ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2006

BEFORE
THE HON'BLE V.K. SHUKLA, J.

Civil Misc. Writ Petition No. 61593 of 2006

Praveen Kumar ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Yadav
Sri Lalji Yadav

Counsel for the Respondents:
Sri Shashank Shekhar
Sri Dr. A.K. Nigam, Addl. Solicitor General of India

Constitution of India Art. 226-a-Alternative remedy-Air Force Act 1950, Section-26 (2)(3) and (4) readwith Air force Rules 1969 Rule 15 (2)(g)(ii)-Discharge from duty-petitioner working as Air Man-statutory remedy-to complain before the chief of the air staff-against that further remedy to revision before central government-petition dismissed on the ground of alternative remedy.

Held: Para 7

The claim of petitioner is that he has been wronged by Air officer Incharge Personnel, who is subordinate to the Chief of the Air Staff. Once petitioner submits that he has been wronged by an officer of the level of Air Officer Incharge Personnel, then petitioner has remedy in terms of Sub-Section (2) of Section 26 of the Act to complain to the Chief of the Air Staff, and in the event of receipt of any such complaint Chief of the Air Staff will make investigation for giving full redress to the petitioner in terms of sub-section (3) of Section 26, and if even thereafter, petitioner is aggrieved then there is further remedy of revision before Central Government in terms of sub-Section (5) of Section 26. Consequently, equally efficacious remedy is there.

(Delivered by Hon'ble V.K. Shukla, J.)

1. Petitioner had been performing and discharging duties as Airman with the Indian Air Force. Proceedings were undertaken against him and court of inquiry was conducted. Thereafter show cause notice dated 22.12.2005 was served on the petitioner on 11.01.2006 to show cause as to why petitioner may not be discharged from service under Rule 15 (2) (g) (ii) of the Air Force Rules, 1969 for his alleged misconduct as brought out on court of enquiry. Petitioner submitted his reply on 25.05.2006 to the said show cause notice and thereafter in exercise of power under Section 22 of the Air Force Act, 1950 read with Rule 15 (2) (g) (ii) of the Air Force Rules, 1969 order of discharge was passed on 09.11.2006 and the said order was served on petitioner on 10.11.2006.

2. Petitioner has approached this Court questioning the validity of the aforementioned two actions directing his discharge and issuance of discharge certificate.

3. At the point of time when matter has been taken up, Sri Shashank Shekhar, learned counsel representing respondents, contended with vehemence that present writ petition is not maintainable, as the petitioner has got equally efficacious remedy of approaching the Chief of the Air Staff under Section 26 of the Air Force Act, 1950, as such writ petition is liable to be dismissed on the ground of alternative remedy.

4. Sri Rajesh Yadav, learned counsel for the petitioner, on the other hand contended that Section 26 of the aforesaid Act is not applicable and attracted in the matter of discharge and as such petitioner cannot be relegated to the said alternative remedy.

5. After respective arguments have been advanced, Section 26 of the Act dealing with the remedy of aggrieved airman is to be looked into, which is being quoted below:

"26. Remedy of aggrieved airmen.- (1) Any airman who deems himself wronged by any superior or other officer may, if not attached to a unit or detachment, complain to the officer under whose command or orders he is serving; and may, if attached to a unit of detachment complaint to the officer commanding the same.
(2) When the officer complained against his officer to whom any complaint should, under sub-section (1), be preferred, the aggrieve airman may complain to such officer's next superior officer, and if he thinks himself wronged by such superior officer, he may complain to the Chief of the Air Staff.
(3) Every Officer receiving any such complaint shall make as complete an investigation into it as may be possible for giving full redress to the complainant; or when necessary, refer the complaint to superior authority.
(4) Every such complaint shall be preferred in such manner as may from time to time be specified by the proper authority.
(5) The Central Government may revise any decision by the Chief of the Air Staff under sub-Section (2) but subject thereto, the decision of the Chief of the Air Staff shall be final."

6. A bare perusal of Section 26 of the Act would go to show that any airman who deems himself wronged by any superior or other officer, if not attached to a unit or detachment, has been given a right to complain to the officer commanding the same. It has also been provided that if he is attached to a unit of detachment then he can complain to the officer commanding the same. Sub-section (2) of Section 26 further provides that when the officer complained against his officer to whom any complaint should be preferred under sub-section (1), the aggrieve airman may complain to such officer's next superior officer, and if he thinks himself wronged by such superior officer, he may complain to the Chief of the Air Staff. Sub-section (3) of Section 26, on receipt of any such complaint, obligates the officer to make a complete investigation into it as may be possible for giving full redress to the complainant, and in case it is not feasible, the said officer has authority to refer the complaint to superior authority. Sub-section (4) of Section 26 provides the format in which complaint is to be preferred. Sub-section (5) of Section 26 provides for giving finality to the order of the Chief of the Air Staff, but even the said finality is subject to power of revision, which can be exercised by the Central Government.

7. Section 26 of Air Force Act, 1950 is specific and comprehensive qua aggrieved airman and same is self contained, and whenever any airman deems himself ti have been wronged, he has been given liberty to approach the authority concerned. The language of the Section imports in itself widest amplitude,

as it gives an opportunity to the Airman, whenever he thinks that he has been wronged, to approach the authority. Section 26 is not only comprehensive but it also obligates the authority concerned of making investigation for giving full redress to the complainant. In the present case order of discharge has been passed against petitioner and pursuant to the same discharge certificate has been issued. The claim of petitioner is that he has been wronged by Air officer Incharge Personnel, who is subordinate to the Chief of the Air Staff. Once petitioner submits that he has been wronged by an officer of the level of Air Officer Incharge Personnel, then petitioner has remedy in terms of Sub-Section (2) of Section 26 of the Act to complain to the Chief of the Air Staff, and in the event of receipt of any such complaint Chief of the Air Staff will make investigation for giving full redress to the petitioner in terms of sub-section (3) of Section 26, and if even thereafter, petitioner is aggrieved then there is further remedy of revision before Central Government in terms of sub-Section (5) of Section 26. Consequently, equally efficacious remedy is there.

8. It has been next contended by learned counsel for the petitioner that in the present case order has been passed by Air Head Quarter, New Delhi, and as such it should be presumed that the order has been passed by the Chief of the Air Staff, as such relegation of petitioner to the Chief of Air Staff would be redundant exercise. This is clearly misconception on the part of petitioner, inasmuch as in the present case order has been passed by Air Officer Incharge Personnel posted at Air Head Quarter, New Delhi, and he cannot be equated with the Chief of the Air Staff, who holds a unique position under Section 4 (xiv) of the Air Force Act, 1950.

9. Consequently, petitioner has got equally efficacious remedy under Section 26 of the said Act, as such present writ petition is dismissed on the ground of alternative remedy.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.11.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Civil Revision No. 76 of 2006

Smt. Rajni Chauhan & another ...Revisionist
Versus
Smt. Saroj Singh ...Respondent

Counsel for the Revisionist:
Sri Prabhat Kumar Srivastava

Counsel for the Respondent:

Code of Civil Procedure-Order 40 rule 5-Review-scope thereof explained-striking out defence-review on the ground counsel not advised-held-can not be ground for review-unless discovery of new facts or the error apparent on the fact of record.

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

1. Heard learned counsel for the revisionist.

This revision challenges the order dated 17.10.2006 passed by the court below dismissing the review petition of the revisionist.

2. A suit for eviction of the revisionist was filed by the opposite-party

landlord before the Judge Small Causes Court in which payment of rent till 01.12.2005 was admitted by the applicants. The rent/damages remained due after that date which has admittedly not been deposited as per the requirement under order XV Rule 5 C.P.C. Accordingly, looking to the facts and circumstances of the case the court below struck off the applicant's defence filed in the case vide order dated 17.11.2005. Thereafter this review petition has been moved stating that since there was no fault on the part of the revisionist-tenant, the defence was not liable for being struck off. It is further stated that the requirement of the deposit under Order 15 Rule 5 C.P.C. was not made clear to the tenants by their counsel and because of this ignorance the deposit could not be made. Finding this ground as non sustainable for a review petition the court below has held that the order as such could not be reviewed under circumstances and the petition has been dismissed by the impugned order.

3. The learned counsel appearing for the revisionist has contended that since there is no deliberate default committed by the tenants and the deposit could not be made because of the counsel's incorrect advice, there is every cogent ground for the court to have reviewed its earlier order dated 17.11.2005. The matter actually involves the future of small children who were continuing their studies in the educational institution.

4. As regards the scope of a review petition the court can interfere into a judgment and order passed by it only when it is found from discovery of a new and important matter or evidence which, after exercise of due diligence, was not available at the time when the order was passed or on account of some mistake or error apparent on the face of the record. The court would not be obliged to review any order or decree on the ground as taken by the revisionist in the present case. The simple ground which has been taken by the petitioners and as submitted by them also for grant of the, review is that they could not make the deposit as required under Order 15 Rule 5 C.P.C. because of the fact that the counsel did not advice them for the same. This is no ground which can be said to be coming within the ambit of the grounds as enumerated under Order XLVII Rule 1 (c) of the Code of Civil Procedure. There is absolutely no mistake or error apparent on the face of the record nor there is any discovery of new matter or evidence which can impel the court to reverse its decision given earlier. Therefore, since the aforesaid ground does not cover the scope of review as enumerated in the aforesaid order XLVII, the court below has rejected the review petition.

5. I do not find any infirmity· in the order impugned as to call for any interference against it in this review petition.

The petition having no force and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 4997 of 2003

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

Counsel for the Petitioner:
Sri Vashistha Tiwari

Counsel for the Respondents:
Sri Sanjay Goswami
S.C.

U.P. Recruitment of Dependants of Govt. Servants (Dying in Harness) Rules 1974-Rule-5-Compassionate appointment-claim denied on the ground at the time of death-employee was not discharging his duty-held-only requirement-government. servant must be in service-order of rejection passed under misconception-total non application of mind-order quashed.

Held: Para 6

Thus a Government servant, if he is in service and die, is one who die in harness and dependent members of family are entitled for suitable employment under Rule 5 of 1974 Rules. The aforesaid Rule no where require that the death of the Government servant must occur while discharging duty in the course of employment. The only requirement under 1974 Rules is that the Government servant must be in service. It is not disputed that the petitioner's father when died in 1992, was in service, therefore, apparently the view taken by the Superintendent of Police, Mainpuri for rejecting the claim of the petitioner is, incorrect and in the teeth of 1974 Rules. It appears that the aforesaid authority has not at all cared to look into 1974 Rules and has passed the impugned order under some misconception showing total non application of mind on his part. In a matter pertaining to compassionate appointment, this kind of exercise on the part of the competent authority shows total apathy and cannot be appreciated.

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

1. Heard Sri Vashistha Tiwari, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The grievance of the petitioner is that his father working as Constable in Civil Police of Uttar Pradesh died in a road accident on 17th June, 1992. The petitioner after having obtained Intermediate Qualification sought for compassionate appointment under the U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rules, 1974 (hereinafter referred to as 1974 Rules) but vide impugned order dated 19th December, 2002 the Superintendent of Police, Mainpuri has rejected his claim only on the ground that the petitioner's father while unauthorizedly traveling by a Matador, met an accident, therefore his death cannot be said to have occurred in the course of employment and he is not entitled for any compassionate appointment under 1974 Rules. He submits that the ground on which the petitioner's claim for compassionate appointment has been rejected is totally *non-est,* illegal and contrary to the provision of 1974 Rules.

3. The learned Standing Counsel, however, submits that under 1974 Rules

dependants of a deceased Government servant is entitled for appointment only when the death has occurred in the course of employment and therefore the order passed by Superintendent of Police, Mainpuri is correct and does not warrant any interference,

4. Heard learned counsel for the parties and perused the record. The only question required for consideration is, whether 1974 Rules is applicable in the case in hand or not. Rule 3 of 1974 Rules provides t hat the said Rules shall apply to recruitment of dependants of deceased Government servant to public services and posts in connection with the State of Uttar Pradesh, except those, which are within the purview of Uttar Pradesh Public Service Commission. Rule 4 gives overriding effect to the aforesaid Rules over any rule, regulation or order enforce at the commencement of 1974 Rules. Rule 5 is the substantive provision entitling the dependants of a deceased Government servant recruitment in Government service and reads as under:-

5. Recruitment of a member of the family of the deceased:-*(1) In case a Government servant dies in harness after the commencement of these rules and the spouse, of the deceased government servant is not already employed under the Central Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purpose, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person:-*

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant;

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner;

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

5. A perusal of the aforesaid Rules make it clear that the only thing relevant for application of the Rule is whether the deceased person was in the employment of the State Government or not. The terms "Government servant" and "deceased Government" servant has also been defined under Rule 2 (a) and 2(b) which reads as under:-

2. (a) "Government Servant" means a Government servant employed in connection with the affairs of Uttar Pradesh who-

(i) was permanent in such employment: or
(ii) though temporary had been regularly appointed in such employment: or
(iii) though not regularly appointed, had put in three years' continuous service in regular vacancy in such employment.
(b) "deceased Government servant" means a Government servant who dies while in service;

6. Thus a Government servant, if he is in service and die, is one who die in harness and dependent members of family are entitled for suitable employment under Rule 5 of 1974 Rules. The aforesaid Rule no where require that the death of the Government servant must occur while discharging duty in the course of employment. The only requirement under 1974 Rules is that the Government servant must be in service. It is not disputed that the petitioner's father when died in 1992, was in service, therefore, apparently the view taken by the Superintendent of Police, Mainpuri for rejecting the claim of the petitioner is, incorrect and in the teeth of 1974 Rules. It appears that the aforesaid authority has not at all cared to look into 1974 Rules and has passed the impugned order under some misconception showing total non application of mind on his part. In a matter pertaining to compassionate appointment, this kind of exercise on the part of the competent authority shows total apathy and cannot be appreciated. The way in which the Superintendent of Police, Mainpuri has considered the case of petitioner, has resulted in adding certain words in 1974 Rules i.e. "Government servant dying in harness while discharging duty in the course of employment" though the words "discharging duty in the course of employment" does not exist in the Rule. The purpose of Rule is to mitigate the sudden crisis and hardship caused to the family of the deceased on account of unexpected death while in service. Whether at the time of death he was discharging duties or was ill etc. and therefore died or for whatever other reason, is wholly irrelevant, since the purpose is to mitigate crisis suddenly occurred due to unexpected death of the sole bread earner. The only thing which has to be consider for application of 1974 Rules is whether the incumbent was in service or not. The learned Standing Counsel could not dispute this fact that the father of the petitioner was in service when met accident and died.

7. In view of the aforesaid discussion, this writ petition succeeds and is allowed. The order dated 19.12.2002 is hereby quashed.

8. The Superintendent of Police, Mainpuri is directed to reconsider the matter and pass appropriate order in the light of the above observations and in accordance with law. It is needless to say that while considering the claim of the petitioner under 1974 Rules all other aspects would also be considered regarding the nature of appointment, the objective of compassionate appointment etc. and thereafter he shall pass a speaking order in accordance with law.

There shall be no orders as to costs.

9. The competent authority shall take decision as directed above within two months from the date of production of certified copy of this order.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 39944 of 2006

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

Counsel for the Petitioner:
Sri Arun Kumar Mishra

Counsel for the Respondents:
Sri R.P. Dubey
Sri Sanjay Srivastava
S.C.

Constitution of India, Art. 226- Appointment as lecturer of Physics- empanelled against the requisition vacancy of Hindu Inter College Banda- due the reasons best known-petitioner not joined at Banda-but managed be adjusted in another institution against Backward category-without requisition without advertisement-held-without leave of court no salary shall be paid such appointee secretary to hold and submit its enquiry report against the conduct of D-103, the manager and the Head of the Institution concerned.

Held: Para 9 & 10

The enquiry may be completed by the Secretary and specific finding should be recorded in respect of the individual persons involved. Report may be submitted before this Court by 12th December, 2006. The original records, as have been produced before this Court, may be transmitted to the Secretary, Secondary Education, U. P. Government, Lucknow under a sealed cover along with certified copy of the order.

From the facts as have been noticed herein above, this Court is prima facie satisfied that continuance of Sri Ramesh Chandra is apparently illegal and is based on procured documents. It is, therefore, directed that Sri Ramesh Chandra shall not be paid salary without leave of the Court.

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

1. A post of Lecturer Physics in Chaudhary Chhotu Ram Inter college, Muzaffarnagar was requisitioned to the U.P. Secondary Education Services Selection Board, Allahabad vide requisition dated 28th February, 2003. The vacancy was earmarked for Other Backward Classes category in the requisition. The said vacancy was ultimately advertised under Advertisement No. 2/2004 in the said category. Petitioner, who belongs to the category of Other Backward Classes applied in pursuance to the advertisement. He was ultimately selected and empanelled for appointment as Lecturer Physics in the Caudhary Chhotu Ram Inter College, Muzaffar Nagar.

2. The District Inspector of Schools, Muzaffarnagar, on receipt of the select panel, forwarded a letter to the Secretary, U.P. Secondary Education Services Selection Board dated 21.4.2006 stating therein that one Sri Ramesh Chandra has already been appointed against the requisitioned vacancy of Lecturer Physics and therefore there is no vacancy against which petitioner can be offered appointment and requested that he may be adjusted in some other institution. Against this order of the District Inspector of Schools present writ petition has been filed.

3. This Court required the District Inspector of Schools, Muzaffar Nagar to remain present before this Court with all relevant records. The Secretary of the U.P. Secondary Education Services Selection Board was also directed to produce the records. The original records produced by the District Inspector of Schools as well' as U.P. Secondary Education Services Selection Board have been examined by the Court today. A counter affidavit has also been filed on behalf of Sri Ramesh Chandra (respondent no. 5).

4. From the records it is apparent that Sri Ramesh Chandra (respondent no. 5) was selected in pursuance to the advertisement no. 2/2002 for the post of Lecturer Physics and was empanelled against the vacancy which was requisitioned for Hindu Inter College, Atarra, district Banda within the reserved category of Scheduled Caste. The said Ramesh Chandra, for the reasons best known to him, did not join the said institution, it is alleged that the institution refused to accept his joining. However, instead of pursuing the remedy against the institution concerned, Sri Ramesh Chandra manipulated the documents in connivance with the Principal of Chaudhary Chhotu Ram Inter College, District Inspector of Schools Muzaffarnagar as well as with the officers of U.P. Secondary Education Services Selection Board, which resulted in an order being passed by the Secretary, U.P. Secondary Education Services Selection Board dated 21.8.2003. Under this order Sri Ramesh Chandra has been directed to be adjusted/appointed against the vacancy on the post of Lecturer Physics in Chaudhary Chhotu Ram Inter College, Muzaffarnagar. In pursuance whereof the District Inspector of Schools, Muzaffarnagar issued a letter to the Manager of the institution, which was promptly accepted and appointment was offered to Sri Ramesh Chandra without raising any objection to the fact that the candidate now appointed was not with the category reserved for appointment for the post in question and as had been requisitioned.

5. It Is further admitted on record that the vacancy on the post of Lecturer Physics "reserved for Other Backward Classes in Chaudhary Chhotu Ram Inter College, Muzaffarnagar was not advertised up to the date adjustment had been directed by the U.P. Secondary Education Services Selection Board. Thus, it is an admitted position that adjustment has been directed against an unadvertised vacancy in favour of Sri Ramesh Chandra.

6. On being asked as to on what basis the U.P. Secondary Education Services Selection Board had issued the order directing adjustment of Ramesh Chandra against an unadvertised vacancy, and that to of a candidate non-belonging to requisitioned category, counsel for the U.P. Secondary Education Services Selection Board refers to the letter dated 24.7.2003, which is said to have been forwarded by Sri Ramesh Chandra along with his application dated 19th July, 2003. The said document appears a stamp, which reads as follows:

"प्रति हस्ताक्षरित
सह जिला विद्यालय निरीक्षक
मु०नगर "

7. However, it is apparent from the original document that the same has not

been signed by any officer concerned. It is surprising, responsible officers like Secretary as well as Chairman of the U. P. Secondary Education Services Selection Board acted upon such a letter, which was not countersigned by the District Inspector of Schools, and directed adjustment. These facts lead to an apprehension that adjustment has been directed for other considerations. The matter requires investigation.

8. The records, produced today along with a copy of the writ petition, are directed to be transmitted to the Secretary, Secondary Education, U.P. Government, Lucknow for holding a detail enquiry into the issue (a) can a candidate selected amongst against a reserved category of Scheduled Caste can be adjusted against a vacancy reserved for Other Backward Classes, (b) whether a candidate selected in pursuance of Advertisement No. 2/2001 could have been adjusted against an unadvertised vacancy, as has been done by the U.P. Secondary Education Services Selection Board under an order dated 21.8.2003, (c) who, in fact, inducted the letter dated 24.7.2003 in the records of the U.P. Secondary Education Services Selection Board, inasmuch as counsel for Sri Ramesh Chandra has made a statement that application dated 19th July, 2003 was not accompanied with any such document, as is available on the records of the U.P. Secondary Education Services Selection Board and (d) The role of the Chairman and Secretary by the Secondary Education Services Selection Board in directing adjustment of Ramesh Chandra, the role of the District Inspector of Schools, Committee of Management and Principal of Chaudhary Chhotu Ram Inter College, Muzaffarnagar, who appointed Ramesh Chandra even after being fully aware that vacancy is earmarked for Other Backward Classes candidate.

9. The enquiry may be completed by the Secretary and specific finding should be recorded in respect of the individual persons involved. Report may be submitted before this Court by 12th December, 2006. The original records, as have been produced before this Court, may be transmitted to the Secretary, Secondary Education, U. P. Government, Lucknow under a sealed cover along with certified copy of the order.

10. From the facts as have been noticed herein above, this Court is prima facie satisfied that continuance of Sri Ramesh Chandra is apparently illegal and is based on procured documents. It is, therefore, directed that Sri Ramesh Chandra shall not be paid salary without leave of the Court. The District Inspector of Schools shall further ensure that petitioner is permitted to join in the institution as Lecturer Physics within two weeks from the date a certified copy of this order is filed before him.

List on 12th December, 2006.

Application disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2006

BEFORE
THE HON'BLE R.C. DEEPAK, J.
THE HON'BLE V.D. CHATURVEDI, J.

Criminal Appeal No.1865 of 1980

Hira Lal ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P.N. Misra
Sri Apul Misra
Sri A.P. Mathur
Sri Shashank Shekhar Giri

Counsel for the Opposite Party:
Sri Devendra Upadhyay
Sri S.K. Dubey
Sri S.K. Chaubey
Sri Shivendra Nath Singh
A.G.A.

Indian Penal Code-302-Punishment of life imprisonment-based on presumption of provisioning-No person found in viscera report-peculiar case of punishment without evidence-appeal deserves to be allowed.

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

This criminal appeal has been filed by the appellant-accused Hira Lal for setting-aside the judgment and order passed by Sri I.P. Mittal, the then Additional Sessions Judge, Mirzapur dated 30.8.1980 in Sessions Trial No.43 of 1978 pertaining to Police Station Katra, District Mirzapur convicting and sentencing him to imprisonment for life under Section 302 IPC.

The facts of the prosecution case, briefly stated, are that the informant Munni Lal son of Baldev Prasad, resident of Mohalla Ganeshganj, Police Station Katra, District Mirzapur had solemnized the marriage of his daughter Gyani Devi with appellant-accused Hira Lal resident of the same Mohalla and District two or three years back. His daughter had been happily and peacefully living at the house of the appellant-accused. After two or three months after the marriage, the appellant-accused and the other members of his family started embarrassing, harassing, humiliating, troubling, turmoiling, beating and compelling her to ask for more dowry from her parents. Consequently, she happened to be extremely worried. She used to tell her parents and other members of the family about the anxieties and atrocities caused to her by appellant-accused and other members of his family. Consequently, she was unwilling to go to the house of the appellant-accused. Not only this, but also she very sorrowfully expressed before the parents and other members of the family that she would not visit the house of appellant-accused otherwise the appellant-accused would poison her to death. The informant and other members of her family, however, consoled her and asked appellant-accused not to cause/commit any evil deed in regard to her. The appellant-accused agreed and, therefore, the informant and other members of his family sent Gyani Devi along with the appellant-accused to his house. Two days before the occurrence, one Paras Nath informed the informant that the appellant-accused was beating his wife Gyani Devi in the night between 21/22.7.1977 and, therefore, she was weeping and crying. Consequently, the informant, accompanied by Bhola Nath, Chunni Lal, Rameshwar Prasad, Radhey Shyam, Shanker Lal, Purushottam, Durga Prasad and many others went to the house of the appellant-accused who happened to come out of his house and seeing them all there, started running away. Whereupon they all ran after him, who fell down at a short distance and received certain injuries. The informant and certain others named above beat the appellant-accused and caught hold of him. The appellant-accused with his folded hands confessed his guilt/crime expressing that he at the

instance of his father administered poison to his wife Gyani Devi to death. The informant and others went to the upper storey of the house of the appellant-accused and found Gyani Devi dead there. The informant dictated the alleged report Exhibit Ka-l on the spot to Bhola Nath in connection with the occurrence. He took this report to the Police Station concerned where the first information report Exhibit Ka-l was written on the basis of the said report and a case as case crime no.180 of 1977 under Section 302/328 IPC was registered. After the registration of the case, its investigation was initially entrusted to Sub-Inspector Bal Govind Tiwari and subsequent to Sub-Inspector / Station Officer Narendra Singh. S.I. Bal Govind Tiwari visited the place of occurrence and prepared its site plan Exhibit Ka-16. He took the dead body of Smt. Gyani Devi into his custody and prepared Panchayatnama Exhibit Ka-12 in connection therewith. He sent the dead body of Smt. Gyani Devi through Constable Naim Ullah for postmortem examination. Doctor D.D. Tripathi (p.W.5) conducted the postmortem on the dead body of Gyani Devi on 22.7.1977. His report is Exhibit Ka-3. He preserved viscera also as is clear from his report. The Investigating Officer S.I. Bal Govind Tiwari took down the statements of Munni Lal, Bho1a Nath and Rameshwar Prasad. Similarly, second Investigating Officer S.I. Narendra Singh took down the statements of Paras Nath and Purushottam and after completion of the investigation into the case, he submitted the charge-sheet Exhibit Ka-9 against the appellant-accused and another in the Court. Ultimately, the Court framed charges against the appellant-accused and his father Babu Ram. Babu Ram was acquitted by the trial court. The State filed Government Appeal No.2811 of 1980 against the order of acquittal. He died during the pendency of the Government Appeal. Consequently, the Appeal stand abated.

The prosecution examined as many as 9 witnesses in support of its case. Munni Lal (P.W.l), Bhola Nath (P.W.2), Chunni Lal (P.W.3), Paras Nath (P.W.6) are the witnesses of fact, whereas Dr. D.D. Tripathi (P.W.5), Narendra Singh (P.W.7) and Bal Govind Tiwari (P.W.9), the Investigating Officer are the formal ones. Paras Nath turned hostile. The appellant-accused denied all the charges against him vide his statement under Section 313 Cr.P.C. He has examined Dr. S.C. Verma (D.W.l) in support of his version, as disclosed by him in his statement under Section 313 Cr.P.C. The trial court convicted the appellant-accused under Section 302 IPC against which the present criminal appeal has been filed, as already referred-to-above.

We have heard Sri P.N. Misra, learned senior advocate with the assistance of Sri Apul Misra, learned counsel for the appellant-accused, Sri Devendra Upadhayay, learned A.G.A. for the State and perused the records.

The first information report is a copy (verbatim) of the report Exhibit Ka-l alleged to have been written by Bhola Nath (P.W.2) on the dictation of the informant Munni Lal (P.W.I) allegedly on the spot itself. It may be mentioned at the very outset that there is no evidence on record to point out when, where and from whom Munni Lal (P.W.1) or Bhola Nath (P.W.2) had actually obtained pen-ink or fountain pen and paper for the purpose of writing the alleged report. There is no

mention of any thing in any form or manner in the alleged report, showing where it was actually written. Munni Lal (P.W.1) has stated that the report was written at the door of the house of appellant Hira Lal. Chunni Lal (P.W.3) has stated that Munni Lal (P.W. 1) had got the report written by Bhola Nath (P.W.2) on his dictation while sitting on a platform (chabootra) outside the courtyard of the house of Hira Lal. Bhola Nath (P.W.2) has, on the other hand, categorically stated in this cross-examination that the report was not written on the spot.

In view of all these inconsistent and contradictory statements of Munni Lal (P.W.1), Chunni Lal (P.W.3) and Bhola Nath (P.W.2) and in view of the conspicuous silence of the place of procurement of the pen and paper, as mentioned earlier, the learned counsel for the appellant-accused has forcefully argued that the report was not written on spot, but at the police station itself and that too in consultation with the police officers concerned. This is, according to him, so because Munni Lal had gone mad seeing his daughter Gyani Devi dead at the upper storey of the house of Hira Lal because there was no sketch / rough draft already prepared for the purpose of writing of the report and also because Munni Lal cannot be expected to have given for the first time extempore dictation to Bhola Nath for writing the alleged report in the state of his madness in particular. The arguments of the learned counsel for the appellant-accused appears to have substance.

It is further alleged in the first information report that Munni Lal (P.W.1), Rameshwar Prasad, Chunni Lal, Durga Prasad, Bhola Nath, Shanker Lal, Radhey Shyam and many others had gone together to the house of Hira Lal, who happened to come out of his house and started running away seeing them all there. Whereupon Munni Lal and all others chased and ran after him. He fell down at a short distance and consequently received certain injuries. Munni Lal and all others caught hold of him there whereupon he (Hira Lal) confessed before them all with folded hands that he at the instance of his father Babu Ram, administered poison to his wife Gyani Devi to her death. Munni Pal (P.W.I) has stated in his examination-in-chief that Hira Lal had made the above confession before him and all others in his courtyard where he was taken by them after having been caught hold outside his house. In his cross-examination, he has categorically stated that Hira Lal had made the above confession only in his courtyard and nowhere else. Bhola Nath (P.W.2) has also stated in his cross-examination that Hira Lal had confessed his guilty in the courtyard where he was taken by him and others after having been of caught hold by them outside his house. Chunni Lal (P.W.3) has also stated the same thing. There is nothing in the first information report to indicate that he (Hira Lal) had made any such confession, as alleged, in his courtyard. Similarly there is nothing in the first information report to show that Babu Ram, father of the appellant-accused Hira Lal had made confession to the effect that he had administered poison to Gyani Devi to her death. Bhola Nath (P.W.2) has disclosed in his examination-in-chief that Babu Ram, father of Hira Lal (appellant-accused) had also made confession in his courtyard to the effect that he had administered poison to Gyani Devi.

The first information report shows that Paras Nath had told that Hira Lal was beating Gyani Devi. This report is conspicuously silent where, when and before whom he had told the alleged fact. It was disclosed by Munni Lal, Bhola Nath and Chunni Lal in their respective statements that Paras Nath had told the above fact to Munni Lal before them and others at a temple situate nearby the houses of Munni Lal and others, but their statements in regard to this aspect of the matter stand nowhere especially when Paras Nath (P.W.6) has battered and shattered this alleged aspect of the case saying that he had not gone to any temple, that he had not met there Munni Lal and that he had not told anything to Munni Lal and others. Consequently, he turned hostile. Therefore, the statements of Munni Lal, Bhola Nath and Chunni Lal on the above fact introduced as afterthought are baseless and cannot be relied upon.

It is further alleged in the first information report that Munni Lal, Rameshwar Prasad, Radhey Shyam, Chunni Lal, Durga Prasad, Bhola Nath, Shanker Lal, Purushottam and many others went to the house of Hira Lal who happened to come out of his house and who seeing them all started running away, but they all caught hold of him on his falling down at a little distance, but Munni Lal, Bhola Nath and Chunni Lal (P.Ws. 1, 2 & 3) have very cleverly and cunningly excluded themselves from others named in their respective statements in the alleged process of catching hold of him outside of his house. They have also stated in their respective statements that Paras Nath had also accompanied them to the house of Hira Lal, but first information report is absolutely silent on the alleged presence of Paras Nath at the house of Hira Lal at the time when they are alleged to have been there. It is on the basis of all these inconsistencies and contradictions occurring in the statements of the above named witnesses, the learned counsel for the appellant-accused has vehemently argued that legally speaking there is no case or evidence against the appellant Hira Lal, that there is no eye-witness, that the above named witnesses are related to one another and that they have cooked and concocted the present case with the sole aim and objective of falsely implicating the appellant-accused therein.

Doctor D.D. Tripathi (P.W.5) conducted the postmortem on the dead body of Gyani Devi. His postmortem examination report is Exhibit Ka-3. He has mentioned in this report that the cause of death was poisoning. A perusal of his report would show that his opinion is based on his guess and surmises. This probably the reason why he had preserved viscera, as is clear from his report itself.

The most significant aspect of this appeal is that the postmortem examination report Ext. Ka 18 goes to show that no mark of any external injury was seen on the corpse of the deceased Smt. Gyani Devi. P.W.5 Dr. D.D. Tripathi, therefore, preserved the viscera of the deceased. Regarding the cause of death, Dr. D.D. Tripathi gave his report in a peculiar manner. After scripting cause of death he put a sign of interrogation and thereafter wrote 'poisoning' below that line he mentioned 'viscera preserved'. He deposed that on the basis of the condition of the dead body it might be presumed that she died as a result of poisoning.

The accused cannot be convicted on the basis of the presumption that the death was caused by poisoning. It requires a positive evidence to reach a conclusion that the death was caused by poisoning. The viscera was sent to chemical examiner, who reported vide his report Ex. Ka 18 that no poison was found in any component of viscera. Learned A.G.A. contended that the viscera report Ext. Ka-18 was not proved. Section 293 Cr.P.C. permits that any document purported to be a report under the hand of the Government Scientific Expert upon any matter or thing du1y submitted to him for chemical examination or analysis may be used in any enquiry. Ext. Ka 18 is a report of the chemical examiner and it may be used under Section 293 Cr.P.C. We, therefore, reject the arguments of the learned A.G.A. that the viscera report Ext. Ka 18 cannot be read or used.

The opinion of Dr. D.D. Tripathi that Smt. Gyani Devi died as a result of poisoning is based on presumption and surmises. Therefore, his opinion is not acceptable. Besides it, his opinion that the deceased died due to poisoning is contrary to the opinion of chemical examiner, therefore, it deserves to be rejected.

Thus in the nut-shell we have nothing before us which may lead us to a positive conclusion that Smt. Gyani Devi died due to poisoning.

The investigation into the case does not appear to have been fairly and properly made by the police officers. Nagendra Singh (P.W. 7), Bal Govind Tiwari (P.W.9) who appear to have very formally submitted the charge-sheet against the appellant-accused.

Having visualized, envisioned, paused, pondered, carefully considered and scrutinized all the facts and circumstances of the case, we arrive at the conclusion that the present is a peculiar case without evidence and evidence without. Therefore, the appeal deserves to be allowed and it is accordingly allowed.

The judgment and order dated 30.8.1980 passed by the trial court referred-to-above are set-aside. The appellant-accused Hira Lal is acquitted of the offence under Section 302 IPC for which he was convicted and sentenced. His personal and surety bonds are discharged. He is on bail. He need not to surrender. Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2006

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal From Order No.956 of 2005

Mahendra Yadav ...Plaintiff
Versus
Om Prakash and another ...Defendant

Counsel for the Appellant:
Sri K.K. Mani

Counsel for the Respondents:
Sri J.P. Gupta
Sri Janardan Yadav
Sri Manish Kumar Nigam

Code of Civil Procedure-Order 23 rule 3 readwith Indian Contract Act, Section 23 with Transfer of Property Act-Section-54-Transfer of immovable property-by means of compromise terms of compromise being unlawful u/s 23 of Contract Act-sale transaction being his

by the provisions of 54 of T.P. Act-held-compromise rightly refused.

Held: Para 8 & 9

In other words, the title to the disputed house is being sought to transfer from the defendant to the plaintiff. Such an agreement is obviously hit by Section 23 of the Contract Act. The purpose and object of the said compromise is to transfer the disputed house through the agency of the Court in absence of a registered instrument. Such thing is not permissible in law being against Section 54 of the Transfer of Property Act, which defines sale and provides that in case of tangible immovable property of value of Rs.100/- and upwards can be made only by a registered instrument.

In this view of the matter the finding recorded by the Court below that compromise was not lawful agreement or compromise, is correct and the trial court committed illegality in deciding the suit in terms of compromise.

Case law discussed:

AIR 1993 SC-1139
2000 (4) AWC-2848

(Delivered by Hon'ble Prakash Krishna, J.)

1. This is plaintiff's appeal under Order 43 Rule 1 (u) C.P.C. against the order dated 2nd of February, 2005 passed by the Additional District Judge, Court No.16, Deoria in civil appeal No.14 of 1998 whereby it allowed the appeal and set aside the judgment and decree dated 27.11.1997 passed by the Court below and remanded the matter for decision of the suit on merits after giving opportunities to the parties to file evidence.

2. The plaintiff, Mahendra Yadav, instituted suit No.306 of 1997 against Om Prakash on the allegations that the defendant is living all alone and has been looked after by the plaintiff. He was in need of Rs.1 Lakh in the month of June, 1988, which was advanced by the plaintiff on the understanding that in lieu of money the house of the defendant stood sold. It was also understood that if the aforesaid sum of Rs.1 Lakh is not returned within a period of five years, there would be a sale deed in pursuance of the understanding arrived at between the parties in the month of June, 1988. The defendant has failed to return the money within the aforesaid period and has executed a registered Will deed dated 25.1.1995 in his favour on the assurance that there would be no further demand for refund of money from the plaintiff. In this regard on 5th of April, 1996 a Yaddast was also written by the defendant. The plaintiff is in possession of the house, which belongs to the defendant and filed the suit for injunction that the defendant be restrained permanently from transferring, alienating or interfering in the possession of the plaintiff over the disputed house. A relief for declaration was also sought for that in view of the Yaddast dated 5.4.1996 executed by the defendant, the defendant ceased to have any right, title or interest in the said house.

3. A supporting written statement reiterating the plaint allegation was filed by the defendant on 21st of November 1999 and the evidence of the plaintiff was recorded on 26th of November, 1997. On that day a compromise petition was filed before the trial court on the allegation that the parties have entered into a compromise and the suit be decided in terms thereof. The trial court on 27th of November, 1997 in the presence of the parties decided the suit in terms of

compromise and the compromise was made part of the decree.

4. Feeling aggrieved against the judgment and decree, civil appeal No.14 of 1998 was filed by the defendant Om Prakash and one Smt. Vandana Devi wife of Pawan Kumar Sharma @ Pappu Sharma before the Court Below on the ground that the aforesaid compromise being unlawful, the suit could not have been decided by the trial court in pursuance thereof. It was further stated that the said compromise decree was obtained by impersonation and the defendant namely Om Prakash did not sign the said compromise nor ever agreed to it. The appellant no.2 namely Smt. Vandana Devi Sharma claimed the property in question on the basis of earlier sale deeds executed on 15.9.1995 and 29.10.1992 by the defendant Om Prakash. Smt. Vandana Devi Sharma also claimed that she is in possession of the house in question in pursuance of the aforesaid sale deeds and submitted that the compromise decree dated 27th of November, 1997 is liable to be set aside as the vendor namely defendant had already sold the disputed property to her through the aforesaid two sale deeds.

5. The Court below by the order under appeal has allowed the appeal and remanded the matter to the trial court for fresh consideration in the light of the observations made in the judgment.

6. Heard the learned counsel for the parties and perused the record. The learned counsel for the appellant strenuously submitted that no appeal lies under section 96 C.P.C. in view of the Sub Section (3) thereof. It was submitted that a regular appeal was filed before the Court below and as such the appeal was not maintainable. On merits, he submitted that the parties having been entered into the compromise before the trial court and in the absence of any finding of impersonation by the Court below, the Court below committed illegality in allowing the appeal. The learned counsel for the respondents supported the order under appeal and submitted that the compromise in question, on the face of it, being unlawful is void under Section 23 of the Contract Act. Elaborating the argument it was submitted that title to an immovable property can be passed only through a registered document such as sale deed, gift deed or exchange.

7. The Order 23 of C.P.C. deals with the subject "withdrawal and adjustment of suits." Rule 3 deals with compromise of suit. It provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by lawful agreement in writing signed by the parties, the court shall order the such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith. The orders "lawful agreement' or "compromise' in Rule 3 had given rise to a conflict in the matter of interpretation. One view was that the agreements which are void under Section 19 A of the Contract Act are not excluded. This was the view of the Allahabad, Calcutta, Madras and Kerala High Courts. A contrary view was taken by Bombay and Nagpur High Courts. To set it at rest, the said controversy, an explanation has been added to the Rule to clarify the position. The said "explanation" reads as follows:-

"An agreement or compromise which is void or voidable under the Indian

Contract Act, 1972 (Act No.9 of 1972), shall not be deemed to be lawful within the meaning of this Rule."

8. From the averments made in the plaint, it is clear beyond doubt that the plaintiff is not owner of the house in question. He, rather has admitted the ownership and title of the defendant in respect to the house in question. The learned counsel for the plaintiff appellant could not dispute the proposition that title to an immovable property can be transferred only by a registered instrument namely sale deed, gift deed, exchange, surrender deed etc. A copy of the compromise petition has been annexed along with the affidavit. By means of the said compromise, an attempt has been made to make the plaintiff owner of the disputed house by divesting it from the defendant who is owner thereof. In other words, the title to the disputed house is being sought to transfer from the defendant to the plaintiff. Such an agreement is obviously hit by Section 23 of the Contract Act. The purpose and object of the said compromise is to transfer the disputed house through the agency of the Court in absence of a registered instrument. Such thing is not permissible in law being against Section 54 of the Transfer of Property Act, which defines sale and provides that in case of tangible immovable property of value of Rs.100/- and upwards can be made only by a registered instrument.

9. In this view of the matter the finding recorded by the Court below that compromise was not lawful agreement or compromise, is correct and the trial court committed illegality in deciding the suit in terms of compromise.

10. As regards the maintainability of appeal is concerned, the issue is no longer res integra and has been set at rest by Apex Court in ***Banwari Lal Vs. Smt. Chando Devi A.I.R. 1993 S.C. 1139***. It has been held that where a challenge to the compromise petition is made, an application can be filed under Proviso to Order 23 Rule 3 of C.P.C. or an appeal under Section 96 (1) C.P.C. The relevant paragraph is reproduced below:-

13. "When the amending Act introduced a proviso along with an explanation to Rule 3 of O. 23 saying that where it is alleged by one party and denied by other that an adjustment or satisfaction has been arrived at, "the Court shall decide the question", the Court before which a petition of compromise is filed and which has recorded such compromise, has to decide the question whether an adjustment or satisfaction had been arrived at on basis of any lawful agreement. To make the enquiry in respect of validity of the agreement or the compromise more comprehensive, the explanation to the proviso says that an agreement or compromise "which is void or voidable under the Indian Contract Act ....." shall not be deemed to be lawful within the meaning of the said Rule. In view of the proviso read with the explanation, a Court which had entertained the petition of compromise has to examine whether the compromise was void or voidable under the Indian Contract Act. Even R. 1(m) of O. 43 has been deleted under which an appeal was maintainable against an order recording a compromise. As such a party challenging a compromise can file a petition under proviso to R. 3 of O. 23, or an appeal under S. 96(1) of the Code, in which he

can now question the validity of the compromise in view of R. I A of O. 43 of the Code."

11. The aforesaid judgment has been followed by Learned Single Judge in ***Durga Prasad Tandon Vs. Gaur Brahmin Sabha 2000 (4) AWC 2848***.

The submission of the learned counsel for the appellant that instead of filing a miscellaneous appeal, a regular appeal under Section 96 C.P.C. was filed and therefore the same was not maintainable needs to be noted. However, he could not dispute that even if a miscellaneous appeal would lie before the Court below and there will not be change of forum of the appellate court may be a regular appeal or a miscellaneous appeal. Assuming for a moment that the said argument of the appellant has some force it will not make any difference as it has been firmly established that mere mention of a wrong Section will not make any difference if the court had the jurisdiction to entertain and decide the appeal.

In view of the above discussion I find no merit in the appeal. The appeal is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.09.2006

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Revision No. 3996 of 2004

Deepak ...Revisionist
Versus
State of U. P. and another ...Opposite parties

Counsel for the Revisionist:
Sri T.K. Srivastava

Counsel for the Opposite Parties:
Sri Mahipal Singh
A.G.A.

Code of Criminal Procedure-Section 311- Application for re-examination of witness-after one year-it is for the court to ensure justice-ends of justice is higher than end of law-held-it is for Trail Court to apply its independent mind in evaluating the value of evidence.

Held: Para 5

I am not in agreement with this contention of the learned counsel for the petitioner. The ends of justice are higher than the mere ends of law, and it is for the Courts to ensure that justice is not made hostage to the money or muscle power of accused persons who after committing crimes are determined to sabotage their trials and to prevent them from reaching their culmination. The time factor in moving the application for re-examination of the witnesses who had become hostile is also not all-important, as it may have taken time for the witnesses to regain confidence and to overcome their fear of the accused for deposing about the true version in Court.

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

1. This criminal revision has been filed for challenging the order dated 2.9.2004 passed by the Additional Sessions Judge, FTC No.2, Bijnor allowing the application moved by the complainant-opposite party No. 2 under Section 311 Cr.P.C. seeking to re-examine Rakesh Kumar and Virendra Singh in S.T. No. 220 of 2002 (State Vs. Deepak and others), under Sections 302/324 IPC, police station Haldaur, district Bijnor.

2. The revisionist Deepak along with two other co-accused Chandu and Sumer had been arrayed as accused in the FIR dated 18.5.2001, which alleged that the incident had taken place on 18.5.2001 at about 9 P.M. where the brother of the informant Madan was murdered by the accused persons including the revisionist. The role of the revisionist was to give a knife blow on the chest of the deceased while the other co-accused Chandu and Sumer were assigned the role of catching hold of the deceased at the time of incident.

3. However, when the witnesses appeared in court, they turned hostile.

An application ext. Kha 85, which contained a copy of a report in case No. 467 C of 2003 under Sections 452/504/506 IPC lodged at police station Haldaur, which alleged that the accused Sumer and Chandu (who have been granted bail in the present case) armed with country made pistols had intimidated and threatened the witness Rakesh Kumar on 25.7.2003 at 6 P.M. and had exerted pressure on them to turn hostile in the murder case. It was on account of this threat, that the witnesses could not give the true version in the court because there was such a great terror of the accused persons. On account of this application and the FIR in case crime No. 467 C of 2003, the impugned order had been passed by the Additional Sessions Judge FTC No.2, Bijnor.

4. The principal ground for challenging the impugned order was that the application had been moved by O.P. No.2 on 25.8.2004, i.e. after one year of the examination of the witnesses PW. 1 Rakesh and P. W. 2 Virendra and it was moved belatedly after the other witnesses had been examined just prior to the recording of 313 Cr.P.C. statement of the accused and that no good ground for allowing the application under Section 311 Cr.P.C. after such a long lapse of time.

5. I am not in agreement with this contention of the learned counsel for the petitioner. The ends of justice are higher than the mere ends of law, and it is for the Courts to ensure that justice is not made hostage to the money or muscle power of accused persons who after committing crimes are determined to sabotage their trials and to prevent them from reaching their culmination. The time factor in moving the application for re-examination of the witnesses who had become hostile is also not all-important, as it may have taken time for the witnesses to regain confidence and to overcome their fear of the accused for deposing about the true version in Court.

6. In a Division Bench criminal appeal in the case of *Kundan Singh and others v. State of U.P., Criminal Appeal No. 1194 of 1988* writing for the bench I have held that the *Majesty of Justice is to be upheld. When the witnesses are not prepared to come out with the entire truth and are turning hostile and the police agency and the public prosecutor also do not appear to be completely independent and supportive of the prosecution case, the onus of the Court is even heavier, and if the court is to maintain public confidence in the administration of justice and to vindicate and uphold the 'majesty of the law' it is important that it does not meekly surrender before a wily accused and allow the criminal justice system to be derailed because the accused succeeds in winning over some of the witnesses*

inducing them to turn hostile, or wins over the police or even the public prosecutor to his side.

7. It would also be appropriate here to reiterate the pertinent observations of the Apex Court in paragraph 58 and 59 in the case of Zahira Habibullah H. Shaikh v. State of Gujarat, AIR 2004 SC 3114:

"58. ***The Courts*** *at the expense of repetition we may state,* ***exist for doing justice to the persons who are affected****. The* ***Trial/First Appellate Courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed*** *and noticed.* ***The Court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth.*** *It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code.* ***It has a greater duty and responsibility i.e. to render justice, in a case where the role of prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.***

As pithily stated in **Jennison v. Backer (1972 (1) All ER 1006), "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope". Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large.** If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies. Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See Shakila Abdul Gafar Khan (Smt.) v.. Vasant Raghunath Dhobe, (2003(7) SCC 749)." (Emphasis 'supplied)

8. On examination of the witnesses in exercise of powers under section 311 of the Code of Criminal Procedure, what value is to be assigned to their testimony and the question as to whether the witnesses had indeed been terrorized by the accused to turn hostile or they had voluntarily resiled from the prosecution case at the time of their initial examination in Court are matters for appreciation by the trial court which must exercise its independent mind in evaluating the value of the testimony of the witnesses, uninfluenced by any observations hereinabove.

9. The Revision has, therefore, no force and it is dismissed. Stay order dated 16.9.2004 is vacated.

10. However as the trial has remained stayed for a long time in view of the High Court's stay order the trial court is now directed to proceed with the trial and to conclude it expeditiously.

