APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2007

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE SUDHIR AGARWAL, J.

Special Appeal No. 138 of 2007

Shami Ahmad ...Appellant/Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Surendra Kumar Mishra

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Service Law-Transfer-at behest of concern minister of department-held-Minister being responsible for acts and omissions of his department-direction issued in public interest-can not be vitiated in law.

Held: Para 7

Therefore the Minister of the concerned department being responsible for the acts and omissions of his department, has issued certain directions, it cannot be said that he has no business or reason to direct the subordinate authorities to act in a particular manner so long as such direction is not inconsistent with any statutory provision.

Case law discussed:
2002 (1) UPLBEC-369
1997 (1) SCC-35
AIR 1997 SC-3297

(Delivered by Hon'ble S. Rafat Alam, A.C.J.)

1. Heard Sri S.K. Mishra, learned counsel for the appellant and also perused the judgment of the Hon'ble Single Judge dismissing the appellant's writ petition challenging the order of his transfer.

2. Learned counsel for the appellant vehemently contended that the impugned order of transfer having been passed at the behest of the Minister, Animal Husbandry and hence it is malicious in law and cannot be sustained.

3. After perusing the record as well as the judgment under appeal we are of the view that no interference is called for in this appeal. It appears that initially the appellant was posted as Live Stock Extension Officer at Cattle Care Centre, Niyamtabad, District Chandauli wherefrom he was transferred to Cattle Care Centre, Dulhipur vide Chief Veterinary Officer, District Chandauli's order dated 14.8.2006 and in his place one Ram Awadh Yadav, Live Stock Extension Officer was posted at Niyamtabad. Subsequently vide order dated 24.8.2006 the earlier order of transfer was modified and the appellant was posted at Kamalpur/Dhanapur instead of Dulhipur and one Mohd. Hafiz was transferred from Bhismpur Chakia to Niyamtabad. The order dated 24.8.2006 thereafter was cancelled by order dated 12.9.2006 pursuant to the direction issued by Deputy Director, Animal Husbandry, Varanasi. It appears that the Ministry of Animal Husbandry thereafter intervened and pursuant to the Government Order dated 28.11.2006, the cancellation order dated 12.9.2006 was recalled. Thereafter by order dated 2.1.2007 the appellant has been posted at Bhismpur Chakia i.e. the place wherefrom Sri Mohd. Hafiz was transferred to Niyamtabad and the said Sri Mohd. Hafiz has been sent Niyamtabad whereagainst the appellant filed the aforesaid writ petition which has been dismissed by the Hon'ble Single Judge. The only ground which has been taken by the appellant and argued before us is that

the impugned order of transfer having been passed pursuant to the orders of the Minister of the concerned department, therefore, per se it is vitiated in law. We do not find any force in the submission. A Minister of the department in our view can give suitable direction in the interest of the department to the officers concerned, since for effective functioning of the department he is answerable to the representatives of the people in the House. A Division Bench in **Narendra Kumar Rai Vs. State of U.P. and others, 2002(1) UPLBEC 369** while considering the transfers made on the representation of representative of people i.e. M.L.A. or M.P. observed as under:-

"We are clearly of the opinion that from the mere fact that in a Government servant is transferred on the basis of a complaint made by a MLA or MP or a leader of the political party, it cannot be held that the same is mala fide and the transfer order cannot be struck down on the said ground alone without there being anything more. A MLA or MP is the representative of the people and common public has access to him. Often it is very difficult for a common man to meet the higher officers and to bring to their notice the misdeeds or the wrong way of functioning of a Government servant at a lower level. It is not possible for a common man to go to the capital of the State namely, Lucknow, and then to meet the higher officers to lodge a complaint against the wrong manner of functioning of a Government servant. The MLA and MP visit their constituency frequently and meet the members of the public. It is far easier for the public to lodge a complaint against the improper functioning of a Government servant with their representative namely the MLA or MP of the area than with the higher officers. If in such circumstances, the MLA or MP takes up the matter and brings to the notice of the higher officers or the minister of the concerned department about the misdeeds of a Government servant, no exception can be taken to such a course of action. The representatives of the people (MLA and MP) hold responsible constitutional position and there is no presumption that whenever they drew attention to the misdeeds of a Government servant they do so with mala fide intention. A transfer order passed soon after a letter or complaint lodged by MLA or MP or a political person cannot be branded as having been done at the dictate of such a person. There is no presumption that the authority passing the transfer orders has not applied his independent mind. It is quite likely that the authority was not aware of the situation and after the full and correct facts were brought to his notice he decides to take appropriate action on objective consideration. We are, therefore, clearly of the opinion that without there being anything more, the mere fact that a transfer order has been passed soon after a complaint has been sent by MLA or MP or a political person to the minister or superior officers of the concerned department, it cannot be branded as having been passed without application of mind or on the dictate of a political person."

4. The position of a Minister of the Department stands on a much higher footing. The executive power of the state is exercised in the manner provided in the constitution and the various provisions made thereunder. The Governor runs the executive Government of State with the aid and advice of the Chief Minister and

the counsel of Ministers which exercise powers and perform its duties by the individual Ministers as public officers with the assistance of the bureaucracy working in various departments and corporate sectors etc. Though the executive orders are required to be authenticated in the manner prescribed under Article 166(3) i.e. they are expressed in the name of the Governor but each Minister is individually and collectively responsible for the actions, acts and policies. They are accountable and answerable to the people. Their powers and duties are regulated by law and the rules. The legal and moral responsibility or the liability for the acts or omissions, duties performed and policy laid down rest solely on the Minister of the Department. In **Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and others 1997 (1) SCC 35** the Apex Court in respect to the Minister of the Department observed as under:-

"They are indictable for their conduct or omission, or misconduct or misappropriation. The Council of Ministers are jointly and severally responsible to the legislature. He/they is/are also publicly accountable for the acts or conducts in the performance of duties."

5. The position of Minister of Department was further explained in para 12 and 13 of the judgment as under:-

"12. When a Government in office misuses its powers figuratively, we refer to the individual Minister/Council of Ministers who are constituents of the Government. The Government acts through its bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Actions of the Government, should be accounted for social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the Constitution, the laws or administrative policy. The action would, therefore, bear necessary integral connection between the "purpose' and the end object of public welfare and not personal gain. The action cannot be divorced from that of the individual actor. The end is something aimed at and only individuals can have and shape the aims to further the social, economic and political goals. The ministerial responsibility thereat comes into consideration. The Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the Department of which he is the head. If the Minister, in fact, is responsible for all the detailed workings of his department, then clearly ministerial responsibility must cover a wider spectrum than mere moral responsibility: for no Minister can possibly get acquainted with all the detailed decisions involved in the working of his department. The ministerial responsibility, therefore, would be that the Minister must be prepared to answer questions in the House about the actions of his department and the resultant enforcement of the policies. He owes them moral responsibility. But for actions performed without his concurrence also, he will be required to provide explanations and also bear responsibility for the actions of the

bureaucrats who work under him. Therefore, he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him, bearing actual responsibility in the working of the department under his ministerial responsibility.

13. All purposes or actions for which moral responsibility can be attached are actions performed by individual persons composing the department. All government actions, therefore, means actions performed by individual persons to further the objectives set down in the Constitution, the laws and the administrative policies to develop democratic traditions, social and economic democracy set down in the Preamble, Part III and Part IV of the Constitution. The intention behind the government actions and purposes is to further the public welfare and the national interest. Public good is synonymous with protection of the interests of the citizens as a territorial unit or nation as a whole. It also aims to further the public policies. The limitations of the policies are kept along with the public interest to prevent the exploitation or misuse or abuse of the office or the executive actions for personal gain or for illegal gratification."

6. The same view has been reiterated in **Samatha Vs. State of Andhra Pradesh and others AIR 1997 SC 3297**.

7. Therefore the Minister of the concerned department being responsible for the acts and omissions of his department, has issued certain directions, it cannot be said that he has no business or reason to direct the subordinate authorities to act in a particular manner so long as such direction is not inconsistent with any statutory provision. If under the rules something is required to be done in a particular manner and by a particular authority in such case obviously a minister even if holding a high office would not be competent to direct such authority to exercise statutory power in a particular manner but in the absence of such provision the action taken on the directions of Minister cannot be said to be vitiated in law per se. There is nothing on record to show that the order issued by the Minister is not in public interest or not in the interest of department.

8. In the circumstances, we do not find any fault in the judgment under appeal and of the view that the writ petition has rightly been dismissed by the Hon'ble Single Judge. This appeal, therefore, lacks merit and is accordingly dismissed summarily. Appeal dismissed

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2007

BEFORE
THE HON'BLE R.K. RASTOGI, J,

Crl. Misc. Application no. 3076 of 2007

Shamsher and others ...Applicants
Versus
The State of U.P. ...Opposite Parties

Counsel for the Applicants:
Sri S.R. Singh
Sri Rajesh Maurya

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

(A) Code of Criminal Procedure-Session Trail pending since 1993-after closure of evidence-application to list both-the

pending session Trail as well as the cross cases simultaneously Trail court rejected taking view that the applicant -misusing the bail order-cancelled the Bail Bond-held-cancellation of bail bond proper but taking into judicial custody and sending jail not justified.

Held: Para 5

It is true that the cases were of the year 1993 and when the aforesaid S.T. and its cross sessions trial were pending in the same court, both these cases should have been listed for evidence on the same date in the court so that accused as well as witnesses in both the cases may appear in the court and evidence may be recorded in both the above sessions trials in presence of the parties. The Presiding Officer of the court concerned was of the view the accused were mis-using the bail and so he cancelled their bail bonds. He could do so, but there was no provision for taking that accused into judicial custody and sending him to jail, who was present in court. The Presiding Officer is not justified in this regard.

(B) Code of Criminal Procedure-Section 482-power of court-Trail court issued non-bailable warrant with process of 82 and 83 Cr.P.C.-held-committed great error-both can not be issued simultaneously.

Held; Para 6

It further appears that on the above date Presiding Officer further passed an order for issuing non-bailable warrants and processes under sections 82 and 83 Cr.P.C. simultaneously against the accused persons. He again committed legal error because all these processes cannot be issued simultaneously. The warrant is to be issued at the first instance and when the accused does not appear in court even after issue of warrant, the process under sections 82 Cr.P.C. can be issued only when there is a report to this effect that he is absconding. After issuing proclamation under sections 82 Cr.P.C. the court has to wait for thirty days from the date of publication of proclamation and then attachment under section 83 Cr.P.C. is to be issued. But if the court is of the view that the accused is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local jurisdiction of the court, the proclamation under section 82 Cr.P.C. and attachment u/s 83 Cr.P.C. can be issued simultaneously. In such a case, the court must be satisfied on the basis of the evidence produced before it that these circumstances exist and he has to mention these facts in the order for issuing processes under sections 82 and 83 Cr.P.C. simultaneously.

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

1. This is an application under section 482 Cr.P.C. to quash the impugned order dated 11.1.2007 passed by the Addl. Sessions Judge/Fast Track Court no.2, Azamgarh passed in Sessions Trial no. 18 of 1993 (State Vs. Ram Bahore) under sections 147, 148, 149, 323, 352 & 307 I.P.C. police station Rani Ki Sarai district Azamgarh.

2. Heard learned counsel for the applicants and learned A.G.A. for the State.

3. The facts relevant for disposal of this application are that the aforesaid sessions trial is pending in the above court and date 11.1.2007 was fixed in the case. On that date accused Arvind was present with his counsel, and the remaining accused Vijay Bahadur, Shamsher, Sarakchand, Subhash, Randhir, Raghunath, Smt. Radha Devi and Smt. Salari Devi were absent. An application for exemption on their behalf was moved,

but the Presiding Officer of the court concerned was of the view that the above case as well as its cross case which were of the year 1993 were pending in his court for evidence but the accused persons were delaying the proceedings of the case, hence, he rejected the application for exemption holding that they were mis-using bail and cancelled their bail bonds. He took accused Arvind present in court in judicial custody and sent him to jail and passed orders for issuing non-bailable warrants and processes under sections 82 and 83 Cr.P.C. against the remaining accused and also issued orders for issuing notice to the sureties fixing 19.1.2007. Aggrieved with that order applicants have filed this application.

4. In this petition complainant Ant Lal has also been impleaded as O.P. no.2 but since it is a State case there is no necessity to hear him. The learned counsel for the applicants submitted that he wants to delete the name of O.P. no.2 and he is permitted to do so.

5. It is true that the cases were of the year 1993 and when the aforesaid S.T. and its cross sessions trial were pending in the same court, both these cases should have been listed for evidence on the same date in the court so that accused as well as witnesses in both the cases may appear in the court and evidence may be recorded in both the above sessions trials in presence of the parties. The Presiding Officer of the court concerned was of the view the accused were mis-using the bail and so he cancelled their bail bonds. He could do so, but there was no provision for taking that accused into judicial custody and sending him to jail, who was present in court. The Presiding Officer is not justified in this regard. In such a case the proper order would have been to grant exemption for that date only with a direction to all the accused to appear in person in the court on the next date further providing that no request for exemption shall be entertained on the next date and non-bailable warrant shall be issued against the defaulting accused, and in this way the delaying tactics could be lawfully curbed.

6. It further appears that on the above date Presiding Officer further passed an order for issuing non-bailable warrants and processes under sections 82 and 83 Cr.P.C. simultaneously against the accused persons. He again committed legal error because all these processes cannot be issued simultaneously. The warrant is to be issued at the first instance and when the accused does not appear in court even after issue of warrant, the process under sections 82 Cr.P.C. can be issued only when there is a report to this effect that he is absconding. After issuing proclamation under sections 82 Cr.P.C. the court has to wait for thirty days from the date of publication of proclamation ,and then attachment under section 83 Cr.P.C. is to be issued. But if the court is of the view that the accused is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local jurisdiction of the court, the proclamation under section 82 Cr.P.C. and attachment u/s 83 Cr.P.C. can be issued simultaneously. In such a case, the the court must be satisfied on the basis of the evidence produced before it that these circumstances exist and he has to mention these facts in the order for issuing processes under sections 82 and 83 Cr.P.C. simultaneously.

7. In the present case the learned Presiding Officer of the court fell in grave legal error by issuing all those processes simultaneously.

8. The application under section 482 Cr.P.C. is, therefore, allowed to this effect that the order of the Presiding Officer taking the accused Arvind in judicial custody and sending him to jail is set aside. Accused Arvind shall be released forthwith in this case on bail if not wanted in any other case. The order for issuing processes under sections 82 and 83 Cr.P.C. against the remaining accused is also set aside.

9. The learned counsel for the applicants submitted that the accused applicants are ready to appear before the court below. They are allowed one month's time to appear before the court concerned and during this period execution of non-bailable warrants against them shall remain stayed. After appearance of the accused, the Presiding Officer of the court may release the applicants on taking fresh bail bonds from them and then he shall proceed with the trial of the case in accordance with law.

Application allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2006

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 15033 of 1983

Shr Chandra Bhushan Singh ...Petitioner
Versus
District Basic Education officer, Azamgarh and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Khare
Sri A.B. Singh

Counsel for the Respondents:
Sri Indra Raj Singh
Sri A.N. Singh
Sri Awadh Behari Singh
S.C.

U.P. Recognised Basic School (In High Schools) Recruitment & Conditions of Service Rules of Teachers) Rules, 1978-Rule-12-appointment as L.T. grade teacher-on one year probation-after expiry of one year-stood confirmed on 1.7.78-dis approval by Basic Education officer on 9.9.83-petitioner possess minimum qualification-teaching for a long period-only reason disclosed by the management that appointment made without following the procedure prescribed under rule 1975-held-management later can not turn around-order of disapproval-quashed with all consequential benefits.

Held: Para 11

It was for the Management to obtain requisite approval from the concerned authority for the appointment of the petitioner. The Management who offered appointment to the petitioner later on cannot turn around and say that the appointment of the petitioner is illegal or void.

Case law discussed:
2004 (2) UPLBEC-2070
1994 (3) ESC-117
1990 (1) UPLBEC-425
1993 (2) ESC-245
1993 ESC-231
1982 UPLBEC-365
2004 (2) UPLBEC-2070

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

1. By means of the present writ petition under Article 226 of the

Constitution of India the petitioner has sought a writ of Certiorari quashing the order dated 9.9.1983 passed by the District Basic Education Officer and a writ of Mandamus directing the respondents not to interfere with the function of the petitioner as Assistant Teacher in the institution and to quash the order dated 12.9.1983 passed by the Manager of the institution. Adarsh Junior High School, Kamaluddinpur, Azamgarh is an unaided institution and is not governed by the' provisions of Payment of Salaries Act, 1971. He was appointed as a teacher in Junior High School in the year 1978 in C.T. grade. The petitioner possesses the requisite educational qualification and was selected by Selection Committee and the Committee of Management in its meeting held on 25th of June, 1978 accepted the recommendation of the Selection Committee and appointed the petitioner on probation of one year. The petitioner joined the institution and is working as teacher w.e.f. 1st of July, 1978. The petitioner shall be deemed to have been confirmed on expiry of probation period in view of Rule 12 of U.P. Recognized Basic School (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 and is not related to any member of the Committee of Management of the institution and as such has no disqualification for being appointed as a teacher in the institution. The District Basic Education Officer by letter dated 9.9.1983 Annexure-2) disapproved the appointment of the petitioner as Assistant Teacher as he was appointed on 1st of July, 1978 after commencement of the Service Rules, 1978. In pursuance of the aforesaid letter of the District Basic Education Officer, the services of the petitioner has been terminated by the institution by the order dated 12.9.1983. Hence the writ petition. A counter affidavit of Phool Chand, Manager of the institution has been filed wherein it has been stated that the appointment of the petitioner was terminated on 9.9.1983 under Rule 9 of the U.P. Recognised Basic Schools (Recruitment and Conditions of Service of Teachers and Other Conditions) Rules, 1975. Further it has been stated that since the appointment of the petitioner was not in accordance with the aforesaid Rules 1975 so there is no question of confirmation of petitioner under Rule 12 of Rules, 1978. The main defence is that the procedure as prescribed under Service Rule, 1978 was not followed in toto. Therefore, the appointment of the petitioner is illegal and void.

2. A supplementary counter affidavit is on the record wherein it has been stated that since the institution in question is unaided institution and is not getting any financial aid from the government, the writ petition is basically directed against the Committee of Management. The appointment of the petitioner was not made in accordance with the service rules.

3. The learned counsel for the petitioner submitted that even though there is no formal approval of the appointment of the petitioner, the petitioner is continuing as Assistant Teacher since 1st of July, 1978. It was fault of Management to send the papers late to the District Basic Education Officer. Attention was invited towards the fact that an interim order was passed by this Court on 2nd of December, 1983 staying the operation of the order of the District Basic Education Officer dated 9th of September, 1983. An application for

vacation of the said order was filed on behalf of the Committee of Management. The interim order was confirmed on 11th of July, 1984. It was submitted that the petitioner, possesses the minimum educational qualification and is teaching in the institution since July, 1978 and .in this view of the matter, if there was any irregularity in his appointment, the appointment cannot be cancelled at this distance of time.

4. In reply, the learned counsel for the respondent no.2 submitted that the appointment of the petitioner was made by the Committee of Management contrary to the relevant service rules. Reliance has been placed upon a Division Bench Judgment of this Court in ***Ram Ashrey Vs. District Judge, Bijnore (2004) 2 U.P.L.B.E.C. 2070*** and it was contended that appointment/continuation in service by interim order, does not create any legal right in favour of the appointee.

5. It is not in dispute that the petitioner was selected and was appointed as Assistant Teacher on 1st of July, 1978. He is working since then. In the counter affidavit filed on behalf of the Committee of Management it is not denied that the petitioner is working since 1st of July, 1978. It is not clear either from the writ petition from the counter affidavit filed on behalf of the respondent no.2 as to when the papers were sent by the Committee of Management for obtaining approval of the petitioner's appointment. It was encumbent upon the Committee of Management to follow the procedure prescribed by law before offering appointment letter to the petitioner. In the counter affidavit it is not the case of the Committee of Management that the petitioner played any fraud or adopted any deceitful means to obtain the appointment in question. It does not lie in the mouth of the Committee of Management who appointed the petitioner, to say that the appointment of the petitioner was made without following the prescribed procedure. The Committee of Management is stopped to challenge the legality and validity of the appointment of the petitioner as Assistant Teacher in the institution in question as he is uninterruptedly working in the institution since 1st of July, 1978.

6. A Division Bench of this Court in ***Rajendra Prasad Srivastava Vs. District Inspector of Schools 1994 (3) ESC 117*** has held that it will be highly unfair to remove a person from service after about 20 years on the ground that his initial appointment was illegal. ***Smt. Rani Srivastava Vs. State of U.P. (1990J 1 UPLBEC 425*** is an authority for the proposition that the Committee of Management who appointed the Head Mistress initially on probation cannot put to an end the appointment after 5 years for infirmity in making the appointment.

7. The Apex Court in ***Dr. M.S. Mudhol and others Vs. S.D. Halegkar and others 1993 (2) E.S.C. 245*** has held that it would be iniquitous to set aside the appointment of the Principal of the private aided School who was appointed without having requisite qualification after 12 years for default of Director of Education and Selection Committee.

8. The Apex Court in ***Miss Rekha Chaturvedi Vs. University of Rajasthan 1993 ESC 231*** held that selection of candidates was illegal but refused to set it aside as selected candidates have been

working in their respective posts for the last almost 8 years.

9. In ***Shanti Devi Verma Vs. Deputy Director of Education, 1982 U.P.L.B.E.C. 365*** it has been held by this Court that if a candidate lacks prescribed qualification at the time of appointment but such appointment was not obtained by fraud, it will be case of irregular appointment and as such disqualification can be cured by that teacher by getting himself qualified after his appointment.

10. In view of the above pronouncements particularly taking into consideration that it is not a case of any fraud or connivance and the petitioner has put in best part of his life in service, it is not desirable at this distance of time to uphold the order the respondent no.1 refusing to approve the appointment of the petitioner. There is absolutely no explanation why the Committee of Management sat over the matter for a period of about 5 years.

11. Ram Ashrey Vs. District Judge, Bijnore (2004) 2 U.P.L.B.E.C. 2070 was relied upon by the learned counsel for the respondent no. 2. The said case is in respect of a temporary employee. It has been held that a temporary employee has no right to hold the post and his services are liable to be terminated without assigning any reason. In that connection, it has been held that no litigant can derive any benefit from mere pendency of a case in court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. In para 44 of the report it has been held that appointment/continuation in service by interim order, does not create any legal right in favour of the appointee. There is no quarrel to the above proposition of law. But the said proposition is not applicable to the facts of the present case in as much as the petitioner was appointed on a substantive vacancy on a permanent post. It was for the Management to obtain requisite approval from the concerned authority for the appointment of the petitioner. The Management who offered appointment to the petitioner later on cannot turn around and say that the appointment of the petitioner is illegal or void. It is of some interest to note that this Court on a stay vacation application filed on behalf of the-Committee of Management has observed as follows:-

"At the instance of the Committee of Management I am not prepared to vacate the Interim order dated 2.12.1983. The application is rejected."

In any case, the contesting respondent no.2 cannot be heard taking shelter behind his own wrong.

12. In view of the above discussion, the writ petition is allowed. The impugned order dated 9.9.1983 filed as Annexure - 2 to the writ petition so far as it relates to the disapproval of the appointment of the petitioner as Assistant Teacher is concerned, is quashed. Resultantly, the consequential order issued by the respondent no.2 is also quashed. The respondents are commanded not to interfere with the functioning of the petitioner as Assistant Teacher in the institution. No order as to costs.

Petition allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.11.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 6444 of 2006

Anita Devi ...Complainant/Revisionist
Versus
State of U.P. & another ...Opposite parties

Counsel for the Revisionist:
Sri. Narendra Kumar

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

Code of Criminal Procedure Section 204
Summoning order-marshelling of evidence and critical appreciation thereof held-not proper-suffer from patent illegality cannot be allowed to sustained.

Held Para 4:

The impugned order indicates that at the stage of Section 203 Cr.P.C., the trial court has passed a judgment deciding a case and have the said impugned order suffers from patent illegality and cannot allowed to be sustained in law.

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

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

2. The revisionist is aggrieved by an order-dated 2.9.2006 passed by C.J.M., Azamgarh in Complaint Case No. 3989 of 2006 (Anita versus Shailesh Pratap Singh) has been dismissed under Section 203 Cr.P.C.

3. A perusal of the impugned order indicates that C.J.M. Azamgarh has transgressed the jurisdiction vested in him under Section 203 Cr.P.C. and scanned the allegations of the complaint as if he is finally deciding the trial. Needless to say that marshelling of evidence and critical appreciation thereof is not required at the stage of Section 203 Cr.P.C., for the purposes of summoning under Section 204 Cr.P.C. only a prima facie case is sine qua non. If the allegations are perceptibly clear making out an offence then the accused has to be summoned. Critically appreciating the allegations at the stage of summoning by the Magistrate is not sanctified by the law. There are various stages in complaint cases during the course of the trial where the Magistrate or the trial court is supposed to scan the evidence. The first stage is under Section 204 Cr.P.C. where only a prima facie case has to be looked into. Second stage is at the stage of Section 245 Cr.P.C. where the trial court is to decide whether the accused can be charged with any offence or not. At that stage the trial court can discharge the accused if in its opinion the accused has not committed any offence. The third stage is the stage of finally deciding the case whether the trial court is entitled to go into the whole evidence and all the materials to critically appreciate and decide the case finally.

4. The impugned order indicates that at the stage of Section 203 Cr.P.C., the trial court has passed a judgment deciding a case and have the said impugned order suffers from patent illegality and cannot allowed to be sustained in law.

5. In this view of the matter, this revision is allowed at the admission stage itself. The impugned order dated 2.9.2006 passed by C.J.M. Azamgarh in Complaint Case No. 3989 of 2006, Anita versus

Shailesh Pratap Singh is hereby set aside. The matter is remanded back to C.J.M. Azamgarh to decide it in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2007

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

Civil Misc. Writ Petition No. 24773 of 2004

Chandra Kishori ...Petitioner
Versus.
The State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Tiwari
Sri P.S. Yadav
Sri S.K. Kulsherstha

Counsel for the Respondent:
Sri Shri Kant
S.C.

Land Acquisition Act,1894-Section 28-A-Application for enhancement of Compensation-rejection on the ground no reference filed by the tenure holder-held-illegal, Section 28-A being special provision enacted for inarticulate and poor people to apply for re-determination by the original /owner.

Held: Para 9

Thus, it is apparent that the legislature has carved out an exception in the form of Section 28 and made a special provision to grant some relief to a particular class of society, namely poor; illiterate, ignorant and inarticulate people. It is made only for little Indians. The provisions of Section 28-A refers to the "person interested" which means the original owner and that original owner interested must further be a person aggrieved by the award of the Collector.

Case law discussed:
AIR 1986 SCC(4) 151, 1995 (2) SCC 689, AIR 1996 AWC-1237, 1995 (2) SCC 733, 1995 (2) SCC 735, 1995 SC 2259, 1995 (2) SCC 766, AIR 1995 SC 812, 2004 (7) SCC 753, 1991 (1) SCC 174, 2003 (7) SCC 280, 1997 (6) SCC 280, AIR 1963 SC 1716

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

1. This writ petition has been filed challenging the order dated 23.02.2004, by which Reference Court rejected the application of the petitioner under Section 28-A of the Land Acquisition Act, 1894 (hereinafter called the Act).

2. The facts and circumstances giving rise to this case are that the land of the petitioner was acquired under the provisions of the Act issuing Notification under Section 4 on 04.05.1973 and Declaration under Section 6 on 04.08.1973.The Award was made, against which some of the persons interested filed Reference under Section 18 of the Act which was decided on 11.12.1991 by the Court concerned. On the basis of the said Reference Award dated 11.12.1991 petitioner filed an application under Section 28-A of the Act claiming the same rate for her land which was rejected vide impugned judgment and order of the Reference Court holding it to be not maintainable only on the ground that the application was not maintainable as the petitioner had not filed application under Section 18 of the Act before the Reference Court. Hence this petition.

3. Admittedly, Section 28-A is made for the poor, ignorant and inarticulate people who being little Indian cannot afford to file a Reference under Section

18 of the Act. However, the issue is as to whether such a poor person is to be examined by the Court. But, it is admittedly only for those who had not filed the application for Reference under Section 18 of the Act. The Reference Court placed reliance upon certain judgments of the Hon'ble Supreme Court wherein it has been held that the application under Section 28-A can be maintained provided an application under Section 18 had been filed. It does not be a correct preposition of law.

4. Section 28-A of the Act was inserted in the Act by Amendment Act No.68 of 1984 and it provides for re-determination of the amount of compensation on the basis of the award of the Court in respect of a land which has also been acquired in the same land acquisition proceedings if the applications are filed within a period of three months from the date of the award of the Court.

5. The scope of provisions of Section 28-A was considered by the Supreme Court in Mewa Ram Vs. State of Haryana, (1986) 4 SCC 151 and the Court placed particular emphasis on para 2(ix) of the object and reasons which provided for a special provision for inarticulate and poor people to apply for redetermination of the compensation amount on the basis of the court award in a land acquisition reference filed by comparatively affluent land owner. The Apex Court observed as under:

"Section 28-A in terms does not apply to the case of the petitioners.....They do not belong to that class of society for whose benefit the provision is intended and meant, i.e. **inarticulate and poor people who by reason of their poverty and ignorance have failed to take advantage of the right of reference to the civil court** under Section 18 of the Land Acquisition Act, 1894. On the contrary, the petitioners belong to an affluent class....."

6. The Apex Court approved the law laid down in Mewa ram (Supra) again in Scheduled Caste Cooperative Owning Society Ltd. Batinda Vs. Union of India and others, AIR 1991 SC 730.

7. In Babua Ram Vs. State of U.P. 1995 (2) SCC 689, the Apex Court again approved and reiterated the law laid down in Mewa Ram (Supra) and observed as under:-

"Legislature made a **discriminatory policy between the poor and inarticulate** as one class of persons to whom the benefit of Section 28-A was to be extended and comparatively affluent who had taken advantage of the reference under Section 18 and the latter as a class to which the benefit of Section 28-A was not extended. Otherwise, the phraseology of the language of the non-obstante clause would have been differently worded..... It is true that the legislature intended to relieve hardship to the poor, indigent and inarticulate interested persons who generally failed to avail the reference under Section 18 which is an existing bar and to remedy it, Section 28-A was enacted giving a right and remedy for redetermination.....The legislature appears to have presumed that the same state of affairs continue to subsist among the poor and inarticulate persons and they generally fail to avail the right under sub-section (1) of Section 18 due to poverty or ignorance or avoidance of expropriation."

8. A similar view has been taken by a Division Bench of this Court in Nanak & Ors Vs. State of U.P. & Ors, 1996 AWC 1237 placing reliance of large number of judgments of the Hon'ble Supreme Court.

9. Thus, it is apparent that the legislature has carved out an exception in the form of Section 28 and made a special provision to grant some relief to a particular class of society, namely poor; illiterate, ignorant and inarticulate people. It is made only for little Indians. The provisions of Section 28-A refers to the "person interested" which means the original owner and that original owner interested must further be a person aggrieved by the award of the Collector.

10. In G. Krishna Murthy & Ors. Vs. State of Orissa, (1995) 2 SCC 733; D Krishna Vani & Anr. Vs. State of Orissa, (1995) 2 SCC 735; Union of India & Anr. Vs. Pradeep Kumari & Ors., AIR 1995 SC 2259; and U.P. State Industrial Development Corporation Ltd. Vs. State of U.P. & Ors., (1995) 2 SCC 766, it has been held by Hon'ble Supreme Court that a person who prefers a Section 18 reference cannot maintain an application under Section 28-A of the Act. The benefit of such an exceptional rule cannot be extended to the petitioners as it would be against the public policy. In a similar situation, the Hon'ble Supreme Court in Union of India Vs. Shivkumar Bhargava & Ors., AIR 1995 SC 812 , observed that the benefit of State policy which confers certain beneficial rights on a particular class of person is meant only for the person whose land was acquired and by necessary implication "the subsequent purchaser was elbowed out from the policy and became disentitled to the benefit of" the State policy.

11. In Des Raj & Ors. Vs. Union of India & Anr., (2004) 7 SCC 753 it was held by the Hon'ble Supreme Court that if a person has applied under Section 18 of the Act and pursued the matter further, he is not entitled to maintain the application under Section 28-A for re-determination of compensation. The Court further held that it is mandatory to file the application within prescribed limitation, which runs from the date of the Award under Section 18 of the Act. While deciding the said case the Court placed reliance upon its earlier judgments, including Scheduled Caste Co-operative Land Owning Society Ltd., Bhatinda Vs. Union of India & Ors., (1991) 1 SCC 174.

12. In State of Andhra Pradesh & Anr. Vs. Marri Venkaiah & Ors., (2003) 7 SCC 280, the Hon'ble Supreme Court has dealt with the issue of limitation and held as under:-

"Plain language of the aforesaid section would only mean that the period of limitation is three months from the date of the award of the court. It is also provided that in computing the period of three months, the day on which the award was pronounced and the time requisite for obtaining the copy of the award is to be excluded. Therefore, the aforesaid provision crystallizes that application under Section 28-A is to be filed within three months from the date of the award by the court by only excluding the time requisite for obtaining the copy. Hence, it is difficult to infer further exclusion of time on the ground of acquisition of knowledge by the applicant."

13. While deciding the said case Court placed reliance on its earlier judgment in Tota Ram Vs. State of U.P. & Ors., (1997) 6 SCC 280. The Court further rejected the contention that limitation would run from the date of knowledge distinguishing the earlier judgments on fact and law in Raja Harish Chandra Raj Singh Vs. Deputy Land Acquisition Officer, AIR 1961 SC 1500; and State of Punjab Vs. Qaisar Jehan Begum, AIR 1963 SC 1604.

14. In Union of India Vs. Munshi Ram & Ors., AIR 2006 SC 1716, the Apex Court has laid down the law that such an application is maintainable provided a person has not filed an application under Section 18 of the Act. The Court held that Section 28-A seeks to confer the benefit of enhanced compensation on those owners who did not seek Reference under Section 18. In fact under the said provision they are entitled for enhanced compensation decreed by the Reference Court and further as the decreed amount stands modified in appeal by the higher Courts.

15. The order impugned dated 23.02.2004 has been passed by the Reference Court placing reliance upon the judgments of the Hon'ble Supreme Court in Smt Bhagti (Dead) through L.Rs. Jagdish Ram Sharma Vs. State of Haryana, JT 1997 (2) SC 291; and Vishav Bandhu Gupta & Anr Vs. State of Haryana & Anr, 2002 (1) CRC 145, wherein the Hon'ble Supreme Court has observed that if a person has not filed the Reference under Section 18 of the Act he cannot maintain the application under Section 28-A. The view taken by the Hon'ble Supreme Court in these two cases is apparently in contravention of the statutory provision itself and also run counter to the law laid down by the Hon'ble Supreme Court referred to herein above. The said judgments do not lay down the correct legal proposition.

16. In view of the above, the order impugned cannot be sustained in the eyes of law and is liable to be quashed.

17. The petition succeeds and is allowed. The impugned order dated 23.02.2004 is hereby set aside. The case is remitted to the learned Reference Court to redetermine the whole issue addressing itself to the issue of maintainability, limitation, and then to decide on merit. In view of the fact that long time has elapsed and the land has been acquired long back, learned Reference Court is requested to decide the controversy at the earliest.

Learned Standing Counsel and Shri Shrikant, Advocate, appeared for respondents. Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.02.2007

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

Criminal Misc. Application No.10419 of 2005

Kailash and others ...Applicants
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Applicants:
Sri Gautam Chaudhary

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

Code of Criminal Procedure-Section 482-offence under Section 420 IPC allegation against the applicant-by forged resolution of L.M.C. got allotted the land of Gaon Sabha-not eligible person-encroached upon the right of SC/SC-FIR lodged by A.C.O.-while under section 198 (4) of U.P.Z.& L.R. Act-only the collector empowered to take action-held-FIR lodged by A.C.O. without authority of law-criminal proceeding liable to quashed.

Held: Para 9

Therefore, in my opinion the contention as raised by the learned counsel for the applicants that the Assistant Consolidation Officer had no authority to file this first information report is correct. Therefore the report being without any right the criminal proceeding cannot continue on the basis thereof. Moreover as mentioned above, the fact whether the allotment is legal or not is still subjudice and has to be decided in the writ petition no. 46405 of 2005. In case it is found that allotments are not legal. the collector can take necessary action as permissible under law.

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

1. Application has been filed under Section 482 Cr.P.C. for quashing the criminal case no. 1704 of 2001 State Vs. Saroj and other under Section 420 IPC, P.S. Chandaus, District Aligarh pending in the Court of Addl. Civil Judge, (J.D.) Aligarh.

2. Heard Sri Gautam Chaudhary, learned counsel for the applicant, learned A.G.A. and perused the record.

3. In this matter, notices were issued to opposite party no. 2 and 3 which have been served on them. No counter affidavit has been filed by any of the opposite Parties.

4. The brief facts are that opposite party no.2 who was posted as Assistant Consolidation Officer, Tehsil Kher, District Aligarh lodged a first information report against the applicant on 26.4.2001 at 6.20 p.m. alleging that the applicants on the basis of resolution dated 19.4.1986 of Land Management Committee and in collusion with the officers and officials of the consolidation and revenue department obtained the order of mutation from Consolidation Officer Sadar, Aligarh on 5.5.1998 in respect of Gram Samaj Land situate in Mauja Jalakaseru, Tehsil Gawana, District Aligarh. Mutation was also done in their names, although the applicants belong to the general caste and were not eligible in view of the long list of landless labourers belonging to the Scheduled Caste etc. In this manner, they encroached upon the right of the scheduled Caste landless labourers and also damaged the Gram Samaj property. On the basis of this report, a case was registered and after investigation charge sheet was submitted against the applicants. Learned Magistrate took cognizance and directed to summon the accused persons by order dated 7.7.2005.

5. The contention of the applicants is that the Land Management Committee had passed a resolution recommending the allotment of land in favour of the applicant and the same was approved on 10.10.1986. Thereafter by order dated 5.5.1998 passed by the Consolidation officer, mutation was directed to be affected in their names. Against that order objections were filed before the Settlement Officer Consolidation and he allowed the objection by order dated

3.5.2001. A revision no. 172/139 was filed against the order dated 3.5.2001 before the Deputy Director of Consolidation and he by order dated 7.6.2003 dismissed the revision. Thereafter applicants filed a writ petition no. 29461 of 2003 and by order dated 16.7.2003 operation of the impugned orders dated 3.5.2001 and 7.6.2003 was stayed. The Deputy Director of Consolidation while dismissing the revision on 7.6.2003 had also observed that the matter was already pending before the Collector and according to his order the parties could take legal action in the competent Court. The Additional Collector, Administration, Aligarh by order dated 22.1.2004 held that the Land Management Committee had passed the valid resolution and same was approved on 10.10.1986 and the complaint was made after 17-1 years on 9.5.2003. He also held that resolution was passed in favour of 71 persons and out of them mutation was done in favour of 35 persons. Against this order a revision no. 96/2004 was filed before the Assistant Commissioner, Agra Region, Agra and he by order dated 24.2.2005 partly allowed the revision and remanded the matter to the Collector. Against that order the applicants filed Civil Misc. Writ Petition no. 46405 of 2005 and by order dated 7.7.2005 the operation of the impugned order dated 24.2.2005 has been stayed. It appears that this writ petition is still pending and it shows that the question whether the allotment was legal or not is still subjudice.

6. Learned counsel for the applicants has contended that the collector is competent authority under Section 198(4) of U.P. Z.A. & L. R Act to see whether the allotment of the Gram Samaj Land has been properly made or not and that the Assistant Consolidation Officer had no occasion or authority to lodge any first information report against the applicants.

7. Section 198 (4) of U.P. Z.A. & L.R. Act provides that Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land inquire in the manner prescribed into such allotment and if he is satisfied that the allotment is irregular, he may cancel the allotment and the lease, if any. Sub Section (7) of the aforesaid Section provides the consequence that shall ensue in case the allotment or lease is cancelled under Sub Section (4)).

