;

(b) 75% of the total seats be termed as All India quota seats to be filled as below;

(75% All India quota seats be bifurcated into two parts, (i) 50% of the total seats be reserved for Muslims only to be filled by Entrance Examination to be conducted by the Aligarh Muslim University, Aligarh from external as well as internal candidates, (ii) 25% of the total seats be left for open category to be filled through the All India Examination to be conducted by the All India Institute of Medical Sciences, New Delhi.)

12. The recommendations of the Admission Committee were considered and accepted by the Academic Council and Executive Council in its meetings held on 15.01.2005 and 19.01.2005 respectively. The decision so taken, was communicated to the Union of India by the Registrar of the University. On 10.02.2005 the minutes of the Executive Council, approving the reservation as aforesaid was formally forwarded to the Central Government. A meeting between the Vice Chancellor and the officers of the Ministry for Human Resources, Government of India, took place on 21.01.2005 and 23.02.2005. The Union of India is said to have communicated its acceptance to the proposed reservation vide letter dated 25.02.2005.

13. The petitioners who are Hindu by caste were excluded from participation in the selections for admission against 50% seats which have been reserved for Muslims, the admission whereof was to be done on the basis of entrance examination to be conducted by the Aligarh Muslim University. The reservation so provided in respect of 50% of the total seats for Muslims, to be filled by entrance examination to be conducted by the Aligarh Muslim University itself from internal as well as external candidates has led to the filing of the present writ petitions before this Court.

CONTENTIONS:

14. Sri Ravi Kant, Senior Advocate, assisted by Sri J. J. Munir Advocate on behalf of the petitioners has contended:
(a) that Aligarh Muslim University, which has been declared to be a non-minority institution by the Hon'ble Supreme Court vide its judgment in the case of Azeez Basha (supra) could not have provided any reservation in respect of Muslim students only as has been done under the, resolution of the Admission Committee dated 10.01.2005, the resolution of Academic Council dated 15.01.2005 and the decision of the Executive Council dated 19.01.2005. It is contended that Section 2 (l) and Section 5 (2) (c) of the amending Act have the effect of virtually over ruling the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra) which is legally not permissible. The Hon'ble Supreme Court has as a matter of fact recorded a finding that Aligarh Muslim University has been established by an Act of Legislature, and therefore cannot be said to have been established by the Muslim minority so as to claim protection of Article 30 of the Constitution of India. The finding so recorded by the Hon'ble Supreme Court could not have been over turned by introducing Section 2 (l) and Section 5 (2) (c) to the 1920 Act by Amending Act of 1981. Counsel for the petitioners points out that the law declared by the Hon'ble Supreme Court is binding upon one and all throughout the country in view of Article 141 of the Constitution of India and it is a matter of little difference as to whether the Aligarh Muslim University was a party to the proceedings in the case of **Azeez Basha** (supra) or not.
(b) It is further contended that the Union of India had taken a firm stand before the Hon'ble Supreme Court in the case of Azeez Basha (supra) that Aligarh Muslim University has not been established by the Muslim minority community and that it has been established under a legislative Act, the institution is not entitled to the protection of Article 30 of the Constitution of India. The Union cannot now turn around and assert in these writ

proceedings that the Aligarh Muslim University has been established by the minority community.

(C) With reference to the judgments in the case of **People's Union for Civil Liberties (Pucl) & another Vs. Union of India & others, 2003 (4) SCC 399, Bakhtawar Trust & others Vs. M.D. Narayan & ors; 2003 (5) SCCC 298, S. S. Bola & ors. Vs. B.D. Sardena & ors, AIR 1997 SC 3127, Meerut Development Authority Vs. Satya Veer Singh, 1996 JT 9, SCC 382, in the matter of Cauvery Water Dispute Tribunal, AIR 1993 (1) Suppl. SCC 96**, it is submitted that the legislative power cannot be extended so as to over reach / reverse the decision of the Court of law.

(d) Hon'ble Supreme Court of India in the case of **N.T. Devin Katti V. Karnataka Public Service Commission and others 1990 (3) SCC 157** held that pending selections would not be governed by the subsequent amendment in the rules, there is no question of applying new rules or order to the pending selection.

(e) The reservation made for Muslims in respect of the entire 50% of the total seats, the selection whereof was to be done through an examination to be conducted by Aligarh Muslim University would be hit by Article 29 (2) of the Constitution of India. Even otherwise, the manner in which the reservation has been effected (i.e. 100% reservation for one category of seats would be violative of Article 14 of the Constitution of India. Petitioners being fully qualified for being considered against the aforesaid 50% of the total seats, have every right to maintain the present writ petition and to insist upon the Aligarh Muslim University to hold selection for admission against 50% seats through entrance examination conducted by the Aligarh Muslim University itself in accordance with law ensuring the right of the petitioners to participate in the said process of selection.

15. Dr. Rajiv Dhawan, Senior Advocate, and Mr. Gopal Subramaniyam, Senior Advocate, Supreme Court of India, on behalf of Aligarh Muslim University and the Union of India respectively have raised common contentions so far as minority status claimed by the Aligarh Muslim University and the reservation provided for Muslim students is concerned, namely:

(1) The legislative competence of Parliament to enact a law in respect of Aligarh Muslim University is referable to Entry 63 of List I of VIIth Schedule to the Constitution of India and therefore the competence of the Parliament to enact a provision like Section 2 (l) and Section 5 (2) (c) cannot be questioned on the ground of legislative competence. The amending Act of 1981 has been enforced to fulfill the fundamental rights of Muslims, who were in minority in the undivided country prior to independence and in India even after independence with specific reference to Article 30 of the Constitution of India. Such legislations do not create a fundamental right. They only ensure fulfillment of the fundamental right of the minority. The amending Act 1981 recognizes the historical fact as was apparent from the records before the Parliament to the effect that the Aligarh Muslim University was established by the Muslims and therefore the declaration in Section 2 (l) reads with Section 5 (2) (c), being a recognition of historical fact which the petitioners have not been able to demonstrate in any manner to be arbitrary or whimsical, cannot be faulted with. The judgment of the Hon'ble

Supreme Court in the case of Azeez Basha (supra) was based on an interpretation of the statutory provisions as were then part of the Aligarh Muslim University Act. The basis of the conclusion arrived at by the Hon'ble Supreme Court having been substituted by the Amendment Act of 1981, the judgment in the case of Azeez Basha (Supra) looses all force subsequent to amendments under Act of 1981. Aligarh Muslim University has now been rightly recognized to have been established by a minority community (Muslims). It is submitted that 1920 Act was only for the purpose of incorporation of an institution which was established by the Muslims, into a University. There was only a change in the form and not in substance by such incorporation. The Aligarh Muslim University being an autonomous University, is competent to lay down its own process for admission of students including reservation in favour of Muslim students subject, however, to the same being reasonable i.e. within the parameters fixed by the Hon'ble Supreme Court in its various judgments. It is not necessary for the Central University to seek any prior approval of the Government before providing reservation in respect of minority students. However, in the facts of the case the Central Government has in fact approved the reservation so provided by the Aligarh Muslim University. As such the reservation to the extent of 50% of the total seats reserved by the Aligarh Muslim University for Muslim students only in respect of Post Graduate Medical Courses cannot be said to be constitutionally invalid in any manner. This reservation to the extent of 50% of the total seats is in conformity with judgment of the Hon'ble Supreme Court in the case of **Saurabh Chaudhari and others Vs. Union of India and others**; (2003) 11 SCC 146.

16. The manner to administer is left to the minority community. The methods applied by the minority institutions are usually to ensure the minority purpose by a combination of delineating the purpose of the institution and ensuring a presence of the minority community on various bodies in charge of the institution.

17. It is further submitted that the petitioners have no locus to challenge the reservation so provided by the Aligarh Muslim University in respect of Muslim candidates. Lastly it has been submitted that the writ petitions have become infructuous in view of subsequent developments as well as in view of the fact that practically all the petitioners have either been admitted to the various courses or they have not been found ineligible for being admitted in any of the courses of Aligarh Muslim University.

18. Sri Gopal Subramaniam, Senior Advocate, has submitted that the Amending Act of 1981 is recognition of the historical fact that the Aligarh Muslim University was established by Muslims who were in minority in India at all the relevant time. Such recognition of a historical fact by the Amendment Act, 1981 cannot be objected to inasmuch as it is within the legislature competence of the Parliament with reference to Entry 63, List-I, Schedule-VII of the Constitution of India. The plenary power of the Parliament can be questioned only on the grounds (a) that the legislature has no competence to enact the law, (b) that the legislation is hit by the rights guaranteed under Part-III of the Constitution. The legislative competence of the Parliament

to enact the Amendment Act of 1981 is not in dispute. The Amendment Act, 1981 is only in furtherance of the commitment of the State to fulfill and protect the rights of the minority community and as such it cannot be said to be hit by any of the Articles contained in Part-III of the Constitution of India.

19. The Parliament has not made any attempt to over reach or over rule the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra). The Parliament in exercise of its legislative power has brought the Act in tune to recognize the historical facts. It is further clarified that the stand taken by the Attorney General of India in written submissions to the effect that no permission of the Central Government is required by the Central University which is an autonomous body for providing reservation in respect of Muslim candidates, is based on true and correct application of law laid down by the Hon'ble Supreme Court in the cases of **TMA Pai Foundation Vs. State of Karnataka; (2002) 8 SCC 481 and Islamic Academy of Education and another Vs. State of Karnataka and others; (2003) 6 SCC 697, as well as in Saurabh Chaudhari's case (Supra).** The University being autonomous body has a right to fix the reservation quota for students of minority community within the permissible limits on its own.

20. In respect of the doubts that had arisen with regard to original intention of its founders to set up a Muslim University large number of documents were before the Legislature, for establishing a clear intention of the Muslim community to establish a Muslim University by converting the original M.A.O. College through an Act of incorporation. Accordingly the Parliament subsequent to the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra) had to step in to clear the haze, which was the basis for the judgment of the Hon'ble Supreme Court and to declare that the original minority character of M.A.O College was never lost by incorporation brought by Legislative Act for enforcing the University Act, 1920.

21. The declaration made in that regard by Amendment Act, 1981 cannot be said to be based on no material so as to categorize the amendment as a fraud on the legislative powers or on the Constitution. Census of various years has been produced before Court in support of the plea that Muslims were in minority not only in United Province but in the entire country in the year 1920 when the Aligarh Muslim University was incorporated and even today.

22. The contentions have been formulated in five broad heads by the Counsel for the respondents:--

(a) It is within the legislative competence of the Parliament vide entry 63, List-I, Schedule VII of the Constitution of India to enact a legislation for Aligarh Muslim University which is declared to be an institution of national importance and therefore the Amending Act of 1981 is within the legislative competence of the Parliament.

(b) By the Amending Act of 1981 the Parliament has changed the basis on which the previous decision of the Hon'ble Supreme Court was founded. The change so effected cannot be termed as usurption of the judicial powers. The Amendment Act has the effect of removing the ambiguity and curing the

defects as were noticed in the earlier judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra). Such amendment being within the legislative competence of the Parliament cannot be said to be a brazen overruling of the judgment of the Hon'ble Supreme Court by the legislature which is prohibited.

(c) The Parliament has fulfilled its obligation to protect fundamental right and has only given effect to its constitutional duty to protect the fundamental rights of the minority community by recognizing the fact that Aligarh Muslim University has been established by the Muslims. The Parliament has only declared the doubts, which had arisen because of the language of the earlier Act. There is no impediment for the Parliament to give due recognition to the fundamental rights of the minority community, specifically if the Parliament feels that there has been a deprivation of such a right by an Act of the Parliament itself. In support of the contention the counsel for the Aligarh Muslim University has placed reliance upon the judgments of the Hon'ble Supreme Court in the cases of *State of U.P. Vs. Zalim & ors.; 1996* **SCC 751 (Crl.7),** *Bakhtawar Trust (Supra) and Shri Prithvi Cotton Mills Ltd. Vs. Broach Borough Municipality* **1969(2) SCC 233.**

(d) The Amending Act of 1981 is a declaratory statute, retrospective in nature it has removed or cured the defects which were noticed in the earlier legislation, subject matter of consideration in the case of **Azeez Basha**. Because of the curative action of the competent legislature the earlier judgment becomes inoperative and unenforceable. (reference Ujagar Prints II Vs. Union of India & ors.; (1989) 3 SCC 488).

(e) Once it is established that Aligarh Muslim University has been established by a minority community, the right to administer the same is vested in the minority community. In support thereof it is contended that there can be no waiver of the right of administration. Mere non-performance or the defeasance of the right will not waive the right and the minority community can claim at any point of time, such right of administration, so long as the establishment of the institution by the minority community is established.

(f) Aligarh Muslim University being a Muslim minority institution has a right to provide quota in respect of students of its own community. Such a right has been recognized by Constitution Bench Judgment of the Hon'ble Supreme Court in the cases of *TMA Pai (Supra) and St. Stephen's College Vs. University of Delhi*; **(1992) SCC 558**.

(g) The Aligarh Muslim University has taken a well reasoned decision in respect of reservation of seats for Muslims in Post Graduate Courses which has since received acceptance by the Union of India as per letter dated 25.02.2000. In the latest judgment of the Hon'ble Supreme Court in the case of *P.A. Inamdar and others v. State of Maharashtra and others;* **2005(3) ESC (S.C.) 373** it has been further clarified that admissions in minority institutions should reflect its minority character which may be jeopardized if they do not do so.

(h) Lastly it is submitted that the petitioners have no locus to maintain the present writ petition inasmuch as the petitioners are not entitled to be considered against 50% quota seats which are reserved for Muslim candidates as they do not belong to the particular minority community. The open category seats which were subject matter of

admission under the Entrance Examination held by the All India Institute of Medical Sciences have gone unfilled and the petitioners could not compete in the said Entrance Examination. Further in view of the judgment of the Hon'ble Supreme Court in the case of **Medical Council of India Vs. Madhu Singh & ors.;** (2002) 7 SCC 258 since the admission process has to be completed by a particular date no effective relief can be granted to the petitioners at such a belated stage. It is, therefore, submitted that the writ petition may be dismissed.

23. On behalf of National Commission for Minority Educational Institutions intervention application has been filed. Sri Vijai Bahadur Singh, Senior Advocate, assisted by Sri U. P. Singh Advocate has been heard on behalf of the Intervener. The counsel for the National Commission for Minority Educational Institutions (hereinafter referred to as the Commission) after referring to the historical back ground in which the said Commission has been established, has made reference to facts leading to establishment of the University as well as to various provisions of the Aligarh Muslim University Act. His submissions are to the same effect as have been raised in detail by Senior Advocates appearing for the University and the Union of India, therefore, it is not necessary to reiterate the same all over again.

24. Before adverting to the consideration of the issues raised by the contesting parties it would be in the interest of justice that the Constitutional provisions and legal principles on which the present writ petitions require consideration by this Court may be stated.

Constitutional Scheme and Legal Principles:

25. The preamble of the Constitution of India indicates the objective of the founding fathers who claim to speak on behalf of the people of India. The word "Secular" and "Socialist" were inserted by 42nd Constitutional Amendment in the preamble of the Constitution of India. India is a country of secular people living together. The people of India in delegating legislature, executive and judiciary their respective powers retained for themselves certain rights termed as fundamental rights, which are paramount to the delegated powers. Reference may be had to the judgment of the Hon'ble Supreme Court of India in the case of A.K. Gopalan v. State of Madras; reported in **AIR 1950 SC 27**, wherein it has been said that "*it is true to say "that in a sense the people delegated to the legislative, executive and the judicial organs of the State, there respective powers while reserving to themselves the fundamental rights, which they made paramount by providing that the State shall not make any law, which takes away or abridges the rights conferred by that part*."

26. In the case of State of West Bengal v. Subodh Gopal Bose; reported in **AIR 1954 SC 92** it has been declared that Fundamental rights are natural basic rights which are recognized and guaranteed as natural rights inherent in the status of a citizen of a free country.

Part-III of the Constitution of India with subtitle "Fundamental Rights"

contains Article 12 to Article 35. Such rights are guaranteed against State action, which in turn includes the Parliament and State Legislature as well as other instrumentalities of the State (Reference Article 12 of the Constitution of India). Any law made in violation of fundamental rights would be null and void (Reference Article 13 of the Constitution of India).

27. There is a broad distinction between fundamental rights guaranteed by the Constitution and those rights which are guaranteed by a Statute. If the Statute deals with the right, which is not fundamental in character, the Statute can take it away but the Statute cannot take away a fundamental right. Reference- M/s Pannalal Binjraj and others v. Union of India and others; AIR **1957 S.C. 397**. Thus, fundamental rights need no recognition or conferment by any statutory enactment of the legislature nor any law is necessarily to be framed by the Parliament for enforcement of such fundamental rights. However, it may be emphasised that these fundamental rights are also subject to ultimate laws, which may be made in the interest of the nation.

28. It is clear on a consideration of the provisions of Part-III of the Constitution that the maker of the Constitution deliberately and advisorily made the clear distinction between fundamental rights available to "any person" and those guaranteed to "all citizens". In other words "all citizens" are persons but all persons are not citizens under the Constitution. The legal significance of "all citizens" has been explained by the Hon'ble Supreme Court of India in its judgment, report in **A.I.R. 1963 SC 1811**; *State Trading Corporation of India, Ltd. v. The Commercial Tax Officer and others*, with reference to the provisions of Article 5 to Article 11 of the Constitution of India read with the Citizenship Act, 1955, a distinction between nationality and citizenship and between natural persons, in contradistinction to legal juristic persons, covered by the definition of 'Citizens' entitled to the benefit of the fundamental rights made available to citizens only has been considered in detail. The said legal proposition has been reiterated in the case of *Tata Engineering and Locomotive Co. Ltd. v. The State of Bihar and others*; reported in **AIR 1965 SC 40** as well as in the latest judgment of the Hon'ble Supreme Court in the case of Dharam Dutt and others v. Union of India and others; reported in **(2004) 1 SCC 712** (Reference para 30).

29. In the aforesaid legal background, the Hon'ble Supreme Court of India has reiterated time and again that an incorporated company or corporation formed by a group of citizens has a distinct legal entity viz-a-viz the citizens who have formed the same, the Corporation or Company may claim rights which are available to persons only but they are not entitled to claim fundamental rights, which are available to citizens of the country. Suffice is to reproduce relevant portion of para 30 of the judgment of the Hon'ble Supreme Court in the case of Dharam Dutt (Supra), which reads as follows:

"As soon as citizens form a company, the right guaranteed to them by Article 19 (1)(c) has been exercised and no restraint has been placed on that right and no infringement of that right is made. Once a company or a corporation is formed, the business which is carried on

by the said company or corporation is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing alone and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens. In our opinion, the same principle as has been applied to companies and corporations would apply to a society registered under the Societies Registration Act.

30. It is thus settled that incorporated legal juristic entity cannot claim fundamental rights, which are guaranteed by the Constitution in favour of citizens only.

31. Article 14, 20, 21, 22 and 27 are rights, which are guaranteed in favour of a person, which may include natural as well as juristic persons, while rights guaranteed under Article 19, 26, 29 and 30 are rights which are available to citizens only, who are necessarily natural persons and therefore said rights are not available to other juristic legal person.

32. Article 29 and 30 of the Constitution of India, which are subject matter of consideration in the present writ proceeding, are group of Articles relating to cultural and educational rights which are quoted herein below:

"29 (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30 (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

33. It has been settled by series of judgments that the right guaranteed under Article 30 of the Constitution of India is available to the citizens of India only. Suffice is to reproduce relevant portion of the paragraph 28 of the Constitutional Bench judgment of the Hon'ble Supreme Court of India in the case of St. Stephen's College v. University of Delhi; reported in **(1992) 1 SCC 558**, wherein it has been held as follows:

"Prior to the commencement of the Constitution of India, there was no settled concept of Indian citizenship. This Court, however, did reiterate that the minority competent to claim the protection of

Article 30 (1) of the Constitution, and on that account the privilege of establishing and maintaining educational institutions of its choice, must be a minority of persons residing in India. They must have formed a well defined religious or linguistic minority. It does not envisage the rights of the foreign missionary or institution, however, laudable their objects might be. After the Constitution, the minority under Article 30 must necessarily mean those who form a distinct and identifiable group of citizens of India.

34. Right to establish an administer and educational institution has been subject matter of consideration in series of judgments of Hon'ble Supreme Court of India. The Article is in two parts. The first right is the initial right to establish institutions of minority's choice. "Establishment" means bring into existence of an institution and it must be by a minority community, it is of little relevance if the member of the other community take advantage of such institution or bring in income for establishment of the institution. The second part of right relates to the administration of such institutions. "Administration" means the 'management of affairs' of the institution. The management must be free of control, so that the founders or their nominees can mould the institutions as they think fit, and in accordance with their ideas of how the interests of the community in general and the institution in particular will be best served. No part of the management can be taken away and vested in another body without encroachment of guaranteed fundamental rights. Reference- State of Kerala v. Very Rev. Mother Provincial; reported in **AIR 1970 Supreme Court 2079**.

35. The extent of the meaning of the word 'Establish' was also subject matter of consideration in the case of Azeez Basha (Supra), which shall be dealt with at a later stage in the judgment. The right to administer broadly includes the following rights:

(a) Admit students,
(b) Set up a reasonable fee structure,
(c) Constitute a governing body, and
(d) Appoint staff and to take disciplinary action.

(Reference may be had to the Constitutional Bench Judgment of the Hon'ble Supreme Court in the case of T.M.A. Pai Foundation v. State of Karnataka; reported in **(2002) 8 SCC 481** -para 50)

36. The legislative power of the Parliament, to frame a law in respect of the subject enumerated under respective entries of List-1 and List-3 of the Seventh Schedule of the Constitution of India, has been enshrined under Article 245 and 246 of the Constitution of India. In the case of Ujagar Prints II v. Union of India, **(1989) 3 SCC 488**, the Hon'ble Supreme Court held as follows:

"Entries in the legislative lists, it may be recalled, are not sources of the legislative power, but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow and pedantic sense."

37. Aligarh Muslim University has been declared to be an institution of national importance, and accordingly

included in Entry 63, List-1, (Union List) of Seventh Schedule to the Constitution of India. Therefore, the legislative competence of the Parliament to frame law in respect of the aforesaid subject matter is not in doubt nor any doubt in respect of such legislative competence of the Parliament has been raised. The legislative power of the Parliament to enact a law on the subject includes the power to re-enact, repeal, amend or change a Statute falling under the respective entry. The legislative power of the Parliament can also be invoked for fulfilling the fundamental rights or for giving effect to such rights. As a matter of fact, the Parliamentary Acts for protecting religious endowment through various regulatory Statute is well recognized. Reference-Sri Sri Visheshwaran of Kashi Nath v. State of U.P. **(1997) 4 SCC 606** (Kashi temple), A.S. Narayana v. State of Andhra Pradesh; **(1996) 9 SCC 548**. Such statutory enactment do not in any way curtail the rights conferred in respect of the religious institutions.

38. The legislature, under the Constitution, has power to legislate respectively as well as prospectively. By such exercise of power, the legislature can retrospectively remove the basis of a decision rendered by a competent Court, thereby rendering that decision ineffective. The power of legislature to remove the defect which is the cause, for invalidating the law, by the appropriate legislation is well recognized. However, such legislative power is to be exercised in a manner that it would no more be possible for the court to arrive at the same verdict under the changed law. In other wards, the every premises of the earlier judgment should be degraded thereby resulting in fundamental change of the basis upon which the earlier judgment was founded. A decision of a Court of law has a binding effect unless the very basis upon which it is made is so altered that the said decision would not have been made in the changed circumstances. It is well settled that a validating Act may even make ineffective judgment and orders of the competent Court provided, it by retrospective legislation removes the cause of invalidity or the basis that has led to those decisions. Reference- **(1969) 2 SCC 283**; Sri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality and others, **AIR 1997 SC 3127**; S.S. Bola and others v. B.D. Sardana and others, **(2003) 5 SCC 298**; Bakhtawar Trust and others v. M.D. Narayan and others, **(2004) 1 SCC 712**; Dharam Dutt and others v. Union of India and others. However, the Hon'ble Supreme Court has specifically held that the legislature cannot negate a prior judgment of the Constitutional Court of Law except by legislative Acts, which alter the very basis of the earlier judgment. Any other attempt would sound the death knell of the rule of Law, as has been observed by the Hon'ble Supreme Court in the following decisions. Reference- People's Union for Civil Liberties v. Union of India; **(2003) 4 SCC 399 (Para-34)**, P. Sambha Murthy v. State of Andhra Pradesh (1987) 1 SCC 362 and Dharam Dutt and others v. Union of India and others; reported in **(2004) 1 SCC 712**.

39. In view of the aforesaid judgments of the Hon'ble Supreme Court, for judging as to whether the earlier judgment of the Hon'ble Supreme Court has been rendered inoperative or no more good law by the subsequent legislative enactment of the Parliament following two issues arise- first, what was the basis

of the earlier decision; and second, what, if any, may be said to be the removal of that basis. [Reference- para 27 of Bakhtawar Trust Case (supra)]. In the Constitutional Bench judgment of the Hon'ble Supreme Court in the matter of Cauvery Water Dispute Tribunal, **AIR 1993 (1) Suppl. SCC 96**, it has held as follows:

"The principle which emerges from these authorities in that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal."

40. It is settled that an amending Act purely clarificatory in nature will have retrospective effect. Reference- (1995) 2 SCC 639, AIR 1970 SC 340; Kabul Singh v. Kundan Singh. Whether an Amending Act is retrospective and declaratory in operation or prospective would depend upon the purposes of the Act object of the Amending Act and the language used.

41. What should be the extent for the minorities educational institutions to admit students of minority group would depend on variable factors. The situation would be according to the type of the education and nature of the institution. Suffice is to point out that higher the level, lesser should be the reservation. Reference- para 149 and 151 of T.M.A. Pai Foundation Case (supra). However, it is for the State authorities to properly balance the interest of all. The relevant authority for determining the quantum of reservation in case of minority university incorporated under Central Statute, is the Central Government. Reference-Bharti Vidyapeeth (Deemed University) and others v. State of Maharashtra and another; **(2004) 11 SCC 755 (Para 25)**. The Constitutional Bench of Hon'ble Supreme Court in the case of Saurabh Chaudhary (2003) 1 SCC 146 has held that reservation can be in particular cases up to 50% of the total seats for post graduate medical courses on the basis of the institutional preference.

Findings:--

42. Part-III of the Constitution with sub-title Fundamental Rights' contains Articles 12 to 35. The rights guaranteed under the aforesaid Articles are guaranteed against the State. The 'State' in turn include within its ambit the Government and the State Legislature or any local or other authority within the territory of India or under the control of India (reference Article 12). Articles 12 to 35 make distinction between a citizen and a person. Certain rights are conferred on any person e.g. Right to equality, contained in Article 14, rights guaranteed under Articles 20, 21, 25, and 27. Similarly certain fundamental rights are conferred only on citizen e.g. right to freedom contained in Article 19, right guaranteed under Articles 29 and 30. Rights available to persons including corporations which are juristic persons or persons in the eyes of law. So far as fundamental rights guaranteed to the citizens are concerned such rights are available only to citizens (natural persons). Such fundamental rights which are available to citizens are not available

to corporations or other body corporates which they do not answer the description of citizen. Suffice it to refer the judgments of the Hon'ble Supreme Court in the cases of Hans Muller v. Supdt. Presidency Jail, Calcutta, **AIR 1955 367=1955(1) SCR 1285** and The Tata Engineering and Locomotive Co. Ltd. v. The State of Bihar and others, **AIR 1965 Supreme Court 40**.

43. The facts qua the establishment of Aligarh Muslim University were subject matter of consideration before the Hon'ble Supreme Court in the case of Azeez Basha (supra) and the Hon'ble Supreme Court after referring to the historical back ground of the establishment of the Aligarh Muslim University has recorded its conclusion. It would be worthwhile to refer to para 29 of the said judgment.

"We are therefore of opinion that the Aligarh University was neither established nor administered by the Muslim minority and therefore there is no question of any amendment to the 1920 Act being unconstitutional under Article 30 (1) for that Article does not apply at all to the Aligarh University."

44. From the aforesaid judgment of the Hon'ble Supreme Court it is to be seen as to whether the conclusion about establishment of the Aligarh Muslim University is solely based upon the interpretation of provisions (which have since been amended) of the Aligarh Muslim University Act, 1920, as were existing on the date of consideration or is based upon various factors and over all reading of the Act itself. If the answer to the question is that the findings are based solely on the provisions (which have since been amended) of the Aligarh Muslim University Act, 1920, as they then stood the counsel for the respondents would be justified in contending that the foundation of the judgment has since been amended/removed by the Parliament, by means of the Amending Act of 1981, and, therefore, the law laid down by the Hon'ble Supreme Court in the case of **Azeez Basha** (supra) no more holds good. To that extent the amendment made by the Parliament cannot be said to be a brazen overruling of the judgment of the Hon'ble Supreme Court. It is only at that stage the Court has to be seen as to whether the amendments made by the Act of 1981 so fundamentally alter the basis/foundation of the judgment of the Hon'ble Supreme Court in the case of **Azeez Basha** (supra) or not?

45. The Court may therefore reproduce relevant part of the judgment of the Hon'ble Supreme Court qua the minority status of Aligarh Muslim University. The relevant paras are reproduced below:--

*"**(3)** It is necessary to refer to the history previous to the establishment of the Aligarh University in 1920 in order to understand the contentions raised on either side. It appears that as far back as 1870 Sir Syed Ahmad Khan thought that the backwardness of the Muslim community was due to their neglect of modern education. He therefore conceived the idea of imparting liberal education to Muslims in literature and science while at the same time instruction was to be given in Muslim religion and traditions also. With this object in mind, he organised a Committee to devise ways and means for educational regeneration of Muslims and in May, 1872 a society*

called the Muhammadan Anglo-Oriental College Fund Committee was started for collecting subscriptions to ralise the goal that Sir Syed Ahmad Khan had conceived. In consequence of the activities of the committee a school was opened in May, 1873. In 1876, the school became a High School and in 1877 Lord Lytton then Viceroy of India, laid the foundation stone for the establishment of a college. The Muhammadan Anglo-Oriental College, Aligarh (hereinafter referred to as the M.A.O. College) was established thereafter and was, it is said, a flourishing institution by the time Sir Syed Ahmad Khan died in 1898.

(4) *It is said that thereafter the idea of establishing a Muslim University gathered strength from year to year at the turn of the century and by 1911 some funds were collected and a Muslim University Association was established for the purpose of establishing a teaching University at Aligarh. Long; negotiations took place between the Association and the Government of India, which eventually resulted in the establishment of the Aligarh University in 1920 by the 1920 Act. It may be mentioned that before that a large sum of money was collected by the Association for the University as the Government of India had made it a condition that rupees thirty lakhs must be collected for the university before it could be established. Further it seems that the existing M.A.O. College was made the basis of the University and was made over to the authorities established by the 1920 Act for the administration of the university along with the properties and funds attached to the college the major part of which had been contributed by Muslims though some contributions were made by other communities as well.*

(5) *It is necessary now to refer in some detail to the provisions of the 1920 Act to see how the Aligarh University came to be established. The long title of the 1920 Act is in these words.*

"An Act to establish and incorporate a teaching and residential Muslim University at Aligarh."

The preamble says that "it is expedient to establish and incorporate a teaching and residential Muslim University at Aligarh, and to dissolve the Societies registered under the Societies Registration Act, 1860 which are respectively known as the Muhammadan Anglo-Oriental College, Aligarh, and the Muslim University Association, and to transfer and vest in the said University all properties and rights of the said Societies and of the Muslim University Foundation Committee." It will be seen from this that the two earlier societies, one of which was connected with the M.A.O. College and the other had been formed for collecting funds for the establishment of the University at Aligarh, were dissolved and all their properties and rights and also of the Muslim University Foundation Committee, which presumably collected funds for the proposed university were transferred and vested in the University established by the 1920 Act.

(6) *Section 3 of the 1920 Act laid down that "the First Chancellor, Pro-Chancellor and Vice-Chancellor shall be the persons appointed in this behalf by a notification of the Governor G3eneral in Council in the Gazette of India and the persons specified in the schedule as the first members of the Court", and they happened to be all Muslims. Further Section 3 constituted a body corporate by the name of the Aligarh Muslim University and this body corporate was to have perpetual succession and a Common*

Seal and could sue and be sued by that name. Section 4 dissolved the M.A.O. College and the Muslim University Association and all property, movable and immovable, and all rights, power and privileges of the two said societies, and all rights, powers and privileges of the Muslim University Foundation Committee were transferred and vested in the Aligarh University and were to be applied to the objects and purposes for which the Aligarh University was incorporated. All debts, liabilities and obligations of the said societies and Committee were transferred to the University, which was made responsible for discharging and satisfying them. All reference in any enactment to either of the societies or to the said Committee were to be construed as reference to the University. It was further provided that any will deed or other documents, whether made or executed before or after the commencement of the 1920 Act, which contained any bequest, gift or trust in favour of any of the said societies or of the said committee would, on the commencement of the 1920 Act be construed as if the University had been named therein instead of such society or committee. The effect of this provision was that the properties endowed for the purpose of the M.A.O. College were to be used for the Aligarh University after it came into existence. These provisions will show that the three previous bodies legally came to an end and everything that they were possessed of was vested in the University as established by the 1920 Act. Section 5 provided for the powers of the University including the power to hold examinations and to grant and confer degrees and other academic distinctions."

Paras 6, 7, 8, 9, 10 and 13 of the aforesaid judgment deal with various provisions of the Act of 1920. Paras 14 to 16 deal with the amendments made in the aforesaid Act by Amending Act of 1951. Para 17 deals with the amendments made in the Act of 1920 by amending Act of 1965. After noticing the aforesaid statutory provisions the Hon'ble Supreme Court has held as follows:--

*"**(18)** The contention of the petitioners is that by these drastic amendments in 1965 the Muslim minority was deprived of the right to administer the Aligarh University and that this deprivation was in violation of Article 30 (1) of the Constitution; and it is to this question we turn now."*

***(19)** Under Article 30 (1), "all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice". We shall proceed on the assumption in the present petitions that Muslims are a minority based on religion. What then is the scope of Article 30 (1) and what exactly is the right conferred therein on the religious minorities? It is to our mind quite clear that Article 30 (1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have*

the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious; minority would have the right to administer it because, for some reasons or the other, it might have been administering it before the Constitution came into force. The words 'establish and administer' in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. In this connection our attention was drawn to In re: The Kerala Education Bill, 1957, 1959 SCR 995: (AIR 1958 SC 956) where, it is argued, this Court had held that the minority can administer an educational institution even though it might not have established it. In that case an argument was raised that under Article 30 (1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by this Court for the obvious reasons that if that interpretation was given to Article 30 (1) it would be robbed of much of its content. But that case in our opinion did not lay down that the words 'establish and administer' in Article 30 (1) should be read disjunctively, so that though a minority might nokt have established an educational institution it had the right to administer it. It is true that at p.1062 (of SCR): at p.982 (of AIR) the Court spoke of Article 30 (1) giving two rights to a minority i.e. (i) to establish and (II) to administer. But that was said only in the context of meeting the argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30 (1). We are of opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30 (1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the right to administer it under Article 30 (1). We have therefore to consider whether the Aligarh University was established by a Muslim minority; and if it was so established, the minority would certainly have the right to administer it.