11. Office is directed to communicate this order to the Court below within two weeks.

Revision Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.10.2006

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

Civil Misc. Writ Petition No. 9461 of 1988

Rajendra Singh & another ...Petitioners
Versus
Additional Commissioner, Jhansi division, Jhansi & others ...Respondents

Counsel for the Petitioners:
Sri Kunal Ravi Singh

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

U.P. Imposition Ceiling on Land Holding Act 1960-Section 5 (2)-Surplus land-after declaration of surplus land by Prescribed authority on 2.3.1983-during pendancy of appeal-impladment application by the petitioner-that plot no. 510 1 Bigha 16 Biswa wrongly treated the land of respondent No. 4 as he has been declared bhumidhar by S.D.O.-held-keeping in view of explanation II of section 5 inspite of decree of 1985 the land will be treated of original tenure holder-No right or title can be claimed by the petitioner.

Held: Para 6 & 7

In view of the above explanation (ii), in spite of decree of 1985 land will have to be treated to be of respondent No.4. In this regard reference may be made to *Vinod Kumar Vs. Commissioner 2004(97) RD 17(SC) and D.N. Agarwal Vs. State 1996 RD 112*. Moreover, suit was decreed ex-parte. It was filed and decreed after possession had been taken by the State.

In my opinion, therefore petitioner can not claim any right in the land in dispute and it was validly given in the choice by respondent No.4 to be taken as surplus land.

Case law discussed:
2004 (97) RD (17) SC
1996 RD-112

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

1. This writ petition arises out of proceedings under U.P. Imposition of Ceiling on Land Holdings Act 1960 (hereinafter referred to as the Ceiling Act). Respondent No.4 Rameshwar Singh was tenure holder of the agricultural land in dispute. Ceiling proceedings were initiated against him in the form of case No. 260 which was decided on 2.3.1983 by prescribed authority Kalpi district Jalaun. Through the said order 7.88 acres of irrigated land of respondent No.4 was declared as surplus. Against the said order appeal No.99/101/10 of 1985-86 was filed by the respondent No.4, which was dismissed on 12.2.1988 by respondent no.1.

2. During pendency of appeal, petitioners filed impleadment application stating therein that one of the plots i.e. plot No. 510 area one bigha, 16 biswa was wrongly treated to be held by respondent No.4 and it was actually the petitioners who were tenure holder of the said plot as they had matured their right through adverse possession against respondent no.4 and they had also filed declaration suit under section 229 B of U.P.Z.A.L.R Act which was pending at that time before S.D.O. It was further stated that petitioners were recorded in column No.9

in the revenue records against the plot in dispute. Affidavit in support of impleadment application was filed on 8.11.1985. It may be mentioned that respondent No.4 had indicated his choice regarding surplus land to be taken by the State and plot No. 510 was included in the said choice.

3. The appellate court through its judgment dated 12.2.1988 (dismissing the appeal) also rejected the impleadment application of petitioner hence this writ petition.

4. Appellate court held that it was proved on the basis of record that possession of surplus land as per choice of tenure holder respondent No.4 had been taken in 1983 hence claim of the petitioner was not maintainable. Appellate court rightly held that if petitioners had any claim then they should have raised the same in 1983 when possession of surplus land was being taken. In para 3 of the affidavit filed in support of impleadment application it was stated that petitioners filed suit for declaration against Rameshwar respondent No.4 before S.D.O, which was decreed on 26.8.1985. Copy of the said order has been filed as annexure RA 1 to the rejoinder affidavit.

5. From perusal of the said judgment, it is clear that the respondent No.4 who was defendant in the said suit filed written statement but thereafter absented himself hence case was decided ex-parte.

Explanations 1 and 2 to section 5 of the Ceiling Act are quoted below:

Explanation (i) **-**In determining the ceiling area applicable to tenure holder of land held by him in his own right whether in his own name or ostensibly in the name of another person shall be taken into account.

Explanation (ii) if on or before 24. 1. 1971 any land was held by a person who continues to be in its actual cultivatory possession and the name of any other person is entered in the annual register after the said date either in condition to or to the exclusion of former or on the basis of deed of transfer or licence or on the basis of a decree it shall be presumed unless the contrary is proved to the satisfaction of the prescribed authority that the first mentioned person continues to hold the land and that itself was held by him ostensibly in the name of the second mentioned person.

6. In view of the above explanation (ii), in spite of decree of 1985 land will have to be treated to be of respondent No.4. In this regard reference may be made to ***Vinod Kumar Vs. Commissioner 2004(97) RD 17(SC) and D.N. Agarwal Vs. State 1996 RD 112***. Moreover, suit was decreed ex-parte. It was filed and decreed after possession had been taken by the State.

7. In my opinion, therefore petitioner can not claim any right in the land in dispute and it was validly given in the choice by respondent No.4 to be taken as surplus land.

8. At the time of arguments no one appeared for respondent No.4 hence judgment was reserved after hearing learned counsel for the petitioner and arguments of the learned standing counsel

for the State representing respondents 1,2 and 3. Few minutes thereafter learned counsel for the respondent No.4 appeared and stated that respondent No.4 had died in May 2000 and no substitution application had been filed. However, as I am dismissing the writ petition on merit hence I need not take notice of that.

9. Accordingly there is no merit in the writ petition hence it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2006

BEFORE
THE HON'BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition No. 14752 of 2002

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

Counsel for the Petitioner:
Sri M.L. Rai
Sri Babu Lal

Counsel for the Respondents:
S.C.

Constitution of India Art. 311 (2) readwith U.P. Police Officers of the subordinate Rules (Punishment and appeal) Rules 1991-Section 8 (2)(b)- Dismissal order-without recording any reason about impossibility of holding enquiry-on the ground-unauthorised absence petitioner found with heroin about which-declared indisciplined employee-held-order passed in violation of the provisions of section 8 (2) (b) of Rules without holding enquiry-petitioner be given proper opportunity complete the enquiry within six months-till conclusion of disciplinary proceeding-impugned order kept in abeyance.

Held: Para 5

Such being the case, the petitioner is justified in saying that the impugned order dated 19.6.1993 has been in violation of the provisions of section 8 (2)(b) of the Rules aforesaid. The consequent order has been passed without holding any enquiry is also therefore vitiated. The petitioner is clearly entitled to the protection granted under Article 311 (2) of the Constitution of India.

Case law discussed:
2001 (2) UPLBEC-1775 relied on.

(Delivered by Hon'ble Bharati Sapru. J.)

1. Heard learned counsel for the petitioner and the learned standing counsel for the respondents.

2. The petitioner has made a prayer seeking writ of certiorari quashing the impugned orders dated 19.6.1993 and 2.3.1992 passed by the respondents no. 3 and 2 respectively (Annexures 1 and 2 to the writ petition). The first the order of removal was passed by the Superintendent of Police and the second is the order passed in appeal by the D.I.G. (Police).

3. The contention of the petitioner is that both the impugned orders are arbitrary and illegal because the services of the petitioner have been brought to an end without giving to the petitioner an opportunity of hearing and in violation of the provisions of section 8 (2)(b) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. The contention of the petitioner also is that the provisions of section 8 (2)(b) of the Rules aforesaid can only be dispensed with certain circumstances and although if there are good reasons to do so

and also where the authority who is empowered to dismiss or remove a person is satisfied for reasons to be recorded by the authority in writing that it is reasonably impracticable to hold such an enquiry.

4. I have perused the order of termination dated 19.6.1993. The order does not record any reason why it is impracticable to hold an enquiry. The order simply records that firstly the petitioner was unauthorizedly absent, secondly that previously also he had been absent without leave 164 days; and thirdly he was found with heroin for which he has been declared indisciplined employee but no reason has been given why it is not possible to hold an enquiry against him. After all in all cases of misconduct, an enquiry is held. It is only in very special circumstances that an enquiry can be dispensed with. Therefore if the provisions of Rule 8 (2) (b) are to be invoked by the authority, then it must record clearly the reasons for doing so. Rule 8 (2)(b) is quoted below:

"(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry;"

5. Such being the case, the petitioner is justified in saying that the impugned order dated 19.6.1993 has been in violation of the provisions of section 8 (2)(b) of the Rules aforesaid. The consequent order has been passed without holding any enquiry is also therefore vitiated. The petitioner is clearly entitled to the protection granted under Article 311 (2) of the Constitution of India.

6. The petitioner, in support of his contentions, has stated that the decision of this Court in the case of *Ram Das Yadav versus Sena Nayak, 45th Battalion, P.A.C. Contingent Konkrajhar*, reported in (2001) 2 UPLBEC 177s5 wherein this Court came to the conclusion that in absence of any material being placed before the Court, the decision to dispense with the enquiry was not a good one. I am in respectful agreement with the view taken by the learned Single Judge in the said decision and following the same.

7. In view of the above, I am of the opinion that the petitioner must be given an opportunity of hearing in an enquiry. The respondents no. 1, 2 and 3 are directed to initiate and hold an enquiry against the petitioner giving him a proper opportunity of hearing within a period of ten days from the date of issuance of certified copy of this order. The respondents will allow the petitioner to participate freely in the enquiry and they will conclude it within a period of six months. The impugned order dated 19.6.1993 will be kept in abeyance for a period of six months or till the conclusion of enquiry whichever is earlier. The petitioner will co-operate with the authorities concerned in the enquiry. In case, after completion of enquiry, the petitioner is exonerated, it will be open to the respondents to pass fresh orders in accordance with law. It is made clear that this order is being passed for the purposes of allowing to the petitioner an opportunity of hearing and does not amount to an order of reinstatement of the petitioner in service. However the petitioner will be allowed whatever benefits he is entitled to under the law.

8. The writ petition is disposed of as above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2006

BEFORE
THE HON'BLE A.N. VERMA, J.

Civil Misc. Writ Petition No. 53099 of 2004

Ram Ishwar @ Rameshwar and others ...Defendants-Petitioners
Versus
Laxmi Narain and another...Respondents

Counsel for the Petitioners:
Sri H.S.N. Tripathi
Sri P.S. Tripathi

Counsel for the Respondents:
Sri Pramod Kumar Jain
S.C.

Code of Civil Procedure-Section 115-Revision-against the order of rejection to issue commission-held-neither any issue decided nor the right of parties adjudicated-not amount to case decided-revision not maintainable.

Held: Para 16

Thus what is clearly decipherable from the aforesaid discussion is that before a Revision can be entertained in exercise of power under Section 115 C.P.C., the order which is said to be assailed under Revisional jurisdiction has to be a case decided within the meaning Section 115 of C.P.C. In view of the fact, by rejection of the application issuance of a Commission, neither any issue is decided nor any of the rights of the parties are adjudicated upon, therefore, such an order does not amount to a case decided and in the considered opinion of this Court the Revision against the same is not maintainable.

Case law discussed:
2000 JT (7) SC-379, 2003 (6) SC-465, 2002 (49) AIR 110, 2003 (3) AWC-2198, 1994 ARC (2)-204, 1990 ARC (1) 8

(Delivered Hon'ble A. N. Varma. J.)

The opposite party no. 1, i.e. the Plaintiff before the trial court, instituted a Suit, being Suit No. 209 of 1986, for specific performance of contract against the petitioners, i.e. Defendants. During the pendency of the proceedings the petitioners preferred an application for issuance of a Commission. The trial court vide its order dated 01.07.2004 rejected the said application, against which the petitioners approached the District Judge in Revision under Section 115 of C.P.C., who vide its judgment and order dated 15.10.2004 dismissed the same on the ground of maintainability. It is against the said judgment and order that the petitioners have approached this Court through the instant writ petition.

2. I have heard Sri H.S.N. Tripathi, learned counsel for the petitioners as well ash Sri P.K. Jain, learned counsel for the opposite party no. 1.

3. Sri Tripathi submitted that the learned courts below committed a manifest error in dismissing the Revision on the ground of maintainability.

As per his submission the application which was preferred for issuance of Commission was for the purpose to ascertain as to whether or not the bricks which were supplied to the opposite party no. 1, were from the brick klin of the petitioner and the money which had been paid to them pertained to the cost of the said bricks and not as an advance in respect of the alleged agreement. In

support of his case he placed reliance upon (a) Judgement Today 2000 (7) SC 379- Shreepat vs. Rajendra Prasad & Others, (b) Judgment Today 2003 (6) SC 465 - Surya Dev Rai Vs. Ram Chander Rai & Ors., (c) 2002 (49) A.I.R. 110 - Smt. Soni Vs. District Judge, Allahabad and others, (d) 2003 (3) AWC 2198 (SC) - Shiv Shakti Co-operative Housing Society, Nagpur vs. Swaraj Developers and others.

4. In opposition Sri P. K. Jain submitted that the order rejecting an application for issuance of Commission is not revisable as it is not a case decided within the meaning of Section 115 C.P.C. As per his submission the learned court below was perfectly justified in not interfering with the order dated 1.7.2004 as the same neither adjudicated upon an issue, nor decided any rights of the parties. In support of his case he placed reliance upon 1994 (2) Allahabad Rent Cases 204 - Munshi Lal Agarwal and others V s. IXth A.DJ. Lucknow and others and 1990 (1) Allahabad Rent Cases page 8 Hajari Lal Vs. Siya Saran and others. He further submits that in a Suit for specific performance of contract with regard to supply of the bricks can be established by other evidence and not by issuing the Commission and getting it ascertained through Commission.

5. Section 115 of C.P.C., as amended and applicable to State of U.P. reads as follows:

"115. Revision.--The High Court, in cases arising out of original suits or other proceedings (of the value exceeding one lakh rupees or such higher amount not exceeding five lakh rupees as the High Court may from time to time fix, by notification published in the Official Gazette including such suits or other proceedings instituted before the date of commencement of the Uttar Pradesh Civil Laws (Amendment) Act, 1991, or as the case may be, the date of commencement of such notification), and the District Court in any other case, including a case arising out of an original suit or other proceedings instituted before such date, may call for the record of any case which has been decided by any court subordinate to such High Court or District Court, as the case may be, and in which no appeal lies thereto, and if such subordinate court appears-

(a) to have exercised a jurisdiction not vested in it by lay; or
(b) to have failed to exercise a jurisdiction so vested; or
(c) to have acted in the exercise of its jurisdiction illegality or with i material irregularity; the Hi or the District Court, as the case may be, may make such order in the case as it thinks fit;

Provided that in respect of cases arising out of original suits or other proceeding of any valuation, decided by the District Court, the Hi alone shall be competent to make an order under this section.
Provided further that the Hi or the District Court shall not under this section, vary or reverse any order including an order deciding an issue, made in the course of a suit or other proceeding, except where,-
(i) the order, if so varied or reversed, would finally dispose of the suit or other proceedings; or
(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

*(Provided also that where a proceeding of the nature in which the District Court may call for the record and pass orders under this section was pending immediately before the relevant date of commencement referred to above, in the High Court, such Court shall proceed to dispose of the same.)
Explanation.--In this section, the expression 'any case which has been decided' includes any order deciding an issue in the course of a suit or other proceedings."

6. A perusal of the aforesaid provision shows that the High Court in cases arising out of original Suits or other proceedings and District Courts in any other cases including a case arising out of original Suits and other proceedings may call for the record of any case which has been decided by any court subordinate to such High Court or District Court.

7. Explanation-I appended to the said Section defines the expression "any case which has been decided, which includes any order deciding an issue in the course of the Suit or other proceeding". The application made for issuance of a Commission and decision rendered thereon does not decide any issue in the course of the Suit or other proceedings. Unless any issue which decides the rights of the parties is dealt with and adjudicated upon by the court subordinate to High Court or District Court, as the case may be , the case cannot be said to have been decided.

8. In Sreepat V s. Rajendra Prasad & Ors. (supra) the identity of land which was subject matter of dispute was raised. The Apex Court observed in order to ascertain the identity of the land the issuance of Commission was required. In para 4 the Apex Court had observed as follows:

"4. In our opinion, this contention is correct. Since there was a serious dispute with regard to the area and boundaries of the land in question, especially with regard to its identity, the courts below, before decreeing the suit should have got the identify established by issuing a survey commission to locate the plot in dispute and find out whether it formed part of Khasra No.257/3 or Khasra No. 257/1. This having not been done has resulted in serious miscarriage of justice. We consequently allow the appeal, set aside the order passed by the courts below as affirmed by the High Court and remand the case to the trial court to dispose of the suit afresh in the light of the observations made above and in accordance with law."

9. In the case at hand there is no question of identity of land and therefore, regarding establishment of the same the issuance of Commission was not required. The said case does not have any application as such.

10. In Surya Dev Rai Vs. Ram Chander Rai & Ors. (Supra), the Apex Court observed that those interlocutory orders passed by the subordinate court which are amenable the Revisional jurisdiction. Supervisory jurisdiction under Article 226 of the Constitution of India would be applicable. This is also not the case in the present dispute, therefore, the said case has no application.

11. In Smt. Soni Vs. District Judge, Allahabad & Others (supra) the question was also to whether or not the Plaintiff is entitled to exparte injunction amounts to a

case decided. Since this is not the question involved, therefore, the said case also does not have any application.

12. In Shiv Shakti Co-operative Housing Society, Nagpur Vs. Swaraj Developers and others the question before Apex Court was as to whether a Revision was maintainable against interlocutory order. The Hon'ble Supreme Court observed that in case the order attaches finality then the Revision is maintainable and if the answer is 'no' then the Revision is not maintainable. In para 32 of the said report, the Apex Court observed as follows:

"32. A plain reading of Section 115, as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no', then the revision is not maintainable Therefore, if the impugned order is of interim nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115. There is marked distinction in language of Section 97(3) of the Old Amendment Act and Section 32 (2) (i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32 (2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change, the mode of procedure is altered the parties are to proceed according to the altered mode, without exception unless there is a different stipulation."

13. In view of the fact that the order rejecting an application for issuance of a Commission does not attach any finality to the proceedings, therefore, no Revision lies against the said order which is in the shape of an interlocutory order. The said case also does not have any application.

14. In Munshi Lal Agarwal and others vs. IXth A.D.J. Lucknow and others (supra) relaying upon various decisions of this Court as well as by the Apex Court, it was observed that order rejecting an application for issuance of Commission does not amount to a case decided and the same being an interlocutory order no Revision lies. In para 11 of the said report it was observed as follows:

"11. An order rejecting earlier application dated 15-9-1990 in this case is nothing but order is interlocutory in its nature. This order by itself does not pass or determine any right of the parties. The Court had only to observe that the report of the Commissioner is nothing but a piece of evidence and that a party cannot be allowed to adduce fresh evidence except in very exceptional circumstance. In the order dated 15-9-1990 the Court further observed that in the instant case, from the perusal of the Lower Court record it is clear that the appointment of Vakil Commissioner was done on 6-1-1990 with the consent of the parties. The learned Lower Court has given full opportunity to the parties to file their objection against the Commissioner report and after hearing these objections the

learned Court had passed the order on 16-3-1990 that the Commissioner report would be read in evidence subject to the evidence adduced on behalf of the parties. It further appears from the records that the appellant has filed evidence in this case after the submission of the report of the Vakil Commissioner. In view of the matter the prayer of appellant for Local Inspection of the disputed property, I find, is not liable to be allowed. The appellant's application is rejected. Such orders are and have been taken to be orders of inter-locutory nature and not one deciding or determining any of rights of the parties and so do of the amount to be case decided. This being the position that the order does not amount to be an order determining the right of the parties when an application for issue of Commission is rejected it does not amount to be a case decided. It has been so held by a Division Bench of this Court in the case of Gambhir Mal Pandia v. George Anthony John, reported in AIR 1934 Allahabad. 57."

15. In Hajara Lal Vs. Siya Saran and others (supra) this Court held that an order holding a document to be inadmissible in evidence is a interlocutory order and also it does not amount to final adjudication of dispute inter se within the parties, therefore, Revision is not maintainable. However, the Revision of the said case was under Section 25 of the Small Causes Court Act. In para 2 of the said report it was observed as follows:

"2. Under Section 25 of the Act only such decrees or orders are open to challenge which are made in any case decided. It cannot be gainsaid that any order which does not adjudicate upon any right or obligation of the parties in controversy cannot amount to a case decided, which is a condition precedent for exercise of powers under section 25 of the Act. In its decision, rendered in the Central Bank of India Ltd. v. Gokal Chand, reported in AIR 1967 SC 799, the Hon'ble Supreme Court has held that orders regarding of summoning witnesses, discovery, production and inspection of documents, issue of a commission for examination of witness, inspection of premises, fixing a date of hearing and admissibility of a document or a relevancy of a question are interlocutory orders. They are steps towards the final adjudication and for assisting the parties in the prosecution of their cases in the pending proceedings, they regulate the procedure only and do not affect any right or liability of the parties."

16. Thus what is clearly decipherable from the aforesaid discussion is that before a Revision can be entertained in exercise of power under Section 115 C.P.C., the order which is said to be assailed under Revisional jurisdiction has to be a case decided within the meaning Section 115 of C.P.C. In view of the fact, by rejection of the application issuance of a Commission, neither any issue is decided nor any of the rights of the parties are adjudicated upon, therefore, such an order does not amount to a case decided and in the considered opinion of this Court the Revision against the same is not maintainable.

17. Thus, in the backdrop of the discussions made hereinabove, the learned court below did not commit any illegality in not interfering with the order dated 1.7.2004 in exercise of its revisional jurisdiction. The learned District Judge was perfectly justified in holding that

since the order under challenge did not amount to case decided and also the same being an interlocutory order, therefore, the revision was not maintainable.

18. I do not find any illegality or infirmity in the orders passed by the District Judge. The petition being devoid of merit is hereby dismissed.

19. There will, however, be no order as to costs.

20. Since the Suit is of 1986, it is desirable that the trial court shall decide the same expeditiously, say within a period of six months. Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Habeas Corpus Petition No. 47785 of 2006

Smt. Santoshi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ram Chandra Srivastava

Counsel for the Respondents:
A.G.A.

Constitution of India, Art. 226-Habeas Corpus Petition-scope under writ jurisdiction-considering the statement of corpus as well as the welfare of two very young infants the corpus being 19 years of age-at the time of marriage-living happily with her husband-her father restrained to resort any illegal means for their separation-pending criminal case quashed-with consequential directions.

Held: Para 3

In view of the statement made by Smt. Santoshi she is allowed to go with her husband Manoj Verma as the interest of justice demands that the mother of two infants who has expressed her deep desire to live a happy life with her husband, must be allowed to go and live with her husband and children. The father Om Prakash is hereby restrained not to interfere into the marital life of Smt. Santoshi and Manaj Verma.

(Delivered by Hon'ble Vinod Prasad, J.)

1. Corpus Smt. Santoshi is personally present today in court who has been identified by his father Sri Om Prakash Gupta who is also present in the court. The statement of Smt. Santoshi was recorded in open court today, which was verified to be correct by her and after said verification she has put her thumb impression on it. She clearly stated that she is aged about 24 years and she had married with Manoj Verma on her own accord. At the time of marriage she was 19 years of age. She also expressed the desire that she would like to go with her husband Manoj Verma. She further stated that she has got two issues Jahanwi and Dinkar aged about 2 years four months and one year respectively. She also stated that she is very happy in her family and with her husband. (She has brought both the infants in the court today. Her husband Manoj Verma is also present in court).

2. Father of Smt. Santoshi, namely, Om Prakash Gupta, the petitioner who is also present in court today raised serious objection to the said request of Smt. Santoshi and prayed that the couple be sent to Jail.

I have heard both the sides.

3. In view of the statement made by Smt. Santoshi she is allowed to go with her husband Manoj Verma as the interest of justice demands that the mother of two infants who has expressed her deep desire to live a happy life with her husband, must be allowed to go and live with her husband and children. The father Om Prakash is hereby restrained not to interfere into the marital life of Smt. Santoshi and Manaj Verma.

4. This Habeas Corpus petition now does not relate with two lives only but it relates with the life of two young adult persons and two very young infants, who require all the love affection and caring of both of their parents. In exercise of my power under Article 226 of the Constitution of India, I direct the father Om Prakalsh Gupta not to resort any illegal means for the separation of couple.

5. It is stated that a criminal case has been lodged against them which is pending before CJM, Allahabad arising out of Crime No. 359 of 2001, U/S 363, 366 IPC, P.S. Civil Lines, district Allahabad. In view of the order passed by me today, I also quash the criminal prosecution of Manoj Verma and Smt. Santoshi arising out of aforesaid crime number.

6. Smt. Santoshi and her husband Manoj Venna are directed to get a certified copy of this order and to appear before the court of CJM Allahabad within a period of one week from today. The CJM, Allahabad will pass a order in accordance this order and will close the prosecution.

7. The SHO P.S. Civil Lines, Allahabad is personally present in court today. He is not needed to be present further. His presence is exempted. Since I have quashed the criminal prosecution of Smt. Santoshi and her husband Manoj Verma, no coercive measure, which has been issued against them, shall be executed against them.

Let a copy of this order be sent to CJM, Allahabad for his intimation forthwith. Petition disposed of.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.10.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 4501 .Of 2006

Lok Bahadur and others ...Revisionists
Versus
State of U.P. & another...Opposite Parties

Counsel for the Revisionists:
Sri S.A. Saroj
Sri Mahesh Kumar

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-S. 397 (1)-Criminal Revision-offence under section 323/34 IPC-sentenced with six month R.I. with 500/- fine-conviction order passed in the year 1992-more than 14 years passed undoubtly the conviction cemented by concurrent finding of facts-revisionist remained in jail for about one month-nothing to suggest regarding any mis happening by either side during this period-conviction reduced to already undergone with fine of Rs.4000/- on each-payable to the injured-revision party allowed.

Held: Para 8

I have considered the submissions of the rival sides. This is admitted that the incident occurred in the year 1992 and fourteen years had lapsed since then and that the revisionist do not have any bad antecedent. No doubt their conviction is cemented by the concurrent findings of facts but after such a long gap of fourteen years things must have settled down a lot between the rival factions. There is nothing on record to suggest that any of sides did any thing after the incident or made any complaint against each other. The revisionist also remained in jail for about a month as is clear from the lower appellate court record which indicates that after their conviction by the trial court on 27.10.2004 they filed appeal against the said conviction on 9.11.2004 on which date they were ordered to be released on bail by the lower appellate court. After dismissal of their appeal by the lower appellate court on 7.8.2006 they filed instant revision in this court on 11.8.2006 and on 18.8.2006 they were ordered to be released on bail by this court. Their actual release must have taken another a week. Thus it seems that the revisionists had remained in jail for more than a month. In this view of the matter I consider it appropriate that the sentence for the period already under gone and a compensation of Rs. Four thousand each to be paid to the injured will meet the ends of justice.

(Delivered by Hon'ble Vinod Prasad, J.)

1. Heard learned counsel for the revisionists and learned AGA.

2. This revision is finally disposed of in agreement with both the sides.

3. The revisionists have challenged their convictions and sentences recorded by A.C.J.M., Allahabad in case no. 6462 of 2002 State Vs. Lok Bahadur and others, under Sections 325, 323, 504 I.P.C., P.S. Phoolpur, District Allahabad relating to crime no. 166 of 1992 vide his order dated 27.10.04. The trial court had convicted the revisionists for offences under Section 323/34 I.P.C. and had sentenced them to six months Rigorous Imprisonment and to pay a fine of Rs.500/-. It had allowed ten days time for depositing the fine so awarded. Aggrieved by aforesaid judgment of convictions and sentences passed in the aforesaid case no. 6462 of 2002, the revisionists preferred an appeal before the Sessions Judge, Allahabad as Criminal Appeal No. 41 of 2004. Lok Bahadur and others Vs. State of U.P. The said appeal was heard and was dismissed by Additional Sessions Judge, Court No.5, Allahabad vide its order dated 7.8.06. Hence this revision challenging the said convictions and sentences.

4. I have heard learned counsel for the revisionists and learned AGA at a great length and have gone through both the impugned judgments.

5. So far as the merits of the matter is concerned, learned counsel for the revisionists fairly conceded that the findings record by both the courts below does not suffer from any illegality and consequently he did not challenge the merits of the matter at all. Hence so far as conviction of the revisionists under Section 323/34 I.P.C. is concerned, the same is affirmed.

6. However, learned counsel for the revisionists contended that the incident had taken place as for back as in 1992 and more than 14 years has lapsed and no useful purposes will be served to send the

revisionists to jail at this belated stage. Learned counsel for the revisionists further contended that the revisionist had remained in jail for 13 days after their conviction by the trial court and they had also remained in jail after the dismissal of their appeal by the lower appellate court and thus for nearly about a month or so they had remained in jail. He also contended that there is no bad antecedent of the revisionist and they have no criminal background. He also submitted that the incident started all of a sudden at the spur of moment without any pre meditation and therefore there was total absence of any mes-rea on the part of the revisionists. He also submitted that the revisionist had suffered a lot from 1992 till date and therefore their substantive sentence be altered into fine.

7. Learned AGA on the other hand contended that the sentence awarded to the accused revisionists is not excessive and they had caused as many as fourteen inures to the injured Kirti Singh and therefore no leniency should be shown to the accused revisionists.

8. I have considered the submissions of the rival sides. This is admitted that the incident occurred in the year 1992 and fourteen years had lapsed since then and that the revisionist do not have any bad antecedent. No doubt their conviction is cemented by the concurrent findings of facts but after such a long gap of fourteen years things must have settled down a lot between the rival factions. There is nothing on record to suggest that any of sides did any thing after the incident or made any complaint against each other. The revisionist also remained in jail for about a month as is clear from the lower appellate court record which indicates that after their conviction by the trial court on 27.10.2004 they filed appeal against the said conviction on 9.11.2004 on which date they were ordered to be released on bail by the lower appellate court. After dismissal of their appeal by the lower appellate court on 7.8.2006 they filed instant revision in this court on 11.8.2006 and on 18.8.2006 they were ordered to be released on bail by this court. Their actual release must have taken another a week. Thus it seems that the revisionists had remained in jail for more than a month. In this view of the matter I consider it appropriate that the sentence for the period already under gone and a compensation of Rs. Four thousand each to be paid to the injured will meet the ends of justice.

9. Hence this revision is party allowed. The conviction of the revisionists under section 323/34 IPC is maintained but their sentences of six months RI and a fine of Rs. Five hundred each are reduced to the period already under gone and each of them are further directed to pay a compensation of Rs Four thousand to the injured Kirti Singh to-tallying to Rs. Sixteen thousand in all. The said amount of Rs. Sixteen thousand shall be deposited by them with the trial court to be paid to Kirti Singh injured by the trial court. The revisionist are granted three weeks time to deposit the said amount of compensation with the trial Magistrate who will give it to the injured within a week of it's deposit with it. If the revisionists fail to deposit the said compensation within the time allowed to them the trial court is directed to issue non bailable warrant of arrest against them and will send them to jail to serve out the sentence awarded to them by it vide it's order dated 27.10.2004. If the

revisionist deposit the compensation amount within the stipulated period of three weeks the trial court is directed to discharge their sureties and personal bonds.

10. With the above modification in sentence the revision is party allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2006
BEFORE
THE HON'BLE RAKESH SHARMA, J.

Writ Petition No. 55607 of 2003

Ajai Kumar ...Petitioner
Versus
Motor Accident Claims Tribunal, Moradabad and others ...Respondents

Counsel for the Petitioner:
Km. Pratima Srivastava

Counsel for the Respondents:
Sri K.K. Misra
Sri N.K. Srivastava

Constitution of India, Art. 226-Practice and Procedure-Restoration Application-Motor Accident claim Tribunal if found merit in claim-refusal of restoration on technical ground-held-highly unjust and unfair.

Held: Para 6

Therefore, I am of the view that it will be highly unjust and unfair if a claim which is prima facie found to be valid for consideration by the Tribunal is dismissed in default and the restoration application is also rejected on technical or hyper-technical grounds. The Tribunal, while dealing with such matters should not take such a technical view to deny justice to an injured party, vide judgments of Apex Court as reportcd in AIR 1969 SC 575 *Sakuntala Devi Jain Vs. Kuntal Kumari and others*, AIR 1972 SC 749 *The State of West Bengal Vs. The Administrator, Howrah Municipality and others, etc.* and 1998 (2) JCLR 917 :: AIR 1998 SC 3222 *N. Balakrishnan Vs. M.Krishnamurthy*.

Case law discussed:
2003 AC-769
AIR 1969 SC-575
AIR 1972 SC-749
AIR 1998 SC-3222

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

1. Heard Ms. Pratima Srivastava, learned counsel for the petitioner and Sri K.K.Misra, holding brief for Sri N.K. Srivastava, learned counsel appearing for the National Insurance Company Limited, respondent no. 2.

2. The petitioner has assailed the two orders passed by the Motor Accident Claims Tribunal, Moradabad, one dated I. 10.2002 dismissing his claim petition in default and the subsequent order dated 3.3.2003 rejecting the application for recall of the order dated 1.10.2002.

3. Learned counsel for the petitioner has submitted that the Tribunal has exc1uded from consideration the submissions made in the application for recall of the order dated 1.10.2002 and the compelling circumstances under which the petitioner could not pursue his case before the Tribunal. As per petitioner, there was no element of wilful or deliberate avoidance in pursuing the case before the Tribunal. Several circumstances, which were enumerated in the application, were highlighted before the Tribunal showing sufficient reasons to recall the order but they were not taken into consideration. The Tribunal ought to have restored the claim petition and heard it on merits. Learned counsel for the

petitioner has placed reliance on a judgment of this Court as reported in **2003(2) Transport and Accident Cases 769** *United India Insurance Co. Ltd. Vs. Additional District and Sessions Judge. Muzaffarnagar and others*, in support of her submissions.

4. Learned counsel for United India Insurance Company Limited has also put forth his version before the Court.

5. After hearing the learned counsel for the parties and perusing the record, this Court is of the opinion that the Tribunal has failed to consider the entire facts and evidence on record. There was substance in the submissions made before the Tribunal. This fact cannot be ignored that the petitioner was injured in an accident, which took place near village Mangupura on Moradabad-Gajraula road. The claim petition was dismissed as the petitioner could not pursue the matter on the date fixed for sufficient reasons. His application for recall has been dismissed without appreciating the material on record and a too technical view of the matter has been taken by the learned Tribunal while disposing of the application for recall of the order. The petitioner's case is squarely covered by the afore-mentioned judgment cited by the learned counsel for the petitioner. It would be relevant to quote para 9 of the said judgment, wherein this Court has observed as under:

"9. In *United India Insurance Co. Ltd. v. Rajendra Singh and others, (2000) 3 Supreme Court Cases 581*, the Supreme Court allowed the appeal, set aside the orders of Tribunal, which held that Tribunal does not have powers to review its orders except to correct any error in calculating the amounts. The Allahabad High Court had dismissed the writ petition stating that it is a question of fact for which writ petition is the appropriate remedy. The Supreme Court allowing applications filed under Sections 151, 152 and 153, C.P.C., praying for recall of orders on the ground of revelations of new facts that injuries were not suffered due to accident, held in para 16 as follows:

"16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot he foreclosed in such a situation. No Court or Tribunal can he regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

6. Therefore, I am of the view that it will be highly unjust and unfair if a claim which is prima facie found to be valid for consideration by the Tribunal is dismissed in default and the restoration application is also rejected on technical or hyper-technical grounds. The Tribunal, while dealing with such matters should not take such a technical view to deny justice to an injured party, vide judgments of Apex Court as reported in **AIR 1969 SC 575** *Sakuntala Devi Jain Vs. Kuntal Kumari and others*, **AIR 1972 SC 749** *The State of West Bengal Vs. The Administrator, Howrah Municipality and others, etc.* and **1998 (2) JCLR 917 : AIR 1998 SC 3222** *N. Balakrishnan Vs. M.Krishnamurthy*.

In view of above, the writ petition is allowed and the judgment and orders dated 1.10.2002 and 3.3.2003 passed by

the Motor Accident Claims Tribunal, Moradabad, contained respectively in Annexures 2 and 3 to the petition are quashed. The Tribunal shall reopen the proceedings, hear the case on merits and conclude the controversy expeditiously.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Transfer Application No. 260 of 2006

Smt. Geeta Srivastava ...Applicant
Versus
Sri A.K. Saxena, Judge Family Court, Gorakhpur and others ...Respondents

Counsel for the Applicant:
Sri Amish Srivastava

Counsel for the Respondents:
Sri Shashi Nandan
Sri K.K. Mani
Sri Abhishek Srivastava
Sri Shyamal Narain

Code of Civil Procedure Section 24 readwith Family Court Act-Section-8- Transfer of cases pending before judge family court to Additional District Judge of the same district-despite of the provision of exclusion of jurisdiction transfree court would be deemed as competent court.

Held: Para 7

In the same manner, if this court under Section 24 C.P.C. makes an order of the transfer of a particular case pending in a court, which possesses territorial jurisdiction for its trial to a court functioning in another district in that event also the transferee court acquires territorial jurisdiction for the trial or hearing of the transferred case. Therefore, if the cases referred to in paragraph-11 of the petition are withdrawn from the court of Principal Judge, Family Court and transferred to a court of other Additional District Judge whose jurisdiction for its trial is excluded by-Section 8 of Family Courts Act, the transferee court would be deemed as a competent court for its trial notwithstanding the provision of Section 8 of the Family Courts Act. Therefore, the submissions of the learned counsel appearing for the opposite parties that the case could not be transferred to any other court within the district of Gorakhpur, does not appear to have much relevance simply because of the provisions contained in Section 8 of Family Court Act.

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

Heard learned counsel for the applicant.

1. This transfer petition under Section 24 of C.P.C. has been filed seeking transfer of five pending matters detailed in paragraph-11 of the petition from the court of Principal Judge Family Court to any other court in the district.

2. There is a complaint against the Presiding Officer of the concerned court in annexure-3 to the petition, which bas been made the entire basis for seeking the transfer. This complaint has been addressed to Hon'ble the Chief Justice spelling out extremely scandalous allegations against the Presiding Officer. The petitioner has not spared even the District Judge of concerned district against whom there is accusation that he has prejudice against her because he wanted to marry his daughter with

petitioner's husband earlier to the petitioner's marriage. The comments of the concerned District Judge have been received in this context in which he has though, admitted that the proposal was once made but subsequently he himself did not find this proposal as appropriate for his daughter's marriage. Obviously, this sort of allegation against the District Judge, who has absolutely no concern in the aforesaid pending matters himself, demonstrates to the extent of hardheadedness of the petitioner lady. In the accusations made against the Presiding Officer, she has also made some reference to certain conversations and: talks, which the Presiding Officer allegedly had with the lady in his chamber. Those facts, as disclosed in the complaint, have been categorically denied by the Judge Family Court in his comments submitted before this court. Otherwise also these charges, which have been lavelled in the complaint, appear to be wholly frivolous and baseless. Nothing is there on record to indicate as to what has happened in the inquiry against the officer but on the face of it, these accusations being extremely scandalous appear to be wholly absurd and unacceptable. Certain other sundry factual incidents have been narrated in this complaint supporting to petitioner's accusation regarding prejudice that the court has allegedly acquired against her. It is on these grounds that the petitioner has submitted that she would not be getting justice at the hands of the Presiding Officer of the court and is in-charge of those cases for its disposal.

3. As already referred to above, the entire accusations made against the Presiding Officer has been categorically denied and otherwise also, I do not feel such accusation made against a Judicial Officer of the seniority possessed by the Principal Judge Family Court, Gorakhpur, can ever be correct and acceptable. There is absolutely no strength in the grounds taken by the petitioner for transfer of those cases from that court to any other court. Accordingly. the petition being wholly misconceived is hereby dismissed.

4. Besides above, the allegations made against the Presiding Officer assassinating his character and conduct in relation to his approach towards petitioner's cases pending before him, being wholly scandalous and frivolous, there is one big question, which may be noticed that after so much scandalisation of Officer's character would it be justifiable to keep the cases in that court over which he is Presiding? The answer would be in the negative. May be that the Presiding Officer, who has put in so much of service in the judicial wing deciding the cases, must have acquired enough will power to sustain his cool while finally deciding the matter and delivering the judgment. But it apparently does not appear just that the cases, which are before him, should any further-remain there waiting for his decision. It would be always just and-proper that the cases should be transferred to some other court for decision, which may also appear to be fair and unprejudiced. The justice done in a particular matter between the parties ought to appear that the justice in actuality, has been done. Therefore, in pursuance to this if the, cases; are transferred from the court of present Principal Judge Family Court to any other court, it would be more justifiable. In this context, submission was made from the side of the counsel appearing for the opposite parties that there being only one

designated Family Court in the district, the other courts functioning there are not supposed to be competent courts for disposal of those matters in the face of provisions of Section 8 of the Family Courts Act. The provision excludes the jurisdiction of other courts in the district from exercising jurisdiction in respect of any suit or proceeding of the nature referred to in the explanation to Section 7 (i) of the said Act.

5. While dealing with the aforesaid submissions, it would be pertinent that the provisions of Section 8·of the Family Courts Act as well as provisions of Section 24 of C.P.C. should be extracted below to facilitate the discussion on the point:

8. Exclusion of Jurisdiction and pending proceedings*:*

Where a Family Court has been established for any area.-

(a) no district court or any subordinate civil court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no Magistrate shall, ·in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);-

(i) which is pending immediately before the establishment or such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any Magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established, shall stand transferred to such Family Court on the date on which it is established.

24. General power of transfer and withdrawal.-- *(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion, without such notice, the High Court or the District Court may, at any stage-*

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it; and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which [is thereafter to try or dispose of such suit, or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the points at which It was transferred or withdrawn.

[(3) For the purposes of this section--

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b)" "proceeding" includes a proceeding for the execution of a decree or order.]

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

[(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.]

6. No doubt, Section 8 of the Family Courts Act says that where a Family Court has been established for an area, no district court or any subordinate court functioning in that area shall exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation of Section 7 (i) of the said Act. There is definite exclusion of the jurisdiction of other courts functioning in the district after a designated Family Court has been established there. It may, therefore, sound justified that a matter pertaining to the jurisdiction of the Family Court pending there, it cannot be transferred to any other court in that district for its disposal. But in this context, the provision of sub-section (4) of Section 24 C.P.C. may be referred, which says that if a particular suit or proceeding is transferred to any regular court after withdrawing the same from a court of Small Causes, the court trying that suit or proceeding shall for the purposes of such suit or proceeding would be deemed to be a court of Small Cause. An identical provision to that of Section 8 of the Family Courts Act, is available in Section 16 of the Provincial Small Cause Courts Act, which reads as below:-

16. Exclusive Jurisdiction of Courts of Small Causes.- *Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not, be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable.*

7. This provision also excludes the jurisdiction of other courts in the district for trying suit cognizable by a Small Causes Court after a designated court of Small Causes is established thereJ4ri-spite· of this exclusion of jurisdiction of the other courts the aforesaid sub-section (4) of Section 24 C.P.C. says that after withdrawal of the suit of Small Cause nature from the court of Judge Small Causes, if transferred under this Section to any other court, the transferee court for the purposes, of such suit shall be deemed to be a court of Small Causes; meaning thereby that on passing of an order of transfer under Section 24 C.P.C. the case when reaches to a court not having jurisdiction on account of exclusion of the jurisdiction by Section 16 of Provincial Small Cause Courts Act, it acquires such jurisdiction by virtue of transfer itself. Section 24 of.C.P.C. confers general power of transfer of cases upon this court. There are definite provisions in the Code regarding territorial jurisdiction of a court where the suit may legally be instituted. These provisions are contained from Section 15 to 20 of the Code of Civil Procedure. Obviously, every court functioning in the State or in the district does not have power to take cognizance of a particular case the cause of action of

which does not fall in the extent of its territorial jurisdiction but by virtue of this general power of transfer, this court has jurisdiction to withdraw the case and transfer it for disposal to any subordinate court competent to try or dispose of the same in any other district of the State. Any way, the aforesaid Section 15 to 20 of C.P.C. virtually exclude the jurisdiction of other courts in whose territorial the cause of action for the suit has not arisen, still this court, if transfers a particular case to any other court in the State, it acquires territorial jurisdiction to try and dispose of the said case. The territorial jurisdiction stands virtually conferred upon that court by the order of transfer passed under Section 24 C.P.C. It is therefore, clear that in case this court or the court of District Judge makes an order of transfer under Section 24 C.P.C. the transferee court acquires jurisdiction for the trial of that case notwithstanding the exclusion of jurisdiction by any other provision of an statute. In the same manner, if this court under Section 24 C.P.C. makes an order of the transfer of a particular case pending in a court, which possesses territorial jurisdiction for its trial to a court functioning in another district in that event also the transferee court acquires territorial jurisdiction for the trial or hearing of the transferred case. Therefore, if the cases referred to in paragraph-11 of the petition are withdrawn from the court of Principal Judge, Family Court and transferred to a court of other Additional District Judge whose jurisdiction for its trial is excluded by-Section 8 of Family Courts Act, the transferee court would be deemed as a competent court for its trial notwithstanding the provision of Section 8 of the Family Courts Act. Therefore, the submissions of the learned counsel appearing for the opposite parties that the case could not be transferred to any other court within the district of Gorakhpur, does not appear to have much relevance simply because of the provisions contained in Section 8 of Family Court Act.

8. In the aforesaid view of the matter, those cases may be transferred from the court of Principal Judge, Family Court to any other court. All the five pending matters namely (i) Suit No.15 of 2006 under Guardianship and Wards Act (ii) Suit No. 91 of 2005 for divorce·(iii) Suit No. 697 of 2005 for injunction restraining applicants not to damage the house situated at Batiya Hata in which admittedly applicant lives (iv) Suit No.9 of 2006 by applicant as indigent of injunction restraining respondent not to eject applicant from the house (v) Suit No. 180 of 2005·for maintenance, are hereby transferred from the court of Principal Judge Family Court to the court of first Additional District Judge, who shall start taking all these cases on priority basis and will decide one by one by holding day to day hearing/proceeding in the matter. The suit pertaining to the grant of relief for decree of divorce shall be taken up first for hearing and decision and thereafter other matters shall be disposed of by regular hearing one by one. Unnecessary indulgence of the court for adjournment on the request of either of the parties shall be discouraged with hard hands.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Bail Cancellation Application No.12170 of 2004

Satyendra Yadav ...Applicant
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri Rajesh Kumar Sharma

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

Code of Criminal Procedure-Section 482- Cancellation of Bail granted by Session judge-on the ground-counsel who appeared before the session court-power of appearance bears no signature of the counsel-No allegation about fleeing from justice or hampering trail-held-said technicality can not be ground for cancellation by bail.

Held: Para 10
Further the contentions of the counsel for the applicant that the power filed on behalf of the accused did not contain the signature of the counsel, I am of the view that the said technicality is no ground to cancel the bail. A perusal of the power definitely shows that the counsel who appeared on behalf of the applicant had got his stamp affixed in the memo. That, in my view is sufficient compliance so far as engagement of a counsel is concerned in a criminal matter.

(Delivered by Hon'ble Vinod Prasad. J.)

1. Heard Sri R.K. Sharma, learned counsel for the applicant and the learned A.G.A.

2. The accused respondent was granted bail on 6.7.2004 by Additional Sessions Judge/Special Judge S.C./S.T. Act, Ghaziabad. The bail granting order has been filed along with this bail cancellation application, which indicates that the Lower Court considered three aspect of the matter while granting ball to the accused respondent.

3. The first aspect was that there was no intention to commit murder of the deceased as he had received a single fatal injury by assault made by a cricket bat and therefore, the offence will not travel beyond the scope of Section 304 part II I.P.C. and no offence under Section 302 I.P.C. was prima-facie made out.

4. The second reason for granting of bail was that it was a casa of a sudden fight at the spur of the moment without any pre-meditation.

5. The third reason was that a cross case under Sections 452, 323, 504 and 506 I.P.C. initiated by the wife of the present accused, respondent, was also lodged. The said F.I.R. was registered as crime no.436A of 2004. The ancillary reason, which is mentioned by the Additional Sessions Judge was that the accused is an athlete champion and son of a senior advocate. He also belongs to a respectable family and there was no chance of his absconding. The Additional Sessions Judge has observed in concluding portion of the order that there was a single injury on the head. The wife of the accused had also sustained simple injuries in the same incident. The incident had taken place at the spur of the moment regarding the return of two lacs rupees.

6. On all these aspect of the matter considering the totality of the circumstance, the trial court exercised the discretionary power to grant bail to the accused respondent.

7. Sri Rajesh Kumar Sharma learned counsel for the applicant contended that the bail was granted to the accused respondent on the ground that he was the son of a senior advocate and was an athlete champion and he belonged to a respective family and there was no chance of his absconding is wholly illegal. Learned counsel for the applicant also contended that the memo filed in the trial court did not contain the signature of the counsel and hence bail application filed by accused respondent was not maintainable. He has field certified copy of the said memo of the engagement.

8. Learned A.G.A. on the other hand contended that contentions raised by counsel for the applicant is not correct. He submitted that the Additional Sessions Judge did not grant the order of bail on the contentions raised by the counsel for the applicant but he had taken into consideration the material in the case diary and the medical report. He pointed out to paragraph 7 of the bail granting order. He contended that the bail was granted on the factual aspect of the matter and not on the considerations, which has been stated by learned counsel for the applicant. Learned A.G.A. also submitted that the contentions, which has been raised by the counsel for the applicant is wrong in as much as it were the arguments which were raised by the rival sides which has been mentioned by the Additional Sessions Judge in the bail granting order.

9. I have considered the submissions raised by both sides. In this case it is clear that Additional Sessions Judge/Special Judge S.C/S.T. Act, Ghaziabad while allowing bail to the respondent on 6.7.2004 has observed that there was a single injury sustained by the deceased Pintoo on his head, which subsequently proved fatal. The wife of the deceased also sustained some simple injuries. He had further observed that the incident has taken place all of a sudden for the recovery of Rs. 2 lac. Thus on these considerations the Additional Sessions Judge allowed the bail. I am also of the view that this Court is not sitting on the appeal over the bail granting order passed by the Lower Court. Power under Section 439 Cr.P.C. given to this Court in bail matters also gives to the power to the Sessions Judge. Grant of bail is one thing and cancellation thereof is quite another. Bail once granted cannot be cancelled as a punitive measure. The relevant ground for cancellation of bail is tampering with the course of justice or fleeing from justice or hampering the trial or otherwise like reasons such as, it is not in the interest of justice to r allow the accused to remain on bail. None of these conditions are present in the present case. Whatever learned counsel for the applicant has submitted was the argument, which was raised by both the sides and which was referred to by the lower court, as is perceptable from the order granting bail. The Additional Sessions Judge has referred to the submissions raised by both the sides and finding the case to be fit for bail, taking and over all view of the matter, as was argued before him by the rival sides, that he had allowed the bail. The view taken by the Additional Sessions Judge cannot be said to be perverse or illegal in any manner. It cannot be said that the grant of

bail was because of extraneous reasons than those, which are relevant under the law. Moreover, this bail cancellation application was filed on 29th July 2004. It has come up for final disposal after a gap of two years. During this period of two years there has been no complaint at all against accused respondents. The gap of two years is sufficient enough not to interfere with the bail granting order once there is no allegation of tampering with the record or evidences or fleeing from justice.