8. In the circumstances of the case, Consolidation Officer had directed for mutation of the names of the applicants by order dated 5.5.1998. The objection filed before the Settlement Officer against that order was decided on 3.5.2001. The first information report was lodged by Assistant Consolidation Officer on 26.4.2001. The copy of this report has been filed as annexure no. 2 by the applicants. There is no mention in this report as to under what authority or order the Assistant Consolidation Officer was competent to lodge this report. According to the allegations as made in the report, applicants had obtained mutation order from the Consolidation Officer in collusion with the officers of the consolidation and revenue department by producing the photocopy of the resolution dated 19.4.1986 i.e. they had played fraud on the consolidation Court

9. In the circumstances, if any complaint was required to be filed, it could be filed by the Settlement Officer or any Court Officer senior to him and not

by the Assistant Consolidation Officer. Therefore, in my opinion the contention as raised by the learned counsel for the applicants that the Assistant Consolidation Officer had no authority to file this first information report is correct. Therefore the report being without any right the criminal proceeding cannot continue on the basis thereof. Moreover as mentioned above, the fact whether the allotment is legal or not is still subjudice and has to be decided in the writ petition no. 46405 of 2005. In case it is found that allotments are not legal. the collector can take necessary action as permissible under law.

10. With this observation, application is allowed and the criminal proceedings in case no. 1704 of 2001 State Vs. Saroj and others Under Section 420 IPC, P.S. Chandaus, District Aligarh pending in the Court of Addl. Civil Judge (J.D.), Aligarh are hereby quashed.

Petition allowed

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2007

BEFORE
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Criminal Misc. Transfer Application No. 308 Of 2006

Kali Charan and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri Rajesh Kumar Srivastava
Sri Anoop Trivedi

Counsel for the Opposite Parties:
Sri Y.S. Bohra
Sri Parmendra Kumar
A.G.A.

Criminal Procedure Code-Transfer of Session Trail from one District to another-on the ground of long standing enmity and series of crimes lodged from both side-various orders passed by High Court-held-sufficient for transfer of case from Bulandshahar to District Judge, Ghaziabad.

Held: Para 6

After hearing the counsel for the respective parties at length and taking into consideration the entire facts and circumstances and also the series of crime by both the sides as a result of long standing enmity, I am of the considered view that the trial should be held some where else to ensure that it is completed expeditiously. The various orders passed by this Court are sufficient to come to a conclusion that if the trial is permitted to continue at Bulandshahar, the danger of repetition of the offences on either side will continue to loom large.

(Delivered by Hon'ble Mrs. Poonam Srivastava, J.)

1. Heard Sri Anoop Trivedi, learned counsel for the applicants, Sri Y.S. Bohra Advocate for the opposite party no. 2 and learned A.G.A, for the State.

2. This is transfer application for transferring the Sessions Trial No. 1144 of 2001, arising out of case Crime No. 493 of 1999, under Sections 147, 148, 149, 302 I.P.C., State Vs. Kali Charan and others to some other adjoining district.

3. The submission is that two persons namely Jagpal son of Desh Raj, and Satyapal son of Jagpal have lost their life. The case was committed to the court of Sessions. It appears that both the parties have a long standing enmity. Another first information report was

lodged on 3.11.2000 by Chandra Pal against the applicant Kali Charan and Pappu alias Autar at Police Station Sikandrabad at case crime No. 666 of 2000 under Section 302 I.P.C. The brother of first informant Jagpal was murdered. Another first information report was lodged by Ravindri wife of Jai Singh against Suman, Bitto, Harendra, Ravindra, Chandra Pal and Narendra on the same day i.e. 3.11.2000, which was registered as cross case at case crime No. 666A of 2000, in which four persons namely Rajviri wife of applicant Kali Charan, Smt. Sundari wife of Pappu alias Autar and two children of Smt. Sundari namely Kartik aged about 2 years and Laxmi aged about 4 years were murdered. An application was moved by the complainant for change of investigation regarding case crime No. 666 of 2000 since the statements of the witnesses were not being recorded by the Investigating Officer. A transfer application was moved at the instance of the applicants, which was numbered as Transfer Application No. 359 of 2002-Kali Charan and another Vs. State of U.P. which was disposed of by this Court. The Court while disposing of the transfer application observed that there is great animosity between the two parties, consequently adequate protection may be given to the parties till the conclusion of the trial. When the trial was fixed on 20.5.2006, the applicant no. 2 while going to attend the case, the opposite party, no. 2 opened fire upon him causing injuries. A first information report was registered under Section 307 I. P.C. at case crime No. 143 of 2006. A copy of the first information report is annexed as Annexure-14 to the affidavit filed in support of the transfer application. The applicant no. 2 Autar alias Pappu was medical1y examined on 20.5.2006 in B.B.D.G. Hospital, Bulandshahar. A copy of the order sheet of the said date is annexed as Annexure-l 8 to the affidavit, to show that the applicants were not provided any security and they are not able to attend the court on the date fixed in the trial. As a consequence, non bailable warrant has been issued against them and the trial is proceeding.

4. Sri Anoop Trivedi has filed Criminal Misc. Application against the order issuing non bailable warrant to keep the non bailable warrant in abeyance and not to compel their attendance in the court till the stage of Section 313 Cr.P.C. Annexure-2 to the Misc. Application is an order dated 18.7.2006 passed by this Court in the present transfer application permitting the accused not to appear personally before the trial court on the date fixed. Thereafter another order was passed on 11.8.2006. The Senior Superintendent Of Police, Bulandshahar was directed to file an affidavit in reply to the averments made in the affidavit filed in support of the transfer, application fixing 4.9.2006. It is averred in the affidavit filed in support of the Misc. Application dated 24.1.2007 that though the court below was apprised about the order of this Court despite the fact that the applicants were not required to be present in the court, order has been passed on 29.8.2006 on different time at short intervals. One order was passed prior to 12 Noon, subsequent order was passed at 12 O'clock then again at 2.30 and last order at 3 0' clock issuing notices to the sureties and also initiating proceedings under Section 446 Cr.P.C.

5. Sri Y.S. Bohra appearing for the opposite party no. 2 has emphatically disputed the assertions made by the

counsel for the applicants and has stated that even the counsel did not appear despite time was allowed by the court and the case was taken up on a number of occasions on the same day at short intervals. An application with a prayer not to give effect to the order issuing non bailable warrant was rejected as no one was present to press the application. Counter affidavit has been filed by Sub Inspector but no counter affidavit is on record pursuant to the order passed by this Court on 11.8.2006 directing the Senior Superintendent of Police, Bulandsahar to file counter affidavit. Counter affidavit filed by Sub Inspector mentioned that the proceeding under Section 82/83 has been initiated against the applicants and also denied the averments of the affidavit filed in support of the transfer application.

6. After hearing the counsel for the respective parties at length and taking into consideration the entire facts and circumstances and also the series of crime by both the sides as a result of long standing enmity, I am of the considered view that the trial should be held some where else to ensure that it is completed expeditiously. The various orders passed by this Court are sufficient to come to a conclusion that if the trial is permitted to continue at Bulandshahar, the danger of repetition of the offences on either side will continue to loom large.

7. In the circumstances, it is appropriate in the interest of justice that the Session Trial No.1144 of 2001 be transferred to Ghaziabad. The District Judge, Bulandshahar is directed to remit the record of session Trial No. 1144 of 2001- State Vs. Kali Charan and others to Ghaziabad. The District Judge, Ghaziabad shall ensure that the Session Trial is posted to a court of competent jurisdiction who shall complete the trial expeditiously.

8. With the aforesaid directions, this transfer application stands allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2007

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No.32 of 2007

Sukhram ...Accused-Revisionist (In Jail)
Versus
The State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Ravi Shanker Tripathi
Sri A.P. Tewari

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

Criminal Revision-offence under Section 279, 304A, 427 I.P.C.-punishment of one month R. I -the accused/revisionist already undergone punishment of 15 days-No useful purpose served-if revision dismissed and directed to serve the remaining period-remaining period of one month R. I altered in to fine of Rs.15000/- out of which 12,000/- be paid to bereaved family-direction issued accordingly.

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

The revisionist Sukhram was tried by Additional Chief Judicial Magistrate, court no.7, Ghaziabad in Case No.251 of2004, State vs.Sukhram for offences under Sections 279, 304A, 427 I.P.C., Police Station, Kavi Nagar, District Ghaziabad arising out of Crime No. 728

of 2000. Finding the revisionist guilty under Sections 279, 304A, 427 I.P.C. the trial court convicted him under the aforesaid sections and sentenced him for rigorous imprisonment of one month under Section 279 I.P.C, four months rigorous imprisonment for each of the offences under Section 304 A and 427 I.P.C vide its order dated 22.6.2004. The trial court further ordered that all the sentences shall run concurrently. Aggrieved by the aforesaid conviction and sentences the revisionist preferred Criminal Appeal No.55 of 2004, Sukhram vs. State, which appeal was heard and decided by Additional Sessions Judge, Court no.12, Ghaziabad who was please to dismiss the aforesaid appeal on 12.12.2006 in toto, hence this revision challenging both the aforesaid orders of conviction and sentences and the affirmation thereof.

The synopsized allegations against the revisionist are that Sunil Kumar Agrawal (deceased) who was the brother of Anil Kumar Agrawal, informant, was returning on his Moped to his house on 17.12.2000 at 6.00 P.M. when at Rajnagar Fly Over Crossin& Roadways Bus No. U.P.-24-1886 dashed against his Moped from behind as result of which the deceased Sunil Kumar Agrawal was thrown on the ground and the said Roadways Bus crushed him to death. Neeraj Kumar, a scooter rider chased the said bus on which the driver of the bus ran away from the spot after leaving the bus, The F.I.R. of the said incident was lodged by Anil Kumar Agrawal on 17.12.2000 at 6.45 P.M. at Police Station Kavi Nagar, District Ghaziabad, which was registered as Crime No. 728 of 2000 under the aforesaid sections. The investigation revealed that the present revisionist was the accused of the aforesaid offences and therefore, the charge sheet was laid against him.

During the trial Anil Kumar Agrawal, informant was examined as P.W. l, Y.P. Singhal P.W. 2, Sub Inspector J.K. Gangwar P.W.3, Neeraj Garg P.W.4, Gagan Nanda P.W.5, Pradeep Suxana P.W.6 in support of the prosecution version. The accused did not examine anybody in his defense. From the evidence on record and finding the case of the prosecution to have been proved to the hilt, Additional Chief Judicial Magistrate, court no.7, Ghaziabad convicted the revisionist for offences under Section 279, 304A, 427 I.P.C and sentences him for one month rigorous imprisonment on the first count and four month rigorous imprisonment each on the rest of the two counts vide his impugned order dated 22.6.04. As has been stated above the appeal of the accused was also dismissed by the Lower Appellate Court.

I have heard Sri A.P, Tiwari, learned counsel for the revisionist as well as learned A.G.A. in support and opposition of this revision.

Sri A.P. Tiwari learned counsel for the revisionist fairly conceded that so far as findings of fact recorded in this revision are concerned both the courts below did not commit any error in recording the said findings of fact. Consequently, learned counsel for the revisionist did not lay much emphasis on the conviction part of the impugned judgments and conceded that the revisionist has been rightly convicted. However, he addressed the court on the sentence part of the revisionist an contended that six years has lapsed since

the incident had taken place and to send the revisionist to jail at this belated stage for a maximum period of four months rigorous imprisonment will not serve any useful purpose. He submitted that sentencing the revisionist to jail is not going to further cause of justice. Learned counsel for the revisionist contended that after the appeal of the revisionist was dismissed on 12.12.2006, the revisionist has already remain in jail for more than a month and therefore his substantive sentence of imprisonment be altered into fine.

Learned A. G .A. on the other hand contended that the sentence is too meager and therefore it should not be altered.

I have considered the submission of both the rival sides. As of now after the appeal of the revisionist was dismissed on 12.12.2006, he is in jail till date. Therefore one and a half months he has already served out the sentence. In my view no useful will be served in dismissing the revision in toto and allow the revisionist to serve the rest of the period of his imprisonment. From the judgment of the trial court I find that the trial court even though has sentenced the revisionist for a smaller period of four month but it has not cared to anoint the done by the revisionist to the bereaved family. In matter of such nature I am of the opinion that the accused must be directed to compensate the deceased family adequately. During the e course of the argument learned counsel for the revisionist has informed the Court that under Motor Vehicles Accident Claim six lac rupees has been paid to the family of the deceased already. I am of the view that under such facts the revision should allow and, the substantive imprisonment of jail of rest of the period of two and a half month should be altered by imposing a further fine of Rs.15000/- on the revisionist out of which Rs.12000/- shall be given to the family members of the deceased.

In view of what I have stated above this revision is allowed in part. While the conviction of the revisionist is maintained on the aforesaid counts, his conviction of substantive imprisonment is altered to pay a fine of Rs.15000/- in all under all the three heads. The revisionist is granted one month from to day to pay the said fine. After the fine is deposited by the revisionist the trial court concerned is directed to pay Rs.12000- as compensation to the entitled family member of the deceased. For the purpose of realizing the fine the revisionist is directed to be released from jail on his furnishing a personal bond of Rs.20000/- and two sureties each in the like amount to the satisfaction of the trial court concerned. In the event of failure by the revisionist to deposit the amount of fine, which has been awarded on him by this judgment, within the specified time allowed by this judgment the trial court is directed to issue a warrant of arrest against him, get him arrested and send him to jail to serve out the remaining part of sentence imposed by it.

With the aforesaid direction this revision is allowed in part.

Revision allowed

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2007

BEFORE
THE HON'BLE RAJES KUMAR, J.

Sales Tax Revision N0.1704 Of 1993.
And
Sales Tax Revision N0.1705 Of 1993.

The Commissioner, Sales Tax, U.P., Lucknow ...Applicant
Versus
S/S Ram Narain Pratap Narain, Farrukhabad ...Opposite party

Counsel for the Applicant:
Sri B.R. Tripathi
Sri C.B. Yadav
Sri B.K. Pandey
S.C.

Counsel for the Opposite Party:
Sri Bharat Ji Agrawal
Sri Piyush Agrawal
Sri Shubham Agrawal

U.P. Trade Tax Act-Section 21 (2)-"Oil of all Kinds"-whether Nagar Motha Oil, Pipermint Oil and Raunsa oil full under unclassified item?-held-'Yes' where the commodity not classified should be taxed as unclassified.

Held: Para 8

There is no dispute that Nagar Motha Oil, Peppermint Oil and Raunsa Oil are the oils and they are not been classified elsewhere under any of the Notification. The entry "Oil of all kinds" is a generic entry and includes all kinds of oil. Thus, there appears to be no reason why Nagar Motha Oil, Peppermint Oil and Raunsa Oil are not covered under the entry "Oil of all kinds". It is settled principle of law that effort should be to classify a commodity under the entry and if it is not possible to classify under any of the entry then only the commodity should be taxed as an unclassified goods. In the case of Collector of Central Excise, Shillong Versus Wood Craft Products Ltd. reported in 1995 (3) SCC page 454, Apex Court held that the residuary can be resorted to only when even a liberal construction of the specific headings is not capable of covering the goods in question. Thus, in the absence of any specific entry relating to the aforesaid three items, being essential oils has been rightly covered under the generic entry "Oil of all kinds".

Case law discussed:
1987 UPTC-504
1999 UPTC-45
1995 (3) SCC-454

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

1. At the instance of the Revenue, following two questions have been raised in the present revisions.

"1. Whether the Sales Tax Tribunal was legally justified to hold that Nagar Motha Oil, Pipermint Oil and Raunsa Oil fall under the entry of "Oil of all kinds" despite the fact that the aforesaid commodities fall under the category of an unclassified item and are liable for tax accordingly?

2. Whether on the facts and in the circumstances of the case, the Trade Tax Tribunal was legally justified to hold that the proceedings under section 21 are barred by limitation in view of the decision of Hon'ble High Court in the case of CST Versus Bhagwan Finance Corporation 1988-27 STL (34) and decision of Hon'ble Supreme Court in the case of Additional Commissioner Versus Jyoti Traders 1999 UPTC 45?".

2. For the assessment year 1976-77 under section 21 (2) of the U.P. Trade Tax

Act (hereinafter referred to as **"the Act"**), the limitation for making the assessment was four years from the end of the assessment order, which expired on 31.03.1981, therefore, the assessment should be made by 31st March, 1981. The notice under section 21 of the Act was admittedly not issued within four years i.e. by 31st March, 1981, but was issued on 6th March, 1982 by U.P. Sales Tax (Amendment and Validation) Act, 1983 (U.P. Act no.16 of 1983), proviso to section 21 (2) of the Act was amended and the limitation to make assessment has been extended upto 31st December, 1982. Relying upon the decision of this Court in the case of **M/S Jaiswal Colour Trading Company Versus Commissioner of Sales Tax reported in 1987 UPTC 504**, Tribunal held that the proceeding under section 21 of the Act was barred by limitation inasmuch as the amendment was not applicable because the entire proceeding was closed when the amendment was introduced.

3. Learned counsel for both the parties agreed that the question No.2 is squarely covered by the decision of the Apex Court in the case of **Additional Commissioner (Legal) and another Versus M/S Jyoti Traders and another reported in 1999 UPTC 45** in which it has been held that the amendment made, extending the period of limitation applies to a case where no proceeding was pending.

4. Respectfully, following the decision of the Apex Court, question No.2 is answered in favour of the Department and against the assessee and the order of the Tribunal to this extent is set aside.

5. Now coming to question no.1. Tribunal held that Nagar Motha Oil, Peppermint Oil and Raunsa Oil are covered under the entry " Oil of all kinds". In this regard, Tribunal held as follows:

"The second dispute in the present appeals are as to whether Nagar Motha Oil, Peppermint Oil, Raunsa Oil being essential Oils are covered under the entry of "Oil of all kinds". It has been argued by the learned counsel for the assessee that Nagar Motha Oil, Pepperment Oil and Raunsa Oil are extracted from roots, herbs and plants and are essential oils, hence the same is taxable as "Oil of all kinds". The learned counsel for the assessee has further submitted that in the assessee's case, second appeal no.691/83, Commissioner of Sales Tax Vs. M/S Ram Narain Pratap Narain (assessee), for the assessment year 1975-75, decided on 14.4.1983, the Kanpur Bench of the Tribunal, after relying on the case of M/S R. Oil and Chemicals, Bareilly Vs. Commissioner Sales Tax, 1983 STI (Alld H.C) page-295, has already held that Rausa and Menthol Oils are manufactured from Rausa and Mentha grass. They are covered under the general entry "Oil of all kinds". There is nothing on record to show that the said decision of the Tribunal has neither been set aside or the operation of the order is stayed. Consequently, we hold that Nagar Motha Oil, Peppermint Oil and Raunsa Oil will fall under the entry of "Oil of all kinds".

6. The question for determination is as to whether the Nagar Motha Oil, Peppermint Oil and Raunsa Oil being essential oils are covered under the entry "Oil of all kinds". It has been argued by the learned counsel for the assessee that Nagar Motha Oil, Peppermint Oil and Raunsa Oil are extracted from roots, herbs

and plants and are essential oils, hence the same is taxable as Oil of all kinds. Learned counsel for the assessee has further submitted that in the assessee's case in second appeal no.691 of 1983, Commissioner of Sales Tax Versus M/S Ram Narain Pratap Narain (assessee) for the assessment year 1975-76 decided on 14.04.1983, the Kanpur Bench of the Tribunal, after relying on the case of M/S R. Oil and Chemicals, Bareilly Versus Commissioner of Sales Tax, reported in 1983 STI (Alld. H.C.) page 295 has held that Raunsa and Menthol Oils are manufactured from Rausa and Mentha grass and they are covered under the general entry "**Oil of all kinds**". There is nothing on record to show that the said decision of the Tribunal is either set aside or the operation of the order is stayed.

7. Learned Standing Counsel was asked to file the copy of the order of the Tribunal for the assessment year, 1975-76 and to inform whether any revision against the order of the Tribunal was filed or not. By supplementary affidavit dated 15th December, 2006, it has been informed that the file relating to the assessment year, 1975-76 is not available and the order dated 14.04.1984 passed in appeal no. 691 of 1983 is not traceable. Learned Standing Counsel is not able to show any illegality in the decision of the Tribunal.

8. There is no dispute that Nagar Motha Oil, Peppermint Oil and Raunsa Oil are the oils and they are not been classified elsewhere under any of the Notification. The entry "**Oil of all kinds**" is a generic entry and includes all kinds of oil. Thus, there appears to be no reason why Nagar Motha Oil, Peppermint Oil and Raunsa Oil are not covered under the entry "Oil of all kinds". It is settled principle of law that effort should be to classify a commodity under the entry and if it is not possible to classify under any of the entry then only the commodity should be taxed as an unclassified goods. In the case of **Collector of Central Excise, Shillong Versus Wood Craft Products Ltd. reported in 1995 (3) SCC page 454**, Apex Court held that the residuary can be resorted to only when even a liberal construction of the specific headings is not capable of covering the goods in question. Thus, in the absence of any specific entry relating to the aforesaid three items, being essential oils has been rightly covered under the generic entry "**Oil of all kinds**".

9. In the result, both the revisions are allowed in part. The order of the Tribunal is set aside. Tribunal is directed to pass appropriate orders under section 11 (8) of the Act. Revision allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.12.2006

BEFORE
THE HON'BLE V M SAHAI, J.
THE HON'BLE SABHAJEET YADAV, J

First Appeal From Order No. 820 of 1999

National Insurance Company Ltd.
...Appellant
Versus.
Smt. Madhulika Lal and others
...Claimant-respondents

Counsel for the Appellant:
Sri. M.S. Haq.

Counsel for the Respondents:
Sri. Shashi Nandan
Miss Awantika Banerji

Smt. Madhulika Lal, (In Person)
Pooja Agarwal.

Motor Vehicle Act. 1988 Section 173
Appeal by Insurance Company-without permission -cannot be challenged on the ground of Quantum of Compensation including the negligence.

Held: Para 6

In our opinion, it is not open for the insurer/appellant to challenge the quantum of compensation fixed by the tribunal on merits including the ground of negligence and/or contributory negligence of the offending vehicle.

Held: Para 8

In view of our findings the argument of the learned counsel for the appellant that the accident took place due to contributory negligence of drivers of both the vehicles had not been considered by the tribunal cannot be accepted.

Case Law discussed:
2002(7) SCC-456
1988(3) SCC-140
1998(9) SCC-202
2000(4) 138,1987(2) SCC-654.

(Delivered by Hon'ble V.M. Sahai, J.)

1. The short question that arises for our consideration in this appeal is where an insured has not preferred an appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'Act') against an award given by the Motor Accident Claims Tribunal, is it open to the insurer to prefer an appeal against the award by the Tribunal questioning the quantum of the compensation, as well as finding as regards the negligence of the offending vehicle in absence of permission under Section 170 of the Act granted by the Tribunal?

2. This appeal is preferred by the Insurance Company/insurer of the offending vehicle under Section 173 of the Act against the award dated 5.5.1999 passed by Motor Accident Claim Tribunal/Special Judge, Essential Commodities Act, Bareilly in M.A.C.T. No. 340 of 1993 whereby Tribunal has awarded a sum of Rupees 10,80,000/- (Ten lacs eighty thousand) as compensation along with 8% (eight percent) interest thereon from the date of filing of claim petition before Tribunal to the claimants-respondents. No appeal appears to have been filed by the insured/owner of the offending motor vehicle.

3. The facts leading to this appeal are that on 13.8.1993 Amod Lal and .Sunil Kumar Jain were travelling in Maruti Van No. D.N.J. 194 from Bareilly to Nainital when an accident took place at about 5.15 p.m. due to head on collision between Maruti Van and Mini Bus No. U.P. 25/6493. In the accident Amod Lal died. The heirs of the deceased filed a Claim Petition which was numbered as M.A.C.T. No. 340 of 1993 before the Motor Accident Claim Tribunal claiming Rs.30-00 lakhs as compensation on the ground that the accident took place due to rash and negligent driving of Mini Bus No. U.P. 25/6493. It was claimed that Amod Lal was serving in M/s. Western Electronics Okhla Industrial Area, New Delhi and his monthly salary was Rs.8,000/- per month and Rs. 4,000/- was given to him as House Rent Allowance and other perks car, telephone, bonus etc was also provided. The owner of the Mini Bus, the respondent no. 5 filed written statement alleging that the vehicle was being driven by a driver, who was having a valid driving licence and the vehicle

was insured with National Insurance Company from 7.7.1993 to 6.7.1994 as per cover note no. 704436 and liability, if any, to pay compensation was of the Insurance Company. The National Insurance Company contested the claim on the ground that the vehicle was not driven by a driver who was having valid driving lincence and details of Insurance Policy had not been given. The claimants are not legal representatives of the deceased and they are not entitled for any compensation. The accident took place due to the negligent driving of the vehicle in which the deceased was travelling and the Insurance Company was not liable to pay any compensation. However, the Motor Accident Claim Tribunal by its award dated 5.5.1999 awarded Rs. 10,80,000/- compensation to the claimants for the death of deceased Amod Lal. While awarding aforesaid compensation the Tribunal has held that the accident took place due to rash and negligent driving of the Mahindra Mini Bus No. U.P. 25/6493 due to which Amod Lal who was travelling in the Maruti Van had died. The tribunal has further held that on the date of accident the vehicle was insured by National Insurance Company and has awarded Rs. 10,80,0001- compensation to be paid by the Insurance Company to the claimants.

3. We have heard Sri M.S. Haq, learned counsel for the appellant and Sri Shashi Nandan, learned Senior Counsel assisted by Miss Awantika Banerji for the respondents. Learned counsel for the appellant has urged that quantum of compensation was excessive as dependency and multiplier had wrongly been worked out. There was contributory negligence of drivers of both the vehicles but this had not been considered by the tribunal in correct perspective though it was argued. On the other hand learned-counsel for the claimants has urged that this appeal on quantum of compensation on merits including negligence or contributory negligence is not maintainable as no permission had been granted by the tribunal under Section 170 of the Act.

4. Hon'ble Apex Court has occasion to consider similar question in **National Insurance Company Ltd., Chandigarh Vs. Nicolletta Rohtagi & others (2002) 7 S.C.C.456= J.T. 2002 (7) S.C. 251** wherein after analyzing the relevant provisions of Sections 147, 149, 170 and 173 of the Act in para 18 of the decision, Hon'ble Apex Court held as under:

"18. *The aforesaid provisions show two aspects. Firstly, that the insurer has only statutory defences available as provided in sub section (2) of Section 149 of the 1988 Act and, secondly, where the Tribunal is of the view that there is a collusion between the claimant and the insured, or the insured does not contest the claim, the insurer can be made a party and on such impleadment the insurer shall have all defences available to it. Then comes the provision of Section 173 which provides for an appeal against the award given by the Tribunal. Under Section 173, any person aggrieved by an award is entitled to prefer an appeal to the High Court. Very often the question has arisen as to whether an insurer is entitled to file an appeal on the grounds available to the insured when either there is a collusion between the claimants and the insured or when the insured has not filed an appeal before the High Court questioning the quantum of compensation. The consistent view of this Court had*

been that the insurer has no right to file an appeal to challenge the quantum of compensation or finding of the Tribunal as regards the negligence or contributory negligence of offending vehicle."

5. For better understanding of the controversy, it would be useful to refer the cases considered by Hon'ble Apex Court in para 19 to 23 of the aforesaid decision as under:

"19. In ***Shankarayya V. United India Insurance Co. Ltd. (1998) 3 SCC 140*** *it was held that an insurance company when impleaded as a party by the court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Section 170 are found to be satisfied and for that purpose the insurance company has to obtain an order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless this procedure is followed, the insurance company cannot have a wider defence on merits than what is available to it by way of statutory defences. In absence of the existence of the conditions precedent-mentioned in Section 170, the insurance company was not entitled to file an appeal on merits questioning the quantum of compensation.*

20. In ***Narendra Kumar V. Yarenissa (1998) 9 SCC 202:1999 SCC (Cri) 245*** *question arose whether there can be a joint appeal by an insurer and owner of the offending vehicle. It was held that even in the case of a joint appeal by the insurer and the owner of an offending vehicle, if an award has been made against the tortfeasors as well as the insurer, even though an appeal filed by the insurer is not competent, it may not be dismissed as such. The tortfeasor can proceed with the appeal after the cause title is suitably amended by deleting the name of the insurer. In the said case, it also held thus: (SCC p. 206, para 5).*

"The grounds on which the insurer can defend the action commenced against the tortfeasors are limited and unless one or more of those grounds is/are available the Insurance Company is not and cannot be treated as a party to the proceedings. That is the reason why the courts have consistently taken the view that the Insurance Company has no right to prefer an appeal under Section 110-D of the Act unless it has been impleaded and allowed to defend on one or more of the grounds set out in sub-section (2) of Section 96 or in the situation envisaged by sub-section (2-A) of Section 110-C of the Act. "

21. In ***Chinnama George V. N.K Raju (2000) 4 SCC 130 : 2000 SCC (Cri) 780*** *it was held that if none of the conditions as contained in subsection (2) of Section 149 exists for the insurer to avoid the liability, the insurer is legally bound to satisfy the award and the insurer cannot be a person aggrieved by the award. In such a case, the insurer will be barred from filing an appeal against the award of the Tribunal. It was also held that the insurer cannot maintain a joint appeal along with the owner or driver if defence of any ground under Section 149 (2) is not available to it.*

22. In ***Rita Devi V. New India Assurance Co. Ltd.*** *it was held that· the insurer having not obtained permission under Section 170 of the 1988 Act, is not entitled to prefer any appeal to the High Court against the award given by the Tribunal on merits.*

*23. However, in **United India Insurance Co. Ltd. V. Bhushan Sachdeva** it was held that where the insured fails to file an appeal to the High Court against the quantum of compensation awarded by the Tribunal, the insurer is entitled to file an appeal as the insured has failed to contest the claim and in that view of the matter, the insurer could be a person aggrieved. This is the only decision which has taken a contrary view to the consistent view of this Court in regard to maintainability of appeal at the instance of an insurer. In our view, the decision in United India Insurance does not lay down the correct view of law for the reasons stated hereinafter."*

Thereafter Hon'ble Apex Court in para 26,27,30,31 and 32 of the decision held as under:

26. For the aforesaid reasons, an insurer if aggrieved against an award, may file an appeal only on those grounds and no other. However, by virtue of Section 170 of the 1988 Act, where in course of an enquiry the Claims Tribunal is satisfied that (a) there is a collusion between the person making a claim and the person against whom the claim has been made, or (b) the person against whom the claim has been made has failed to contest the claim, the Tribunal may, for reasons to be recorded in writing, implead the insurer and in that case it is permissible for the insurer to contest the claim also on the grounds which are available to the insured or to the person against whom the claim has been made. Thus, unless an order is passed by the Tribunal permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made. Thus where conditions precedent embodied in Section 170 are satisfied and award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation. Sections 149, 170 and 173 are part of one scheme and if we given any different interpretation to Section 173 of the 1988 Act, the same would go contrary to the scheme and object of the Act.

27. This matter may be examined from another angle. The right of appeal is not an inherent right or common law right, but it is a statutory right. If the law provides that an appeal can be filed on limited grounds, the grounds of challenge cannot be enlarged on the premise that the insured or the persons against whom a claim has been made have not filed any appeal. Section 149(2) of the 1988 Act limits the insurer's appeal on those enumerated grounds and the appeal being a product of the statute, it is not open to an insurer to take any plea other than those provided in Section 149(2) of the 1988 Act. The view taken in United India Insurance Co. Ltd. V. Bhushan Sachdeva that a right to contest would also include the right to file an appeal is contrary to well-established law that creation of a right to appeal is an act which requires legislative authority and no-court or tribunal can confer such right, it being one of limitation or extension of

jurisdiction. Further, the view taken in United India Insurance that since the insurance companies are nationalised and are dealing with public money/fund and to deny them the right of appeal when there is a collusion between the claimants and the insured would mean draining out or abuse of public fund is contrary to the object and intention of Parliament behind enacting Chapter XI of the 1998 Act. The main object of enacting Chapter XI of the 1988 Act was to protect the interest of the victims of motor vehicle accidents and it is for that reason the insurance of all motor vehicles has been made statutorily compulsory. Compulsory insurance of motor vehicle was not to promote the business interest of the insurer engaged in the business of insurance.' Provisions embodied either in the 1939 or the 1988 Act have been purposely enacted to protect the interest of the travelling public or those using the road from the risk attendant upon the user of motor vehicles on the roads. If law would have provided for compensation to dependants of victims of a motor .vehicle accident, that would not have been sufficient unless there is a guarantee that compensation awarded to an injured or dependant of the victims of a motor accident shall be recoverable from the person .held liable for the consequences of the accident. In ***Skandia Insurance Co. Ltd. Vs.Kokilaben Chandravadan (1987) 2 SCC 654*** *it was observed thus:*

"In other words, the legislature has insisted and made it incumbent on the user of a motor vehicle to be armed with an insurance policy covering third-party risks which is in conformity with the provisions enacted by the legislature. It is so provided in order to ensure that the injured victims of automobile accidents or the dependants of the victims of fatal accidents are really compensated in terims of money and not in terms of promise. Such a benign provision enacted by the legislature having regard to the fact that in the modern age the use of motor vehicles notwithstanding the attendant hazards, has become an inescapable fact of life, has to be interpreted in a meaningful manner which serves rather than defeats the purpose of the legislation. The provision has therefore to be interpreted in the twilight of the aforesaid perspective".

30. It was then urged that if there is a collusion between the claimants and the insured does not contest the claim and the Tribunal does not implead the insurance company to contest the claim on the grounds available to the insured or the persons against whom claim has been made, or in such a situation when the insurer files an application for permission to contest the claim on merit and the same is rejected or where the claimant has obtained an award by playing fraud, in such cases the insurer has a right of appeal to contest the award on merits and the appeal would be maintainable.

31. We have already held that unless the conditions precedent specified in Section 170 of the 1988 Act are satisfied, an insurance company .has no right of appeal to challenge the award on merits. However, in a situation where there is a collusion between the claimants and the insured or the insured does not contest the claim and, further, the Tribunal does not implead the insurance company to contest the claim, in such cases it is open to an insurer to seek permission of the Tribunal to contest the claim on the ground available to the insured or to a

person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits, in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenge only that part of the order while filing appeal on grounds specified in sub-section (2) of Section 149 of the 1988 Act. But such application for permission has to be bonafide and filed at the stage when the insured is required to lead his evidence. So far as obtaining compensation by fraud by the claimant is concerned, it is no longer res integra that fraud vitiates the entire proceeding and in such cases it is open to an insurer to apply to the Tribunal for rectification of award.

32. For the aforesaid reasons, our answer to the question is that even if no appeal is preferred under Section 173 of the 1988 Act by an insured against the award of a Tribunal, it is not permissible for an insurer to file an appeal questioning the quantum of compensation as well a, findings as regards negligence or contributory negligence of the offending vehicle."

6. In view of the aforesaid legal position as explained by the Apex Court, it is clear that in absence of any permission granted by the tribunal under Section 170 of the Motor Vehicle Act the insurer/ Insurance Company can file appeal challenging the award only on the limited grounds available to the insurer under Section 149(2) of the Act. In our opinion, it is not open for the insurer/appellant to challenge the quantum of compensation fixed by the tribunal on merits including the ground of negligence and/or contributory negligence of the offending vehicle.

7. The contention of the learned counsel for the appellant that if an insured has not filed any appeal, it means he has failed to contest the claim and that the right to contest includes the right to contest by filing an appeal against the award of Tribunal as well and in such situation an appeal by the insurer questioning the quantum of compensation including negligence or contributory negligence would be maintainable or in a situation when the insurer files an application for permission to contest the claim on merit and the same is rejected or where the liability of payment of compensation is fastened upon the insurer and the insured does not prefer appeal against the award of Motor Accident Claim Tribunal in that situation the award made by Motor Accident Claim Tribunal on the question of quantum of compensation inasmuch as on the question of negligence or contributory negligence howsoever erroneous it may be, would attain the finality and if the insurer cannot be permitted to challenge the same by filing appeal under Section 173 of the Act on the quantum of compensation on merit including negligence of offending vehicle in that situation it would cause serious mischief and miscarriage of justice, cannot be accepted for the simple reason that the Hon'ble Apex Court has dealt with the issue in quite detail and has also repelled somewhat similar contention raised by appellant in the aforesaid case, therefore, this court cannot take different view in the matter as the law declared by Hon'ble Apex Court is binding upon us.

8. From the records, we do not find that any ground had been taken by the Insurance Company that there was any breach of insurance policy. We have also examined the records. We do not find that any permission had been applied by the Insurance Company under Section 170 of the Motor Vehicle Act, 1988 and the same was either refused or granted by the Tribunal.

9. In view of our findings the argument of the learned counsel for the appellant that the accident took place due to contributory negligence of drivers of both the vehicles had not been considered by the tribunal cannot be accepted.

Thus, the appeal fails and is dismissed.

10. Office is directed to send back the records of the court below expeditiously.

Parties shall bear their own cost

Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2007

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE V.C. MISRA, J.
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Criminal Misc. Writ Petition No. 11998 of 2006

Smt. Nausheeda and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Mohd. Aslam Ansari
Sri Mukhtar Alam

Counsel for the Respondents:
Sri V.K. Mishra, Government Advocate
Sri Vijay Shanker Mishra, Government Advocate
Sri Neeraj Kant Verma,
Sri Lal Vijay Singh,
Sri S. Murtaza Ali, Addl.Govt.Advocate.

Constitution of India Art. 21 and 226-Personal Liberty-Writ petition-challenging the FIR-offence u/s 363, 366, 325, 504 and 506 IPC-the boy and girl both found major-generally writ court refused to interfere in respect of heinous crime-but in social object court can not give absolute go bye-No persons shall be deprived from personal liberty established by law-in absence of valid age proof-person concerned to go for ossification to determine actual age.

Held: Para 12,13 & 14

A boy and a girl are at liberty to choose their own bride and bridegroom. This is neither a crime nor disrespect to the elders even within the social framework of the country. No person shall be deprived of his life or personal liberty except according to procedure established by law under Article 21 of the Constitution of India.

If such determination supports the requisite age, then the right of marriage of such persons cannot be said to be a criminal offence. As soon as it is proved by the medical test that both the boy and girl are not minors, their willingness of the marriage to each other cannot be ignored. If it is ignored, the same will be interference with the fundamental right of such persons.

We normally refuse to pass any order in respect of heinous crimes. But where the question of social object is involved, we can not give an absolute go bye. Therefore, we cannot construe that the writ petition is not maintainable and deserves to be dismissed *in limine* without the test of bonafide.

Case law discussed:
2006 (56) ACC-234
2006 (54) ACC-235
2006 (55) ACC-424
2002 (1) JIC-937

(Delivered by Hon'ble Amitava Lala, J.)

Amitava Lala,J.-1. The writ petition is made basically for the following reliefs amongst others;

(A) Issue a writ, order or direction in the nature of certiorari quashing the impugned first information report lodged at Case Crime No.257 of 2006 under sections 363,366,352,504,506 I.P.C. Police Station Gangoh, District Saharanpur (Annexure No.1 to the writ petition).

(B) Issue a writ, order or direction in the nature of mandamus commanding the respondents not to arrest the petitioners with reference to Case Crime No.257 of 2006 under Sections 363,366, 352,504,506 I.P.C. Police Station Gangoh, District Saharanpur.

2. An F.I.R. has been lodged on 2nd September,2006 by one Safdar, the respondent no.4 herein saying that Afzal alias Mohd.Afzal, kidnapped Km.Nausheeda, on 8th August,2006, who is allegedly about 15 years of age.

3. In the writ petition, the concerned girl Nausheeda is the petitioner no.1 when the accused Afzal is the petitioner no.2 along with others. The writ petition is supported by the affidavit of Nausheeda herself describing her age is 22 years. The writ petition is supported by various annexures including annexure 3 which is very relevant for the purpose of due consideration. Such annexure is a certificate of the concerned Chief Medical Officer (hereinafter called as C.M.O.) Saharanpur dated 22nd September, 2006 on the basis of the order dated 18th September, 2006 of the Additional District Magistrate, Administration, Saharanpur. It is stated therein that the girl was present for examination. The examination was done. According to her own statement the age is 22 years. On the physical appearance the C.M.O. certified that her age is about 20/22 years.

4. A Division Bench consisting of (**Hon'ble Mr. Justice R.C.Deepak and Hon'ble Mr. Justice V.D. Chaturvedi**) were divided in entertaining the writ petition.

R.C. Deepak, J. was pleased to pass the following interim order:

"In my opinion without expressing anything on the merit of the case, it is fit and proper in the interest of justice and equity both that the investigation into the case crime no. 257 of 2006 under Sections 363, 366, 352, 504, 506 IPC at Police Station Gangoh, District Saharanpur shall go on, but the arrest of the petitioners no.2 to 5 (Afzal @ Mohd.Afzal, Imran, Gulshana @ Gullo and Sabra) shall not be effected by the investigating agency till the date fixed, provided they cooperate with the investigation. The order is passed accordingly.