(20) *We should also like to refer to the observations in Durgah Committee, Ajmer V. Syed Hussain Ali, 1962-1 SCR 383: (AIR 1961 SC1402). In that case this Court observed while dealing with Article 26 (a) and (d) of the Constitution that even if it be assumed that a certain religious institution was established by a minority community it may lose the right to administer it in certain circumstances. We may in this connection refer to the following observations at p.414 (of SCR): (at p. 1416 of AIR) for they apply equally to Article 30 (1).*

"If the right to administer the properties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked."

We shall have to examine closely what happened in 1920 when the 1920 Act was passed to decide (firstly) whether

in the face of that Act it could be said that the Aligarh University was established by the Muslim minority, (secondly) whether the right to administer it, ever vested in the minority, and (thirdly) even if the right to administer some properties that came to the University vested in the minority before the establishment of the Aligarh University, whether it had been surrendered when the Aligarh University came to be established.

(21) *Before we do so we would like to say that the words 'educational institutions' are of very wide import and would include a university also. This was not disputed on behalf of the Union of India and therefore it may be accepted that a religious minority had the right to establish a university under Article 30 (1). The position with respect to the establishment of Universities before the Constitution came into force in 1950 was this. There was no law in India which prohibited any private individual or body from establishing a university and it was therefore open to a private individual or body to establish a university. There is a good deal in common between educational institutions which are not universities and those which are universities. Both teach students and both have teachers for the purpose. But what distinguishes a university from any other educational institution is that a university grants degrees of its own while other educational institutions cannot. It is this granting of degrees by a university which distinguishes it from the ordinary run of educational institutions. See St. David's College, Lampeter V. Ministry of Education, 1951-1 All ER 559. Thus in law in India there was no prohibition against establishment of universities by private individuals or bodies and if any university was so established it must of necessity be granting degrees before it could be called a university. But though such a university might be granting degrees it did not follow that the Government of the country was bound to recognise those degrees. As a matter of fact as the law stood upto the time the Constitution came into force, the Government was not bound to recognise the degrees of universities established by private individuals or bodies and generally speaking the Government only recognised degrees of universities established by it by law. No private individual or body could before 1950 insist that the degrees of any university established by him or it must be recognized by Government. Such recognition depended upon the will of the Government generally expressed through statute. The importance of the recognition of Government in the matters of this kind cannot be minimized. This position continued even after the Constitution came into force. It was only in 1956 that by sub-s. (1) of S.22 of the University Grants Commission Act (No. 3 of 1956), it was laid down that*

"the right of conferring or granting degrees shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under Section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees"

Sub-section (2) thereof further provided that

"save as provided in sub-s. (1), no person or authority shall confer, or grant, or hold himself or itself as entitled to confer or grant any degree."

S. 23 further prohibited the use of the word 'university' by an educational

institution unless it is established by law. It was only thereafter that no private individual or body could grant a degree in India. Therefore it was possible for the Muslim minority to establish a university before the Constitution came into force, though the degrees conferred by such a university were not bound to be recognised by Government.

(22) There was nothing in 1920 to prevent the Muslim minority, if it so chose to establish a university; but if it did so the degrees of such a university were not bo8und to be recognised by Government. It may be that in the absence of recognition of the degrees granted by a university, it may not have attracted many students, and that is why we find that before the Constitution came into force, most of the universities in India were established by legislation. The Aligarh University was also in the same way established by legislation and it provided under S.6 of the 1920 Act that

"the degrees, diplomas and other academic distinctions granted or conferred to or on person by the university shall be recognised by the Government as are the corresponding degrees, diplomas and other academic distinctions granted by any other university incorporated under any enactment."

It is clear therefore that even though the Muslim minority could have established at Aligarh in 1920 a university, it could not insist that degrees granted by such a university should be recognised by Government. Therefore when the Aligarh University was established in 1920 and by S. 6 its degrees were recognised by Government, an institution was brought into existence which could not be brought into existence by any private individual or body for such individual or body could not insist upon the recognition of the degrees conferred by any university established by it. The enactment of S.6 in the 1920 Act is a very important circumstance which shows that the Aligarh University when it came to be established in 1920 was not established by the Muslim minority for the minority could not insist on the recognition by Government of the degrees conferred by any university established by it.

(23) It is true, a is clear from the 1920 Act, that the nucleus of the Aligarh University was the M.A.O. College, which was till then a teaching institution under the Allahabad University. The conversion of that college (if we may use the expression) into a university was however not by the Muslim minority; it took place by virtue of the 1920 Act which was passed by the Central legislature. There was no Aligarh University existing till the 1920 Act was passed. It was brought into being by the 1920 Act and must therefore be held to have been established by the Central Legislature which by passing the 1920 Act incorporated it. The fact that it was based on the M.A.O. College, would make no difference to the question as to who established the Aligarh University. The answer to our mind as to who established the Aligarh University is clear and that is that it was the Central Legislature by enacting the 1920 Act that established the said University. As we have said already, the Muslim minority could not establish a university whose degrees were bound to be recognised by Government as provided by S. 6 of 1920 Act; the one circumstance along with the fact that without the 1920 Act the university in the form that it had, could not come into existence shows clearly that the Aligarh University when it came into

existence in 1920 was established by the Central Legislature by the 1920 Act. It may be that the 1920 Act was passed as a result of the efforts of the Muslim minority. But that does not mean that the Aligarh University when it came into being under the 1920 Act was established by the Muslim minority.

(25) What does the word established' in Article 30 (1) mean? In Bouvier's Law Dictionary, Third Edition, Vol. 1, it has been said that the word 'establish' occurs frequently in the Constitution of the United States and it is there used in different meaning; and five such meanings have been given, namely-- (1) to settle firmly, to fix unalterably, as to establish justice; (2) to make or form; as, to establish a uniform rule of naturalization; (3) to found, to create, to regulate; as, Congress shall have power to establish post offices; (4) to found, recognize, confirm or admit; as, Congress shall make no law respecting an establishment of religion; (5) to create, to ratify, or confirm, as We, the people, etc., do ordain and establish this constitution. Thus it cannot be said that the only meaning of the word 'establish' is to be found in the sense in which an eleemosynary institution is founded and we shall have to see in what sense the word has been used in our Constitution in this Article. In Shorter Oxford English Dictionary, Third Edition, the word 'establish' has a number of meanings i.e. to ratify, confirm, settle, to found, to create. Here again founding is not the only meaning of the word 'establish; and it includes creation also. In Webster's Third New International Dictionary, the wford 'establish' has been given a number of meanings, namely, to found or base squarely, to make firm or stable, to bring into existence, create, make, start, originate. It will be seen that here also founding is not the only meaning; and the word also means 'to bring into existence'. We are of opinion that for the purpose of Article 30 (1) the word means 'to bring into existence', and so the right given by Article 30 (1) to the minority is to bring into existence an educational institution, and if they do so, to administer it. We have therefore to see what happened in 1920 and who brought the Aligarh University into existence.

(26) From the history we have set out above, it will be clear that those who were in charge of the M.A.O. College, the Muslim University Association and the Muslim University Foundation Committee were keen to bring into existence a university at Aligarh. There was nothing in law then to prevent them from doing so, if they so desired without asking Government to help them in the matter. But if they had brought into existence a university on their own, the degrees of that university were not bound to be recognised by Government. It seems to us that it must have been felt by the persons concerned that it would be no use bringing into existence a university, if the degrees conferred by the said university were not to be recognised by Government. That appears to be the reason why they approached the Government for bringing into existence a university at Aligarh, whose degrees would be recognized by Government and that is why we find S.6 of the 1920 Act laying down that "the degrees, diplomas, and other academic distinctions granted or conferred to or on persons by the university shall be recognised by the Government." .... It may be accepted for present purposes that the M.A.O. College and the Muslim University Association

and the Muslim University Foundation Committee were institutions established by the Muslim minority and two of them were administered by Societies registered under the Societies Registration Act (No. 21 of 1860). But if the M.A.O. College was to be converted into a university of the kind whose degrees were bound to be recognised by Government, it would not be possible for those who were in-charge of the M.A.O. College to do so. That is why the three institutions to which we have already referred approached the Government to bring into existence a university whose degrees would be recognised by Government. The 1920 Act was then passed by the Central Legislature and the university of the type that was established thereunder, namely one whose degrees would be recognised by Government, came to be established. It was clearly brought into existence by the 1920 Act for it could not have been brought into existence otherwise. It was thus the Central Legislature which brought into existence the Aligarh University and must be held to have established it. It would not be possible for the Muslim minority to establish a university of the kind whose degrees were bound to be recognised by Government and therefore it must be held that the Aligarh University was brought into existence by the Central Legislature and the Government of India. If that is so, the Muslim minority cannot claim to administer it, for it was not brought into existence by it. Article 30 (1), which protects educational institutions brought into existence and administered by a minority cannot help the petitioners and any amendment of the 1920 Act would not be ultra vires Article 30 (1) of the Constitution. The Aligarh University not having been established by the Muslim minority, any amendment of the 1920 Act by which it was established, would be within the legislative power of Parliament subject of course to the provisions of the Constitution. The Aligarh University not having been established by the Muslim minority, no amendment of the Act can be struck down as unconstitutional under Article 30 (1).

(27) Nor do we think that the provisions ;of the Act can bear out the contention that it was the Muslim minority which was administering the Aligarh University after it was brought into existence. It is true that the proviso to Section 28 (1) of the 1920 Act said that "no person other than a Muslim shall be a member of the Court", which was declared to be the supreme governing body of the Aligarh University and was to exercise all the powers of the University, not otherwise provided for by that Act. We have already referred to the fact that Select Committee was not happy about this provision and only permitted it in the Act out of deference to the wishes of preponderating Muslim opinion.

(29) ..... These provisions in our opinion clearly show that the administration was also not vested in the Muslim minority; on the ot4her hand it was vested in the statutory bodies created by the 1920 Act, and only in one of them, namely, the Court, there was a bar to the appointment of any one else except a Muslim, though even there some of the electors for some of the members included non-Muslims. We are therefore of opinion that the Aligarh University was neither established nor administered by the Muslim minority and therefore there is no question of any amendment to the 1920 Act being unconstitutional under

Article 30 (1) for that Article does not apply at all to the Aligarh University."

(Note: A feable attempt was also made on behalf of the respondents to create a doubt with regard to law so declared by Hon'ble Supreme Court with reference to the opinion expressed by Constitutional Expert Sri H.M. Seervai in his book 'Constitutional Law of India". The said contention, being beyond the scope of the proceedings in the present writ petition, was rightly given up.)

46. The Hon'ble Supreme Court has dealt in great detail the historical background in which the Muhammadan Anglo Oriental College, Aligarh and Muslim University Association were dissolved their properties and rights were transferred and declared to be vested in the University. Section 3 of the Act declared the constitution of a body corporate by the name of Aligarh Muslim University having perpetual seal and a right to sue and to be sued by that name.

47. The dissolution of M.A.O. College and the Muslim University Association was also specifically noticed in section 4 of the Act. The effect of Section 3, Section 4 read with Section 6 of the original Act viz-a-viz the University being brought in existence by an legislative Act are the main basis for the decision of the Hon'ble Supreme Court in Azeez Basha. The said sections have not been amended and holds ground even today. Mere deletion of the word "Establish" from the long title and amendment to Section 2(l), whereby the University has been defined to be an educational institution of their choice, established by the Muslims of India, which originated as M.A.O. College, Aligarh and which was subsequently incorporated as Aligarh Muslim University in itself is not sufficient to hold that the Aligarh Muslim University, which was a creation of a legislative Act, has not been so created. The entire Act has to be read as a whole, amendment in the long title and few sections of the Act are not themselves sufficient for record a finding that the Aligarh Muslim University is a minority institution covered by Article 30 of the Constitution of India. In the case of the Bakhtawar Trust (supra), the Hon'ble Supreme Court, in paragraph 27 has held that two questions ought to be answered for judging as to whether the basis, upon which the earlier decision of the Court was based, had been changed for the purposes of coming to a conclusion that the earlier law declared by the Court is no more good law. The question are (a) what was the basis of the earlier decision and (b) what if any may be said to be the removal of that basis. From the judgment of Azeez Basha, which has been quoted in exteniso herein above, this Court has no hesitation to hold that the basis of the judgment of the Hon'ble Supreme Court in Azeez Basha has not been so fundamentally altered so as to come to a conclusion that if the amendments made under the 1981 Act had been there before the Hon'ble Supreme Court at the time of decision of Azeez Basha the judgment would have been otherwise. The Hon'ble Supreme Court has clarified the meaning to be attached to the word 'Establish' as mentioned in Article 30 of the Constitution of India, and has held that the same means to bring into existence. The bringing into existence of the Aligarh University by an Act of Legislature has been considered by the Hon'ble Supreme Court in the light of the historical

background and various provisions of the Act, including Sections 3, 4 and 6, which remain unamended. The Hon'ble Supreme Court has taken not of the fact that the foundation of the Aligarh Muslim University lay in the M.A.O. College as well as in the Muslim University Association. Thereafter, having regard to Sections 3, 4 and 6 read with other sections of the Act, whereby Aligarh Muslim University was declared to be a body corporate, having perpetual succession and a common seal, it has been held that the Aligarh Muslim University was a statutory body distinct from its members, who had contributed to incorporation of the same.

48. The legal position with regard to fundamental rights being altered with the incorporation of a company/corporation has been a subject matter of consideration before the Hon'ble Supreme Court in the case of Dharam Dutt (supra) as well as in A.I.R. 1963 SC 1811; State Trading Corporation of India, Ltd. v. The Commercial Tax Officer and others it has specifically been held that with incorporation, the corporate body become a distinct legal entity viz-a-viz the members, who have contributed to the incorporation. Fundamental rights, which are available to the citizens (e.g. Article 19, 29 and 30) under the Constitution of India, are not available to incorporated body's and as they do not answer the description of citizen of India. Aligarh Muslim University having been incorporated as a legal juristic person under a legislative Act of 1920, as such cannot claim fundamental right guaranteed for citizens under the Constitution of India nor the members of the minority community can claim such a fundamental right in respect of a body incorporated.

49. It is no doubt true that in the case of Azeez Basha it has been held that institution as referred to in Article 30 may include the University also. The aforesaid conclusion of the Hon'ble Supreme Court has to be read in the background, in which it has been so held. The Hon'ble Supreme Court itself in the case of Azeez Basha has recorded that a private University could be created prior to the enforcement of University Grant Commission Act, 1956 although the degree awarded by the said University may not be necessarily recognized by the government. Meaning thereby that prior to University Grant Commission Act there was no bar for a private University being established and degree awarded, which may or may not be recognized by the State. As a matter of fact reference may be had to the following institutions, which were awarding degrees/certificates without having been established by any Act of Legislature, prior to the enforcement of the University Grant Commission and such degrees/certificates were recognized by the State:

1. Hindi Sahitya Sammelan, Allahabad; AIR 1971 Supreme Court 966 (para 1).
2. Tibbia College (Medical College); AIR 1962 Supreme Court 458 (Para-2).

Subsequent to the enforcement of the University Grant Commission Act, 1956 a private University can be established provided such University is granted recognition as 'deemed University' by the University Grant Commission. Therefore, to that extent minority citizens may establish a minority University subject to

it being declared a 'deemed University' by the University Grant Commission.

50. In view of the aforesaid, the Court is of the opinion that the judgment of the Hon'ble Supreme Court in the case of Azeez Basha (supra) was based on over all consideration of the provisions of the Act and the historical background, in which Aligarh Muslim University was brought in existence. Such basis, on which the aforesaid judgment was founded has not been so fundamentally altered under Act of 1981 so as to create a situation that in the changed circumstances the Court could not have rendered said judgment.

51. This leads us to the second issue namely whether the members of the minority community, who are said to have founded the University, retained a right to administer the University even after its incorporation. From Section 3 read with Section 13, 15, 16 to 22 of the Act, it is apparently clear that the administration of the University was vested in the officers and the statutory body's, which were constituted under the Act itself and at no point of time the founders, who had contributed to establish the University claimed any right to administer the same. The administration of the University has all along vested in the officers and the bodies continued under the statutory provisions itself. The Hon'ble Supreme Court has, therefore, held in the case of Azeez Basha that the right of administration was never vested in the Muslim minority. Subsequent to the creation of the University itself under 1920 Act.

52. The contention of the counsel for the respondent to the effect, that the right of administration automatically follows once it is established that the institution is established by a minority community is to broad a proposition to be accepted. From the judgments, which have been noticed herein above, it is settled that Article 30 consists of two part (1) right to establish (2) right to administer. Both rights are to be read conjunctively. Reference- T.M.A. Pai Foundation and St. Stephen's College (supra). However, it does not necessary follow that every time the citizens of minority community establishes an institution, they necessarily desires that said institution must be administered by the members of the minority community only. It is always open to the founder members, who establish an institution, to handover the administration of the same to person who may not belonging to minority community and therefore it is not always necessary that that the right to administer the minority institution would follow automatically, once the institution is established by the minority. The right to administer depend upon the wish and desire of the founder members. From the facts, which have been noticed in the case of Azeez Basha and as apparent from the Act of 1920, right to administer the University was ever retained by the members of the Muslim community. As a matter of fact, the right to administer had been willing surrendered in favour of the statutory authorities and bodies constituted under the Act. Suffice is to reproduce para 20 of the judgment in Azeez Basha:

"(20) We should also like to refer to the observation in Durgah Committee, Ajmer v. Syed Hussain Ali, 1962-1 SCR 383: (AIR 1961 Supreme Court 1402). In that case this Court observed while dealing with Article 26 (a) and (d) of the Constitution that even if it be assumed

that a certain religions institution was established by a minority community it may lose the right to administer it in certain circumstances. We may in this connection refer to the following observations at p. 414 (of SCR): (at p. 1416 of AIR) for they apply equally to Article 30 (1).

"If the right to administer the proper ties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked."

53. At this stage it would be worthwhile to refer to the challenge, which was made to the amendment incorporated in 1920 Act by the amending Act of 1951 and Act of 1965. The proviso to Section 23(1) of the Act, 1920, which provided that all members of the Court would only be Muslims, was deleted vide Amending Act of 1951. In order to give effect to the said amendment, the Amending Act of 1965, provided that all members of the Court as well as of the Executive Council will ceases to hold such office from the appointed date i.e. 20th May,1965. The provisions of the aforesaid Act of 1951 and 1965 were challenged before the Hon'ble Supreme Court specifically by the Muslims only, who alone could claim a right as citizens to seek protection under Article 30 of the Constitution of India. The challenge was repelled by Hon'ble Supreme Court after recording a finding amongst other that the right to administer was never vested in Muslim minority.

54. That an other anomaly, which may be created on acceptance of the contention raised by the counsel, for the University and Union of India would be that, in case it is held that amendment incorporated vide Act 1981 declare Aligarh Muslim University to be a minority institution with Reference to Article 30, it would logically follow that the amendments made vide Amending Act, 1951 and the Amending Act of 1965, whereby the constitution of the governing bodies was altered by the legislature would ipso facto be rendered void, being hit by Article 13 of the Constitution of India inasmuch as the amendments made by the Act of 1951 and 1965 would violate the rights of the minority institutions vested under Article 30 of the Constitution. The contention of respondents, if accepted, would create a situation whereby the legislative Acts of 1951 and 1965 declared constitutionally valid by the Hon'ble Supreme Court, would be rendered void being hit by Article 13 of the Constitution of India.

55. In the opinion of the Court the power to amend the statutory provisions cannot be extended to such an extent so as to create a situation whereby legislative Act, declare constitutionally valid, could be rendered unconstitutional by subsequent legislative enactment.

56. In view of the facts noticed and conclusions arrived by the Hon'ble Supreme Court in the case of Azeez Basha qua the Aligarh Muslim University being brought in existence, it cannot be said that the said decision was solely based on the interpretation of the statutory provisions, so as to enable the legislature to declare vide Section 2(l) that the Aligarh Muslim University has been established by the Muslim minority. The declaration in that regard under Section 2(l) is on the face of it is an attempt to negate the judgment of the Hon'ble

Supreme Court specifically when such declaration has been made without altering the foundation/basis on which the judgment in the case of Azeez Basha was based. Section 2 (l) has the effect of setting aside an individual decision inter parte. Such an Act on the part of the legislature amounts to exercise of judicial power, and functioning as an Appellate Court or Tribunal. Reference- Judgment of the Hon'ble Supreme Court in the case of Cauvery Water Tribunal (supra). In order to save Section 2(l), as substituted under 1981 Act from being stuck down on the ground of brazen overruling of the judgment of the Hon'ble Supreme Court in Azeez Basha it is necessary to read down the said provision in a manner so as to hold that the word "Established" referred to in Section 2 (l) necessarily refers to Muhammadan Anglo Oriental College, which was established by Muslims and was subsequently incorporated into the University, as has been held in the case of Azeez Basha. Accordingly it is held that the word 'Established" in Section 2(l) may be read with reference to Muhammadan Anglo Oriental College only, which was established by Muslims.

57. It is also surprising to note that the Academic council and Executive Council of the Aligarh Muslim University, which have been constituted under the statutory provisions of the Aligarh Muslim University Act itself and declared to be a body corporate (Section 3 of the Act), started asserting a fundamental right guaranteed by Article 30 of the Constitution of India. As already held by the Hon'ble Supreme Court, such rights are available to citizens only and therefore the statutory body like the Academic Council and Executive Council could not have claimed any protection for themselves under Article 30 of the Constitution so as to provide reservation for the Muslim students nor it was open to the Executive Council and the Academic Council, which are creature of legislative enactment itself to assert that Aligarh Muslim University is entitled to the benefits of Article 30 of the Constitution of India, specifically when Academic Council and the Executive Council in control of the University on date have been reconstituted by the Amending Acts of 1951 read with the Amending Act of 1965, the constitutionally whereof has been upheld by the Hon'ble Supreme Court only after coming to the conclusion that Aligarh Muslim University was not a minority institution.

58. The contention raised on behalf of the counsel for the University with regard to Aligarh Muslim University being not a party to the writ petition of Azeez Basha may also be dealt with. In the case of Nabhi Raja and R.C. Cooper (supra), the Hon'ble Supreme Court has held that a person not possessed of a fundamental right cannot challenge the validity of a law on the ground that it is unconstitutional. Fundamental right (Article 30 of the Constitution of India) are available to a citizen of India only. Admittedly the Aligarh Muslim University cannot be held to be a citizen, as it is a body incorporate and therefore on its own it cannot claim protection of Article 30 of the Constitution of India. It is only the Muslim minority members who can claim such protection and could challenge the validity of amending Acts of 1951 and 1965. It makes no difference as to whether the Aligarh Muslim University was a party in the case of Azeez Basha or not. Even otherwise at no

point of time any attempt was made by the Aligarh Muslim University to get itself impleaded those proceedings nor the law declared by the Hon'ble Supreme Court in the case of Azeez Basha was ever questioned by any review petition.

59. Although the Court has reservation with regard to the extent of reservation provided in respect of Post Graduate Medical Courses by the Aligarh Muslim University (i.e. 50% of the total seats) as well as to the manner in which the said reservation has been implemented i.e. one category of the seats being completely reserved for Muslim students (50% of the total seats required to be filled by open examination to be conducted by the Aligarh Muslim University), both the aforesaid issue are not required to be gone into any further inasmuch as this Court has held that Aligarh Muslim University is not a minority institution, entitled to protection of Article 30 of the Constitution of India and therefore has no right to provide any reservation on the basis of religion. The reservation provided by the Academic Council of the Aligarh Muslim University vide its resolution dated 15th January, 2005 the resolution of the Executive Council dated 19th February, 2005 and the approval granted by the Central Government vide letter dated 25.2.2005 to that extent are hit by Article 29(2) of the Constitution of India and as such cannot be legally sustained.

60. It is declared that no reservation can be provided by the Aligarh Muslim University for admission of students on the basis of religion only and any decision in that regard, being hit by Article 29(2) of the Constitution of India, would be patently illegal and without jurisdiction.

61. The objection with regard to locus and the writ petitions having been infructuous because of subsequent developments may also be dealt with.

62. On behalf of the University it is conceded that students belonging to Muslim community irrespective of their having appeared in All India Entrance Test, as well as their appearance in the examination conducted for the internal students, including the result thereof, have been permitted to appear in the entrance examination conducted by the Aligarh Muslim University in respect of the 50% of the total seats, which are since reserved for the Muslim students only. It logically follows that if reservation of 50% is done away under order of this Court, the petitioners who are members of other community would have a right to participate in the aforesaid examination held by the University for the 50% of the total seats irrespective of the fact as to whether the petitioners had appeared in the All India Entrance Examination and were successful therein or not, as well as irrespective of the fact that the petitioners who were internal candidates and had appeared in the examination conducted by the Aligarh Muslim University for internal students (25% of the seats). Like the students belonging to Muslim community, petitioners are also entitled to participate in the selection process for admission to Post Graduate Medical Courses against 50% seats to be filled through the entrance examination conducted by the Aligarh Muslim University both for internal as well as external candidates. Such participation in entrance examination could have resulted in the petitioners being declared entitled for admission to Post Graduate Courses and in case where the petitioners have

been successful in other two examinations, to improve their ranking so as to become entitled for being admitted to a particular subject of their choice i.e. the popular subject like Medicine, Surgery etc.

63. In such circumstances, the participation of the petitioners in All India Entrance Examination, their admission to Post Graduate Medical Course by the Aligarh Muslim University on the basis of the other two examinations, is of no consequence so far as the right of the petitioners to participate in the entrance examination conducted by the Aligarh Muslim University for the 50% of the total seats which have since been reserved for students belonging to Muslim community only is concerned.

64. Dr. Naresh Agrawal (Writ Petition No. 15504 of 2005) has appeared in the admission test held by the Aligarh Muslim University as an external candidate staking his claim against 50% of the seats which were subsequently reserved for Muslims. He has been refused consideration because of the subsequent resolution of the Academic Council and Executive Council, which are under challenge in the present writ petition.

65. In the opinion of the court, the writ petitions have neither become infructuous on the basis of the subsequent developments nor it can be said that the petitioners have no locus to challenge the reservation, which has been provided for in respect of Muslim students only. Objections in that regard are accordingly rejected.

66. Normally this Court would not have interfered with the admissions already granted on the basis of examinations held after the students have already been admitted and a considerable time has lapsed, however, this court is also conscious of the fact that reservations as has been applied by the Aligarh Muslim University, for Muslim students only, is totally unconstitutional and in teeth of Article 29(2) of the Constitution. Therefore this Court cannot permit such flagrant violation of the Constitution of India, and the conscience of the Court does not permit that admissions granted for Post Graduate Medical Courses on the strength of reservation provided for Muslim students only by the Aligarh Muslim University to stand. Reference may also be had to the fact that under the interim order of this Court dated 11.3.2005 it was provided that any admission granted during the pendency of the writ petition would abide the final out come of the petition. Therefore, the admission, which had been granted in pursuance of the reservation applied, were made subject to the final orders to be passed in the present petition.

67. At the fag end of the hearing in the present petition, counsel for the University brought to the knowledge of the Court that a similar writ petition is pending consideration before the Hon'ble Supreme Court of India. However, he fairly conceded that it is for the Court to decide as to whether the proceedings of this petition be kept in abeyance till decision of the Hon'ble Supreme Court. Since this Court has already heard the counsel for the parties at great length (for weeks together) after exchange of pleadings and further since the Hon'ble Supreme Court has not passed any interim

order restraining the disposal of the present writ petition, this Court deems it fit and proper to decide the present writ petition on the merits of the contention raised before the Court itself.

68. Accordingly, the writ petitions are allowed. It is held that the judgment of the Hon'ble Supreme Court in the case of Azeez Basha still holds good even subsequent to the Aligarh Muslim University Amendment Act, 1981(Act No. 62 of 1981). Aligarh Muslim University is not a minority institution within the meaning of Article 30 of the Constitution of India. Therefore, the University cannot provide any reservation in respect of the students belonging to a particular religious community. The resolution of the Academic Council dated 15th January, 2005, the decision of the Executive Council dated 19th February, 2005 as also the approval granted thereto under letter of the Union of India dated 25th February, 2005 are hereby quashed. The admissions granted in pursuance of the aforesaid reservation stand cancelled. The Aligarh Muslim University is directed to conduct a fresh entrance examination in respect of the 50% seats of the Post Graduate Medical Courses, preferably within one month from the date a certified copy of this order is filed before the Vice Chancellor of the University, without making any reservation on the basis of religion.

Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.10.2005

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE AMAR SARAN, J.

Criminal Appeal No. 6628 of 2004

Panney @ Pratap Narain Shukla and another ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri G.S. Chaturvedi
Sri B.K. Tripathi

Counsel for the Opposite Party:
Sri R.K. Singh
A.G.A.

India Penal Code-Section 302-Death sentence-sentence of imprisonment for life is now a rule-but capital sentence an exception-obligatory for court to record Special reason-upholding the Constitutional validity death sentence still awardable-in rarest of rare case-present case genesis of dispute-was the land-deceased was done to death in every brutal manner-injury by fire, bomb blast-thereafter cutting the neck by gandasi-considering the reasoning given by Session Judge-this case does not fall within the category of 'rarest of rare case'.

Held: Para 27, 28

Under the old code of criminal Procedure ample discretion was given to the courts to pass death sentence as a general proposition and the alternative sentence of life term could be awarded in exceptional circumstances, that too after advancing special reasons for making this departure from the general rule. The new Code of 1973 has entirely reversed the rule. A sentence for imprisonment

for life is now the rule and capital sentence is an exception. It has also been made obligatory on the courts to record special reasons if ultimately death sentence is to be awarded. A Constitutional Bench of the Supreme Court in the case of *Bachan Singh Vs. State of Punjab A.I.R. 1980 898* while upholding the constitutional validity of the death sentence voiced that as a legal principle death sentence is still awardable but only in rarest of rare cases when the alternative option of lesser sentence is unquestionably foreclosed. The Sessions Judge sentenced the appellants to death on the ground that the genesis of the dispute was the land which the deceased had purchased from one Rudra Narain Shukla, in the name of his son. It is further held that the deceased was done to death in a very brutal manner by causing injuries by fire, bomb blast and thereafter cutting the neck by Gandasi. We have considered the reasoning given by the sessions judge for awarding death sentence.

Considering the aggravating and mitigating circumstances we are of the opinion that in the facts and circumstances of the case, this case does not fall within the category of "rarest of rare case' and it can not be said that imposition of lesser sentence of life term altogether foreclosed.

Case law discussed:

2004 (1) SCC-414
AIR 1980 SC-898

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

1. This appeal has been filed against the judgment and order dated 9.12.2004 passed by the Additional Sessions Judge/F.T.C.4 Deoria in S.T.No. 152 of 2004 whereby the appellants have been convicted under section 302 I.P.C. and sentenced to death and a fine of Rs. 5000/-each and in default of payment of fine further rigorous imprisonment for one year.

2. Briefly stated, the facts mentioned in the first information report lodged by Ram Awadh Yadav are that about one month prior to the incident his son Sheodhari got registered a sale deed of the land from one Rudra Narain Shukla, who was pattidar of Harihar Shukla. The accused were annoyed due to the execution of the sale deed and they were inimical with them. On 7.11.2003 at about 7. p.m. Sheodhari had gone to the house of Shyam Kunwar of the village. On the exhortation of Harihar Shukla, Panney @ Pratap Narain Shukla hurled a bomb, which hit Sheodhari on his abdomen and he fell on the ground. Chhanney @ Prabhu Naain Shukla fired from a country made pistol on the abdomen of his son Sheodhari. One Vishwajeet s/o Ramanand cut the neck of Sheodhari with a Gandasi and he died on the spot. Hearing the sound of explosion and firing, informant Ram Awadh Yadav, his sons Ramdhari and Tilakdhari and one Dalsingar of the village rushed to the spot flashing their torches and saw the accused persons running away from the spot. The occurrence was also witnessed by Shyam Kunwar son of Sobaran.

3. On the basis of the written report case crime No. 41/2003 under section 302 I.P.C. at police station Ekona, District Deoria was registered against the accused persons.

4. Chandra Bali Yadav, S.H.O., P.S. Ekona commenced the investigation. He recorded the statements of informant and witness Ramdhari and prepared the site plan on their pointing out. He also recovered one empty cartridge of 12 bore.

The blood stained Gandasi was recovered from the bush of Shyam Kunwar. He also collected residue of bomb. Blood stained earth and plain earth was also collected. He also inspected the torches of the witnesses. He prepared the recovery memos, Exs. Ka. 2 to Ka. 6. Site plan of the place of occurrence is Ex. Ka. 8. He also prepared the inquest memo of the dead body, which is Ex. Ka.7 and also prepared the relevant papers for the post mortem examination and handed over the dead body to Ram Charittar Yadav and Lal Chandra Yadav for the post mortem. Harihar Shukla, Panney @ Pratap Narain, Chhaney @ Prabhu Narain were arrested on 8.11.2003. He recorded the statements of Constable Ram Charittar Yadav and Constable Lal Chandra and Ishwar Chand, scribe of the first information report. The statement of Tilakdhari was recorded on 15.11.2003. After the conclusion of the investigation he submitted the charge sheet against Harihar Shukla, Panney @ Pratap Narain Shukla and Chhaney @ Prabhu Narain Shukla, which is Ex. Ka. 8.

5. After the submission of the charge sheet the case was committed to the Court of Sessions. The prosecution examined P.W.1, Ram Awadh, P.W.2, Ramdhari Yadav, P.W.3, Tilakdhari, P.W.4, Constable Lal Chand Yadav, P.W.5, Sub-inspector Chandra Bali Yadav, P.W.6, Ishwar Chand Shukla and P.W.7, Dr. S.B. Singh who conducted the post mortem examination of the deceased.

6. The case of the defence is of denial and D.W.1, Upendra Nath Mishra, Clerk in the Court of Chief Judicial Magistrate, Deoria was examined on behalf of the defence. Certified copy of the charge sheet of case crime No. 189/94, P.S. Rudrapur and two questionnaires of the Court of Judicial Magistrate, Deoria were also filed.

The Sessions Judge after considering the evidence on the record convicted the appellants as aforesaid and acquitted Harihar Shukla.

7. We have heard the learned counsel for the appellants and the learned A.G.A. for the State.

8. Learned counsel for the appellants has challenged the findings of the Sessions Judge on the ground that there is conflict in the medical report and direct evidence and the presence of witnesses at the place of occurrence is doubtful. There was no motive for the appellants to commit the offence and the testimonies of the prosecution witnesses are not sufficient to hold the appellants guilty.