10. Further the contentions of the counsel for the applicant that the power filed on behalf of the accused did not contain the signature of the counsel, I am of the view that the said technicality is no ground to cancel the bail. A perusal of the power definitely shows that the counsel who appeared on behalf of the applicant had got his stamp affixed in the memo. That, in my view is sufficient compliance so far as engagement of a counsel is concerned in a criminal matter.

11. In view of what has been stated herein before, I am of the opinion that there is no reason to cancel bail of accused respondent no.2 which has been allowed by the Additional Sessions Judge/Special Judge SC/S.T. Act, Ghaziabad vide his Impugned order dated 6.7.2004 in Crime No. 436 of 2004 under Section 302, 504 I.P.C., P.S. Kavi Nagar, district Ghaziabad. Resultantly, this criminal miscellaneous bail cancellation application being devoid of merit is hereby dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.11.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 6130 of 2006

Revati Raman & others ...Revisionists
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Revisionists:
Sri D.K. Tiwari

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

Code of Criminal Procedure–397(2)-Revision–Order passed under Section 146(1) Cr.P.C. being preventive measure an interlocutory in nature–not a final order–hence revision not maintainable.

Held Para 7

In view of the above, the order under Section 146(1) Cr.P.C. can be bracketed only within the purview of an order which is interlocutory in nature and not as an order which is final. Hence revision under Section 397(2) Cr.P.C. is barred against such an order.

(Delivered by Hon'ble Vinod Prasad, J.)

1. The applicants have filed this revision aggrieved by an order dated 11/10/2006 passed by Sub Divisional Magistrate, Handia in Case No. 44 of 2006 Gauri Shanker Vs. Revati Raman and others under Section 145 Cr. P.C. by the impugned order, the S.D.M. concerned has passed an order under Section 146(1) Cr. P.C. for attachment.

2. Learned counsel for the revisionists contended that the Magistrate

has committed an illegality by passing the impugned order. He further contended that the there was no justification for the trial court to pass such an order.

3. In my view, the order under Section 146(1) Cr. P.C. is an interlocutory order and revision is not maintainable against such an order being barred by Section 397(2) Cr. P.C. The order under Section 146(1) Cr. P.C. is only an enabling provision giving power to the Magistrate concerned, during the pendency of the proceeding under Section 145, to attached the property so as to obliterate apprehension breach of peach during the pendency of 145 proceeding itself. By passing an order under Section 146(1) Cr. P.C. no proceeding is finalized. It is only an interim order which is in the nature of a preventive measure. The court concerned is required to decide the question of possession two months prior to the passing of the preliminary order and inter regrum in deciding the said question of possession, the power under Section 146(1) Cr. P.C. has been conferred, by the statue, on the Magistrate for the simple reason that during the pendency of the determination on the question of possession the parties should not take undue advantage and commit breach of peace. I may remind that 145(1) Cr.P.C. proceeding is also started to obliterated apprehension of breach of peace and no change in the property in question should be permitted to be done meanwhile. The very phraseology in which Section 146(1) Cr. P.C. as is enacted by the legislature indicates that an order under Section 146(1) is an interim order and the said order is not covered within the word "proceeding" as is contemplated under Section 397 Cr.P.C. which gives power to this Court and to the Session Judge to revised any order or any proceeding of the lower Court.

4. For clarity of understanding Section 146 Cr.P.C. is quoted below:

146. Power to attach subject of dispute and to appoint receiver. (1) If the Magistrate at any time after making the order under sub-section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, of if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determine the rights of the parties thereto with regard to the person entitled to the possession thereof:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, the may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangement as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908).

Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate,

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the

receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him.

(b) may make such other incidental or consequential orders as may be just.

5. From the bare reading of the said statutory provision, it is clear that if at the time of passing an order under section 145(1) Cr.P.C. or after making of the aforesaid order if the Magistrate considers "the case to be one of emergency" or "if he decides that none of the parties was then in possession as is referred to under Section 145" or "if he is unable to satisfy himself as to which of them was then in possession of the subject of dispute" he can pass an order under Section 146(1) Cr.P.C. These three conditions are *sine quo non* for exercising power under Section 146(1) Cr. P.C.

6. Suffice to it to say that two subsequent conditions do not apply on the facts of the present case. So far as the first condition is concerned, the same is related to a case of emergency. It is a discretionary power of the Magistrate based on his satisfaction on the tangible material that emergency exist for passing of an order under Section 146(1) Cr.P.C. The said order can be withdrawn, annulled or modified by him at any subsequent stage of proceeding on being satisfied that the emergency no longer exists.

7. In view of the above, the order under Section 146(1) Cr.P.C. can be bracketed only within the purview of an order which is interlocutory in nature and not as an order which is final. Hence revision under Section 397(2) Cr.P.C. is barred against such an order.

8. This revision, therefore, is not maintainable and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 32177 of 2005

Ganesh Swaroop Tandon ...Petitioner
Versus
Anchal Kumar Tandon and others ...Respondents

Counsel for the Petitioner:
Sri M.A. Qadeer

Counsel for the Respondents:
Sri T.A. Khan

Code of Civil Procedure-Order 8 Rule-6-A-counter claim-written statements filed on 3.10.02-amendement application in counter claim filed on 31.07.04-held-could not be filed.

Held: Para 5

A perusal of the aforesaid provision indicates that a counter claim could be filed where the cause of action accrued either before or after the filing of the suit and, in· any case, before the filing of the written statement. The counter claim cannot be filed where the cause of action accrued to the defendants after the filing of the written statement. In the present case, the written statement was filed on 3.10.2002 and-the cause of action, as admitted by the defendant, accrued on 31.7.2004, i.e., after the filing of the written statement. Clear1y the said-counter claim could not be filed in the present proceedings in view of the mandatory provision of Order 8 Rule 6Aof the C.P.C.

Case law discussed:
AIR 1966 SC-2222

AIR 1967 SC-3985
AIR 1987 SC-1395

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

1. Heard Sri M.A. Qadeer, the learned counsel for the plaintiff-petitioner and Sri T.A. Khan, the learned counsel for· the defendant-respondent.

2. A written statement was filed by the defendant on 3.10.2002. Thereafter, the defendant filed an application on 2.8.2004 praying for an amendment of the written statement and to bring on record a counter claim. This application was opposed by the plaintiff. The trial court by an order dated 10.9.2004 allowed the amendment of the written statement permitting the defendant to incorporate the counter claim in his written statement. A revision was filed by .the plaintiff which was rejected by an order dated 24.3.2005. Consequently, the writ petition.

3. The learned counsel for the petitioner submitted· that in view of the mandatory provision of. Order 8 Rule 6-A of the C.P.C., the amendment could not be allowed, inasmuch as, the counter claim, if any, could be filed where the cause of action accrues· to the defendant against the plaintiff either before or after the filing of the suit but before the defendant had delivered his defence. It was urged that the written statement was filed on 3.10.2002 and in the application for amendment, the cause of action, as alleged by the defendant arose on 31.7.2004, therefore, the cause of action accrued after the filing of the written statement which cannot be permitted under Order 8 Rule 6-A.

4. The submission of the learned counsel for the petitioner appears to be correct. Order 8, Rule 6-A of the C.P.C. provides as under:-

"6-A. Counter-claim by defendant.-(l) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the· defendant has delivered his defence or before the time limited for delivering his defence has expired, ,whether such counter claim is in the nature of a claim for damages or not;

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a p1aintand governed by the rules applicable to plaints."

5. A perusal of the aforesaid provision indicates that a counter claim could be filed where the cause of action accrued either before or after the filing of the suit and, in· any case, before the filing of the written statement. The counter claim cannot be filed where the cause of action accrued to the defendants after the filing of the written statement. In the present case, the written statement was

filed on 3.10.2002 and-the cause of action, as admitted by the defendant, accrued on 31.7.2004, i.e., after the filing of the written statement. Clear1y the said-counter claim could not be filed in the present proceedings in view of the mandatory provision of Order 8 Rule 6Aof the C.P.C.

6. In **Jag Mohan Chawla and another vs. Dera Radha Swani Satsang and others**, A.I.R. 1996 SC 2222 the Supreme Court held-

"The only limitation is that the cause of action should arise before the time fixed for filing the written statement expires. The defendant may set up a cause of action which has accrued to him even after the institution of the suit."

7. In **Smt. Shanti Rani Das Dewanjee vs. Dinesh Chandra Day (dead) By Lrs.**, AIR 1997 SC 3985, the Supreme Court held that the cause of action should arise before or after the filing of the suit and such cause of action should arise before or after the filing of the suit and such cause of action could continue upto the date of the filing of the written statement or extended date of the filing of the written statement. Similar view was again reiterated by the Supreme Court in **Mahendra Kumar and another vs. State of Madhya Pradesh**, AIR 1987 SC 1395.

8. In view of the consistent pronouncement of the Supreme Court on this issue, the impugned order cannot be sustained and is quashed. The writ petition is allowed. The amendment application of the defendant is consequently rejected. Petition Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.10.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No.6049 of 2006

Sitari Begam ...Revisionist
Versus
State of U.P. and another...Respondent

Counsel for the Revisionist:
Sri Devendra Saini

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section 156(3)–Rejection of application by Magistrate–in where cognizable offence of gravious nature disclosed–Magistrate to follow the mandate of law–victim may not file complaint, for so many reasons–held–Magistrate committed manifest error of law in not directing the police to register and investigate the case.

Held: Para 2

The Judicial Magistrate-Ist Saharnpur without looking into the law laid down by the Apex Court in state of Haryana and others versus Bhajan Lal and others;1992 SCC (Criminal) 426 and in other similar judgments of the Apex Court has passed the impugned order on 16/10/2006 in the said Misc. Application No. 54 of 2006, under Section 156(3) Cr.P.C. filed by the revisionist Sitari Begam, which cannot be sustained and is hereby set aside. The matter is recommended back to him decide the application afresh in accordance with law.

Case law discussed:
1992 SCC (Criminal)-426

(Delivered by Hon'ble Vinod Prasad, J.)

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

2. The application being Misc. Application No. 54 of 2006 filed by the revisionist Sitari Begam, under Section 156(3) Cr.P.C. disclosed commission of a cognizable offence of grievous nature under section 325 I.P.C. as well as under section 308 I.P.C. Since there was a fracture of the head bone found on the head of Kumar Gulista. Moreover, the accused persons have entered into the house of the revisionist and there they have assaulted her, which is also a cognizable offence. Judicial Magistrate-I, Saharanpur committed manifest error of law in not directing the police to follow the mandate of law to exercise their plenary power of investigation as was prayed by the revisionist through the said application under Section 156(3) Cr.P.C. It is not the law that if an application under Section 156(3) is filed disclosing commission of cognizable offences the Magistrate should leave the police to act arbitrarily by not directing to register the F.I.R. The Magistrate concerned was expected to follow the mandate of law and direct the police to register the F.I.R. In this case the Magistrate by not directing the police to register the F.I.R. of the cognizable offence committed manifest error of law and did not exercise his jurisdiction properly in law. The victim never wanted to file a complaint and there may be thousands of reasons for the same including the fact that the accused are musclemen and the victim was not in position to bring the witness to the court of law to support her version. The Judicial Magistrate-Ist Saharnpur without looking into the law laid down by the Apex Court in **state of Haryana and others versus Bhajan Lal and others; 1992 SCC (Criminal) 426** and in other similar judgments of the Apex Court has passed the impugned order on 16/10/2006 in the said Misc. Application No. 54 of 2006, under Section 156(3) Cr.P.C. filed by the revisionist Sitari Begam, which cannot be sustained and is hereby set aside. The matter is recommended back to him decide the application afresh in accordance with law.

3. With the aforesaid direction revision is allowed at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2006

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

Civil Misc. Writ Petition No.46861 of 2005

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

Counsel for the Petitioner:
Sri K.C. Shukla
Sri Rakesh Kumar Singh
Sri Pradeep Verma

Counsel for the Respondents:
Sri A.K. Singh
Sri C.K. Rai
S.C.

Uttar Pradesh Secondary Education (Service Selection Board) Act 1982 read with U.P. Secondary Education Service Selection Board Rules 1998-Adjustment of earlier selected candidate against unadvertised vacancy whether possible?-held-'No'-decision of single Judge in case of Savita Gupta-overruled.

(B) Whether the U.P. Secondary Education Service Selection Board is empowered to direct for adjustment against the vacancy although intimated and notified but not advertised with the aid of G.O. dated 12.3.2001? held-'No'.

Held: Para 33

Therefore, it is evident that subordinate legislation cannot override the statutory rules nor can it curtail the content and scope of the substantive provision for or under which it has been made.

For the reasons and the conclusions drawn hereinabove, our answer to Question No. 1 is:

"An unadvertised vacancy cannot be filled up from amongst the candidate who has been selected in any previous selections and to that extent we declare that the pronouncement of the learned Single Judge in the case of Savita Gupta Vs. State of U.P. & Ors., 2004 (2) UPLBEC 2739, does not lay down the law correctly and is hereby overruled."

and to Question No.2 is:

"The U.P. Secondary Education Services Selection Board constituted under the U.P. Act No.5 of the 1982 cannot, with the aid of the Government Order dated 12th March, 2001, order any adjustment in respect of a vacancy, which has been intimated and notified but not advertised".

Case law discussed:

AIR 1996 sC-976, 1994 (Supp.) SCC-591, 1996 (4) SCC-319, AIR 1999 SC-1701, 1992 (Supp.) 3 SCC-84, AIR 1998 SC-18, 2001 (10) SCC-237, 2005 (4) SCC-148, AIR 2001 SC-2900, 2005 (4) SCC-148, 2003 (1) ESC-53, 2005 (4) SCC-154, 2006 (3) SCC-330, W.P. No.21245/2000 decided on 11.05.2005, (1876) 1 CH. D.-426, AIR 2001 SC-1512, AIR 2000 sC-2281, AIR 2004 SC-1657, AIR 1968 SC-49, AIR 1977 SC-757, AIR 1990 SC-166, AIR 1991 SC-2288, AIR 1998 SC-431, AIR 1961 SC-757, AIR 1981 SC-711, (1994) 1 SCC-269, 2001 (5) SCC-581, 2002 (4) SCC-380, 2005 (2) SCC-720, 2006 (5) SCC-789

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

1. This reference has arisen out of the order dated 25th August, 2005, wherein a learned Single Judge of this Court has referred the following questions to be answered by this Bench, as nominated by Hon'ble the Chief Justice:-

1. Whether an unadvertised vacancy can be filled up from amongst the candidates, who have been selected in the earlier selection?

2. Whether under U.P. Act No.5 of 1982 or under U.P. Secondary Education Service Selection Board Rules, 1998, there is any authority vested with the U.P. Secondary Education Service Selection Board to direct for adjustment of candidates who have been selected but could not join for one reason or the other, to any other institution, vacancy whereof has been notified but not advertised?

2. The aforesaid questions relate to filling up of an unadvertised vacancy of a Lecturer in an Intermediate College, the selection whereof is governed by the provisions of the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 (U.P. Act No.5 of 1982) (hereinafter called the "Act') and U.P. Secondary Education Service Selection Board Rules, 1998 (hereinafter called the "Rules').

3. The occasion for this reference has arisen on account of the decision of a learned Single Judge in the case of Savita Gupta Vs. State of U.P. & Ors., 2004 (2)

UPLBEC 2739, wherein it has been held that if the vacancy has been requisitioned and the Management has notified it to the Board under the provisions of the aforesaid Act, then in that event, the said vacancy can be offered to a selected candidate even if the vacancy was not advertised by the Board. This decision was cited on behalf of the petitioner where after the learned Single Judge, in the instant case, for the reasons stated in the referring order, has after respectfully disagreeing with the said judgment, framed the questions aforesaid for being answered by this Bench.

4. The learned Single Judge in the case of Savita Gupta (supra) was considering the case of a teacher, who was claiming promotion on the post and whose claim had been returned by the District Inspector of Schools after the said vacancy had been offered to the respondent therein, who was a candidate selected by the Board through direct recruitment and whose adjustment was sought to be made in terms of the Government Order dated 12th March, 2001. The learned Single Judge held that once a vacancy was notified to the Board for selection by way of direct recruitment, then it was not open to the Committee to consider the case of any promotion against the said post and once the vacancy had been notified, it was the Board alone which could have filled up the said vacancy. The Court further held that this would advance the cause and purpose of selection by way of direct recruitment in accordance with the object of the said Act. It was further held that the provisions of the Act and the Rules did not prohibit or create any hindrance for making such adjustments and, therefore, it cannot be said that the recommendation made against an unadvertised vacancy would, in any way, violate the provisions of the Act and the Rules. The learned Single Judge distinguished the ratio of the decision of the Hon'ble Apex Court in the case of Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta, AIR 1998 SC 1021 on the ground that that was a case pertaining to selections under the provisions of U.P. Higher Education Services Commission Act, 1980 and the Rules framed there under, which made a provision for a definite life of the select list. The learned Single Judge went on to distinguish the said decision that in the Rules under consideration and in the case under U.P. Secondary Education Service Commission Act, there was no such provision, providing the life of the list, therefore, the Board did not commit any error in making adjustment against the said post. The Court held that in the absence of any such restriction under the Act and the Rules under consideration, it cannot be said that the selection of the candidate and his or her adjustment was invalid. In effect, the conclusion drawn was that such an interpretation serves the object and purpose of the Act and Rules, referred to hereinabove. The action of the Board in making the recommendation against an unadvertised vacancy was upheld.

5. Heard Shri Pradeep Verma, learned counsel for the petitioner and Shri Amit Kumar Singh for respondent no.7 and Shri C.K. Rai, learned Standing Counsel for the State.

6. The gist of the argument of the learned counsel for the petitioner is that once a vacancy stood notified to the Board, though might have occurred subsequent to the advertisement issued by

the Board, the Board has a right to fill up the said vacancy recommending the name of the selected candidate from the panel prepared in pursuance of the advertisement issued prior to the date of occurrence of the vacancy, as it does not adversely affect any person and further guarantees avoidance of any kind of nepotism and corruption, therefore, both the questions should be answered in affirmative.

7. On the other hand, it has been argued by the counsel for respondent no.7 that if a person attains eligibility subsequent to the date of advertisement and if the vacancy so occurred after the advertisement is filled up by the panel prepared in pursuance of the advertisement issued prior to occurrence of the vacancy, it would violate the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India, of such persons who were not eligible to apply in pursuance of the advertisement made prior to occurrence of the vacancy. Therefore, adjustment in such facts and circumstances is not permissible and, therefore, both the questions should be answered in negative.

8. We have considered the rival submissions made by learned counsel for the parties and perused the record.

In Ashok Kumar & Ors. Vs. Chairman, Banking Service Recruitment Board & Ors., AIR 1996 SC 976, the Supreme Court held as under:-

"5. Article 14 read with Article 16 (1) of the Constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. **The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 (1) of the Constitution.....**Boards should notify the existing and excepted vacancies and the Recruitment Board should get advertisement published and recruitment should strictly be made by the respective Boards in accordance with the procedure to the notified vacancies but not to any vacancies that may arise during the process of selection". (Emphasis added)

9. In Gujarat State Deputy Executive Engineer's Association Vs. State of Gujarat & Ors., 1994 Suppl. (2) SCC 591, the Hon'ble Supreme Court quashed the appointments made over and above the vacancies advertised holding that such an action was neither permissible nor desirable for the reason that it would amount to 'improper exercise of power' and only in a rare and exceptional circumstance and in emergent situation, this rule can be deviated from and it can be done only after adopting policy decision based on some rational as the authority cannot fill up more posts than advertised as a matter of course.

10. In Prem Singh & Ors. Vs. Haryana State electricity Board & Ors., (1996) 4 SCC 319, the Apex court observed as under-

".....The selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future

vacancies. **If the requisition and advertisement are for a certain number of posts only, the State cannot make more appointments than the number of posts advertised.....** State can deviate from the advertisement and make appointments on the posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf." (Emphasis added).

11. The said judgment in Prem Singh was followed with approval by the Hon'ble Supreme Court in Virendrer Singh Hooda Vs. State of Haryana, AIR 1999 SC 1701.

12. In Union of India & Ors. Vs. Ishwar Singh Khatri & Ors, 1992 Suppl. (3) SCC 84, the Court held that selected candidate have right to appointment only against 'vacancies notified' and that too during the life of the select list as the panel of selected candidate cannot be valid of indefinite period. Moreover, impaneled candidates "In any event cannot have a right against future vacancies." In State of Bihar & Ors. Vs. The Secretariat, Assistant S.E. Union, 1986 & Ors, AIR 1994 SC 736, the Apex court held that " a person who is selected does not, on account of being empanelled alone, acquire any indefeasible right of appointment. Empanelment is at the best a condition of eligibility for purposes of appointment, and by itself does not amount to selection or create a vested right to be appointed unless relevant service rules say to the contrary." In the said case as the selection process was completed in five years after the publication of the advertisement, the contention was raised that the empanelled candidates deserved to be appointed **over and above the vacancies notified.** The Hon'ble Supreme Court rejected the contention observing that keeping the selection process pending for long and not issuing any fresh advertisement in between, may not be justified but offering the posts in such a manner would adversely prejudice the cause of those candidates who achieved eligibility in the meantime.

13. In Surinder Singh & Ors. Vs. State of Punjab & Ors., AIR 1998 SC 18, the Apex Court held as under:-

"A waiting list, prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the persons from the waiting list may be pushed UP and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that **since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound**. This practice may result in depriving those candidates who became eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as infinite stock for appointment, there is danger that the State may resort to the device of not holding the examination for years together and pick up candidates from the waiting list as and when required. The Constitutional discipline requires that this Court should not permit such improper exercise of power which may result in

creating a vested interest and perpetuating the waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.....Exercise of such power has to be tested on the touch-stone of reasonableness.....**It is not a matter of course that the authority can fill up more posts than advertised**." (Emphasis added).

In Kamlesh Kumar Sharma (supra), the Apex Court similarly observed as under:-

"As per the scheme of the Act and the aforesaid provisions, for each academic year in question, the management has to intimate the existing vacancies and vacancies likely to be caused by the end of the ensuing academic year in question. Thereafter, the Director shall notify the same to the Commission and the Commission, in turn, will invite applications by giving wide publicity in the State of such vacancies. **The vacancies cannot be filled except by following the procedure as contained therein**. Sub-section (1) of Section 12 has incorporated in strong words that any appointment made in contravention of the provisions of the Act shall be void. This was to ensure to back-door entry but selection only as provided under the said sections." (Emphasis added).

14. Similar view has been reiterated by the Hon'ble Supreme Court in Sri Kant Tripathi Vs. State of U.P. & Ors., (2001) 10 SCC 237; and State of J & K Vs. Sanjeev Kumar & Ors., (2005) 4 SCC 148.

In State of Punjab Vs. Raghbir Chand Sharma & Ors., AIR 2001 SC 2900, the Apex Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No.1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as under:-

"With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."

15. Similar view has been reiterated in State of Jammu & Kashmir Vs. Sanjeev Kumar, (2005) 4 SCC 148; and Secretary, Andhra Pradesh Public Service Commission Vs. G. Swapna, (2005) 4 SCC 154, wherein the Court dealt with the powers of the employer or Board in relation to filling up existing vacancies, notified vacancies and future vacancies and held that the question of making appointment beyond advertised vacancy does not arise.

16. In State of U.P. & Ors. Vs. Rakjumar Sharma & Ors., (2006) 3 SCC 330, the Hon'ble Apex Court, placing reliance upon a larger number of its earlier judgments, held that filling up vacancies over and above the number of vacancies advertised, would be violative

of fundamental rights guaranteed under Articles 14 and 16 of the Constitution, for the reason that persons, who acquire eligibility subsequent to the advertisement, could not have an opportunity to make applications.

17. Several Divisions Benches of this Court dealing with the issue of higher education service, have taken the same view, in Dr. Radhey Shyam Sharma Vs. Director (Higher Education) U.P. Allahabad, 2003 (1) ESC 35; Dr. Prakash Chandra Kamboj & Ors. Vs. Committee of Management of Bareilly College, Bareilly & Ors., 2003 (4) ESC 2363; and Writ Petition No. 21245 of 2000, Dr.Kanta Srivastava Vs. Director of Higher Education, U.P. Allahabad & Ors., decided on 11.05.2005.

18. In order to answer the aforesaid questions, it is necessary to examine the scheme of the Act and the Rules framed thereunder.

19. Section 10 of the Act provides that for filling up the vacancy by direct recruitment, the Management shall determine the number of vacancies taking into consideration the policy of reservation and notify the same to the Board and the said vacancies shall be filled up by adopting the procedure as may be **prescribed**. Section 11 of the Act provides for preparation of the panel after holding the examination/interview of the candidates who are found most suitable for appointment.

20. In order to determine as what is the **procedure prescribed**, reference may be made to the relevant Rules. Rule 11 provides for determination and notification of vacancies by the Committee of Management through the Inspector of Schools to the Board. Rule 12 provides that on receiving such vacancies, the Board shall **advertise** the vacancies taking into consideration the reservation policy etc., at least in two daily newspapers, having wide circulation in the State and call for applications from the eligible candidates. The applicants are also asked to give the choice of three institutions in order of preference. After receiving the applications, the Board shall scrutinize the same and subsequently, it may hold the examination/interview etc. for their evaluation and a list shall be prepared on the basis of merit category-wise. Thereafter, the Board, after preparing the panel in accordance with the Rules, allocate the institutions to the selected candidates according to their preference. In case a candidate cannot be allocated an institution as per his choice/preference for the reason that other candidates had been placed in the merit list above to him, the Board may allocate him any other institution as it may deem fit. The panel so prepared shall be sent to the Inspector of Schools for further action. Rule 13 further provides for intimation of names of selected candidates to the Committee of Management for issuance of appointment letters.

Section 16 (1) of the Act provides for appointment to be made only on the recommendation of the Board. However, sub-section 2 thereof reads as under:-

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

21. The cumulative effect of reading the Act and the Rules together is that the

Act and Rules provide for a complete Code and none of its chain is removable. The procedure starts with the intimation of the vacancy by the Committee of Management to the Board and ends with issuance of the appointment letter to the selected candidate by the Committee of Management. Any appointment made in violation of the procedure so prescribed would be de hors the Rules and rendered void in view of the provisions of Section 16 (2) of the Act.

22. There is no dispute to the settled legal propositions that statutory provisions require to be given strict adherence and authority is bound to act in the manner prescribed under the Statute.

23. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention thereof. The uncontroverted legal position is that where a Statute requires thing to be done in a certain way, the thing must be done in that way alone or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. This maxim has consistently been followed, as is evident from the cases referred to above. (Vide Tailor Vs. Taylor, (1876) 1 Ch.D. 426; State of Bihar & Anr. Vs. J.A.C. Saldanna & Ors., AIR 1980 SC 326; Haresh Dayaram Thakur Vs. State of Maharashtra & Ors., AIR 2000 SC 2281; Dhanajaya Reddy Vs. State of Karnataka, AIR 2001 SC 1512; and Ram Phal Kundu Vs. Kamal Sharma, AIR 2004 SC 1657).

24. The learned Single Judge in Savita Gupta (supra) placing reliance upon the Government Order dated 12th March, 2001 has proceeded to hold that such an adjustment is permissible and is not prohibited nor is there any bar under the Act and the Rules to provide for the requisitioned and intimated vacancies to be filled up from amongst the selected candidates of the previous selections who could not get appointment even though the post had not been advertised. The learned Single Judge has held that the purpose and object of the Act and the Rules will not be defeated, if such an interpretation is given. We have scrutinized the same microscopically. The said Government Order refers to a grave concern over the irregularities and illegalities in filling up the vacancies because of non-cooperation of the Committee of Management of the educational institutions. Therefore, by this order, a Committee consisting of three officials named therein was constituted to examine particular cases where the vacancies could not be filled up because of the attitude of non-cooperation adopted by the Committees of Management. The said Order provided that the appointments must be made in such institutions keeping in mind the reservation policy, without any further delay. The Government Order seems to have been issued to remove any action of nepotism and corruption keeping in view the adamant attitude adopted by the Committees of Management. It does not provide any procedure other than the statutory provisions referred to hereinabove. However, the said Government Order, a little before the penultimate paragraph states that in the

event a candidate is unable to join against the post of his preference, then in that event an order for adjustment of such a candidate shall be passed subject to the Rules of reservation. The Act and Rules do not indicate any power vested with the State Government for constituting any such Committee through a Government Order. The Act makes a provision for the promulgation of regulations by the Selection Board with the approval of the State Government and in Section 35, the State Government has been empowered by way of notification to make Rules for carrying out the purpose of the Act. Apart from this, there is no other power vested in the State Government to issue Government Orders for creating an authority other than the authorities referred to in the Rules, in order to enable such an authority to issue orders for making adjustment in the event a candidate is unable to join the post which has been allocated to him. For this purpose, the statutory provisions are already in existence as contained in Section 17 of the Act for ensuring the appointment and joining of a selected candidate and to take appropriate action in the matter. This 3rd alternative of adjustment as indicated in the Government Order dated 12th March 2001 is nowhere authorized under the Act and the Rules. As indicated hereinabove, Rules 1998 make a specific provision for the manner in which a candidate has to be permitted to join in an institution. Rules 12 and 13 are exhaustive in nature and sub-rule 4 of Rule 13 empowers the Joint Director of Education to monitor and ensure that the candidates selected by the Board are able to join the institution in the specified time for this purpose. For this, the Joint Director has also been empowered to issue necessary directions to the District Inspector of Schools as he may think proper. The joining of a candidate has to be in accordance with his merit and preference offered by him in respect of the post available.

25. The question therefore, is, that does the Government Order dated 12th March 2001 permit adjustment of a selected candidate against a vacancy which was not advertised. Rule 12 (1) clearly prescribes the advertisement of the vacancies in at least two daily newspapers. Rule 12 (1) of the Rules is quoted herein below for ready reference:-

"12. Procedure for direct recruitment.- (1) The Board shall, in respect of the vacancies to be filled up by direct recruitment, **advertise the vacancies** including those reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other backward classes of citizens in at least two daily newspapers, having wide circulation in the State, and call for the applications for being considered for selection in the proforma published in the advertisement. For the post of Principal of an Intermediate College or the Head Master of a High School, the name and place of the institution shall also be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wished to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application." (Emphasis added)

26. As discussed hereinabove, the Act in Section 10 mandates that the selection will proceed in the **manner prescribed**, which clearly means that in

the manner as provided under the Rules. The prescription has to be by way of either Regulations or Rules, which cannot be substituted through the executive instructions. The above quoted Rule, therefore, mandates the **advertisement** of a post before the applications of the candidates are scrutinized and selections held. This leaves no room for doubt that an unadvertised post cannot be offered to a candidate who could not have applied as the post had not been advertised. The selection against an unadvertised post, therefore, is not prescribed under the Rules. The offering of the vacancies by way of preference, which have been intimated and notified by the Management has to be a subject matter of **advertisement** and the vacancy cannot be filled up by avoiding the **advertisement**. This aspect of the matter has not been effectively noticed and considered by the learned Single Judge and, therefore, with respect, we are unable to agree with the reasoning of the learned Single Judge in Savita Gupta's case. The question, therefore, is not as to whether the object and purpose of the Act is not being defeated rather the question is as to what would be the manner in which the object and purpose of the Act has to be achieved. In our opinion and in view of the discussions made hereinabove, we hold that the object and purpose of the Act has to be fulfilled in the manner as prescribed under the Rules and not by introducing a method of adjustment, which is not prescribed under the Rules.

27. One of the reasons given by the learned Single Judge in Savita Gupta's case is that since the U.P. Act No.5 of the 1982 and the Rules framed thereunder does not provide any life for the list of a selected candidates, therefore, the candidates so selected, can by offered appointment against the vacancies, which have been notified and requisitioned even if not advertised. The aforesaid reasoning overlooks the fact that the Rules do not indicate that candidates selected in respect of the vacancies occurring in the year of recruitment if not appointed, will continue to form a perennial pool for the source of recruitment. So far as the question of the life of the select list is concerned, the same is not a relevant criteria in our considered opinion for judging the issue as to whether an unadvertised vacancy can be offered to a candidate who had appeared in the previous selections. To our mind, the same does not have any rationale nexus to the object to be achieved. Selection of a candidate against a non-advertised vacancy would clearly violate the fundamental rights guaranteed under Articles 14 and 16 of the Constitution as ruled by the Apex Court in the judgments referred to herein above. In our opinion, in the event, a vacancy is not advertised, the same would give a handle to the Board and the authorities to indulge into selective discrimination by offering appointments to such candidates for whom vacancies were not available and by discriminating such candidates who were qualified and had not been able to apply in the absence of advertisement.

28. Even otherwise, it is settled legal proposition that the executive instructions cannot override the statutory provisions. A Constitution Bench of the Hon'ble Supreme Court, in B.N. Nagarajan & ors. Vs. State of Mysore & ors., AIR 1966 SC 1942, has observed as under:-

"It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by

that Act or Rule and it cannot in exercise of its executive powers under Article 162 of the Constitution ignore or act contrary to that rule or the Act."

Similarly, another Constitution Bench of the Hon'ble Supreme Court in Sant Ram Sharma Vs. State of Rajasthan & Ors., AIR 1967 SC 1910, has observed as under:-

"It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed."

29. The law laid down above, has consistently been followed and it is settled proposition of law that an Authority cannot issue orders/office memorandum/executive instructions in contravention of the statutory Rules. However, instructions can be issued only to supplement the statutory rules but not to supplant it. Such instructions should be subservient to the statutory provisions. (Vide The Commissioner of Income-tax, Gujarat Vs. M/s. A. Raman & Co., AIR 1968 SC 49; Union of India & ors. Vs. Majji Jangammayya & ors., AIR 1977 SC 757; Paluru Ramkrishnaiah & ors. Vs. Union of India & Anr., AIR 1990 SC 166; Comptroller & Auditor General of India & ors. Vs. Mohan Lal Mehrotra & ors., AIR 1991 SC 2288; and C. Rangaswamaiah & ors. Vs. Karnataka Lokayukta & ors., AIR 1998 SC 2496).

30. The Constitution Bench of the Hon'ble Supreme Court, in Naga People's Movement of Human Rights Vs. Union of India., AIR 1998 SC 431, held that the executive instructions are binding provided the same have been issued to fill up the gap between the statutory provisions and are not inconsistent with the said provisions.

31. Thus, it is settled law that executive instructions cannot amend or supersede the statutory rules or add something therein. The orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules have full force of law as held by the Constitution Bench of the Hon'ble Supreme Court in State of U.P. & ors. Vs. Babu Ram Upadhya, AIR 1961 SC 751; and State of Tamil Nadu Vs. M/s. Hind Stone etc. etc., AIR 1981 SC 711.

32. Similar view has been reiterated in Union of India & Anr. Vs. Amrik Singh & Ors., (1994) 1 SCC 269; Swapan Kumar Pal & Ors. Vs. Samitabhar Chakraborty & Ors., (2001) 5 SCC 581; Khet Singh Vs. Union of India, (2002) 4 SCC 380; Laxminarayan R. Bhattad & Ors. Vs. State of Maharashtra & Anr., (2003) 5 SCC 413; ITW Signode India Ltd. Vs. Collector of Central Excise, (2004) 3 SCC 48; Dr. Mahendra Prasad Singh Vs. Chairman Bihar legislative Council, (2004) 8 SCC 747; Pahwa Chemicals (P) Ltd. Vs. Commissioner of Central Excise, New Delhi, (2005) 2 SCC 720; K.P. Sudhakaran & Anr. Vs. State of Kerala & Ors.,(2006) 5 SCC 386; and K.K. Parmar Vs. High Court of Gujrat & Ors., (2006) 5 SCC 789; and it has been observed that statutory rules create enforceable rights which cannot be taken away by issuing executive instructions.

33. Therefore, it is evident that subordinate legislation cannot override the statutory rules nor can it curtail the content and scope of the substantive provision for or under which it has been made.

For the reasons and the conclusions drawn hereinabove, our answer to Question No. 1 is:

"An unadvertised vacancy cannot be filled up from amongst the candidate who has been selected in any previous selections and to that extent we declare that the pronouncement of the learned Single Judge in the case of Savita Gupta Vs. State of U.P. & Ors., 2004 (2) UPLBEC 2739, does not lay down the law correctly and is hereby overruled."

and to Question No.2 is :

"The U.P. Secondary Education Services Selection Board constituted under the U.P. Act No.5 of the 1982 cannot, with the aid of the Government Order dated 12th March, 2001, order any adjustment in respect of a vacancy, which has been intimated and notified but not advertised".

Shri Pradeep Verma, learned counsel for the petitioner states that the petitioner does not stake any claim further against the post in D.A.V. College, Varanasi for the reason that the said post has already been filled up and he, therefore, prays that the writ petition be dismissed as withdrawn.

34. It is a settled legal proposition that the Court answering the reference should not decide the case on merit and after answering the question, the matter should be sent back to the appropriate Bench for proper adjudication/final disposal in the light of law laid down therein. As in the instant case, the petitioner does not want to press the petition, no purpose would be served, sending the matter back to the Court concerned. The petition is accordingly dismissed as withdrawn.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.58649 of 2006

State of U.P. and another ...Petitioners
Versus
Ram Kishun and others ...Respondents

Counsel for the Petitioners:
Sri Shiv Nath Singh (Addl.S.C.)

Counsel for the Respondents:

Constitution of India-Art. 226-Writ petition-challenging the order passed by District Judge-delay about 2 years 124 days-explain given-the file run from one place to another table-in the case of government the court should be liberal-held-a bald averment without showing sufficient cause-before court the private and government litigants be given equal treatment-petitioner can not be entertained on highly belated stage.

Held: Para 10

In my opinion, these averments are insufficient for the Court to hold that sufficient cause was made out by the petitioner for condoning the delay and for the Court to entertain a petition beyond the stipulated period. In the opinion of the Court, on the basis of a bald averment, sufficient cause has not

been explained and therefore, the Court is not inclined to give any kind of latitude to the State Government. Consequently, the Court is not inclined to entertain this writ petition at this belated stage.

Case law discussed:

1996 SCC (3)-132, J.T. 1996 (7) SC-204, 1998 (7) SCC-123, J.T. 2000 (5) SC-389, 1969 (1) SCR-1006, 1979 (4) SCC-365, 1969 (2) SCC-770, 1981 Supp. SCC-72, 1982 (3) SCC-366, 1984 (4) SCC-661, J.T. 1987 (1) SC-537, 1987 (2) SCC-107, 1987 Supp. SCC-339, J.T. 1988 (1) SC-524, J.T. 1992 (Supp.) SC-496, 1993 (1) SCC-572, 1993 Supp. (1) SCC-487, 1994 Supp. (2) SCC-507, 1995 Supp. (1) SCC-37, 1996 (3) SCC-132

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

1. Heard Sri S.N. Singh, the learned Additional Chief Standing Counsel appearing for the petitioners.

2. The petitioners have challenged the judgment dated 16.3.2004 passed by the District Judge, Kushi Nagar. There is a delay of two years and 124 days in approaching the writ Court. The explanation for condoning the delay has been averred in paragraph-18 of the writ petition which stated that the department sought permission for filing the writ petition and, in that regard, the file had to pass from one table to another table and, therefore, that it took some time in granting the permission. The said paragraph further stated that the Court should take a lenient view, while condoning the delay, in the cases filed on behalf of the State Government.

3. The State Government is not above the law and that it cannot be treated differently from that of a common litigant. The law applies equally to all, including the State Government. The doctrine of equality before law demands that all litigants including the State, as a litigant, should be equally treated and that the law should be administered in an even handed manner. The law of limitation is the same for a common litigant as well as for the State Government. A common litigant has to arrange for the requisite expenses and make arrangement for his boarding and lodging. He also has to choose an advocate of his choice. These are time consuming process, but the same has to be done within a stipulated period. On the other hand, the State Government has all the requisite infrastructure to file a writ petition as early as possible. Merely, because the State Government is an impersonal machinery does not mean that the Government can work at its own pace and leisure.

4. Section 5 of the Limitation Act, extends the period of limitation in filing an application or an appeal and gives a power to the Court to admit the appeal or an application after the prescribed period. The only condition is, that the applicant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within the stipulated period. Though, the Limitation Act is not applicable in a writ jurisdiction, nonetheless, the principles can be applied and the Court can decline to entertain a writ petition, on the ground of laches, if sufficient cause is not shown.

5. What constitutes "sufficient cause" cannot be laid down by any hard and fast principle. The discretion given to the Court cannot be defined or crystallised in a rigid rule of law. The Supreme Court in a number of cases has observed that the expression "sufficient cause" should be construed liberally if it finds that the litigant had acted with reasonable

diligence in pursuing the matter. If the Court finds that there was lack of bonafide or negligence on the part of the party, the application was liable to be refused.

6. In **State of Haryana Vs. Chandra Mani and others, (1996)3 SCC 132** the Supreme Court held that even though the Court should adopt a liberal approach in condoning the delay, the law of limitation was required to be administered in an even handed manner and that a litigant, including the State, should be accorded the same treatment, though certain amount of latitude was permissible to be given to the State Government on account of its impersonal machinery and the inherited bureaucratic methodology. Similar view was held by the Supreme Court in the case of **The Special Tehsildar, Land Acquisition, Kerla Vs. K. V. Ayisumma, JT 1996(7) SC 204** wherein the Supreme Court held as follows:

"It is true that Section 5 of the Limitation Act envisages explanation of the delay to the satisfaction of the Court and in matters of Limitation Act made no distinction between the State and the citizen. Nonetheless adoption of strict standard of proof leads to grave miscarriage of public justice. It would result in public mischief by skilful management of delay in the process of filing the appeal. The approach of the Court would be pragmatic but not pedantic."

7. In **N. Balakrishnan Vs. M. Krishnamurthy, (1998)7 SCC 123**, the Supreme Court held as under :

"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court.

The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal

remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is previous and wasted time would never revisit. During the efflux of time, never causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium [It is for the general welfare that a period be put to litigation]. Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."

8. The Supreme Court in **State of Bihar and others Vs. Kameshwar Prasad Singh and Another, JT2000 [5] SC 389** the Supreme Court after analysing its earlier judgment held –

"After referring to the various judgments reported in New India Insurance Co. Ltd. v. Shanti Misra [1975 (2) SCC 840], Brij Inder Singh v. Kanshi Ram [AIR 1917 PC 156], Shakuntala Devi Jain v. Kuntal Kumari [1969 (1) SCR 1006], Concord of India Insurance Co. Ltd. v. Nirmala Devi [1979 (4) SCC 365], Lala Mata Din v. A. Narayanan [1969(2) SCC 770], State of Kerala v. E.K. Kuriyipe [1981 Supp. SCC 72], Milavi Devi v. Dina Nath [1982(3) SCC 366], O.P. Kathpaliav.Lakhmir Singh [1984(4) SCC 66], Collector,LandAcquisition v. Katiji [JT 1987 (1) SC 537 = 1987 (2)SCC 107], Prabha v. Ram Prakash Kalra [1987 Supp. SCC339],G. Ramegowda, Major v. Spl. Land Acquisition Officer [JT1988(1) SC 524 =1988(2) SCC 142], Scheduled Caste Coop. Land Owning Society Ltd. v. Union of India [JT 1990 (4) SC 1= 1991 (1) SCC 174], Binod Bihari Singh v. Union of India [JT 1992 (Supp.) SC 496 =1993(1) SCC 572], Shakambari & Co. v. Union of India [1993 Supp. (1) SCC487], Ram Kishan v. U.P.S.R.TC. [1994 Supp. (2) SCC 507] and Warlu v. Gangotribai [1995 Supp. (1) SCC 37] ; this Court in State of Haryana v. Chandra Mani & Ors. [UT 1996(3) SC 371 = 1996(3) SCC 132] held :

"It is notorious and common knowledge that delay in more than 60 percent of the cases filed in this Court be it by private party or the State- are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even-handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note- making, file pushing, and passing -on-the buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to

table and keeping it on table for considerable time causing delay intentional or otherwise- is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient case. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision to give appropriate permission for settlement. In the event of decision to file the appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants."

9. To the same effect is the judgment of this Court in Special Tehsildar, Land Acquisition, Kerala v. K.V. Ayisumma [JT 1996 (7) SC 204 =1996 (10) SCC 634].

In Nand Kishore v. State of Punjab [JT 1995 (7) SC 69=1995(6) SCC 614] this Court under the peculiar circumstances of the case condoned the delay in approaching this Court of about 31 years. In N. Balakrishnan v. M. Krishnamurthy [JT 1998 (6) SC 242 =1998(7) SCC 123] this Court held that the purpose of Limitation Act was not to destroy the rights. It is founded on public policy fixing a life span for the legal remedy for the general welfare. The primary function of a Court is to adjudicate disputes between the parties and to advance substantial justice. The time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. The object of providing legal remedy is to repair the damage caused by reason of legal injury. If the explanation given does not smack malafides or is not shown to have been put forth as a part of dilatory strategy, the court must show utmost consideration to the suitor. In this context it was observed:

"It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter; acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned, as the explanation

thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammeled by the conclusion of the lower court."

10. In view of the aforesaid, it is clear that the State Government being an impersonal machinery and because of its bureaucratic methodology imbued with the note-making, file pushing and passing -on-the buck ethos, certain amount of latitude is required provided it shows sufficient cause. In the present case, sufficient cause which has been alleged is that the file had to travel from one table to another and consequently, in the cases relating to the State Government, the Court should take a liberal approach. Necessary details are lacking in this regard. Nothing has been stated or brought on the record as to when the permission was sought from the higher authority for filing a writ petition. No details have been given as to how the delay occurred from one table to another table. Merely by making a bald statement that the delay occurred because of the movement of the file from one table to another does not come within the parameter of the words "sufficient cause" for the court to exercise its discretion and condone the delay. If there had been a delay at the behest of some officer or employee, some responsibility should have been fixed upon that officer or employee concerned, but no such allegation has been made. Further the averment that the court should take a lenient view in matters relating to the State Government is a clear indication that the State Government thinks that it is above the law and that it can get away with anything. In my opinion, these averments are insufficient for the Court to hold that sufficient cause was made out by the petitioner for condoning the delay and for the Court to entertain a petition beyond the stipulated period. In the opinion of the Court, on the basis of a bald averment, sufficient cause has not been explained and therefore, the Court is not inclined to give any kind of latitude to the State Government. Consequently, the Court is not inclined to entertain this writ petition at this belated stage.

11. The writ petition is dismissed on the ground of laches.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.10.2006

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

Criminal Revision No. 5775 of 2006

Smt. Ranju ...Revisionist
Versus
State of U.P. and others ...Opposite Parties

Counsel for Revisionist:
Sri Prashant Kumar Singh

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

Code of Criminal Procedure-section-156(3)-Rejection of complaint-No

evidence about injury-out of 13 witnesses-no witness support the case-rejection of application-held-No jurisdictional error illegality found.

Held: Para 5

In this case where there is no evidence that injury was caused and no witness supports the case of the complaint, if the learned Magistrate has rejected the application and under section 156 (3) Cr.P.C there appears no jurisdictional error, illegality irregularity in the impugned order. The revision is dismissed at the admission stage

Case law discussed:
1976 SCC (Crl.)-507
AIR 1992 SC-1815

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

1. Smt. Ranju Devi has preferred instant revision against order dated 10.7.05 passed by learned Addl. Sessions Judge (D.A.A.) Kanpur Dehat in Misc. Application No. Nil of 2006 whereby application moved under section 156 (3) of Cr.P.C, Police Station Ghatampur, district Kanpur Nagar was rejected.

2. Heard Sri Prashant Kumar Singh learned counsel for the revisionist and learned AGA and have gone through the record. Record shows that revisionist Smt. Ranju Devi moved application against 13 persons including four ladies under section 156(3) Cr.PC containing the fact that Crime No. 222/06 under section 308 IPC was registered against her husband Rajendra Singh. Later on the case was converted under section 304 IPC. Her husband surrendered in the court of C.J.M. Kanpur Dehat on 29.4.06. It is said that on 1.6.05 revisionist 2 to 14 went to her residence, looted Rs.20,000/= cash, ornaments worth Rs.40,000/=, took away 2 buffaloes, 2 goats, and 10 quintals wheat etc. Many persons witnessed the occurrence. She went to lodge FIR at Police Station Ghatampur, it was not written, then she moved application to the S.S.P. Kanpur Nagar but no action was taken. Thereafter she moved application under section 156(3) Cr.PC which was rejected by learned Addl. Sessions Judge (D.A.A.) Kanpur Dehat, hence this revision.

3. A perusal of the record shows that as many as 13 persons made raid at the house of the revisionist but not even a single abrasion or contusion was caused to her, nor there is any injury report· in support of the fact that injury was caused to her. According to allegation of the revisionist the occurrence was witnessed by many persons including Ram Sewak, Hanuman, and Lakhan Lal etc. but no person has filed affidavit in support of the allegation of the revisionist. If animals, 10 quintals wheat etc. would have been taken away by the respondent 2 to 14 then conveyance would have been specified in respect of which the revisionist stated nothing. It does not appear natural that such heinous offence was committed but there is no evidence in support of it. Mere allegation of damage being caused, loot being made cannot be taken to be sufficient' unless natural consequences follow which is medical examination of the victim-revisionist, statement or affidavit of the witnesses, details of the manner in which looted articles were taken away. If an allegation merely contains the ingredients of the offence but it does not appear natural merely on the basis of allegation as many as 13 persons cannot be prosecuted.