Let a counter affidavit be filed by the investigating officer within three weeks. Notice be issued to respondent no.4 to file counter affidavit within the period indicated above.

The case shall appear on list on 1st November, 2006."

5. In the process of delivering judgment **R.C. Deepak, J.** relied upon the following judgments:

AIR 1963 SC 1295 (Kharak Singh vs State of U.P.), AIR 1975 SC 1375 (Govind Vs State of M.P.), AIR 1997 SC 568 (P.U.C.L. Vs Union of India), 2002 (1) J.I.C. 937 (Shamsher Aalam alias Sheru Vs State of U.P.), 1994 (31) ACC 431(Joginder Kumar Vs State of U.P.)

On the other hand **V.D. Chaturvedi, J.** felt as follows:

"In view of Hon'ble Supreme Court's verdict given in **AIR 1957 529 (Paragraphs 5 &6) (Sohan Lal Vs Union of India), AIR 1959 SC 942 (Paragraph 17) (Mahant Moti Das Vs S.P. Sahi and others), AIR 1961 SC 1526 (Paragraph 7) (Union of India & others Vs. Ghaus Mohd), AIR 1963 SC 516 (Paragraphs 4 & 5), (Bokaro & Rangur Ltd. Vs State of Bihar & another), AIR 1964 SC 1419 (paragraph 7), (Thansingh Nathmal Vs. Superintendent of Taxes & others) and in AIR 1976 SC 386 (paragraph 18), (D.L.F. Housing Construction Pvt. Ltd. Vs Delhi Municipal Corporation & others)** the High Court in writ jurisdiction cannot enter into the field of investigating the facts and cannot adjudicate such questions of disputed facts which require the investigation and the evidence. The questions of facts which invite the investigation or enquiry or probe cannot be decided in the writ jurisdiction."

6. His Lordship further held that "the adjudication of such facts would also be an interference in the investigation of the offence."

7. Ultimately it was held that the writ petition is not maintainable and deserves to be dismissed **in limine** without issuing Rule-Nisi.

8. In coming to conclusion **V.D. Chaturvedi, J.** made the following observations:

"I am further of the opinion that the consent expressed by the victim Km.Nausheeda either in the affidavit or elsewhere, while she was in the custody of the accused of Crime No.257 of 2006, fails to inspire the confidence that the alleged consent was free from fraud, coercion, misrepresentation, under influence or threat etc. At this juncture such consent cannot be termed more than a spurious consent.

Petitioner Km. Nausheeda is undisputedly in the custody of the petitioner Afzal. So long as she lives in his custody, her continuous sexual exploitation by at least Afzal cannot be prevented. If after the trial of Crime No.257 of 2006, she is found minor or that she was induced or enticed by Afzal and others to go with them or that her consent was not a free consent, her loss, as a result of such sexual exploitation would be an irreparable and the biggest loss, which a unmarried girl of her age may suffer in her life. She is a living person and not a case property. Her welfare and future is in peril. Only suitable order may save her future and protect her welfare.

Km. Nausheeda, being the victim of a case under Sections 363,366 IPC is the prime witness of Crime No.257/2006. Her custody with the accused of such offence would enable them to win over the prime witness before her statement in the investigation and in the trial. Thus the

fairness of the investigation and the trial is in jeopardy. It may defeat the ends of justice. For the maintenance of the administration of justice and to avert the defeat of the ends of justice, it is therefore, necessary that she be kept out of the clutches of the accused of case Crime No.257 of 2006. It is the high time to pass a suitable and appropriate order regarding her custody or for her living in a healthy atmosphere under the care and watch of a responsible person. Her natural guardian is best person to whom her custody may be restored. I do order that her custody be restored forthwith to her natural guardian."

9. In any event while **R.C. Deepak,J.** was pleased to place the matter before Hon'ble the Chief Justice to refer the matter to the third Judge, keeping the writ petition pending. **V.D. Chaturvedi, J.** was pleased to send the matter to the office to place the matter before the Hon'ble Chief Justice to constitute a full Bench for determination of the above mentioned points.

Hon'ble the Chief Justice constituted this Bench and forwarded the matter.

The following questions are formulated by the Bench after hearing the matter on 15th December, 2006:

(a) What would be the wisdom of the writ Court under this jurisdiction?
(b) What relief could be granted by the writ Court?

10. We have carefully considered the submission of learned counsel appearing for the petitioners and learned Government Advocate. Both the petitioners i.e., boy and girl, who were directed to be personally present before this Court were identified by learned counsel appearing for the petitioners. Irrespective of the consideration of issue, this Court was pleased to direct the petitioners on 15th December, 2006 to get the age proof of both the boy and girl through an ossification test. The part of the order dated 15th December, 2006 is as follows:

"For the purpose of getting age proof, both the girl and the boy (petitioner nos.1 and 2 herein) will be produced before the C.J.M., Allahabad along with their photographs, which will be attested by the subordinate officer of the C.J.M. concerned and then the petitioner nos.1 and 2 will be sent to the Chief Medical Officer, Allahabad along with the attested photographs for their identification and completion of ossification test, report of which will be produced before the Officer of the Court within a period of one month by the learned Government Advocate. If any copy of the same is available with the petitioners, they can also file the same."

11. From the ossification test report it appears that as per the test dated 20th December, 2006 the age of the boy is 22 years when the age of the girl is 19 years. The F.I.R. was lodged on 2nd September, 2006 describing 8th August, 2006 is the date of the incident. Hence it appears to this Court that on the fateful day both the petitioners were major.

12. Now we have to consider the questions formulated by this Court. According to us, both the questions, are intermingled with each other. The relief will be dependable upon the wisdom. Therefore, the entire endeavour of this Bench is confined to the question of

wisdom of the writ Court. It is well known that the writ Court does not interfere with the investigation or inquiry or adjudicate the disputed question of fact. At the same time it is also to be remembered that writ Court possess unfettered right under Article 226 of the Constitution of India particularly in respect of fundamental right of the people. Therefore even within our self restraint we should not forgetful about proper utilization of the tool at least for the sake of fundamental right, principles of natural justice, question of jurisdiction and ultra vires. A boy and a girl are at liberty to choose their own bride and bridegroom. This is neither a crime nor disrespect to the elders even within the social framework of the country. No person shall be deprived of his life or personal liberty except according to procedure established by law under Article 21 of the Constitution of India. The question of crime, if any, arises when one is underaged that too eloped by any one by force for the purpose of marriage or for some other reason. Even where a consent of the minor is not backed by the parents' consent, cannot be said to be a consent in the eye of law. Therefore, court has to visualise whether the consent is valid or not. In the process the age is not verified. Otherwise there would be likelihood of infringement of fundamental right.

13. It is a border line issue. Therefore the writ Court can not dismiss the writ petition ***in limine***. After the age verification, if the Court found that either of them is underaged, then Court may not interfere with the matter of investigation under Sections 363, 366 of Indian Penal Code (hereinafter called as I.P.C). Normally age is to be verified from the school certificate or from an authentic document. If those are not available or one is illiterate, it would be proper for the Court to send him/her to medical expert for the purpose of determination of age scientifically. If such determination supports the requisite age, then the right of marriage of such persons cannot be said to be a criminal offence. As soon as it is proved by the medical test that both the boy and girl are not minors, their willingness of the marriage to each other cannot be ignored. If it is ignored, the same will be interference with the fundamental right of such persons.

14. Independently it is to be remembered that in our State we have no provision for granting anticipatory bail as yet. Since such protection is not available there is no other alternative for a person aggrieved but to invoke the writ jurisdiction on the two fold grounds i.e.,(i) to quash the F.I.R. and (ii) not to arrest the petitioner/s. Even thereafter very seldom, we pass an order quashing the F.I.R. We normally pass order not to arrest a person for a limited period on the prima facie case within our self restraint. We normally refuse to pass any order in respect of heinous crimes. But where the question of social object is involved, we can not give an absolute go bye. Therefore, we cannot construe that the writ petition is not maintainable and deserves to be dismissed ***in limine*** without the test of bonafide.

15. In **2006 (56) ACC 234 Supreme Court (Lata Singh Vs. State of U.P. and another)** on a different factual background but on the question of marriage, the Supreme Court held:

".....this is a free and democratic country, and once a person becomes a major, he or she can marry whosoever he/she likes....."

16. A Division Bench of our High Court in **2006 (54) ACC 235 (Nitin Agnihotri vs State of U.P. and others)** considered the question of girl's willingness and ultimately directed the police authorities to ensure peaceful living of the married couple and prevented the parent of the family members of the husband from giving any threat.

17. A Division Bench of this High Court in which one of us (Amitava Lala, J.) is member, as reported in 2006 (55) ACC 424 (Sayed Sadab Hasan and another vs State of U.P.and others) it was held:

"... once the girl become major she has her own right to stay as per her will and she cannot be protected even by sending her to any home i.e. Nari Niketan etc."

The guardian's prayer as a complainant to allow to stay with her was also refused by the Court.

18. In **2002 (1) JIC 937 (All) (Shamsher Alam @ Sheru & Anr. Vs State of U.P. & Ors.)** this High Court even quashed the F.I.R. in view of the moot issue that when a person become major and is not under the guardianship of her father and she had left the paternal home and married one out of her own free-will, the allegations in the F.I.R. that the boy has threatened to kidnap the girl, does not prima facie constitute the committal of offence.

19. In **AIR 1997 SC 568 (People's Union for Civil Liberties (PUCL) vs Union of India and another)** the Supreme Court held right to privacy is a part of the right to "life' and "personal liberty' enshrined under Article 21 of the Constitution of India. Although the different facts were involved therein but interference with the right to privacy was a major issue. The right to privacy by itself has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the each case.

20. In the well celebrated judgment of the Supreme Court reported in **1994 (31) ACC 431 (Joginder Kumar Vs. State of U.P.)** it was held that the existence of the power to arrest is one thing. The justification for the exercise of it is quite another.

21. We are considering the cause of justification, which can not be equated with probability. When there is a cause of justification, the matter cannot be dismissed ***in limine*** but will be disposed of either way after justification of the cause. Probability means you think that it is very **likely** to happen when justification means an **acceptable position** with reason/s or explanation for it. Justification means judge the cause and pass the order when dismissal ***in limine*** means there is no necessity of judging the case at all.

22. Hence in totality we respectfully disagree with view of **Hon'ble Mr.Justice V.D.Chaturvedi,** and we respectfully agree with the view of **Hon'ble Mr.Justice R.C.Deepak**, but

with a rider that in case of any doubt or in absence of any valid age proof document, persons concerned will be directed to go for ossification being the valid scientific test to determine the age and pass order on such determination.

23. With the above view, the reference is formally treated to be disposed of. The matter is directed to be sent back to the appropriate Division Bench for the purpose of final adjudication. Reference decided.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2007

BEFORE
THE HON'BLE R.P. MISRA, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No.35617 of 2002

Suresh Dwivedi & another ...Petitioners
Versus
The District Magistrate, Hamirpur and another ...Respondents

Counsel for the Petitioners:
Sri Mukesh Prasad

Counsel for the Respondents:
Sri Vishnu Pratap
S.C.

Mines and Minerals (Regulation and Development Amendment Act, 1979-Rule-4 (1-A)-Liability of royalty-petitioners doing business of purchase and sale of morrum, gitt in their different business premises-purchase of morrum from open market from various leased permit holder-whether liable to pay royalty? Held-'No'.

Held: Para 17

From the record it is clear that no rules were framed till the notice to the petitioners have been given, therefore, we are of the view that notice given by the respondents to the petitioners itself is bad in law and no action under Section 21 of the Act for contravention of Section 4(1-A) can be initiated against the petitioners.

Case law discussed:
AIR 1987 M.P.-74
AIR 1995 SC-858
2004 (2) SCC-783

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

1. By means of the present writ petition the petitioners have approached this Court for quashing the impugned notices dated 6.4.2002 and 22.2.2002 (Annexures 1 and 2 to the writ petition).

2. The petitioners who are traders of sand/ morrum and gitti having their business premises on different plots in village Shitalpur and Kalauli in District Hamirpur. The petitioners purchase the minerals from open market and also from various lease/permit holders from storing and transporting for sale to various customers to take the aforesaid minerals for private consumption/use.

3. Notices dated 6.4.2002 and 22.2.2002 were received from the mines officer by which the petitioners were directed to clarify the position regarding the genuineness of the stock of morrum. According to the aforesaid notice, under Section 4 (1-A) no person can stock or transport minerals without permission, otherwise action be taken under Section 21 of the Act. Section 4 of the Act under the heading "Prospecting or mining operations to be under license or lease" has been amended by the Mines and Minerals (Regulation and Development)

Amendment Act, 1999 and a new of Section 4 (1-A) of the Act has been inserted. Section 4(1-A) is being quoted below:-

***"4(1-A)** - No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder."*

4. The aforesaid section is an enabling provision and it enables the Central Government to make rules in exercise of powers under Section 13 and the State Government has been conferred power under Section 15 of the Act. It is not in dispute that till date no rules have been framed under the Act or the 1963 Rules either by the Central Government, in exercise of powers under Section 13 or 13-A of the Act, or by the State Government in exercise of powers under Section 15 of the Act, which prohibits the storing and selling of minerals by wholesale and retail dealers, who are not lease/permit holders and who are carrying on their business outside the mining areas. There is no provision in the Act nor under Rules which prohibits the storing of minor minerals outside any mining area for being sold by retail or wholesale by any person who is not a lease or permit holder. The intention of the legislature while amending Section 4 and inserting Section 4 (1-A) was to safeguard its royalty, which was being evaded by the lease and permit holders by storing minerals within the mining area and removing them after expiry of mining lease or permit, without payment of royalty. If the legislature was to apply amended section to all the minerals then the entire construction work and repair work even by the private persons will come to a standstill because even they cannot transport or store sand even for the construction purposes of their houses, since they will be liable for prosecution under the amended section 21(1) of the Act. Section 21(1) is being reproduced below:-

***"21(1)** Whoever contravenes the provisions of sub-section (1) or subsection (1-A) of Section 4 shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to twenty-five thousand rupees, or with both."*

5. In case, the amended section are applied even without framing any relevant rules, then a person cannot have a possession even a bagful of sand and will be liable for prosecution under Section 21 of the Act.

6. Rule 70 of the U.P. Minor Minerals (Concession) Rules 1963 is the only provision in respect of Transportation of Minerals. Rule 70 is being reproduced below:-

"70. Restriction of transport of minerals.-

1. The holder of mining lease or permit or a person authorised by him in this behalf may issue a pass in Form MM-11 to every person carrying a consignment of minor mineral by a vehicle, animal or any other mode of transport. The State Government may, through the District Officer, make arrangements for the supply of printed MM-11 Form books on payment basis.

2. No person shall carry, within the State, a minor mineral by a vehicle,

animal or any other mode of transport, excepting railway, without carrying a pass in Form MM-11 issued by sub-rule 91).

3. Every person carrying any minor mineral shall, on demand by any officer authorised under Rule 66 or such officer as may be authorised by the State Government in this behalf, show the said pass to such officer and allow him to verify the Correctness of the particulars of the pass with reference to quantity of the minor mineral.

4. The State Government may establish a check post for any area included in any mining lease or permit, and when a check post is so established public notice shall be given of this fact by publication in the Gazettee and in such other manner as may be considered suitable by the State Government.

5. No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area, for verification of the weight or measurement of the mineral.

6. Any person found to have contravened any provision of this rule shall, on convictions be punishable with imprisonment of either description for a term which may extend of six months or with fine which may extend to one thousand rupees or with both."

7. From the perusal of the aforesaid rule, it is clear that lease or permit holders will issue a pass in Form MM-11 to every person carrying a consignment of minor minerals by a vehicle, animal or any other mode of transport. Admittedly, the business premises of the petitioners are outside the mining areas, as such, no Form MM-11 is required for trading in minor minerals and there cannot be any restriction for the same. Form MM-11 is issued by the lease/permit holder as proof of payment of royalty. There is no provision under the Act and rules under which any permission is required for storing any minerals. The amended section is an enabling provision and it enables the Central Government to make rules in exercise of powers under Section 13 and the State Government under Section 15 of the Act, but till date, no rules have been framed under the Act or under 1963 Rules either by the Central Government or by the State Government. There is no enabling provision under 1963 Rules, which prohibits the storing or transporting the minor minerals outside any mining area for being sold by retail or wholesale by any person who is not a lease or permit holder.

8. In view of the aforesaid fact, the learned counsel for the petitioners submits that the notice itself is bad and is liable to be quashed.

9. Further submission has been made that the Form MM-11 is issued for transportation of minerals. It is not for the purposes of storage of minerals. Rules 57, 58 and 59 of the U.P. Minor Minerals (Concession) Rules, 1963 are not applicable in the case of the petitioners. Rule 57 provides regarding penalty for unauthorised mining. Rule 58 is regarding non-payment of royalty, rent or other dues and Rule 59 is regarding consequences of contravention of certain conditions mentioning thereby that if a lease holder itself commits any breach of any conditions, provided in Rules 44 and 46

shall on conviction be punished with imprisonment or fine. Admittedly, the petitioners are not the mining lease holders. They purchased the minerals and store it and sell it and there is no restriction to this effect.

10. The reliance has been placed upon a judgement in M***.P. Contractors Sangh, Indore and others Vs. State of M.P. and others*** reported in AIR 1987 Madhya Pradesh 74, ***State of Tamil Nadu Vs. M.P.P.Kavery Chetty*** reported in AIR 1995 Supreme Court 858 and in ***Karnataka Rare Earth and another Vs. Senior Geologist, Department of Mines & Geology and another*** reported in 2004(2) Supreme Court Cases 783. Further reliance has been placed in ***Sharma & Co. and others Vs. The State of U.P. and another*** reported in AIR 1975 Allahabad 386. The learned counsel for the petitioners in support of the aforesaid decisions stated that royalty cannot be recovered in the facts and circumstances of the case. It imposes a liability only on holders of mining lease granted under the Rules to pay royalty in respect of minerals recovered at the rate for the time being specified. As the petitioners are not holder of mining lease, no royalty can be charged from the petitioners.

11. A counter affidavit has been filed on behalf of the respondents. It has been submitted on behalf of the respondents that in view of Section 4(1-A) no person has a right of keeping stock or can transport without permission and if he violates he is liable for punishment as provided under Section 21 of the Act of 1957. As the petitioners has not produced any document neither has produced Form MM-11, therefore, they are liable for punishment for keeping unauthorisedly the stock of minerals. As the petitioners are keeping stock of minerals without payment of any royalty to the State and due to the aforesaid act, there is a loss of the Government, therefore, notices dated 6.4.2002 and 22.2.2002 have been issued to petitioners for payment of an amount. Further it has been submitted that petitioners have an alternative remedy by way of filing an appeal under Rule 77 of the Act. The writ petition is liable to be dismissed.

12. We have heard Sri Mukesh Prasad, learned counsel for the petitioners and Sri Vishnu Pratap learned Standing Counsel for the respondents.

13. Rule 4(1-A) of the Minor Minerals (Regulation and Development) Act 1957 provides that no person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the Rules made thereunder. Rule 70 of the U.P. Minor Minerals (Concession), Rules, 1963 also put a restriction of transport of minerals which restricts that no person shall carry within the State a minor minerals without carrying a pass in Form MM-11. The submission of the learned counsel for the petitioners are that Section 4 (1-A) has been inserted by an amendment in 1999 provides that no person shall transport or store the mineral otherwise in accordance with the provisions of this Act. It has been submitted by the petitioners that the aforesaid amended rule is an enabling provision and cannot be enforced unless rules are made making it obligatory to obtain a license or permit to store or cause to be transported or stored any mineral by a person not being a lease or permit

holder. It is not disputed that no rules have been framed till date of notice issued to the petitioners. The expression otherwise than in accordance with the provisions of the Act and Rules made thereunder occurring in Section 4 (1-A) of the Act is significant in the sense that if both the Acts and Rules are silent about the procedure for transportation or storage, then it will be treated to be vague and arbitrary.

14. From the perusal of the aforesaid Act of 1957 Rules of 1963, no rules have been framed either by the Central Government or by the State Government.

15. Admittedly, now the legislature only to prevent the illegal transportation, mining and possession of minerals have notified a Rule namely Uttar Pradesh (Prevention of Illegal Mining Transportation and Storage) Rules 2002 but the nature of the aforesaid rules are prospective in nature it is not retrospective.

16. Now the question for consideration by this Court is whether the person involved in selling the minerals after purchasing it from the lease holder and stores in his godown for selling to the customers, whether it can be called an Act in view of the provision of Section 4 (1-A) of 1957 Act or in view of the provision of Rule 70 of 1963 Rules because it clearly says that Form MM-11 is necessary and the minerals cannot be sent outside the mining area unless and until royalty is paid and the requirement given in Form MM-11 is complete. It clearly indicates that immediately when the mineral is excavated and it is shifted to other place royalty has to be paid. The Government has fixed the rate of royalty which is to be both before the goods are taken out by the lease holder from the quarries and the person who has purchased subsequently in terms of sale either from the lease holder or from any person then it will not be possible for the person like petitioners to have any document regarding payment of royalty. In this way these goods were coming to the market through several hands with the result that obviously the subsequent purchaser do not have and cannot have the royalty pay receipt relating to the articles.

17. From the record it is clear that no rules were framed till the notice to the petitioners have been given, therefore, we are of the view that notice given by the respondents to the petitioners itself is bad in law and no action under Section 21 of the Act for contravention of Section 4(1-A) can be initiated against the petitioners.

18. In view of the aforesaid fact, the writ petition is allowed and the impugned notices dated 6.4.2002 and 22.2.2002 (Annexures 1 and 2 to the writ petition) are hereby quashed.

No order as to costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2006

BEFORE
THE HON'BLE V.M.SAHAI, J.
THE HON'BLE SANJAY MISRA, J.

First Appeal From Order No.1226 of 2000s

Smt. Pratima Srivastava and another
...Appellants
Versus
Debi Prasad @ Beni Prasad and others
...Respondents

Counsel for the Appellants:
Sri. R.P. Singh .
Sri. Murlidhar.
Sri. K.P. Upadhayay.
Sri. V.P. Mishra.

Counsel for the Respondents:
Sri. A.B. Saran.
Sri. Deepak Jaiswal.

Motor Vehicle Act 1988, Sect. 173 Accident Claim Tribunal- fixed the liability- on the ground the driver not possess Driving Licence and the vehicle was not insured-finding recorded by tribunal-patently erroneous-insurer cannot be absolved-from liability-if the amount already deposited-shall be recovered from the Insurance Company with 6% interest.

Held: Para 7

In the present case the finding of the Tribunal on issue no.2 has been found - to be erroneous. The driver was holding a valid driving license on the day of the accident, therefore, when the contrary has not been established by the insurer it cannot absolve itself of the liability.
Case law discussed:
2004(3) SCC 297

(Delivered by Hon'ble V.M. Sahai, J.)

1. We have heard Sri R.P. Singh, learned counsel for the appellants. Though the list has been revised but none has appeared on behalf of the respondents.

2. This is a first appeal from order filed against the award dated 24.5.1997 passed by Motor Accident Claim Tribunal, Kanpur Nagar in Motor Accident Claim Petition No.283 of 1996.

3. Learned counsel for the appellant has contended that the finding recorded by the Tribunal on issue no.2 is that the driver was not having a driving licence of light motor vehicle for driving of private vehicle. It is contended that the finding is patently erroneous inasmuch as the driving licence a copy of which was a part of the record of the Tribunal and has been filed as Annexure along with this appeal indicates that the driving license of Driver-Virendra Kumar son of Sunder Lal, who was driver of the vehicle involved in the accident, was issued on 23.9.1991, it was made valid for LMV Transport w.e.f. 29.1.1993 and the aforesaid endorsement was again extended w.e.f.13.3.1996. It is submitted that the licence also bears another endorsement to the effect that it is valid for LMV (Private) and the same is valid from 29.1.1996 to 28.1.1999 under the order of the Licensing Authority.

4. Perusal of the aforesaid licence shows that licence of the driver i namely, Virendra Kumar was also valid for LMV (Pvt.) hence a contrary finding recorded by the Tribunal on issue no.2 appears to be patently erroneous.

5. It is also contended that the liability to pay the awarded amount has illegally been imposed upon the owner of the vehicle whereas since the vehicle was duly insured and the driver was having a valid driving licence hence the liability to pay the awarded amount could not be fastened upon the appellants.

6. Learned counsel has placed reliance on a three judges decision of the Hon'ble Supreme Court in the case of **National Insurance Co.Ltd. Versus Swaran Singh and others (2004) 3 SCC**

297 and has relied on paragraphs 69 and 98 which are quoted hereunder:

"69. The proposition of law is no longer res integra that the person who alleges breach must prove the same The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi)

98. "Nicolletta Rohtagi was a case where a question arose as to whether an appeal by the insurer on the ground dehors those contained in Section 149(2) would be maintainable. It was held not to be. There cannot be any doubt or dispute that defences enumerated in Section 149(2) would be available to the insurance companies, but that does not and cannot mean that despite such defences having not been established, they would not be liable to fulfill their statutory obligation under sub-section (1) of Section 149 of the Act."

7. In the present case the finding of the Tribunal on issue no.2 has been found -to be erroneous. The driver was holding a valid driving license on the day of the accident, therefore, when the contrary has not been established by the insurer it cannot absolve itself of the liability.

8. In view of the foregoing discussion, the appeal is allowed to the extent that the amount awarded to the claimant respondents is to be paid by the Insurance Company-respondent no.6 against whom the award is executable. In case any amount has been paid by the appellants in pursuance of impugned award, they shall be entitled to six percent interest on the amount from the date of deposit upto the date it is recovered from the insurer.

9. No order is passed as to costs.

Appeal allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2006

BEFORE
THE HON,BLE DR. B.S. CHAUHAN, J.
THE HON,BLE DILIP GUPTA, J

Civil Misc. Writ Petition No. 67078 of 2006

Jayanta Bandhopadhyay and another.
...Petitioners
Versus
U.P. Power Corporation limited Lucknow & another. ...Respondents

Counsel for the Revisionist:
Sri. G.K. SINGH
Sri. V.K. Singh

Counsel for the Opposite parties:
Sri. R.D. KHARE
S.C.

Constitution of India Act 226 -read with Limitation Act 1963 Section 5(1) (b), 14 claim petition-dismissed on the ground of limitation-petitioner instead of addressing the tribunal under section 14 of Limitation Act-approached under section 5 of the Act-held- petitioner entitled for the benefit of section 14 although not addressed the Court - tribunal directed to decide the claim on merit.

Held Para 8:

In view of the above, as the learned Tribunal had not been addressed by the petitioners for grant of benefit under Section 14 of the Limitation Act, though it could have very safely been advanced, we are of the considered opinion, and it is also in the interest of justice, that the learned Tribunal be requested to decide the case on merit. We have also examined the matter that in case the petitioner is given benefit of Section 14 of Limitation Act, the Claim Petition filed by him, would not be barred by time

Case law discussed:

1996(6) SCC-199
2004(13) SCC-463
2004(13) SCC-656
1996(6) SC-101
2001(10) SCC-513
2004(3) SCC-458
2005(12) SCC-454

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

1. This writ petition has been filed for challenging the impugned judgment and order dated 14th August, 2006, rejecting the Claim Petition No. 265 of 2004 only on the ground of limitation. The learned Tribunal has dealt with various provisions of the U.P. Public Service Tribunal Act, 1976 and reached the conclusion that the Claim Petition was time barred, and the provisions of Section 5 (1) (b) of the Limitation Act, 1963 would not apply in case of the main petition.

2. We have heard Shri V.K. Singh, learned counsel for the petitioners and Shri R.D. Khare, learned counsel for respondent.

3. The learned Tribunal has only been addressed to the effect that of Section 5 of the Limitation Act, and it appears that the learned counsel appearing before the learned Tribunal did not advance the arguments on the basis of Section 14 of the Limitation Act, 1963.

4. In Danda Rajeshwari Vs. Bodavula Hanumayamma & Ors., (1996) 6 SCC 199, the Hon'ble Supreme Court has held that in case the writ Court has the power to entertain a petition but does not want to decide the same itself and relegates the party to some other statutory forum, the Court can prescribe a particular time during which the party may file/present a petition before the said statutory authority. Therefore, this Court may, in exceptional circumstances, pass an order that in case the statutory authority is approached within the stipulated period, the authority can be requested to decide the case on merit without entering into the issue of limitation.

5. In Virendra Kumar Rai Vs. Union of India, (2004) 13 SCC 463, the Hon'ble Supreme Court held that where a party has approached the High Court or Supreme Court without approaching the statutory forum, in a bona fide manner, he may be entitled of the benefit of provisions of Section 14 of the Limitation Act. A similar order has been passed in Trai Foods Ltd. Vs. National Insurance Co., (2004) 13 SCC 656 relegating the party by the Hon'ble Supreme Court to the civil court, giving him the benefit of Section 14 of the Limitation Act. In such a case, the period for which petition remained pending before the writ Court, can be excluded therefrom.

6. In Roshanlal Nuthiala & Ors. Vs. R.B. Mohan Singh Oberai, AIR 1975 SC 824, the Hon'ble Supreme Court considered the provisions of Section 14 of the Limitation Act and held that the said

provisions is wide enough to cover such cases where the defects are not merely jurisdictional, strictly but similarly other defects also. Any circumstance, legal or factual, which inhabits entertaining by the Court of the dispute on the merits of the case within the scope of the Section and a liberal touch must inform the interpretation of the Limitation Act which deprives remedy of one who has a right.

7. Similar view has been reiterated in Tapan Kumar Sadhukhan Vs. Food Corporation of India & Ors., (1996) 6 SCC 101; World Tel Inc. & Anr. Vs. Union of India & Ors., (2001) 10 SCC 513; Union of India &Ors. Vs. West Coast Paper Mills Ltd. & Anr (III), (2004) 3 SCC 458; and NITCO Tiles Ltd. Vs. Gujarat Ceramic Floor Tiles Mfg.Assn & Ors., (2005) 12 SC 454.

8. In view of the above, as the learned Tribunal had not been addressed by the petitioners for grant of benefit under Section 14 of the Limitation Act, though it could have very safely been advanced, we are of the considered opinion, and it is also in the interest of justice, that the learned Tribunal be requested to decide the case on merit. We have also examined the matter that in case the petitioner is given benefit of Section 14 of Limitation Act, the . Claim Petition filed by him, would not be barred by time.

9. Thus, in view of the above, we allow the writ petition and set aside the impugned judgment and order of the learned Tribunal and remand the case to the learned Tribunal to be decided on merit. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 52295 of 2006

Pushpanjali Avasthi (minor) ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Maurya

Counsel for the Respondents:
S.C.

Constitution of India-Art. 226-Declaration of result petitioner appeared in High School Examination-declared failed-prayer for re-evaluation denied-no provision for re-evaluation-neither counters affidavit filed nor answer sheet that of Sansprit produced-report regarding missing of answer sheet and award of average marks-in other subjects obtained 63% marks-held-Board to give 20,000/- cost for mental agony and shock-shall be permitted to appear in Intermediate examination 07-08 even if the date had expired.

Held: Para 6

Keeping in view the fact that the petitioner has suffered mental agony and shock on account of being declared fail, whereas she has actually passed the High School Examination with first division marks, and also considering the fact that the petitioner has not been able to seek admission in Class 11, this Court has no option but to award compensation to her, which is assessed at Rs.20,000/-. The Madhyamik Shiksha Parishad, U.P. Allahabad is directed to pay the same to the petitioner by a bank draft payable in favour of the petitioner. Such bank draft shall be sent to the

petitioner through the College from where she appeared in the High School Examination, 2006 within three weeks from today. It is further directed that the petitioner shall be permitted to appear in the Intermediate Examination 2007-2008 and her form be accepted even if the last date has expired.

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

1. Heard Sri G.K.Maurya, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents.

2. The petitioner appeared in the High School Examination, 2006 and was declared fail as she was shown to have obtained only 4 marks in Sanskrit. In other papers of the High School Examination, 2006 the petitioner has obtained reasonably good marks averaging to 63%. Learned counsel for the petitioner has submitted that the petitioner has done very well in Sanskrit paper also and since there is no provision of revaluation of marks, she has filed this writ petition with a prayer for summoning the answer copy of Sanskrit Papers of High School Examination, 2006 and to award correct marks after getting the same re-examined.

3. This Court, vide order dated 20.9.2006, granted two weeks time to the learned Standing Counsel for filing counter affidavit and also to produce the answer copy of Sanskrit papers of the High School Examination, 2006 of the petitioner fixing 5.10.2006 as the next date. No counter affidavit has been filed and when the case was taken up on 2.11.2006, the learned Standing Counsel, appearing for the respondent no.1, informed the Court that an enquiry in the matter was going on, the report of which was likely to be submitted. Accordingly, this Court fixed 20.11.2006. On the said date the Court directed the learned Standing Counsel to produce the result of the enquiry report and case was directed to be listed today.

4. Today the learned Standing Counsel has produced the enquiry report and has made a statement that in the enquiry it was found that the answer copy of Sanskrit Paper of the petitioner was changed and that suitable action against the center in-charge and two Invigilators, who were found responsible for the same, has been taken. It has further been submitted that as provided under the Rules, average marks as obtained by the petitioner in other papers, have been awarded to her in Sanskrit paper and on 25.11.2006, the corrected mark-sheet of the petitioner has already been sent to the institution, from where the petitioner had appeared in the High School Examination.

5. In such view of the matter, the respondent-Board is directed to declare the petitioner as having passed the High School Examination, 2006 with first division marks and with 63% in Sanskrit Paper and also provide the High School Certificate to the petitioner forthwith.

6. Keeping in view the fact that the petitioner has suffered mental agony and shock on account of being declared fail, whereas she has actually passed the High School Examination with first division marks, and also considering the fact that the petitioner has not been able to seek admission in Class 11, this Court has no option but to award compensation to her, which is assessed at Rs.20,000/-. The Madhyamik Shiksha Parishad, U.P.

Allahabad is directed to pay the same to the petitioner by a bank draft payable in favour of the petitioner. Such bank draft shall be sent to the petitioner through the College from where she appeared in the High School Examination, 2006 within three weeks from today. It is further directed that the petitioner shall be permitted to appear in the Intermediate Examination 2007-2008 and her form be accepted even if the last date has expired.

7. Accordingly, this writ petition stands allowed with costs. It is, however, provided that the respondent-Board shall be at liberty to recover the costs/compensation amount of Rs.20,000/- from erring officers.

8. A certified copy of this order may be given to the learned counsel for the parties within three days on payment of usual charges. Petition allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2007

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

Civil Misc. Review Application No.247459 of 2006
IN
Second Appeal No. 1540 of 1982

Ram Manorath and others ...Appellants
Versus
Surya Pal and others ...Respondents

Counsel for the Appellants:
Sri Satish Chandra Srivastava
Sri Radhey Shyam
Sri K.S. Misra
Sri Rajesh Dwivedi

Counsel for the Respondents:
Sri K.G. Srivastava
Sri Sankatha Rai
Sri Vinod Kumar Rai
Sri Vijay Kumar Rai
Sri Sumiti Sachan
Sri Ashok Pandey
Sri L.K. Tripathi

Order 47 Rule I-Review Application-Secope thereof-explained-second Appeal decided on consideration the sale deed executed in violation of provisions section 5 C(11_ of Consolidation of Holdings Act-Review on the ground the land in question being abadi land-excluded from consideration operation burning example of apparent error on the fact of record-held-good ground for Review.

Held: Para 15

In view of above, in the present case, it is an error apparent on the face of the record which could not be noticed at the time of hearing which also goes to the root of the matter and this important question of law in the undisputed fact was not brought to the notice of the Court at the time when hearing of the Second Appeal took place, this Court considers it a sufficient reason to entertain Review Application.

Case law discussed:
AIR 1971 Alld-87

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

1. This Review Application has been filed to review my judgment dated 8.12.2004 on the ground that no permission of Settlement Officer, Consolidation was necessary to execute sale deed in respect of a land which was already excluded from the consolidation scheme at the initial sage of consolidation as is clear from Exhibit 27-C and further that the execution of a sale deed of entire

share of a co-tenure holder in a land not in the consolidation scheme did not hit by Section 5(c)(ii) of the U.P. Consolidation of Holdings Act on the date of execution of sale deed and could not be declared invalid under Section 45(2) of the U.P. Consolidation of Holdings Act.

2. Opposite Parties were directed to file counter affidavit. After exchange of Pleadings between the parties, parties were also heard on the Review Application.

3. The dispute in the present case relates to Plot no.386 (re-numbered as Plot no.348 in the consolidation proceedings). The land was used as Abadi and was declared Chakout (out of consolidation scheme) after the preliminary survey at the initial stage of consolidation proceeding as mentioned in C.H. Form-18, that is, out of consolidation scheme. Out of four brothers, who were cotenureholders of the land in dispute, one brother, Indrapal, executed a sale deed of entire 1/4th share in favour of Defendant-appellants. Remaining brothers instituted suit for permanent injunction against Defendant-appellants on the pleading, interalia, that they are in possession of the land in dispute and Defendants are going to make constructions on land in suit and illegally constructed one Kothari. Defendants filed their written statement denying the allegation of making any construction and pleaded that Defendant no.2 Indrapal was co-tenure holders to the extent of 1/4th share, who executed a sale deed of his entire 1/4th share in favour of Defendants and Defendants are in possession of the land in suit accordingly, Consolidation Officer in Case No. 1171/699, mutated Defendants' names and they are also in possession of a constructed house, Defendant no.2, Indrapal, also filed a written statement supporting Defendants and admitting execution of a sale deed of his entire 1/4th share in favour of Defendants-appellants whose names were recorded as co-tenure holder alongwith plaintiffs, land in dispute was Chakout and execution of sale deed did not require any permission from the Settlement Officer Consolidation.

4. The Trial court decreed the suit on the ground that no permission from Settlement Officer, Consolidation was required for execution of sale deed of the land in suit for entire 1/4th share of Indrapal through the sale deed and the same is not affected by consequences of Section 5(c)(ii) of the U.P. Consolidation of Holdings Act wit a further finding that Defendants have constructed their houses and are in actual possession on the entire land transferred through the sale deed dated 29th January, 1972.

5. In Appeal preferred against the judgment and decree of the Trial court decreeing the Suit, the Appellate Court held that sale deed in question as a consequence of violation of Section 5(c)(ii) of the U.P. Consolidation of Holdings Act and is inoperative, ineffective and thereby does not confer any title to Defendants.

6. The Second Appeal preferred by Defendants-appellants was admitted on two questions, the same are being reproduced below:-

"(1) Whether, on the facts proved in the case, permission contemplated by Sec.5(c) of the U.P. Consolidation of Holdings Act was necessary for Indrapal

before selling the disputed Chaks in favour of the appellants.

(2) Whether the provisions of the Consolidation of Holdings Act do not apply in this case for reasons mentioned in para 12 at page 6 of the Memo of Appeal."

7. The Second Appeal was dismissed by my judgment dated 8.12.2004. That judgment is sought to be reviewed by the present Review Application on the ground that the sale deed executed by Indrapal was not hit by Section 5(c)(ii) read with Section 45-A(2) of the U.P. Consolidation of Holdings Act.

8. On bringing the fact through this Review Application to the notice of the Court that the land in dispute was out of consolidation scheme right from very beginning and was recorded in C.H. Form-18 and does not form part of the consolidation scheme, parties had already made construction of their residential houses on the land in dispute which was not in cultivatory possession of parties, they were directed to file their respective replies to the Review Application. Pleadings are complete.

Heard learned counsel for the parties.

9. Learned counsel for the Appellant urged that Section 5(c)(ii) of the U.P. Consolidation of Holdings Act will not apply in the facts of the suit as intention of Legislature while introducing Section 5(c)(ii) of the U.P. Consolidation of Holdings Act by way of U.P. Consolidation of Holding (Amendment) Act, 1958 was to protect all the land which are included in the consolidation scheme. He further urged that in the present case as the admitted position at the time of verification of the spot and revenue records it was found that the land in dispute was not connected with agriculture, horticulture, and animal husbandry and did not form part of the land affecting consolidation scheme and, therefore, Section 5(c)(ii) of the U.P. Consolidation of Holdings Act would not affect the impugned sale deed. Thus, the sale deed executed by Indrapal may not be declared void which was also not under challenge in the Civil Court by way of Suit for cancellation on any ground and the suit for permanent injunction was not maintainable against a co-tenureholder/co-sharer. Suit was wrongly decreed. It was prayed that Second Appeal deserves to be allowed.