9. In order to appreciate the submissions of the learned counsel for the appellants, we have to examine the testimony of the prosecution witnesses.

P.W.1 Ram Awadh deposed that Harihar Shukla belongs to his village. Rudra Narain Shukla was pattidar of Harihar Shukla, who shifted to District Pratapgarh and the accused had taken the forcible possession of his land. Rudra Narain Shukla had transferred his land through a sale deed in the name of Suresh, son of the deceased Sheodhari. The execution of the sale deed had annoyed the accused persons and they became inimical with the deceased. On the date of occurrence at about 7.00 p.m. Sheodhari Yadav had gone to the house of Shyam Kunwar. On the exhortation of Harihar Shukla, Panney @ Pratap Narain Shukla hurled a bomb which hit the deceased on

his abdomen and he fell down. After that, Chhanney @ Prabhu Narain Shukla fired at Sheodhari with a Katta and another accused Vishwajeet, who had absconded and was not facing trial, cut the neck of the deceased with a Gandasi and Sheodhari died on the spot. The incident was witnessed by Ramdhari, Tilakdhari and Dalsingar, who rushed to the spot. At the time of incident informant was returning from his field through Kharanja road and witnessed the incident. At the time of occurrence a lantern was burning at the house of Shyam Kunwar and the witnesses had seen the accused persons by flashing their torches. He had lodged the report, which was scribed by Rajaram.

10. P.W.2 Ramdhari Yadav deposed that Rudra Narain Shukla was pattidar of Harihar Shukla whose land was forcibly occupied by the accused after his migration to Pratapgarh. Rudra Narain Shukla had sold his land to Sheodhari and after the execution of the sale deed Sheodhari had taken the possession of the land and this had annoyed them and they became inimical. On the date of incident at about 7.00 p.m. his brother Sheodhari had gone to the house of Shyam Kunwar and he had gone to his field and was returning therefrom. It is further stated that when he reached near the place of incident he saw that Harihar Shukla was exhorting to kill the deceased and Panney hurled a bomb, which struck the abdomen of the deceased. It is further stated that when he fell down Chhanney fired from a country made pistol. Vishwajeet got his neck cut by a Gandasi. The occurrence was also witnessed by Shyam Kunwar and his family members. Ram Awadh, Tilakdhari and several persons of the village also witnessed the incident.

11. P.W.3 Tilakdhari deposed that at the time of the incident he was coming from his field and witnessed the incident. His father Ram Awadh and brother Ramdhari were also with him. He stated that Panney had hurled a bomb on the deceased and Dhanney had fired from a country made pistol and Vishwajeet had cut the neck by a Gandasi. The occurrence was witnessed in the torch light. Shyam Kunwar and Dalsingar also witnessed the occurrence.

12. P.W.4, Lal Chand Yadav was posted as constable at P.S. Ekona on 8.11.2003. He had accompanied Station House Officer to village Bhedi. He also prepared the inquest memo, Ex.Ka.7. The dead body was handed over to him in a sealed condition for mortuary.

13. P.W.5, Sub-inspector Chandra Bali Yadav deposed that he was posted at P.S. Ekona as Station House Officer on 7.11.2003. He was the investigating officer of the case. After conclusion of the investigation he had submitted the charge sheet.

14. P.W.6, Ishwar Chandra Shukla deposed that he was posted as constable moharrir at P.S. Ekona, District Deoria on 7.11.2003. On the basis of the report of Ram Awadh Yadav he had prepared the first information report which is Ex. Ka 9. He had also prepared the G.D. Ex. Ka.10. is the copy of the G.D.

15. P.W.7 Dr. S.B. Singh conducted the post mortem examination of the deceased on 8.11.2003. He noted following ante mortem injuries on the body of the deceased:

1. Incised wound 10 cm x 5 cm x bone deep on front of neck, just above the thyroid cartilage. Trachea, oesophagus and muscles and all blood vessels and nerves cut.
2. Incised wound 5 cm x 2 cm x cavity deep on right side front of chest, 8 cm above right nipple. Lungs lacerated.
3. Blast injury 15 cm x 5 cm x cavity deep on right side of abdomen, including lower part of right side chest, 10 cm below right nipple. Viscera was protruding out, blackening in and around was present.
4. Blast injury 7 cm x 3 cm x cavity deep on left side of abdomen, 2 cm left to injury No. 3. Blackening in and around the wound was present.
5. Blast injury 5 cm x 3 cm x cavity deep on right side of abdomen, 5 cm below injury No. 3, blackening in and around the wound was present.
6. Incised wound 4 cm x 2 cm x bone deep on right side back of chest, 15 cm above right iliac crest.
7. Incised wound 7 cm x 2 cm x muscle deep on back of upper part of right thigh.

In the opinion of doctor the cause of death was due to shock and haemorrhage as a result of ante mortem injuries.

16. D.W.1, Upendra Nath Mishra deposed that according to the register of First Information Reports, F.I.R of this case was received in his office on 12.11.2003 and on the same day it was placed before the Chief Judicial Magistrate, Deoria.

17. The first submission of counsel for the appellants is that the prosecution has relied upon 3 eyewitnesses namely P.W. 1 Ram Awadh Yadav, P.W. 2 Ramdhari Yadav and P.W. 3 Tilakdhari. P.W. 1 is father of the deceased and P.Ws. 2 and 3 are brothers of the deceased, therefore, their testimonies should not be believed. It is further submitted that the presence of two independent witnesses namely Dal Singar and Shyam Kunwar is admitted but the prosecution did not examine them.

18. We have considered the submission of the counsel for the appellants. It is a settled position of law that testimony of close relatives should not be thrown away merely on the ground of their relationship. The court should scrutinise their testimony with more caution. If the testimony inspires confidence and trustworthy the same could be relied upon. As regards the non-examination of other witnesses namely Shyam Kunwar and Dal Singar is concerned, it is a well-settled principle of law that prosecution is not bound to examine all the witnesses. Now a days the villages are faction-ridden. In some cases persons may not like to come and depose as witnesses and in some other cases the prosecution may carry the impression that their evidence would not help it. In such a case, mere non-examination would not affect the prosecution version. But at the same time, if the relatives or interested witnesses are examined, the court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence was biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused, foundation for the

same has to be laid. If the materials show that there is a partisan approach, the court has to analyse the evidence with care and caution. Additionally, the accused persons have always the option of examining the left-out persons as defence witnesses.

19. It is also submitted by the counsel for the appellants that the first information report in this case is anti-timed. Learned counsel for the appellants has drawn our attention towards the statement of P.W. 5 Chandraoli Yadav, investigating officer. He had deposed that he gathered the information of the incident that one explosion had took place towards North in village Bhedi. He had also visited the place of incident after about 10 minutes of the incident. He found that a dead body was lying at the place of occurrence. Informant Ram Awadh was not there but witnesses Tilakdhari, Ramdhari and Dal Singar were present . He was informed that Ram Awadh had gone to lodge the report at the police station. He returned after about 20 - 25 minutes to the police station and after the registration of the report, he again visited the place of occurrence. He had collected the empty cartridges in the night on 7.11.2003 and also collected the remains of the explosion. It is contended by the counsel for the appellants that recovery memos Exts. Ka. 2 and Ka. 3 were prepared on 8.11.2003 which contradict the statement of P.W. 5. The statement of P.W. 1 shows that after hearing the explosion, police did not reach on the spot. He further deposed that after about half an hour of the incident, the dead body was taken to the police station where it remained through the night and it was dispatched for the post-mortem examination at 8.30 A.M. Learned counsel for the appellants has also drawn our attention towards the statement of P.W. 2 who admitted that deceased was murdered about one hour earlier to the dispatch of the dead body for the post-mortem examination. According to the counsel for the appellants this shows that murder took place early in the morning on 8.11.2003. It is also pointed out by the counsel for the appellants that P.W. 3 deposed that the dead body remained throughout the night at the spot and the investigating officer visited the place of occurrence at 6.00 A.M. It is vehemently argued that these contradictions in the statement of the witnesses show that prosecution has suppressed the actual time of the occurrence and the same is not clear whether the dead body remained at the place of occurrence or kept at the police station before dispatching for the post-mortem examination. We have considered the submission and in our opinion there is no merit. The eye witness account with regard to actual occurrence and participation of the appellants is credible and consistent and these contradictions are minor in nature and they are bound to occur when the witnesses are rustic villagers. It is further submitted that the first information report was received in the office of Chief Judicial Magistrate, Deoria on 12.11.2003. It is submitted that due to delay in sending the F.I.R. to the court concerned, possibility cannot be ruled out that the F.I.R. was anti-timed.

20. We have considered the submissions of the counsel for the appellants. The first information report of the incident was registered on 7.11.2003 at 8.15 P.M. The distance of the police station is only one furlong. The inquest proceedings were conducted on 8.11.2003 at 8.00 A.M. In the instant case according

to P.W. 5 special report of the incident was sent on 7.11.2003 after lodging of the F.I.R. by a constable. P.W. 6 Ishwar Chand Shukla also stated that special report was sent by Con. Udai Narain on the same day. Post-mortem examination was conducted on 8.11.2003 at 1.40 P.M. The first information report was also dispatched alongwith inquest report to the doctor concerned for the post-mortem. The delay in sending the F.I.R. in no way prejudices the prosecution case.

21. The counsel for the appellants submits that crime number is not mentioned in the inquest report which shows that the F.I.R. was not in existence at the time. No substance has been found in this contention because in the inquest report time of occurrence and G.D. entry number of registration of crime are mentioned.

22. Learned counsel for the appellants also challenged that there was no source of light in which the witnesses had identified the accused persons. In the first information report no source of light was mentioned. At the time of inquest proceedings, light was not available. P.W. 5, investigating officer, deposed that lantern was burning and this fact is supported by the testimonies of 3 eyewitnesses who stated that lantern was burning at the house of Shyam Kunwar and the witnesses were also having torches with them. The witnesses were already known to the accused. They are residents of the same village. Even known persons can be identified in faint light.

23. The further submission of the counsel for the appellants is that P.W. 3, Tilakdhari, was interrogated by the investigating officer after one week i.e. 15.11.2003. The delay in interrogation of P.W. 3 makes the prosecution case doubtful and suggests that P.W. 3 was neither present on the spot nor he was available to the investigating officer for interrogation. The investigating officer deposed that after lodging of the F.I.R. he recorded the statement of informant Ram Awadh and thereafter recorded the statement of Ramdhari, P.W. 2. He inspected the place of occurrence and completed other formalities on 8.11.2003. He arrested the accused persons on 15.11.2003 and recorded the statement of P.W. 3, Tilakdhari. Thus, the statement of Tilakdhari was recorded after above 8 days. The evidence of Tilakdhari cannot be rejected simply because there was some delay in recording 161 Cr.P.C. statement. The name of P.W. 3, Tilakdhari, is mentioned in the first information report as an eye witness. He is also witness of the recovery memos which were prepared on 8.11.2003. Therefore, his presence cannot be doubted and his testimony cannot be rejected. It is well settled principle that it is not every delay in recording the statement, which may be fatal. The prosecution is under obligation to offer explanation for the delay and if the explanation is reasonable and plausible, testimony of the witness cannot be considered un-acceptable because of his delayed interrogation. Apart from this the defence must put specific question to the investigating officer for the delay in recording his statement and must seek explanation from him. In the present case no question was asked by the defence for the delayed recording of the statement of P.W. 3, Tilakdhari. The Apex Court held as under in the case of ***Banti v. State of M.P. (2004) 1 SCC 414, at page 419***:

"As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion."

24. The last submission of the counsel for the appellants is that ocular account of witness is totally inconsistent with the medical evidence. According to the prosecution case Panney alias Pratap Narain Shukla hurled a bomb on the deceased and Chhanney alias Prabhu Narain Shukla had fired from a country made pistol and Vishwajeet cut the neck of the deceased by Gandasa. In the post-mortem examination report 4 incised wound and 3 blast injuries were noted by the doctor and 25 big metallic pellets of bolt shape from the abdominal cavity of the deceased were recovered. The doctor did not find any firearm injury which can be said to be of country made pistol. It is submitted that complicity of Chhanney alias Prabhu Narain Shukla is doubtful. We have considered the submission and perused the evidence on record. The blast injuries are of a very big dimension and injuries caused by firearm became invisible. It would not be possible to distinguish the firearm and blast injuries. The manner of assault and the weapon used is consistent with the testimony of the witnesses. It is not necessary for the prosecution to explain each and every shot fired by a country made pistol. It is the case of the prosecution that firstly a bomb was hurled and thereafter country made pistol was fired. The role of the accused, manner of assault is credit worthy and if no separate pellet was recovered, it cannot be said that the firearm was not used in committing the murder of the deceased. Now a days cartridges are used which are filled by different metallic pieces. The possibility cannot be ruled out that same metallic pieces might be filled which are used in preparation of a bomb. In such a situation in our opinion there is no conflict in medical and direct evidence. The role assigned to Chhanney @ Prabhu Narain Shukla by the witnesses is consistent, credible and inspires full confidence.

25. The counsel for the appellants submitted that on the basis of same evidence one co-accused Harihar Shukla is acquitted by the trial court and the evidence of the witnesses with regard to appellant should also have been rejected by the trial court. We have considered the submission of counsel for the appellants and also perused the grounds for acquittal of Harihar Shukla. The Sessions Judge had considered the submission of the counsel for the accused that only role of Harihar Shukla was of exhortation and no active role is assigned to him. He was also not carrying any weapon. The Sessions Judge had considered the submission and also considered the observations of the Apex Court and High Court and held that the complicity of accused Harihar Shukla becomes doubtful and prosecution has not succeeded to prove beyond reasonable doubt the involvement of the accused Harihar Shukla and also held that the rule of abundant caution would be attracted

and he was given benefit of doubt and acquitted. The case of the appellants is distinguishable from the case of Harihar Shukla. The appellants have been assigned specific weapons and their roles are corroborated by the medical evidence also. The appellants cannot be acquitted only because the evidence of the witnesses was not relied against Harihar Shukla. It is well settled by the catena of decisions of the Apex Court that the mere fact that out of many accused some are acquitted is not sufficient to entitle the rejection of the entire prosecution case. It is further held that the court should make every effort to disengage the truth from the falsehood and to sift the grain from the chaff rather than take the easy course of rejecting the entire prosecution case.

26. Lastly, the question that arises for serious consideration is whether imposition of death penalty in the facts and circumstances of the case is justified?

27. Under the old code of criminal Procedure ample discretion was given to the courts to pass death sentence as a general proposition and the alternative sentence of life term could be awarded in exceptional circumstances, that too after advancing special reasons for making this departure from the general rule. The new Code of 1973 has entirely reversed the rule. A sentence for imprisonment for life is now the rule and capital sentence is an exception. It has also been made obligatory on the courts to record special reasons if ultimately death sentence is to be awarded. A Constitutional Bench of the Supreme Court in the case of ***Bachan Singh Vs. State of Punjab A.I.R. 1980 898*** while upholding the constitutional validity of the death sentence voiced that as a legal principle death sentence is still awardable but only in rarest of rare cases when the alternative option of lesser sentence is unquestionably foreclosed. The Sessions Judge sentenced the appellants to death on the ground that the genesis of the dispute was the land which the deceased had purchased from one Rudra Narain Shukla, in the name of his son. It is further held that the deceased was done to death in a very brutal manner by causing injuries by fire, bomb blast and thereafter cutting the neck by Gandasi. We have considered the reasoning given by the sessions judge for awarding death sentence.

28. Considering the aggravating and mitigating circumstances we are of the opinion that in the facts and circumstances of the case, this case does not fall within the category of "rarest of rare case' and it can not be said that imposition of lesser sentence of life term altogether foreclosed.

29. In view of the above the appeal is dismissed with the modification that conviction under Section 302 I.P.C. is upheld but sentence of death is reduced to imprisonment for life. The appellants are in jail. They shall be kept there to serve out the sentence as reduced by us.

30. Reference made by learned Sessions Judge for confirmation of death sentence is rejected.

31. Office is directed to send a copy of this judgment to the Chief Judicial Magistrate, Deoria, within two weeks.

Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2005

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

Civil Misc. Contempt Application No. 2642 of 2005

Paras Nath Yadav ...Applicant
Versus
Sri Ramendra Tripathi and others ...Opposite parties

Counsel for the Applicant:
Sri B.N.Pandey

Counsel for the Opposite Parties:

Contempt of Court Act 1971-S-20-Limitation for filing the contempt application-direction issued on 11.3.99 to decide the claim within six weeks-cause of action arase in-May 99-contempt petition filed on 23.8.2000-explanation representation after representation-held-after the elapsed of statutory period of one year-cannot be enlarged.

Held: Para 8

In my opinion, the period of one year contemplated under Section 20 of the Contempt of Court Act, 1971, having expired some time in May, 2000,subsequent representations made by the petitioner-applicant from time to time, as alleged by the petitioner applicant, will not enlarge the period mentioned in Section 20 of the Contempt of Court Act, 1971.

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

1. The present Contempt Petition has been filed, inter-alia, by the petitioner-applicant on the ground of alleged non-compliance of the order dated 11th March, 1999 (Annexure 1 to the Affidavit accompanying the Contempt Petition) passed by this Court in Civil Misc. Writ Petition 7261 of 1999.

2. Relevant portion of the said order dated 11th March, 1999 is quoted below:

"As the question involved is to trivial to drag on unnecessarily before this Court, hence after hearing the learned counsel for the petitioner as well as the learned Standing Counsel I dispose of this writ petition by issuing direction to the respondent Nos. 2 and 3 to pass appropriate order on the application of the petitioner within six weeks from the date of presentation of the copy of this order."

3. From a perusal of the averments made in paragraph 1! Of the Affidavit accompanying the Contempt Petition and Annexure 2 to the Affidavit accompanying the Contempt Petition, it appears that a certified copy of the said order dated 11th March, 1999 was sent to the Zila Adhikari, Basti and the Up Zila Adhikari, Basti by Registered Post on 20th March, 1999.

4. In view of the directions given in the said order dated 11th March, 1999, the application of the petitioner was to be decided within six weeks of the receipt of the said certified copy of the order dated 11th March, 1999. The said period of six weeks evidently expired some time in May, 1999. Consequently, cause of action for filing Contempt Petition arose some time in May, 1999. In the circumstances, the Contempt Petition ought have been filed within one year i.e. by May, 2000, in view of the provisions of Section 20 of the Contempt of Court Act, 1971.

5. The present Contempt Petition has been filed on 23rd August, 2005. Therefore, the Contempt Petition is clearly not maintainable in view of the provisions of Section 20 of the Contempt of Courts Act, 1971 which lays down as under:

"**20. Limitation for actions for contempt.**-No court shall initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed."

6. It is submitted by the learned counsel for the petitioner applicant that the petitioner-applicant has been making representations from time to time to the authorities concerned, but the authorities concerned did not comply with the said order dated 11th March, 1999.

7. I have considered the submission made by the learned counsel for the petitioner-applicant.

8. In my opinion, the period of one year contemplated under Section 20 of the Contempt of Court Act, 1971, having expired some time in May, 2000,subsequent representations made by the petitioner-applicant from time to time, as alleged by the petitioner applicant, will not enlarge the period mentioned in Section 20 of the Contempt of Court Act, 1971.

9. In view of the aforesaid discussion, the Contempt Petition is liable to be dismissed, and the same is accordingly dismissed.

Application rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.10.2005

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 57310 of 2005

Pramod Kumar Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri R.C. Yadav

Counsel for the Respondents:
Sri M.A. Qadeer
C.S.C.

Constitution of India, Art. 226-Mode of Service-Application invited by U.P. Public Service Commission-with stipulation-it should be reached at Commission office by Registered Post or by hand upto 5 p.m. on before 22.07.02-application send from 100 km. Away from office of Commission through Regd. Post on 14.07.05-reached on 28.07.2005-refusal by Commission-held-proper when-only one mode given one has no alternate, but to fallow the same-at the same time if there are more than one mode and failed to exercise other mode-the responsibility lies with sender-No equitable justice can be rendered.

Held: Para 9

Therefore, what we get from the above analysis? We get the answer that either in the law or in the contract or in the advertisement or in the necessary document if mode is prescribed, such mode will be the guiding principle in determining the issue as regards service. If the mode is one, one has no other alternative but to follow the same. If the mode is more than one then the alternative mode can be exercised. If

one chooses to apply adopting one mode and failed to exercise other mode, the responsibility lies with the sender not with the addressee because the post office is the agent only in respect of one mode. In the instant case, fault might have been committed by the post office be it agent of either of the parties or be it a public service mechanism. But so far as the Commission is concerned, it is not at fault whenever more than one mode is prescribed in the advertisement. Frankly speaking we are very much sympathetic to the candidate, who lost the opportunity of making application, but we are sorry to say that we can not render any equitable justice in favour of the petitioner against the Commission in such circumstances.

Case law discussed:

2000 (4) E.SC-2483
1987 UPLBEC-316
AIR 1980 SC-431
Appeal No. 1619-05 decided 19.09.05
AIR 1966 SC-1466
AIR 1954 SC-429

Present:
(Hon'ble Mr. Justice Amitava Lala and Hon'ble Mr. Justice Prakash Krishna)

Appearance:

For the Petitioner : Sri R.C. Yadav.

For the Respondent No. 1 : Chief Standing Counsel.

For the Respondent No. 2 : Sri M.A. Qadeer.

Amitava Lala, J.-- 1. An interesting point is involved in the writ petition. The writ petitioner is a candidate of an examination to be held under the supervision of Public Service Commission, Uttar Pradesh, Allahabad. One of the conditions about the modes of making application "how to apply" speaks as under:

"...Application complete in all respects must reach the "Secretary, (Deptt No.....) Public Service Commission, U.P., 10 Kasturba Gandhi Marg, Allahabad-211018" at the Commission's office either by registered post or by ***hand upto 5.00 p.m. on or before 22nd July, 2005****."*

Therefore, there are two modes of making application as aforesaid.

2. The petitioner contended that he sent his application through registered post on 14th July, 2005 from a place 100 Kms. From the Commission's office at Allahabad but the Commission refused to accept the same since it was reached to the office on 28th July, 2005 after expiry of the last date. According to the petitioner, there is no fault on the part of the petitioner in making the application. Therefore, such application should have been accepted by the Commission. Since the same has not been done, the writ jurisdiction has been invoked for the purpose of giving direction upon the Commission to accept the application and to permit the petitioner to sit for the interview. In the alternative for a direction upon such authority to decide the petitioner's representation dated 22nd August, 2005.

3. A question arose before this Court whether the Post Office is an agent of the Public Service Commission in this case or not. If so, as soon as the application is posted with the local post office the duty of the applicant is discharged. Responsibility lies with the Commission,

if not received within the time prescribed in the advertisement inviting applications.

4. We have come across several important judgements either passed by this High Court or the Supreme Court to come to a definite conclusion in respect of the subject matter herein. In **2000 (4) E.S.C. 2483 (All.) (Shashi Bhushan Kumar Vs. U.P. Higher Education Services Commission and another)** a Division Bench of this Court directed the Higher Education Services Commission to entertain the application although it was received to it after expiry of the last date. There the condition was that it will be sent by Parcel/Speed Post. In the same judgement the Division Bench of our High Court distinguished the ratio of another judgement reported in **1987 UPLBEC 316 (Ram Autar Vs. Public Service Commission and others)**. In distinguishing part it has held that so far as the decision of the Division Bench in **Ram Autar (supra)** is concerned it was no doubt held therein that the application sent by registered post if received after expiry of the last date, it will be liable to be rejected. But the relevant portion of the advertisement as quoted by the Division Bench in its judgement do not expressly or by necessary implication establish an agreement inviting the applications through post office and as such the Division Bench decision on facts is not applicable. As we have understood from the prescriptions in both the judgements that when in the earlier case no mode of making application was prescribed, in the later case only one mode of making application by parcel/speed post was prescribed. Therefore, according to us both the Division Bench judgements are justified on their own stand. Neither of the cases prescribed having two modes when one mode is availed and other mode is not availed, Commission can be held liable or not. Having so, matter should have been sent to the Larger Bench.

5. It is to be remembered that we can deal with the cause against the Commission but not against the Postal authorities, unless of course, it is proved beyond doubt that such authorities are the exclusively agent of their principal i.e. Commission. It can only be done when addressee i.e. Commission expressly or impliedly made such arrangement. Here both the avenues i.e. principal to principal and principal to agent are open. The question is that whether right of making application is otherwise preserved/protected by the Commission or not. If it is protected otherwise and if not availed, the Commission can not be held responsible.

6. As per the ratio of **AIR 1980 SC 431 (Union of India Vs. Mohd. Nazim)** a post office accepts responsibility of the sender when it accepts postal articles to send to the addressee. It is a public service. It can neither be treated as agent like common carrier nor it enter upon any contract by the acceptance of postal article either with the sender or addressee. However, in a recent judgement dated 19th September, 2005 in **Appeal (Civil) No. 1619 of 2005 (Unit Trust of India Vs. Ravinder Kumar Shukla, etc. etc.)** the Supreme Court held that in the absence of any contract or request from the payee, mere posting would not amount to payment. In cases where there is no contract or request, either expressly or impliedly, the post office would continue to act as an agent of the drawer. In that case the loss is of the drawer. If two situations are seen side by side, the

question of responsibility will be understandable. In the instant case, request is there on the part of the addressee. Therefore, the addressee is responsible provided post office alone has been made agent for the purpose of receiving application as per the request. There the shoe pinches. When two modes are prescribed by the Commission and one mode is availed, the same is the risk and responsibility of the sender himself. Writ Court can not evaluate amount of risk and responsibility to compensate the petitioner. If the petitioner is entitled for any compensation in accordance with law from the post office, he can seek advise for the same but Commission can not be held responsible by extending time for availing the postal mode only. It has argued that if someone is stationed in a far away place and is not able to come to file such application personally, second mode can not help such candidate. We can understand the agony but in such case we can not compel the Commission for accepting application because post office is agent only in respect of the service through it. Moreover, according to us, question is not the distance, but non-availability of other mode. Commission is to discharge public duty to all. It can not find out individual difficulty to meet the same. Otherwise it will become never ending process. Two very important Supreme Court judgements have been referred herein. First one is reported in **AIR 1966 SC 1466 (V 56 C 288) (The Indore Malwa United Mills Ltd. Vs. The Comissioner of Income-tax (Central) Bombay)**. This is in respect of Income Tax Act but even therein the Supreme Court categorically held as follows:

"If by an agreement, express or implied, by the creditor, the debtor is uthorized to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him." (Emphasis supplied)

Therefore, the mode of sending the cheque was only by post.

7. In **AIR 1954 SC 429 (Vol.41, C.N.104) (Commr. Of Income tax, Bombay South, Bombay Vs. Messrs Ogale Glass Works Ltd., Ogale Wadi)** the Supreme Court held again in a case of Income Tax Act and Contract Act about sending cheques by post, as under:

"There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee. After such request the addressee cannot be heard to say that the post office was not his agent and, therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender having the very limited right to reclaim the cheque under the Post Office Act, 1898, the Post Office was his agent, when in fact there was no such reclamation." (Emphasis Supplied)

8. Again in this case we find that a request was made by the addressee to the sender to send the cheque by post and for the same he could not avoid the responsibility. Sometimes in the cases between landlord and tenant we find notice is required to be served by post in accordance with law and if not served

following such prescription, such notice can not be construed as a valid notice.

9. Therefore, what we get from the above analysis? We get the answer that either in the law or in the contract or in the advertisement or in the necessary document if mode is prescribed, such mode will be the guiding principle in determining the issue as regards service. If the mode is one, one has no other alternative but to follow the same. If the mode is more than one then the alternative mode can be exercised. If one chooses to apply adopting one mode and failed to exercise other mode, the responsibility lies with the sender not with the addressee because the post office is the agent only in respect of one mode. In the instant case, fault might have been committed by the post office be it agent of either of the parties or be it a public service mechanism. But so far as the Commission is concerned, it is not at fault whenever more than one mode is prescribed in the advertisement. Frankly speaking we are very much sympathetic to the candidate, who lost the opportunity of making application, but we are sorry to say that we can not render any equitable justice in favour of the petitioner against the Commission in such circumstances.

Hence, the writ petition stands dismissed.

However, no order is passed as to costs.

However, this petitioner is not prevented from taking action against the postal authority in connection with wrongful discharge of public duty, if so advised. Petition dismissed.

ORIGINAL JURISDICATION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2005

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 31041 of 1991

Prem Chand Jaiswal and others
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.N. Saxena
Sri S.C. Budhwar
Sri R.M. Saggi

Counsel for the Respondents:
C.S.C.

Uttar Pradesh Regularization of Ad hoe appointments (on the post within the preview of Public Service Commission) Rule 1979 Rule 4 (c)-Regularization-petitioner initially appointed as junior clerk-in the year 1974-stood confirmed on 1.9.79-considering the administrate exigencies-by order date 5.2.75 the petitioner alongwith so many others appointed as Khandsari Inspector on Ad hoe basis-all those person as well as juniors to the petitioner regularsied-even whose integrity were-downfall-held-action of the authorities illegal-in rejecting the claim of petitioner on the basis of adverse entries-either communicated after four, five years-or time of four yrs consumed inconsideration of representation held-entitled to be regularized from the date on which juniors to the petitioner were regularized with all consessential benefits.

Held-Para-15 and 16

It is also not disputed by the respondents that he persons having bad service record and whose integrity were

doubtful have been regularized by the Selection Committee on 3.12.1987 and even it sis not the case of the respondents that their representation against the adverse entries were pending on the day when they were considered for regularization.

In such a way, I find that action of the respondents is illegal and the order dated 10.10.1991 cannot be sustained in eye of law. As the order dated 10.10.1991 (Annexure 19 to the writ petition) has been set aside, the petitioner is entitled for regularization on the post of Khandsari Inspector at least immediately on the day when his immediate junior to the petitioner mentioned at Serial No. 19 of the list dated 5th February, 1975 has been regularized.

Case law discussed:

1970 (1) Sec-479
1992 (2) Sc-I
1997 (3) UPLBEC-1937
1981 (2) SLR 627
1996 (1) ECC-65
1993 (1) UPLBEC-347
1974 AISLRJ 106
1970 SCC876
AIR 2003 SC-3983
1980 (2) SLR 417

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

1. The present writ petition has been filed for issuing a writ of certiorari quashing the order dated 10.10.1991 (Annexure 19 to the writ petition) passed by the respondent No. 2 and issuing a writ in the nature of mandamus directing the respondents not to interfere with the functioning of the petitioner as Khandsari Inspector and to regularize the services of the petitioner.

2. The fact arising out of the present writ petition is that the petitioner was initially appointed as junior Clerk in the sugar Department of the State of U.P. in the month of November, 1974 The petitioner was confirmed on 1.9.1979 vide order dated 15.91987 As the various posts of Khandsari Inspectors were lying vacant and the same were to be filled after selection by the public service Commission, the petitioner along with number of other persons were appointed as Khandsari Inspectors by direct recruitment on ad hoc basis wide its appointment letter dated 5.2.1975. The appointment of the petitioner on the said post was to continue till regular selection is make by the Commission. The petitioner has field the order of appointment dated 5.2.1975 as Annexure I to the writ petition and the name of the petitioners appears at Serial No. 18. The post on basis was admittedly vacant and no selection was made by the Commission, therefore the petitioner as well as various other persons were permitted to continue on ad hoc basis. The State Government in exercise of powers conferred under Article 309 to the Constitution of India took a policy decision for regularization of ad hoc appointees (on the post within the preview of Public Service Commission) without approval from the Commission and a Rule was framed called as " Uttar Pradesh Regularization of Ad hoc Appointment (on the post within the preview of Public Service Commission Rules, 1979 published on 14.9.1979. These rules provided that all the ad hoc appointees on before 1.1.1977 who possesses the requisite qualification on the date of ad hoc appointment and has completed three years of continuous service be regularized in permanent or temporary vacancies as may be available on the basis of service record and suitability, meaning thereby that all ad hoc appointees were to be

regularized subject to rejection of unfit, Relevant Rules is
4(1) The same is being reproduced below:-

"4(1). Any person who -

(i) was directly appointed on ad hoc basis before January 1.1977 and is continuing in service, as such , on date of commencement of these rules:-

(ii) possessed requisite qualification prescribed for regular appointment at the time of such ad hoc appointment; and

(iii) has completed or, as the case may be, after he has completed three years continuous service.

Shall be considered for regular appointment in permanent or temporary vacancy as may be available on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders. "

3. It has also been stated by the petitioner that the suitability on the basis of service record was to be seen by the Selection Commission constituted by appointing authority as provided under Rules 4and 5 of the said Rules ant the select list was to be prepared in order of seniority. Rule 7 (1) provides that person appointed under these rules shall be entitled to seniority only from the date pf appointment after selection and were to be placed below the persons appointed through regular selection before the appointment of such persons and rules 8 provides that the services of a person, who is not suitable, shall be terminated. The entire scheme under the rule shows that exercise for selection had to be taken just after framing the rules in 1979 because according to rule 7 (1) the seniority was to be fixed from the date of appointment after selection and they were to be placed below the persons appointed through a regular selection before the appointment of said persons ant the selection were to be made from available permanent or temporary vacancies on the basis of service record. In the year 1979, immediately after publication of the aforesaid Regularization Rule, the petitioner had completed more than four years since the petitioner was appointment on a permanent vacant post an the post was available. The petitioner was having unblemished service record and is entitled for regularization on a permanent post of Khandsari Inspector and on 5.7.1982, the petitioner was communicated an adverse entry for the 1977-78 the petitioner filed a representation on 1.10.1982 the adverse entry representation as well as the rejection has filed as Annexure 5, 6 and 7 to the writ petition. It appears that in the meantime the selection committee has considered the case for regularization and has published a list of selected candidates for regularization on 31.12.1987. 47 persons were selection of which four people from serial that No.44to 47 were juniors to the petitioner. It is submitted that the persons selected at Serial No. 1 Sri Gyan Prakash Ahluwalia was ultimately awarded the punishment of permanently with-holding five annual increments and his integrity was note as doubtful. The said integrity against the aforesaid person is dated 16.11.1986. Sri Ahluwalia has been selected while the petitioner has not been shown in the select list. One Sri Pawan Kumar Jain, his integrity was also being noted as doubtful yet he has been selected and has placed at Serial No. 4 of the select lust, which has

been filed as Annexure 2 to the writ petition. The second select list was published on 16.6.1989, In the aforesaid list, one Sri B.D. Pandey was shown at Serial No. 1 and Sri Chhabi Lal at Serial No. 4 and the entries of both these persons have been marked as doubtful. The petitioner specifically submitted that a specific averment has been made in the writ petition regarding the aforesaid fact.