4. It has been held in **1976 SCC (Crl.) 507 Smt. Nagawwa V. Veeranna**

Shivalingappa Konjalgi and others by Hon'ble the Apex Court that where the allegation made in the complaint are patently absurd or are inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the "accused or the discretion of the Magistrate is based on no evidence. The prayer for summoning the accused can be rejected. In **1992 SC 1815 Punjab National Bank v. Surendra Prasad Sinha** it has been held by Hon'ble the Apex Court that relevant fact and circumstances should be considered before issuing the process: Process issued mechanically on the basis of complaint filed as vendetta to harass persons deserves to be quashed because judicial process would not be an instrument of oppression of needless harassment.

5. In this case where there is no evidence that injury was caused and no witness supports the case of the complaint, if the learned Magistrate has rejected the application and under section 156 (3) Cr.P.C there appears no jurisdictional error, illegality irregularity in the impugned order. The revision is dismissed at the admission stage.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 6445 of 2006

Raju and another ...Revisionists
Versus
State of U.P. and another
...Opposite Parties

Counsel for the Revisionists:
Sri Santosh Kumar Dubey
Sri Vinod Kumar Tripathi

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

Code of Criminal Procedure-Section 397 (2)-Trail Court by exercising power under section 311 Cr.P.C.- summoned the witness for cross examination-for just decision-re-examination P.W. 2 must-such order being interlocutory-revision held-bar under section 397 (2) Cr.P.C.

Case law relied:
1977 SCC (Crl.) 585

(Delivered by Hon'ble Vinod Prasad, J.)

Heard Sri Vinod Kumar Tripathi holding brief of Sri Santosh Kumar Dubey, learned counsel for the revisionists and the learned A.G.A.

Exercising power under Section 311 Cr.P.C. the Additional Sessions Judge, F.T.C. No.3, Gautam Budh Nagar in S.T. No.250 of 2006, State Vs. Raju and other, under Section 307 I.P.C., P.S. Dankaru, district Gautam Budh Nagar has re-summoned the P.W.2 for further cross-examination vide his impugned order dated 9.11.2006. In view of the law laid down by the Apex Court in **Amar Nath And Others versus State of Haryana and Another 1977 SCC (Cr.) 585**, the said order of summoning a witness is nothing but an interlocutory order and a revision against such an order is barred under Section 397(2) Cr.P.C. Further the trial court was of the opinion that for just decision of the case reexamination of P.W.2 is a must. This discretionary power of the trial court should not be in any way curtailed by this court while exercising its

revisional power specially when the revision is not maintainable.

In this view of the matter, this revision stands dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 4388 of 2006

Mohd. Feroj ...Revisionist (In Jail)
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Revisionist:
Sri M.A. Khan

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

Juvenile Justice Act S-12-Bail Application–applicant a juvenile–an accused of selling narcotic drug–a serious offence–The Juvenile Board as well as the lower Appellate Court–over sighted the very purpose of the enactment of the Act itself which cover all developments of juvenile–Jail cannot be a place where the delinquent juvenile can be reared up–held–entitled for Bail.

Held para 3
The Lower Appellate Court also in an unmindful manner has rejected the bail prayer of the revisionist. I have considered the merits of the matter. In my view, the revisionist deserves to be released on bail.

(Delivered by Hon'ble Vinod Prasad, J.)

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

2. The revisionist is admittedly a juvenile. His bail prayer by the Juvenile Board has been rejected on 19/04/2006 with the observation that if the revisionist will be released his physical, mental and psychological condition is such that he is likely to fall in bad company. The appeal preferred by the revisionist being Criminal Appeal No. 37 of 2006 was also dismissed by Additional District and Sessions Judge Court No. 1 Kanpur Nagar vide his order dated 13/06/2006. The aforesaid two orders are under challenge in the instant revision. It is an admitted fact that the applicant is a juvenile and that he is an accused of selling a narcotic drug. No doubt the offence is a serious one but the Juvenile Board and the Lower Appellate Court did not address itself to Section 12 of the Juvenile Justice Act. Keeping juveniles in custody is not the law as the Juvenile Justice Act has been enacted for an over all development of the delinquent juveniles. Jail is not such a place where a juvenile can be reared up in an healthy atmosphere. Section 12, therefore, mandates that before rejecting the bails prayer of an juvenile some tangible cogent material unerringly pointed out that juveniles likely to fall in a bad company must be recommended. The bail to a delinquent cannot be denied by making casual observations as has been done which rejecting the bail of the present revisionist. The Juvenile Justice Board has made a cursory objection that the revisionist is likely to fall in a bad company. The said observation was not based on any tangible material at all. Cursory observation without any material before it is not expected from Juvenile Board who should be sensitive to juveniles as the mind of delinquent juveniles is psychologically very unmatured and they are roved to hazards

of the punishment which can have an adverse effect on them.

3. The Lower Appellate Court also in an unmindful manner has rejected the bail prayer of the revisionist. I have considered the merits of the matter. In my view, the revisionist deserves to be released on bail.

4. The revisionist Mohd. Feroj is directed to be released on bail on his father Mohd. Hanif furnishing a personal bond of Rs.50,000.00 and two sureties each in the like amount to the satisfaction of Juvenile Justice Board, Kanpur Nagar. Father of the revisionist Mohd. Hanif is directed to keep his son Mohd. Feroj under his guardianship. He is further directed to produce Mohd. Feroj before Juvenile Justice Board once in a month. He is further directed to keep watch over his son Mohd. Feroj so that he may not indulge any criminal activity in further.

With the aforesaid direction, this revision is finally allowed at the admission stage itself.

APPELLATION JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 17764 of 2006

Awdhesh Singh ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri V.P. Srivastava
Sri Ram Lal Singh
Sri Lav Srivastava

Counsel for the Opposite Party:
Sri Braham Singh
Sri Susheel Kumar Tiwari
A.G.A.

Code of Criminal Procedure-Section 439-Bail Application offence under section 147, 148, 149, 307, 302/34 read with U.P. Criminal law Amendment Act S. 7-informant and injured persons belonging to Scheduled Cast-applicant, a very powerful man-offence committed-in order to establish supremacy-occurrence took place broad day light-role of causing injury by rifle-two persons lost their life-several injured-considering gravity of case-without expressing any opinions on merit-held-not entitled for bail.

Held: Para 7

Considering the facts that the alleged occurrence had taken place in broad day light, F.I.R. was promptly lodged, role of causing injury by rifle has been assigned to the applicant, two persons have lost their lives, several persons are injured, the cause of death was due to fire arm injury and there are injured witnesses to support the prosecution story, the gravity of offence is too much and other facts and circumstances of the case and submission made by both side, without expressing any opinion on the merits of the case, the applicant is not entitled for bail. Therefore, the prayer for bail is refused.

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

1. This application has been filed by the applicant Awdhesh Singh with the prayer that he may be released on bail in case crime no. 16 of 2006 under sections 147,148,149,307,302/34 I.P.C. and Section 3(2)(v) SC.C./S.T.(P.A) Act and section 7 of U.P. Criminal Law

Amendment Act P.S. Dhanapur district Chandauli.

2. The prosecution story in brief is that the F.I.R. of this case has been lodged by the applicant Ram Lakhan Ram at P.S. Dhanapur on5.3.2006 at about 12.30 p.m. in respect of the incident which had occurred on 15.3.2006 at about 11.00 p.m., the distance of the police station was about 5 k.m. from the alleged place of occurrence, alleging therein that the first informant was belonging to Chamar Caste, on 15.3.2006 at about 11.00 a.m. the accused Desh Raj Singh hurled abuses to the deceased Ramapati due to the enmity of previous election, he was asked not to abuse then the co-accused Ganga Sagar, co-accused Bhullan alias Ramesh, co-accused Hansraj caused injuries by using lathi and danda blows on the person of Smt. Kaushalya, Achche Lal, Ram Lakhan and Dehuli. They were asked again not to beat then the applicant having a licensed rifle, co-accused Saheb Singh and Bablu Singh having unauthorised fire arm chased the first informant and others. Dilip Kumar and Dinesh have made attempt to pacify the matter but the applicant and co-accused Saheb Singh, Bablu Singh discharged shots by their respective weapon, consequently deceased Ramapati, deceased Ram Nihore and injured Saraswati ran to save their lives but they were chased by the applicant and others discharged shots consequently Ramapati, deceased Ram Nihore sustained injuries, deceased Ramapati died instantaneously. Due to the above act done by the applicant and others persons a panic was created and a atmosphere of fear and terror was created.

3. According to the post mortem examination report the deceased Ramapati received three ante mortem injuries in which injury no.1 was abraded contusion, injury no.2 was fire arm wound of entry and injury no.3 was fire arm wound of exit. The deceased Ram Nihore sustained two ante mortem injuries in which injury no. 1 was firearm wound of entry and its exit wound, injury no.2. Injured Dehuli sustained five injuries. Injured Sadani sustained three injuries. Injured Nageshwari Devi sustained one injury. Injured Saraswati sustained four injuries. Injured Ram Lakhan sustained two injuries.

4. Heard Sri V.P. Srivastava, Senior Advocate, assisted by Sri Ram Lal Singh and Sri Lav Srivastava, learned counsel for the applicant, learned A.G.A. for the State of U.P. and Sri Braham Singh and Sunil Kumar Tiwari, learned counsel for the complainant.

5. It is contended by the learned counsel for the applicant:

1. That the prosecution story is false, concocted and highly improbable.
2. That the prosecution story is not corroborated by the medical evidence because according to the F.I.R. the applicant and other co-accused persons discharged shots from the back side but both of the deceased received injuries on front side. Therefore, the manner of the occurrence has been changed during investigation by alleging that the injuries were caused from the front side.
3. That according to the prosecution version the applicant was armed with licence rifle but the direction of the injuries are upward to downward which suggest that the injuries were not caused as alleged by the prosecution.

4. That the prosecution story is not corroborated by the spot inspect note and the site plan.
5. That the alleged motive is absolutely false, baseless because the previous election was not contested by any of the first informant side, therefore, there was no question of enmity.
6. That the applicant is a peaceful person. He is not a previous convict and not wanted in any other case. Therefore, he may be released on bail.

6. In reply to the above contentions it is submitted by the learned A.G.A. ad the learned counsel for the complainant:

I. That the alleged occurrence had taken place in a broad daylight. Its F.I.R. has been lodged within 1,1/2 hours. The distance of the police station was about 5 k.m. Specific role of causing injury by rifle has been assigned to the applicant. In this case two persons have lost their lives. The injuries were caused by the fire arm and several persons are injured.
II. That the applicant is a very powerful man and the first informant and injured persons belong to scheduled cast, weaker section of the society and the applicant and other co-accused persons have committed the alleged offence without any reason, in order to establish his supremacy. In case, the applicant is released on bail, he shall temper with evidence. Therefore, he may not be released on bail

7. Considering the facts that the alleged occurrence had taken place in broad day light, F.I.R. was promptly lodged, role of causing injury by rifle has been assigned to the applicant, two persons have lost their lives, several persons are injured, the cause of death was due to fire arm injury and there are injured witnesses to support the prosecution story, the gravity of offence is too much and other facts and circumstances of the case and submission made by both side, without expressing any opinion on the merits of the case, the applicant is not entitled for bail. Therefore, the prayer for bail is refused.

8. Accordingly this application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2006

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

Civil Misc. Writ Petition No. 8309 of 1990

Sukhdeo ...Petitioner
Versus
Collector, Banda & others ...Respondents

Counsel for the Petitioner:
Sri V.D. Ojha

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

U.P.Z.A. & L.R. Act-Section 122-B-Eviction for Graon Sabha Land-proceeding initiated after 30 years-even if the allotment not found valid-due to in ordinate delay-can not be evicted-nor the damage more than the market rate can be imposed.

Held: Para 3

In view of this, even though I agree that valid allotment was not fully proved by the petitioner still due to inordinate delay of 30 years in initiating the proceedings for eviction, award of the damages is the appropriate relief instead

of eviction. The amount of Rs.11400/- awarded as damages by the impugned order will be more than the market value of the land at the time of occupation i.e. either 1958 or 1961.

Case law discussed:
2005 RD (98) 741

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

1. This writ petition arises out of proceedings under section 122-B of U.P.Z.A.L.R Act. Property in dispute is comprised in Gaon Sabha plot No. 528, area 2 Bigha 13 Biswas. The proceedings were initiated in the form of case No. 178 of 1987-88 Gaon Sabha Vs. Sukhdev. The petitioner pleaded that Gaon Sabha had validly allotted the land in dispute to him on 28.10.1961. He also filed copy of proceeding register of Gaon Sabha dated 28.10.1961. He also filed copy of form No. 59. Against the land in dispute, name of petitioner was mentioned in column 4 since 1366 fasli (1.7.1958 to 30.6.1959). Column 4 contains the names of unauthorised occupants. In the notice 49 Ka possession of petitioner was shown from 1395 fasli (1.7.1987 to 30.6.1988). Tehsildar/ Assistant Collector gave notice to petitioner on 23.3.1988. Tehsildar through order dated 27.7.1988 directed eviction of petitioner and imposed damages of Rs.11400/-. Against the said order petitioner filed revision which was registered as Case No. 24. Collector Banda dismissed the revision on 25.1.1990, hence this writ petition.

2. Collector held that petitioner was in possession from 1366 to 1395 fasli. Regarding the plea of valid allotment, Collector held that original Patta was not filed by the petitioner.

3. There are some authorities of this court which have held that there is no limitation to initiate the proceedings by Gaon Sabha for eviction of persons who are in unauthorised occupation of its land. Still silence of Gaon Sabha for about 30 years was very strange. Even if there is no limitation for starting the eviction proceedings still delay of about 30 years is sufficient to refuse to pass the order of eviction. In certain cases even if possession of some one is unauthorised still eviction is not necessary or proper relief and award of damages in lieu of eviction is the appropriate relief. In respect of small pieces of land of Gaon Sabha over which the occupants have constructed their houses since long I have held that award of damages is the proper remedy in lieu of eviction vide ***Bhudaee Vs. Collector 2005(98) RD 741***. Gaon Sabha is required to allot the land to the needy persons in accordance with preference and proceedings provided under section 195/198 U.P.Z.A.L.R Act. Accordingly, if a person is in possession for more than 12 years, instead of eviction award of damage is the appropriate relief. In view of this, even though I agree that valid allotment was not fully proved by the petitioner still due to inordinate delay of 30 years in initiating the proceedings for eviction, award of the damages is the appropriate relief instead of eviction. The amount of Rs.11400/- awarded as damages by the impugned order will be more than the market value of the land at the time of occupation i.e. either 1958 or 1961.

4. Accordingly impugned orders are set-aside in respect of eviction. Petitioner is directed to pay the awarded damages of Rs.11400/- within six months. On payment of these damages, land in dispute

shall stand settled with him. However if damages are not paid within six months then this order shall stand automatically vacated and writ petition shall stand dismissed. Damages shall be deposited before S.D.O concerned for being kept in concerned Gaon Sabha fund.

Writ petition is accordingly disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2006

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 8502 of 1989

R.P. Garg ...Petitioner
Versus
Indian Oil Corporation Ltd. and another ...Respondents

Counsel for the Petitioner:
Sri A.S. Diwakar
Sri V.K. Agarwal
Sri I.M. Kushwaha
Sri Rahul Sahai
Sri H.P. Pandey
Sri V.K. Verman

Counsel for the Respondents:
Sri V.R. Agarwal
Sri Vivek Ratan

Constitution of India, Art. 226-Termination Order-appointment on one year probation with stipulation that confirmation of service shall be in writing-even after expiry of one year neither probation period extended-nor confirmation order passed-performance found excellent-held shall be deemed automatically confirmed-termination held-illegal-in view of standing order-services stood confirmed hence without disciplinary proceeding without show cause notices-termination not proper.

Held: Para 8

he impugned order has to be judged in the light of what has been contained in it and not on the basis of the stand or the defence taken in the counter affidavit. The respondents, by counter affidavit cannot supplement reasons which are not contained in the impugned order. The above view is fortified by the decision of the Supreme Court in case of *Mohinder Singh Gill & another Vs. The Chief Election Commissioner, New Delhi & Ors. AIR 1978 SC 851*. The Apex Court in the said decision ruled that when statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. In view of the above it is not possible to consider the defence taken by the respondents in the counter affidavit and to read the reasons mentioned therein for terminating the services of the petitioner to be part of the impugned order. Therefore, as the services of the petitioner under the Standing Orders stood confirmed he was not liable to be terminated for the reasons recorded in the impugned order by treating him to be on probation. Admittedly, no disciplinary proceedings were initiated against the petitioner. Accordingly, the impugned order is unsustainable and is liable to be quashed.

Case law discussed:
AIR 1973 SC-2650
AIR 1978 SC-851
2006 (4) ADJ-772

(Delivered by Hon'ble Pankaj Mithal, J.)

1. The petitioner was appointed as Electrician Gr. III with Indian Oil Corporation Ltd. vide letter of appointment dated 21.4.1986. The said

appointment of the petitioner was on probation. According to the appointment letter the probation was for a period of six months from the date of joining and was liable to be extended or reduced. However, condition No. 3 of the appointment letter stated that the petitioner was not liable to be treated as confirmed unless a letter of confirmation to that effect is issued. The petitioner alleges that he had worked satisfactorily and he had completed the probation period which was never extended. Under the model standing orders framed under the Industrial Employment Standing Orders Act, which are applicable, the maximum period of probation provided is one year and on completion of the said period of probation, the services of the petitioner were deemed to be automatically confirmed. These Model Standing Orders being statutory in nature supersedes the terms and conditions contained in the letter of the appointment. Therefore, the petitioner stood confirmed after he had put in over one year of service. However, his services were abruptly terminated without any notice or opportunity of hearing vide order dated 26.4.1989 on the ground that he is on probation and his services are no longer required. The said termination order is under challenge by the petitioner.

2. In the counter affidavit, the respondents have tried to justify the termination by stating that the petitioner, before joining his duties had given a declaration suppressing material information and containing false information. The petitioner in the declaration form had concealed about his last employment, which was with U.P. Rajya Vidyut Utpadan Nigam Ltd. On inquiries it was revealed that the petitioner was sponsored for training by the Nigam from 3rd February 1986 to 4th July 1986 but the petitioner deserted training on 19th May 1987 by submitting his resignation which was in violation of the contract which was for a period of three years. Therefore, he had rendered himself disqualified for appointment.

3. The first question which arises for determination is whether the services of the petitioner stood confirmed or he continued to be on probation on the date on which his services were terminated.

4. Undisputedly under the appointment letter the petitioner was appointed on probation and the probation was to continue till a letter of confirmation was issued to him. Admittedly no letter of confirmation was ever issued to the petitioner.

5. However, according to the petitioner he stood confirmed under the Model Standing Orders as he had continued in service beyond 12 months, the maximum period of probation provided therein. Learned counsel for the petitioner Sri Rahul Sahai in this connection placed reliance upon a decision of the Hon'ble Supreme Court in the case of ***Western Indian Match Company Ltd. Vs. Workman AIR 1973 SC 2650***. In this case the Apex Court held that where the terms of the agreement were inconsistent with the Standing Order, the terms of employment as per the Standing Order would prevail over the express terms of the contract of service. In other words, the terms and conditions of employment inconsistence with the Standing Orders would not survive. Thus, from the above it is evident that the Standing Orders, which have the statutory

force would prevail over the terms and conditions of the letter of appointment. The Standing Order provides for a probation of a maximum period of 12 months. Therefore, the period of probation of the petitioner cannot exceed the above period. Since the petitioner satisfactorily continued in service for three years he stood automatically confirmed on the expiry of the above probation period of 12 months and as such was a confirmed employee when his services were terminated.

6. Sri V.K. Agrawal, Senior Advocate assisted by Sri Vivek Ratan emphasized that since the petitioner was guilty of concealment of facts and of making false declaration, his services have rightly terminated as the corporation does not want to retain such type of persons in employment.

7. I have examined the record of the writ petition and have perused the impugned termination order dated 26th April 1989. The impugned order specifically states *"You were on probation and no confirmation letter is yet issued to you. Your services cannot therefore be regarded as confirmed. Your services are no longer required by the Corporation and hence terminated with immediate effect*". The contents of the impugned order demonstrates that the service of the petitioner had been terminated by treating him to be on probation and for no other ground much less for the reasons stated in the counter affidavit. The termination order does not say that the services of the petitioner are being terminated on the ground of concealment of facts and for making a false declaration at the time of seeking the employment.

8. The impugned order has to be judged in the light of what has been contained in it and not on the basis of the stand or the defence taken in the counter affidavit. The respondents, by counter affidavit cannot supplement reasons which are not contained in the impugned order. The above view is fortified by the decision of the Supreme Court in case of ***Mohinder Singh Gill & another Vs. The Chief Election Commissioner, New Delhi & Ors. AIR 1978 SC 851***. The Apex Court in the said decision ruled that when statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. In view of the above it is not possible to consider the defence taken by the respondents in the counter affidavit and to read the reasons mentioned therein for terminating the services of the petitioner to be part of the impugned order. Therefore, as the services of the petitioner under the Standing Orders stood confirmed he was not liable to be terminated for the reasons recorded in the impugned order by treating him to be on probation. Admittedly, no disciplinary proceedings were initiated against the petitioner. Accordingly, the impugned order is unsustainable and is liable to be quashed.

9. Sri Agrawal then relied upon the decision in the case of ***Ramesh Prasad Patel Vs. Union of India & Ors. 2006 (4) ADJ 772 (Alld.)*** and submitted that even if the petitioner is treated to be a confirmed employee since his services have been terminated on the ground as stated in the counter affidavit i.e. for making wrong declaration, which was subsequent found to be false as such the

principles of natural justice are not attracted and the appointment of the petitioner itself stand vitiated under law. The above argument is devoid of any substance in as much as the impugned termination order has otherwise been found to be invalid without going into the question of it having been passed in violation of the principles of natural justice. Moreover, the respondents have not chosen to cancel the appointment of the petitioner on the alleged ground of misrepresentation or concealment of fact which may have possibly be done without affording any opportunity of hearing to the petitioner.

10. In view of the above discussion, the impugned termination order dated 26th April 1989 (Annexure 3 to the writ petition) is quashed. However, the respondents are at liberty to pass a fresh order if they so desire in accordance with law.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.10.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE VIKRAM NATH, J.

Income Tax Reference No.73 of 1993

M/s Nainu Mal Het Chand, Kanpur
...Applicant
Versus
Commissioner of Income Tax, Kanpur
...Respondent

Counsel for the Applicant:
Sri K.N. Kumar

Counsel for the Respondent:
Sri A.N. Mahajan
S.C.

Income Tax Act, 161, Section 271 (c)- Imposition of penalty applicant-assessed income tax during assessment year 1989-90-assessee concealed the particulars of income of Rs.1,65,000/- held-the satisfaction can be concluded from assessment order itself-penalty proceeding rightly initiated.

Held: Para 20

So far as the two decisions of the Delhi High Court are concerned, we find that under the provisions of the Act, the Income Tax Officer is not required to record his satisfaction in a particular manner or reduce it in writing. It can be gathered from the assessment order itself. In D.M. Mansavi (supra) the Apex Court has clearly held that the Income Tax Officer should be satisfied during the course of the assessment proceeding that the assessee had concealed his particulars of income or has furnished inaccurate particulars of such income. The satisfaction can be gathered from the assessment order. In the present case, we find that the Income Tax Officer had material before him for being satisfied that the applicant has concealed the particulars of his income and, therefore, penalty proceeding have rightly been initiated. We are, therefore, with great respect unable to persuade ourselves to follow the view taken by the Delhi High Court in the aforesaid two cases.

Case law discussed:
(1991) 189 I.T.R. 41 (Bom)
(1994) 210 ITR 103 (Cal.)
(1999) 235 ITR-461 (G)
(2000)164 CTR 209 (Guj)
(2000) 246 ITR-568 (Delhi)
(2000) 246 ITR-571
(2003) 263 ITR-484 (P & H)
(1972) 86 ITR-557

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

1. The Income Tax Appellate Tribunal, Allahabad has referred the following question of law under Section 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for opinion to this Court:-

"Whether on the facts and in the circumstances of the case, the Tribunal was justified in confirming the penalty under Section 271(1)(c) read with Explanation 1 thereto?"

2. The reference relates to the Assessment Year 1989-90 in respect of the penalty imposed under Section 271(1)(c) of the Act.

3. Briefly stated, the facts giving rise to the present reference are as follow:-

The applicant has been assessed to income tax during the assessment year 1989-90 as a registered firm. During the course of the assessment proceeding, three cash credit entries of Rs.26,000/- appearing in the name of Master Manish Matlani, Rs.78,000/- appearing in the name of Master Hitesh Matlani and Rs.61,000/- appearing in the name of Master Lucky Matlani were noticed by the Assessing Authority. He proposed addition of the aforesaid amount under Section 68 of the Act. The applicant gave the explanation that all the three depositors who were minors, have been regularly assessed to tax with the Income Tax Officer, Ward II (VII), Kanpur and were maintaining savings bank account with the Indian Overseas Bank, Swarup Nagar Branch, Kanpur. The applicability of the provisions of Section 68 of the Act was also challenged on the ground that the income had already been assessed in the hand of the minors and that the deposits have come from their savings bank account through cheques. The genuineness of the cash credit as well as the capacity to give money/loan stands established. The Assessing Authority after examining the explanation and the documents filed by the applicant in the assessment proceeding, came to the conclusion that all the three minors are grand sons of Sri Nainu Mal Matlani who is a partner of the firm and are closely related to the partners. The father of Master Manish Matlani, Sri Ram Chandra Matlani is working as Manager on a salary of Rs.1,500/- p.m. in M/s Naini Mal & Sons, which is a sister concern of the applicant whereas Sri Om Prakash Matlani, father of Master Hitesh Matlani and Sri Kanhaiya Lal Matlani, father of Master Lucky Matlani, are working in the applicant firm on a monthly salary of Rs.1,500/-. He further found that Master Lucky Matlani had a credit balance of Rs.27,000/- in the applicant firm. He had made a deposit of Rs.2,000/- on 2.4.1988, Rs.58,000/- on 21.6.1988 and Rs.1,000/- on 1.7.1988 and the entire amount was squared up on 28.7.1988. The source of deposit of Rs.61,000/- made during the year was explained as gifts received by the minor on various occasions. However, no proof regarding receipt of gifts was furnished. The only explanation offered was that the minor had shown the gift as his income in his return filed for the assessment years 1986-87, 1987-88 and 1988-89. Sri Kanhaiya Lal, father of Master Lucky Matlani, who was examined under Section 131 of the Act, had deposed in his statement that in the return of income of Master Lucky Matlani filed for the assessment year 1988-89, Rs.87,800/- was shown as cash in hand

which was deposited in the savings bank account maintained with the Indian Overseas Bank, Swarup Nagar Branch, Kanpur from where Rs.58,000/- was withdrawn and deposited with the applicant firm. On being questioned to explain the source of the income of the minor declared in the income tax return, Sri Kanhaiya Lal had stated that the gifts were the source of the income for which he had no proof and every year the source of income remained the same, i.e., the gifts. On being further questioned as to how the gifts received in each year were not deposited in the bank account immediately or soon thereafter they were received, Sri Kanhaiya Lal had no explanation to offer. The Income Tax Officer examined the savings bank account pass book of Master Lucky Matlani and found that the amount of Rs.87,800/- was deposited in cash on 21.6.1988 and on the same day, the money was deposited with the firm. He came to the conclusion that it is nothing but unaccounted profit of the firm which has come to it in the garb of gifts and subsequently as deposits in the name of the minors. So far as the deposit made by Master Manish Matlani is concerned, his account with the applicant firm showed opening credit balance of Rs.8,000/- and further credit of Rs.25,000/- on 21.6.1988 and Rs.1,000/- on 1.7.1988 and the entire amount was squared up on 1.10.1988. The explanation furnished was the same as in the case of Master Lucky Matlani. Sri Ram Chandra Matlani, father of Master Manish Matlani, was examined under Section 131 of the Act and he gave the similar explanation. The copy of the savings bank account of Master Manish Matlani was also examined by the Income Tax Officer who found that Rs.25,000/- was deposited on 21.6.1988 in the bank which is the same date on which the amount was credited by the applicant in its books of account. He came to the conclusion that the firm's profit had been routed through minor's bank account. In respect of the deposits appearing in the name of Master Hitesh Matlani, the position was no different. The Assessing Authority added a sum of Rs.1,65,000/- towards unexplained cash credit under Section 68 of the Act. The additions have been upheld upto the stage of the Tribunal. The Income Tax Officer while passing the assessment order, also directed for initiation of penalty proceeding under Section 271(1)(c) of the Act for concealment of particulars of its income. After considering the explanation given by the applicant, he imposed a sum of Rs.86,950/- as penalty. The appeal preferred by the applicant has been rejected by the Commissioner of Income Tax (Appeals), Kanpur, which order has been affirmed by the Tribunal.

4. We have heard Sri K.N. Kumar, learned counsel for the applicant, and Sri A.N. Mahajan, learned Standing Counsel appearing for the Revenue.

5. The learned counsel for the applicant submitted that before initiating penalty proceedings under Section 271(1)(c) of the Act, the Income Tax Officer had not recorded his satisfaction and, therefore, the entire penalty proceeding stands vitiated. He further submitted that minor depositors had three independent source of income and the money credited in the books of account of the applicant really belonged to them. They were income tax payees and had been assessed to income tax on such income whereunder the amounts received by them as gifts have been treated to be

their income and merely because in the quantum proceeding the amount had been added under Section 68 of the Act at the hands of the applicant, the explanation given by the applicant cannot be treated to be false or unsubstantiated. Thus, no penalty under Section 271(1)(c) of the Act could have been imposed. He further submitted that the onus of proving the source of these deposits have been discharged. In support of his aforesaid plea, he has relied upon the following decisions:-

(i) **Commissioner of Income Tax v. Dajibhai Banjibhai**, (1991) 189 ITR 41 (Bom);
(ii) **Commissioner of Income Tax v. Eastern Commercial Enterprises**, (1994) 210 ITR 103 (Cal);
(iii) **Roop Chandra & Manoj Kumar v. Commissioner of Income Tax**, (1999) 235 ITR 461 (Gau);
(iv) **National Textiles v. Commissioner of Income Tax**, (2000) 164 CTR 209 (Guj);
(v) **Commissioner of Income Tax v. Ram Commercial Enterprises Ltd**., (2000) 246 ITR 568 (Delhi);
(vi) **Diwan Enterprises v. Commissioner of Income Tax**, (2000) 246 ITR 571 (Delhi); and
(vii) **Commissioner of Income Tax v. Munish Iron Store**, (2003) 263 ITR 484 (P&H).

6. On the other hand, Sri A.N. Mahajan, learned Standing Counsel, submitted that the deposits made by the three minors with the applicant have been upheld upto the stage of the Tribunal to be not genuine deposits and have been added as unexplained cash credit under Section 68 of the Act. The explanation offered by the applicant had been disbelieved by all the authorities. According to him, in the assessment order itself the Assessing Authority had mentioned for initiating penalty proceeding under Section 271(1)(c) of the Act for concealment of particulars of income which itself establishes that the Income Tax Officer was satisfied that in the present case penalty proceeding for concealment of particulars of income has to be initiated. According to him, no particular form of recording satisfaction has been mentioned under the Act and, therefore, recording of the fact to initiate penalty proceeding during the course of the assessment proceeding would itself mean that the Assessing Authority was satisfied that the applicant had concealed the particulars of his income and penalty proceedings have to be initiated. He further submitted that the explanation offered by the applicant had rightly been disbelieved by all the authorities including the Tribunal on valid and cogent reasons. He submitted that Explanation 1 to Section 271(1)(c) of the Act clearly applies in the present case as the explanation offered by the applicant has been found to be false by all the authorities. Thus, the penalty has rightly been imposed. He has relied upon a decision of the Apex Court in the case of **D.M. Manasvi v. Commissioner of Income Tax, Gurjarat** - II, Ahmedabad, (1972) 86 ITR 557.

7. We have given our anxious consideration to the various pleas raised by the learned counsel for the parties.

8. It is not in dispute that the deposits of Rs.1,65,000/- appearing in the name of three minors have been added as unexplained cash credit under Section 68 of the Act. The explanation given by the applicant has been found to be false by all

the authorities including the Tribunal. In the penalty proceeding, similar explanation was given, which had been disbelieved and penalty of Rs.86,950/- under Section 271(1)(c) of the Act has been imposed. The Tribunal while dealing with the explanation has recorded a finding of fact that the applicant has not been able to substantiate the explanation to the effect that the depositors have received gifts in any of the previous years or had any independent source of income; the applicant has not been able to prove that this explanation was bona fide; there was no documentary evidence in support of the assessee's contention; even the name of the person from whom the alleged gifts were received, were not disclosed to the Department; the minor depositors were intimately related to the partners of the assessee firm; the explanation was baseless and the provision of Section 271(1)(c) of the Act were attracted in the present case.

9. The learned counsel for the applicant had not been able to show that the conclusions arrived at by the Tribunal suffer from any legal infirmity. It is based on appreciation of evidence and material on record. The Tribunal has not committed any illegality while recording the aforesaid findings and the conclusions it drew.

10. So far as the question of recording the satisfaction by the Income Tax Officer is concerned, we find that the Apex Court in the case of **D.M. Mansavi** (supra) has held that merely because notices for imposition of penalty were issued subsequent to making of the assessment order, would not show that there was no satisfaction of the Income Tax Officer during the assessment proceeding that the assessee had concealed the particulars of his income or has furnished incorrect particulars of such income. In paragraph 8 of the report, the Apex Court has held as follows:-

"The fact that notices were issued subsequent to the making of the assessment orders would not, in our opinion, show that there was no satisfaction of the Income-tax Officer during the assessment proceedings that the assessee had concealed the particulars of his income or had furnished incorrect particulars of such income. What is contemplated by clause (1) of section 271 is that the Income-tax Officer or the Appellate Assistant Commissioner should have been satisfied in the course of proceedings under the Act regarding matters mentioned in the clauses of that sub-section. It is not, however, essential that notice to the person proceeded against should have also been issued during the course of the assessment proceedings. Satisfaction in the very nature of things precedes the issue of notice and it would not be correct to equate the satisfaction of the Income-tax Officer or Appellate Assistant Commissioner with the actual issue of notice. The issue of notice is a consequence of the satisfaction of the Income-tax Officer or the Appellate Assistant Commissioner and it would, in our opinion, be sufficient compliance with the provisions of the statute if the Income-tax Officer or the Appellate Assistant Commissioner is satisfied about the matters referred to in clauses (a) to (c) of sub-section (1) of section 271 during the course of proceedings under the Act even though notice to the person proceeded against in pursuance of that satisfaction is issued subsequently. We may in this

context refer to a decision of five judges Bench of this court in the case of **Commissioner of Income-tax v. S. V. Angidi Chettiar** [(1962) 44 ITR 739] Shah J., speaking for the court, while dealing with section 28 of the Indian Income-tax Act, 1922, observed:

"The power to impose penalty under section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clause (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction."

11. In the case of **Dajibhai Kanjibhai** (supra) one of the questions up for consideration before the Bombay High Court was as to whether the finding of the Tribunal that the primary ingredient for initiating penalty proceedings was absent in the case as the Income-tax Officer did not record his satisfaction during the course of the assessment proceedings is correct in law? In the last paragraph of the assessment order, the Income Tax Officer has stated as follows:-

"Assessed under section 144 of the Act. Issue notice of demand. Issue notice under sections 271(1)(a), 273(b) and 271(l)(b) of the Act Charge interest under section 217. Give concession in tax as per Taxation Concessions Order, 1964."

12. Though Section 271(1)(c) of the Act was not mentioned as one of the sections in respect of which the Income Tax Officer was satisfied, the Inspecting Assistant Commissioner to whom the reference was made, imposed penalty of Rs.3,00,000/- under Section 271(1)(c) of the Act. In the light of the aforesaid facts, the Bombay High Court has held as follows:-

".....the legal position in this regard is now well settled. In view of the Supreme Court's decision in CIT v. S. V. Angidi Chettiar [1962] 44 **ITR 739**, power to impose penalty under section 28 of the old Act corresponding to section 271 of the new Act depends upon the satisfaction of the Income-tax Officer in the course of the proceedings under the Act. It cannot be exercised if he is not satisfied and has not recorded his satisfaction about the existence of the conditions specified in clauses (a), (b) and (c) before the proceedings are concluded. There is no evidence on record to show that the Income-tax Officer, in this case, was satisfied in the course of the assessment proceedings. Therefore, we must hold that the penal provisions of section 271(1)(c) were not attracted in this case."

13. The aforesaid decision is clearly distinguishable for the reason that in the present case during the course of the assessment proceeding the Income Tax Officer has mentioned for initiating penalty proceeding under Section 271(1)(c) of the Act for concealment of the particulars of income.

14. In the case of **Eastern Commercial Enterprises** (supra) the Calcutta High Court has held that it is trite

law that cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him and he must be supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him which necessarily also postulates that he should cross-examine the witness hostile to him. In the present case, we find that all the witnesses examined under Section 131 of the Act were fathers of the minor depositors and were closely related with the applicant. In any event, the applicant had not raised any grievance nor had made any request for cross examination. The aforesaid decision is, therefore, of no help to the applicant.

15. In the case of **Roop Chandra & Manoj Kumar** (supra) the Gauhati High Court has held where the gift amount does not run into four or five figures, generally no record or list is maintained and this is not a case of receipt of gifts on one occasion, like marriage, etc. and were purportedly received on various occasions, each year and for 12-14 years, the creditworthiness in respect of a sum of Rs.9,000 each by the two creditors stands established. The facts of the present case are entirely different. Here the gifts run into five figures. The list of the donors have not been produced nor any explanation had been given. Even the recipients of the gifts, i.e., the three minors had voluntarily disclosed the same as their income. The amount which had been advanced, was deposited in cash on the same day with the bank and later given as loan by cheques. The authorities have disbelieved the explanation and, therefore, the credit worthiness of the depositors stands disproved.

16. In the case of **National Textiles** (supra) the Gujarat High Court has held that the Explanation is to the effect that where in respect of any fact or material for purposes of his assessment, an assessee offers an explanation which is found by the Assessing Officer or the Deputy Commissioner of Income Tax (Appeals) to be false or where the assessee is unable to substantiate his explanation, then the amount added to his income shall be deemed to represent his concealed income; the newly introduced Explanation 1 considerably reduces, but does not altogether remove the Department's onus to prove concealment in assessed income based on unexplained cash credit or unexplained investment and like; in order to justify the levy of penalty, two factors must co-exist, (i) there must be some material or circumstances leading to the reasonable conclusion that the amount does represent the assessee's income; it is not enough for the purpose of penalty that the amount has been assessed as income, and (ii) the circumstances must show that there was animus, i.e., conscious concealment or no act of furnishing of inaccurate particulars on the part of the assessee; the Explanation has bearing on factor no.1 but it has bearing only on factor no.2; the Explanation does not make the assessment order conclusive evidence that the amount assessed was in fact the income of the assessee; no penalty can be imposed if the facts and circumstances are equally consistent with the hypothesis that the amount does not represent concealed income as with the hypothesis that it does; if a assessee gives an explanation which is unproved but not disproved, i.e., it is not

accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, the Explanation cannot help the Department because there will be no material to show that the amount in question was the income of the assessee; alternatively, treating the Explanation as dealing with both the ingredients (i) and (ii) above, where the circumstances do not lead to the reasonable and positive inference that the assessee's explanation is false, the assessee must be held to have proved that there was no mens rea or guilty mind on his part; even in this view of the matter, the Explanation alone cannot justify levy of penalty and absence of proof acceptable to the Department cannot be equated with fraud or wilful default.

17. In the case of **Ram Commercial Enterprises Ltd.** (supra) the Delhi High Court has held that a bare reading of the provisions of section 271 and the law laid down by the Supreme Court makes it clear that it is the assessing authority which has to form its own opinion and record its satisfaction before initiating the penalty proceedings; merely because the penalty proceedings have been initiated, it cannot be assumed that such a satisfaction was arrived at in the absence of the same being spelt out by the order of the assessing authority; even at the risk of repetition we would like to state that the assessment order does not record the satisfaction as warranted by section 271 for initiating the penalty proceedings. The aforesaid decision has been followed subsequently by the Delhi High Court in the case of **Diwan Enterprises** (supra).

18. In the case of **Munish Iron Store** (supra) the Punjab and Haryana High Court has approved the order of the Tribunal wherein the Tribunal has given the following reasoning for cancelling the penalty imposed under Section 271(1)(c) of the Act:-

"It is clear from the above that not a word has been written about concealment of income. The Assessing Officer quietly accepted the revised return and the income disclosed therein. He did not record how and why the revised return was submitted. The statement of the partner on pages 14-16 of the paper book, Shri Ramesh Kumar was recorded and in that statement, he did explain the reasons which led to filing of the revised return. Learned counsel for the assessee contended that those reasons were impliedly accepted by the Assessing Officer. Looking at the assessment order, one cannot challenge the above assertion of learned counsel for the assessee. At any rate, the satisfaction above the concealment of income of furnishing of inaccurate particulars of income to assume jurisdiction to initiate and levy penalty is clearly not recorded as enjoined by law. The above jurisdictional defect in our view cannot be cured. Accordingly, we hold that penalty imposed is not valid and jurisdiction to impose the same was illegally assumed without recording a proper satisfaction. Penalty imposed is cancelled for the above reasons."

19. The aforesaid decisions is of no help to the applicant inasmuch as in the present case we find that in the assessment order the Assessing Authority had recorded a clear finding that the profits of the firm had been diverted through the deposits in question and a case of concealment has been made out.

20. So far as the two decisions of the Delhi High Court are concerned, we find that under the provisions of the Act, the Income Tax Officer is not required to record his satisfaction in a particular manner or reduce it in writing. It can be gathered from the assessment order itself. In **D.M. Mansavi (supra)** the Apex Court has clearly held that the Income Tax Officer should be satisfied during the course of the assessment proceeding that the assessee had concealed his particulars of income or has furnished inaccurate particulars of such income. The satisfaction can be gathered from the assessment order. In the present case, we find that the Income Tax Officer had material before him for being satisfied that the applicant has concealed the particulars of his income and, therefore, penalty proceeding have rightly been initiated. We are, therefore, with great respect unable to persuade ourselves to follow the view taken by the Delhi High Court in the aforesaid two cases.

21. In view of the foregoing discussions, we answer the question referred to us in the affirmative, i.e., in favour of the Revenue and against the assessee. There shall be no order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 4674 of 2006

Km. Mona and others ...Revisionists
Versus
State of UP and another ...Respondents

Counsel for the Revisionists:
Sri Rahul Chaturvedi

Counsel for the Opposite Parties:
A.G.A.
Sri K.K. Nirkhi

Code of Criminal Procedure-Section 319-Power of Trail Court-an extra ordinary one-to be exercised ex-debito justice-only when reasonable possibility of conviction-un married handicapped girl suffering deformity in her leg-no possibility of her involvements-should not be harassed merely because of the relative of husband of the deceased-consequential directions issued.

Held: Para 10 & 11

Power under section 319 Cr.P.C. is an extraordinary power given to the court to be exercised ex- debito justice. It should be exercised sparingly only when it is required most. Summoning any body as an accused at the stage of trial after the evidence had started in the case should be resorted to only when there is reasonable possibility of his conviction. Asking some body to fact the ordeal of trial only to be acquitted is not the law but is his harassment.

On the facts of the present case I find that revisionist no.1 is an unmarried girl who is handicapped and has deformity in her leg. Her involvement in the offence is a remote possibility. So far as two other revisionists are concerned they are a married couple resident of different places. Merely because they are relatives of the husband they should not be harassed without any specific allegation against them. They have got two infant daughters and it very unlikely that they will indulge in the demand of dowry and torture. There is no specific allegation against them and their names are mentioned as a matter of course in the statements, which in my view was not sufficient to anoint any charge on them.

(Delivered by Hon'ble Vinod Prasad, J.)

1. Aggrieved by their summoning order dated 15.7.2006, under section 319 Cr.P.C., passed by Additional Chief Judicial Magistrate, Court No. 1, Mathura in criminal case no. 1312 of 2005 State versus Gajendra Pal Singh And Others, the three revisionists- Km. Mona, Smt Poonam and Balvir Singh have approached this court in it's revisional jurisdiction under sections 397/401 Cr.P.C. with the prayer that the said order of summoning them in the aforesaid case be quashed. Their interim prayer is for stay of further proceeding of the said case no. 1312 of 2005 State versus Gajendra Pal Singh And Others interregnum.

2. In short the factual matrix of the case are that a FIR was lodged by Raghunath Prasad against Veeri Singh, his wife Smt Prabha, his two sons Gajendra Singh and K.P. Singh and two daughters Km. Mona, Smt. Poonam and one Balbir Singh at police station Govardhan District Mathura as crime number 270 of 2003 under sections 498A, 323 IPC and ¾ D.P. Act in respect of an incident dated 26.11.2001 to 14.7.2003. The narration of incident in the said FIR were that Kusum Singh,daughter of the informant Raghunath Prasad Pali was married to Gajendra Singh son of Veeri Singh on 26.11.2001.In the marriage the informant had spent Rs. 5 lakhs which included one lakh fifty thousand cash, one Hero Honda Motor Cycle, 20 Tolas of gold 1 ½ KG of silver ornaments fridge, Washing Machine and other house hold articles. The accused were no satisfied with the dowry given in the marriage and started torturing Smt. Kusum for bring a car. For the fulfillment of the said demand Kusum was assaulted also and was subjected to torture. Kusum made a complaint of the said demand to the informant and other relatives. The informant tried to pacify the in laws but of no avail. There was a conciliatory meeting also in which the accused had said that they will not demand the dowry henceforth. On 18.7.2003 the accused persons accompanied with Kusum came to do *Govardhan Parikrama* on a jeep and then while returning they dropped Smt Kusum near Agra Canal at 1.30 AM in the night of 14.7.2003 and went away warning her that she will not bring the car they will accept her back. Smt. Kusum tried to plead that her parents were poor and they will not be able to fulfill the car demand she was assaulted as well. This incident was witnessed by Pooran, Banwari Lal, Pritam Singh, Bhagwan Das, who all saved Kusum. The accused then left for Mathura. The informant tried to lodge the report on 14.7.2003 and 17.7.2003 but the same was not registered. At last he filed a written FIR to Senior Superintendent Of Police Mathura on 18.7.2003 and on his direction his FIR was registered on 16.10.2003 at 8.30 PM at PS Govardhan District Mathura as crime number 270 of 2003 under sections 498A, 323, IPC and ¾ D.P. Act. The police investigated the matter and ultimately submitted a charge sheet against rest of the accused persons but for the revisionist against whom the police did not find offence being committed by them. The submission of charge sheet was succeeded by trial in the court of Ist Additional Chief Judicial Magistrate Mathura as case number 1312 of 2005 State versus Gajendra Pal And Others. In the trial during the examination of PW 2 Smt. Kusum an application, 27 Ba, was filed by the prosecution to summon the revisionists under section 319 Cr.P.C. but

the same was rejected by the trial court vide it's order dated 6.6.2006 on the grounds that the three revisionist are married Nanad and Nandoi and she used to reside in her in laws house and that merely because they were named in the statement they should not be summoned. More over the cross examination of PW.2 was continuing and therefore till her cross-examination is over there was no reason to summon the revisionists vide annexure no. 3 to the affidavit filed in support of this revision. How ever from the record it transpires that after the examination of PW 2 Kusum, the wife was over on 9.6.2006 the prosecution filed another application for summoning the revisionist under section 319 Cr.P.C. vide paper no. 48 A. which was allowed by the trial court vide it's impugned order dated 15.7.06 which order is under challenge in this revision.

3. I have heard Sri Rahul Chaturvedi learned counsel for the applicant in support of this revision and the learned AGA as well as Sri K.K.Nirkhi, Learned counsel for the victim Smt. Kusum.

4. Sri Rahul Chaturvedi contended that the summoning order under section 319 Cr.P.C. is illegal and deserves to be quashed. He contended that on the earlier occasion the trial court had rightly rejected the prayer for summoning the revisionists by passing a well-reasoned and well-considered order on 6.6.2006. He further contended that the revisionist no. 1 Km. Mona is unmarried girl and is handicapped and therefore her implication is false. He further contended that rest of the two revisionists Smt Poonam and her husband Balvir are residents of Bulandshahr and therefore their summoning order is also bad in law. He also contended that there are no specific allegations against the revisionists and they are named in the statements only to be harassed. He contended that during the course of investigation the complicity of the revisionist was found to be false and therefore on the same evidence the revisionist should not be summoned. He further contended that the summoning order is illegal and deserves to be set aside.

5. Learned AGA as well as learned counsel for the victim contended that since the revisionist are named in the statements therefore they are liable to be summoned and there is no illegality in the impugned order which deserves to be up held. They further submitted that the demand of the car or of RS. Two lakhs in lieu thereof was made by all the accused and therefore the summoning order is not bad in law. They also contended that once a person is named in the statement recorded in court as an accused the court has no option but to summon him for trial. In their submission the revision lacked merit and deserved to be dismissed.