10. In reply to the same, learned counsel for Respondents urged that the word "holding' has been defined under Section 3(4-C) of the U.P. Consolidation of Holdings Act according to which "Holding' means a parcel or parcels of land held under one tenure by a tenure-holder singly or jointly with other tenure-holders. He further urged that that the "Land' has also been defined under Section 3(5) of the U.P. Consolidation of Holdings Act according to which "Land' means land held or occupied for purposes connected with agriculture, horticulture and animal husbandry. He further urged that it includes all land including the land which is not part of the consolidation scheme. He further urged that the judgment and decree passed by this Court while affirming the judgment of the Trial Court was rightly passed in accordance with law. He further urged that the questions again raised through the Review

Application cannot be gone into in review.

11. Considered the arguments of learned counsel for the parties and the relevant provisions of law on the point as well as relevant materials on record.

12. The first question requires to be considered is whether Review Application is maintainable on the grounds mentioned therein in the present case.

13. For deciding this question, Order 47 Rule 1 (1) of the Code of Civil Procedure is relevant, the same is being quoted below for ready reference:-

"1. Application for review of judgment-(1) Any person considering himself aggrieved.-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

14. Order 47, Rule 1(1) of the Code of Civil Procedure provides grounds for review from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. There is no dispute of fact and admitted facts which were not brought to the notice of the Court at the time of hearing of the Second Appeal that the land in dispute was not included in consolidation scheme for allotment of Chak proceeding and was out of consolidation scheme recorded in U.P. C.H. Form-18. The Court could not consider the effect of non-inclusion of the land in suit in consolidation scheme, though it was part of consolidation proceeding on notification under Section 4 of the U.P. Consolidation of Holdings Act. My view of supported by the judgment of Apex Court reported in (1997) 8 SCC 715, Parsion Devi and others v. Sumitri Devi and others, as this error is self-evident and does not require a process of reasoning, but an interpretation of law.

15. In view of above, in the present case, it is an error apparent on the face of the record which could not be noticed at the time of hearing which also goes to the root of the matter and this important question of law in the undisputed fact was not brought to the notice of the Court at the time when hearing of the Second Appeal took place, this Court considers it a sufficient reason to entertain Review Application.

16. The facts that the land in dispute was not being used for the purposes connected with agriculture, horticulture and animal husbandry and was excluded

from the consolidation scheme at the time of spot verification for proposed inclusion of the land in scheme for consolidation and was recorded in C.H. Form-18 and the construction also existed on a part of the land in suit shown in the consolidation records published in Village under Section 9 of the U.P. Consolidation of Holdings Act are not disputed. It was not brought to the notice of the Court by Sri Radhey Shyam, learned Counsel appearing for Defendant-appellants at the time of hearing of Second Appeal. It was brought to the notice of this Court by the Review Application. In such a situation, the important question of law arises to be considered in undisputed fact is whether Section 5(c)(ii) of the U.P. Consolidation of Holdings Act while enacting U.P. Consolidation of Holdings (Amendment) Act, 1958 (U.P. Act No. XXXVIII of 1958) is applicable in the facts like in the present case. For ready reference Section 5(c) of the U.P. Consolidation of Holdings Act introduced by U.P. Act No. XXXVIII of 1968 is being reproduced below:-

"5(c) notwithstanding anything contained in the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act of 1951), no tenure-holder, except with the permission in writing of the Settlement Officer, Consolidation, previously obtained shall-

(i) use his holding or any part thereof for purposes not connected with agriculture, horticulture or animal husbandry including, pisciculture and poultry farming; or
(ii) transfer by way of sale, gift or exchange any part of his holding in the consolidation area

provided that a tenure-holder may continue to use his holding, or any part thereof, for any purpose for which it was in use prior to the date specified in the notification issued under Section 4."

17. This very amendment also defines consolidation under Section 3(2) of the U.P. Consolidation of Holdings Act which means rearrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holdings more compact. In explanation there are seven exception by which it has been provided that the land falling in these exception will not be included in the consolidation scheme. It is borne out from the record that the land in dispute was not used for the purposes connected with agriculture, horticulture and animal husbandry on the date on which the notification under Section 4 of the U.P. Consolidation of Holdings Act was issued and was not included in the consolidation scheme as it was exclusively used as Abadi land consisting old constructions.

18. The purpose for which U.P. Consolidation of Holding Act was enacted as mentioned in the Preamble is to provide consolidation of agricultural holdings in Uttar Pradesh for the development of agriculture. The purpose of consolidation as defined under Section 3(2) of the U.P. Consolidation of Holdings Act is rearrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holdings more compact. Section 3(4-C) of the U.P. Consolidation of Holdings Act defines holding according to which "Holding' means a parcel or parcels of land held under one tenure by a tenure-holder singly or jointly with other tenure-holder.

19. In this regard a Full Bench decision of Lucknow Bench of this Court reported in AIR 1971 Allahabad 87 (V 58 C18), Smt. Asharfunisa Begum v. Dy. Director of Consolidation, Camp at Hardoi and others is very relevant, Paragraphs 18, 19 and 21 of the judgment are being reproduced below:-

"18. The Statement of Objects and Reasons of the Act reads thus:-

"After the enforcement of the U.P. Zamindari Abolition and Land Reforms Act, 1950, there was naturally a pressing demand for the consolidation of holdings in the State. Since the complicated and numerous types of tenures, both proprietary and cultivatory, the greatest stumbling block in the way of successful consolidation of holdings, have been abolished it is an opportune time to start this work. The advantages of having in compact blocks all the land farmed by one family need only be briefly mentioned. Boundary lines should be reduced in "number and extent, saving land and diminishing boundary disputes, larger fields would be possible and time saved in making trips to the fields. Further, if land were all in one piece barriers, such as fences, hedges or ditches could be erected to obtain privacy and prevent trespassing, thieving and gleening. The control of irrigation and drainage water would be easier control of pests, insects and disease would also be difficult."

19. Referring to the object of the Act, in Attar Singh v. State of U.P., AIR 1959 SC 564, the Supreme Court made the following observations:-

"The object of the Act is to allot a compact area in lieu of scattered plots to tenure-holders so that large scale cultivation may be possible with all its attendant advantages. Thus by the reduction of boundary-lines saving of land takes place and the number of boundary disputes is reduced. There is saving of time in the management of fields inasmuch as the farmer is saved from traveling from field to field, which may be at considerable distance from each other. Proper barriers such as fences, hedges and ditches can be erected around a compact area to prevent trespassing and thieving. It would further be easier to control irrigation and drainage and disputes over water would be reduced considerably where compact area are allotted to tenure-holders. Lastly, the control of pests, insects and plant-disease is made easier where farmers have compact areas under cultivation. There advantages resulting from consolidation of holdings are intended to encourage the development of agriculture and larger production of food grains, which is the necessity of the day."

The preamble of the Act reads:-

"An Act to provide for the consolidation of agricultural holdings in Uttar Pradesh for the development of agriculture.

Whereas it is expedient to provide for the consolidation of agricultural holding in Uttar Pradesh for the development of agriculture."

21. The preamble of a Statute is a key to the understanding of it. Jagdish Sahai, J. observed in Sobha v. State, AIR 1963, All 29, that a preamble is a key to the interpretation of an Act and can be used to know the aims and objects of the legislation. The Statement of Objects and Reasons can be referred to for the limited purpose of ascertaining the conditions prevailing at the time which actuated an Act to be passed and the extent and urgency of the evil which it sought to

remedy. A perusal of the Statement of Objects and Reasons and the preamble will clearly establish that the intention of the Legislature was to provide for consolidation of agricultural holdings for the development of agriculture. If an agricultural holding is used for purposes not connected with agriculture, development will be retarded and similarly is a farmer is to travel from place to place to look to his scattered fields, again development will be retarded. The prohibition under sub-cl.(ii) is to avoid fragmentation by sale, gift or exchange. It appears to me that it is because of this that while under sub-clause(i), the prohibition applies to the entire as well as to the part of a holding; under sub-clause (ii) it extends to a party only, because if the whole holding is transferred, there can be no fragmentation and the only effect will be the substitution of the transferee in place of the transferor. Sub-clause (i) and (ii) of the Clause (c), therefore, were purposely enacted to subserve the purposes of the legislation and to avoid the existing evil.

20. Considering the Preamble, Object of the Act and other relevant provisions of U.P. Consolidation of Holdings Act, this Court is of the view that intention of introducing Section 5(c)(ii) of the U.P. Consolidation of Holdings Act was that if the land included in consolidation proceeding does not affect allotment of Chak proceeding under U.P. Consolidation of Holdings Act by transfer by way of sale, gift or exchange, no prior written permission of Settlement Officer, Consolidation as required under Section 5(c)(ii) of the U.P. Consolidation of Holdings Act was required. Intention of Legislature is clear that if any land is not used for the purposes connected with agriculture, horticulture and animal husbandry and not part of the consolidation scheme for allotment of Chak, any transfer could not be declared void as it does not affect consolidation scheme in any way. This Court is of the firm view that restriction by way of introducing Section 5(c)(ii) of U.P. Consolidation of Holdings (Amendment) Act, 1958 was to affect transfer of the land included in the consolidation scheme and not the land which does not affect the consolidation scheme for allotment of Chak and excluded from the consolidation scheme, though it may be in village on notification under Section 4 of the U.P. Consolidation of Holdings Act. Therefore, this Court fully agreeing with the arguments of learned counsel for the Defendant-appellants (Opp. Parties herein) is satisfied that the provisions of Section 5(c) (ii) of U.P. Consolidation of Holdings Act and its consequences thereof as contained under Section 45-A(2) of the U.P. Consolidation of Holdings Act shall not affect the impugned sale deed by which a valid title passed to the Defendant-Appellants.

21. In view of the discussions made above, my order dated 8.12.2004 requires to be reviewed.

22. There is another aspect of the matter. Admittedly the land in dispute was out of consolidation scheme in which Indrapal had 1/4th share who executed a sale deed in favour of Defendant-Appellants after taking full consideration by transferring his entire 1/4th share and Defendant-transferee would also be co-tenureholder for entire 1/4th share of Indrapal by way of sale.

23. In view of the above, Substantial question of law no.1 is decided in negative as it was held that no prior permission of Settlement Officer, Consolidation was necessary as required under Section 5(c)(ii) of the U.P. Consolidation of Holdings Act and the impugned sale deed could not be declared void. The judgment of the lower Appellate Court is vitiated in law and is liable to be set aside and the suit is liable to be decreed. The Substantial question of law no.2 is answered in affirmative.

24. With the result, Review Application is allowed. The judgment-dated 8.12.2004 passed in Second Appeal stands reviewed and the Second Appeal is allowed. Judgment of Lower Appellate Court is set aside and the Suit is dismissed, but no order as to cost.

Review allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 23289 of 1998

Smt. Risalo ...Petitioner
Versus
IInd A.D.J. and others ...Opposite Parties

Counsel for the Petitioner:
Sri B.D. Mandyan
Sri M.D. Singh
Sri P.R. Ganguly
Sri Ramanuj Pandey
Sri S.D. Kautilya
Sri Anil Kumar
Sri S.C. Mandhyan
Sri Satish Mandhyan

Counsel for the Opposite Parties:
Sri Suneel Rai
S.C.

Limitation Act-Section 5-Application for condonation of delay-in filling application under order 9 rule 13 of C.P.C.-Rejection on the ground of want of proper explaination-held-view taken by Trail Court contrary to law.

Held: Para 7

Learned counsel for the petitioner submitted that in view of the decision of the Apex Court, referred to above, is abundant the view taken by the Courts below in refusing to condone the delay in filing the application under Order IX, Rule 13 is contrary to law. Learned counsel further submitted that in the facts and circumstances the Courts below ought to have condone the delay in filing the application for setting aside ex-parte decree.

Case law discussed:
AIR 1987 SC-1353
J.T. 2000 (2) SC-569
AIR 1978 486

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

1. By means of present writ petition under Article 226 of the Constitution of India, petitioner Smt. Risalo challenges the order passed by II nd Additional District Judge, Ghaziabad dated 13th April, 1998, whereby the appeal filed by the petitioner against the order dated 24th January, 1998 has been dismissed. The order dated 24th January, 1998 was passed by the trial Court on the application moved by the petitioner in original suit no. 181 of 1989. It so happen that the suit no. 181 of 1989 is decreed ex-parte on 30th May, 1989. The petitioner filed application for recall of the order decreeing the suit no. 181 of 1989 by way of an application under

Order IX Rule 13, read with Section 151 of the Code of Civil Procedure. On the pleadings of the parties, it appears that the petitioner filed a suit before Munsif concerned being suit no. 743 of 1992. In the aforesaid suit no. 743 of 1992, the defendant-contesting respondent in this petition filed written statement on 8th September, 1992 and it is only after filing of the written statement, the petitioner came to know on 8th September, 1992 that suit no. 181 of 1989 has been decreed ex-parte and the decree was also got executed ex-parte passed in suit no. 181 of 1989. The petitioner has explained that on coming to know of the ex-parte decree dated 30th May, 1989 on 8th September, 1992, the petitioner got the record inspected on 13th October, as 11th 12th and 13th September, 1992 were holidays and from 14th September, 1992 to 12th October, 1992, the Advocates of the judgeship were on strike and has filed the application on 5th November, 1992 wherein it has been explained that for th first time, as stated above, the petitioner came to know of the ex-parte decree, it was therefore prayed that the ex-parte decree may be set aside and the delay, if any, in filing the aforesaid application may be condoned.

2. The defendant-contesting respondent in this petition contested the statement made by petitioner and submitted that even on her own saying the petitioner has acquired knowledge of the ex-parte decree on 8th September, 1992 but she has not given any satisfactory explanation of not filing the application for setting aside the ex-parte decree up to 9th October, 1992 and even assuming that 12th October, 1992 was a holiday for the Court, she should have filed the said application on 13th October, 1992, whereas the application has been filed beyond time and explanation filed for the condonation of delay should not be accepted. The petitioner stated that on 19th October, 1992 she obtained the copy of Intkhab from the concerned Lekhpal and on 30th October, 1992 after the Courts were re-opened, she filed the application on 5th November, 1992. The trial Court found that the explanation is not sufficient for condonation of delay in filing the aforesaid application under Order IX Rule 13, read with Section 151 of Code of Civil Procedure, thus rejected the same vide its order dated 24th January, 1998.

3. Aggrieved by the order passed by the trial Court dated 24th January, 1998, the petitioner filed appeal before the lower appellate authority, which vide judgment and order dated 13th April, 1998 dismissed the appeal and confirmed the order passed by the trial Court, thus this writ petition.

Heard learned counsel appearing on behalf of the parties.

4. Learned counsel appearing on behalf of the petitioner in support of his contention relied upon the law laid down by the Apex Court reported in **AIR 1987 S.C., 1353 - Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others**, wherein the Apex Court in paragraph 3 has held, which reads as under:-

"3. The legislature has conferred the power to condone delay by enacting S. 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression

"sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at th very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable or removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore have to informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is

therefore, set aside. Delay is condoned. And the matter is remitted t the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

5. In view of above law laid down by the Apex Court in the case of Collector, Land Acquisition (supra), which has been followed by the Apex Court in the subsequent decisions in the case of *G.P. Srivastava Vs. Shri R. K. Raizada & Ors. JT 2000 (2) SC, 569 and International Airports Authority of India Vs. M.L. Dalmia & Co. Ltd*., particularly in view of the law laid down in the case of Collector, Land Acquisition (supra), in clause 4, 5 and 6, which read thus, in my opinion the present writ petition deserves to be allowed.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable or removing injustice and is expected to do so.

6. Learned counsel for the petitioner has also relied upon the decision in the case of **Ramji Dass and others Vs. Mohan Singh reported in ARC 1978, 496**, wherein the Apex Court has held that "we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing".

7. Learned counsel for the petitioner submitted that in view of the decision of the Apex Court, referred to above, is abundant the view taken by the Courts below in refusing to condone the delay in filing the application under Order IX, Rule 13 is contrary to law. Learned counsel further submitted that in the facts and circumstances the Courts below ought to have condone the delay in filing the application for setting aside ex-parte decree.

8. On the other hand, learned counsel for contesting respondent has submitted that the Courts below have not committed any error which may warrant any interference by this Court.

9. In view of the above discussions, the writ petition succeeds and is therefore allowed. The order dated 13th April, 1998, passed by IInd Additional District Judge, Ghaziabad and the order dated 24th January, 1998, passed by the trial Court are hereby quashed. The ex-parte decree dated 30th May, 1989 is recalled and the suit is restored to its original number on the payment of cost of Rs.500/- to be paid by the petitioner to the defendant-contesting respondent in this petition. The matter will now go back to the trial court with the direction to decide the same after affording an opportunity of hearing to the petitioner within a period of six months' from the date of presentation of a certified copy of this order before it.

Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.11.2006

BEFORE
THE HON'BLE SHIV SHANKER, J.

Criminal Misc. Application No. 555 of 2006

Walliullah ...Appellant (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Vinay Saran

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section 407-Transfer of Session Trail-on grounds-taken senior Advocate in District Varanasi is not ready to appear on behalf of applicant-appointment of Amiecus Curiae-itself denotes this fact- held-apart from violation of section 302 of the Code, there shall be denied of fundamental Rights of applicant-conferred under Article 21 and 22 (1) of constitution-case transferred from Session Division Varanasi to session judge Ghaziabad.

Held: Para 7

The appointing of amicus curiae for defending the case of the applicant shows that he was unable to engage any Advocate in the district of Varanasi as well as out side of district Varanasi according to his choice. It appears that there is violation of provision of Section 302 of the Code-of Criminal Procedure, 1973 as well as the fundamental rights conferred by Articles 21 and 22(1) of the Constitution of India, as the applicant is ready to engage an Advocate of his choice for doing the Pairvi of his case. In such circumstances, it will be appropriate in the ends of justice that the above three connected sessions trials pending in the court of Special Judge (E.C.Act), Varanasi be transferred to any other district.

Case law discussed:
2006 (3) SCC(Crl.)-400
2005(8) SCC-771
2004 SCC(Crl.)-999
1974 SCC(Crl.)-59
1973 SCC(Crl.)-349

(Delivered by Hon'ble Shiv Shanker, J.)

1. This is a transfer application moved under Section 407 of the code of Criminal Procedure on behalf of accused-applicant Waliullah son of Habibullah praying to recall three connected Sessions Trial No. 368 of 2006, under Sections 3/4/5/ Explosive Substance Act; 15/16 Unlawful Activities Prevention Act and 302/307/324/326 IPC, Police station Lanka, district Varanasi, Sessions Trial No. 400 of 2006, under section 302/307/324/326/424/120-B IPC and 3/4/5/ Explosive Substance Act, Police station G.R.P. Cantt, district Varanasi and Sessions Trial No. 388 of 2006 under sections 3/4/5/ Explosive Substance Act. Police station Dashaswamedh, district Varanasi and transfer to some other court of sessions outside the court of Sessions, Varanasi.

2. Heard Sri Vinay Saran, learned counsel for the applicant and learned A.G.A. as well as perused the whole records, including the supplementary affidavit filed on 22.11. 2006 which was taken on record.

3. It is contended by the learned counsel for the applicant that no Advocate of district Varanasi is available to conduct the case of the applicant according to his choice. It was case where the public sentiment is involved. Therefore, he is

unable to get lawyer of his choice and most of the senior lawyers of the city have refused to appear on behalf of the applicant in the trial of the aforementioned three cases. It is further contended that the atmosphere at the Court of Sessions at Varanasi is very hostile towards the applicant so much so that on 21.4.2006, while the applicant \Vas produced before the court after his so called arrest, heavy stone pelting was done by the public and activists of various organization posing serious threats to the life of the applicant. Photocopy of news-paper cutting to the effect is available on record as Annexure-XI to the application. It is further contended that when the applicant was again produced in court on 23.4.2006, a mob of lawyers, numbering in hundreds, gathcrc9 and assaulted the applicant in court premises itself while, the administration and police party remain a silent spectator. Photocopy of news-paper cutting to this effect is available on record as Annexure-XII to the application. It is further contended that the atmosphere of Court of Sessions at Varanasi is so charged that on 3.10.2006, a resolution was brought to the Bar Association on a signature campaign by the local lawyers that no lawyer would appear on behalf of the applicant in the aforesaid connected sessions trials. The true copy of the said resolution is also available on record as Annexure-XIII to the application. It is further contended that the applicant and his father also brought these facts to the notice of the Sessions Judge, Varanasi and, thereafter, the dates in the trials arc being given inside jail in specially constituted court. It is also contended that till dates none of the family members were allowed to meet the applicant at Varanasi and it was only when the applicant was produced at Allahabad in a previous Sessions Trial No. 872 of 2001, the brothers met the applicant in Allahabad Court. Therefore, the applicant is being denied of his legal right of being defended by the pleader of his choice as contemplated under Section 303 of the Code of Criminal Procedure, which is against Articles 21 and 22(1) of the Constitution of India. Without his choice, an Amices Curiae has been appointed to defend the case of the applicant, which is also against the provision of Section 303 of the Code of Criminal Procedure. It is further contended that no lawyers from out side of Varanasi are ready to go and conduct the trials at Varanasi on behalf of the applicant. I t is further contended that the applicant is inside jail and he does not have any near relative or friend at Varanasi who may do Pairvi for him at Varanasi. The learned counsel for the applicant has attracted the attention of the Court on the following decisions of the Apex Court:-

(1) Ravir Godbole vs. State of M.P.
(2006) 3 Supreme Court Cases (Cri) 400.
(2) Sri Jayendra Saraswathy Swami gal (II) T.N Vs. State of T.N. and others;
(2005) 8 Supreme Court Cases 771
(3) Zalziura Habibulla H. Sheikh and another Vs.
State of Gujarat and others 2.004 Supreme Court Cases (Cri) 999
(4) Ranchod Mathur Wasawa vs. State of Gujarat, 1974 Supreme Court Cases (Cd) 59.
(5) Sesamma Phillip & ETe Vs. P. Phillip & Etc.
1973 Supreme Court Cases (Cd) 349.

4. On the other hand, it is submitted by the learned A.G.A. that there will be difficulty of the prosecution witnesses, who are fifty five in nwnber in each

sessions trial, to go in another district for giving their evidence. It is further contended that hearing of the above sessions trials is being made in Varanasi Jail as per the orders of the appropriate authority. In such circumstances, there will be no danger to the applicant in jail for doing the Pairvi of the ease. It', is 'further contended that the Advocates of outside district can also be engaged to do the Pairvi of his case. The names of the Advocates have not been disclosed in the transfer application to whom the Pairokar of the applicant had met to do the Pairvi of the above sessions trials. In these circumstances, the session's trials should not be transferred merely on the choice of the applicant and the transfer application is liable to be rejected.

5. The incident had alleged happened in the city of Varanasi at a very religious place i.e. premises of ***Sankat Mochan Mandir*** by making bomb blast at three places simultaneously on the same date and time. Photocopy of news-paper cutting (Annexure-XI) reveals that heavy stone pelting was done by the public upon-the applicant when he was produced firstly in the court of Varanasi. Similarly, second time, stone pelting was made as per Annexure-XII. Therefore, it appears that after considering the safety of the applicant, who is facing the above sessions trials, the trials are being conducted inside the District Jail, Varanasi as per the orders of the appropriate authority.

Section 303 of the Code of Criminal Procedure, 1973 is produced as under:-

"303. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice."

6. The resolutions of Bar, which are Annexures 12 and SA-1 available on record, to the application and supplementary affidavit, reveal that resolution was made in the Bar Association for not doing the Pairvi on behalf of the applicant but doing the Pairvi of the prosecution free of costs and fee will be paid from the funds of the Bar Association of Varanasi. Although such resolution was deferred in the absence of adequate quorum. However, no Advocate has been prepared for defending the case of the applicant in district Varanasi. Similarly, no Advocate of the outside of district is ready to go to Varanasi for doing the Pairvi of the case of the applicant. These facts have been mentioned in the affidavit and supplementary affidavit filed on behalf of the applicant. No counter affidavit or supplementary counter affidavit has been filed on behalf of the State controverting the facts. In such circumstances, Amicus Curiae have been appointed by the Court for doing the Pairvi of the case on behalf of the applicant. This shows that the applicant cannot engage an Advocate of his choice for doing the Pairvi of the case. It is also the fundamental right of the citizen as provided in Articles 21 and 22(1) of the Constitution of India which are quoted as below:-

"21. Protection of life and personal liberty: - No person shall be deprived of his life or personal liberty except according to procedure established by law.
22. Protection against arrest and detention in certain cases:-(1) No person who is arrested shall. be detained in

custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practioner of his choice."

7. It is important to note here that justice not only be done but appears to be done. The appointing of amicus curiae for defending the case of the applicant shows that he was unable to engage any Advocate in the district of Varanasi as well as out side of district Varanasi according to his choice. It appears that there is violation of provision of Section 302 of the Code-of Criminal Procedure, 1973 as well as the fundamental rights conferred by Articles 21 and 22(1) of the Constitution of India, as the applicant is ready to engage an Advocate of his choice for doing the Pairvi of his case. In such circumstances, it will be appropriate in the ends of justice that the above three connected sessions trials pending in the court of Special Judge (E.C.Act), Varanasi be transferred to any other district.

8. It is worthwhile to mention here that about fifty five prosecution witnesses in each sessions trial, aforementioned, are to be produced for their examinations. The applicant is resident of district Allahabad and it will not be appropriate to transfer the cases from Varanasi Sessions Division to nearby Sessions Division of districts. In the circumstances, in my view, it will be justified in the interest of justice that the aforementioned sessions trials be transferred to the Sessions Division, Ghaziabad as there will be no problem for engaging the counsel by the applicant of his choice of Ghaziabador nearby districts or New Delhi for conducting his trials fairly.

9. After considering the facts and circumstances of the case and submissions made on behalf of both the parties, this transfer application is liable to be allowed.

10. Consequently, the transfer application is hereby allowed and the L aforementioned three connected sessions trials, pending in the court of Special Judge (E.C. Act), Varanasi are hereby recalled and transferred to the court of Sessions Judge, Ghaziabad for trial. The Sessions Judge, Gbaziabad is specially directed to conduct the trial of the aforementioned sessions trials himself according to law.

Transfer application allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2007

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

Civil Misc. Review Application No. 63852 of 2006

Chandra Bhan and others ...Petitioners
Versus
Deputy Director, Consolidation and others ...Respondents

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

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

Constitution of India Article-226- Power to decide the revenue cases-by administrative officer-cannot be equipped with qualification of law-High Court following the decision of Apex Court-issued Mandamus to create a separate judicial cadre-cannot be

ignored by Government Order-State can create Revenue judicial Service -no ground to review direction -issued following the decision of Apex Court made out.

Held Para 7

Moreover, the question involved in the writ petition was not the question akin to one referred to the High Court on administrative side before the G.O. Dated 29.9. 1967 and the State rightly took decision permitting to constitute separate judicial cadre of judicial officers working in the revenue side under the supervision of the High Court. Further it is clear that by the aforesaid G.O the judicial officers who became member of a separate judicial service were permitted to decide revenue cases with the permission of the High Court on deputation. Since the government order dated 29.9.1967 issued by the State specifically mentions that revenue cases could-be-disposed of even after creation of separate judicial service of judicial offices on deputation with the permission of the High Court, it is clarified that the State can create revenue judicial service by direct recruitment or by way of getting members of the Civil Services (Judicial Branch) appointed on deputation till regular separate judicial revenue cadre is created as is clear from the Government order dated 29.9.1967. Such a deputation can be granted with the permission of the High Court to dispose of revenue cases as was done under the Government order dated 29th Sept 1967

Case Law discussed
AIR 1977 Alld 310
1995(I) J.T. SC-180

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

1. This review petition has been preferred on behalf of the State of U.P. seeking reconsideration of certain points considered and decided by this Court by means of judgment and order dated Dec 13,2005.

2. After the review petition had been filed by the State on 24.3.2006 alongwith an accompanying application to condone the delay, the same was presented before the Court on 18.5.2006 alongwith office report dated 17.5.2006 on which date learned Standing counsel prayed for adjournment on the ground that learned Advocate General would appear to argue the case. On the request aforesaid the case was adjourned to 22.5.2006 on which date on further. request made by learned Standing counsel, the case was adjourned to 25.5.2006. Learned Advocate General was heard on 25.5.2006 but on his request, the case was adjourned to 14th July 2006. On 14.7.2006, the case was directed to be put up on 17.7.2006 on the request made by learned Standing counsel. On 17.7.2006, Chairman Board of Revenue appeared in person and prayed for permission to seek clarification and also to discuss the nitty gritty of the consequences flowing from the main decision aforesaid. Thereafter, on 28.7.2006, judgment was reserved in the review petition. On 2.8.2006, learned Advocate General appeared and prayed for rehearing of the matter on certain points claiming the same to be of pivotal significance and in deference to the request, the matter was directed to be put up on 3.8.2006. On 3.8.2006, the learned Advocate General stated across the bar that the matter was under active consideration of the Government and on this ground sought adjournment and again in deference to the request, the case was directed to be put up on 18.8.2006. On 18.8.2006, again the case was adjourned to 11th Sept 2006 on the request of learned Advocate General. Thereafter, the matter

stood de-listed and has come up today for hearing.

3. It may be aptly mentioned here that learned Advocate General was heard at prolix length on earlier occasion who was then assisted by Sri Sanjai Goswami learned Standing counsel and the learned Advocate General assisted by Sri Sanjai Goswami had then pressed into service two arguments cloaking the same as the basis for review of the judgment of this Court but today Sri Sanjai Goswami learned Standing counsel appeared and argued only those two points. The first argument brought to bear was that this Court framed certain issues for determination including issue whether the qualification and training as conceived in the relevant service Rules of the consolidation authorities dealing with consolidation cases is sufficient training to meet the essentials required of a judicial officer performing judicial functions but no specific issue was formulated regarding creation of separate revenue judicial cadre for the purpose and by this reckoning, it is further argued, the Court was precluded from issuing writ of mandamus commanding the State to create separate judicial cadre for trial of consolidation cases as also the suit arising out of U.P.Z.A. & L.R. Act.

4. The specific argument advanced across the bar on behalf of the State was that order to create revenue cadre should not have been made and further that the power to be exercised by the Authorities dealing with consolidation cases as well as cases arising out of U.P.Z.A. & L.R. Act were strictly in accordance with law the same having been conferred by the provisions of the statute i.e. the U.P. Consolidation of Holdings Act and also of the U.P. Zamindari Abolition and Land Reforms Act and by this reckoning, were intra-vires the Constitution of India. It is significant to mention here that Sri Sudhir Agarwal, learned Addl. Advocate General (as he then was) was called upon to argue on the question of creation of separate judicial revenue cadre and consequently, he made elaborate submissions on this point and judgment was pronounced after hearing both the parties on this question. The case laws were profusely cited on behalf of the State, which were duly noticed and discussed in the judgment of the Court itself. No precise ground then was raised opposing creation of separate judicial cadre for revenue/consolidation cases. Come what may, one very Import aspect may be referred to here. At page 20 of the judgment of this Court, the objects embodied in Amending Act XXXVIII of 1958 were excerpted and cited from a perusal of which it would appear that while conferring power on consolidation authorities through U.P. Act No. XXXVIII of 1958, the State had enlisted the basis to the effect that "Since the jurisdiction for Bhumidhari suits is being transferred to revenue courts, it has become necessary to do away with the provisions for arbitration, which used to cause great delay." It is also worthy of mention herein this connection that after coming into force the Constitution of India, the power to deal with all revenue suit pertaining to title of Bhumidhari rights in agricultural land vested in the civil court and it was subsequently that the power to decide title was transferred to revenue courts. In proceeding for consolidation on notification under section 4 of the U.P. Consolidation of Holdings Act, the power to decide title in the land in consolidation area stands transferred to the Consolidation

authorities to decide title but after notification under section 52 i.e. after closure of the consolidation operation, the power stands revived for being exercised by the revenue authorities for deciding the title. The Court has already dilated upon the matter in detail in its judgment dated 13.12.2005 the quintessence of which is that consolidation as well as revenue authorities decide that right of a tenure holder i.e. Bhumidhar with transferable rights and Bhumidhar with non-transferable rights and other rights of the tenure holder relating to agricultural land conferred by the State under the U.P.Z.A. & L.R. Act and further that both the courts decide the title in the matter emanating from U.P.Z. A & L.R. Act only. In this perspective, considering that had there been no such direction for creating separate revenue judicial cadre for trying revenue suit or other title matters, relating to land by the revenue authorities and also by the consolidation authorities, it would have amounted to invidious discrimination and therefore regard being had to the intendment of the legislature while conferring powers on the consolidation authorities on the ground that jurisdiction has been conferred to decide the revenue suits to the revenue courts, direction was rightly given by this Court to create a separate judicial cadre for trial of revenue as well as consolidation cases. The direction to create separate revenue judicial cadre was given for determination of the title in the agricultural land in the light of the fact that prior to it the power had vested in civil courts under section 9 of the C.P.C. and that power was taken away from the civil court and it was conferred by various amendments to revenue authorities under the U.P.Z.A. & L.R. Act and subsequently to Consolidation authorities presided over by such authorities wholly incompetent to decide the issues on law. The Court has elaborately discussed all these issues in the judgment in all its ramifications and by this reckoning, the first ground of review as urged on behalf of the State is devoid of force and falls to the ground.

5. The second ground urged on behalf of the State is that State of U.P. by a Government order dated 29th Sept 1967 has already taken a decision for separation of judiciary from executive and further urged that by this Govt. order, judicial officer who were then had the appellation "Add. District Magistrate (Judicial)" and were earlier members of judicial officers Services were included in a separate judicial cadre under the policy of separation of judiciary from executive but all the suits and proceedings under the U.P.Z.A. & L.R. Act were transferred to S.D.Os. The learned counsel further urged that the G.O. aforesaid was issued after eliciting the concurrence of the High Court in its administrative side vide reference at page 75 of the judgment of this Court. From a perusal of the aforesaid Government order particularly para 3 of the said G.O. it would crystallize that the High Court had merely concurred to create a separate judicial services comprising officers who were empowered to deal exclusively with the criminal works under the control of the High Court the necessary consequence of which was that revenue works pending before these judicial officers were transferred to S.D.Os or Judicial officers who were posted for revenue cases. It is significant to mention here that under this Government order, all the members belonging to earlier judicial officers services were included in a separate judicial service hedged with certain

condition. It would further appear that this Government order was considered by a Division Bench of this Court in Dinesh Chand Srivastava v. State of U.P. AIR 1977 Alld 310 which matter journeyed upto the Apex Court and the decision of the Apex Court is reported in 1995 (1) JT SC 180. The ratio flowing from the decision rendered by the Apex Court was that a separate judicial cadre could be created other than U.P. Civil Services (Judicial) and in view of the above, this Court following the ratio of the Apex Court-issued mandamus to create a separate revenue judicial cadre. This Government Order issued. by the State Govt does not confer any power on the State to act against the mandate of Article 50 of the Constitution. In my considered view, after coming into force the Constitution, that power cannot be taken away and conferred on such Administrative authorities who are neither equipped with qualification of law or have training for judicial work to deal with important issue like adjudication of title in land which is the very backbone of India economy. There is yet another aspect to be reckoned with and it is that all the land has already vested in the State by virtue of Section 4 of the U.P.Z.A. & L.R. Act and the State in turn has conferred different kind of rights on various tenure holders namely, Bhumidhari, Sirdari, Asami rights or other rights. It appears that the State has not carefully gone through its own Government order dated 29th Sept 1967 quoted in the main judgment of this Court dated 13.12.2005 by which accepting policy of separation of judiciary from executive, the State placed all judicial officers under the control of the High Court. The State has further mentioned in the G.O. that revenue matters may be decided by the Sub Divisional Officer, Deputy Collectors or such judicial officers obtained on deputation from the High Court from time to time for the purpose and the High Court agreed to lend service of judicial officers for revenue work vide D.O. letter dated 7th Sept 1967. It was further mentioned in paragraph 4 that those judicial officers who will work and dispose of revenue cases on deputation from High Court will not be assigned any duties relating to maintenance of law and order.

6. There is nothing in the Government relied upon by the standing counsel to show that members of earlier judicial officer cadre transferred to the High Court will not try and dispose of revenue cases. The effect of the Government order was that all judicial officers may work thereafter on deputation and may also try and dispose of revenue cases with the permission of the High Court on deputation only.

7. In view of the above, the argument of learned Standing counsel that this Government order supports the case of the State that the revenue cases may be decided by the Deputy Collector/Sub Divisional officer only and direction to create separate judicial cadre for revenue cases is against policy decision taken by the Government in the G.O. mentioned above, is not loaded with any substances. Rather, it would appear that the Government order aforesaid lends affirmance to the view taken by this Court that there should be separation of judiciary from executive. Moreover, the question involved in the writ petition was not the question akin to one referred to the High Court on administrative side before the G.O. Dated 29.9. 1967 and the State

rightly took decision permitting to constitute separate judicial cadre of judicial officers working in the revenue side under the supervision of the High Court. Further it is clear that by the aforesaid G.O the judicial officers who became member of a separate judicial service were permitted to decide revenue cases with the permission of the High Court on deputation. Since the government order dated 29.9.1967 issued by the State specifically mentions that revenue cases could-be-disposed of even after creation of separate judicial service of judicial offices on deputation with the permission of the High Court, it is clarified that the State can create revenue judicial service by direct recruitment or by way of getting members of the Civil Services (Judicial Branch) appointed on deputation till regular separate judicial revenue cadre is created as is clear from the Government order dated 29.9.1967. Such a deputation can be granted with the permission of the High Court to dispose of revenue cases as was done under the Government order dated 29th Sept 1967.

8. In view of the above discussion, the second ground too has no force and falls to the ground.

9. No other point of any consequence was raised capable of interference with the main judgment of the Court.

10. In the result, the review application is rejected being bereft of any merit.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 1893 of 2007

Vishwanath Ram ...Petitioner
Versus
General Manager Obra Thermal Station, U.P. Rajya Vidyut Utapadan Nigam Ltd., District Sonbhadra & others ...Respondents

Counsel for the Petitioner:
Sri K.S. Ojha

Counsel for the Respondents:
Sri A.K. Mehrotra

Constitution of India, Art. 226-Reduction of Salary-petitioner was getting salary of Rs.9700 at time of retirement-monthly pension fixed Rs.4679/- deduction of Rs.1871/- per month-held-illegal-petitioner not found instrumental in wrong fixation-Govt. may take action against the erring officer but after retirement petitioner can not be penalized.

Held: Para 10

There was nothing to show that he was instrumental in grant of such benefits. If any state officials have wrongly fixed the salary it is upon the State to fix responsibility upon such erring person but petitioner cannot be penalized for wrong act of others.

Case law discussed:
2004 (1) UPLBEC-127 relied on.

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

1. List has been revised. None has appeared for the respondents. Heard Sri K.S. Ojha, counsel for the petitioner.

2. This writ petition has been filed for issuance of a writ, order or direction in the nature of certiorari for quashing the impugned order dated 7.3.2006 in pursuance of the order dated 12.10.2004 passed by respondent no.4. It has further been prayed that a writ of mandamus be issued commanding the respondents to act in accordance with law and reaffirm prior pay scale of Rs.9700/- per month and pay the entire post retiral benefits in pursuance of the order dated 19.11.1997 with 15% interest to the petitioner.

3. Brief facts of the case are that the petitioner was appointed on the post of Operator II in the year 1968 e in Obra Thermal Power Plant Obra, District Sonbhadra and was regularized as permanent employee in fuel Handling Division 1 Obra Thermal "A' Power Station Obra, Sonbhadra on 15.5.1971. Thereafter he was promoted on the post of Operator I grade in the year 1981. His pay scale was reduced and refixed as Rs.2630/-. The petitioner retired from service on 29.2.2004 and at the time of retirement he was getting salary of Rs.9700/- per month.

4. It is alleged by the petitioner that the respondent-authorities have wrongly and illegally reduced and refixed the salary of the petitioner as Rs.9500/- in place of Rs.9700/- per month and accordingly computed all post retiral benefits on the basis of fixation of Rs.9500/-. The respondents have passed the pension order vide order dated 12.10.2004 by fixing pension as Rs.4679/- but they have started deducting Rs.1871/- from the monthly pension of the petitioner without paying the gratuity and Rashi Karan amount.

5. It is further alleged by the petitioner that he had made representation along with reminders on 11.3.2005, 20.5.2005 and 27.7.2005in this regard to the authorities concerned but to no avail. Then petitioner filed Civil Misc. Writ Petition No. 58881 of 2005.