4. The second entry against the petitioner is censure entry communicated to the petitioner vide letter dated 15.10.1981 with regard to two years i.e. 1979-80 and 1980-81. Against this, the petitioner has submitted representation on 7.1.1982, which was rejected on 30.7.1991 after expiry of more than nine years. The other adverse entry was communicated to the petitioner vide letter dated 31.5.1985, which did not disclose the year for which this entry has been made. The entry itself was vague. However, this entry was recorded for the year 1981-82. The representation dated 1.11.1985 filed by the petitioner kept pending and was rejected on 4.6.1992. The fourth adverse entry was communicated vide letter dated 16.4.1990 (Annexure 15 to the writ petition) for the year 1985-86. This entry was based on some audit report for which the petitioner was not giver any opportunity. The petitioner filed a representation on 22.6.1990, which was rejected on 12.8.1992.

5. It has been submitted on behalf of the petitioner that the petitioner was allowed to cross the efficiency bar with effect from 1.4.1987 and when the order dater10.10.1991 was passed the petitioner approached this Court and this court was pleased to grant time to the learned Standing counsel to file counter affidavit and he operation of the order dated 10.10.991 was stayed. Petitioner submits that he petitioner is still working on he post of Khandsari Inspector on the basis of the interim order passed by this Court.

6. The contention on behalf of the petitioner is that the regularization Rules came in the year 1979 and at that time various permanent posts were vacant and the petitioner and other persons were appointed on ad hoc basis till regular selection was made by the Commission. As the petitioner has completed more than four years of service and there was no adverse entry in the service record of the petitioner as Rule 7 (1) provides that persons regularized after selection shall be entitled to seniority from the date of appointment after selection,. It appears that the selection was made sometime in the year 1987 and the select list was published on 31.12.1987.When there was one adverse entry (warning) communicated to the petitioner on 5.7.1982 for the year 1977-78 already another adverse entry was communicated to petitioner on 15.10.1981 against which the petitioner has already submitted a representation, which was pending. Since the petitioner had been permitted to cross the efficiency bar with effect form 1.4.1987 the adverse entry for the year 1977-78 is to be washed up and second entry communicated to to petitioner of 15.10.1981, the representation of the petitioner was pending, as such, the same cannot be taken into consideration by the Selection Committee in 1987.

7. The petitioner has placer reliance upon a judgment in ***The State of Punjab Vs. Dee wan Chunnel Lal and others*** report in 1970 (1) SCC Page–479 and has

placed reliance upon Paras 10 and 14 of the said judgment. The same is being reproduced below:-

"10. It was urged before us that the crossing of the deficiency bar must be regarded as giving him a clean bill up to that date and in view of this the reports of 1941 and 1942 should not have been taken into consideration against him."

"14. In our view reports earlier than 1942 should not have been considered at all in as he was allowed to cross the efficiency bar in that year. It is unthinkable that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing the deficiency bar in 1944. It will be noted that there was no specific complaint in either of the two years and at best there was only room for suspicion regarding his behavior."

8. The another judgment relied by the petitioner is in ***Shri Baikuntha Nath Das and another Vs. Chief Distic Midecal Officer, Baripada and another***, reported in Judgment Today 1992(2) S.C. Page 1,and has placed reliance upon Paras 32 and 34 of the said judgment.

"32. We may not be understood as saying either that adverse remarks need not be communicated or that the representations. It any, submitted by the government servant (against such remarks) need not be considered or disposed of. The adverse remarks ought to be communicated in the normal course, as required by the Rules orders in that behalf. Any representations made against them would and should also be dealt with in the normal course, with reasonable promptitude. All that we are saying is that the action under F.R.56 (j) (or the Rule corresponding to it) need not await the disposal or final disposal of such representation or representations, as the case may be. In some cases, if may happen that some adverse remarks of the recent years are not communicated or if communicated, the representation received in that behalf are pending consideration. On this account alone. The action under F.R56 (j) need not be held back. There is no reason to presume that the Review committee or the government, if chooses to take into consideration such excommunicated remarks, would not be conscious or cognizant of the fact that are but communicated to the government servant and that he was not given an opportunity to explain or rebut the same. Similarly, if any representation made by the government servant so there, it shall also be taken into consideration. We may reiterate that not only the Review Committee is generally composed of high and responsible officers. It is unlikely that adverse remarks over a number of years remain excommunicated and yet they are made the primary basis of action. Such an unlikely situation it indeed present, may be indicative of malice in-law. We may mention in this connection that the remedy provided by Article 226 of the Constitution is no less an important safeguard. Even with its well-known constraints the remedy

is an effective check against malafide perverse or arbitrary action."

"34. The following principles emerge form the above discussions:

(i) An order of compulsory retirement is not a punishment. It implies no stigma or suggestion of misbehavior.

(ii) The order has to be passed by the government on forming the opinion that it sis in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High court or this court would to examine the matter as an appellate court hey may interfere if they are satisfied that the order is p[assed (a) malafide or (b) that it is based on no evidence or (c) that it is arbitrary-in the sense that no reasonable person would form the requisite opinion on the given material: in short if it is found to be a perverse order.

(iv) The government (or the Review committee, as the case may be) shall have to consider the entire record of serve before taking decision in he matter of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records character rolls, both favorable and adverse, If a government servant sis promoted to a higher post not with standing the adverse remarks such remarks lose their sting more so it the promotion is based upon merit (Selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference. Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

9. The Supreme Court has held that if adverse remark is remained uncommunicated over a number of years, it may be indicating of malice in law. Petitioner has submitted that if a person has been allowed to cross efficiency bar, adverse entries in the service record of that person for the years prior to crossing efficiency bar shall stand washed out and ceased to have effect and shall not be taken into consideration by the Selection Committee to deny the right of regularization of service. The further reliance has been placed by the Counsel for the petitioner in ***Ved Prakash Joshi Vs. State of U.P. and others*** reported in (1997) 3 UPLBEC, Page and in ***Sri Hira Nand Vs. State of Himachal Pradesh and others***, reported in 1981 (2) SLR Page–627.

10. The petitioner submits that order of the respondents is also violative to Article 14 as the petitioner has been discriminated as one Parasnath Tewari was denied promotion and his juniors has been promoted because of successive adverse entries in his record but as Sri

Parasnath Tewari had been allowed to cross the efficiency bar, the U.P. Public Service Tribunal allowed the claim petition of Sri Paras Nath Tewari for promotion on the ground that adverse entries prior to crossing efficiency bas have been washed out. Sri Paras Nath Tewari as been regularized in spite of successive adverse entries in this service record on the post of Khandsari Inspector and his name appears at Serial No.8 in the first list that has been filed as Annexure 2 to the writ petition. But the petitioner in spite of the aforesaid fact, has not been selected and promoted. The further submission made on behalf of the petitioner cannot be taken into consideration as in view of the Government Order dated 31.3.1997, provides that the adverse entry shall be communicated to a person concerned within six weeks or recording entry and the employee concerned was required ot submit his representation within six weeks thereafter of receipt of communication and the authority concerned was to decide the representation within three months from the date of receipt. The State Government has framed Rules regarding adverse annual confidential reports and disposal of representations know as *"The U.P. Government Servants" (Disposal of Representation against Adverse Annual confidential Reports and Allied Matters) Rules, 1995*, which provided that adverse report shall be communicated to the employee within 45 days of its reporting and within 45 days, the aggrieved person may filled a representation. The appropriate authority concerned, who has recorded the adverse report was to submit his comments to the competent authority within 45 days and the competent authority is required to decide the representation within120 days thereafter.

11. It has further been argued on behalf of the petitioner that for the purposes of compulsory retirement under fundamental rules 56, the screening committee has to examine the service record of the employee concerned and the court has help that for the purposes of compulsory retirement an entry against which a representation is pending the said adverse entry is to be excluded from consideration.

12. The reliance has been place upon a judgment in ***Narendra Singh vs. State of U.P. and others*** reported in 1993 (1) UPLBEC, page 347, and in ***Nand Lal vs. State of U.P. and others*** reported in 1996(1) ECC, 65 [Allahabad]. It has further been submitted on behalf of the petitioner that a specific allegation in paras 12 and 13 has been made regarding the stoppage of five annual increment and regarding with holding the increment o0f Gyan Prakash Ahluwalia and similarly Pawan Jain and regarding regularization of one B.D. Panday and Chabilal. Who are at serial Nos. 1and 5 respectively were regularized. Thought their integrity are withheld earlier The allegation to this effect in the said paragraph has not been controverter by the respondents in the counter affidavit. In such a way, the petitioner submit the adverse entries communicated after a lapse a of few years are not in accordance with the Government Order and Rules. The entries before crossing the efficiency bar cannot be taken into consideration and the representation, which was pending the said entry cannot be taken into was pending the said entry cannot be into consideration. The submission of the

petitioner is that it is not the number of adverse entries, Which matter but it is the gravity of the adverse enter In the case of the petitioner, entries are of general in nature and at the time of consideration by the selection committee the same was washed off crossing of efficiency bar. The Representation of the petition was pending which was decided after 1990 but the petitioner was have been awarded punishment and persons whose integrity have been recorded as doubtful has selected for regularization way back in 1987 and 1987 but the services of the petitioner has been terminated on the ground that he has not been selected by two Selection Committees. Petitioner submits that the aforesaid Act of the Selection Committee is wholly illegal, arbitrary and volatile to Articles 14 and 16 of the Constitution of India

13. On the other hand the learned Standing Counsel submits that the petitioner was suspended and the adverse entries have also been awarded against the petitioner for the years 1977-78, 1978-79,1979-80, 1980-81 and 1981-82 and for the year 1987-88 special adverse entries have been entered in his character roll, as such the petitioner services have been terminated on 10.10.1991. The representation of the petitioner has also been rejected and that has not been challenged, therefore, that has become final. The respondents have submitted that the adverse sentries for the year 1977-78, which was recorded on 5.7.1982 and informed to the petitioner on the same day will not be treated as time barred. It has been submitted that as soon as the entry was recorded, it was informed to the petitioner and as the petitioner has already submitted the representation, the same was considered and rejected, therefore, the petitioner cannot claim that there was no adverse entry and taking into consideration the adverse entry by the Selection committee, the Selection Committee has committed an illegality. The reliance has been placed by the respondents in judgment reported in 1974 in All India Service Law Journal page-106 ***Sri Kant Chand Jain Vs. State of U.P.*** and has submitted that in view of the aforesaid judgment, the contention that adverse entry has to be communicated. There is no statutory rules and it is difficult to accept the right proposition the adverse entry which is not communicated may nerve be taking into consideration. The further reliance has been placed by to respondents in case of ***R.L. Butail Vs. Union of India and others*** reported in 1970 Supreme Court SCC Page- 876, and has submitted that rules regarding preparation ad maintenance of confidential rules or by way of departmental, are neither statutory rules nor rules made under Article 309 of the Constitution of India. As the petitioner right form 1977 to 1987 continuously awarded entries as such, his case has been rejected,. It has further been submitted that if certain junior persons have been given promotion or confirmed that will not give any right to the petitioner. Reliance has been placed in ***Union of India and another Vs. International Trading Company and another*** reported in A.I.R. 2003 Supreme Court, Page-3983. The further submission of the respondents is that similar controversy has been raised and decided by the Full Bench decision of the Oirssa High Court in ***Ramesh Prased Mahapatra Vs. State of Orissa and others*** reported in 1980 (2) SLR Page 417. As the petitioner was not found suitable in view of the adverse

entries awarded against the petitioner, as such his services have been terminated.

14. I have heard learned counsel for the petitioner and learned Standing Counsel and have perused the record.

15. The petitioner was given appointment as a junior clerk in he year 1974 and was promoted on the post of Khandsair Inspector on ad doc basis on 5.2.1975. The name of the petitioner is in the list at serial No. 18, which the regularization Rules of 1979 was published on 14.5.1979, the petitioner was completed three years of ad hoc service on the post of Khandsair Inspector. As regards, the adverse entries for the year 1977-78 ad the representation of the petitioner is of 1.101982. According to the Government Order, the adverse of sex weeks. Admittedly, the same has been communicated to the petitioner after lapse of about four years and the representation of the petitioner was rejected in the year 1987 after a lapse of five years, which is a clear violation of the government order, which has been issued on 31.3.1977. That U.P. Government has framed rules regarding disposal ad communication of the adverse entry against an employee. In the present case, admittedly, the adverse entries against the petitioner have not been communicated as provided under the government order and rules. Admittedly, the petitioner has cross the efficiency bar on 1.4.1987, therefore, in view of the judgments cited above, all the adverse entries before 1.4.1987 will be treated to be washed out. The respondents have also not denied the allegations made in Paras 12 and 13 of the writ petition, which clearly states that the persons, who have been awarded adverse entries and their integrity was also withheld vide its order dated 16.11.1986, has been regularized an his name is at serial No. 1 of the list dated 31.12.1987. The case of Pawan Kumar Jain,. Who is at Serial No.4 of the said list, his integrity is also withheld on 16.11.1986 but both the persons were regularized by the Selection Committee. It has also come form the record that one Sri Dhoom Singh, who is admittedly, junior to the petitioner in the list of ad hoc promotion dated 5.2.1975 have been regularized. Similarly,. One Paras Nath Tewari, who is at Serial No. 8 of the select l8ist of Regularization dated 31st December, 1987, has been given benefit on the basis of the judgment passed by the Tribunal only on the ground that Sri Paras Nath Tewari was permitted to cross the efficiency bar therefore, the earlier adverse entries awarded against Sri Paras Nath was treaded to be washed out. The said judgment of the Tribunal has become final and Sri Paras Nath Tewari has been regularized on the post of Khandsair Inspector. The court has also considered the judgment of Ved Prakash Joshi and Sri Hira Lal (Supra). The Court has taken a view that if a person has been allowed to cross efficiency bar, the averse entries in the service record of that person was prior to crossing efficiency bar shall be treated to be washed out and shall ceased to effect an shall not be taken into consideration by the Selection Committee to deny the right of regularization of his service. The court has also perused the adverse entries, which has been awarded against the petitioner. It clearly goes to show that the same has been given to the petitioner only to deprive the petikti0ner form regularization on the post of Khandsair Inspector. If the working of an employee is not up to the mark for a particular yea, the immediate authority has to record the performance of that

particular employee within a reasonable time in the service record of the person concerned and it there is provision that in case of communication of the adverse entry to an employee has right to make representation to the competent authority to satisfy the authority that the adverse entry, which has bee awarded that is to correct and if that authority is satisfied the same can be washed out. But in the present case, the adverse entries of 1977-78 has been communicated to the petitioner in the year 1982 after a lapse of four years and the representation of the petitioners has been rejected after a lapse of five years on 26.11.1987. Only about one moth before of the consideration of various employees similarly situated to the petitioner, for the purposes of regularization by the Selection Committee according to Regularization Rules. The said action of the respondents appears to be intentional and malafide from the perusal of the list dated 31.12.1987 of the selected candidate for regularization, 47 persons were selected and admittedly persons mentioned at serial numbers 44 to 47 were junior to the petitioner and certain persons have been regularized in spite of the fact that their integrity were doubtful and that was not expunged on the date when the Selection Committee was constituted for consideration of the cases of those persons. Further it is noted that censure entry, which was given to the petitioner with regard to the years 19979-80 and 1980-81 was communicated on 15.10.1981 and the representation which was filed by the petitioner on 7.1.1982 was rejected on 30.7.1991, therefore, in view of the various judgments of the Court and the Apex Court, the said censor entry for the years 1979-80 and 1980-81 cannot be take into consideration as on the date when the Selection Committee was considering the cases of various employees, the representation of the petitioner was pending,. The adverse entry dated 31.5.1985 does not disclose the adverse entry of any year, The representation dated 1.11.1985 was rejected on 4.6.1992 meaning thereby the said adverse entry should not have been taken into consideration at the time of consideration on 31st December,1987. The adverse entry for the year 1985-86 was communicated to the petitioner on 16.4.1990, therefore, in my view, in of the Government Order, the same should not be treated to be a adverse entry, which has been communicated after four years. From the record, it sis also clear that on the day when the selection Committee has considered the other persons for regularization according to Rules, there was nothing against he petitioner as the petitioner as the petitioner was permitted to cross the efficiency bar. In case of ***State of Punjab Vs. Dewan Chunni Lal***, the Apex Court has held that crossing of the efficiency bar must be recorded as giving him a clean chip up to that date and the same should not be taken into consideration against him. In case of Baikunth Nath (Supra) the Apex Court has observed "*It is unlikely that adverse remarks over a number of years remain uncommunicated a yet they are made primary basis of action. Such an unlikely situation. It needed present may be indicative of malice in law*" It is also not disputed by the respondents that he persons having bad service record and whose integrity were doubtful have been regularized by the Selection Committee on 3.12.1987 and even it sis not the case of the respondents that their representation against the adverse entries were pending on the day when they were considered for regularization.

16. In such a way, I find that action of the respondents is illegal and the order dated 10.10.1991 cannot be sustained in eye of law. As the order dated 10.10.1991 (Annexure 19 to the writ petition) has been set aside, the petitioner is entitled for regularization on the post of Khandsair Inspector at least immediately on the day when his immediate junior to the petitioner mentioned at Serial No. 19 of the list dated 5th February, 1975 has been regularized. It is also to be noted that this Court vide order dated 28.10.1991 was pleased to stay the order dated 10.10.1991. The petitioner is working on the basis of the interim order on the post of Khandsair Inspector.

17. As the order dated 10.101991 has been quashed, the respondent No.2 is directed to pass appropriate orders regarding regularization of the petition on the post of Khandsair Inspector form 31st December, 1987 when the junior persons of he petitioner have been regularized by the Selection Committee. It is also made clear that the petitioner swill be entitled for all the consequential promotional benefits for which the petitioner is entitled according to law.

18. The writ petition is allowed. There shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.10.2005

BEFORE
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Criminal Misc. Application No.14442 of 2005

Rajpal and another ...Applicants
Versus
State of U.P. & another...Opposite Parties

Counsel for the Applicants:
Sri Raghuraj Kishore.

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

Code of Criminal Procedure S-482-Compromise Application-offence under section 307/506.IPC-if prosecution version accepted maximum conviction under 324 IPC can be given-which is a compoundable offence-concerned session Judge directed to grant permission and to accept the compromise.

Held-Para-6

In view of various decisions, I find that especially in the facts of the present case, injuries are not such which could constitute offences under Section 307 I.P.C. In the circumstances, if the prosecution version is accepted, the conviction would end only one under Section 324 I.P.C., which is compoundable with the permission of the court. In view of the facts and circumstances of the present case, I dispose of this application with a direction to the concerned court to grant permission and accept the compromise in Sessions Trial No. 1105 of 1999 State vs. Rajpal and another (supra), and pass a fresh order in confirmation of the guidelines given above.

Case law discussed:
1999 G.L.J. 3417
AIR 1988 SC-2111

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Shri Raghuraj Kishore, counsel for the applicants and learned A.G.A.

2. The submission on behalf of the applicants is that Sessions Trial No. 1105 of 1999 State Vs. Rajpal and another under Sections 307, 506 I.P.C., Police Station Gangoh, Saharanpur, is pending and the compromise submitted in the same, may be accepted.

3. The facts giving rise to the dispute is that on 3rd May, 1999, at 6:30 PM, the applicant's caught hold on the victim Sukrampal and caused injuries with knife. A first information report was registered on 4.5.1999 at 4:30 PM. The victim was medically examined; the doctor did not give any opinion with regard to the injury report has been annexed as annexure no. 2 to the affidavit filed in support of this application. There were two injuries on the body of the victim. According to the opinion of the doctor, one injury was found to be simple in nature and another was kept under observation. Subsequently, no X-Ray was performed as there was no supplementary injury report on record. After completion of investigation, the police submitted a charge sheet under Section 307 I.P.C. A compromise was entered into between the victim and the accused on 22.8.2005 and the same was filed in the court of Additional Sessions Judge, Court No. 3, Saharanpur in Sessions Trial No. 1105 of 1999 State Vs. Rajpal and another, with the specific prayer that they did not want to continue the proceedings and, therefore, in view of the compromise, the proceedings may be dropped. The application was rejected by means of impugned order on the ground that section 307 I.P.C. is not compoundable hence the compromise cannot be accepted.

4. It is submitted that the injuries were not such which could either be dangerous to life or was likely to cause death. There is no opinion of the doctor on the injury report which is annexure no. 2 In any event, if there would have been no compromise and trial would have concluded into an order of conviction; it could not travel beyond the preview of Section 324 I.P.C. which is compoundable. Reliance has been placed on the decision in the case ***Gopal Tiwari and another Vs. State of Madhya Pradesh, 1999 CRI. L.J.* 3417,** paras 4 and 5 of the said decision are quoted below.

"4 Keeping in view the size of the injury; the part of the body on which it was inflected it was not vital part, it did not damaged the heart or the lung, there was no repeated attack and in the absence of clear motive, it should be inferred that accused Gopal Tiwari had no intention or knowledge to cause death of Mukesh. The offence is not covered by Section 307 but it comes with in the purview of Section 324, I.P.C. The charge under Section 324 I.P.C. is brought home to accused Gopal Tiwari and Under Section 324/34 to accused Ramesh Tiwari.

Where in appeal conviction for non-compoundable offence is altered to that of a compoundable offence permission to compound can be granted. Ram Shankar

Vs. State of U.P. (1982) 3 SCC 388. The offence under Section 324, I.P.C. is compoundable with the permission of the Court. Considering the facts mentioned in para 2 of this judgment and the affidavit of the complainant to the effect that the parties have amicably settled the matter the permission to compound the offence is granted. It would be in the mutual interest of the complainant and the appellants and also in the interest of the society that key should forget the past and live peacefully as good and law-abiding citizens. That would remove the bitterness and rancor between them. It has been observed in Shakuntala Sawhney vs. Kaushalaya Sawhney (1980) 1 SCC 63, that finest hour of the justice is the hour of compromise when parties after burying the hatchet reunited by a reasonable and just compromise. The complainant and the accused are granted permission to compromise the offence. It is expressed that they have compounded the offence."

5. Section 320 Cr.P.C. is relevant provision, which permits the compounding of the offences. However, Hon'ble Supreme Court had granted permission to compound the offences which are non-compoundable under the Code vide **Devender V. State of M.P. 1994 SCC (Cri.0 145, Union Carbide Vs. Union of India (1991) 4 SCC 584: Mahesh Chand Vs. State of Rajasthan AIR 1988 SC 2111.**

6. In view of various decisions, I find that especially in the facts of the present case, injuries are not such which could constitute offences under Section 307 I.P.C. In the circumstances, if the prosecution version is accepted, the conviction would end only one under Section 324 I.P.C., which is compoundable with the permission of the court. In view of the facts and circumstances of the present case, I dispose of this application with a direction to the concerned court to grant permission and accept the compromise in Sessions Trial No. 1105 of 1999 State vs. Rajpal and another (supra), and pass a fresh order in confirmation of the guidelines given above. Application Allowed.

ORIGINAL JURISDICATION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2005.

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 52316 of 2005

Ramesh Chandra Nagar and others
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.P. Singh
Sri Gautam Awasthi

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

Contract Labour and Abolition Act-S-10-regularisation-petitioner working as driver with Noida Development Authority-Principal employee of the petitioner is the licensed contractor-challenge made to advertisement of fresh vacancy-and the regularization on preferential basis-held absence of vacancy claim for regularization held wholly fallacious-before regularization they hare to first establish their states-being selected on merit alongwith other-and their performance is equal but not

otherwise-regularization can be decided only by Labour Court.

Held-Para 23 and 27

It is apparent from the order and judgment dated 18.2.2005 that the petitioners were yet to establish first their status of workers of respondent-Authority in order to claim preference, which can only be decided by a Lalbour Court after adjudication the matter on facts and evidence and the Court had in no circumstance observed that selection would proceed subject to adjudication in favors of the petitioner.

The petitioners have given service to NOIDA Authority through licensed contractors and have received remuneration from the contractors for their services. The question of preference may arise only after the petitioners are selected on merits along with other candidates for the post who have not worked with NOIDA Authority and their performance is equal but not otherwise.

Case law discussed

2001(7) SCC-I
1998(9) SCC-709

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

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

In there two writ petitions, common questions of law and facts are involved, as such they are being decided by this common judgment.

2. In Writ Petition NO. 52316 of 2005 the petitioners claim to be appointed as Drivers in the New Okhla industrial Development Authority (hereinafter referred to as the NOIDA), Gautam Budh Nagar. They also claim to be working continuously from the year shown against their names as under.

S No	Name	Year of appointment
1.	Shri Ramesh Chandra Nagar	1989
2.	Shri Yogender Singh	1985
3.	Shri Ram Prasad	1995
4.	Shri Upender Singh	1996
5.	Shri Suresh Chand	1990

3. The petitioner in this petition has prayed for quashing of the advertisement dated 30.6.2005 (Annexure 7) issued by the NOIDA Authority and further to fill up the vacancies for drivers only from amongst the petitioners and similarly situated persons.

4. The case of the petitioners is that they have worked for a considerable period in the service of NOIDA @ Rs.100/= per month as daily wagers and have become over age for other Government job that they are eligible for the post of Driver and are entitled to be appointed as such on permanent basis in the pay scale of Rs.3050–4590.

An advertisement dated 30.6.2005 was published for filling up one post in the pay scale of Rs.3050 -4590.

5. Subsequently NOIDA Authority vide resolution dated 5.7.1999 sent a proposal subject to approval of the State Government, for creation of 64 additional posts of drivers under covering letter dated 4.8.1999 of the Chief Executive Officer, NOIDA.

6. The petitioners also made representations to the Chief Executive Officer, NOIDA for requesting the State

Government to take action in the matter and in these circumstances when the matter remained unactioned the petitioner filed Writ Petition No. 44838 of 2001 for the following main reliefs:

(a) Issue a writ, order or direction in the nature of mandamus commanding the respondent no. 2 to take decision on the proposal sent by the respondent no. 3 vide letter dated 4.8.1999 for creation of 64 more posts of drivers in the NOIDA.
(b) Issue a writ, order of direction in the nature of mandamus commanding the respondents to regularize the services of the petitioner drivers in the New Okhla Industrial Development Authority.
(c) Issue a writ, order of direction in the nature of mandamus commanding the respondents to pay the same salary to the petitioners as is permissible under the law to the drivers employed on sanctioned posts.
(d) Issue a writ, order or direction in the nature of mandamus commanding the respondent no. 3 not to terminate the services of the petitioners."

7. The Project Engineer also made a recommendation that the services of the drivers working on contract basis be regularized only after taking sanction from the state Government.

8. It also appears from the record that the matter was kept pending and the State Government did not sanction 64 posts of drivers, rather issued advertisement dated 17.10.2004 inviting fresh applications for appointment on 8 posts of drivers.

9. The writ petition was disposed of on 17.9.2002 with the following directions:

"In view of the aforesaid, so far the relief as prayed in this petition regarding regularization of the services and direction for payment of regular salary, required no examination at this stage. So far as the prayer as made for a direction to the respondent no. 2 for taking the decision on the proposal sent by the respondent no. 1 dated 4.8.1999, copy of which has been appended as Annexure Nos. 11 to 13 to the writ petition, suffice it to say that in the event the matter is still pending decision before respondent no.2 it will be appropriate for that authority to take appropriate decision by means of a reasoned order in that respect within a reasonable time which this court feels, period of three months will be sufficient.

In view of the aforesaid, this Court without going into the merits of the case/Claim of the petitioners which has been placed before this Court either way, this petition is being disposed of in terms of the directions as contained aforesaid.

In the light of the aforesaid, writ petition stands disposes of.

SD / - S.K. Singh, J.
17.9.2002"

SUBMISSIONS

10. The counsel for the petitioners submits that the petitioners have a legal right in view of law declared by the Hon'ble Supreme Court in the case of **Steel Authority of India Ltd. Vs National Union Waterfront Workers and Others, (2001) 7 S.C.C. 1**. According to him the apex court in the aforesaid decision has held that the contract workman shall have preferential

right of appointment on the pasts which are sought to be filled up by regular appointment and as such the advertisement for filling up the posts (s) of driver (s) without considering the rights of the petitioner (s) is illegal, arbitrary and is liable to be quashed.

11. It is urged that the similarly situated drivers **along with petitioner no.1** challenged the advertisement aforesaid in Civil Misc. Writ Petition No. 48390 of 2004 before this Court which was decided vide judgment dated 18.2.2005 whereby respondents 3 and 4 were restrained to made appointments in pursuance of the advertisement dated 17.10.2004. It is further urged that after hearing the learned counsel for the parties in Writ Petition No. 48390 of 2004 the Court passed the following order:

"After having examined the contention of the parties and perused the records as well as the order passed by this Court referred to herein above, it is evident that the respondent authority ought to have considered the claim of the petitioners in the light of the representations made by them. As per the advertisement which is impugned in the present writ petition, it is clear that the appointing authority is the Chief Executive Officer, NOIDA, Gautam Budh Nagar, i.e., the respondent no. 3. **The question as to whether there is an employee–employer relationship, ought to have been at least attended to**, qua the petitioners keeping in view their length of services rendered as drivers to the respondent NOIDA authority. In absence of any such consideration, this Court is of the opinion that the respondent no. 3 shall consider the claims of the petitioners in the light of the decisions of the Apex Court referred to in this judgment and in particular keeping in view paras 71 to 77, 88, 97, 101, 107 and 125 of the judgment of the Apex Court rendered in Steel Authority of India (supra). The respondent authority will also consider the judgment relied upon by the respondents as well and take a decision in the matter accordingly. It is expected that the respondent no3 shall endeavor to take a decision preferably within a period of 3 months from the date of presentation of the certified copy of this order. In case the petitioners are not satisfies with such decision, the remedy available to then is to approach the industrial / labour court in accordance with the Industrial Disputes Act as held by the Apex Curt and as directed by this Court in its judgment dated 17.09.2002.

In view of the aforesaid **facts and circumstances and in view of the fact that the petitioners are yet to establish their status in order to claim preference, it would not be appropriate for this Court to interfere with the selection process undertaken by the respondent at this stage. It is however, observed that the selections pursuant to the impugned advertisements and the appointments which the respondents no. 3 and 4 would proceed to make, shall be subject to any adjudication made in favour of the petitioners**.

With the aforesaid observation, the writ petition is disposed of.

SD / - A.P. Sahi, J.
18.2.2005"

12. The petitioner- workmen aggrieved by the judgment dated 18.2.2005 aforesaid filed Special Leave Petition C.C. No. 3924 of 2005 which was later on dismissed as withdraw. The Hon'ble Supreme Court vide order dated

11.4.2005 while dismissing the writ petition granted liberty to the appellants to approach appropriate court. The petitioners have now come up in this writ petition for the following relies:

"(a) quash the advertisement published on 30.6.2005 (Annexure P-7) by the NOIDA to the extent it relates to the posts of driver, declaring the same to be violative of Articles 14 & 16 and also in contravention of the direction given by the Hon'ble supreme Court in Para 125 (6) of the Steel Authority of India case (2001) 7 S.C.C.
(b) direct the NOIDA to till the vacancy of the driver only from amongst the petitioners and similarly situated employees.
(c) pass such other or further direction or appropriate writ of order as this Hon'ble Court may deem fit and proper."

FACTS OF WRIT PETITION NO. 54320 OF 2005

13. In Writ Petition No.54320 of 2005, the petitioners have claimed that they are regularly working as Junior Engineers in NOIDA and have become over age for ay other job; that they possess requisite qualifications for the posts of Junior Engineers but are paid less salary though they perform the same functions which a regularly appointed Junior Engineer performs on permanent post. It is also their case that though they are employees of NOIDA but are being shown to have been engaged through the contractor which is nothing but a mere camouflage. It is further claimed that an incorrect statement has been made by NOIDA that they have no record of the petitioners which is established from Annexure P3 toP7. It is urged that from these documents it is established that the petitioners are transferred from one place to another by the NOIDA Authority without any reference to the alleged contract and various inspection reports are signed by the petitioners as officers of the Authority. It is also the case of the petitioners in the writ petition that they have been given as assurance that whenever vacancies would be available the petitioners would be regularized, but this has proved to be a false assurance.

SUBMISSIONS

14. The learned counsel for the petitioners on the legal aspect of the matter has submitted that in terms of paragraph 125 of the judgment rendered in Steel Authority of India (supra) in the case of genuine contract of the principal employer in the event of filling the posts by regular appointments shall have to give preferential appointment to the erstwhile contractual employees it is submitted that the reasoning for the judgment is very just and fair in the sense that the contract employment on the post which are meant to perform regular and perennial work should not be rule and such post should be filled by regular recruitments but if contractual employees have been made to work on those post for substantive period prior to filling up of the post by regular recruitment then in that event erstwhile contractual employees should be given preferential appointment it is further submitted that as there is no disputed question of facts to be determined writ is maintainable The petitioners are seeking enforcement of their legal right of preferential appointment in accordance with the law enunciated by the Hon'ble Supreme scours in Steel Authority's case (supra) and the High Court can issue a

writ of mandamus directing the Authority to give the preferential appointment to the petitioners under Article 226 of the Constitution in given facts and circumstances of a case.

15. Sri U.S Awasthi learned counsel for the respondents, has raised a preliminary objection that the writ petition is not maintainable as it pertains to contract labours working working through a licensed contractor. He submits that the petitioners are not employees of NOIDA Authority at all; that it is well-settled law that the remedy for contract labours is before the industrial Tribunal/Labour Court: that they are only hired labours supplied by the licensed contractor on day-to-day need basis. It is further submitted that the petitioners have no direct link with NOIDA and they have failed to establish any relationship of employees with he respondent by any adjudications observed by the Court in he judgment dated 18.2.2005 in Writ petition No.48390 of 2004 (Ram Kumar & others Vs State of U.P& Others) while dismissing the writ petition. He also submits that after the Special Leave Petition was dismissed by the Hon'ble Supreme court with liberty to approach the appropriate court the petitioners filed Special Appeal No.247 of 2005 (defective) which is pending disposal before these court. He has vehemently urged that the petitioners and the like contract workers are not paid wages by NOIDA Authority directly but are paid by the licensed contractor who is their employer. It is further urged by him that mo decision has been taken by the State government on the proposal for creation of posts sent by NOIDA Authority, as such the petitioners cannot be treated as regular employees as there is no sanctioned post; that the so called representations dated 7.11.2002 and 8.1.2004 said to be submitted by the petitioners is false and have not been received by the NOIDA.

16. It is lastly submitted by Sri Awasthi that the relationship of employer and employees itself is a disputed question of fact, which requires adjudication of facts on the basis of evidence, it can only be decided by an adjudication authority.

17. The learned counsel for the petitioners in rebuttal submits that it is an admitted position have been working since long as contract workmen and hence in terms of the Constitution Bench judgment delivered by the Hon'ble Supreme Court in Steel Authority of India case they have a preferential right to appointment in the event the same posts are being filled up by regular appointment.