6. In view of rival contentions and keeping the facts of the case into consideration when I examine the matter it transpired that the revisionist were named in the FIR. There was no specific allegation against them but they were named in a casual way. The investigating officer after the investigation found their complicity in the crime not established and hence no charge sheet was submitted in their respect. At the stage of summoning on objection was raised regarding non-charge sheeting the revisionist by the informant or the victim. During the trial PW 1 Aghast oath Prasad had admitted that Gajendra husband had

filed a case of restitution of conjugal rights in Oligarchy much before the present case.He also admitted the revisionist no. 1 Mona is unmarried and she is handicapped by one leg. He further admitted that revisionist no, 2 was married prior to the marriage of Kusum. He intentionally concealed stating the age of Mona and regarding children of Smt. Poonam and her husband. In his statement he has no said any thing against the revisionist specifically but has only said at times "Sasural Wale". At rest of the places he has stated "All accused" without making any specification. His whole statement read to gather indicates that there is a dispute between husband and wife read-only far statement of victim Kusum PW 2 is concerned her statement also does no improve upon the merit of prosecution case. She is an educated lady and is postgraduate. She has also admitted that Mona has got a deformity in her one leg. She has admitted that the application under section 9 of Hindu Marriage Act 1955 was filed by Gajendra (husband) in 2002 being AP No. 1105/ 02. She even does not remember as the demand was made for which car. She admitted that the revisionist no. 3 is posted in Narora and both revisionist no. 2 and 3 Poonam and Balvir had two daughters Shikha and Sonu aged about 4 and 2 years respectively. She has also admitted that but for her husband and father in law no other accused has assaulted her. Thus from the above gist of her statement it is clear that the material on record is insufficient to try the revisionist. At this stage a glimpse of law laid down by the apex court may be taken to be the guiding factor. It has been held by the apex court in the case of **Ramesh And Others versus State of Tamil Nadu : AIR 2005 SC 1989** as follows:-

"6. Before we proceed to deal with the two contentions relating to limitation and territorial jurisdiction, we would like to consider first the contention advanced on behalf of the appellant-Gowri Ramaswamy. Looking at the allegations in the F.I.R. and the contents of charge sheet, we hold that none of the alleged offences, viz. Sections 498-A, 406 of the I.P.C. and Section 4 of the Dowry Prohibition Act are made out against her. She is the married sister of the informant's husband who is undisputedly living in Delhi with her family. Assuming that during the relevant time, i.e. between March and October, 1997, when the 6th respondent (informant) lived in Mumbai in her marital home, the said lady stayed with them for some days, there is nothing in the complaint which connects her with an offence under Section 498-A or any other offence of which cognizance was taken. Certain acts of taunting and ill-treatment of informant by her sister-in-law (appellant) were alleged but they do not pertain to dowry demand or entrustment and misappropriation of property belonging to the informant. What was said against her in the F.I.R. is that on some occasions, she directed the complainant to wash W.C. and she used to abuse her and use to pass remarks such as 'even if you have got much jewellery, you are our slave'. It is further stated in the report that Gowri would make wrong imputations to provoke her husband and would warn her that nobody could do anything to her family. These allegations, even if true, do not amount to harassment with a view to coercing the informant or her relation to meet an unlawful demand for any property or valuable security. At the most, the allegations reveal that her sister-in- law Gowri was insulting and making derogatory remarks against her

and behaving rudely against her. Even acts of abetment in connection with unlawful demand for property/dowry are not alleged against her. The bald allegations made against her sister-in-law seem to suggest the anxiety of the informant to rope in as many of the husband's relations as possible. Neither the F.I.R. nor the charge-sheet furnished the legal basis to the Magistrate to take cognizance of the offences alleged against the appellant-Gowri Ramaswamy. The High Court ought not to have relegated her to the ordeal of trial. Accordingly, the proceedings against the appellant-Gowri Ramaswamy are hereby quashed and her appeal stands allowed."

7. Further in the case of **Michael Machado v. Central Bureau of Investigation: AIR 2000 SUPREME COURT 1127** the apex court has held as follows:-

"11. The basic requirements for invoking the above section is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, had committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

12. But even then, what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other persons."

8. The Supreme court in Municipal Corporation of Delhi v. Ram Kishan Rohtagi, AIR 1983 SC 67 has held that: -

"*But we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.*"

9. It has been further held by the apex court in the case of **Michael Machado (Supra)**:-

"14. The Court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole

proceedings must be re-commenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite a large in number the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action."

10. Thus from the above law laid down by the apex court it is evident that no body should be summoned under section 319 Cr.P.C. only to face the trial. There should be possibility of his conviction as well. Power under section 319 Cr.P.C. is an extraordinary power given to the court to be exercised ex-debito justice. It should be exercised sparingly only when it is required most. Summoning any body as an accused at the stage of trial after the evidence had started in the case should be resorted to only when there is reasonable possibility of his conviction. Asking some body to fact the ordeal of trial only to be acquitted is not the law but is his harassment.

11. On the facts of the present case I find that revisionist no.1 is an unmarried girl who is handicapped and has deformity in her leg. Her involvement in the offence is a remote possibility. So far as two other revisionists are concerned they are a married couple resident of different places. Merely because they are relatives of the husband they should not be harassed without any specific allegation against them. They have got two infant daughters and it very unlikely that they will indulge in the demand of dowry and torture. There is no specific allegation against them and their names are mentioned as a matter of course in the statements, which in my view was not sufficient to anoint any charge on them.

Resultantly in view of the discussions made above I find force in this revision, which deserves to be allowed.

12. This revision is allowed. The impugned order dated 15.7.2006, under section 319 Cr.P.C., passed by Additional Chief Judicial Magistrate, Court No. 1, Mathura in criminal case no. 1312 of 2005 State versus Gajendra Pal Singh And Others summoning the three revisionists- Km. Mona, Smt Poonam and Balvir Singh is here by set aside. The trial court is directed to proceed with the case against rest of the accused and conclude the same if possible within five months.

Revision allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2006

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE RAN VIJAI SINGH, J.

Second Appeal No. 1291 of 1981

Pujari Yadav ...Plaintiff-Respondent-Appellant
Versus
Ram Briksha Yadav ...Defendant-Appellant-Respondent

Counsel for the Appellant:
Sri N.P. Mishra

Sri Awadhesh Rai
Sri D.N. Shukla
Sri Vimal Kumar
Sri Ganga Prasad
Sri Saroj Kumar Singh
Sri D.B. Yadav

Counsel for the Respondent:
Sri Faujdar Rai
Sri C.K. Rai
Sri V.K. Singh

U.P. Intermediate Education Act, 1921-Regulation 16-G-jurisdiction of civil court-termination of class 4th employee of recognized school imparting education upto class 10-shall for declaration and injunction-before civil court-held proper.

Held: Para 17

We would have, either finally decided this point or if necessary referred it to the larger bench for decision, however, in view of our finding on other points, it is not necessary to do so. Even if it is taken that these two categories as mentioned above are added, no relief can be granted to the plaintiff-appellant.

(B) Inter Mediate Education Act, 1921-chapter III Regulation 31-Termination of Class 4th employee of recognized institution-imparting education upto class 10-whether prior approval is necessary? Held- 'No'.

Held: Para 28

In view of above we hold that after amendment of Regulation 31 by the 1975 Notification, it is not necessary to take prior approval of the Inspector before terminating the services of a Class-IV employee.

Case law discussed:
2006 ESC-1965
1993 (2) UPLBEC-1402
1998 (1) ESC-403
AIR 1977 Alld.-977

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

1. The main question involved in this appeal is when can a contract of personal service be enforced in a civil suit.

THE FACTS

2. There is a school known as Shri Shanker Uchchtar Madhyamik Vidyalaya, Pargana Ghosi, district Azamgarh (the School). This school imparts education up to 10th class and is recognized under Intermediate Education Act 1921 (the Act); it is also given grant-in-aid by the State Government in respect of salaries of its teachers and non-teaching staff.

3. The plaintiff-appellant was appointed as Class IV employee in the School on 1.3.1976 and was subsequently confirmed. There was misappropriation of Rs.1400/- from the Boys' Fund. It was alleged that the plaintiff-appellant had forged the signatures of the Principal and had taken out the money. The defendant-respondent was the officiating principal of the school. He called an explanation of the plaintiff-appellant on 11.5.1977. Initially a reply was submitted on 11.5.1977. Thereafter the plaintiff-appellant admitted his guilt on 15.5.1977. Subsequently, his services were terminated on 12.6.1977.

4. The plaintiff-appellant filed the original suit no. 259 of 1977 against the officiating principle, who is sole defendant-respondent in the suit, for declaration that:

- The termination order dated 12.6.1977 was illegal, null and void; and

- An injunction be issued restraining the defendant-respondent from interfering/stopping the plaintiff-appellant from functioning as the Class IV employee of the School.

The defendant-respondent filed written statement denying the allegations of the suit.

5. The trial court decreed the suit on 16.5.1979. The court restrained the defendant respondent for interfering with the service of the plaintiff-appellant. The court while decreeing the suit recorded the following findings:

- The Civil Court has jurisdiction to decide the suit. This was held earlier on 24.8.1978.
- The defendant-respondent could not be officiating Principal of the School.
- The principle of natural justice were not followed in conducting the enquiry.

6. The defendant-respondent filed an appeal. This appeal was allowed on 12.11.1980 and the suit was dismissed. The appellate court recorded the following findings:

- It can not be said that the defendant-respondent was not the officiating principal of the School.
- There was no illegality in terminating the services of the plaintiff-appellant.

7. Aggrieved by the order of the appellate court, the plaintiff-appellant has filed the present second appeal. The Single Judge by his order dated 3.12.1999, referred the question of maintainability of the suit to the larger bench by observing that:

'In this way I find that there is a serious controversy over the aforesaid question regarding maintainability or the suit in Civil Court. In my humble opinion the matter requires consideration by a larger bench and therefore, the entire record be remitted before the Bench nominated by the Hon'ble Chief Justice. Lay before the Hon'ble Chief Justice for orders.'

This is how the case has come up before us.

POINTS FOR DETERMINATION

8. It was agreed by the parties that instead of answering the referred question, the entire appeal may be decided. We have heard Sri DB Yadav, counsel for the plaintiff- appellant and Sri CK Rai, counsel for the defendant-respondent, and Sri VK Singh who was appointed as friend of the Court. The following points are to be decided in the appeal:

(i) Whether the suit is maintainable in the Civil Court?
(ii) Whether the prior approval of DIOS was necessary before terminating the services of the plaintiff-appellant?
(iii) Whether on the finding recorded by the first appellate court, the plaintiff is entitled to any relief?
(iv) Whether any relief can be granted to plaintiff-appellant in absence of Committee of Management, the DIOS and the State of UP?

POINT NO. 1: THREE EXCEPTIONS SHOULD BE EXTENDED.

9. The counsel for the defendant respondent submitted that the suit is not maintainable as,

- The suit is for declaration that termination order is illegal and for permanent injunction restraining the defendant-respondent from interfering his right to function as Class-IV employee;
- It is essentially a suit for specific performance of personal service; and
- The right can neither be enforced in a suit, nor such a suit can be decreed.

10. The counsel for the defendant-respondent also cited the decision in Executive Committee of Vaish Degree College, Shamli and others vs. Lakshmi Narain and others: AIR 1976 SC 888 (the Vaish College case) decided by the Supreme Court and brought to our notice the following observations of the Supreme Court:

'On consideration of the authorities mentioned above, it is, therefore, clear that a contract of personal service cannot ordinarily be specifically enforced and a Court normally would not give a declaration that the contract subsists and the employee, even after having been removed from service can be deemed to be in service against the will and consent of the employer.

This rule, however, is subject to three well-recognised exceptions—

(i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India;
(ii) where a worker is sought to be reinstated on being dismissed under the Industrial Law; and
(iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.'

This case has also been followed by a division bench of our court reported in Agarwal Digambar Jain Samiti Vs. Badri Prasad Srivastava (the Agrawal Digambar case). According to the counsel for defendant-respondent, the case in hand does not fall in any of the aforesaid three categories and as such it is not maintainable.

11. It is correct that the Supreme Court in the Vaish College case has laid down the three categories where a suit for contract of personal service has been held to be maintainable and this case is not covered in that but, are these three categories exhaustive? Was it necessary to provide exhaustive list of categories in that case? Shouldn't the observations be confined to the facts of that case?

12. The facts of the Vaish College case as found by the Supreme Court were as follows:

(i) The College was being managed by a society which was registered under the Societies Registration Act. It was held by the High Court that it is a statutory body. This was reversed by the Supreme Court and it was held that the committee of management

was not a statutory body or rather it was held to be a private body.

(ii) There was no agreement between the Executive Committee of the College and the Principal.

(iii) In absence of any agreement, the statutory provisions requiring prior approval of the Vice Chancellor did not apply.

13. The aforementioned findings are clear from the following observations of the Supreme Court:

It may be noticed that so far as the plea of the plaintiff-respondent that he had executed an agreement with the Executive Committee of the College which formed the basis of the terms of his contract of service was concerned the learned Additional Civil and Sessions Judge also affirmed the finding of the Munsif on this point and held that there was no such agreement. Even before us this finding was not disputed by the learned counsel for the plaintiff-respondent who has proceeded on the assumption that there was no agreement executed between the plaintiff and the defendant as alleged by the plaintiff. [Paragraph-5].

…

In the instant case, the statute merely enjoined that the agreement between the employer and the employee should be incorporated according to the form and conditions prescribed by the statute and until the said agreement is executed the provisions of the Statute would not apply proprio vigore.[Paragraph-12].

14. Thus it is clear that in the Vaish College case the services were terminated by a private body. There was also no violation of any statutory provision. On these facts, the three categories enumerated in the Vaish College case are exhaustive but if the facts are otherwise then it may not be so; for example:

(i) If a body (which is not a statutory body) is a state within the meaning of Article 12 of the Constitution and acts contrary to the regulations and byelaws framed by it then it will be violating article 14 of the Constitution. Can it be still said that a suit is not maintainable for enforcement of Article 14?

(ii) If a private body (which is neither statutory body nor a state within the meaning of Article 12 of the Constitution) acts contrary to mandatory provisions of law. Or in other words acts contrary to the mandate of the legislature. Can if still be said that a suit is not maintainable?

15. In our opinion on the facts of the Vaish College, the three categories mentioned therein are exhaustive. Nevertheless, if the facts are otherwise then they may not be so. In fact this was explained in the judgment itself by Justice Bhagwati in his concurring but separate judgment:

'But in any event it does appear to me that the three exceptions formulated in the statement of law laid down by this Court in the above decisions are not intended to be and cannot be exhaustive. The categories of exceptions to the general rule should not be closed, because any attempt at rigid and exhaustive formulation of legal rules--any attempt to put law in a straitjacket formula--is bound to stifle the growth of law and seriously cripple its capacity to adapt itself to the

changing needs of society. In fact, Ray J., as he then was, speaking on behalf of this Court in Sirsi Municipality v. Cecelia Kom Francis, (1973) 3 SCR 348= (AIR 1973 SC 855) pointed out that the third exception applied not only to employees in the service of "bodies created under statutes", but also to those in the employment of "other public or local authorities." It may be a possible view -- and some day this Court may have to consider it --that where law, as distinct from contract, imposes a mandatory obligation prescribing the kind of contract which may be entered into by an employer and the manner in which alone the service of an employee may be terminated, any termination of service effected in breach of such statutory obligation would be invalid and ineffective and in such a case the court may treat it as null and void.' [Paragraph 32 of the judgment].

16. In our opinion the following two categories may be added to three mentioned in the Vaish College case:

(iv) Where a body which is non-statutory but is 'State' within the meaning of Article 12 of the Constitution acts contrary to the Rules, Regulations and bye-laws framed by it.
(v) Where a private body (which is neither statutory nor 'State' within the meaning of Article 12 of the Constitution) acts in violation of any mandatory provision of statutory law.

17. We would have, either finally decided this point or if necessary referred it to the larger bench for decision, however, in view of our finding on other points, it is not necessary to do so. Even if it is taken that these two categories as mentioned above are added, no relief can be granted to the plaintiff-appellant. (Kindly see Appendix-I)

POINT NO. 2: NO VIOLATION OF ANY STATUTORY PROVISION.

18. The committee of management is not a statutory body. This is clear from the VaishCollege case as well as Aley Ahmad Abidi Vs. DIOS, Allahabad and others AIR 1977 Allahabad 539. The committee of management is also not a State within the meaning of Article 12 of the Constitution. So the fourth exception does not apply. However, is there violation of any mandatory provision of statutory law?.

19. The counsel for the appellant submitted that before terminating the services of class IV employee prior approval of the Inspector was necessary under regulation 31 of Chapter-III. In support of his submission, he has also brought to our notice the following decisions:

(i) Daya Shanker Tewari vs. Principal RDBM Uchchatar Madhyamik Vidyalay Neogaon, Mirzapur and others: 1998 (1) ESC 403 (All);
(ii) Principal Rastriya Inter College, Bali Nichlaul, vs. DIOS and others: 2000 (1) ESC 704 (All);
(iii) Raj Kumar Sharma vs. Joint Director of Education (Girls), directorate of Education UP Allahabad and others (1993) 2 UPLBEC 1402.

Is this submission correct?

20. Section 16-G of the Act relates to conditions of service. Initially the title

of this section was 'Conditions of Service of Teachers'. Subsequently by UP Act No. 26 of 1975 this title was amended and words 'Conditions of service of Heads of Institutions, teachers and other employees' were substituted. Sub-section (1) of section 16-G {Section 16-G(1)} provides that conditions of service of every person employed in a recognised institution may be prescribed by Regulations and agreement which is not inconsistent with provisions of the Act and the Regulations. Sub-section (3) of Section 16-G {Section 16-G(3)} provides that the Principal, Headmaster and teacher may not be discharged, removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments without the prior approval in writing of the Inspector. The word Inspector means the District Inspector of Schools, (DIOS) and in relation of institution for girls, the Regional Inspectress of Girls School {Section 2(bb) of the Act}. A party aggrieved by grant of approval can also file appeal before the Regional Deputy Director of Education. Section 16-G (3) does not apply to the non-teaching staff.

21. The Board has framed regulations under section 15 of the Act. Regulation 31 of Chapter III of the Regulation (see Appendix-II of the judgment) provides that the prior approval of the Inspector will be necessary for the punishments enumerated therein. This includes dismissal also which is the case in present. Regulation 31 unlike section 16-G(3) of the Act is not confined to the teachers and Head of Institutions but refers to the 'employees' which prima facie include non teaching staff as well as class IV employees also.

22. Regulation 31 has been amended twice:

(i) By the Notification no. 789 (1)/15(7)-75 dated 1st March 1975 published vide No. Board-7/562-V-8 (Board September 1974) Allahabad dated 10th March 1975 (the 1975 Notification). By this notification two clauses were added in regulation 31.

(ii) By Notification No. 8372/15(7)-12(103)/77 Lucknow: dated 27th February, 1978 (the 1978 Notification). By this Notification the two clause added by the 1975 Notifications were modified.

23. The effect of the first clause added by the 1975 Notification was to empower the principal to award any punishment to class IV employees and his order is subject to appeal before the Committee of Management. The second clause provides further appeal to the DIOS/Regional Inspector. These clauses are further amended by the 1978 Notification, however substantially they remain the same.

24. The services in the present case were terminated on 12.6.1977 and as such the Regulation 31 as amended by the 1975 notification was applicable. The question is, whether Regulation 31 as amended by the 1975 Notification requires prior approval of the Inspector before terminating the services a class IV employee or not.

25. It is correct that the cases (mentioned in paragraph 19 of this judgement) do support the submission of the plaintiff-appellant. However these cases have not taken into account the

amendment made in Regulation 31 by the 1975 or 1978 Notification. They have taken into account regulation 31 as it was originally framed. These cases have not considered the regulation 31 as amended from time to time and can not be pressed to show that prior approval was necessary before terminating services of class IV employees. This question has to be decided in the light of the regulation 31 of Chapter III as amended.

26. Regulation 31 as it was originally framed required prior approval of the DIOS before terminating service of an employee. However, after addition of two clauses in regulation 31 in 1975 it clearly empowered the principal to terminate the services of class-IV employee. It further provided an appeal to the Committee of Management and thereafter to the Inspector itself. In case prior approval of Inspector was necessary before terminating services of class IV employee then what was the point in providing appeal first to the committee of management and then to the Inspector. In case the Inspector has already granted approval for terminating the service then can he change his decision in the appeal. In our opinion the purpose of including two clauses by 1975 notification, which continued with some modification by 1978 notification, clearly show that the principal is empowered to terminate the services of the class-IV employee without taking any prior approval of the Inspector and his decision is final; it is subject to an appeal before the committee of management then to the appeal before the Inspector.

27. We are not alone in taking this view. It is also so held by a division bench of our court after considering these amendments in the case of Ali Ahmad Ansari vs. DIOS Kushinagar and others: 2006(3) ESC 1965 All) DB). The court held that:

'The scheme of the Regulations 31 to 45 Chapter-III, thus, do not provide that prior approval is required for awarding punishment of removal or termination of a Class-IV employee from the District Inspector of Schools.'

28. In view of above we hold that after amendment of Regulation 31 by the 1975 Notification, it is not necessary to take prior approval of the Inspector before terminating the services of a Class-IV employee.

29. There will be no difference in outcome of this case, even if the three exceptions laid down in the VaishCollege case are extended by the two exceptions mentioned in paragraph 16 of this judgement: this case is neither covered by the fourth nor by the fifth.

POINTS NO. 3: FINDING NOT VITIATED

30. In our opinion, even if it is taken that the prior approval of the Inspector was necessary and the suit was maintainable before the Civil Court no relief can be granted to the plaintiff-appellant.

31. The trial court had held in favour of the plaintiff-appellant but the appellate court has recorded the following findings:

- The defendant-respondent was officiating principal and could terminate the services of plaintiff-appellant.

- There is no violation of principle of natural justice in terminating the services of the plaintiff-appellant as he himself admitted his guilt and his admission was not properly explained.

32. These are findings of fact. There is nothing to show that these findings are illegal. On these finding, even if the prior approval of Inspector was necessary no relief could be granted to the plaintiff-appellant.

POINT NO. 4: NECESSARY PARTY NOT IMPLEADED.

33. The School was a recognised institution. The grain-in-aid is given by the State Government. It is given for the post that was held by the plaintiff-appellant. The committee of management, the State Government and the DIOS have not been impleaded as parties. In their absence no relief can be granted as the damages are to be paid by the State Government. It is not a fit case in which any relief should be granted in absence of these parties. This is also clear from the decision reported in (2001) 10 SCC 11; Shiv Kumar Tiwari (D) Lrs Vs. Jagar Narain Rai and others.

CONCLUSIONS

34. Our conclusions are as follows:

(a) In a suitable case, the court may consider whether the three exceptions mentioned in the VaishCollege case are exhaustive or not and may consider including the following two more exceptions,

(iv) Where a body which is non-statutory but is State within the meaning of Article 12 of the Constitution acts contrary to the Rules, Regulations and Bye Laws framed by it.

(v) Where a private body (which is neither statutory nor state within the meaning of Article 12 of the Constitution) acts in violation of any mandatory provision of statutory law.

(b) After amendment of regulation 31 by the 1975 Notification prior approval of the Inspector (DIOS here) is not necessary before terminating the services of class IV employee.

(c) No mandatory provision of statutory law was violated before terminating the services of the plaintiff appellant.

(d) In absence of of State and DIOS as a party, no relief can be granted to the plaintiff appellant.

35. In view of our conclusions, the appeal is dismissed however, the parties shall bear their own cost.

Appendix-I

Apart from the VaishCollege case, some other cases were also cited before us. As we have not finally expressed our opinion on the first point, we have not referred to them in our judgement but wish to refer them here in case they are so required in future.

Cases Cited By The Defendant-Respondent

J. Tiwari vs. Jwala Devi Vidya Mandir AIR 1981 SC 122 (the JwalaDevi case) and UPSW Corporation vs. CK Tyagi case AIR 1979 SC 1244 (the

Warehousing case) were cited by the counsel for the defendant-respondent.

The Jwala Devi case has merely assumed that the Vaish College Case is correct and the court was influenced by the fact that the plaintiff did not attempt to mitigate the damages.

In the Warehousing case, there was breach of regulation 16(3) while conducting the enquiry. The Supreme Court refused to grant the declaration that the termination is null and void as well as dthe eclaration that the employee continues to be in service. However this was on the following finding (paragraph 31 of the judgement,

'An order made in breach of the regulations ... would not be in breach of any statutory obligation, ... The Act does not guarantee any statutory status to the respondent, nor does it impose any obligation on the appellant in such matters. ... It is not in dispute that, in this case, the authority who can pass an order of dismissal has passed the same. Under those circumstances, a violation of regulation 16(3), has alleged and established in this case, can only result in the order of dismissal being held to be wrongful and, in consequence, making the appellant liable for damages. But the said order cannot be held to be one which has not terminated the service, albeit wrongfully or which entitles the respondent to ignore it and ask for being treated as still in service.

Cases Cited By The Plaintiff-Appellant

The plaintiff-appellant has cited P. Shri AKUM Vidyalay vs. B. Ram: 1978 (4) ALR 62 and Sachindanand Dubey vs. Committee of Management (1995) 3 UPLBEC 1682. In these cases the VaishCollege case was distinguished.

Appendix-2

The Regulation 31 as it was initially framed was as follows:

31- कर्मचारियों की प्राप्य दंड, जिसके लिए निरीक्षक अथवा मंडलीय निरीक्षिका की पूर्व स्वीकृति आवश्यक होगी, निम्नलिखित में से किसी एक रूप में हो सकती है:-

(क) वियुक्ति;
(ख) पृथक्करण अथवा प्रमुक्ति;
(ग) श्रेणी में अवनति
(घ) परिलब्धियों में कमी

The followings two clauses were added by the 1975 Notification.

चतुर्थ श्रेणी कर्मचारियों को उपरोक्त कोई दंड देने हेतु प्रधानाचार्य अथवा प्रधानाध्यापक सक्षम होगा। सक्षम अधिकारी द्वारा दंड दिये जाने की दशा में चतुर्थ श्रेणी कर्मचारी द्वारा प्रबन्ध समिति को अपील की जा सकेगी। यह अपील दंड सूचित किये जाने की तिथि से एक माह के अन्दर प्रस्तुत हो जानी चाहिए। समस्त आवश्यक अभिलेखों पर विचार करने एवं कर्मचारी की, यदि चह प्रबन्ध समिति के समक्ष स्वयं उपस्थिति होना चाहे, सुनवाई के पश्चात प्रबन्ध समिति अपील पर निर्णय देगी।

चतुर्थ श्रेणी कर्मचारी को यह भी अधिकार होगा कि उसकी अपील पर किये गये प्रबन्ध समिति के निर्णय के विरूद्ध वह जिला विद्यालय निरीक्षक/मंडलीय बालिका विद्यालय निरीक्षिका को, निर्णय सूचित किये जाने की तिथि से एक माह के अन्दर, अभ्यावेदन कर सकेगा। जिला विद्यालय निरीक्षक/मंडलीय बालिका विद्यालय निरीक्षिका का निर्णय अन्तिम होगा।

अभ्यावेदन के प्रस्तुतीकरण, विचार एवं निर्णय के सम्बन्ध में आवश्यक परिवर्तन के साथ इस अध्याय के विनियम 86 से 98 लागू होंगे।

The two clauses added by the 1975 Notification were substituted by the followings clauses by the 1978 Notification.

चतुर्थ श्रेणी कर्मचारियों को उपरोक्त कोई दंड देने हेतु प्रधानाचार्य अथवा प्रधानाध्यापक सक्षम होगा। सक्षम अधिकारी द्वारा दंड दिये जाने की दशा में चतुर्थ श्रेणी कर्मचारियों द्वारा प्रबन्ध समिति को अपील की जा सकेगी। यह अपील दंड सूचित किये जाने की तिथि से एक माह के अन्दर प्रस्तुत हो जानी चाहिए और उस पर प्रबन्ध समिति द्वारा निर्णय अपील की प्राप्ति की तिथि से अधिकतम ६ सप्ताह के भीतर दे दिया जावेगा। समस्त आवश्यक अभिलेखों पर विचार करने एवं कर्मचारी की, यदि वह प्रबन्ध समिति के समक्ष स्वयं उपस्थिति होना चाहे, सुनवाई के पश्चात प्रबन्ध समिति अपील पर निर्णय देगी।

चतुर्थ श्रेणी कर्मचारी को यह भी अधिकार होगा कि उसकी अपील पर किये गये प्रबन्ध समिति के निर्णय के विरूद्ध वह जिला विद्यालय निरीक्षक/मंडलीय बालिका विद्यालय निरीक्षिका को, निर्णय सूचित किये जाने की तिथि से एक माह के अन्दर, अभ्यावेदन कर सकेगा।

किन्तु प्रतिबन्ध यह होगा कि यदि प्रबन्ध समिति उपर्युक्त निर्धारित छः सप्ताह की अवधि के भीतर अपना निर्णय उपरोक्त अपील पर न दे तो सम्बन्धित कर्मचारी अपना अभ्यावेदन सीधे जिला विद्यालय निरीक्षक/मंडलीय बालिका विद्यालय निरीक्षिका को उपरोक्त छः सप्ताह की अवधि बीत जाने पर दे सकता है।

जिला विद्यालय निरीक्षक/मंडलीय बालिका विद्यालय निरीक्षिका द्वारा उपरोक्त अभ्यावेदन की प्राप्ति की तिथि से अधिकतम तीन माह के भीतर निर्णय दे दिया जायेगा और यह निर्णय अन्तिम होगा।

अभ्यावेदन के प्रस्तुतीकरण, विचार एवं निर्णय के सम्बन्ध में आवश्यक परिवर्तन के साथ इस अध्याय के विनियम 86 से 98 में लागू होंगे।

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.42264 of 2001

Jai Prakash ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh
Counsel for the Respondents:
S.C.

U.P. Office Inspection Service Rules, 1990-Rule 21-seniority-peitioner got promotion-under promotion quota on 1.7.96 in the vacancy of 1996-97-direct appointee selected against the vacancy of 1989-90-admitedly the substantive date of appointment of petitioner is 2.12.98 whereas direct recruities 29.8.98-placement of petitioner below the direct recruities-held-proper-there can not be retrospective promotion.

Held: Para 10 & 11

From a reading of Rule 21, we find that seniority has to be determined according to the date of substantive appointment.

The date of substantive appointment which is the criteria fixed for determining the seniority under sub-rule (1) of Rule 21 of the Rules, in respect of the petitioner is subsequent to the date of substantive appointment of the direct recruits and, therefore, the petitioner has rightly been placed after the direct recruits. Even though under the first proviso to sub-rule (1) of Rule 21 of the Rules, the provisions have been made to treat the date of order as substantive appointment if the appointment order specifies a particular back date, it does not give any advantage to the petitioner to claim a back date for substantive appointment as the appointment order does not mention the petitioner's appointment from any back date.

Case law discussed:
J.T. 1991 (5) SC-35
1991 Supp. (2) SCC-363

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

1. By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner, Jai Prakash, seeks the following reliefs:-

(i) a writ, order or direction in the nature of certiorari quashing the impugned orders dated 5.11.2001 (Annexures No.12 & 13 to this petition) passed by respondent no.1.
(ii) a writ, order or direction in the nature of mandamus commanding the respondent no.1 to fix the seniority of the petitioner above Faiyyaz Ahmad and below Sri R.D.Sonkar in the seniority list treating his date of promotion to be 1.7.1996.
(iii) any other writ, order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case to meet the ends of justice.
(iv) award cost of the petition to the petitioner."

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

According to the petitioner, he was appointed as a Routine Grade Clerk in the office of the Chief Inspector, Government Offices, U.P., Lucknow, with effect from 1.7.1976. He belongs to the Scheduled Caste. As per the provisions contained in the U.P. Office Inspection Service Rules, 1990 (hereinafter referred to as "the Rules"), 15% of the total number of the posts of Inspectors are to be filled up by way of promotion from the permanent employees who had put in more than 20 years of service in the clerical cadre. 3 posts of Inspectors were available on 1.7.1996. According to the petitioner, these posts were to be filled up by way of promotion. As the petitioner had completed 20 years of continuous service as Routine Grade Clerk on 1.7.1996, he staked his claim, by making a representation on 2.7.1996, for being considered for promotion on the post of the Inspector. The promotion was to be made in consultation with the U.P. Public Service Commission, Allahabad (hereinafter referred to as "the Commission"). The Principal Secretary, Administrative Reforms Department I, Lucknow, vide letter dated 8.10.1996, asked the Secretary of the Commission, respondent no.10, to arrange for holding of a meeting of the Selection Committee for considering the cases of promotion. No action was taken in the matter. The petitioner sent a reminder to the respondent no.1 on 19.12.1996. The Commission made certain query from the State Government, which was replied by the Chief Inspector, Government Offices, U.P., Allahabad, vide letter dated 20.11.1996. Instead of considering the case of the petitioner for promotion, the respondent no.1 proceeded to fill up, by way of direct recruitment, certain other vacancies of Inspectors which were already there in the Department to which the petitioner got an objection filed on 2.8.1997 through his union. No heed was paid to the request made by the petitioner. The Commission interviewed the candidates for appointment on the post of the Inspectors by way of direct recruitment in August, 1997 and made the recommendations. The State Government issued an order on 29.8.1998 appointing 10 persons as Inspector directly and sending them for six months training. They were required to submit their joining on or before 30.9.1998. Thereafter the matter relating to promotion was considered and vide order dated 2.12.1998, the petitioner and two other persons were promoted on the post of the Inspector. A tentative seniority list was issued on 19.10.2001. Objections were invited. The petitioner filed his objections on 24.10.2001. The respondent no.1, vide

order dated 5.11.2001, had rejected the objection preferred by the petitioner and, vide order of the same date, had finalised the seniority list. It may be mentioned here that while rejecting the objection filed by the petitioner, the respondent no.1 has held that the petitioner has been appointed/promoted against the vacancy for the year 1996-97 and there was no question of his being promoted in respect of the vacancies of the earlier years. Some time is taken by the Commission for considering the promotion. Further, the direct recruits have been selected and appointed in respect of the vacancies for the recruitment years 1989-90 to 1995-96 and, therefore, these direct recruits have rightly been placed above the petitioner in the seniority list. The petitioner is aggrieved by finalisation of the seniority list as, according to him, he was entitled to be granted promotion to the post of the Inspector with effect from 1.7.1996 and the action of the respondent no.1 in granting him promotion from 2.12.1998 was totally illegal and arbitrary and, therefore, his seniority ought to have been fixed taking the date of promotion and joining on the post of the Inspector on 1.7.1996.

3. In the counter affidavit filed by S.D. Padalia, Chief Inspector of Government Officers, U.P., Allahabad, on behalf of the respondent no.1, it has been stated that the requisition for 12 posts of the Inspector of Government Offices by direct recruitment was sent to the Secretary of the Commission, vide letter dated 15.4.1996, whereas the requisition for selection by promotion was sent vide letter dated 8.10.1996 and 15.10.1998. The recommendations of the Commission in respect of 12 posts of direct recruits were received by the State Government on 14.10.1997 and the appointment letters were issued on 29.8.1998, whereas the recommendations in respect of the selection by promotion were sent to the State Government by the Commission vide letter dated 18.11.1998 and appointment letters were issued on 2.12.1998. The petitioner had been selected against the vacancies of the recruitment year 1996-97 and not of any prior recruitment year and, therefore, he can be placed in the seniority list in respect of selection made against the vacancies of that recruitment year only. Writing letter by the Secretary of the State Government to the Secretary of the Commission, on the basis of the so-called representation dated 2.7.1996, has been denied. The seniority list, as finalised, has been defended.

4. In the counter affidavit filed by Radhey Lal, Section Officer, U.P. Public Service Commission, Allahabad, on behalf of the respondent no.10, it has been stated that the Selection Committee for making promotion to the post of Inspector, Government Offices, for the recruitment years 1995-96 to 1997-98 made recommendations on 24.10.1998 and the petitioner was found suitable for one vacancy reserved for the Scheduled Caste candidate in the recruitment year 1996-97. The recommendation was sent on 18.11.1998 whereas the Commission had interviewed the candidates for the post in question for making selection by way of direct recruitment and sent its recommendations of selected candidates vide letter dated 7.10.1997.

5. In the rejoinder affidavit filed by the petitioner he has stated that when the vacancies for the year 1996-97 was available, the Commission ought not to

have taken such a long time in considering the matter of promotion and the State Government ought to have granted promotion to the petitioner retrospectively with effect from the date he became eligible and entitled. The petitioner cannot be made to suffer on account of inaction on the part of the respondents.

We have heard Sri G.K. Singh, learned counsel for the petitioner, and the learned Standing Counsel on behalf of the respondents.

6. The learned counsel for the petitioner submitted that under Rule 3(l) of the Rules, "year of recruitment' has been defined to mean a period of 12 months commencing from the first date of July of a calendar year. Under Rule 5 of the Rules, the source of recruitment has been given. Clause (b) of sub-rule (1) of Rule 5 of the Rules provides for recruitment to the post of the Inspector by way of promotion from the permanent ministerial employees who have put in 20 years of continuous service and the total strength of the promotees, at any time, have been fixed at 15% of the cadre strength. Under Rule 16 of the Rules, the procedure for recruitment by promotion to the post of the Inspector has been provided. Rule 18 of the Rules deals with the appointment. Rule 21 of the Rules deals with the seniority. According to him, taking into consideration the various provision of the Rules and also the first proviso to sub-rule (1) of Rule 21, appointment can be made by specifying a particular back date. He, thus, submitted that the petitioner was entitled to be promoted with effect from 1.7.1996 and consequently ought to have been placed above the direct recruits who were appointed on 29.8.1998. He further submitted that, under Rule 27 of the Rules, the State Government has been empowered to relax or dispense with the requirement of any rule which may cause undue hardship in a particular case. Thus, the State Government ought to have issued an order appointing the petitioner on the post of the Inspector with effect from 1.7.1996 and the petitioner should not be made to suffer for no fault of his. In support of his submissions, he has relied upon a decision of the Apex Court in the case of **Nirmal Chandra Bhattacharjee and others v. Union of India and others**, JT 1991(5) SC 35 = 1991 Supp (2) SCC 363.

7. The learned Standing Counsel, however, submitted that the petitioner has been promoted on the post of the Inspector in respect of vacancies which were available during the recruitment year 1996-97 as he became eligible for promotion on 1.7.1996. His promotion has been made on 2.12.1998. The direct recruits have been selected in respect of the vacancies which had occurred during the recruitment years 1989-90 to 1995-96 and the requisition was sent on 15.4.1996 by the State Government to the Commission for making selection on the post of the Inspector to be filled up by direct recruitment. It was much before the date on which the petitioner became eligible for being considered for promotion under 15% promotional quota, i.e., 1.7.1996. The selected direct recruits were appointed on 29.8.1998 whereas the recommendation was sent by the Commission on 14.10.1997. In completing the exercise for filling up the post whether by direct recruitment or by way of promotion, some time is taken and, therefore, no person can take

advantage of the time taken for completing the process. He further submitted that, under Rule 21 of the Rules, the seniority has to be determined from the date of the order of substantive appointment and, as admittedly the petitioner's date of substantive appointment is 2.12.1998 whereas that of the direct recruits is 29.8.1998, the petitioner has rightly been placed below the direct recruits.

8. Having given our anxious consideration to the various pleas raised by the learned counsel for the parties, we find that it is not in dispute that the selection of direct recruits which have been selected and appointed vide order dated 29.8.1998, was in respect of the vacancies which had arisen during the recruitment years 1989-90 to 1995-96. The requisition was sent by the State Government on 15.4.1996. The selection was made by the Commission and recommendations was made on 14.10.1997. The petitioner has been selected for promotion in respect of the vacancies arising or available during the recruitment year 1996-97 as he became eligible for the first time for being considered for promotion on 1.7.1996 which fell vacant during the recruitment year 1996-97. The requisition was sent to the Commission on 8.10.1996 and 15.10.1998. The Commission had recommended on 18.11.1998 and the appointment letter to the petitioner was issued on 2.12.1998.

9. It would be relevant to reproduce Rules 21 and 27 of the Rules, for ready reference:-

"21. Seniority. - (1) Except as hereinafter provided, the seniority of persons in any category of post shall be determined from the date of the order of substantive appointment and, if two or more persons are appointed together, by the order in which their names are arranged in the appointment order :

Provided that if the appointment order specifies a particular back date with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean the date of issue of the order:

Provided further that, if more than one orders of appointment are issued in respect of any one selection the seniority shall be as mentioned in the combined order of appointment issued under sub-rule (2) of rule 18.

(2) The seniority inter se of persons appointed directly in the result of any one selection, shall be the same as determined by the Commission or as the case may be, by Selection Committee:

Provided that a candidate recruited directly may lose his seniority if he fails to join without valid reasons when vacancy is offered to him. The decision of the appointing authority as the validity of reasons shall be final.

(3) The seniority inter se of persons appointed by promotion on the result of any one selection shall be the same as it was in the cadre from which they were promoted."

"27. Relaxation from the conditions of service. - Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular

case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that where a rule has been framed in consultation with the Commission that body shall be consulted before the requirements of the rule are dispensed with or relaxed."

10. From a reading of Rule 21, we find that seniority has to be determined according to the date of substantive appointment.

11. The date of substantive appointment which is the criteria fixed for determining the seniority under sub-rule (1) of Rule 21 of the Rules, in respect of the petitioner is subsequent to the date of substantive appointment of the direct recruits and, therefore, the petitioner has rightly been placed after the direct recruits. Even though under the first proviso to sub-rule (1) of Rule 21 of the Rules, the provisions have been made to treat the date of order as substantive appointment if the appointment order specifies a particular back date, it does not give any advantage to the petitioner to claim a back date for substantive appointment as the appointment order does not mention the petitioner's appointment from any back date.

12. We further find that the State Government has been empowered, under Rule 27 of the Rules, to dispense with or relax the requirement of any Rule but, in the absence of any such power having been exercised, the petitioner cannot claim any benefit. The insistence of the petitioner to get a declaration that he be treated as having been appointed on the post of the Inspector on 1.7.1996, taking recourse to the provisions of Rule 27 of the Rules, if accepted, would also lead the Court to give a direction to the State Government to provide for retrospective operation of the date of substantive appointment of the direct recruits as they have been selected against the vacancies which had occurred during the recruitment years 1989-90 to 1995-96, i.e., prior to the vacancies in which the petitioner has been appointed. The decision of the Apex Court in the case of **Nirmal Chandra Bhattacharjee** (supra) relied upon by the learned counsel for the petitioner is of no help. In para 5 of the report, the Apex Court has held as follows:-

"5. One of the principles of service is that any rule does not work to prejudice of an employee who was in service prior to that date. Admittedly the vacancies against which appellants were promoted had occurred prior to restructuring of these posts. It is further not disputed that various other posts to which class "IV' employees could be promoted were filled prior to August 1, 1983. The selection process in respect of Ticket Collectors had also started prior to August 1, 1983. If the department would have proceeded with the selection well within time and would have completed it before August 1, 1983 then the appellants would have become Ticket Collectors without any difficulty. The mistake or delay on the part of the department, therefore, should not be permitted to recoil on the appellants. Paragraph "31' of the restructuring order itself provides that vacancies in various grades of posts

covered in different categories existing on accordance with the procedure which was in vogue before August 1, 1983."

13. Applying the principle laid down in the aforesaid case to the facts of the present case, we find that the process of selection for direct recruitment had started by sending the requisition on 15.4.1996 much before the date when the petitioner became eligible for promotion. Thus, the principle that any prejudice had been caused to the petitioner cannot be accepted.

14. In view of the foregoing discussions, we do not find any merit in the petition. It is dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2006

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 29857 of 1999

Mohan Lal and others ...Petitioners
Versus
U.P. Co-operative Institutional Services Board and others ...Respondents

Counsel for the Petitioners:
Sri K.N. Misra

Counsel for the Respondents:
Sri V.K. Goel
Sri Raj Kumar
Sri V.K. Shukla
S.C.

Constitution of India, Art. 226-Principle of Natural Justice-cancellation of selection including appointment-petitioner were appointed on class IV post-in District Cooperative Bank-cancellation by Secretary/G.M. on the ground the appointment were not transparent most of them found relative of the officers-termination order-can not be raised-who itself the result of fraud-not interfered.

Held: Para 8

In the present case the impugned letter reveals that undoubtedly a fraud has been committed in the process of selection and the appointment of the petitioners,. Therefore any technical infringement or nonobservance of principles of natural justice can not deflect the course of justice. In *S.L. Kapoor Vs. Jagmohan and Ors. AIR 1981 SC 136*, it has been held that where from admitted and undisputed fact, only one conclusion is possible and under the law only one course is permissible to be adopted, the court should not enforce the observance of the principles of natural justice, as it would amount to giving premium to unscrupulous persons by getting a futile writ issued.

1994 UPLBEC-129
AIR 1992 SC-1555
1992 AWC 780
AIR 1981 SC-136
1990 (3) SCC-655
2004 (2) UPLBEC-1473

(Delivered by Hon'ble Pankaj Mithal, J.)

1. All the four petitioners were appointed on Group-IV posts in the District Co-operative Bank, Meerut under the order dated 15.5.1999 issued by the Secretary/ General Manager, District Co-operative Bank, Meerut. However Respondent No. 2- Addl. Registrar (Banking) co-operative Societies U.P. Lucknow vide letter dated 8th July 1999 directed the Secretary/ General Manager, District co-operative Bank Limited to immediately cancel all the appointments made on the Group IV posts including that of the petitioners, as the selection and

the appointments were not transparent and regular and all the candidates selected and appointed were related to some officers. This letter of respondent No. 2 has been challenged by the petitioner by means of the present writ petition and it has been prayed that the the working of the petitioners may not be disturbed.

2. The contention of the petitioner is that that the petitioners were appointed following the procedure prescribed under the U.P. Co-operative Societies Employees Services Regulations 1975 (hereinafter referred to as Regulations). The posts were duly advertised in the local daily newspaper 'Heera Times' dated 7.4.1999 and applications were also invited from the Employment Exchange. On 28.4.1999 the duly constituted Selection Committee issued the select list in which the names of the petitioner were also included. The said selection list was approved by the Secretary U.P. Co-operative Institutional Services Board, Lucknow- respondent No. 1 vide letter dated 13.5.1999. Thereafter the order of appointment dated 15.5.1999 was issued and the appointments of the petitioners were made.

3. Sri K.N. Misra, learned counsel for the petitioner argued that the services of the petitioner can not be terminated without approval of the respondent No. 1 as provided under Regulation 87 of the Regulations more particularly without notice or affording opportunity of hearing to the petitioners.

4. Sri V.K. Goel, learned counsel for Respondent No. 1 and Sri V.K. Shukla appearing for respondent No. 4 submitted that this is not a case were any punishment as provided under the Regulations has been imposed upon the petitioners and they have been ordered to be removed from service by way of punishment. The impugned letter has been issued to cancel the appointments of the petitioners as they have been unlawfully appointed. All the candidates in the select list from which the petitioners have been appointed were relatives and favourites of the members of the Selection committee. The Selection Committee prepared the Select list without advertising the post properly in newspapers having wide circulation. The local daily newspaper Heera Times is not a widely circulated newspaper of any standard. The notice was placed on the notice board on 12.4.1999 fixing last day for submitting application as 16.4.1999 and therefore only four days time was given to the applicants to apply. None of the candidates recommended by the Employment Exchange were selected. The relationship of each of the selected candidate with some officer of the Bank has also been described in the counter affidavit. Thus it has been argued that the procedure adopted for the appointment of the petitioners was not transparent and they were unlawfully appointed. Accordingly the respondent No. 2 has committed no illegality in issuing direction for cancelling their appointments. It has also been argued that in the above circumstances, since fraud was played in getting the appointments, therefore, no notice or opportunity of hearing is necessary before cancelling all the appointments. Lastly it has been submitted that the writ petition is premature, as on the basis of the impugned letter the appointments of the petitioners have not been canceled.

A perusal of the impugned letter reveals that it only directs the Appointing Authority to cancel the appointments of the category IV employees who have been appointed as according to the preliminary Enquiry made by the office of the Commissioner Meerut Division, Meerut it transpired that the selection was not transparent and the appointments were made unlawfully on the basis of favouritism. It is not an order terminating the services of the petitioner. There is no order pursuant to the above letter by which the services of the petitioners can be said to have been terminated. Therefore, the said order would not amount to order of punishment pursuant to any disciplinary proceeding imposing any penalty upon the petitioners and as such would not be an order which would require prior concurrence of the respondent No. 1 as contemplated by regulation 87. Thus, the submission of the learned counsel for the petitioner that the impugned letter is unsustainable as no prior approval of the respondent No. 1 has been taken, is misconceived and has no merit. It is therefore fails.

5. The two authorities ***1994 UPLBEC 129 Munne Khan Pathan Vs. Jalaun District Co-operative Bank Limited and 1992 AWC 780 Shekh Abdul Kalam Azad Vs. B.M. Bohra, Managing Director/ Chairman, U.P. Co-operative spinning Mill and others*** cited by the learned counsel for the petitioner in support of his contention that the services of the petitioner cannot be terminated without the prior concurrence of the respondent No. 1 are of no help to him in so far as the services of the petitioners have not been terminated by way of punishment under the Regulations. Secondly, the direction to cancel the appointment of the petitioners is not an order of punishment as contemplated under the regulations and therefore regulation 87 of the regulations does not come into ply at all.

6. The next submission that the appointments of the petitioners cannot be cancelled without giving them notice or opportunity of hearing is also of no force. First for the reason that so far there is no order cancelling the appointment. Moreover, where fraud has been detected in the matter of appointment such appointment can not be sustained in the eyes of law, as fraud vitiates even the most solemn proceedings in any civilized system of jurisprudence vide ***AIR 1992 Supreme Court 1555 Smt. Shrishti Dhawan Vs. M/S Shaw Bros***. It is a cardinal principal of law that fraud and justice never dwell together and therefore the petitioners who have invoked the discretionary jurisdiction of the Court must have come before the Court not only with clean hands but with clean mind and clean heart. They should not expect the court to promote their malafide intention by upholding their appointments so as to allow fraud to perpetuate. The Hon'ble Apex Court in ***District Collector & Chairman Vizianagram Social Welfare Residential School Society Vs. M. Tripura Sundari Devi (1990) 3 SCC 655*** has observed as under:-

"If by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a Court of Law as the employment secured by fraud renders it voidable at the option of the employer."