6. It is stated that this Court vide order dated 23.1.2006 directed the respondents to decide the aforesaid representation within a time bound frame and further directed the respondents to pay the admitted post retiral dues of the petitioner.

7. It is further stated that in pursuance of the order of this Court dated 23.1.2006 respondent no.4 rejected the representation of the petitioner without paying the admitted gratuity and Rashi Karan amount, hence this writ petition.

8. The counsel for the petitioner submits that the respondents authorities had already fixed the pay of Rs.9700/- of the petitioner at the time of his retirement but subsequently they refixed and modified the pay scale of the petitioner as Rs.9500/- interalia that due to mistake of Accounts department increment was wrongly granted to the petitioner on 1.4.1984.

9. It is urged that the petitioner had been rightly granted increment by the Accounts department on 1.4.84 as such the impugned order dated 7.3.2006 is arbitrary and illegal and the same is liable to be quashed and the petitioner is entitled to get the prior pay scale of Rs.9700/-.

10. The petitioner is not at fault of alleged wrong fixation of his salary. In **State of U.P. and others Vs. State**

Public Services Tribunal, U.P. Luckow and another, (2004) 1 UPLBEC-127 it has been held that pensionary benefits of an employee can not be withheld after his retirement on the ground that promotional pay scale and selection grade was wrongly granted. There was nothing to show that he was instrumental in grant of such benefits. If any state officials have wrongly fixed the salary it is upon the State to fix responsibility upon such erring person but petitioner cannot be penalized for wrong act of others. In the aforesaid case of **State of U.P. and others (supra)** the High Court therefore, found that Tribunal was justified in directing payment of pensionary benefits. Refusing to interfere with Tribunal's direction, High Court held that it was not fit case for exercise of discretionary jurisdiction under Article 226 of the Constitution.

11. For the reason that neither the petitioner is at fault nor was instrumental in fixation of his alleged wrong salary and in view of the decision in the case of **State of U.P. and others Vs. State Public Services Tribunal, U.P. Luckow and another (2004) 1UPLBEC-127 (supra)** and for the reasons stated above, the writ petition is allowed. The impugned order is quashed. No order as to costs. Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.11.2006

BEFORE
THE HON'BLE BARKAT ALI ZAIDI, J.

Criminal Misc. Application No. 8955 of 2002

Ashok Kumar Buxi and another
...Applicants-Accused
Versus
State of U.P. and another
...Complainant-Opposite parties

Counsel for the Applicants:
Sri Rajesh Kumar Srivastava

Counsel for the Opposite Parties:
Sri Anil Srivastava
Sri Amit Srivastava
Sri Narendra Kumar Sharma
A.G.A.

Indian Penal Code-Section 406-Criminal breach of Trust-complaint by wife against her husband, family member of her in-laws including 11 members-particular of Stridhan not specified- only a general and vague statement that all the accused have usurped the property-held-continuation of proceeding-be an abuse of process of court-proceeding quashed.

Held: Para 9

The requirement of Section 406 Indian Penal Code being attracted as enumerated in the aforesaid case, cannot be said to be available in the present case, because, there is no clear mention of the entrustment of items to any particular accused and there is only a general and vague statement that all the accused have usurped the property. Even on merits, the case of the complainant- wife is unsuccessful.

Case law relied on:
1991 Cr.L.J.-2333

(Delivered by Hon'ble Barkat Ali Zaidi, J.)

1. Wife filed a complaint (No. 1088 of 1999) against the husband and ten other relatives for non-return of Stridhan property under Section 406 Indian Penal Code and the Magistrate (A.C.J.M.) Agra issued process. Two of the eleven accused, named above, being the brother and the wife of husband's brother have come under Section 482 Cr.P.C. to quash the proceedings.

2. The complainant-Opp. Party no.2 has mentioned the Stridhan given in para No. 6 of the complaint, and the list annexed which are as follows:-

(i) Cash amount of Rs. 35,000/-
(ii) One Bajaj Chetak Scooter.
(iii) One Big Almirah.
(iv) Polar Ceiling Fan.
(v) Two HARS of Gold and
(vi) One Ring of Gold
(vii) Etc.

3. It was mentioned in the complaint that she was turned out of the house by his Kinsmen while the husband had gone out of the country and they retained the Stridhan item for themselves. A notice was also given for return of Stridhan property by the wife (Opp.Party No.2) to the accused but the Stridhan property was not returned and thereafter, she filed this complaint.

4. The two petitioners, who have come to this Court, who are husband's brother and his wife, are residing at Bombay since 1980 i.e. since before the marriage of the complainant wife and the petitioner no.1 (Sri Ashok Baxi) is an employee in Taj Hotel, Bombay. A certificate of Taj Hotel, Bombay has been filed to this effect.

5. There is no allegation that the petitioners took any Stridhan to Bombay for their own use, and, there is no likelihood of their having appropriated any Stridhan property of the wife. This is an illustrative of the reckless and ruthless manner for which the accused have been arrayed in this complaint.

6. The other aspect is that the complaint seems to be barred, prima-facie by Limitation. Marriage of the complainant-Opp. Party took place at Udaipur. She alleges that she was turned out of the house by the accused on 13.4.1996. The Limitation for filing the complaint under Section 406 Indian Penal Code is 3 years from the date of entrustment as provided in Section 468 (2) (c) Cr.P.C. The complaint, therefore, be deemed to have been filed beyond Limitation and becomes un-maintainable on this ground.

7. There is another ground on which complaint seems to be un-maintainable in the court at Agra, and that is, that, the marriage of the complainant took place in Udaipur, and the Stridhan items are naturally delivered at the time of marriage and must have been so delivered at Udaipur. It is, therefore, the Udaipur Court, which will have the jurisdiction. It is for the first time, in this Court, in her counter affidavit that the wife-Opp.party has mentioned that the Stridhan property was given 3 days before marriage at Agra. At first, no such thing was mentioned either in the notice nor in the complaint. This has now been deliberately inserted in order to bring the matter within the jurisdiction of Court at Agra. The

contention that the Stridhan property was given even before the marriage is obviously a manipulated move to bring the matter within the jurisdiction of Agra Court. The Agra Court, therefore, seems to have no jurisdiction to entertain the complaint.

8. Besides limitation and jurisdiction, even on merits, the complaint's case against so many of her husband's relatives seems infirm and depreciated. The reason is that there is no clear mention of any entrustment of Stridhan property to any particular accused, which is necessary for constituting the offence under Section 406 Indian Penal Code. There is a general averment about so many accused about retaining the property. It would be appropriate to quote here the observations made in case of *Vinod Kumar Goyal Vs. Union Territory*, 1991 Cri. L.J.,2333(P & H), which is as follows:-

"As to criminal breach of trust by a spouse, it may, however, be opposite that mere allegations in the complaint either concerning entrustment of articles of dowry constituting stridhan to all the accused, or , their refusal to return such articles of dowry to the complainant wife at a later stage, would not per se be sufficient to make out a prima-facie case for commission of offences punishable under Section 405 or Section 406 I.P.C. against any particular accused. In the absence of clear, specific and unambiguous allegations concerning entrustment of specific articles of dowry to any particular accused and in the absence of further allegations against him that he had dishonestly or with malafide intention retained the same and had refused to return those articles to the wife for whose exclusive use such article were allegedly entrusted to him, no prima-facie case for commission of such offence would be made out against that particular accused. Normally, in the cases relating to commission of offence of criminal breach of trust punishable under Section 406 of the Indian Penal Code, a particular accused can prima-facie be said to be responsible only for his individual acts and cannot be fastened with joint or vicarious liability."

9. The requirement of Section 406 Indian Penal Code being attracted as enumerated in the aforesaid case, cannot be said to be available in the present case, because, there is no clear mention of the entrustment of items to any particular accused and there is only a general and vague statement that all the accused have usurped the property. Even on merits, the case of the complainant- wife is unsuccessful.

10. In view of the aforesaid circumstances, the continuation of the proceedings in the wife's complaint would obviously be an abuse of process of Court, and the proceedings, need to be brought to a close.

11. The relief need not, therefore, be conferred to petitioners and where this Court finds, as here, that that continuation of the proceedings is wholly unwarranted and unjust, the Court should terminate the same even in respect of other accused, who have not specifically approached this Court.

12. In the result, the proceedings initiated on the basis of complaint in question shall stand terminated.

13. A copy of this order be sent by the Registry forthwith to Addl. Chief Judicial Magistrate through District and Sessions Judge, Agra for information and compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.02.2007

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 9728 of 2006

Rahul ...Applicant
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicant:
Sri S.R. Verma

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

Code of Criminal Procedure-Section 437-readwith javenalie justice (care and protection of children) Act 2000-accused below 16 years of age-seeking direction -the Magistrate concerned to consider the bail application under Act of 2000-as one member of the Board resigned-held-such application can be considered even by one member-it does not make the Board non functional-requires no direction by High Court.

Held: Para 10

Coming to the facts of the present application it is to be noted that it has not been averred anywhere that there is no member of the Board. The only ground, which it taken in this application is that one of the member of the Board, has had resigned and therefore the Board is not functioning. To my mind resignation of one of the member of the Board does not make the Board non functional. As has been discussed above the bail prayer of the applicant can be considered even by one member. Thus the prayer of the applicant that CJM be directed to consider the bail of the applicant cannot be allowed against the provisions of the Act. If the applicant wants he can move his bail application before the Board who is under the legal duty to consider his prayer for bail.

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

1. The applicant has filed this application under section 482 Cr.P.C. with the prayer that his bail be directed to be considered by the CJM, Mathura as Juvenile Justice Board is not functioning in District Matura because one of it's member has resigned.

2. From the facts it seems that the applicant is an accused for offence under section 401 IPC which means that the allegations against him that he belongs to a gang of thieves. He is alleged to have been apprehended on the intervening night of 16/17-7-2006 at about 1.45 AM and FIR against him was lodged by R.S. Malik, Sub Inspector of police PS Kotwali District Mathura at 3.15 AM on 17.7.2006 as crime number 394 of 2006.

3. I have heard Sri S. R. Verma, learned counsel for the applicant and the learned AGA in support and opposition of this applicant.

4. Learned counsel for the applicant has mainly argued that there is no bar in Cr.P.C. under section 437 for considering the bail of a juvenile if the Juvenile Justice Board is not functioning. He further contended that under section 437 Cr.P.C. it is provided that if the accused is less than 16 years of age then he may be released on bail by the Magistrate.

5. Learned AGA contrarily submitted that the impugned order does not suffer from any illegality and this revision being meritless deserved to be dismissed.

6. For appreciating the submissions of the counsel for the revisionist a scrutiny of the relevant legal provisions in un eschewable. Section 437 Cr.P.C., which relates with grant of bail by Magistrate in non bailable offences indicates that the Magistrate can grant bail in non bailable offences with the rider that he shall not grant bail in respect of offences which are punishable with death or imprisonment for life vide section 437 (1) (i) Further rider is that he shall not grant bail if the accused has been previously sentenced for death, imprisonment for life, or imprisonment for seven years or more or he has been convicted on two or more occasions of cognizable offences which are punishable with three years or more but not less than seven years. These two riders under section 437 (I) (i) and (ii) is diluted in cases of accused below sixteen years of age or is a woman or sick or inform vide first proviso to section 437 (i) Cr.P.C. The second proviso provides that the Magistrate may direct the release of any person who falls within the purview of Section 437(i) (ii) if he is satisfied that it just and proper to do so for any special reasons. There are various other proviso and sub sections to section 437 Cr.P.C but I am omitting them as they are not very relevant for the controversy at present.

7. Under The Juvenile Justice (Care And Protection Of Children) Act 2000, herein after referred to as the Act (Act 56 of 2000), Section 4 deals with Constitution Of Juvenile Justice Board and eligibility of the persons to be it's members. Section 5, which of relevance in the present context is referred to below:-

"5. Procedure, etc. in relation to board (1) The Board shall meet at such times and shall observe such rules of procedure in regard to the transaction of business at its meetings, as may be prescribed.

(2) A child in conflict with law may be produced before an individual member of the Board, when the Board is not sitting:

(3) A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any stage of proceedings:

Provided that there shall be at least two members including the Principal Magistrate present at the time of final disposal of the case.

(4) In the event of any difference of opinion among the members of the Board in the interim or final disposition, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Principal Magistrate shall prevail."

8. A perusal of section 5 (3) indicates that unless all the members of the Board are absent the Board continues to be in existence and no order of the Board can be challenged only on the ground that Board did not constituted all it's members. However, for final disposal of a case the quorum of at least two of it's members is essential. This section 5 thus deals with the business of the Board and how it is to be transacted, Section 12 of

the Act deals with Board's power in matters of grant of bail. It provides thus:-

"Bail of Juvenile (1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the code of Criminal Procedure, 1973 (2 of 1974 or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub section (1) by the officer in charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can be brought before a Board.

(3) When such person is not released on bail under subsection (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

Section 7 of Act is also to be referred to here as that makes the exposition of law more clear. Section 7 provides thus:-

"(1) When any Magistrate not empowered to exercise the powers of a Board under this Act is of the opinion that a person brought before him under any of the provisions of this Act (other than for the purpose of giving evidence), is a juvenile of the child, he shall without any delay record such opinion and forwarded juvenile or the child and the record of the proceeding to the competent authority having jurisdiction over the proceeding

(2) The competent authority to which the proceeding is forwarded under sub section (1) shall hold the injury as if the juvenile or the child had originally been brought before it."

9. From a joint reading of all the above sections of the Act, in conjunction with each other, it is conspicuously clear that for passing of interim orders like bail, remand etc. full quorum of the Board under the Act is not required and the presence of one of it's member is sufficient. Sub section 5(3) provides for such an eventuality. Under that sub section, absence of any member can be because of any reason, which may include reason for resigning also. The said sub section also provides that no order of the Board shall be invalid only by the reason that any of it's member was absent during any proceeding. The requirement of Act is that for final disposal of a case the quorum should be or at least two members to be present.

, 10. Coming to the facts of the present application it is to be noted that it has not been averred anywhere that there is no member of the Board. The only ground, which it taken in this application is that one of the member of the Board, has had resigned and therefore the Board is not functioning. To my mind resignation of one of the member of the Board does not make the Board non functional. As has been discussed above

the bail prayer of the applicant can be considered even by one member. Thus the prayer of the applicant that CJM be directed to consider the bail of the applicant cannot be allowed against the provisions of the Act. If the applicant wants he can move his bail application before the Board who is under the legal duty to consider his prayer for bail.

11. In view of the proceeding analysis of law and of facts, this application lacks merit and deserves to be dismissed and is here by dismissed.

Application dismissed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2007

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE R.N. MISRA, J.

Criminal Misc. Writ Petition No. 15622 of 2006
with
Criminal Misc. Writ Petition No. 15687 of 2006, Criminal Misc. Writ Petition No. 1190 of 2007, Criminal Misc. Writ Petition No. 9510 of 2006, Criminal Misc. Writ Petition No. 1974 of 2007, Criminal Misc. Writ Petition No. 14711 of 2006, Criminal Misc. Writ Petition No. 15624 of 2006, Criminal Misc. Writ Petition No. 13109 of 2006, Criminal Misc. Writ Petition No. 15721 of 2006, Criminal Misc. Writ Petition No. 10358 of 2006, Criminal Misc. Writ Petition No. 14524 of 2006, Criminal Misc. Writ Petition No. 14974 of 2006, Criminal Misc. Writ Petition No. 9903 of 2006

Udaiveer ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rahul Chaturvedi

Counsel for the Respondents:
Sri W.H. Khan
Sri Rajendra Kumar Mishra
Sri V.S. Mishra
Sri A.K. Sand
Sri Ranjeet Saxena
A.G.A.

Constitution of India, Art. 226-Petition for Quashing F.I.R.-stay of arrest-offence under section 135 of Electricity Act, 2003-earliar High Court disposed of all petitions with direction to Police or other concerned officer to approach before Magistrate seeking direction for investigation and warrant of arrest-court expressed its great concern with shocking state of affairs that-no action taken in furtherance of direction of Court-electricity theft being non-cognizable offence-such negligence on the part of power corporation resulted irreparable loss of revenue and immense suffering to honest consumers direction issued to approach before the Magistrate under section 155 (2) of the Code-submit the progress report in the next date-the C.M.D. Power Corporation shall personally appear before the Court.

Held: Para 13

We, therefore think it imperative to now issue a mandamus directing that that immediate measures be taken in the present cases as well as in all other cases relating to Section 135 of the Electricity Act and other related provisions, in which arrest were earlier stayed or are sought to be stayed, to immediately file applications before the Court concerned for investigations and arrests of the accused under section 155(2) P.C within three weeks. The compliance report in all the cases mentioning details of all the cases relating to power thefts and the dates when the applications have been moved

before the Courts concerned, the progress of investigations including arrests shall be submitted to this Court on or before 19.3.2007. The Court will take an extremely serious view in case of any non-compliance with this order and may be constrained to summon the Managing Director, (U.P. Power Corporation Limited) Lucknow, or the DIG (Public Grievances), DGP Headquarters, Lucknow and hold them answerable if it finds any laxity in compliance with this order.

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

1. We have heard learned counsel for the petitioners, Shri W.H. Khan and Shri Rajendra Kumar Mishra, learned counsel appearing for U.P. Power Corporation Limited, Shri V.S. Mishra, learned Government Advocate assisted by Shri A.K. Sand, learned Additional Government Advocate.

2. Since all the above-mentioned writ petitions involve the same questions of fact and law, they have been heard together and are being disposed of by this common interim order. However, for convenience we are taking up writ petitions No. 15622 of 2006 (Udai Veer Vs. State of U.P. and others), 15687 of 2006 (Ram Chandra Mishra Vs. State of U.P. and others) and 1190 of 2007 (Parasu Ram Pandey Vs. State of U.P. and others) as leading cases in which counter affidavits have been filed by the U.P. Power Corporation Limited or the State.

3. All the above-mentioned writ petitions have been filed challenging the registration of criminal cases against the petitioners *inter alia* under Section 135 of the Electricity Act, 2003 on the basis of first information reports essentially relating to the theft of electricity. It may be mentioned that by means of an earlier leading writ petition No. 10090 of 2005, Mustaq Vs. State of U.P. and others (reported in 2006(6) ALJ 257 which was connected with a large number of writ petitions, orders were passed by a Division Bench of this Court comprising Hon'ble Amitava Lala and Hon'ble Shiv Shankar, JJ on 15.9.2006 disposing of the writ petitions with certain directions. It was held in the said decision that the offence of theft of electricity could not be made a cognizable offence with the aid of Rule 12 of the Electricity Rules, 2005 as the said offence was non-cognizable in view of Section 151 of the Electricity Act. However, as stealing of electricity was a social crime, which infringed the personal right of a citizen in all possible manner in respect of an essential service, causing suffering to honest consumers of electricity, hence till the Act was amended, the police officer or appropriate authority under the Electricity Act could make applications before the Magistrate under Section 155(2) of the Code of Criminal Procedure for investigating criminal cases against offenders. The Division Bench concluded its judgement with the following words:

"Necessary applications can be made by the appropriate authority and/or by the police to the Court of competent jurisdiction to obtain leave and/or permission for necessary investigation of the individual cases. After obtaining such leave/permission there will be no bar for them to investigate and/or arrest an offender or offenders. The arrest of the petitioners is stayed for a period of one month or till after order of the Court of competent jurisdiction to investigate the matter, whichever is earlier.

Thus, the writ petition stands disposed of."

4. To our dismay although the said judgement was delivered 5 months ago, we find that neither the police, nor the electricity department/ power corporation has taken any steps in furtherance of the said decision for obtaining permission from the competent Court for investigating cases against the accused, in blatant violation of the mandate of the earlier Division Bench to obtain the said permission within one month of the order.

5. This unpardonable laxity does lead this Court to wonder whether the department/ power corporation and the police are not hands in gloves or sympathetic to the thieves of electricity as they do not appear to be at all serious in bringing to book thousands of offenders involved in power thefts who have obtained stays of arrest on the technical plea that the offence is non-cognizable, when the answer to the problem was provided by the earlier division bench itself, viz. proceeding with the investigations and arrests after filing applications before the Court concerned under section 155(2) Cr.P.C within a fixed time frame. Such negligence and inaction on part of the power corporation and the police has resulted in irreparable loss of revenue to the electricity department/ power corporation and immense suffering to honest consumers, who regularly pay their electricity dues and yet are denied regular and continuous supply of power which is largely due to power thefts.

6. In writ petition No. 15622 of 2006 preferred by Udaiveer, we had passed an order on 4.1.2007 after hearing various parties, which included Sri Ashok Nigam, learned Additional Solicitor General for Union of India, the learned Government Advocate for the State and Shri W.H. Khan and Shri Ranjit Saxena for U.P. Power Corporation to inform this Court as to what follow up measure have been taken in pursuance of the earlier order of the Division Bench comprising Hon'ble Amitava Lala and Hon'ble Shiv Shanker,JJ dated 15.9.2006. We had directed that the Central Government, State Government and U.P. Power Corporation act in a coordinated manner to give effect to the directions of the aforesaid Division Bench in writ petition No. 10090 of 2005 and that in the meantime the order passed in the said writ petition was to apply *mutatis mutandi* to this petition as well.

7. In writ petition No. 1190 of 2007 preferred by Parasu Ram Pandey, a supplementary counter affidavit has been filed by the Chief Engineer (Distribution) U.P.P.C.L. on behalf of U.P. Electricity Power Corporation, which contains a letter dated 9.10.2006 written by the Superintending Engineer (Legal) Lucknow, addressed to the Managing Directors of various divisions of the U.P. Power Corporation asking them to comply with the order of the High Court.

8. Now it appears that in consequence of the correspondence of Shri W.H. Khan enquiring as to what steps have been taken by the Power Corporation in pursuance of the directions of the earlier Division Bench, another letter dated 17.2.2007 has been written by the Chief Engineer (Commercial) to the Managing Directors of all the divisions that the subordinate officers of their divisions have not given any compliance

report to the U.P. Power Corporation Limited and that effective measure be taken in pursuance of the order of Allahabad High Court dated 15.9.2006 for lodging FIRs, effecting arrests and taking up other criminal proceedings after taking permission from the Courts concerned. The said permission could be taken by the Executive Engineer concerned or the police in appropriate cases.

9. Contrary to this circular, another counter affidavit has been filed by Shri Rajendra Kumar Mishra dated 14.2.2007, which contains a circular letter dated 13.2.2007 of the Director, Ministry of Power, Government of India, New Delhi addressed to the Managing Director, UPPCL, copies of which were also sent to Dr. Ashok Nigam, learned Additional Solicitor General of India and Shri Rajendra Kumar Mishra, Advocate, that in consultation with the Department of Legal Affairs a decision has been taken to file an SLP against the decision of the Division Bench of Allahabad High Court in writ petition No. 10090 of 2005. Also that the Electricity (Amendment) Bill 2005 seeking amendments to a few sections of the Electricity Act, 2003 (including Section 151) is said to be ready after its consideration by a Parliamentary Standing committee of energy and is likely to be presented before the House in the forthcoming budget session. Clause 4 of the Statement of Object and Reasons prepared on 20.12.2005 insofar as it is applicable to this case reads as follows:

"4. As per the provisions contained in section 151 of the Act, the offence relating to theft of electricity, electric lines and interference with meters are cognizable offences. Concerns have been expressed that the present formulation of section 151 stands as a barrier to investigation of these cognizable offences by the police. It is proposed to amend section 151 so as to clarify the position that the police would be able to investigate the cognizable offences under the Act. To expedite the trial before the special courts, it is also proposed to provide that a special court shall be competent to take cognizance of an offence without the accused being committed to it for trial."

10. In writ petition No. 15687 of 2006 (Ram Chandra Mishra Vs. State of U.P and others) a counter affidavit of Additional Superintendent of Police (Crime) DGP Headquarters, U.P., Lucknow dated 14.2.2007 has been filed by Shri A.K. Sand, learned Additional Government Advocate, which contains a reference to the minutes of a meeting of the Power Corporation dated 3.1.07 for giving effect to the orders of this Court in writ petition No. 10090 of 2005 for investigating the matters after taking permission of the concerned courts.

11. There is another letter of the Additional Director General (Public Grievance) dated 8.2.2007 which also seeks compliance of the order passed in writ petition No. 10090 of 2005, and the illegality of the police straight away registering FIRs and investigating these cases as the said offences have been held to be non-cognizable.

12. It would be incumbent on this Court to point out that this Court is extremely disappointed with the desultory compliance in calling offenders to book, who are engaged in theft of electricity even though the judgement of the Division Bench was pronounced on

15.9.2006 and five months have elapsed and the Union of India is still only thinking of filing an SLP against the said judgement. One wonders whether the Power Corporation, the State and Central governments are at all serious in checking thefts of electricity and in increasing the revenue earning from electricity so that there could be smooth and continuous supply of electricity to honest consumers. Likewise, only a hope is expressed that in all likelihood the amendment bill seeking amendment of the Electricity Act (2003) and the Rules framed thereunder shall be passed in the forthcoming budget session and that offences of power theft shall be made cognizable offences. In the same vein we also notice that no clear directions have been issued by the U.P. Power Corporation or its legal cell directing the Executive Engineers or subordinate officers concerned or by the DIG (Public Grievances), DGP Headquarters, Lucknow to the subordinate police officers about the steps needed and the manner in which applications are to be moved before the Courts concerned under Section 155(2) of the Code of Criminal Procedure for commencing investigation and for arresting the accused for offences under the Electricity Act.

13. We, therefore think it imperative to now issue a mandamus directing that that immediate measures be taken in the present cases as well as in all other cases relating to Section 135 of the Electricity Act and other related provisions, in which arrest were earlier stayed or are sought to be stayed, to immediately file applications before the Court concerned for investigations and arrests of the accused under section 155(2) P.C within three weeks. The compliance report in all the cases mentioning details of all the cases relating to power thefts and the dates when the applications have been moved before the Courts concerned, the progress of investigations including arrests shall be submitted to this Court on or before 19.3.2007. The Court will take an extremely serious view in case of any non-compliance with this order and may be constrained to summon the Managing Director, (U.P. Power Corporation Limited) Lucknow, or the DIG (Public Grievances), DGP Headquarters, Lucknow and hold them answerable if it finds any laxity in compliance with this order.

14. The Registry is also directed to furnish the list of cases in which interim stays of arrests or other relief have been passed or which have been disposed of along with writ petition No. 10090 of 2005 on the next date of listing.

15. The Managing Director, U.P. Power Corporation Limited, Lucknow is also directed to furnish details of the amount and percentage of loss in revenue due to power theft and non-payments for power consumed on the next date of listing. On that date the State of U.P., Power Corporation and Union of India shall also apprise the Court about the progress made in having the Bill passed in Parliament amending the Electricity Act (2003) and the Rules framed for treating offences under the Electricity Act as cognizable and/ or moving the apex Court for challenging the decision of the earlier Division Bench in Cr. Misc. Writ Petition No. 10090 of 2005, Mustaq Vs. State of U.P. and others declaring offences under the Electricity Act as non-cognizable offences.

16. Till the date of moving of applications under Section 155(2) before the competent Court, the arrest of the petitioners shall remain stayed. The practice of moving applications under section 155(2) Cr.P.C by the police or other competent authority before the concerned Court for investigating offences under the Electricity Act shall continue to be followed in all cases henceforth until there is an amendment in the Electricity Act treating the said offences as cognizable offences or an order is obtained from the apex Court staying the operation of the earlier Division Bench in criminal miscellaneous Writ No. 10090 of 2005 declaring offences under the Electricity Act to be non-cognizable offences.

17. List this case on 19.3.2007 for further orders.

Office is directed to communicate this order to the various parties within one week for necessary compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2006

BEFORE
THE HON'BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition no. 17514 of 2004

Suraj Singh ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar
Sri W.H. Khan
Sri Akshaya Kumar
Sri J.H. Khan
Sri Gulrez Khan

Counsel for the Respondents:
Sri Shree Prakash Singh
Suman Sirohi
S.C.

U.P. Police Regulation-Regulation 493 (c)-Reinstatement-acquittal in criminal appeal-denial on the ground-that on benefit of doubt order of acquittal passed-held-in absence of provision-regarding nature of acquittal-hence the objection is nothing but sitting order court-entitled for reinstatement.

Held: Para 18

Such being the case, the petitioner having been tried and judicially acquitted which was later on confirmed by the Hon'ble Apex Court by its order dated 23.9.2003, there could be no doubt that the he has been ''judicially acquitted' and therefore he is entitled for the benefit of Regulation 493 (c) of the U.P. Police Regulations. The order dated 30.10.2000, by which the distinction has been sought to be made, is clearly misconceived and deserves to be quashed.

1989 (1) UPLBEC-624
AIR 1991 SC-1210

Constitution of India Art. 226-Back wages-if the authorities kept away from working-employee willing work-despite of final judgement of acquittal-No order passed-held-entitled for reinstatement with full back wages.

Held: Para 18

Such being the case, the petitioner having been tried and judicially acquitted which was later on confirmed by the Hon'ble Apex Court by its order dated 23.9.2003, there could be no doubt that the he has been ''judicially acquitted' and therefore he is entitled for the benefit of Regulation 493 (c) of the U.P. Police Regulations. The order dated 30.10.2000, by which the distinction has

been sought to be made, is clearly misconceived and deserves to be quashed.

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

1. Heard Sri Gulrez Khan learned counsel for the petitioner and Sri Shree Prakash Singh learned standing counsel for the respondents.

2. This writ petition has been filed seeking a writ of certiorari quashing the order dated 30.10.2000 passed by the respondent no. 3 by which he has rejected the representation of the petitioner to be reinstated in the police force and the consequential order which the petitioner seeks quashing of the order of dismissal dated 28.5.1990 passed by the respondent no. 3. This is the original order by which the impugned order of dismissal was passed against the petitioner removing him from the service of the State. The next prayer, which the petitioner made, is for a writ of mandamus commanding the respondents to reinstate him in service with full back wages and all other consequential benefits.

3. The facts of the case are that the petitioner was working as a constable in the Provincial Armed Constabulary and was posted at Gurgaon and an F.I.R. was lodged under sections 363, 366 and 376 I.P.C. in case crime no. 740 of 1989, which was registered against the petitioner on 18.10.1989.

4. The investigation was conducted against the petitioner and a charge sheet was issued against him. The trail had proceeded before the Sessions Court in S.T. no. 10 of 1990. The trial Court passed an order on 30.3.1990 and the petitioner was held guilty of having committed offences under sections 366, 376 I.P.C. and was sentenced 8 years R.I. together with a fine of Rs.2000/- each in respect of both the offences.

5. As soon as the order of conviction was passed by the trial Court, the petitioner was dismissed from service on 28.5.1990 by the Commandant 28 Battalion P.A.C. Etawah. The order of dismissal dated 28.5.1990 is appended as Annexure 1 to the writ petition and it records in para 3 that pursuant to the provisions of Rule 55 and 55-A of the U.P. Civil Services (Classification, control and Appeal) Rules and Regulation 493 of U.P. Police Regulations read with Article 311 (2 (a) of the Constitution and in view of the Government Order dated 12.10.1979, it is reasonably appropriate to dismiss the services of the petitioner.

6. The extract of relevant provision of 493 (c) of the U.P. Police Regulations is quoted below:

"493.(c). If the accused has been judicially acquitted or discharged, and the period for filing an appeal has elapsed and/or no appeal has been filed, the Superintendent of Police must at once reinstate him if he has been suspended; but should the findings of the court not be inconsistent with the view that the accused has been guilty of negligence in, or unfitness for, the discharge, of his duty within the meaning of section 7 of the Police Act, the Superintendent of Police may refer the matter to the Deputy Inspector General and ask for permission to try the accused departmentally for such negligence or unfitness."

7. Admittedly, thereafter no disciplinary proceedings took place against the petitioner. This is evident from the counter affidavit, which has been filed and is on record.

8. The petitioner filed an appeal against the order of conviction passed by the trial Court being criminal appeal no. 124(SB) of 1990 which the Punjab & Haryana High Court allowed acquitting the petitioner vide its judgment dated 24.2.1994.

9. After the passing of the judgment dated 24.2.1994 by which the petitioner was acquitted, the petitioner applied to the authority concerned for being reinstated in service with all consequential benefits. It has also been stated in the writ petition that against the judgment of Punjab & Haryana High Court dated 24.2.1994, Government had preferred a criminal appeal being Criminal Appeal no. 2060 of 1996 and by its order dated 23.9.2003, the Hon'ble Apex Court dismissed the said Criminal Appeal. As such the judgment dated 24.2.1994 of Punjab & Haryaya High Court acquitting the petitioner has been confirmed.

10. During the pendency of Criminal Appeal before the Hon'ble Apex Court arises out of judgment of the Punjab & Haryana High Court acquitting the petitioner, the services of the petitioner had been removed. Aggrieved, he had made a representation on 7.12.1995 for his reinstatement, which was rejected by the impugned order dated 30.10.2000, which is also impugned in the present writ petition.

11. The impugned order of rejection of the representation dated 30.10.2000 has been passed adopting reasoning that because the petitioner was acquitted on the basis of "benefit of doubt" and because it was not a clear order of acquittal, he is not entitled to be reinstated in service.

12. Learned counsel for the petitioner has drawn attention of this Court to a judgment of this Court rendered in the case of *Dhani Ram versus Superintendent of Police, Hardoi*, reported in (1989) 1 UPLBEC 624 (Lucknow Bench). In this case, it has been held that the Regulation 493 (c) simply provides for "a judicial acquittal'.

13. Having heard learned counsel for the petitioner and the learned standing counsel and having perused the relevant provisions of Regulation 493 (c) of the U.P. Police Regulations, it is abundantly clear that there is no stipulation in the Regulation 493 (c) with regard to the nature of acquittal and no distinction has been made between a "clear acquittal' and "acquittal', which is made basis of "benefit of doubt" in the impugned order.

14. Denial of the benefit of words "judicially acquitted" as provided in of Regulation 493 (c), after the affirmation of judgment of acquittal by the Hon'ble Apex Court, on the pretext that the judgment of acquittal is based on "benefit of doubt" is nothing else but sitting over an appeal or revision of the judgment of acquittal. "Judicial acquittal' means "acquittal' by the court of law. As such judicial acquittal is an "acquittal' simplicitor.

15. Notably once the judgment of acquittal has become final by the order of Hon'ble Apex Court, under Article 141 of

the Constitution of India, it is incumbent upon every State, Tribunal, Courts and functionary of the State to comply with it in letters and spirit.

16. It is also contended on behalf of the State that the petitioner is not entitled to any back wages on the principle of "no work no pay" and the petitioner is also not entitled to any other consequential benefits for the duties that he has not discharged from the date of acquittal. The petitioner was acquitted with effect from 24.2.1994 and he made a representation to be reinstated on 7.12.1995. The authorities concerned has frustrated the attempt of the petitioner to get reinstated. Despite the fact that the Regulation 493 (c) clearly provides that once a person is acquitted on criminal charges, he is liable to get reinstated.

17. The Hon'ble Supreme Court in the case of Union of India versus K.V. Jankiraman, reported in AIR 1991 SC 2010, held that normal rule of "no work no pay" cannot be applied to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remained away from work for his own reasons. Other than the criminal proceedings, which were initiated against the petitioner from which he was judicially acquitted, there is not even censor note against him. In the present case the authority concerned failed to exercise the jurisdiction vested in him under Regulation 493 (c) by not passing an appropriate order of reinstatement. Therefore in view of the above discussion, I am of the opinion, the petitioner deserves to be reinstated with full consequential benefits.

18. Such being the case, the petitioner having been tried and judicially acquitted which was later on confirmed by the Hon'ble Apex Court by its order dated 23.9.2003, there could be no doubt that the he has been "judicially acquitted' and therefore he is entitled for the benefit of Regulation 493 (c) of the U.P. Police Regulations. The order dated 30.10.2000, by which the distinction has been sought to be made, is clearly misconceived and deserves to be quashed.

19. I therefore command the respondents to reinstate the petitioner with all consequential benefits from the date of acquittal which is dated 24.2.1994. The impugned order dated 30.10.2000 as well as the order of dismissal dated 28.5.1990 is hereby set aside.

The writ petition is allowed as above. There will be no costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2007

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

Civil Misc. Writ Petition No.43617 of 1999

Rishi Kumar Katiyar ...Petitioner
Versus
Labour Court, Vth, U.P., Kanpur and another ...Opposite Parties

Counsel for the Petitioner:
Sri V.K. Barman

Counsel for the Opposite Parties:
Sri Prakash Padia
S.C.

Constitution of India Art. 226-Practice and Procedure-burden of proof-240 days

working-despite of specific pleading of workman-not denied by employer-burden shifts upon employer.

Held: Para 7

Labour Court, however, held that petitioner could not prove that he worked continuously from 04.09.1987 to 07.11.1988 or 08.11.1988. It was also mentioned that employer had not produced the relevant records, hence workman was directed to prove the documents filed by him through secondary evidence, which he failed to do. The Supreme Court in AIR 2006 SC 355 "R. M. Yellattiv v. Assistant Executive Engineer" has held that if the workman has filed some, documents then the burden shifts upon the employer to dispute the version of the employee.

Case law discussed:
AIR 2006 SC-355
AIR 2006 SC-2113
AIR 2006 SC-2427
AIR 2006 SC-2614
AIR 2006 SC-2670
AIR 2006 SC-2682

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

1. Heard learned counsel for the parties.

2. This writ petition is directed against award dated 02.07.1998 given by Presiding Officer, Labour Court,(Vth), U.P. Kanpur in adjudication case No.55 of 1995. The matter, which was referred to the labour Court, was as to whether the action of the employer Vice-Chancellor, Chandrashekhar Azad Krishi and Prodyogiki, University, Kanpur, respondent No.2 terminating the services of its employee-petitioner w.e.f. 07.11.1988 was valid or not. The dispute itself was raised by the petitioner after four years (in the impugned order, year of C. P. case is mentioned as 829/1992).

3. The case of the workman was that he was working since 07.09.1987 as daily wager on Rs.12/- per day and he had worked continuously till 07.11.1988·however, without any reason, on 08.11.1988, the employer retrenched him. It was also stated that his appointment was to continue until 31.12.1988. The Labour Court held that workman-petitioner failed to prove that he had worked, for 240 days in a calendar year. Labour Court ultimately held that petitioner was not entitled to any relief.

4. Labour Court took an extremely technical view of the matter. It is mentioned in the award that workman himself stated that he had worked till 07.11.1988 and his services were terminated from 8.11.1988, while in the reference, it was mentioned that services were terminated on 07.11.1988. It is correct that jurisdiction of the Labour Court depends upon the terms of the reference. However, incidental things may very well be seen by the Labour Court. Reference cannot be refused to be decided merely on the ground that there is slight variation in the date of termination.

5. Labour Court, however, held that petitioner could not prove that he worked continuously from 04.09.1987 to 07.11.1988 or 08.11.1988. It was also mentioned that employer had not produced the relevant records, hence workman was directed to prove the documents filed by him through secondary evidence, which he failed to do. The Supreme Court in **AIR 2006 SC 355 "R. M. Yellattiv v. Assistant Executive Engineer"** has held that if the

workman has filed some, documents then the burden shifts upon the employer to dispute the version of the employee.

6. Annexure-1 to the writ petition is written statement of the petitioner-workman filed before the Labour Court. In Paragraph-2 of the written statement, it was categorically stated that he worked from 07.09.1987 till 07.11.1988 continuously without any break. Annexure-2 to the writ petition is the written statement of the employer. In Paragraph-2 of the said written statement, it was stated that the petitioner was employed as daily wager and was paid as such. Thereafter, it was stated that petitioner himself stopped coming for work in the said written statement, the assertion of the workman that he continuously worked from 07.09.1987 till 07.11.1988 was not denied. In view of this, it was proved that the petitioner worked continuously from 07.09.1987 till 7 .11.1988 and in this manner he completed 240 days in a calendar year. Accordingly, impugned award is quite illegal and liable to be set aside.

7. However, it was not denied by the petitioner rather it was his own case that he was employed on daily wage basis. The Supreme. Court in the following authorities has held that provisions of Section 6-N of U.P. Industrial Disputes Act (equivalent to Section 25-F of Industrial disputes Act) are also applicable on daily wagers or work-charged employees. However, in the same authorities, It has further been held that in case of retrenchment of daily wagers or work-charged employee without complying with the provisions of Section 6-N of U.P.I.D. Act or 25-F of I.D. Act, it is not always necessary to direct reinstatement with fullback wages. In such scenario, award of consolidated damages/compensation is proper relief.