18. Having considered the arguments advanced by the learned counsel for the parties in support of their case at length an after going through the record, the undisputed facts which emerge are that the petitioners had come in Writ Petition No. 44838 of 2001 for direction to the State Government to take decision on the proposal sent by the respondent – NOIDA for creation of posts and further to regularize the petitioners on the said posts. It is also undisputed that the Hon'ble supreme Court in the case of Steel Authority of India Ltd. (Supra) has held that in order to ascertain the status of a person claiming regularization or absorption the appropriate authority is the Industrial Tribunal or Labour court which can go into such issues and adjudicate

upon the matter. In this case the petitioners have also placed reliance on the judgment rendered in Steel Authority of India (Supra) in Writ Petition No. 44838 of 2001, wherein the Hon'ble Supreme Court in paragraph 125 (5) held:

*/"If the contract is found to be not genuine but a mere camouflage, the so – called contract labour will have to be treated as employees of the principal employer who shall be directed to regularize the services of the contract labour in the establishment concerned subject to the conditions as may be specified by it for that purpose in the light of Para 6 hereunder."

19. There after the apex court in the very next paragraph, i.e. paragraph 126 has made it clear that:-

"We have used the expression "Industrial adjudicator" by design as determination of the questions aforementioned requires enquiry into disputed questions of facts which cannot conveniently be made by High Court in exercise of jurisdiction under Article 226 of the Constitution. Therefore, in such cases the appropriate authority to go into those issues will be the Industrial Tribunal/Court whose determination will be amenable to judicial review."

20. Admittedly, the State Government sanctioned only 1 post and not 64 posts for which advertisement dated 30.6.2005 has been issued. Five of the petitioners have claimed the relief of preferential appointment and whose claim is better cannot be adjudicated upon by this court as this has to be adjudicated by an ' Industrial adjudication'. In view of the fact that the petitioners are working as drivers having been appointed through a licensed contractor, they do not have a legal right to claim regularization in HOIDA Authority which is not their employer. Regularization ca only be claimed against sanctioned vacant post against which an employee is appointed or is working in the organization of the employer and not in the organization where he is sent to work by his employer. Thus it has to be seen as to who is the employer before deciding regularization of an employee. Even otherwise regularization cannot be ordered by the High Court in view of ***State of Punjab Vs Sardara Singh (1998) 9 S.C.C. 709***, wherein it has been held:

"We find merit in the said contention. The High Court could not direct of regularization of the respondent but could only direct the appellants to frame a scheme for the said regularization and since the scheme has already been framed, the regularization can only be made in accordance with the said scheme."

21. The parties also do not dispute that contractual appointments have snot been abolished in HOIDA under Section 10 of the Contract Labour and Abolition Act and as such they can approach the appropriate court in this regard. This admission of the fact by the petitioners that they are contract workers is also corroborated from Annexure 6 to the writ petition which is their representation wherein it has been sated by them that they are working in the NOKDA as drivers on "**contract basis**" for the last several years.

22. The posts of drivers are not in existence, as the State Government has not sanctioned the same; hence it is wholly fallacious to claim regularization

by the petitioners against the not-existing posts.

23. It is apparent from the order and judgment dated 18.2.2005 that the petitioners were yet to establish first their status of workers of respondent-Authority in order to claim preference, which can only be decided by a Lalbour Court after adjudication the matter on facts and evidence and the Court had in no circumstance observed that selection would proceed subject to adjudication in favors of the petitioner.

24. The petitioners have neither placed their appointment letters issued either by the contractors or by the NOIDA Authority (as they claim to be employees of NOIDA). The contract between the licensed contractor and NOIDA Authority has also not been placed. In fact the petitioners in reply to the counter affidavit in Writ Petition No. 48390 of 2004 have not denied the averment that they are contract workers and do not dispute the genuineness of the contract.

25. Admittedly, in Writ Petition No. 48390 of 2004 also the petitioners had placed reliance upon paragraph 125 of the judgment rendered in Steel Authority of India (supra) like the present wherein also the petitioners are basing their claim upon the observations given in paragraph 125, which has been disposed of with finding that the petitioner has to approach industrial adjudicator, hence this petition is barred by principles of res judicator.

26. The petitioners admittedly also has withdrawn the special Leave Petition C.C. No.3924 of 2005 fled before the Hon'ble supreme Court against the judgment and order dated 178.2.2005 and the Special Appeal filed against the judgment and order dated 18.2.2005 passed in Writ Petition No. 48390 of 2004 is pending as a defective Special Appeal. It appears that the Special appeal has been deliberately filed as defective with the sole motive to keep the matter alive so that a stand may be taken that the Special appeal is pending decision. The petitioners are filing successive writ petition after another on the same gourds which can safely be said to be abuse of process of law on same law point which had earlier been considered and decided by the Court between the parties. Special Appeal is not the proper forum as it is in continuation of the writ petition itself, In the writ petition the Court has directed the petitioner to raise the matter before Industrial Court/ Tribunal and the Hon'ble supreme Court has also dismissed the Special Leave Petition of the petitioner as withdrawn with observation to approach the proper form i.e. Industrial Adjudicator which has not been done by the petitioner and not only he filed Special Appeal No. 247 of 2005 (defective) but also the present writ petition again on same grounds.

27. In so far as the question of preferential rights is concerned, the case of the petitioners is not like that of Apprentices appointed under the Apprenticeship Act, 1961 where the employer spends considerable amount of time, money and energy in imparting training to the apprentices in various trader. The petitioners have given service to NOIDA Authority through licensed contractors and have received remuneration from the contractors for their services. The question of preference may arise only after the petitioners are selected on merits along with other

candidates for the post who have not worked with NOIDA Authority and their performance is equal but not otherwise.

28. The learned counsel for the petitioners has tired to point out minor mistakes in the photo copies of the documents filed in Writ petition No. 54320 of 2005 to establish a case against the respondents, such as that copy of Annexure P 4 at page 31 is not endorsed to any contractor; the name of Sri Shyam shown along with other employees working as contract labour is not junior Engineer but a Computer Operator. Similar mistakes have been pointed out in Annexure P 5 wherein it is claimed that the inspection report sis signed by the petitioners as the signatures of NOIDA Officer. Annexure P 7 is said to have been signed by one of the employees as In charge showing loading and unloading of vehicles. These discrepancies emphasized by the petitioners are irrelevant. Relationship of master and servant between the petitioners which may have typographical or clerical errors. Such mistakes will not crate the relationship. The burden of proof has to be discharged before the adjudicating authority. The documents have to be proved as has rightly been held by the courts by oral evidence as it is pure question of fact which cannot be decided in writ petition merely on the basis of photocopies of some documents filed or the first time before the High Court. The NOIDA Authority has not denied the engagement of the petitioners through contract labour, hence even if the petitioners have signed the inspection report etc. the same does not support their case. What really matters is the nature of their appointment and who has appointed them

29. I have already dealt with other legal contention of the learned counsel for the petitioners in this judgment which are common in both the petitions and need not be repeated.

30. For the reasons stated above these petitions are dismissed. No order as o costs.

Petition dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2005

BEFORE
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Criminal Misc. Application No. 8650 of 2005

Rashim ...Applicant
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri P.K. Bhardwaj

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

Code of Criminal Procedure-S-482-Quashing of Criminal Proceeding-offence under 498-A, 323 IPC-Trail of other co-accused ended in acquittal-all the prosecution witnesses became hostile-if trail allowed against the applicant-amounts to wart age of time-held-principle of "stare decise" applicable-proceeding quashed.

Held- Para 2 & 3

The witnesses were declared hostile and finally the trial has ended in acquittal. In the circumstances, the claim of the applicant is that there is no prospect of the case ending in conviction if allowed to continue against the applicant. It will

only result in wastage of valuable time of the Court. If the trial is allowed to continue, it will be sheer formality and, therefore, the applicant has claimed that she should be given the benefit of principle of "stare decisis' and proceedings should be quashed.

In the circumstances, I allow this application and grant the benefit of principle of stare decisis and criminal proceedings initiated against the applicant on the basis of first information report registered at case Crime No. 21 of 2002, under Sections 498-A, 323 I.P.C. read with Section 3/4 Dowry Prohibition Act, Police Station Sikandrabad, District Bulandshahar is quashed. The application is allowed.

Case law discussed:

2004 (1) JIC-508

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard learned counsel for the applicant and learned A.G.A. for the State.

2. This application under Section 482 Cr.P.C. has been filed for availing the benefit of principle of stare decisis. A first information report was lodged by the contesting opposite party against six persons including the present applicant under Sections 498-A, 323 I.P.C. read with Section 3/4 Dowry Prohibition Act, Police Station Sikandrabad, District Bulandshahar on 20.1.2002 which was registered at case Crime No. 21 of 2002. A charge sheet was submitted against the accused persons. It appears that some of the accused including the applicant had approached this Court and got the proceedings stayed in Criminal Misc. Application No. 62545 of 2002. The co-accused Vibhu, Vivek, Ravi, Rashmi, Nirmala and Brij Lal Santoshi have been given a clear verdict of acquittal vide judgment dated 5.11.2004. A certified copy of the judgment is annexed as Annexure-3 to the affidavit. It is, therefore, prayed that since the present applicant is also an accused in the same case crime number, the evidence is also common. The witnesses were declared hostile and finally the trial has ended in acquittal. In the circumstances, the claim of the applicant is that there is no prospect of the case ending in conviction if allowed to continue against the applicant. It will only result in wastage of valuable time of the Court. If the trial is allowed to continue, it will be sheer formality and, therefore, the applicant has claimed that she should be given the benefit of principle of "stare decisis' and proceedings should be quashed. Reliance has been placed on a decision of this Court in the case of **Narayan Rai Vs. State of U.P. and another, 2004 (1) J.I.C. 508 (Allahabad)**. I have gone through the judgment of acquittal in respect of the other co-accused and it is apparent that P.W.-1 had supported the prosecution story in examination-in-chief but subsequently when he was recalled on 1.11.2004, he admitted that the accused had made no demand of dowry from his daughter and she was never subjected to cruelty whatsoever. There was certain differences between the husband and wife, thus as a result his daughter has come to her father's home. He had also admitted that both the daughters have been remarried and they have been given alimony during the divorce proceedings and in the circumstances, for want of evidence, the judgment of acquittal was recorded. I am satisfied that if the proceeding against the present applicant is allowed to continue, there will be no other

outcome but for the same verdict which has been recorded in the other case.

3. In the circumstances, I allow this application and grant the benefit of principle of stare decisis and criminal proceedings initiated against the applicant on the basis of first information report registered at case Crime No. 21 of 2002, under Sections 498-A, 323 I.P.C. read with Section 3/4 Dowry Prohibition Act, Police Station Sikandrabad, District Bulandshahar is quashed. The application is allowed. Application allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2005

BEFORE
THE HON'BLE AJOY NATH RAY, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No.52247 of 2005

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

Counsel for the Petitioners:
Dr. H.N. Tripathi
Sri. Rajesh Tripathi

Counsel for the Respondents:
Sri V.P. Mathur
Sri C.B. Yadav, C.S.C.
Sri P.N. Rai,
C.S.C.

U.P. Industrial Area Development Act 1976-Section.12 A-read with Constitution of India.Act-243-Q-P/L-by Notification Date 11.07.1989-about eight villages acquired for Industrial Development Area-Public Interest Petition-claming not to hold village Panchayat election-neither specification regarding township made for notification for exclusion made as required under Act 243-Q-No Question of exclusion from Panchayat arise-merely Notification u/s 2-(a)-ipso facts does not exclude from Panchayat-Petition dismissed.

Held: Para 7, 8

From Section 12-A it further reveals that if the said area is included in Panchayat area, such area with effect from the date of notification made under proviso (proviso to article 243-Q) stand excluded from such panchayat. Thus specification to be an industrial township as well as a notification under proviso to Article 243 are condition precedents for excluding from any panchayat area. There is nothing on the record to come to conclusion that the area in question has been specified as an industrial township. Further no notification, as stated by Chief Standing Counsel, has been issued under proviso to Article 343 Q by the State Government, hence, question of exclusion of the area from panchayat area does not arise.

Merely because the Villages in question are covered under 2-(d) does not ipso facto exclude them from Panchayat area. As noted above neither it has been specified as Industrial Township nor a notification under Article 243-Q has been issued. The relief claimed by the writ petitioner in the writ petition cannot be granted.

(Delivered by Hon'ble Ajoy Nath Ray, C.J.)

1. These are the two writ petitions filed as public interest litigations on same facts and cause of action. Both writ petitions being identical in nature are decided by this common order.

2. It is sufficient to mention the facts of writ petition No.52247 of 2005 for deciding both the writ petitions. Writ petition No.52247 of 2005 has been filed

by five petitioners claming themselves to be residents of Block Bisarakh Tehsil Dadri. The case of the petitioners in the writ petition is that 81 villages are covered by U.P. Industrial Area Development Act 1976(hereinafter referred to as Act) and by virtue of Section 12-A of U.P. Industrial Area Development Act 1976, no election for constituting Panchayats in the said Villages can take place. A mandamus has been prayed directing the respondents not to hold proposed election of Panchayat in respect of 81 villages which was acquired by the authority. In the supplementary affidavit filled in Writ Petition No.52247 of 2005 petitioners, have brought on the record copy of the notification dated 11.07.1989 issued in exercise of power under section 2(d) of U.P. Industrial Area Development Act, 1976 read with section 21 of U.P. General Clauses Act declaring certain Villages in the Industrial Development area as contemplated under section 2 (d) of the Act.

3. The counsel for the petitioners contended that notification having been issued under section 2 (d) of the Act, the area in question is an industrial development area and is maintained by the authority constituted that all facilities are being provided by the authority and there is no occasion to constitute the panchayat. Reliance has been placed on Section 12-A of the Act.

4. Shri C.B. Yadav, learned Chief Standing Counsel, appearing for the State, contended that the area, which is included in Industrial Area, has not yet been declared as an Industrial township and no notification has been issued by the State in exercise of proviso to Article 343 Q of the Constitution of India. He contended that in the year 2000 also the Panchayat elections were held and panchayats were constituted and the State is issuing necessary funds to the Panchayat for all development.

5. Before we proceed to examine the respective contentions of the parties, it is appropriate to set out section 2(d) and 12-A of the Act, which are as follows:

"2(d) "industrial development area" means an area declared as such by the State Government by notification;"

"12-A Notwithstanding anything contained to the contrary in any Utter Pradesh Act where an Industrial Development Area or any part there of is specified to be an industrial town ship under the proviso to clause (I) of Article 243-Q of the constitution such industrial development area or part thereof, if included in a Panchayat area, shall, with effect from the date of notification made under the said proviso, stand excluded from such panchayat area and no Panchayat shall be constituted for such industrial development area or part thereof under the United Provinces Panchayat Raj Act, 1947 or the Utter Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, as the case may be, and any Panchayat constitution for such industrial development area thereof before the date of such information shall cease to exist."

6. From a plain reading of Section 12-A of the Act it is clear that after declaration of any industrial development area under Section 2 (d) of the Act two things are required for excluding them from existing Panchayat area. First is, specification to be an industrial township and secondly a notification under Proviso

to Article 243-Q of the Constitution of India.

7. From Section 12-A it further reveals that if the said area is included in Panchayat area, such area with effect from the date of notification made under proviso (proviso to article 243-Q) stand excluded from such panchayat. Thus specification to be an industrial township as well as a notification under proviso to Article 243 are condition precedents for excluding from any panchayat area. There is nothing on the record to come to conclusion that the area in question has been specified as an industrial township. Further no notification, as stated by Chief Standing Counsel, has been issued under proviso to Article 343 Q by the State Government, hence, question of exclusion of the area from panchayat area does not arise.

8. Merely because the Villages in question are covered under 2-(d) does not ipso facto exclude them from Panchayat area. As noted above neither it has been specified as Industrial Township nor a notification under Article 243-Q has been issued. The relief claimed by the writ petitioner in the writ petition cannot be granted.

In view of above, both the writ petitions are dismissed. Petition dismissed.

ORIGINAL JURISDIDTION
CIVIL SIDE
DATED: ALLAHABAD 4.8.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 9227 of 2001

Sacchidanand Tiwari and others ...Petitioners
Versus
Assistant Security Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri Satish Dwivedi
Sri Suresh Chandra Dwivedi

Counsel for the Respondent:
Sri Govind Saran

Railways Protection force rules 1987-Rule-120-unauthorise occupation-petition during posting period at Allahabad-allowed railway quarter no.37-D type-I-even after transfer from Allahabad-not vacated-charge of penal rent w.e.f. 13.7.93 to 24.4.01-arreaas of rent Rs.1,20,595-recovry of Rs.1000/- per months from the salary of petitioner-held-proper-once the petitioner transferred-allotment comes to an end-if not vacated nor applied to the competent authority-even before writ Court no challenge made questing the amount of realization of panel rent-protection under public premises (Eviction of unauthorized occupants) Act 1947 not available to the petitioner-notice in writing not required-

Held: Para-8 and 9

In the present case the petitioner has not enclosed the allotment letter by which the residential accommodation was allotted. It is however admitted in the pleadings that it was allotted to him as a member of the force by virtue of his posting at Allahabad. Rule 120.2 of the

R.P.F. Rules, 1987 provides it to be a condition of service of the member of RPF that he shall vacate the accommodation on his transfer from that place or on the orders to no passed by the Security Commissioner for reasons to be recorded in writing. The rule do not provide for say notice or order to be given to the member of Railway Protection Force to vacate the accommodation after he has been transferred. As soon as a person is transferred the allotment comes to an end and he is required to vacate the accommodation, unless he applies and the competent authority by an order passed allow him to occupy the same.

Once a person is found to be unauthorized occupant and does not vacate of his own, he is required to pay penal rent according to rules. In the present case, apart from raising a plea that the petitioner's family was suffering and that no notice was given the petitioner has not challenge the quantum of penal rent fixed by the respondents. In facts more than half of the penal rent had already been recovered. There is no pleading tart the penal rent is excessive or has not been fixed in accordance with the rules.

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

1. Heard Sri Satish Dwivedi counsel for the petitioner and Sri Govind Saran for respondents.

2. By means of this writ petition, the petitioners has prayed for issuing a writ of certiorari, quashing the orders, it any, passed by the respondents after summoning the same by which deductions and realization of damages as damage rent is being made from the petitioner from his monthly salary. He has further prayed for a writ of mandamus restraining respondents not to deduct or realise the damage rent for less than half of the salary of the petitioner except nominal charge of the accommodation under the law and to refund the amount which has been excessively realized from the petitioner,

3. The facts giving rise to this petition are that on his posting as Constable in Railway Protection Force at District Allahabad, the petitioner was allotted a Railway Quarter No. 37.D Type-1 Subedarganj, Allahabad. He completed the tenure of posting at subedarganj. Allahabad and was transferred to Company No. 49/ GMC/ Kanpur on 1.6.1993 and was spared on 17.3.1993. The petitioner did not vacate the accommodation allotted to him, nor made any request to continue to occupy the accommodation. He was transferred from Kanpur to Cash Guard at Allahabad on 15.4.1996 and thereafter he transferred from Cash Guard Allahabad to Cash Guard Platoon Tundla on 14.9.1996. He was again transferred from Cash Guard Tundla to Allahabad on his own request on 25.4.2001. During this entire period he did not vacate the accommodation nor paid penal rent in accordance with the Rules fro allotment. It is admitted between the parties that on hid transfer back to Allahabad on his won request he has been re-allotted the same quarter on 25.4.2001. The dispute in the present case is thus confined only to the penal rent which was payable by the petitioner from 13.7.1993 to 24.4.2001. The details of the assessment of plenary rent have been given in paragraph 7 of the counter affidavit. Out of total amount of arrears of damage rent of Rs.1.20. 595 an amount of Rs.61.326 /- has been realise from the petitioner and that the remaining amount of Rs59.269 is being realised from his

salary W.e.f. January, 2oo3 Rs1ooo/-per month.

4. Leaned counsel for the petitioner submits that no proceedings were take for his eviction under public premises (Eviction of Unauthorized Occupants) Act. 1997 prior to the notice dated 28.2.2000 and that the petitioner was never given an order to vacate the accommodation. He submits that the petitioner and his family we in great difficulty as his wife was suffering from serious ailment for which she was treated in Railway Hospital and in the S.R.N. Hospital at Allah bad.

5. A perusal of the record whose that the respondents did not take any steps to gets the accommodation vacated from the petitioner. The respondents started recovering penal rent from the petitioner after its assessment vide order dated 6.3.2000. Although it is alleged that the petitioner had made representation there is nothing to show that the petitioners had requested to continue into the accommodation prior to 16.2.2000 when he made his first representation.

6. The Court has been called upon to decide the rights of the petitioner to occupy the residential accommodation allotted to him at the place of his posting and to consider the submission whether it was incumbent upon the department to give a notice to the petitioner to show cause as to why he may not be evicted, and further to issue show cause notice before the penal rent was determined and imposed upon the petitioner, and also whether in such case the only remedy for the department is to proceed for eviction and determination of penal ret under . The Public Premises' (Eviction of Unauthorized Occupants) Act, 1947.

7. Rule 120 of the Railway Protection Force Rules, 1987 made under Railway Protection Force Act, 1957 provide for maintenance and vacation of the of accommodation as follow:

"120. Maintenance and vacation of residential accommodation:

120.1. If any residential accommodation is allotted to a member of the Force, he shall reside their subject to such conditions and terms as may be specified by he Chief Security Commissioner concerned and shall be responsible for maintaining it in a good state.

120.2. It shall be a condition of his service that he shall vacate the accommodation on his ceasing to be a member of the Force or on his transfer from that place or whenever an officer not below the rank in writing, finds it necessary and expedient for him to de so.

120.3. If any enrolled member of the Force who is required under sub-rule (2) to vacate any premises fails to do so, such superior officer may after giving human opportunity of being heard; direct any officer subordinate to him, with such assistance as may be necessary, to enter upon and open the premises and take possession of the premises and deliver the same to any person specified in the order.''

8. In the present case the petitioner has not enclosed the allotment letter by which the residential accommodation was allotted. It is however admitted in the pleadings that it was allotted to him as a member of the force by virtue of his posting at Allahabad. Rule 120.2 of the R.P.F. Rules, 1987 provides it to be a

condition of service of the member of RPF that he shall vacate the accommodation on his transfer from that place or on the orders to no passed by the Security Commissioner for reasons to be recorded in writing. The rule do not provide for say notice or order to be given to the member of Railway Protection Force to vacate the accommodation after he has been transferred. As soon as a person is transferred the allotment comes to an end and he is required to vacate the accommodation, unless he applies and the competent authority by an order passed allow him to occupy the same. The notice under Rule 120.3 is required to be given where members of the Railway Protection Force has been required by the Security Commissioner for reasons to be recorded in writing to vacate the accommodation. The order at vacate accommodation to a member of the force is required to be given only when he does not obey the orders of his superior officer to vacate the accommodation. In case of transfer this procedure is not required to be followed. Unless a member of the Force has requested for permission of the competent authority Le: Security Commissioner to continue to occupy the accommodation, after his transfer, he has no authority to retain the same. In such cases a person may be evicted from the accommodation after giving the simple notice informing him and giving him reasonable time to vacate the accommodation. It is not necessary for the department to proceed under the Public Premises (Eviction of Unauthorized Occupation) Act as the occupation becomes unauthorized under Rule 120.2 of the Railway Protection Force Rules, 1987. The burden of port of unendorsed occupied in such cases cannot be fixed upon the department. A member of the Force occupying the accommodation in pursuance of allotment becomes an unauthorized occupant after he fails to vacate the same on his transfer, and in such case his occupation can only be protected by an order of the competent authority.

9. Once a person is found to be unauthorized occupant and does not vacate of his own, he is required to pay penal rent according to rules. In the present case, apart from raising a plea that the petitioner's family was suffering and that no notice was given the petitioner has not challenge the quantum of penal rent fixed by the respondents. In facts more than half of the penal rent had already been recovered. There is no pleading tart the penal rent is excessive or has not been fixed in accordance with the rules.

10. For the aforesaid reasons. I do not find any good ground to interfere in the matter. The petitioner has been allotted the same accommodation on his transfer back to Allahabad on 25.4.2001. I find that the respondents have been reasonable to the petitioner, by recovering only Rs.1.000/- per month until the entire dues of penal rent are recovered.

The writ petition is accordingly dismissed with no orders as t costs.

Petition dismissed.

ORIGINAL JURISDICATION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2005

Before
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 32149 of 1996

Sanjay Singh and another ...Petitioners
Versus
States of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Sushil Tyagi
Sri Shree Prakash Singh

Counsel for the Respondents:
Sri A.S. Diwakar
S.C.

Constitution of India Art-14..16-right to get appointment-petitioner placed in final selected list for sending on training for the post of lekhpal-after publication of final list-on the basis of oral complaint-another examiner appointed who reevaluated the marks of are candidates-petitioner not qualified-held reduction of original marks in written examination in the garb of re-examination of their answer book-should be ignored from consideration-instead of cancellation of entire list direction issued at declare the result of petitioner as per original marking allowed by the examiner within two months.

Held-Para-14 and 15

Admittedly the petitioners have secured 53 marks and 51 marks respectively in their written examination, which were reduced to 42 and 44 marks respectively. Thus the subsequent reduced marks of written test and in interview would form the select list. However, in given facts and circumstance of the case it would be appropriate to direct the authorities to redress the grievance of the petitioners by taking into account heir original marks secured in written examination period to re-evaluation of their answer books, and after adding the marks of their interview, if it is found that their performs on, edits comes to at par with any last selected candidates lowest in merit in the selection in question, in their respective category, they shall also be selected and sent for training of Lekhpal forthwith without causing any further delay in the matter but they shall not be entitled for payment of any back wages or other service benefits prior to their selected and appointment .

Thus in view of aforesaid discussion and observation the respondents are directed to declare the result of the petitioners on the basis of original marks allotted by the examiner in their written examination and interview ignoring reevaluation of their answer books and marks allocated by another examiner. The Commissioners, Meerut Division Meerut, and District Magistrate/Collector, Saharapur are directed to undertake this exercise within a period of 2 months from the date of production of a certified copy of this order before them.

Case law discussed:
AIR 1987 SC-454
AIR 1985 SC-135
AIR 1991 SC-295
AIR 1992 SC-80

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

By this petition the petitioners have sought relief of certiorari for quashing the result of selection held on 11.7.96 including the select list. And a writ of mandamus commanding the respondents not to proceed with the final touch of the selected candidate and to consider the appointment of the petitioners on the marks originally secured by them and further not to give effect to the appointment and joining of the

respondent's no.7 and 8 on the posts in question.

2. The petitioners have come forward with the case that an advertisement dated 29.4.1006 was published by the office of District Magistrate. (Bhoolekh Section). Saharanpur for holding written examination and interview for selecting for selecting candidates to be sent for training of Lekhpal There were as many as total 49 vacancies which were likely to be changed by increase or decrease in future Being fully eligible ad qualified for selection and appointment against the aforesaid vacancy the petitioners have applied for the same The written examination for the purpose of said selection was held on 17th June, 1996 and the candidates who had succeeded in the written examination and were called for interview by the respondents fixing date of interview on6th July, 1996 the petitioners have succeeded in written examination and called for and appeared in the interview The result of final selection was declared after the said written examination and interview on11th July,1996 The petitioners name did not find place in the final selection list. After lapse of some times the petitioners came to know that some manipulations have been done in the answer books of the petitioners on account of which they could not succeed in the final selection Their marks in the written examination have been reduced so as to exclude them from the final select list prepared in the aforesaid selection it is further alleged that the respondent no 6 was one of the member of selection committee whose two sons namely the respondents no7 and 8 were also candidates of the aforesaid selection in the process of the aforesaid selection the respondent no 7 has been finally selected and sent for training Therefore, the entire process of selection is vitiated on account of such manipulations and bias. Accordingly the select list prepared on 11.7.96 is liable to be quashed and consequently the further action of the respondents appointing selected persons are also liable to be struck down by this Court and the petitioners are entitled for selection and to be sent for training of Lekhpal.

3. On behalf of the respondents two counter affidavits have been filed in the writ petition one sworn by Sri Tabeer Singh Additional tehsildar, Saharanpur and another by Om Prakash the respondent no 6 the then District inspector of schools, Saharanpur wherein in para6 and 11 of the counter affidavit sworn by Tabeer Singh Addl. Tehsildar, Saharanpur almost complete reply has been given Virtually same and similar reply has also been given in Para 6.7.8 and 11 of the counter affidavit sworn by Om Prakash respondent no 6 For ready reference the averments made in the aforesaid paragraphs of counter affidavit are being reproduced as under:

"6. That the contents of paragraph no15 and 16 of the writ petition are not admitted as stated in reply it is necessary to submit here that certain oral complaints have been made by the candidates appearing in the test regarding valuation of marks and regarding appointment of examiner, therefore, selection committee after looking into complaints, to go through the marks allotted by the examiners. The members of selection committee had gone through the certain copies of written test have been wrongly examined, therefore, a decision was taken

by the committee to appoint another examiner for looking into the answer books. The Principal of the Government Industrial Training Institute (Sersawa), Saharanpur was appointed as examiner and he had examined all the answer books of280 candidates who had been called for interview After re-examination of answer books, the Principal fount that marks allotted to the candidates of Roll No.2.4 and 5 are not correct therefore, correct marks were allotted by the Principal and accordingly earlier marks allotted to the petitioners have bee changed.

7. That the contents of paragraph no.17 of the writ petition are completely incorrect hence denied. As stated above, neither the respondent no 4 nor any member of interview board corrected the marks in answer books of the petitioners allotted to them by earlier examiner. After coming to know that certain answer books have not been correctly examined by examiner, therefore. A decision was taken for ex- examination of answer books and accordingly for that purposes, the Principal Government industrial Training Institute Sarawak, District Saharanpur was appointed as examiner and he had examined the answer books and corrected the marks accordingly.

9. That the content of Para 19 of the write petition are writ petition are not admitted as stated it is relevant to point out here that after written test marks allotted by examiners on answer books was feeded in computer for purposes of maintaining a list for calling the candidates for interview. As per marks allotted by earlier examiner a list was prepared and candidates were called for interview accordingly. As stated above after interview, on the basis of complaints, answer book of the candidates appeared in interview were directed to re-examined and after re- examination as stated above certain corrections were made and final list was corrected on the basis of corrected marled.

11. That the contents of Para 21of the write petition are completely incorrect hence denied .The answering respondent was nominated as member of selection committee by order dated 4.7.1996 passed by district Magistrate. The respondent no .7 and 8 are son of the answering. It is relevant to submit here that respondent no 8 was not succeeded even in written test therefore; question does not arise appearing before selection committee .So far as the respondent no.7 is concerned he is meritorious student .The respondent No .7 qualified the written test therefore he appeared before selection committee .It is necessary to mention here that at the time of interview of respondent no. 7, the answering respondent was not present in selection committee. Only 3 members were present at the time of interview of the respondent no.7.the marks allotted to respondent no.7 was only by 3members of selection committee and average was also concluded from the marks allotted by the three members of selection committee. A chart prepared by selection committee shall be produced at the time of hearing. The allegation leveled in Para under reply against the respondent no6 is completely baseless and without any substance. Non selection of the respondent no.8 is sufficient proof of fairness of selection committee and particularly of the respondent no.6 So far as decision rendered by Apex court on this issue is concerned, the same is legal, hence can suitably be replied at the time of hearing."

4. I have heard learned counsel for the petitioners and learned standing counsel for the respondents. Having gone

through the rival submission of the counsel of the parties and from the perusal of record, the first question arises of consideration as to whether entire process of selection is vitiated on account of alleged bias affecting the selection and other manipulations in the process of selection? In this regard it is necessary to point out that it is not in dispute that the respondent No. 6 was appointed as Member of selection committee and his two sons namely the respondents no. 7 and 8 have participated in the process of selection and one son has secured his selection and send for training and appointed on the post in question thus the question arises for consideration as o whether whole selection would be vitiated or only one selected candidate who was son of the respondent no. 6 alone can be excluded from select list and consequently can be directed to vacate the post held by him at this juncture it is necessary to be pointed out that similar question has received consideration of Hon'ble Apex Court and other High Courts to be discussed herein after.

5. In ***A.K. Yadav Vs. State of Haryana AIR 1987 SC 454*** Hon'ble Apex Court has dealt with the issue at length Para 15, 16, 17and 18 of the decision as under:-

"15. But the question still remains whether the selections made by the Haryana Public Service Commission could be said to be vitiated on account of the fact that Sri R. C. Maria and Sri Raghubar Dayal Gaur participated in the selection process, though Trujillo Nath Sharma who was related to Shri Raghubar Dayal Gaur did not participate when Trilogy Nath Sharma came up for interview and similarly Sri R.C. Marya did not participate when Shakuntala rani and Balbir Singh appeared for interview at the viva voce examination. But according to the [petitioners this was not sufficient to vipe out the blemish in the process of selection for two reasons: firstly because Shri R.C. Marya and Shri Raghubar Dayal Gaur participated in the interviews of the other candidate an that gave rise to a reasonable apprehension in the mind of the candidates that Shri R.C Marya and Shri Raghubar Dayal Gaur might tent to depress he marks of the other candidates with a view to ensuring the selection of the candidates related to them and secondly, because there could be reasonable apprehension in the mind of the candidate that the other members of the Haryana Public Service Commission interviewing the candidates might out of regard for their colleagues tend to give higher marks to the candidates related to them. The argument of the petitioners was that the presence of Shri R.C. Marya and Shri Raghubar Dayal Gaaur on the interviewing committee gave rise to an impression that there was reasonable likelihood of bias in favour of three candidates related to Shri R.C. Marya and Shri Raghubar Dayal Gaur and this had the effect of vitiating the entire selection process. This argument was sought to be supported by the petitioners by relying on the decisions reported in D.D. Khanna v. Unjion of India (1973)1 Serv. AIR 19 73 Him Para 30) Surinder Nath Goel v. State of Punjab (1973) 1Serv. LR.690, (Punj) and M. Ariffudin v.D.D. Chitaley (1973) 2 Ser. L.R 119, We do not think this argument can be sustained and for reasons, which we shall presently state, it is liable to be rejected.