7. The above view has been followed regularly by the Supreme Court and the other Courts in quick succession.

8. In the present case the impugned letter reveals that undoubtedly a fraud has been committed in the process of selection and the appointment of the petitioners,. Therefore any technical infringement or nonobservance of principles of natural justice can not deflect the course of justice. In ***S.L. Kapoor Vs. Jagmohan and Ors. AIR 1981 SC 136***, it has been held that where from admitted and undisputed fact, only one conclusion is possible and under the law only one course is permissible to be adopted, the court should not enforce the observance of the principles of natural justice, as it would amount to giving premium to unscrupulous persons by getting a futile writ issued.

9. The aim of following the principles of natural justice is to secure justice and not to perpetuate any illegality.

10. In the present set of circumstances the observance of principles of natural justice is not at all warranted when the conclusion, even if the petitioners were afforded opportunity of hearing, would not have been different. Besides, the entire selection has been found to be stinking therefore,individual innocence has no priority.

11. Sri V. K. Goel in support of his argument has placed reliance upon the judgment of the Division Bench of the Alld. High Court ***(2004) 2 U.P.LBEC 1473 Arvind Kumar Pipal and others Vs. Commissioner, Trade Tax, U.P., Lucknow and others.*** In the said case without giving individual notice to the selected candidates the entire selection process was cancelled. The court held that where irregularities were found in the selection process and the entire selection had been cancelled neither notice nor opportunity of hearing is necessary and no individual notice was required to be given to the selected candidates, as cancellation was passed on valid reasons and the Appointing Authority was within his jurisdiction to cancel the appointments. The above case law squarely applies to the facts and circumstances of the present case and therefore the argument that the principles of natural justice have not been followed falls to the ground.

12. In the last learned counsel for the petitioner submitted that the impugned letter is without jurisdiction the Addl. Registrar (Banking) Co-operative Societies, U.P. Lucknow has no authority under law to issue such directions. Be as it may be, it is pointless to go into the controversy, as the Appointing Authority is fully empowered under law to take suitable action for cancellation of the appointments, if it is found that the appointments were obtained by misrepresentation, concealment of fact or by playing fraud irrespective or independent of the above letter.

13. In view of the above, the writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2006

BEFORE
THE HON'BLE PRADEEP KANT, J.

Civil Misc. Writ Petition no. 30150 of 2000

Ram Prasad Kushwaha ...Petitioner
Versus
Vice Chancellor Bundelkhand University, Jhansi and others ...Respondents

Counsel for the Petitioner:
Sri R.S. Singh

Counsel for the Respondents:
Sri Prakash Padia
Sri R.P. Tiwari

Constitution of India, Art. 226-Cancellation of admission-admission to persue the B.Ed. course-on the basis of mark sheet of graduation from Bhartiya Kshiksha Parishad-refusal to participate in examination alongwith candidature-held proper-but omission on the part of university resulted wasting precious time of petition-direction to refused fee of Rs.5000/- alongwith damage of Rs.5000/- within one month.

Held: Para 11

For the lapse on the part of the University which has resulted into wasting of one year precious time of-his -youth-in pursuing the course of study as it was the duty of the University to deny admission to the petitioner at the very outset and in fact his form for admission should not have been entertained, makes the petitioner entitled to the refund of fee viz., Rs.5000/- from the University. Besides the aforesaid amount of fee, the petitioner is also entitled to the damages, for compensating him for the loss that he suffered, by pursing a course, to which he was not entitled, because of the mistake on the part of the University in admitting him and allowing him to carry on the studies for one year I assess these damages, to the tune of Rs.5000/-.

(Delivered by Hon'ble Pradeep Kant, J.)

1. By this petition Ram Prasad Kushwaha claims recognition of the degree of Bachelor of Programme (B.A.), (one sitting), of the Bhartiya Shiksha Parishad U.P. and consequently also the prayer for declaration of the result of the B.Ed. Examination conducted by the Bundelkhand University for the academic session 1997-98. It appears that the petitioner swayed by the scheme of the Govt. of India for providing Education from Open Universities, applied for admission in the aforesaid examination of B.A. to the Bhartiya Shiksha Parishad Uttar Pradesh which is a registered body under the provisions of Societies Registration Act, 1860 for providing education under the Open University System. The petitioner completed his one year course which is known as one sitting course of Bachelor of Programme (B.A.) in August, 1995. He was issued a mark sheet which shows that Bhartiya Shiksha Parishad U.P. conducted examination under Open University System, the name of which is Bachelor of Programme (B.A.) in one sitting. The petitioner succeeded in that examination.

2. After clearing the aforesaid examination the petitioner applied for admission in the B.Ed. Course of the Bundelkhand University wherein he became successful in the test and was required to deposit Rs.5000/- on 11.7.97

under the special Scheme for entrance. The petitioner was issued admission card in B.Ed. Special scheme on 12.7.97; accordingly the petitioner was given admission in Atarra College Atarra District Banda. The petitioner got himself admitted in the aforesaid college and as per his case after one year study he appeared in the examination in the year 1998 with Roll No. 97252. However, the Bundelkhand University did not declare the result and on contacted by the petitioner he was informed that his B.A. (Bachelor of Programme) examination conducted by the Bhartiya Shiksha Parishad was neither a recognised degree nor was a degree of the minimum duration of 3 years which is the usual duration of graduate degree, the minimum basic educational qualification required for pursuing B.Ed course. The petitioner therefore has approached this Court for the relief's aforesaid.

3. A counter affidavit has been filed by the University specifically stating therein that B.A. Examination which has been cleared by the petitioner is not a recognised degree and that in the absence of the minimum basic educational qualification, the petitioner could not have been admitted in the B.Ed. Course nor he could be allowed to appear in
the examination but since due to inadvertence this fact could not be noticed by the University at the time of admission therefore admission was wrongly given, but this fact in itself could not give any right to the petitioner to get the result declared of B.Ed. Examination. A plea regarding the duration of the course of the graduate degree to be of 3 years as against the B.A. Degree of one year has also been taken by the learned counsel for the respondents.

4. Sri Ram Swaroop Singh learned counsel for the petitioner could not satisfy the court and rather admitted that unless the petitioner was possessed of the basic educational qualification, the minimum qualification which was necessary for making him eligible for taking admission in B.Ed. Course, the petitioner could not have been given admission in the B.Ed. Course, but he qualified the aforesaid argument by arguing that the petitioner is not at fault when he took admission with the Bhartiya Shiksha Parishad, little knowing that the degree which is to be given by the Parishad under the Open University Scheme would not be a recognised degree and that further when he was duly admitted by the University wherein he had not concealed any material fact regarding his educational qualification, he has a right to get his result declared.

5. I have considered the pleas raised from both the sides and I find that it is a hard case for the petitioner which deserves sympathy but the Court would not be issuing any mandamus for declaration of the result where the petitioner inherently lacks the basic educational qualification for being admitted in the B.Ed. Course.

6. The plea that since the admission has been made and therefore the result be declared can also not be sustained for the simple reason that if the petitioner is not eligible for being admitted and/or it was by inadvertence or otherwise he was admitted, it could not give any right to him for pursuing the B.Ed. Course or seeking declaration of the result.

7. A dispute has also been raised by the standing counsel that the Bundelkhand University stopped the B.Ed. Examination right from 1996-97 and therefore the plea raised that the petitioner appeared in the examination in the year 1998 is not correct. However, I do not find it necessary to deal with this question as in my opinion no relief can be granted to the petitioner, even otherwise.

8. Learned counsel for the petitioner lastly urged that since the petitioner had applied for admission in the B.Ed. Examination in Bundelkhand University on the same result of Bhartiya Shiksha Parishad U.P. annexing the mark sheet and other relevant papers etc., and the University had allowed the petitioner admission in the B.Ed. Special scheme, for which he was also required to deposit Rs.5000/- as fee and was also admitted in one of the named college namely Atarra College Atarra District Banda where he had studied one year therefore the University be directed to return the fee which was deposited by the petitioner. His further argument is that since the petitioner has been dealt with unfairly resulting into loss of precious time, he is entitled for appropriate damages from the University and also from Bhartiya Shiksha Parishad.

9. Sri Prakash Padia appearing for the University in response had stated that since the petitioner had studied for one year therefore there was no question for returning the fee or award of damages.

10. From the facts available on record and, the admitted position on behalf of the University that the petitioner did not conceal his basic educational qualification at the time of admission and has provided the necessary certificate including the mark sheet showing that he had cleared the aforesaid examination from Bhartiya Shiksha Parishad, the action of the University giving him admission even of its own with the aforesaid material may be by oversight, cannot run against the petitioner or against his interest. One cannot lose sight of the fact that the petitioner could have pursued some other course, and the University not admitted him in B.Ed. course, which virtually wasted his complete one year under the mistaken belief that he is pursuing a professional qualification. There is no fault of the petitioner in taking admission and pursuing the course for one year and for the delayed action on the part of the University in cancelling his admission or informing about his ineligibility.

11. For the lapse on the part of the University which has resulted into wasting of one year precious time of-his - youth-in pursuing the course of study as it was the duty of the University to deny admission to the petitioner at the very outset and in fact his form for admission should not have been entertained, makes the petitioner entitled to the refund of fee viz., Rs.5000/- from the University. Besides the aforesaid amount of fee, the petitioner is also entitled to the damages, for compensating him for the loss that he suffered, by pursing a course, to which he was not entitled, because of the mistake on the part of the University in admitting him and allowing him to carry on the studies for one year I assess these damages, to the tune of Rs.5000/-.

12. The plea that the petitioner is liable to be compensated by Bhartiya Shiksha Parishad also, as they did not

disclose that B.A. Program was a course which was not recognised, however, cannot be accepted, as firstly, the Parishad has not been impleaded as a party and secondly, it is not the case of the petitioner that the Parishad had made any such representation which misled the petitioner. The plea is thus rejected.

13. For the aforesaid reasons, though I hold that the petitioner is not entitled to any relief as claimed, and dismiss the writ petition, but direct that the petitioner shall be paid a total sum of Rs.10,000/- only within a maximum period of one month from the date of receipt of a certified copy of this order by the University. As requested by the learned counsel for the parties, the said amount be sent at the address of the petitioner by means of a Demand Draft or Banker's cheque under Registered cover.

Subject to the above direction, the petition is dismissed. Costs easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 13886 of 2003

Pooran Chandra Jain ...Petitioner
Versus
The State of U. P. & others ...Respondents

Counsel for the Petitioner:
Sri K.K. Dubey

Counsel for the Respondents:
S.C.

Civil Services Regulations-Regulation 470 (b) and 351-A-Reduction of Family pension 40%-petitioner found guilty of grave misconduct-causing loss to government-proceeding initiated after retirement without permission of governor-the punishing authority-nowhere-mentioned regarding unsatisfactory service-held-impugned order unsustainable-impugned order quashed with all consequential benefit.

Held: Para 12

A perusal of the entire order impugned in the writ petition shows that the appointing authority nowhere has mentioned its satisfaction that the service of the petitioner was not thoroughly satisfactory. Therefore, it is evident from the entire facts, circumstances and perusal of the record that though the appointing authority has mentioned and referred to Article 470(b) of CSR in order to pass the impugned order but in fact has sought to exercise powers under Article 351-A without conforming to the conditions of those provisions. The orders impugned in the writ petition are thus ex-facie unsustainable either under Article 470(b) or 351-A of CSR.

Case law discussed:
1976 L & C 1 cases-1734
1993 (1) UPLBEC-251

(Delivered by Hon'ble Sudhir Agarwal. J.)

1. Heard Sri K.K. Dubey, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. This writ petition is directed against the orders dated 10.10.2002 passed by the District Magistrate, Lalitpur holding petitioner guilty of grave misconduct causing loss to the Government and therefore reducing his family pension to 40%, and, dated 22.11.2002 whereby the order dated 10.10.2002 has been partly modified by

substituting the word “family pension” to “pension”.

and was posted in the office of Special Land Acquisition Officer, Jhansi wherefrom he was transferred to Lalitpur on 22.4.1984. On 19.10.1987 he was placed under suspension, a charge sheet was issued and after holding inquiry he was reinstated with the punishment of reduction of 10% of salary during the period of suspension. Thereafter vide order dated 19.6.1991 his annual increment for the year 1991 was withheld with cumulative effect and his representation against the aforesaid punishment was rejected on 31.3.1998. Thereafter he was allowed to cross efficiency bar by order dated 24.4.1999 w.e.f. 1.1.1992. The petitioner attained the age of superannuation on 29.2.2000 and retired on the said date. After retirement a charge sheet was issued on 11.5.2000 under Article 470 (b) of Civil Service Regulations (hereinafter referred to as "CSR") containing charges of causing loss to the Government Revenue, doubtful integrity and misappropriation. The petitioner submitted reply to the charge sheet on 5.6.2000 whereafter Additional District Magistrate (Finance & Revenue), Lalitpur was appointed as Inquiry Officer who conducted an oral inquiry and submitted his report dated 28.8.2002 holding charges proved against him. The appointing authority i.e. the Collector, Lalitpur thereafter passed punishment order dated 10.10.2002 reducing family pension of the petitioner by 40% which order was modified by subsequent order dated 22.11.2002 and instead of "family pension" it was made "pension".

3. The brief undisputed facts giving rise to this petition are that the petitioner was appointed as Amin on 19.10.1970

4. The learned counsel for the petitioner vehemently contended that after retirement, inquiry proceedings could not have been held except in accordance with the procedure prescribed under Article 351-A of CSR and since the charges relates to four years prior to the date of retirement and no sanction was obtained from the Hon'ble Governor, hence, the entire proceedings as well as the impugned orders are vitiated of law.

5. The learned Standing Counsel however, disputing the contention submitted that Article 351-A of CSR has no application in this case since proceedings were initiated under Article 470(b) of CSR which requires only approval of the appointing authority and no approval of Governor is needed thereunder, therefore the entire proceedings are in accordance with law and the writ petition deserve to be dismissed.

6. In the light of the rival submissions the only question required to be answered in this case is whether the proceedings in question were rightly initiated under Article 470(b} of CSR and whether Article 351-A of CSR has any application or not.

7. The inter-relationship of Article 351-A and 470(b} of CSR came up for consideration before a Full Bench in **Murli Sharan Sahai Sinha Vs. The State of Uttar Pradesh and others, 1976 Labour & Industrial Cases, 1734** and it was held that Article 351-A and 470(b) are not actually exclusive but are overlapping to some extent. Where a civil

servant is found to have caused pecuniary loss to Government or guilty of grave misconduct or negligence, the authority empowered under Article 470(b) of CSR can resort to exercise such power under that Article. Similarly on the same set of facts if the departmental inquiry would have been initiated and an order of reduction of pension could not have been passed under Article 351-A, there is no reason to deduce that such an order may not be passed by resorting to Article 470(b) of CSR. Para 13 of the judgment which for the purpose of present case in my view is relevant may be reproduced as under:-

"If on a set of facts and circumstances a departmental enquiry or judicial proceedings could have been taken for establishing grave misconduct or misconduct or negligence on the part of a civil servant resulting in pecuniary loss to the Government, there is no compulsion on the Governor to resort to that course. There is no reason why on those very facts and circumstances the authority sanctioning pension or the appointing authority should not issue a show cause notice to the concerned civil servant, and consider his explanation or representation. If such authority, on considering such explanation or representation, is satisfied that his service was not thoroughly satisfactory, there is no reason why it should not, under Article 470(b) reduce his pension. Neither in Article 351-A nor in Article 470(b) is there any express or implied prohibition against such course of action being taken by such authority merely because on the same set of facts and circumstances a departmental enquiry or judicial proceedings could have been taken to establish that he was guilty of grave misconduct or misconduct or negligence resulting in pecuniary loss to the government which would warrant action under Article 351-A."

8. The aforesaid judgment therefore leave no doubt where an inquiry and order of reduction of pension can be passed under Article 351-A, the same could have been passed under Article 470(b) of CSR. The problem however arise where the proceedings are barred under Article 351-A for example if the charges, whereagainst it intends to conduct inquiry are anterior to four years from the date of retirement and no proceedings can be held under Article 351-A, whether even in such case Article 470(b) would be attracted. It would be appropriate at this stage to reproduce Article 351-A and 470 of CSR:-

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of Ordering the recovery from a pension of the whole or part of any pecuniary loss caused to government, if the petitioner is found in departmental or judicial proceedings to have been guilty of grave mis-conduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which tool place not more than four years before the institution of such proceedings, and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made,

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during reemployment shall have been instituted in accordance with sub-clause (ii) of clause (a), and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

"470. (a) The full pension admissible under the rules is not to be given as a matter of course, or unless the service rendered has been really approved (see Appendix 9),

(b) If the service has not been thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

Provided that in cases where the authority sanctioning pension is other than the appointing authority, no order reading reduction in the amount of pension shall be made without the approval of the appointing authority."

9. A bare reading of Article 351-A shows that the Governor has reserved to himself all the right of withholding and withdrawing a pension or any part of it, whether permanently or for a specified period and also the right of ordering recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings guilty of grave misconduct or to have caused pecuniary loss by misconduct or negligence during hii service. However, Article 470(b) empowers the appointing authority to pass an order for reduction of pension if the service of the Government servant has not been thoroughly satisfactory. In the case of Article 351-A the order can be passed by the Governor while under Article 470(b) the order can be passed by the appointing authority. It is thus clear that in order to attract Article 470(b) of CSR, appointing authority have to record its conclusion that the service of the retired employee was not thoroughly satisfactory. It is true that to some extent both the Articles are overlapping and may run parallel but still the issues require to be considered under the two provisions are slightly of different magnitude. Where on account of any individual or particular act or omission constituting grave misconduct or negligence causing loss of the Government servant, the appointing authority intend to exercise power under Article 470 (b), it has to record a finding that the service has not been thoroughly satisfactory. It is not open to the appointing authority to byepass the provision and where the proceedings are otherwise barred under Article 351-A to circumvent the same or to resurrect the closed issue, it may resort to Article 470 (b) without recording any finding that the service has not been thoroughly

satisfactory. It is a settled legal exposition where something is required to be done in a particular manner and in specified contingencies, the action has to be taken strictly in accordance therewith and any deviation thereto shall vitiate the proceedings. In other words it can be said that where a single act or more than that may constitute a grave misconduct or negligence or having caused loss to the Government justifying order under Article 351-A of CSR, the same would not justify an order under Article 470 (b) of CSR unless and until the competent authority formed a conclusion that such act or omission constituting misconduct or negligence or loss results in making the entire service thoroughly unsatisfactory.

10. A perusal of the entire order would show that the appointing authorities have nowhere mentioned that the service of the petitioner is thoroughly unsatisfactory. The Full Bench in **Murli Sharan Sahai Sinha (Supra)** approved the proposition that for the same set of misconduct, order can be passed in either of the provisions but made it clear that such an order can be passed subject to fulfillment of other conditions under that Article. The answer to question no. 3 by the Full Bench in **Murli·Sharan Sahai Sinha (Supra)** as contained in para 15(3) is reproduced as under:-

"15(3) Both Article 351-A and Article 470(b) will apply to a case where misconduct of a civil servant has resulted in pecuniary loss to the Government. If such misconduct is established in a departmental enquiry against him or judicial proceedings, action can be taken under Article 351-A subject to fulfillment of other conditions under that Article. In respect of same misconduct, action can also be taken under Article 470(b) subject to fulfillment of other conditions under that Article.

11. In **Vishwanath Prasad Vs. Uttar Pradesh Public Services Tribunal and others, 1993(1) UPLBEC, 251** a Single Judge of this Court while considering Article 470(b) of CSR observed that discretion conferred on the authority under Article 470(b) though wide cannot be exercised without assuming thorough satisfaction about the petitioner's service. In para 14 of the judgment, the court held:-

"In Article 470(b), the discretion of reduction of pension-can be exercised only if it is proved that the service of the pensioner has not been thoroughly satisfactory during his tenure as employee under the State. The finding with regard to question of service not being satisfactory of any employee is not left to the whim of the authority....."

Further in para 16, the Court observed:-

"For invoking Article 470(b) by any authority for the purpose of ordering reduction of pension, two considerations are inherent in the said Article. Firstly, the authority has to satisfy itself on the basis of material, that the services of a person who claims pension, were not thoroughly satisfactory. Secondly, while arriving at a conclusion that the service of an employee was not thoroughly satisfactory, the authority has to furnish material, evidence or any report on which he has formed his opinion, to the person concerned who is likely to be affected by his order under Article 470(b) of C.S.R. If these considerations are not expressly incorporated in the said Article, that

would not mean that the authority, empowered to operate the said Article, has to omit to consider the aforesaid considerations, before he issues an order taking these two considerations implicit in the Article, the Article itself would become arbitrary and violative of Article 14 of the Constitution. In order to make this Article 470(b) workable it is necessary that unfettered discretion conferred by this Article or an authority is exercised within the limits of law and satisfaction about the service of an employee not being satisfactory thoroughly is assumed on the basis of evidence and before that evidence is acted upon, employee, likely to be affected by the order in that section is given opportunity of being heard. These are the rudimentary requirements which are to be followed before the discretion under Section 470(b) is exercised by any authority."

12. A perusal of the entire order impugned in the writ petition shows that the appointing authority nowhere has mentioned its satisfaction that the service of the petitioner was not thoroughly satisfactory. Therefore, it is evident from the entire facts, circumstances and perusal of the record that though the appointing authority has mentioned and referred to Article 470(b) of CSR in order to pass the impugned order but in fact has sought to exercise powers under Article 351-A without conforming to the conditions of those provisions. The orders impugned in the writ petition are thus ex-facie unsustainable either under Article 470(b) or 351-A of CSR.

13. In the result, the writ petition succeeds and is allowed. The impugned orders are quashed and it is declared that the petitioner shall be entitled for all consequential benefit. There shall be no order as to costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.11.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 49253 of 2006

Ishwar Chand ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri H.P. Singh
Sri Amarendra Pratap Singh

Counsel for the Respondents:
Sri R.P. Dubey
Sri Ravi Ranjan
Sri P.S. Baghel
Sri Kailash Nath Singh
S.C.

U.P. Secondary Education Service Selection Board-Section-18-Ad-hoc appointment till the regular selections made-whether the joining of regular selected candidate can be resisted by such adhoc-appointee? Held-'No'-such adhoc appointee has to give way to the regular selected candidate.

Held: Para 21

From the aforesaid, it is apparent that petitioner has a prima facie case in his favour, an ad hoc appointee (who has been appointed by an Authority having no jurisdiction to offer such

appointment) must give way to the regularly selected candidate.
The petitioner, is therefore, entitled to following interim order:

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

1. Learned Standing Counsel represents respondent nos. 1,3 and 4. Sri R.P. Dubey, Advocate has accepted notice on behalf of respondent no.2 and Sri P.S. Baghel, Advocate has accepted notice on behalf of respondent no.6.

2. Issue notice to respondent no.5 fixing 14th December, 2006 as the date for appearance.

Petitioner to take steps by 4th December, 2006.

3. All the respondents may file counter affidavit by the next date fixed.

4. Since serious legal and factual issues have been raised in respect of the disposal of the interim application filed along with this writ petition, this Court feels it proper to record reasons in support of the order to be passed on the interim application.

5. Petitioner Ishwar Chand, who has been selected for the post of Lecturer in subject of Psychology in Baba Barua Das Inter College, Paruliya Ashram, Ambedkar Nagar by the U.P. Secondary Education Services Selection Board at Allahabad, has filed this petition for a writ of mandamus commanding the respondents to appoint the petitioner accordingly. An application for interim direction has also been filed.

6. This appointment of petitioner is objected to by respondent no.5, Rajendra Prasad Verma who claims to have been appointed on Ad-hoc basis against the same vacancy of Lecturer (Psychology) by the Committee of Management of the institution on 31st August, 1998.

7. On specific query being made to Sri P.S. Baghel, who represents respondent no.6, namely, Sri Rajendra Prasad Verma, about statutory provisions under which he has been offered ad-hoc appointment by Committee of Management, learned counsel for respondent no.6 has refused to answer the same, and. has taken a stand, that this Court has no jurisdiction to enter into the aforesaid dispute, inasmuch as:

(a) two writ petitions have been filed by respondent no.6 before the Lucknow Bench of this Court being Writ Petition No. 64B2 (8/8) of 1999 and Writ Petition No. 3920 (S/S) of 2006. In the first writ petition an interim order has been granted by the Lucknow Bench of this Court on 17th December, 1999 while in second writ petition an another interim order has been granted by the Lucknow Bench of this Court on 3rd May, 2006.

(b) the institution in respect whereof the petitioner claims appointment and the respondent no.6 is already working on ad hoc basis is situate within the territorial jurisdiction of Lucknow Bench.

8. For the purposes of adjudication upon the aforesaid objections raised by Sri P.S. Baghel, learned counsel for respondent no.6 it would be necessary to reproduce the relevant facts, as are admitted to respondent no.6. In paragraph nos. 3,4, 7 and 9 of his writ petition no. 6482 (S/S) of 1999 (hereinafter referred to as the first writ petition) filed before the

Lucknow Bench of this Court, it has been stated as follows:

"3. That the petitioner was initially appointed on the post of Psychology lecturer on 31-8-1998 in Baba Barua Das Inter College, Paruliya Ashram, District Ambedkar Nagar (hereinafter mentioned as College) on adhoc basis against the sanctioned post. The copy of appointment letter dated 31-8-1998 is being annexed herewith as ANNEXURE NO.1 to this writ petition.

4. That the petitioner joined on 1-9-1998 in pursuance of appointment letter in the College on the post of lecturer of Psychology and since then he has been continuously working in the College with good and efficient servicer. Nothing adverse ever has been communicated against the petitioner. The copy of the joining letter dated 1-9-1998 is being annexed herewith as ANNEXURE NO.2 to this writ petition.

7. That the post of lecturer of the Psychology was occurred due to the death of Shiv Shanker Upadhyay regular lecturer of College on 152-1998. The work and the post is available. The petitioner has been appointed against the sanctioned and duly created post. The petitioner is entitled for payment of salary under the provision of Salary Act, 1971.

9. That the Selection Committee was duly constituted and total ten candidates had participated in the interview for want of selection as per the advertisement and the petitioner has been awarded the highest quality marks and he has been selected and recommended as first candidate. The Selection Committee recommended the name of the petitioner for want of appointment on the post of lecturer of Psychology and in pursuance of the recommendation of the Committee of Management the Manager of College issued appointment letter to the petitioner and the Principal of College provided the joining to the petitioner. The copy of the chart of quality points is being annexed herewith as the ANNEXURE NO.5 to this writ petition."

9. It may be recorded that in writ petition no. 6482 (S/S) of 1999 an interim order has been granted by the Lucknow Bench of this Court dated 17th December, 1999 in favour of respondent no.6, which reads as follows:

"In the meantime the opposite parties shall allow the petitioner to draw the salary of a lecturer as, admissible under rules if he is a duly appointed Lecturer in accordance with the prescribed regulations until a regularly selected candidate is available."

10. Respondent no.6 initiated contempt proceedings before the Lucknow Bench of this Court being Crl. Misc. Case No. 1338 (C) of 2000, for enforcing the said interim order wherein following order was passed by the Lucknow Bench of this Court on 10th January, 2001:

"Learned standing counsel appearing on behalf of the opposite parties requests for three weeks' time to file counter affidavit. The prayer is granted. List on 19.2.2001. The opposite parties are directed to ensure the compliance of the court's order, if appointments similar to that of the petitioner's have been given effect to.

So far as the subsequent writ petition being Writ Petition No. 3920 (S/S) of 2006 filed before the Lucknow Bench of

this Court is concerned (hereinafter referred to as the second writ petition), suffice it to record that this second writ petition is dependent upon the first writ petition filed in the year 1999, reference paragraph nos. 6,7,8,9 and 10 of the second writ petition which read as follows:

"6. That the petitioner was appointed on the post of Lecturer (Psychology) on 31.8.98 by the selection committee constituted by the Committee of Management after due process against the sanctioned and vacant post. A Photocopy of the appointment letter dated 31.8.98 is being annexed herewith as **Annexure No.2** to this writ petition.

It is also relevant to mention here that post of Lecturer (Psychology) occurred on 15.2.98 due to death of Sri Shiv Shankar Upadhyay who was working on the post of Lecturer (Sociology).

7. That in respect of the appointment letter dated 31 .8.98 the petitioner joined his duty on the post of Lecturer (Psychology) on 31.8.98 and since the date of joining the petitioner is discharging his duties on the aforesaid post with the full satisfaction of the authorities concerned. A Photocopy of the joining letter dated 31.8.98 is being annexed herewith as **Annexure No.3** to this writ petition.

8. That on 21.12.98, the Committee of Management submitted details in respect of the financial approval in favour of the petitioner but District Inspector of Schools, Ambedkar Nagar but the District Inspector of Schools neither approved nor disapproved the appointment of the petitioner.

9. That feeling aggrieved due to non payment of salary. the petitioner filed writ petition bearing No. 6482 (S8) of 1999 before this Hon'ble Court and this Hon'ble Court after considering all the facts and circumstances pleased to pass an order directing the Opposite Parties to pay the salary tot he petitioner for the post of Lecturer (Psychology).

The Photocopy of the order dated 17.12.99 passed by this Hon'ble Court, is being annexed herewith as **Annexure No.4** to this writ petition.

10. *That in compliance of the order dated 17. 12.99 passed by this Hon'ble Court, the District Inspector of Schools, Ambedkar Nagar released the salary in favour of the petitioner and since then the petitioner is getting salary for the post of Lecturer (Psychology) and is discharging his duties on the post of Lecturer (Psychology). A Photocopy of the order dated 14.1.03 passed by the District Inspector of Schools, is being annexed herewith as* ***Annexure No.5*** *to this writ petition."*

11. In writ petition no. 3920 (8/8) of 2006 an interim order has also been granted by the Lucknow Bench of this Court dated 3rd May, 2006 in favour of respondent no.6, which reads as follows:

"Heard Sri Mahendra Singh Rathore, learned counsel for the petitioner and the learned Chief Standing Counsel for opposite parties no. 1 to 3. Notice on behalf of opposite party no.4 has been accepted by Sri H.S. Jain.

Issue notice to opposite parties no. 5 and 6.

Let the counter affidavit be filed by the opposite parties within a period of six weeks and the petitioner may file rejoinder affidavit within two weeks thereafter.

List in the second week of July, 2006 for hearing/admission.

The grievance of the petitioner is that he was appointed as Lecturer (Psychology) in Baba Barua Das Inter College, Paruliya Ashram, Ambedkar Nagar on 31.8.1998 and is discharging duties, functions and responsibilities of the post.

The grievance of the petitioner is that opposite party no. 6, Ishwar Chand has been appointed on the post held by the petitioner. The learned counsel for the petitioner has further submitted that the opposite party no.6 has not joined the post and the petitioner is still working as Lecturer (Psychology) in the institution.

In view of above, it is provided that the petitioner shall be allowed to continue on the post of Lecturer (Psychology) in Baba Barua Das Inter College, Paruliya Ashram, Ambedkar Nagar, till further orders of this Court."

12. From the aforesaid facts it is admitted on record that respondent no.6 was appointed on ad hoc basis against a substantive vacancy which was caused in the institution due to death of the permanent Lecturer, namely, Shiv Shanker on 15th February, 1998. On the relevant date, on which substantive vacancy was caused in the recognised Intermediate College, there was no authority with the Committee of Management of the institution to offer any ad-hoc appointment. Power to make ad-hoc appointments against substantive vacancies was with the Deputy Director of Education under Rule 15 of the U.P. Secondary Education Services Selection Board Rules, 1995 and subsequent to it under the U.P. Secondary Education Services Selection Board Rules, 1998. Rules 15 of 1995 Rules, which is more or less *para mataria* to Rule 15 of Rules of 1998 reads as follows:

15. Procedure for ad hoc appointment by direct recruitment.----*(1) (a) Where ad hoc appointment of the teachers in respect of the vacancies to be filled in by direct recruitment are to be made under section 18 of the Act, the Deputy Director shall advertise the vacancies subjectwise, for lecturers grade and groupwise for trained graduates (L.T.) grade, along with the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens in at least two newspapers one of which having wide circulation in the district and the other in the State, and invite applications for ad hoc appointment in the pro forma given in Appendix 'F'. Such advertisement shall, inter alia, mention the pay and allowances admissible to the posts, minimum academic qualifications for appointment and such other things as may be considered necessary. The candidates shall be required to give the choice of not more than three districts in order of preference, where, if selected, he may wish to be appointed. Where a candidate wishes to be considered for any particular district and for no other district, he may mention the fact in his application."*

13. It is thus apparent from the relevant facts admitted that the *ad hoc* appointment claimed by respondent no.6 is de hors the aforesaid statutory provisions, made by an Authority having no jurisdiction to do so. It has to be treated as nullity in view of Section-16 of the U. P. Secondary Education Services Selection Board Act, 1982, which reads as follows:

"16. **Appointment to be made only on the recommendation of the Board.-**

(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder, but subject to the provisions of sections 12,18,21-B, 21-C, 21-D, 33,33-A, 33-B, 33-C, 33-D and 33-F, every appointment of a teacher shall, on or after the date of commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board:

Provided that in respect of retrenched employees, the provisions of section 16-EE of the Intermediate Education Act, 1921 shall *mutatis mutandis* apply:

Provided further that the appointment of a teacher by transfer from one institution to another may be made in accordance with regulations made under clause (c) of sub-section (2) of section 16-G of the Intermediate Education Act, 1921:

Provided also that the dependent of a teacher or other employee of an institution dying in harness who possesses the qualifications prescribed under the Intermediate Education Act, 1921 may be appointed as teacher in Trained Graduates' Grade in accordance with regulations made under sub-section 94) of section 9 of the said Act.

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

14. The interim order passed by the Lucknow Bench of this Court, in the first writ petition in favour of respondent no.6 permitted him to continue as Lecturer (Psychology) provided that he was appointed in accordance with law, only for the period till the regularly selected candidate becomes available.

15. It is also apparent that the Lucknow Bench of this Court provided that respondent no.6 shall be paid salary only if he has been validly appointed in accordance with the rules/regulations applicable and only till regularly selected candidate becomes available.

16. The interim order passed in second writ petition fails to take note of the interim order passed in first writ petition as also of the fact that respondent no.6 infact claimed ad hoc appointment only and such ad hoc appointees cannot in any way obstruct the appointment of regularly selected candidates, inasmuch as their appointment itself has been made in the contingency till regularly selected candidate is appointed. Such *ad hoc* appointments have a contingent right to continue only till the period regularly selected candidate becomes available. Substantial justice requires that the regularly selected candidate should not be asked to wait at the fence while the *ad hoc* appointee like respondent no. 6, is permitted to continue in the institution.

17. Learned counsel for respondent no.6 has not answered the query made by this Court, the reason is obvious. Learned counsel knows that there is no provision under which the *ad hoc* appointment of respondent no.6 can be sustained, nor could he refer to any statutory provisions under which ad hoc appointment against the substantive vacancy in the year 1998, could be made the Committee of Management of the institution. He has succeeded in misleading the authorities for obtaining payment of salary, despite the specific directions of the Lucknow Bench of this Court under order dated 17th December, 1999 for which appropriate action may have to be recommended against the District Inspector of Schools,

who has released the salary in favour of respondent no.6 at the time of final disposal of the writ petition.

applicable and therefore, also he has no legal right to object to the legal appointment of the petitioner who has been selected in accordance with Statutory provisions.

19. With regard to the second objection this Court has no hesitation to record that this Court has every jurisdiction to entertain the present writ petition, which has been filed for ensuring appointment being offered to a candidate selected by the U.P. Secondary Education Services Selection Board, at Allahabad, as part of cause of action has arisen at Allahabad.

20. In such circumstances both the objections raised by learned counsel for respondent n06 are hereby rejected.

21. From the aforesaid, it is apparent that petitioner has a prima facie case in his favour, an ad hoc appointee (who has been appointed by an Authority having no jurisdiction to offer such appointment) must give way to the regularly selected candidate.
The petitioner, is therefore, entitled to following interim order:

22. The District Inspector of Schools, Ambedkar Nagar who is present in the Court today is directed to ensure that the petitioner is permitted to join in the institution as Lecturer (Psychology) within a week from the date a certified copy of this order is filed before him. This appointment shall be subject to the final orders to be passed in this petition.

18. As noticed herein above, respondent no.6 has not been appointed in accordance with the statutory provisions

Put up on 14th December, 2006 as unlisted matter.

23. In order to avoid conflicting judgments being passed in the writ petitions filed by respondent no. 6 namely, Rajendra Prasad Verma before the Lucknow Bench of this Court, being Writ Petition No. 6482 (S/S) of 1999 and Writ Petition No. 3920 (S/S) of 2006 and the present writ petition filed before this Court, it is desirable that The Hon'ble The Chief Justice may consider the transfer of the writ petitions filed before the Lucknow Bench of this Court being Writ Petition No. 6482 (S/S) of 1999 and Writ Petition No. 3920 (S/S) of 2006 to the Allahabad High Court and the same may be tagged along with this writ petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2006

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

Habeas Corpus Writ Petition No.66525 of 2005
Connected with
Habeas Corpus Writ Petition No.66528 of 2005

Pappu ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
I.M. Khan

Counsel for the Respondents:
Sri K.C. Sinha Addl. S.G. of India

Sri Arvind Tripathi
Sri A.K. Singh
A.G.A

National Security Act, 3 (2)-Detention Order-passed on the allegations-broad day light taking the girl-stripped her naked-tearing her cloths-armed with fire arm-required on hue and cry resulted breach of peace-no interference.

(Delivered by Hon'ble K.K. Misra, J.)

In both these writ petitions the common impugned detention order dated 30.7.05 passed by District Magistrate, Rampur, respondent no. 2, under section 3 (2) of the National Security Act is under challenge.

The ground of detention are contained in Annexure No. 1 to the writ petition. It is stated therein that on 22.4.2005 at 10.15 a.m. a report was lodged by the complainant Sunil son of late Ram Saran that when he alongwith his wife and his nieces, namely, Ms. Poonam and Ms. Sundari entered his house on return from temple, the petitioner with his associates entered his house armed with firearms and they took with them his niece, namely, Ms. Poonam. They stripped Ms. Poonam naked, tearing her clothes. On raising shouts by complainant Sunil and his family members, many neighbours assembled. The petitioners and their associates threw Miss Poonam naked outside the house. Then the petitioner and his associates ran away, firing. An F.I.R. was registered as case crime No. 145/05 under section 452/354/509/323/506 I.P.C. The incident had taken place in broad day light. There was hue and cry and atmosphere was exceedingly charged which resulted in breach of public order.

Counter and rejoinder affidavits have been exchanged.

We have heard Shri I.M. Khan, learned counsel for the petitioners and Sri Arvind Tripathi, learned A.G.A. No-body has turned up for the Union of India in petition no. 66528/05. But Shri A.K. Singh argued for Union of India in petition no.66525/05.

The main contention of the learned counsel for the petitioners is that the incident relied upon for passing the impugned detention order related only to the problem of law and order and it had nothing to do with the maintenance of public order.

On the other hand, Sri Arvind Tripathi, learned A.G.A. strongly contended that due to the incident, there was hue and cry in the locality and the force was deployed in the locality for maintenance of public order. In short, the submission of the learned A.G.A. is that the incident in question gave rise to breach of public order and not of law and order.

Any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality and it may also affect law and order but the same need not always affect maintenance of public order. The question whether a person has only committed a breach of law and order or has acted in a manner likely to cause disturbance of the public order, is a question of degree and the extent of the reach of the act upon the society. The present incident was definitely one which adversely affected public order.

In the above circumstances, we find that the incident on the basis of which the present detention order was passed related to question of public order. Consequently the detention order passed by the District Magistrate, Rampur does not suffer from any illegality.

In the result, both the writ petitions are dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD 17.10.2006
Before
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 5729 of 2006

Chandan ...Revisionist
Versus
State of U.P. & another...Opposite Parties

Counsel for the Revisionist:
Sri. S.K. Parikh

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

Code of Criminal Procedure-S-397(1)-Revision against an order passed under section156(3)-at pre cognizance stage-No doubt a judicial order but administrative in nature under Chapter XII of the code-No opinion formed by Magistrate against any body-No body is within the meaning of accused-Question of infringement of fundamental rights does not arise-held neither revision nor application under section 482 of the code -maintainable by the prospective accused-general direction issued-

Held: para 20 & 23

To sum up the discussions made above it is clear that the alleged accused has no right to challenge an order passed under section 156(3) Cr.P.C. at pre cognizance stage by a Magistrate and no revision lay against such an order at the instance of the alleged accused under section 397(1) Cr.P.C. being barred by section 397(2) Cr.P.C. nor at his instance an application under section 482 Cr.P.C. is maintainable for the simple reason that to secure the ends of justice it is a must that if cognizable offence is disclosed in an application filed by the aggrieved person then his such an application must be investigated to bring culprits to books and not to thwart his attempt. to get the ,FIR registered by rejecting such an application which will not amount to securing the ends of justice but will amount to travesty of it.

Thus there was no opinion formed by the Magistrate against any body and hence no body was an accused and. hence there does not arise any question of infringment of any "Fundamental Right" or"legal right" of any person.

From the discussions made above it is clear that no revision is maintainable at the instance of the accused against an order passed under section 156(3) Cr.P.C."

Case Law discussed:
AIR 1994 SC-1349, 1994 SCC(Crl)-1172, AIR 1997 SC-610, 1997 (1)SCC-416, AIR 2004 SC-7, AIR 1993 SC-1960, 1970(1) SCC-653, 1995 SCC(Crl)-1059, 2003(6) AWC-4986, 2000(10) SCC-482, AIR 1958 SC-1986, 2004(5) AWC-4956, 1998(8) SCC 1, 1980 SCC (Crl)-272, 1997(34) ACC-163. 1991(28) ACC-422, 2004 UPCR-242, JT 1994(4) SC-537, 2003 SCC(Crl)-1305, 1963 ISCR-202, 1997(13) ACC-225, 1994 ACC-535, 2005 SCC(Crl)-242, 1980 CrCJ-258, 1993 SCC(Crl)-36, 2002(44) ACC-143, 1997(34) ACC-687, 2000(46) ACC-1180, 1992 SCC(Crl)-426.

(Delivered by Hon'ble Vinod Prasad, J.)

This revision has been filed by Chandan who is aggrieved by the, order dated 31.8.2006 passed by Civil Judge (Junior Division) Judicial Magistrate, Chakia, Chandauli in Miscellaneous Case

No: Nil of 2006, Manoj Kumar Vs. Chandan and anothers, under Section 156(3) Cr.P.C, P.S. Chakia, district Chandauli. By the impugned order the Magistrate concerned has ordered for registration of the F.I.R. and investigation in pursuance thereof in the crime by the police, on the application under Section 156(3) Cr.P.C.filed by Manoj Kumar (respondent no.2).

2. The facts giving rise to this revision are that on 5.9.2006 an application under Section 156(3) Cr.P.C. was filed by Manoj Kumar with the allegations that his wife Smt. Usha Devi was enticed away by Chandan (present revisionist) and after exerting undue influence on her got himself photographed with her in objectionable poses. His wife Smt., Usha Devi because of shame could not inform the said fact to, the family members. On 12.8.2006 Chandan, (revisionist) sent those photographs to the applicant Manoj Kumar (respondent no.2) and started blackmailing him for Rs.10000/-on the pretext that in case the said amount is not paid he will defame the couple by publishing the said photographs in the village. When the applicant Manoj Kumar objected to the said conduct, revisionist Chandan and his maternal uncle Ram Ji, who is said to be a police constable, threatened him with life and also abused him filthily. Manoj Kumar wanted to lodge the report of extortion and threatening but his report was not taken down by the Officer-in-charge of the police station. His application to the Superintendent of Police, Chandauli, sent through registered post on 17.8.2006 did not yield any result; consequently, on 19.8.2006, Manoj Kumar, respondent no.2 filed· an application under Section 156(3) Cr.P. C. before the concerned Magistrate. Magistrate initially called for a report from police and fixed 21.8:2006. Subsequently, he again fixed 22.8.2006 and 25.8.2006. Ultimately on 31.8.2006 the Magistrate ordered that the application filed by the applicant discloses commission of a. cognizable offence and therefore, it should be investigated as no F.I.R. was already registered at the police station. With the aforesaid observation he directed the police to register the F.I.R. and investigate the case and sent a copy of the F.I.R. to him within seven days which order is under challenge in this revision.

3. I have heard Sri C.K. Parikh, learned counsel for the revisionist in support of this revision and the learned AGA in opposition.

4. At the very out set the question of maintainability of this revision at the instance of the revisionist, against whom an order u/s 156 (3) Cr. P.C. was passed, came up for consideration, as the learned AGA raised the preliminary objection that this revision by the revisionist who is a proposed accused is not maintainable.

5. Learned counsel for the revisionist submitted that since the application u/s 156 (3) Cr. P.C. had been filed against him and the order will definitely affect him prejudicially he has got a right to maintain the revision. He further contended that after an order u/s 156 (3) is passed the police has got no option but to register the FIR against him, therefore, the revisionist have got a right to challenge the said order passed by the learned Magistrate in as much as his fundamental right is jeopardized. He further contended that the Magistrate must hear the accused at the stage of 156

(3) Cr. P.C. and therefore also the impugned order deserves to be set aside. He relied upon a reported judgment in *Ajai Malviya Vs State of U.P.2000 (4) ACC 435.*

6. Learned AGA on the other hand contended that the Magistrate was not obliged to hear, the accused at the stage of 156 (3) Cr. P.C. as he was exercising the administrative power of control over the police by passing a, judicial order. He submitted that the contentions raised by the learned counsel for the revisionists are against the basic principles of criminal law and section 156 (3) Cr. P.C. He further submitted that Supreme Court had laid down in many judgments that the accused has no right of hearing, before being summoned. He further submitted that passing of an order U/S 156 (3) Cr.P.C the Magistrate had only directed the registration of the case and its investigation and the accused has got no right to challenge the aforesaid order of registration of F.I.R. He can challenge the FIR if it does not discloses commission of a cognizable offence in a writ petition. He further submitted that section 397 and 401 Cr.P:C. is not at all applicable against such an interlocutory order of registration and investigation and this revision is not maintainable and deserves to be dismissed; He also submitted that *Ajai Malviya's* case (Supra) does not laid down good law and is *per-incurium* being contrary to Section 397(1) &(2) Cr.P.C. and the law laid down by Apex Court that order under Section 156(3) Cr.P.C. is a pre-cognizance order.

7. I have considered the submissions raised by both the parties. The bone of contention in this revision no longer remains *res-integra*. It has come up before me in criminal Miscellaneous Application No. 4670 of 2006, Rakesh Puri and another Vs. State of U.P. and another. In that decision it has been held as follows-:

"Section 156 (3) Cr. P.C. falls under Chapter XII, which deals with the power of police to register and investigate a cognizable offence u/s 154 (1) and 156 (1) Cr. P.C. The law has mandated the police to register all the information's whether oral or in writing if it discloses the commission of a cognizable offence in the form and in the manner prescribed by the respective State Government and to obtain the signature of the informant after its registration. Sub clause (3) of section 154 Cr.P.C. provides that if the Officer Incharge of the Police Station refuses to register such an information which discloses the commission of a cognizable offence the aggrieved person may send, through post, the substance of such information in writing to the concerned Superintendent of Police who will either investigate into the matter himself or get it investigated through some officer if it discloses the commission of a cognizable offence. It further provides that deputed officer after such entrustment of investigation by the Superintendent of Police will have all the powers of the Officer Incharge of Police Station as is provided to him under the law. Thus section 154 (3) Cr.P.C. is the power conferred on Superintendent of Police to get the FIR registered in case the same is refused by the officer in charge of the concerned police station when cognizable offence is disclosed by such information. Section 156(1) in conjunction with section 157(1) Cr.P.C. provides that every cognizable offence must be investigated if the officer in charge of police station has

got "*reason to suspect*" that cognizable offence is disclosed after registration of the FIR. Thus the scheme of the Code from section 154 to section 157 Cr.P.C. makes is clear that all information disclosing commission of cognizable offence must be registered as a FIR at the police station and the officer in charge of a police station has got no right to refuse it's registration. In case of refusal to register such an information as FIR the officer in charge of police station is guilty of flouting the mandate of law. Subsequently after it's registration if the officer in charge of the police station has "*reason to suspect*" that cognizable offence is disclosed by the said registered FIR he must investigate it. This aspect of the matter has been dealt, exhaustively, by the Apex Court in the case of ***State of Haryana And Others versus Bhajan Lal And Others;1992 SCC(Cr.) 426***. In paras 30,31 and 33 the apex court has laid down that:-

"30. The legal mandate enshrined in section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined under section2(c) of the code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" (within the meaning of section 2 (o) of the code) and signed by the informant should be entered in a book to be kept by such officer in such form as, the state government may prescribe which form is commonly called as " First Information report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable' offence in compliance with the mandate of section 154(1) of the code the concerned police officer can not embark upon an inquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence, which he is empowered under section 156 of the code to investigate subject to the proviso to section 157... ... ...In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the superintendent of police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, ,should either investigate the case himself or direct an investigation to be made by any police officer subordinate, to him in the manner provided by sub section(3) of section 154 of the Code.