(1) **Nagar Mahapalika (now Municipal Corpn.) v. State of U.P. and Ors, AIR 2006 SC 2113.**

(2) **"Haryana State Electronics Devpt Corpn v. Mamni" AIR 2006 SC 2427.**

8. Moreover, in the instant case, the dispute was raised by the petitioner after four years. The Supreme Court in **U.P.S.R.T.C. Ltd. v. Srada Prasad Misra, AIR 2006 SC 2466, Manager (now Regional Director), R.B.I. v. Gopinath Sharm, AIR 2006 SC 2614, Assistant Engineer, C.A.D., Kota v. Dhan Kunwar, AIR 2006 SC 2670 and Chief Engineer, Ranjit Sagar Dam v. Sham Lal, AIR 2006 SC 2682** has held that seven or more years delay in raising the industrial dispute is fatal.

9. Accordingly, I am of the opinion that even though the award of the Labour Court refusing to grant any relief to petitioner is illegal, however, petitioner is not entitled to reinstatement with full back wages. Accordingly, writ petition is allowed. Impugned award is set aside.

10. It is held that petitioner's termination was illegal for non-compliance of Section 6-N of U.P. I.D. Act. Petitioner is entitled to consolidated damages/compensation of Rs.15,000/-. Respondent No.2 is directed to pay the said amount to the petitioner within three months failing which 1% per month interest shall be payable upon the said amount since after three months till actual payment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2007

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

Criminal Misc. Writ Petition No. 770 of 2007

Surya Bhan ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Satish Trivedi
Sri Roshan Khan
Sri Vinod Shanker Giri

Counsel for the Respondents:
Sri G.S. Chaturvedi
Sri Udai Chandani
A.G.A.

Code of Criminal Procedure-Section 190 (1)(6)-Power of Magistrate-investigation officer submitted final report-the Magistrate can either accept the final report and drop the proceeding or direct for further investigation or treating the protest petitioner as complaint may proceed under Section 200 and 202 Cr.P.C.-but can not go beyond the material provided by I.O.-without specifying offences, the section-summoning the accused-held- in correct-set-aside.

Held: Para 17

In the instant case, the learned Magistrate has directed to summon the accused persons under Section 190(1)(b) of Cr.P.C. This in itself is an illegal order as the accused could not be summoned and tried under Section 190 of Cr.P.C. This section empowers the Magistrate to take cognizance of an offence which is constituted from the facts as disclosed in the police report. The accused is summoned for the offence that has been committed by him under the provisions of Indian Penal Code or any other law under which he could be tried and punished. The learned Magistrate Should have specified the offence and the section (s) under which he was summoning the accused after taking cognizance. Thus I come to the conclusion that the impugned order dated 10.10.2006 passed by the learned Magistrate is not correct and is liable to be set aside. The order in revision passed on 6.12.2006 by the learned Incharge Sessions Judge is also, therefore, liable to be set aside. Therefore, the writ petition is to be allowed.

Case law discussed:
2001 (43) ACC-1096
1963 Supp. (1) SCR-953
2005 (7) SCC-467

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

1. This writ petition has been received in this Court by nomination.

2. The writ petition has been filed with the prayer to quash the impugned order dated 6th December, 2006 passed by the Incharge Sessions Judge, Allahabad in Criminal Revision No.876 of 2006 whereby the revision has been dismissed in limine and order dated 10th October 2006 passed by the Additional Chief Judicial Magistrate, Court No.2, Allahabad in Criminal Case No.99/XII of 2006 (Deepak Kumar Singh Vs. Dilip Agrahari and others) [Annexures- 1 and 2], whereby the final report No.36 of 2006 has been rejected and the protest petition dated 17.6.2006 filed by respondent no.2 has been accepted and the accused have been directed to be summoned under Section 190 (1)(b) of Cr.P.C.

3. Heard Sri Satish Trivedi, learned Senior Advocate assisted by Sri Roshan Khan for the petitioner, Sri O.S. Chaturvedi, learned Senior Advocate assisted by Sri Udai Chandani for respondent no.2, learned A.G.A. and perused the material on record. Counter and rejoinder affidavits have been exchanged.

4. The brief facts of the case are that respondent no.2 Deepak Kumar Singh filed an application under Section 156(3) of Cr.P.C. on 15th December, 2005 alleging that the election of the Students Union, Allahabad University, had concluded on 24th November, 2005. Manoj Kumar Singh elder brother of Deepak Kumar Singh was a candidate for the President's post. On that day, in the night at about, 8 P.M. respondent no.2 and his supporters had collected at the room of Ajai Singh in Chhota Baghara and they had some programme for dinner etc. At that time Chandan Pandey, driver of the brother of respondent no.2, Brijesh Singh and Santosh Singh were also present. The boys were making noise expecting the victory of their candidate. But at that time, Kamlesh Yadav with his supporter Dilip Agrahari and his uncle Surya Bhan and 8-10 persons came at the room and started pulling Deepak Kumar Singh saying as to why they were talking against them. They took Deepak outside and Dilip Agrahari struck a butt blow on his head. At that time Surya Bhan exhorted to shoot him and Kamlesh Yadav wanted to make a second fire but he could not do so as someone fired from his (Deepak Kumar Singh) side to save them and the shot hit Kamlesh Yadav. Surya Bhan also made fire but it missed. Thereafter, the injured were taken to the hospital. On the basis of this application, the learned Magistrate directed for registration of the case and after investigation the Investigating Officer submitted a final report. Against the final report respondent no.2 filed a protest petition and along with that protest petition he also filed his affidavit as well as affidavits of his witnesses Brijesh Singh, Santosh Kumar, Chandan Pandey and Ajai Singh. The learned Magistrate after considering the case diary and affidavits allowed protest petition holding that the Investigating Officer had not correctly recorded the statements of the witnesses and had wrongly concluded that no incident had taken place. The learned Magistrate also held that the medical evidence on record proved that the incident took place. Consequently he rejected the final report and allowed the protest petition and directed to summon the accused under Section 190 (1)(b) of Cr.P.C. Against that order the applicant preferred Criminal Revision No.879 of 2006 but the same has been dismissed in limine, hence this writ petition.

5. It may be noted that a report was lodged by Shiv Bhan Singh Yadav on 24.11.2005 at 10.30 P.M. regarding the incident that took place the same day at 9 P.M. and the case was registered as case crime No.6237050358 of 2005 under Section 302I.P.C. In this report Manoj Kumar Singh, Deepak Kumar Singh (respondent no.2) and Chandan Pandey have been named as accused persons and it has been alleged that after conclusion of the students union election, the informant Shiv Bhan Singh Yadav along with nephew Kamlesh Kumar Singh Yadav who was candidate for the post of General Secretary had hardly reached near the house of Dilip Kumar Agrahari, a friend on motorcycle, the accused persons came

in a black Safari vehicle which was being driven by Chandan Pandey. They abused Kamlesh Kumar Singh Yadav and Manoj Kumar Singh fired at the right temple of Kamlesh Kumar Singh Yadav from point blank range. He was injured and fell down. The accused also made several fires in air and one of them hit Chandan Pandey. Kamlesh Kumar Singh Yadav was taken to hospital, but the doctors present there, declared him dead.

6. Learned counsel for the petitioner has contended that, the learned Magistrate has not properly exercised jurisdiction vested in him while summoning the accused under Section 190 (l)(b) of Cr.P.C. and has committed mistake regarding procedure itself. According to the learned counsel for the petitioner, the Investigating Officer has statutory duty to investigate on the basis of report and after collecting evidence he can submit charge sheet or can give a final report in the matter. Although, he has further contended that the Magistrate is not bound by the opinion of the Investigating Officer and can form his own independent opinion but only on the basis of materials collected by the Investigating Officer, the Magistrate can either accept the final report or reject the same and take cognizance of the offence under Section 190(1)(b). But if there is any extraneous matter, then the Magistrate can take cognizance under Section 190 (l)(a) of Cr.P.C. and can proceed under Sections 200 and 202 of Cr.P.C. or can direct the Investigating Officer for further investigation under Section 173(8) of Cr.P.C. According to him, in this case the Investigating Officer submitted final report and against that respondent no.2 filed a protest petition with affidavits which was extraneous matter and, therefore, the learned Magistrate could not have summoned the accused under Section 190 (1)(b) of Cr.P.C.

7. Learned counsel for the respondent no.2 has contended that if the material collected during investigation shows that the offence has been committed, the accused can be summoned under Section 190(1)(b) of Cr.P.C. even if there is any extraneous material and at the most it is irregularity and not illegality.

8. Section 190 provides for cognizance of offence by a Magistrate. The relevant portion of sub section (1) reads as under:

Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under subsection (2), may take cognizance of any offence-
"(a) upon receiving a complaint of facts which constitute such offence;
(b) upon a police report of such facts;"

9. It shows that a Magistrate can take cognizance upon receiving a complaint of facts which constitute such offence in sub-clause (l)(a) and upon a police report of such facts under sub-clause (1)(b). The Criminal Procedure Code provides for separate procedures for cases in which the cognizance has been taken on a complaint and on a police report. Therefore, these are two separate categories and cannot be intermixed. These are statutory provisions and have to be followed as such.

10. In the case of *Pakhando and others Vs. State of U.P. and another 2001 (43) ACC 1096*, a Division Bench of this Court has held that where the Magistrate

receives final report the following four courses are open to him and he may adopt anyone of them as the facts and circumstances of the case may require:

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complaint: or

(II) He may take cognizance under Section 190(l)(b) and issue process straightaway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police there is sufficient ground to proceed; or

(Ill) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(l)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

11. In this case it has also been held that it would, however, be relevant to mention that for forming such an independent opinion the Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and other material collected during investigation. It is not permissible for him at that stage to make use of any material other than investigation records, unless he decides to take cognizance under Section 190(1)(a) of the Code and calls upon the complainant to examine himself and the witnesses present, if any, under Section 200.

12. Therefore, this shows that the Magistrate while taking cognizance under Section 190(1)(b) can only rely on the police report that means evidence and material collected by the Investigating Officer during investigation. The Magistrate can not, therefore, take into consideration any extraneous material and if he does so, he should, take cognizance under Section 190(1)(a) and should proceed in the matter as a complaint case.

13. It is relevant to quote the following passage of the case of Ajit Kumar Palit Vs. State of West Bengal 1963 Supp (1) SCR 953 as quoted in the case of CREF Finance Ltd. Vs. Shree Shanthi Homes (P) Ltd. and another (2005) 7 Supreme Court Cases 467:

"The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means- become aware of and where used with reference to a court or judge, to take notice of judicially. It was stated in Gopal Marwari V. emperor by the learned Judges of the Patna High Court in a passage quoted with approval by this Court in R.R. Chari V. State of U.P. (SCR at p.320) that the word, 'cognizance' was used in the Code to indicate the point when the magistrate or judge takes judicial notice of an offence and that it was a word of indefinite import, and is not perhaps always used in exactly the

same sense. As observed in Emperor Vs. Sourindra Mohan Chuckerbutty (ILR at p. 416) 'taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such applies his mind to the suspected commission of an offence'. Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled."

14. Therefore, the legal position is clear that where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled, Applying this principle to Section 190(1)(b), it becomes apparent that the Magistrate while taking cognizance of the offence under this section cannot rely on any material other than the police report of such fact.

15. The contention of learned counsel for the respondent no.2 is that even if the Magistrate takes wrong cognizance under section 190(l)(a)or(b), it is merely on irregularity. But this contention cannot be accepted as statute itself provides as to what material is to be considered by the Magistrate before taking cognizance and procedure for trial of the case will depend on the cognizance taken in accordance with those materials. The cognizance is taken of the offence and, therefore, the court on perusal of the complaint or report has to satisfy itself on the basis of the facts which constitute the offence. There may be instances where the Magistrate finds that the complaint is not made by the person who can lodge the complaint or the complaint is not entertainable by that Court or cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority etc. In such matters Magistrate should refuse to take cognizance but if the Magistrate takes cognizance in such matters, and proceeds, the same may be curable under Section 460 Cr.P.C. But in the case where statute directs as to how and on what material the cognizance is to be taken, any violation thereof will he illegality and not irregularity. As for instance if the Magistrate takes cognizance on a complaint and directs to proceed as a police case or conversely takes cognizance on a police report and directs to proceed as a complaint case, this defect in cognizance would not be irregularity and would not be curable as it would vitiate the procedure. Such contingency is not permissible under law and in the circumstances the contention as raised by the learned counsel for the respondent no.2 is not tenable and cannot be accepted.

16. In this case the learned Magistrate while passing the impugned order has given a finding that the Investigating Officer did not correctly record the statements and wrongly concluded that the incident had not taken place and submitted final report whereas the medical and documentary evidence fully proved that the incident took place. It is well settled that the cognizance is taken of the offence and not of the offender and at the stage of cognizance the learned Magistrate is only required to see whether *prima facie* any offence has been committed. But the learned Magistrate instead of giving any such findings has concluded that the incident did take place.

17. In the instant case, the learned Magistrate has directed to summon the accused persons under Section 190(1)(b) of Cr.P.C. This in itself is an illegal order as the accused could not be summoned and tried under Section 190 of Cr.P.C. This section empowers the Magistrate to take cognizance of an offence which is constituted from the facts as disclosed in the police report. The accused is summoned for the offence that has been committed by him under the provisions of Indian Penal Code or any other law under which he could be tried and punished. The learned Magistrate Should have specified the offence and the section (s) under which he was summoning the accused after taking cognizance. Thus I come to the conclusion that the impugned order dated 10.10.2006 passed by the learned Magistrate is not correct and is liable to be set aside. The order in revision passed on 6.12.2006 by the learned Incharge Sessions Judge is also, therefore, liable to be set aside. Therefore, the writ petition is to be allowed.

18. The writ petition is hereby allowed and the impugned orders are set aside. The learned Magistrate is directed to consider the matter afresh and to proceed according to law and in the light of the observations made in the judgment herein above. The complainant shall appear in the Court of the learned Magistrate for further orders on 12th March, 2007.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD09.02.2007

BEFORE
THE HON'BLE G.P. SRIVASTAVA, J.

First Appeal No. 273 of 1996

Raj Pal Singh ...Appellant-Claimant
Versus
State of U. P. and others ...Respondents

Connected with
First Appeal No. 274 of 1996, First Appeal No. 275 of 1996, First Appeal No. 276 of 1996, First Appeal No. 277 of 1996, First Appeal No. 278 of 1996, First Appeal No. 279 of 1996, First Appeal No. 280 of 1996, First Appeal No. 281 of 1996

Counsel for the Appellant:
Sri P.K. Singh
Sri B.C. Jauhari

Counsel for the Respondents:
S.C.

Land Acquisition Act-Section 20 (1)-A-Enhancement of compensations-S.L.O. given award at the rate of Rs.12500/- per Bigha-reference court enhanced to Rs.20,000/- per Bigha with solatium at the rate of 30% along with 12% interest on enhanced amount-first appeal claiming further enhancement-held-not entitled for larger amount what have been claimed by the appellant.

Held: Para 10

It appears that the Reference court has come to conclusion that the market value of the land in question should be at least at the rate of Rs.20,000/- per bigha because the land in question stands on the better footing than the land involved in the award given by the S.L.A.O. dated 2.3.1983 in respect of a different village Badha. As the appellants themselves

claimed compensation at the Rs.20,000/- per bigha before the S.L.A.O. therefore they cannot be held entitled for larger amount. Moreover they could not show any exemplar which may entitle him more compensation than awarded by the Reference Court.

(Delivered by Hon'ble G.P. Srivastva. J.)

1. These are appeals against the judgment and decree passed by the learned VIII Addl. District Judge, Ghaziabad on 19.2.1987 in Land Acquisition Reference No. 96 of 1983 and 14 others which were consolidated and the L.A.R. No. 96 of 1983 was made a leading case.

All those references arose out of the award dated 15.12.1981 given by he Special Land Acquisition Officer, Ghaziabad in respect of 39-323 acres of land of village Mohammadpur Khuralia Pargna and Tehsil Garh District Ghaziabad. The said land was acquired for the construction of Madhya Ganga Nahar, Nirman Khand 9, Garh, Ghaziabad. The notification under section 4 (1) of Land Acquisition Act was published on 28.7.1979 and notification under section 6 of Land Acquisition Act read with section 17 of the said Act was published on 15.9.1979. Possession of the land was taken on 21.11.1979. The Special Land Acquisition Officer, Ghaziabad awarded compensation at the rate of Rs.12,500/- per bigha. The claimants preferred Land Acquisition References noted above which were decided by the impugned judgment dated 19.2.1987 whereby it was held that the market value of the land was Rs.20,000 per bigha. The claimants were also given additional amount under section 20(1-A) at the rate of 12% per annum on the market value, solatium at the rate of 30%, interest at the rate 9% per annum from the date of possession and cost under section 27 (2) of the Act.

2. Feeling aggrieved with the judgment and decree passed by the learned VIII Addl. District Judge, Ghaziabad, nine tenure holders/claimants out of fifteen have preferred these appeals which has been connected with First Appeal No. 273 of 1996 Raj Pal Singh Vs. State of U.P. and others.

3. I have heard learned counsel for the parties and gone through the entire evidence on record.

4. Learned counsel for the appellants has argued that the learned court below in determining the market value of the land arbitrarily determined the market value at the rate of Rs.20,000/- per bigha whereas it should not be where as it should not be less than Rs.40,000/- per bigha.

5. The learned Addl. District Judge while determining the market value of the land has first of all considered the sale deed dated 7.12.1978 allegedly executed by one Hari Prakash in favour of Hoshiyar Singh in respect of Khasra No. 245 measuring 2-17-12 bighas. In this sale deed the vendor had sold his 1/3 share for a consideration of Rs.12,000/-. This sale deed was considered by the S.L.A.O. but the learned Reference Court after considering the evidence on record came to the conclusion that the S.L.A.O. erred while awarding compensation on the basis of this sale deed.

6. The next sale deed which was considered, and examined by the learned Reference Court is the sale deed dated

4.9.1975 executed by Kalu and others in favour of Harish Chandra for a consideration of Rs.18,000/-. The land in this sale deed was sold at Rs.20/- per sq. yard. The said land situated at a distance of 12 miles from Hapur. The said sale deed was executed 4 years before the notification under section 4 (1) of the Act. As the sale deed was for a very small piece of land measuring 8.84 sq. yard and the land was abadi land, therefore this sale deed was neither relied upon by the S.L.A.O. nor by the learned Reference Court. However as the sale deed relates to abadi land and very small piece of land therefore this sale deed was rightly discarded.

7. The claimants have filed another sale deed dated 23.3.1978 whereby a land measuring 0-1-17 was sold for a consideration of Rs.14,250/-. The land of the sale deed situated in the same village. This sale deed was executed one year before the notification under section 4 (1) of the Act. The learned Reference Court has held that the land in question can be equated with the land involved in the sale deed, as regard to the potentiality because both the land situate in the same village. The learned Reference Court has not considered the said sale deed in determining the compensation without assigning any reason. The learned Standing Counsel has argued that the sale consideration of the land if calculated will come more than Rs. One lac per bigha and the appellants have never claimed compensation at such excessive rate but only at the rate of Rs.40,000/- per bigha therefore it cannot be a basis for determining compensation of the land involved.

8. The learned Reference Court has referred an award of S.L.A.O. dated 2.3.1983 relied upon by the claimant which relates to village Badha. In the said case S.L.A.O. has awarded compensation at the rate of Rs.18,500/-,per bigha. The said land is 6 kms away from National High Way but the land in question is near National High Way. Moreover the land situates near Simbholi Sugar Factory therefore the learned Reference Court has opined that the S.L.A.O. must have granted compensation at least at the rate of Rs.18,500/- per bigha.

9. The claimants in the Reference Court has submitted another sale deed dated 10.8.1983 which was executed for Rs.52,000/- but the sale deed was rejected because it was executed after 5 years from the date of notification.

10. It appears that the learned Reference court has determined the market value at the rate of Rs.20,000/· influenced by the demand of the claimants as shown in the award of S.L.A.O. wherein it is mentioned that the tenure holders demanded compensation at the rate of Rs.20,000/- per bigha. No counter appeal has been filed by the State nor there is any counter objection preferred by the State. It appears that the Reference court has come to conclusion that the market value of the land in question should be at least at the rate of Rs.20,000/- per bigha because the land in question stands on the better footing than the land involved in the award given by the S.L.A.O. dated 2.3.1983 in respect of a different village Badha. As the appellants themselves claimed compensation at the Rs.20,000/- per bigha before the S.L.A.O. therefore they cannot be held entitled for larger amount.

Moreover they could not show any exemplar which may entitle him more compensation than awarded by the Reference Court.

11. The appeals fail and are dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2007

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

Special Appeal No. 200 of 2007

Ajay Pratap Rai ...Respondent-Appellant
Versus
District Basic Education Officer Jaunpur and others ...Petitioner-Respondents

Counsel for the Applicant:
Sri P.N. Saksena
Sri R.M. Vishwakarma

Counsel for the Respondents:
Sri Ashok Khare
Sri P.N. Triapthi
S.C.

(A) Constitution of India-Art. 226-Doctrine of Merger-upgradation of junior High School to High School then Intermediate-No existence of Junior High School-or the High School-No question of appointment of Head Master of Junior High School-except under the provisions of U.P. Inter Mediate Education Act 1921.

Held: Para 13

The contention of Shri Saxena, therefore, to the effect that institution did not loose its identity as a Junior High School has to be necessarily rejected. Accordingly, we are of the considered opinion that neither the selection nor appointment of the appellant nor the appointment of the respondent no.3 was in order and, therefore, the learned Single Judge was perfectly justified in holding that no selection or appointment has been held in accordance with law to the post of Head of the Institution.

(B) Constitution of India-Art. 226-Recovery of Salary-petitioner no eligible for the post of head of institution-applied and got appointed as Head Master-Not occasion for making application for Head Master in Junior High School-payment of salary-complete fraud on statute in contravention of law-recovery held proper.

Held: Para 20

In sum and substance, we are of the view that after upgradation of an institution from Junior High School to High School and then to Intermediate, the lower section of the institution, i.e. Junior High School looses its existence and merges into the higher section and in that eventuality, the question of making the appointment of Head Master for the Junior High School, a Principal for the High School and another Principal to run the Intermediate classes would lead to complete chaotic situation and absurdity. Thus, the appointment on the post of Head Master could not be made. The appellant did not possess the eligibility, i.e. experience as required under the law in making an application to the said post and had illegally been appointed. Further, the serious illegality/irregularity in advertising the vacancy existed and the possibility of committing fraud cannot be ruled out. As the appointment of the appellant had been made in total violation of law and without possessing the eligibility, the recovery of salary received by him in contravention of the order passed by the Statutory Authority does not warrant any interference.

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

1. The dispute in this Special Appeal is about the post of the Head of the Institution, namely, Kisan PurVa MadhyamiK Vidyalaya, Itaili, Gazna Kudda, District Jaunpur which post is being claimed by the appellant Ajai Pratap Rai and respondent no.3 Shri Krishna Dixit respectively. The judgment under appeal rejects the claim of the appellant as well as the respondent no.3 and directs that the teacher next to the respondent no.3 in seniority shall be handed over charge as the Head of the Institution till the respondent no.3 is not cleared of the charges against him or till a permanent regular selection is made in accordance with law. The learned Single Judge has also recorded a finding that the appellant and respondent no.3 as well as the then District Basic Education Officer have indulged in certain malpractices for which a direction has been issued to launch criminal prosecution against them and other directions have been issued in respect of the connected writ petition pertaining to the management of the institution with which the present appellant is not concerned.

2. The facts of the case have already been set out in detail in the judgment of the learned Single Judge and, therefore, are not being exhaustively reproduced. However, bare minimum facts which are necessary for adjudication of the controversy are that the institution was initially a Junior High School recognized and governed by the U.P. Basic Education Act, 1972 (hereinafter called the "Act 1972'). The said institution applied for recognition as a High School and was awarded the said status with effect from 25.01.1993. Further the institution succeeded in promoting itself into an Intermediate College with effect from 16.01.1999 for which a recognition was granted under the provisions of the U.P. Intermediate Education Act, 1921 (hereinafter called the "Act 1921'). On 30th June, 1999, the Head Master of the institution Shri H.P. Maurya attained the age of superannuation as a result whereof a vacancy occurred on the said post. The respondent no.3 Shri Krishna Dixit is stated to have been handed over the charge as he was the next senior most teacher of the institution to function on the said post. The handing over charge was preceded by an alleged advertisement dated 06.06.1999 stated to have been issued by the then Manager and it is alleged that the signatures of the respondent no.3 were attested by the educational authorities on 13.07.1999. It appears that the respondent no.3 was seeking a declaration of his status as Head Master of the institution for which he had approached the District Basic Education Officer. Having failed to receive any response from him, the respondent no.3 filed Writ Petition No. 893 of 2000, which was disposed of on 11.01.2000 with a direction to the District Basic Education Officer to decide the representation of the respondent no.3 in respect of his claim to the post of Head Master. From the records, it appears that in December 2002/January 2003, the Basic Education Officer attested the signatures of respondent no.3.

3. In between, there appears to have been a dispute with regard to the management of the institution and one Raja Ram Vishwakarma claimed himself to be the Manager of the institution and a rival claim was set up by Subhash Chandra Yadav. Both these persons

staked their claims and the dispute came to this Court in several writ petitions which have been referred to in the judgment of the learned Single Judge. For the purposes of this controversy, suffice would be to say that Shri Raja Ram Vishwakarma as a Manager claimed that he appointed the appellant Ajai Pratap Rai. The said alleged appointment of the appellant is stated to have been approved on 07.03.2003 by the District Basic Education Officer, which was challenged by the respondent no.3 in Writ Petition No. 14612 of 2003, which has given rise to the present Special Appeal. An order of status quo was passed on 21st May, 2003, yet the salary has been disbursed by the District Basic Education Officer to the appellant. The District Inspector of Schools intervened and issued directions in favour of respondent no.3 which was reviewed by him on 03.03.2006. The order dated 7th March, 2003 had been assailed by the respondent no.3 and the order dated 03.03.2006 was again challenged by the respondent no.3 in Writ Petition No. 16925 of 2006, which has also been disposed by the same judgment of the learned Single Judge.

4. The relief claimed in this Special Appeal is confined only to the judgment insofar as it rejects the claim of the appellant in Writ Petition No. 14612 of 2003 and a prayer has been made to dismiss the said writ petition filed by respondent no.3. In essence, the relief claimed is that the judgment of the learned Single Judge be set aside and the appellant be permitted to continue as Head of the Institution.

5. We have heard Shri P.N. Saxena, learned Senior Counsel assisted by Shri R.M. Vishwakarma for the appellant; Shri Ashok Khare, learned Senior Counsel assisted by Shri P.N. Tripathi for respondent no.3 and the learned Standing Counsel for the other respondents.

6. On behalf of the appellant, it has been urged that the identity of the Junior High School is intact and, therefore, the appellant's appointment as Head Master of the Junior High School was in accordance with the provisions of U.P. Recognized Basic (Junior High School) (Recruitment and Condition of the Service of Teachers) Rules, 1978 (herein after referred to as the "Rules 1978'). It has further been contended that the appointment of respondent no.3 was never made in accordance with the said Rules 1978 and there is no valid approval and as such the claim of the respondent no.3 deserves to be rejected. Shri Saxena has further stated that the appellant is fully qualified and possesses the requisite qualification for the post of the Head Master of the Junior High School. He has further contended that the learned Single Judge has erred by ordering prosecution without there being any enquiry with regard to the genuineness or otherwise of the newspapers from the Information Bureau and further the direction for refund of salary from the appellant is unsupported in law.

7. Replying to the aforesaid submissions, Shri Khare has taken us to the findings recorded by the learned Single Judge with the aid of the Full Bench decision in the case of State of U.P. & Ors. Vs. District Judge, Varanasi & Ors., 1981 UPLBEC 336 and the decision of the learned Single Judge in the case of Dr. Smt. Sushila Gupta Vs. Regional Joint Director of Education, (2006) 1 ALJ 523 and has urged that the

entire claim of the appellant has to be rejected in view of the findings recorded by the learned Single Judge and, therefore, the appeal deserves to be dismissed.

8. The learned Standing Counsel has also made his submissions and has invited the attention of the Court to the various definitions as contained in Act 1972, the Rules 1978, the U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978, the provisions of the Act 1921 and the U.P. Secondary Education Services Selection Boards Act, 1982 (hereinafter called the "Act 1982') and has urged that the directions given by the learned Single Judge in respect of the claim on the post of the Head of the Institution do not deserve any interference as no ground has been made out either in law or in fact for any further judicial intervention.

9. Having considered the rival submissions, we find that the learned Single Judge after having noticed the Full Bench decision in the case of State of U.P. & Ors. (supra) and the judgment of the learned Single Judge in Sushila Gupta (supra) has held that once a Junior High School stands upgraded as a High School or an Intermediate College, then in that event the post of the Head of the Institution has to be filled up in accordance with the procedure prescribed under the Act 1921 read with Act 1982. It has been held that in such eventuality the Junior High School looses its identity as such and upon upgradation of the institution, there cannot be any appointment of a Head Master in a Junior High School under Rules 1978. For this, the learned Single Judge has placed reliance upon the decisions referred to therein and has also indicated the ratio of the decision in Sushila Gupta's case to be fully applicable to the facts of the present controversy.

10. The issue raised by the appellant, therefore, in respect of the status of the institution as still to be that of a Junior High School for the purposes of appointment on the post of Head of the Institution, has to be rejected for the reasons given by the learned Single Judge with which we find ourselves to be in full agreement with. The word "upgradation" in its normal connotation means improvement; enhancement of status; more efficient. The word "grade" is derived from the latin word "gradus' which means degree, step. In Hari Nandan Sharan Bhatnagar Vs. S.N. Dixit & Anr. AIR 1970 SC 40; and A.K. Subraman Vs. Union of India & Ors., AIR 1975 SC 483, the Apex Court held "grade' means rank, position in a scale, a class or position in a class according to the value. It means a degree in the scale of rank, dignity, proficiency etc. (Section 15 of Code of Civil Procedure, 1908). The word "upgradation' therefore means improvement in degree, raising of status, rank, quality or in value. It is an improvement in proficiency and reflects a rising gradient. The institution was admittedly a Junior High School and was raised to the status of a High School in 1993 and to that of Intermediate College in the year 1999. It is undisputed that upon being upgraded as a High School, the institution has been recognized as such under the provisions of Act 1921. This undisputed position, therefore, clearly establishes that the institution ceases to be a Junior High School and for the purposes of appointment of Head of the Institution, the appointment can only

be made by resorting to the provisions as indicated in the judgment rendered in Sushila Gupta's case (supra). The observations made by the Full Bench in the case of State of U.P. Vs. District Judge Varanasi (supra), which have been quoted in detail by the learned Single Judge are worth reiterating to the effect that Basic School or a Junior High School is different from a High School or an Intermediate College as the same institution cannot be called Basic School or a Junior High School as well as a High School or an Intermediate College. The Full Bench above referred to held as under:-

"On a Basic School or a Junior High School being upgraded as a High School or Intermediate College, the identity of the institution known as Basic School or a Junior High School is lost and it ceases to exist as a legal entity and in its place another institution with a legal entity comes into being. One cannot be equated with the other."

11. The aforesaid observations of the Full Bench as explained in the judgment of Sushila Gupta's case, therefore, leave no room for doubt that the selection and appointment on the post of Head of the Institution which has been recognized as a High School and Intermediate College cannot be made under the provisions which are applicable to a Junior High School. In Sushila Gupta (supra), the learned Single Judge considered all the Amendment made in the Statute and held that in spite of so many amendments to the statutory provisions, the proposition of law laid down by the above referred to Full Bench remained the same. Mr. Saxena has not brought to our notice any provision which have altered the legal position.

12. From the aforesaid discussions, it is evident that status of an institution after being upgraded looses its significance and the lower section of the school after upgradation completely merges into the upgraded institution. Interpreting the provisions otherwise would lead to complete absurdity and create a chaotic situation even for governance of the different parts of the same institution. An institution cannot have a multiple Code for its governance. There is no provision permitting continued applicability of the laws in relation to a Junior High School even after its upgradation.

13. The contention of Shri Saxena, therefore, to the effect that institution did not loose its identity as a Junior High School has to be necessarily rejected. Accordingly, we are of the considered opinion that neither the selection nor appointment of the appellant nor the appointment of the respondent no.3 was in order and, therefore, the learned Single Judge was perfectly justified in holding that no selection or appointment has been held in accordance with law to the post of Head of the Institution.

14. The second submission made by Shri Saxena that the finding has been recorded by the learned Single Judge that the appellant did not possess the eligibility as he did not have experience of three years as required under the law for being appointed as a Head Master in the Junior High School is liable to be set aside only on the ground that such an issue had been raised by the petitioner-respondent while filing the rejoinder

affidavit. Had it been the ground in the writ petition, the appellant could have taken the pleadings to rebut the same. The learned Single Judge has dealt with the issue as under:-

"There is requirement of three years experience as teacher for being appointed as Headmaster of Junior High School under Rule 4(2) (c) of 1978 Rules. Large Scale manipulation appears to have been made. Ajai Pratap Rai in his affidavit dated 30.12.2003, has mentioned that he has worked as Assistant Teacher at Mahantha Ram Asrey Das Madhyamik Vidyalaya Madhuban Nagar, Laparey, Jaunpur since 01.07.1999 to June 2002 and said fact finds support from the certificate issued by the Principal of the college on 18.01.2003 and also from the attendance register of July 1999 to June 2002. Certificate dated 18.01.2003, certifying functioning of Sri Ajai Kumar Rai has been given by Manager Ram Daur Yadav. Sri Ram Daur Yadav, pursuant to letter written by petitioner has categorically informed that Sri Ajai Pratap Rai has never functioned in the institution and has never been appointed in the institution. Notarial Affidavit has also been given, by Sri Ram Daur Yadav, reiterating same statement of fact and further documents submitted in this regard be treated as forged. These documents have been filed as Annexure RA-2 and 3 to rejoinder affidavit filed in Civil Misc. Writ Petition No. 16925 of 2006, copy of which has been served on Sri R.M. Vishwakarma, Advocate on 04.05.2006 and qua which no dispute has been raised. In attendance register which has been appended at various places, Sri Ajai Pratap Rai who claims himself to be Assistant Teacher has appended his signature below Class IV employee. In the data list (Annexure RA-I and RA-II of rejoinder affidavit dated 11.01.2004) maintained at Madhyamik Shiksha Parishad, Regional Office Varanasi, qua teachers of institution name of Sri Ajai Pratap Rai is conspicuously missing. All these circumstances mentioned above, prima facie speaks for itself, and until and unless there is nexus in between Manager, candidate and the District Basic Education Officer, such appointment is not at all feasible."

15. Admittedly, in this case such a plea had been taken by filing a rejoinder affidavit and annexing the affidavit of the Manager of the institution where the appellant alleged to have served from 01.07.1999 to June 2002. The copy of the rejoinder affidavit had been served upon the learned counsel for the appellant on 4th May, 2006 though the matter was decided on 09.01.2007. Thus, there was a sufficient time of eight months for the appellant to file reply to the rejoinder affidavit rebutting the averments made in the rejoinder affidavit. The plea taken by Shri Saxena is preposterous as there was a notice of new facts to the appellant and sufficient time for rebuttal of the same but he, for the reasons best known to him, did not avail the opportunity to controvert the same. In Sri-La Sri Subramania Desika Gnanasambanda Pandarasannidi Vs. State of Madras & Anr., AIR 1965 SC 1578, the Hon'ble Supreme Court considered the similar issue and held that such a plea is permissible provided the defendant does not have a notice of new facts taken in the replication or did not have sufficient time to rebut the same. In the instant case, no attempt had ever been made by the appellant to rebut the said factual averments taken in the rejoinder affidavit nor any attempt has been made in appeal

to show that the factual averments made in the rejoinder affidavit could not be factually correct. In view of the above, the learned Single Judge was justified in drawing adverse inference against the appellant. Thus, the aforesaid finding does not warrant any interference in appeal.

16. The contention with regard to the direction of the learned Single Judge in respect of lodging a First Information Report also does not deserve to be interfered with as the learned Single Judge having recorded his finding in respect of the manipulations in the publication in the newspaper, has concluded that the same requires to be investigated by an investigating agency. We do not find any error in the same as, prima facie, there was ample material before the learned Single Judge to have arrived at the aforesaid conclusion. We have ourselves also perused the two copies of the Hindi Daily "Dainik Manyavar" alleged to have been published on Monday, the sixth of January, 2003. On page two of the said newspaper there is a clear difference as the same space in one copy carries a news item of arrest of two persons whereas the other copy contains the advertisement under scrutiny. The same therefore leaves no room for a genuine doubt that fraud has been apparently practiced. Both copies at page four disclose the name of the Editor Sri Om Prakash Jaiswal and recite the name and address of Mamta Printers, Khwajgi Tola, Jaunpur as Publishers. The same further discloses the name of the printing press as Bharatdoot Press, 6 Rampuri, Varanasi. The telephonic and E-mail address are also indicated therein. The investigating agency shall also take notice of the above while initiating proceedings and copies of the newspapers shall be made available and obtained for the said purpose as the involvement of the publishing and printing agency in this matter cannot be ruled out. The investigation shall forthwith be set into motion as per the directions of the learned Single Judge.

17. So far as the issue of refund of the salary received by the appellant is concerned, Mr. Saxena, learned Senior Counsel has vehemently submitted that the appellant had been working on the post of Head Master and, therefore, the order of refund of the salary received by the appellant could not have been passed. The learned Single Judge has dealt with the issue in detail observing as under:-

"The fact of the matter is that appointment letter had been issued in his favour, signature had also been attested, but he never functioned in the institution, and this is fortified from the circumstance that Sri Raja Ram Vishwakarma on 26.05.2005 asked Sri Krishna Dixit to hand over the charge to Sri Ajai Pratap Rai and Sri Krishna Dixit then apprised the Manager of interim order of this Court. There is voluminous documents on record to suggest that it was Sri Dixit who had functioned as Principal, at all point of time and not Sri Ajai Pratap Rai, filed along with rejoinder affidavit, copy of which has been served on Sri R.M. Vishwakarma, Advocate on 04.09.2003. On 20.06.2003, Additional Director of Education, Basic gave categorical direction for not ensuring salary to Sri Ajai Pratap Rai, but ignoring the same it appears salary has been ensured to Sri Ajai Pratap Rai."

18. In the aforesaid factual matrix, as the finding of fact has been recorded by the learned Single Judge that the appellant had not worked and the said finding seems to be correct otherwise there was no occasion for the Manager of the institution to ask Mr. Sri Krishna Dixit on 26.05.2005 to hand over the charge to the appellant and there was no need to pass an order by the Additional Director of Education on 20.06.2003 for ensuring that the appellant does not get the salary. The salary has been paid to him definitely in violation thereof.

19. Recovery of the salary received by the appellant at such a belated stage is admittedly very harsh and the Court must be alive of the existing circumstances that such a refund may cause great hardship to him but in view of the fact that we have already reached the conclusion that he was not even eligible to make an application for want of experience and there was no occasion for making the appointment of Head Master after upgradation of the Junior High School to High School and subsequently Intermediate, the entire proceedings had been nothing but fraud upon the Statute. In such circumstances, recovery of the salary paid to him cannot be held to be unjustified.

20. In sum and substance, we are of the view that after upgradation of an institution from Junior High School to High School and then to Intermediate, the lower section of the institution, i.e. Junior High School looses its existence and merges into the higher section and in that eventuality, the question of making the appointment of Head Master for the Junior High School, a Principal for the High School and another Principal to run the Intermediate classes would lead to complete chaotic situation and absurdity. Thus, the appointment on the post of Head Master could not be made. The appellant did not possess the eligibility, i.e. experience as required under the law in making an application to the said post and had illegally been appointed. Further, the serious illegality/irregularity in advertising the vacancy existed and the possibility of committing fraud cannot be ruled out. As the appointment of the appellant had been made in total violation of law and without possessing the eligibility, the recovery of salary received by him in contravention of the order passed by the Statutory Authority does not warrant any interference.

21. In view of the above, the appeal is misconceived and accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.2006

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 24458 of 1989

Ram Rama Pal ...Petitioner
Versus
District Inspector of Schools, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava
Sri M.B. Saxena
Dr. Y.K. Srivastava

Counsel for the Respondents:
Sri Tribeni Prasad
S.C.