16. We agree with the Petitioners that is one of the fundamental principles of our jurisprudence that no man be a judge in

his own cause and that if here is a reasonable likelihood of bias it is in accordance with natural justice and common sense that the justice likely to be so biased should be incapacitated from sitting. The question as to whether the judge is actually biased or in fact decides partially but whether there is a real likelihood of bias. What is objectionable in such a case is not that the decision is actually tainted with bias but that the circumstances are such as to crate a reasonable apprehension in the mind of others that here is a likelihood of bias affecting the decision. The basic principle underlying this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of this Court. It is also important to note that this rule is not confined to cases where judicial power stricto sensu is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the f\rival claims of parties. Justice is not the function of the courts alone it is also the duty of all those who are expected to decide fairly between contending parties. The strict standards applied to authorities exercising judicial power are being increasingly applied to administrative bodies, for it is vital to the maintenance of the rule of law I a welfare state where the jurisdiction of administrative bodies is increasing at a rapid pace that the instrumentalities of the state should discharge their functions in a fair and just manner. This was the basis on which the applicability of his rule was extended to the decision making process of a selection committee. Constituted for selecting officers to the Indian Forest service in A.K Kraipak V Union of India AIR 1970 SC150. what happened in this case was that one Naquishbund. The acting Chief Conservator of Forests. Jammu and Kashmir was a member of the selection Board which had been set up to select officers to the Indian Forest Service from those serving in the forest Department of Jammu and Kashmir, Naqnisbund who was a member of the Selection Board was also one of the candidates for selection to the India Forest Service . he did not sit on the Selection board at the time when name was considered for selection but he did sit in the selection Board and participated in the deliberations when the names of his rival officers were considered for selection and took part in the deliberations of the selection Board while preparing the list of the selected candidates in order of preference. Theirs court held that the presence of Naquishbund vitiated the selection on the ground that there was reasonable likelihood of bias affecting the process of selection. hedge, J speaking on behalf of the court countered the argument that Naquishbund did not take part in the deliberations of the selection board when his name was considered by saving;

"But then the very fact that he was a member of the selection board must have its own impact on the decision of the Selection board. Further admittedly he participated in the deliberations of the Selection Board when the claims of his rivals….. were considered. He was also party to the preparation of the list of selected candidates in order of preference. At very sage of his [participation in the deliberation of the selection Board there was a conflict between his interest and duty…… The real question is not whether he was biased. It is difficult to prove the state of

mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased…… There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities ad ordinary course of human conduct".

This Court emphasized that it was not necessary to establish bias it was sufficient to invalidate the selection process if it could be shown that here was reasonable likelihood of bias. The likelihood of visa may arise on account of proprietary interest or on account of personal reasons such as hostility to one party or personal friendship or family relationship with the other. Where reasonable likelihood of bias is alleged on the ground of relationship the question would always be as to how close is the degree of relationship or in other words is the nearness of relationship so great as to give rise to reasonable apprehension of bias on the part of the authority making the selection.

17. The High Court of Himanchal Pradesh in D.K. Khanna's case (AIR 1973 Him Para. 30) (Supra) drawing inspiration from A.K. Kraipak's case, held that where one of the members of the committee constituted for selecting members of the State Civil Service of promotion to the Indian Administrative Service, was the son-in –law of a candidate who was competing for inclusion in the list of selected candidates , the entire selection process was vitiated by the presence of such member, though he did not take any part in consideration of his father-in– law. The High Court observed that the degree of relationship in his case was so close as to reasonably give an impression to the other candidate that there was a real likelihood of the son in law espousing he cause of this father in law as his own. So also in Surinder Nath Goel 's case (1973) I Serv LR 690 (Supra) , the High Court of Punjab and Haryana took the same view stare it was found hat two of the candidates appearing for selection were the candidate appearing for selection were related to lone of the members of the selection committee . The same approach was adopted by the High Court of Andhra Pradesh in M. Ariffudin's case (1973) 2 Serv LR 119 (Supra) where one of the m embers of the Andhra Pradesh Public Service commission and participated in the selection for the posts of Professor and Lecturer in the Andhra Pradesh Technical Education Service, was a partner with some of the candidates appearing for he selection and it was held that the entire selection process was vitiated, because there was clearly reasonable likelihood of bias in favour of those candidates on the part of such member of the Commission. We may paint out that for as this last decision is concerned, it does not appear that he member of the Commission who was a partner with some sod the candidate withdraw when those candidate came to be interviewed and did not participate in the consideration of their candidature.

18. We must straightway point out that A.K. Kraipak's case (AIR 1970SC 150) is a landmark in the development of administrative law and it has country. We would not like to whittle down in the slightest measure the vital principle laid down in this decision which has nourished the roots of the rule of law and injected justice and fair play not illegality. There can be no doubt that if a selection committee is constituted for the purpose of selection candidates on merits and one of the members of the selection committee

is closely related to a candidate appearing for the selection, I would not be enough for such member merely to withdraw from participation in the interview of the candidate related to him but he must withdraw altogether from the entire selection committee authorities to nominate another person in his place on the selection committee because otherwise all the selections made would be vitiated on account of reasonable likelihood of bias affecting the process of selection . But the situation here is a little different because the selection of candidates to the Haryana Civil Service (Executive) and allied services is being made not by any selection committee constituted for hat purpose but it is being done by the Haryana Public Service Commission which is a Commission set up under Article 316 of the Constitution. It is a commission which consists of a Chairman and a specified member of members and is a Constitutional Authority. We do not think that the principle which requires that a member of a selection committee whose close relative is appearing for selection should decline to become a member of the selection committee or withdraw form it leaving it to the appointing authority to nominate another person in his place, need be applied in case of la Constitutional Authority lie the Public Service Commission, whether Central or State. If a member of a Public Service Commission were to withdraw altogether from the selection process on the ground that a close relative of his is appearing for selection no there person save a member can be substituted in his place. And it may sometimes happen that no other member is available to take the place of such member and the functioning of the Public Service Commission may be affected. When two or more members of a Public Service Commission are holding a viva voce examination, they are functioning not as individual but as the Publ9ic Service commission. Of course, we must make it clear that when a close relative of a member of a Public Service Commission is appearing for interview, such member must withdraw from participation in the interview of that candidate and must to take part in any discussion in regard to the merits of that candidate and even the marks or credits given to that candidate should not be disclosed to him. Chinappa Reddy, J. observed to the same effect in Javid Rasool Bhatt v. State of J and K. (1984) 2 SCC 631: (AIR 1984 SC 873) while dealing with a similar question which arose before him for consideration:

"The procedure adopted by the selection committee and the member concerned was n accord with the quite well-known and generally accepted procedure adopted by the public Service Commission everywhere. It is not unusual for candidates related to members of the Service Commission or other selection committee to seek employment. Where such a situation arises, the practice generally is for the member concerned to excuse himself when the particular candidate is interviewed. We notice that such a situation has also been notices by this Court in the case of Nagarajan v. State of Mysore (1966) 3 SCR 682: (ARIR 1966 SC 1942) where it was painted out that in the absence of male fides it would not be right to set aside the selection merely because one of the candidates happened to be related to member of selection committee who has abstained from participating in the interview of that candidate. Nothing unusual was done by the present selection committee. The girl's father was not present when she was

interviewed. She was one among several hundred candidates. The mark obtained by her in the written test was not even known when she was interviewed'…… In the case before us, the Principal of the Medical College, Srinagar, dissociated himself from the written test and did not participate in the proceedings when his daughter was interviewed. When the other candidates were interviewed, he did not know the marks obtained either by his daughter or by any of the candidates. There was not occasion to suspect his bona fides even remotely. There was not even a suspicion of bias, leave alone a reasonable likelihood of bias. There was no violation of the principles of natural justice. " We wholly endorse these observations. Here in the present case it was common ground between the parties that Shri Raghubar Dayal Gaur did not participate at all in interviewing Trilogy Nat Sharma and likewise Shri R.C. Marya did not participate at all when Shakuntala Rani and Balbir Singh came to be interviewed ad in fact both of them retired form the room when the interviews of their respective relatives were held. Moreover, neither of them took any part in nay discussion in regard to the merit of his relatives nor is there anything to show that the marks or credits obtained by their respective relatives at the interviews were disclosed to them. We are therefore of the view that there was o infirmity attaching to the selections made by the Haryana Public service Commission on the ground that thought their close relatives were appearing for the interview. Shri Raghubar Dayal Gaur and Shri R.C. Marya did not withdraw completely from the entire selection process. This ground urged on behalf of the petitioners must therefore be rejected."

6. Now coming to the facts of the case it sis not in dispute that the respondent no.6 was nominated as member of selection committee and his two sons the respondent no.7 and 8 participated in the said selection process. The respondent No. 8 was not succeeded in written test. The only excuse the respondents have pleaded in the counter affidavit that the application was invited for selection of candidate vide advertisement dated 29.4.1996 in pursuance there of the respondents no. 7 and 8 have appeared in the said examination. The respondent no. 6 was nominated as Member of selection committee vide order of District magistrate dated 4.7.1996. The selection committee was constituted according to the existing rules and G.O. It is averred that at the time of interview of the respondent no. 7 the respondent no. 6 has not participated in the interview and selection process and he withdrew himself at that moment. Thus in view of law laid down by Hon'ble Apex Court as indicated herein before I have no hesitation to hold that such course was to proper where selection was held by statutory selection committee as in present case, It would not be enough for such member of statutory selection committee merely to withdraw from participating in interview of candidate closely related to him but he must withdraw altogether from entire selection process ad ask the authorities to nominate another person in his place in the selection committee, because otherwise all the selection made would be vitiated on account of reasonable likelihood of bias affecting the process of selection. This excuse is permissible only in case of selection made by Union Public Service Commission and State Public Service Commissions constituted under

the provisions of Article 316 of the Constitution for simple reason that the replacement of member of commission except by other available member of commission are holding the interviews, they are functioning not as individual member but under the rules of business of commission they are doing so as public service commission as a shale and when a close relative of any member of Public Service Commission is appearing for interview, such member must withdraw from participation in interview of that candidate and eve the marks or credits given to such candidate should not be discloses to such member and he shall no take part I discussion of merits of the candidates. Accordingly whole process of selection is vitiated on account of bias affecting the selection and not sustainable in the eyes of law, but petitioner din neither place the whole select list on record sought to be quashed by this Court nor imleaded all the selected candidates either in individual capacity or in representative capacity and only the respondents 7 and 8 have been imleaded in the writ petition since the respondents no. 8 could not succeed in within examination and only respondent no. 7 alone has succeeded in selection, therefore , it would be unjust and unfair to quash the selection and appointment of the respondents 7 alone when the selection and appointment of all the selected candidates have been fond illegal and invalid on the ground of bias affecting the aforesaid process of selecting but while doing so I should not be understood to say that the illegalities committed in the aforesaid process of selection have been intended to be legalized by this Court.

7. Now next question arises for consideration as to whether selection committee was justified in reducing the marks of write examination secured by the petitioners after the result of written examination and interview was finally prepared in the garb of oral complaints made against allocation of marks given to the candidate in written examination without any proper inquiry held in this regard? In this connection it is necessary to paint out that it sis to in disputes rather as admitted in counter affidavits that on account of oral complaints made by certain candidates appearing in the test, the selection committee decided to go through the mars allotted by the examiners, there upon it was found that in certain copies of answer books much more marks were awarded by the examiner therefore a decisions was taken to appoint another examiner to look unto answer books. The Principal of the Govt. Industrial Training Institute Saharanpur was appointed as examiner and he examined all answer books of 280 candidates who were called for interview out of 12098 candidates appeared in the written test. After re- examination the Principal found that marks awarded to the candidate of Roll No. 2,4 and 5 are not correct therefore correct marks were allotted them after re-evaluation of their answer books of written examination accordingly marks secured by them have been reduced and after re-examination of answer books certain corrections were made and final list was corrected on the basis of corrected marks.

8. In this connection it is necessary to point out that it is not in dispute that the petitioner no. 1 was allotted Roll No. 4 and the petitioner no.2 was allotted Roll No. 5 in the aforesaid selection process

therefore it is admitted case of the respondents that the petitioners marks in written examination were reduced by selection committee not only after result of written examination was declared and interview was over but after preparation of final result of selection. Admittedly this exercise was undertaken by selection committee on alleged oral complaints of certain candidates According to the respondents out of answer books of 280 candidates only 3 candidates including the petitioners were allocated more marks in written examination. It was not a case of scrutiny of marks whereby mistakes in computation of marks were discovered by selection committee no such averments have been made in any of the counter affidavit rather it was a case of re-evaluation of answer books and on reevaluation by another examiner out of 280 candidates marks of only 3 candidates were varied from their original marks. The marks secured by remaining 277 candidates remained intact. It is also not the case of the respondents that re-evaluation was permissible under rules. It is also not clearly mentioned in the counter affidavit that re-evaluation was made on alleged complaint of candidates who were qualified in written examination or the candidate who have not qualified in the written examination. No other sort of manipulation were pointed out in the written examination. In absence of expertise of examining the answer books of candidates the selection committee can not examine answer book of 280 candidates who were called for interview. Another examiner was appointed to re-evaluation of answer books of 280 candidates who were called for interview, therefore, it seems very doubtful how the selection committee had come to this conclusion that mars awarded to certain candidates are not correct and high prior to re-evaluation of answer books of written examination of 280 candidates made by second examiner. Admittedly this exercise was undertaken by selection committee when the interview was over and final select list was prepared. The aforesaid facts leads towards an irresistible conclusion that the aforesaid exercise undertaken by selection committee was just to accommodate its own persons by excluding the petitioners from the final select list. The story of alleged oral complaints in given facts and circumstances of the case calling upon alleged inquiry made by selection committee appears to be concocted and after thought to save the selection in question. Thus whole process of selection is held to be arbitrary and illegal and not sustainable in the eye of law.

9. In a slightly different situation in ***Umesh Chandra Shukla Vs. Union of India A.I.R 1985 S.C. 1351*** certain equal number of marks were added to each candidates, under the garb of moderation to enable the certain candidates to secure qualifying marks in competitive examination was held illegal. In Para 13 of the decision the Hon'ble Apex Court held as under:

"13. The question for consideration is whether the High Court in the circumstances of this case had the power to add two marks to the marks abstained in each paper by way of moderation. It is no doubt, true that he High Court is entrusted with the duty of conducting the competitive examination under R.13 of the Rules. It is argued on behalf of the High Court that the power to conduct an examination includes the power to add marks either by way of moderation or by way of grace marks if it feels that it is

necessary to do so and reliance is placed by the High Court on its own past, and the practice prevailing a number of universities in India where marks are awarded either as moderation marks of as grace marks it is true that in some educational institutional institutions marks are awarded by way of moderation at an examination if the examining body funds any defect in the examination conducted by it such as inclusion of question in the question books by an examiner or any other reason relevant to the question papers or the valuation of the answer books the reason given by the High Court for adding the moderation marks has nothing to do either with the question papers or with the mode of valuation. The High Court approved the list of 27 candidates who had secured the required qualifying marks which would enable them to appear at the viva test as prescribed in the Appendix Thereafter the High Court resolved to add two marks to the marks obtained in each paper by way of moderation on the ground that a few candidates who had otherwise secured very high marks may have to be kept out of the zone of consideration for final selection by reason of their having secured one or two marks below the aggregate or the qualifying marks prescribed marks prescribed in the particular paper. The resolution does not show the names of the particular candidates considered at the meeting in whose case such a concession had to be shown. The affidavit filed on behalf of the High Court of course, refers to certain hard cases which persuaded the High Court to add additional marks by way of moderation. The question for decision is whether such a resolution can be passed by the High Court which is entrusted with the duty of conducting the examination. The High Court had not found any defect in the question papers o any irregularities in the valuation of the answer books. It may be hat some candidates had obtained high marks in some papers and by reason of their not obtaining the required marks in the other papers or 6 and above in the aggregate they may not have become qualified for the viva voce test. In our opinion this alone would not be sufficient to add any marks by way of moderation. It is relevant to note the mandatory character of cal. (6) in the Appendix to the Rules which says only such candidates will be called for viva voce who have obtained 50 marks in each written paper and 60 in the aggregate except in the case of candidates belonging to the Scheduled Castes. Tribes in whose case the qualifying marks will 40 in each written paper and 50 in the aggregate. Addition of any marks by way of moderation to the marks obtained in any written paper or to the aggregate of the marks in order to make a candidate eligible to appear in the viva voce test would indirectly amount to an amendment of c l. (6) of the appendix .Such amendment to the Rules can be made under Art. 234 only by Lt. Governor (Administrator) after consulting the High Court in that regard. In the instant case the resolving to add two marks to the marks obtained in each answer book by a candidate has virtually amended the Rules by substituting 48 in the place of 50 which is required to be secured each written paper and 58 in the place of 60 which is required to be secured in the aggregate in the case of candidates not belonging to Scheduled Castes. Tribes and 38 in the place of 40 each written paper and 48 in the place of 58 in the aggregate in the case of candidates belonging to Scheduled Castes Tribes. The adverse effect of the

moderation on the candidates who had secured the required qualifying marks at the examination question is quite obvious since four candidates whose names were not in the list of 27 candidates published on the first occasion have been included in the first list of candidate chosen for appointment from out of the final list of successful candidates in preference to some of the candidates who had obtained the qualifying marks In the written papers and they would have been appointed as Sub-judges but for the interim order made by this Court. These four candidates were also tog et into the list of persons to be appointed as Sub-Judges because of the high marks they were able to secure at the viva voce test for which they were not eligible but for the moderation marks. The area of competition which the 27 candidates who had been declared as candidates eligible to appear at the viva voce examination before such moderation had to face became enlarged as they had to compete also against those who had not been so qualified according to the Rules. The candidates who appear at the examination under the Delhi Judicial Service Rules acquire aright immediately after their names are included in the list prepared under R.16 of the Rules which limits the scope of competition and that right cannot be defeated by enlarging the said list by inclusion of certain other candidates who were otherwise ineligible by adding extra marks by way of moderation. In a competitive examination of this nature the aggregate of the marks obtained in the written papers and at the viva voce test should be the basis for selection. On reading R. 16 of the Rules which merely lays down that after the written test the High Court shall arrange the names in order of merit and these names shall be sent to the selection committee, we are or the view that the High Court has no power to include the names of candidates who had not initially secured the minimum qualifying marks by resorting to the devise of moderation. Particularly when there was no complaint either about the question paper or about the mode of valuation. Exercise of such power of moderation is likely to create a feeling of distrust in the process of selection to public appointments which is intended to be fair and impartial. It may also result in the violation of he principle of equality and lead to arbitrariness .the case pointed out by the high court are no doubt hart case. But hart cases cannot be allowed to make bad law. In the circumstance, we learn in favor of a strict construction of the rules and hold that the high court has no such power under the rules. W are of the opinion that the list prepared by the high court after adding the moderation marks in liable to be struck down .The fist contention urged on behalf of the petitioners has there four to be upheld. We however make it clear that the error committed by the high court in this case following its past practice is a bonfire one and is not prompted by any sinister consideration.

10. Thus in view of the admission made in the counter affidavit and above discussion it is clear that after evaluation of answer book in written examination and completion of interview when result of final selection was prepared a novel device has been adopted by the respondents to re- examine the answer the book by way of reevaluation of only 280 candidates who had been called for interview3 after their interview was over. Such practice cannot be found fair and free from doubt regarding the process of selection such exercise is likely to create

feeing of distrust in the process of selection to public appointment which is intended to fair and impartial. It may also result in violation of principal of equality and may lead to arbitrariness as held by Hon'ble Apex court in case referred herein before. There fore in given facts and circumstances of the case the selection help the respondent cannot be help to be fair and tree from doubt and I have no hesitation to hold so. Now further question arises for consideration before this Court that in given facts and circumstances of the case what would be future course of action?

11. In this connection it is necessary to point out that in some what slightly different situation in case of ***H.C. Puttaswamy and others Vs. The Hon'ble the Chief Justice of Karnataka High Court A I R 1991 S C 295***, while taking note of earlier decisions rendered by Hon'ble Apex Court in Para 13, 14 and 16 of decision held as under:-

"13. There is good sense in the plea put forward for the appellants. The human problem stands at the outset in these cases and it is that problem that appellants are in service for the past 10 years. They are either graduates or double graduates or post graduates a s against the minimum qualification of S.S.I.C required for Second Division Clerks in which cadre they were originally recruited. Some of them seem to have earned higher qualification by hard work during their service. Some of them in the normal course have been promoted to higher cadre. They are now overage for entry into any other service. It seems that most of them cannot get the benefit of age relaxation under Rule 6 of the Karnataka Civil Service (General Recruitment) Rules,1977. One could only imagine their untold miseries and of their family if they are left at the mid stream. Indeed, it would be an act of cruelty at this stage to ask them to appear for written test and viva voce to be conducted by the Public Service Commission for fresh selection (See Lila Dhar v. State of Rajasthan (1982) SCR 320 at 326: (AIR1981SC 1777 at p. 1780) .

14. We may briefly touch some of the decisions referred to us by counsel for the appellants. A. K. Yadav v. State of Haryana (1985) 4 SCC 417: (AIR 1987 SC 454) was concerned with the selection made by the Haryana Public Service Commission for appointment to the cadre of the Haryana Civil Service by allocating 33.3 per cent for viva voce . The selection was challenged before this Court on the ground that the marks awarded for the interview was high as it would open door for arbitrariness. This Court upheld that contention and held that the marks for viva voce test would not exceed 12.2 per cent. However, the Court did not set aside the appointment instead, directed the Public Service Commission to give one more opportunity to the aggrieved candidates to appear at the competitive examination. In State of U.P. V. Rafiquddin (1988) I SCR 794: (AIR 1988 SC 162 0, the validity of selection made by the Public Service Commission of Uttar Pradesh to the cadre of Musings came for consideration. Here again the Court refused to quash the appointment even though the selection was found to be contrary to the Rules of recruitment. In Miss. Shainda Hasan V. State of U.P. (1990) 2 Serv. LJ 93: (AIR 1990 SC 1381), the legality of appointment of a principal of a minority college was in question. The principal was averaged. Yet the Court has declined to strike down her appointment. On the contrary, the

Chancellor was directed to grant the necessary approval or her appointment with effect from the date she was holding the post of the Principal. Her continuous working as Principal in the College seems to be the only consideration that weighed with this Court for giving that relief.

16. The precedents apart, the circumstances of this case justify an humanitarian approach and indeed, the appellants seem to deserve justice ruled by mercy. We also take note of the fact that the writ petitioners also would be appointed in the High Court as stated by learned Advocate General of the State".

12. In ***Sri Ashok alias Sommana Gowanda and another Vs. State of Karnataka and others AIR 1992 S.C. 80*** only two candidate have challenged the process of selection, where large number of persons included in the select list contrary to the dictum of Apex Court, but while protecting the selected candidates who were appointed long back, Hon'ble Apex Court granted relief to only two persons who have challenged the process of selection. In Para 2 of the decisions Hon'ble Apex Court has held as under:-

"2. Sri Ashok alias So manna Gowda appellant No. 1 is a bachelor of Engineering (Civil) having secured first class with distinction getting 69.96% marks from Karnataka University, Shri Rajendra appellant No. 2 is a bachelor of engineering (Mech.) from Karnataka University and secured 66.40% marks in the qualifying examination. The Govt. of Karnataka by notification dated 4th April, 1985 invited application for recruitment of Asset. Engineers (Civil) and (Mech.) for the Public works Deptt. The selection were to be made on the basis of marks obtained in the qualifying examination and marks secured in the interviews, in accordance with the D.S.C. (direct Recruitment by Selection) Rules, 1973 (hereinafter referred to as the Rules.) According to these Rules total marks for qualifying examination were kept at 100 and 50 for interview. Thus the marks allotted for interview amounted to 33.3% of the total marks. Applications were invited for 300 posts of civil Engineers and 100 Mechanical Engineers initially and subsequently added additional posts of 150 civil Engineers and 10 Mechanical Engineers, thus in all 450 civil engineers and 110 Mechanical Engineers. Both the appellants applied for the posts of their choices in the Public works Department, Government of Karnataka. Appellant No. 1 secured 29.50 marks out of 50 marks in the interview and 69.96% marks in the qualifying examination thus in all 99.46 marks out of 150. The 2nd appellant abstained 24.83 marks in the interview and 66.40 marks in the qualifying examination thus in all 91.23 marks out of 150. Both the appellants were not selected in merit as the last candidate selected for the above posts unsecured higher marks than the appellants. The appellants filed a petition before the Karnataka Administrative Tribunal Challenging the Rules on the ground that the percentage of marks for viva voce as 33.3 was excessive and in violation of the decision of this Court. The Tribunal by its order dated 24th May, 1990 dismissed the petitions ad the appellants aggrieved against the aforesaid decision have approached this Court by grant of special leave. It is not necessary to examine the matter in detail inasmuch as 50 marks for interview out of 150 are clearly in violation of the judgment of this Court in ***Ashok Kumar Yadav V. State of Haryana (1985) Supp (1) SCR 657: (SC) 704****. On a direction given by this Court on*

4th September, 1991 the record of the selection committee was produced before this Court at the time of hearing. From a perusal of the marks awarded to the selected candidate but has secured very High marks in the viva voce out of 50 marks Kept for the purpose. Thus it is on admitted position that if the marks for interview were kept even at 15% of the total marks and merit list is prepared accordingly then both the appellants were lboutn to be selected and a large number of selected candidate would have gone much lower in merit list than the appellants. In view of the fact that the result of the impugned selection was declared in 1987 and the selected candidate have already joined the posts, we do not consider it just ad proper to quash the selections on the above ground. Further the selections were made according to the Rules of 1973 and this practice is being consistently followed for the last 17 years and there is no allegation of any male fides in the matter of the impugned selection. However, the Flues are clearly in violation of the dictum laid down by this Court in the above referred cased and in case the marks for viva once would have been kekpt say at 15% of the total marks, the appellants before us were bound to be selected on the vats of marks secured by them in interview, calculated on he basis of converting the same to 15% of the total marks."

13. Thus from a case analysis of observations made by Hon'ble Apex Court in ***H.C. Puttaswamy case (supra) and Ashok alias Sommana Gowda case (supra)*** it is clear that while taking note of earlier decisions rendered by Hon'ble Apex court referred in the aforesaid cased Hon'ble Apex Court has held that although selections made which were under considerations were in either violation of exiting statutory rules or against dictum of Supreme Court, thus were invalid but persons who were selected and appointed in pursuance of aforesaid selection their appointments sere protected and services were saved by the Hon'ble Apex Court on humanitarian ground on account of fact that in pursuance of said selection they have continued in service for quite long time and they were over aged for entering into and other service. Under the excising ruled most of them could not get age relaxation. At that stage they could also not be asked to face frosh selection and asking them to vacate the office in the mid stream of their life, when they have sot bear their family burden on their shoulder it shoulder it would be unjust and inequitable to dislodge them from service. It is true that such observation made by Hon'ble Apex Court in peculiar facts and circumstances of the case cannot be treated to be ratio of the decision having effect of binding precedents as held by Apex Court itself in several reported decisions need not to be referred o avoid bulkiness of the judgment yet the same can furnish sufficient light and guidelines to decide cases like present one. This court is further conscious about the distinguishing feature of the aforesaid cases referred herein before one but fact remains as held earlier that he petitioners did not being the select list on record not imp leaded the selected persons, who were appointed pursuant to the collection and they might have completed more than nine years service, therefore on humanitarian considerations it would not be just and proper and equitable to dislodge them from service on the ground

of such unfair selection at this belated stage.

14. Admittedly the petitioners have secured 53 marks and 51 marks respectively in their written examination, which were reduced to 42 and 44 marks respectively. Thus the subsequent reduced marks of written test and in interview would form the select list. However, in given facts and circumstance of the case it would be appropriate to direct the authorities to redress the grievance of the petitioners by taking into account heir original marks secured in written examination period to re-evaluation of their answer books, and after adding the marks of their interview, if it is found that their performs on, edits comes to at par with any last selected candidates lowest in merit in the selection in question, in their respective category, they shall also be selected and sent for training of Lekhpal forthwith without causing any further delay in the matter but they shall not be entitled for payment of any back wages or other service benefits prior to their selected and appointment .

15. Thus in view of aforesaid discussion and observation the respondents are directed to declare the result of the petitioners on the basis of original marks allotted by the examiner in their written examination and interview ignoring reevaluation of their answer books and marks allocated by another examiner. The Commissioners, Meerut Division Meerut, and District Magistrate / Collector, Saharapur are directed to undertake this exercise within a period of 2 months from the date of production of a certified copy of this order before them.

16. With the aforesaid observations and direction the writ petition succeeds and is allowed to the extent indicated in the body of judgment.

17. There shall be no order as to costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 35092 of 2005

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

Connected with

Civil Misc. Writ Petition No. 35082 of 2005
Raj Kumar Singh Rathore ...Petitioner
Versus
State of U.P. and others ...Respondents
And
Civil Misc. Writ Petition No. 35089 of 2005
Chheda Lal Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.N. Saxena
Sri S.C. Dwivedi

Counsel for the Respondents:
Sri Adesh Agarwal, Addl.A.G.
Sri V.K. Rai, S.C.
Sri Vijendra Singh
Sri C.B. Yadav

Constitution of India, Art.226-Service Law-Transfer challenged on the ground of malafide-petitioners are Sub-Inspector in civil Police-within short span of time of one year-Transfer made against the Policy decision of the Govt. itself-on the recommendation of M.L.A.

as they belong to particular costs and not looking the interest of the workers of Samajwadi Party-Order passed brazen manner un abashedly at the instance of M.L.A.-held-malafide-court has no option but to interfere.

Held: Para 24

In my opinion, the transfer order has been issued in a brazen manner unabashedly at the instance of a Minister and a M.L.A. Although the Courts are reluctant to interfere in the transfer orders, yet in view of the fact, that the transfer order has been issued malafidely at the behest of the Minister and the M.L.A., this Court has no option but to interfere with the transfer order, coupled with the fact that the transfer order was also against the guidelines framed by the department itself.

Case law discussed:

J.T. 1999 (5) SC-621
1993 (4) SCC-24
1996 (c) UPLBEC-54
1999 (1) AWC-179
1998 AWC (1) 27 (L.B.)
1996 (Suppl.) AWC-441
2003 11 SCC-740

(Deliveed by Hon'ble Tarun Agarwala, J.)

1. Three Sub Inspectors posted in district Badaun have been transferred to various places by separate orders. They have filed separate writ petitions challenging the transfer order on identical grounds. Consequently, all the three writ petitions are being decided together. For facility, the writ petition of Sarvendra Singh is being taken as the leading case and the affidavits in this petition is being referred to in the judgement.

2. The petitioner, Sarvendra Singh, was working as a Sub Inspector in District Badaun and has been transferred by an order dated 11.4.2005 issued by the Inspector General of Police (Establishment), U.P., Lucknow to A.S.I.O. Rihand in district Sonebhadra. By another order of the same date, the petitioner was relieved. The petitioner, Raj Kumar Singh Rathore, was working as a Sub Inspector and has been transferred by an order dated 12.4.2005 issued by the Inspector General of Police (Establishment), U.P. from Police Station Wazirgarh, district Badaun to Inter State Border Force. By another order of the same date, the petitioner was relieved by the Senior Superintendent of Police Badaun. The petitioner Cheda Lal Sharma was working as a Sub Inspector and was transferred from Kotwali Ujhani to Economic Crime Branch, Lucknow by an order dated 12.4.2005 issued by the Inspector General of Police, U.P., and by another order of the same date, he has been relieved by the Senior Superintendent of Police.

3. All the three petitioners contend that they had recently been posted in 2004 and, that within a year, they have again been transferred at the behest of a Minister and an M.L.A. of the ruling party and, therefore, the transfer order which had been passed on political pressure, was purely malafide and liable to be quashed. The petitioner's further contended that the transfer order was also in violation of the transfer policy. The petitioner's were entitled to remain in a particular district for a period of five years, whereas, the petitioner's were being transferred within a year. The petitioner's further alleged that the transfer was neither in public interest nor was issued on administrative grounds and, was issued on the political grounds.

4. The petitioner's alleged that one Sri Banwari Singh Yadav, State Minister

for Protocol Civil Aviation and State Property and Sri Onkar Singh Yadav, M.L.A., Samajwadi Party had written a letter dated 4.4.2005 to the Chief Minister, stating therein, that the petitioner Sarvendra Singh is a Khattri by caste and was not looking after the interest of the workers of the Samajwadi Party and that the interest of the Samajwadi Party was at stake and, therefore, he should be transferred to some other place so that the interest of the Samajwadi Party was not disturbed. Similar letters were written by the Minister and the M.L.A. complaining about the other two petitioners. The petitioner's submitted that based on these letters, the Inspector General of Police, Lucknow had issued the transfer orders which was sent to the Senior Superintendent of Police by Fax and the petitioners were relieved on the same date by the Senior Superintendent of Police, Badaun.

5. A counter affidavit has been filed on behalf of respondent nos.1 to 5 denying the allegations made in the writ petition. In paragraph 5 of the counter affidavit, the respondents have contended that the Government is functioning in a computer age and that once the order of transfer was passed, the same was sent through Fax and, therefore, there was nothing wrong in relieving the petitioners on the same date by the Senior Superintendent of Police. The transfer order has been passed as per "the command" issued by the Inspector General of U.P., Lucknow and the same has been carried out by the Senior Superintendent of Police. The respondents further alleged that the order of transfer was passed in the exigency of the administration of the service and that no reasons were required to be given in the order of transfer. The respondents further submitted that no political pressure was mounted in transferring the petitioners and that the Sub Inspector of Police was not such a big authority for whose transfer a political pressure was required to be mounted. The transfer of any particular employee was the prerogative of an officer who had power to transfer him. In paragraph 8 of the counter affidavit the respondents have stated that the transfer order of the petitioner was made in a routine manner because the petitioner Sarvendra Singh was a competent and efficient officer and was required to be posted at Sonebhadra. In paragraph 9, the respondent admits that Badaun was a V.V.I.P. place because the Chief Minister, had once represented the Sambhal Parliamentary constituency and now his cousin was representing this constituency. In paragraph 10 the respondents alleged that the guidelines has no statutory force and that the transfer had been made in public interest.

6. For facility, certain portions of some of the paragraphs of the counter affidavit are quoted herein:-

"That the contents of paragraphs 5, 6 and 7 of the writ petition are not admitted in the manner as are stated hence denied. In reply thereto it is submitted that the petitioner is surprising just for nothing because now a days the Government is functioning in computer age. Once the order of transfer is passed, the same are sent through fax and because the order of transfer dated 12.04.2005 was containing that the petitioner shall be relieved forthwith. The petitioner was relieved on 12.04.2005 by the Senior Superintendent of Police in compliance to the order of

transfer dated 12.4.2005 issued by the Inspector General of Police (Establishment) U.P. at Lucknow. Compliance of the order issued by the Higher Authorities does not come within the purview of any kind of adverse because once the order of transfer has been passed as per command issued by the Inspector General (Establishment) U.P. At Lucknow, the Senior Superintendent of Police has rightly relieved the petitioner forthwith after receiving the order of transfer dated 12.04.2005. As such the contrary averments made by the petitioner in paragraphs under reply are totally misconceived hence denied. The order of transfer is passed in exigencies of administration of service. No reasons are required to be assigned in the order of transfer. It is further relevant to make a mention here that no political pressure has been mounted in transferring the petitioner. Sub-Inspector of Police is not such a big authority for whose transfer political pressure has been mounted in transferring the petitioner. Sub-Inspector of Police is not such a big authority for whose transfer political pressures are mounted. The transfer of any particular government servant is the prerogative of the Officer who has been empowered to transfer him. However, the contrary averments made by the petitioner in paragraphs under reply are totally misconceived hence denied.