……

……

33. *It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer-in charge of a police station satisfying the requirements of section 154 (1) of the code, the said police officer has no other option except to enter the substance thereof in ,the prescribed form, that is to say, to register a case on the basis of such information."*

(Under line Emphasis Supplied). "

Further it has been held in the aforesaid judgment (Rakesh Puri) that:-

8 "Section 156 (3) provides that the Magistrate ***"may order such an investigation as mentioned above"***. These words clearly indicate and are relatable to an investigation, which is to be conducted by the police under section 156(1) Cr.P.C. The purview of the power of the Magistrate conferred under section 156(3) Cr.P.C. does not travel beyond the said scope. It is limited in nature and the, Magistrate under that subsection, is empowered only to look to the application or complaint only to, find out as to whether a cognizable offence is disclosed or not? Let me make it clear that registration of a FIR is quite different than the investigation of the same. It has been, so held in the case of *Bhajan Lal* (Supra) by the apex court. In para 41 of the said judgment the apex court has held:-

"We shall now examine as to what are the requirements to be satisfied by an officer in charge of a police station before he enters into the realm of investigation of a cognizable offence after the stage of a registration of the , offence under section 154(1). We have already found that the police have under section 154(1) of the code a statutory duty to register a cognizable offence and thereafter under section 156(1) a statutory right to investigate any cognizable case without requiring sanction of a Magistrate. However the said statutory right to investigate a cognizable offence is , subject to the fulfillment of pre- requisite condition contemplated in section 157(1). The condition is that the officer in charge of the police station before proceeding to investigate the facts and circumstances of the case should have " reason to suspect", the, commission of an offence which he is empowered under section 156 to investigate. (Under line emphasis supplied)."

In para 48 and 49 of the same judgment the apex court has reiterated the same view and has concluded the (this) aspect thus:-

"Resultantly, the condition precedent to the commencement of the investigation under section 157(1) Cr.P.C. of the code is the existence of the reason to suspect the commission of a cognizable offence which has to be, prima facie, disclosed by the allegations made in the first information report laid before the police officer under section 154(1).

9. In the case of ***Madhu Bala versus Suresh Kumar and others; 1998 SCC(Cr.) 111*** it has been held by' the Supreme Court in para 10 thereof:-

"The provisions of the code therefore do not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under section 156(3) of the code is to be made the proper direction to the police would be " to register a case at the police station treating the complaint as the first information report and investigate into the same". (emphasis supplied).

It has been held by the apex court in the case of **Central Bureau Of Investigation through S.P .Jaipur versus State of Rajasthan and another:2001 SCC(Cr) 524** as follows:- .s

"What is contained in sub- section (3) of section 156 is the power to order the investigation referred to in sub-section (1) because the words " order such an investigation as above mentioned " in sub- section (3) are in mistakably clear as referring to the other sub- section. Thus the power is to order an "officer in charge of a police station" to conduct investigation (Emphasis mine and Supplied)"

It has further been laid down in the said case Rakesh Puri (supra) that:

"***The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer ,Section 156(3) of the code empowers a Magistrate to direct such officer in charge of the Police station to investigate any cognizable case over which such· Magistrate. has jurisdiction.*** "(Emphasis mine and Supplied)

In para 16 thereof the apex court has laid down the law, in, respect of the power of Magistrate under section 156(3)Cr.P.C: ,as, follows:

"We, therefore reiterate·, that the magisterial power can not be stretched under the said sub-section beyond directing the officer in charge of a police station to conduct the investigation ". (Emphasis mine and supplied)

The above· quoted passages, unequivocally brings out the ambit of power of Magistrate under section 156(3) Cr.P.C. Under the said section the Magistrate does not take the cognizance of the offence himself and the power is wielded by him, at the pre cognizance stage falling under chapter XII relating to the power of the police to investigate into the cognizable offence. Thus at the stage of section 156(3) Cr.P.C. a person against whom an application under the said· section is filed does not come into the picture at all to participate in the proceedings. It is preposterous even to cogitate that a, person has a right, to appear before the Magistrate to oppose an application seeking a direction from him for registration and investigation of the offence when he has got no right to participate in the said ex-parte proceeding. If permitted will amount to killing of foetus of investigation in the womb when it was not there at all. Such a power has not been conferred under the law on the prospective accused. See **Hari Raj Singh versus State of U.P 2000 (46) ACC 1180;Brijesh Versus State of U.P. and others 1997 (34) ACC 687; Father Thomas versus State of U.P. and others 2002 (44) ACC 143**. Further at the stage of section 156(3) Cr.P.C. which is a pre cognizance stage there is no body who is an accused. The, character of being an accused will be implanted on a person only by registration of the FIR by the police or by taking cognizance by the Magistrate of the offence and summoning of the person as an accused under section 204 Cr.P.C. Thus no person can be bestowed with a right to challenge an order for registration and investigation of offence passed under section 156(3) Cr.P.C. when he is not even an accused."

It has further been held that in that judgment:-

"Cr.P.C. does not permit the accused to challenge any order at every stage of proceedings. There are certain stages in which even though judicial orders are passed but the person aggrieved has no

right to challenge the order even on the pretext that his Fundamental Rights are being infringed. As exemplars, I refer, that an accused does not have a right to challenge the registration of a complaint and taking cognizance on it by the Magistrate, recording of statements under section 200 and 202 Cr.P.C., issuing of bailable and non-bailable warrants, registration of charge sheet after investigation under section 173 Cr.P.C., granting of adjournments, exemption of accused, fixing dates for evidences, recording of statement under section 313 Cr.P.C., directing for further investigation by the police under section 173(8) Cr.P.C. etc. All these types of orders and many such other orders are all judicial orders passed in a judicial proceeding but they are not subjected to the revisional powers of the courts under section 397(1) Cr.P.C. at the instance of the accused. If an accused does not have a right to participate in a proceeding at the stage of section 156(3) Cr.P.C. it is incomprehensible that he has power to challenge order passed under that section more so order for registration of FIR which is different from investigating the offences, if any, disclosed by the said FIR.·In the case of Bhajan Lal (Supra) while laying down the guidelines for quashing of the FIR the apex court has not conferred the power on the accused to challenge the registration of FIR against him. This matter has come up before the apex court in the case of ***Janta Dal versus H.S.Chowdhary.and others 1993 SCC(Cr) 36*** (known as Bofor's case) where the apex court denounced the practice of lower court in issuing of notice on the registration. of FIR under section 397(1) or 482 Cr.P.C. In the said case the revisional court because of various illegalities had taken suo motu cognizance and had issued notice to C.B.I. to show cause as to why the FIR and the proceeding subsequent thereto be not. quashed. The apex court in the concluding part of it's judgment quashed the order of revisional court under section 397 and 401 read with section 482 Cr.P.C. taking suo motu cognizance. In the same case (the)Apex Court has approved the judgment of ***Kekoo J.Maneckji versus Union Of India;1980 Cr.L.J.258(Bom)*** in para 156 thereof in which it has been held as follows:-

"This is admittedly a stage where the prosecuting agency is still investigating the offence and collecting evidence against the accused The petitioner, who is accused, has therefore, no locus standi as this stage to question the manner in which the evidence should be collected. The law of this country does not give any right to the accused to control, or interfere with, the collection of evidence".

10. It has been further held in the said case Rakesh Puri (Supra) that *Ajai Malviya Vs. State of U.P. 2000(41)ACC 435* does not lay down correct law in the following words:

"1 have gone through the said judgment. With profound respect to the Hon'ble· Judges in the said case and with utmost·humility and humbleness at my command I find myself unable to agree with said judgment in so far as the maintainability of revision at the instance of the accused against the order passed under section 156(3) Cr.P.C. is concerned in as much as the said judgment is not only against the statutory provision of section 397 (1) and (2) Cr.P.C. which escaped the notice of the aforesaid Division Bench but also because it is against the very spirit of the provision of 156(3) Cr.P.C. and law laid down by the

apex court referred to above which is binding under Article 141 of the Constitution Of India and is the law declared. Let me list the reasons for my disagreement. Firstly, Ajai Malviya's case (Supra) was decided in a writ jurisdiction under Article 226 of The Constitution Of India where the infringement of Fundamental Rights was alleged on the ground that *no offence is disclosed in the FIR already registered. (Emphasis Mine)*; The prayer made in the said writ petition is mentioned in the opening part of the said judgment as follows:-

"The first information report dated 6.8.1998 on the basis of which case crime No.743 of 1998 under section 406/420IPC has been registered at police station Chakeri, district Kanpur Nagar is sought to be quashed by means of this writ petition under Article 226 of the Constitution. A direction not to arrest the petitioner in the case aforestated during the course of investigation has also been sought besides the relief of certiorari. "

11. Thus the petitioner in that, case was seeking an extra ordinary Constitutional remedy conferred on him under Article 226 of The Constitution Of India. He was not seeking a legal. Remedy provided under Cr.P.C. To avail (of) a legal remedy it has to be specifically provided for by the concerned Statute and such a remedy is governed by the provisions contained therein. If a statute prohibits the claimed legal remedy then the aggrieved person cannot avail of it. Secondly, the Division Bench in that case completely over looked the provisions of section 397(1)& (2) Cr.P.C especially sub section (2) thereof which prohibits maintainability of a revision in cases of interlocutory orders. The aforesaid Division bench did not at all considered the said section before recording a finding that the revision is maintainable against the order passed under section 156(3) Cr.P.C. it concentrated only on one aspect of the matter and that was that the order passed under section 156 (3) Cr.P.C. is a judicial order and hence amenable to revisional jurisdiction. This view by the said Division Bench, with profound respect, is indirect conflict with section 397 (2) Cr.P.C. in as much as all interlocutory orders are judicial orders passed in a judicial proceeding but they all are not subjected to revisional powers of the courts under section 397(1) Cr.P.C. Registration of a complaint, Ordering for further investigation under section 173 (8) Cr.P.C by a Magistrate after receiving a report from the police under section 173(1), registration of charge sheet submitted by the police under section 173(2), issuance of non bailable warrant, issuance of process under section 82-83 Cr.P.C., recalling a witness, granting bail and cancellation thereof asking the complainant to produce evidence under sections 200 and 202Cr:P.C. granting of adjournments, exemptions of accused giving dates in the cases, order for framing of charge, recording of statement under section 313 Cr.P.C. fixing dates for evidences, order for committal of cases to the court of Session's and many more such orders are all judicial orders passed in a judicial proceeding but they are not subjected to revisional powers under section 397/401 Cr.P.C. and in fact are barred by Section 397(2) Cr.P.C. This very important aspect of the matter which was *sine qua non* for deciding the question of maintainability of a revision at the instance of accused against the order passed under section 156(3) Cr.P.C. and

was relevant and germane to the controversy was not considered at all by the said Division Bench. Let me point out here that under section 156(3) Cr.P.C. there was no proceeding between the litigating parties and no such proceeding was finalised. No inquiry or trial was held between two parties. Under that section it is only an administrative power which is being exercised by the Magistrate ex parte being superior authority to direct the police to register and investigate the offence. Such an order is pure and simple interlocutory order barred under section 397(2) Cr.P.C. from being revised. Thirdly, the said Division Bench also failed to notice that the word "Proceeding" mentioned under section 397 (I) Cr.P.C. does not embraces within it's purview all proceedings even exparte proceeding in which the other side even does not have the right to participate and to be heard. At the stage of section 156 (3) Cr.P.C. the prospective accused cannot be .heard at all and once he cannot be heard how can he challenge the said order. The word "Proceeding" under section 397 (1) Cr.P.C. means the "Proceedings" which is final in nature and in which both the sides had got a right to be heard whether they have in fact been heard or not. It is because of this reason that recently the Apex court in the case of **Subarmaniyam Sethuraman versus State of Maharastra; 2005 SCC (Cr) 242** has held that even an order of summoning of an, accused is not amenable, to revisional jurisdiction. The same view was expressed by this court in the case of Atul Kumar Mathur and others versus State of UP ,and others: 1994ACC 535. Thus the accused who does not have a legal right to participate in the proceeding under section 156(3) Cr.P.C. certainly can not be conferred with the right to challenge the order passed under that section. The Apex Court has held that the accused has got such a right of challenge only after he has been summoned as an accused in the case by the trial court to face the charge after the charge sheet is submitted against him. See Janta Dal versus H.S. Chowdhary(Supra).The apex court has held in many other decisions that the accused has no right to be heard before he is summoned. In **Nagawwa versus V.S.Konjalgi 1976 (13) ACC 225** The apex court has observed thus:-

"*in proceeding under section 202 the accused has' got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not." ,*

12. In **V. Panchal versus D.D Ghadigaonkar:AIR (1961) ISCR 1** it was also held by the apex court that:-

"The section does not say that a regular trial of adjudging the 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 allegation made against him only when a process has been issued. "(Emphasis Mine)

13. In the case of **Chandra Deo Singh versus Prakash Chandra Bose;AIR (1963) ISCR 202** it was observed by the apex court:-

"*Permitting the accused person, to intervene during the inquiry would frustrate its very object and that is why legislature has made no specific provision, permitting an accused person to "take part in the inquiry"*

14. In the case of **Superintendent Of Police. C.B.I. And Others Versus Tapan Kumar Singh: 2003 SCC (Cr) 1305** dealing with registration of FIR by the police it has been held by the apex court:-

"*The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under section 156 of the Code to investigate. 1f it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true whether it discloses full details regarding the manner of occurrence whether the accused, is named . and whether there is sufficient evidence to support the allegation, are all matters which are alien to the consideration. of the question whether the report discloses, the commission of cognizable offence. Even if the information does not give, full details regarding these matters the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can*. "*(Emphasis Mine)*

15. It is under such power of police that the order under section 156(3) is to be passed by the Magistrate when he is approached by the aggrieved person. It is the duty of the Magistrate to get the mandate of law observed by the police and not to get flouted by it. Therefore the natural corollary is that if an application or a complaint disclosing commission of a cognizable offence is filed and the Magistrate is prayed for a direction to order for an investigation he has to order for such an investigation and he does not have any other option. Reference is to be made to the following judgments of this court:-

Bahadur Singh Versus State of U.P; 2005 (51) ACC 901 and Smt. Roopa Versus State of U.P. and others: 2004 U.P. Cr. R 242.s

16. In the case of **Samardha Sreepada Vallabha Venkata Vishwadaha Maharai versus State of Andhra Pradesh : JT 1999 (4),SC 537** it has been held by the apex court:-

"There is nothing in section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of such obligation on the court ',would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the 'opportunity of being heard. "

17. In the case of **Pratap versus State of UP: 1991(28)ACC 422** it was held by Hon'ble G.P. Mathur J. as his lordship then was as follows :-

"*Neither under the code of Criminal Procedure nor under any principle of natural justice the Magistrate is required to issue notice or afford an opportunity of hearing to an. accused in a case where the police has submitted final report but on consideration of material on record the Magistrate cognizance of the offence in exercise of his power under section 190 (1)(b) and direct issue of process to the accused. The code does not contemplate holding of two trials one before issue of process and the other after the process is issued "* (emphasis Mine)

18. The said observations in Pratap' s case has been quoted with approval in the case of Karan Singh versus State

:1997(34)ACC 163 where in it has been observed by this court as follows:-

"*Where an order is made under Section 156(3)Cr.P.C. Directing the police to register FIR and investigate. the· same, the Code no where provides that the Magistrate shall hear the accused before issuing such a direction. nor any person can be supposed to be having a right asking the court of law for issuing a direction that an FIR should not be registered against him. Where a person has no right of hearing at the stage of making an order under section 156(3) or during the stage of investigation until courts takes cognizance and issues process, he can not be clothed also with a right to challenge the order of the Magistrate; by preferring a revision under the Code. He cannot be termed as an "aggrieved person" for the purpose of section 397 of the Code".*

19. Thus at the stage of section 156(3)·any order made by the Magistrate does not adversely affect the right of any person since he has got ample remedy to seek relief at the appropriate stage by raising his objections. Further the observations of the apex court in case of Bhajan Lal (Supra) quoted above applies with full force in negation of the right of a prospective accused to challenge an order under section 156(3) .Cr.P.C. It is incomprehensible that the accused can not challenge the registration of FIR by the police directly but can challenge the order made by the Magistrate for the registration of the same with the same consequences. Thus from the discussions made above it is clear that an accused does not have any right to be heard before he is ·summoned by the court under the code and that he has got no right to raise any objection till the stage of summoning and resultantly he can not be conferred with a right to challenge order passed prior to his summoning ignoring the provisions of Code. Further if the accused does not have a right to install the investigation, but for the limited grounds available to him under the law. it surpasses all suppositions to comprehend that he posses a right to resist recording of the FIR.

20. To sum up the discussions made above it is clear that the alleged accused has no right to challenge an order passed under section 156(3) Cr.P.C. at pre cognizance stage by a Magistrate and no revision lay against such an order at the instance of the alleged accused under section 397(1) Cr.P.C. being barred by section 397(2) Cr.P.C. nor at his instance an application under section 482 Cr.P.C. is maintainable for the simple reason that to secure the ends of justice it is a must that if cognizable offence is disclosed in an application filed by the aggrieved person then his such an application must be investigated to bring culprits to books and not to thwart his attempt. to get the ,FIR registered by rejecting such an application which will not amount to securing the ends of justice but will amount to travesty of it. It is out side the purview of scope of section 397 (1) Cr.P.C. to embrace any proceeding which is not final in nature and in which the other side has no right to be heard. Proceeding under section 156(3) Cr.P.C; is not such a proceeding and it is conducted only for a limited purpose of ordering for an investigation by the police, ex- parte, if cognizable offence is disclosed through such an application. The Magistrate under that section is required to scan the application or the

complaint only to find out as to whether any cognizable offence is disclosed or not and no further. No. doubt, as has been held by me herein before, that the order under section 156(3) Cr.P.C. is a judicial order but it is administrative in nature because of it's placement-under chapter XII Cr.P.C. relating to power of the police to investigate a matter. The Division Bench in *Ajai Malviya's case* (Supra) did not at all addressed itself to the said aspect of the matter in·conjunction with the scope of section 154 (1) and 156(1) Cr.P.C. and the law laid down by the apex court in the case of **State of Haryana versus Bhaian Lal;1992 SCC (Cr) 347(Supra)** and also in the case of **Central Bureau of Investigation. Through S.P.Jaipur versus State of Rajasthan and another: 2001SCC(Cr)524 (**Supra).Fourthly, the accused can not be allowed to challenge each and every order at every stage of judicial proceedings as has been' discussed by me in this judgment herein before. Fifthly, the order undersection1 56(3) Cr.P.C. is a pre cognizance stage order as has been held by the Apex court in the case of **Devarapalli Lakshaminarayana Reddy and others versus V.Narayana Reddy and others: 1976 ACC 230** and recently in the case of **Suresh Chand Jain versus State of Madhya Pradesh and another: JT 2001(2) SC 81**. In the case of Devarapalli (Supra) the Apex Court has gone to the extent in observing that the nature of order under section 156(3) Cr.P.C. is:-

"Peremptory reminder or intimation to the Police to exercise their plenary powers of investigation under section 156(1)"

21. Such a nature of order is not revisable under section 397(1) Cr.P.C. and is barred under section 397 (2) Cr.P.C. Sixthly, because section 156(3) Cr.P.C. embraces into it's purview those cases also where the police on it's own has registered the FIR and had investigated the matter and after investigation has submitted a report to the concerned Magistrate. Magistrate in such cases enjoins the same power which the,police enjoins under section 173(8) Cr.P.C. to direct for further investigation even though the police had already investigated the matter and had submitted it's report to the Magistrate. It has been held by the Supreme Court in the case of **State of Bihar and another versus J.A.C. Saldanha and others: 1980 SCC (Cr).272**·as follows:-

"The power of the Magistrate under section 156(3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out herein before. The power conferred upon the Magistrate under section 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even after the submission of the report as provided in section 173(8)."

(Emphasis Mine).

22. The Supreme Court has spelt out the same law earlier also in the case of **Abhinandan Jha versus Dinesh Misra:**

AIR 1968 SC 117 in the following terms:-

"But there may be instances when the Magistrate may take the view, on a consideration of a final report that the opinion formed by the police is not based on full and complete investigation, in which case, in our opinion, the Magistrate will have ample jurisdiction to give direction to the police, under section 156(3), to make a further investigation" (Emphasis Mine)."

It has further been held Rakesh Puri's case (Supra):-

"**Thus it is clear the under section 156(3) Cr.P.C. the Magistrate can only direct registration and investigation of the offences by the Police. (Is) can such an order revisable under section 397 Cr.P.C.? The answer is emphatic No. The accused no where comes into picture at that stage. Such a nature of order if allowed to be subjected to. the revisional powers of the court under section 397 Cr.P.C. then it will defeat the very purpose of section 156(3) Cr.P.C. for which it has been enacted in the Code and will open 'Tsunamis' for the revisional courts and. no investigation will be allowed to proceed. This was never the intention of the Legislature and framers of law. The aggrieved accused has been conferred the right to be heard at the appropriate stage by the Cr.P.C. and that certainly does not include the stage of Section 156(3) Cr.P.C.** Resultantly an order under section 156(3) is not revisable under section 397(1) Cr.P.C. The Division Bench in Ajai Malviya's case (Supra) even though took a note of the observations made by the Apex Court m the case of **Devarapalli Lakshaminarayana Reddy and others** but went contrary to it in holding that the revision lay against an order under section 156(3) Cr.P.C. at the instance of an accused, which view is the very ante thesis of the observation made by the Apex Court in the said Judgment. With due respect to the Judges of the said division bench case they have made a casual observation, even with out looking to section 397 Cr.P.C. which deals with revisional· powers of the High. Court as well as of the Session's Court, that the revision lay against the order passed under Section 156(3) Cr.P.C. The Division Bench, with profound respect did not examine the scope of revisional powers of the courts at all. In the case of **Suresh Chand Jain** (Supra) has been held by the Apex court that:-

"***But the significant point to be noticed is when a Magistrate orders investigation under chapter XII he does so before he takes cognizance.*** "
(Emphasis Mine)

23. Thus there was no opinion formed by the Magistrate against any body and hence no body was an accused and. hence there does not arise any question of infringment of any "Fundamental Right" or"legal right" of any person.

From the discussions made above it is clear that no revision is maintainable at the instance of the accused against an order passed under section 156(3) Cr.P.C."

24. In the decision (Rakesh Puri's Case) another aspect of the matter of maintainability of writ petition of the instance of accused when the F.I.R. has

been registered under order of Magistrate under Section .156(3) Cr.P.C. has also been dealt with as follows:-.

"Now coming to the last submission, which has been argued during the course of the argument that a writ petition is not maintainable for quashing of a FIR unless and until an order under section 156(3) is challenged by the aggrieved person. In this respect I am of the view that the said aspect the matter should not vex the mind at all. 'Legal rights' are different from 'Constitutional Rights'. The code of criminal procedure confers a Legal Right' where as Article 32 and 226 of The Constitution Of India confers a 'Fundamental' and a 'Constitutional Right'. Article 32 by itself is a 'Fundamental Right'. Because a person does not possess a legal right does not divest him from wielding his constitutional rights. More over prior to the lodging of the FIR a person against whom an application or complaint under section 156(3) Cr.P.C. has been filed is not entitled to be heard nor he can challenge any order passed on the said application but as soon as the FIR is registered he gets a constitutional right to challenge the same as he is anointed as an accused and hence can always show that his Fundamental Rights conferred under Article 14, 19 and 21 of The Constitution Of India are jeopardized as no offence is disclosed through the said FIR and registration of the same by the police is illegal. Since the aggrieved person does not have any right to challenge and raise his grievance before the court of law prior to the registration of FIR his said disability vanishes with registration of the same against him. Merely because the Magistrate has ordered for registration and investigation of the case that does not takes away or abridges and /or divest the aggrieved person to approached the High Court in it's extra ordinary constitutional writ Jurisdiction to show that the FIR does not discloses commission of any cognizable offence and therefore it deserves to' be quashed or that proceedings are tainted with malafides and is vexatious. The passing of an order under section 156 (3) Cr.P.C. by a Magistrate does not in any way even slightly takes away extra-ordinary powers of this court under Article 226 of the constitution to examine the contentions of the petitioner accused within the periphery of the guide lines laid down by the apex court in Bhajan Lal's case (Supra). It will be dichotomical even to ponder that a FIR registered by the police under section 154(3) of the code or on it's own is amenable to the writ jurisdiction of this court but this court will have no such constitutional power. if the FIR is registered under the order passed by the Magistrate in an administrative capacity under chapter XII Cr.P.C. though the power under section 154(3) and 156(3) are, in essence, similar to each other having the same result The writ power of this court under Article 226 of The Constitution is not dependent upon the power or authority of the subordinate courts. Further an alternative remedy is no bar to entertain a petition under Article 226 of The. Constitution as pas been held in voluminous judgments both by this court as well as by the Apex Court. Reference may be had to ***Whirlpool Corporation versus Registrar of Trade Marks, Mumbai And others;(1998) 8 SCC 1, Committee Of Management, S.P.G. Inter College, Eka, Firozabad And Another versus Regional Joint director of Education And others; 2004(5) A WC 4956, State of U.P. versus Mohd Mooh; AIR 1958 SC 86, M/S***

Canon India Pvt Ltd versus State of U.P.; 2003 UPTC 10, Hidustan Aluminium Corporation Ltd versus State of U.P. 1977 UPTC 81., Union If India And another versus State of Haryana and another(2000)10 SCC 482, Sophia Girls School, Meerut, Cantt versus Cantonment Board, Meerut And Another;2003 (6) A WC 4986.

25. Further maintainability of a writ petition is not dependent upon an order passed by the Magistrate under section 156(3) Cr.P.C. because even administrative action are subject to writ jurisdiction of this court. Exercise of Constitutional power under Article 226 Of The Constitution in the context of present controversy depends more upon factual aspect of the matter-discloser of offence by the FIR and not on the fact that the FIR was registered . under Magistrate's direction. The order passed by the Magistrate under section 156(3) Cr.P.C. does not diminishes the Fundamental Rights under Chapter III of the Constitution conferred on it's citizens. It is to be noted that while dealing with power to quash the FIR by High Court the Supreme Court in **Bhajan Lal's case** (Supra) as well as in ***B.R. Bajaj versus State of Punjab; 1995 SCC(Cr.) 1059*** has not said that the prospective accused has got no right to challenge the FIR. It had laid down various criterion's for quashing of the FIR and one of such ground is that the FIR does not discloses commission of cognizable offence of any kind. The Magistrate under section 156(3) Cr.P.C. is concerned only with this guide lines and not with other guide lines enumerated by the apex court in those cases whereas a writ for quashing of the FIR is also maintainable on other grounds as well which include legal bar from prosecution, malafide, no legal evidence, lack of admissible evidences etc. Thus the writ petitioner can not be thrown out of the court merely because the FIR is registered under the orders of the Magistrate passed under section 156(3) Cr.P.C. It has been held by the apex court in the case of ***S.N. Sharma versus Bipen Kumar Tiwari: (1970) 1 SCC 653*** in para 10 as follows:-

"*It appears to us that the, though the code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that cognizable offence has been committed in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the high court under Article 226 of the Constitution under which . if the high could be convinced that the power of investigation has been exercised by a police officer malafide the High Court can always issue a writ of mandamus restraining the police from misusing his legal powers.* "s

26. The above quoted passage of **S.N. Sharma's case** (Supra) has been quoted with approval in **Bhajan Lal's case** (Supra) by the apex court and it has been observed thus:

"*But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen then the court on being approached by the person aggrieved for the redress of any grievance, has to consider the nature and extent of the breach and pass appropriate orders as may be called forwithout leaving the citizens to the mercy of police echelons*

since human dignity is a dear value of our Constitution."

Moreover, the Apex Court has taken a good care in the cases of arbitrary exercise of power by the police in the law laid down in ***Joginder Kumar Vs. State of Uttar Pradesh: AIR 1994 SC 1349: 1994 SCC(Cr) 1172; D.K.Basu versus State ofW.B.: AIR 1997 SC 610 : (1997) 1 SCC 416; State of Maharastra versus Christian Community Welfare Council:AIR 2004 SC 7*** and in ***Smt. Nilabati Behera versus State of Orrisa :AIR1993 SC1960: 1993 Cr.LJ.2899***.

27. Thus the residue of the discussion made above is that a writ petition under Article 226 of The Constitution Of India. Is maintainable at the instance of the accused challenging the FIR within the periphery of guide lines laid down by the apex court in **Bahajan Lal's case** (Supra).**S.N. Sharma's case** (Supra) as well as in other binding judicial pronouncements by it and also by this court whether the FIR has been registered by the police itself or under the orders of the Superintendent Of Police(Section 154(3) or Under orders of Magistrate. under section 156(3) Cr.P.C.

28. Summing up the discussion the judgment of the division bench in Ajay Malviya's case (Supra) does not lay down the correct law and it's opinion is contrary to the law laid down by the apex court as well as against the statutory provision under section 397(1)&(2) Cr.P.C. and hence it does not have any binding effect. The alleged accused has no right to challenge an order passed under section 156(3) Cr.P.C. at a pre cognizance stage by a Magistrate and no revision under section 397/401 Cr.P.C. or petition under section 482 Cr.P.C. lay against such an order at his instance being barred by section 397(2) Cr.P.C. and on the simple reason that to secure the ends of justice it is a must that if cognizable offence is disclosed in an application or complaint filed by a victim then his such an application must be ordered to be investigated by the Magistrate to bring the culprits to books and not to thwart his attempt to get the FIR registered against prospective malefactors by rejecting his such an application which will not amount to securing the ends of justice but will result in travesty of it. "

29. Resultantly, from the discussions made above it is clear that Ajai Malvia's case is contrarily to Section 397 (1) and (2) Cr.P.C. which deals with the revisional powers of this Court. In the aforesaid judgment the Division Bench has not at all taken into consideration the aforesaid Section which deals with revisional power of this Court as well as Sessions Judge. Consequently, it does not lay down a binding precedent and is declared per incurium. In holding so I am fortified by the following judgments in the Apex Court:-

State through S.P. New Delhi and another Vs. Rattan Lal Rora (2004) 4 SCC 590; State of U;P. and another Vs. Synthetics and chemicals Ltd. and another (1991)4 SCC 139; Nirmal Jeet Kaur Vs. State of M.P. (2004) .7 SCC 558;N. Bhargavan Pillai Vs. State of Kerala AIR 2004 SC 2317.

It has been held by the Apex Court in 2006 in the case of ***Mayuram Subramnian Srinivasan Vs. C.B.I*** as follows;

"*The effect of Order XXI Rule 13A of the Rules does not appear to have been brought to the notice of the Court while dealing with the application for stay of the judgment of the High Court in orders on which reliance is placed by learned counsel for the appellants. The consequences which flow from such non reference to applicable provisions have been highlighted by this Court in many cases., In State through S.P. New Delhi v. Ratan Lal Arora (2004) 4 SCC(590) it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedent value and shall have to be treated as having been rendered per incuriam. The present case stands at pat, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.*

"Incuria", literally means "carelessness". In practice per incuriam is taken to mean per ignoration. English Courts have developed this principle in relaxation of the rule of stare decisis The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293, is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the 'Constitution') which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. and another v. Synthetics and Chemicals Ltd. and another (1991) 4 SCC (139). To perpetuate an error is no heroism. To rectify it is the compulsion ,of the judicial conscience. The position was highlighted in Nirmal Jeet Kaur v. State of MP. (2004 (7) SCC 558). The question was again examined in N. Bhargavan Pillai; (dead) by, Lrs. And. Anr. v. State of Kerala (AIR 2004 SC 2317).

It was observed in para 14 of the said judgment as, follows:

"14- Coming to the plea relating to benefits under the, Probation Act, it is to be noted that Section 18 of the said Act clearly rules out application of the Probation Act to a case covered under Section 5(2) of the Act. Therefore, there is no substance, in the accused-appellant's plea relating to grant of benefit under the Probation Act. The decision in Bore Gowda's case (supra) does not· even indicate that Section 18 of the Probation Act was taken note of. In view of the specific statutory bar the view.' if any. expressed without analyzing the statutory provision cannot in our view be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. Looked at from any angle, the appeal is sans merit and deserves dismissal, which we direct.

(underline emphasis supplied)"

30. Thus, the residue from the discussion made above brings out that the accused does not have any right to challenge an order passed under Section 156(3) Cr.P.C and therefore, the present revision at the instance of Chandan, who is a prospective accused in an application under Section 156(3) Cr.P.C. is not maintainable and therefore, this revision is dismissed as being not maintainable.

31. Since, this Court is burdened with a spate of such revisions every day, therefore, I consider it appropriate to direct the Registrar General of this Court to circulate a copy of this order to all the Judicial Officers in the State for their information and follow up action.

This revision stands dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 6152 of 2006

Smt. Masuman ...Applicant
Versus
State of U.P. & others...Opposite Parties

Connected
With Criminal Misc. Application No.1442 of 2006, With Criminal Misc. Application No.3420 of 2006, With Criminal Misc. Application No.3313 of 2006, With Criminal Misc. Application No.3207 of 2006, With Criminal Misc. Application No.3275 of 2006, With Criminal Misc. Application No.3184 of 2006, With Criminal Misc. Application No.3617 of 2006, With Criminal Misc. Application No.3611 of 2006, With Criminal Misc. Application No.3637 of 2006, With Criminal Misc. Application No.3725 of 2006, With Criminal Misc. Application NO.3106 of 2006, With Criminal Misc. Application No.2290 of 2006, With Criminal Misc. Application No.2298 of 2006, With Criminal Misc. Application No.2199 of 2006, With Criminal Misc. Application No.2093 of 2006, With Criminal Misc. Application No.2301 of 2006, With Criminal Misc. Application No.2385 of 2006, With Criminal Misc. Application No.2516 of 2006, With Criminal Misc. Application No.2773 of 2006

Counsel for the Applicant:
Sri Rajesh Dwivedi

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

Code of Criminal Procedure-Section 156 (3)-Power of Magistrate-when aggrieved person approach to Magistrate-only requirement to consider whether any cognizable offence made out or not-should not saddle himself with additional burden of the function of Police-held-the view taken by Magistrate-illegal-order Quashed-direction issued for fresh consideration.

Held: Para 49

At this stage it may be pointed out that the Magistrate is not required to conduct an enquiry under section 156(3) of the code and he should not saddle himself with additional burden of discharging the function of police as crime prevention and crime detection is the primary and foremost duty of the later and so it must be left to it to perform this part of his duty

Case law discussed:
2002 (44) ACC-670, 2002 (1) JCC-853, 2001 (2) JIC-231, AIR 1961 SC-896, 1977 ACC-364, 2001 (42) ACC-459, 2002 LCR-2907, 2001 (2) 320, 2005 (52) ACC-568, AIR 1950 Cal.-437, 2006 J.T. (1) SC-10, 1951 SCR-312, 2006 J.T. (1) SC-10, ILR 36 Alld.-222, AIR 1951 Cal.-2, ILR 19 Ban-51, ILR-35 Alld. 102, 2003 (47) ACC-140, 2001 ACC-(Suppl.)-277, AIR 1929 Pat-473, AIR (36) 1949 Cal-55, AIR 1988 SCC-111, 2001 J.T. (2) SC-81, AIR 1961 SC-986, 1976 ACC-230, 1997 (8) SCC-476, 2001 (50) SCC-264, J.T. 1990 (4) SC-650, 2003 JIC (2)-126, 2001 SCC (Crl.)-524, 2002 (44) ACC-248, 2003 C.B.C.-934

(Delivered by Hon'ble Vinod Prasad. J.)

1. This cluster of petitions have been filed by the aggrieved persons who have been rebuffed by the Magistrate and in some cases by the lower revisional court applications raises a common question of law and argument. In all these petitions the applicants have questioned the scope of section 156(3) Cr.P. C. and the power of the Magistrate there under. The prayer in all these applications are that the impugned orders passed by the concerned Magistrates, and in some cases also by the lower revisional court, refusing to order for registration of FIR on the application filed by various applicants under section 156(3) Cr.P.C. be set aside and the concerned Magistrates be directed to reconsider the said applications afresh and pass orders in accordance with law. The applicants have also challenged the correctness of the law laid down in *Gulab Chand Upadhyay Vs. State of UP. 2002 (44) ACC 670 as* in their submissions it is *per-incurium*. Since the arguments and the prayer made in all these cases are similar and identical therefore these applications were clubbed together and are being disposed of by this common judgment.

2. Before coming to the contentions raised a narration of the facts are inked below.

Criminal Misc. Application No. 6152 of 2006

Smt. Masuman vs State of UP and Others

The applicant Smt. Masuman wife of Faiz Mohmmad resident of village Rasoolpur police station Billhor district Kanpur Dehat invoked the power of the Chief Judicial Magistrate, Kanpur Dehat on as well in getting their FIR registered under section 156(3) Cr.P.C. (herein after referred to as the code). The applicants in all these applications are victims of the alleged malefactors and all these 20.9.2005, through an application under section 156 (3) Cr.P.C. with the allegations that Kallu Pal, Ram Pal, Raju , Munshi Lal, Vipin, Suresh, Jaggi Lal Kushwaha, and Chunna, alleged accused persons are her co-villagers. Her's is 'the only Mohammadan family in the village. Her husband is old, and fragile. The family earns it's livelihood by labouring. In the village Pradhan election in the recent past her family had supported the candidature of one Rajjan Singh who had defeated Sanjai in the said election. This had generated a feeling of revenge in the minds of alleged malefactors Kallu Pal, Ram Pal, Raju, Munshi Lal, Vipin, Suresh, Jaggi Lal Kushwaha, and Chunna who all are either relatives or well wishers of aforesaid Sanjai. Bubbling with feeling of revenge, on 7.9.2005 at 8 P.M when all the family members of the applicant except Iqrar, the younger son, were present in the house the aforesaid persons surrounded the house of the applicant vituperising the family. Faiz Mohd. and Mister, husband and elder son of the applicant Masuman were belaboured by raiders when they protested against the hurled abuses. Masuman, the applicant, her daughter Iskiman and grand daughter Afsana tried to save them but Iskiman was thrown on the ground by the alleged accused . Kallu, Raju and Chunna caught hold of her hands and Juggi Lal by sliding her clothes above her waist attempted to rape her. Iskiman was also sexually assaulted and molested by Munshi Lal who pressed her breasts and after putting his hands on her private parts tried to lift her. On hue and cry being raised by the

victim's family they were saved by the co-villagers who had collected there. The accused left the place of the incident threatening the family with dire consequences. Masuman could not get her FIR registered as she was surrounded in the way by the malefactors and was threatened for her life. Next day morning her husband and son were picked up by the alleged accused persons and were got implicated in a false case of theft. Injured Iskiman and Kumari Afsana got themselves medically examined in Ursala hospital, district Kanpur Nagar. The application of the applicant to the Senior Superintendent of Police, Kanpur Nagar, dated 13.9.2005 yielded no results and therefore the applicant approached the Chief Judicial Magistrate, Kanpur Dehat , through an,application under section 156 (3) Cr.P.C. against the respondents alleged accused to get her FIR registered for offences under sections 376/511/354/323/504/506 IPC and get it investigated by the police. She appended the injury reports of the two injured, her own affidavit and a copy of her application to SSP, Kanpur Nagar along with her application which are filed as annexure no. 1, 2 and 3 to the affidavit filed in support of this application. The aforesaid application of the applicant under section 156 (3) Cr.P.C. was however rejected by the Chief Judicial Magistrate, Kanpur Dehat by the impugned order dated 9.11.2005 (Annexure no. 4) by passing an order as if, he was deciding the case finally. The revision preferred by Masuman being Criminal Revision No. 145 of 2005, too also rejected by the lower revisional court vide it's impugned order dated 24.2.2006 (Annexure no.6) Hence this application to this court under section 482 Cr.P.C. by the applicant for quashing both the impugned orders and for a direction for fresh consideration of her application under Section 156(3) Cr.P.C. by the Chief Judicial Magistrate, Kanpur Dehat.

Criminal Miscellaneous Application No. 1442 of 2006

Uma Dutta Diwedi versus State ofU.P.

3. This application has been filed by the applicants for quashing of the order dated 18.1.2006 passed by Judicial Magistrate, Mau in Case no. 315 of 2006. By the aforesaid order, annexure no.7 the trial court has rejected the prayer for registration of FIR on application of the applicant filed under Section 156(3) Cr.P.C. on the ground that the applicant is in the knowledge of complete facts about the incident including the names of the accused and therefore, in view of the judgment in *Gulab Chand Upadhyay Vs. State of U.P. 2002 (1) JIC 853, Allahabad and Ram Babu Gupta Vs. State of U. P. 2001 (2) JIC 203* the said application was registered as a complaint case and an order for getting statement under Section 200 Cr.P.C. recorded was passed. The facts of the case were that the applicant who is retired railway government servant had very good relations with Virendra Singh, Vinod Kumar Singh and Iftikhar Ahmad. Seema Singh wife of Virendra Singh, who is grand daughter of Jagdish Singh was a teacher in the school started by his grand father. Virendra Singh aforesaid, who is a land mafia had misappropriated Rs.125000/= which was given to him by the applicant to start a brick kiln. He also got a tractor financed in the name of Vinod Kumar Singh, brother of applicant Uma Dutta Diwedi by deceiving Union Bank, Mazawara Branch and had also obtained signature of the applicant on papers to grab his property

and had also, committed theft of applicant's suit case. The applicant dispatched many registered letters on 24.12.2004, 27.12.04, 30.12.04 and 31.12.04 but no action was taken against alleged accused so much so that his registered letter dated 24.12.04 to S.S.P. Mau, D.I.G. Azamgarh and I.G. Varanasi range also proved futile in getting the FIR registered. Hence he filed application under section 156(3) Cr.P.C. on 14.3.2005 annexing therewith the photocopy of forged stamp papers, the copy of the application sent to S.S.P. on 24.12.04 and the registry receipts. The Magistrate however turned down his prayer by passing the impugned order on 18.1.2006. Hence this application.

Criminal Miscellaneous Application No.3420 of 2006

Indra Mohan Gautam versus State of U.P. And Others

4. In this application order dated 7.7.05 passed by A.C.J.M. Court no.1 Aligarh in Miscellaneous Application No.838 of 2004 Indra Mohan Gautam Vs. Ramesh Chandra and others as well as order dated 24.3 .06 passed by Additional Sessions Judge, court no.5 Aligarh in Criminal Revision No. 531 of 2005, under section 156(3) of the code is under challenge.

5. By order dated 7.7.05 the application under Section 156(3) filed by the applicant was ordered to be registered as a complaint case and 30.7.05 was fixed for recording of the statement under Section 200 Cr.P.C. By order dated 24.3.06, lower revisional court has rejected the revision also filed by the applicant. The facts of the case in nut shell were that on 3.6.2005 at 9 AM, when the applicant along with his father Bas Deo Sahai Gautam was going on his motor cycle to Aligarh to deposit the installments of his Ambassador car then near Nala crossing an attempt to murder him was attempted by shooting at him by the alleged accused Ramesh Chand Sharma, Subhash, Vinod and Kuldeep because his brother was a witness against these persons in a case for offence under section 392 IPC. The aforesaid persons were also threatening him on phone to annihilate him since last fifteen days, as a result of which he was unable to go to the police station to get his F.I.R lodged. Even though he had intimated the incident to S.S.P. Aligarh through registered post on 25.6.05 his FIR was not registered and hence he had filed application under section 156(3) Cr.P.C. on 29.6.2005 which was ordered to be registered as complaint by ACJM Court No.1, Aligarh on the ground that the police report, which was called for on the said application under Section 156(3) mentioned that there was enmity between the applicant and Rarnesh Chandra regarding the land dispute and that no injury report was filed by the applicant in the court . The revisional court also rejected his revision hence this Criminal Miscellaneous Application.

Criminal Miscellaneous Application No.3313 of 2006

Pradeep Kumar versus State ofU.P.and others

6. In this application the order dated 3.12.05 passed by A.C.J.M court no.1 Kanpur Dehat in criminal case no. 3096 of 2005, Pradeep Kumar Vs. Rams Shanker and others as well as order dated 20.12.05 passed by District Judge Kanpur Dehat in criminal revision

no. Nil of 2005 have been challenged. By the aforesaid orders the application under Section 156(3) Cr.P.C. by the applicant has been rejected by both the courts. A.C.J.M. court no.1 has observed in his impugned order that a report from police station has been received and he has perused the application and the annexure appended therewith. It seems just to get the application under Section 156(3) registered as complaint in register no. 9 and hence he fixed 7.1.06 for recording of statement under Section 200 Cr.P.C. The lower revisional court relying upon the judgment reported in 2001(2) JIC 231 Ram Babu Gupta Vs. State of U.P. has rejected the revision only on the ground that application under Section 156(3) Cr.P.C. can be registered as a complaint as well. The allegations in nutshell were that Mahabir was assaulted with Kulhadi and lathi by the alleged accused Rama Shanker and Manoj on the pretext that he had bet his pigs on 6.11.05 at 9 A.M. Injured Mahavir had received injuries. The incident was witnessed by the applicant and Anil Kumar. The application to S.S.P. Kanpur Nagar dated 7.11.2005 proved futile hence the application under Section 156(3) was filed on 9.11.05. Along with it the affidavit of the applicant Pradeep Kumar, copy of application sent to S.S.P. Kanpur Nagar ,registry receipt and the injury report dated 7.11.05 were annexed. Injury report indicated one incised wound and three contusions caused by sharp edged weapon and blunt object respectively were sustained by the applicant. Since the prayer for getting the FIR registered was denied by both the courts below hence, this application for setting aside the two orders and for a fresh consideration of the application under section 156(3) Cr.P.C.

Criminal Miscellaneous Application No.3207 of 2006

Dimi versus State of Uttar Pradesh

7. In this case application under Section 156(3) dated 17.1.06 filed by the applicant was rejected on 25.1.06 by Additional Civil Judge (Senior Division) Room No. 13, Allahabad. The facts of the case were that the respondents Rashid, Sadhu, Dildar, Liyakat Ali and Shaukat Ali armed with *lathi* and *danda* looted the house of the applicant on 5.1. 06 at 9.00 P.M. and belaboured the application inside his house. He was saved by the intervention of the villagers. The accused had left the spot threatening him. It is mentioned in the impugned order by the Magistrate that according to the police report both the rival fractions assaulted each other 5. 1.06 in which Saukat Ali respondent had lodged a NCR No. 6/06, under Sections 323, 504 I.P.C. The A.C.J.M. has referred various ruling reported in *AIR 1961 S.C. 896 Gopal Das Vs. State of Assam, 1977 ACC 364 (HC) Tula Ram Vs. Kishore Singh 2001 (42) ACC459 (HC) Suresh Chandra Jain Vs. State of M.P.* and ultimately ordered that the application be registered as complaint as there was no reason to direct the police to register the F.I.R.
and investigate the case. He had fixed 27.2.06 for recording of statement under Section 200 Cr.P.C.

Hence, this application.

Criminal Miscellaneous Application No.3275 of 2006

Mahakar Singh versus State of U.P**.**

8. In this Criminal Miscellaneous Application order dated 22.3.06 passed by Judicial Magistrate/Additional Civil

Judge Junior Division, Court no.2, Meerut, passed in case no. 461/06 has been challenged by which the application under Section 156(3) Cr.P.C. has been rejected by the trial court. The synopsised facts of the case were that the applicant Mahkar Singh had enmity with respondents Raj Karan because of land dispute. On 2.3.06 at 4.30 P.M. the applicant accompanied with his cousin brother Harveer had gone to Bally Bazar Meerut for purchasing and while returning at 8 P.M. he met his friend Bhanu Pratap Chandel. When they were chatting alleged accused, namely, Rajkaran, Prem Singh with one person, who was driving the motorcycle, surrounded them and Rajkaran assaulted the applicant with knife on the chest and head. When the applicant tried to escape, Prem Singh assaulted him with Saria as a result of which the applicant sustained injuries. On hue and cry being raised the accused escaped on the motorcycle. The F.I.R. of the applicant was not registered at P.S. Delhi Gate and the applicant was directed to get his medical examination done. The applicant was got admitted in P.L. Sharma Hospital and after two days of hospitalization he was discharged. Since the F.I.R. of the applicant was not registered, therefore, he filed an application under Section 156(3), for offences under section 307, 324, 506, 120B I.P.C. before the Magistrate ACJM II (JD), Meerut, on 13.3.06, which was rejected by the impugned order on the ground that the place of the incident is populated and the applicant has not filed any affidavit of witnesses, who had reached on the spot. Hence, this application challenging the aforesaid rejection.

Criminal Miscellaneous Application No.3184 of 2006

Smt. Suman Kumari versus State of U.P.And Others

9. In this Criminal Miscellaneous Application order dated 16.2.06 passed by Additional Chief Judicial Magistrate, Moradabad, passed in Miscellaneous Case No. 82/9/06 has been challenged.

10. The facts were that on 2.1.06 at 9.45 A.M. when Pankaj son of applicant Suman Kumari was going to school Asgar Hussain (Constable in G.R.P.) started abusing him. On protest being raised by the applicant, Asgar Hussain aforesaid, with knife and his wife Afrosh and others bet Smt. Suman Kumari. The applicant was saved by the neighbors. Since the F.I.R. of Smt. Suman Kumari was not taken down and she was arrested falsely under Section 151 Cr.P.C. therefore, she filed an application under Section 156(3) Cr.P.C. The said application and her prayer for registration of FIR was rejected by the Magistrate by passing the impugned order on the ground that no medical report was filed and the incident was known to her and no new fact can come to light. Therefore, in view of *Gulab Chand Upadhyay Vs. State 2002 LCR Page 2907 and 2001(2) 320 Joseph Madhuri Vs. Sachidanand Hari Shashtri* the application was ordered to be registered as complaint. Hence, challenge has been thrown to the aforesaid order dated 6.2.06 by this application.

Criminal Miscellaneous Application No.3617 of 2006

Asraf AU versus State of U.P. and Others

11. In this case application under Section 156(3) Cr.P.C. was ordered to be registered as a complaint vide impugned

order dated 4.8.05. The facts were that an application under Section 156(3) Cr.P.C. was filed on 15.3.05 before Judicial Magistrate first, Allahabad being Miscellaneous Case No. 750 of 2005 on the facts that on 14.2.05 at 2.30 P.M. the accused respondents Raja @ Irfan, Nafees Khan, Muzibulla @ Majjan, Mohd. Rijwan Khan, Farooq, Jameel, Ramjaan, Laddan, Imran, Zulifikaar attacked the complainant the other villagers and caused injuries to the applicant Ashraf Ali, Shakil, Imran @ Guddu. Two other person Suhail and Jameel also received injuries while trying to save the applicants. The police had connived with the accused. Applicant Ashraf Ali, Shakil and Imran @ Guddu have received serious injuries including fracture. Suhail and Mohd. Jameel had also received serious injuries. Since the police has not taken down the F.I.R. in spite of sending registry to the S.S.P. Allahabad and giving an application to him, therefore, the applicant Asraf Ali filed an application under Section 156(3) Cr.P.C. It is relevant to mention here that the police in respect of this very incident had registered the F.I.R. being crime no. 41 of 2005, under Section 307 I.P.C., crime no. 42 of 2005, under Section 25 Arms Act, crime no. 43 of 2005, under Section 4/5 Explosive Act, crime no. 44 of 2005, under Section 4/5 Explosive Act against the applicant Asraf Ali and injured Shakeel, Imran etc. Since the Magistrate refused to get the F.I.R. registered for the applicant's version of the incident hence this application under Section 482 Cr.P.C. for quashing of the aforesaid order.