U.P. High School and Intermediate College (Payment of Salaries and Teachers & other Employees) AC 1971-Section-3-Payment of Salary-petitioner appointed by Principal as class 4th employee-appointment on substantive vacancy-payment of salary denied by D.I.O.S.-On grounds firstly no approval secondly the said post ought to have fulfilled by compassionate appointment-held-for class 4th employee the Head of Institution is the appointing authority-approval of D.I.O.S. not required under law-when employee died in the 1989, No existences of Regulation 101-107 inserted vide notification dated 2.2.95-entitiled for salary from the date of appointment with all consequential benefits.

Held: Para 8

Thus at the time when the petitioner was appointed in the year 1989 there was no Regulation such as Regulation 101 providing for obtaining prior approval of the DIOS to the appointments of class IV employees at the institution. This aspect of the matter was considered by the Division Bench of this Court in case of *Om Prakash Vs. DIOS, Budaun [1982 UPLBEC 232]* and it was clearly held that the appointment of class IV employees i.e. of Chaukidar made by the Principal of the institution requires no approval of the DIOS as there is no provisions to this effect and, therefore, such appointees are entitled for salary. The aforesaid decision has duly been followed by the another decision of this Court in case of *Mool Chandra Maurya vs DIOS, Jaunpur [1991 (1) UPLBEC 50].* Therefore, no approval by the DIOS was necessary to the petitioner's appointment.

Case law discussed:
1982 UPLBEC-232
1991 (1) UPLBEC-50

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

1. Heard Sri M.B. Saxena, learned counsel for the petitioner and learned Standing Counsel for the respondent No.2.

2. The petitioner was appointed as peon in Ishwar Sharan Intermediate College, Allahabad. The appointment letter was issued by the Principal (respondent No.2) on 17.5.1989 (Annexure 1 to the writ petition). The petitioner joined his duties in pursuance of the said appointment letter on 18.5.1989. The said appointment of the petitioner is said to be against a clear substantive vacancy. The DIOS vide letter dated 4.7.1989 raised certain objections against the aforesaid appointment of the petitioner. The objections so raised by the DIOS were duly replied by the Principal and proper clarification was given. However, the DIOS insisted that the post be offered to one Shiv Lochan the dependent of an employee of K.P. Inter College who had died-in-harness. Accordingly, the salary bills of the petitioner submitted by the college along with the other staff members were not cleared and no payment of salary was made to the petitioner.

3. In the above background the petitioner filed the present writ petition commanding the DIOS to pay salary to the petitioner from the date of his appointment i.e. 17.5.1989. The Hon'ble Court vide interim order dated 20.3.1991 directed the DIOS to pay the salary to the petitioner in accordance with law subject to the final decision of the writ petition. Accordingly the petitioner started receiving salary.

4. The petitioner in the writ petition has also contended that the objection on which his salary was withheld by the DIOS was not tenable and had ceased to

exist when the petitioner was appointed. The dependent of Khandan Lal who died-in-harness while in service in K.P. Intermediate College i.e. Shive Lochan had already been appointed in K.P. Intermediate College itself on 12.2.1987 and his appointment had also been approved by the DIOS vide letter dated 7.2.1987. He had even joined his duties. The petitioner further contents that the time of his appointment the provisions of Regulation 101-107 of the Regulations were not in existence. It has also been contended there was no provision under the U.P. Intermediate Education Act or the regulations framed therein for seeking any formal approval of the DIOS to the appointment of class IV employees at the relevant time.

5. Learned Standing counsel has placed reliance upon Paragraphs 3, 6 and 9 of the counter affidavit filed on behalf of the DIOS by Sri H. S. Dubey, Assistant Supervisor in the office of DIOS, Allahabad. It has been stated therein that the petitioner was appointed by the resolution of the Committee of Management dated 12.5.1989 and since the appointing authority of the class IV employee is the principal of the college, the resolution of the Committee of Management is without jurisdiction and, therefore, the petitioner cannot be said to have been validly appointed. No other defence has been taken in the counter affidavit.

6. It is admitted on record that the appointment of the petitioner dated 17.5.1989 has been made by the principal of the college and not by the committee of Management. This appointment has not been disapproved by any specific order of the DIOS. The petitioner has been appointed by the Principal and, therefore, even if the Committee of Management has passed a resolution in support thereof it would not affect the appointment of the petitioner. Therefore, the defence taken by the DIOS in the counter affidavit has no substance and is not acceptable.

7. The only objection taken to the petitioner's appointment was in relation to the appointment of Sri Shiv Lochan on compassionate ground. The said Shiv Lochan had already been appointed in the K.P. Intermediate College itself where his father was an employee. This fact has not been disputed in the counter affidavit. Therefore, the said ground of objection had ceased to exist and as such the DIOS was not justified in withholding the salary of the petitioner on this ground.

8. It is not the case of the respondents that the appointment of the petitioner was not against any substantive sanctioned post or was in excess of the sanctioned posts. It is also not their case that the procedure prescribed for the appointment was not followed. Now the only question which remains to be seen is as to whether any formal approval from the DIOS to the appointment of the petitioner, who was appointed as a class IV employee was necessary under the relevant provisions. Learned Standing counsel has placed reliance upon Regulation 101 under Chapter III of the Regulations framed under the Act. Regulations 101 to 107 which were inserted w.e.f 28.8.1992 vide Government notification No.400/15-7-2(1)/90 dated 30.7.1992 and Regulations 101 and 103 to 107 have been substituted vide notification No.300/15-7-2(1)/90 dated 2.2.1995. Thus at the time when the petitioner was appointed in the year 1989

there was no Regulation such as Regulation 101 providing for obtaining prior approval of the DIOS to the appointments of class IV employees at the institution. This aspect of the matter was considered by the Division Bench of this Court in case of ***Om Prakash Vs. DIOS, Budaun [1982 UPLBEC 232]*** and it was clearly held that the appointment of class IV employees i.e. of Chaukidar made by the Principal of the institution requires no approval of the DIOS as there is no provisions to this effect and, therefore, such appointees are entitled for salary. The aforesaid decision has duly been followed by the another decision of this Court in case of ***Mool Chandra Maurya vs DIOS, Jaunpur [1991 (1) UPLBEC 50].*** Therefore, no approval by the DIOS was necessary to the petitioner's appointment.

9. Apart from the above the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other employees) Act 1971, which has been enforced w.e.f 1st August 1971 vide Section 3 of the said Act provides that the salary of a teacher or other employee of an institution after 31st day of March 1971 shall be paid to him on monthly basis by the office of DIOS on submission of bills by the management of recognized institution. In view of the above it is a primary responsibility of the DIOS to pay salary to the petitioner when his appointment is not in any way unlawful.

10. In view of the above, the writ petition is allowed and the District Inspector of School, Allahabad (respondent No.1) is directed to make payment of salary to the petitioner w.e.f the date of his appointment which happens to be 17.5.1989 with all consequential benefits. The salary received by the petitioner in pursuance of the interim order of the High Court shall duly adjusted.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2007

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Second Appeal No. 108 of 2007

Sri Atul Kumar Jain ...Plaintiff-Appellant
Versus
Cantonment Board, Meerut Cantt.
...Defendant/Opp.Party

Counsel for the Appellant:
Sri Siddhartha

Counsel for the Opposite Party:

(A) Cantonments Act 1924-Section 185-Notice-before demolition of unauthorized construction-Notice served upon the wife and not upon appellant-held-sufficient-construction erected by plaintiff and his wife-No legal obligation of separate service.

Held: Para 5

In the allegedly unauthorised constructions erected by the plaintiff his wife is also one of the occupiers and if the notice has been served upon her that notice can rightly be treated as sufficient service and no legal objection in respect thereto is entertainable at all. Therefore, the findings recorded by the court below with regard to the service of the notice as sufficient, are wholly justified and do not require any interference in this second appeal.

(B) Specific Relief Act-Section 41 (h)-maintainability of suit for injunction-order of demolition passed by the Board-

under section 185-Appealabe under section 274-but not availed-held-suit not competent.

Held: Para 6

As regards the bar of suit under Section 41 (h) of the Specific Relief Act, it is quite obvious that since service of notice upon the appellant is held to be sufficient, he had every opportunity and occasion to file appeal as provided under Section 274 of the Cantonment Act and if he has not availed of the said remedy before coming to the Civil Court for the relief of permanent injunction, the suit cannot be held to be competent for the grant of such relief. The findings recorded in this regard by the courts below are also wholly justified.

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

Heard the learned counsel for the appellant.

1. The plaintiff-appellant challenged the order passed by the Cantonment Board under Section 256 of the Cantonments Act 1924 (hereinafter called as the Act) stating that no notice as required under Section 185 of the said Act was ever served upon him and the direction for demolition of the building erected by him is wholly illegal and uncalled for, therefore, the prayer for the relief of permanent injunction.

2. This suit was contested from the side of the Cantonment Board advancing the pleadings that the notice under Section 185 of the Act was duly served upon the wife of the plaintiff Smt. Babita Jain and when no compliance of the said notice was made nor any appeal was filed as provided under Section 274 of the Act, the orders under Section 256 of the Act were passed. The contention of the plaint regarding no service of the notice was specifically refuted by the respondent-defendant. It has also been pleaded that the suit was incompetent and barred under section 41 of the Specific Relief Act and the alternative remedy of appeal as provided under Section 274 of the Act was not availed.

3. The courts below recording concurrent findings have held that the service of notice upon the wife of the plaintiff-appellant was sufficient and she had received the same and in its acknowledgement had put her signatures on the counter foil of the said notice. The courts below also found that the suit was not competent as the remedy of appeal provided under Section 274 of the Act was not availed of. Accordingly, the trial court dismissed the suit and plaintiff's appeal before the lower appellate court was also dismissed.

4. The learned counsel appearing for the appellant submits that since the service of the notice as claimed by the defendant in its pleading is not in the manner as provided under Section 254 of the Cantonment act there could not be a legal presumption as to the said alleged service by the court. It is submitted that under sub-section (1) of Section 254 of the Act if the addressee of the notice is not found at the place the notice should be served by giving or tendering the same to any adult male member or servant of the family and since the wife of the appellant is not a male member of the family, the delivery of the notice made to her should not be treated as sufficient service. The learned counsel has further submitted that since the notice under Section 185 of the Act was not served upon the plaintiff-appellant, occasion for filing the appeal as

provided under Section 274 of the Act did not arise and the suit as such cannot be said to be barred by Section 41 of the Specific Relief Act.

5. On perusal of the judgements of the courts below and other documents filed with the paper-book it is found that the specific plea in the defence taken by the respondent Cantonment Board is that the service of the notice under Section 185 of the Act was done upon the wife of the appellant and in an acknowledgement to that she appended her signature on the counter foil. This plea has been duly substantiated and proved in the statement of the defendant's witness who filed his affidavit and specifically stated that the notice was delivered at the residence to the plaintiff's wife, who was also residing and occupying the same building having unauthorised construction. This witness of the defendant has also been subjected to through cross-examination by the plaintiff's counsel, but no challenge at any place, even in the least, has been made regarding the fact deposed by the witness relating to the service of the notice upon plaintiff's wife. There is no suggestion to this witness from the side of the plaintiff that the notice was not taken at the address given and that it was not handed-over to plaintiff's wife. Sub-section (2) of Section 254 of the Cantonment Act provides that the notice can be also served by giving or tendering the same upon one of the occupiers also if there are more than one. In the allegedly unauthorised constructions erected by the plaintiff his wife is also one of the occupiers and if the notice has been served upon her that notice can rightly be treated as sufficient service and no legal objection in respect thereto is entertainable at all. Therefore, the findings recorded by the court below with regard to the service of the notice as sufficient, are wholly justified and do not require any interference in this second appeal.

6. As regards the bar of suit under Section 41 (h) of the Specific Relief Act, it is quite obvious that since service of notice upon the appellant is held to be sufficient, he had every opportunity and occasion to file appeal as provided under Section 274 of the Cantonment Act and if he has not availed of the said remedy before coming to the Civil Court for the relief of permanent injunction, the suit cannot be held to be competent for the grant of such relief. The findings recorded in this regard by the courts below are also wholly justified.

7. In the result, the appeal appears to be without substance and merits and it accordingly fails and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2006

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

Civil Misc. Writ Petition No.27313 of 1993

Sardar Kulwant Singh ...Petitioner
Versus
The VIth Additional District Judge, Saharanpur and others ...Respondents

Counsel for the Petitioner:
Sri R.S.D. Misra
Sri Ravi Kiran Jain

Counsel for the Respondents:
Sri Atul Dayal
Sri S.N. Misra

U.P. Urban Building (Regulation of letting and Rent) Control Act-1972-Section 21 (1)-Release application-bonafide need to establish chamber of the son of land lord-an practicing advocate in taxation side-allowed by the prescribed authority-rejected by the Appellate court-held- appellate court clearly misconstrued the meaning and import of bonafide need-utterly erroneous in law.

Held: Para 11

Accordingly I hold that the finding of the appellate court that the need of the landlord was not bonafide is utterly erroneous in law. The facts found by the Appellate Court clearly proved the bonafide need.

Case law discussed:

AIR 2006 SC-780
AIR 2003 SC-532
AIR 1977 SC-59
AIR 2000 SC-656
AIR 1998 SC-2696
AIR 1998 SC-3146
AIR 2002 SC-108
AIR 2003 2713
AIR 2002 SC-200

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

1. Heard learned Counsel for the parties.

2. This is landlord's writ petition arising out of eviction/release proceeding initiated by him against tenant-respondent no.2 District Cooperative Development Federation Limited, Saharanpur on the ground of bonafide need under section 21 of U.P. Act No. 13 of 1972 in the form of P.A. Case No. 59 of 1980. Accommodation in dispute is a shop rent of which is Rs.100/- per month. In the release application the need set up was for establishing the chamber of landlord's son, who was practicing on taxation aside. The shop is situate at Railway Road, Saharanpur. On the backside of the shop in dispute, at a short distance therefrom house of landlord is situate which is stated to be quite big. However, according to the learned counsel for the landlord the passage from the main road i.e. Railway Road to the landlord's house is narrow and congested. Tenant has got another building in its tenancy occupation on the same road i.e. Railway Road on which accommodation in dispute is situate. However, according to the tenant the other building is situate on first or second floor and is used as residence by its employees. Tenant further asserted that in the accommodation in dispute it was having its retail out let. Prescribed Authority/IInd Additional Munsif, Saharanpur allowed the release application on 1.1.1990. Against the said order tenant respondent no. 2 filed R.C. Appeal No. 919 of 1990. VI A.D.J. Saharanpur through judgment and order dated 6.5.1993 allowed the appeal and set aside the order of the Prescribed Authority dated 1.1.1990. This writ petition is directed against the aforesaid judgment of the Appellate Court.

3. Earlier also release application on different grounds had been filed in the year 1977 which was rejected and appeal against the said order was also dismissed.

4. The tenant mainly pleaded that landlord had several businesses in which he could accommodate his son and further he had several other properties to fulfill his alleged need. Initially tenant also denied that landlord's son was practicing as advocate at taxation side. However, later on the said stand was given up by the tenant.

5. Supreme Court in **Sushila vs.A.D.J.** (A.I.R. 2006 S.C. 780) and **A. Kumar Vs. Mushtaqeem** (A.I.R. 2003 S.C. 532) has held that no landlord or any adult member of his family can be compelled to participate in family business and every adult member of the landlord's family particularly male members have got right to establish independent business. Absolutely no fault can be found if the son of a businessman opts to practice as an Advocate.

6. In respect of other properties the explanation of the landlord was that firstly, they were not in his exclusive ownership possession and he was only co-sharer in the said properties and secondly, the said properties were being used for other businesses by the landlord.

7. It was vehemently argued on behalf of the tenant that shop, which was vacated by Milap Machines was available to the landlord to establish the Chamber of his advocate son. In this regard much reliance was placed upon an affidavit of real brother of the landlord filed in another release case, filed by him against his tenant Mayer Machinery Mart, copy of which affidavit has been annexed as Annexure '11' to the counter affidavit. In the said affidavit it was stated that the shop in which Milap Machinery Mart was being run, had fallen into the share of Kulwant Singh, petitioner in the instant writ petition and one Shrimati Gurmeet Kaur, and it was in their possession. According to the landlord the said shop was being used for business purpose. In para 27 of the writ petition it was clearly stated that the business of Milap Machinery Mart had come to an end but another business had been started in the said shop. In para 38 of the counter affidavit, the said assertion was not denied. The only thing which was stated was that the said property was in actual occupation of the petitioner as all the partners had left the business and the premises was in exclusive possession of the petitioner.

8. A landlord can not be compelled to curtail his business in order to accommodate his son so that tenant may not be disturbed.

As far as the residential house of the landlord is concerned, the passage leading from the main road to the said house was stated to be narrow and crowded. Moreover, the office/chamber of an advocate if situated on a main road is certainly of great advantage in comparison to office in a narrow lane not having proper access. One may like it or not but the fact is that profession of advocacy has also become commercial of late, particularly on taxation side.

9. The main point on which the Appellate Court reversed the judgment of the Prescribed Authority and found the need of the landlord's son satisfied is that the said son was having his office in a small room of 7 feet x 9 feet at another place. According to the landlord the said office was on licence and according to the tenant it was on rent. Appellate Court accepted the case of the tenant. An alternative accommodation available to landlord either as a licensee or as a tenant is no ground to reject the release application vide **Mrs. M.R. Kshirsagar vs. M/S Traders and Agencies** (A.I.R. 1997 S.C. 59) and **G.K. Devi vs. Ghanshyam Das** (A.I.R. 2000 S.C. 656). Moreover, a room of 7 feet can not be said to be sufficient for advocates

chamber. The fact that the son of the landlord was having his chamber in another's accommodation either as licensee or as tenant fully proved that the need for establishing chamber was quite bonafide and landlord was not having any suitable accommodation for the said purpose. It is important to note that tenant himself asserted with great force that the son of the landlord was having his chamber in another accommodation of which he was tenant. This clearly amounted to admission of the facts that landlord's son was actually practising as an advocate and was not having any accommodation of his own to establish Chamber and the chamber was being run in a very small accommodation.

10. The Supreme Court in **V. Radhakrishnan vs. S.N.L.Mudaliar** (A.I.R. 1998 S.C. 2696) has held that if the release application is filed for the need of the son, then the property in occupation and use of the land lord is not relevant and can not be taken in to consideration. Similarly in **A.G. Nambiar vs. K. Raghavan** (A.I.R. 1998 S.C. 3146) it has been held that the other alternative accommodation available with the landlord which is not suitable for the business proposed to be established by the landlord is not relevant and can not be taken in to consideration.

In **Chandrika Prasad (Dead) through L.Rs. and others vs. U.K. Verma and others** (A.I.R. 2002 S.C. 108) the Supreme Court has held that a less suitable accommodation available to the landlord is no ground to reject the release application in respect of tenanted accommodation which is more suitable. In the said case the landlord had sought release of the tenanted commercial accommodation, which was situate at main road for setting up the clinic of his doctor son in-law. The tenant pointed out that the father of the doctor was having a vacant accommodation in which clinic. On the same principle landlord can not be compelled to establish the chamber of his advocate son in the residential house which is away from the main road and connected with narrow congested passage with the main road.

11. Accordingly I hold that the finding of the appellate court that the need of the landlord was not bonafide is utterly erroneous in law. The facts found by the Appellate Court clearly proved the bonafide need. The Appellate Court completely mis-construed the true meaning and import of bonafide need. The Supreme Court in Shenoy's case reported in **Siddalingama vs. M. Shenoy** (A.I.R. 2001 S.C. 2896) has held that the Rent Control Acts are basically meant for the benefit of the tenant and provision of release on the ground of bonafide need is the only provision which treats the landlord with some sympathy.

12. As far the question of comparative hardship is concerned, tenant himself pleaded that its business was of quite a large scale. It could, therefore, purchase or take on rent other accommodation. Tenant did not even make any effort in the direction. Nothing was brought on record in that regard by the tenant. The Supreme Court in **B.C.Butada vs. G.R.Mundada** (A.I.R. 2003 S.C.2713) has held that after filing of release application it is utmost essential for the tenant to make efforts either to purchase or take on rent other accommodation otherwise question of

hardship maybe decided against the tenant.

13. The Appellate Court has given a very strange finding in this regard. Appellate Court held that for 'the landlord, getting possession of the property in dispute was merely a matter of convenience, while the tenant actually needed the same. Tenant is having a very good business for several decades. Landlord's son has got no proper accommodation for establishing his Chamber. The balance of hardship therefore tilts heavily in favour of the landlord.

14. The Supreme Court in **G.C. Kapoor vs. N.K. Bhasin** (A.I.R. 2002 S.C, 200) reversed the concurrent findings of all the three courts i.e. the Prescribed Authority, Appellate Court/District Judge and the High Court on the question of bonafide need and comparative hardship and out rightly allowed the release application, of the landlord holding that the findings of all the three courts below were erroneous in law.

15. Accordingly writ petition is allowed. Judgment and order passed by the Appellate Court is set aside and judgment and order passed by the Prescribed Authority is restored.

Tenant respondent is granted six months time to vacate provided that:

Within one month from today it files an undertaking before, the Prescribed Authority to the effect that on or before the expiry of period of six months it will willingly vacate and handover possession of the accommodation in dispute to the petitioner-landlord.

(ii) For this period of six months which has been granted to the tenant to vacate it is required to pay Rs.12,000/- (at the rate of Rs.2000/-per month) as damages for use and occupation. This amount shall also be deposited within one month before the Prescribed Authority and shall immediately be paid to the petitioner-landlord.

In case of default in compliance wit~ either of these conditions, tenant respondent shall be evicted after one month through process of Court.

16. It is further directed· that in case undertaking is not filed or Rs.12000/- are not deposited within one month then tenant respondent shall be liable to pay damages at the rate of Rs.3000/- per month since after one month till the date of actual vacation.

17. Similarly, if after filing the aforesaid undertaking and depositing Rs.l2,000/- the accommodation in dispute is not vacated after six months then damages for use and occupation shall be payable at the rate of Rs.3000/- per month since after six months till actual vacation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2006

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No.40429 of 1998

Munendra Pal Singh Chauhan ...Petitioner
Versus
The Chairman and Managing Director(C.M.D.), U.P. Rajya Vidyut Utpadan Nigam Ltd. & others ...Respondents

Counsel for the Petitioner:
Sri G.C. Gehrana
Sri Amrit Lal Singh
Sri Manoj Kumar
Sri Pt. Lal Chandra Pandey

Counsel for the Respondents:
Sri S.K. Mishra

Indian Evidence Act, 1808-Section-108-presumption of Death a person not known for 7 years-legal death-presumption-but there can not be any presumption about the date of death-claim for compassionate appointment-prior two days of retirement of missing employee-can not be treated died in harness-dependent of such employee can not be appointed on compassionate ground.

Held: Para 11

Taking into consideration the entire stock of situation this Court is of the view that the petitioner has not been able to prove the actual death of his father as 29th of August, 1990 or the fact that his father died in harness. Secondly, even if accepting the case of the petitioner for the sake of argument, the petitioner is not entitled for any relief as very avow object of the compassionate appointment runs counter to the claim of the petitioner: It is acknowledged position of law that compassionate appointment cannot: be new source of recruitment otherwise, as pointed out by the Apex Court in State of Hariyana and others Vs. Rana Devi and others AIR 1966 Supreme Court 2445, such claim of the petitioner cannot be upheld on the touch stone of Articles 14 or 16 of the Constitution of India in as much as the claim for compassionate appointment is considered, as reasonable or permissible on the basis of sudden crisis occurred in the family of such employee, who has served the State and dies while in service.

Case law discussed:

AIR 1926 PC-9
J.T. 2002 (1) SC-11
1994 AIR SCW-2309
AIR 2004 SC-4155
2006 (5) ALJ-489
AIR 1966 SC-2445

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

1. Raising a short controversy the present writ petition has been filed principally on the allegation that the petitioner's father Mahendra Pal Singh Chauhan was a senior operator in 'A' Power Station, Harduaganj, U.P. State Electricity Board and was a permanent employee who left the house for attending duty on 28th of August, 1990 and did not return thereafter till date. The petitioner claimed that a civil death of his father should be presumed and as his father died during the service, the petitioner is entitled for appointment under the Dying in Harness Rules. The said claim having been rejected by the respondents by the impugned order dated 17th of November, 1998, the present writ petition has been filed for quashing the impugned order dated November 17, 1998 (Annexure -2 to the writ petition) and a writ of Mandamus commanding the respondents to consider the appointment of the petitioner on the post of routine grade clerk under the Dying in Harness Rules forthwith in place of his father and prayed for all consequential service benefits in accordance with law.

2. The fact that the father of the petitioner was in the permanent service of the respondents, has not been disputed in the counter affidavit. The claim for compassionate appointment has been denied on the ground that the father of the petitioner was reported to be missing two days prior to his date of superannuation

and he could not be traced out, but in absence of any cogent material about the date of death or place of death, it would not be proper to treat that he died during the service. By extending the benefit of Dying in Harness Rules, it will not be proper to offer the appointment to the petitioner. The due date for the retirement of the petitioner's father was 31st of August, 1990 who after availing medical leave w.e.f. 22.8.1990 to 27.8.1990 attended the duty in the last night shift (from 22 hours to 6 hours) on 28/29th of August, 1990 in "D" group at Harduaganj "A" Thermal Plant Station. After due date of retirement, the mother of the petitioner has been paid G.P.F. amounting to Rs.23,488-78, encashment balance leave Rs.8,348.67 and arrears of pension amounting to Rs.1,32,633-69. Besides, the family pension is being paid every month.

3. The sole argument raised by the learned counsel for the petitioner, in the present writ petition is that indisputably the father of the petitioner was in service on 28th of August, 1990, since when he is missing. A reference has been made to a circular dated August 16, 1996 issued by the Mukhya Karmik Adhikari wherein, according to the learned counsel for the petitioner it has been provided that in case of such employees whose whereabouts are not known and the presumption of their civil death should be drawn, the payment of pension and other pensionary benefits and the balance amount has been provided for. In the said circular it has been clarified that in the case of such employees whose whereabouts are not known, the compassionate appointment shall not be made within a period of one year. The facility of compassionate appointment shall be admissible as per Section 108 of Indian Evidence Act when the competent authority has treated such employee as dead. In contra, the learned counsel for the Department supported the impugned order and submitted that the father of the petitioner has been found missing only two days prior to the date of his superannuation. The petitioner cannot claim compassionate appointment as only two days were left and the object of giving compassionate appointment is to give support to such families to tide over the sudden crisis.

4. I have given careful consideration to the respective submissions of the learned counsel for the parties. Before considering the nature of the compassionate appointment, it is desirable to notice the law dealing with when presumption about the death of a person from the fact that a person has not be heard of for 7 years to be drawn. The Privy Council in ***Lal Chand Marwari Vs. Mahant Ram Rup Giri and another A.I.R 1926 Privy Council 9*** held that there is no presumption, under law as to when a person has died, if such person is not heard of for 7 years. There is only one presumption, and that is the person was no longer alive. There is no presumption at all as to when such person has died, like any fact, is a matter to proof. Their Lordships quoted with approval law of England and held that there is no difference both in India and in England on this issue. Their Lordships have quoted following passage:

"If a person has not been heard of for 7 years, there is a presumption of law that he is dead. But at what time within what period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any

particular time within 7 years lies upon the person who claims a right to the establishment of which that fact is essential."

5. The aforesaid judgment of the Privy Council has been approved by the Apex Court in ***Darshan Sinah and others Vs. Gujar Singh JT 2002 (1 J S.C. 11***. A suit was filed claiming property of Jagjeet Singh who was reported to be not being 'heard for more than 7 years. The High Court considered Jagjeet Singh to be "dead only on the date on which the present suit was filed." In this fact situation the Supreme Court held that succession to the estate of Jagjeet Singh would open only on the death of Jagjeet Singh and as the plaintiff could not prove the date of death of Jagjeet Singh therefore his succession to the estate did not open on the date of filing of the suit. In para 5 of the report, the Apex Court noticed the decision of the Privy Council of Lal Chand Marwari Vs. Mohan Ram Rup Giri (supra).

6. Thus from the above discussion it boils down to this that the burden to prove the actual date of death, lies upon the person who propounds the death of such person. Under Sections 107 and 108 of the Evidence Act only this much presumption can be drawn that such a person is no longer alive but there is no presumption about the actual date of death of such person. In view of this legal proposition, the argument of the learned counsel for the petitioner that the father of the petitioner has died on 29th of August 1990 while in service cannot be accepted in absence of any proof about his actual death on that date. Reliance has been placed upon a judgment of Civil Judge in O.S. suit No.588 of 1997 Smt. Murti Devi Vs. Munendra Singh Chauhan and another decided on 17.1.1998. The Civil Judge has held only this much therein, that a presumption may be drawn about the death of Mahendra Pal Singh as there is no evidence that he is alive, under Section 108 of the Indian Evidence Act. Even in the said judgment no finding has been recorded about the actual date of death of Shri Mahendra Pal Singh Chauhan.

7. In view of the above discussion, the argument that Shri Mahendra Pal Singh Chauhan, the father of the petitioner has expired on 29th of August, 1991 or while in service, is not tenable in law and is therefore rejected. There is no material on record to show nor the petitioner has made any attempt by producing evidence of unimpeachable character to prove that his father actually expired on 29th of August, 1990 or in harness.

8. There is another aspect of the case also. The entire thrust of the argument is that as the father of the petitioner has expired on 29th of August, 1990 while in service, therefore, the petitioner is entitled for compassionate appointment. The aforesaid argument has been made ignoring the very concept of compassionate appointment.

9. The object of compassionate appointment is not to give a member of deceased family a post. Mere death of an employee in harness does not entitle his family to such source of livelihood. The employer or the government as the case may be, has to examine the financial condition of the family of the deceased and compassionate appointment shall be offered only when the employers come to

the conclusion that the family will not be able to meet the crisis on account of the sudden death of the employee, then a job is to be offered to the eligible member of the family **(See Umesh Kumar Nagpal Vs. State of Hariyana and others 1994 AIR SCW 2309).**

Punjab National Bank and others Vs. Ashwani Kumar Taneja AIR 2004 S.C. 4155 is an authority for the proposition that the appointment on compassionate ground is not source of recruitment but merely an exception to the requirement of making appointment on open invitations of applications on merits. Basic intention is that on the death of employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over the sudden financial crisis. In ***Union Bank of India Vs. M. To Latheesh 2006 AIR SCW 4626***, the Apex Court has reiterated its above view.

10. In ***M/s. Indian Drugs and Pharmaceuticals Vs. Devki Devi and others 2006 (5) ALJ 489***, the Apex Court has considered its other earlier decisions on the point and reached to the same conclusion that compassionate appointment is given out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both the ends meet, provisions are made for giving to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that the provision for grant of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible to seek appointment against the post which would have been available, but for the provisions enabling appointment being made on compassionate grounds of the dependants of the deceased employee, it has been held that appointment on the compassionate ground is not another source of recruitment.

11. Coming to the facts of the present case and the law as discussed above, it is clear that in any view of the matter it is not a case of sudden crisis. Indisputably, the father of the petitioner was due to retire on 31st of August, 1990. Two days prior to the date of superannuation, according to the petitioner, he has been found missing. The father of the petitioner indisputably was going to retire on 31st of August, 1990 and as such even assuming for the sake of argument that he has not been actually heard of since 29th of August, 1990, the family has not suffered any sudden financial crisis to entitle the petitioner to lay his claim for compassionate appointment. As pointed out by the Apex Court that the very object of granting compassionate appointment is to provide financial support to the family of an employee on account of sudden death. By no stretch of imagination, in the present case it can be said that it is a case of sudden financial crisis to the family even if it is assumed that the father of the petitioner is no longer alive. Taking into consideration the entire stock of situation this Court is of the view that the petitioner has not been able to prove the actual death of his father as 29th of August, 1990 or the fact that his father died in harness. Secondly, even if accepting the case of the petitioner for the sake of argument, the petitioner is not entitled for any relief as very avow object of the compassionate

appointment runs counter to the claim of the petitioner: It is acknowledged position of law that compassionate appointment cannot: be new source of recruitment otherwise, as pointed out by the Apex Court in **State of Hariyana and others Vs. Rana Devi and others AIR 1966 Supreme Court 2445**, such claim of the petitioner cannot be upheld on the touch stone of Articles 14 or 16 of the Constitution of India in as much as the claim for compassionate appointment is considered, as reasonable or permissible on the basis of sudden crisis occurred in the family of such employee, who has served the State and dies while in service.

12. Reliance placed upon the circular dated August 16, 1996 (Annexure -4 to the writ petition) is misplaced one and has hardly any application to the facts of the present case. Only this much has been said in the said circular that the facility of compassionate appointment shall be admissible only when the competent authority treats the employee as dead, under Section 108 of the Indian Evidence Act.

13. In view of the above discussion, the writ petition lacks merit and is therefore dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.02.2007

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

Civil Misc. Writ Petition No. 47758 of 2005

Smt. Sheela Devi ...Petitioner
Versus
Managing Director & others ...Respondents

Counsel for the Petitioner:
Sri A.N. Srivastava

Counsel for the Respondents:
Sri Vivek Ratan

(A) Constitution of India, Art. 226-Compassionate appointment-husband of petitioner died in harness-within one month claimed appointment-non of the grounds for rejection of claim found in existence-time consumed in litigation-can not be treated as ground for rejection-held-entitled for appointment on compassionate ground.

Held: Para 12

Next it is urged that now since more than six years have expired and the family has managed to survive, thus, giving any relief at this point of time would defeat the object of lending a helping hand to tide over the sudden crises. Foremost, such a plea cannot be raised by the Bank because the widow had approached them within a month claiming compassionate appointment and the Bank rejected her claim and forced her to approach this Court earlier. Again it has rejected her claim which grounds have been held to be incorrect or misleading.

(B) Constitution of India-Art. 226-Writ Jurisdiction Practice of Procedure-direction for appointment-normally writ court should not issue such direction-but where the authorities found negligent-dispite of repeated direction failed to exercise their consideration- futile - direction shall not be issued-held-considering the entire facts and the circumstances in view of-law laid down by Division Bench of this Court-direction issued to issue letter of appointment within six weeks.

Held: Para 14

Normally, the Court is very loathe to grant a mandate itself for appointment

but as has been noted hereinabove, twice the Bank has raised the same bogey and misleading grounds to reject the claim of the widow. Since the Bank appears to have a closed mind on the issue and is harassing a young widow by forcing her to approach the Court time and again it would be against the interest of justice to remand the matter for decision afresh. Applying the ratio of a Division Bench of this Court rendered in the case of Dr. Sangeeta Srivastava Vs. University of Allahabad and others (2002) (3) U.P.L.B.E.C. 2502, which has been affirmed by the Apex Court, remand would be futile.

Case law discussed:
2002 (3) UPLBEC-2502

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

1. Heard counsel for the petitioner and Sri Vivek Ratan for the respondent-bank and perused the records of both the writ petitions.

2. This petition is directed against an order dated 3.5.2005 by which the claim for compassionate appointment has been rejected.

3. The husband of the petitioner was working as Clerk /Typist in the Union Bank of India and posted at Ballia. He died in harness on 22.3.1999 and the petitioner moved an application alongwith relevant documents seeking compassionate appointment on 10.4.1999. By an order dated 19.2.2000 the claim was rejected on the ground that the husband of the petitioner had not completed ten years of service in the respondent-bank and as such she was not entitled for compassionate appointment. This was subjected to challenge in writ petition no. 43349 of 2003 and after exchange of pleadings the said writ petition was allowed by a reasoned order on 3.3.2005 holding that under the scheme there was no such limitation and as such it remanded the matter to the respondent-bank to consider her claim afresh in view of the scheme dated 19.2.1997.

4. In pursuance thereof the said impugned order has been passed rejecting her claim on various grounds which we would presently examine.

5. When this petition was heard on 7.7.2005 it was directed to come up alongwith record of earlier writ petition which had been allowed on 3.3.2005.

6. Before examining the grounds on which the claim has been rejected, it would be appropriate to examine the background facts.

7. Admittedly, the deceased husband of the petitioner who joined the Bank in September, 1989 died in harness at the age of 33 years leaving behind his widow, the petitioner aged about 30 years and two sons and a daughter who were minors and students. The total terminal benefits payable at the time of death under the heads of Provident Fund, Gratuity, Insurance and Leave encashment amounted to Rs.3,02,640/- while the liability under various loans was Rs.2,13,800/- so the net payable amount was only Rs.88,840/- which according to the Bank itself could have earned interest of Rs.740/- only. In the order dated 19.2.2000 the Bank admits that the entire burden of the family has fallen on the shoulder of the petitioner as there is no other earning member in the family. The husband of the petitioner would have normally been in service till the year 2024 or 2026 depending on the retirement age.

8. In the aforesaid background, let us examine the ground on which the claim has been rejected.

9. In paragraph no. 9 of the impugned order the first ground taken for rejection is that *"the deceased employee had served the Bank for a very short period."* This very ground was repelled by this Court in its judgment dated 3.3.2005 passed in the earlier writ petition. The second ground of rejection is that "*family of the deceased employee received a terminal benefits amounting to Rs.3.02 lacs*". This is palpably false and misleading. The net amount allegedly paid to the petitioner was only Rs.88,840/- which admittedly could earn a monthly income of Rs.740/- only. The next ground given is that *"the present claim, after a lapse of six years from the death of the employee, defeats the very object of the scheme"*. This ground is also palpably false as it is the own case of the respondent Bank that after the death of her husband on 22.3.1999 the petitioner had applied within a month on 10.4.1999. Thereafter, the order goes on to recite that the claim of compassionate appointment is not a vested right but it holds that "*It is to be granted at its discretion only in deserving cases."*

10. As noted hereinabove out of three grounds given for rejecting the claim, two have been found to be false or misleading. Can a family of four, including three minor students survive on notional monthly income of Rs.740/-? The answer can only be a big no. No doubt, none can claim compassionate appointment as a matter of right but the Bank which is a Government of India Undertaking has to act in a fair manner. The scheme framed by it and so also recited in the impugned order reflects that the object of compassionate appointment is "*to enable the family to tide over the sudden crises*". But twice the Bank has rejected her claim firstly on non-existing ground and secondly on false or misleading grounds. She has been made to approach this Court second time which reflects that the Bank has a closed mind and does not want to abide by the scheme framed by itself. Being an instrumentality of the State, it has to justify deviation from its policy enshrined under the scheme. It is not their case that no compassionate appointment was given under the scheme to anyone.

11. However, the learned counsel appearing for the Bank contended that the petitioner had earlier approached this Court against the order dated 19.2.2000 after a delay of 3 ½ years and the Court did not consider the issue of laches and allowed the writ petition. Be it so, admittedly no appeal was filed against the judgment and order dated 3.3.2005 and this Court in coordinate jurisdiction cannot sit in appeal against the said judgment.

12. Next it is urged that now since more than six years have expired and the family has managed to survive, thus, giving any relief at this point of time would defeat the object of lending a helping hand to tide over the sudden crises. Foremost, such a plea cannot be raised by the Bank because the widow had approached them within a month claiming compassionate appointment and the Bank rejected her claim and forced her to approach this Court earlier. Again it has rejected her claim which grounds have been held to be incorrect or misleading.

13. Lastly it is urged that now under a new scheme she is not entitled to appointment but only some monetary benefit. This argument also cannot be accepted because vide the earlier judgment dated 3.3.2005, which has become final, the claim has to be considered under the scheme dated 19.2.1997.

No other point has been urged.

14. Normally, the Court is very loathe to grant a mandate itself for appointment but as has been noted hereinabove, twice the Bank has raised the same bogey and misleading grounds to reject the claim of the widow. Since the Bank appears to have a closed mind on the issue and is harassing a young widow by forcing her to approach the Court time and again it would be against the interest of justice to remand the matter for decision afresh. Applying the ratio of a Division Bench of this Court rendered in the case of **Dr. Sangeeta Srivastava Vs. University of Allahabad and others (2002) (3) U.P.L.B.E.C. 2502**, which has been affirmed by the Apex Court, remand would be futile.

15. For the reasons above, this petition succeeds and is allowed and the impugned order dated 3.5.2005 is hereby quashed and the respondent bank is directed to grant compassionate appointment to the petitioner expeditiously, preferably within a period of six weeks from the date of submission of a certified copy of this order. Petitioner would be entitled to her costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 50537 of 2005

Indra Mohan Dikshit ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Aditya Kumar Singh

Counsel for the Respondents:
Sri D.K. Srivastava
S.C.