7. In routine manner the petitioner has been transferred from Badaun to Local Intelligence Unit, Rihand Bandh, Sonbhadra. It is further relevant to mention here that Local Intelligence Unit, Rihand Bandh, Sonbhadra is very important branch of Civil Police, where the competent and efficient officers are required to be posted. The petitioner has been awarded and has been brought in the category of most efficient Police Officer, and therefore, he has been selected for posting in Local Intelligence Unit, Rihand Bandh, Sonbhadra.

8. That in reply to the contents of paragraph 10 of the writ petition it is submitted that no doubt earlier the Chief Minister has represented the Sambhal Parliamentary Constituency and now his cousin is representing and no doubt the district Badaun is said to be V.V.I.P. place, but that is no basis for drawing any inference as referred by the petitioner, that the petitioner transfer has been made on account of any political pressure. If the Chief Minister is cause of transfer, then he is the Chief of the State dignitary and nothing is personal. The Chief Minister has got very vital issue to be considered and it is very surprising that a Sub-Inspector is making such allegations by taking name of Chief Minister, and Members of his family only in order to obtain interim order in his favour from Court of Law."

9. A supplementary counter affidavit dated 22.5.2005 sworn by Sri Kiran Pal Singh, Deputy Superintendent of Police, was filed. In paragraph 4 of the affidavit, it was alleged that the transfer had been issued at the behest of the Principal Secretary, Home, Government of U.P. on the basis of the need and the exigency of the service. Another supplementary counter affidavit by respondent no.3 dated 16.5.2005 sworn by Shiv Shanker Singh, Superintendent of Police, Allahabad was filed, stating therein, that the transfer of the petitioner was made in pursuance of the transfer policy and that the petitioner, Sarvendra Singh, was posted in Badaun

from 10.10.1985 to 23.8.1991 and thereafter again from 12.6.2004 to 12.4.2005 and, therefore, was posted in Badaun for a total number of 6 years, 8 months 12 days and, therefore, was liable to be transferred to another place.

10. Another supplementary counter affidavit dated 23.5.2005, sworn by Sri Shrikant Singh, Additional Superintendent of Police, was filed, in which two letters dated 16.5.2005 written by Sri B.S. Yadav, State Minister and Sri Onkar Singh Yadav, M.L.A. were written to the Government Advocate, High Court, Allahabad stating therein that they had never issued the letters to the Chief Minister and that it transpires that a computer generated signature had been manufactured on their letter pad.

11. Initially, when the writ petition was entertained, notices to the Minister and M.L.A. was not issued but, subsequently after the aforesaid letters had been filed through respondent Nos.1 to 5, this Court issued notices to the Minister as well as to the M.L.A. who appeared and filed a common counter affidavit. In their counter affidavit, the Minister and the M.L.A. have reiterated that they had never written the letter and that the said letter was a forged document on account of the fact that the said letter does not contain any dispatch number or reference number. The counter affidavit further stated that they are close relatives and that they interact with each other and, therefore, the question of writing two separate letters does not arise.

12. Heard Sri P.N. Saxena, the learned Senior Advocate assisted by Sri S.C. Dwivedi, the learned counsel for the petitioner and Sri Adesh Agarwal, the learned Additional Advocate General assisted by Sri V.K. Rai, Standing Counsel for respondent nos.1 to 5 and Sri Vijendra Singh, the learned counsel appearing for the Minister and the M.L.A.

13. An allegation of political pressure has been levelled by the petitioners. The petitioners categorically stated that the Minister and the M.L.A. had written letters to the Chief Minister alleging that the petitioners were not looking after the interest of the Samajwadi Party workers as they belonged to a different caste and, therefore, they should be transferred to another place. Respondent nos.1 to 5 have denied this fact and submitted that the petitioner's had been transferred in public interest as well as on administrative grounds, on account of the exigency of service, as they were required elsewhere because they were good police officers. Strangely, respondent nos.1 to 5, annexed letters dated 16.5.2005 written by the Minister and M.L.A. even when this Court did not issue any notice to the Minister or the M.L.A. Annexing the letters of the Minister and the M.L.A. signifies that the police authorities had either approached the Minister and the M.L.A. or the Minister and the M.L.A. had approached the police authorities. One thing is clear, that the Minister and the M.L.A. were working in tandem with the police authorities. There was a link between them. This creates a suspicion with regard to their modus operandi and the functioning of the Ministers and the M.L.As. with the other authorities.

14. The Minister and the M.L.A. filed their counter affidavit denying the issuance of the letters annexed in the writ petition and contended that those letters

are forged and that a computer generated signature had been obtained on their letter pads. The Minister and the M.L.A. categorically stated that the letters are forged as it does not contain any dispatch number or reference number, whereas, all theirs letters contains a dispatch and reference number.

15. Ministers and M.L.A. are elected by the people. When a Minister or an M.L.A. comes forward and makes a statement on an affidavit, there is no reason for the Court to doubt the veracity of their statements. But, on a closer scrutiny, this Court finds that the reasons given by them that their letters are forged documents is not entirely correct for the simple reason, that if all their letters contains a dispatch number or a reference number, in that situation, the letters written by them dated 16.5.2005 addressed to the Government Advocate High Court, Allahabad should also have contained the dispatch number and/or the reference number. Those letters do not contain any dispatch number or reference number. Those letters have been annexed by the respondents in their counter affidavit. Consequently, I am unable to agree with the statement made by the Minister and the M.L.A. that the letters annexed to the writ petition are forged. In my opinion, the stand taken by the Minister and the M.L.A. are contradictory. The affidavit filed by them are not reliable. Ministers and M.L.A. are elected by the public. The public reposes confidence in them. They have an onerous task upon them in fulfilling the desires and wishes of the people. To the public at large, the Ministers and the M.L.A. are called "honourable men". But are these "honourable men" acting fairly? Are they coming forward with clean hands? Marc Anthony in Shakespeare's "Julius Caesar" sarcastically referred to shrewd and corrupt politicians and custodians of public office as "honourable men". The same situation exists in modern day times.

16. It should not be lost sight of the fact that the sitting Member of the Parliament of Sambhal Parliamentary constituency is the brother of the present Chief Minister. This constituency comes in district Badaun. The M.L.A. has been elected from the Gunnaur Vidhan Sabha which comes under the Sambhal constituency. The State Minister is also from this area. This district Badaun is, therefore, a V.V.I.P. area, as admitted by the respondents themselves. Therefore, from a perusal of the record and from the affidavits filed, it is a clear case, where the transfer order has been issued at the behest of the political leaders.

17. There is another aspect. The language and the tone of the contents of the counter affidavit indicate the mindset and the attitude of the respondents. The usage of the words, "nowadays the Government is working in computer age", "order of transfer sent through fax", "transfer as per the command issued by the Inspector General", "Sub Inspector of Police is not such a big authority" and "if the Chief Minister is the cause of transfer, then he is the Chief of the State dignitary and nothing is personal", speaks volumes of the attitude and high handedness of the authorities in tackling this matter. The tenor of the language in the counter affidavit is indicative of the brazen attitude adopted by the respondents in the handling of the situation in the present writ petition. The tone and the tenor in counter affidavit has, to a large extent, helped the cause of the petitioners. The

petitioners has, therefore, been successful in proving the malafides.

18. The respondents have stated that the petitioners were transferred on the exigency of service and at the behest of the Principal Secretary, Home. The record has been produced by the Additional Advocate General who invited the attention of the Court to a letter dated 6.4.2005, written by the Principal Secretary to the Inspector General U.P., Lucknow, which indicated that a request had been made to fill up the vacant posts. This letter does not indicate anything with regard to the transfer of the petitioner's on account of the need and exigency of service. The record does not indicate that the transfer of the petitioners was made on the basis of the letter of the Principal Secretary, Home. Consequently, the submission of the respondents that the petitioners were transferred at the behest of the Principal Secretary is patently erroneous.

19. The respondents have justified their stand stating that the transfer of the petitioners was in accordance with the guidelines dated 16.11.2004 and 2.12.2004. According to the respondents, the petitioner, Sarvendra Singh, was posted in Badaun for a total period of 6 years, 8 months and 12 days and, therefore, in view of the transfer policy, the petitioner having worked for more than 6 years, was liable to be transferred. Paragraph 2 of the policy dated 16.11.2004, indicates that a Police Officer can serve in one district for a maximum period of 10 years. Therefore, according to the respondents, the petitioner Sarvendra Singh remained in Badaun for a total length of 6 years, 8 months and 12 days and had not completed 10 years of posting in that district. Therefore, the respondents were not justified in stating that the transfer of the petitioner was in accordance with the transfer policy.

20. The respondents have also made an attempt to state that the transfer policy had no statutory force and, therefore, no reliance can be taken on this policy by the petitioner. In my view, the submission raised by the respondents is totally erroneous. Even though the transfer policy has no statutory force, nonetheless, it is binding upon the authorities. In **Virender S. Hooda and others vs. State of Haryana and others**, JT 1999 (5) SC 621, the Supreme Court held:-

"The view taken by the High Court that the administrative instructions cannot be enforced by the appellant and that vacancies became available after the initiation of the process of recruitment would be looking at the matter from a narrow and wrong angle. When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instruction are not contrary to the rules, the respondents ought to follow the same."

21. In **Home Secretary,U.T. Of Chandigarh and another vs. Darshjit Singh Grewal and others** (1993) 4 SCC 25, the Supreme Court held that the policy guidelines are relatable to the executive powers of the administration and having enunciated a policy of general application and having communicated to all concerned, the administration was bound by it till such time as the policy was changed.

22. In **Smt. Deepa Vashishtha vs. State of Uttar Pradesh and another**, (1996) 1 UPLBEC 54, a Division Bench of this Court held that the department is bound by its transfer policy till such time as the guidelines are changed.

In **Phoola Devi vs. State of U.P. and others**, 1999(1) AWC 179, this Hon'ble Court held:-

"In my opinion, if politicians keep ordering transfers and postings the result will be the total collapse of administration and opening of the floodgates for corruption and crime. The time has come when this practice of politicians ordering transfer and postings must be stopped and we must follow the British system where the bureaucracy is really independent and non-political and can function without political interference."

In **Lokesh Kumar vs. State of U.P. and others**, 1998(1) A.W.C. 27 (L.B.), this Hon'ble Court held:-

"Public interest is not abstract to be found in the Dictionaries but must be obvious and visible. Politicising services would be unproductive and detrimental against the interest of the country."

In **Pradeep Kumar Agarwal vs. Director, Local Bodies, U.P. IV, Lucknow and others**, (1994) 1UPLBEC 189, a Division Bench of this Court held-

"It would be appropriate to observe here that in a democratic set up like ours, bureaucrats are expected to act and discharge their executive functions impartially and strictly in accordance with the Rules and Regulations. No doubt, as of right no Government servant can claim to be posted either on a particular station or post, therefore, the transfers are to be done only in administrative exigencies and in public interest, but in the instant case the letter written by the aforesaid M.P. addressed to Minister for Urban Development bearing endorsement of the officers of the State Government, indicates that instant transfer has neither been made in administrative exigency nor in public interest. It is not only a matter of surprise but highly objectionable that bureaucrats are dancing at the tunes of such letters ignoring the well settled norms meant for transfer."

In **Dr. Bal Krishna Bansal vs. State of U.P. and others**, 1996 (Suppl.) A.W.C.441, State of U.P. And others, a Division Bench of this Court held that the transfer order passed at the behest of the local M.L.A. is not a transfer order in public interest but is an order in personal interest.

23. In my view, the aforesaid principles propounded squarely applies to the present facts and circumstances of the case.

In **Sarvesh Kumar Awasthi vs. U.P. Jal Nigam and others**, (2003) 11 SCC 740, the Supreme Court held:-

"In our view, transfer of officers is required to be effected on the basis of set norms or guidelines. The power of transferring an officer cannot be wielded arbitrarily, mala fide on an exercise against efficient and independent officer or at the instance of politicians whose work is not done by the officer concerned. For better administration the officers concerned must have freedom from fear of being harassed by repeated transfers or

transfers ordered at the instance of someone who has nothing to do with the business of administration."

24. In view of the aforesaid, the transfer order is malafide and has been issued at the instance of the politicians against efficient officers who were not toeing the line of the political bosses. In my opinion, the transfer order has been issued in a brazen manner unabashedly at the instance of a Minister and a M.L.A. Although the Courts are reluctant to interfere in the transfer orders, yet in view of the fact, that the transfer order has been issued malafidely at the behest of the Minister and the M.L.A., this Court has no option but to interfere with the transfer order, coupled with the fact that the transfer order was also against the guidelines framed by the department itself.

25. In view of the aforesaid, the impugned transfer orders are quashed and the writ petitions are allowed. In the circumstances of the case, there shall be no order as to cost. Petition allowed.

APPELLATE JURISDICATION
CIVIL SIDE
DATED: ALLHABAD 4.8.2005

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

Civil Misc. Writ Petition No.15966 of 2005

Shabana Smt. ...Petitioners
Versus
Additional City Magistrate and another ...Respondents

Counsel for the Petitioners:
Sri C.B.S. Yadav
Sri Rakesh Kumar

Counsel for the Respondents:
Sri Iqbal Ahmad
S.C.

U.P. Urban Building (Regulation of rent and eviction) Act 1972-Section-16 (1)(b)-release application-on the grand of personal need-petitioner the grand daughter of the original tenant–objected on the ground that being grand daughter she was residing with her grandfather-(the chief tenant)-after death she become the tenant-admittedly the father of petitioner being permanent employee in railway never resided with his father(the chief tenant)-held under Muslim law the grand daughter is not within the definition of heir-when her father never reviled with the chief tenant for last 30 years-she cannot be allowed to continue her possession-deemed vacancy rightly presumed.

Held-Para 6 and 9

Under Muslim Law grand-daughter of a person is not his heir if at the tie of his death, his son I.e. the father of the grand-daughter is alive.

Any other relation who may be legally entitled to reside with the tenant in the tenanted house during the life time of the tenant does not become tenant after the death o the original tenant unless he or she is tenant's legal heir also. Supreme Court in Ganesh Trivedi Vs. Sundar Devi A.I.R. 2002 S.C. 676 held that real brother was not included in the definition of family as provided under Section-3 (g) of U.P. Act No. 13 of 1972 however, he could very well reside with his brother tenant in the tenanted accommodation. It has further been held in the said authority that in case such brother is heir of the tenant then after the death of the tenant he becomes tenant by virtue of the definition of the tenant given under Section3 (a) of the Act. In the instant case petitioner not being the heir of original tenant she could therefore reside along with tenant

during his life time but she did not become tenant after the death o the original tenant Abid Hussain, petitioner's grand father.

Case law discussed:

AIR 2002 Sc 676 relied on.

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

1. Mohd. Idris landlord respondent no.2 filed release application under section 16 (1) (b) of U.P. Rent Regulation Act (U.P. Act No. 13 of 1972) in respect of house no. 184 C chandari, Kanpur. In the release application it was stated that Shamim Hussain (or Shamim Ahmad), the tenant had illegally handed over the possession of the tenanted property in disputed to Javed Ashrad hence it was vacant under Section 12 (1) (b) of the Act and that landlord Mohd. Idris required said house bonafidely for his personal use. Petitioner Smt. Shabana is wife of Jafar or (Zafar) Ahmad who is real brother of Javed Ashraf.

2. During the proceedings it was further stated on behalf of landlord-respondent no.2 that Smt. Shabana the petitioner was residing in another house of the same locality bearing no. 188. She is daughter of Sahmin Husain.

3. It is not disputed that initially Abid Hussain grand-father of Smt.Shabana i.e. father of shri Shamim Ahmad was tenant of the house in dispute.

4. Petitioner contested the proceedings and contended that she was residing along with her grand-father the tenant hence after his death she became the tenant and she was residing in the house in dispute.

5. R.C.& E.O./Additional City magistrate (VI), Kanpur before whom the case was registered as case no. 38 of 1995 Mohd. Idris vs. Javed Ahmad, through order dated 6.4.1996 declared the vacancy of the house in dispute. The said order is under challenge in this writ petition.

6. Under Muslim Law grand-daughter of a person is not his heir if at the tie of his death, his son I.e. the father of the grand-daughter is alive.

7. In case the petitioner had taken up the case that after the death of her grand-father, her father Shri Shamim Ahmad became tenant of the house in dispute and she was residing in the house in dispute as family member of Shamim Ahmad then there would not have been any vacancy even if it was found that Shamim Ahmad had completely withdrawn his possession from the house in dispute. However, the petitioner in her affidavit filed before R.C. & E.O. copy of which is Annexure-3 to the writ petition specifically took a diametrically opposite case. In paragraphs 6,7,8, and 9 particularly paragraph-9 of the said affidavit she very categorically stated that since before the death of her grand father I.e. Avid Hussain, her father i.e Shamim Ahmad was residing at Bombay and he never came back to kanpur to reside in the house in dispute. In para-6 it was stated that the father of the deponent was residing at Bombay for 30 years and was employed in Indian Railways on permanent basis and it was impossible for him to become tenant of the house in dispute and thereafter leave the said house as he performed his duties without even a short break at Bombay. It was further stated in said paragraph that Abid Hussain grand father of the deponent was tenant of the house in

dispute and deponent was residing with her grand-father hence after his death she became valid tenant of the house in dispute. Para-9 of the affidavit is translated below:

"That as Shamim Hussain neither ever resided in the house in dispute nor he was ever tenant thereof nor he ever gave possession of the said house to any other person"

8. After this clear admission of the petitioner there romaine no doubt that the house was rightly deemed to be vacant by R.C. & E.O.

9. Absolutely no fault can be found with the residence of the petitioner in the house in dispute along with her grant father who was the tenant as every tenant is fully authorized to keep with himself such of his relations which may not be his family members. However, after the death of the tenant, tenancy devolves only on such heirs who normally resided with him. Any other relation who may be legally entitled to reside with the tenant in the tenanted house during the life time of the tenant does not become tenant after the death o the original tenant unless he or she is tenant's legal heir also. Supreme Court in ***Ganesh Trivedi Vs. Sundar Devi A.I.R. 2002 S.C. 676*** held that real brother was not included in the definition of family as provided under Section-3 (g) of U.P. Act No. 13 of 1972 however, he could very well reside with his brother tenant in the tenanted accornmodation. It has further been held in the said authority that in case such brother is heir of the tenant then after the death of the tenant he becomes tenant by virtue of the definition of the tenant given under Section3 (a) of the Act. In the instant case petitioner not being the heir of original tenant she could therefore reside along with tenant during his life time but she did not become tenant after the death of the original tenant Abid Hussain, petitioner's grand father.

10. As the averments made by the petitioner herself in her affidavit completely prove vacancy hence no fault can be found with the order passed by the R.C. & E.O. The said affidavit is like a self goal'.

11. Accordingly, there is not merit in the wit petition hence it is dismissed

12. Tenants-petitioner is granted six months time to vacate provided that within one month from today she files an undertaking before R.C.& E.O. that on or before that expiry of six months she will willingly vacate and handover possession of the properly in dispute to the landlord-respondent no.2. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2005

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 25946 of 2003

Shri Niwas Budhaulia and others
...Petitioners
Versus
The Secretary, Regional Transport Authority, and others ...Respondents

Counsel for the Petitioners:
Sri H.P. Shukla

Counsel for the Respondents:
Sri R.K. Awasthi
Ms. Nand Prabha Shukla

S.C.

Motor Vehicle Act 1988-Section-80 (3)-demand of additional tax-for the portion of rout granted extension-in absence of statutory provision-state can not charge any tax or fee, particularly where the proposed distance of the extension of rout are within 24 kms.-fee can be collected on the principle of "quid pro quo" explained.

Held Para 7, 8 & 9

According to us, Section 80 (3) of the Act is to be carefully read. First part of such section is making a provision in permitting extension or curtailment of the route as a grant of new permit, but proviso says that if variation is not exceeding 24 kilometers from the terminus then the authority, on an application, will find out whether variation or extension will serve the convenience of the public or not and then allow without treating the same as separate permit. In the instant case, factually 8 Kms. to 22 Kms. are the distances extended on the basis of the applications of the petitioners, therefore, by virtue of such distance being within the 24 Kms. from the terminus the petitioners' cases are squarely covered by the proviso but not by the original part of the provision. In such case question of levy of fees does not arise.

The collection of levy has to be treated as fees. Admittedly "fees" can be collected following the principles of quid pro quo, meaning thereby the recovery of fees for the service rendered by the authority. In the present case, no such situation arose. Therefore, "fees", if any, levied by the authority upon the petitioners is nothing but "tax".

Hence, we declare that the authority has unjustly enriched themselves by levying fees upon the petitioners. The State has no authority to collect or withhold the said sum. Therefore, the note/ notice of demand to deposit such sum is cancelled. If any one deposited the sum under threat of such notice, the same is refundable and the concerned respondent authority is hereby directed to refund the same at the earliest but not beyond the period of three months from this date.

Case law discussed:
AIR 1971 SC-517
AIR 1984 SC-9
AIR 1992 SC-2038
1997 (1) UPLBEC-99
2005 (4) SCC-245

(Hon'ble Mr. Justice Amitava Lala and Hon'ble Mr. Justice Sanjay Misra)

Appearance:
For the Petitioners : Sri H.P. Dubey.
For the Respondents : Sri R.K. Awasthi, Standing Counsel.

Amitava Lala, J.—1. These writ petitioners stated that the resolution dated 26th March, 2002 was passed by the Regional Transport Authority extending the permits of the petitioners on various dates on the condition that they shall pay additional tax at the enhanced rate. It is stated that the petitioners have been paying additional tax at the enhanced rate for the portion, for which they have been granted extension, and they are operating their vehicles continuously for the last about one and half years uninterruptedly without any hindrance.

2. On 31st May, 2003 the petitioners received demand notes dated 24th May, 2003 issued by the respondent no. 1, whereby the petitioners have been directed to deposit Rs.4800/-, as fee for extension of the route, latest by 31st May, 2003. It was also mentioned in the demand notes that in the event of failure to deposit the said amount, the grant of

extension in favour of the petitioners shall be stand cancelled automatically. Demand notes are impugned hereunder. According to the petitioners, no fee can be imposed as against any operators as there is no such provision in the statute. They have jointly submitted a representation and sought extension of time to deposit the sum but the Divisional Commissioner, Kanpur Division, Kanpur/Chairman, Regional Transport Authority declined to entertain the same.

3. The petitioners made the writ petition showing urgency because of time bound programme on the part of the respondents. The petitioners had also no other alternative but to deposit the sum under threat. According to the petitioners, the operation of vehicles on public route is regulated under the provisions of Motor Vehicles Act, 1988. Section 80 (3) of the said Act is as follows:

"80 (3). An application to vary the conditions of any permit, other than a temporary permit, by the inclusion of a new route or routes or a new area or by altering the route or routes or area covered by it, or in the case of a stage carriage permit by increasing the number of trips above the specified maximum or by the variation, extension or curtailment of the route or routes or the area specified in the permit shall be treated as an application for the grant of a new permit:

Provided that it shall not be necessary so to treat an application made by the holder of stage carriage permit who provides the only service on any route to increase the frequency of the service so provided without any increase in the number of vehicles:

Provided further that,--

(i) in the case of variation, the termini shall not be altered and the distance covered by the variation shall not exceed twenty-four kilometres;

(ii) in the case of extension, the distance covered by extension shall not exceed twenty-four kilometres from the termini,

and any such variation or extension within such limits shall be made only after the transport authority is satisfied that such variation will serve the convenience of the public and that it is not expedient to grant a separate permit in respect of the original route as so varied or extended or any part thereof."

4. Petitioners contended that due to the need of travelling public they have applied for grant of extension of their routes so as to cover the portions from Rath to Khera and Orai to Jalaun. According to the petitioners, necessary fee can be charged from the operators only in view of the provisions contained under Rule 125 of the Uttar Pradesh Motor Vehicles Rules, 1998. There is no other provision under the Act or Rules, under which fee can be levied for grant of extension of the route. Whenever extension was granted permitting the petitioners to run the vehicles on the extended route, nowhere it was mentioned that any fee shall be imposed and realised from the respective petitioners in lieu of grant of such extension. As per Article 265 of the Constitution of India no tax can be collected except under the authority of law. Expression of "law" is given under Article 13 therein. Numerous decision of the Supreme Court and High Courts

expressed clear opinion that a tax within the tax under Article 265 of the Constitution includes "fee" as well. Unless and until there is expressed provision in the statute, no levy of fee can be imposed for extension of such permit, therefore, the impugned demand is totally arbitrary and patently illegal. In **AIR 1971 SC 517 (Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.)** it has been held that no tax can be imposed by any bye-law or rule or regulation unless the statute, under which the subordinate legislation is made, specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the Statute can not be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it. In **AIR 1984 SC 9 (M/s. Shiv Chand Amolak Chand Vs. The Regional Transport Authority and another)** we find that in discussing similarly placed section as available earlier under Sub-section (8) of Section 57 of the Motor Vehicles Act, 1939 the Supreme Court held that where an application merely seeks a short extension of the route specified in the permit, it would not be appropriate to say that it is an application for grant of a new permit, though technically the extended route may not be regarded as the same as the original route and where such is the case, it would not be necessary to comply with the procedure. Such Sub-section (8) of Section 57 is quoted hereunder:

"(8) An application to vary the conditions of any permit, other than a temporary permit, by the inclusion of a new route or routes or a new area or, in, the case of a stage carriage permit, by increasing the number of trips above the specified maximum or by altering the route covered by it or in the case of a contract carriage permit or a public carrier's permit, by increasing the number of vehicles covered by the permit, shall be treated as an application for the grant of a new permit:

Provided that it shall not be necessary so to treat an application made by the holder of a stage carriage permit who provides the only service on any route or in any area to increase the frequency of the service so provided, without any increase in the number of vehicles."

5. In **AIR 1992 SC 2038 (Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others)** the Supreme Court held that in a fiscal matter it will not be proper to hold that even in the absence expressed provision, a delegated authority can impose tax or fee. Such power of imposition of tax and/or fee by the delegated authority must be very specific and there is no scope of implied authority for imposition. Delegated authority must act within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power.

6. The respondents contended that as per Section 80 (3) of the aforesaid Act for extension or curtailment of route/routes or the area specified in the permit shall be treated as an application for grant of a new permit. Section 80 (3) is the substantive provision, which permits the extension and the application has to be

treated as an application for grant of new permission. Law deems that the extension of existing route amounts to grant of a new permit. The ratio of **AIR 1984 SC 9** (supra) can not be applicable in the case since there was no controversy before the Supreme Court regarding payment of fee. Thus, the proposition to hold that the extension of an existing permit would not be a new permit is available therein. The respondents contended that by **(1997) 1 UPLBEC 99 (State of U.P. and others, etc. Vs. Smt. Malti Kaul and another, etc.)** a Division Bench judgement of our High Court reported in **(1995) 2 UPLBEC 974 (Smt. Malti Kaul and another Vs. Allahabad Development Authority, Allahabad and another)** was overruled. According to us, the Supreme Court overrided in such judgement the decision of our High Court to the extent that State in exercise of its executive power can not impose any tax or fee in absence of specific statutory provisions authorising such a charge. In such Division Bench judgement the ratio of **AIR 1992 SC 2038 (supra)** was effectively considered. The Supreme Court held it is settled law that levy of fee is a compulsory exaction for services rendered as quid pro quo. Relying upon a Constitution Bench judgement of the Supreme Court, it was held that fee is levied essentially for the services rendered. In distinguishing **AIR 1971 SC 517 (supra)** he contended that in such case duty was imposed by means of a notification not by law, therefore, it has exceeded legislative competence of the State. Ultimately, the respondents finished their argument by saying that there is a substantive provision that the extension of a permit is to be deemed as new permit. All formalities of a new permit including the payment of fee has to be completed. The demand is fee not a tax and the same is being charged as a regulatory fee on quid pro quo basis. The learned Standing Counsel relied upon a judgement reported in **2005 (4) SCC 245 (Calcutta Municipal Corpn. and others Vs. Shrey Mercantile (P) Ltd. and others).** In paragraph-13 therein the Supreme Court said that the Central point in the entire controversy is whether the impugned imposition is in the nature of "fee" or "tax". The Supreme Court further explained in paragraph-14 that according to Words and Phrases, Permanent Edn., Vol. 41, page 230, a charge or fee, if levied for the purpose of raising revenue under the taxing power, is a "tax". Similarly, imposition of fees for the primary purpose of "regulation and control" may be classified as fees as it is in exercise of "police power", but if revenue is the primary purpose and regulation is merely an incidental then imposition is a "tax". The tax is an enforced contribution expected pursuant to a legislative authority for the purpose of raising revenue to be used for public or governmental purposes and not as payment for a special privilege or service rendered by a public officer, in which case it is a "fee". Generally speaking, "taxes" are burdens of pecuniary nature imposed for defraying the cost of governmental functions, whereas charges are "fees" where they are imposed upon a person to defray the cost of particular services rendered to his account.

7. According to us, Section 80 (3) of the Act is to be carefully read. First part of such section is making a provision in permitting extension or curtailment of the route as a grant of new permit, but proviso says that if variation is not exceeding 24 kilometres from the

terminus then the authority, on an application, will find out whether variation or extension will serve the convenience of the public or not and then allow without treating the same as separate permit. In the instant case, factually 8 Kms. to 22 Kms. are the distances extended on the basis of the applications of the petitioners, therefore, by virtue of such distance being within the 24 Kms. from the terminus the petitioners' cases are squarely covered by the proviso but not by the original part of the provision. In such case question of levy of fees does not arise.

8. That apart the further question is whether the levy is levy of fees or levy of tax? According to us, the route tax has already been imposed and the authority either recovered or recovering from the respective owners of the transports. Therefore, there can not be further question of tax. The collection of levy has to be treated as fees. Admittedly "fees" can be collected following the principles of quid pro quo, meaning thereby the recovery of fees for the service rendered by the authority. In the present case, no such situation arose. Therefore, "fees", if any, levied by the authority upon the petitioners is nothing but "tax". Hence, the petitioners are victim of double taxation. The same is not permissible under the law. In case of fiscal statute, authority has to be much more careful in connection with imposition of fees, tax, etc. otherwise the same will be treated to be unjust enrichment. In **AIR 1984 SC 9 (supra)** Section 57 (8) of the old law was exhaustively considered by the Supreme Court and held that short extension of route can not be construed as a new permit. Section 57 (8) of the old Act is pari materia with Section 80 (3) of the present Act. Therefore, interpretation of the Supreme Court is fully applied in this case. Moreover, this is not a case, whereunder the notice of imposition of levy has been challenged beforehand without payment of the sum. It is a case where the petitioners were forced to make such payment. Therefore, without going into the other controversy whether the essential fiscal provision is inbuilt under the Act in respect of recovery of such fees, we have to hold and say that the authority has no power to levy "fees" over and above tax without quid pro quo as explained by the Supreme Court in **AIR 1984 SC 9 (supra)**.

9. **Hence**, we declare that the authority has unjustly enriched themselves by levying fees upon the petitioners. The State has no authority to collect or withhold the said sum. Therefore, the note/ notice of demand to deposit such sum is cancelled. If any one deposited the sum under threat of such notice, the same is refundable and the concerned respondent authority is hereby directed to refund the same at the earliest but not beyond the period of three months from this date. However, since the public exchequer will be affected, no interest is imposed on such refund, if made within the period. But if not, the same will be refunded with the interest at the rate of 12% per annum being simple rate as this Court found reasonable. Thus, the writ petition is allowed.

However, no order is passed as to costs.

(Justice Amitava Lala)

I agree.

(Justice Sanjay Misra)

Dated: 05.10.2005 Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2005

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No.11860 of 2005

Sonveer @ Sonu ...Applicant (IN JAIL).
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Sunil Chandra Srivastava
Sri Nitin Srivastava

Counsel for the Opposite Parties:
Sri Sunil Vashisth
A.G.A.

Code of Criminal Procedure-S-439. Bail Application-offence under section 307/504 IPC-applicant caused injury-on the chest at the door of the injured-injury gravious in nature-caused by knife-spot arrest applicant also sustained three simple injury during course of arrest-no material shown to about self defence-Right of self defence shall be considered at the stage of trail-held-not entitled for bail.

Held: Para 8

Considering the facts and circumstances of the case and the submission made by the learned counsel for the applicant and the learned A.G.A. and considering the fact that the applicant caused the injury on the person of the injured on the chest at his door by using the knife blow, the injury was grievous in nature and the applicant was arrested on the spot along with the knife and during the course of his arrested, the applicant had also sustained 3 simple injuries, the F.I.R. was promptly lodged and there is no material to show that the applicant was having any right of self defence as such, the plea of self defence if taken shall be considered at the stage if trial therefore, without expressing any option on the merit of the case, the applicant is not entitled for bail.

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

1. Heard Sri Sunil Chandra Srivastava and Nitin Srivastava learned counsel for the applicant, Sri Sunil Bashishth, learned counsel for the complainant and the learned A.G.A.

2. The applicant has applied for bail in Case Crime No. 68 of 2005 under Section 307 and 504 I.P.C. P.S. Saroorpur District Meerut.

3. From the perusal of the record, it reveals that in the present case, the F.I.R. was lodged by one Mangey Ram at police station Saroorpur, District Meerut on 01.04.2005 at 8.10 P.M., in respect of the incident which had occurred on 01.04.2005 at about 6.30 P.M. The distance of the police station was about 4 Km. from alleged place of occurrence.

4. The prosecution story in brief is that the applicant was outraging the modesty of the girls. He was asked by the injured Krishna Pal not to do so about 4-5 months prior to the alleged occurrence. On 01.04.2005 at about 6.30 P.M., the injured Krishna Pal was standing at the door of his house. The applicant come there and started hurling the abuses. On that shouting, the first informant, his son and some other women came out from the house. The applicant used knife blow on the person of the injured with an intention to commit his murder, consequently he received injury but the applicant having a knife was apprehended by the first informant and other in scuffling and snatching the knife, the first informant has

also received the knife injuring in the fingures of his left hand. After receiving the injuries, the condition of the injured Krishna Pal became serious so he was taken to Meerut by Om Pal, Vishnu Pal Brahm Singh and others by Maruti Car. The first informant and his son Sonu and other villagers have taken to the applicant along with his knife to the police station in a Jeep, where the F.I.R. was lodged and the applicant was taken into custody by the police. Accordingly by the medical examination report, the injured had received incised wound 2cm * 1cm *depth not probed present over 6th intercostals space at 5 O'clock position of nipple was done. Supplementary Medical Examination report shows that this injury received by the injured was grievous in nature.

5. It is contended by the learned counsel for the applicant that even according to the prosecution version, the applicant used only one knife blow. There is no allegation in respect of the repetition of the knife blows and there was no motive or intention for the applicant to commit the murder of the injured, thereafter offence under Section 307 I.P.C. is not made out. At the most, the offence under Section 324 I.P.C. is made out, which is a bailable.

6. It is further contended that the applicant was also medically examined on 2.4.2005 at 11.20 A.M. at P.H.C. Saroorpur Khurd, Meerut. He was brought by the police. He had received 3 injuries in which injury no.1 was a contusion over the left side of face, injury No.2 was a contusion on interior side of right wrist joint and injury no.3 is a contusion over the post surface of right thumb. It is contented that the applicant has also received injury in the said incident. The right of the self defence was available to him and his injuries were not explained.