Criminal Miscellaneous Application No.3611 of 2006

Bobby Khan versus State of U.P. and another

12. In this application the impugned order is dated 13.3.06 passed by C.J.M. Jaunpur by which the application under Section 156(3) Cr.P.C. of the applicant was rejected and the same has been ordered to be registered as complaint on the ground that there is no need for investigation by the police and the complainant can produce the evidence, which is available to him. The facts in nutshell were that the respondent Rakesh Kumar Srivastava had taken away Marshal Jeep No. MP 18BB 1372 belonging to the applicant and thereafter was threatening him to get him murdered through anti-social elements and was not returning his aforesaid vehicle. The alleged accused had wrongly detained the vehicle and it was not possible to get the vehicle recovered without the help of police. Since his prayer for getting the matter investigated by the police was rejected by the impugned order therefore, this application under Section 482 Cr.P.C. for setting aside that order.

Criminal Miscellaneous Application No.3637 of 2006

Om Prakash versus State of U.P. and others

13. In this case the impugned order is dated 20.3.06 passed by Additional Chief Judicial Magistrate, Bijnor in Miscellaneous Application No. Nil of 2006. In this case also the application under Section 156(3) Cr.P.C. has been ordered to be registered as complaint on the ground that all the facts are clear including the names of the accused with

their addresses and hence there was no need to order for investigation by the police on the basis of judgment in *Gulab Chand Upadhyay and Ram Bahadur Gupta (Supra)*.

The facts in nutshell were that the applicant Om Prakash son of Ram Dayal was cheated to a tune of Rs. 50,000/- by Mohd. Arif, which was entrusted to him by the applicant on 4.4.05 and repeated demand of the same resulted in his beating by Mohd. Arif aforesaid , his brother Malwa, and father Mujareen Ahmad with one more person inside his house with *lathi* and *Dandas*. The applicant had received injuries and got himself medically examined in district hospital yet his F.I.R. was not taken down. Aggrieved by the said refusal by the Magistrate in getting the FIR registered and investigated by the police this application under section 482 Cr.P.C. to set aside the said impugned order has been filed.

Criminal Miscellaneous Application No. 3725 of 2006

Gava Prasad versus State of U.P. and others

14. In this case the impugned order is dated 17.2.06 passed by A.C.J.M. court no.1 Kanpur Dehat in Case Gaya Prasad Vs. Rajendra Singh @ Lakhan. By the impugned order the application under Section 156(3) Cr.P.C. by the applicant has been ordered to be registered as complaint fixing 1.3.06 for recording of statement under Section 200 Cr.P. C. The challenge has also been made to the revisional court's order dated 25.3 .06 by which the revision has also been dismissed mentioning cases of *Ram Babu Gupta and Gulab Chand Upadhyay* which was filed against the said order of rejection. The facts in nutshell were that Subhash Chandra @ Lalla son of applicant Gaya Prasad was fired at when he was sitting at his door by Sunil son of Suresh Chand, who was accompanied by Rajendra @ Lakhan, Sunil son of Rajendra and Babloo, who all were armed with *lathi, kanta* and *barehi.* This incident was witnessed, by Puttu, Jamaluddeen, Rambali and others including the applicant. The son of the applicant was sent for medical treatment to Kanpur. The police had arrested the three accused but later on released them. The accused persons were threatening the applicant with dire consequences. The injured son of the applicant was admitted in Hallet Hospital. Since the F.I.R.of the applicant was refused to be registered the applicant filed an application under Section 156(3) Cr.P.C. but the registration of case by the police was denied by the Magistrate as well and also by lower revisional court. Hence, this application under Section 482 Cr.P.C. to set aside both the orders.

Criminal Miscellaneous Application No.3106 of 2006

Radhey Shyam Versus State of U.P. and others

15. In this case the impugned order is dated 18.2.06 passed by C.J.M. Farrukhabad in Miscellaneous Case No. Nil of 2005, Radhy Shyam Vs. Rakesh and others by which application under Section 156(3) Cr.P. C. filed by the applicant has been rejected by C.J.M. Farrukhabad on the ground that all the facts were known to the applicant including the names of witnesses. Hence, on the basis of case of *Glulab Chand Upadhyay* there was no need for investigation. The facts were that the application under Section 156(3) Cr.P.C.

was filed on 16.12.05 by applicant Radhey Shyam for offences under Section 147, 148, 323, 452, 504 and 506 I.P.C. and SC/ST Act. The occurrence alleged in nutshell were that on 28.11.05 at 7.30 P.M. the accused, ten in number armed with *lathi* and *danda* and one accused armed with licensee gun raided the house of the applicant making utterances of filthy abuses relating to castes and bet the wife of the applicant Sushila Devi and Shyam Singh. The accused left the spot threatening the family members. Since the registry sent to the administrative authorities and the other applications did not yielded any result in getting the F.I.R. lodged therefore, the application under Section 156(3) was filed by the applicant. The medical examinations of the injured was done in Dr. Ram Manohar Lohia Government Hospital Farrukhabad on 1.12.2005. Since the F.I.R. was not ordered to be registered by the impugned order hence this application under Section 482 Cr.P.C. for quashing the said order and direction for fresh consideration.

Criminal Miscellaneous Application No.2290 of 2006

Mahendra Singh versus State of U.P.

16. In this case the impugned order is dated 7.1.06 passed in Miscellaneous Case No. 15 of 2005, Mahendra Singh Vs. State of U.P. by which order of registration of F.I.R. and investigation by the police has been refused by A.C.J.M. Ghaziabad and the application under Section 156(3) Cr.P.C. was ordered to be registered as complaint. The incident in short were that a fraud has been committed regarding a land scam in respect of Gram Sabha land relating which the civil suit is already pending. The said land scam has been committed by preparation of forged and false documents, sale deeds, agreements to sell etc. by the accused. Since the registration of F.I.R. was denied by the Magistrate hence this application under Section 482 Cr.P.C. for quashing and direction for fresh consideration in accordance with law of the application under Section 156(3) Cr.P.C.

Criminal Miscellaneous Application No.2298 of 2006

Naresh Kumar Tanjia versus State of U.P.

17. In this case the impugned order is dated 29.11 .2005 by which the application under Section 156(3) Cr.P.C. of the applicant has been ordered to be registered as complaint and the registration of F.I.R. and investigation has been denied by the Judicial Magistrate II, court No. 15, Saharanpur. The aforesaid application was for offences under Section 323, 504,506,441, 120B, 427, 327, 341, 342 I.P.C. The incident incapisulated was that the applicant Naresh Kumar Taneja was assaulted on 2.10.05 at 11.00 A.M. and the accused had grabbed the plot belonging to the applicant by opening a way on the said plots. The accused also snatched away his licensee revolver and had illegally captured the plot belonging to the nephew of the applicant. The police had registered a false case against the applicant under Section 307 I.P.C. and had taken his licensee revolver as well. The applicant was got medically examined by the police. Since the applicant's efforts to get the F.I.R. registered failed he filed an application under Section 156(3) for getting his F.I.R. registered, which was denied by the Magistrate on the basis of cases of *Glulab Chand Upadhyay Vs. State and Vinay Pandey Vs. State 2005*

(52) ACC 568. Since the effort to get his F.I.R. registered failed hence, this application under Section 482 Cr.P.C. by the applicant.

Criminal Miscellaneous Application No. 2199 of 2006

Badshah versus State of U.P.& others

18. In this case the impugned order is dated 19.4.05 passed by A.C.J.M court no.8, Aligarh in case no. 1100 of 2004 Badhshah Vs. Netrapal Singh and others wherein application under Section 156(3) Cr.P.C. was ordered to be registered as complaint and the revision against the said order was also dismissed by Additional Sessions Judge court no.5, Aligarh vide impugned order dated 29.8.05 in revision no. 373 of 2004. The facts indicated that the applicant was defrauded of his land as well as of an amount of more than Rs. 3 lakhs on the basis of a false sale deed, which had been registered in the name of Rosh Kumar, Sunil Kumar and Subhash Kumar by the power of attorney holder Netra Pal Singh. Because of the aforesaid fact Badshah was threatened on 17.10.03 at 8.00 P.M. for being annihilated by the said Netra Pal and his sons and hence he had filed application under section 156(3) Cr.P.C. The rejection of his prayer to order for registration of FIR by the Magistrate is under challenge in this application.

Criminal Miscellaneous Application No.2093 of 2006

Anil Versus State of U.P.

19. In this case the impugned order is dated 7.2.06 passed by A.C.J.M. II, Meerut by which the application under Section 156(3) Cr.P.C. had been ordered to be registered as complaint. The allegations were that on 1.1.06 at 7.30 P.M. the accused armed with country made pistol entered into the house of the applicant Anil and committed a decoity of motorcycle, colour T.V., Fridge, C.D. Player, Almirah, Dressing table, Mixy etc. when the applicant was in jail. The registration of the F.I.R. was denied on the basis of judgment reported in *2005 (52) ACC 568* by the A.C.J.M. (2) Meerut. Hence, this application under Section 482 Cr.P.C. for quashing the said order and for a direction for reconsideration of the application under Section 156(3) afresh by the Magistrate concerned A.C.J.M. II, Meerut.

Criminal Miscellaneous Application No.2301 of 2006

Rajendra Singh versus State of U.P. And Others

20. In this case" the impugned order is dated 16.1.06 passed by Special Judge (D.A.A.) Etawah in Miscellaneous Case No. 7 of 2006, under Sections 395 I.P.C. By the impugned order the registration of the F.I.R. has been denied by the Special Judge D.A.A. Etawah the ground that the applicant knew the accused, who are resident of his village and all the facts regarding the incident is known to the him. The impugned order mentions the rulings of Ram Babu Gupta reported in 2001 (43) A.C.C. page 50. The application under Section 156(3) Cr.P.C. has been ordered to be registered as complaint. Since the registration of F.I.R. was denied and hence this application for quashing and direction for fresh consideration by the Special Judge D.A.A of the application filed by the applicant.

Criminal Miscellaneous Application No.2385 of 2006
Brij Kishore Diwedi versus State of U.P. and others

21. In this case the impugned order is dated 16. 1. 06 passed by A.C.J.M. Court no.2 Kanpur Dehat by which the application under Section 156(3) Cr.P.C. filed by the applicant Brij Kishore being case No. 24 of 2006 has been ordered to be registered as complaint. The application under Section 156(3) was filed for offences under Section 323, 324, 325, 452, 504, 506 I.P.C. on the synopsized allegations that on 22.8.05 at 10.30 A.M. the accused filthily abused the applicant on the ground of washing of clothes and after entering into his house bet the applicant and his wife Madhu Dwivedi with *lathi, danda* and *Kurphi* as a result of which they sustained injuries. The applicant got themselves medically examined on 24.8.05 and 25.8.05. Fractures were found in their injuries. Along with the application the applicant had appended the medical reports as well as the X-ray reports. Inspite of the fact that the application disclosed cognizable offences his F.I.R. was not registered and therefore, he filed application under Section 156(3) Cr.P.C. for registration of his F.I.R., which was denied by the Magistrate, ACJM Kanpur Dehat , Court no.1 and the application under Section 156(3) was ordered to be registered as a complaint. Hence, this application under Section 482 Cr.P.C. for quashing of the aforesaid order and for a direction to the Magistrate concerned to proceed in accordance with law.

Criminal Miscellaneous Application No.2516 of 2006
Naimuddin versus State of U.P. and another

22. In this case the impugned order is dated 4.2.06 passed by A.C.J.M. 1st Bulandshahar in Miscellaneous Case No. 31 of 2006 Naimuddin Vs. Shamsu by which application under Section 156(3) Cr.P.C., which was filed by the applicant Naimudeen has been ordered to be registered as complaint by the impugned order. The facts in short were that the applicant is litigating with the family members of his wife and because of the aforesaid enmity on 12.1.06 at 4.30 P.M. the accused armed with knife, country made pistol and *danda* assaulted the applicant Naimuddin, who sustained injuries. Since his F.I.R. was not registered he filed application under Section 156(3) Cr.P.C. but the Magistrate also denied passing an order for registration of the F.I.R. by the impugned order. Hence, this application under Section 482 Cr.P.C. for quashing of the impugned order and a direction for registration of the F. I.R. and investigation thereon.

Criminal Miscellaneous Application No.2773 of 2006
Ram Prasad Tiwari versus State of U.P. And Others.

23. In this case the impugned order is dated 3.3.06 passed by civil Judge, Judicial Magistrate, court no.6, Allahabad in Miscellaneous Case No. 34/XII/06. The order for registration of F.I.R. was not made by the Magistrate on the basis of the case of Gulab Chand Upadhyay. The facts were that the tractor and trolley belonging to the applicant Ram Prasad Tiwari had

been stolen but his F .I.R. was not taken down by the police nor his aforesaid tractor being tractor no. U.P. 70 V 9289 and the trolley have been recovered by the police. The Magistrate had refused to order for registration of the FIR on the ground that there is no need of investigation and ordered that the application under Section 156(3) be registered as complaint. Hence this application under section 482 to set aside the said order and for a direction for reconsideration of the application under section 156(3) Cr.P.C. afresh by the Magistrate.

24. From the facts mentioned above there is a comity of prayer and legal question which is engulfing all these cases. All these applications are filed by victims who had earlier approached the concerned Magistrates under section 156(3) CLP.C. for getting their FIR registered by the police but the said prayer has been rebuffed by the concerned Magistrates and in some cases even by the lower revisional courts mainly on two grounds, in some cases by ordering the applicant to file a complaint as he is in full knowledge of all the facts and investigation is not required on the basis of *Gulab Chand Upadhyay's* and *Ram Lal's case* and in others by rejecting his application under Section 156(3) Cr.P.C. Thus, in all these cases a common grievance and a common question of law have been raised.

25. I have heard respective counsels for the applicants in all these applications in support of their case as well as learned A.G.A. in opposition

26. Learned counsels for the applicants in all these cases contended with force that the order passed by the Magistrate is wholly illegal without jurisdiction and de horse the law. They contended that the application under Section 156(3) Cr.P.C. disclosed commission of cognizable offences and hence the Magistrate had no jurisdiction to refuse passing of an order for registration and investigation of the FIR. The counsels contended that the Magistrate has to act in accordance with law and he cannot travel beyond the scope of the power, which has been conferred on him under Section 156(3) Cr.P.C. They harangued that once a cognizable offence is disclosed in the application filed under section 156(3) Cr.P.C. the Magistrate is left with no other option but to order for investigation as the applicants had invoked the administrative jurisdiction of the Magistrate for a direction to the police to register the FIR under chapter XII of the code and the Magistrate acted illegally in not granting the said relief. They further argued that the Magistrate who is not in a position to deal with the cases already pending before him further saddled himself to inquire into the matter under chapter XV Cr.P.C. when the applicants never wanted it from him under chapter XII of the code. They urged that the Magistrate has acted on his own by passing the impugned orders and it is he who has started the *lis* by taking cognizance under chapter XV which was never prayed for by the applicants and which is not permissible under the law. According to their submission the power of investigation lies with the police and not with the Magistrate and hence he is incompetent to decide as to whether a cognizable offence is investigable or not and it is only the police who can decide it under section 157 (1) &(2) Cr.P.C. and if the police decides not to investigate the

FIR then it has to record it's reasons for the same and communicate it to the informant. They contended that the Magistrate by usurping the power of the police has acted de-hors the law and without jurisdiction. They further submitted that it was choice of the applicants to decide as to under, which forum he wants the redressal of his grievances and start the *lis*. They further contended that the Magistrate cannot be a party to a *lis* and he cannot decide the forum for it, which is the right of the victim. The Magistrate does not have the advisory jurisdiction to direct them to file a complaint they harangued. In some cases the counsels even went on to argue that the Magistrate by directing the applicants to file a complaint has sided with the accused as they will never be arrested for committing the cognizable offences and there by the Magistrate has circumvented the power of the police under section 41 of the code and thus the applicants can bring the culprits before the court only after a gap of many days when the summoning order is issued against them and even after that the accused will be released on bail under the normal procedure. The counsels further submitted that no justice has been done by the Magistrates by passing the impugned orders and he has given a further blow to victim, the injured and aggrieved which is nothing but adding insult to injury. The counsels further contended that the Magistrate in fact has made himself a party to the litigation by starting the litigation under chapter XV against the mandate of law ignoring the definition clause of the "complaint" under Section 2(d) Cr.P.C. With other collateral submissions the counsels in chorus in all theses cases concluded their arguments by submitting that the impugned orders passed by the concerned Magistrate is illegal and deserves to be set aside and they - the Magistrate in all these cases deserves a direction from this court to reconsider the application of the applicants under section 156(3) Cr.P.C. afresh in accordance with the law and decide the same within a stipulated period of time. They seriously questioned the correctness of the law laid down in *Gulab Chand Upadhyay Vs. State of U.P: 2002(44) ACC page 670* and contended that it is *per- incurium* and should be declared as such. They further contended that in ‘full Bench decision of this Court reported in *Ram Babu Gupta* versus State of U.P. 2001 (43) ACC 50, it is no where laid down that if a cognizable offence is disclosed the Magistrate even then can refuse to direct registration of FIR and follow up investigation and further that the Magistrate can *suo motu* on his own convert an application under Section 156(3) Cr.P.C. into one as "complaint". In support of their contentions, the learned counsels relied upon many judgments of apex court as well as of this Court which will be 'referred to at the appropriate stage subsequently in this judgment. Learned AGA on the other hand contended that since in all these cases the Magistrate thought it essential not to order for an investigation, therefore, the order can not be faulted with. He contended that the Magistrate can treat the application under section 156(3) Cr.P.C. as a "Complaint". He submitted that since that the Magistrate felt that there is no requirement of investigation in view of the law laid down in *Ram Babu Gupta* and *Gulab Chand Upadhyay(*Supra), therefore , he has passed the impugned orders which should be upheld. He further contended that the Magistrate under section 156(3) of the code on his own can

order the registration of an application under that section as a "complaint" and that power vests in him.

27. Cogitating over the rival contentions raised by the contesting rival sides it is clear that the contentions raised by both the sides mainly rotates around the Controversy as to what is the scope of section 156(3) Cr.P.C. and what are the powers of the Magistrate there under and whether the Magistrate on his own, without prayer being made by the aggrieved persons, direct the applicant to take recourse to a particular forum of litigation and to refuse his prayer for the other forum by starting a *lis* The last bone of contention is as to whether the decision in *Gulab Chand Upadhyay's* case(Supra) is against the provision of section 2(d) & 156(3) Cr.P.C. and is *per incurium*.

For an indepth analysis and for determination of the rival submissions a glimpse of the various relevant provisions of the Code seems to be an indispensable must. To start with section 2(d) Cr.P.C. describes the "complaint" thus:-

"Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

28. This definition of "Complaint" reproduces, with adjustments in sequence of words, old section 4(h) Cr.P.C. of 1898 (Old Code) and it brings out the salient features of "complaint". A complaint is an allegation made orally or in writing to a Magistrate in respect of some person whether known or unknown who has committed an offence **with a view to his taking action** (Emphasis Supplied). Under the code there is no definite format for lodging of the "Complaint". It is the prayer made and intention shown, of the person making it, that will determine the document to be a "Complaint" or not? *This ingradient of taking action by the Magistrate himself" in a definite manner provided under chapter XV of the code is the sine qua non for any Magistrate to take action on a complaint. For a document to be "Complaint" under section 2(d) of the code there has to be an express or implied intention of the person concerned for the Magistrate to take action himself . It does not Include a police report, which is defined under section 2(r) Cr.P.C*. The actions which a Magistrate is required to take on a complaint are provided under chapter X V titled as "COMPLAINT TO A MAGISTRATE". The action is to record statement of the complainant under section 200 and that of his witnesses under section 202 of the code. However if the prayer is of any other kind then that will not be a complaint as is defined under section 2(d) Cr.P.C. Let me clear a doubt here. The word "Complaint" as is used in common parlance in a generic Sense is different from the word "Complaint" under section 2(d) Cr.P.C. An application for issuing a warrant or for recovery of a thing or article or for registration of a case under section 156(3) Cr.P.C. or for issuance of search warrants etc. falls out side the periphery of the definition of "Complaint" under section 2(d) of the code. In the case of **Superintendent and Remembrancer of legal affairs, West Bengal Vs. Abani Kumar Banerjee, AIR 1950. Cal 437** while explaining taking of cognizance on a "complaint" Calcutta High Court has observed thus:-

"When the Magistrate applies his mind not for the purposes of proceedings under the subsequent sections of this chapter, but for taking action of some other kind, e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he can not be said to have taken cognizance of the offence".

29. The aforesaid judgement has the approval of the apex court in case of **Mohd. Yousuf versus Afaq Jahan and Another: 2006 JT (1) (SC) 10 and R.R. Chari versus State of U.P.: 1951 SCR 312.** Thus it is clear that the prayer made before the Magistrate by an aggrieved person of any other kind or with the prayer to direct the police to register the case and investigate is not a "Complaint", In **Mohd. Yousuf versus Afaq Jahan and Another: 2006 JT (1) (SC) 10** the apex court has observed thus:-

"*What is taking cognizance has not been defined in the Criminal procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1) (a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter- proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceedings under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. "* (Emphasis Mine)

In **Haidar Raza versus King Emperor: ILR 36 All 222: 12ALJ 306** it has been held by this court that:-

"Now the original statement made by Sukhari to the Honorary Magistrates, by which their attention was first drawn to the commission of an offence punishable under Section161 or the Indian Penal Code, was certainly not a "complaint" within the meaning of the definition given in section 4 of the Criminal Procedure Code. It is clear to me that Sukhari had no intention of asking the Magistrates to take action under the Criminal Procedure Code. When he made that statement, he was merely explaining to them why he was holding out for certain terms before he could consent to compound the offence in the case in which he appeared as complainant. If, therefore, the Honorary Magistrates proceeded to take cognizance of this offence, they could only do so under section 190, clause 1(c). The learned Sessions Judge's view of the proceedings which followed seems either to be coloured by the assumption that the Honorary Magistrates, being empowered by law to take cognizance of the matter under the clause aforesaid, were legally bound to do so, and to do so immediately, or else to rest on the supposition that their examination of Sukhari on solemn affirmation shows that they had so taken cognizance. I am not prepared to admit either of these propositions."

30. The same view has been reiterated in *Durga Dutto versus State: AIR 1951 Cal 2: Bhagwan Singh versus Hanuman Mandal: ILR 19 Bom. 51;*

Emperor versus Phu Lal: ILR 35 All 102: 11 ALJ 15 and many other decisions. Thus there does not remain any doubt that any or all and sundry application is not a complaint and the Magistrate does not have the power to take cognizance on such an application under section 190(1) (a). An application under Section 156(3) Cr.P.C. falls within the category of one of such applications as is clear from the above judgments. The said matter has also come up before this Court on numerous occasions in Ram Anuj Dubey Vs. State of U.P. 2003 (47) ACC page 140, Mahboob Ali Vs. State of U.P. and others 2001 (supplement) ACC page 277, Dinesh Chandra and others Vs. State of U.P.2001(1) JIC 942 (Allahabad) and Madhubala vs. Suresh Kumar and others 1997 (35) ACC 371. It has been held in *Dinesh Chandra and other* as follows:-

"The Apex Court has definitely not used the term complaint to thwart or defeat the purpose behind the enactment of Section 156(3) itself. The term was never used with any intention that the reference order appears to channelise. Thus, in my view it should be an application and not a complaint." (Emphasis mine)

It has been further held in the same case that:-

"It is, therefore, abundantly clear from the above analysis that the application given under Section 156(3) has only a limited purpose i.e. to seek the interference of the court of concerned Judicial Magistrate for an order to the police to register and investigate the cognizable case, facts of the which are disclosed in such an application. Such an application is never meant for cognizance under Section 190 Cr.P.C. or for drawing of proceedings under Chapter XV and XVI. (Emphasis mine)

31. It has been held in the case of **Mahboob Ali Vs. State of U.P. and others 2001 ACC(suppl.) 277** that:-

"The scope and procedure of application under Section 156(3) Cr.P.C. and the complaint are totally different. The provisions of 156(3) Cr. P. C. are contained in Chapter XII of Code of Criminal Procedure which deals with the information to the police officers and their powers to investigate. Subsection(1) of Section 156 Cr.P.C. empowers Officer In-Charge of a police station to investigate any cognizable case without the order of the. Magistrate. Section 156(3) empowers a Magistrate to order investigation of a cognizance offence. Therefore, the provisions of Section 156 are concerned with the investigation of a case and since there can be no investigation without registering of a case, it may be said that the above provisions of Section 156(3)relate to the registration and investigation of a case. In case any order is passed under Section 156(3) Cr.P.C. the police will follow the procedure contained under Section 156(1) Cr.P.C. and after investigation submit a report under Section 173 Cr.P.C. The procedure for taking cognizance on the report submitted under Section 173 Cr.P.C. shall be separated i.e. cognizance on a police report under Section 190 (b) Cr.P. C. Separate procedure for trail of such cases is also provided in the Cr.P.C. While on a filing a complaint the Magistrate had to adopt a procedure under Chapter XIV of Cr.P.C. If the Magistrate takes cognizance on a complaint, it would be under Section

190(a) Cr.P.C. and separate procedure is also provided for trial of a complaint case. Thus, the legislature had intentionally made to separate procedures to be followed and therefore, the Magistrate cannot convert one procedure into other. It has also been held in several cases of this Court that Magistrate has no power to register. an application under Section 156(3) Cr.P.C. as complaint. Moreover. the definition of complaint given in Section 2(d) says that 'complaint' means any allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Thus, the scope of application under Section 156(3) Cr.P.C. and that of a complaint are also different. (Emphasis Mine)

32. It is further been held in the case of **Bharat Kishore Lal Singh Deo Versus Judhistir Modak: AIR 1929 Patna 473**as follows:-

"The definition of a complaint is to be found in Section4 (h), Criminal P. C. and is as follows:

"*Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown has committed an offence, but it does not include the report of a police officer. "*

In my opinion these words mean this. First of all there must be an allegation of an offence, and it is true that the petition in this case does contain that requirement, but secondly, the allegation of the specific offence must be with a give to action being taken under the Code, that is to say action being taken for the prosecution of the offender far having committed the specific offence, and it must be made to the Magistrate in his Judicial capacity so that he may exercise his power of taking cognizance of that specific offence and proceed in respect of it against the person accused. In this case and examination of the petition shows clearly that the object of the "'petition was not that the particular offence should be punished but rather the mention of the particular offence is put in with a view to illustrate the kind of conduct which is the accused person is supposed to be following and against which kind of conduct the petitioner seeks protection. The whole tenor of the petition shows that what is super most in the mind of the petitioner is the anticipated conduct of the person whom he mentions and against that conduct he asked the Deputy Commissioner in his executive capacity to make enquiry and protect him against a repetition of such conduct. "(Emphasis Mine)

33. It has been held in the case of ***Subodh Chandra Vs. Jamser Mandal: AIR (36) 1949 Calcutta(page 55)*** as follows:-

"It has been urged by Mr. Mukherjee on behalf of the petitioner that the so-called petition was not a complaint within the meaning of Section 4(1) (h), Criminal P.C. "Complaint" is there defined as an allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person whether known or unknown had committed an offence, but it does not include a report by a police officer. In short to amount to a complaint the

allegation must be made with a view to the recipient taking action under the Code charging some person with a particular offence.

It is clear that the petition or complaint of the opposite party was not presented to the Sub Divisional magistrate with a view to the latter taking action under the Criminal Procedure Code. The learned Magistrate is in terms asked to take administrative action. Therefore, the petition or complaint was not such a complaint as a Magistrate could act upon under Section 190 (1), Criminal P.C. "(Emphasis Mine).

34. Thus, it is clear that a document to be a "complaint" must be made before the Magistrate for his taking action in a defined manner under Chapter XV of the Code after taking cognizance of the offence under Section 190 (1)(a). Hence, there is a scuttle but well perceptible distinct between a “complaint” and an application under Section 156(3) Cr.P.C. and that difference lies between the intention and prayer of the applicant. If he wants the Magistrate to take action against the culprits then that is a "complaint". If the aggrieved person does not want to Magistrate take action himself, but he wants a different kind of action from him Such as a direction to the police to take action then it is not a "complaint". I do not mean to say that if a "complaint" covered by section 2(d) is filed before the Magistrate, he cannot direct for an investigation. The Magistrate certainly can send a "complaint" for investigation but that he has to send to the police before he takes cognizance of the offence under section 190(1) (a) but after being satisfied that the application discloses, prima facie, commission of a cognizable offence. Thus, it is amply clear that the blanket order of treating every application with a prayer for a direction to register and investigate the FIR cannot, be registered as a "complaint" by the Magistrate and in case he does so the action will be unsanctified by law. The purpose of a "complaint" and an application for investigation under Section 156(3) Cr.P.C. are entirely different. In this view of the matter, the contention of the learned counsel for the applicants that an application under Section 156(3) cannot be treated to be a complaint on its own by the Magistrate is well founded and has to be upheld. I am fortified in my view from the above judgements of this court.

35. Coming to the second aspect of the argument which was elaborately submitted regarding the registration of FIR and it's investigation by the police it is to be noted that the FIR is registered under section 154(1) or under the directions section 154(3) or 156(3) of the code. All information which discloses commission of a cognizable offence has to be mandatorily registered under section 154(1) Cr.P.C. and the same has to be investigated under section 156(1) of the code unless the officer in charge of the police station decides not to investigate it under section 157(2) of the code for which the officer in charge has to mention his reasons for not entering into such an investigation and inform the informant regarding the said decision. Informant thereafter can take recourse to the remedy available to him under the law. This aspect of the matter has been dealt with exhaustively by the apex court in the case of **State of Haryana And Others versus Bhajan Lal And Others; 1992 SCC(Cr.) 426.** In paras 30,31 and 33 the apex court has laid down that:-

"30.The legal mandate enshrined in section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined under section2(c) of the code) if given orally (in which case it is to be reduced into writing) or In writing to "an officer in charge of a police station" (within the meaning of section 2 (o) of the code) and signed by the informant should be entered in a book to be kept by such officer in such form as the state government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.

31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of section 154(1) of the code, the concerned police officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under section 156 of the code to investigate, subject to the proviso to section 157. In case, an officer in charge of a police station refuses to exercise the Jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the superintendent of police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub section (3) of section 154 of the Code.

……

……

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of section 154 (1) of the code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information". (Under line Emphasis Supplied).

Section 156(3) provides that "Any Magistrate may order such an investigation as mentioned above". These words "Any Magistrate" includes Executive Magistrates as well besides Judicial Magistrates. This sub section does not create any distinction between these two types of Magistrates. Further words "an investigation as mentioned above" relates to an investigation which is to be conducted by the police under section 156(1) Cr.P.C. The purview of the power of the Magistrate conferred under section 156(3) Cr.P.C. does not travel beyond the said scope. It is limited in nature and the Magistrate under that sub-section is empowered only to look to the application or complaint only to find out as to whether a cognizable offence is disclosed or not? Let me make it clear that registration of a FIR is quite different than the investigation of the offence disclosed. It has been so held in the case of ***Bhajan***

Lal (Supra) by the apex court in para 41 of the said judgment.

The apex court has held:-

"*We shall now examine as to what are the requirements 'to be satisfied by an officer in charge of a police station before he enter into the realm of investigation of a cognizable offence after the stage of registration of the offence under section 154(l). We have already found that the police have under section 154(1) of the code a statutory duty to register a cognizable offence and thereafter under section 156(1) a statutory right to investigate any cognizable case without requiring sanction of a Magistrate. However, the said statutory right to investigate a cognizable offence is subject to the fulfillment of pre-requisite condition, contemplated in section 157(1). The condition is that the officer in charge of the police station before proceeding to investigate the facts and circumstances of the case should have "reason to suspect " the commission of an offence which he is empowered under section 156 to investigate* ". (Emphasis Supplied)

In para 48 and 49 of the same judgement the apex court has reiterated the same view and has held thus:-

"Resultantly, the condition precedent to the commencement of the investigation under section 157(1) Cr.P.C. of the code is the existence of the reason to suspect the commission of a cognizable offence which has to be, prima facie, disclosed by the allegations made in the first information report laid before the police officer under section 154(1)." (Emphasis Supplied)

36. In the case of **Madhu Bala versus Suresh Kumar and Others: 1998 SCC (Cr.)111** it has been held by the Supreme Court in para 10 thereof;-

"*The provisions of the code, therefore, do not in anyway stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under section 156(3) of the code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same".*

37. The above quoted passage in unequivocal terms brings forth the ambit of power of Magistrate under section 156(3) Cr.P.C. Under the said section the Magistrate does not takes the cognizance himself and the said power is wielded at the pre cognizance stage falling under chapter XII relating to the power of the police to investigate into the cognizable offence. In the case of **Suresh Chand Jain versus State of Madhya Pradesh: JT 2001(2) SC 81 (Supra)** it has been held by the Apex court that: -

"But the significant point to be noticed is when a Magistrate orders investigation under chapter XII he does so before he takes cognizance." (Emphasis Supplied)

The Apex Court in the same judgment has approved the following observations made by it in the case of ***Gopal Das Sindhi versus State of Asaam: AIR 1961 SC 986 : 1961(2) Cr.L.J.39 :-***

"There is no reason why the time of the Magistrate should be wasted when

primarily the duty to investigate in a case involving cognizable offence is with the police". (Emphasis mine).

Nothing can depict the scope of the power of the Magistrate under the section 156(3) of the code more clearly than the words of the apex court in **Devarapalli Lakshaminarayana Reddy and others versus V. Narayana Reddy and others: 1976 ACC 230** where the apex court has observed thus:-

"Peremptory reminder or intimation to the police to exercise their plenary powers of investigation under section 156(1)" (Emphasis mine)

38. Thus if an application is filed by an aggrieved person under Section 156(3) Cr.P.C., his prayer is to be decided within the ambit of the aforesaid section by the Magistrate as is mentioned above. Magistrate cannot travel beyond the scope of the said section on his own. The Magistrate under that section cannot transform an application to one under Section 2 (d) Cr.P.C. as a "complaint". There is yet another difficulty in allowing the Magistrate take cognizance *suo motu* by transforming application under section 156(3) Cr.P.C to one under section 2(d) and 190 (1) (a) Cr.P.C. and that is that the Magistrate cannot start the *lis* on his own. It is for the aggrieved person to engineer it and that too in the form and forum he deems fit and proper. I may note a word caution here. It has been noticed by this Court that in some cases where the cognizable offences are disclosed the Magistrates does order for registration and investigation but in some cases they refuses it. The learned A. G .A. has pointed out that this gives a dis-advantage to the accused and fosters arbitrariness at the hands of the Magistrate. In my view if a cognizable offence is disclosed through an application under Section 156(3) Cr.P.C. the Magistrate has no option but to order for registration and investigation of the case. So far as injustice to accused is concerned if he is aggrieved by the registration of F.I.R. he can challenge the same by filing a writ petition under Article 226 of the Constitution of India with in the ambit of the guidelines laid down by the apex court in the case of ***Bhajan Lal*** (Supra). Moreover, the Apex Court has taken a good care in cases of arbitrary exercise of power by the police through judgements in cases of ***Joginder Kumar Vs. State of Uttar Pradesh: AIR 1994 SC 1349: 1994 SCC(Cr) 1172 ; D.K.Basu versus State of W.B.: AIR 1997 SC 610 : (1997) 1 SCC 416; State of Maharastra versus Christian Community Welfare Council : AIR 2004 SC 7; Smt Nilabati Behera versus State of Orissa :AlR1993 SC 1960: 1993 Cr.L.J.2899;***and also in ***State of Haryana Versus Bhajan Lal (Supra)*** where it has been held as such:-

"But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen then the court on being approached by the person aggrieved for the redress of any grievance, has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution."

39. These judgements by the apex court obliterates the anxiety shown by the learned A.G.A. during the course of his

argument regarding the misuse of power by the police and malicious prosecution of citizens. It is to be reminded that investigation is the province of the police and not of the Magistrate. What cases are to be investigated and what are not to be investigated is to be judged by the investigating agency under section 157 (l) &(2) of the code and the Magistrate can not dwell upon the said question at all as it is not for him to decide whether the investigation is required or not. To be brief, he lacks the power to investigate and thereby lacks ancillary power to decide any question relating to it.

40. Another point is that the Magistrate can not pre-judge the issue of investigation merely on the basis of an allegations leveled in an application under Section 156(3) Cr.P.C. that the matter does not require an investigation and he will inquire it himself. If the Magistrate is of the opinion that a cognizable offence does not require investigation then what he is going to inquire himself is a big question as the law is that all cognizable offence must be investigated subject to exception under section 157(2) of the code. In most of the cases the Magistrate has rejected the prayer by holding that the applicant is in the knowledge of all the facts and therefore, he will not order for an investigation. This, to me, seems to be a totally perverse and injudicious approach. For example in cases of murder, loot, decoity, rape etc. the informant is in the knowledge of all the facts of the incident but this does not mean that the Magistrate should not direct an investigation under section 156(3) Cr.P.C. It is preposterous even to cogitate that merely because the victim applicant /complainant is in the knowledge of all the facts therefore his F.I.R. should not be directed to be registered. Such type of orders are wholly illegal and are glaring examples of injustice. Further under that section 156(3), the aggrieved person never wanted the Magistrate to take cognizance of the offence and inquire into the matter himself. The Magistrate by refusing the registration of FIR has done great injustice to the victim who is the worst sufferer.

41. From a third point of view also such types of orders cannot be sustained. Filing of a complaint and prosecuting it many times is not viable. The complainant may be at a loss to lead the evidences because of so many reasons political as well as social. Normally the police does not register the FIR against politically and socially influential persons and the witnesses are not ready to give evidences against them. The poor aggrieved person who cannot arrange for bringing witnesses to the court and launch a successful prosecution, or the accused may be so powerful so as to detest the complaint from bringing his witness or they may be politically so strong that the witnesses may not come forward to support complainant's case in the Court are some of such examples, which are not exhaustive in nature but where the insensitiveness of the Magistrate may result in total miscarriage of justice. Thus, there may be thousands of other reasons for an aggrieved victim not to file a complaint but to resort to the power of Magistrate under Section 156(3) Cr.P.C.

42. Moreover by not allowing the prayer for registration of FIR and investigation of cognizable offence the Magistrate in fact has made Section 156(3) of the code otiose. It has been held

by the Apex Court in the case of ***Suresh Chand Jain (Supra)*** as follows:-

"Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code."

43. It has been further held by the Apex Court in the same judgment *"But the significant point to be noticed is when a Magistrate orders investigation under chapter XII he does so before he takes cognizance."* (Emphasis Mine).

It has been held by the Apex Court in case of ***Madhu Bala vs. Suresh Kumar and others (J997) 8 Supreme Court Cases 476*** as follows:-

"Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(I) of the Code which empowers the police to investigate into a cognizable "case" and the Rules framed under the Indian Police Act. 1861 it (the police) is duty-bound to formally register a case and then investigate into the same."

(Emphasis Supplied)

44. Thus from the above it is clear that the Magistrate by nor directing investigation under section 156(3) Cr.P.C. gives a long rope to the police to act on it's whims and caprice and fosters illegality of inaction by the police in registration of information of cognizable offences. It is not permissible for any Magistrate under the code to act contrary to the provisions of the code. It has been held in the case of **K.S. Bhoir versus State of Maharastra: (2000) 10 SCC 264:-**

"It is not permissible of the High Court to direct an authority under the Act to act contrary to the statutory provisions".

45. It has been held by the Apex Court in the case of ***State of Haryana and others Vs. Bhajan Lal and others: JT 1990 (4) SC 650: 1992 Supp (1) SCC 335,*** that:-

"At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon any enquiry as to whether the information laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer-in-charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 157 of the Code to investigate, subject to the proviso to Section157 (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the insuing part of this judgment, we do not propose to deal with those sections in extenso in the present context). ***In case, an offence incharge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him,*** *the person*

aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section(3) of Section 154 of the Code.

Be it noted that in Section 154(1) of the Code the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. ***Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (e) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case****. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 861) passed by the Legislative Council of 1ndia read that 'every complaint or information' preferred to an officer-in-charge of a police station should 'be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872(Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer-incharge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1955 which word is now used in Sections 154, 155, 157 and 189 (c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence."*

"It is therefore, manifestly clear that if any information disclosing a cognizable offence is laid before, officer-in-charge of a police station satisfying the requirements of Section 154 (1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information". (Emphasis mine)

46. The aforesaid quoted portions of the said judgment of **Bhajan Lal** (Supra) has been quoted with approval in following judgments of apex court - **Ramesh Kumari Vs. State NCT of Delhi and others :JT 2006 (2) SC 548; Superintendent Of Police, C.B.1. & Others versus Tapan Kumar Singh 2003 (2) JIC 126 (para 20)** where it has been observed by the apex court as follows:-

"The true test is whether the information furnished provides a reasons to suspect the commission of an offence which the concerned police officer is

empowered under section 156 of the code to investigate. If it does he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolve of his duty to investigate the case and discover the true facts, if he can. "

47. The above quoted portion of the two judgements ***Bhajan Lal*** and ***Tapan Kumar Singh*** (Supra) (Under Line ones) provides the ample guide lines for the Magistrates to act under section 156(3) Cr.P.C. since under that section he is required to order the same investigation which the officer in charge of the police station was required to conduct under section 156(1) within the scope of section 157(2) of the code. The investigation under section 154(3) or under Section 156(3) are the same which the officer in charge of the police station is required to conduct. Once an order under these two sections are passed the power of the investigation under section 156(1) of the code is infused with life and the investigation by the police is conducted under that section alone. It has been held by the apex court in the case of **Central Bureau Of Investigation through S.P.Jaipur versus State of Rajasthan and another:2001 SCC(Cr) 524** as follows:

"What is contained in sub-section (3) of section 156 is the power to order the investigation referred to in sub-section (1), because the words " order such an investigation as above mentioned "in sub- section (3) are inmistakably clear as referring to the other sub- section. Thus the power is to order an "officer in charge of a police Station" to conduct investigation" (Emphasis mine and Supplied)

It has further been laid down in the same judgement:-

"The primary responsibility for conducting investigation into offences in cognizable cases vests with such police officer. Section 156(3) of the code empowers a Magistrate to direct such officer in charge of the police station to investigate any cognizable case over which such Magistrate has jurisdiction."(Emphasis mine and Supplied)

In para 16 thereof the apex court has laid down the law, in respect of the power of Magistrate under section 156(3)Cr.P.C. as follows:-

"We. Therefore, reiterate that the magisterial power can not be stretched under the said sub-section beyond directing the officer in charge of a police station to conduct the investigation ". (Emphasis mine and supplied)

48. This, leads us to the case of *Gulab Chand Upadhyay and others Vs. State of U.P. :2002(1) JIC 853*. In the aforesaid judgment Hon'ble Sushil Harkauli, J. had relied upon the judgment rendered by Hislordship in *Masuriyadin alia Note and others Vs. Additional*

Session's Judge, Allahabad :2002 (44) ACC 248. The aforesaid judgment of *Masuryiadin's case* was however over ruled by a Division Bench of this Court in the case of **Govind and others vs. State of U.P. And others : 2003 Current Bail Cases 934 (DB)** . Since *Masuriyadin's case* was over ruled by a Division Bench of this Court therefore, the law laid down in the case of *Gulab Chand* (supra), in my humble view and with utmost respect to the Hon'ble Judge, does not lay down the correct law. In the aforesaid judgment *Gulab Chand Upadhyay (Supra)* Hislordship has taken a view that if the complainant is in the knowledge of all the details of an incident and where no investigation is required the investigation should not be ordered by the Magistrate under section 156(3) Cr.P.C. With utmost respect and humility at my command, I am unable to agree with the, aforesaid reasoning of the Hon'ble Judge being contrary to the section 156(3) of the code itself and also being contrary to the judgement of the apex court in cases of ***Bhajan Lal***(Supra), ***Suresh Chand Jain*** (Supra), ***B. C Govind*** (Supra) and ***Tapan Kumar Singh*** (Supra). It is the responsibility of the Magistrate to direct the police to follow the mandate of law and it will be a travesty of justice that the Magistrate instead of directing the police to follow the statutory mandate of law gives it a long rope to act arbitrarily at it's whims. Thus when ever the Magistrate is approached by an aggrieved person with the prayer that the police has refused to register his FIR of cognizable offence the Magistrate is required to look into his such prayer only to determine as to whether any cognizable offence is disclosed thereby or not, and if it does, then he has no option but to direct the police to register the FIR and investigate the offence. (Emphasis Mine)

49. At this stage it may be pointed out that the Magistrate is not required to conduct an enquiry under section 156(3) of the code and he should not saddle himself with additional burden of discharging the function of police as crime prevention and crime detection is the primary and foremost duty of the later and so it must be left to it to perform this part of his duty. It has been held by Privy Council in the case of **Emperor versus Khwaja Nazir Ahmad:1945 PC 17** thus:-

"The function of the judiciary and the police are complementary and not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise it 's own function, always, of course, subject to the right of the court to intervene in appropriate case when moved under section 491, Criminal Procedure Code, to give direction in the nature of Habeas Corpus."

Further the observations in ***Gopal Das Sindhi's case***(Supra) that:- "***There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in a case involving cognizable offence is with the police***" is the law of the land. This observation by the apex court, with due respect and humility, in my view, runs counter to the following observations made by this court in Gulab Chand Upadhyay's case (Supra):- *"it must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring*

investigation" . A reading of *Gulab Chand Upadhyay and others Vs. State of U.P.:2002 (1) JIC 853 I* find that the above quoted passage in the judgements in **Bhajan Lal)(Supra), Central Bereau Of Investigation through S.P.Jaipur versus State of Rajasthan and another:2001 SCC(Cr) 524 (Supra)** and observations of the apex court in ***Gopal Das Sindhi's case (Supra)*** were not placed before His lordship and he had no occasion to consider the same which is clear from the following observation by His lordship:- *"No decision was cited before me to throw any light upon the consideration which should weight with the Magistrate to guide his discretion*". Since in the aforesaid judgement the law as is spelt out by the apex court, mentioned above was not placed before His lordship and he did not dwelled upon it, I with utmost respect and humility and humbleness, is bound by the law laid down by the apex court and therefore is of the opinion that the said judgement in *Gulab Chand Upadhyay and others Vs. State of U.P.: 2002(1) JIC 853* does not lay down the correct law and have no binding effect so far it runs contrary to the law laid down by the apex court.

50. Resultantly all the above Criminal Misc. Applications, in this cluster of petitions, under section 482 Cr.P.C., filed by various applicants being Criminal Misc. Application No. 6152 of 2006 Smt. Masuman vs. State of UP and Others; Criminal Miscellaneous Application No. 1442 of 2006 Uma Dutta Diwedi versus State of U.P. Criminal Miscellaneous Application No.3420 of 2006 Indra Mohan Gautam versus State of U.P. And Others Criminal Miscellaneous Application No.3313 of 2006 Pradeep Kumar versus State of U.P. and others; Criminal Miscellaneous Application No.3207 of 2006 Dimi versus State of Uttar Pradesh; Criminal Miscellaneous Application No.3275 of 2006 Mahakar Singh versus State of U.P.; Criminal Miscellaneous Application No.3184 of 2006 Smt. Suman Kumari versus State of U.P. And Others; Criminal Miscellaneous Application No.3617 of 2006 Asraf Ali versus State of U.P. And Others; Criminal Miscellaneous Application No.3611 of 2006 Bobby Khan versus State of U.P. and another; Criminal Miscellaneous Application No.3637 of 2006 Om Prakash versus State of U.P. and others; Criminal Miscellaneous Application No. 3725 of 2006 Gaya Prasad versus State of U.P. and others; Criminal Miscellaneous Application No.3106 of 2006 Radhey Shyam Versus State of U.P. And Others; Criminal Miscellaneous Application No.2290 of 2006 Mahendra Singh versus State of U.P.; Criminal Miscellaneous Application No.2298 of 2006 Naresh Kumar Taneja versus State of U.P.; Criminal Miscellaneous Application No. 2199 of 2006 Badshah versus State of U.P.& others; Criminal Miscellaneous Application No.2093 of 2006 Anil Versus State Of U.P.; Criminal Miscellaneous Application No.2301 of 2006 Rajendra Singh versus State of U.P. And Others; Criminal Miscellaneous Application No.2385 of 2006 Brij Kishore Diwedi versus State of U.P. And Others; Criminal Miscellaneous Application No.2773 of 2006 Ram Prasad Tiwari versus State of U.P. And Others; all are allowed. The impugned order/orders passed by concerned Magistrates, and in concerned cases, also by the lower revisional courts, in all the above Criminal Misc. Applications are quashed. Concerned Magistrates are directed to take up the applications under section 156(3) Cr.P.C. filed by respective applicant afresh and

decide it in accordance with the law within one month from the receipt of the copy of this judgement by them.

51. Concludingly, in view of what has been stated above, all these Criminal Misc. Applications, mentioned above, under Section 482 Cr.P.C. are allowed in terms of observations mentioned above.

52. Let a copy of this judgment be sent to the Registrar General of this Court to be circulated to all the Magistrates and other Judicial Officers in the State for their intimation, guidance and compliance.