U.P. Government Private aided Technical Education Institutions Regulations 1996-Regulation 14 (6)-Cancellation of entire selection-post of Principal-name of two senior most lecturer including the petitioner and the respondent no. 5 send-respondent No. 5 stood first in merit list-director refused to appoint on the ground of overage-when the vacancy advertised-held-the petitioner being at serial No. 2 automatically entitled to be placed at serial No. 1-when there is no allegation of mal-practice-No illegality in recommendation by selection committee shown-entire selection can not be cancelled.

Held: Para 5

Therefore, the second recommended person by the selection committee in the panel of selected candidates was required to be considered. In case we uphold the order of Director then it would result in re-advertisement of the vacancy and unnecessary expenses would be involved in making the advertisement which would further delay the appointment of a regular principal.

Further, since Regulation 14(6) clearly states that the select list will contain the recommendation more than the number of vacancy, the intention of the Regulation making authority appears to be that there should be panel of names. If the intention was that only one name for the post of principal should be recommended then it would have been clearly provided in Regulation 14(6). The Regulation has to be interpreted in such a manner that it advances the purpose for which it had been framed. Therefore, we hold that panel of at least two names for the post of principal is required to be sent by the selection committee so that if the candidate at serial no.1 is found ineligible or he does not join then the second candidate could be offered appointment.

(Delivered by Hon'ble V.M. Sahai, J.)

1. The petitioner was appointed in February, 1980 as lecturer in Mechanical Engineering in Chandauli Polytechnic, Chandauli (in brief institution). The institution is receiving granted-in-aid from the State Government and the payment of salary to the principal and teaching staff is made from the government fund. The institution is governed by the provisions of U.P. Government Private Aided Technical Education Institutions Regulations, 1996 (in brief Regulations). The permanent principal of the institution retired on 30.6.1997. A substantive vacancy on the post of Principal came into existence. The petitioner was appointed as officiating principal of the institution from 11.11.1999 to 30.5.2003. The selection committee issued an advertisement on 15.2.2002 for selection for the post of principal. However, no selection proceedings could be held.

2. Another advertisement dated 20.5.2004 was issued for appointment of Principal in Chandauli Polytechnic, Chandauli. The petitioner along with six others applied in pursuance to the said advertisement. The selection committee prepared a panel and recommended the name of respondent no.5 at serial no.1 and that of petitioner at serial no.2 to the Director, Technical Education, U.P., Kanpur (in brief Director). The Director on 27.10.2004 held that the recommendation of selection committee with regard to Respondent No.5 Sri Radhey Shyam Singh could not be approved as the experience shown by him has not been properly verified by the selection committee. By another order dated 5.3.2005 the Director held that on the date of advertisement i.e. 20.5.2004 the respondent no.5 was aged about 52 years though the maximum age for the post of Principal was 50 years. Sri Radhey Shaym Singh was found to be over age. The selection committee had calculated the age of respondent no.5 from 15.2.2002, the date when the first advertisement was issued which was illegal, therefore, the appointment of respondent no.5 was not approved. The Director also quashed the selection process initiated by respondent no.4 and directed that a fresh advertisement be issued for selection on the post of Principal. In this writ petition the petitioner has challenged the order dated 5.3.2005 of the Director by which he has cancelled the entire selection proceedings for the post of principal and has directed for re-advertisement of the vacancy. The petitioner has prayed that he may be granted appointment on the post of principal in pursuance to the recommendations of the selection committee dated 5.10.2004.

3. We have heard Sri Ashok Khare, learned senior counsel assisted by Sri Aditya Kumar Singh, Advocate appearing for the petitioner and learned standing counsel appearing for respondents no.1 to 3. Sri D.K.Srivastava, Advocate has filed his vakalatnama on behalf of respondent no.5. He is not present though the matter has been taken up in the revised list and his name has also been printed in the cause list. Service of notice on respondent no.4 has been deemed to be sufficient by order dated 25.1.2006 under the Rules of the Court.

4. Sri Ashok Khare, learned counsel for the petitioner has urged that since a panel of two names was sent, as per Regulation 14(6) of the Regulations if the candidate recommended at serial no.1 was found to be ineligible then the second person recommended in the panel namely, the petitioner was entitled to be considered for appointment, but the Director has illegally set aside the entire selection and directed for fresh advertisement. The standing counsel has supported the impugned order relying on the counter affidavit filed by him.

Regulation 14(6) of the Regulations is extracted below:-

"**सरकार से सहायता प्राप्त उत्तर प्रदेश प्राविधिक शिक्षा संस्था विनियमावली,** 1996.

14(6) चयन समिति अभ्यर्थियों की उनकी प्रवीणता-क्रम में जैसा कि साक्षात्कार में प्रत्येक अभ्यर्थी को प्राप्त अंकों से प्रकट हो, एक सूची तैयार करेगी। यदि दो या अधिक अभ्यर्थी बराबर-बराबर अंक प्राप्त करें तो आयु में ज्येष्ठ अभ्यर्थी को सूची में उच्चतर स्थान में रखा जायेगा। सूची में नामों की संख्या, रिक्तियों की संख्या से अधिक किन्तु पच्चीस प्रतिशत से ज्यादा अधिक नहीं होगी।"

5. It is not disputed by the respondents that the select list was prepared in accordance with Regulation 14. In paragraphs 3 and 8 of the counter affidavit it has been stated that since there was only one vacancy for the post of principal, only one name was required to be recommended by the selection committee as sending of second name would be in excess of 25% of the vacancy as provided by Regulation 14(6). The last line of Regulation 14(6) is important. It provides that in the select list names will be recommended in excess of the vacancy, but it should not exceed more than 25%. Regulation 14(6) applies to the selection of both principal and teachers. In case of principals as there would always be only one vacancy and as per the aforesaid regulation names have to be recommended more than the number of vacancy as per the Regulations which would mean at least two names. The bar created by Regulations that the recommendation should not be made in excess of 25% of the vacancies, would apply, in our opinion, in case of teachers where more than one teachers are to be appointed, in such a case the panel of names should not be in excess of 25% of the vacancies. There is another reason, which has persuaded us to take the view that for the post of principal at least two names should be recommended as per Regulation 14(6). As seen in this case regular selection to the post of principal of the polytechnic has not been made for more than seven years. The selection committee has recommended two names. The first name was of respondent no.5 who had been found by the Director to be over age. Therefore, the second recommended person by the selection committee in the panel of selected candidates was required to be considered.

In case we uphold the order of Director then it would result in re-advertisement of the vacancy and unnecessary expenses would be involved in making the advertisement which would further delay the appointment of a regular principal. Further, since Regulation 14(6) clearly states that the select list will contain the recommendation more than the number of vacancy, the intention of the Regulation making authority appears to be that there should be panel of names. If the intention was that only one name for the post of principal should be recommended then it would have been clearly provided in Regulation 14(6). The Regulation has to be interpreted in such a manner that it advances the purpose for which it had been framed. Therefore, we hold that panel of at least two names for the post of principal is required to be sent by the selection committee so that if the candidate at serial no.1 is found ineligible or he does not join then the second candidate could be offered appointment.

6. From the perusal of records as well as the counter affidavit, we do not find that any finding has been recorded by the Director that the selection made by the selection committee in recommending the panel of names any illegality or mal-practice was committed by the selection committee. We are of the opinion that the Director was not justified in setting aside the entire selection process initiated by respondent no.4 and directing for fresh advertisement for appointment on the post of principal. The Director is required to consider the claim of the petitioner who was at serial no.2 in the panel for appointment on the post of principal, Chandauli Polytechnic, Chandauli as the candidate at serial no.1 in the panel had been found over age and ineligible for appointment.

7. In the result, this writ petition succeeds and is allowed. The order dated 5.3.2005 passed by respondent no.2 cancelling the selection process and directing for fresh advertisement, Annexure-6 to the writ petition, is quashed. A writ of mandamus is issued to the Director, Technical Education, U.P., Kanpur to consider the name of the petitioner for appointment on the post of Principal, Chandauli Polytechnic, Chandauli within a period of one month from the date a certified copy of this order is produced before Respondent No.2.

8. The parties shall bar their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.48466 of 2004

U.P. State Road Transport Corporation and others ...Petitioner
Versus
Kashi Nath and others ...Respondents

Counsel for the Petitioner:
Sri Samir Sharma
Sri Sheshadri Trivedi

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

Constitution of India, Art. 226- Termination order passed by the management on the ground workman produced forged and false caste

certificate of Scheduled Cast while belongs to Backward cast-labour court set-aside the termination order-for non compliance of provisions of section 6 N of the Industrial dispute Act, being passed in violation of principle of Natural justice-held-fraud vitiate every thing-principle of "Juri Ex. Injuria Non Ortur" squarely applies.

Held: Para 12 & 13

Consequently, by playing a fraud, it was no longer open to the workman to plead that he was entitled to a right of hearing. In my opinion, the workman cannot claim any right arising out of his wrong doing. The principles of "Juri Ex Injuria Non Oritur" is squarely applicable.

In view of the fraud played by the workman, the question of complying with the requisite requirement of Section 6-N does not arise in the fact of the circumstances of this case. Apart from the aforesaid, the provisions of Section 6-N of the U.P. Industrial Disputes Act comes into play provided the workman proves that he had worked for 240 days in a calendar year. In the present case there is no material on the record to prove that the workman had actually worked for more than 240 days in a year. Consequently, the provisions of Section 6-N of the Act is not applicable in the present case.

Case law discussed:
2005 (7) SCC-690
2005 (4) ESC-2720
1990 (3) SCC-655

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

1. Heard Sri Sheshadri Trivedi, the learned counsel for the petitioner and Sri K.S. Rathore, the learned counsel for the workman, respondent No.1.

2. By means of this writ petition, the petitioner has challenged the validity and legality of the award passed by the Labour Court in Adjudication Case No.36 of 1999. The reference made under Section 4-K of the U.P. Industrial Disputes Act is whether the employers were justified in terminating the services of the workman w.e.f. 5.5.1994 and, if so, to what relief was the workman entitled to. It is relevant to state here that the order of termination was passed in the year 1994. The reference was made by the State Government by an order dated 17.1.1999.

3. The facts leading to the impugned award is, that an advertisement was issued by the petitioner Corporation in a newspaper on 3.3.1993 for filling up 50 posts of drivers. The advertisement indicated that the posts would be filled up from the candidates belonging to Scheduled Castes and Scheduled Tribes. Pursuant to the aforesaid advertisement, the workman, respondent No.1, applied and filed a certificate issued from the Tehsildar indicating that he belonged to a scheduled caste category. The petitioner was selected and an appointment letter dated 26.4.1993 was issued to him as a driver on a daily rated basis. Subsequently, on an inquiry, it was found that the respondent No.1 was not a Scheduled Caste candidate. Based on the investigation made by the petitioner, a show cause notice dated 28.4.1994 was issued to the workman, to show cause, as to why his services should not be dispensed with, for furnishing a false caste certificate. The workman was directed to submit a reply by 30.4.1994. Since no reply was received by the employers till 4.5.1994, the management, taking the averments made in the show cause notice to be correct, passed the impugned order of termination dated 5.5.1994.

4. It transpires that the workman filed a Writ Petition No.21009 of 1994 before the High Court challenging the order of termination dated 5.5.1994, which was dismissed as withdrawn in the year 1999. It seems that the workman thereafter raised an industrial dispute under the U.P. Industrial Disputes Act and upon the failure of the conciliation proceedings, the State Government, by an order dated 17.2.1999, referred the dispute, for adjudication before the Labour Court.

5. Before the Labour Court, the workman filed a written statement alleging that he had worked for more than 240 days in a calander year and that his services were terminated arbitrarily without applying the principles of audi alteram partem and without complying with the provisions of Section 6-N of the U.P. Industrial Disputes Act. The petitioner in its written statement submitted that the appointment of the respondent No.1 was made pursuant to an advertisement inviting applications from the Scheduled Caste/Scheduled Tribe candidates for appointment on the post of a Driver, and in the inquiry, it was found, that the workman was not a Scheduled Caste and that he was a Backward Class. The employer further stated that a show cause notice was issued to the workman and since he failed to file a reply, it was presumed that he had nothing further to say in the matter and accordingly, the impugned order of termination was passed by the employers. It was also submitted that there was no requirement to hold an oral inquiry or to give any further opportunity to the workman or to comply with the provisions of Section 6-N of the U.P. Industrial Disputes Act.

6. The Labour Court in its award held that the workman was entitled for an opportunity of hearing pursuant to the preliminary inquiry conducted by the employers. Since no opportunity of hearing was given to the workman, the order of termination was in violation of the principles of natural justice. The Labour Court further found, that no fraud was committed by the workman and that the error in the issuance of the caste certificate was done by the Tehsildar in which the workman had no role to play. The Labour Court further held that the provisions of Section 6-N of the Act was not complied by the employers. In view of the aforesaid findings, the Labour Court directed the reinstatement of the workman with 25% of back wages.

7. In my view, the award of the Labour Court is manifestly erroneous in law and cannot be sustained. Admittedly, the Labour Court has given a categorical finding that an advertisement was issued for filling up 50 vacancies on the post of driver and that these vacancies were required to be filled up from the candidates belonging to the Scheduled Caste or Scheduled Tribe. The Labour Court has also given a clear finding that the petitioner was not a Scheduled Caste or a Schedule Tribe and that he belonged to a Backward Class. Consequently, it is clear that the workman could not be appointed for the post of a driver pursuant to the aforesaid advertisement. The finding of the Labour Court that the error was committed by the Tehsildar in the issuance of the caste certificate and that the workman did not play a fraud is patently erroneous. It is expected that an individual knows his own caste. In any case, the workman himself applied for a Scheduled Caste certificate which was

granted by the Tehsildar. It is only upon an investigation that it was found that the workman did not belong to a Scheduled Caste category and that he belonged to a backward class. Consequently, filing of a wrong certificate by the workman was a fraud played by him upon the employers. The workman played a fraud in seeking an appointment showing himself to be a Scheduled Caste when, in fact, he was a Backward Class.

8. Fraud vitiates all appointments and, in such a scenario, it is not necessary for the employer to give a show cause notice or an opportunity of hearing to the workman. It is also not necessary for the employer to hold an oral inquiry and thereafter take action, if any, on the delinquent workman. If it is found that a fraud was committed by a workman, in seeking an employment, the Management is not required to comply with the principles of natural justice. In any case, in the present case, the petitioner had issued a show cause notice dated 28.4.1994 to the workman, to show cause, why his services should not be terminated, on account of obtaining an appointment on the basis of a false certificate. The workman was required to file a reply and till the date of the issuance of the order of termination, the workman did not file any reply. In the absence of not filing a reply to the show cause notice, the management, having taken the contents of the show cause notice to be correct, had no option but to pass the order of termination. The management was not required to hold an oral inquiry. An oral inquiry is required to be conducted only when the charge is denied by the workman. In the present case, the charge levelled against the workman in the show cause notice was not denied by the workman. Consequently, the management was justified in issuing the order of termination.

9. The contention of the workman that he had submitted a reply is incorrect. The reply which the workman had submitted is dated 2.5.1994, which is after the deadline as stipulated in the show cause notice. In any case, there is nothing on record to suggest that the reply was received by the management before the issuance of the order of termination. No explanation has been given as to whether the reply could not be filed on or before the dead line.

10. The contention of the workman that the principles of natural justice was violated is patently misconceived. As stated above, a show cause notice was issued to the workman which he did not avail. The management was therefore justified in passing the order of termination and it was not necessary for the management to give an opportunity of hearing thereafter to the workman nor the management was obliged to hold an oral inquiry or give an opportunity to the workman to defend himself.

11. In **Bank of India and another vs. Avinash D. Mandivikar an others**, (2005)7 SCC 690, the Apex Court held-

".....When fraud is perpetrated the parameters of consideration will be different. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence."

Similarly in **Sheo Govind Singh vs. Inspector General of Police, CS CRPF, Lucknow and another**, 2005(4)ESC 2720, a Division Bench of this Court after

considering various judgments of the Supreme Court held that where the applicant obtained an order by misrepresentation or by playing a fraud upon the competent authority, such an order could not be sustained in the eyes of law .

In **District Collector and Chairman Vizianagram Social Welfare Residential School Society vs. M. Tripura Sundari Devi**, 1990 (3) SCC 655, the Supreme Court held:-

"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."

12. Consequently, by playing a fraud, it was no longer open to the workman to plead that he was entitled to a right of hearing. In my opinion, the workman cannot claim any right arising out of his wrong doing. The principles of "Juri Ex Injuria Non Oritur" is squarely applicable.

13. In view of the fraud played by the workman, the question of complying with the requisite requirement of Section 6-N does not arise in the fact of the circumstances of this case. Apart from the aforesaid, the provisions of Section 6-N of the U.P. Industrial Disputes Act comes into play provided the workman proves that he had worked for 240 days in a calendar year. In the present case there is no material on the record to prove that the workman had actually worked for more than 240 days in a year. Consequently, the provisions of Section 6-N of the Act is not applicable in the present case.

14. In view of the aforesaid, this Court is of the opinion that the award of the Labour Court cannot be sustained and is therefore quashed. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 14434 of 2007

Uma Kant Yadav ...Petitioner
Versus
State of U.P. Through Chief Secretary, Govt. of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Yadav
Sri Rakesh Pandey
Sri B.P. Singh
Sri S.C. Pandey
Sri R.C. Yadav
Sri M.S. Yadav

Counsel for the Respondents:
Sri J.K. Khanna
Sri B.N. Mishra
Sri Waseem Alam
S.C.

Constitution of India Art. 226-read with Arms Act Section 21-General direction to deposit fire Arm without taking recourse of law-contained in Arms Act-basis of impugned order-G.O. dated 11.2.07 considering election-petitioners are Advocate, M.P. or M.L.A. or Doctors or Security Guard-direction contained in para 10 of impugned order passed by D.M.-empowering S.H.O.-held- wholly illegal and unwarranted-can not sustained-guide line issued.

Held: Para 17

Consequently, this Court is of the opinion that the direction given by the District Magistrate to the Station House Officer for depositing the fire arms from the licence holders was wholly illegal and unwarranted. The said direction as contained in paragraph No.10 of the order of the District Magistrate, Allahabad dated 6.3.2007 cannot be sustained.

Case law discussed:

1994 ACJ-315, 2000 ALR (38)-44, 2002 ACJ-586, 2000 (40) ALR-281, 1996 (27) AL-198, 200 ALJ-2246, 2004 (5) AWC-4675, 2004 ACJ-1312, W.P. No. 12755/96 decided on 12.1.96

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

1. Heard Sri R.K. Yadav, Sri Rakesh Pandey, Sri B.P. Singh, Sri S.C. Pandey and Sri R.C. Yadav, and other learned counsels appearing for the petitioners at length and Shri J.K. Khanna, Sri B.N. Misra and Sri Waseem Alam, the learned Standing Counsels for the respondents.

2. Since the matter is one of urgency and no disputed facts are required to be considered, this group of petitions are being decided together, with the consent of the parties at the admission stage itself, without the exchange of counter or rejoinder affidavits. However, pursuant to the direction of the Court, the Standing Counsel has filed an application bringing on record the order of the State Government dated 11.2.2007 and the consequential order dated 6.3.2007 issued by the District Magistrate, Allahabad with regard to the deposit of fire arms during the ensuing general assembly elections.

3. The preamble to our Constitution seeks to give India a democratic Constitution which provides for holding free, fair and peaceful elections and to achieve this constitutional goal, the constitutional authorities as well as other authorities are empowered to take appropriate action by exercising its power either under the Constitution or under the existing laws.

4. Whenever, elections are announced, the authorities, in the past, have been issuing general directions with regard to the deposit of fire arms during the election period. The compliance of these directions had become a bone of contention by the law abiding citizens, who refused to surrender the weapons for various reasons. It has been noticed that whenever the election process started, a large number of writ petitions were filed praying that the authorities should be restrained from compelling the petitioners from depositing their weapons. Various directions had been issued by the Court directing the authorities not to force the licence holders from depositing their weapons. Inspite of these directions, the State Government comes out with another ingenuous method for the compulsory deposit of arms which has no authority or sanction of law.

5. In **Mohd. Arif Khan and others vs. District Magistrate, Lucknow and others, 1994 A.C.J 315**, a Division Bench of this Court, while quashing the order of the District Magistrate passed under Section 144 Cr.P.C. for depositing of the fire arms held, that it was based on the directive of the Election Commission and was not based on the own opinion of the District Magistrate and consequently suffered from the non application of the mind. The Court held that the power to take action under Section 144 Cr.P.C. was discretionary and the same had to be exercised in accordance with law. The Court further found that if any action was

required to be taken under the said provision, the authority was required to consider the material facts of the case and form a bonafide opinion on relevant consideration as to whether there was a sufficient ground for proceeding under that Section and whether immediate prevention or speedy remedy was desirable. The Court further found that if the authority found that such a situation existed, in that eventuality, the authority could direct any person to abstain from doing a certain act but could not pass a general order for depositing the fire arms.

6. Subsequently, the Court in **Shahabuddin and others vs. State of U.P. And others, 2000 (38) A.L.R. 44** issued a mandamus directing the State Authorities not to compel the licence holders to deposit the firm arms on the basis that elections are going to be held in the near future. Similar direction was again issued in **Mohd. Arif Khan and others vs. State of U.P. and others 2002 A.C.J. 586**.

7. In **Ram Hit Vs. State of U.P. and others, 2000 (40) ALR 281**, the Court held that the authority cannot compel a citizen to deposit the fire arms unless there was a specific order by a competent authority under the Arms Act.

8. In **Israr Khan Vs. State of U.P., 1996(27) ALR 198**, the Court held that the weapon could only be deposited in accordance with law as contemplated under the Arms Act and that the weapon could not be deposited under an oral order of the Station House Officer.

9. In **Pandhari Yadav vs. State of U.P. And others, 2004 A. L.J. 2246**, the Court held that the retention of the fire arms was essential to the preservation of the life and property of the licence holder.

10. In **Shesh Nath Nayak vs. District Magistrate, Sant Kabir Nagar and another, 2004 (5) AWC 4675**, a single judge of this Court held that even though the Election Commissioner could issue orders directing the District Magistrate to get the fire arms deposited as a preventive measure for conducting free and fair election, nonetheless, the deposit of the fire arms could only be sought through legitimate means, i.e., on a review of each individual case on objective assessment.

11. In **Yaduvir Singh Chauhan vs. District Magistrate, Etah and other, 1993, A.C.J 1312**, this Court quashed the notification of the Election Commissioner as well as the order of the District Magistrate with regard to the deposit of fire arms of the valid licence holders. Similar view was reiterated in **Shri Narayan Shukla and another vs. District Magistrate, Allahabad and others** decided on 12.1.1996 in Civil Misc. Writ Petition No.12755 of 1996.

12. Inspite of the aforesaid directions, upon the announcement of the ensuing Assembly elections, a bunch of writ petitions have again been filed alleging that the State Administration has issued some orders for the deposit of the weapons and based on such orders, the Station House Officer was compelling the petitioners and other law abiding citizens to deposit the fire arms.

13. In this bunch of the writ petitions, the petitioners before the Court is a Member of Parliament, a Member of Legislative Assembly, a Doctor, an

Advocate, a farmer , a businessman, a prospective candidate in the ensuing election, a Security Guard, a Central Government Employee, etc. Some of the writ petitioners have approached this Court contending that they are valid licence holders of the fire arms and could not be compelled to deposit their arms on the basis of some general orders being issued by the Administration. Some of the petitioners have alleged that the licence was granted to them because of the danger to their life and property. Another petitioner has approached this Court contending that he is a security guard and that he is required to carry the fire arms as part of his employment. Another petitioner has contended that in the last election his brother was shot dead by a rival candidate and that he was also seriously wounded, and therefore requires the weapon to protect himself. There is yet another petitioner, who has approached this Court contending that as a law abiding citizen he had deposited the weapon in the last election as per the direction of the Administration and the Station House Officer, and that the Station House Officer refused to hand back the weapon to him after the elections were over. The weapon was only released when a mandamus was issued by the High Court in his petition. The petitioner contends that he does not want to undergo the same harassment again.

14. All the petitioners, by and large, contend that no sweeping orders could be issued by the Administration for depositing the fire arms. The petitioners contend that they are law abiding citizens and that no criminal cases are pending against them nor have they misused their weapons. It was urged that no orders had been passed either suspending their licence nor any orders had been passed cancelling their licence under the Arms Act, and therefore, the petitioners cannot be compelled to deposit the fire arms merely because the Assembly election were going to be held in the near future. The petitioners have further contended that no notice has been issued for depositing the fire arms. A learned Advocate of this Court submitted that only yesterday he had heard an announcement on a loudspeaker directing the citizens to deposit the fire arms at the local police station. The counsel submitted that such general orders could not be issued by the local Administration.

15. This Court had directed the Standing Counsel appearing on behalf of State of U.P. and the local administration to seek necessary instructions.

The Standing Counsel has filed an application today bringing on record an order dated 11.2.2007 issued by the Chief Secretary and the Director General of Police directing all the District Magistrates and other officers for compliance of various directions in the ensuing Assembly elections. Para 6 of this order pertains to the deposit of the fire arms, in which the State Government has directed the authorities to reappraise the fire arms licence issued by them and take appropriate action for the deposit of fire arms, suspension or cancellation in accordance with the provisions of law, where it was found that the licence holder was likely to misuse the weapon.

In my view, the aforesaid direction of the State Government as contained in paragraph No.6 of its order dated 11.2.2007 is in consonance with the provision of the Arms Act and in

accordance with the directions issued by this Court, from time to time, in various judgments but, based on this direction, the District Magistrate, Allahabad has issued a further direction in paragraph No.10 of its order dated 6.3.2007 directing the Station House Officer to submit a certificate indicating therein that he had made all the licence holders in his jurisdiction to deposit the weapon where in his opinion, the licence holder was likely to misuse the weapon during the election period. This portion of the order has given unlimited power to the Station House Officer pressurising the law abiding citizens to deposit their weapons. The question, at this stage, to be considered is, whether such an omnibus order could be issued by the District Magistrate to the Station House Officer for depositing the weapons? Can the District Magistrate issue a direction to the Station House Officer to exercise his discretion for depositing the fire arms ?

In my view, the direction issued by the District Magistrate, as contained in paragraph No.10 of its order dated 6.3.2007 is totally illegal and unwarranted. Such power cannot be delegated to the Station House Officer. Under Section 21 of the Arms Act, 1959, a fire arms could be deposited under certain conditions mentioned therein. The arms licence can be suspended or cancelled under the provision of Arms Act by a competent authority and while passing such an order, the authority could direct the licence holder to deposit the weapon. Even under Section 144 Cr.P.C., the competent authority has to apply his mind and exercise its discretion before issuing an order of restraint. Such power, under the Arms Act or under any other statutory provision is required to be exercised by a competent authority and such power cannot be delegated to another person, especially to a Station House Officer.

16. Undoubtedly, the arms licence is issued under the Arms Act. There exists a provision for the revocation, suspension, cancellation and for the deposit of the fire arms. Action, if any, for the deposit of the fire arms is required to be taken under the Arms Act. The District Magistrate or any other authority could not seek the deposit of the fire arms without initiating action under the Arms Act.

17. Consequently, this Court is of the opinion that the direction given by the District Magistrate to the Station House Officer for depositing the fire arms from the licence holders was wholly illegal and unwarranted. The said direction as contained in paragraph No.10 of the order of the District Magistrate, Allahabad dated 6.3.2007 cannot be sustained.

18. In view of the aforesaid, these writ petitions are being disposed of with the following directions;

(i) The direction contained in the order of the District Magistrate, Allahabad dated 6.3.2007 to the Station House Officer for the deposit of the fire arms from the licence holders is quashed.

(ii) A mandamus is issued to the respondents and its authorities, including the Station House Officer, not to compel the petitioners and other licence holders to deposit their fire arms unless,

(a) A review and objective assessment is made in individual cases by the competent authority, as directed by

the State Government in its order dated 11.2.2007 and

(b) if it is found by the competent authority that there is a chance of the misuse of the weapon, an appropriate order in writing is required to be passed by the competent authority for the deposit of the fire arms.

(c) The order of the deposit of the weapon made by the competent authority in writing should be communicated to the licence holder.

(d) The directions contained aforesaid will apply not only for this election but for all elections.

19. A certified copy of this order shall be made available to the parties on payment of usual charges within four days from today. The registry is also directed to supply a certified copy of this judgment to Sri J.K. Khanna, the learned Standing Counsel within the same period, who shall immediately forward it to the Chief Secretary of the State of Uttar Pradesh, for necessary communication to all the authorities in the State of Uttar Pradesh, for immediate compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2006

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

Civil Misc. Writ Petition No. 35360 of 2003

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

Counsel for the Petitioner:
Sri D.K. Tiwari

Counsel for the Respondents:
S.C.

Arms Act-Section-14-Refusal to grant arm licence-No reason assigned by District Magistrate-only reason disclosed for refusal that the application not contains any reason for grant of licence-held-order of refusal on the face of record itself suffer from error of law by quashing the impugned order-direction issued for fresh consideration.

Held: Para 9

In view of the above, the order passed by the District Magistrate, Allahabad refusing to grant Arm's license to the petitioner suffers from error of law apparent on the face of record and the order passed by the Appellate authority affirming the same was also passed without application of mind, though the Appellate authority mentioned in its order that the petitioner is a businessman and requires an Arm's license for protection of his life and property.

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

1. This writ petition is directed against the order dated 9.10.2002, passed by the District Magistrate, Allahabad and the order dated 4.3.2003, passed by the Commissioner, Allahabad Division, Allahabad in Appeal affirming the order passed by the District Magistrate refusing to grant Arm's license to the petitioner.

2. Inspite of the order dated 4.10.2006 passed by this Court, neither any counter affidavit has been filed by the State nor original application of petitioner has been produced before the Court.

Heard learned counsel for the parties.

3. The petitioner applied for grant of an Arm's licence of D.B.B.L. Gun on 22.8.2001. The District Magistrate did not pass any order, hence petitioner filed Writ Petition No.22881 of 2002. This C6urt by an order dated 24.5.2002 directed the District Magistrate, Allahabad to pass appropriate orders on petitioner's application within six months' and in compliance of the said order, the District Magistrate by an order dated 9.10.2002 rejected the application of petitioner for grant of Arm's license. An appeal preferred against the said order was also dismissed on 4.3.2003. These two orders have been impugned in the present writ petition.

4. Duly considered arguments of learned counsel for the parties and perused the materials on record.

5. From perusal of the record, it clearly transpires that the District Magistrate while passing the order did not consider petitioner's application alongwith the report of the Police authorities and other materials on record.

6. Section 14(2) of the Arms Act makes it clear that in case the licensing authority refuses to grant the license, he shall record reasons in writing for such refusal and furnish to that person, on demand, a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

7. In the present case, no reasons have been recorded in the order of the District Magistrate. The order passed by tile District Magistrate makes it clear that he admitted that Police authorities have submitted a report in favour of petitioner, but rejected the application of petitioner on the ground that application does not contain any reason for grant of Arm's license.

8. This Court on 4.10.2006 directed learned Standing Counsel to produce the original Application of petitioner, but neither original application was produced nor averments made by the petitioner in the writ petition were controverted by filing a counter affidavit. In the facts of the case, this Court is of the view that the District Magistrate was duty bound to consider report submitted by the Police authorities alongwith Application of petitioner and other materials on record. Uncontroverted averments made in the writ petition are that petitioner is a reputed person and requires an Arm's license for safety of his life and security of his property. The Appellate authority in its order also mentioned that the petitioner is a business-man. It is also borne out from the uncontroverted averments made in the writ petition that petitioner has right to live with dignity and for protection against criminals and the antisocial elements of the area and, therefore, he requires an arm's license. These averments made in the writ petition have not been denied by the State by filing counter affidavit: The matter relates to the City of Allahabad, but the State did not care to challenge or controvert the averments made in the writ petition denying these facts and as such petitioner's requirement of an Arm's license to protect his life and property is established. The In the present scenario where life and property of the civilized citizens of the society is under threat from criminals and antisocial elements and the law and order situation prevailing in the

State also makes out a case for grant of an Arm's license to the petitioner.

9. In view of the above, the order passed by the District Magistrate, Allahabad refusing to grant Arm's license to the petitioner suffers from error of law apparent on the face of record and the order passed by the Appellate authority affirming the same was also passed without application of mind, though the Appellate authority mentioned in its order that the petitioner is a businessman and requires an Arm's license for protection of his life and property.

10. In view of the discussions made above, writ petition succeeds and is allowed. The impugned orders dated 9.10.2002 and 4.3.2002 passed by the District Magistrate, Allahabad and the Commissioner, Allahabad Division, Allahabad are hereby quashed. The matter is remanded back to the District Magistrate, Allahabad to pass a fresh order in accordance with law in the light of the observations made by this Court in this judgment.

11. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2006

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

Civil Misc. Writ Petition No. 58112 of 2005

Sidheswar Mishra ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Rajesh Nath Tripathi
Sri S.K. Tiwari

Counsel for the Respondents:
Sri Ranjit Saxena
Sri R.D. Khare

U.P. State Electricity Board Employees (Retirement) Regulations 1975-Regulation 2 (b) and 2 (C) (i)-2A-Compulsory Retirement-based on un-communicated bad entry-more than three decades-can not be sufficient to assume that public interest requires the retirement of petitioner compulsorily-held-arbitrary not based on any relevant materials-quashed.

Held: Para 6

Assuming that there is one bad entry of 1998-99 but that has also not been communicated to him. It is aptly said one swallow does not bring a spring. One bad entry in more than three decades of service cannot be said to be sufficient to hold that the public interest requires the compulsory retirement of the petitioner. From the service record, it is also apparent that throughout his service, the integrity of the petitioner was never doubted. The counsel for the respondent has failed to point out any material which could show that the conduct or the method of working of the petitioner was adversely telling up on the efficiency of the unit where he was working or of the corporation at large. Therefore, the exercise of power of compulsory retirement appears to be arbitrary and not based on any relevant material. Therefore, it has to be quashed.

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

1. Heard learned counsel for the petitioner and Shri Ranjeet Saxena for the respondent Corporation.

2. This petition is directed against an order of compulsory retirement dated 3.8.2005.

3. The petitioner was working as a Junior Engineer in the respondents Corporation and by the impugned order dated 3.8.2005 he has been compulsory retired in view of U.P. State Electricity Board Employees (Retirement) Regulations, 1975 (hereinafter referred to as 'Regulations').

4. Learned counsel for the petitioner has urged that neither any adverse entry was ever communicated to him nor any enquiry or charge sheet was ever served on him. He has also urged that there was no adverse material available before the respondents to have taken action under Regulation 2 (b) and 2 (c)(i). Regulation 2-A of the said Regulations provides as under.

"In order to be satisfied whether it will be in the public interest to require a Boards servant to retire under Clause (b) the appointing authority or any authority to whom the appointing authority is subordinate may take into consideration any material relating to the efficiency and suitability of the Boards servant including Service Records, Annual Confidential Reports, any report of the Vigilance Establishment or any other Inquiry Report and other relevant material."

5. A perusal of the aforesaid Regulation shows that the Appointing Authority has to take into consideration any material relating to the efficiency and suitability of the incumbent including any report of vigilance or any other enquiry report to decide whether it is necessary to compulsorily retire the incumbent. There are only two material disclosed in the counter affidavit. One is that miscellaneous advance amounting to Rs.5,35,173/- was neither deposited by' the petitioner nor accounted for. The other is an alleged bad entry for the year 1998-99.

6. In the writ petition itself the petitioner has annexed a copy of the report dated 30.9.2004 showing that an amount of Rs.5,03,477/- had already been accounted for through vouchers and verified in form no. A-9 of March 2000 but for the remaining amount of Rs.31,696/-, the Deputy General Manager vide his letter dated 7.1.2005, which is Annexure-6 to the petition had declared that it is being recovered from the petitioner through his salary. These allegations or the annexures have not been denied specifically. Once the amount had already been duly accounted for and explained, it could not be said by any stretch of imagination that it reflected upon the efficiency or suitability of the petitioner. The record relating to the award of bad entry for 1998-99 has not been annexed with the counter affidavit. The award of the bad entry and its communication has been specifically denied in the rejoinder affidavit. However, learned counsel for the respondent has produced some of the service record of the petitioner. There is an order mentioning about bad entry against the petitioner but neither in the Annual Confidential Report of 1998-99 it is reflected nor its communication is demonstrated by any material on record. To the contrary the service record shows that right from 1992-93 till 1996-97 the petitioner was awarded "Very Good" or "Good" entries. No· service record subsequent to 1998 has been produced to

justify the action against the petitioner. Assuming that there is one bad entry of 1998-99 but that has also not been communicated to him. It is aptly said one swallow does not bring a spring. One bad entry in more than three decades of service cannot be said to be sufficient to hold that the public interest requires the compulsory retirement of the petitioner. From the service record, it is also apparent that throughout his service, the integrity of the petitioner was never doubted. The counsel for the respondent has failed to point out any material which could show that the conduct or the method of working of the petitioner was adversely telling up on the efficiency of the unit where he was working or of the corporation at large. Therefore, the exercise of power of compulsory retirement appears to be arbitrary and not based on any relevant material. Therefore, it has to be quashed.

7. For the reasons above, this petition succeeds and is allowed and the impugned order dated 3.8.2005 is hereby quashed and it is directed that the petitioner shall be treated to be in service till the date of his actual retirement and will also be entitled to consequential benefits. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2006

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE R.N. MISRA, J.

Crl. Misc. Writ Petition No.7662 of 2004

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

Counsel for the Petitioner:
Sri Naveen Yadav
Sri Y.S. Bohra

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section-299-Power of Magistrate-when accused absconded-even after 82 and 83, proceeding and the closure of proceeding under section-299-if magistrate gets information about existence of any immovable property-Magistrate should pass attachment order-inaction on the part of concerned Magistrate despite of the particulars given by the informant/complainant-court expressed its great concern.

Held: Para 3

Learned Magistrate is also directed to proceed, under Section 299 Cr.P.C. against the accused, if he is satisfied that there is no immediate prospects of arresting the accused after passing a detailed order. Even if while proceeding, under Section 299 Cr.P.C., the Magistrate gets information from the police or complainant-informant about existence of any moveable and immoveable property of the accused, there is no impediment in issuing as attachment order.

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

1. In this case, F.I.R was registered on 7.5.2003 under Section 302 I. P. C. and the charge sheet was submitted on 1.6.2003. The accused have not been arrested so far in collusion with the Investigating Officer as alleged in the writ petition. The C.J.M. concerned has also not taken effective steps for arresting the accused persons despite several orders, passed by this Court. It has been mentioned ¥ in the supplementary

affidavit, filed by Vinod Kumar, the present S.H.O, Adarsh Nagar, district Muzaffarnagar that he has already moved the C. J. M, Muzaffarnagar for proceeding, under section 299 Cr.P.C. and that application is still pending. It has also been informed by the prosecution side that the police had applied to the Magistrate concerned for attachment of the properties of the accused, under Section 83 Cr.P.C. but that application was rejected. In that application, a paper mill was desired to be attached belonging to the accused Rakesh Jain, but the C.J.M concerned has rejected the application vide order dated 28.6.2006 on the ground that it was leased to one Anuj Jain. It appears that the police and magistrate both were passing time, which was in favour of the accused.

2. Admittedly, the process under Sect ion 82 Cr. P. C. has been exhausted and under Section 83 Cr.P.C the moveable and immoveable properties of the accused are to be attached. Learned counsel for complainant-informant says that besides paper mill, there are other properties also belonging to the accused, which may be attached. He is directed to furnish details of the properties owned by the accused before the C.J.M. concerned at the earliest. The police is also directed to trace out the properties of the accused and inform the Magistrate concerned. The Magistrate concerned is directed to take immediate steps for attachment of the properties of accused, so that pressure may be built up for procuring their attendance.

3. Learned Magistrate is also directed to proceed, under Section 299 Cr.P.C. against the accused, if he is satisfied that there is no immediate prospects of arresting the accused after passing a detailed order. Even if while proceeding, under Section 299 Cr.P.C., the Magistrate gets information from the police or complainant-informant about existence of any moveable and immoveable property of the accused, there is no impediment in issuing as attachment order.

4. Learned C.J.M. is directed to submit his explanation about laches on his part. The Investigating Officer/S.H.O. concerned is also directed to be present in this Court in person on 19.12.2006 to apprise this Court about the steps taken by them for arrest of the accused and or identifying their properties.

5. The application for impleadment of accused in this petition is also allowed and they be impleaded as opposite parties in this case.

6. List this case on 19.12.2006.

Let a copy of this order may be given to learned A.G.A. within one week for compliance.