7. It is opposed by the learned A.G.A. by submitting that in the present case, the injury was caused by the applicant by using the knife blow at the door of the injured with an intention to commit his murder. The injury was grievous in nature and there was no opportunity for the applicant to repeat the knife blow because he was apprehended immediately after the use of the first blow of knife, therefore, the offence under Sect. 307 I.P.C. is clearly made out. It is further contended that according to the prosecution version, there had been scuffle between the applicant and the other person and in scuffling, his knife was snatched and he was arrested on the spot in the course of his arrest he received 3 contusions, which were on the face wrist joint and outer surface of right thumb. Which were simple in nature in such circumstances, a right of self defence was not available to the applicant. The applicant was arrested on the spot at the time of committing the offence, the chance of his false implications is ruled out, therefore, he does not deserve for bail.

8. Considering the facts and circumstances of the case and the submission made by the learned counsel for the applicant and the learned A.G.A. and considering the fact that the applicant caused the injury on the person of the injured on the chest at his door by using the knife blow, the injury was grievous in nature and the applicant was arrested on the spot along with the knife and during the course of his arrested, the applicant

had also sustained 3 simple injuries, the F.I.R. was promptly lodged and there is no material to show that the applicant was having any right of self defence as such, the plea of self defence if taken shall be considered at the stage if trial therefore, without expressing any option on the merit of the case, the applicant is not entitled for bail.

According this bail application is rejected at this stage.

Application rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.2005

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

Civil Misc. Writ Petition No. 14177 of 2001

Union of India and others ...Petitioners
Versus
Dukkhi Lal and another ...Respondents

Counsel for the Petitioner:
Sri Govind Saran

Counsel for the Respondents:
Sri Sanjay Kumar
S.C.

(A) Industrial Dispute Act 1947-S-25-N-Re-appointment-after two years working-petitioner, employee retrinched-termination order remained unchallenged-No appointment could be made only on the basis of seniority list-prepared under Rule 77-petitioner, were allowed to participate in the screening test but not succeeded despite of the direction of Tribunal-the Department failed to produce the guidelines-prescribing procedure for screening test-tribunal rightly drawn adverse inference against the department-direction for re-appointment/regularization upheld.

Held: Para 20,21,22 and 23

The present case is required to be considered in the light of the aforesaid settled legal propositions. Petitioner worked from 1984 to 1986 for a period of 2 years and was retrenched. He never challenged the termination of his service. At the most, petitioner could claim the relief available to him under Section 25-G and 25-H of the Industrial Disputes Act, 1947 or his case could be considered for re-employment in accordance with the seniority list prepared under Rule 77 of the Industrial Disputes Rules whenever the vacancy occurred. Petitioner did not challenge the termination order. As per the scheme framed by the Department his case was considered. Petitioner appeared in the test, but could not pass the same.

The Tribunal allowed the claim of the employee drawing adverse inference against the Department for not producing the policy under which the test was conducted and record of selection. We find no force in the submissions made by Shri Govind Saran, learned counsel for the petitioners that there was no occasion for the learned Tribunal to draw the adverse inference as the said record was not relevant to determine the controversy.

In Mst Ramrati Kuer Vs. Dwarika Prasad Singh, AIR 1967 SC 1134, the Hon'ble Supreme Court held that in case of withholding the material evidence, adverse can be drawn by the Court against a party who possesses the evidence, but does not produced the same in spite of the order of the Court. A similar view has been reiterated in Indira Kaur Vs. Sheo Lal Kapoor, AIR 1988 SC 1074 and Mohinder Kaur Vs. Kusam Anand, AIR 2000 SC 1745.

In the instant case the Tribunal has recorded a finding of fact as under:

"Learned counsel for the respondents was directed to produce a copy of the guidelines prescribing the procedure and the requirement for holding screening test for absorption of casual labourers. The record has not been produced. It is presumed that the same is not available in the office of the respondents". (Emphasis added)

In view of the above, as the learned Tribunal has specifically asked the present petitioner to produce the relevant record and for the reasons best known to it the petitioner did not produce it before the Tribunal, the Tribunal has rightly drawn the adverse inference against the Department.

(B) Constitution of India Art. 226-Service law-Regularisation-mere working 240 days working-or long period of working under the interim order of court-No benefit can be derived by the employee.

Held: Para 9

The question of regularisation does not arise by merely working for 240 days or any particular number of days, unless it is so long that his continuation on ad hoc basis becomes arbitrary as no such ad hoc employee can derive any benefit for working for particular number of days or even for years under the interim order of the Court. More so, his appointment should be directly in accordance with law.

Case law discussed:

1987 (Supp.) SCC-497
1991 (1) SCC-28
AIR 1992 SC-2130
AIR 1994 SC-1808
(1996) 10 SCC-65
AIR 1996 SC-417
1996 (9) SCC-217
1996 (11) SCC-341
AIR 1996 SC-708
1996 (1) SCC-773
1991 Lab. C.I.C. 944
AIR 2003 SC-2357
2004 (7) SCC-112
2005 (2) SCC-470
2002 (4) SCC-726
2005 (1) SCC-639
(2005) AIR Sew. 4920
AIR 1997 SC-2685
1998 (1) SCC-183
AIR 1994 SC-2148
1918 (6) SCC-626
AIR 1952 SC-192
AIR 1967 SC-1134
AIR 2000 SC-1245

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

1. This writ petition has been filed for quashing the judgment and order dated 11/1/2000 (Annex. 4), by which the application of the respondent employee has been allowed by the Central Administrative Tribunal, Allahabad Bench Allahabad (hereinafter called the Tribunal) directing the department to absorb and regularise the services of the said employee after 11 years of termination of his service and order dated 07/2/2001 (Annex-6) by which the review petition of the Department has been dismissed.

2. The facts and circumstances giving rise to this case are that the respondent-employee had worked as a Casual Labourer from 06/1/1984 to 1986. His services were dispensed with for want of work. His case was to be considered for re-employment as per the seniority list of casual labourers as and when the vacancy would arise in the future. The respondent employee filed an application in 1997 for appointment, absorption and regularisation in the Railway Department as Class IV employee. His application was contested by the Department submitting that the case of the said employee was considered, he appeared in the screening test but could not pass, and thus he could not be empanelled for

absorption against one of the substantive vacancies. The claim of the said applicant has been allowed on the ground that the department failed to produce the copy of the guidelines prescribing the procedure for holding the screening test for absorption of casual labourers and record thereof. The review application has also been rejected. Hence this petition.

3. Shri Govind Saran, learned counsel for the petitioners has submitted that the employee was not in service from 1986-1997. He filed the application after eleven years, therefore, the question of his absorption/regularization could not arise; it was not the case even of the applicant that he succeeded in the test conducted by the Department, nor allegations of malafide had been alleged against any person, nor there was any pleading suggesting any illegality or irregularity in the screening test, therefore, there was no occasion for the Tribunal to draw the adverse inference against the department for not producing the policy etc; the Tribunal could not issue a direction to absorb and regularise the service of the said applicant as at the most the Tribunal could direct to consider his case for regularisation, hence the petition deserves to be allowed setting aside the impugned judgment and orders.

4. Sri Sanjay Kumar, learned counsel appearing for the respondent-employee has submitted that it was an obligation on the part of the department to produce the entire record of selection before the Tribunal, and as the department failed to do so, the Tribunal has rightly drawn the adverse inference and thus no interference is called for. The petition is liable to be dismissed.

We have considered the rival submissions made by learned counsel for the parties and perused the record.

The issue of regularisation has been considered by the Hon'ble Apex Court time and again.

5. The question as to whether the services of certain employees appointed on ad hoc basis should be regularised relates to the condition of service. The power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution of India or any analogous provision and in the absence of such Rules, under the instructions issued in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights and statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rule of Law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the haplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the Directive Principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. A perusal of the authorities would show that appointments are as a rule to be made in accordance with statutory rules, giving equal

opportunity to all the aspirants to apply for the posts and following the prevalent policy of reservation in favour of Scheduled Castes/Scheduled Tribes and other backward classes. Whenever the employees are appointed on ad hoc basis to meet an emergent situation, every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant rules as expeditiously as possible. Where the appointment on ad hoc basis has continued for long and the State has made rules for regularisation, case for regularisation of employee has to be considered in accordance with the said rules. Where, however, no rules are operative, it is open to the employees to show that they have been dealt with arbitrarily and their weak position has been exploited by keeping them on ad hoc for long spell of time. However, it is a question of fact whether in the given situation, they were treated arbitrarily. (Vide Dr. A.K. Jain Vs. Union of India, 1987 Supp SCC 497; Jacob M. Puthuparambil & Ors. Vs. Kerala Water Authority & Ors., (1991) 1 SCC 28; State of Haryana & Ors. Vs. Piara Singh & Ors., AIR 1992 SC 2130; J & K. Public Service Commission etc. Vs. Dr. Narinder Mohan & ors, AIR 1994 SC 1808; Er. Ramakrishnan & Ors. Vs. State of Kerala & Ors., (1996) 10 SCC 565; and Ashwani Kumar & Ors Vs. State of Bihar & Ors., AIR 1997 SC 1628).

6. In Khagesh Kumar Vs. Inspector General of Registration, U.P. & ors., AIR 1996 SC 417, the Hon'ble Supreme Court did not issue direction for regularisation of employees who had been appointed on ad hoc basis or on daily wages after the cut off date, i.e., 1.10.1986 as was required by the provisions of U.P. regularisation of Ad hoc Appointment (On posts Outside the Purview of the Public Service Commission) Rules, 1979. The same view has been taken by the Supreme Court in Inspector General of Registration, U.P. & anr. Vs. Avdesh Kumar & ors., (1996) 9 SCC 217. Moreover, in the above referred cases it has been laid down that for the purpose of regularisation, various pre-requisite conditions are to be fulfilled, i.e., the temporary/as hoc appointment of the employee should be in consonance with the statutory rules and it should not be a back-door entry. The service record of the employee should be satisfactory; the employee should be eligible and/or qualified for the post at the time of his initial appointment. There must be a sanctioned post against which the employee seeks regularisation and on the said sanctioned post, there must be a vacancy. Moreover, regularisation is to be made according to seniority of the temporary/ad hoc employees. The regularisation should not be in contravention of the State Policy regarding reservation in favour of Scheduled Castes/Scheduled tribes and other backward classes and other categories for which State has enacted any Statute or framed rules or issued any Government Order etc.

7. Similar view has been reiterated by the Hon'ble Supreme Court in Union of India Vs. Bishamber Dutt, (1996) 11 SCC 341; and State of Uttar Pradesh Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh, AIR 1996 SC 708. In the case of State of Himachal Pradesh Vs. Ashwani Kumar, (1996) 1 SCC 773, the Apex Court held that if an employment is under a particular Scheme or the employee is being paid out of the funds of

a Scheme, in case the Scheme comes to closure or the funds are not available, the Court has no right to issue direction to regularise the service of such an employee or to continue him on some other project, for the reason that "no vested right is created in a temporary employment."

8. In Prabhu Dayal Jat Vs. Alwar Sahkari Bhumi Vikas Bank, 1991 Lab.& IC 944, the Court rejected the case of an employee, for regularisation as his services stood terminated on the ground that he had been appointed without any authorisation of law.

9. The question of regularisation does not arise by merely working for 240 days or any particular number of days, unless it is so long that his continuation on ad hoc basis becomes arbitrary as no such ad hoc employee can derive any benefit for working for particular number of days or even for years under the interim order of the Court. More so, his appointment should be directly in accordance with law. (Vide M.D. U.P. Land Development Corp. Vs. Amar Singh, AIR 2003 SC 2357; A. Umarani Vs. Registrar, Coop. Societies, (2004) 7 SCC 112; Pankaj Gupta Vs. State of J & K, (2004) 8 SCC 353 and Dhampur Sugar Mills Ltd. Bhola Singh, (2005) 2 SCC 470).

10. In Vindon T. Vs. University of Calicut (2002) 4 SCC 726 and Mahendra L. Jain & ors. Vs. Indore Development Authority & Ors., (2005) 1 SCC 639, it has categorically been held by the Hon'ble Apex Court that the appointees appointed irregularly can be regularised but illegally appointed employees cannot be regularised. As illegal appointments are void ab initio being opposed to public policy and violative of Articles 14 and 16 of the Constitution, and all such authorities and instrumentalities which are State within the meaning of Article 12 of the Constitution, must give strict observance to the mandate of the Constitution. Regularisation can never be claimed as a mater of right. A daily wager in absence of statutory provisions in this behalf cannot claim entitlement for regularisation.

11. In State of West Bengal & Ors. Vs. Alpana Roy & Ors., (2005) AIR SCW 4920, the Hon'ble Supreme Court held that if someone's name is included in the list of unapproved employees for a long time, mere empanelment would not give any right of regularisation in service if the appointment at the initial stage had been made de hors the recruitment rules.

12. It is also settled legal proposition that a retrenched employee cannot claim the relief of regularisation unless his termination from service is found to be illegal. Thus, only an employee who is continuing in service for a long time is eligible for seeking such a relief. (Vide H.P. Housing Board Vs. Om Pal & Ors, AIR 1997 SC 2685 and Ramchander & Ors Vs. Additional District Magistrate & ors, (1998) 1 SCC 183).

13. Thus, it is evident from the above settled legal proposition that a person who had been appointed on daily wages and worked for a period of 1 or 2 years, cannot claim regularisation in absence of any statutory provisions. He must possess the eligibility for the post on the date of initial appointment and the appointment should be made in consonance with the statutory provisions. The regularisation is not permissible

ignoring the policy framed by the State providing for reservation in favour of certain classes. A retrenched employee cannot claim regularisation without asking for quashing his termination order. More so, regularisation may be either under a scheme framed by the employer or under the statutory provision framed by the State for this purpose.

14. In Life Insurance Corporation of India Vs. Asha Ramchhandra Ambekar (Mrs.) & anr., AIR 1994 SC 2148, the Hon'ble Apex Court held that the writ jurisdiction cannot be exercised issuing directions straight away as the Courts are required to issue directions for mere consideration of the claim of the employee as straightway direction to appoint a particular person would only put the authority concerned in a piquant situation. The disobedience of the said direction may entail contempt notwithstanding the fact that the appointments etc. may not be warranted as per the Rules.

15. In Hindustan Shipyard Ltd. & Anr. Vs. Dr P. Sambasiva Rao & Ors.,(1996) 7 SCC 499, the Hon'ble Apex Court held that in a case where the relief of regularization is sought by employees working for a long time on ad hoc basis, it is not desirable for the Court to issue direction for regularization straight away. The proper relief in such cases for issuing direction to the authority concerned to constitute a Selection Committee to consider the matter of regularization of the ad hoc employees as per the Rules for regular appointment for the reason that the regularization is not automatic, it depends on availability of number vacancies, suitability and eligibility of the ad hoc appointee and particularly as to whether the ad hoc appointee had an eligibility for appointment on the date of initial as ad hoc and while considering the case of regularization, the Rules have to be strictly adhered to as dispensing with the Rules is totally impermissible in law. In certain cases, even the consultation with the Public Service Commission may be required, therefore, such a direction cannot be issued.

16. In Government of Orissa & Anr., Vs. Hanichal Roy & Anr., (1998) 6 SCC 626, the Hon'ble Supreme Court considered the case wherein the High Court had granted the relaxation of service conditions. The Apex Court held that the Court cannot take upon itself the task of the Statutory Authority and only order which Court could have passed was directing the Government to consider relaxation itself forming an opinion in view of the statutory provisions as to whether the relaxation was required in the facts and circumstances of the case. Issuing such a direction by the Court is illegal and impermissible.

17. Similar view has been reiterated by the Hon'ble Supreme Court in A. Umarani (supra).

18. In G. Veerappa Pillai Vs. Raman and Raman Ltd., AIR 1952 SC 192, the Constitution Bench of the Hon'ble Supreme Court while considering the case for grant of permits under the provisions of Motor Vehicles Act, 1939, held that High Court ought to have quashed the proceedings of the Transport Authority, but issuing the direction for grant of permits "was clearly in excess of its powers and jurisdiction."

19. In view of the above, it is not permissible for the Court to take the task of the employer upon itself and issue a direction straight away to absorb/regularise or appoint any litigant. The Court/Tribunal can issue a direction to consider his case in accordance with law. The Court has a power only to issue direction to the authorities concerned to consider the case in accordance with law as absorption may depend upon the availability of the vacancy, satisfactory service rendered by him earlier, or a candidate may be found unsuitable on the ground that he had been given some punishment in the domestic inquiry in past or he did not possess the requisite qualification/eligibility at the time of initial appointment etc. etc. More so, the Appointing Authority has to give effect to the Reservation Policy of the State.

20. The present case is required to be considered in the light of the aforesaid settled legal propositions. Petitioner worked from 1984 to 1986 for a period of 2 years and was retrenched. He never challenged the termination of his service. At the most, petitioner could claim the relief available to him under Section 25-G and 25-H of the Industrial Disputes Act, 1947 or his case could be considered for re-employment in accordance with the seniority list prepared under Rule 77 of the Industrial Disputes Rules whenever the vacancy occurred. Petitioner did not challenge the termination order. As per the scheme framed by the Department his case was considered. Petitioner appeared in the test, but could not pass the same.

21. The Tribunal allowed the claim of the employee drawing adverse inference against the Department for not producing the policy under which the test was conducted and record of selection. We find no force in the submissions made by Shri Govind Saran, learned counsel for the petitioners that there was no occasion for the learned Tribunal to draw the adverse inference as the said record was not relevant to determine the controversy.

22. In Mst Ramrati Kuer Vs. Dwarika Prasad Singh, AIR 1967 SC 1134, the Hon'ble Supreme Court held that in case of withholding the material evidence, adverse can be drawn by the Court against a party who possesses the evidence, but does not produced the same in spite of the order of the Court. A similar view has been reiterated in Indira Kaur Vs. Sheo Lal Kapoor, AIR 1988 SC 1074 and Mohinder Kaur Vs. Kusam Anand, AIR 2000 SC 1745.

In the instant case the Tribunal has recorded a finding of fact as under:

"Learned counsel for the respondents was directed to produce a copy of the guidelines prescribing the procedure and the requirement for holding screening test for absorption of casual labourers. The record has not been produced. It is presumed that the same is not available in the office of the respondents". (Emphasis added)

23. In view of the above, as the learned Tribunal has specifically asked the present petitioner to produce the relevant record and for the reasons best known to it the petitioner did not produce it before the Tribunal, the Tribunal has rightly drawn the adverse inference against the Department.

24. In view of the above, petition succeeds partly and it stands disposed of

with the modifications of the judgment and order dated 11/1/2000 to the extent that the Department shall reconsider the case of respondent-employee for absorption/ regularisation. This exercise may be completed within a period of three months from today. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.16768 of 2003

Vijay Singh and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri K.P. Shukla
Sri N.K. Mishra
Sri V.D. Chauhan
Sri Sanjay Kr. Rai

Counsel for the Respondents:
Sri Virendra Kumar
Sri Mahendra Pal Singh Niranajan
S.C.

Constitution of India, Art. 39 (d) Equal Pay for Equal work-Petitioner appointed as reader in the year 1966-given pay scale of Rs.4000-6000-while those appointed in pursuance of G.O. 12.12.89 or prior to that-getting pay scale of Rs.4500-7000/- only reason disclosed by the authorities, the G.O. dated 23.7.1997-which provides different Pay Scale on the particular date-classification based no rational basis-G.O. dated 23.799-held arbitrary and violative of Art. 14 of the Constitution.

Held: Para 15, 20 & 22

In such a case, the differentiation would not amount to discrimination, but where two classes of employees perform identical duties with the same measure of responsibility and have the same qualification for the appointment on the said post, in that event, they would be entitled for equal pay and denial of equal pay would be violative of Articles 14 and 16 of the Constitution.

In my opinion, the classification made by the respondents in giving different cadre to the Readers is not based on any intelligible criterion nor does it have a rational nexus and in my opinion, such differentiation amounts to a hostile discrimination. It would have been a different scenario, if persons holding the same post and performing similar work had separate responsibilities or educational qualifications, but merely by making a differentiation on the ground that persons appointed prior to a particular date would be given a higher pay scale than that of a person appointed after the said date would be a clear case of hostile discrimination and violative of Articles 14 and 16 of the Constitution of India.

The aforesaid principle squarely applies to the present facts and circumstances of the case. The classification made by the Government by its Government Order dated 23.7.97 was not based on any rational principle and the classification made, does not stand the test of reasonableness under Article 14 of the Constitution. Consequently, the Government Order dated 23.7.1997 in so far as its provides the grade of 1200-2040, which has now been revised to 4000-6000 for the Readers working in the District Consumer Forum is arbitrary and violative of Article 14 of the Constitution of India and to that extent, the said Government Order is quashed. The writ petition is allowed.

Case law discussed:
1982 (1) SCC-618
1984 (2) SCC-141
1989 (2) SCC-299

1997 (5) SCC-253
2002 (4) SCC-556
2004 (4) SCC-646
1989 (2) SCC-235
1989 (3) SCC-191
AIR 1983 SC-130

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

1. The petitioner No.1 was appointed as a Reader in the year 1996 and the petitioner No.2 was appointed as a Reader in the year 1999 in the office of the District Consumer Forum II at Moradabad in the pay scale of Rs.4000-100-6000. The petitioners' contends that 13 Readers, working in the District Consumer Forum, are getting the salary in the pay scale of Rs.4500-7000 whereas the petitioners are being given the pay scale of Rs.4000-6000. The petitioners have filed the present writ petition alleging that they are doing the same kind of work, and therefore, are liable to be paid the same pay scale of Rs.4500-7000 and the denial of this pay scale amounts to a hostile discrimination and is also against the principles of 'equal pay for equal work'. The petitioners therefore, prayed that a mandamus be issued to the respondents commanding them to pay the salary in the scale of Rs.4500-7000 and also pay the arrears.

2. A counter affidavit has been filed by the respondents stating that on 5.2.1988, 13 posts of Reader were sanctioned in the District Consumer Forum in the pay scale of Rs.470-735. On the basis of the recommendation of the Samta Samiti, the State Government issued a Government Order dated 12.12.1989 revising the pay scale of Rs.470-735 to Rs.1200-2040. By another Government Order dated 23.7.1997, the pay scale of Rs.470-735 was revised to Rs.1350-2000 in so far as its related to the 13 Readers, and that the Readers appointed after the Government Order of 12.12.1989 were kept in the pay scale of Rs.1200-2040. At the present moment, the pay scale of Rs.1200-2040 has been revised to Rs.4000-6000 and the pay scale of Rs.1350-2200 has been revised to Rs.4500-7000. The respondents submitted that the Government Order dated 23.7.1997 made it very clear that only the 13 Readers, who were initially appointed were only entitled to get the benefit of the pay scale of Rs.1350-2200 and those who are appointed after the Government Order dated 12.12.1989 would not be entitled to this pay scale. Since the petitioners were appointed in the year 1996 and 1999 respectively, they were not entitled to be given the pay scale as claimed by them.

3. Heard Sri Ashok Khare, Senior Counsel assisted by Sri V.D. Chauhan and Sri N.K. Mishra, the learned counsel for the petitioners and the learned Standing Counsel for the respondents.

4. The learned Counsel for the petitioners submitted that the nature of work which the petitioners are performing is the same which the original 13 Readers are performing, and therefore, the principle of equal pay for equal work should be adopted and that the petitioners should also be placed in the same pay scale. The learned counsel for the petitioners submitted that since the petitioners are performing the same kind of work and they hold the same degree of responsibilities, consequently giving a different pay scale was not only violative of Article 14 of the Constitution of India, but also amounted to a hostile discrimination.

5. The petitioners have invoked the principle of equal pay for equal work and contended that having regard to the nature of work and the responsibilities shouldered by them and taking into consideration the relevant facts, they are entitled to the same benefits as granted to the 13 Readers.

6. The principle of equal pay for equal work has been considered, explained and criticised in a number of decisions by the Supreme Court of India.

7. Article 39 (d) of the Constitution provides 'equal pay for equal work for both men and women i.e. equal pay for equal work for everyone and as between the sexes. Even though this directive principle under the Constitution is not a fundamental right, nonetheless, is certainly a Constitutional goal and therefore, Article 39 (d) of the Constitution has to be read alongwith the Articles 14 and 16 of the Constitution. Article 14 of the Constitution contemplates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Article 16 of the Constitution declares that there shall be equality of opportunity to all the citizens in the matter relating to the employment or an appointment to any office under the State. The equality clause under Articles 14 and 16 of the Constitution enshrines the principle of equal pay for equal work.

8. In **Randhir Singh vs. Union of India and others, 1982(1) SCC 618**, the Supreme Court held-

"Construing Articles 14 and 16 in the light of the Preamble and Article 39 (d), we are of the view that the principle 'equal pay for equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer."

9. The Supreme Court in the aforesaid case held that the drivers working in the Delhi Police Force were performing the same functions and duties like any other drivers in the service of the Delhi Administration and the Central Government and therefore entitled for the same pay scale and that the principle of equal pay for equal work was clearly applicable. The Supreme Court further held that the denial of the same pay scale was irrational.

10. In **P.K. Ram Chandra Iyer vs. Union of India, 1984 (2) SCC 141**, the existing incumbent to the post, even though they were fulfilling the qualifications and the experience, were deprived of the revised pay scale, whereas the newly selected incumbent were given the revised scale, the Supreme Court held that the action of the respondents was arbitrary, discriminatory and violative of the principle of equal pay for equal work as enshrined under Articles 14, 16 and 39(d) of the Constitution, and that the revised pay scale was liable to be given to all the incumbents.

11. In **Bhagwan Sahai Carpenter vs. Union of India and another,1989 (2) SCC 299**, out of 15 trades in the skilled grade, six of these trades were given a higher pay scale, the Supreme Court held that the employees of the 15 trades in the skilled grade cannot be treated differently and that giving different pay scale was

discriminatory and contrary to the equality clause envisaged under Articles 14 and 16 of the Constitution and the principle of equal pay for equal work . The Supreme Court issued a mandamus that all the employees in different trade in the skilled grade were liable to be treated equally.

12. In **State of Haryana and others vs. Ram Chander and others, 1997(5) SCC 253**, the Supreme Court held that the teachers teaching students of XI and XII standard in Haryana Government vocational education institution and those teachers teaching student of XI and XII standard in Higher Secondary Institutions were entitled for the same pay scale on the principle of equal pay for equal work. The Supreme Court held that the work performed by the teachers in a vocational school and those performed by the teachers in a Secondary School was qualitatively and quantitatively the same and therefore, they were entitled for the same pay scale.

13. In **State Bank of India and another vs. M.R. Ganesh Babu and others, 2002(4) SCC 556**, the Supreme Court held-

"The principle of equal pay for equal work has been considered and applied in many reported decisions of this Court. The principle has been adequately explained and crystallised and sufficiently reiterated in a catena of decisions of this Court. It is well settled that equal pay must depend upon the nature of work done. It cannot be judged by the mere volume of work; there may be equalitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgement by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgement is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination."

14. In **M.P. Rural Agriculture Extension Officers Association vs. State of M.P. and another, 2004 (4) SCC 646**, two different pay scales were provided in the same cadre on the basis of educational qualification even though the nature of work was the same and the posts were also interchangeable. The said classification was challenged which was rejected by the High Court. The Supreme Court while dismissing the appeal held that despite the fact that the employees had been performing similar duties and functions and even though their posts were interchangeable, nonetheless, a valid classification was made on the basis of their educational qualifications and therefore the doctrine for equal pay for equal work was not applicable. The Supreme Court further held that Article 14 of the Constitution does not forbid a reasonable classification and that Article 14 forbids a class legislation but permits reasonable classification subject to the conditions that it was based on an intelligible differentia and that the differentia must have a rational relation to the object sought to be achieved. The Supreme Court held that the classification done by the State Government was not discriminatory in nature, inasmuch, as there was a reasonable classification based on the educational qualifications.

15. In view of the aforesaid, it is clear that the principle of equal pay for equal work would depend upon the nature of work done and that the same cannot be judged by the mere volume of work. If the responsibilities that carries with the post are different, then the same would make a difference. The differentiation in the pay scale of person holding the same post and performing similar work on the basis of the degree of responsibilities would be a valid differentiation. Difference of pay scale in the same cadre based on education qualification can be made a valid classification. However, while comparing and evaluating the work done by different persons either in the same department or in different department a reasonable classification can be made on intelligible criterion which has a rational nexus with the object of differentiation. In such a case, the differentiation would not amount to discrimination, but where two classes of employees perform identical duties with the same measure of responsibility and have the same qualification for the appointment on the said post, in that event, they would be entitled for equal pay and denial of equal pay would be violative of Articles 14 and 16 of the Constitution.

16. In **Mewa Ram Kanojia vs. All India Institute of Medical Science and others, 1989(2) SCC 235** held-

"While considering the question of application of principle of 'equal pay for equal work' it has to be borne in mind that it is open to the State to classify employees on the basis of qualifications, duties and responsibilities of the posts concerned. If the classification has reasonable nexus with the objective sought to be achieved, efficiency in the administration, the State would be justified in prescribing different pay scales but if the classification does not stand the test of reasonable nexus and the classification is founded on unreal, and unreasonable basis it would be violative of Articles 14 and 16 of the Constitution. Equality must be among the equals. Unequal cannot claim equality."

17. In **V. Markendeya and others vs. State of Andhra Pradesh and others, 1989 (3) SCC 191** held-

"In view of the above discussion we are of the opinion that where two classes of employees perform identical or similar duties and carrying out the same functions with the same measure of responsibility having same academic qualifications, they would be entitled to equal pay. If the State denies them equality in pay, its action would be violative of Articles 14 and 16 of the Constitution, and the court will strike down the discrimination and grant relief to the aggrieved employees. But before such relief is granted the court must consider and analyse the rationale behind the State action in prescribing two different scales of pay. If on an analysis of the relevant rules, orders, nature of duties, functions, measure of responsibility, and educational qualifications required for the relevant posts, the court finds that the classification made by the State in giving different treatment to the two classes of employees is founded on rational basis having nexus with the objects sought to be achieved, the classification must be upheld. Principle of equal pay for equal work is applicable among equals, it cannot be applied to unequals. Relief to an aggrieved person seeking to enforce the principles of equal pay for equal work can be granted only after it is demonstrated before the court that

invidious discrimination is practised by the State in prescribing two different scales for the two classes of employees without there being any reasonable classification for the same. If the aggrieved employees fail to demonstrate discrimination, the principle of equal pay for equal work cannot be enforced by court in abstract. The question what scale should be provided to a particular class of service must be left to the executive and only when discrimination is practised amongst the equals, the court should intervene to undo the wrong, and to ensure equality among the similarly placed employees. The court however cannot prescribe equal scales of pay for different class of employees."

18. From the aforesaid, it is clear that Article 14 prohibits discriminatory legislation against an individual or against a class of individual. It does not forbid reasonable classification. In the light of the aforesaid, the plea for equal pay for equal work has to be analysed with reference to Articles 14 and 16 of the Constitution of India and the burden is upon the petitioners to establish their right to equal pay or the plea of discrimination, as the case may be.

19. The petitioners in their writ petition have only stated that 13 Readers are getting the salary in the grade of Rs.4500-7000 and that the petitioners are getting the salary in the grade of Rs.4000-6000, and therefore, on the principle of equal pay for equal work, they are entitled to be given the same pay scale. No details have been furnished as to how they are doing the same kind of work. The mere fact that they are working as Reader in the District Consumers Forum does not mean that they are performing the same kind of work and shoulder the same kind of responsibilities as that being performed by the 13 Readers. In my view, the foundation for equal pay for equal work has not been laid down by the petitioners in the writ petition.

20. On the other hand, the respondents justify their action in making a reasonable classification alleging that persons who were appointed as Reader prior to 1989 would be given a higher pay scale and those who were appointed as Readers after 1989 would be given a lower pay scale. The difference in the pay scale is only on this ground itself and, is not on the ground of volume of work or educational qualifications or qualitatively difference in quality of work and responsibilities. In my opinion, the classification made by the respondents in giving different cadre to the Readers is not based on any intelligible criterion nor does it have a rational nexus and in my opinion, such differentiation amounts to a hostile discrimination. It would have been a different scenario, if persons holding the same post and performing similar work had separate responsibilities or educational qualifications, but merely by making a differentiation on the ground that persons appointed prior to a particular date would be given a higher pay scale than that of a person appointed after the said date would be a clear case of hostile discrimination and violative of Articles 14 and 16 of the Constitution of India.

21. In **D.S. Nakara and others Vs. Union of India, A.I.R. 1983 SC 130**, the Supreme Court granted pensionary benefits even to those employees who had retired before the revision of the pension scheme observing that the pensioners form a class as a whole and cannot be

micro classified in an arbitrary and in a unreasonable manner. The Supreme Court held that the specified date dividing the pensioners between those who retired prior to the specified date and those who retired subsequent to that date was arbitrary as well as discriminatory. The classification was not based on any rational principle and therefore, the classification could not stand the test of Article 14 of the Constitution of India.

The Supreme Court held –

"Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have a rational nexus to the object sought to be achieved by the statute in question."

and again held-

"The artificial division stares into face and is unrelated to any principle and whatever principle, if there be any, has absolutely no nexus to the objects sought to be achieved by liberalising the pension scheme. In fact this arbitrary division has not only no nexus to the liberalised pension scheme but it is counter productive and runs counter to the whole gamut of pension scheme. The equal treatment guaranteed in Article 14 is wholly violated inasmuch as the pension rules being statutory in character, since the specified, date the rules accord differential and discriminatory treatment to equals in the matter of commutation of pension."

and further held-

".....The date of retirement is irrelevant. But the revised scheme would be operative from the date mentioned in the scheme and would bring under its umbrella all existing pensions and those who retired subsequent to that date."

22. The aforesaid principle squarely applies to the present facts and circumstances of the case. The classification made by the Government by its Government Order dated 23.7.97 was not based on any rational principle and the classification made, does not stand the test of reasonableness under Article 14 of the Constitution. Consequently, the Government Order dated 23.7.1997 in so far as its provides the grade of 1200-2040, which has now been revised to 4000-6000 for the Readers working in the District Consumer Forum is arbitrary and violative of Article 14 of the Constitution of India and to that extent, the said Government Order is quashed. The writ petition is allowed.

23. Since relevant details of the petitioners with regard to the qualifications and the work performed and the responsibilities which carries with the work is lacking in detail, consequently the matter is remitted to the respondents to consider the nature of the work performed by the petitioners and the responsibilities that carries with the post and if their qualifications, nature of the work and responsibilities is the same as that being performed by the 13 Readers, in that eventuality, the same pay scale would be given to the petitioners as that given to the 13 Readers. This exercise shall be done by the respondents within three months from the date of receiving a certified copy of this judgement.

Petition allowed.